BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENY
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' REPLY BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

EPA CASES

STATE CASES

FEDERAL STATUTES AND REGULATIONS

I. EPA COMMITTED CLEAR LEGAL ERROR IN EXCLUDING IGCC FROM THE BACT DETERMINATION.

Respondents' categorical exclusion of IGCC from the list of "production processes, available methods, systems, and techniques," 42 U.S.C. § 7479(3), to be evaluated in developing BACT for a coal-fueled power plant, is clear legal error.[1] As Conservation Petitioners point out, EPA's decision unlawfully reads out of the statute a choice Congress expressly intended it to consider in the BACT determination. Cons. Pets.' Supp. Br. at 74-97. As a result, the purported BACT emissions limits are not "based on the maximum degree of reduction" in each pollutant achievable through application of IGCC, an inherently lower polluting process with the potential for application at this site.[2] 42 U.S.C. § 7479(3); In re: Knauf Fiber Glass, GmbH, 8 EAD 121, 128-29 (Feb. 4, 1999), Cons. Pets.' Supp. Br. at 101-112.

Contrary to Respondents' assertions, the plain language of all of the PSD provisions in the statute when read in harmony,[3] requires meaningful evaluation on the record of the full range of control options, including alternative "production processes," or innovative combustion techniques, available to DREC for its stated business purpose and objective of generating electricity from the onsite Navajo coal. The statute requires that a PSD permit must be based on

---

[1] EPA's assertion that it can "eliminate [an option] (at step 1) from further consideration," EPA Response at 11, misleadingly suggests that EPA did actually list IGCC at step 1, or evaluate its merits. The Response to Comments makes clear that EPA did not. AR 120 at 13, 20 (asserting EPA's "view" that IGCC need never be listed at step 1 of BACT determination for any coal plant). Indeed, more than a year before requesting public comment on the draft permit EPA agreed --at DREC's behest-- that DREC "need not go on the record submitting [IGCC] as BACT." Ex. 61 (in AR at Attachments to Public Cmt. Ltr. No. 23, Ltr. 23 attachments.zip/FOIAAppealResponse-R9).

[2] In addition to the lost opportunity for lower criteria pollutant emissions levels which would result from BACT limits based on a controlled IGCC plant rather than a controlled conventional coal facility, EPA's failure to list IGCC at Step 1 of the BACT determination prematurely removed from the control technology list the only control option that offers the potential for the capture of CO_2 emissions from a new plant generating electricity from coal. Cons. Pets.' Supp. Br. at 107-108 (citing AR-66, Thompson Decl. at ¶¶34-50, 52-60).

[3] Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000).

analysis of "the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations." 42 U.S.C. § 7475(a)(2). EPA illegitimately attempts to find distinctions or conflicts between this language, § 165(a)(4)'s requirement that the proposed facility must be subject to BACT, and § 169(3)'s BACT definition itself. See EPA Resp. at 10, AR 120 at 14-15. In order to avoid nullifying language in the Act, and to fulfill Congressional intent, these subsections must be read together so as to require consideration of all available process technologies in identifying the "maximum degree of [emissions] reduction" achievable. Contrary to EPA's assertions in its Response at 9-11, EPA may not permissibly read language regarding the consideration of "alternatives to the proposed source" to limit the agency's specific obligations under section 169(3) to consider "production processes and available methods, systems, and techniques" where such limitation would exclude measures that Congress specifically contemplated as part of the BACT analysis.

EPA's attempt to deconstruct the statute in order to avoid robust analysis is precisely the kind of "misinterpretation" Senator Huddleston strove to protect against in adding his 1977 amendment. In his explanatory remarks, he noted that in the BACT determination "all actions taken by the fuel user are to be taken into account – be they the purchasing or production of fuels which may have been cleaned or up-graded through chemical treatment, gasification, or liquefication; use of combustion systems such as fluidized bed combustion which specifically reduce emissions..."[4] 123 Cong. Rec. S9434-35 (June 10,1977) (debate on P.L. 95-95) (emphasis added); Cons. Pets.' Supp. Br. at 95-97.

[4] Senator Huddleston's explanation that "all actions are to be taken into account" is language mandating consideration of all actions, not an intention that the question whether to consider an action would be a matter for Agency discretion. In any event, it is plainly in conflict with EPA's position that it may categorically exclude a relevant technology from the analysis. See Ex. 61, at 3 (EPA wrongly asserting that process technologies need not be considered in top-down BACT analysis).

Moreover, EPA's assertion that it is following the statutory mandate to set BACT on a "case-by-case" basis is entirely disingenuous. EPA is in fact reading the statute to say that IGCC can never be included in a BACT determination for a coal-fueled power plant.[5] See AR-120, RTC at 20; EPA Resp. at 15-17. Although couched nominally in a statutory analysis that asserts that EPA is limited to considering the "proposed facility" at Desert Rock, in fact EPA is unlawfully elevating its policy preference or "view" that IGCC need never be listed as a potentially applicable control option for a new coal-fired power plant, above the clear language of the statute requiring that emissions limitations in a PSD permit be based on the maximum achievable degree of pollution reduction. Indeed § 169(3) requires BACT analysis for "such facility" to include "application of production processes for each [pollutant required to be controlled]."[6] 42 U.S.C. §7479(3) (emphasis added). The statute does not say that only "slight

[5] DREC's attempt to bolster its arguments by making allegations that are not supported anywhere in the record for the Desert Rock facility must be soundly repudiated and excised from the Board's consideration. Compare DREC Response at 65-69 (making a number of factual assertions without citation to the Administrative Record) with AR-27 and -34 (DREC's record submissions on IGCC) and AR-66, Thompson Declaration (Conservation Petitioners' record submission on IGCC).

[6] On January 29, 2009, the Court of Appeals for the 7th District of Texas issued an opinion in Blue Skies Alliance, et al. v. Texas Comm'n on Envtl.Quality, No. 07-07-0306-CV, slip op. at 12-19, interpreting this language as it is incorporated into Texas statutes. While the decision has no precedential value in this case, Conservation Petitioners (including Environmental Defense Fund, a party in the Texas appeal) assert that the Texas Court misreads the federal statute underlying the Texas law. Specifically, the statute's requirement to analyze "application of production processes ..." in setting BACT, is not, as the Texas Court asserts, limited to analysis of "only those control technologies that can be *applied* to the *proposed*" facility – i.e. to the blueprint as offered by the applicant. Blue Skies, slip op. at 15 (emphasis in original). Basing BACT on "application of production processes..." to achieve a particular purpose, is distinctly different from basing BACT only on changes that can be "applied to" the production process initially selected by the permit applicant. The former is consistent with the statute and its legislative history requiring the consideration of "gasification technologies" in BACT, but the latter reading plainly is not.

design changes" need occur,[7] it requires "application of" a production process at the site and for the purpose intended by the applicant. Id.; see also Knauf, 8 E.A.D. at 129-30. Indeed, the requirement that this analysis occur on a "case-by-case" basis means precisely that the particular characteristics of a facility are an important aspect that can be affected by the BACT determination – not as EPA asserts that the agency is limited to the precise production process technology proposed by the applicant to achieve its purpose.[8]

EPA's assertion that it can somehow have met its statutory obligation to consider all production processes that are inherently lower emitting simply because it included circulating fluidized bed ("CFB") technology at Step 1, EPA Resp. at 19-20, does not correct the fundamental legal error made by Region 9 when it failed to include IGCC on a truly comprehensive Step 1 list. It is EPA's allegation that it "considered" CFB that is the "straw man" in the Desert Rock analysis, not Conservation Petitioners' point that IGCC would not change the fundamental purpose for the Desert Rock facility. See id. at 15, 19-20. Simply

---

[7] DREC's unsupported views on the limits of a BACT determination are couched entirely in policy terms, DREC Response at 64-65, further illustrating EPA's error in elevating its policy preference over the language of the statute. DREC's further attempt, id. at 65-68, to put forward extra-statutory factors for eliminating a control technology at Step 1, such as whether a pollution control technology represents a "feasible business venture," also should be rejected – there is no basis in the statute, nor in EPA's Top Down BACT policy to keep a technology option off the Step 1 list on these grounds. Indeed, DREC conflates two concepts here – availability, and feasibility – which are characteristic of different steps within the BACT determination.

[8] DREC's brief ignores that the whole point of the statute's PSD review, including the BACT analysis, is precisely to consider whether environmental factors warrant the kind of changes EPA and Industry seek to avoid, i.e., fundamental changes to the process equipment used to achieve the applicant's objectives. Further, DREC's attempt to paint the IGCC process (which not only generates electricity, but also additional economically valuable outputs) as posing more environmental problems than would a conventional plant, DREC Response at 56, is without merit. The Desert Rock plant as the applicant proposes it will produce millions of tons of coal wastes every year, containing arsenic, selenium, and other toxic metals, in addition to higher levels of air emissions, and significant amounts of CO_2, which cannot be captured for sequestration should a CO_2 BACT be required for this plant. AR 66, Thompson Declaration.

stating that it "considered" one alternative production process does not correct EPA's fundamental failure to "cast a wide net" at Step 1 of the BACT determination.[9]

II. EPA'S "REDEFINING THE SOURCE POLICY" PROVIDES NO SUPPORT FOR CATEGORICALLY EXCLUDING IGCC AT STEP 1 OF THE BACT DETERMINATION FOR ANY COAL-FUELED POWER PLANT.

EPA rightly notes that its ability to make policy in the PSD permitting context is constrained by the contours of the Clean Air Act ("CAA" or "Act"). EPA Resp. at 11. But EPA's view that its policy choices somehow provide shelter from the plain language of the statute is confused and fundamentally mistaken. The Supreme Court has made clear that "the strong normative terms 'maximum' and 'achievable' in the statutory definition of BACT constrain the permit-issuing authority's discretion in conducting a BACT determination." Cons. Pets.' Supp Br. at 78-79 (quoting Alaska Dep't Envtl. Conservation v. EPA, 540 U.S. 461, 489 (2004)). EPA's attempt to categorically exclude IGCC from any consideration in the BACT determination for any coal-fueled power plant exceeds the constraints imposed by the statute, as it reads out of the BACT definition an entire category of control technology options listed there. Id. at 76-79.

EPA's argument that the Board's Prairie State case provides support for its categorical exclusion of IGCC is without merit.[10] As an initial matter, the Illinois EPA included IGCC at

[9] Moreover, the record demonstrates that EPA's "consideration" of CFBs was scant at best, consisting of three brief references in the Response to Comments. AR 120 at 20, 53-54, 84.

[10] DREC's assertion that Conservation Petitioners "ignore" the holding in In re: Inter-Power of New York, Inc., 5 EAD 130 (1994) fundamentally misses the point. The question presented by Inter-Power was whether EPA Region II, in setting an SO_2 BACT limit for a proposed power plant, properly evaluated the use of lower sulfur coals as "clean fuel," after having required their inclusion in the analysis underlying the BACT determination for the proposed plant. Inter-Power, 5 E.A.D. at 131, 136-39. Inter-Power does not concern itself with the question whether the statute permits EPA to categorically exclude a production process from the BACT determination for a particular type of source, nor does it involve questions related to the Board's "redefining the source" policy.

Step 1 of the BACT determination for the Prairie State coal plant, and so the precise question presented here was not on the record there. In re: Prairie State, PSD App. No. 05-05, Slip op. at 35-36.(Aug. 2006). And, while the Board's narrowly-tailored decision in Prairie State describes its position on the limits of EPA's "redefining the source" policy on the facts presented in that case, it does not support EPA's real argument here, namely that it may categorically exclude from the BACT analysis "production processes" that use the same fuel and that represent the "maximum degree of emissions reduction" for a particular pollutant. AR 120, RTC at 20.

EPA's reliance on Sierra Club v. Envtl. Protection Agency is similarly unavailing. EPA Resp. at 13. The Seventh Circuit's review of limited aspects of the Prairie State decision simply did not present the question at issue here: i.e., whether EPA can categorically exclude from the BACT determination for any new facilities of a specific type, a particular "production process" using the same kind of fuel for the same purpose. See Sierra Club, 499 F.3d 653, 655-656 (7th Cir. 2007). Indeed, the Court noted that while some of the boundaries confining EPA's exercise of its judgment about where a "control technology ends and a redesign of the 'proposed facility' begins," might be less than obvious, it is certain that EPA's discretion is constrained by the language of the statute. Sierra Club, 499 F.3d at 655. As Conservation Petitioners have pointed out, EPA's categorical exclusion of IGCC from the BACT determination for any coal-fired power plant crosses over that boundary, by in effect writing "production process" and "innovative fuel combustion techniques" out of the statutory definition of BACT. EPA has clearly overstepped the statutory constraint on its discretion here, which constitutes legal error.[11]

[11] Nor can EPA show any rational basis for its decision to exclude a technology that offers the promise of CO_2 capture from the BACT review for a coal plant located in an area that offers significant potential for CO_2 sequestration. See Will Sands, Captured at Desert Rock, DURANGO TELEGRAPH, Feb. 5, 2009, cover story (describing DREC and Navajo Nation plans to pursue CO_2 capture and storage from DREF), available at

III. EPA'S FAILURE TO CONDUCT A PROPER BACT COLLATERAL IMPACT ANALYSIS IS CLEARLY ERRONEOUS.

Respondents' allegations that Conservation Petitioners' collateral impact argument is a further claim that EPA should have selected IGCC as BACT, (EPA Resp. at 49; DREC Resp. at 70), miss the mark. Conservation Petitioners demonstrate that if a BACT analysis for CO_2 is not required,[12] EPA must conduct a collateral impacts analysis of the differing collateral environmental costs of CO_2 emissions and the differing collateral costs of future CO_2 regulation as applied to IGCC and pulverized coal technologies.

Conservation Petitioners need not demonstrate that these considerations would have resulted in a different choice in control technologies. They need only show that EPA's failure to consider collateral environmental and economic costs "materially affected the quality of the permit determination," and "may alter the permitting decision." In re: Prairie State Generating Co., 13 E.A.D. ____, slip op. at 58-59 (EAB August 24, 2006) (quoting In re: Mecklenberg Cogeneration, LP, 3 E.A.D. 492, 494 n.3 (Adm'r 1990). Conservation Petitioners clearly meet that standard here: EPA does not even address the evidence presented of IGCC's relative advantage in reducing CO_2 emissions. See Ex. 28,[13] AR 66 (Comment Letter 23 Attachment, Thompson Decl. ¶¶ 56-59). That evidence is more than sufficient to require EPA to conduct a collateral impact analysis as part of the BACT analysis for NO_X, SO_2, CO, sulfuric acid mist, and VOCs, if a BACT analysis for CO_2 is not required.

---

http://www.durangotelegraph.com/telegraph.php?inc=/09-02-05/coverstory.htm (last visited Feb. 19, 2009).

[12] Conservation Petitioners do not concede this point, but note only that EPA's legal error in failing to undertake a CO_2 BACT analysis is compounded by its failure to conduct a collateral impacts analysis for CO_2, comparing the environmental footprints of various generating technology choices.

[13] References to "Ex. __" are to Exhibit 61 to this brief, Exs. 1-12.3 submitted with the August 13, 2008 Petition for Review, Exs. 13-59 submitted with the October 2, 2008 Supplemental Brief, and Ex. 60 submitted with the November 24, 2008 Notice of Errata.

Nor is there any basis in the CAA for EPA's view that a collateral impacts analysis can only "focus on local impacts." It is clear that EPA's attempt to avoid considering the collateral impacts of DREF's CO_2 emissions is contrary to the statute's requirements. Section 169(3) of the CAA simply requires the "case-by-case" BACT analysis to be informed by "energy, environmental, and economic impacts and other costs." 42 U.S.C. § 7479(3). Nothing in the Act limits the analysis to impacts of a local nature. Section 169(3) is plain and unambiguous and leaves no room for interpretation by EPA on this point.[14] Further, EPA's assertions fly in the face of the purpose of the Act to "protect and enhance the quality of the Nation's air resources," 42 U.S.C. § 7401(b)(1) (emphasis added). Finally, the Agency's view contravenes the Supreme Court's holding that the CAA offers EPA regulatory flexibility to address newly arising issues such as climate change, and EPA cannot ignore its duties under the CAA to address pollutants that cause climate change. See Massachusetts v. EPA, 549 U.S. 497, 512, 532 (2007).

Whether or not a BACT analysis for CO_2 is required, EPA must analyze the differing impacts of IGCC and pulverized control technologies on hazardous air pollutant emissions, solid waste disposal, water quality, water use, and plant and animal species. EPA does not dispute that such analysis is required, beyond its dismissal of the point based on the Agency's unlawful elimination of IGCC from consideration at Step 1 of the BACT analysis. Nor does EPA dispute

[14] DREC's assertions that Congress intended collateral impacts analysis to be limited only to local considerations is unsupported by the cited history. See DREC Response 74. Senator Muskie did state that one reason for requiring BACT analysis to be conducted on a "case-by-case judgment at the State level" was a concern that "the use of the best available pollution control technology demonstrated to be applicable in one area of the country is not applicable . . . in another area because of difference [sic] in feedstock material, plant configuration or other reasons." But DREC ignores that Senator Muskie did not leave it there – he also stated that "other reasons" motivated this case-by-case requirement. Senate Debate on S. 252 (June 8, 1977), reprinted in 3 Senate Committee on Environment & Public Works, A Legislative History of the Clean Air Act Amendments of 1977 at 729 (Comm. Print Aug. 1978).

that it did not conduct the analysis before issuing the Permit. Instead, EPA claims that it deferred consideration of these issues to BIA's ongoing NEPA proceeding.

Moreover, EPA has simply not provided substantive responses to comments regarding the relative advantage of IGCC over pulverized coal technology in generating less solid waste and using less water. Compare Ex. 5, AR 66, Comment Letter 23, at 7 & n.10, 10, 33, 41; Ex. 28, AR 66 (Comment Letter 23 Attachment), Thompson Decl. ¶¶ 28, 60; AR 75, Comment No. 684 with AR 120, at 161, 173-74 (RTC and comments cited therein). EPA also provides no substantive responses to environmental justice comments related to these issues, including concerns about consumption of fish contaminated with mercury, other impacts to public health in an area in which public health services are underfunded, and water use. AR 120, at 161, 166. Instead, EPA suggests only that commentors contact BIA. See AR 120, at 73-75; see also AR 120, at 150.[15] EPA's lack of response is contrary to the Act's requirement that EPA analyze such environmental and other costs as part of the PSD proceeding, prior to issuing the Permit. At the very least, EPA should have obtained from BIA its analysis and responses before issuing the Permit. The complete absence of these analyses materially affects the quality of the permitting decision, as the information resulting from them could significantly alter the Permit.

[15] EPA has a specific regulatory obligation to perform an adequate assessment of impact on soils and vegetation. As noted in Conservations Petitioners' Supplemental Brief and in comments on the draft permit, EPA did not inventory the plants and soils in the region surrounding the DREF. Cons. Pets.' Supp. Br. at 263-65, 274-76, 294. As a result, EPA did not meet its burden to provide the public with an adequate record upon which to comment regarding potential impacts. Moreover, EPA blindly relied on a outdated screening procedures ("A Screening Procedure for the Impacts of Air Pollution Sources on Plants, Soils, and Animals," EPA 450/2-81-078, December 12, 1980), despite detailed comments specifically observing that the screening procedure was inadequate (see AR 66 Cmt. 23 at 78-83, Conservation Petitioner Comments on DREC Draft Permit) and observing that the record specifically identified a number of threatened and endangered plant species (Id. at 81, n.160, 163 (referencing Application Appendix 8)), and despite previous admonitions from the Board. EPA's only substantive response to these comments, that the screening procedure is the "only guidance currently available for conducting additional soil and vegetation impacts assessments" is wholly inadequate (AR 120 at 150).

This clear error justifies the vacatur and remand of the Permit for further consideration of these issues.

EPA does not demonstrate that it has met its affirmative obligation under Executive Order 12,898 (Environmental Justice) to ensure that issuing this Permit will not result in disproportionately high and adverse human health or environmental effects on low income or minority populations ("EJ communities"). The relevant question here is whether EPA's inquiry in support of the Permit met the minimum criteria for compliance (not whether Petitioners made an adequate affirmative showing that such adverse effects will result). EPA's responses to Petitioners substantive objections boil down to a single point – EPA asserts it is categorically absolved of further substantive review beyond its conclusion that DREC's emissions would not cause a NAAQS violation. There is no further reference to any other EPA analysis or evaluation relevant to assessing DREF's impact on surrounding EJ communities. Indeed, EPA completely ignores Conservation Petitioners' specific arguments that it must identify and assess all relevant impacts to EJ communities that might be addressed in the context of a PSD permit. Cons. Pets.' Supp. Br. at 260.[16]

In particular, EPA's Response ignores its failure to identify or assess the health or environmental impacts from non-criteria PSD-regulated air pollutants. See id. at 260-61. Nor did EPA respond to claims that it did not identify or assess impacts from levels of pollution below the NAAQS, despite Conservation Petitioners' emphasis that additional $PM_{2.5}$ reductions below the NAAQS can avoid death and disease. Id.; see also 70 Fed. Reg. 65,983, 65,988 (Nov. 1, 2005) ("emissions reductions resulting in reduced concentrations below the level of the

[16] Desert Rock's "analysis" of EJ impacts turns out to be no more than a repackaging of EPA's NAAQS-related conclusions. Moreover, Desert Rock cannot remedy EPA's inadequate response to comment after the fact.

standards may continue to provide additional health benefits to the local population."); 71 Fed. Reg. 2620, 2635 (Jan. 17, 2006) (US EPA unable to find evidence supporting the selection of a threshold level of $PM_{2.5}$ under which the death and disease associated with $PM_{2.5}$ would not occur at the population level). North Carolina v. Tennessee Valley Authority, __ F.Supp.2d ____, 2009 WL 77998 (W.D.N.C. Jan. 13, 2009) at *8 ("Court finds that, at a minimum, there is an increased risk of incidences of premature mortality in the general public associated with $PM_{2.5}$ exposure, even for levels at or below the NAAQS standard of 15 [u]g/m^3."). EPA did not meaningfully respond to allegations that EPA's soils and vegetation impacts analysis was insufficient to allow assessment of adverse effects on surrounding EJ communities. See Cons. Pets.' Supp. Br. at 260-66.

For these reasons, the Board should remand the Permit.

IV. CAA § 165(c) DOES NOT EXCUSE FAILURE TO COMPLETE REQUIRED ANALYSES BEFORE ISSUING THE PERMIT.

EPA cannot rely on CAA § 165(c) and Sithe's suit to compel issuance of the Permit under § 165(c)[17] to justify issuance of the Permit before all required analyses that must inform the permitting decision are completed. The statute's one year period for issuing or denying a permit begins to run only when EPA determines that the applicant has submitted all information necessary for all required analyses. 42 U.S.C. § 7475(c); 40 C.F.R. § 52.21(b)(22) . Because EPA controls the timing of the completeness determination, it strains reason for EPA also to argue that § 165(c) excuses its failure to be sure all required analyses are complete.

[17] On March 18, 2008, DREC and DPA sued EPA in federal district court to compel action on the permit. AR 98. On June 3, 2008, EPA lodged with the court a proposed Consent Decree requiring EPA to make a determination on the permit by July 31, 2008. AR 118. EPA issued the permit on July 31, 2008. AR 122.

EPA's Response to Comments refers to § 165(c) and the lawsuit only once, as justification for not completing the ESA consultation before issuing the Permit. AR 120, at 171. By contrast, EPA's Response brief repeatedly relies on § 165(c) and the lawsuit as justification for its failure to complete ESA requirements and § 112(g) MACT analysis before issuing the Permit. EPA Resp. at 3-4 (stating lawsuit "limited the Region's ability to withhold action on the PSD permit pending completion of related reviews of the DREF project required under various federal statutes, such as [CAA §] 112(g) ... and the [ESA]"), 104 ("holding up the PSD permit in order to complete case by case MACT risked a continuing violation of [§] 165(c)"); 117 &126 (same).

DREC's Response brief also repeatedly relies on § 165(c), requesting the Board to consider § 165(c) as a basis for not completing ESA requirements, and for not awaiting BIA's completion of the EIS before issuing the Permit. DREC Resp. at 1-2, 244, 255-57, 267. But neither EPA nor DREC properly rely on § 165(c). EPA regulations provide that "[c]omplete means in reference to an application for a permit that the application contains all of the information necessary for processing the application." 40 C.F.R. § 52.21(b)(22) (emphasis added). The regulations also impose on the permit applicant the obligation to "submit all information necessary to perform any analysis or make any determination required under [the PSD regulations]." 40 C.F.R. § 52.21(n). In other words, it is EPA's determination that DREC has submitted all required information[18] that starts the one year clock. As discussed above and in our Supplemental Brief, development of much of the required information has been deferred to

[18] This includes all information required for the mandatory BACT collateral impacts analysis, ESA consultation, § 112(g) MACT analysis, assessment of potential 8-hour ozone NAAQS and $PM_{2.5}$ impacts, and environmental justice analysis

ongoing or future ESA, NEPA and § 112(g) proceedings – so, if, as DREC alleges, EPA made a completeness determination, it erred in doing so.

Indeed, EPA can and must ensure that the required analyses have been completed (or that all information required for the analyses has been submitted by the applicant) before determining that the application is complete. See Jones v. Gordon, 792 F.2d 821, 825-26 (9th Cir. 1986) (statutory requirement to issue or deny permit within 90 days after publication of notice plus length of any hearing is no bar to preparation of EIS because date of issuance of notice is within agency's control); People ex rel. California Dept. of Transp. v. City of S. Lake Tahoe, 466 F. Supp. 527, 538-39 (E.D. Cal. 1978) (60 day period to review proposal does not bar compliance with state environmental quality act because it is reasonable to interpret 60 day period as not commencing until environmental impact report is submitted); Asarco, Inc. v. Air Quality Coal., 92 Wash. 2d 685, 601 P.2d 501 (Wash. 1979) (65 day deadline for acting on variance request is no bar to preparation of EIS under state law because state can require submission of all information necessary for EIS before declaring application complete, thus triggering deadline).

At the very least, the Board should remand this issue to Region 9 for further proceedings, including public notice and comment. EPA offered the public no opportunity to comment on its reliance on § 165(c) and the lawsuit, despite having publicly announced it would issue the Permit only after completion of ESA consultation requirements, review of the FWS' Biological Opinion, and a determination of consistency with ESA requirements. AR 47 (Statement of Basis for Draft Permit), AR 47 (7/27/06 letter to Sithe). EPA also refused to respond to Conservation Petitioners' April 25, 2008 request that EPA withdraw its qualified May 21, 2004 completeness

determination and deny the Permit. Ex. 10 to Petition for Review.[19] While EPA did solicit public comment on the lodged Consent Decree, it never responded to the detailed written objections to the Consent Decree submitted by a number of the Conservation Petitioners on July 11, 2008. Ex. 45 to Cons. Pets.' Supp. Br.[20] Conservation Petitioners' April 25, and July 11, 2008 submissions described at length reasons why EPA was not required to issue the Permit in response to the lawsuit. EPA has never presented any meaningful explanation why it believes § 165(c) and the lawsuit required it to issue the Permit before EPA was in possession of all information required to make a fully-informed decision on the Permit. If the Board is unable to determine that EPA's reliance on § 165(c) and the lawsuit is clearly erroneous, the Board should remand for further notice and comment proceedings on this issue.

V. EPA COMMITTED CLEAR ERROR BY FAILING TO COORDINATE WITH PREPARATION OF THE ENVIRONMENTAL IMPACT STATEMENT.

Notably, EPA does not allege either in its Response to Comments or its Response Brief, that § 165(c) and DREC's lawsuit excuse it from compliance with 40 C.F.R. § 52.21(s), requiring EPA to coordinate its review of the PSD Permit with BIA's ongoing preparation of an environmental impact statement "to the maximum extent feasible and reasonable." Because the timing of EPA's determination that a complete application has been submitted is within EPA's control, see supra, EPA can ensure coordination with ongoing NEPA proceedings by requiring completion of a final or draft EIS (or submission of all information required for the final or draft EIS) prior to determining that the PSD application is complete. Section 165(c) therefore

[19] EPA states in its Response to Late-Filed Comments that it has exercised its discretion to decline to respond to the April 25, 2008 letter because it was submitted after the close of the public comment period. AR 121, at 1. EPA's refusal to consider and respond to these comments, on an issue that arose long after the comment period expired, is especially troubling given the extensive reliance on the statute and lawsuit in the Responses of EPA and DREC.

[20] EPA ultimately issued the Permit without seeking approval of the Consent Decree it had lodged with the court.

provides no obstacle to coordination with the ongoing NEPA proceeding. See Jones, 792 F.2d at 825-26; People ex rel. California Dept. of Transp. v. City of S. Lake Tahoe, 466 F. Supp. 527, 538-39 (D.C. Cal. 1978); Asarco, 601 P.2d at 517-19. Even if EPA lacked control over the timing of its determination of when the application is complete, it may well have been feasible to complete the EIS within one year of filing of a complete application. See W. Land Exch. Project v. U.S. Bureau of Land Mgmt., 315 F. Supp. 2d 1068, 1082 (D. Nev. 2004) (rejecting agency's assertion not supported by citation to record evidence that 1 year statutory deadline precluded application of EIS requirement); Forelaws on Bd. v. Johnson, 743 F.2d 677 (9th Cir. 1985) (9-month period to offer contract does not preclude EIS requirement).

EPA baldly asserts that it complied with the NEPA coordination requirement, but provides no support for its assertion other than that it provided BIA certain information. EPA Resp. at 129. Beyond EPA's submission of a letter to satisfy § 309 requirements, the record is devoid of additional evidence of coordination. Furthermore, EPA's non-specific and unsupported assertion that it "obtained all necessary information for issuing the PSD permit through the permitting process," AR 120, at 168, also cited by DREC Resp. at 266, is undercut by EPA's deferral of required collateral impacts analysis to the NEPA proceedings, described supra. The Permit therefore should be remanded, with directions to EPA to refrain from issuing it until after the EIS is completed and EPA has obtained and assessed all relevant information submitted in the NEPA proceedings.

VI. EPA ERRED BY ISSUING THE PERMIT BEFORE INITIATION AND COMPLETION OF ENDANGERED SPECIES ACT CONSULTATION.

A. Section 7(d) Cannot Allow the Advancement of the Very Action for Which § 7(a)(2) Consultation Is Required.

The parties do not dispute that DREF may affect listed species and their habitat, and that there has yet been no completed consultation to consider those effects under § 7 of the ESA, 16 U.S.C. § 1536.[21] EPA's issuance of the Permit prior to completion of § 7 consultation violates the basic requirements of the ESA and EPA's misuse of § 7(d) is supported by neither the ESA nor the case law.[22]

1. Section 7(a) requires completion of consultation prior to agency action.

Section 7(a) dictates that agency actions that may affect listed species or critical habitat may not progress unless and until the agency assures, through completion of the consultation process, that the proposed action is not likely to jeopardize the continued existence of listed species or adversely modify their critical habitat. 16 U.S.C. § 1536(a); 50 C.F.R. §§ 402.14; 402.13 (emphasis added). See also Connor v. Burford, 848 F.2d 1441, 1452 (9th Cir. 1988) ("before any leases could be sold, the FWS was required to prepare a biological opinion") (citing Thomas v. Peterson, 753 F.2d 754, 763 (9th Cir. 1985)); accord, Natural Res. Def. Council v.

[21] At the time of the petition to the EAB, consultation had not commenced. According to the EPA Response, consultation has now commenced, but until the Fish and Wildlife Service issues a Biological Opinion, consultation will not be complete. 16 U.S.C. § 1536(b).

[22] DREC and EPA's arguments that the BIA is the proper lead agency for § 7 consultation miss the real issue for consideration by the EAB: the complete lack of consultation under § 7(a) prior to permit issuance. Because BIA's status as the "lead agency" is not the real concern, Conservation Petitioners do not further address this argument here. See Cons. Pets.'Supp. Br. at 12-13. DREC also offers a new and unsupported argument when it implies that the EAB cannot or should not hear claims regarding the failure to consult because Conservation Petitioners can later raise them in district court. EAB has clearly addressed failure to consult in the context of a PSD permit appeal and the issue need not be revisited here. See In re Indeck-Elwood, L.L.C., 13 E.A.D.___, slip op. at 92, (Sept. 27, 2006). Indeed, where a statute provides exclusive jurisdiction over agency actions, claims regarding failure to consult must be brought in that forum as well, in this case the EAB. See, e.g., American Bird Conservancy v. Fed. Commc'ns Comm'n., 545 F.3d 1190, 1194 (9th Cir. 2008) (and cases cited therein) (involving the Hobbs Act); SW Ctr. for Biological Diversity v. Fed'l Energy Regulatory Comm'n, 967 F.Supp. 1166, 1173 (D. Ariz. 1997) (involving the Federal Power Act). Were the EAB to decline to hear the consultation issue in this case, Conservation Petitioners and CBD could be left with no forum to address lack of consultation on the Permit.

Houston, 146 F.3d 1118, 1128, n. 6 (9th Cir. 1998); Friends of the Earth v. U.S. Navy, 841 F.2d 927, 933-34 (9th Cir. 1988).

The agency action at issue here is issuance of the Permit.[23] Contrary to § 7(a)(2), the argument advanced by EPA and DREC would allow the very agency action that is the subject of the consultation obligation to proceed, not just companion actions related to the action itself. This is a violation of § 7(a) and is not the function of § 7(d).

2. Section 7(d) is a prohibition on, and safeguard against, additional actions that may increase the momentum for the project under consultation.

Section 7(d) does not amend the § 7(a) consultation requirement to provide a tool to advance the primary action, or pieces of the primary action, under consultation. Rather, the statute and the case law are clear that § 7(d) is in addition to the basic consultation requirement of § 7(a), and prohibits actions that may contribute to the momentum of the action under consultation. Section 7(d) is meant to address peripheral, additive, or supportive actions. For example, while the Permit is under consultation, § 7(d) may also prevent the investment, loan, or expenditure of funds for consultants or for site planning and design work related to the Permit, or the construction of transmission lines. Section 7(d) is an additional safeguard and prohibition, not an excuse to move forward with the primary action. Courts have repeatedly reinforced this principle, holding that § 7(d) does not allow an agency to circumvent consultation on the relevant agency action itself, but requires the agency to maintain the status quo pending the completion of consultation under § 7(a).

> We have previously made it clear that § 7(d) [16 U.S.C. § 1536(d)] does not serve as a basis for *any* governmental action unless and until consultation has been initiated. In *Connor*...[w]e rejected the Fish and Wildlife Service's suggestion that projects it unilaterally determined were not irreversible and irretrievable commitments of resources

[23] DREC and EPA arguments regarding the "finality" of the Permit, that the filing of an appeal by citizens somehow "saves" the Permit from being in violation of § 7, make no sense.

could go forward even though it had not obtained an adequate biological opinion as required by § 7(a)(2).

Pacific Rivers Council v. Thomas, 30 F.3d 1050, 1056 (9th Cir. 1994) (citing Connor v. Burford, 848 F.2d at 1455, fn.34.) (second emphasis added).[24] See also, Pacific Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation, 138 F. Supp. 2d 1228, 1242 & 1245-46 (N.D. Cal. 2001) (initiation of "informal consultation" does not trigger § 7(d) or allow agency action that is actually under consultation to proceed under claim of no irreversible or irretrievable commitment of resources); Greenpeace v. Nat'l Marine Fisheries Serv., 106 F. Supp. 2d 1066, 1074 n.5 (W.D. Wash. 2000) (citing Connor v. Burford that "[§] 7(d) does not amend [§] 7(a) to read that a comprehensive biological opinion is not required before initiation of agency action so long as there is no irreversible or irretrievable commitment of resources" on the agency action itself).

EPA unsuccessfully attempts to reinvent § 7(d) case law by skirting the primary holding in NRDC v. Houston, that the underlying water contracts that were the subject of a § 7 consultation were illegal because they were issued prior to completing § 7(a)(2) consultation, and could not be saved by any conditions clause. Houston, 146 F.3d at 1128 (emphasis added). Only after emphasizing this basic principle does the Houston court apply a "belt and suspenders" approach, evaluating language in the Bureau of Reclamation contracts at issue. EPA

[24] EPA tries to distinguish the Connor decision, but succeeds only in bolstering Conservation Petitioners' position. EPA's Response points out that in Connor a biological opinion had been completed, but that the opinion was ultimately found to be inadequate, omitting important factors and resulting in piecemeal consideration of an agency action that was subject to consultation. EPA's description highlights that EPA's position here is actually more precarious than that in Connor. Here, there is no biological opinion, piecemeal, inadequate, or otherwise, making EPA's issuance of DREF's Permit a clear violation of § 7(a), under both the statutory language and the reasoning in the Connor case.

conveniently seizes only on this second part of the Houston decision to wrongly argue that § 7(d) can sometimes be used to circumvent § 7(a)(2), sidestepping the basic legal principle entirely.

3. Cases cited by EPA and DREC do not detract from the basic, constant principle that the agency action that is under consultation cannot go forward under § 7(d) prior to the completion of consultation.

Many of the cases cited by DREC to support circumvention of consultation were decided prior to Connor and Pacific Rivers Council and the majority concern the Outer Continental Shelf Lands Act ("OCSLA"). The Connor court noted DREC's primary OCSLA case, North Slope Borough v. Andrus, 642 F.2d 589 (D.C. Cir. 1980), and dismissed the OCSLA situation as distinct due in large part to the unique procedural requirements of OCSLA that allow for segmented action. See, e.g., Connor, 848 F.2d at 1455.[25] The remainder of the published cases are easily distinguished from the situation here. In Nat'l Wildlife Fed'n v. Nat'l Park Serv., 669 F. Supp. 384 (D. Wyo. 1987), NMFS had made a decision that the action would not adversely affect listed species, in sharp contrast to this case where the FWS stated that DREF will adversely affect species and habitat and thus a full biological opinion is required. In Forest Conservation Council v. Espy, 835 F. Supp. 1202 (D. Idaho 1993), work on the road in question was completed before the species in question was listed. The decision in SW. Ctr. for Biological Diversity v. U.S. Forest Serv., 307 F.3d 964 (9th Cir. 2002) (opinion withdrawn, dismissed as moot), while mentioning § 7(d), doesn't rule or rely on § 7(d) and therefore is of no value here.

Finally, EPA and DREC cite to Bays' Legal Fund v. Browner, 828 F. Supp. 102 (D. Mass. 1993), in an attempt to support the claim that non-jeopardizing actions can go forward. The Bays' Legal Fund case runs counter to the bulk of the case law and the sound reasoning of

[25] The D.C. District Court also agrees with limiting North Slope Borough and other OCSLA cases as set forth in Connor. National Wildlife Federation v. Brownlee, 402 F.Supp.2d 1, 10, fn.15 (D.D.C. 2005).

Connor and cases following and Conservation Petitioners submit that the case was wrongly decided.[26] The Bays Legal Fund decision does not distinguish Connor or its progeny, and moreover is narrowly tailored to the facts of the particular case before it, including that the project at issue was far along in the construction process, and that a biological assessment shows "no evidence of harm to any species." Id. at 112. Overall, Bays Legal Fund stands alone: at best it is an outlier, and at worst, it is simply legally incorrect.

EPA's rationale for issuing the Permit prior to completing § 7 consultation does not provide justification for departure from the basic principles set forth in the case law. EPA and DREC would have the additional safeguards in § 7(d) override the primary consultation requirements. However, the cases make clear that § 7(d) is in the ESA to maintain the status quo and to prevent steamrolling of agency action through approval of incremental activities that increase momentum for the project.

B. Even If EAB Were Inclined To Allow Issuance Of A Permit Before The § 7(a)(2) Obligation Is Satisfied, Issuance Of The DREF Permit Violates The Prohibition Of § 7(d).

Even under a § 7(d) analysis, the DREF Permit violates the ESA because it represents an irreversible and irretrievable commitment of resources and because it reduces flexibility of the EPA to adequately protect species and habitat in the future. As the EAB stated in the Indeck-Elwood decision, while "a permit once issued may subsequently be amended" this "does not diminish the irretrievable nature of the decision to issue the permit" because "amendments are

[26] While the decision was clearly anomalous, the Massachusetts court did rely on the fact that NMFS had issued a "tentative" conclusion that the agency action would not jeopardize listed species – a situation very different from here. Rather, FWS has indicated there are likely adverse effects from DREF, including from its air emissions, necessitating a full biological opinion.

discrete actions" that are "independent from the decision to issue the permit in the first instance." Indeck-Elwood, slip op. at 111 n.151.[27]

By issuing the Permit, EPA has committed itself to a course of action that will require reversal of decisions, and additional notice and comment should changes be made later. See Cons. Pets.' Supp. Br at 286-287. Similarly, issuing the Permit entailed the commitment of staff resources that cannot be recovered (and presumably the agency will desire to not duplicate). Finally and perhaps most importantly, the additional processes and resources necessary to amending the Permit results in a commensurate reduction in flexibility, including the ability to deny the Permit outright should FWS be unable to formulate reasonable and prudent alternatives for the Desert Rock project.[28] Therefore, even if the EAB were to engage in assessment of EPA's actions under § 7(d) of the ESA, issuance of the Permit was an irretrievable and irreversible commitment of resources altering EPA's ability to act to protect species and habitat.

C. EPA's 'Balancing' Of Its Obligations Under § 7 Of The ESA And § 165 Of The CAA Is Unsupported By The Law.

EPA and DREC, very late in this process, manufacture a conflict in the law to avoid their ESA obligations. As set forth above, the CAA § 165(c) deadline does not excuse EPA from its ESA obligations to consult with FWS on the DREF Permit. There is therefore no irreconcilable conflict between application of CAA § 165 and ESA § 7, indeed, EPA retains control over the

[27] EPA's position that it can use § 7(d) as an end-run around consultation similarly ignores Indeck-Elwood, where the EAB stated that EPA's issuance of a PSD permit "would appear to be the point at which the permitting agency has irretrievably committed itself with respect to the discrete act of permitting a given activity" and "to avoid violating [§ 7, the Agency should complete the ESA process prior to the issuance of the final permit." Indeck-Elwood, slip op. at 111 (citing Lane County Audubon Soc'y v. Jamison, 958 F.2d 290, 295 (9th Cir. 1992)).

[28] The conditions language itself provides only that the EPA may amend the permit in the future, depending upon the outcome of the biological opinion. The conditions language does not preserve the flexibility for the EPA to withdraw the permit altogether should the biological opinion find jeopardy to species that cannot be addressed by reasonable and prudent alternatives.

timing of the completeness determination, and can avoid action on a permit until all § 7 analyses are finished.

Even if the one-year deadline had commenced to run, one year is more than a reasonable time to complete § 7 consultation: indeed, ESA § 7(b)(1)(A) requires that consultation be completed within 90 days (subject to extension in accordance with the statute). Moreover, nothing in the ESA excuses compliance on the basis of another statute's deadline. See Alaska Wilderness League v. Kempthorne, 548 F.3d 815, 834 (9th Cir. 2008); Douglas County v. Babbitt, 48 F.3d 1495, 1502 (9th Cir. 1995) (discussing and applying reasoning from Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Oklahoma, 426 U.S. 776 (1976)). The EAB made clear in Indeck-Elwood that in the PSD permitting context, EPA "cannot escape its obligation to comply with the ESA merely because it is bound to comply with another statute, "even one (such as the CAA) that has "consistent, complementary objectives." Indeck-Elwood, slip op. at 108 (quoting Washington Toxics Coal. v. EPA, 413 F.3d 1024, 1031 (9th Cir. 2005)).[29]

VII. EPA FAILED TO PERFORM ANY ASSESSMENT OF THE MEASURES REQUIRED TO ADDRESS HAZARDOUS AIR POLLUTANTS OR TO ADEQUATELY EXPLAIN WHY IT WAS REASONABLE TO ISSUE A PSD PERMIT WITHOUT DOING SO.

EPA claims that Petitioners' arguments regarding the significance of Desert Rock's maximum achievable control technology ("MACT") obligations under section 112 of the CAA hinge on whether EPA "must establish case-by-case MACT limitations under section 112(g) . . .

[29] DREC also makes exceedingly thin and misleading claims in a footnote, that § 165(c) eliminates EPA's discretion over the Permit which in turn eliminates the need for § 7 consultation. DREC's reliance on Nat'l Assoc. of Homebuilders v. Defenders of Wildlife, __ U.S.__, 127 S. Ct. 2518 (2007) ("NAHB") is deeply flawed and should be rejected. The NAHB case involved EPA discretion over substantive decisions, not deadlines for those decisions, and the ability to impose reasonable and prudent alternatives for the protection of species and habitat. It has no application here where § 165(c) does not control the substance of the decision, and leaves EPA free to impose any reasonable and prudent alternative needed for the protection of species and habitat.

at the same time (or before) the issuance of a PSD permit." EPA Resp. at 92. In fact, the question before the Board is two-fold. The first question is whether the CAA compels the completion of a case-by-case MACT analysis prior to (or at the same time as) the issuance of a PSD permit, where both obligations apply. The second question, whether or not the Act necessarily compels simultaneous establishment of MACT and PSD emission limits, is whether EPA in this instance has failed to adequately assess what the likely PSD-related implications of section 112(g) application will be on the design and operation of the proposed plant (including its control equipment, fuel, and operational parameters). In the face of a critical court determination during the pendency of the Permit (see New Jersey v. Envtl. Protection Agency, 517 F.3d 574 (D.C. Cir. 2008), the interrelationship between PSD and MACT that is evident on the face of the CAA, public comments noting Desert Rock's § 112(g) obligations and specifically questioning the need for a coordinated PSD-MACT analysis, and statements in the permit application materials recognizing the appropriateness of coordinating hazardous air pollutant ("HAP") and criteria air pollutant controls, EPA's failure to meaningfully address this issue constitutes reversible error.

A. PSD-MACT Coordination Issues Are Properly Before The EAB.

Contrary to EPA's and DREC's assertions, the PSD-MACT coordination issue is properly before the Board. First, EPA's point that § 165 specifically excludes HAP emissions from PSD is entirely irrelevant: Conservation Petitioners do not claim that MACT limits must be incorporated into the PSD Permit, or that § 112(g) limits somehow become adopted or enforceable through the PSD Permit.[30] See EPA Resp. at 93. Nor are Conservation Petitioners

[30] Conservation Petitioners do not claim that final case-by-case MACT limits must be issued before a final PSD permit, but only that the case-by-case MACT analysis (the only meaningful

asserting the Board's authority to review the substantive adequacy of EPA's MACT analysis in this context. However, the Board has clear authority to review the substantive adequacy of the BACT analysis, which is substantively compromised by EPA's failure to account for the MACT emission controls required under § 112.

Second, EPA's suggestion that Conservation Petitioners are mounting a collateral attack on EPA's § 112 regulation is patently absurd. See EPA Resp. at 93. Conservation Petitioners' appeal is now, and has always been, focused on the substantive adequacy of the Permit. Indeed, Conservation Petitioners' position is not in conflict with EPA's regulations (which are simply silent as to whether MACT and PSD must or should be coordinated), but merely reflects the Agency's obligations under each program to rationally apply each review to produce meaningful and accurate results. For example, setting a BACT emissions limit for particulate matter without considering the controls required by § 112 to achieve MACT-level control of toxic metals (which behave like particulates) means that the emissions level selected as BACT will not incorporate consideration of relevant aspects of the facility design. See Cons. Pet. Supp. Br. at n.109.

EPA tellingly does not dispute that Conservation Petitioners may raise issues related to the applicability of § 112(g) in this appeal. Indeed, EPA voluntarily elected to address this when it issued the final Permit. See EPA Resp. at 94; Cons. Pets.' Supp. Br. at 129 n.93.[31] EPA errs, however, in suggesting that questions of EPA's statutory obligation to consider the PSD-related implications of MACT review have somehow been waived. EPA Resp. at 94-95. The issue was raised in two supplemental comment letters filed after the D.C. Circuit's decision in New Jersey

---

process through which EPA assesses what control measure will be necessary to comply with § 112) must have been performed in order to have properly informed PSD permit limits.

[31] Desert Rock's attempt to invoke In re: Christian County (PSD Appeal No. 07-01 (EAB 2007)) is unavailing. This case is highly distinguishable from Christian County. Cons. Pets.' Supp. Br. at 129 n.93, as even EPA implicitly recognizes. EPA Resp. at 94.

v. EPA – the first submitted on March 4, 2008, and the second on June 17, 2008. In the first of these letters, Conservation Petitioners noted Desert Rock's MACT-related obligations and generally raised the concern that the MACT and PSD analyses needed to be coordinated; in the second letter, among other things, Petitioners provided additional details regarding the statutory basis for EPA's obligation to coordinate the MACT and PSD elements of this plant approval.

Petitioners' March 4, 2008 letter raising the § 112(g) issues reasonably requested that EPA 1) reopen the PSD permitting process, 2) explain how it would deal with the relationship between MACT and PSD/BACT emissions limits, and 3) allow for detailed public comment. The letter represented good practice, providing an immediate notification to Region 9 of the general significance of the court's decision – before the court issued the mandate in the case on March 14. When Region 9 not only did not reopen the process, but did not respond at all, Conservation Petitioners provided more detailed comments for the record on EPA's statutory obligations. EPA had ample time to consider Petitioners' comments – EPA issued the Permit 45 days after receiving the June 17 letter – sufficient time to examine, consider and respond to a three-page statutory argument. Moreover the timing of EPA's issuance of the Permit was well within the Agency's control.[32]

Where, as here, a requirement that will significantly impact the Permit's emissions limits becomes clearly relevant after the close of the comment period, it is reasonable to give the public significant information and opportunity to comment in order to ensure that the issue is meaningfully addressed. In fact, EPA's convoluted statutory analysis, EPA Resp. at 98-102, affirmatively demonstrates precisely why a period of public notice and comment was needed

[32] Conservation Petitioners filed adverse comments raising these MACT-related deficiencies in response to the draft consent decree in DREC's mandatory deadline suit, and sought to intervene in the case. Cons. Pets.' Supp. Br. at 293-94. Because the court never entered the consent decree, EPA cannot argue that issuance of the Permit was compelled.

before issuance of the Permit, as well as why the Board should remand the Permit to allow further development of the issue here.[33] Despite EPA's protestations, the Act does contemplate an interaction between MACT and PSD, see, e.g., 42 U.S.C. § 7479(3)(cross-referencing section 112).[34] And, because EPA has failed to explore even the basic emission control obligations that case-by-case MACT will impose at DREF, it cannot possibly have met its statutory responsibilities under § 169(3), or its obligation to adequately respond to public comments.

B. EPA Failed To Meaningfully Respond To MACT-Related Comments.

EPA admits it did not respond to Petitioners' June 17, 2008 letter raising the specific statutory issues addressed in this appeal. See EPA Resp. at 94-95. Nor did EPA respond to Petitioners' MACT-related comments in their April 25, 2008 letter requesting withdrawal of the completeness finding for DREF's permit application. This failure alone justifies exercise of EAB authority to remand these important policy questions to the Agency for resolution.

EPA's response to the substance of Conservation Petitioners' comments on the need for a co-extensive MACT analysis defies logic. On the one hand, EPA agrees with Conservation Petitioners that the only way to assess the impact of MACT on facility design, operation, fuel, and other parameters is to conduct a case-by-case MACT analysis. But, on the other hand, EPA

---

[33] EPA concedes that CAA § 110(j) requires "a showing that construction or modification and operation of a source 'will be' in compliance with other requirements." EPA Resp. at 100. The statute further provides that MACT determination is the proper vehicle for demonstrating compliance with section 112(g). See CAA § 112(g)(2)(B). Thus, EPA's claim that "the permit record sufficiently demonstrates that construction of the DREF facility will be in compliance with case-by-case MACT," EPA Resp. at 101, is at odds with both the record and the Act itself.

[34] EPA's attempt to dismiss the reference to § 112 in § 169(3) as a statutory accident cannot be credited – there are straightforward ways to reconcile this language, and cannons of statutory interpretation demand that EPA do so rather than simply disregard the Act's plain language. TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) ("'It is a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'") (quoting Duncan v. Walker, 533 U.S. 167, 174 (2001)).

concludes, without a single reference to any analysis or facts in the record, that "there is no basis to believe that HAP controls will affect . . . BACT." See EPA Resp. at 105 (quoting AR 121 at 22).[35] As Petitioners observed in their Supplemental Brief, EPA has identified some 67 HAPs typically emitted by coal plants. Even though they must all be subject to MACT analysis and the imposition of MACT emissions standards under section 112(g), nothing in the record assesses the likely levels of HAP emissions from DREF, identifies the MACT-floor reference plants for each HAP, or otherwise provides any fact-based assessment of what HAP emission controls might be required.[36] See Cons. Pets.' Supp. Br. at 131-35. Indeed, as a practical matter, it is difficult to see how a PSD permit for a source that is subject to the requirements of section 112(g) can be deemed "complete" without some assessment of the design, control and operational implications of mandatory HAP emission controls.[37]

In light of these facts, and Conservation Petitioners' other observations in their Supplemental Brief, EPA's claim in its Response at 104-106 that it has reasonably concluded that there is "no basis to believe" that MACT will require any relevant changes to the PSD Permit simply does not hold water. There is considerably more than simple "uncertainty" as EPA claims, id. at 105, there is a complete absence of any relevant analysis. Thus, in effect,

---

[35] EPA relies in its Response Brief on a single sentence in the record regarding the removal of sorbent by the baghouse. It is difficult to see how this sentence is responsive at all to the general observation that MACT emissions limits (which must be based on the single best performing similar source for each pollutant no matter how such source achieves that level of control) have the potential to change the PSD analysis for criteria pollutants. March 4, 2008 Letter at 4.

[36] DREC's assertion that including any necessary additional conditions in the operating permit alone would be sufficient must be rejected. See DREC Resp. at 92. The Act requires that the PSD permit must reflect the "greatest degree of reduction achievable" – if controls, process changes or other measures imposed under section 112(g) make it possible to achieve greater criteria pollutant reductions than the facility might otherwise have been able to achieve, then the PSD permit conditions must be changed, as a preconstruction matter.

[37] Petitioners raised this issue in their April 25, 2008 letter at 3, and the Board in its remand should find that the permit application was incomplete due to, among other things, the absence of any analysis regarding the implications of § 112(g) applicability.

EPA admits in its Response that its conclusions in the record below are based on nothing. For these reasons, the Board should remand the Permit to EPA with instructions to assess the PSD-related implications of MACT review and provide an opportunity for public notice and comment on that issue. If the Board does not remand the Permit on this basis, at a minimum it should retain jurisdiction over this issue to allow Petitioners the opportunity to raise issues regarding the impact of any future MACT determination on the adequacy of the PSD permit conditions.[38]

VIII. EPA FAILED TO PROVIDE ADEQUATE OPPORTUNITY FOR PUBLIC COMMENT ON THE NOx AND SO_2 BACT ANALYSES.

A. EPA Did Not Provide An Opportunity For The Public To Comment On Its Actual BACT Analysis, Which Was Performed After The Public Comment Period.

EPA fails to respond to Conservation Petitioners argument that NOx and SO_2 BACT limits in the DREF permit were largely, although not exclusively, based on improper procedures rather than final results. Specifically, Conservation Petitioners stated "the NOx and SO_2 BACT limits must be remanded because the public was never given the opportunity to review and comment on EPA's actual BACT analysis." Cons. Pets.' Supp. Br. at 156. See also id. at 165.

EPA's Response, however, misses the mark, attacking Conservation Petitioners for discussing the draft permit and proposed decision, which EPA asserts are irrelevant. See EPA Resp. at 8, 27, 28, 29 and n.6. EPA seeming fails to understand that the issue actually is whether EPA allowed the public to review and comment on its BACT analysis. It did not. See Cons. Pets.' Supp. Br. at 152–70, 174–80. Therefore, the Permit must be remanded to allow for public comment on EPA's actual BACT analysis, which was not performed until after the public comment period had ended. See 42 U.S.C. § 7475(e)(3)(C).

[38] In the absence of an express reservation of jurisdiction on this issue it is unclear whether the public would have the opportunity to raise these issues with the Board at a future date.

Step Three of a BACT analysis must consider three general types of information: (1) other permit limits; (2) actual emission data from actual sources; and (3) analysis of what is achievable based on analysis of presently available technology. Cons. Pets.' Supp. Br. at 160. EPA falsely claims that the "administrative record supporting the proposed NOx BACT decision included emissions data[.]" EPA Resp. at 29. Even if true, a remand would be required because EPA completely ignored information in the third category. EPA not only failed to consider such information, it committed clear legal error by indicating in its Response that it does not believe that evidence of what can be achieved considering current technology can be considered in a BACT analysis. See EPA Resp. at 31 n.10. EPA is entitled to no deference as EPA's error of law contradicts the plain language of the statute. BACT is the maximum reduction that is "achievable." 42 U.S.C. § 7479(3). EPA erroneously believes BACT is based on what has "been achieved." See EPA Resp. at 31, n.10.[39]

Moreover, a review of the record items EPA cites reveals that the administrative record did not include emissions data, but rather only included permit limits. EPA cites to the EPA's national coal workgroup spreadsheets. EPA Resp. at 29. However, in the Administrative Record, EPA stated:

> The National Coal Workgroup database shows that the NOx BACT emissions limits in recent PSD permits for pulverized coal fired boilers using LNB and SCR range from 0.07 lbs/MMBTU to 0.10 lbs/MMBTU.

[39] The NOx Optimization Plan is further evidence of EPA's erroneous interpretation of the definition of BACT to be "achieved" rather than "achievable." EPA says, in effect, that the way to determine what is achievable is to see what is achieved. EPA Response at 35 ("Since the facility must be designed and built to meet an achievable level of emissions, it is sensible to begin with the level that is more certain to be achievable [i.e. a level that has been achieved in the past] and provide for downward adjustment once it is verified that the source can in fact achieve a lower limit after it is constructed [i.e. only after the level has been achieved].").

AR 46 at 13 (emphasis added). To state the obvious, an emission limit is not emission data. EPA also cites to the DOE/NETL database. EPA Resp. at 29. Again, the Administrative Record indicates that this database lists emission limits:

> DOE/NETL's database of information for pulverized coal fired boilers shows that 0.06 lbs/MMBTU is below the lowest NOx BACT emission limits for recently permitted facilities.

AR 46 at 13 (emphasis added). EPA then goes on to cite the Newmont and Weston cases, which upheld reliance on permit limits. See EPA Resp. at 29. Again, these are not evidence of emissions data.

DREC makes a similar, false claim. Step Three of the BACT analysis is where EPA should have considered actual emission data from actual power plants as well as what emission rates are achievable, considering current technology. However, all that Desert Rock can point to for NOx is one table in the AAQIR which does not contain or even reference any emission data or analysis of what is achievable considering current technologies. See DREC Resp. at 96, citing AR 46 at 8. The references table lists "Typical Emission Rates" without providing any information about where the information comes from. AR 46, at 8. The "B" in BACT is Best, not "typical." The table also provides "Control Efficiency Range" which is relevant but useless without information about the inlet emission rate to the control device. One needs both pieces of information to calculate an emission rate, i.e. an emission rate is the product of the inlet emission rate and the control efficiency. See AR 46 at 8.

Conservation Petitioners do not dispute that the upper range of Efficiency Range is approximately 90% as represented in AR 46 at 8. Such control efficiency, when considered in conjunction with achievable inlet emission rates, will achieve a much lower emission rate than

was in the draft permit. EPA did not provide any information about how this Control Efficiency Range played a role in arriving at the BACT limit in the draft permit.

This is not a case in which EPA said that the inlet emission rate would be X, commenters said it would be less than X, and then EPA revised the BACT limit in light of the comments. This is a case in which EPA did not provide an inlet emission rate at all and did not even indicate that they thought the inlet emission rate was a relevant factor in the BACT analysis prior to the public comment period. Thus, the public did not know the legal and factual basis of EPA's BACT limits because the data, an explanation of how that data would be used in the analysis, and the analysis itself were absent.

Desert Rock correctly states "the permitting authority should explain how it derived the specific emissions limit and indicate whether that limit reflects the best emission rate achievable through application of the selected BACT." DREC Resp. at 97. However, Desert Rock cannot point to the explanation of how EPA derived the specific emission limit, other than by looking at other permit limits, because no explanation existed prior to the end of the public comment period. Desert Rock implicitly acknowledges this point by citing to the Response to Comments, which did not exist during the public comment period, to identify EPA's analysis. See id. at 99-100 citing AR 120 (Response to Comments).

EPA further states that "[t]he fact that comments presented additional information fails to provide a factual basis demonstrating the administrative record for proposing the NOx BACT limit of 0.06 lbs/MMBtu was insufficient." Id. at 29-30. While that is a true statement in the abstract, it has nothing to do with Conservation Petitioners' argument here—that the public was denied an opportunity to comment on the legal and factual basis for EPA's BACT determination because it did not exist until after the public comment period was over.

B. EPA Did Not Provide An Opportunity For The Public To Comment On The NOx Optimization Plan.

EPA also created the NOx Optimization Plan ("NOP"), which is found in Condition IX.E of the final permit, after the public comment period. Thus, it is undisputed that EPA did not provide the public with an opportunity to comment on the NOP. This was a violation of 42 U.S.C. §§ 7475(e)(3)(C); (a)(2), 7470(5) and 40 C.F.R. § 52.21(q). See e.g. In re Indeck-Elwood LLC, Slip op. at 51-52 (EAB 2006). EPA offers several excuses for this clear violation of the public notice and comment requirements. As explained below and in the Conservation Petitioners' Supplemental Brief, none have merit.

EPA mentions in a heading of a section of its Response Brief that if a change to a permit is the logical outgrowth of the draft permit and comments, then EPA is not required to hold a new public comment period on the change in the final permit. EPA Resp. at 33. However, the logical outgrowth exception is not applicable to this case.

To ensure fairness and provide a meaningful comment opportunity, a final rule must be a "logical outgrowth" of the agency's proposed rule. Natural Res. Def. Council v. U.S. Envtl. Protection Agency, 824 F.2d 1258, 1283 (1st Cir. 1987). In contrast, "[i]f the final rule deviates substantially from the proposed rule, it amounts to a new proposal and must run the regulatory gauntlet afresh." O'Connell v. Shalala, 79 F.3d 170, 180 (1st Cir. 1996).

> The essential inquiry is whether the commenters have had a fair opportunity to present their views on the contents of the final plan. We must be satisfied, in other words, that given a new opportunity to comment, commenters would not have their first occasion to offer new and different criticisms which the Agency might find convincing.

Natural Res. Def. Council, 824 F.2d at 1283 (quoting BASF Wyandotte Corp. v. Costle, 598 F.2d 637, 642 (1st Cir. 1979)).

In this case, Conservation Petitioners catalogued their new and different criticisms of the NOP that they would give EPA for the first time if EPA was to take public comment on it. See Cons. Pets.' Supp. Br. at 171-72.[40] And, indeed, EPA's and DREC's Responses essentially make Conservation Petitioners' point. The Responses argue that Conservation Petitioners' arguments about the NOP are based on speculation. See, e.g., EPA Resp. at 37, 39, 40, 41; DREC Resp. at 108-09. It is certainly true that there are no exhibits or expert affidavits in the Administrative Record to support Conservation Petitioners' criticisms of the NOP – but that is solely because EPA never exposed the NOP to public comment. Had the opportunity been presented, Conservation Petitioners would have submitted such evidence. EPA's responsive argument is quintessentially arbitrary: having failed to allow the Conservation Petitioners to submit evidence on the issue, EPA now criticizes Conservation Petitioners for not submitting such evidence. EPA's footnote 14 is a prime example of the absurdity of the Agency's arguments. Having denied Conservation Petitioners the opportunity to submit comments, EPA now argues that if Conservation Petitioners are so certain that an annual NOx limit of 0.0385 lb/MMBtu is achievable, Conservation Petitioners should have no fear that it will eventually go into place.[41]

However, NOx emission rates at coal fired power plants are dictated by two general factors, equipment design and equipment operation. Coal-fired power plants very often operate

---

[40] None of these issues were, or could have been raised in the comments on the draft permit because none of these issues could be ascertained until the specific terms of the NOP were announced. Thus, DREC's reliance, DREC Resp. at 107-08, on In re Thermalkem, Inc., 3 E.A.D. 355, 357 (EAB 1990), is unavailing.

[41] In any event, "eventually" is cold comfort for the members of the public who may be harmed by Desert Rock's air pollution before the lower NOx emission limit goes into place. EPA cannot reasonably dispute that NOx emissions from sources such as Desert Rock are precursors to $PM_{2.5}$. Nor can EPA reasonably dispute that a reduction in $PM_{2.5}$ levels may reduce death and disease regardless of whether the $PM_{2.5}$ NAAQS is achieved or not. See Pages 10-11, above.

at higher NOx emission rates than they are designed to achieve because the operator chooses to operate the plant at a higher NOx emission rate. For example, one operational parameter is how much ammonia is injected into the SCR. Ammonia is a commodity which power plant operators have to purchase, and if they can save money by using less ammonia, they do. Thus, contrary to DREC's misstatement, see DREC Resp. at 9-10, 111, Conservation Petitioners do not claim that DREC will commit fraud, but simply assert that absent an enforceable requirement to do otherwise, DREC will likely operate its business to minimize expenses, as most prudent businesses do.[42] The NOP in the DREF Permit is fundamentally flawed in that it fails to include a requirement that Desert Rock's NOx control system be operated to achieve an emission rate of 0.0385 lb/MMBtu or less. See AR 122 at Condition IX.E.2.

Why do Conservation Petitioners offer no citations to the Administrative Record to prove their points in the above paragraph? Because EPA never had a public comment period during which Conservation Petitioners could submit evidence into the Administrative Record to establish these points and other flaws with the NOP. Thus, the Permit must be remanded to allow for such a public comment period.

It is theoretically possible that once it is created, the SCR catalyst management plan provided for in Permit Condition IX.E.2.b could state that Desert Rock must operate the NOx Control System to achieve a NOx emission rate of 0.0385 lb/MMBtu or less. However, as the SCR catalyst management plan does not currently exist, will not be subject to public notice and comment, and will not be an enforceable part of the Permit, it provides no support for EPA's

[42] There are actually coal-fired power plants that have their NOx control systems automatically adjusted to make NOx control level decisions based on the current price of NOx credits under cap and trade programs like the NOx SIP Call. If NOx SIP Call credits are more expensive than the incremental cost of reducing NOx emissions, then the plant will reduce emissions and vice versa.

position. See e.g. 42 U.S.C. § 7475(e)(3)(C) (BACT analysis must be available to the public "at the time of the public hearing"). EPA's most recent attempt to rely on a non-public, non-enforceable plan was recently rejected by the D.C. Circuit. See Sierra Club v. U.S. Envtl. Protection Agency, No. 02-1135, slip op. at 4-17 (D.C. Cir. Dec. 19, 2008). The same logic in that decision applies here. EPA's claim that the "NOx optimization plan requires DREF to make every effort possible to achieve the post-optimization period emission rates even during the first five years" is false.

EPA cites to 40 C.F.R. § 124.14(b) to justify its choice not to allow public comments on the NOP. While it true that 40 C.F.R. 124.14(b) uses the term "may," it is also true that EPA did not follow any of the three options listed in 40 C.F.R. § 124.14(b). 40 C.F.R. § 124.14(b) does not say that EPA can create a whole new permit provision which is completely different from the draft permit and deny the public an opportunity to comment on that completely different permit provision. Rather, the Clean Air Act does not countenance such an approach. See 42 U.S.C. § 7475(e)(3)(C).

IX. THE ADMINISTRATIVE RECORD FAILS TO JUSTIFY AS BACT THE LB/HR EMISSION LIMITS DURING START UP AND SHUT DOWN.

The EPA has failed to justify as BACT the lb/hr emission limits effective during startup and shutdown.[43] Cons. Pets.' Supp. Br. at 180-90. EPA has waived compliance with the lb/MMBTU emission limits during periods of start up and shut down. EPA undertook only a specific BACT analysis for those emission limits. Id. EPA did not undertake such a specific BACT analysis for the lb/hr emission limits. Id.

[43] Conservation Petitioners also have challenged whether the SO_2 lb/MMBTU emission limits constitute BACT. Cons. Pets.' Supp. Br. at 174-80. If the EAB upholds this challenge, the Conservation Petitioners request that the EAB simultaneously remand the lb/hr SO_2 emission limits effective during start up and shut down because the EPA admits that the SO_2 lb/hr emission limits are based on the SO_2 lb/MMBTU emission limits.

EPA's Response brief for the first time identifies the mathematical equation used to derive lb/hr emission limits from lb/MMBTU emission limits. Resp. at 48-49, n.17 & 18. DREC's Response also contains a lengthy discussion attempting to justify the lb/hr limits as BACT. DREC Resp. at 112-15. These new justifications are nowhere to be found in the administrative record, and furthermore cannot correct EPA's fundamental error in failing to include them in the record and subject them to public comment. In re Woodcrest Manufacturing, Inc., 7 E.A.D. 757, 763-64 (1998) (rejecting new evidence submitted in briefs); In the matter of Edward Pivirotto, 3 E.A.D. 96 (1990) (rejecting arguments of counsel as evidence because not in the administrative record).

The CAA requires all analyses underlying the permit's terms to be subjected to public comment. 42 U.S.C. § 7475(a)(2). EPA's attempt to make its analysis public for the first time in Response briefs cannot correct this error. EAB must remand the DREC Permit with instructions to EPA to supplement the administrative record by providing and allowing an opportunity for public comment on a full and complete justification for all emission limits effective during start up and shut down, an explanation of how such limits were derived, and an explanation why such emission limits constitute BACT.

X. EPA FAILED TO PERFORM THE REQUIRED CASE-BY-CASE ANALYSIS TO ENSURE EMISSIONS FROM DREF WILL NOT CAUSE OR CONTRIBUTE TO A VIOLATION OF THE PM2.5 NAAQS.

A. There Is No Dispute That There Is A Case-By-Case Requirement To Prove Compliance With The PM2.5 NAAQS.

The parties do not contest that the CAA imposes a specific regulatory burden on the "owner or operator" of a new major source of air pollution to prove that its proposed "facility will not cause or contribute to, air pollution in excess of any ...national ambient air quality

standard in any air quality region" 42 U.S.C. § 7475(a)(3)(B) (emphasis added).[44] Likewise, the parties do not contest that EPA has promulgated an effective national ambient air quality standard for $PM_{2.5}$. See DREC's Resp. at 40 and EPA's Resp. at 69. Moreover, DREC and EPA appear to admit that the owner/operator of a new major stationary source must prove compliance with the $PM_{2.5}$ NAAQS on a "case-by-case" basis during the PSD permitting process. See DREC's Resp. at 141-42 (the permittee and EPA must determine "the most suitable approach [to estimate the impact of the source] on a case-by-case basis"); Cons. Pets.' Supp. Br., Ex. 36, at 17 (EPA admits "the adequacy of using PM10 as a surrogate for PM2.5 is subject to case-by-case evaluation in the review of individual permits."). There is no genuine dispute that DREC must prove in this case that its $PM_{2.5}$ emissions will not cause or contribute to a violation of the $PM_{2.5}$ NAAQS. Instead, the main dispute is how this demonstration must be made and whether EPA's administrative record in this case contains such a demonstration.

B. EPA's Administrative Record Does Not Contain A Case-By-Case Demonstration That Emissions From DREF Will Not Cause Or Contribute To A Violation Of The PM2.5 NAAQS.

In their Responses, EPA and DREC argue that they have made the requisite demonstration under EPA's PM_{10} Surrogate Policy, showing DREF's emissions will not cause or contribute to a violation of the $PM_{2.5}$ NAAQS.[45] The EPA PM_{10} Surrogate Policy essentially

---

[44] EPA's Response attempts to shift this burden to Conservation Petitioners by arguing they failed to "present permit-specific information and arguments showing that use of PM_{10} as a surrogate in this instance is clear error." EPA's Response at 71. To the contrary, the CAA imposes the burden on the owner or operator of the facility to prove that its emissions will not cause or contribute to a violation of the $PM_{2.5}$ NAAQS. 42 U.S.C. § 7475(a)(3)(B).

[45] The 2008 PM_{10} Surrogate Final Rule is currently being challenged in the D.C. Court of Appeals. See Cons. Pets.' Supp. Br. at 205-06. This regulatory challenge seeks a ruling that using PM_{10} as a surrogate for $PM_{2.5}$ is illegal. EPA wrongly argues that even if the PM_{10} Surrogate Final Rule is set aside as illegal, it will not impact this case because the EPA would continue to apply the PM_{10} Surrogate Policy. EPA Resp. at 73. If the D.C. Circuit sets aside the

allows an owner/operator to utilize its PM_{10} emission modeling as a surrogate for modeling $PM_{2.5}$ impacts. Conservation Petitioners specifically challenge EPA's application of the PM_{10} Surrogate Policy to the DREF PSD permitting determination.[46]

DREC admits that there are two ways to apply the PM_{10} Surrogate Policy: 1) the permitting agency can make a technical determination that "all of the source's PM_{10} emissions represent $PM_{2.5}$ emissions"; or, 2) "a source may quantify its $PM_{2.5}$ fraction" from the total PM_{10} emissions. See DREC's Resp. at 141 (citing EPA's April 5, 2005 Memorandum from Stephen D. Page, Implementation of New Source Review Requirements in $PM_{2.5}$ Nonattainment Areas).[47] The EAB has previously upheld the use of the PM_{10} Surrogate Policy when the permitting agency has made a case-by-case technical demonstration that either all or a fraction of the facility's PM_{10} would be assumed to be $PM_{2.5}$ emissions and then compared those emissions to the $PM_{2.5}$ NAAQS to ensure the emissions would not cause or contribute to a violation of the NAAQS as required by Section 165(a)(3)(B). See In re BP Cherry Point, 12 E.A.D. 209 (EAB 2005); In re Prairie State Generating Company, PSD Appeal No. 05-05 (EAB, August 24, 2006), 13 E.A.D. __.[48]

EPA Region 9 improperly applied the PM_{10} Surrogate Policy in this case because it failed to make the following technical demonstrations: 1) that PM_{10} emissions in this case can be used as a reasonable surrogate for $PM_{2.5}$ emissions; 2) that all or a fraction of DREF's PM_{10} emissions

---

PM_{10} Final Rule by finding it is illegal to use PM_{10} as a surrogate for PM2.5, then EPA would likewise be legally prohibited from applying the PM_{10} Surrogate Policy in the same fashion.

[46] Conservation Petitioners continue to argue that CAA § 165(a)(3)(B) requires that a specific NAAQS compliance determination be made for $PM_{2.5}$ and that EPA's PM_{10} Surrogate Policies may not be relied upon in this case. Although Petitioners have chosen not to brief this argument further in this Reply Brief, they continue to assert this argument and have not waived it for purposes of this case.

[47] As shown below, this same methodology is used in attainment areas.

[48] Both of these cases involve application of the PM_{10} Surrogate Policy to issuance of PSD permits under CAA § 165.

in this case will be assumed to be $PM_{2.5}$ emissions; and, 3) that the fraction of PM_{10} emissions assumed to be $PM_{2.5}$ emissions in this case was compared to the $PM_{2.5}$ NAAQS and it was determined that these emissions will not cause or contribute to a violation of the $PM_{2.5}$ NAAQS. Instead, EPA only determined whether its PM_{10} emissions would violate the PM_{10} NAAQS and never performed the comparative $PM_{2.5}$ analysis required by the EAB. As such, the PM_{10} Surrogate Policy has been improperly applied in this case.

C. EPA's Failure To Make The Required Technical Determinations Deprives It Of The "Deference" It Seeks From The EAB.

EPA and DREC ask the EAB to give deference to EPA's "technical determinations" regarding compliance with the $PM_{2.5}$ NAAQS. This argument fails because EPA has made no $PM_{2.5}$ technical determinations for the EAB to defer to – as noted above, EPA's administrative record doesn't contain the requisite $PM_{2.5}$ compliance determinations. The DREC and EPA requests, therefore boil down to a request for EAB to broadly defer to EPA's decision to embrace the PM_{10} Surrogate Policy in this case, rather than defer to EPA's technical determinations made in the process of applying the policy to this PSD permitting decision. See DREC Resp. at 151; EPA Resp. at 70. As noted above, EAB has allowed use of the PM_{10} Surrogate Policy in PSD permitting determinations only where the agency has performed a comparative analysis between known PM_{10} emissions and anticipated $PM_{2.5}$ emissions. See Cherry Point and Prairie State. Having failed to perform such a comparative $PM_{10}/PM_{2.5}$ technical analysis in this case, EPA is entitled to no deference.

In summary, the Conservation Petitioners request that the EAB remand the Permit to EPA with instructions to make the following determinations in the administrative record: 1) determine whether PM_{10} emissions in this case can be used as a reasonable surrogate for $PM_{2.5}$ emissions; 2) determine whether all or a specified fraction of DREF's PM_{10} emissions in this

case will be assumed to be $PM_{2.5}$ emissions; and, 3) determine whether the specified fraction of PM_{10} emissions assumed to be $PM_{2.5}$ emissions in this case will cause or contribute to a violation of the $PM_{2.5}$ NAAQS.

XI. EPA COMMITTED CLEAR ERROR BY FAILING TO ACCEPT THE FLM'S FINDINGS OF ADVERSE IMPACT TO VISIBILITY AND BY FAILING TO PRESENT TECHNICAL EVIDENCE PROVING THAT IMPLEMENTATION OF THE MITIGATION AGREEMENT WOULD OFFSET THESE ADVERSE IMPACTS.

A. The Federal Land Managers Made Legally Adequate And Timely Adverse Impact Determinations.

Contrary to EPA and DREC's arguments, the Federal Land Managers ("FLMs") made legally adequate, timely, and fully supported "adverse impact determinations" under 42 U.S.C. § 7475(d)(2)(C)(ii) and (iii) and the implementing regulations at 40 C.F.R. § 52.21(p). These determinations mandate remand of the Permit.

As noted in Conservation Petitioners' Supplemental Brief, the FLMs only need to determine whether emissions from a proposed facility "may have an adverse impact on visibility in any Federal Class I area." 40 C.F.R. § 52.21(p)(3) (emphasis added). EPA wrongly seeks to impose on the FLMs a higher burden of making an absolute finding of adverse visibility impact. More specifically, the U.S. Forest Service ("USFS") clearly stated "[b]ased on the information provided to us by Sithe, the USDA-FS does find that the predicted impacts [of DREF] would be adverse." (AR 66, "ltr_23_attachments" file "USFS letter 9-8-2006.pdf"). The National Park Service ("NPS") also found that emissions from DREF may cause adverse impacts to Class 1 areas. AR 120.8 at 2. Moreover, even EPA acknowledges in its draft permit documentation that emissions from DREF will adversely impact visibility in Class 1 areas. See AR 46 at 38. Clearly, the FLMs, with the apparent agreement of EPA, have made the requisite determinations of impacts under the law.

In an attempt to avoid these legally adequate "adverse impact determinations," EPA and DREC argue that the FLM's determinations were untimely and failed to follow the data requirements of 40 C.F.R. § 52.21(p). A close examination of the regulation and EPA's actions thereunder, however, proves that any alleged untimeliness or lack of data was due entirely to EPA's failure to follow its own regulation. EPA claims that "[b]eing mindful of the prescriptive procedures in the regulations regarding adverse impact findings, on March 24, 2006, Region 9 advised the FLMs that it intended to propose the PSD permit 30 or more days later." See EPA Resp. at 82 and AR 39. Title 40 C.F.R. § 52.21(p) states that EPA's "notice" to the FLMs "shall include a copy of all information relevant to the permit application" including "an analysis of the proposed source's anticipated impacts on visibility in the Federal Class I area. The Administrator shall also provide the Federal land manager and such federal officials with a copy of the required preliminary determination required under paragraph (q) of this section and any materials used in making that determination..." 40 C.F.R. § 52.21(p)(1). EPA's March 24, 2006 notice comprises a three sentence e-mail sent at 2:42 pm Pacific Time on the preceding Friday informing the FLMs that their 30-day clock would begin running on Monday March 27, 2006. AR 39. EPA's "notice" to the FLMs contained no attachments or any further information. Id. EPA's "notice" to the FLMs fails to comply with its own regulations and cannot be grounds for EPA to object to the subsequent adverse impact determinations as untimely.

Further, there is no evidence in the administrative record that EPA included with itsr notice email, or otherwise sent to the FLMs on March 24, 2006, the information required by the regulation. That failure compromised the FLMs' ability to analyze and utilize the relevant data in a timely fashion. Instead, the administrative record shows that EPA was both unwilling to respond, and late in responding to the FLMs' request for information. For example, in 2004 the

FLMs requested that DREC conduct a cumulative visibility analysis for the Class I areas. AR 15 at 2; AR 26. A cumulative visibility analysis was never performed. AR 120 at 146; Response to Comment 22. Also by way of example, in March 2006, DREC had just completed extensive Class I air modeling relevant to the FLMs' adverse impact determinations. See AR 38 and 38.1. This Class I modeling result was supposed to be provided to the FLMs in October 2005. AR 46.32. The FLMs submitted extensive questions to EPA on March 27, 2006 regarding this newly completed Class I air modeling. See AR 40. The EPA failed to provide the information requested and instead responded to the FLMs on March 30, 2006 by stating "[w]e wanted to be clear that, at this point, we do not anticipate further regional haze modeling analyses from Sithe Global and ENSR, beyond the responses ENSR has already provided." AR 40 at 1. It is also clear from the administrative record that the "mitigation proposal," which was intended to offset the adverse visibility impairing emissions, was not available at the time EPA issued its March 24, 2006 "notice" to the FLMs. The "draft mitigation proposal" is dated "April 2006" and could not have been provided to the FLM's until sometime after the EPA's "notice". AR 41. The FLMs have consistently demanded that the mitigation proposal become an enforceable provision of the PSD permit. EPA refused to include the mitigation proposal as an enforceable provision of the draft PSD permit. AR 46, at 38.

Finally, the regulations provide that if EPA determines the FLM's "analysis does not demonstrate to the satisfaction of the Administrator that an adverse impact on visibility will result in the Federal Class I area, the Administrator must, in the notice of public hearing on the permit application, either explain his decision or give notice as to where the explanation can be obtained." 40 C.F.R. § 52.21(p)(1). EPA's notice of public hearing fails to contain any explanation why it did not accept any of the determinations of the FLMs. AR 45.

In summary, the Conservation Petitioners request that the EAB accept as timely, and legally adequate, the adverse impact determinations submitted by the FLMs, including the October 2006 determinations submitted during the public comment period on the draft PSD permit. AR 120.8 at 2, 47, and 48; AR "ltr_23_attachments" file "USFS letter 9-8-2006.pdf".

B. The Mitigation Agreement Is Intended To Remedy The Adverse Visibility Impacts But Lacks Evidentiary Support.

In their Supplemental Brief, the Conservation Petitioners established that there is no data or analysis in the administrative record proving that the mitigation agreement, if implemented, will remedy the FLMs' adverse impact determinations. Resp. Supp Br. at 231-33. EPA and DREC's Responses do not contest that the administrative record fails to contain data or analysis proving that the mitigation agreement will remedy the adverse impact determinations. Instead, EPA and DREC are forced to argue that the mitigation agreement is voluntary, was not intended to remedy the adverse visibility impacts, and thus does not need factual support in the administrative record. DREC Response at 170-71, EPA Response at 81-88. To the contrary, a review of the administrative record proves that the mitigation agreement was intended to remedy DREF's adverse visibility impacts and thus its effectiveness must be supported by evidence in the administrative record.

The FLMs repeatedly informed EPA that the Permit must contain an enforceable mitigation agreement to offset adverse visibility impacts caused by DREF's emissions. For example, in October 2006, the USPS wrote;

> • When it became apparent that emissions from the facility could adversely impact visibility in several NPS Class I areas, Sithe suggested mitigation measures that were intended to produce a net environmental improvement, notwithstanding construction and operation of the Desert Rock Energy Facility.
>
> • The NPS has reviewed the PSD application and prepared preliminary technical findings with respect to the proposed project. Relevant portions of the document state

that the proposed project may lead to adverse impacts to Class I areas in the absence of conditions and measures designed to mitigate these impacts.

AR 120.8 at 2.

In August 2007, NPS wrote to BIA stating:

- As we indicate in our PSD comments, and to address our adverse impact concerns, Sithe proposed a package of mutually acceptable mitigation measures. Most noteworthy is Sithe's commitment to obtain emission reductions (sulfur dioxide and/or nitrogen oxides) within the region that will mitigate their contribution to regional visibility impairment. We expect this mitigation agreement to be enforceable.

See Exhibit 38 to Cons. Pets. Supp. Br. (Memorandum from Snyder, NPS, to Yazzie, BIA (August 6, 2007)).

In response to comments, EPA admits:

- Partly in consideration of the mitigation package agreed to by Sithe, the FLMs did not require a cumulative visibility analysis in their assessment of whether the impact was adverse." AR 120 at 146, RTC 22.

It is clear from these exchanges that the agreement was required to mitigate adverse visibility impacts. The CAA requires an "analysis" and/or "demonstration" that a source's "air quality impact" will not adversely impact visibility in Class I areas. 42 U.S.C. § 7475(2) and § 7475(d)(1)(C)(i) and (iv). EPA, DREC and the FLMs have never provided an analysis or demonstration of how the mitigation agreement will ensure that adverse impacts will not result from operation of DREF and why the mitigation agreement obviates the need for a cumulative visibility analysis. That failure constitutes clear error. Accordingly, the Conservation Petitioners request that the EAB remand the Permit for a specific analysis of how the mitigation agreement will ensure that DREC's emissions alone, and in combination with other sources, will not cause adverse visibility impacts in Class I areas.

XII. THE DREC PSD PERMIT WARRANTS A REMAND FOR PROPER ANALYSIS OF SO_2 PSD INCREMENT CONSUMPTION AND ADDITIONAL PUBLIC NOTICE AND COMMENT.

Neither EPA's nor DREC's response briefs adequately refute Conservation Petitioners' claims regarding improper analysis of SO_2 PDS increment consumption. The cumulative SO_2 PSD increment analyses conducted for the Permit are flawed for all of the reasons laid out in Conservation Petitioners' Supplemental Brief and exhibits and as admitted by EPA in its Response to Comments.[49] And, without providing adequate documentation as well as public notice and the opportunity to comment, EPA cannot rely on its twelve new SO_2 PSD increment modeling analyses to justify issuance of the Permit.

A. EPA Failed To Respond To Public Comments Regarding Appropriate SO_2 Baseline Emissions For The San Juan And Four Corners Power Plants.

EPA and DREC correctly observe that Conservation Petitioners repeat comments made during the comment period about the deficient SO_2 PSD increment analysis without discussing how EPA erred – but EPA and DREC ignore the fundamental point that EPA simply failed to provide a response, inadequate, or otherwise.

The technical errors requiring remand of the Permit fall into two basic categories. First, EPA failed to identify the emissions from Units 1 and 2 of the San Juan Generating Station ("SJGS") and from all five units at the Four Corners Power Plant ("FCPP") that contributed to SO_2 baseline concentrations in the various areas impacted by the DREP. Instead, EPA simply identified the level of SO_2 emissions that was determined necessary to attain the SO_2 NAAQS in the 1981 New Mexico SO_2 State Implementation Plan ("SIP"). EPA ignored and failed to

[49] Specifically, EPA agreed that the baseline SO_2 emission rates assumed in DREC's modeling for the SJGS may have been overestimated. AR 120 at 132.

respond to Conservation Petitioners' comments that the actual and allowable baseline emissions from at least the SJGS were lower than what EPA approved in the 1981 SO_2 SIP.

During the public comment period on the draft permit, Conservation Petitioners demonstrated that, at the time of the applicable minor source baseline dates for SO_2, Units 1 and 2 of the SJGS were subject to enforceable emission limitations that were lower than what EPA ultimately approved as part of the SO_2 SIP in 1981. Conservation Petitioners also demonstrated that the SJGS units were actually emitting at lower SO_2 emission rates than what was approved by EPA as part of the SO_2 SIP in 1981.[50] EPA did not respond to, or even mention, these comments in its Response to Comments. See AR 120 at 131-2. While EPA made the blanket statement in its Response to Comments that it "disagrees with most of the comments" regarding the SO_2 increment analysis, such a response without any further specific explanation is hardly a reasoned basis for dismissing these comments. See AR 120 at 132.

Second, EPA failed to take into account the different SO_2 minor source baseline dates for the various Class I areas analyzed. In its response brief, EPA states that the variation in SO_2 minor source baseline dates for the Class I areas didn't matter because "all of the SO_2 emitting sources in the area were modeled at their full emission rates," albeit with "three exceptions" which included the SJGS and the FCPP. EPA Resp. at 78-79. Yet, it is these three exceptions that make the difference in the results of DREC's SO_2 increment analysis and which constitute error further dictating remand of the Permit.

EPA attempts to respond to its deficiencies by stating "the legally binding emissions limits are the correct limits to establish baseline..." and that Conservation Petitioners "failed to

[50] As discussed and cited in Cons. Pets.' Supplemental Brief at 244-48 and at Ex. 42 (Stamper Affidavit) and Ex. B to Stamper Affidavit at 9-14 (which is part of the DREP Administrative Record at AR 66).

demonstrate that decision was erroneous." EPA Resp. at 77. Again, EPA misses the point – EPA did not respond to Conservation Petitioners' comments, so the basis for EPA's decision is not apparent. By only relying on the 1981 SO_2 SIP to determine emissions reflective of baseline concentration for SJGS and FCPP, furthermore, EPA has ignored the plain language of the definition of "baseline concentration." The definition essentially ties baseline concentration to what was being emitted, or was allowed to be emitted, at the time of the applicable minor source baseline date.[51] Finally, if a source is out of compliance with emission limits that applied at the time of the minor source baseline date, the source must not be allowed to expand the increment simply by coming into compliance with emission limits that otherwise applied at the time of the minor source baseline date.

As Conservation Petitioners have demonstrated, the allowable and actual SO_2 emission rates at the SJGS and FCPP changed during the times of the applicable SO_2 minor source baseline dates for the areas impacted by DREP, which varied from 1977 to 1981.[52] This is precisely why different increment inventories should have been developed at least for the SJGS at the different baseline areas. By allowing the baseline emissions for the SJGS to be based on the 1981 SO_2 SIP, EPA and DREC have essentially revised the SO_2 minor source baseline dates for Colorado, Arizona, Utah, and New Mexico[53] and have disregarded the plain language of the definition of "baseline concentration." As a result, EPA unlawfully allowed for the inflation of

---

[51] 40 C.F.R. § 52.21(b)(13); 42 U.S.C. §7479(4). See also 40 C.F.R. §§ 52.21(b)(14)(i) and (ii).
[52] See page 4 of the November 9, 2006 Stamper report at AR 66 (report is at folder "ltr_23_attachments.zip," subfolder "Stamper Report and attachments," and file "Nov92006 stamper report").
[53] Only two New Mexico Class I areas' SO_2 minor source baseline dates were triggered in 1981, while the SO_2 baseline dates in all other areas were triggered earlier. Id. Also, contrary to DREC's unsupported claims, the Utah SO_2 baseline date was triggered in 1979 or earlier. Id. See also 40 C.F.R. §§ 52.21(b)(13), (14)(ii), and (15), and 40 C.F.R. §§ 81.300(b) and 81.345 (designating the "rest of State" area in Utah as one SO_2 baseline area).

baseline emissions from these units, which ultimately allowed for significant increment expansion by at least Units 1 and 2 of the SJGS.

DREC has attempted to provide responses for EPA to the unanswered comments in its briefing here,[54] DREC Resp. at 187-93, but DREC's briefing before the EAB cannot substitute for EPA's lack of an adequate record. Woodcrest Manufacturing, 7 E.A.D. 757; Pivirotto, 3 E.A.D. 96. DREC primarily questioned the evidence put forth by Conservation Petitioners regarding the SO_2 emission rates from the SJGS units reflective of baseline concentrations. DREC Resp. at 188. However, neither EPA nor DREC have presented any evidence to contradict the Conservation Petitioners' evidence.

B. EPA's New SO_2 Increment Modeling Has Not Been Adequately Documented And Must Be Subject To A New Public Notice And Comment Period.

EPA provided insufficient explanation of the twelve new modeling analyses it conducted after the public comment period on the Permit closed. In its Response, DREC claims that EPA's twelve new modeling runs were conducted in response to Conservation Petitioners' comments and that the additional modeling "decreased the increment expansion available" for DREP. DREC Resp. at 178, 193-94. DREC's response simply reinforces Conservation Petitioners' claims that EPA's new modeling analyses are not sufficiently documented in the administrative record and should be subject to a new public notice and comment period. Contrary to DREC's assertions, EPA never indicated that its new modeling responded to comments that SJGS and FCPP were subject to lower actual or allowable SO_2 emission rates at the time of the applicable

[54] DREC also incorrectly claimed that Conservation Petitioners have raised an issue for the first time in their Supplemental Brief, i.e., that allowable emissions at the time of the baseline date were more stringent than what EPA approved as part of the New Mexico SIP. DREC Response at 189. However, this issue was raised in detail at pages 9-11, 14, and 23-25 of the November 9, 2006 Stamper report at AR 66 (at folder "ltr_23_attachments.zip," subfolder "Stamper Report and attachments," and file "Nov92006 stamper report").

baseline dates. AR 120 at 133-34. Further, a review of the total amount of 3-hour and 24-hour average SO_2 increment consumed in Mesa Verde National Park as determined by EPA's twelve new modeling scenarios shows that, in all scenarios except one, EPA projected lower amounts of SO_2 increment consumption than the SO_2 increment modeling presented in the DREC PSD permit application.[55] In other words, almost all of EPA's new modeling scenarios appear to allow for greater increment expansion by SJGS and FCPP, not less as claimed by DREC. Clearly, DREC was as confused as Conservation Petitioners about what EPA modeled in its new SO_2 increment analyses, demonstrating the need for further documentation, public notice, public comment and review of the new EPA modeling analyses.

C. EPA Cannot Rely On Any Class I Significant Impact Levels In Any PSD Increment Analyses.

In their Responses, neither EPA nor DREC refute the fact that the Class I Significant Impact Levels ("SILs") have never been promulgated by EPA. Nor did EPA or DREC attempt to address Conservation Petitioners' arguments that Class I SILs are inconsistent with Clean Air Act mandate for Class I area and PSD increment protection. EPA's reliance on Class I SILs in the DREC SO_2 and NO_2 increment modeling analyses thus constitutes clear legal error.

---

[55] Compare the 3-year maximum 3-hour and 24-hour average SO_2 concentrations predicted by EPA, in the spreadsheet with filename "so2_inc_high.xls," to the DREP SO_2 increment results in Table 4-12 of its January 2006 Class I Area Modeling Update (at p. 4-24) for Mesa Verde National Park ("meve"). Only EPA scenario "cb2@3mx" shows higher SO_2 increment concentrations than the January 2006 DREP modeling. All other EPA scenarios predict much lower SO_2 concentrations than the 2006 DREP SO_2 modeling. See Appendix B to EPA's Response to Comments for the spreadsheet "so2_inc_high.xls" (in zipped file "RTC_mod_prep.zip" available at http://www.epa.gov/region09/air/permit/desert-rock/administrative.html; AR 37 for the January 2006 DREP SO_2 modeling.

CONCLUSION

For the reasons described above and in Conservation Petitioners' Supplemental Brief, the Board should remand the Permit to Region 9 with instructions to undertake additional proceedings to correct its numerous errors and deficiencies.

Respectfully submitted this 20th day of February, 2009.

Nicholas Persampieri
Attorney
Earthjustice
1400 Glenarm Place, #300
Denver, CO 80202
(303) 996-9617
Fax: (303) 623-8083
npersampieri@earthjustice.org

John Barth
Attorney at Law
P.O. Box 409
Hygiene, CO 80533
(303) 774-8868
Fax: (303) 774-8899
barthlaw@aol.com
Counsel for Sierra Club, Dine Care, San Juan Citizens Alliance, Grand Canyon Trust, and WildEarth Guardians

Patrice Simms
Attorney
Natural Resources Defense Council
1200 New York Avenue NW, Suite 400
Washington, D.C. 2005
(202) 289-2437
Fax: (202) 289-1060
psimms@nrdc.org
Counsel for Natural Resources Defense Council

Kevin Lynch
Staff Attorney
Environmental Defense Fund
Climate and Air Program
2334 N. Broadway
Boulder, CO 80304
(303) 447-7200
Fax: (303) 440-8052
klynch@edf.org
Counsel for Environmental Defense Fund

Ann Brewster Weeks
Clean Air Task Force
18 Tremont Street, Suite 530
Boston MA 02108
(617) 624-0234 ext. 13
Fax: (617) 624-0230
aweeks@catf.us
Of Counsel for Dine Care, San Juan Citizens Alliance, Grand Canyon Trust, and WildEarth Guardians

Amy Atwood
Center for Biological Diversity
P.O. Box 11374
Portland, OR 87211-0374
(503) 283-5474
Fax: (503) 283-5528
atwood@biologicaldiversity.org

EXHIBIT 61

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

SEP 1 9 2006

Jill H. VanNoord
Environmental Defense
2334 Broadway Avenue
Boulder, CO 80304

Subject: Freedom of Information Act (FOIA) request #09-RIN-00434-06

Dear Ms. VanNoord:

We have received a copy of your appeal letter dated July 26, 2006 regarding the subject FOIA request. After carefully reviewing our initial response of June 28, 2006 to your FOIA request, Region 9 has determined that some of the documents or portions thereof which you requested are releasable under FOIA. Please note that portions of some of the documents are not within the scope of the FOIA request, but are being released if they are not subject to FOIA Exemption (b)(5). We are also releasing reasonably segregable factual portions of withheld documents; however, some of this information is dated and may no longer be accurate.

Please also note that Richard Knox of URS Corporation is currently consulting for the Bureau of Indian Affairs (BIA) for the Environmental Impact Statement (EIS). EPA, at the invitation of BIA, is a cooperating agency for the EIS. As such, we consider certain correspondence and other memoranda with Richard Knox to fall under the classification of inter-agency communications.

The following documents are being released in part:

- 9/12/2005 – meeting notes, Karen Vitulano, USEPA, Pre-meeting with Air Division prior to meeting with applicant (portions withheld pursuant to FOIA exemption (b)(5)—deliberative process privilege.)
- 11/1/2005 – phone conversation notes, Karen Vitulano, USEPA and Richard Knox - URS Corporation (portions withheld pursuant to FOIA exemption (b)(5)—deliberative process privilege.)
- 5/3/2006 - phone conversation notes, Karen Vitulano, USEPA and Richard Knox - URS Corporation (portions withheld pursuant to FOIA exemption (b)(5)—deliberative process privilege.)
- 5/4/2006 - meeting notes, Karen Vitulano, USEPA, Briefing Air Division Chief on draft PSD permit (portions withheld pursuant to FOIA exemption (b)(5)—deliberative process privilege.)

If you have any questions, please contact Karen Vitulano of this office at 415-947-4178 or vitulano.karen@epa.gov.

Sincerely,

Enrique Manzanilla, Director
Communities and Ecosystems Division

cc: Ivry Johnson, FOIA Officer, Region 9 EPA
Byron R. Brown, EPA Office of General Council
Larry Gottesman, EPA Office of Environmental Information

permit is needed but a Draft permit at least can get them moving. They need a roadmap from EPA with a timeline. Power is for export – estimate 25-30% in NM, 50% in AZ, 20% in NV. Navajo Transmission Utility would probably take a small portion. Economies of scale – need this size to get efficiencies.

Final transmission study by APS – supports paths of lines (line capacity), is supported by the market. NTP – line from 4 corners, would connect, path rating is a long process, studies support capacity and supports their plans. Also they met with FERC in W.VA who is interested in plugging transmission gap in the Southwest, and with fuel diversity in the west consistent with the Western Governors Assoc. plans. They may want to get EPA in discussion with them in the future, has national importance.

Colleen asked if they had any deadlines we should now about. Gus said no, Ray said NN has some deadlines – Mojave station is closing end of year, 2008 BM coal operation shutting down, effects services in these areas. NN getting advance payments from Sithe to help with their shortfalls.

Colleen presented EPA's issues – visibility impacts, NEPA coordination, and impacts to residents they are hearing from. Ann Lyons said that the company can't construct until 30 days after the Final permit is issues. The EAB can remand permit back so they are trying to get a good Admin record. There are 2 coal plants before the EAB now – Praire State and Newmont. She gave them copies of these petitions so they would know what they are trying to accomplish with our Admin record. Ann said we expect this permit to be appealed, Gerardo said info we are trying to get anticipates an appeal.

Gus said anything that will help strengthen the record they will cooperate. Ann said –we can issue draft permit before ESA stuff, can't issue final permit until BiOp from FWS. Gerardo said regarding NEPA, if impact on NEPA process, we are trying to figure out legal vulnerability. Gus said they need air permit before the EIS. Ann said they understood and didn't expect NEPA would slow that down and assured they are not waiting b/c of NEPA and are proceeding with work on the permit.

<u>BACT issues</u>-

Bob said project as proposed probably satisfies BACT for a P.C. Boiler, even sets a new standard. Need a complete record that looks at all technologies. Coal gasification (IGCC) info was submitted but was confusing, we need additional info. Circulating fluidized bed (CFB) – also more info including costs. Ann asked that it be framed in a top-down analysis. Gus said he doesn't think IGCC should be BACT and will not go on record as submitting it as BACT. Bob said OK. Said top-down doesn't work for IGCC since it's a process technology, not dedicated to a pollutant. Ann stated that there are 2 EAB decisions that opened up the door – we need to deal with it. Gus said in the next 2-3 weeks will get us a report on IGCCV and CFB. Cost-effectiveness – annualized cost per ton of coal.

<u>Modeling</u> – Scott

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 20, 2009 he caused a copy of the foregoing to be served by mail on:

Deborah Jordan
Director, Air Division (Attn: AIR-3)
EPA Region 9
75 Hawthorne Street
San Francisco, CA 94105-3901

Brain L. Doster
Elliott Zenick
Kristi M. Smith
U.S. Environmental Protection Agency
Office of General Counsel
Air and Radiation Law Office
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Seth Cohen
Assistant Attorney General
P.O. Drawer 1508
Santa Fe, NM 87504

Douglas C. MacCourt
Michael J. Sandmire
Ater Wynne LLP
1331 NW Lovejoy, Suite 900
Portland, OR 97209

Stephanie Kodish
Clean Air Counsel
National Parks Conservation Association
706 Walnut Street, Suite 200
Knoxville, TN 37902

George E. Hays
236 West Portal Avenue # 110
San Francisco, CA 94127

Leslie Barnhart
Eric Ames
Special Assistant Attorneys General
New Mexico Environment Department
P.O. Box 261 10
Santa Fe, NM 87502-61 10

Jeffrey R. Holmstead
Richard Alonso
Bracewell & Giuliani LLP
2000 K Street, N.W.
Washington D.C. 20006

Leslie Glustrom
4492 Burr Place
Boulder, CO 80303

Justin Lesky
Law Office of Justin Lesky
8210 Mirada Place NE Suite 600
Albuquerque, NM 87109

Louis Denetsosie
D. Harrison Tsosie
Navajo Nation Department of Justice
P.O. Box 2010
Old Club Building
Window Rock, Arizona 86515

Ann Lyons
Office of Regional Counsel
EPA Region 9
75 Hawthorne Street
San Francisco, CA 94105

Signed: _____
Patrice Simms