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

In re:	
Desert Rock Energy Company, LLC	PSD Appeal Nos. 08-03, 08-04, 08-05 & 08-06
PSD Permit No. AZP 04-01	

EPA REGION 9's REPLY TO OPPOSITIONS TO MOTION FOR VOLUNTARY REMAND

Region 9 disputes the charge by the Desert Rock Energy Company ("DREC") that EPA officials have acted in bad faith in this matter, and the grounds upon which this charge is based are erroneous. Furthermore, the oppositions and responses of DREC, Dine Power Authority ("DPA"), and the American Coalition for Clean Coal Electricity ("ACCCE") to Region 9's Motion for Voluntary Remand do not establish that EPA regulations, the Clean Air Act, or the Constitution of the United States preclude the Environmental Appeals Board ("EAB" or "Board") from granting the relief requested by Region 9 to facilitate reconsideration of disputed elements of the permitting decision presently under review by the Board.

I. REGION 9's REQUEST FOR A REMAND TO ENABLE RECONSIDERATION OF DISPUTED ISSUES DOES NOT REFLECT BAD FAITH BY ANY EPA OFFICE

The charge of bad faith is groundless and utterly without merit. Region 9's motion for voluntary remand is based on a presently-effective stay of a regulatory exemption that Region 9 had relied upon to establish compliance with the PSD requirements for $PM_{2.5}$ in this instance. In addition, nowhere in the motion for voluntary remand does Region 9 assert that the administrative record for the Desert Rock PSD permit shows that Region 9 was previously precluded by EPA headquarters policy from considering IGCC in the BACT analysis for the

facility. Moreover, the Region's remand motion contains valid and independent reasons that justify completing an ESA consultation and case-by-case MACT analysis on the same schedule as a final PSD permit. Finally, Region 9 filed the remand motion after DREC, DRA, and the President of the Navajo Nation had received notice that the Administrator's office was reviewing the issues on appeal in this case. At no time after this notice was given did any EPA office deny a request by these parties to meet personally with EPA officials.

A. Under regulations currently in effect, federal PSD permitting authorities are not authorized to continue applying EPA's interim policy to satisfy PSD requirements for $PM_{2.5}$.

Region 9's motion for voluntary remand is based on the provisions of section 52.21 of EPA regulations that are presently in effect. The motion does not rest on a prospective change in Agency policy or law. As a result of the stay of section 52.21(i)(1)(xi) of EPA's regulations, EPA's interim policy for demonstrating compliance with the PSD requirements for $PM_{2.5}$ is not presently applicable under section 52.21, and thus may not be relied upon by EPA or delegated state permitting authorities to justify a PSD permitting decision. Additional action by EPA to repeal the exemption in section 52.21(i)(1)(xi) (which was adopted in a final rule without prior notice or public comment) is necessary to make the status quo permanent, but this prospective action is not necessary to establish that the EPA's interim policy is no longer applicable at this time to PSD permits issued pursuant to 40 C.F.R. § 52.21.

Since 1980, section 52.21(k)(1) of EPA's PSD regulations has required that an owner or operator of a proposed source demonstrate that emissions increases from the proposed source would not cause or contribute to a violation of "any national ambient air quality standard." 45 Fed. Reg. 52739 (Aug 7, 1980). At the end of 2002, EPA defined the term "regulated NSR pollutant" to include "any pollutant for which a national ambient air quality standard has been promulgated." 40 C.F.R. §52.21(b)(50)(i); 67 Fed. Reg. 80186, 80278 (Dec. 31, 2002). With

respect to BACT, EPA regulations current state that "[a] new major stationary source shall apply best available control technology for each regulated NSR pollutant that it would have the potential to emit in significant amounts." 40 C.F.R. § 52.21(j)(2).

However, under the 1997 interim policy memorandum issued by John S. Seitz entitled "Interim Implementation for the New Source Review Requirements for $PM_{2.5}$," EPA has recognized that the requirements of section 52.21 described above may be satisfied for $PM_{2.5}$ by a permit and supporting record that contains a BACT limitation and supporting analysis for PM_{10} and a demonstration that the proposed source will not cause or contribute to a violation of the National Ambient Air Quality Standards ("NAAQS") for PM_{10}. However, on May 16, 2008, EPA issued a final regulation, effective July 15, 2008, that ended the application of the interim policy for $PM_{2.5}$ to the federal PSD program except with respect to pending applications covered by section 52.21(i)(1)(xi). 73 Fed. Reg. 28321, 28340 (May 16, 2008).

In the notice of proposed rulemaking for this action, EPA explained that it was establishing regulations that would eliminate the need for the interim policy and that such regulations would take effect immediately under section 52.21. 70 Fed. Reg. 65984, 66043 (Nov. 1, 2005). Thus, EPA engaged in a notice and comment rulemaking process[1] to establish that, as of the effective date of the final rule, EPA would begin strictly applying the terms of section 52.21 to $PM_{2.5}$. DREC apparently agrees that "The $PM_{2.5}$ Rule ended the Agency practice of allowing sources to use PM_{10} as surrogate for $PM_{2.5}$" except with respect to applications covered by the grandfather provision. DREC Response at 30.

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[1] As discussed further below, to the extent the Seitz memorandum is considered an interpretation of EPA regulations, EPA satisfied the procedural requirements for changing such an interpretation. *See, Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997); *Alaska Professional Hunters Ass'n Inc. v. FAA*, 177 F.3d 1030, 1033-34 (D.C. Cir. 1999).

However, the November 1, 2005 proposal for this rule contained no notice to the public of EPA's intent to adopt an exception to EPA's proposal to end reliance on the Seitz memorandum under the federal PSD program as of the effective date of the proposed implementation rules for $PM_{2.5}$. This procedural shortcoming is the subject of a challenge to section 52.21(i)(1)(ix) in the D.C. Circuit. In that case, the Petitioners sought a stay of section 52.21(i)(1)(ix). In defending against a court-imposed stay, EPA argued that the court lacked the authority to selectively stay specific provisions (effectively rewriting EPA's regulations) and could only issue a stay of the entire rule to restore the status quo before EPA adopted the May 16, 2008 rule. Exhibit A, pages 1-3. In its opposition to a stay by the D.C. Circuit, EPA pointed out that the only stay the court could issue (a stay of May 16, 2008 action in its entirety) would have restored applicability of the interim policy (sometimes called the "PM_{10} surrogate policy") to permits like Desert Rock because such an order would also stay that portion of the rule and preamble that ended the application of the interim policy in federal PSD permitting. Exhibit A, page 11.

Consistent with the position advocated by EPA in the D.C. Circuit, EPA Region 9 argued the following in its January 8, 2009 Response to Petitions for Review, Supplemental Briefs, and Amicus Brief: "if the implementation rule is vacated by the D.C. Circuit, this remedy would reinstate the pre-existing PM_{10} surrogacy policy for all federal PSD permits (because the grandfather provision is part of the provision that ended the surrogate policy for federal PSD permits)." Page 73. This statement referred only to the possibility of a D.C. Circuit vacatur of the entire May 16, 2008 implementation rule for $PM_{2.5}$ (which included the grandfather provision). Region 9's response brief to the EAB did not express a view as to the effect of the vacatur or stay of only the grandfather provision at section 52.21(i)(1)(xi) without a vacatur or

stay of the other portions of the May 16, 2008 rule (including the statements in the preamble) that terminated the application of the Seitz memorandum in permitting under section 52.21.

Recognizing the notice and comment deficiency and other concerns with EPA's adoption of the challenged exemption in section 52.21(i)(1)(xi), the Administrator exercised express statutory authority in section 307(d)(7)(B) of the Clean Air Act to stay the effectiveness of the grandfather provision pending reconsideration. *See,* Region 9's Motion for Voluntary Remand, Exhibit A. EPA published notice of this stay in the Federal Register on June 1, 2009. 74 Fed. Reg. 26098 (Jun. 1, 2009). However, the Administrator's action stayed only the exemption at section 52.21(i)(1)(xi) -- not the other provisions of the May 16, 2008 rule and associated preamble statements that otherwise ended the application of the Seitz memorandum in the federal PSD permitting program. The Administrator's power to stay regulations under section 307(d)(7)(B) is not constrained by the same principles that apply to the power of a court to issue a stay of Agency regulations. As the writer of regulations in the first instance, the Administrator may determine the terms of the applicable regulations.

Thus, rather than seeking to apply prospective changes in EPA policy, Region 9's motion for voluntary remand seeks only to ensure compliance with regulations presently in effect after actions by the Administrator to correct a deficiency in EPA's compliance with notice and comment rulemaking requirements. Such action does not demonstrate bad faith on the part of Region 9 or any EPA officials at headquarters.

B. Region 9 has not misrepresented the permitting record on IGCC.

Region 9 does not assert anywhere in its motion for voluntary remand that the record for the Desert Rock permit supports the statement in the motion that "Region 9 determined that it was precluded under headquarters policy from evaluating IGCC technology as part of the BACT analysis for this facility." Thus, while DREC may legitimately argue that Region 9's motion

includes a statement that is not directly supported by the administrative record for this particular permit, DREC has no basis for the claim that Region 9 has acted in bad faith by willfully misstating what that record says. Furthermore, notwithstanding the presence or absence of support for this statement in the record, DREC has not demonstrated that the statement in question is false or that Region 9 (or its counsel in this matter) knows it to be false. A failure to provide record support for a statement is substantially different from a knowing misrepresentation and does not amount to bad faith.

Notwithstanding the absence of citations to the permitting record, the statement in question is not without support. Region 9's remand motion references a 2005 letter from EPA headquarters staff and a 2007 permitting decision in another Region that are consistent with the manner in which Region 9 approached the IGCC technology in its review of the permit application and the permitting record. Together, these actions show a pattern that supports Region 9's statement that it acted in accordance with the policy preference of EPA headquarters offices at that time that EPA Region 9 not include IGCC in a detailed BACT analysis for the Desert Rock facility.[2] In addition, DREC itself alleges elsewhere that Region 9 cannot change EPA's established practice on excluding IGCC from the BACT analysis without completing a notice and comment rulemaking process.[3] DREC Response at 28, 33. Region 9 cannot be simultaneously misrepresenting previous EPA headquarters policy and failing to go through a rulemaking process to change the same.

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[2] To the extent the Board considers the veracity of this specific statement material, the Region 9 can provide additional records of EPA deliberations preceding the final permitting decision for Desert Rock that confirm the truth of the statement.

[3] As discussed further below, the cases cited by DREC on this point apply only to changes in interpretations of regulations.

Furthermore, Region 9's motion does not assert that the Region misunderstood EPA's "redefining the source" policy. Nor does the motion attempt to create the appearance of a prior misunderstanding of this matter by Region 9. At most, the motion for voluntary remand might suffer from a poor choice of words in describing the present Administrator's expression of her views on this issue as a "clarification" rather than simply a statement. *See,* Motion for Voluntary Remand, page 21. Region 9 did not intend to suggest that its recent communication with the Administrator's office (since the change in the Presidential Administration) somehow revealed a prior misunderstanding regarding the policies of the previous Administration. The motion for voluntary remand expressly states the following:

> Region 9 is not seeking to change EPA's longstanding policy that the BACT analysis should not be used to fundamentally redefine the proposed source and the Agency's interpretation that the Clean Air Act provides some discretion for a permitting authority to decline to evaluate such option in detail as part of the BACT review.

Page 20. Region 9 in no way seeks to disguise the fact that Administrator Jackson has a different view of how EPA Regional Offices should exercise that discretion than the previous Administrator. Thus, while DREC may argue this difference in view is not sufficient to justify the remand sought by Region 9 at this stage of the proceedings, DREC cannot sustain the claim that Region 9 has acted in bad faith by seeking to disguise a change in policy preference as some kind of mistaken understanding by Region 9 of the policy favored by the Agency's leadership in July 2008.

C. Region 9's arguments regarding the benefits of coordinating the ESA consultation, case-by-case MACT analysis, and PSD permitting have independent merit and are not a pretext for other purposes.

Region 9's motion for voluntary remand articulates sound reasons supporting its current preference for completing the ESA consultation for this permit and the related case-by-case MACT determination for the facility contemporaneously with a revised final PSD permit

decision on remand, thus resolving disputed issues in this case. Since this portion of Region 9's motion is independently supported by reasoning unconnected to the IGCC or $PM_{2.5}$ issues, DREC cannot sustain the claim that Region 9's arguments regarding the merits of completing these reviews at the same time as the PSD permit review are made only as a pretext to provide justification to remand the entire permit. Since Region 9's arguments on these issues stand on their own merit, they are plainly not makeweight intended only to prop up other grounds for reconsidering additional disputed issues in this case.

Furthermore, nothing on page 14 or any other part of this section of Region 9's motion suggests that Region 9 is seeking a remand to reconsider the permit on the basis of "the threat of subsequent litigation." This portion of Region 9's motion simply explains why reconsidering the approach Region 9 had taken with respect to the timing of the PSD permit, ESA consultation, and case-by-case MACT analysis would produce a better permitting decision in this case and reduce the risk that the Board will expend its effort to review permit conditions that may change for reasons other than a remand by the Board. At no place among this argument does Region 9 state that its request for a remand to reconsider several of the disputed issues in this ongoing administrative appeal is based on a threat of future litigation.

D. No party in this case has been denied the opportunity to meet with EPA officials to present their views, and EPA staff has communicated with the government of the Navajo Nation and individual citizens of the Navajo Nation.

DREC has not substantiated its allegation that the integrity of EPA Region 9's actions in this case was compromised by the fact that EPA officials at headquarters granted requests from two of the Petitioners to discuss options for building alternatives to the Desert Rock facility and their views on how EPA should improve its policies and practices with respect to Clean Air Act permitting for coal-fired power plants. Nor is there any evidence to support DPA's assertion that EPA headquarters staff or Region 9 cut DPA or the Navajo Nation out of any opportunity to

consult with EPA officials or otherwise express their views with respect to EPA's approach to this appeal of the Desert Rock permit. DREC and DPA have not established that they, or the government of the Navajo Nation, requested but were denied an opportunity to consult with Region 9 or EPA headquarters officials concerning the Desert Rock permit or the pending appeal after they were informed that EPA offices were requesting permission to defer filing a surreply brief so that EPA officials appointed by the new Presidential Administration could review the positions previously advocated on behalf of Region 9 in this case.

The record reflects that the allegedly improper meetings between EPA staff and two of the Petitioners in this matter were requested and initiated by the Petitioners, not EPA. DREC Response, Exhibits A.1. and A.2. No regulation, order, ethic, or custom obligates EPA to invite representatives of DREC, DPA, or the Navajo Nation government to join meetings that had been requested by other parties.

As DPA and DREC are aware but neglect to mention, Administrator Jackson personally notified President Shirley of the Navajo Nation in a telephone call initiated by EPA on March 12, 2009 that EPA offices were requesting additional time to file a surreply so that the Administrator and her incoming staff could review the issues in this case. *See,* Exhibit B. On this call, which also included the acting Regional Administrator of Region 9, Administrator Jackson explained that the current EPA leadership has different priorities from the previous Administration. *Id.*

On this same date, Region 9 filed its Motion for Extension of Time to File Surreply Brief, which explained to the Board and all parties in this appeal that Administrator Jackson and her advisers "have been reviewing many of the Agency's policies under the Clean Air Act." Page 3. In addition, the motion stated that Region 9 wished to ensure "that the positions previously advocated by EPA attorneys on behalf of Region 9 in this matter have the support of the

Agency's current leadership before the submission of an additional EPA brief." The Board's March 17, 2009 order granting the requested extension observed that "[i]t would be highly inefficient to proceed without clarification of whether the position of the Agency on fundamental issues has changed in light of the change of Administration." Page 4.

Thus, DREC, DPA, and the Navajo Nation were on notice that the matters in this appeal were under review by the EPA's new leadership and that there was a possibility that Region 9 might change one or more of its positions in the appeal. Nevertheless, at no time after these events did the DREC or DPA request an opportunity to meet personally with any EPA officials that were conducting this review. Administrator Jackson had already given the Navajo president an opportunity to talk with her about Desert Rock project in a call initiated by EPA.

Region 9 and EPA headquarters offices granted the first requests (after the present Administrator assumed office) of DREC, DPA, and the Navajo nation to meet personally with EPA officials. Senior EPA officials and counsel in this case met with representatives for the DREC and DPA on June 5, 2009 (Exhibit C), and the Administrator met personally with the President of the Navajo Nation on June 10, 2009. Exhibit D. The fact the Administrator has twice talked personally with the President of the Navajo Nation (while no other party in this matter has had such direct contacts with the Administrator) shows that EPA offices have appreciated and sought to fulfill their consultation obligations with the Navajo Nation.[4]

Since DREC, DPA, and the Navajo Nation have not been denied the opportunity to present their views in meetings with EPA officials, their real complaint appears to be that they were not provided with advance notice of Region 9's decision to file the request for voluntary remand and an advance opportunity to persuade Region 9 against seeking this relief. However,

[4] EPA officials also scheduled a call with President Shirley on April 27 (Exhibit B), but the Administrator was unable to participate on this date.

no other party in this appeal received such notice either. None of the EPA records attached to DREC's motion show that EPA officials specifically talked with any of the Petitioners about the preparation of a motion for voluntary remand or a change in Region 9's positions in this appeal. DREC Response, Exhibit A.1. and A.2. Although the Desert Rock permit is included on a list of pending permit decisions submitted by Sierra Club in advance of the March 2, 2009 meeting with EPA officials, the detailed notes from the meeting with this organization[5] reveal no discussion of any request by Sierra Club that EPA Region 9 seek a voluntary remand in this case. DREC Response, Exhibit A.1. Indeed, the notes from this meeting do not reveal any discussion of the Desert Rock permit at all. *Id.* Likewise, the records of the March 19, 2009 meeting with the Navajo citizens representing the Diné CARE organization do not reflect any discussion of an EPA plan, or a Diné CARE request, for Region 9 to submit a motion for voluntary remand of the Desert Rock permit. DREC Response, Exhibit A.2.

II. APPLICABLE LAWS AND REGULATIONS DO NOT PRECLUDE THE BOARD FROM GRANTING REGION 9's REQUEST FOR A VOLUNTARY REMAND

A. Since there has been no final action on the permit for the Desert Rock facility, Region 9 is not seeking to apply changes in law or policy retroactively.

A central premise of many of DREC's arguments that the EAB is precluded from granting Region 9's request for voluntary remand is that doing so would retroactively apply new laws or policies to a final decision of the EPA. However, as the regulations in 40 CFR Part 124 make clear, the Desert Rock permitting decision is not yet a final agency action. 40 C.F.R. § 124.15(b); 40 C.F.R. § 124.19(f). The permit is not yet effective and the conditions of the permit and Region 9's justification for those conditions remain under review within the EPA. A request by EPA Region 9 that the EAB grant the Region an opportunity to reconsider disputed elements

[5] The records attached to DREC's response do not show that any representatives of the Natural Resources Defense Council attended this meeting.

of its action before it becomes a final Agency action does not enable the retroactive application of new requirements. Due to the appeal of this matter to the EAB, the specific requirements for this permit have not yet been finally decided by the Agency and were not finally decided at the time that Region 9 issued the permit in July 2008.

B. DREC has not been denied due process and has no protected property right in a permit that has not become final.

Because there has been no final agency action on the PSD permit for the Desert Rock Energy Facility, DREC has not established that it has obtained a property right that may not be deprived without due process. Furthermore, even if it could show that Region 9's initial permit decision established a property right,[6] DREC has been afforded due process through the opportunity to submit a response to the Petitions for Review and supplemental briefs and a response to Region 9's motion for voluntary remand before any action by the EAB to remand the permit. In addition, the remand of a permit does not take away the permit. The permit may still be finalized after a remand, with perhaps a revision to the operative conditions or only a revision of the permitting record and no change to the requirements under the permit.

The opinion of the Board cited by DREC does not establish that DREC has a protected property right in a PSD permit before the conclusion of an appeal to the EAB. *See, In the Matter of General Electric Co.*, 4 E.A.D. 615 (EAB 1993). This opinion addressed the necessary

[6] EPA signed a consent decree in a District Court case that would have required Region 9 to issue a decision on the Desert Rock permit application by July 31, 2008. Under section 113(g) of the Clean Air Act and the terms of the Consent Decree, the Consent Decree would not become final and effective until EPA and the Department of Justice gave final consent to the Consent Decree after consideration of public comments. However, the Consent Decree became moot when EPA issued the permit prior to entry of the Consent Decree by the court, and the parties agreed that the Court should not enter the decree. By its terms, therefore, the Consent Decree never became effective. DREC incorrectly states that the Consent Decree called for action by Region 9 by August 1, 2008. *See,* Conservations Petitioners' Response in Support of Environmental Protection Agency's Motion for Voluntary Remand, Attachment 1, Paragraphs 2-3.

conditions in a RCRA permit to handle disputes between EPA and the permittee after the permit was finalized. The Board held, based on the due process clause of the Fifth Amendment of the Constitution, that a deprivation of property would occur if EPA revised an "interim submission" of the permittee based on the fact that these interim submissions establish corrective action requirements under the RCRA permit. Under the facts of that case, any revision of an interim submission would not occur until after the RCRA permit had become a final agency action. In contrast, the Desert Rock permit has not become a final agency action. The EPA retains the authority to revise the permit in accordance with a remand order of the EAB, regardless of whether that order is based on the EAB's review of the merits or a decision by the Board to grant Region 9 a remand to reconsider disputed issues in this case before a decision on the merits. The reasoning of the Board's order in *General Electric* (and the case cited therein on page 628) that a permittee has a constitutionally protect property right in a permit is not applicable here because the PSD permit has not yet been finally granted by Region 9.

In addition, while the Board's *General Electric* opinion makes clear that the due process clause of the Fifth Amendment requires notice and an opportunity for a hearing before a property right is deprived, the case also observes that the form of hearing required varies depending on the type of case involved. *Id.* at 627. In some circumstances, the opportunity to present objections in writing is enough to satisfy due process obligations. *Id.* DREC has received such an opportunity here and has made no attempt to establish that a written presentation is insufficient under the circumstances. Even if an opportunity for an oral presentation was required, the Board still has the opportunity to convene an oral argument in this case.

C. An exercise of discretion by EPA that is not applied by other permitting authorities does not deny DREC equal protection under the laws.

The claim that granting Region 9's request for a remand in this case would deny DREC equal protection under the laws rests on the remarkable proposition that the actions of parties other than EPA makes EPA's treatment of DREC unequal. Under the Clean Air Act's system of cooperative federalism, other governmental authorities besides EPA have the independent discretion to determine how they will apply applicable PSD regulations based on the record before them when reviewing applications for permits that they are authorized to issue. None of the permit applicants that DREC alleges to be similarly-situated to DREC have submitted applications to EPA Region 9 or another EPA Regional Office for a PSD permit. Among these examples, only the Seminole Electric Cooperative has a permit currently subject to an appeal to the EAB. However, in that case, the Florida Department of Environmental Protection is the permitting authority. DREC cites no case law supporting the proposition that an equal protection violation can occur where a regulatory agency fails to require other entities to exercise their discretion in the same manner.

Moreover, DREC has not established that these other permit applicants are in fact in a similar situation. DREC does not demonstrate that the Longleaf or Big Cajun permits remain pending and are not yet final due to an administrative appeal. According to DREC's response, these permits are both on appeal to state courts, suggesting that final action has occurred in each case. In the case of the Seminole permit, there is an ongoing dispute over whether an administrative appeal should be heard,[7] leaving uncertainty as to whether there has been final agency action on that permit or not.

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[7] As the Board is aware, there is dispute in the Seminole case over whether the matter is properly before the EAB due to the transition of Florida from a delegated to a SIP-approved state for this type of source while the Seminole permit application was pending. This brief on behalf of

D. EPA's Part 124 regulations do not preclude a Regional Administrator from requesting the EAB's permission to withdraw a permit after review is granted.

The parties opposing Region 9's motion for voluntary remand do not establish that the inference they draw from the text of section 124.19(d) of EPA regulations is compelled by the terms of the regulation or more persuasive than the inference drawn by Region 9. Section 124.19(d) of EPA's regulations says only that a Regional Administrator may withdraw a prior permitting decision (merely by notifying with the Board and interested parties) at any time before the EAB has granted review. This regulation does not expressly permit or exclude the relief requested by Region 9 -- leave of the EAB to reconsider disputed issues after the EAB has granted review. In its motion for voluntary remand, Region 9 reasonably inferred from the authorization to withdraw disputed permit conditions without EAB authorization prior to a grant of review that Region 9 may seek similar relief after the EAB has granted review, so long as the Region obtains the EAB's approval. DREC and other parties infer that the Part 124 rules authorize a Region to reconsider its permitting decision only under the precise circumstances covered in section 124.19(d). Assuming arguendo that either of these inferences is reasonably drawn from the regulation, the parties opposing Region 9's motion have not established that their reading is the only one the Board is authorized to follow. These parties do not cite any regulatory history or preamble text from the Federal Register that indicate EPA intended section 124.19(d) go have the effect they ascribe to this provision.

Region 9 has provided persuasive reasoning in it motion for voluntary remand as to why a Region should be permitted to reconsider disputed issues after the Board has granted review, so long as the Region seeks the permission of the Board and demonstrates good cause for the request. Section 124.19(d) does not preclude this interpretation.

Region 9 should not be construed to suggest or imply any positions with respect to those issues, which Region 4 will address in its brief due in that matter on July 16.

E. Section 165(c) of the Clean Air Act does not preclude the relief sought by Region 9 because DREC's permit application does not directly address $PM_{2.5}$ emissions and is not complete under regulations now in effect.

Section 165(c) of the Clean Air Act does not prevent EPA from conducting further review of the Desert Rock permit application because that application is not currently complete under regulations currently in effect. Due to the May 16, 2008 rulemaking that ended application of the Seitz memo to the federal PSD permitting program and the stay of the grandfathering provision in section 52.21(i)(1)(xi) that exempted some pending permit applications from the effect of the May 16, 2008 action, the Desert Rock permit applicant has the burden of demonstrating that construction of this source will not cause or contribute to violation of the $PM_{2.5}$ NAAQS and apply BACT for $PM_{2.5}$. While EPA may have accepted an air quality and BACT analysis for PM_{10} as a surrogate means of demonstrating compliance with the PSD requirement for $PM_{2.5}$ at the time DREC initially submitted its application, this is no longer the case under EPA regulations presently applicable to this action. Thus, additional information must now be provided for Region 9 to continue review of the permit application.

F. Region 9's motion is not based on any change in interpretation of regulations that must go through a notice and comment rulemaking process.

DREC overextends the reach of case law that holds that regulatory agencies cannot change an established interpretation of their regulations without going through a notice and comment rulemaking. *See, Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997); *Alaska Professional Hunters Ass'n Inc. v. FAA*, 177 F.3d 1030, 1033-34 (D.C. Cir. 1999). These cases do not address changes in policy or changes in the way an agency exercises its discretionary authority under existing interpretations of the regulations. Region 9's motion for voluntary remand does not reflect any changes in interpretations of EPA regulations that have not gone through a notice and comment rulemaking process.

Region 9's motion makes clear that it is not seeking to change EPA's established interpretation that options that fundamentally redefine the proposed source may be excluded from the BACT analysis. With respect to the IGCC technology, Region 9 has only asked for a remand to reconsider the way it has exercised its discretion within the framework of the Agency's existing interpretation of the BACT provisions of the PSD regulations. In addition, to the extent EPA's previous policy position on this issue could be considered an interpretation of the regulations, as explained in Region 9's motion for voluntary remand, this was not in fact reflected in any final agency action and may still be determined, as an initial matter, in this proceeding.

Furthermore, with respect to the $PM_{2.5}$ requirements, EPA completed a notice and comment rulemaking on May 16, 2008 that changed its interpretation that the PSD requirements for $PM_{2.5}$ could be met by using a BACT and air quality analysis for PM_{10} as a surrogate. The provision that allowed continued reliance on the Seitz memo has been stayed by the Administrator on the grounds that this special exemption did not go through a notice and comment process. Thus, the Administrator's action to stay section 52.21(i)(1)(xi) is in fact an action that corrects a notice and comment deficiency by suspending the application of a provision adopted into EPA rules without prior notice -- not a change of an EPA interpretation of its regulation without notice and comment rulemaking. The procedural requirements set forth in the case law cited above do not apply to an administrative stay under section 307(d)(7)(B) of the Clean Air Act.

III. ACCCE DOES NOT DEMONSTRATE THAT GRANTING REGION 9's MOTION WILL HARM ITS MEMBERS

ACCCE fails to substantiate its argument that its members will be harmed by the Board granting Region 9's motion for voluntary remand. ACCCE does not establish that the permit

applicant (DREC) is one of its members or that its membership includes any entity that has a business relationship with DREC. There is no showing that any of ACCCE's members have been issued a PSD permit that is presently subject to an appeal to the EAB, or that the Board has granted review for such a permit. ACCCE does not allege that any of its members have submitted an application for a specific PSD permit that would be subject to review by the EAB if the permit is granted. ACCCE says only that its members "have either applied for or are in the process of applying for prevention of significant deterioration permits ('PSD') from EPA." ACCCE Opposition at 2. Thus, the alleged harm to ACCCE's members rests entirely on the possibility that a grant of Region 9's motion will produce "disorder" and "uncertainty" in the permitting process that may affect ACCCE's members. This claim is speculative.

ACCCE does not establish that granting Region 9 leave to reconsider its approach to this particular permit under these particular circumstances will have widespread spillover affects on other pending permit applications or Regional or delegated state permitting decisions that may be before the EAB in the future. It is not at all obvious that requests like Region 9's will become common or widespread if the EAB confirms it has the discretion to grant a request from a Regional Administrator (or delegate) to reconsider its permitting decision after review is granted and does so under the circumstances presented here.

The circumstances of the Desert Rock permit are in fact rather unique. After a recent change in the Presidential Administration, one EPA Region has asked for permission to modify its approach to several disputed issues with respect to regulatory requirements that were not yet final or were in a transitional stage at the time a new EPA Administrator was sworn in. EPA's regulations for implementing the PSD requirements for $PM_{2.5}$ took effect two weeks before Region 9 issued the Desert Rock permit, and a key provision of those regulations on which

Region 9's action was based was challenged in federal court and stayed by the Administrator based on a procedural irregularity in the adoption of that regulation. In addition, the disputed $PM_{2.5}$ regulations address a transition from an interim to a final policy that has not been fully implemented. EPA has not yet finally resolved whether it is permissible to issue a PSD permit that precludes construction until the subsequent completion of a consultation under the Endangered Species Act. Nor has EPA taken any final action on its approach to addressing IGCC technology in the BACT analysis for a coal-fired electric generating unit. The hazardous air pollutant requirements for electric generating units are subject to case-by-case determination at the present time due to the vacatur of an EPA regulation. Furthermore, Region 9 has not yet made a final determination on the matter of whether the Desert Rock permit is required to contain an emission limitation for carbon dioxide after the EAB determined (while this matter was pending) that EPA had not previously established a definitive interpretation of its regulations with respect to this issue. These unique circumstances are not likely to occur frequently.

Thus, for the reasons stated above and in Region 9's motion for voluntary remand, the Board should grant Region 9's request for leave to reconsider several of the disputed issues in this matter.

Dated: June 29, 2009

Respectfully Submitted,

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Brian L Doster

June 29, 2009

Brian Doster

EXHIBIT A

EPA REGION 9's REPLY TO OPPOSITIONS TO
MOTION FOR VOLUNTARY REMAND

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL, and SIERRA CLUB, Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	No. 08-1250 ORAL ARGUMENT NOT YET SCHEDULED

RESPONDENT EPA'S MEMORANDUM IN OPPOSITION TO PETITIONERS' MOTION FOR STAY PENDING REVIEW

INTRODUCTION AND SUMMARY

In this action, Petitioners the Natural Resources Defense Council and Sierra Club ("Petitioners") seek the Court's review, pursuant to section 307(b) of the Clean Air Act ("CAA"), 42 U.S.C. § 7607(b), of an EPA final rule entitled "Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers (PM2.5)." See 73 Fed. Reg. 28,321 (May 16, 2008) (the "Final Rule" or "Rule"). On August 18, 2008, Petitioners filed a "Motion for Stay Pending Review" ("Mot.") asking that the Court enjoin selected provisions of the Rule while allowing other closely-related provisions to remain in effect.

For example, in one challenged portion of the Rule, EPA provided that certain newly-promulgated regulatory requirements would take effect immediately in all States subject to the federal implementation plan for "Prevention of Significant Deterioration" ("PSD"), but with the caveat that certain previously-submitted permit applications could continue to rely on an earlier EPA policy allowing a different implementation approach (the "PM10 Surrogate Policy"). 73 Fed. Reg. at 28,340/3; id. at 28,349/3 (new regulatory text at 40 C.F.R. § 52.21(i)(1)(xi); see also infra at I.A (background regarding PSD), III.A (explaining

the PM10 Surrogate Policy). Petitioners impermissibly seek to stay the caveat, but not the general regulatory requirement. Mot. at 20. The Rule also triggers a three-year deadline for States that have their own approved PSD plans to revise those plans, while allowing these States to rely on the PM10 Surrogate Policy during the transitional period until the plan revisions are due. 73 Fed. Reg. at 28,340/3-28,341/1. Here, again, Petitioners impermissibly seek a *partial* stay that would leave the deadline in place, but stay the integral provision allowing reliance on the earlier policy prior to the deadline. Mot. at 20.

A stay of a newly-promulgated rule may be granted if the movant establishes a substantial likelihood of success on the merits, and demonstrates that such relief is necessary to avert irreparable harm and that staying the rule will not to lead to a different and greater harm. See infra at II. A stay is not, however, a means to "rewrite" a rule by severing related provisions and allowing some, but not others, to take effect. This Court has long recognized that "[s]everance . . . of a portion of an administrative regulation is improper if there is substantial doubt that the agency would have adopted the severed portion on its own." Davis County Solid Waste Mgmt. v. EPA, 108 F.3d 1454, 1459 (D.C. Cir. 1997) (internal quotation omitted); see also North Carolina v. FERC, 730 F.2d 790, 795-96 (D.C. Cir. 1984) ("Whether an administrative agency's order or regulation is severable . . . depends on the . . . agency's intent."). Accordingly, where challenged and unchallenged portions of a rule are "intertwined," the Court will not sever them by vacating one portion and affirming another. Compare, e.g., Davis County, 108 F.3d at 1459 (provisions that "operate[d] entirely independently of one another" could be severed), with Appalachian Power Co. v. EPA, 208 F.3d 1015, 1028 (D.C. Cir. 2000) (although EPA guidance was challenged only in part, those portions were not severable). Moreover, while the cited cases all concern the form of relief to be granted after a final decision on the

merits, the same approach should be used to determine the scope of a stay pending review, as it arises fundamentally from recognition of the constitutional separation of powers. See National Treasury Employees Union v. Chertoff, 452 F.3d 839, 867 (D.C. Cir. 2006) ("[W]e are obliged to respect the fundamental principle that agency policy is to be made, in the first instance, by the agency itself – not by courts . . . .") (internal quotation omitted); North Carolina, 730 F.3d at 796 (severability is a "jurisdictional" issue).

Thus, with respect to the two sets of closely-related Rule provisions cited above, the proper form of relief – had Petitioners adequately supported their motion – would be to stay those provisions as a whole, thereby restoring the regulatory status quo that existed prior to the rulemaking. However, Petitioners have not requested such relief. Even if they had, a return to the prior status quo would not address Petitioners' alleged "harm." Infra at III.A.1.

Even if the Court accepts the premise that the piecemeal stay Petitioners advocate would be an appropriate form of relief, Petitioners still have failed to meet their heavy burden of demonstrating irreparable harm with respect to either of the above-referenced sets of provisions concerning use of the PM 10 Surrogate Policy, or the remaining Rule provisions at issue in this motion (those addressing "condensable" emissions). Infra at III.A.2-3, III.B. Furthermore, a stay could adversely affect the public interest by further delaying States' revision of the PSD provisions of their SIPs – an outcome that is contrary to Petitioners' own espoused goal in seeking review. Infra at III.C. Finally, Petitioners have also failed to show a sufficient likelihood of success on the merits. Infra at IV. For these reasons, the Court should deny the "extraordinary" relief Petitioners seek. See Cuomo v. United States Nuclear Regulatory Comm'n, 772 F.2d 972, 978 (D.C. Cir. 1985) ("On a motion for stay, it is the movant's obligation to justify the court's exercise of such an extraordinary remedy.").

I. STATUTORY AND REGULATORY BACKGROUND

A. General Background Regarding NAAQS and New Source Review

The CAA, enacted in 1970 and extensively amended in 1977 and 1990, establishes a comprehensive program for controlling and improving the nation's air quality through a combination of state and federal regulation. Under Title I, EPA identifies criteria air pollutants anticipated to endanger the public health and welfare and formulates national ambient air quality standards ("NAAQS"), which establish maximum permissible concentrations of those pollutants in the ambient air. 42 U.S.C. §§ 7408-09; 40 C.F.R. pt. 50.

Within three years of promulgating a new or revised NAAQS, EPA must "designate" areas of the country as either "attainment" (i.e., meeting that NAAQS), "nonattainment," or "unclassifiable." Id. § 7407(d)(1). The CAA sets forth a complex program for implementing NAAQS in these areas, including a preconstruction permitting program, known as "New Source Review" or "NSR," that applies when a stationary source is constructed or modified. See New York v. EPA, 413 F.3d 3, 10 (D.C. Cir. 2005) (per curiam). There are several components of the NSR program, including "Prevention of Significant Deterioration" or "PSD," which applies when a major source is constructed or undergoes a major modification in an area designated "attainment" or "unclassifiable" for any criteria pollutant. 42 U.S.C. § 7475; "Nonattainment NSR," which applies to the construction or major modification of major sources in "nonattainment" areas, id. §§ 7502(c)(5), 7503; and "minor NSR," which applies generally in all areas and to all sources, id. § 7410(a)(2)(C). See 73 Fed. Reg. at 28,323/3.[1]

In general, a PSD permit may not be issued absent a demonstration that construction or operation of the proposed new or modified major source will not

[1] EPA uses the shorthand term "major source" to refer to the sources defined as being subject to the PSD and Nonattainment NSR programs. Id. at 28,323/3 n.2.

"cause, or contribute to" a violation of any NAAQS, and that the source is subject to the best available control technology ("BACT") "for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility." 42 U.S.C. §§ 7475(a)(3), (4); see generally id. §§ 7475(a)(1)-(8). Nonattainment NSR is more stringent, requiring emissions reductions to offset any increased emissions from the new or modified source, and compliance with technology-based standards based on the lowest achievable emissions rate ("LAER"). Id. §§ 7503(a)(1)(A), (2); see id. § 7501(3) (defining LAER).

B. NAAQS Implementation Through State and Federal Implementation Plans

Congress "delegated to the States primary responsibility for implementing the NAAQS." Louisiana Envtl. Action Network v. EPA, 382 F.3d 575, 578-79 (5th Cir. 2004). States are required to submit to EPA a state implementation plan or "SIP" setting forth the required pollution control measures and other programs the State will use to timely attain the NAAQS. 42 U.S.C. §§ 7410(a), 7502(b). SIPs must meet numerous substantive requirements under 42 U.S.C. § 7410(a)(2). See also id. §§ 7502, 7513 (additional requirements in nonattainment areas). Among other things, a SIP must contain the necessary elements of NSR preconstruction permitting. Id. § 7410(a)(2)(I)-(J).

SIPs are adopted by States after reasonable public notice and a hearing. Id. § 7410(a)(1). EPA then reviews each submitted plan. Id. § 7410(k). If EPA approves the SIP in whole or in part, the approved provisions become federally enforceable. Id. §§ 7413, 7604. If EPA does not approve the SIP or finds it incomplete, the State may be subject to sanctions and, eventually, federally imposed clean air measures. Id. §§ 7410(c), 7509. EPA's SIP approval is subject to review in the appropriate United States Court of Appeals. Id. § 7607(b)(1).

In certain instances, EPA may adopt a federal implementation plan to implement an air pollution control program in areas lacking an approved SIP for that program. For example, 40 C.F.R. § 52.21 sets forth the federal PSD program, which applies in States that have not obtained EPA's approval of a PSD SIP. See 73 Fed. Reg. at 28,340/3. These States are referred to as "delegated States" (a reference to EPA's delegation of federal authority to implement 40 C.F.R. § 52.21, under paragraph (u) of that section), while States with an approved PSD program in their SIPs are known as "SIP-approved States." 73 Fed. Reg. at 28,340/3.

C. Particulate Matter Pollution and the PM 2.5 NAAQS

Particulate matter is one of six criteria air pollutants that were covered by the original NAAQS promulgated in 1971. 36 Fed. Reg. 8186 (Apr. 30, 1971). The term "particulate matter" or "PM" embraces a broad class of discrete, but chemically and physically diverse, particles in the ambient air. There are two generally different modes of PM – fine and coarse. Fine particles derive from combustion by-products that volatilize and quickly condense or form gases (such as sulfur oxides, nitrogen oxides and volatile organic compounds) that react and transform in the atmosphere. Coarse particles are emitted by some of the same industrial sources that emit fine particles, and are also formed by mechanical disruption (crushing, grinding, and abrasion) and suspension of dust. See generally 70 Fed. Reg. 65,984, 65,992 (Nov. 1, 2005) (Proposed Rule preamble).

The particulate matter NAAQS have evolved in tandem with the ongoing development of scientific evidence concerning the public health and welfare risks associated with PM exposure. The original PM NAAQS imposed a limit on the ambient concentration of "Total Suspended Particles" or "TSP," measured by a device that captured most particles smaller than 25-45 micrometers in diameter.

When EPA first revised the PM NAAQS in 1987, it refined the air quality standards to focus on "inhalable" particles. EPA changed the PM indicator from

TSP to "PM10," based on evidence that the risk of adverse health effects associated with particles 10 micrometers or less in diameter, which can penetrate into the trachea, bronchi and deep lungs, was "markedly greater" than that associated with larger particles. 52 Fed. Reg. 24,634, 24,639 (July 1, 1987).

In its second revision of the PM NAAQS, in 1997, EPA determined that it was appropriate to have separate standards for fine particles and coarse particles, based on evidence of adverse health effects associated specifically with exposure to fine particles. See 62 Fed. Reg. 38,652, 38,665-68 (July 18, 1997). EPA adopted the indicator "PM2.5" – referring to particles 2.5 micrometers or less in diameter – while retaining the PM10 indicator for the coarse particle standard.

In reviewing the 1997 PM NAAQS, this Court reached two key conclusions that are relevant in assessing the merits of the PM10 Surrogate Policy. First, although there are differences in the evidence of human health and public welfare impacts associated, respectively, with fine and coarse particles, PM2.5 and PM10 are not separate "criteria pollutants" under the CAA. American Trucking Assn's, Inc. v. EPA, 175 F.3d 1027, 1055 (D.C. Cir. 1999) ("ATA I"), op. on rehearing en banc, 195 F.3d 4 (D.C. Cir.) ("ATA II"), rev'd in part on other grounds, Whitman v. American Trucking Ass'n, 531 U.S. 457 (2001), op. after remand, 283 F.3d 355 (D.C. Cir. 2002) ("ATA III"). Second, PM10 by definition includes all of the emissions encompassed by the PM2.5 indicator. ATA I, 175 F.3d at 1055.[2]

II. STANDARD OF REVIEW

As noted above, a stay of a administrative regulation pending judicial review is an "extraordinary" and generally disfavored remedy, and the movant bears a heavy burden to show that the Court's exercise of such power is warranted. Cuomo, 772 F.2d at 974, 978. The factors considered in determining whether a

[2] The latest PM NAAQS revision (in 2006) is under review in American Farm Bureau Fed'n v. EPA, No. 06-1410 (D.C. Cir.) (argument held Sept. 15, 2008).

stay pending review is warranted are: (1) the likelihood that the movant will prevail on the merits; (2) the likelihood that the movant will be irreparably harmed absent a stay; (3) the prospect that others may be harmed if the Court grants the stay; and (4) the public interest. Id. at 974; see also Fed. R. App. P. 18.

To demonstrate a likelihood of success, Petitioners must show that they are likely to persuade this Court that the Rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9)(A). This narrow, deferential standard prohibits a court from substituting its judgment for that of the agency and presumes the validity of agency actions. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43-44 (1983).

The "irreparable harm" alleged by the movant "must be both certain and great; it must be actual and not theoretical," and "of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." Wisconsin Gas Co. v. FERC. 758 F.2d 669, 674 (D.C. Cir. 1985). Petitioners must "substantiate the claim that irreparable injury is 'likely' to occur," and that it "will directly result from the action which [they seek] to enjoin." Id. Failure to meet this test is sufficient grounds, by itself, to deny the motion. Id.; see also, e.g., New Jersey v. EPA, No. 05-1097, 2005 WL 3750257 (D.C. Cir. Aug. 4, 2005) (denying a stay in a case where petitioners later prevailed on the merits).

III. PETITIONERS HAVE NOT SHOWN THAT A STAY IS NECESSARY TO PREVENT IRREPARABLE HARM.

At issue in this motion are the Final Rule's provisions concerning: (1) the continued application of EPA's long-established policy allowing the use of PM10 as a surrogate for PM2.5 for purposes of compliance with certain PSD requirements (the "PM10 Surrogate Policy"); and (2) the extent to which "condensable" particulate emissions must be addressed in complying with these requirements. See Mot. at 4-6; id. at Ex. C (a copy of the PM10 Surrogate Policy

originally established in 1997[3]); 73 Fed. Reg. at 28,340-42 (discussing the application of that policy); id. at 28,334-35 (discussing condensable emissions). As discussed below, the Rule achieves the ultimate end sought by Petitioners – that is, it requires SIP-approved States to adopt revised SIP provisions requiring emissions sources to directly address PM2.5 emissions rather than relying on the use of PM10 as a surrogate, and to address condensable emissions. Petitioners' dispute primarily is with the time EPA is giving States to make this transition, as well as with the "grandfathering" of certain previously-submitted permit applications in delegated States. However, Petitioners have not shown that a stay would prevent "irreparable harm," and in fact a stay of the entire Rule could further delay States' submission of SIP revisions to directly address PM2.5.

A. The PM10 Surrogate Policy

EPA established the PM10 Surrogate Policy shortly after promulgating the PM2.5 NAAQS in 1997. The previous PM NAAQS had only included standards limiting the ambient concentration level of PM10 pollution, and EPA recognized that "significant technical difficulties . . . now exist with respect to PM2.5 monitoring, emissions estimation, and modeling." PM10 Surrogate Policy at 1. EPA concluded that PM10 – which by definition includes all PM2.5 emissions, supra at 7-8[4] – "may properly be used as a surrogate for PM2.5 in meeting [NSR] requirements until these difficulties are resolved." PM10 Surrogate Policy at 1.

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[3] John S. Seitz, Director, Office of Air Quality Planning & Standards, EPA, "Interim Implementation of [NSR] Requirements for PM2.5" (Oct. 23, 1997).

[4] See also Stephen D. Page, Director, "Implementation of [NSR] Requirements in PM-2.5 Nonattainment Areas" (Apr. 5, 2005), at 2 ("applying a PM-10 NSR program . . . will effectively mitigate increases in PM-2.5 . . . because PM-2.5 is a subset of PM-10 emissions") (Opp. Ex. A); 73 Fed. Reg. at 28,341/3 (same).

Petitioners impermissibly seek an order severing and staying portions of the Rule relating to this policy while leaving in place other closely related provisions, which effectively would "rewrite" the Rule and produce a result that the Agency did not intend. The appropriate question, instead, is whether a *complete* stay of these provisions is necessary. Petitioners have not requested such relief, however; and even if they had, they could not meet their burden of justifying it. Infra at A.1.

Furthermore, even if the "severance and stay" sought by Petitioners is a permissible form of relief, they still have not met their burden to show irreparable harm. First, there is substantial evidence that the technologies typically selected as the "best available control technology" ("BACT") for PM10 and other pollutants presently subject to PSD requirements are also the best technologies available to control PM2.5 emissions. Infra at A.2. Second, while EPA's policy *presumes* that PM10 may be used as a surrogate for PM2.5 in permit reviews during the transition period, it does not *mandate* that applicants rely on the presumption, nor does it preclude reevaluation of the presumption on a case-by-case basis in connection with review of individual applications (as two state tribunals have recognized) if the record shows a surrogate analysis is insufficient to meet PM2.5 requirements in case-specific circumstances. Infra at A.3.

1. A complete stay of the pertinent Rule provisions would merely restore the prior status quo, in which the PM Surrogate Policy was applicable nationwide.

At the time the Final Rule was promulgated, EPA had continuously applied the PM10 Surrogate Policy since 1997. The Rule will finally bring an end to the transitional reliance on PM10 as a surrogate for PM2.5 by requiring all States with approved PSD implementation plans to adopt, by 2011, plan revisions that provide for addressing PM 2.5 directly. 73 Fed. Reg. at 28,340/3-41/1. The three-year period for submitting these plan revisions is mandated by pre-existing regulations codified at 40 C.F.R. § 51.166(a)(6)(i). See 73 Fed. Reg. at 28,341/1.

In States that do not have approved PSD SIPs (delegated States), there is no analogous transition period. Rather, the requirement to address PM2.5 directly took effect in these States immediately upon the effective date of the Rule, except for certain sources for which: (a) permit applications relying on the PM10 Surrogate Policy were submitted prior to date of the Rule; and (b) those applications are determined to be complete as submitted. See 73 Fed. Reg. at 28,340/3. Only a small number of permit applications are covered by this "grandfathering" provision. See Declaration of William T. Harnett ¶¶ 6-8 (Opp. Ex. B) (nine permit applications meet the above-listed criteria, and comments concerning use of the PM10 Surrogate Policy were submitted in response to only six of those applications; by comparison, over 1000 total PSD permits have been issued with BACT emissions limits for PM since January 1, 1997).

Thus, the Rule changed the regulatory status quo by: (1) making the PM10 Surrogate Policy inapplicable in a number of States (the delegated States) except as to a limited and finite subset of sources; and (2) setting a final deadline beyond which sources in the remaining States (the SIP-approved States) no longer may rely on the policy. If the entire Rule were stayed, the effect would be to block adoption of regulations necessary to end the Surrogate Policy and thus to make the policy once again applicable to *all* PSD permit applications in *all* States with no date for ending the policy. This would not address Petitioners' alleged "harm."

2. Petitioners fail to demonstrate that a partial stay is necessary to prevent irreparable harm from the adoption of allegedly inferior control technologies as BACT.

Petitioners' argument for selectively staying the Rule provisions continuing the applicability of the Surrogate Policy during the transition period for SIP-approved States, and with respect to the "grandfathered" applications in delegated States, is based on the premise that permit applicants will not be required to employ control technologies that constitute the best available control technology

for PM2.5 emissions. See Mot. at 16 ("Unless this grandfathering exemption is stayed, [facilities] will be allowed to construct without ensuring adequate PM2.5 controls, threatening Petitioners' members with irreparable harm."). Their motion cites the recent Desert Rock Energy Facility permit as typifying this problem. Id. However, Petitioners have not substantiated their claim that EPA's policy will allow sources to be constructed without the best PM2.5 control technologies.

The Desert Rock permit requires that the facility install fabric filters, wet limestone flue gas desulfurization technology (a form of a device commonly called a wet scrubber), low NOx (nitrogen oxide) burners, and selective catalytic reduction technology. See Desert Rock Permit, Condition IX.B.2. (pp. 4-5) (Opp. Ex. C); Ambient Air Quality Impact Report, at pp. 6-19 (Opp. Ex. D). These technologies combined provide a high level of capture for PM2.5.

EPA analysis shows that fabric filters and electrostatic precipitators ("ESPs") reduce PM10 and PM2.5 emissions at very high collection efficiencies – often 96 to 99 percent or more. Stationary Source Control Technique Document for Fine PM, EPA Contract No. 68-D-98-026, at 5.2-26 and 5.3-23 (Oct. 1998) ("CTD") (Opp. Ex. E). The report also shows that fabric filters produced higher collection efficiencies for PM2.5 than for PM10 at ferroalloy electric arc furnaces, thus rebutting Petitioners' allegation (based on the simplistic analogy of placing marbles and flour in a kitchen strainer) that "a fabric filter will always collect large particles more efficiently than small particles." Compare CTD at 5.3-23, with Att. to Taylor Decl. at 10 (Mot. Ex. D). More recent reports confirm that dry ESPs – another technology used to control PM10 emissions – are also highly efficient at reducing solid PM2.5. Mastopietro, Worldwide Pollution Control Association News, Issue 12 (2007) (Opp. Ex. F). EPA's RACT/BACT/LAER Clearinghouse – a database that includes records of past BACT determinations – shows that both fabric filters and ESPs are technologies typically required as BACT to control

PM10 emissions. <http://cfpub.epa.gov/rblc/htm/bl02.cfm)>; see also CTD at 5.2-26 to 5.2-27, 5.3-23 to 5.3-24 (identifying a wide variety of typical industrial applications for these technologies).

Petitioners' expert alleges that wet ESPs would be required as BACT for PM2.5 at a coal-fired power plant, but provides no analysis to support this claim. See Attachment to Taylor Decl. at 7.[5] The documents cited above indicate that fabric filters and ESPs have similar control efficiencies for both PM2.5 and PM10, and thus suggest that either technology might be determined to constitute BACT for a particular type of source after a case-by-case analysis. Thus, Petitioners have not demonstrated that the Desert Rock permit or other permits would necessarily require additional technologies to address solid PM2.5 emissions if the Surrogate Policy was not applicable. See Wisconsin Gas Co., 758 F.2d at 674 (alleged injury must be "certain," not "theoretical").

3. Petitioners also fail to show irreparable harm in connection with modeling of air quality impacts.

Petitioners also cite the J.K. Smith Power Plant permit application in Kentucky (a SIP-approved State) as an example of the harm that purportedly will arise from allowing permit applications to model air quality impacts using PM10 as a surrogate for PM2.5. Mot. at 17. What Petitioners overlook, however, is that even in States that are subject to the surrogate policy during the transition period, the adequacy of using PM10 as a surrogate for PM2.5 is still subject to reevaluation – and, if challenged, to judicial review – on a case-by-case basis whenever evidence is presented indicating that PM 10 may not be a reliable

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[5] Determining BACT is a case-by-case process requiring consideration of cost and environmental and energy impacts. EPA recommends a complex five-step analysis to satisfy BACT criteria. See In Re Prairie State Generating Co., PSD Appeal No. 05-05, slip. op. at 14-18 (EPA Envt'l App. Board 2006) (Opp. Ex. G).

surrogate for PM 2.5 for purposes of a particular permit application. See PM10 Surrogate Policy at 2 (the policy "do[es] not bind State and local governments and the public as a matter of law"); 73 Fed. Reg. at 28,341/2 (reiterating that the policy "recommends" the surrogacy approach); see also In re: Southern Montana Elec. Generation & Transmission Cooperative-Highwood Generating Station Air Quality Permit No. 3423-00, Case No. BER 2007-07 AQ, slip. op. at 44 (Montana Board of Envt'l Review May 30, 2008) (Opp. Ex. H) (concluding that surrogacy approach was not supported by the record and remanding with instructions to conduct PM2.5 BACT analysis); Friends of the Chattahoochee, Inc. v. Couch, No. 2008CV146398, slip op. at 9-12 (Ga. Sup. Ct. June 30, 2008) (same) (Opp. Ex. I); Harnett Decl. ¶¶ 6-7 (comments regarding surrogacy were submitted in response to 6 of the 9 grandfathered permit applications in delegated States). Because case-by-case remedies are available if particular permits lack record justification for the surrogacy approach, a stay of the Rule is not necessary.

B. Condensable Emissions

"Condensable" particulate matter is emitted in a gaseous form and then condenses in the atmosphere into solid or liquid particles. See 70 Fed. Reg. at 65,992/1. Prior to this rulemaking, EPA guidance indicated that States were required to address condensable emissions in establishing emissions limitations for PM 10, but that guidance was not consistently applied either by EPA or by the States. See 70 Fed. Reg. at 66,044/1; 73 Fed. Reg. at 28,335/1.

In this rulemaking, EPA originally proposed to require that all States immediately begin addressing condensable emissions in determining major NSR applicability and control requirements under the PSD program. See 70 Fed. Reg. at 66,044/1. The Agency received a large number of comments both for and against this proposal, many of which raised concerns about the availability of reliable test methods or emissions estimation techniques for condensable

emissions. 73 Fed. Reg. at 28,335/1; Response to Comments ("RTC"), EPA-HQ-OAR-2003-0062-278 (March 2008) at 49-50 (Opp. Ex. J). Recognizing these concerns, EPA decided in the Final Rule to adopt a transition period during which it "will undertake a collaborative testing effort with industry, [the] National Association of Clean Air Agencies (NACAA), and other stakeholders to assess and improve the effectiveness and accuracy of the available or revised test methods." 73 Fed. Reg. at 28,335/2. The Agency will then undertake a rulemaking to codify the improved test methods. Id. at 28,334/2-3. After the transition period – i.e., no later than January 1, 2011, or such earlier date as may be established in the rulemaking codifying test methods, id. – all PSD (as well as all Nonattainment NSR) permits will be required to include limitations on condensable emissions. Id. at 28,334/3. Thus, rather than reversing course as Petitioners allege (Mot. at 5), the Agency adopted the proposed Rule provisions that require States to address condensables but simply delayed the appliction of these provisions until the conclusion of the transition period.

During this transition period, States with SIPs that require condensable emissions to be addressed shall continue to implement those requirements, see 73 Fed. Reg. at 28,349 (52 C.F.R. § 52.21(b)(50)(vi)),[6] while States that have not adopted such requirements will not be required to address condensable emissions until the transition period ends. Essentially, the Final Rule preserves the regulatory status quo during the transition. Therefore, no significant change in regulation of condensable emissions would result from granting a stay.

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[6] "Compliance with emissions limitations for PM, PM 2.5 and PM 10 issued prior to [January 1, 2011 or such earlier date as may be established] shall not be based on condensable [PM] *unless required by the terms and conditions of the permit or the applicable implementation plan.*" Id. (emphasis added).

Moreover, as with the PM10 Surrogate Policy, Petitioners have not shown that permits issued during the transition period necessarily will fail to require the best control technologies for addressing condensable PM emissions. In fact, the Desert Rock permit includes a limitation on PM10 emissions that covers condensable emissions. See Responses to Comments on Proposed PSD Permit for [Desert Rock] at 83 (Opp. Ex. K). Furthermore, technologies used to meet BACT requirements for other pollutants that are often precursors to PM – e.g., SO2 and NOx, see 70 Fed. Reg. at 65,995-96 – can achieve substantial control of condensable emissions. The Desert Rock permit requires low NOx burdners and selective catalytic reduction as BACT for NOx emissions. See Desert Rock Permit, Condition IX.B.2. (pp. 4-5). These technologies frequently have been identified as BACT for NOx at coal-fired generating facilities. Ambient Air Quality Impact Report ("AAQIR") at 13. To comply with BACT for SO2, the Desert Rock permit requires use of a wet scrubber, a technology that is often required as BACT for SO2 and is also recommended to control condensable PM2.5. See Desert Rock Permit, Condition IX.B.2. (pp. 4-5); AAQIR at 18; Mastropietro at 10. Although wet ESPs can also address condensable emissions, they are not necessarily suitable for all sources because they are limited to operating below a specific gas stream temperature. CTD at 5.2-7.[7]

C. A Stay Could Adversely Affect the Public Interest By Delaying Submission of PSD SIP Revisions to Directly Address PM2.5 .

Finally, a stay of the entire Rule would nullify, for the duration of the litigation, the deadline by which States with approved PSD plans would otherwise have to submit revised SIPs addressing PM2.5, which was triggered by EPA's

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[7] This page inadvertently was omitted from the separately bound volume of Exhibits to this Opposition, and accordingly is attached directly to this Motion as "Supplement to Exhibit E."

revision of its PM implementation rule. See 40 C.F.R. 51.166(a)(6)(i) ("Any State required to revise its [SIP] by reason of an amendment to this section . . . shall adopt and submit such plan revision to [EPA] for approval no later than three years after such amendment is published in the Federal Register."). Granting a stay will not lead to States submitting those SIP revisions any sooner, and could delay the submissions beyond the existing deadline. Since Petitioners argue that the transition already is too long, this further shows that a stay is not appropriate.

IV. PETITIONERS HAVE NOT SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS.

Petitioners also have not carried their burden to "make out a substantial case on the merits." Cuomo, 772 F.2d at 974 (internal quotation omitted). To begin with, because the adequacy of using PM10 as a surrogate for PM2.5 is subject to case-by-case evaluation in the review of individual permits, challenges related to the PM 10 Surrogate Policy (Mot. at 10-13) are unripe. Cf. New York v. EPA, 413 F.3d at 43-44 (claim that EPA's rule would cause "backsliding" could not be evaluated until an adequate factual record was developed, "as might occur in the course of a state's quest for [SIP] approval"); Citizens for a Better Env't v. Costle, 515 F. Supp. 264, 270 (N.D. Ill. 1981) (challenge to an EPA control technique guideline for determining "reasonably available control technology" was unripe).

Moreover, the Surrogate Policy does not "waive" or "exempt" sources from complying with statutory requirements (Mot. at 11-12); rather, it presumes that assessing control technologies and modeling air quality impacts for PM10 is an effective means of fulfilling those statutory requirements for PM2.5 as well PM 10, during the transition period while EPA works to develop better PM2.5 monitoring data and modeling techniques. The Seventh Circuit has upheld the use of a surrogate ozone analysis to demonstrate compliance with PSD permitting critiera during the transition to implementation of a newer air quality standard.

Sierra Club v. EPA, 499 F.3d 653, 658 (7th Cir. 2007) ("[P]ending adoption of a compliance measure tailored to the new standard, the agency was entitled to use the measure used for the older standard as a stopgap to demonstrate that if the plant complied with that measure it would be unlikely to violate the new standard."). This Court has likewise upheld surrogate approaches for regulating air pollutants that were based on a similar rationale to that articulated here. Compare 73 Fed. Reg. at 28,341/3 ("PM 10 will act as an adequate surrogate for PM 2.5 in most respects . . . because PM 2.5 is a subset of PM 10"), with National Lime Ass'n v. EPA, 233 F.3d 625, 637-39 (D.C. Cir. 2001) (as amended) (EPA reasonably used PM as a surrogate for hazardous air pollutant ("HAP") metals in establishing national emission standards for portland cement facilities, where the record showed that PM generated by these facilities invariably contains HAP metals), and Sierra Club v. EPA, 353 F.3d 976, 984-85 (D.C. Cir. 2004) (same).

The three-year period for SIP-approved States to submit revised PSD SIPs was not adopted "without notice and public comment" (Mot. at 4, 6-7). Rather, it is mandated by a pre-existing regulation. See 40 C.F.R. § 51.166(a)(6)(i); 73 Fed. Reg. at 28,341/1 (citing same). Although EPA had proposed to modify that time period and establish an earlier deadline for submitting revised PSD provisions, it committed no procedural error by reverting to the existing rule after it became impossible as a practical matter for States to meet the proposed submission deadline (which had already passed by the time EPA promulgated the Final Rule).

Furthermore, none of the statutory provisions and judicial decisions Petitioners cite (Mot. at 7-9) supports their claim that either the three-year transition or the "grandfathering" provision applicable to certain permit applications in delegated States is unlawful. First, the Rule does not "waive" compliance with CAA section 165(a)(3)'s requirement that a permit applicant demonstrate that the source will not cause or contribute to a violation of "any

NAAQS." 42 U.S.C. § 7475(a)(3). Instead, the Rule allows sources in SIP-approved States, along with a limited number of sources in delegated States, to continue to *comply* with section 165(a)(3) by "show[ing] that PM10 emissions will not cause a violation of the PM10 NAAQS *as a surrogate for* demonstrating compliance with the PM2.5 NAAQS." 73 Fed. Reg. at 28,341/2 (emphasis added). Second, Sierra Club v. EPA, 294 F.3d 155 (D.C. Cir. 2002), is not on point; that decision held that EPA lacks authority to extend an area's attainment deadline, id. at 160-62, which this Rule does not purport to do. 42 U.S.C. § 7502(b) also is inapplicable, as it concerns submission of nonattainment area SIPs, whereas the PM10 Surrogate Policy only addresses PSD SIPs submitted by "attainment" areas. Finally, the deadline in section 110(a)(1) does not apply to the SIP revisions submitted in response to this Rule. 42 U.S.C. § 7410(a)(1). States were required to make initial "infrastructure" SIP submissions for PM2.5 by July 2000 to meet this statutory deadline, and EPA agreed in a consent decree to make findings of failure by October 5, 2008 for any State that has still failed to make the initial submission. See 70 Fed. Reg. at 66,043-44 n.104; 73 Fed. Reg. at 28,341 n.16; see also Early Planning Guidance[8] at 5-8 (Opp. Ex. L); Consent Decree in Environmental Defense v. Johnson, Case No. 1:05-cv-00493 RBW (D.D.C. June 15, 2005) (Opp. Ex. M). Thus, the Rule under review does not concern the initial SIP submission necessary to meet the section 110(a)(2) requirements for the PM2.5 NAAQS by the statutory deadline.

The Final Rule provisions on condensable emissions also were not adopted without notice as Petitioners claim. To the extent the Final Rule differs from the proposal, that is in direct response to the comments EPA received questioning

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[8] Sally L. Shaver, Dir., Air Quality Strategies & Standards Div., "Re-Issue of the Early Planning Guidance for the Revised Ozone and [PM] [NAAQS]" (June 16, 1998).

whether available test methods and modeling techniques were reliable enough to support a requirement that all States immediately begin addressing condensable emissions, as had been proposed. See 73 Fed. Reg. at 28,335 (discussing comments and EPA's response); RTC at 48-52 (same); Northeast Maryland Waste Disposal Auth. v. EPA, 358 F.3d 936, 951 (D.C. Cir. 2004) ("Agencies are free – indeed, they are encouraged – to modify proposed rules as a result of the comments . . . ."); New York v. EPA, 413 F.3d at 32 (same). The three-year period for addressing condensable emissions was reasonable given: (a) the above-noted concerns regarding available test methods and modeling; (b) EPA's conclusion that addressing only filterable PM2.5 and PM precursors likely would provide adequate protection of the PM2.5 NAAQS; (c) its finding that technologies selected as BACT or LAER for PM2.5 and PM10 can control condensables; and (d) its recognition that States with SIP provisions requiring condensables to be addressed could continue to enforce those provisions during the transition, and could do so earlier than 2011 at their discretion. See generally 73 Fed. Reg. at 28,334-35; RTC at 50-52; see also 25 Pa. Code §§ 127.81-127.83 (Pennsylvania has adopted the final PSD requirements for PM2.5 without a transition period).[9]

CONCLUSION

For the foregoing reasons, the Court should deny Petitioners' motion.

Respectfully submitted,

RONALD J. TENPAS
Assistant Attorney General
Environment and Natural Resources Div.

Dated: September 29, 2008 By: _____

BRIAN H. LYNK, D.C. Bar No. 459525

[9] EPA has provided only a partial summary of its merits arguments here. It will address the issues more fully in its Respondent's brief.

U.S. Department of Justice
Environmental Defense Section
P.O. Box 23986
Washington, D.C. 20026-3986
(202) 514-6187 (tel.)

Attorney for Respondents

OF COUNSEL:

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Office of General Counsel (2344A)
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

SUPPLEMENT TO EXHIBIT E
(all other exhibits are separately bound)

Stationary Source Control Techniques Document for Fine Particulate Matter

EPA CONTRACT NO. 68-D-98-026
WORK ASSIGNMENT NO. 0-08

Prepared for:

Mr. Kenneth Woodard
Integrated Policy and Strategies Group (MD-15)
Air Quality Strategies and Standards Division
U.S. Environmental Protection Agency
Research Triangle Park, North Carolina 27711

October 1998

Submitted by:

EC/R Incorporated
Timberlyne Center
1129 Weaver Dairy Road
Chapel Hill, North Carolina 27514

stream conditions, temperatures, and pressures. However, once an ESP is designed and installed, changes in operating conditions are likely to degrade performance.[1,2,3]

5.2.3.2 Wet ESPs

The basic components of a wet ESP are the same as those of a dry ESP with the exception that a wet ESP requires a water spray system rather than a system of rappers. Because the dust is removed from a wet ESP in the form of a slurry, hoppers are typically replaced with a drainage system. Wet ESPs have several advantages over dry ESPs. They can adsorb gases, cause some pollutants to condense, are easily integrated with scrubbers, and eliminate reentrainment of captured particles. Wet ESPs are not limited by the resistivity of particles since the humidity in a wet ESP lowers the resistivity of normally high resistivity particles.[2,4]

Previously, the use of wet ESPs was restricted to a few specialized applications. As higher efficiencies have currently become more desirable, wet ESP applications have been increasing. Wet ESPs are limited to operating at stream temperatures under approximately 170°F. In a wet ESP, collected particulate is washed from the collection electrodes with water or another suitable liquid. Some ESP applications require that liquid is sprayed continuously into the gas stream; in other cases, the liquid may be sprayed intermittently. Since the liquid spray saturates the gas stream in a wet ESP, it also provides gas cooling and conditioning. The liquid droplets in the gas stream are collected along with particles and provide another means of rinsing the collection electrodes. Some ESP designs establish a thin film of liquid which continuously rinses the collection electrodes.[2,3]

5.2.3.3 Wire-Plate ESPs

Wire-plate ESPs are by far the most common design of an ESP. In a wire-plate ESP, a series of wires are suspended from a frame at the top of the unit. The wires are usually weighted at the bottom to keep them straight. In some designs, a frame is also provided at the bottom of the wires to maintain their spacing. The wires, arranged in rows, act as discharge electrodes and are centered between large parallel plates, which act as collection electrodes. The flow areas between the plates of wire-plate ESPs are called ducts. Duct heights are typically 20 to 45 feet.[2] A typical wire-plate ESP is shown in Figure 5.2-2.[2]

Wire-plate ESPs can be designed for wet or dry cleaning. Most large wire-plate ESPs, which are constructed on-site, are dry. Wet wire-plate ESPs are more common among smaller units that are pre-assembled and packaged for delivery to the site.[4] In a wet wire-plate ESP, the wash system is located above the electrodes.[2]

5.2.3.4 Wire-Pipe ESPs

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on September 29, 2008, I caused a true and correct copy of the foregoing Respondent EPA's Memorandum in Opposition to Petitioners' Motion for Stay Pending Review to be sent by first class mail, postage prepaid, and by electronic transmission to the following counsel, and that on the same date I caused a separately bound, true and correct copy of Exhibits A through M to the Memorandum to be sent by overnight delivery to the same counsel:

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Counsel for the National Environmental Development Association's Clean Air Project

Dated: September 29, 2008

Brian H. Lynk

EXHIBIT B

EPA REGION 9's REPLY TO OPPOSITIONS TO
MOTION FOR VOLUNTARY REMAND

The Administrator's Phone Call with Navajo Nation President Joe Shirley, Jr.

Thu 03/12/2009 2:00 PM - 2:20 PM

Attendance is for Laura Yoshii

Chair: Daniel Gerasimowicz/DC/USEPA/US
Location: The Administrator's Office - By Phone

Required:	Laura Yoshii/R9/USEPA/US@EPA, Lisa Heinzerling/DC/USEPA/US@EPA
Optional:	Abigail Gaudario/R9/USEPA/US@EPA, Eric Wachter/DC/USEPA/US@EPA, Georgia Bednar/DC/USEPA/US@EPA, Robert Goulding/DC/USEPA/US@EPA
Time zones:	This entry was created in a different time zone. The time in that time zone is: Thu 03/12/2009 5:00 PM EDT5:20 PM EDT

The Administrator will initiate a call to Laura Yoshii on 415-947-4234, then connected to President Shirley's office by dialing 928-871-7915. Thank you.

Please note: The following individuals will be attending with President Shirley (confirming names)

Steve Etsitty - Navajo EPA
Steve Begay - DinePower Authority
President Shirley's Chief of Staff
Head of Department of Natural Resources
President's Counsel
President's Press Contact

Talking Points for Administrator Jackson's
Call with President Shirley

Talking Points For Desert Rock Energy Company

- I am glad to have this opportunity to talk to you in person. One of my priorities as Administrator is to ensure open communication with tribal nations and to understand their environmental goals and priorities, so I wanted to contact you directly.

- We are part of a new Administration that has very different priorities from the previous Administration. Consequently, we are looking very carefully at decisions that were made under the previous Administration to see if we agree with those decisions. This is taking some time but we want to make sure that our decisions are the best for the public health and environment.

- EPA's next deadline to file a brief with the Environmental Appeals Board is tomorrow. Instead of filing a brief in response to the Petitioners' latest briefs, we intend to file a motion for a 45-day extension of time to give the new Administration more time to become familiar with the issues surrounding this permit.

- I understand how much work the Navajo Nation has put into the development of the Desert Rock project and what it potentially means for your economy so this news of additional delay will undoubtedly come as a disappointment to you. I wanted to call you in person and tell you this news myself.

- We will try to work through the issues as quickly as we can and I will follow up with you before we get to the end of the 45-day extension period.

(**Note:** President may invite you to visit the Navajo Nation, which we hope you can accept. Region 9 would be glad to help arrange such a visit.)

- I will look forward to visiting the Navajo Nation and I appreciate the invitation.

Talking Point on Abandoned Uranium Mines

(**Note**: We understand that President Shirley might take this opportunity to ask for your commitment to continue or expand EPA's commitment to our 5-year plan to address impacts from uranium mining on the Navajo Reservation.)

- "As I told Senator Udall during my confirmation hearing, I am committed to implementing our 5-year plan to address the impacts of uranium mining on the Navajo Reservation. We know that Navajo Nation's partnership and participation is essential to our success in tackling this historic problem, and we will continue to consult with Navajo Nation as we proceed."

Update call to discuss Desert Rock with President Shirley of Navajo Nation (Call-in number is 1(866) 299-3188 access code: 6649310785)

Mon 04/27/2009 1:00 PM - 1:30 PM

No Location Information

Required:	Deborah Jordan/R9/USEPA/US@EPA, Eric Wachter/DC/USEPA/US@EPA, Laura Yoshii/R9/USEPA/US@EPA, Lisa Heinzerling/DC/USEPA/US@EPA, LisaP Jackson/DC/USEPA/US@EPA, Nancy Marvel/R9/USEPA/US@EPA
Optional:	Colleen McKaughan/R9/USEPA/US@EPA, Daniel Gerasimowicz/DC/USEPA/US@EPA, Robert Goulding/DC/USEPA/US@EPA

EXHIBIT C

EPA REGION 9's REPLY TO OPPOSITIONS TO
MOTION FOR VOLUNTARY REMAND

DR. JOE SHIRLEY, JR.
President

BEN SHELLY
Vice President

April 28, 2009

The Honorable Lisa Jackson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

RE: The Desert Rock Energy Center PSD Permit

Dear Administrator Jackson,

As the elected leader of the Navajo Nation and the Navajo People, I write to follow up on our recent telephone conversation concerning the Navajo Nation's Desert Rock Project. It is extremely important for the future economic development of the Navajo People that the U.S. Environmental Protection Agency (EPA) follow existing law and regulatory procedures, and issue the final PSD permit for the Desert Rock Energy Project. I respectfully ask that you meet with me, and select representatives of the Navajo Nation, in furtherance of our government-to-government relationship, to discuss the issues raised during our phone call at your offices in Washington, D.C. during the week of April 13, 2009.

The Desert Rock Energy Project is the linchpin of the Navajo Nation's economic development strategy for the foreseeable future. The plant itself would provide approximately $1.5 billion to the Navajo Nation over the next 30 years, and employ approximately 3000 workers during the construction phase and more than 400 full time people upon completion. Given the unemployment rate on the Navajo Nation hovers around 50% and at least 43% of all Navajos live below the federal poverty level (Census 2000), these are essential Navajo jobs. This project is also the single largest economic development project on Native lands with a total cost approximately $4 billion including the associated transmission project. This transmission project is essential to the Navajo Nation's renewable energy plans because it provides a path westward to demand centers for New Mexico renewable energy.

The Navajo Nation and the project proponents have complied with all statutory and regulatory requirements including extensive environmental modeling, voluntary Navajo Nation regulation of mercury levels, and a commitment to construct the cleanest coal burning power plant ever built in the U.S. Our belief is that the proposed plant is cleaner than any other existing best available control technology.

The Navajo Nation is seeking to lead the Native American tribes in a new era of self sufficiency and self determination by developing new, domestic energy sources to meet the dire economic needs of

Office of the President and Vice President
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tribal communities. Accessing all of our energy reserves both renewable and fossil has the ability to remake the Native American landscape, and transform our impoverished tribal regions into examples of sustainable economic development. I truly believe the Navajo Nation and the EPA can work together to solve these problems and to complete the regulatory requirements for this important project without further delay.

I look forward to hearing from you.

Sincerely,

Dr. Joe Shirley Jr., President
THE NAVAJO NATION

Hide Details

The Administrator's Meeting with Navajo Nation President Joe Shirley (Desert Rock)

Wed 06/10/2009 1:00 PM - 1:45 PM

Attendance is **required** for Brian Doster

Chair: Daniel Gerasimowicz/DC/USEPA/US

Location: The Bullet Room

This entry has an alarm. The alarm will go off 15 minutes before the entry starts.

Required: Ann Lyons/R9/USEPA/US@EPA, Beth Craig/DC/USEPA/US@EPA, Bob Sussman/DC/USEPA/US@EPA, Brian Doster/DC/USEPA/US@EPA, Carol Jorgensen/DC/USEPA/US@EPA, Colleen McKaughan/R9/USEPA/US@EPA, Gina

Optional: Abigail Gaudario/R9/USEPA/US@EPA, Edna Silver/DC/USEPA/US@EPA, Georgia Bednar/DC/USEPA/US@EPA, Jean Walker/RTP/USEPA/US@EPA, Marta Montoro/DC/USEPA/US@EPA, Shela Poke-Williams/DC/USEPA/US@EPA, Teri

Description

Please note: Attending with President Shirley will be:

-Sharon Clahchischilliage, Executive Director, Navajo Nation Washington Office
- Simon Boyce, Navajo Nation Washington Office
- Doug McCourt
- 1 additional staffer may attend.

The call-in number for Region 9 will be:

1-866-299-3188

access code 2025644700

Thank you.

Personal Notes

EXHIBIT D

EPA REGION 9's REPLY TO OPPOSITIONS TO
MOTION FOR VOLUNTARY REMAND

"Straussfeld, Dirk" <straussfeld@sitheglobal.com>

04/30/2009 10:05 AM

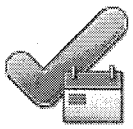
To Colleen McKaughan/R9/USEPA/US@EPA

cc "Straussfeld, Dirk" <straussfeld@sitheglobal.com>

Subject meeting

Colleen
the week of the 18th would work best for a meeting. The earlier week might not work.
Dirk

winmail.dat



Meeting with Desert Rock Energy Company and Dine Power Authority regarding Desert Rock PSD Permit and Voluntary Remand - Call-in # 866-299-3188; conference code 202-564-1447 Calendar Entry

Fri 06/05/2009 11:00 AM - 12:30 PM

Attendance is **required** for Brian Doster
Chair: **Colleen McKaughan/R9/USEPA/US**
Location: Ariel Rios Building, Room 5415 ARN

Required:	Ann Lyons/R9/USEPA/US@EPA, Anna Wood/DC/USEPA/US@EPA, Beth Craig/DC/USEPA/US@EPA, Brian Doster/DC/USEPA/US@EPA, Deborah Jordan/R9/USEPA/US@EPA, Don Zinger/DC/USEPA/US@EPA, Gerardo
Optional:	Clancy Tenley/R9/USEPA/US@EPA, Jean Gamache/R9/USEPA/US@EPA, William Glenn/R9/USEPA/US@EPA
Time zones:	This entry was created in a different time zone. The time in that time zone is: Fri 06/05/2009 8:00 AM MST - 9:30 AM MST

Description

I have added the call-in number and the room location. The time of the meeting should show up as 11 AM EDT and 8 AM PDT.

Personal Notes