BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC

IN THE MATTER OF:	PSD APPEAL NOS. 08-03, 08-04, 08-05 & 08-06
DESERT ROCK ENERGY COMPANY, LLC	
PSD PERMIT NO. AZP 04-01	

AMERICAN COALITION FOR CLEAN COAL ELECTRICITY'S BRIEF IN OPPOSITION TO EPA REGION 9'S MOTION FOR VOLUNTARY REMAND

I. INTRODUCTION

On May 27, 2009, the Environmental Appeals Board (the "Board") granted the American Coalition for Clean Coal Electricity's ("ACCCE") Motion Requesting Reconsideration of its Motion to Participate and Permission to File Brief Out of Time in this proceeding. ACCCE respectfully submits this brief in opposition to the Environmental Protection Agency Region 9's ("EPA") Motion for Voluntary Remand (the "Motion").

A. ACCCE

ACCCE is a non-profit organization formed by the nation's coal-producing companies, railroads, a number of electric utilities, and related organizations for the purpose of educating the public (including public-sector decision-makers) about the benefits of affordable, reliable and environmentally compatible coal-fueled electricity. ACCCE, originally named the Center for Energy and Economic Development (CEED), was created in 1992. CEED combined with Americans for Balanced Energy Choices (ABEC) to become the American Coalition for Clean Coal Electricity "ACCCE" in 2008. On behalf of its members, ACCCE has long been an

advocate of policies that advance environmental improvement, economic prosperity, and energy security. ACCCE is committed to continued and enhanced U.S. leadership in developing and deploying new, advanced coal technologies.

ACCCE's members include power providers, coal producers and other related organizations who are subject to EPA regulation. As demonstrated herein, the implications of EPA's Motion far transcends this individual situation and creates problems of nationwide magnitude. Many of ACCCE's members have either applied for or are in the process of applying for prevention of significant deterioration ("PSD") permits from EPA. If granted, this Motion will allow EPA and state PSD programs to reopen what would otherwise be final PSD permits and reconsider whether they should have been granted under policies not in effect at the time of issuance of the permit.

B. Background

1. *Issuance of the Permit*

In its April 27, 2009 Motion, EPA seeks this Board's approval to remand back to EPA the PSD permit (the "Permit") EPA previously issued to Desert Rock Energy Company, LLC ("DREC") on July 31, 2008 to construct a coal fired power plant (the "Plant"). The Permit was issued by EPA pursuant to the New Source Review ("NSR") program authorized by the federal Clean Air Act (the "CAA"). The CAA and the NSR program regulate the construction of major new stationary sources and major modifications to existing stationary sources. EPA's NSR regulations require such sources to perform health and visibility/air quality impact analyses, install stringent air pollution control equipment, and obtain permits for new construction at major stationary sources. NSR consists of more than one distinct subprogram: PSD is for areas in attainment with health based National Ambient Air Quality Standards ("NAAQS"); Non-

attainment NSR is for those that are not in attainment with NAAQS. The Permit was issued by EPA since the Navajo Nation does not have an EPA approved PSD permitting program.

The Permit was issued by EPA after it had gone through a thorough application and review process. More than 1,000 public comment letters were received by EPA; four expert reports were submitted by Petitioners; and public hearings were held in Arizona, New Mexico, Colorado and the Navajo Nation. *See* Petition for Review of Dine Care et al. at 5. Thousands of pages of comments were submitted over the course of the five year review period. Despite five years of EPA analysis and public participation, EPA has now completely reversed its position and asserts that the Permit must undergo further analysis and study. As noted by EPA in its Response to Petitions for Review, Supplemental Briefs and Amicus Brief (the "Response") the agency "took care to ensure that its action, and the DREF project as a whole, would comply with all such [federal] requirements." Response at 4.

2. *Motion for Voluntary Remand*

EPA requests that the Permit be remanded so that the agency may now consider "(1) the use of PM10 as a surrogate to satisfy the PSD requirements for PM2.5; (2) the consideration of integrated gasification combined cycle technology ("IGCC") in the BACT analysis; (3) the issuance of the final permit decision before completing consultation under section 7(a)(2) of the ESA; (4) the issuance of the final PSD permit decision before completing the case-by-case MACT analysis for hazardous air pollutants under CAA section 112(g); and (5) the sufficiency of the additional impact analysis for the [Plant]." Motion at 5.

Nowhere within the Motion does EPA assert that there has been an error in the agency's detailed analysis; any discovery of new evidence or information that would invalidate its previous findings; any misapplication of the law; any failure to consider required data or

information; any misrepresentation by DREC; any adoption of a new law that would prohibit the Plant; or any similar circumstance that would cast doubt on whether the Permit was properly issued. Rather, the request for voluntary remand is merely (and solely) based upon the new Administration's desire to commence a prospective review (and potential future revision) of EPA's existing policies and regulations under the Clean Air Act and other statutes. Motion at 3.

II. ARGUMENT

A. EPA Is Prohibited By Regulation From Withdrawing The Permit The Agency Previously Issued.

EPA's Motion asks this Board to allow it to withdraw the Permit well after the time in which the agency may lawfully do so. Motion at 5. Pursuant to EPA's regulations, an EPA Regional Administrator may only withdraw a permit up until the time that this Board issues a decision to accept or deny review of the permit. 40 C.F.R. §124.19(d). "The Regional Administrator, at any time prior to the rendering of a decision ...to grant or deny review of a permit decision, may, upon notification to the Board and any interested parties, withdraw the permit and prepare a new draft permit." 40 C.F.R. §124.19(d). On January 22, 2009, this Board issued an order granting review of the petitions for review filed by Petitioners (the "Petitions for Review"). While C.F.R. §124.19(d) does not explicitly set out a deadline by which EPA must act to withdraw the Permit, the deadline is contingent upon when this Board acts to accept or reject a petition for review. "[A] deadline need not be explicitly set out in a statute if it is readily ascertainable by reference to a fixed time or event." *American Canoe Ass'n. Inc. v. E-PA*, 30 F.Supp.2d 908, 921 (E.D. VA 1998).

As of January 22, 2009, EPA no longer had the authority under 40 C.F.R. §124.19(d) to withdraw the Permit, something that EPA squarely acknowledges. "The regulations, EAB Practice Manual, and EAB precedent have not established a procedure for the Agency to

reconsider its permitting decision after the Board has granted review but before it has reached a final decision on the merits of the argument." Motion at 7. This Board therefore, is presently the only entity that has the authority to review the Permit. "[T]he Board serves as the final decisionmaker for the Agency." *In re: Mobil Oil Corporation*, 5 E.A.D. 490, 509 n. 30 (EAB 1994). To now grant the EPA's Motion would do precisely what EPA and federal law states cannot be done: withdraw a permit after the Board has denied or granted a petition for review.

B. Voluntary Remand of the Permit is Not Supported by Case Law.

EPA cites several cases that it claims support its request for voluntary remand. However, EPA's reliance on these cases is misplaced, as each involves circumstances materially different from the circumstances under which EPA finds itself presently.

1. *Ethyl Corporation v. Browner*, 989 F.2d 522 (D.C. Cir. 1993).

In *Ethyl*, EPA requested the U.S. Court of Appeals for the D.C. Circuit to remand an administrative record so that the agency could consider new evidence submitted by the permittee which refuted data submit by a third party. In its order granting EPA's request, the court noted that courts prefer "to allow agencies to cure their own mistakes rather than waste[] the courts' and the parties' resources reviewing a record that **both** sides acknowledge to be incorrect or incomplete." *Emphasis added. Ethyl* at 524. While EPA may now believe that the Permit was issued as a result of incorrect information, the Permit applicant does not believe that the Permit was incorrectly issued. Unlike the facts of *Ethyl* there is no new data that a party has brought to EPA's attention that would indicate the Permit was incorrectly issued.

2. *Ford Motor Co. v. Nat'l. Labor Relations Board*, 305 U.S. 364 (1939).

In *Ford,* the question before the Supreme Court was whether a National Labor Relations Board's ("NLRB") petition for remand was properly granted. After the issuance of a Supreme Court opinion in a case unrelated to *Ford*, the NLRB requested that it be permitted to withdraw

its order requiring *Ford* to reinstate discharged employees and reconsider the matter at the agency level. *Ford* had also separately petitioned the court to set aside the NLRB's order. In affirming the lower's court order granting the NLRB's request for remand, the Supreme Court found that there is nothing "which precludes the court from giving an administrative body an opportunity to meet objections to its order by correcting irregularities in procedure, or applying deficiencies in its record, or making additional findings where these are necessary, or supplying findings validly made in the place of those attacked as invalid." *Ford* at 375.

No irregularities in procedure have been claimed by EPA in the issuance of the Permit. Nor are there any asserted deficiencies in the record or findings that are now claimed as invalid and which must be corrected. Finally, there are no additional findings that are necessary for EPA to consider before it can issue the Permit. EPA has already considered thousands of pages of comments from the public; and spent five years studying the Permit application. EPA did not haphazardly consider whether to issue the Permit; it did not ignore studies or data required to be obtained during the review process. EPA complied with its obligation under the CAA and upon consideration of all of the evidence determined that the Permit should be granted.

3. *Trujillo v. General Electric*, 621 F.2d 1084 (10th Cir. 1980).

EPA cites *Trujillo* in further support of its argument that a voluntary remand should be granted. In *Trujillo* an employee's right to file an action against his employer for discrimination was not barred for timeliness because the employee appealed the EEOC's original finding that discrimination did not occur. The EEOC's reconsideration of its previous decision occurred pursuant to 29 C.F.R. §160119(b). Similar to the authority granted to EPA under 40 C.F.R. §124.19(d), the EEOC has the authority to reconsider its decisions. However, unlike EPA in the

present situation, the authority of the EEOC to reconsider its decision was not barred by federal regulation.

4. *SKF USA v. United States,* 254 F.3d 1022 (Fed. Cir. 2001).

In *SKF*, the court found that if during the course of litigation an agency's "concern is substantial and legitimate" regarding its prior decision a remand can be appropriate. *SKF* at 1029. Or if an agency believes that "its original decision is incorrect on the merits and wishes to change the result" a remand may be permitted. *Id.* In its Motion, EPA does not assert that its decision to issue the Permit was incorrect or that it desires to deny the Permit. Rather, the reasons set forth by EPA to warrant remand are due to the desire of the new Administration to consider additional factors in the permitting process of the Plant. These additional factors cited by EPA, however, are purely discretionary and were deemed not necessary to include in the Permit review process. While it may be "familiar appellate practice to remand causes for further proceedings without deciding the merits, where justice demands that course in order that some defect in the record may be supplied," no such showing has been made by EPA here. *Ford* at 373.

C. EPA Fails To Establish Cause To Remand The Permit

The permit review and application process is not unlike that of a rulemaking. Pursuant to the CAA, EPA conducted a thorough analysis of the permit application, which included soliciting public comment. EPA should be held to the same standard of review that any agency is when it decides to rescind a rule. "An agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change." *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 42 (1983). EPA's explanation for wanting to remand the Permit fails this test.

EPA cites five issues in its Motion that it only now asserts are necessary to consider before the Permit is issued. As demonstrated below, none of the issues raised by EPA are areas that EPA is or was required to consider when issuing the Permit.

1. *PM10 Review*. Pursuant to Administrator Jackson's April 24, 2009 letter to EarthJustice, EPA officials apparently intend in the future to propose to repeal the grandfathering provision contained in 40 CFR 52.21(i)(1)(xi) relating to PM10 standards (the "Grandfathering Provision"). *See* Exhibit A to the Motion. Prior to the Grandfathering Provision being stayed by the Administrator, EPA was authorized to use PM10 as a surrogate to comply with the PSD requirements for PM 2.5. EPA applied this Grandfathering Provision when considering the Permit.

While the Grandfathering Provision has not yet been repealed, and will only be repealed once a federal notice and comment rulemaking has been completed (pursuant to the federal Administrative Procedures Act, 5 U.S.C. §552), EPA believes that remand is justified to consider whether there is a violation of PM2.5. EPA's rule relating to PM10 standards is the agency's statement regarding its present and future policy on this issue. ""[R]ule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. §551(4). When and if EPA commences a rulemaking to repeal the Grandfathering Provision, that rulemaking once adopted will set forth EPA's present and future policy on the issue of PM10 and PM2.5.

When EPA conducted its analysis of the Permit application it properly applied the Grandfathering Provision and found there to be no violation of PM10 under the regulation in effect at the time. EPA may not now retroactively apply a change in a regulation that has yet to

even be amended. "Quite simply, a rule is an agency statement "of future effect," not "of future effect and/or reasonable past effect."" *Bowen v. Georgetown University Hospital et al.*, 488 U.S. 204 (1988). To ask this Board to remand the Permit so that it may consider whether the Plant will cause or contribute to a violation of PM2.5 in the absence of the Grandfathering Provision, which has yet to be repealed, is not only distressing but contrary to well and long established federal case law and statute.

The purpose and wisdom of the federal APA is not subject to debate. Regulations are adopted and put in place so as to put individuals on notice as to what the standards, procedures and expectations are of an agency on a certain issue or topic. How can an agency decide to amend a regulation, not complete a rulemaking to amend the regulation, but still retroactively apply the proposed amended regulation to a decision it has previously made? If EPA is allowed to do this, how will any citizen ever have confidence in knowing what rule it is they will be held subject to by an agency?

2. *IGCC.* EPA asserts that under the previous Administration its policy was to preclude consideration of integrated gasification combined cycle technology ("IGCC") under BACT. *See* Motion at 18. As a result of this policy, EPA intimates that IGCC was not considered as a BACT option. However, nothing from the record would indicate that EPA did not exercise its discretion to consider IGCC during the Permit application process. As EPA notes in its Motion, it originally requested from DREC information on IGCC. Motion at 18. In response, two reports on IGCC were submitted by DREC to EPA. EPA exercised its discretion in whether to consider IGCC during the permitting process, precisely what EPA now asserts it should have the discretion to do. Motion at 21. EPA clearly desires to reconsider its decision not to include IGCC under BACT as a result of the change in Administration. However, no case

law, statute or regulation gives EPA the authority to reconsider IGCC after the Permit application has been fully reviewed and the Permit validly issued.

3. *Analysis Under the Endangered Species Act ("ESA").* The Permit was issued with an express condition that Plant construction could not commence until completion of consultation required under the ESA. Initial analysis from the Fish and Wildlife Service indicates that Plant emissions "may" impact wildlife, which EPA now says increases "the likelihood that the ESA consultation will lead to an amendment to the permit application or a modification of the PSD permit." Motion at 10. As such EPA wishes to conduct the analysis now because it anticipates that there will be amendments to the Permit, though there is no certainty that once the analysis is completed any amendments will be required.

Pursuant to Section I of the Permit, the Permit will "become invalid if: 1) construction is not commenced ...within 18 months after the approval takes effect." Further, construction cannot commence until EPA notifies DREC that it has satisfied its consultation obligations under section 7(a)(2) of the ESA. *See* Section II(A) of the Permit. EPA need not remand the Permit for further review under the ESA. The Permit already clearly provides that until the ESA analysis is completed construction cannot begin, and construction must begin with 18 months. Therefore the effective deadline for completing the ESA analysis is 18 months from the issuance of the Permit. If this timeframe is not satisfied the Permit will expire. If amendments are required as a result of the ESA analysis those amendments may be made to the Permit. Remanding the Permit to EPA will do nothing to expedite or streamline the ESA process.

4. *Coordination of BACT and MACT Analysis.* In its Motion EPA further requests that the Permit be remanded so that it may coordinate the BACT and MACT analysis. Nothing requires EPA to coordinate BACT and MACT review. "Although this is not a mandatory

requirement under EPA regulations at this time, federal PSD and section 112(g) regulations do not preclude Region 9 from completing a PSD BACT analysis at the same time as a case-by-case MACT analysis and coordinating these analyses." Motion at 17. Just as EPA is not precluded from coordinating a BACT and MACT analysis neither was it so precluded during the five year review and analysis period of the Permit application. EPA chose not to coordinate this review and was under no obligation to do so.

The reason now given by EPA to support coordination of BACT and MACT review is "to ensure consistency between the two analyses and promote efficiency in permit processes." Motion at 16. However, in the next sentence EPA admits that "there remains uncertainty over the interaction of PSD BACT and case-by-case MACT requirements." Motion at 16. Nonetheless, EPA asserts that there is a likelihood of an overlap between the two analyses and that they should be conducted concurrently. Motion at 16.

EPA is justifying the remand of the Permit based upon its belief that a non-mandatory coordinated review process, of which there remains uncertainty of its effectiveness, "**may** result in changes to a source's design or operational parameters," which "**may** have an effect on the method of emissions control chosen under other programs." *Emphasis added.* Motion at 16. Nothing put forth by EPA in support of the coordinated review process indicates that it will be successful or result in any improved emission controls. To remand the Permit so that EPA may conduct a coordinated review process that is likely to be of any use appears to be dilatory and not as EPA asserts to "save additional time." Motion at 17.

For EPA to now determine that it must conduct a new analysis of BACT and MACT, one that is not required by law and the results of which remain uncertain, once again begs the

question of how will any permit applicant ever have confidence in knowing what it is they must comply with during the permit application process?

5. *Additional Impacts Analysis.* EPA asserts that the additional impacts analysis conducted during the Permit review "relied heavily" on a 1980 EPA document, which provides procedures for screening for the impacts of air pollution on plants, soils and animals. EPA now believes that additional screening is necessary to "strengthen compliance" with the appropriate regulations. Motion at 24. No order of the EAB or EPA decision has rendered the 1980 analysis obsolete or no longer applicable. EPA now merely desires to conduct further analysis based upon its conclusion that the 1980 analysis is not sufficient. As with the IGCC analysis, nothing requires EPA to conduct additional analysis other than what has already been conducted. Remanding the Permit to allow EPA to reconsider its impact analysis when an impact analysis was already completed in compliance with PSD requirements is unnecessary.

III. THIS BOARD SHOULD DENY EPA'S MOTION

A. EPA's Motion Should Be Denied Because It Is In Bad Faith

This Board may refuse EPA's request for remand if it is "frivolous or in bad faith." *SKF* at 1029. If a request for remand is made "for any purpose that might be considered dilatory or vexatious" it may be denied. *Ford* at 374. Remand is permissible "absent the most unusual circumstances verging on bad faith," so long as the agency "believes that its original decision is incorrect on the merits and wishes to change the results." *SKF* at 1029-1030.

The Permit was properly issued after five years of analysis and public comment in strict compliance with the CAA. No evidence of mistake, error, or failure to follow a regulatory procedure is cited by EPA in support of remand. As demonstrated by ACCCE, no evidence has been provided by EPA that would suggest that the original decision to grant the Permit was

incorrect on the merits. EPA has failed to provide a credible basis as to why the Permit should be remanded. Given EPA's extensive efforts to defend the Permit until recently, and the lack of basis to support remand, EPA's request for remand should be rejected as it is made in bad faith.

The extensive permit application and review process, carried out under the requirements of the CAA, cannot be undone by administrative fiat as the EPA seems to think. The EPA is seeking to erase the prior Administration's final, properly issued Permit merely to suit the new Administration's view on environmental policy. ACCCE recognizes that new federal agency officials have a degree of discretion to change policy; however, they must do so in accordance with the law.

The proper thing is for this Board to continue its consideration of the Petition for Review. After this Board's careful consideration of the record and each of the parties comments it will be in a position to determine whether the Permit was properly issued. If the Permit is remanded now, prior to this Board's consideration of the Permit, it will almost certainly guarantee that the Permit will languish for years to come while an entirely new review process is completed. EPA asserts that granting the Motion will result in streamlining the review process. Motion at 17. Nothing could further from the truth. Assuming that after the second permit review process EPA issues a new permit, it is almost guaranteed that a petition for review will be filed and the permit will be before this Board again. What advantage do any of the parties to this matter gain in postponing this Board's review of the Permit? Unless it is the intent of EPA to deny the issuance of the Permit without ever having this Board consider the Permit, no advantage exists in granting the Motion.

If EPA is correct and the Permit requires additional review before it is issued, then this Board is more than qualified to review the Permit and determine whether the issues raised by EPA and the Petitioners should lawfully result in a remand of the Permit.

IV. GRANTING THE MOTION WILL CAUSE HARM TO ACCCE'S MEMBERS

Through its Motion, EPA seeks to establish new grounds under which it, or any State PSD program may reconsider permit applications that have been recently granted. The effect of this will be to put on hold potentially dozens of projects across the nation that are preparing to commence, have commenced, or recently completed the extensive PSD permitting process, just to be faced with starting that process essentially anew. Further, granting the Motion would set the precedent that EPA may, after this Board has granted or denied a petition for review, assert new issues that EPA believes require a permit to be remanded. The result will be to give EPA carte blanche authority to remand a PSD permit at any time. Notwithstanding the fact that no regulation, statute or case can be interpreted to support such a result.

ACCCE's members include those who are 1) either currently in the PSD permitting process; 2) have recently been issued PSD permits; 3) or those who will be applying for PSD permits in the future. Certainty in the permitting process is vital to these ACCCE members. Granting EPA's Motion will cause substantial disorder and uncertainty with the permitting process. Permit applicants will be faced with not knowing what policies EPA will apply in the permitting process, since EPA could add or change the standards of review at anytime. "To require the industry to proceed without knowing whether the [regulation] is valid would impose a palpable and considerable hardship on the utilities, and may ultimately work harm on the citizens." *Pacific Gas & Electric Co. v. State Energy Resources Cons. and Dev. Comm.*, 461 U.S. 190, 201-202 (1983).

Permit applicants will risk having a permit remanded after it has gone through a thorough review process and then placing it before this Board for review. Such uncertainty as to whether a PSD permit will ever be issued will result in some projects never moving forward and for those that do, a substantial increase in the cost and time that it will take to obtain a PSD

permit. As noted in *Sayles Hydro Associates v. Maughan*, 985 F.2d 451, 454 (9th Cir. 1992), it is the process that results in hardship to permit applicants.

> "The hardship is the process itself. Process costs money. If a federal licensee must spend years attempting to satisfy an elaborate, shifting array of state procedural requirements, then he must borrow a fortune to pay lawyers, economists, accountants, archaeologists, historians, engineers, recreational consultants, environmental consultants, biologists and others, with no revenue, no near-term prospect of revenue, and no certainty that there ever will be revenue." "Undue process may impose cost and uncertainty sufficient to thwart the federal determination that a power project should proceed." *Id.*

If EPA's Motion is granted, the PSD permit application will become that much more burdensome and costly, resulting in harm to applicants.

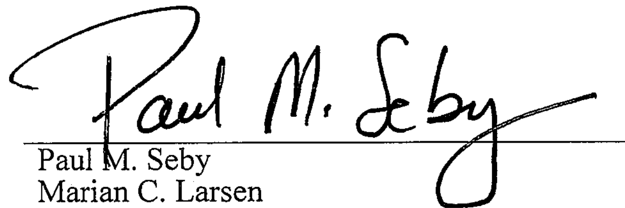
This Board should consider carefully the disruptive consequences associated with EPA's Motion. When an agency seeks to vacate a rule, the reviewing court must consider "the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and disruptive consequences of an interim change." *International Union, United Mine Workers v. Federal Mine Safety & Health Adm.*, 920 F.2d 960, 967 (D.C. Cir. 1990). That same logic applies here. EPA has failed to establish that there are any serious deficiencies with the Permit as issued. Nothing that EPA has put forth requires the Permit be remanded for further review. However, the disruptive consequences that will result if the Permit is remanded are great.

V. CONCLUSION

The time when EPA was to have considered the additional factors set forth in its Motion has long passed. The Regional Administrator had the opportunity during the permitting process to require consideration of these additional factors and failed to do so. The Regional Administrator had 30 days from the issuance of the Permit to reconsider the Permit, but failed to do so. 40 C.F.R. §124.19(d). The Regional Administrator had up until this Board accepted or rejected the Petitions for Review to withdraw the Permit, but failed to do so. The Regional Administrator has no authority to now ask the EAB to allow the Permit to be remanded to the EPA for further review.

For these reasons the Board should deny EPA's Motion.

Respectfully submitted this 10th day of June, 2009



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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **AMERICAN COALITION FOR CLEAN COAL ELECTRICITY'S BRIEF IN OPPOSITION TO EPA REGION 9'S MOTION FOR VOLUNTARY REMAND** in the matter of Desert Rock Energy Company, LLC, PSD Appeal Nos. 08-03, 08-04, 08-05 & 08-06, were sent this 10th day of June via First Class Mail to the following persons:

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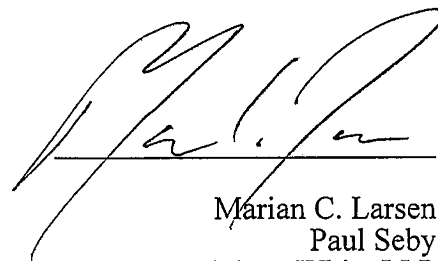

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