

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)		
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**CONSERVATION PETITIONERS' RESPONSE IN SUPPORT
OF ENVIRONMENTAL PROTECTION AGENCY'S MOTION
FOR VOLUNTARY REMAND**

Petitioners Center for Biological Diversity ("CBD"), Diné Care, Environmental Defense Fund, Grand Canyon Trust, Natural Resources Defense Council, San Juan Citizens Alliance, Sierra Club and WildEarth Guardians (collectively "Conservation Petitioners") hereby file this response in support of the Environmental Protection Agency's ("EPA") Motion for Voluntary Remand ("Remand Motion"). Conservation Petitioners request that the Environmental Appeals Board ("EAB") **GRANT** EPA's Remand Motion. As will be shown below, EAB has regularly granted such voluntary remands and should do so in deference to EPA's broad discretion regarding Prevention of Significant Deterioration ("PSD") permits. Moreover, the harm to Desert Rock Energy Company L.L.C. ("DREC") will be minimal.

BACKGROUND

As late as 2008, a number of deficiencies remained with DREC's 2004 PSD permit application including but not limited to, the failure to complete Section 7 consultation under the Endangered Species Act ("ESA") and failure to obtain a Clean Air Act Section 112(g) maximum achievable control technology ("MACT") approval for emission of hazardous air

pollutants. EPA's Remand Motion, pp. 4-5. To date, ESA Section 7 consultation is not complete and DREC has yet to even submit a Section 112(g) MACT analysis for approval. Id.

Nonetheless, in 2008 DREC brought suit against EPA alleging that EPA had failed to timely issue or deny DREC's PSD permit. Administrative Record ("AR") at Document 98. DREC sought to force EPA to issue a PSD permit before all permitting requirements had been completed. DREC and EPA entered into a settlement agreement wherein EPA agreed to act on the permit application by July 31, 2008. See attached copy of agreement. Conservation groups filed comments objecting to the settlement agreement and moved to intervene in the litigation. On July 31, 2008, EPA issued a PSD permit to DREC without waiting for the court to rule on the intervention request or for the court to enter the settlement agreement. Conservation Petitioners' Petition for Review, Exhibit 1; AR at Document 122 (the "Permit"). The Permit terms acknowledge that ESA Section 7 consultation was not complete and as a result specifically provide "EPA shall have the power to reopen and amend the permit ..." AR at Document 122, p. 2, ¶ 2.A. The Permit also failed to include a CAA Section 112(g) MACT approval. Id. Therefore, the Permit also provides: "[t]his PSD permit does not relieve the Permittee from the responsibility to comply with any other applicable provision of the Clean Air Act and other federal requirements." Id. at p.1. Finally, the PSD permit clearly states that the permit will not become effective in the event a petition for review is filed with the EAB. Id. Conservation Petitioners filed a timely Petition for Review on August 13, 2008. On September 2, 2008, CBD filed its petition for review of the Permit.

On January 7, 2009, prior to completion of briefing before the EAB and prior to the EAB accepting review, EPA, on the authority of 40 C.F.R. § 124.19(d), filed a Notice of

Partial Withdrawal of Permit relating to regulation of carbon dioxide (“CO₂”) and other greenhouse gases. EPA based its partial withdrawal of the Permit on the EAB’s decision in Deseret Electric Power Cooperative, PSD Appeal No. 07-03, regarding the need to regulate greenhouse gas emissions under the PSD provisions of the CAA. DREC did not oppose EPA’s action. In January 2009, EPA proposed a new justification for its failure to regulate DREC’s CO₂ emissions, relying entirely on an “interpretive rule” that former EPA Administrator Johnson issued in December 2008, which has been challenged in the D.C. Circuit. Conservation Petitioners and others submitted comprehensive comments on EPA’s new proposed statement of basis, raising detailed legal, factual, and policy issues. EPA’s remand decision regarding regulation of greenhouse gas emissions at the Desert Rock facility is pending.

On January 22, 2009, the EAB granted review of all issues raised by Conservation Petitioners and stayed consideration of the greenhouse gas related issues that the Region had already withdrawn. In granting the stay of the Deseret greenhouse gas issues, the EAB noted a stay was appropriate given that “the carbon dioxide issue could possibly impact other issues [in the Permit] as well.” January 22, 2009 Order, fn. 3. In its January 22, 2009 order, the EAB also stated that the “order is not intended to be an adjudication on the merits of any of the issues raised in the Petitions or Supplemental Briefs.” January 22, 2009 Order, fn. 1.

On April 27, 2009, in lieu of a Reply brief, EPA filed a Motion for Voluntary Remand (“Remand Motion”) asking that all remaining portions of the Permit be remanded to the EPA for further review. The Remand Motion states that the “Administrator’s office...requested that Region 9 reconsider several parts of its permitting decision...” Remand Motion, p. 1. The Remand Motion contains a detailed explanation of the bases for

remand, including:

(1) the EPA Administrator has recently granted a stay of a rule relied on by the Region as the basis for its finding that DREC met its burden to show that the proposed Desert Rock Energy Project will not cause or contribute to a violation of the National Ambient Air Quality Standard for PM 2.5 (EPA's Remand Motion, p. 8 and Exhibit A);

(2) concerns have been recently expressed by the United States Fish and Wildlife Service to Region 9 regarding affects of the proposed plant's mercury emissions on the endangered Colorado Pike Minnow, id. at 9-15, the need to engage in full consultation regarding effects on listed species and their habitat and the desirability of completing Section 7 consultation in order to avoid amending the Permit after action by the EAB;

(3) the need to coordinate the PSD review for the plant with the required case by case MACT analysis under Section 112(g) of the Clean Air Act, id. at 15-17;

(4) the need to consider further whether Integrated Gasification Combined Cycle Technology should be evaluated through BACT analysis for the facility, id. at 18-23;

(5) the need to consider site-specific concerns more carefully to ensure the Permit complies with additional impact analysis requirements of 40 C.F.R. 52.21(o), id. at 23-25.

Finally, EPA still needs to render its final permitting decision regarding regulation of greenhouse gas emissions, which the EAB has acknowledged may impact other provisions of

the Permit and which will then also be subject to EAB review.

ARGUMENT

I. EAB HAS BROAD DISCRETION TO GRANT EPA'S MOTION FOR VOLUNTARY REMAND.

The EAB is a "board within [the] Agency" of EPA. 40 C.F.R. § 124.2. Therefore, matters pending before the EAB remain EPA administrative proceedings. When a petition for review is filed with the EAB, final agency action does not occur until all administrative processes, including the EAB review process, are exhausted. 40 C.F.R. § 124.19(f)(1). Exhaustion occurs when the EAB enters a final decision with regard to the appeal. 40 C.F.R. § 124.19(f)(1). Only after completion of the appeal may "[a] final permit decision" be "issued by the Regional Administrator," which must thereafter be "promptly published in the Federal Register." 40 C.F.R. § 124.19(1)-(2).¹

Until the Board has made a final determination on a permit appeal, it has broad discretion within the administrative review process to remand permits, allow the Region to withdraw all or part of a permit, or to refer permit appeals to the Administrator. Nothing in either the Clean Air Act or EPA's implementing regulations compel the EAB to itself resolve all contested issues in a PSD permit appeal once review has been granted.

EPA's regulations provide that the Region may, as a matter of right, withdraw a permit or individual permit conditions "and prepare a new draft permit . . . addressing the portions . . . withdrawn." 40 C.F.R. § 124.19(d). See also In re San Jacinto River Authority, 2008 WL 869683, NPDES Permit Appeal 07-19 (March 28, 2009). While such withdrawals appear to be available as a matter of right only prior to a grant of review, nothing in the

¹ No permit applicant, including DREC, may reasonably rely on the terms of a permit as reflecting the final determination of the Agency until the entire administrative process is complete and a final permit has been issued.

EPA's regulations or in prior EAB caselaw restrict the Board's discretion to allow withdrawal of a permit (in whole or in part) after review has been granted. In fact, section 124.19(d) itself evidences a strong regulatory preference for allowing the permit authority broad discretion to reconsider permit decisions – eliminating the Board's discretion to disallow withdrawal “at any time prior to the rendering of a decision” by the Board to grant review. It would be contrary to this clear regulatory preference for the Board to interpret EPA's regulation as preventing the Board from allowing remand after review has been granted.²

The Board has also granted voluntary remand where the permitting authority requests such remand in order to “reconsider comments that had been provided by Petitioners.” In re NE Hub Partners, 7 E.A.D. 561 (EAB 1998). See also In re GMC Delco Remy, 7 E.A.D. 136 (EAB 1997) (granting a voluntary remand to add additional provision to a RCRA permit). This precedent is consistent with the general preference for resolution of critical policy issues at the level of the permitting authority. In fact, the Board has repeatedly cautioned that the administrative review process should be “guided by the preamble to the part 124 permitting regulations, which states that the Board's power of review ‘should be only sparingly exercised.’” In re Dominion Energy Brayton Point, 2007 WL 3324213, NPDES Appeal No. 07-01 (Sept. 27, 2007) (quoting 45 Fed. Reg. 33,290, 33,412 (May 19, 1980)); accord In re Teck Cominco Alaska, Inc., 11 E.A.D. 457, 472 (EAB 2004). “Agency

² Moreover, in this case there is no practical difference or impact in the 3-month time span between EPA's partial withdrawal of the Permit before the order for review and now. There have been no significant events between January 2009 and April 2009. DREC still has not submitted its CAA Section 112(g) approval and ESA consultation has not been completed. The fact that EAB granted review on January 22, 2009 has had no practical effect on whether EPA's current Remand Motion should be granted or denied.

policy favors final adjudication of most permits at the regional level.” 45 Fed. Reg. at 33,412; see also In re Carlota Copper Company, 11 E.A.D. 692, 708 (EAB 2004); Teck Cominco, 11 E.A.D. at 472. Indeed, the Board has not traditionally viewed itself as primarily a policy-making body, and typically defers to the Region and responsible program offices to guide Agency policy within permissible limits.

While the Administrator of the EPA has delegated the authority to EAB to review PSD permit decisions, 40 C.F.R. § 27.48, this “delegation does not preclude the Environmental Appeals Board from referring an appeal or motion under this subpart to the Administrator when the Environmental Appeals Board, in its discretion, deems it appropriate to do so.” Id. This language strongly suggests that until a final decision is entered on a permit appeal, the EAB has broad discretion to refer or remand issues of permit terms and conditions to the EPA for resolution. For example, the EAB found that the agency has discretion to remand permit conditions for reconsideration in light of changed legal requirements. See In re Dominion Energy Brayton Point, L.L.C., 12 E.A.D. 490, 616 and 618 (Feb. 1, 2006) (“[o]n administrative review, the Agency has the discretion to remand permit conditions for reconsideration in light of legal requirements that change before the permit becomes final agency action.”) (citing In the Matter of J & L Specialty Products Corp., 5 E.A.D. 31, 66 (Feb. 2, 1994)). In J & L Specialty Products, the Board remanded a permit condition for the agency to consider changes to effluent limitations applicable to NPDES permits.

In this matter, portions of the Permit have already been withdrawn by the EPA under its authority in 40 C.F.R. § 124.19(c). While the EAB has accepted the matter for review, it is still within the EAB’s discretion to remand the entirety of the permit to the agency for

further consideration and, as set forth below, it is appropriate for the EAB to do so.

II. THE EAB SHOULD GRANT EPA'S MOTION FOR VOLUNTARY REMAND.

A. It Is Appropriate for the EAB to Defer to EPA's Policy Judgments and Assessment of the Need for Further Consideration.

As set forth above, absent extraordinary circumstances, the Board generally defers to EPA's remand requests, consistent with the fundamental principle that "most permit conditions should be finally determined at the Regional level." See, 45 Fed. Reg. 33,390, 33,412 (May 19, 1980). See also EAB Practice Manual, pp. 39-40. A review of EAB case law shows that the EAB can and should exercise its discretion to generally defer to EPA's request for remand of a PSD permit prior to the issuance of a final decision by EAB in a permit appeal. See In re Indeck-Elwood, L.L.C., PSD No. 03-04 (May 20, 2004) Order Denying Respondent's Motion for Voluntary Partial Remand and Petitioners' Cross Motion for Complete Remand, and Staying the Board's Decision on the Petition for Review), slip op. at 5 (citing In re NE Hub Partners, L.P., 7 E.A.D. 561, 563, n.14 (EAB 1998), and In re GMC Delco Remy, 7 E.A.D. 136, 154, 167 (EAB 1997)).

In Indeck-Elwood, the EAB noted that voluntary remand is "generally available where the permitting authority has decided to make a substantive change to one or more permit conditions, or otherwise wishes to reconsider some element of the permit decision before issuing the permit." Id. at p. 6. This makes complete sense in that the reason for the administrative appeal process (as opposed to proceeding immediately to judicial review) is to catch impermissible or imprudent or not-fully-formed decisions during the internal agency process. In the face of the role of the agency and the administrative process, it would be inconsistent with its purpose and mission for the EAB to unnecessarily limit voluntary remand during the administrative review process where the agency, as here, has become

convinced that a permit was wrongly or prematurely issued. Moreover, as a matter of agency decision-making, critical issues of environmental policy, for example regarding greenhouse gases, MACT, and PM_{2.5}, are best left to the region and program offices to sort through.

In this case, EPA has detailed sound reasons for its request for remand of the Permit, including changes in EPA regulations, changes in policy, and new technical information. EPA's reasons for requesting a voluntary remand are stated with particularity, are consistent with the terms of the Permit and are within EPA's mission and discretion. Therefore the Board should give deference to EPA's request for voluntary remand and grant the motion.

B. Granting EPA's Remand Motion Will Foster Administrative and Judicial Economy.

As noted above, the EPA has already withdrawn a portion of the Permit relating to regulation of greenhouse gases. DREC did not oppose the partial withdrawal of the Permit. The EAB has recognized that EPA's final determination on the withdrawn portion relating to regulation of greenhouse gas could impact other issues in the Permit as well. The EAB has discretion to manage its docket to ensure judicial economy and efficiency. Granting EPA's Remand Motion is in the interest of administrative agency economy and efficiency because it will allow EPA to address all outstanding issues and potential deficiencies with the Permit at one time, rather than through potentially multiple proceedings leading to separate and distinct petitions for review on various provisions of the permit over an extended period of time. For the same reasons, EPA's Remand Motion is also in the interest of administrative/adjudicative economy for both the permitting office and the EAB. Granting EPA's Remand Motion will allow the agency to issue a single remand determination and thus avoid multiple appeals being filed before the EAB on the same PSD permit.

C. The Terms of the Permit Allow EPA to Reopen and Amend the Permit Making Any Claimed Harm to DREC From Remand and Reconsideration, Minimal to Nonexistent.

As noted above, DREC's lawsuit pressured EPA to issue the Permit prior to completion of all project requirements and legal approvals. On the date EPA issued the Permit, the ESA Section 7 consultation was not complete and EPA had not issued a CAA Section 112(g) approval for emission of hazardous air pollutants. In fact, DREC still has not submitted an application under Section 112(g). See Remand Motion, p. 5.

As a result, EPA reserved the right to change the permit, providing within the Permit itself that "EPA shall have the power to reopen and amend the permit ...", something EPA could clearly do before the Permit becomes final. DREC did not appeal this provision of the permit. The status of DREC's project has always been dependent upon completion of some of the things EPA now wishes to fully consider and include in the Permit prior to final issuance. Therefore, any harm that DREC may claim from EPA's request to withdraw and reconsider the Permit are minimal to nonexistent. Rather, remand may be more efficient, not just for the EAB and EPA, but for DREC as well, avoiding a piecemeal approach to permitting and piecemeal appeals that could take even longer to resolve.³ It is in fact far more efficient for all the parties that EPA be given the opportunity to fully assess and reconsider the Permit in light of the developments in this case and developments in EPA policy and rules.

³ It is further worth noting that while a final PSD permit would normally provide approval to construct under the PSD provision of the CAA, construction on the Desert Rock facility may not, in fact, proceed until DREC applies for and obtains a final and effective MACT determination under section 112(g). Therefore, a remand of the PSD permit will have no immediate practical affect on DREC's ability to begin construction of the proposed plant.

III. EVEN IF THE CASE LAW CITED BY DREC IS FOUND APPLICABLE, REMAND IS APPROPRIATE.

The case-law analysis set forth in earlier filings by DREC is not applicable here. As argued above, this matter is still within the agency and as such, remand is and should be more freely given in order to flesh out problems or completeness issues with the permit prior to final issuance and potential judicial review. Once an agency decision has reached the judicial review stage, there may be a higher bar for granting a voluntary remand based on the expectation that the responsible agency has already resolved the key legal and policy issues during the administrative process. In fact, it is at this stage – during administrative review – that EPA should resolve complicated question of agency policy and program implementation. Administrative review and remand is fundamentally different than judicial review. Once a permit does finally enter the judicial review stage, the case law cited by DREC may be a more appropriate measure.

Nonetheless, even if the EAB were to apply the cases cited by DREC in earlier filings, it is clear that remand is proper in this case. Even at the judicial stage, it is undisputed that administrative agencies have inherent power to reconsider their decisions and are generally entitled to voluntary remand to reconsider positions whenever the agency has a substantial and legitimate concern regarding a permit or decision. See, e.g., Citizens Against Pellissippi Parkway Extension, Inc. v. Mineta, 375 F.3d 412, 416 (6th Cir. 2004); Sierra Club v. Van Antwerp, 560 F. Supp. 2d 21, 23 (D.D.C. 2008). See also Nucor Corp. v. U.S., ___ F. Supp. 2d ___, 2009 WL 762357 (CIT 2009). An agency “must be allowed to assess ‘the wisdom of its policy on a continuing basis’.” Ohio Valley Environmental Coalition v. Aracoma Coal Co., 556 F.3d 177, 215 (4th Cir. 2009) (cites omitted). In situations where, as here, the agency requests voluntary remand because it believes that its original decision may

have been incorrect and/or incomplete on the merits, courts will allow remand to correct simple errors. SKF U.S.A., Inc. v. United States, 254 F.3d 1022, 1028 (Fed. Cir. 2001).

Where the error is based upon a policy change or specific policy interpretation, a court will defer to the agency and allow remand where the agency policy is clearly within the agency's discretion under the statute in question. SKF U.S.A., Inc., 254 F.3d at 1030. Finally, if the remand is because of intervening events outside the agency's control, remand is generally considered required if the intervening event would affect the validity of the agency action.


Id.


In this case, EPA's reconsideration of the Permit fully falls within its discretion and obligations under the Clean Air Act and the Endangered Species Act. The policy changes discussed in EPA's Remand Motion go directly to EPA's obligations and authorities to regulate and control air pollutants in PSD permits. The decision to complete Section 7 consultation is a primary obligation of all federal agencies under the ESA. Furthermore, some of the changed circumstances, for example the situation with respect to the U.S. Fish and Wildlife's findings relative to the Colorado Pikeminnow, are beyond EPA's control and the outcome could affect the validity of the Permit if the Permit failed to include any suggested mitigation measures. Finally, EPA's request for remand is clearly not frivolous or interposed as last-minute delay. EPA has set forth legitimate policy and factual considerations warranting reconsideration of the Permit, some of which (such as the MACT and Section 7 consultation issues) must be addressed in any event. If anything, EPA's request is timely and measured in that it will be more efficient and result in fewer delays in the long-term. Therefore, even if the EAB were to apply the more strict judicial approach to remand, it is appropriate to grant EPA's Remand Motion.

CONCLUSION

Conservation Petitioners support EPA's Remand Motion and request that the EAB defer to EPA's request. EPA's request is an appropriate and timely exercise of its discretion under the administrative review process and will result in a more efficient process and better Permit.

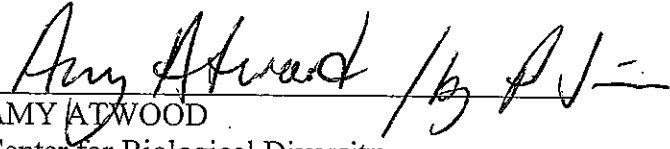
Respectfully submitted this 11th day of June, 2009.

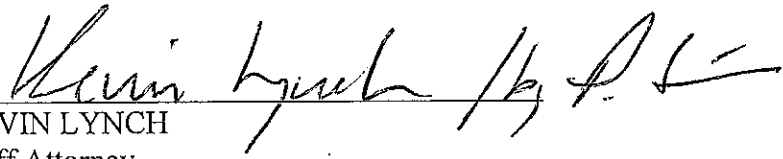

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CERTIFICATE OF SERVICE

On June 11, 2009, a true and correct copy of the following document(s) were served

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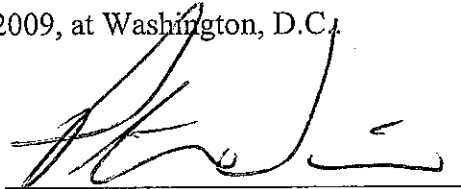
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I, Patrice Simms, declare under penalty of perjury that the foregoing is true and correct. Executed on this 11th day of June, 2009, at Washington, D.C.



Patrice Simms

ATTACHMENT 1

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DESERT ROCK ENERGY COMPANY, LLC and)
THE DINÉ POWER AUTHORITY)

Civ. No. 08-872

Plaintiffs,)

v.)

UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY, *et al.*,)

Defendants.)

CONSENT DECREE

WHEREAS, on March 21, 2008, Plaintiffs Desert Rock Energy Company, LLC and Diné Power Authority (collectively, "Plaintiffs") served upon the United States a Complaint in this action pursuant to section 304(a) of the Clean Air Act ("CAA"), 42 U.S.C. § 7604(a), alleging that Defendants United States Environmental Protection Agency and Stephen L. Johnson, as Administrator of the United States Environmental Protection Agency (collectively, "EPA") failed to perform a mandatory duty pursuant to CAA § 165(c), 42 U.S.C. § 7475(c), to take action on Plaintiffs' application for a permit to construct a coal-fired power plant on land held by the United States Government in trust for the benefit of the Navajo Nation (the "Permit Application").

WHEREAS, Plaintiffs and EPA (each, a "Party," and collectively "the Parties") wish to effectuate a settlement of the above-captioned matter without expensive and protracted litigation;

WHEREAS, the Parties consider this Decree to be an adequate and equitable resolution of the claims in the above-captioned matter;

WHEREAS, the Court, by entering this Decree, finds that the Decree is fair, reasonable, in the public interest, and consistent with the CAA, 42 U.S.C. §§ 7401 et seq.;

NOW THEREFORE, before the taking of testimony, without trial or determination of any issue of fact or law, and upon the consent of the Parties, it is hereby ORDERED, ADJUDGED and DECREED that:

1. This Court has subject matter jurisdiction over the claims set forth in the Complaint and to order the relief contained in this Decree. This Court has personal jurisdiction over the parties, and venue is proper in the United States District Court for the Southern District of Texas.

2. On or before July 31, 2008, EPA shall issue a final permit decision on the Permit Application, within the meaning of 40 C.F.R. § 124.15(a).

3. The Parties agree and acknowledge that before this Decree may be finalized and entered by the Court, EPA must provide notice in the Federal Register and an opportunity for public comment pursuant to Clean Air Act section 113(g), 42 U.S.C. § 7413(g) ("Section 113(g)"). After the EPA has provided the opportunity for comment on this Decree as required by Section 113(g), the Administrator of EPA and/or the Attorney General, as appropriate, shall promptly consider any such written comments in determining whether to withdraw or withhold his consent to the Decree, in accordance with Section 113(g). If the federal government elects not to withdraw or withhold consent to this Decree pursuant to the criteria set forth in Section 113(g), the Parties shall promptly file a motion that requests the Court to enter this Decree.

4. Any provision of this Decree may be modified by (a) written stipulation of the Parties with notice to the Court, or (b) by the Court following motion of any Party to this Decree, pursuant to the Federal Rules of Civil Procedure, and upon consideration of any response by the non-moving Party.

5. Plaintiffs and EPA shall not challenge the terms of this Decree or this Courts jurisdiction to enter and enforce this Decree. Upon entry, no Party shall challenge the terms of this Decree.

6. Nothing in this Decree shall be construed to limit or modify any discretion accorded EPA by the Clean Air Act or by general principles of administrative law in granting or denying the Permit Application. EPA's obligation to perform the action specified in Paragraph 2 by the time specified therein does not constitute a limitation or modification of EPA's discretion within the meaning of this paragraph.

7. Nothing in this Decree shall be construed as an admission of any issue of fact or law nor to waive or limit any claim or defense, on any grounds, related to any action EPA may take pursuant to Paragraph 2 above.

8. Nothing in this Decree shall be construed to confer upon the district court jurisdiction to review any action taken by EPA pursuant to this Decree. Nothing in this Decree shall be construed to confer upon the district court jurisdiction to review any issues that are within the exclusive jurisdiction of the United States Courts of Appeals pursuant to CAA section 307(b)(1), 42 U.S.C. § 7607(b)(1). Nothing in the terms of this Decree shall be construed to waive any remedies or defenses the Parties may have under CAA Section 307(b)(1), 42 U.S.C. § 7607(b)(1). Nothing in this Decree shall be construed to limit any person's right to petition the

EPA Environmental Appeals Board to review the Agency's action with respect to the Permit Application under 40 C.F.R. § 124.19.

9. The obligations imposed upon EPA under this Decree can only be undertaken using appropriated funds. No provision of this Decree shall be interpreted as or constitute a commitment or requirement that EPA obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable federal statute.

10. Any notices required or provided for by this Decree shall be made in writing and sent to the following:

For Plaintiffs:

JEFFREY R. HOLMSTEAD
Bracewell & Giuliani LLP
2000 K St. NW, Suite 500
Washington, DC 20006-1782
(202) 828-5852

DOUGLAS C. MacCOURT
Ater Wynne LLP
222 S.W. Columbia St., Suite 1800
Portland, OR 97201-6618
(503) 226-8672

For Defendant:

DAVID GUNTER
United States Department of Justice
Environmental Defense Section
P.O. Box 23986
Washington, D.C. 20026-3986
(202) 514-3785

BRIAN DOSTER
U.S. Environmental Protection Agency
Office of General Counsel
1200 Pennsylvania Ave., N.W.
Washington, DC 20460
(202) 564-1932

11. The deadline for filing a motion for costs of litigation (including attorneys' fees) for activities performed prior to the entry of this Decree shall be 120 days after entry of this Decree by the Court. Prior to the filing of any motion for costs of litigation (including attorneys' fees) pursuant to 42 U.S.C. § 7604(d), the Parties shall seek to resolve informally any such claim. The Court shall retain jurisdiction to resolve any request for costs of litigation (including attorneys' fees), notwithstanding any dismissal pursuant to Paragraph 13 of this Decree.

12. The Court shall retain jurisdiction to determine and effectuate compliance with this Decree, including jurisdiction over any claim for costs of litigation (including attorneys' fees) that Plaintiffs may incur in seeking to enforce the terms of this Decree.

13. When EPA's obligation under Paragraph 2 has been completed, the case shall be dismissed. EPA shall file the appropriate notice with the Court so that the Clerk may close the file. This dismissal shall be with prejudice with respect to the final permit decision described in Paragraph 2. No Plaintiff shall file a complaint alleging that 42 U.S.C. § 7475(c) requires additional action with respect to the Permit Application, including the completion of the procedures described in 40 C.F.R. § 124.19, before 210 days have elapsed from the date this Consent Decree becomes effective. EPA expressly preserves any available defenses to such a claim, including the defense that EPA's performance of the obligation stated in Paragraph 2 of this Consent Decree constitutes full performance of its statutory duty under 42 U.S.C. § 7475(c) with respect to the Permit Application.

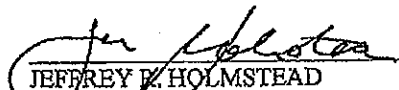
14. The undersigned representatives of each Party certify that they are fully authorized by the Party they represent to bind that Party to the terms of this Decree.

SO ORDERED on this ____ day of _____, 2008.

HON. MELINDA HARMON
UNITED STATES DISTRICT JUDGE

SO AGREED:

FOR PLAINTIFFS


JEFFREY E. HOLMSTEAD
Bracewell & Giuliani LLP
2000 K St. NW, Suite 500
Washington, DC 20006-1782
(202) 828-5852

DATED: June 3, 2008

Douglas C. MacCourt

DOUGLAS C. MacCOURT

Ater Wynne LLP

222 S.W. Columbia St., Suite 1800

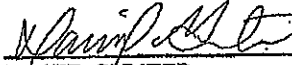
Portland, OR 97201-6618

(503) 226-8672

DATED: *June 3*, 2008

FOR DEFENDANT

RONALD J. TENPAS
Assistant Attorney General
Environment & Natural Resources Division



DAVID GUNTER
United States Department of Justice
Environmental Defense Section
P.O. Box 23986
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DATED: June 3, 2008