

information that merits consideration or would change the permitting decision. Third, the 2007 actual monitored ozone levels are lower than the predicted ozone levels for the monitors modeled in the 2005 NM Demonstration, thereby supporting the conclusion developed through modeling that emissions from the Desert Rock simulated facility would not contribute to the days with the highest ozone levels. As a result, the Petitioners have failed to present any evidence that sufficiently meets the burden of demonstrating that the Region's technical analysis was in error. *Newmont Nevada Energy*, 12 E.A.D. at 449. (In order to meet its heavy burden of obtaining review of a technical issue . . . a party arguing in favor of review must demonstrate why the [permitting authority's] analysis is clearly erroneous.").

In short, even with the new monitoring data, Petitioners have not shown that the emissions from the Desert Rock Project would have a significant impact that would cause or contribute to ozone exceedances – past, present or future. *See Prairie State*, slip. op at 142 (citing Memorandum from Gerald A. Emison, Director, to Thomas J. Maslany, Director, Air Management Division, Regarding Air Quality Analysis for Prevention of Significant Deterioration (PSD) (July 5, 1988) (affirming EPA guidance that a PSD permit may be granted if it is not demonstrated that the proposed source's impact is not "significant" in a spatial and temporal sense")). For these reasons, the Board should deny review of these claims.

1. *A New Ozone Standard is Not Automatically Imposed Upon a PSD Permit Applicant.*

In the past four years, the permit application life of the Desert Rock Project has spanned three ozone standards. The one-hour 125 ppb ozone standard was in effect when Desert Rock submitted the permit application in February 2004. Although EPA revoked the 1-hour ozone standard in 1997, litigation delayed implementation of the stricter 8-hour standard of 80 ppb until

June 15, 2004 two months after Desert Rock submitted its initial application. 69 Fed. Reg. 23,951 (Apr. 30, 2004).

The NM Demonstration included emissions simulating the Desert Rock Project and predicted that San Juan would be in compliance with the 80 ppb 8-hour standard. Then, in June 2007, EPA proposed a revised-"new" 8-hour standard which the Agency finalized as 75 ppb effective May 27, 2008 – two months before EPA issued the final Desert Rock Permit on July 31, 2008. 73 Fed. Reg. 16,436 (Mar. 27, 2008). Although EPA had not yet proposed the new, 75 ppb 8-hour ozone standard in 2004, the NM Demonstration also showed that future ozone episodes would not exceed the 75 ppb level, and as discussed above, that emissions from the proposed Desert Rock Project would not contribute to the highest ozone modeled days. AR 120 at 124-26; NM Demonstration at 7, section 3.3 (predicting that the design value for two ozone monitors in operation in 2004 would not exceed 75 ppb in 2007).

The new 8-hour NAAQS standard is not automatically imposed upon proposed sources applying for a PSD permit. The final rule promulgating the new standard establishes a new ozone standard but does not itself impose the emission limits upon existing or new sources and permits. Instead, the CAA and the implementing rule imposing the new standard requires several regulatory actions to take place before the new standard, and associated emission limits, may be imposed upon existing or proposed sources. *See* 42 U.S.C. § 7407(d)(1)(A) (providing one year for the governor of each state to designate areas as nonattainment); 42 U.S.C. § 7407(d)(1)(B)(i) (allowing EPA no more than two years after the governor's designation to finally promulgate the designations of nonattainment areas); 42 U.S.C. § 7410(a)(1) (providing no more than three years after promulgation of NAAQS to allow states to develop a SIP

infrastructure); 42 U.S.C. § 7502(b) (requiring SIP submittals to EPA no later than three years of final nonattainment designation).

Promulgation of the new 8-hour NAAQS is no exception. EPA's final rule provides the following: the states must submit designation recommendations by March 12, 2009; EPA will promulgate the nonattainment designations no later than March 12, 2011; and EPA will establish deadlines for SIP submittals no later than three years after May 12, 2011. 73 Fed. Reg. at 16,503 (Mar. 27, 2008). Moreover, subsequent to any new NAAQS promulgation, it is EPA's practice to issue guidance and regulations relating to planning, modeling, monitoring and implementation of significant emission rates for incorporation into the PSD permitting programs. *See, e.g.*, 70 Fed. Reg. 71,612, 71,618 (Nov. 29, 2005) (generally describing amendments made to the New Source Review permitting regulations for compliance with the then-effective 8-hour ozone standard of 80 ppb).

NAAQS promulgation does not impose control requirements directly upon a source and halt permitting midstream; rather, the NAAQS are standards that must be achieved through adoption of state implementation plans containing specific control measures based upon the timeframes and requirements established in the CAA. *See* 62 Fed. Reg. 38,651, 38,704 (July 17, 1997) (preamble to 1997 final rule promulgating the NAAQS for PM_{2.5} discussing how controls are imposed to achieve the standard). Should an area be designated as nonattainment, it is the responsibility of the delegated state and/or tribal authority to coordinate to implement control measures necessary and appropriate to meet the applicable NAAQS. 70 Fed. Reg. at 71,618 ("In implementing the [8-hour ozone rule] it is important for both States and Tribes to work together to coordinate planning efforts"); *see also* 42 U.S.C. § 7601(d) (generally allowing EPA to treat Indian tribes as States to meet the requirements of the Clean Air Act).

Based upon the CAA regulatory timelines and implementation requirements, the PSD permitting process is not structured to hold proposed sources hostage to changing standards – particularly when technical data demonstrates that emissions from the proposed project do not "cause or contribute" to the standard in question. In fact, by lifting the statutory "construction ban" previously imposed upon newly designated nonattainment areas that failed to submit a state implementation plan, the 1990 CAA amendments recognize that NSR permitting will continue even when an area is newly designated as nonattainment. *See* 70 Fed. Reg. at 71,673.

Significantly, even situations when a construction ban is imposed such a ban only applies to "major stationary sources of emissions that cause or contribute to" the pollutant or precursor applicable to the designated nonattainment pollutant. 40 C.F.R. § 52.24(d) (emphasis added); *See Prairie State*, slip op. at 139 ("EPA has long interpreted the phrase 'cause, or contribute to' to refer to significant, or non-de minimis, emission contributions."). Therefore, even going to the extreme to apply a statutorily-designated construction ban to the area (a situation which is no longer allowed by the CAA and would not be allowed in the current situation) the proposed Desert Rock Project could be permitted because the NM Demonstration determined that it did not, in fact, cause or contribute to ozone exceedances. AR 120 at 126.

Regardless of the prerequisite regulations that must be in place before NAAQS controls may be imposed upon a source, current regulations also provide that monitoring data alone is not sufficient to make such a determination regarding emission limits – even if the prerequisite NAAQS framework were in place. Appendix W to Part 51 strongly cautions against the use of monitoring data in lieu of modeling to impose emission limitations upon new and existing sources. 40 C.F.R. Pt. 51, App. W, § 10.2.2.a ("Monitoring will normally not be accepted as the sole basis for emission limitation."). If monitoring data is used to establish the appropriate

emission limits for nonattainment SIPs or PSD permitting, there are several considerations that must be addressed such as the adequacy of the network, the established nature of the monitoring network, and whether the data set allows the most important individual source to be identified if more than one source or emission point is involved. *Id.* at 10.2.2.b. This regulatory caution against relying upon monitoring data applies even after an area has been designated nonattainment and EPA has implemented the appropriate new source review provisions applicable to the new standard. These considerations greatly weigh against NGO Petitioners' contention that such monitoring data should be used to halt a proposed project in an area that is currently designated as attainment where the modeling shows that such project will not "cause or contribute to" any potential ozone exceedance.

The NGO Petitioners' argument fails to provide any regulatory basis to remand the proposed permit for consideration of the recent monitoring data. NGO Petitioners' Supp. Br. at 199. As discussed above, appropriate emission limits to achieve the new 8-hour NAAQS may only be determined after EPA promulgates the appropriate implementing regulations. The monitoring data alone does not provide sufficient information to impose appropriate emission limits upon any new or existing source, nor does such monitoring data refute EPA Region 9's assessment based upon the NM Demonstration that the Desert Rock Project will not cause or contribute to an ozone exceedance. AR 120 at 126. Because NGO Petitioners do not satisfy the burden necessary to demonstrate that the EPA Region 9's decision was based upon a clearly erroneous finding of fact or conclusion of law, review should be denied. *See Prairie State*, slip op. at 129 ("We generally accord broad deference to permitting authorities with respect to issues...requiring the exercise of technical judgment and expertise.") (citing *Ash Grove Cement Co.*, 7 E.A.D. 387, 403 (EAB 1997)).

2. *Petitioners' Untimely Submission of Additional Monitoring Data Does Not Provide Substantial New Information that Merits Consideration or Would Change the Permitting Decision.*

In March 2006, the State of New Mexico installed the Navajo Lake monitor referenced in the NGO Petitioners' Supplemental Brief. NGO Petitioners' Supp. Br. at 197-99. There is no evidence, based upon the NM Demonstration, that the Desert Rock Project would have any impact on the higher ozone levels days monitored by Navajo Lake or that stopping the proposed project would in any way remedy the elevated levels.

On June 17, 2008, NGO Petitioners submitted additional comments to EPA Region 9 and provided additional ozone monitoring data for San Juan County, New Mexico. AR 62 at 12 (referencing the spreadsheet "2008.xls" provided on "6-18-08 attachments.zip"). Although EPA Region 9 opted to exercise its discretion and fully responded to Petitioners' late responses to the rulemaking, EPA Region 9 emphasized that "these comments were submitted after the close of the public comment period." AR 121 at 1.

Under EPA's permitting rules, the administrative record for a PSD permit is considered complete on the date the final permit is issued. 40 C.F.R. § 124.18(c). The Board has repeatedly interpreted § 124.18(c) to mean that "the record is closed at the time of permit issuance and that documents submitted subsequent to permit issuance cannot be considered part of the administrative record."⁵³ *In re Keene Wastewater Treatment Plant*, NPDES Appeal No. 07-18, slip op. at 22 (EAB Mar. 19, 2008). Other Board decisions have echoed this principle, pointing out that allowing new substantive issues to be raised after permit issuance "would run contrary to

⁵³ Footnote 5 of New Mexico's motion to supplement the record seeks to cast doubt on this clear principle by making reference to 40 C.F.R. § 124.19(f)(1)'s definition of "final" for purposes of judicial review. DI 57. The language of the Board's opinion in *Keene*, however, makes clear that, for purposes of establishing an administrative record, the relevant date of record closure is when the permit is issued by EPA - in this case July 31, 2008. *Keene*, slip op. at 23.

the principle that the administrative record for a permitting decision is complete at the time of permit issuance." *BP Cherry Point*, 12 E.A.D. at 220 n.27 ; *see also Prairie State*, slip op. at 63 (rejecting petitioner's attempt to introduce new evidence as "simply not a sufficient basis for introducing further delay in issuing the Permit at this late stage in the administrative decisionmaking process"); *Dominion Energy*, 12 E.A.D. at 518-19 (refusing to admit into the administrative record items that arrived several hours *after* the permit issued because the "key distinction" "is the time of their submission and not their content"); *In re Gen. Motors Corp.*, 5 E.A.D. 400, 405 (EAB 1994) ("To accept such information would be to invite unlimited attempts by permittees to reopen and supplement the record after the period for submission of comments has expired[.]").

In *Keene*, the Board determined that the Region was not obliged to consider in its permitting analysis oxygen data collected subsequent to permit issuance and therefore declined review of the permit on that ground. *Keene*, slip op. at 23. Likewise, EPA Region 9 is not obliged to consider new data that was generated and submitted by Petitioners subsequent to the issuance of the Desert Rock permit. As it stands, the present motion seeks to reopen the administrative record for the improper purpose of extending the permitting process beyond its necessary limit, as the Board has defined it.

New Mexico attempts to rely on language from the Board's decision in *In re Dominion* as precedent for their attempt to alter the administrative record. New Mexico's Supp. Br. at 51. This reliance is misplaced. As an initial matter, *Dominion* does not stand for the proposition that the Regional Office has the authority to supplement the record *after* it has already made a decision on the permit. *See Dominion*, 12 E.A.D. at 695-96. Rather, in *Dominion*, the Board emphasized that under 40 C.F.R. § 124.17(b), the Region has authority to add new materials to

the administrative record where "new points are raised or new material [is] supplied during the public comment period" *Id.* (citing 40 C.F.R. § 124.17(b)). Petitioners' request to add additional data to the record is simply not analogous to the Region needing to supplement the record in response to comments or materials raised during the public comment process.

Dominion also acknowledges that the Regional Office has discretion to "[r]eopen or extend the comment period" where "data[,] information[,] or arguments submitted during the public comment period . . . appear to raise substantial new questions" *Id.* at 695 (emphasis added). Petitioners' situation does not merit reopening or extending the comment period because their comments were not submitted during the comment period. *Id.*; *see also Prairie State*, slip op. at 65 n.52 (noting that "[b]y extending the permit issuer's discretionary authority to reopen the public comment period in such circumstances, we do not alter the requirement that commenters 'must raise all reasonable and ascertainable issues and submit all reasonably available arguments supporting their position by the close of the comment period.'" (quoting *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 585 (EAB 1998))).

The PSD permit issued by EPA Region 9 should not be remanded to reopen the public comment period simply because Petitioners have located new information they believe supports their original comments. As explained above, the administrative record in this matter is closed. As New Mexico acknowledges, the standard for reopening public comment periods and permitting records is extremely high. *See, e.g., State of New Mexico's Supp. Br.* at 4. The Board in *Keene* articulated that standard as requiring that "new data, information, or arguments 'appear to raise substantial new questions' about a permitting analysis that the permit issuer should, in its discretion, choose to hear." *Keene*, slip op. at 23 (emphasis added) (citing *Prairie State*, slip op. at 65-66 n.51-52). In the instant case, the issue of the Desert Rock facility's impact

on ozone levels in the area is certainly not a "substantial new question," as the issue was addressed at length in the permitting process and in the administrative record.

The Board has consistently held that "permitting authorities are under no obligation to consider comments received after the close of the public comment period." *Steel Dynamics*, 9 E.A.D. at 194 n.32. As the Board stated in *Keene*, and Petitioners remind us, "it is an exceptional case in which data developed after the issuance of a final permit will be deemed substantial enough to warrant a reopening of the permitting record." *Keene*, slip op. at 23. The Board cited as justification for this extremely high standard the very danger posed by New Mexico's present motion: "that the permitting processes provided under existing statutory and regulatory authorities might never be brought to an end." *Id.* The permit process for the Desert Rock facility has already been underway for almost five years⁵⁴ and must come to an end. When the record validates the permitting authority's decision to issue a permit, it is unreasonable to subject the applicant to an unnecessary delay. *In re Carlota Copper Co.*, 11 E.A.D. 692, 786 (EAB 2004).

The Board in *Keene* went on to deny review of the wastewater discharge permit and the request that the public comment period be reopened. The Board noted that the city had failed to seek admittance of its data until the reply stage of the appeal proceedings, while the Region had chosen in its discretion "not to reach beyond the time parameters of the permitting process," and that the Region could not be faulted for its choice. *Keene*, slip op. at 24. The matter before the Board is indistinguishable from *Keene* in this respect. EPA Region 9 gave due consideration to comments submitted by Petitioner and others during the public comment period, even going so

⁵⁴ Desert Rock submitted its initial permit application to EPA in February 2004. AR 6. EPA notified Desert Rock by letter dated May 21, 2004, that the permit application was deemed complete. AR 14.

far as to exercise its discretion to respond to late-filed comments. AR 120 (responding to timely comments); AR 121 (exercising discretion by responding to late filed comments). Petitioners attempt to translate this accommodation of late-filed comments into an indefinite waiver by EPA of its right—indeed, its regulatory imposed duty—to end the comment period. This self-serving interpretation, however, clearly runs counter to the guiding principle of agency deference employed by the Board in its review of permitting decisions.

The fact that EPA elected to respond to these late comments does not waive the threshold requirement of standing because the Board has previously determined that the mere fact that a party's comments are in the Administrative Record is insufficient grounds to establish standing where the comments were not received during the public comment period. *City of Phoenix*, 9 E.A.D. at 531 (explaining that petitioners lacked standing even when the agency had received the comments in advance of the public comment period and those comments were in the record). The Board expressly noted that the use of the word "during" in the title of 40 C.F.R. § 124.13—"Obligation to raise issues and provide information during the public comment period"—"cannot be dismissed as superfluous." *Id.* at 529. Therefore, the Petitioners here were required to file "all reasonably available arguments supporting their position by the close of the public comment period," 40 C.F.R. § 124.13. *See also* 40 C.F.R. § 124.19(a). "[A] litigant cannot simply sit back, fail to make good faith arguments and then, because of developments in the law, raise a completely new challenge." *Christian County*, slip op. at 18 n.21 (quoting *Old Ben Coal Co.*, 62 F.3d at 1007).

New Mexico's reliance on *In re St. Lawrence* is also unavailing. New Mexico's Motion to Supplement to the Record on Appeal at 7. That case involved the challenge of a PSD permit on the basis that the permit issuer had not considered in its analysis an NSPS rule that had been

proposed after the close of the public comment period but *before* the permit's issuance. *In re St. Lawrence County Solid Waste Auth.*, PSD Appeal No. 90-9, slip op. at 1-3 (Adm'r July 27, 1990). As the Board understands, however, a proposed NSPS has immediate legal consequences, since anyone constructing a new plant after the date of proposal must meet the proposed emission limits unless the final NSPS is less stringent. As the Administrator noted in his review of the Agency's permit analysis in that case, the proposed rule would apply retroactively and thereby constituted a preliminary determination by the agency that more stringent limits were "currently achievable." *Id.* at 2. Conversely, here, NGO Petitioners seek to introduce new data generated after the permit's issuance. As Petitioners recognize, such data certainly does not have any immediate legal consequences and does not constitute even a preliminary determination by the agency that nonattainment requirements apply in New Mexico.⁵⁵ Ozone concentrations in the area were fully considered by EPA Region 9 in its Desert Rock PSD permitting decision. Petitioners have not overcome the heavy burden of overcoming the general principle of agency deference afforded to scientific and technical matters. *Keene*, slip op. at 13.

In their efforts to stop or further delay final action on this permit, Petitioners seek to make much of (1) two data points from a newly installed ozone monitor and (2) supposedly "updated" information regarding oil and gas development in the area (development that, in many cases, was specifically authorized by the State of New Mexico, one of the Petitioners). As the administrative record makes clear, before issuing the permit, EPA Region 9 considered substantial amounts of information regarding ozone measurements and emissions of ozone

⁵⁵ The State of New Mexico specifically does not allege "that the area now be treated as a legally designated nonattainment area for purposes of permitting Desert Rock." State of New Mexico's Supp. Br. at 3 n.2.

precursors in the area. Under these circumstances, the Board should not entertain a motion to undermine the fundamental rules regarding the review of an administrative record.

The requirement to raise issues during the public comment period "is not an arbitrary hurdle, placed in the path of potential petitioners simply to make the process of review more difficult; rather, it serves an important function related to the efficiency and integrity of the overall administrative scheme." *BP Cherry Point*, 12 E.A.D. at 219. The rules are intended to "ensure that the permitting authority has the first opportunity to address any objections to the permit, and that the permit process will have some finality." *Id.* (quoting *Sutter*, 8 E.A.D. at 687); *see also Indeck*, slip op. at 58 (noting the efficiency and integrity functions associated with the requirement to raise issues during the public comment period).

Additional information provided to the permitting authority after the close of the comment period which does not raise substantial new questions does not warrant a reopening of the comment period. *Prairie State*, slip op. 140-41. Bringing up facts that do not substantially raise new questions would throw the permitting process into a never-ending cycle of uncertainty driven by the limitless amount of information and data that can be gathered for technical and scientific analysis such as an ozone demonstration. Timely and complete submission of comments provides some finality to the complex PSD permitting process which must coexist with the moving target of environmental law. *See ConocoPhillips.*, slip op. at 50 ("To allow Petitioners to raise this issue at this stage would frustrate the Agency's important policy of ensuring predictability, efficiency, and finality in the permitting process by allowing the permit issuer the opportunity to address objections to the permit in the first instance."). When the record validates the Region's decision to issue a permit, it is unreasonable to subject the applicant to an unnecessary delay. *Carlota Copper*, 11 E.A.D. at 786.

3. *2007 Actual Ozone Levels are Lower than the 2007 Modeled Ozone Levels*

Although the NGO Petitioners' Supplemental Brief provided additional information regarding "new" monitoring data, their Supplemental Brief failed to mention that the monitors modeled in the NM Demonstration are, in fact, still in attainment and that the model actually overpredicted the actual monitored 2007 design value. The ozone 8-hour standard is measured as a three year average of the annual fourth highest daily maximum 8-hour value, this average is referred to as the design value ("DV"). 40 C.F.R. Pt. 51, App. W at 10.1.c (describing how the standard is calculated for the ozone NAAQS.) It is the DV that is measured against the prior 8-hour ozone standard of 80 ppb and the new 8-hour standard of 75 ppb.

As demonstrated by the table below, the data shows that the monitors in operation at the time of the NM Demonstration and modeled in the NM Demonstration actually measure less than the modeled predictions.

	2007 Modeled DV	2007 Monitored DV
Substation	74.37 ppb	72 ppb
Bloomfield	72.49 ppb	69 ppb

As shown above, the modeled 2007 DV for the Substation and Bloomfield monitors was 74.37 ppb and 72.49 ppb, respectively. NM Demonstration at 7, section 3.3; *see also* NM Base and Future Case Modeling, Section 6.2.3 at 6-2, 3. Based upon the New Mexico ozone data listed on the EPA Air Data website, the actual 2007 design value for the same two monitors was 69 ppb for Bloomfield and 72 ppb for Substation.⁵⁶ The accuracy of the NM Demonstration as it relates

⁵⁶ Based upon the average of the fourth highest ozone 8-hour average for 2005, 2006 and 2007, for each monitor, as reported on EPA's Air Data web page, Monitor Values Report for New Mexico, available at <http://www.epa.gov/air/data/repst.html?st~NM~New%20Mexico>.

to the 2007 modeled monitors actual DV values supports the NM Demonstration's corollary finding that emissions from the simulated Desert Rock facility are not linked to causing the ozone days exceeding the standard. AR 120 at 125; NM Growth and Control Strategy Modeling, section 4.2.1 at 34-3. This correlation also refutes the State of New Mexico's argument that there is great disparity between the results of the modeling and the actual monitored data. New Mexico's Supp. Br. at 49-50.

Reliance on a "casual connection" between the proposed facility and ozone levels is not sufficient to demonstrate the Desert Rock Project will "cause or contribute" to an ozone exceedance. *See Old Dominion*, 3 E.A.D. at 787-88 (calling the FLMs' assumption that where air quality related values deteriorated, the addition of other sources of pollution will inevitably cause further damage an "unverified supposition").

When evaluating the NM Demonstration, it is clear that data alone from the Navajo Lake Monitor, recently installed in 2006, does not warrant halting the current permitting process for the Desert Rock Project. The Petitioners simply have nothing to substantiate their argument that emissions from the Desert Rock Project would cause or contribute to ozone exceedances in the area generally or specifically at the Navajo Lake Monitor. For this reason, the Board should deny review of Petitioners' claims regarding ozone modeling.

VIII. THE DESERT ROCK PERMIT COMPLIES WITH EXISTING REQUIREMENTS REGARDING PM_{2.5}.

In 1997, EPA promulgated a NAAQS for PM_{2.5} particulate matter with a diameter of 2.5 microns or less. 62 Fed. Reg. 38,652 (July 18, 1997). Prior to that time, the controlling particulate matter NAAQS was for PM₁₀, which is particulate matter with a diameter of 10

Monitoring data from 2008 was only updated through June 2008 and therefore not included in this analysis.

microns or less. *Id.* at 38,653-54. In October of 1997, EPA issued a guidance document detailing the use of PM₁₀ as a surrogate for PM_{2.5} in PSD areas. *See* AR 120 at 77 (citing AR 120.30, Memorandum from John S. Seitz, Interim Implementation New Source Review Requirements for PM_{2.5} (Oct. 23, 1997)). This memorandum explained that due to technical difficulties with monitoring, estimating, and modeling PM_{2.5} emissions, "EPA believes that PM₁₀ may properly be used as a surrogate for PM_{2.5} in meeting NSR requirements until these difficulties are resolved." *Id.* at 1.

In 2005, EPA provided further guidance regarding the implementation of the nonattainment-NSR provisions for PM_{2.5}. AR 120.31 (Memorandum from Stephen D. Page, Implementation of New Source Review Requirements in PM_{2.5} Nonattainment Areas (Apr. 5, 2005)). This 2005 memorandum from the Director of the Office of Air Quality Planning and Standards to the Regional Offices expressly re-affirmed the Office's 1997 guidance document with respect to PM_{2.5} in PSD areas. *Id.* at 1. EPA clarified that continuing the policy of utilizing PM₁₀ as a surrogate for PM_{2.5} "will effectively mitigate increases in PM_{2.5} emissions and protect air quality because PM_{2.5} is a subset of PM₁₀ emissions." *Id.* at 2. Therefore, "States should assume that a major stationary source's PM₁₀ emissions represent PM_{2.5} emissions." *Id.* However, in this memorandum, EPA cautioned that using the surrogate approach could be overly conservative and adverse to the permittee by noting that "assuming that all of the source's PM₁₀ emissions represent the source's PM_{2.5} emissions could inappropriately trigger nonattainment major NSR for PM_{2.5}." *Id.* at 3. The same could be said for triggering PSD. Hence, EPA noted that "a source may quantify its PM_{2.5} fraction" to avoid such a result. *Id.* (emphasis added). In fact, because there is no specific requirement to perform PM_{2.5} modeling, EPA's modeling guidelines invite individual sources to discuss with the Regional Offices "the most suitable

approach [to estimate the impact of the source] on a case-by-case basis." 40 C.F.R. Part 51, Appendix W at 5.2.2.1c.

On November 1, 2005, EPA issued a proposed rule to implement the PM_{2.5} NAAQS. 70 Fed. Reg. 65,984 (Nov. 1, 2005). The proposal presented three options for the transition period for SIP-approved states covering the time between when "this rule is final until EPA approves a State's PSD program for PM_{2.5}[:]" (1) continue to implement the 1997 guidance by utilizing PM₁₀ as a surrogate for PM_{2.5}, (2) update the 1997 guidance, or (3) allow States to request delegation of the federal PM_{2.5} program. *Id.* at 66,044.

EPA announced its final rule regulating PM_{2.5} in two parts. On April 25, 2007, the first part of the final rule addressed "attainment dates, SIP submittals, [and] reasonable further progress (RFP) requirements, etc." associated with PM_{2.5}. 72 Fed. Reg. 20,586 (Apr. 25, 2007). On May 16, 2008, EPA finalized the remainder of the NSR provisions presented in the proposed rule. 73 Fed. Reg. 28,322, 28,324 (May 16, 2008). One of the provisions of the May 16, 2008 final rule allows sources with pending permit applications to utilize PM₁₀ as a surrogate for PM_{2.5} if the application followed the 1997 surrogate approach, was deemed complete, and had been submitted by July 15, 2008. *Id.* at 28,340. In this rulemaking, EPA clarified that "PM₁₀ will act as an adequate surrogate for PM_{2.5}" for two reasons: (1) PM_{2.5} is a subset of PM₁₀ and (2) the precursors SO₂ and nitrogen dioxide NO_x, are already regulated under the NSR programs. *Id.* at 28,341.

In this case, Desert Rock relied upon conservative national EPA guidance and followed the EPA's surrogate approach in its permit application. EPA Region 9 approved this established approach, and Petitioners now challenge the application of this surrogate approach in Desert Rock's PSD permit.

A. EPA Region 9 Appropriately Determined that Desert Rock's PSD Permit Complies with the Requirements to Utilize PM₁₀ as a Surrogate for PM_{2.5}.

EPA's final rule regulating PM_{2.5} set forth basic criteria to determine whether a source should be grandfathered and allowed to use PM₁₀ as a surrogate. The rule merely requires that the source have been subject to the PM_{2.5} criteria in 40 C.F.R. § 52.21 before July 15, 2008 and that "the owner or operator submitted an application for a permit under this section before that date" consistent with the 1997 policy to use PM₁₀ as a surrogate for PM_{2.5} and that the application was administratively complete. 40 C.F.R. § 52.21(i)(1)(xi).

Desert Rock's permit complies with the grandfathering requirements that enable certain sources to use PM₁₀ as a surrogate for PM_{2.5}. Desert Rock submitted its PSD permit application to EPA on February 22, 2004. AR 6. EPA deemed the application administratively complete on May 21, 2004. AR 14. Without question, Desert Rock's PSD permit was administratively complete well in advance of the July 14, 2008 deadline. As a result, EPA determined that Desert Rock's permit was consistent with the 1997 guidance regarding the use of PM₁₀ as a surrogate. Therefore, EPA appropriately determined that Desert Rock may utilize PM₁₀ as a surrogate for PM_{2.5}. 40 C.F.R. § 52.21(i)(1)(xi). This rationale was specifically included in the administrative record. AR 120 at 77.

B. By Requesting that the EAB Review EPA's Rulemaking, Petitioners Seek Action that is Beyond the Board's Jurisdiction.

NGO Petitioners have improperly objected to the Administrator's decision to continue using the PM₁₀ surrogate policy for sources with completed applications before the effective date of the new rule. While NGO Petitioners are entitled to object to the rulemaking, the EAB is not the appropriate forum to raise such objections because NGO Petitioners are requesting relief that is beyond the Board's delegated authority. 40 C.F.R. § 124.19 (noting that conditions in a final

PSD permit decision may be appealed to the Board). Specifically, NGO Petitioners request that "[t]he Board should rule here that, as implemented in this instance, this approach [of using PM₁₀ as a surrogate for PM_{2.5}] is impermissible." NGO Petitioners' Supp. Br. at 212. However, the Board cannot act beyond its delegated authority. *See, e.g., In re Russell City Energy Center*, PSD Appeal No. 08-01, slip op. at 41 (EAB July 29, 2008) (noting the "Board's longstanding principle of declining to hear substantive challenges to earlier, predicate determinations that are separately appealable under other statutes"). Notably, the Board's jurisdiction does not include reviewing rulemakings by the Administrator. *Tondu Energy*, 9 E.A.D. at 715 ("As we have repeatedly stated, permit appeals are not appropriate for challenging Agency regulations."); *see also In re Woodkiln, Inc.*, 7 E.A.D. 254, 269 (EAB 1997) (noting the strong presumption against reviewing "final Agency regulations that are attacked because of their substantive content" based upon Congress providing another forum for challenging regulations). As a result, NGO Petitioners have requested that the EAB overturn final agency rulemaking – an action that the Board should refrain from taking.

Some of the Petitioners have already filed a challenge to the underlying national rulemaking in the U.S. Court of Appeals for the District of Columbia. CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1). Section 307(b)(1) of the CAA requires that petitions challenging rulemaking actions of the Administrator "may be filed only in the United States Court of Appeals for the District of Columbia." *Id.* Similarly, the final PM_{2.5} rule makes it clear that judicial review of the action must be filed in the United States Court of Appeals for the District of Columbia Circuit. 73 Fed. Reg. 28,321, 28,346. NGO Petitioners acknowledge that a case is pending in the D.C. Circuit, which challenges the final rule issued on May 16, 2008 allowing PM₁₀ to be used as a surrogate for PM_{2.5} for sources that were subject to that policy or that had

applications complete as of July 15, 2008. NGO Petitioners' Supp. Br. at 206 (referencing *Natural Res. Def. Council v. EPA*, No. 08-1250 (D.C. Cir., filed July 15, 2008)). The Board should deny review of the permit and adhere to its past ruling on its jurisdiction to refrain from hearing challenges to Agency rulemaking.

C. NGO Petitioners' Public Notice and Comment Challenges of the Final PM_{2.5} Rule in this Proceeding Are Not Material.

To the extent that the Board reviews the merits and procedural requirements for EPA's final PM_{2.5} regulations, NGO Petitioners allege that EPA promulgated final regulations that "waive" the PSD requirement for PM_{2.5} "without public notice or comment." NGO Petitioners' Supp. Br. at 205. This statement misrepresents the content of the final rule on PM_{2.5} and the procedures that EPA followed in proposing the final rule, including NGO Petitioners' opportunity to comment on the continuance of the policy of using PM₁₀ as a surrogate for PM_{2.5} during the rulemaking process. NGO Petitioners are raising this issue before the Board in an attempt to have the Board decide an issue that is squarely before the U.S. Court of Appeals for the District of Columbia. NGO Petitioners' Supp. Br. at 206 (noting that NRDC and Petitioners have appealed the rulemaking). Furthermore, NGO Petitioners provide no insight on how their overall comments in the rulemaking proceeding relate to the PM₁₀ surrogate policy nor how those comments would have changed EPA Region 9's PSD permitting action under review in this matter.

On November 1, 2005, EPA issued a notice in the Federal Register entitled "Proposed Rule to Implement the Fine Particle National Ambient Air Quality Standards." 70 Fed. Reg. 65,984 (Nov. 1, 2005). The proposal presented three options regarding how to implement the PSD program in the interim period between when the rule became final and the time that EPA approves a State's PSD program for PM_{2.5}. *Id.* at 66,044. As noted above, one of the options

presented by EPA was to continue to implement the 1997 guidance and to allow sources to use PM₁₀ as a surrogate for PM_{2.5}. *Id.* The public notice and comment period was held from November 1, 2005 until January 3, 2006. *Id.* at 65,984. As an outgrowth of this proposal, EPA's final rule allows sources that "previously submitted applications in accordance with the PM₁₀ surrogate policy to remain subject to that policy" if the application was complete before July 15, 2008. 73 Fed. Reg. at 28,340; 40 C.F.R. § 52.21(i)(1)(xi).

NGO Petitioners improperly emphasize that EPA's final rule on PM_{2.5} "became effective on July 15, 2008, just 16 days prior to issuance of the final PSD permit for Desert Rock on July 31, 2008." NGO Petitioners' Supp. Br. at 205 n.146. The effective date of the rule is not relevant where the issue is whether Petitioners had the opportunity to comment about the effect of a new rule regarding PM_{2.5} upon the Desert Rock permit. Therefore, it is important to note that EPA issued the notice in the Federal Register regarding implementation of the NSR Program for PM_{2.5} on November 1, 2005. 70 Fed. Reg. 65,984 (Nov. 1, 2005). Based upon this notice being provided over a year in advance of the closure of the Desert Rock draft permit, NGO Petitioners had ample notice that EPA might use PM₁₀ as a surrogate for PM_{2.5} in the future and had more than adequate opportunity to submit comments regarding their specific concerns about the potential use of PM₁₀ as a surrogate for PM_{2.5} during the notice and comment period held from July 27, 2006 to November 13, 2006. In fact, Petitioner San Juan Citizens Alliance submitted questions during the public comment period on the Desert Rock permit about the application of EPA's policy of using PM₁₀ as a surrogate for PM_{2.5}. AR 120 at 76-77. Similarly, NGO Petitioners submitted a general objection during the public comment period to the use of the PM₁₀ as a surrogate for PM_{2.5}. AR 66 at 55.

The "law does not require that every alteration in a proposed rule be reissued for notice and comment." *Natural Res. Def. Council v. EPA*, 279 F.3d 1180, 1186 (9th Cir. 2002) (quoting *First Am. Discount Corp. v. Commodity Futures Trading Commission*, 222 F.3d 1008, 1015 (D.C. Cir. 2000)). Rather, no additional public notice and comment period must be held where a final action differs from the proposal if the final rule is a "logical outgrowth" from the proposal. *Id.*; see also *In re D.C. Water & Sewer Authority*, NPDES Appeal Nos. 05-02, 07-10, 07-11, and 07-12, slip op. at 61 (EAB 2008). In assessing whether a final rule was a "logical outgrowth" of the proposed rule, the Board must assess "whether interested parties reasonably could have anticipated the final rulemaking" based on the proposed rule. *Natural Res. Def. Council v. EPA*, 279 F.3d at 1186. Hence, the reviewing court should consider "whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule." *Id.*

Because NGO Petitioners clearly had the opportunity to comment on this policy as applied to Desert Rock and exercised that option, EPA did not need to provide additional notice and comment about the grandfathering rule regarding PM_{2.5}. "Grandfathering" certain sources, such as Desert Rock given the timing of their permitting activities, under EPA's final PM_{2.5} rule was a "logical outgrowth" from the proposed rule. A new round of notice and comment would not represent the first opportunity that NGO Petitioners had to provide comments on the PM₁₀ surrogate policy. As explained above, NGO Petitioners were aware that EPA was considering an alternative that would have enabled sources to continue using PM₁₀ as a surrogate for PM_{2.5}. The final rule applies the 1997 surrogate policy in the same manner, but instead provides for a sunset of the PM₁₀ surrogate policy. Furthermore, NGO Petitioners were on notice that adopting a grandfathering provision was a possibility because EPA used a similar grandfathering policy in

1987 when the PM₁₀ rule was promulgated. AR 120 at 77; 52 Fed. Reg. 24,672 (July 1, 1987) (noting that out of a sense of "fairness," EPA was providing a grandfather provision to prevent retroactive review of sources not previously subject to such review and for those applicants that had submitted complete applications to EPA by July 1, 1987). Because the final PM_{2.5} rule is a "logical outgrowth" of the proposal, no additional notice and comment period was required to adopt the rule. *Natural Res. Def. Council v. EPA*, 279 F.3d at 1186.

Moreover, NGO Petitioners would not be able to present new and different technical objections to this policy beyond those they already presented. Before EPA Region 9 decided to issue the PSD permit to Desert Rock, EPA Region 9 considered and rejected NGO Petitioners' objections to utilizing PM₁₀ as a surrogate for PM_{2.5}. AR 120 at 77 (responding to NGO Petitioners' objection to using PM_{2.5} as a surrogate by citing to EPA's longstanding policy guidance and past particulate matter rulemaking). Thus, NGO Petitioners have not established grounds to review the application of the PM_{2.5} rule to Desert Rock. *See Cardinal FG*, 12 E.A.D. at 164 (noting that petitioners did not establish grounds for review where they raised the same issues on appeal as those presented in their public comment letter without explaining why the response provided was clearly erroneous or warranted review).

Finally, the final rule does not constitute a "waiver" of the PM_{2.5} requirements. NGO Petitioners' Supp. Br. at 205. The underlying guidance documents referenced in the Response to Comments makes it clear that utilizing PM₁₀ as a surrogate does not constitute a "waiver" of the PM_{2.5} requirement because PM_{2.5} is a subset of PM₁₀. AR 120.31. By expanding the scope of particulate matter that must be monitored for PM_{2.5}, sources that rely upon the surrogate policy may in fact be adopting a stricter standard. *Id.* As a result, there has not been a "waiver" of the PM_{2.5} requirement.

Given the arguments above, the Board should deny review of the PM_{2.5} issues.

D. Deference to EPA's Decision is Appropriate Because EPA Made a Technical Determination Regarding How to Comply with the PM_{2.5} NAAQS.

If the Board were to entertain NGO Petitioners' PM_{2.5} argument, the Board should exercise deference in assessing the application of and compliance with 1997 PM₁₀ surrogate policy to Desert Rock's PSD permit. The EAB has a long standing precedent of giving deference to the Region on permitting issues requiring technical expertise. *In re Peabody Western Coal Co.*, 12 E.A.D. 22, 33 (EAB 2005) (citing *Carlota Copper*, 11 E.A.D. at 708 ; *In re Teck Cominco Alaska Inc.*, 11 E.A.D. 457, 473 (EAB 2004); *In re City of Moscow*, 10 E.A.D. 135, 142 (EAB 2001)). Deference to the Region's technical judgment is appropriate where "the record demonstrates that the Region duly considered the issues raised in the comments and if the approach ultimately selected by the Region is rational in light of all of the information in the record." *Id.* at 34 (citing *NE Hub Partners*, 7 E.A.D. at 567-68). Based upon the explanations provided in the Response to Comments documentation, EPA Region 9 reasonably supported its position in responding to Petitioners' objections to the use of PM₁₀ as a surrogate.

The EAB has previously determined that utilizing PM₁₀ as a surrogate for PM_{2.5} is acceptable and, in fact, requires compliance with a stricter standard. *Prairie State*, slip op. at 123-31; *BP Cherry Point*, 12 E.A.D. at 223. The Board concluded that by "count[ing] all the PM₁₀ from the Proposed Facility as PM_{2.5}," rather than treating PM_{2.5} as a smaller subset of PM₁₀, the applicant "performed a more conservative analysis, not a more lenient one." *BP Cherry Point*, 12 E.A.D. at 222, 223 (emphasis in original). The EAB's finding in *BP Cherry Point* is applicable here because the Board characterized the petitioners' complaint in *BP Cherry Point* as being a general objection "to the use of . . . PM₁₀ as a surrogate for PM_{2.5}" as is the case currently before the Board. *Id.* at 221. Similarly, the Board's findings in *Prairie State* are also

instructive because the petitioners in *Prairie State* presented a similar argument to that presented here by arguing that the surrogate analysis "did not determine whether the Facility will cause or contribute to an exceedance of the . . . PM_{2.5} NAAQS." *Prairie State*, slip op. at 128. In response, the EAB emphasized in *Prairie State* that "there is little by way of formal regulatory requirement governing the analysis predicting whether . . . the PM_{2.5} NAAQS will be exceeded . . ." *Id.* at 129. Therefore, the EAB determined it should provide broad deference to the regional authority's technical judgment and expertise in assessing compliance with the PM_{2.5} NAAQS. *Id.* These policies are applicable to Desert Rock's case and therefore this precedent should apply.

Moreover, a remand of the permit to EPA Region 9 is not appropriate in this case. The Administrator has made clear that EPA supports a policy, which enables certain sources to use PM₁₀ as a surrogate. 73 Fed. Reg. 28,321, 28,340 (May 15, 2008).⁵⁷ There is no need to remand the permit back to EPA Region 9 for further evaluation because EPA Region 9 has already provided a clear rationale in the response to comments document regarding its decision on this issue. AR 120 at 77.

In its Response to Comments, EPA Region 9 referenced the 1997 guidance document, in addition to the 2005 memorandum from Stephen D. Page, which clarifies that using PM₁₀ as a surrogate is appropriate because PM_{2.5} is a subset of PM₁₀ emissions. *Id.* EPA Region 9 also noted that a similar grandfathering policy was adopted in 1987 when the PM₁₀ rule was promulgated. *Id.*; 52 Fed. Reg. 24,714 (July 1, 1987) (providing in 40 C.F.R. § 52.21(c)(4)(ix) and (x) that sources with PSD applications for particulate matter or with all Federal and State preconstruction approvals or permits before July 31, 1987 are exempt from PSD review for

⁵⁷ The Administrators' statements on this issue are included in the administrative record for the Desert Rock permit given that the May 8, 2008 final rule was specifically referenced in EPA Region 9's Response to Comments. AR 120 at 77; *see also* 40 C.F.R. § 124.17(b).

PM₁₀); *see also* Memorandum from Darryl D. Tyler to Regional Air Division Directors at 2 (dated Aug. 5, 1987) (noting that the NAAQS promulgated for PM₁₀ on July 1, 1987 contain "grandfathering provisions"). Given that EPA Region 9 fully justified its position on this issue in the Desert Rock administrative record, the Board should deny review.

In sum, EPA Region 9, based on its technical judgment, reasonably determined that the established PM₁₀ surrogate policy should be applied to the Desert Rock Project and explained its justification in the administrative record – an explanation that included citations to the EPA-wide policy documents governing this issue. AR 120 at 77. The Board should give deference to this determination and deny review of this issue.

IX. EPA REGION 9 COORDINATED WITH THE FLMS TO PROTECT CLASS I AREAS FROM VISIBILITY IMPACTS, AND SATISFIED ALL REQUIREMENTS RELATED TO THE PROTECTION OF VISIBILITY

The Administrative Record documents the exhaustive efforts made by Desert Rock Energy and EPA Region 9 to work with the Federal Land Managers ("FLMs") to analyze the visibility impacts of the proposed facility and then, at the request of the FLMs, to include a condition in the Permit that goes well beyond any statutory or regulatory requirement in order to offset any possible impact on visibility. The National Park Service ("NPS") and the Department of Agriculture Forest Service ("USFS") are the FLMs for all the Class I areas within 300 kilometers of the Desert Rock Project. 42 U.S.C. § 7475(d)(2); 40 C.F.R. § 52.21(p). Despite the time limits in the CAA (one year to complete all aspects of a PSD permit) and EPA's regulations (which require the FLMs to analyze and document any visibility concerns within 30 days after receiving the permit application), Desert Rock Energy and EPA Region 9 spent more than 3 years working with the NPS and the USFS to analyze and then address their concerns about visibility.

The Administrative Record shows that, since the permit application was submitted in 2004, EPA, the FLMs and Desert Rock (or Desert Rock's outside consultant, ENSR) have exchanged numerous emails and letters, held several conference calls, and conducted at least one fact-to-face meeting regarding all aspects of modeling for the visibility analysis in Class I areas. See AR 1; AR 11 at 4; AR 15 at 2; AR 19 at 2-3; AR 20; AR 32 at 1-4; AR 37 at 4-7; AR 37 at 4-22; AR 37 Addendum at 1-1, 2; AR 37 Addendum at 3-2; AR 38; AR 41; AR 42; AR 46 at 44-45; AR 46.15 at 1; AR 46.20; AR 46.26; AR 46.28 at 3-5; AR 81; AR 92 at 182-186. Additionally, at the request of NPS, Desert Rock prepared and submitted supplemental modeling, which is clearly not required as part of the PSD permitting process, that further analyzed the impact of projected Desert Rock emissions on the Regional Haze reasonable progress goals in the area. AR 38; AR 120 at 149. Almost two years before the permit was issued, in a letter to EPA Region 9, dated October 26, 2006, NPS recognized the extensive collaboration that had already taken place by that time:

Over the past two years, the NPS has worked closely with representatives of [Desert Rock Energy], the U.S. EPA, the U.S. Forest Service, Dine Power Authority, and Navajo EPA to ensure that potential impacts of the proposed Desert Rock Energy Facility on air quality and related values were carefully analyzed.

AR 120.8 at 2.

As discussed in EPA's Response to Comments and explained further below, the Petitioners' visibility arguments fail for several reasons. First, Petitioners ignore EPA Region 9's role as the permitting authority and the extensive technical analysis that was conducted to make a visibility determination compliant with the CAA. Second, they mistakenly assert that the FLMs made a finding of adverse impact on visibility as provided under the CAA, when they clearly did not. Finally, Petitioners' argument regarding regional haze has no basis under federal law. There

is nothing in the PSD program that requires consideration of "regional haze," which is a completely separate program under the CAA. Even so, in order to address concerns raised by Petitioners and the FLMs, Desert Rock voluntarily conducted a regional haze modeling analysis, which demonstrated that emissions from the proposed facility would not interfere with the "reasonable progress" requirements of the regional haze program.

A. EPA Region 9 Met and Exceeded the CAA Requirements for Notification to the Federal Land Managers and Consideration of the Federal Land Managers' Comments.

The CAA requires that the permit issuer, in this case EPA Region 9, gives notice of the permit application to the appropriate FLM for any proposed major stationary source that may affect a Class I area. 42 U.S.C. § 7475. The implementing regulations require that the notification occur within thirty days from receipt of the application and in no case later than sixty days before a public hearing on a PSD application. 40 C.F.R. § 52.21(p)(1). The FLMs play an important role by considering whether a proposed facility will have an adverse impact on visibility or any other "air quality related value" in a national park or any other Class I area.

The CAA and its regulations also impose two significant limitations on the FLM's involvement in the permit review. First, the CAA itself grants the ultimate decision authority to the permitting authority. In order to influence the permitting process, the Federal Land Manager must demonstrate "to the satisfaction of the [permitting authority]" that "such facility will have an adverse impact" on Class I areas when the increments are not exceeded, as in this case. 42 U.S.C. § 7475. The regulations echo the statute, providing the FLM with the responsibility to "consider, in consultation with the Administrator, whether a proposed source or modification will have an adverse impact." 40 C.F.R. § 52.21(p)(3). Then, only if the permitting authority concurs, a permit application could be denied based upon a FLM's demonstration. 40 C.F.R.

§ 52.21(p)(4). Finally, EPA's guidance reiterates the statutory limitation placed on FLMs and recognizes the ultimate decision rests with the permitting authority. *See* NSR Manual at E.12 ("the reviewing agency makes the final decision on permit issuance"), E.19 ("the reviewing agency is responsible for . . . making a final determination whether construction should be approved, approved with conditions or disapproved").

The second limitation imposes a time frame on the FLM's ability to submit comments to the permitting authority for consideration. The CAA regulations require the permitting authority to consider "any analysis provided by the FLM within 30 days of the notification" 40 C.F.R. § 52.21(p)(3); *Prairie State*, slip op. at 151 ("The regulatory text's plain meaning is that the public notice must explain a permit issuer's decision to reject the FLM's adverse impact analysis when that analysis is 'provided within 30 days of the notification required by paragraph (p)(1) of this section'" (citing 40 C.F.R. § 52.21(p)(3))).

In the instant case, EPA Region 9 and Desert Rock complied with, and went beyond, the regulatory notice requirements; and the visibility analysis and coordination between the FLMs and EPA Region 9 took place over several years. EPA Region 9 provided the initial notification of the Desert Rock Project permit application to the FLMs in 2004. In an early letter to EPA Region 9 dated July 6, 2004, NPS acknowledged they had reviewed the Desert Rock Project application and requested that, "in the spirit of the PSD regulations" EPA Region 9 "afford [NPS] at least 30 days to review the preliminary determination and all other relevant information before beginning the public review process." AR 15. Between the 2004 notification and the 2006 public review process, several emails and letters were exchanged between EPA Region 9, NPS, and USFS. In fact, the notes from at least one face-to-face meeting have been included in the administrative record. AR 31.

The FLMs and Desert Rock devoted a significant effort to collaborate on the correct method to evaluate the predicted visibility extinction rate, a technical evaluation specifically cited by Petitioners. NGO Petitioners' Supp. Br. at 216-18 at 229. In March 2005, Desert Rock provided a point-by-point response to NPS regarding the visibility impact analysis. AR 46.28. Desert Rock responded to NPS' concerns relating to improvements made to FLAG model which computed hourly ratios of modeled to background extinction rather than 24-hour ratios, as prescribed by FLAG, to better account for visibility variances throughout the day. AR 46.28 at 3-5. Continuing to develop the extinction analysis in light of comments from NPS, in January 2006, Desert Rock submitted an updated modeling protocol that included results of an alternative regional haze analysis. AR 37 at 4-12. The alternative visibility analysis incorporated EPA's modeling guidelines for the final Regional Haze Regulations for the Best Available Retrofit Technology (BART) rule, signed by EPA on June 15, 2005. AR 37 at 4-12 (citing 70 Fed. Reg. 39,104 (July 6, 2005)).

Two years after EPA's initial notification regarding the Desert Rock Project permit, and as requested by NPS in 2004, EPA notified both NPS and USFS that the start of the 30-day FLM review period for the Desert Rock Project PSD permit would begin on March 27, 2006. 40 C.F.R. § 52.21(p). In compliance with the PSD regulations, EPA requested that NPS and USFS provide any finding of adverse impact by April 26, 2007. AR 40; 40 C.F.R. § 52.21(p)(3). NPS did not respond to this notification until October 26, 2006, well after the April 26, 2007 deadline which was set for the FLM to submit comments that demonstrate "a proposed new major source . . . may have an adverse impact on visibility in any Federal Class I area." 40 C.F.R. § 52.21(p)(3).

The Petitioners, however, are unwilling to accept the limitations placed upon FLMs in the permitting process and would like this Board to impose notification and consideration requirements upon the Region that are not imposed by law. NGO Petitioners' Supp. Br. at 215, 228; Nat'l Parks Amicus Br. at 14-15; New Mexico's Supp. Br. at 64, 74-75. In some cases, inexplicably, the enhanced coordination is asserted as an excuse for NPS to provide late comments. New Mexico's Supp. Br. at 74-75; Nat'l Parks Amicus Br. at 14. The exchange of information that occurred throughout 2004 to early 2006 prior to the draft permit issuance should have only placed the FLMs in a better position to evaluate and provide comments in accord with the federal regulations.

The FLM bears the burden of demonstrating an adverse impact when the proposed facility will not cause or contribute to an exceedance of the Class I increment. *Prairie State*, slip op. at 153. Here, NPS did not respond within the regulatory 30 days, much less with an analysis necessary to support or demonstrate an adverse impact on visibility. AR 120.8. Because NPS did not issue such a finding, the Region was not required to explain why it issued the permit given the FLM's nonexistent finding of an adverse impact on visibility. 40 C.F.R. § 52.21(p)(3).

Far from issuing a finding of adverse impact, the October 2006 letter from the NPS that NGO Petitioners reference stated that "the applicant has committed in good faith to perform and/or implement a full set of measures" that mitigate any portions of "the proposed project that may lead to adverse impacts in Class I areas." AR 120.8 at 2; NGO Petitioners' Supp. Br. at 216. In this letter, NPS was referring to mitigation measures included in a SO₂ Mitigation Agreement Memorandum of Understanding ("MOU") between Desert Rock Energy, EPA, and the Navajo Nation to purchase and retire SO₂ allowances. USFS also submitted a letter which, like NPS, did not issue a finding of adverse impact. AR 42. Contrary to the Petitioners' allegation, USFS did

not issue a finding of adverse impact on visibility. Rather, USFS supported the proposed MOU to "alleviate concerns." AR 42 at 2. As stated in its Preliminary Findings, the USFS determined that the proposed MOU "will more than offset the [Desert Rock Project's] contribution to regional visibility impairment." *Id.* (emphasis added). USFS did not state that the mitigation agreement was meant to remedy a finding of adverse impact on visibility. Without explanation or technical support,⁵⁸ USFS countered their position stated in the April 2006 letter and stated that the USFS "does find the predicted impacts would be adverse . . . but with the Mitigation Agreement that [Desert Rock] has agreed to execute, the [USFS] finds that those impacts would be sufficiently mitigated and would not recommend that the permit be denied based on impacts." AR 120 at 142-43. In other words, the MOU provided enough cushion above and beyond the reductions required in the draft permit that USFS determined that additional analysis was not necessary. AR 42 at 2.

This Board should reject the NGO Petitioners' attempt to fabricate a FLM finding of adverse impact. NGO Petitioners' Supp. Br. at 228-29; Nat'l Parks Amicus Br. at 2-3. EPA complied with the procedural and substantive notification and analysis requirements of the CAA. 42 U.S.C. § 7475(d)(2); 40 C.F.R. § 52.21(p)(1)(3). After extensive coordination with the EPA Region 9 and Desert Rock Energy, the FLMs did not issue a finding of adverse impact relating to visibility and NPS did not provide any response within the regulatory time period. 40 C.F.R. § 52.21(p)(1)(3). Ultimately, the FLMs' role is advisory and EPA makes the final permitting decision. As demonstrated in Section IX.B, the EPA Region 9's decision to approve the Desert

⁵⁸ Significantly, EPA guidance requires the FLM submit analysis supporting the adverse finding. *See* NSR Manual at E.23 ("The FLM has 30 days after receipt of the visibility impact analysis and other relevant information to submit to the reviewing agency a finding that the source will adversely impact visibility in a Federal Class I area.").

Rock Project, including the visibility analysis, was based upon review and modeling provided by Desert Rock Energy. Concerns and comments provided by the FLMs during the extensive permit application review period were addressed by revised modeling provided by Desert Rock Energy in 2006 (AR 37 and 38), EPA's Ambient Air Quality Impact Analysis in 2006 (AR 46), and EPA Region 9's Response to Comments (AR 120).

B. For the Cumulative Visibility Analysis Claim, Petitioners Have Failed to Either Provide New Comments to Counter EPA's Response to Comments or Prove Error in those Responses.

Neither the NGO Petitioners' reliance on NPS's modeling or the inaccurate assertion that cumulative analysis is required for visibility impacts fulfills the burden necessary to find error with the EPA Region 9's permit issuance. NGO Petitioners' Supp. Br. at 217, 229. In order to merit review, petitions "must include specific information supporting their allegations . . . and may not simply repeat objections during the comment period; instead they must demonstrate why the permitting authority's response to those objections warrants review." *Knauf II*, 9 E.A.D. at 5. Here, NGO Petitioners failed to even provide general comments that challenge EPA's response to comments on these identical issues. AR 120 at 146-147.

NGO Petitioners' repeated claims that a cumulative visibility analysis was required are based upon two faulty arguments. First, NGO Petitioners continue to rely on NPS modeling that does not comply with EPA guidance and was addressed by EPA Region 9's Response to Comments. NGO Petitioners' Supp. Br. at 217-18 (citing AR 120.8; AR 66 at 73; AR 120 at 144-47). Second, NGO Petitioners merely repeat earlier comments asserting that a cumulative visibility assessment is required without addressing EPA's response that there are no regulatory requirements for a cumulative assessment or identifying error with the detailed modeling refinements conducted to analyze potential visibility impacts, including scenarios specifically

requested by NPS. NGO Petitioners' Supp. Br. at 229-30; AR 66 at 73-74; AR 120 at 146. As discussed below, the administrative record demonstrates that EPA Region 9 evaluated Desert Rock Energy's original visibility analysis conducted according to the Federal Land Managers' Air Quality Requested Values Workgroup (FLAG) requirements for cumulative visibility analysis during the permit review process (AR 37 and AR 46.28); provided its analysis in the issuance of the draft permit (AR 46 at 44-45); and responded to these concerns in the Response to Comments. AR 37, AR 46 at 44-45, AR 46.28, AR 120 at 146-147). In short, the NGO Petitioners' repeated reliance on a faulty NPS model and an inaccurate interpretation of FLAG guidance do not meet the "heavy burden" necessary to successfully assert error in the Region's decision, which was based upon technical analysis and review. *See Newmont Nevada Energy*, 12 E.A.D. at 430 (finding that the petitioner in that case "failed to surmount its heavy burden of overcoming the deference the [B]oard generally accords to permitting authorities in matters requiring technical expertise").

1. *The NGO Petitioners Have Relied Upon an NPS Model that is Not in Accord with EPA Guidance.*

The NGO Petitioners used modeling conducted by NPS to fabricate an adverse finding of visibility by NPS. NGO Petitioners' Supp. Br. at 218. As discussed extensively in this Section IX, NPS did not issue a finding of adverse impact on visibility; any analysis submitted by NPS and considered by EPA does not alter that underlying fact.⁵⁹ Regardless, in response to similar comments related to NPS's modeling submitted by the Petitioners in 2006, EPA noted that the modeling conducted by NPS used two models known as the Comprehensive Air Quality Model

⁵⁹ As discussed in Section IX.A *supra*, the NPS modeling relied upon by Petitioners was submitted in October 2006, after the regulatory comment period provided for an FLM finding of adverse impact on visibility. 40 C.F.R. § 52.21.

with Extensions ("CAMx") and the Langrangian CAPTIA Monte Carlo Model ("CMC"), which are non-guidance models for PSD modeling. AR 120 at 145.

The NGO Petitioners asserted in a letter submitted during the public comment period that Desert Rock's visibility model underestimated the impact of the Desert Rock Project's emissions when compared to the NPS technical analysis. AR 66 at 73; *see also* NGO Petitioners' Supp. Br. at 217 (citing an NPS conclusion that Desert Rock's visibility impacts "underestimate impacts.") In particular, Petitioners' 2006 comments referenced data obtained from NPS's use of CAMx and CMC, which are non-guidance models for PSD modeling. AR 66 at 73; AR 120 at 144. In response to the NGO Petitioners' comments, EPA Region 9 conducted additional analysis and crafted a "rough comparison" to evaluate the NPS modeled ammonium sulfate concentrations against the actual maximum measured ammonium sulfate concentrations at the Grand Canyon, Canyonlands and Mesa Verda in January 2001. AR 120 at 145-46. EPA Region 9's analysis determined that the NPS model overestimated the ammonium sulfate monitored concentrations by a factor of 3 to 37. *Id.* This finding led the EPA Region 9 to disagree with the commenter's assertion that the higher NPS results prove that Desert Rock underestimated the anticipated visibility impacts of the Desert Rock Project. AR 120 at 146. Instead, EPA Region 9 continued to support Desert Rock's visibility analysis which used CALPUFF, the model that the EPA guidelines recommend for long-range transport, in conjunction with the visibility methodology recommended by FLAG. *Id.* at 144-45.

In addition to the CALPUFF analysis prepared in accord with FLAG guidance, Desert Rock performed an additional analysis in response to NPS' concerns with the original visibility extinction analysis. Submitted in January 2006, Desert Rock's modeling update describes the revised visibility analysis approach selected based upon comments from NPS. AR 37, Appendix

A at Sections 1 and 2. In particular, to address NPS' concerns relating to the approach previously taken to account for meteorological conditions which may naturally obscure visibility, the revised analysis incorporated EPA's modeling guidelines for the BART rule, signed by EPA on June 15, 2005. 70 Fed Reg. 39,104 (July 6, 2005). The BART rule only applies to existing facilities, and not new sources such as Desert Rock. However, due to a lack of FLAG regional haze modeling guidance relating to meteorological impacts, Desert Rock proposed the EPA-approved BART modeling approach as alternative analyses to evaluate the potential regional haze impacts. *See* AR 46.28 (ENSR commenting that NPS has been reluctant to provide specific guidance to applicants as how to assess interference in regional haze assessments); *see also* 70 Fed Reg. 39,104, 39,107-39,121 (July 6, 2005) (discussing generally how EPA structured the BART modeling guidance to take into account the maximum modeled visibility impacts that may be unduly impacted by weather). Although EPA views the BART analysis as "additional information which the public could use to corroborate, and compare to, the standard results," the Agency did not rely upon the alternative analysis in its conclusion that the Desert Rock Project would not have an adverse impact on visibility. AR 120 at 147.

Petitioners fail to respond to EPA's analysis comparing the NPS model to monitored levels or to EPA's ultimate conclusion that the NPS model overestimated the ammonium sulfate monitored concentrations by a factor of 3 to 37. NGO Petitioners' Supp. Br. at 217; *see also* New Mexico's Supp. Br. at 73. By relying upon NPS modeling that is not compliant with PSD guidance, the Petitioners have failed to provide enough evidence or expertise to overcome the broad deference granted to permitting authorities on issues based upon the application of technical judgment and expertise. *Prairie State*, slip op. at 129; *see also Newmont Nevada Energy*, 12 E.A.D. at 430 (finding that the petitioner in that case "failed to surmount its heavy

burden of overcoming the deference the [B]oard generally accords to permitting authorities in matters requiring technical expertise"). Further, in addition to the lack of evidence supporting clear error, the Petitioners have not provided new issues to counter the EPA Region 9's response concerning faults relating to the NPS model or that the alternative BART analysis corroborated EPA's underlying determination that the proposed Desert Rock Project does not adversely impact visibility in Class I areas. *Compare* AR 66 at 73 with NGO Petitioners' Supp. Br. at 217-18; *Knauf II*, 9 E.A.D. at 5 ("Petitions for review may not simply repeat objections made during the comment period; instead they must demonstrate why the permitting authority's response to those objections warrants review").

2. *A Cumulative Analysis for Visibility is not Required either for the Visibility Analysis or to Supplement the SO₂ Cumulative Analysis.*

In response to identical comments submitted by the Petitioners during the notice and comment period for the Desert Rock Project permit, EPA Region 9 noted that neither the CAA, nor any other regulatory program, requires Desert Rock Energy to prepare a cumulative analysis for visibility impacts. NGO Petitioners' Supp. Br. at 229-30; AR 66 at 73-74 (citing AR 15 at 2); New Mexico's Supp. Br. at 66-67; AR 120 at 146. EPA Region 9 pointed out that the FLAG guidance recognizes that a cumulative analysis would aid the FLM with its determination regarding an adverse visibility impact in some cases where the visibility extinction exceeds 10%. AR 120 at 146; FLAG at 26. But even if visibility exceeds 10%, the Petitioners are incorrect in stating that such a finding automatically requires a cumulative visibility assessment. While a cumulative visibility analysis may serve as additional guidance for FLMs, the FLMs reviewing the Desert Rock Project did not need a cumulative analysis to preclude an adverse finding. AR 120 at 146. FLAG at 26 (providing suggested levels for cumulative analysis thresholds). In fact, the EAB has recognized that the FLAG document is merely guidance – not a rule – and

therefore, the Board has previously affirmed permits where the permitting authority noted that the applicants' analysis and modeling showed five days exceeding the 5% extinction threshold and one day exceeding the 10% extinction threshold over the three years modeled. *Prairie State*, slip op. at 153-157.

Regardless, the 5% threshold argument for a cumulative analysis is moot, as described by EPA's Ambient Air Quality Impact Report (AAQIR), due to additional analysis that determined the days which exceeded 5% level of extinction were naturally obscured by rainy or cloudy weather. AR 46 at 44. The AAQIR described that when the additional visibility analysis exceeded the 5% level of extinction were naturally obscured by rainy or cloudy weather. AR 46 at 44. The AAQIR described that when the additional visibility analysis exceeded the 5% level of extinction, Desert Rock conducted an hour by hour weather analysis to exclude days when visibility was naturally obscured by rainy and cloudy weather. *Id.* The additional detailed analysis determined the extinction level would not exceed the 5% and thus was within the range of acceptable visibility impacts. *Id.* EPA reviewed the visibility analysis performed by Desert Rock and the supporting technical analysis to reach a finding of no adverse impacts to a visibility. AR 46 at 44.

NPS did provide comments on the meteorological refinements conducted to the FLAG analysis. *See* AR 46.28 (a March 30, 2005 ENSR Memorandum responding to several early issues posed by NPS relating to the visibility impact analysis). In addition to the visibility analysis prepared in accord with FLAG guidance and discussed in EPA's AAQIR, Desert Rock performed an additional analysis in response to NPS' concerns with the original visibility extinction analysis. Submitted in January 2006, Desert Rock's modeling update describes the revised visibility analysis approach selected based upon comments from NPS. AR 37, Appendix

A at Section 1 and 2. In particular, to address NPS' concerns relating to the approach previously taken to account for meteorological condition which may naturally obscure visibility, the revised analysis incorporated EPA's modeling guidelines for the final Regional Haze Regulations for the Best Available Retrofit Technology (BART) rule, signed by EPA on June 15, 2005. *Regional Haze Regulations and Guidelines for Best Available Retrofit Technology (BART) Determinations, Final Rule*, 70 Fed. Reg. 39,104 (July 6, 2005).

The BART rule only applies to existing facilities, and not new sources such as Desert Rock. However, due to a lack of FLAG regional haze modeling guidance relating to meteorological impacts Desert Rock proposed the EPA-approved BART modeling approach as alternative analyses to evaluate the potential visibility impacts. See AR 46.28 (ENSR commenting that NPS has been reluctant to provide specific guidance to applicants on how to assess interference in regional haze assessments); see also 70 Fed Reg. at 39,107-39,121 (discussing generally how EPA structured the BART modeling guidance to take into account the maximum modeled visibility impacts that may be unduly impacted by weather). EPA's analysis of the BART alternative scenario concluded that the "modeling showed that visibility would improve the area regardless of the emissions from the proposed [Desert Rock Facility]." AR 46 at 45. Although EPA views the BART analysis as "additional information which the public could use to corroborate, and compare to, the standard results," the Agency did not rely upon the alternative analysis in its conclusion that the Desert Rock Project would not have an adverse impact on visibility. AR 120 at 147.

NPS' comments on the meteorological refinements were briefly referenced by the Petitioners. The references in the Petitions are so vague it is difficult to trace them back to the highly technical summary and analysis prepared by Desert Rock and reviewed by EPA for the

visibility determination. *Compare* New Mexico's Supp. Br. at 68-69 (referring to "refinements" and "meteorological" interferences) *and* National Parks Conservation Association's Petition at 7 (merely referencing "deviations" in modeling) *with* to AR 46.28 (ENSR's Response to NPS Technical Review of the STEAG Visibility Impact Analysis), *and* AR 37, at 4.4, *and* AR 37 Appendix A, at 2-1 to 2-6 (Addendum to Modeling Protocol). These brief references to alleged errors in modeling concepts evaluated by EPA Region 9 during the course of the permit evaluations do not merit review because the Petitioners fail to clearly articulate why the permitting authority's basis for the decision "is clearly erroneous or otherwise warrants review." *Prairie State*, slip. op at 13; 40 C.F.R. § 124.19(a).

The Petitioners also incorrectly cite to an EAB decision as support for a mandatory cumulative impact analysis. NGO Petitioners' Supp. Br. at 226, 230 (citing *Old Dominion Electric*, 3 E.A.D. 779). *Old Dominion* merely clarified that if a visibility impact cumulative analysis is conducted, the analysis does not need to incorporate future, unpermitted emissions. 3 E.A.D. at 788-89. Further, Petitioners' one sentence response that the "FLMs have found that Desert Rock's emissions will cause visibility extinction at greater than 10% in Class I areas" is not sufficient to explain why EPA's decision was erroneous. NGO Petitioners' Supp. Br. at 230 (citing AR 120.8 at 47). In fact, the reference to the NPS modeling, AR 120.8, bases the visibility claim on NPS modeling which, as discussed in Section IX.B.1, *supra*, was not conducted in accord with EPA guidance and determined by EPA to overestimate emissions when compared to monitored values. AR 120 at 144-45. Therefore, NGO Petitioners' allegation regarding a cumulative visibility assessment fails to satisfy the requirement that a petitioner demonstrate why the response to the objection "is clearly erroneous or otherwise warrants review." *Prairie State*, slip op. at 13.

In order to warrant review of the permit issuance, it is not sufficient to merely repeat objections made during the comment period. *Id.* at 13. Here, NGO Petitioners have provided no new issues or additional support to explain why EPA's response to comments warrants review. AR 66 at 73; NGO Petitioners' Supp. Br. at 230. Failing to adequately articulate new issues that could not have been reasonably ascertainable and were therefore not raised during the comment period, while also failing to explain why the permit issuer's response here was inadequate fails to meet the EAB standard for review or error. *Knauf II*, 9 E.A.D. at 5. Therefore, the Board should deny review of this issue.

C. The Mitigation Agreement Was Not a Remedy to the Desert Rock Permit

Throughout the permit process, NPS and USFS worked with Desert Rock Energy "in intensive negotiations" that culminated in a package of "mutually acceptable mitigation measures" to be implemented for the Desert Rock Project. AR 120.8 at 2. The SO₂ emission offsets implemented in the MOU are supplemental SO₂ reductions beyond CAA PSD requirements. As stated repeatedly throughout the administrative record, based upon review of Desert Rock Energy's visibility analysis and modeling, EPA Region 9 concluded the proposed project would not cause adversely impact visibility. AR 46 at 35-36, 38, 44; AR 120 at 140, 142. Under the MOU, Desert Rock Energy committed to obtain emission reductions that would increase the SO₂ emission reductions already required by the pre-existing and Region-approved provisions of the draft PSD permit.

The Petitioners' arguments relating to the MOU all fail because the MOU does not serve as a remedy to a finding of adverse impact on visibility. NGO Petitioners' Supp. Br. at 230-32; New Mexico's Supp. Br. at 78-80. Instead, EPA Region 9 included the MOU in the permit, in accord with EPA guidance, to address uncertainty that the FLMs perceived in the modeling.

NSR Manual at E.19-20; AR 42 at 2; AR 120 at 140; AR 120.8 at 2. Petitioners have not and cannot point to any provision in the Clean Air Act that prevents the inclusion of non-PSD mandated requirements from being incorporated into a PSD permit.

The CAA provides that although EPA consults with the FLM to review a draft PSD permit, it is the permitting authority that finally determines whether the proposed facility may create an adverse visibility impact and ultimately determines whether to issue the permit. 42 U.S.C. § 7475; 40 C.F.R. § 52.21(p)(3); NSR Manual at E.12, E.19. As discussed in Section IX.B, *supra*, EPA Region 9 evaluated extensive visibility modeling scenarios, including models prepared by NPS. AR 37; AR 38; AR 120 at 140; and AR 120.8. EPA Region 9 ultimately determined that the Desert Rock Project would not cause an adverse impact on visibility. AR 46 at 35-36, 38, 44; AR 120 at 140, 142. Notwithstanding this determination, EPA Region 9 included the MOU in accord with EPA guidance and based upon requests from the FLMs. NSR Manual at E.19-20; AR 42 at 2; AR 120 at 140; AR 120.8 at 2. EPA guidance recommends that in consultation with the FLM the permitting authority "where appropriate, incorporate permit conditions . . . which will assure protection of AQRV's. Such conditions may be most appropriate when the full extent of the AQRV is uncertain." NSR Manual at E.20. In this case, EPA Region 9 recognized "the general concerns expressed by the FLMs and uncertainty in modeling such impacts" and therefore decided to include the MOU "as an enforceable condition in the permit to remove any questions concerning the impact of the project on visibility in nearby Class I areas." AR 120 at 140.

As requested by the FLMs, and in accord with EPA guidance, EPA Region 9 added the MOU to the permit as a permit provision. AR 120 at 140; AR 122 at 7. Both NPS and USFS supported including the MOU as a provision of the PSD permit. AR 42; AR 120 at 143; AR

120.8 at 2. The MOU was not added to the Permit to mitigate a finding of adverse impact on visibility by the FLMs, and EPA Region 9 did not rely on the MOU in its permit determination. AR 46 at 35-36, 38, 44; AR 120 at 140, 142. EPA Region 9's action to add the MOU to the permit demonstrates the willingness of the Agency and Desert Rock Energy to work collectively to address the concerns of the FLMs, even absent a finding of adverse impact on visibility.

Contrary to Petitioners' claims, the incorporation of the MOU into the permit does not prove that it functions as a remedy to a finding of an adverse impact on visibility. NGO Petitioners' Supp. Br. at 231; New Mexico's Supp. Br. at 76-77. Rather than serving as a remedy, the MOU supplements the existing SO₂ emission reductions in the permit and effectuates the intent of EPA's guidance to "serve as an arbitrator and advisor in FLM/applicant agreements." NSR Manual at E.20. Although it is not a remedy, the MOU does include provisions for adequate recordkeeping and reporting requirements that demonstrate enforceability under the PSD regulations as well as practical enforceability. AR 81 at 3-5; 40 C.F.R. § 52.21(b)(17); NSR Manual at A.5. The MOU includes two options that provide for additional sulfur reductions above the permit requirements. AR 81 at 3-5. Roughly, each option requires Desert Rock to reduce emissions directly from its operations or acquire and retire SO₂ emission credits equal to its annual SO₂ emissions, at a minimum, or up to a cost of three million dollars, whatever is greatest. *Id.* at 3, 4. Recordkeeping and reporting requirements include submitting a report to EPA, or FLM-approved party, 30 days after the end of each calendar year. *Id.* at 4, 5. The report must include the total SO₂ emissions from Desert Rock and, for emission credits, proof that the Emission Reduction Credits/Allowances have been transferred into an account with the U.S. EPA Clean Air Markets Division. *Id.* The Emission Credit Market provides adequate recordkeeping and reporting requirements that enable the parties and the FLMs to

ensure that Desert Rock Energy achieves the reductions required under the MOU. *Id.* at 3. *See* 42 U.S.C. § 403(b) (establishing an allowance transfer system to apply to "any other person who holds such allowances and "a system for issuing, recording and tracking [SO₂] allowances"). Because EPA included the MOU in the permit in compliance with EPA guidance and the MOU itself includes provisions that meet the enforceability criteria under the PSD program, the Petitioners' arguments regarding the unenforceable nature of the MOU are misplaced. NGO Petitioners' Supp. Br. at 231-32; New Mexico's Supp. Br. at 78 -80.

Regardless of whether this Board determines the permit provision is federally enforceable, review should be declined because the Petitioners fail to provide any justification for this Board's review. *In re Multitrade Limited Partnership*, 4 E.A.D. 24, 27-28 (EAB 1992). In *Multitrade*, without deciding whether a permit provision incorporating an MOU was federally enforceable, the Board declined to review of the question entirely for two primary reasons that closely mirror the current situation. *Id.* at 27-28. First, EPA was not a party to the agreement; second, if the agreement failed the permit would not violate any provision of federal law. *Id.* Likewise, in the instant case, EPA Region 9 is not a party to the MOU. And, although not anticipated or alleged by any of the parties, if the MOU were not satisfied the permit would still comply with federal law. EPA Region 9, as allowed by EPA guidance, incorporated the permit at the bequest of the FLMS to address their stated concerns relating to visibility impacts. NSR Manual at E.18-20; AR 42 at 2; AR 120.8 at 2. As EPA Region 9 has asserted, even absent the MOU the Desert Rock Project would not cause an adverse impact on visibility. AR 46 at 35-36, 38, 44; AR 120 at 140, 142. For these reasons, review of the federally enforceable nature of the MOU should be declined.

NGO Petitioners' arguments relating to the source of the emission reduction credits also falls short of meriting review for the same reason: the MOU does not remedy a finding of adverse impact, therefore it is not necessary to demonstrated that "the mitigation agreement will in fact offset adverse impact to visibility." NGO Petitioners' Supp. Br. at 231. As stated by EPA in its response to this identical comment, "in light of EPA's own conclusion that the mitigation would be sufficient to avoid an adverse impact, EPA is confident that, with the SO₂ mitigation measures in place, there will be no adverse impacts on AQRVs." AR 120 at 148. Again, EPA Region 9 has stated its conclusion as the permitting authority that the adverse impact did not exist even without the MOU, and adding the MOU at the bequest of the FLMs only naturally goes to further support that position.

Finally, the Petitioners also assert several moot claims relating to the MOU, including that the MOU was not signed, and was not part of the Administrative Record during the comment period. NGO Petitioners' Supp. Br. at 215-16, 230; New Mexico's Supp. Br. at 78-80. The MOU is not new information presented after the end of the comment period, and regardless, EPA Region 9 did not rely upon it when deciding whether to issue the permit. Therefore, the fact that the MOU was added to the permit after the comment period does not present information sufficient to reopen the permit to comments. *Prairie State*, slip op. at 3 ("Petitioners have not demonstrated how the post-comment period information upon which they rely is sufficiently significant to call into questions IEPA's permit limit. [The permitting authority] did consider, prior to issuing its decision, information substantially similar to the new information upon which the Petitioners rely"). Likewise, in the instant case, the MOU was available during the public comment period; thus, it was not new information to either the permitting authority, the FLMs or the Petitioners. *See* AR 120 at 142 (referencing an USFS comment letter that

enclosed a copy of the mitigation agreement); *see also* AR 120 at 149 (EPA's response noting that "the mitigation measures were reflected in the record of the draft PSD permit."). Even if the MOU were not a part of the administrative record, this Board has previously determined that a permitting authority did not commit clear error where a mitigation agreement negotiated between the permit applicant and a third party was not in the administrative record. *BP Cherry Point*, 12 E.A.D. at 234. As in this case, the permitting authority in *BP Cherry Point* did not rely upon the MOU to make its final permitting decision. *Id.* at 210, 234.

D. Desert Rock's Optional Modeling Assured the FLMs that the Project would not Impede Regional Haze Rate of Progress.

In addition to the 2004 and 2006 modeling scenarios demonstrating that the proposed Desert Rock Project would not adversely impact visibility in Class I areas, Desert Rock submitted another modeling supplement in March 2006 to show whether the area was proceeding towards the Regional Haze Rule ("RHR") reasonable progress goals. AR 38; 40 C.F.R. § 51.308(d) (federal regulations imposing the RHR state implementation plan requirements and reasonable progress goals). The additional RHR modeling scenario was prepared solely at NPS's request to "provide a more quantitative estimate of the potential regional haze benefits" of planned emission reductions from area coal-fired power plants Four Corners Power Plant (Four Corners Power Project) and the San Juan Generating Station (San Juan Generating Station) together with the projected emissions from the Desert Rock Project. AR 38 at 1-1. Although EPA did not rely on the RHR analysis to issue the PSD permit and refers to the modeling as "optional," the Region viewed the supplemental RHR modeling as useful information for the public. AR 120 at 149.

EPA's Response to Comments specifically stated "that there is no requirement to show regional haze reasonable progress in a PSD permit." *Id.* It is significant, however, that the

Agency recognized that the RHR model demonstrated the area's visibility improvement would exceed the 10% RHR Reasonable Progress Requirement through 2010. AR 120 at 149. The NGO Petitioners allege that the RHR supplemental modeling scenario was significantly flawed, and request that this Board remand the permit based upon the RHR reasonable progress modeling scenario. NGO Petitioners' Supp. Br. at 233-35. The NGO Petitioners' RHR modeling allegation is not based in PSD statutory or regulatory permitting requirements, is not supported in the Administrative Record, and attempts to penalize Desert Rock for preparing a supplemental modeling scenario which exceeds regulatory requirements.

The CAA includes a Regional Haze program to prevent and remedy visibility impairment. The Regional Haze program requires states to develop an implementation plan that improves regional haze in Class I areas. 42 U.S.C. § 7491(b)(2). The implementation plan must be submitted to EPA for approval and must include, at a minimum, the following two components: 1) a determination on whether older facilities built between 1962 and 1977 should implement Best Available Retrofit Technology ("BART"); and 2) measures to track and achieve reasonable progress towards the national visibility goal. 42 U.S.C. § 7491(b)(2); 40 C.F.R. § 51.308.

Clearly, the BART requirement of the Regional Haze program targets older facilities, not new facilities such as Desert Rock. In fact, the Desert Rock SO₂ permit limit is 0.06 lb/MMBTU, an emission reduction of 98%. AR 122 at 7. This represents an additional 60% reduction in emissions over BART's presumptive SO₂ limit of 95% reduction or 0.15 lb/MMBTU. 40 C.F.R. pt. 51, App. Y.

For the Regional Haze long-term strategy implementation plan and goals, states must consider several factors including ongoing emission reductions, emission limitations required to

meet Regional Haze reasonable progress goals, and the enforceability of such measures. 40 C.F.R. § 51.308(d)(3)(v)(G). The Regional Haze program imposes multi-year, multi-state planning goals that require states to coordinate to address pollution that impairs visibility. Each state must submit revisions to its respective Regional Haze implementation plan no later than July 31, 2018 and every ten years thereafter. 40 C.F.R. § 51.308(f). Additionally, periodic reports evaluating progress towards the RHR reasonable progress goal must be submitted every five years. 40 C.F.R. § 51.308(g).

Contrary to the NGO Petitioners' implications, the CAA does not require that individual permit applications model compliance with the Regional Haze state implementation plan in addition to the requirement to submit Regional Haze ten-year plan revisions and five-year reports. NGO Petitioners' Supp. Br. at 223-34. Instead, the CAA includes a separate provision to ensure that individual PSD permits do not adversely affect visibility at Class I areas. 42 U.S.C. § 7475(d)(2). As noted in Section IX.A, Desert Rock Energy, EPA Region 9, and the FLMS coordinated to ensure that Desert Rock's permit meets, and even exceeds, the CAA PSD visibility requirements. Consistent with the finding that Desert Rock's permit limitations comply with the PSD visibility requirements, the optional RHR modeling scenario, requested by NPS and using time periods and data provided by NPS for this purpose, found that the proposed Desert Rock Project emissions do not impede RHR reasonable rate of progress goals in the state implementation plan. AR 38 at Section 2 (describing the modeling procedures requested by NPS); AR 38 Section 4 (describing the modeling procedures requested by NPS); AR 38 at Section 4 (describing the modeling results.) In fact, the regional haze reductions exceed the 10% reduction needed by 2010 in all Class I areas modeled. AR 38 at 4-1.

NGO Petitioners, however, merely repeat prior comments made during the 2006 notice and comment period by claiming that the regional haze modeling effort failed to account for other current and future sources in the area including planned coal-fired power plant units and significant oil, gas and coal bed methane gas development for the region. AR 66 at 74; NGO Petitioners' Supp. Br. at 226. Specifically, EPA Region 9 responded to the NGO Petitioners' concerns on Regional Haze by stating:

The supplemental Regional Haze analysis performed by [Desert Rock Energy] was optional; there is no regulatory requirement to show Regional Haze reasonable progress in a PSD permit and therefore no requirement that this prospective estimate rely on enforceable future emission reductions. The modeling incorporated plausible assumptions about the future emissions from two large nearby sources ([Four Corners Power Plant] and [San Juan Generating Station]) in conjunction with [Desert Rock Project's] own emissions. The model incorporated the emission changes from those facilities and evaluated the change in visibility at Class I areas using the same metric that is used under the regional haze rule (64 FR 35714, July 1, 1999) which is the extinction improvement in the best 20% and worst 20% days. The analysis showed that the resulting visibility improvement exceeded the 10% regional haze rulemaking progress requirement through 2010 (based on a 6 year period, 10% of the way to the final goal in 2064).

AR 120 at 149. Further, EPA Region 9 noted that the NGO Petitioners' comments attempted to misapply the RHR on top of the PSD permitting requirements. *Id.* at 150. EPA Region 9 thoroughly responded to the NGO Petitioners' comments by explaining how Desert Rock performed the optional RHR modeling at the FLM's request and it was not required for the PSD permit. AR 120 at 149. Progress towards the RHR goal is a multi-state, multi-decade process. AR 120 at 150. Compliance with the RHR implementation plan cannot be accomplished within the context of an individual source's PSD permit; therefore, the CAA established a specific visibility provision within the PSD permitting program. 42 U.S.C. § 7475(d)(2). Here, the optional modeling provides additional assurance that the Desert Rock Project will not impede visibility improvement expected in the area. AR 120 at 149.

In sum, the NGO Petitioners have provided no regulatory support for the assertion that the RHR modeling submitted by Desert Rock in March 2006 was either necessary to the PSD permit analysis or was relied upon in error by EPA Region 9. Further, the NGO Petitioners fail to provide any new regulatory support to challenge EPA Region 9's Response to Comments about the supplemental nature of the RHR analysis. AR 66 at 74-76; NGO Petitioners' Supp. Br. at 233-34. Rather, the NGO Petitioners have merely repeated the same objections they raised during the comment period and place inappropriate reliance on 40 C.F.R. § 51.308 (relating to the RJR state implementation plans and not PSD permitting requirements) as the sole regulatory support for their argument. AR 66 at 74; NGO Petitioners' Supp. Br. at 233-34. To warrant review of the permit, petitioners must describe each objection that they are raising in their petition for review and explain why the permit issuer's previous response to these previously raised objections was clearly erroneous or otherwise deserves additional review. *Prairie State*, slip op. at 13. The NGO Petitioners have failed to meet this standard so the Board should deny review of these Regional Haze analysis claims.

X. THE ADMINISTRATIVE RECORD CLEARLY SHOWS THAT DESERT ROCK HAS SATISFIED ALL REQUIREMENTS RELATING TO PSD INCREMENTS

Under the CAA, anyone seeking to build a new power plant must demonstrate that the plant will not increase concentrations of certain pollutants above the relevant PSD "increments." A PSD increment is the maximum allowable increase in the concentration of a particular pollutant compared to a baseline concentration, as projected by EPA-approved computer models. *See* 40 C.F.R. § 52.21(c). "If, after taking into account emissions from a proposed source and certain existing sources, the modeled ambient air concentration of a pollutant is below the NAAQS, and the increase in concentration for that pollutant is less than the applicable PSD

increment, the permit applicant has successfully demonstrated compliance." *Knauf I*, 8 E.A.D. at 148-49.

As the Board well knows, it is often very complicated to evaluate compliance with the PSD increments – primarily because of the numerous issues associated with the "baseline emissions." In virtually all cases, the baseline concentrations for each pollutant at issue (the starting point for the increment analysis) can only be established after conducting historical research and computer modeling. To accomplish this task, the permit applicant must work with the permitting authority to identify the sources (both major and minor) that were operating at various points in the past (because the "baseline date" may be different in different areas that are potentially affected by the proposed plant) and then estimate and model emissions from those sources as of the baseline dates.

As EPA Region 9 explained in the AAQIR, however, the increment analysis for Desert Rock is more straightforward than encountered in many other applications, for three reasons. AR 46 at 41-42. First, because of the isolated location of the proposed plant and the nearby Class I areas, there are very few minor sources that could possibly "consume" increment in any Class I or Class II areas that might be affected by Desert Rock. *Id.* at 42. In fact, after consulting with state regulators in Arizona, Colorado, New Mexico, and Utah, "EPA has determined that emissions from minor sources and the potential for minor source growth will not have any effect on either the Class II or Class I increment analysis." *Id.* No one disputes this conclusion. Second, simple assumptions that were specifically designed to be "conservative" – i.e., to make it more difficult for the source to show compliance were used in the Desert Rock Project. *Id.* Specifically, Desert Rock Energy assumed "that all emissions at each major source consume increment regardless of baseline date," thereby overstating potential emissions. If this

type of conservative modeling shows that the source is in compliance (in this case with the PSD increments), then there is no need to deal with many issues that make the modeling analysis more complicated, but also more accurate. Third, after the relevant baseline dates, two major coal-fired power plants in the area substantially reduced their emissions, thus leaving more of the increment available for new, well-controlled facilities like Desert Rock. *Id.* Further, in response to NGO Petitioners' comments, EPA modeled several scenarios which increased the emission reductions required to achieve the NAAQS thus further restricting the increment available for new facilities. Although EPA's modeling was conducted on top of the already conservative assumptions modeled by Desert Rock, EPA confirmed after the additional analysis that the Desert Rock Project was in compliance with the PSD increments. AR 120 at 134.

In the case of Desert Rock, EPA Region 9 specifically noted that "[Desert Rock Energy's modeling] approach guarantees a conservative air quality assessment meaning that the assessment will predict higher impacts than will occur" because (1) for modeling 3-hour impacts, Desert Rock modeled the main stack at 50% higher than the proposed 24-hour maximum; and (2) it used the "worst case scenario" for different load conditions by "assuming 100% load." AR 46 at 37. These assumptions were used throughout the air quality impacts analysis (to analyze potential impacts on the NAAQS, increment consumption, deposition, visibility, and other air quality related values). AR 46 at 35, 37.

As EPA noted, the increment modeling also "assumes that all emissions at each major source consume increment regardless of baseline date. This procedure is considered conservative because it overestimates potential emissions." *Id.* at 35. Even with these conservative assumptions, the modeling analysis showed that emissions from the Desert Project,

"including the monitored background concentration[s], are well below the Class I and Class II increments where they are respectively applicable." AR 46 at 38; *see also* AR 120 at 122-23.

As discussed in more detail below, the NGO Petitioners challenge the Class I Significant Impact Levels ("SILs") and the baseline concentrations used in the increment analysis by using several convoluted arguments that for the most part are simply irrelevant. The administrative record shows that EPA considered and rejected most of these arguments. Where the EPA did not explicitly reject NGO Petitioners' arguments, it simply ran the models again using the emission rates proposed by NGO Petitioners, without deciding whether NGO Petitioners' arguments were valid. AR 120 at 133-134. As discussed in the Response to Comments, these additional modeling runs showed that, even using the assumptions proposed by NGO Petitioners, Desert Rock clearly satisfies all the increment requirements. *Id.* at 131-34. Finally, instead of responding to the model runs provided by EPA in response to NGO Petitioners' comments, the Petition asserts new arguments and emission rates which were not specifically presented to the Region during the comment period. In presenting this information that was outside the administrative record, NGO Petitioners still fail to meet the "heavy burden of overcoming the deference the board generally accords to permitting authorities in matters requiring technical expertise." *Newmont Nevada Energy*, slip op. at 430.

A. EPA Region 9 Properly Used "Significant Impact Levels" (SILs) to Identify the Class I Areas For Which a Full Cumulative PSD Increment Analysis Was Necessary

EPA and Desert Rock coordinated extensively with the FLMs responsible for Class I areas that might be affected by the Desert Rock Project – NPS and USFS. The administrative record shows that since the time that the initial permit application for Desert Rock was submitted in 2004, EPA, the FLMs and Desert Rock (or Desert Rock's outside consultant, ENSR) have

exchanged numerous emails and letters, held several conference calls, and conducted at least one face-to-face meeting regarding all aspects of the Class I increment analysis. See AR 1 at 2; AR 7 at 1; AR 9; AR 10; AR 13; AR 15; AR 19 at 2; AR 20; AR 27, Addendum at 2-1; AR 120 at 131-35; AR 120.8. The 2004 permit application included a PSD Class I impact modeling analysis using CALPUFF, the air quality model recommended by EPA and the FLMs. AR 6, AR 12. Desert Rock Energy's consultant, ENSR, provided January 2006 and March 2006 modeling updates to specifically address PSD Class I Increment and Regional Haze concerns raised by NPS and USFS. AR 37, AR 38.

Desert Rock Energy worked closely with EPA Region 9 and the FLMs to conduct a Class I SO₂ increment analysis that met the regulatory requirements and also addressed any concerns brought forth by the federal agencies. As requested by EPA Region 9 and NPS, ENSR used CALPUFF to model the potential impact of the proposed plant's SO₂ emissions. AR 37 at 4-1. This modeling exercise went beyond the EPA prescribed class increment evaluation of 100 kilometers and conducted a preliminary analysis at every Class I area within 300 kilometers of Desert Rock – a total of 15 different Class I areas. AR 37 at 4-2; AR 46 at 40. *See also* NSR Manual at E.18; *BP Cherry Point*, 12 E.A.D. at 218 n.22 (noting that "[p]roposed sources within this range of [100 km] may be required to perform a variety of analyses relating to the Class I area.").

Ignoring EPA's long-standing guidance and practice regarding the use of SILs in Class I area air quality assessments and prior decisions from this Board upholding their use, NGO Petitioners now repeat arguments that are unsupported and blatantly misrepresent prior EPA comments relating to Class I SILs. The NGO Petitioners first argue that Class I SILs are not "lawful" and cannot be used in the PSD increment analysis; then they claim that a full

cumulative analysis should be conducted for all Class I areas. NGO Petitioners' Supp. Br. at 252, 255; AR 66 at 64-65. As regulatory support for NGO Petitioners' argument against the use of SILs in Class I areas the NGO Petitioners reference an EPA Comment letter to a North Dakota SIP which stated "that it is not appropriate to establish Class I significance levels when an increment violation already exists." NGO Petitioners' Supp. Br. at 255 (citing EPA Comments ND PSD Rule at 5, found in "ltr_23_attachments.zip" folder of the administrative record). EPA's comments in the letter clearly restrict the use of SILs in Class I areas that already violate the increment but do not limit the use of SILs in Class I areas where the increment is not violated, such as the Class I areas analyzed for the Desert Rock Project. EPA Comments ND PSD Rule at 5-6 (found in "ltr_23_attachments.zip" folder of the administrative record). The NGO Petitioners' attempt to distort EPA's comments to support their interpretation contravenes EPA guidance and EAB decisions supporting the use of SILs in Class I areas where the increment is not violated.

The Desert Rock modeling properly used the SILs to evaluate the impact of SO₂ emissions in Class I areas. In accordance with EPA's modeling guidance, where the model indicated SO₂ emissions from the proposed facility would exceed the SIL in any Class I area, a full cumulative impact analysis was conducted to determine whether the Class I PSD increment would be exceeded in that area. NSR Manual at C.24-.28, E.18. For Class I areas, Desert Rock relied on EPA guidance which establishes the "de minimis" SIL level, as being less than 4 percent of the concentration defined for the existing Class I increment."⁶⁰ 61 Fed. Reg. at

⁶⁰ Desert Rock used the more conservative, or restrictive, Class I SIL for this permit analysis. Earlier EPA guidance established the Class I SIL at 1 µg/m³ (24-hour average) or more. NSR Manual at E.18; *Knauf I*, 8 E.A.D. at 155-56 (EAB 1999). Based upon the Desert Rock preliminary increment analysis, none of the Class I areas evaluated exceeded the prior 1

38,292. As explained by EPA, if emissions from a new source would not consume more than 4 percent of the Class I increment, then the source could not be considered to "cause or contribute to" an increment violation. *Id.* EPA's Response to Comments document recognizes the Class I SILs were never finalized but says "in practice, EPA and the FLM . . . have used the proposed SILs as a baseline for comparison and as one component of the determination whether an impact is significant." AR 120 at 127. In effect, the SILs are a screening tool used to focus the analysis on those areas where a new source may have a meaningful impact on air quality. This Board has recognized that EPA "has long interpreted the phrase 'cause, or contribute' to refer to significant or non de minimis emission contributions both in applicable EPA regulations and long-standing guidance." *Prairie State*, slip op. at 139.

The NGO Petitioners' assertion that cumulative emissions should be assessed in every Class I area should be dismissed as the Desert Rock Class I increment evaluation properly relied upon EPA guidance to evaluate emissions from the facility itself against the SIL as a preliminary increment analysis. NGO Petitioners' Supp. Br. at 255. Cumulative emission analyses are not required unless the impact of the emissions from the proposed facility under review exceeds the SIL. NSR Manual at C.24-.28, E.18. If the impact of the emissions exceed the SIL, the applicant must conduct a cumulative analysis to determine if the emissions exceed the applicable increment. *Id.* As discussed above, Desert Rock Energy conducted the cumulative SO₂ increment analysis in coordination with EPA Region 9 and in compliance with applicable EPA

$\mu\text{g}/\text{m}^3$ value; the value used as the Class I SIL for the Desert Rock Project was $0.2 \mu\text{g}/\text{m}^3$ for a 24-hour average, significantly lower than the prior SIL recommended for Class I areas. AR 46 at 40. *Id.* at 156. The value used as the Class I SIL for the Desert Rock Project was $0.2 \mu\text{g}/\text{m}^3$ for a 24-hour average, significantly lower than the prior SIL recommended for Class I areas. AR 46 at 40; *Id.* Notably, based upon the Desert Rock preliminary increment analysis, none of the Class I areas evaluated exceeded the prior $1 \mu\text{g}/\text{m}^3$ value.

guidance. The NGO Petitioners' argument also disregards prior decisions of this Board, which have approved the use of SILs to evaluate the impact of emissions from the proposed facility alone. *BP Cherry Point*, 12 E.A.D. at 227 (noting that "EPA does not require a full impact analysis for a particular pollutant when emissions of that pollutant from a proposed source or modification would not increase ambient concentrations by more than prescribed significant impact levels"); *Knauf I*, 8 E.A.D. at 156 (denying review because modeling showed that any PM₁₀ concentrations would be less than the significant ambient impact level).

EPA Region 9 properly approved Desert Rock Energy's SO₂ increment analysis which evaluated the emissions from the Desert Rock Project against Class I SILs. The NGO Petitioners' unsupported claims that SILs are unlawful in Class I areas falls far short of demonstrating that the Region's decision "is clearly erroneous or otherwise warrants review." *Prairie State*, slip op. at 13. Desert Rock's modeling followed EPA guidance to determine if additional SO₂ modeling, including a cumulative SO₂ analyses, were required for Class I areas. The EAB should reject both SIL arguments posed by the NGO Petitioners.

B. EPA Properly Approved Conservative Baseline Assumptions Used in the SO₂ Cumulative Analysis

Where the preliminary Class I increment analysis required a cumulative emission evaluation, Desert Rock submitted the necessary PSD increment modeling to EPA in January 2006. AR 37. Based upon the cumulative analysis, EPA Region 9 found that the Desert Rock Project would not cause or contribute to a SO₂ Class I increment exceedance and therefore issued the draft PSD permit in July 2006. AR 46 at 42. In response to NGO Petitioners' comments on the draft permit regarding emission reductions taken at San Juan Generating Station to achieve the NAAQS, EPA ran additional models which revised the San Juan Generating Station emissions in the baseline concentration and simultaneously reduced the available increment for

the Desert Rock Project. AR 120 at 132-34. Even after incorporating the NGO Petitioners' revised emission estimates, EPA's Class I modeling scenarios confirmed that Desert Rock Project would not exceed the Class I increment. *Id.*

Assessing emission increases and decreases relative to the appropriate baseline concentration is an integral part of the PSD increment analysis. In fact, Desert Rock acknowledged early in the permitting process in an email to EPA in May 2003 that the SO₂ PSD increment analysis a key issue. AR 1. Consistent with this recognition, the appropriate baseline concentration remained the subject of considerable analysis throughout the permitting process, as documented in the Administrative Record. AR 1 at 2; AR 7 at 1; AR 9; AR 10; AR 13; AR 15; AR 19 at 2; AR 27, Addendum at 2-1; AR 120 at 131-35; AR 120.8.

The CAA establishes the SO₂ PSD increment as the maximum emission increase allowed in addition to the SO₂ baseline concentrations in place at the respective minor source baseline date. 42 U.S.C. § 7473(b). The regulations provide that the baseline concentration should include the following major source emissions: 1) actual emissions from major sources operating on the minor source baseline date and 2) allowable major source emissions if construction commenced before the major baseline date but the source was not yet in operation on the minor source baseline date. 40 C.F.R. § 52.21(b)(13)(i). After the minor source baseline date, the baseline concentration includes actual emissions increases or reductions from minor stationary sources in addition to the major sources. 40 C.F.R. § 52.21(b)(13)(ii).

As discussed below, the emissions included in Desert Rock Energy's PSD SO₂ increment analysis meets the regulatory requirements for calculating the baseline concentrations. Where the NGO Petitioners' comments pointed to historical uncertainty relating to the emissions necessary to meet the SO₂ NAAQS, the Region conducted supplemental CALPUFF modeling

that incorporated additional emission reductions into the baseline concentration and simultaneously reduced the available increment for the Desert Rock Project emissions. AR 120 at 131-34. Instead of responding to EPA's modeling, the NGO Petitioners repeat their assertions regarding the NAAQS emission limits and continue on a series of minor source baseline arguments. NGO Petitioners' Supp. Br. at 240-41, 244-49. The following sections demonstrate how each SO₂ NAAQS and minor source baseline argument that NGO Petitioners raise fails to establish that the permitting decision was clearly erroneous or based upon any erroneous findings of fact or conclusions of law. *Prairie State*, slip op. at 13. Therefore, the Board should decline review of these arguments.

1. *EPA's Additional Modeling Incorporated the NAAQS SO₂ Emission Limits and Confirmed that the Desert Rock Project Would Not Exceed the Class I Increment*

The baseline emission concentrations are often difficult to recreate because they require an evaluation of historical permitting and emission estimates. Conducting this analysis for the Desert Rock Project is no exception. The Desert Rock increment analysis erred on the side of caution and eliminated uncertainty regarding whether major source SO₂ emissions were part of the baseline concentration or counted against the available increment. AR 46 at 41-42. To avoid confusion, the cumulative increment analysis assumed that all major sources, with the exception of emission reductions from area power plants, consumed or reduced the increment available for SO₂ emissions from the Desert Rock Project. *Id.* By assuming that all major sources "consume the increment," the baseline dates were only relevant for two area power plants: San Juan Generating Station and Four Corners Power Project. EPA's Response to Comments discussed these power plants in detail and even conducted additional modeling to respond to NGO Petitioners' comments. AR 120 at 131-34.

Despite the conservative assumptions made in the Desert Rock increment analysis and the additional modeling conducted by EPA Region 9, the NGO Petitioners challenge the cumulative increment analysis by repeating the same SO₂ NAAQS argument presented in their comment submitted during the public notice and comment period. It is unclear why the NGO Petitioners again claim that the model inappropriately allows power plant emissions relating to SO₂ NAAQS reductions to "expand the increment." NGO Petitioners' Supp. Br. at 239-41; AR 66 at 68. EPA Region 9's Response to Comments responded to this concern in detail; the Region even conducted additional SO₂ PSD increment modeling for the Class I areas using the precise emission scenario suggested by the NGO Petitioners. AR 66 at 68; AR 120 at 132-34. EPA Region 9's CALPUFF model evaluated the effect of twelve additional modeling scenarios and emission assumptions, including both the New Mexico NAAQS modeling emission limits and the 3-hour emission limits for San Juan Generating Station as recommended by the NGO Petitioners. These modeling scenarios resulted in "considerably less increment expansion," and confirmed that even with the smaller increment expansion, the Desert Rock Project's proposed SO₂ emissions did not exceed the PSD Class I increment. AR 120 at 132-34. EPA provided the modeling files for the NGO Petitioners and the public to review, yet the NGO Petitioners have blatantly ignored EPA's modeling narrative provided in the Response to Comments and the modeling documentation provided by the Region. Instead, their Supplemental Brief inexplicably states that a lack of data made it "virtually impossible . . . to evaluate the increment-affecting emissions modeled for each scenario." AR 120 at 227; NGO Petitioners' Supp. Br. at 236. "It is not sufficient simply to repeat objections made during the comment period; instead a petitioner must demonstrate why the [permit issuer's] response to those objections (the [permit issuer's] basis for its decision) is clearly erroneous or otherwise merits review." *Newmont Nevada*

Energy, 12 E.A.D. at 471-72 (citing *Steel Dynamics*, 9 E.A.D. at 744; *accord Peabody W. Coal*, 12 E.A.D. at 33, 46 n.58; *Tondu Energy Co.*, 9 E.A.D. at 714; *Encogen Cogen.*, 8 E.A.D at 251-52.

EPA modeled additional SO₂ increment scenarios, which incorporated assumptions regarding the NAAQS emissions as requested by the NGO Petitioners. AR 120 at 131-34. Although this modeling confirmed earlier conclusions that the Desert Rock Project would not exceed the increment in Class I areas, the NGO Petitioners inexplicably opted not to respond to either EPA's narrative in the response to comments or the modeling data provided to the public. AR 46 at 38; NGO Petitioners' Supp. Br. at 251. For these reasons, the Board should reject the NGO Petitioners' argument regarding the NAAQS emission limits incorporated into the SO₂ cumulative Class I analyses.

2. *The Baseline Concentrations were Properly Determined Relative to the SO₂ Minor Source Baseline Dates*

The NGO Petitioners also assert unfounded, and in some cases new, claims that the relative minor source baseline dates require the use of allowable emission estimates in Arizona and Colorado and actual emission estimates in New Mexico and Utah. NGO Petitioners' Supp. Br. at 240, 244-49. EPA's own historical review determined that the SO₂ emissions requirements for Four Corners Power Project and San Juan Generating Station were in flux until the 1980s, well after most of the minor source baseline dates. AR 120 at 132, 134-35. In an attempt to disguise the fact that the NGO Petitioners themselves have little historical evidence to support any of these claims, their Petition spins the various minor source baseline arguments into a messy ball of yarn which is difficult to unravel, while also adding more new claims which NGO Petitioners raise for the first time.

The NGO Petitioners' "baseline" series of arguments begins with the allegation that the San Juan Generating Station emissions included in the baseline concentration for Arizona and Colorado should be estimated as "allowable" emissions rather than actual emissions estimates. NGO Petitioners' Supp. Br. at 245. The use of allowable emission estimates in the baseline concentration for a major source requires proof of two facts which the NGO Petitioners have failed to produce. First, in order to incorporate major source allowable emissions into the baseline concentration a petitioner must prove that the major source commenced construction prior to the major source baseline date. 40 C.F.R. § 52.21(b)(13)(i). Here, NGO Petitioners have merely speculated that San Juan Generating Station commenced construction on the SO₂ controls prior to the major source baseline. The facts presented to support the allegation that construction "commenced" prior to the major source baseline fall far short of the evidence required to fulfill the regulatory definition. 40 C.F.R. § 52.21(b)(9). Second, a petitioner must assert a viable allowable emission rate that should be used to estimate emissions. 40 C.F.R. §§ 52.21(13)(i)(b), (16). The NGO Petitioners' Supplemental Brief fails on this point as well. EPA, as discussed above, extensively responded to and modeled the NGO Petitioners' comments relating the SO₂ NAAQS emissions limit, which is the same the allowable emission rate asserted in the Petitioners' comments for Arizona and Colorado. AR 66 Attachments (see Stamper Report on SO₂ PSD Analysis at 9-11). In response, the NGO Petitioners failed to respond to the Region's modeling in their Supplemental Brief. Any attempt to raise arguments relating to new federally enforceable emissions rates is merely a diversionary tactic from their lack of a response to the substance of EPA's Response to Comments document. See *Prairie State*, slip. op. at 13 (noting that a petitioner must describe each objection it is raising and explain why the permit

issuer's previous response to each objection was clearly erroneous or otherwise deserving of review instead of merely repeating objections made during the comment period).

NGO Petitioners' argument regarding the emissions from San Juan Generating Station is completely unsubstantiated. From a regulatory perspective, construction can be "commenced" either through (i) actual on-site construction, *i.e.* fabrication, installation, or demolition, or (ii) entering into a contractual obligation "which cannot be cancelled or modified without substantial loss to the owner or the operator, to undertake a program of actual construction of the source to be completed within a reasonable amount of time." 40 C.F.R. § 52.21(b)(9). The NGO Petitioners never assert that the first option, actual construction, commenced for San Juan Generating Station prior to the major source baseline. Rather the NGO Petitioners attempt to rely on an underlying exhibit that only mentions the construction "may have commenced" before the major source baseline date and that an industry representative "implied" at a hearing that construction commenced before the major source baseline. NGO Petitioners' Supp. Br. at 240; AR 66 Stamper Report on SO₂ PSD Analysis at 10. The NGO Petitioners hardly present evidence sufficient to find the Region's decision was based upon clearly erroneous finding of fact. Petitioners must demonstrate that a PSD decision is based upon a clearly erroneous finding of fact or conclusion of law to support review by this Board. *Newmont Nevada Energy*, 12 E.A.D. at 437 (citing 40 C.F.R. § 124.19(a)).

In addition to the lack of evidence supporting the alleged start date of construction, the NGO Petitioners assert noncompliance with federally enforceable emission rates which were not specifically addressed during the comment period. NGO Petitioners' Supp.Br. 245-46. The NGO Petitioners' attached exhibit includes only one paragraph, which addresses the SO₂ emission requirements applicable in a federally approved SIP to set the allowable emissions rate

for San Juan Generating Station. AR 66, Stamper Report on SO₂ PSD Analysis at 10-11. EPA responded to this comment by conducting additional modeling scenarios that incorporated the very SIP emission limits referenced by the exhibit. AR 120 at 132-34, 227. The NGO Petitioners' Supplemental Brief for the first time asserts that the allowable emission rates should equal "emission reduction requirements that were more stringent than what was ultimately approved by EPA as part of the New Mexico SIP." NGO Petitioners' Supp. Br. at 245 (emphasis added).

Addressing new issues on appeal conflicts with EPA's regulatory requirement to raise all reasonably ascertainable issues during the public comment period. 40 C.F.R. § 124.19(a). Based upon this regulatory limitation, this Board has recognized that the EAB's power to review appeals should be only sparingly exercised. *Newmont Nevada Energy*, 12 E.A.D. at 437 (EAB 2005). If issues such as new emission rates were allowed to be raised for the first time on appeal, "it would undermine the efficiency, predictability and finality of the permitting process." *Prairie State*, slip op. at 78.

The NGO Petitioners' Colorado and Arizona minor source baseline arguments for San Juan Generating Station fail because the NGO Petitioners 1) did not provide any evidence that San Juan Generating Station construction commenced prior to the SO₂ Major Source baseline date, and 2) do not assert a viable allowable emission rate for San Juan Generating Station.

The NGO Petitioners recognize that the minor source SO₂ baseline date for New Mexico and Utah occurred after the controls were in place at San Juan Generating Station Units 1 and 2. NGO Petitioners' Supp. Br. at 247. Therefore, the NGO Petitioners allege that the *actual* emissions for San Juan Generating Station at the New Mexico and Utah minor source baseline

dates were lower than the eventual allowable emission levels, and so the actual emissions should be used in the baseline concentration established at the minor source baseline date. *Id.*

From the outset NGO Petitioners' argument is based upon false premises. NGO Petitioners' exhibit incorrectly refers to Utah's minor source baseline for SO₂ date as "Mid 79 or earlier." AR 66 Attachments (*see* Stamper Report on SO₂ PSD Analysis at 4, 11). Desert Rock confirmed in its January 2006 Modeling Update that the Class I increment modeling used the accurate minor source baseline dates, which were confirmed by the respective states. AR 37, Appendix A at 2-1. The Utah minor source baseline date reference by Desert Rock was April 1, 1990; this date was also used by NPS when discussing Canyonlands, a Class I area in Utah. AR 120.8 at 6 (Department of the Interior Preliminary Technical Comments on the Desert Rock Prevention of Significant Deterioration Permit Application) .

In addition to an inaccurate baseline date for Utah, the NGO Petitioners' argument also fails because it is based upon historical speculation regarding actual emissions in Utah and New Mexico. San Juan Generating Station did not operate continuous emission monitors at the time of the minor baseline years for New Mexico and Utah; therefore, the NGO Petitioners' entire argument regarding actual emissions is premised upon heavily qualified assertions, such as San Juan Generating Station "may have been reducing SO₂" and the facility "intended" to operate controls to meet certain emission levels. AR 66 (*see* Stamper Report on SO₂ PSD Analysis at 12); NGO Petitioners' Supp. Br. at 247. This qualified language only supports the EPA Region 9's actions, which accounted for some of the uncertainty by conducting additional modeling scenarios to measure the Desert Rock Project emissions against a considerably reduced SO₂ increment instead of speculating on the historical actual emissions. AR 120 at 131-35. The NGO Petitioners' tentative statements regarding possible actual emission rates are hardly

sufficient to demonstrate that the Region's decisions were based upon facts that were "clearly erroneous" as required by this Board to review a permitting authority's actions. *See Prairie State*, slip. op. at 13.

Moreover, the NGO Petitioners' Supplemental Brief alleges that the baseline concentration fails to include additional Four Corners Power Project emissions reductions necessary to meet the SO₂ NAAQS. NGO Petitioners' Supp. Br. at 244. EPA reviewed the SO₂ emissions modeled for Four Corners Power Project and disagreed with the NGO Petitioner's allegations that the Four Corners Power Project SO₂ emissions reductions allowed for too much increment expansion. AR 120 at 132. Specifically, EPA responded by clarifying that:

The requirements on Four Corners Power Project were in flux for a decade, and not finally decided until after the minor source baseline date, so it is not clear what allowable emission rate should be used. In any case, the baseline concentration is defined in terms of actual emissions at the time of the minor source baseline date; allowable emissions are used as a surrogate for sources permitted but not yet operating, or lacking sufficient operating history to establish an actual emissions rate. Actual emission reductions due to construction, such as of control equipment, are not part of the baseline and do affect the increment. Therefore, we properly used the actual emissions from the Four Corners Power Project as of the minor source baseline date.

Id. EPA went on to explain that the agency had "reviewed and accepted modeling for Four Corners Power Project showing the emission limits needed to meet the NAAQS." *Id.* In fact, the emission rates assumed by Desert Rock for Four Corners Power Project appear to be lower than those assumed in the 1981 New Mexico modeling for NAAQS attainment and proposed by the NGO Petitioners. *Id.*; AR 66 at 67. Because the baseline emissions assumed for Four Corners Power Project are more stringent than the actual emission limits for the facility, Desert Rock conservatively modeled that Four Corners Power Project emissions consumed a greater portion of the increment than is actually the case. AR 120 at 132-33.

The NGO Petitioners' Supplemental Brief fails to address EPA's narrative describing its Four Corners Power Project analysis and therefore this argument should be rejected. The NGO Petitioners did not "explain why the permit decision maker's previous response to those objections . . . is clearly erroneous or otherwise warrants review." *Commonwealth Chesapeake*, 6 E.A.D. at 769; NGO Petitioners' Supp. Br. at 243.

Taken together, the conservative calculation used by Desert Rock and the additional modeling and the responses to comments provided by EPA Region 9 support the determination that the proposed Desert Rock Project complies with the PSD increment limitations. The NGO Petitioners fail to provide any factual basis for the assertion that San Juan Generating Station "commenced construction" before the major source baseline date and then confound the argument by asserting new "allowable" emission rates for San Juan Generating Station should be used – arguments which were not raised during the comment period and which have not been substantiated in fact. Finally, for both San Juan Generating Station and the Four Corners Power Project the NGO Petitioners repeat arguments raised during the comment period without responding to EPA's modeling that evaluates lower NAAQS emission limits in the baseline. Even discounting these procedural errors, the NGO Petitioners have not provided any factual basis or specific legal error that demonstrates the EPA Region 9 "departed from standard statutory and regulatory requirements" or failed to provide justification for the approach used to calculate the baseline or the increment. NGO Petitioners' Supp. Br. at 249. EPA Region 9 responded to the NGO Petitioners' comments relating to SJGP and Four Corners Power Project SO₂ emissions in the baseline and increment expansion. When challenging technical issues such as these, a petitioner must demonstrate why the EPA's analysis is erroneous in order "to surmount its heavy burden of overcoming the deference the board generally accords to

permitting authorities in matters requiring technical expertise." *Newmont Nevada Energy*, 12 E.A.D. at 430. The additional baseline arguments related to allowable emissions are not only insufficient to prove a "clearly erroneous finding of act or conclusion of law" as required to merit review by this Board, but also were not specifically raised during the public comment period. 40 C.F.R. § 124.19(a); *Prairie State*, slip op. at 13, 78.

C. EPA's Additional Modeling Scenarios that Confirm Desert Rock Emissions Do Not Exceed the PSD Increment Did Not Need to Undergo Notice and Comment.

The well-documented coordination between EPA, FLMs, and Desert Rock provided many opportunities for the federal agency partners to consult with modelers and request specific modeling scenarios throughout the Desert Rock PSD permit analysis. The Administrative Record is replete with emails, letters and documentation relating to the emission inventories developed for the models, the types of models used for the analysis, and the final results. At least five modeling analyses were prepared and evaluated for this project: 1) the February 2004 initial PSD permit application (AR 6); 2) the revised May 2004 PSD permit application and revised modeling protocol (AR 12, AR 12.1); 3) the January 2006 revised PSD increment, visibility and regional haze modeling as requested by EPA and the FLMS (AR 37); 4) the March 2006 additional regional haze analysis (AR 38); and 5) modeling conducted by NPS and submitted to EPA in October 2006 (AR 120.8). None of the aforementioned models predicted that the cumulative SO₂ analysis, including emissions from the Desert Rock project, exceeded any Class I PSD increment.

Based upon comments submitted by the NGO Petitioners during the comment period, EPA conducted yet another modeling analysis that reduced the PSD increment available for the Desert Rock Project. The additional modeling primarily increased the San Juan Generating

Station SO₂ emissions reductions attributed to achieving the NAAQS and thus decreased the increment expansion available for emission from new sources such as Desert Rock. AR 120 at 131-34. Like the previous modeling analyses, the demonstration confirmed that projected SO₂ emissions, including the emissions from the proposed Dessert Rock Project, would not exceed the PSD increment in any Class I area.

"[T]he regulations contemplate the possibility that permit terms will be added or revised in response to comments received during the public comment period." *Indeck*, slip op. at 28 (citing *Amoco Oil Co.*, 4 E.A.D. at 980; *Chem-Sec. Sys.*, 2 E.A.D. at 807 n.11). Specifically, under 40 C.F.R. § 124.14, the Regional Administrator has discretion regarding whether to reopen a public comment period. The EAB generally defers to EPA's discretion regarding whether the public comment period should have been reopened as a result of changes made in a final permit. *Thermalkem*, 3 E.A.D. at 357; see also *Amoco Oil Co.*, 4 E.A.D. at 981; *GSX Services*, 4 E.A.D. at 467.

One factor that the Board must assess whenever a change has been made to the draft permit is whether the record contained a thorough explanation of EPA's basis for changing the terms of the permit. *Indeck*, slip op. at 29 (citing 40 C.F.R. § 124.17(a)(1); *City of Marlborough*, 12 E.A.D. at 244-45). Here, the EPA modeling scenarios were described in EPA's Response to Comments and the supporting data is included in the administrative record. AR 120 at 131-34, 227.

Additionally, in assessing whether the comment period should be reopened, the permit issuer should assess "(1) whether reopening the comment period 'could expedite the decisionmaking process,' and (2) whether comments on the draft permit have given rise to 'substantial new questions.'" *Thermalkem*, 3 E.A.D. at 357 (citing 40 C.F.R. §§ 124.14(a)(1),

(b)). Petitioners have not shown that reopening the comment period will "expedite the decisionmaking process." Therefore, the only issue remaining is whether the final Desert Rock Project permit raised "substantial new questions." It did not.

The modeling prepared by EPA functioned to support - not correct - the prior modeling analysis that determined the Class I increments were not exceeded. The findings did not alter any PSD permit terms, emission limits or control requirements in the PSD permit, nor did they change the EPA Region 9's proposed approval of the PSD permit. In short, EPA's modeling scenarios do not provide additional information or raise substantial questions that warrant the reopening of the comment period. *Prairie State*, slip op. at 64-65. The modeling did not create any change, much less any substantive change, in the permit requirements or the Region's determination; therefore, additional notice and comment beyond the exchange of information that has occurred since 2004 through the issuance of the PSD permit in 2008 is unnecessary.

XI. EPA PROPERLY ASSESSED THE IMPACTS OF THE DESERT ROCK PROJECT ON ENVIRONMENTAL JUSTICE COMMUNITIES AND MEANINGFULLY RESPONDED TO COMMENTS REGARDING ENVIRONMENTAL JUSTICE.

NGO Petitioners assert that EPA failed to fulfill its environmental justice responsibilities as it relates to the people of the Navajo Nation that inhabit the land surrounding the Desert Rock Project. NGO Petitioners' Supp. Br. at 257. There is a certain paternalistic quality to this particular argument, considering that (1) the Desert Rock Project was conceived by the Navajo Nation, the same low-income, minority community that the NGO Petitioners assert was disregarded in the PSD permitting process; (2) from a tribal law standpoint, the Desert Rock Project could only occur with the explicit approval of the Navajo Nation; and (3) from an economic standpoint, the revenue realized by the Navajo Nation as a result of the Desert Rock Project will be substantial and is essential to the community's continued viability. *See* AR 16;

AR 29. Indeed, the NGO Petitioners posit this environmental justice argument in the face of a resolution by the Navajo Nation Council, the elected body representing the interests of the Navajo Nation, approving necessary leaseholds. The margin of this vote, 66-7, demonstrates overwhelming support for the Desert Rock Project and Navajo Nation's partnership with Desert Rock Energy.

In advancing this environmental justice argument, the NGO Petitioners attack the sufficiency of the underlying analysis—in this context the NGO Petitioners challenge the soil and vegetation analysis, EPA's environmental justice analysis, and the BACT analysis, overstate EPA's obligations under the relevant law, and attempt to shoehorn into the PSD permitting process consideration of every single environmental issue related to the Desert Rock Project, whether or not related to air quality.

A. EPA Met Its Obligations Under the Environmental Justice Executive Order.

The environmental justice issues raised by the NGO Petitioners relate to the environmental justice mandate issued by President Clinton to the federal agencies in 1994. 59 Fed. Reg. 7,629 (Feb. 16, 1994) (the "Executive Order"). The Executive Order requires each federal agency, "[t]o the greatest extent practicable and permitted by law," to incorporate environmental justice into its mission "by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States. . . ." *Id.* § 1-101.

EPA has issued three guidance documents regarding the Executive Order,⁶¹ EPA has stated that notwithstanding the lack of formal rules or guidance on environmental justice, EPA can address environmental justice issues in the context of the PSD permitting process. *See In re Ecoeléctrica, L.P.*, 7 E.A.D. 56 (EAB 1997); *AES Puerto Rico*, 8 E.A.D. at 350; *Knauf I*, 8 E.A.D. 121.

In each of the above-cited cases, the Board denied review of a PSD permit on environmental justice grounds where (1) the permitting authority conducted an analysis to identify impacted low-income or minority population areas, and (2) where such a population was identified, the permitting authority proceeded to assess whether the proposed PSD permit would result in a disproportionately high and adverse effect on human health or the environment in those areas. *See Ecoeléctrica*, 7 E.A.D. at 68-69; *AES Puerto Rico*, 8 E.A.D. at 350-51; *Knauf II*, 9 E.A.D. at 16-17.⁶² Precisely the same two-step process was employed by EPA here.

⁶¹ In April of 1995, EPA released the document titled "Environmental Justice Strategy: Executive Order 12898," which defined the approaches by which EPA would implement the Executive Order. In August 1997, EPA released the "Environmental Justice Implementation Plan" supplementing the 1995 guidance. Finally, in April 1998, EPA issued a guidance document entitled "Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses — April 1998" (the "NEPA EJ Guidance"). This last document may be found in the administrative record, as Attachment 35 to the Response to Comments. The record indicates that both EPA and Desert Rock Energy considered the NEPA EJ Guidance a useful benchmark in conducting their respective environmental justice analyses, in particular because the air quality impact analysis conducted in the context of the PSD permit is anticipated to be included as part of the DEIS's much broader environmental justice analysis. *See* AR 120 at 160; AR 77 at 1, 38.

⁶² A crucial component of EPA's environmental justice process is providing a meaningful opportunity for the public to participate in the PSD permit process. EPA's Response to Comments document details the extraordinary efforts made to offer such an opportunity, and, indeed, the NGO Petitioners do not challenge the sufficiency of the public participation component. *See* AR 120 at 2-7, 162-64; NGO Petitioners' Supp. Br. at 256-69.

1. *Using Population Data and Air Emissions Data, EPA Properly Concluded that the Proposed PSD Permit Would Not Result in a Disproportionately High and Adverse Effect on Human Health or the Environment in Low-Income or Minority Population Areas.*

The NGO Petitioners state that, "[r]ather than perform any actual analysis of the potential adverse impacts on EJ communities, EPA instead offers up a one sentence answer to all Environmental Justice Concerns." NGO Petitioners' Supp. Br. at 258 (emphasis in original). According to NGO Petitioners, "[w]hile the record contains a document entitled 'Additional Impacts: Environmental Justice Assessment,' dated July 12, 2006, this document contains nothing but very general factual information (such as demographic data), and some brief discussion of the types of issue that should be addressed in an Environmental Justice analysis (without actually performing any such analysis)." NGO Petitioners' Supp. Br. at 259. The NGO Petitioners' characterization of the content of the document is far from accurate.

The "Additional Impacts: Environmental Justice Assessment" report, dated July 12, 2006 (the "EJ Assessment") is a 39-page (excluding exhibits) analysis of the possible air quality impacts of the Desert Rock Project upon minority and low-income populations. *See* AR 77. According to the NEPA EJ Guidance, the use of national decennial census data depicting low-income/poverty and minority statistics is one of the most common methods used to determine the existence and location of low-income and minority communities. NEPA EJ Guidance at 2.1.2. Consistent with the NEPA EJ Guidance, the EJ Assessment recognizes that census data often includes many gaps. *See* AR 77 at 7; NEPA EJ Guidance at 2.1.2. Accordingly, the EJ Assessment drew population data not only from the 1990 and 2000 censuses, but also from data derived from the Colorado State Demography office, the Department of Indian Health Services, the New Mexico Department of Labor, post-2000 reports generated by the U.S. Census Bureau on income and poverty and, of course, data provided by the Navajo Nation itself. AR 77 at 8-20,

36-39; *see also* NEPA EJ Guidance at 2.1.2 ("additional methods available in locating the populations of interest including contacting local resources, government agencies, commercial database firms, and the use of locational/distributional tools").

Using this data, the EJ Assessment appropriately identified the distribution of minority and low-income populations within the Desert Rock Project's areas of influence. According to the EJ Assessment, every local and regional area of influence had a proportion of minority population and low-income population that exceeded the respective reference population in New Mexico, Arizona or Colorado. AR 77 at 8, 14. The fifteen Navajo chapters within the local area of influence had both a larger proportion of American Indian population and a larger proportion of families in poverty. AR 77 at 9.

The EJ Assessment pays special attention to the unique economic, cultural and health characteristics of this environmental justice community. *See, e.g.*, AR 77 at 7, 20-21 (discussing the cultural value of geographically dispersed populace); *Id.* at 22-23 (discussing cultural and economic aspects of grazing); *Id.* at 23-24 (discussing ceremonial uses of plants and animals). In preparing the EJ Assessment, Desert Rock Energy engaged a Navajo botanist and other ethnobotanists to perform field studies on culturally-significant flora, as well as consulting a Navajo cultural specialist regarding the practical and ceremonial uses of the plants and animals that were identified in the study area. AR 77 at 7. The EJ Assessment also studied the health conditions and health care situation, concluding that much of the region of influence is a medically-underserved area. AR 77 at 24-25.

Having identified impacted low-income or minority population areas, the EJ Assessment proceeds to assess whether the proposed PSD permit would result in a disproportionately high and adverse effect on human health or the environment in those areas. Because the proposed

action is a PSD permit, the EJ Assessment focused on the potential air quality effects upon the environmental justice population. AR 77 at 26.

To evaluate these effects, the EJ Assessment compares the anticipated maximum annual emissions from the Desert Rock Project to the NAAQS because:

[t]he [NAAQS] are considered to be sufficiently protective of human health and welfare and include an adequate margin of safety. Consequently, compliance with the NAAQS for a particular pollutant demonstrates that no adverse health effects would be expected for that pollutant.

AR 77 at 27. Applying the modeling of air quality impacts from the Desert Rock Project's air pollutant emissions, the EJ Assessment concluded:

- No significant (*i.e.*, equal to or greater than 1% of the NAAQS) ambient impacts for NO_x and CO were predicted to occur outside the plant perimeter;
- The maximum predicted ambient 3-hour concentration for SO₂ (10% of NAAQS) was predicted to occur approximately 0.66 miles from the plant and ambient concentrations of SO₂ in excess of 2% of the NAAQS were predicted to occur out to a distance of 6.6 miles from the plant; and
- The maximum predicted ambient 24-hour and annual concentrations of PM₁₀ were predicted to occur within 0.3 miles and 0.4 miles, respectively, from the plant perimeter, and ambient concentrations of PM₁₀ in excess of 3.33% of the NAAQS were only predicted to occur out to a distance of 0.7 miles from the plant.

AR 77 at 27. These results indicated project impacts above specified "significance" levels for SO₂ and PM₁₀, thereby requiring a cumulative impacts analysis. *Id.*⁶³ As noted in the EJ Assessment, the PSD application (Table 5-1) analyzes the maximum annual criteria pollutant emission rates from all sources in the area of influence. AR 77 at 28; *see also* AR 6 at 6-37.

⁶³ Analysis was performed to investigate how many residents live within the limited areas that were projected to have slightly elevated SO₂ and PM₁₀ levels. AR 77 at 28. According to the EJ Assessment, the residential population within 1.1 miles of the Desert Rock Project is two American Indian persons. *Id.* Within the 6.6 mile area implicated by the SO₂ analysis, the EJ Assessment identified a maximum population of 76 persons, all of whom are American Indian. *Id.*