BRACEWELL
&GIULIANI

Texas
New York
Washington, DC
Connecticut
Dubai
Kazakhstan
London

Jeffrey R. Holmstead
Partner

202.828.5852 Office
202.857.4812 Fax

jeff.holmstead@bgllp.com

Bracewell & Giuliani LLP
2000 K Street NW
Suite 500
Washington, DC
20006-1872

March 27, 2009

By Messenger

U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board
Colorado Building
1341 G Street, N.W., Suite 600
Washington, DC 20005

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

Dear Clerk of the Board:

Enclosed please find an original and five copies of DESERT ROCK ENERGY COMPANY'S SURREPLY TO PETITIONS FOR REVIEW for filing in the above-referenced matter. Please feel free to contact me if you have any questions.

Very truly yours,

Bracewell & Giuliani LLP

FOR

Jeffrey R. Holmstead

Enclosure

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

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

DESERT ROCK ENERGY COMPANY'S SURREPLY TO PETITIONS FOR REVIEW

Jeffrey R. Holmstead
Jason B. Hutt
Richard Alonso
Bracewell & Giuliani LLP
2000 K Street, N.W.
Washington, D.C. 20006
Telephone: 202-828-5800
Facsimile: 202-223-1225
jeff.holmstead@bgllp.com
jason.hutt@bgllp.com
richard.alonso@bgllp.com

Attorneys for Desert Rock Energy Company, LLC

Jeremiah P. Sheehan
Sithe Global Power, LLC
245 Park Avenue, 38th Floor
New York, NY 10167
Telephone: 212-351-0030
Facsimile: 212-351-0002
sheehan@sitheglobal.com

Attorney for Desert Rock Energy Company, LLC

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATE CASES

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

EXHIBITS

INTRODUCTION

Desert Rock Energy Company, LLC ("Desert Rock Energy") respectfully submits this Surreply to address the issues raised by Petitioner State of New Mexico, Petitioner Leslie Glustrom, and Petitioners Diné Care, Environmental Defense Fund, Grand Canyon Trust, Natural Resources Defense Council, San Juan Citizens' Alliance, Sierra Club and Wild Earth Guardians ("NGO Petitioners") (collectively, "Petitioners").[1] With the issues regarding the regulation of CO_2 stripped out of this appeal by EPA Region 9's Notice of Partial Withdrawal of Permit, dated January 7, 2009, the true nature of Petitioners' remaining legal arguments has become evident: the challenges raised have been presented to this Board not because of any particular merit (indeed, most if not all involve well-settled legal principles that cut clearly against the Petitioners), but simply to delay the Desert Rock Project, at every turn and for as long as possible. The Board has provided ample opportunity for Petitioners to discharge the heavy burden of proving clear error in EPA Region 9's decision by allowing substantial briefing on these issues; Petitioners having failed to prove such error, Desert Rock Energy respectfully requests that the Board uphold EPA Region 9's decision to issue the PSD permit.

ARGUMENT

I. THE EAB SHOULD NOT OVERTURN ITS WELL ESTABLISHED ACCEPTANCE OF EPA REGION 9'S POLICY AGAINST REDEFINING THE SOURCE.

As the EAB recently stated in *In re Northern Michigan University*, "[h]istorically, EPA has not considered the BACT requirement as a means to redefine the source when considering available control alternatives. Board and Administrator decisions adhere firmly to this

---

[1] Desert Rock Energy adopts in its Surreply the Major Defined Terms listed on pages *i* and *ii* of Desert Rock Energy's Response Brief.

principle." *In re N. Michigan Univ.*, PSD Appeal No. 08-02, slip op. at 26 (EAB Feb. 18, 2009) (citing U.S. EPA Office of Air Quality Planning and Standards, *New Source Review Workshop Manual* at B.13 (Draft Oct. 1990) ("NSR Manual"); *In re Prairie State Generating Co., LLC*, PSD Appeal No. 05-05, slip op. at 26-37 (EAB Aug. 24, 2006); *In re Hillman Power Co.*, 10 E.A.D. 673, 691-92 (EAB 2002); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 135-44 (EAB 1999); *In re SEI Birchwood, Inc.*, 5 E.A.D. 25, 29-30 n.8 (EAB 1994); *In re Haw. Commercial & Sugar Co.*, 4 E.A.D. 95, 99-100 (EAB 1992); *In re Old Dominion Elec. Coop.*, 3 E.A.D. 779, 793 n.38 (Adm'r 1992); *In re Hibbing Taconite Co.*, 2 E.A.D. 838, 843 & n.12 (Adm'r 1989)). Despite a mountain of clear and consistent case law reaffirmed just last month by this Board and contrary to Petitioners' position, Petitioners request that this Board void and overturn its precedent endorsing and applying this policy against using BACT to redefine the source in PSD permitting (hereinafter the "Redefining the Source Policy"). NGO Petitioners' Reply Br. at 5.

When reviewing a permitting decision or issuing a permit, the Board and permitting authorities take care to identify the project's "inherent" design elements, the fundamental purpose of the source, or design changes that would "call into question [the proposed facility's] existence." *N. Michigan Univ.*, slip op. at 26-27. Here, the Petitioners have solely focused on the "fundamental purpose" prong of the Redefining the Source Policy. They provide no information showing that an IGCC facility is similar to a pulverized coal-fired power plant in its design or physical lay-out because no such evidence exists. Instead, Petitioners argue that because IGCC makes electricity from coal, it should be used as BACT wherever any project would make electricity from coal. As an initial matter, Petitioners omit that IGCC also must burn natural gas and/or petcoke to ensure the reliability of the facility. In any event, making coal use the sole determining factor in defining the category of sources against which the Desert Rock

Project is compared in determining BACT morphs the control technology with the source itself, which is hopelessly unworkable—a method of converting coal into a synthetic gas that is burned to generate electricity cannot possibly be a way to control emissions from a pulverized coal-fired power plant. The former process would not "control" the latter process at all; it would simply replace it.

Essentially, Petitioners request that the Board hold that the CAA gives no discretion to the permitting authority regarding the actual design and physical construction of the source being proposed by the permittee. Petitioners also request that the Board disregard whether, under such a policy, any mandatory design changes would prevent the source from being built because the project would be so fundamentally different from the proposed source that it would amount to a totally different business venture. If the Board were to make such findings, it would not only overrule and vacate the Redefining the Source Policy, but it would make the EPA and, in particular, this Board, the ultimate arbiter of the fundamental design of the energy generation industry in this country.

The PSD program was never intended to force permittees to build sources they never intended to build, and the Petitioners have not pointed to one passage of the CAA or its regulations that would require a permittee to build a project it has not chosen. Rather than imposing such a burden on the project developer, this Board has repeatedly held that the Redefining the Source Policy is consistent with the statutory language of the CAA. The Petitioners have not presented any sound reason for the Board to find a policy that it supported as recently as last month contrary to the CAA. *See N. Michigan Univ.*, slip op. at 26.

In this case, Petitioners are requesting that EPA Region 9 consider and possibly force the permittee to construct a facility that is more like a refinery than a pulverized coal-fired power

plant. The changes that the Petitioners seek in this appeal are not mere design changes – they amount to a total redesign from the ground up. IGCC is not a "control technology" – it is a totally different facility. As factually stated in a recent state court decision, "[i]t is clear that an IGCC process, by which electricity is produced by the burning of gasses extracted from coal to drive turbines that turn electric power generators, is significantly different from the pulverized coal power plant, which produces electricity by burning coal to generate steam that drives a conventional steam-powered turbine, as proposed by [the permittee]." *Blue Skies Alliance v. Texas Comm'n on Envtl. Quality*, No. 07-07-0306-CV, 2009 WL 214340, at 7 (Tex. Ct. App. – Amarillo Jan. 29, 2009). The PSD permitting program was never intended to impose the burden on the permit applicant of building a completely different facility five years into the permitting process.

Petitioners assert that EPA Region 9's exclusion of IGCC in this permitting matter narrows or freezes BACT at pulverized coal-fired power plants or "reads out" passages included in the statutory definition of BACT. NGO Petitioners' Reply Br. at 5. As noted in Desert Rock Energy's Response Brief, there are various "production processes" and "innovative fuel combustion techniques" applicable to pulverized coal-fired power plants. In no way does EPA Region 9's application of the Redefining the Source Policy in this permitting action restrict the statutory definition of BACT as the Petitioners suggest. As technology and designs improve at pulverized coal-fired power plants (including possibly developing technology to allow some type of gasification processes at pulverized coal-fired boilers), permitting authorities will likely be required to consider those developments in their BACT analyses. No one can predict the future technology path for coal-fired power plants, but whatever those advancements are (and there have been many in the last fifteen years as explained in Desert Rock Energy's Response Brief),

they will likely be part of future BACT analyses. Given the Board's and the Agency's established policy that the PSD permitting process should not require permittees to build sources that they never intended to build, the Board should uphold EPA Region 9's determination that IGCC should not be considered in the Desert Rock BACT analysis because IGCC is a different source than the proposed facility.

II. NGO PETITIONERS FAIL TO ESTABLISH ANY CLEAR ERROR RELATED TO THE COLLATERAL IMPACTS CLAUSE.

NGO Petitioners attempt to argue that EPA Region 9 has neglected to perform an adequate collateral impacts analysis under 42 U.S.C. § 7479(3). The arguments that NGO Petitioners raise are contrary to the Board's precedent and the legislative history of the CAA. Furthermore, NGO Petitioners' entire collateral impacts analysis is centered upon the need to consider the environmental impacts of IGCC when the collateral impacts analysis was meant to focus not on the overall environmental impacts of the source, but rather, the collateral impacts of the control technologies. Overall, NGO Petitioners have failed meet the burden of showing "a compelling reason to believe [that there was] an erroneous permit determination – in other words, [that EPA Region 9's assessment] materially affected the quality of the permit determination." *Prairie State*, slip op. at 58-59 (quoting *In re Mecklenberg Cogeneration, LP,* 3 E.A.D. 492, 494 n.3 (Adm'r 1990)).

A. NGO Petitioners' Argument is Inconsistent with the Clear Meaning of the CAA, the Board's Precedent and the Legislative History of the Act.

The fourth step of a BACT top-down analysis instructs "the permitting authority, on a case-by-case basis, [to take] into account energy, environmental, and economic impacts and other costs" when determining whether an emission limitation is achievable. 42 U.S.C. § 7479(3). This requirement is known as the collateral impacts clause. *Hillman Power Co.*, 10

E.A.D. at 683. Without citing any support for the proposition, NGO Petitioners make the bold misstatement that the collateral impacts clause is "plain and unambiguous and leaves no room for interpretation by EPA . . . ." NGO Petitioners' Reply Br. at 8. This statement completely disregards the fact that Congress plainly intended to grant broad discretion to EPA by ordering the permitting authority to act on a "case-by-case" basis. Therefore, the collateral impacts clause clearly leaves room for interpretation of these factors by EPA Region 9.

Rather than cite to Board.precedent to support their position that EPA Region 9 was required to consider non-local, non-source specific issues such as CO_2 in a collateral impacts analysis, NGO Petitioners cite to sources that provide absolutely no guidance regarding the scope of the collateral impacts clause. For example, NGO Petitioners' citation to *Massachusetts v. EPA*, 549 U.S. 497 (2007), is unavailing because that particular case did not discuss the scope of the collateral impacts clause and does not hold that the clause mandates a broad analysis of the entire source. The broad analysis suggested by NGO Petitioners is more akin to what is contemplated under NEPA. *See* NGO Petitioners' Reply Br. at 8; *see also* Section III.C, *infra*. Furthermore, NGO Petitioners' emphasis on the "Nation's air resources" recalls (and realizes) Senator Edmund S. Muskie's concerns about using the collateral impacts clause because "a technology demonstrated to be applicable in one area of the country [may] not [be] applicable at a new facility in another area because of difference[s] in feedstock material, plant configuration or other reasons." *In re Columbia Gulf Transmission Co.*, 2 E.A.D. 824, 827 (Adm'r 1989) (quoting Senate Debate on S. 252 (June 8, 1977), *reprinted in* 3 SENATE COMMITTEE ON ENVIRONMENT & PUBLIC WORKS, A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1977 at 729 (Comm. Print Aug. 1978)) (emphasis added). Although Senator Muskie stated that "other reasons" also prompted the need to evaluate BACT on a case-by-case

basis, these "other reasons" were not of such prominence that Senator Muskie felt the need to articulate them. *See* Senate Debate on S. 252 (June 8, 1977), *reprinted in* 3 SENATE COMMITTEE ON ENVIRONMENT & PUBLIC WORKS, A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1977 at 729 (Comm. Print Aug. 1978). Moreover, NGO Petitioners have been unable to put forth any evidence that would indicate that these "other reasons" require that EPA Region 9 utilize the collateral impacts clause to deal with global or non-site specific concerns or that these "other reasons" mandate using the collateral impacts analysis to conduct a broad NEPA-like analysis of the entire source, rather than as a focused analysis of the impacts of the control device.

NGO Petitioners' arguments are also inconsistent with previous rulings issued by this Board. Specifically, the Board has made the following key statements regarding the collateral impacts clause: "the primary purpose of the collateral impacts clause . . . is to allow use of a less effective control technology when source-specific energy, environmental or economic impacts or other costs constrain a source from using a more effective technology," "the collateral impacts clause operates primarily as a safety valve whenever unusual circumstances specific to the facility make it appropriate to use less than the most effective technology," and "the collateral impacts clause focuses on specific local impacts which constrain a particular source from using the most effective control technology." *In re World Color Press, Inc.*, 3 E.A.D. 474, 478-79 (Adm'r 1990) (emphasis added). In the face of such precedent, NGO Petitioners fail to explain why the consideration of global, non-source specific issues in the context of the collateral impacts clause is appropriate, particularly when the Board has cited only local and site specific issues when previously asked to interpret this clause. *See, e.g., id.* at 479 n.15 (citing *Columbia*

Gulf, 2 E.A.D. 824) (water resource demands)[2]; *Hillman Power Co.*, 10 E.A.D. at 687 ("flue gas temperatures, acid gases inlet concentrations, control technology placement"); *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 117 (EAB 1997) (rejecting the petitioners' claim in part for failure to provide any information regarding unusual circumstances or local conditions that would have predisposed the specific site in question to having the complained-of problem).

Quite simply, NGO Petitioners have failed to present any legal obligation or basis that would support the allegation that the collateral impacts clause should be interpreted to require the consideration of a global and non-source specific issue like CO_2 emissions from the entire proposed facility, as opposed to the specific BACT control technology selected. To require such consideration here would be inconsistent with both the intent of the collateral impacts clause requirement in PSD permitting and with the Board's precedent.

B. The Focus of the Collateral Impacts Analysis is on Control Alternatives, Not the Overall Environmental Impacts of the Entire Source.

As previously noted, NGO Petitioners have distorted the meaning and application of the collateral impacts clause in an attempt to force a complete redesign of the proposed Desert Rock facility into an IGCC facility. Rather than focusing on the specific control technology selected during the BACT analysis, NGO Petitioners erroneously insist that EPA Region 9 had an obligation to analyze the collateral impacts associated with the overall plant design. There is no basis for interpreting the collateral impacts clause in such a manner.

EPA has made it clear that the obligation to perform a collateral impacts analysis does not call for a broad NEPA-like analysis of all the environmental impacts of the source. The

---

[2] As noted in Section I, *supra,* Petitioners' allegations regarding the need to select IGCC technology to reduce water consumption or solid waste production are not dispositive where the technology they urge would require a complete redesign of the source. *Prairie State*, slip op. at 20.

scope of the collateral impacts analysis is to "identify any significant or unusual environmental impacts associated with a control alternative that have the potential to affect the selection or elimination of a control alternative." NSR Manual at B.47 (emphasis added). Specifically, "the analysis need only address those control alternatives with any significant or unusual environmental impacts that have the potential to affect the selection or elimination of a control alternative." *Id.* (emphasis added). This practice was upheld by the Administrator, who noted in 1986 that "[t]he analysis may take the form of comparing the incremental environmental impact of alternative control systems with the control system proposed as BACT. . . ." *In re N. County,* 2 E.A.D. 229, 230 (Adm'r 1986) (emphasis added). There simply is no obligation to undergo a broad NEPA-like analysis that includes an evaluation of the environmental impacts of completely redesigning the source.

NGO Petitioners' entire collateral impacts argument is founded upon the assumption that IGCC is BACT, rather than a complete redesign of the project – a position Desert Rock Energy has shown to be erroneous in Section I, *supra*. *See, e.g.,* AR 66 at 22 (commenting on the collateral environmental benefits of IGCC), 29 (demanding that EPA Region 9 "conduct a full top-down analysis for this project including . . . the various collateral environmental benefits of IGCC. . . ."), and 79 (noting that "EPA did not evaluate IGCC"). By focusing on whether IGCC was considered in the collateral impacts analysis, NGO Petitioners have not alleged general shortcomings with the collateral impacts analysis performed for the Desert Rock Project. AR 46 at 3, 10, 43-45. Because NGO Petitioners have not challenged the sufficiency of the collateral impacts analysis generally, its overall sufficiency is not before the Board for review. *See In re Arecibo & Aguadilla Regional Wastewater Treatment Plants*, 12 E.A.D. 97, 117 (EAB 2005) ("the issue to be reviewed must have been specifically raised during the comment period")

(citing *In re New England Plating*, 9 E.A.D. 726, 732 (EAB 2001)) (emphasis in original). Therefore, NGO Petitioners have failed to show any clear error related to the collateral impacts clause by arguing that IGCC should have been considered.

III. EPA REGION 9 PROPERLY ASSESSED THE IMPACTS OF THE DESERT ROCK PROJECT ON ENVIRONMENTAL JUSTICE COMMUNITIES AND MEANINGFULLY RESPONDED TO COMMENTS REGARDING ENVIRONMENTAL JUSTICE.

The Executive Order issued by President Clinton to the federal agencies in 1994, 59 Fed. Reg. 7,629 (Feb. 16, 1994) (the "Executive Order"), requires each federal agency to identify and to address "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. Here, the record indicates that both EPA Region 9 and Desert Rock Energy considered the available environmental justice guidance in conducting their respective environmental justice analyses. *See* AR 120 at 160; AR 77 at 1, 38. NGO Petitioners' assertions regarding the "complete absence" of environmental justice analyses are unfounded and inaccurate.

A. EPA Region 9 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.

Despite the presence in the administrative record of a 39-page report dedicated to environmental justice issues, AR 77, and eleven pages of discussion within the Response to Comments, AR 120 at 155-66, NGO Petitioners erroneously claim that EPA Region 9 did not fulfill its environmental justice obligation. NGO Petitioners' Reply Br. at 10. Specifically, NGO Petitioners are dissatisfied that EPA Region 9 focused on whether the emissions from the Desert Rock Project would cause a NAAQS violation. *Id.* However, NGO Petitioners fail to acknowledge that the question of whether a project will cause a NAAQS violation is exactly the

undertaking that EPA Region 9 was obligated to perform. In fact, the Board has consistently held that it would not address any challenge to the sufficiency of the environmental justice assessment where the petitioner could not demonstrate clear error related to the conclusion that there was no adverse impact because NAAQS would not be exceeded. *In re Knauf Fiber Glass, GmbH,* 9 E.A.D. 1, 17 (EAB 2000); *In re Shell Offshore, Inc.*, OCS Appeals 07-01 & 07-02, slip op. at 67-68 (EAB Sept. 14, 2007); *see also In re Ecoeléctrica, L.P.*, 7 E.A.D. 56, 69 (EAB 1997); *In re AES Puerto Rico L.P.*, 8 E.A.D. 324, 352 (EAB 1999). Here, NGO Petitioners have similarly failed to demonstrate that EPA Region 9's analysis is clearly erroneous. *See In re Indeck-Elwood, LLC*, PSD Appeal No. 03-04, slip op. at 48 n.67 (EAB Sept. 27, 2006) (noting that "clear error . . . is not established simply because petitioners document a difference of opinion").

B. EPA Region 9 Meaningfully Responded to the Specific Issues Regarding Environmental Justice that Apply to the PSD Permitting Process.

NGO Petitioners also assert that EPA Region 9 failed adequately to respond to several specific environmental justice comments. NGO Petitioners' Reply Br. at 10-11. However, NGO Petitioners conflate an adequate determination with a determination that reflects NGO Petitioners' opinions as if they were one and the same. In fact, NGO Petitioners have failed to show clear error with respect to EPA Region 9's responses to these issues.

NGO Petitioners failed to demonstrate clear error in EPA Region 9's soil and vegetation analysis for several reasons. First, *Indeck* clearly shows the soil and vegetation analysis need only be "some kind of baseline analysis of the vegetation and soils in the area." *Indeck*, slip op. at 50 n.69. This requirement is met by merely stating that a site "is thinly vegetated with non-indigenous plant species, has rocky soil, and has very poor productivity potential for agricultural, orchard or grazing uses." *Id.* (citing *Kawaihae Cogeneration*, 7 E.A.D. at 130). Therefore, the

real question is whether a petitioner has established that vegetation would be negatively harmed by the proposed project or that there were sensitive plant species that would be harmed by exposure to concentrations of pollutants below the NAAQS. *See Kawaihae Cogeneration*, 7 E.A.D. at 130. Here, NGO Petitioners have failed to make such a showing. Second, EPA Region 9 provided an adequate explanation in its Response to Comments regarding why the agency did not require analysis beyond the comparison of projected emissions to the concentrations identified in the Screening Procedures. *Indeck,* slip op. at 47. The adequacy of EPA Region 9's soil and vegetation analysis is essentially a scientific question, which should be granted deference. *Id.* at 48 n.67.

NGO Petitioners also imply that EPA Region 9 evaded its duty to perform an environmental justice analysis by referring to the ESA § 7 consultation and the NEPA process. NGO Petitioners' Reply Br. at 9. However, as the administrative record reflects, EPA Region 9 merely clarified that issues such as mercury are outside the scope of the PSD permitting process. *See, e.g.,* AR 120 at 160. EPA Region 9 properly noted that the public's opportunity to comment on those types of extraneous issues is through the NEPA process conducted by BIA. NGO Petitioners provide no support for their assertion that anything further was required of EPA Region 9. NGO Petitioners' Reply Br. at 9.

IV. EPA REGION 9'S COORDINATION OF THE PSD PERMITTING PROCESS WITH THE DESERT ROCK PROJECT'S NEPA PROCESS WAS REASONABLE (AS REQUIRED BY 40 C.F.R. § 52.21) AND CONSISTENT WITH THIS BOARD'S DECISION IN *HADSON POWER.*

Nowhere in their Reply do NGO Petitioners address this Board's decision in *Hadson Power*—the most relevant authority on this question—that the "reasonable" coordination required by 40 C.F.R. § 52.21(s) does not mean that EPA Region 9 must delay its decision on the PSD permit until the NEPA process is complete. *In re Hadson Power*, 4 E.A.D. 258, 300 (EAB

1992). In positing that coordination requires absolute synchronicity, NGO Petitioners' argument is at odds with *Hadson Power*: "[a]s used in this regulation, 'coordinate' is best given its every day meaning, namely to harmonize or to act together in a concerted way. In our view, then, this regulation does not require a [permitting authority] to refrain from issuing a PSD permit until the NEPA process is complete." *Hadson Power*, 4 E.A.D. at 300. NGO Petitioners' failure to grapple with *Hadson Power* eviscerates the rest of their argument on this issue.

NGO Petitioners assert that "EPA can ensure coordination with ongoing NEPA proceedings" either by "requiring completion of a final or draft EIS (or submission of all information required for the final or draft EIS) prior to determining that the PSD application is complete" or by "complet[ing] the EIS within one year of filing of a completed application." NGO Petitioners' Reply Br. at 14-15. The former argument attaches more strings to the coordination requirement than the petitioners requested and that this Board rejected in *Hadson Power*. *Hadson Power*, 4 E.A.D. at 300. According to NGO Petitioners, to "coordinate" with the NEPA process requires EPA Region 9 to "incorporate" the NEPA process into the basic requirements of the PSD permitting process, a manifestly unreasonable interpretation of 40 C.F.R. §52.21(s) that is not only at odds with this Board's precedent but also conflicts with the Energy Supply and Coordination Act of 1974, 15 U.S.C. § 793(c)(1), which specifically exempts the PSD permitting process from NEPA.

The fact remains that BIA, not EPA Region 9, is serving as the lead agency in the NEPA process here. NGO Petitioners' alternative method thus boils down to the proposition that it is clear error for EPA Region 9 to fail to compel completion of a process over which it has not served in the lead role and from which its decision has been expressly exempted by law.

V. EPA REGION 9 COORDINATED THE ESA § 7 CONSULTATION WITH THE PSD PERMITTING PROCESS IN A REASONABLE MANNER, AND EPA REGION 9 TOOK APPROPRIATE STEPS TO PRESERVE THE STATUS QUO UNDER ESA § 7(D).

Petitioners attempt again in their Replies to amplify selective dicta from the Board's *Indeck* decision to overtake the fundamental holdings of that case, holdings that defeat Petitioners' central arguments here. With regard to the interplay of PSD permitting decisions and ESA § 7 consultation, the *Indeck* decision stands for two simple propositions: (1) a PSD permit is not *per se* defective when it is issued before ESA § 7 consultation is complete; and (2) where EPA Region 9 retains the legal capacity to adjust the terms of the PSD permit, there has been no "irreversible and irretrievable commitment of resources" within the meaning of ESA § 7(d).[3] EPA Region 9's issuance of the PSD permit here meaningfully coordinates the ESA § 7 consultation and the PSD permitting process in a manner consistent with the *Indeck* decision and with EPA Region 9's explicit statutory obligations, while preserving EPA Region 9's legal capacity to adjust the terms of the PSD permit in the event that the ongoing ESA § 7 consultation recommends further measures to protect and enhance the subject species and habitat. Petitioners' argument here, which is strikingly similar to their NEPA argument, would hold the PSD permitting process hostage to the larger coordination of the various other state and federal approvals required for the Desert Rock Project; what Petitioners demand—completely

---

[3] Desert Rock Energy does not "imply," as NGO Petitioners wrongly state, that this Board has no jurisdiction over EPA's failure to conduct an ESA § 7 consultation on the issuance of a PSD permit. Rather, Desert Rock Energy recognizes that this Board appropriately regards substantive decisions on the ESA § 7 consultation as beyond its jurisdiction, with challenges to such decisions proceeding in federal court under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq*. *Indeck*, slip op. at 118. NGO Petitioners made a number of attacks on the substance of the ESA § 7 consultation in their Petition and argued that EPA erred in deferring to the BIA to lead the ESA § 7 consultation; NGO Petitioners appear to have ceded this latter argument. *See* NGO Petitioners' Reply Br. at 16 n.21.

coextensive, parallel ESA, NEPA and PSD permitting determinations—is not only more than the law requires, it would actually hinder each of these processes by increasing redundancies and discouraging coordination. *See* 40 C.F.R. § 402.06 (encouraging consolidation of ESA § 7 consultation with other environmental procedures); 51 Fed. Reg. 19,938 (June 3, 1986) (coordination of reviews "reduce[s] duplication of paperwork and save[s] time"); Endangered Species Consultation Handbook—Procedures for Conducting Consultation and Conference under Section 7 of the Endangered Species Act at 2-6, 40-27 (FWS & NMFS 1998) ("ESA § 7 Handbook") (one or more interdependent or interrelated federal actions should be consolidated into one ESA § 7 consultation).

A. *Indeck* Requires Reasonable Coordination of the PSD Permitting Process and the ESA § 7 Consultation.

Petitioners spend a significant amount of their argument discussing *Indeck*; surprisingly, in all of those pages, they neglect to state the central holding in that case. This Board held in *Indeck* that "the PSD and ESA processes are separate and need not necessarily be performed simultaneously or in a wholly integrated fashion." *Indeck*, slip op. at 110. Indeed, because there are no regulations that specifically link the PSD and ESA requirements, the Board held that "coordination of the PSD and ESA reviews is all that is required of the PSD permitting authority, and only to the extent feasible and reasonable." *Id.* at 149.

This standard is not comforting for the Petitioners because it requires them to demonstrate that EPA Region 9's coordination of the ESA § 7 consultation and the PSD permitting process was not reasonable, which they cannot and do not try to do. To avoid this dilemma, Petitioners invert *Indeck*'s holding—instead of reasonable coordination, Petitioners argue, *Indeck* established a *per se* requirement that the permitting authority must always conclude ESA § 7 consultation prior to issuing a PSD permit, absent, as the State of New Mexico

puts it, "exceptional circumstances." State of New Mexico's Reply Br. at 5. The State of New Mexico cites to language in the *Indeck* decision suggesting that the Board was drawing on facts significant to its ruling "in this case," but does not identify what those facts were. *See* State of New Mexico's Reply Br. at 5 (citing *Indeck*, slip op. at 112-13). The *Indeck* decision itself makes it clear:

> In this case, consultation took place during the pendency of an appeal, which pursuant to the relevant regulations, had the effect of deferring final agency action on the permit. *See* 40 C.F.R. § 124.19(f)(1). Up to the time of final agency action, there remains legal capacity to adjust the terms of the permit. Accordingly, consultation cannot be viewed as an empty gesture incapable of influencing the outcome; FWS and the Region had the opportunity to analyze the situation and, as necessary, specify protective conditions for inclusion in the permit. Had the FWS or the Region found a negative impact and specified ameliorative conditions, IEPA was not beyond the point of being able to make changes to the permit based on FWS' and/or the Region's input.

Indeck, slip op. at 113. The "exceptional circumstances" that the State of New Mexico relies on to distinguish *Indeck* from the case at bar are, in fact, the most significant commonalities between the two cases.[4]

The State of New Mexico repeats its argument that "[n]either the decision to undertake nor the ability to timely complete a consultation can be premised on the filing of an appeal because either approach would give rise to 'an ESA violation whenever an appeal is not taken.'" State of New Mexico's Reply Br. at 5-6 (citing *Indeck*, slip op. at 114). Implicit in the State of New Mexico's argument, however, is the assumption that if a PSD permit is issued prior to completion of the ESA § 7 consultation then the permit has been issued illegally and can only be saved by an appeal. This is not the law. In *Indeck*, this Board held that coordination of the PSD

---

[4] NGO Petitioners take the rather cavalier approach of dismissing this "finality" problem—a core feature of the *Indeck* decision and an outcome compelled by the PSD regulations themselves—as "mak[ing] no sense." NGO Petitioners' Reply Br. at 17 n.23.

and ESA reviews is all that is required of the PSD permitting authority, and only to the extent feasible and reasonable. *Indeck*, slip op. at 110 n.149.

It is an unavoidable fact that the appeal of the PSD permit does, as a technical matter, postpone the finality of the permit, which means that the permitting authority retains the legal capacity to adjust the terms of the permit.[5] *Indeck*, slip op. at 112-13. The State of New Mexico accuses EPA Region 9 of using this fact as its ESA compliance strategy, which was disapproved of in *Indeck*. State of New Mexico's Reply Br. at 5 (citing *Indeck*, slip op. at 114). This argument misses a crucial difference between *Indeck* and the case at bar. In *Indeck*, the lack of finality regarding the PSD permit was necessary and sufficient to the Board's decision that IEPA's issuance of the permit complied with the ESA § 7 consultation requirement. Here, it is sufficient but not necessary to uphold EPA Region 9's issuance of the PSD permit. So long as EPA Region 9 "retains the legal capacity to adjust the terms of the permit," EPA Region 9 may issue the PSD permit without violating its ESA § 7 consultation requirements. EPA Region 9 built this flexibility into the PSD permit long before this appeal; Condition II.A of the PSD permit provides all the flexibility required by the *Indeck* decision.

B. Condition II.A of the PSD Permit Is Consistent with All Applicable Case Law Relating to ESA § 7(d).

Petitioners attack Condition II.A of Desert Rock's PSD permit, which maintains the *status quo* pending completion of the formal ESA § 7 consultation, as being inconsistent with case law. Petitioners' Replies, however, simply repeat the central flaw in their discussion of the case law—conflating the case law discussing ESA § 7(a) consultation requirements with case

---

[5] This point is crucial. The rest of the disputes between the parties here are premised on the assumption that final agency action has occurred. If there has been no final agency action, there is no need to resolve the parties' disagreements regarding the significance of Condition II.A and the body of ESA § 7 consultation case law.

law discussing what is or is not an "irreversible and irretrievable commitment of resources" under ESA § 7(d). The three cases relied upon by Petitioners—*Conner v. Burford*, *Pacific Rivers Council v. Thomas*, and *NRDC v. Houston*—all hold that ESA § 7(d) does not permit an agency to exempt actions from ESA § 7 consultation simply by finding them to be reversible and retrievable commitments of resources. Those cases that have examined what constitutes an "irreversible and irretrievable commitment of resources" under ESA § 7(d) squarely support EPA Region 9's position.

1. *Case Law Cited By Petitioners Does Not Provide a Basis to Disapprove of EPA Region 9's Action, and Thus Does Not Demonstrate Clear Error.*

The cornerstone of Petitioners' argument against Condition II.A lies in *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988). Desert Rock Energy demonstrated in its Response Brief that *Conner* does not answer the relevant question here (whether Condition II.A renders issuance of the PSD permit a "reversible and retrievable commitment of resources") because *Conner* stands for the proposition that ESA § 7(d) does not obviate ESA § 7(a), *i.e.*, the agency cannot limit the scope of a ESA § 7 consultation simply by taking incremental reversible, retrievable steps that in sum add up to an agency action that should be subject to a comprehensive ESA § 7 consultation. *See id.* at 1457-58 ("We conclude that the ESA does not permit the incremental-step approach . . . [t]he biological opinions must be coextensive with the agency action and the [Threatened and Endangered Species] stipulations cannot be substituted for comprehensive biological opinions").

BLM argued in *Conner* that it could issue leases for oil and gas exploration, development and production without examining the environmental effects of oil and gas exploration, development and production because such effects would be discussed in subsequent ESA § 7 consultations. *Id.* at 1445. Here, EPA Region 9 is not deferring anything; many agencies,

including EPA Region 9, are currently engaged in the ESA § 7 consultation for the comprehensive environmental effects of permitting, constructing and operating the Desert Rock Project. That comprehensive consultation was underway when EPA Region 9 issued the PSD permit. Today, the formal consultation period is nearly complete. *See* Desert Rock Energy's Response Br. at 222 (formal consultation began on January 5, 2009). The question is whether, under ESA § 7(d), when EPA Region 9 issued the PSD permit during the latter portion of the consultation, that action was an impermissible "irreversible and irretrievable commitment of resources" prior to completion of the ESA § 7 consultation.

Petitioners' reliance on *Pacific Rivers Council v. Thomas* likewise misses the point. In *Pacific Rivers Council*, the Forest Service approved timber sales pursuant to land resource management plans for which the Forest Service had not conducted an ESA § 7 consultation. 30 F.3d 1050, 1051 (9th Cir. 1994). The Forest Service determined that the timber sales were not "irreversible and irretrievable commitments of resources" under ESA § 7(d), and so it did not matter that the Forest Service had not commenced an ESA § 7 consultation. The Ninth Circuit rejected this position, noting that "[o]nly after the Forest Service complies with § 7(a)(2) [by initiating consultation] can any activity that may affect the protected salmon go forward." *Id.* at 1056-57. In a footnote to this statement, the Ninth Circuit cautioned that "[o]f course, the activity cannot go forward even after consultation is initiated if it represents an irreversible and irretrievable commitment of resources as prohibited by § 7(d)." *Id.* at 1057 n.15. Implicit in this statement is the proposition that the activity could go forward after consultation was initiated if it did not represent an irreversible and irretrievable commitment of resources.[6]

---

[6] NGO Petitioners cite language from *Pacific Rivers Council* suggesting that the Ninth Circuit held in *Conner* that the agency could take no action prior to the completion of the ESA

Finally, the Ninth Circuit held in *Houston* that an agency could not forgo ESA § 7 consultation entirely by simply determining that the agency action was not an "irreversible and irretrievable commitment of resources" under ESA § 7(d). *NRDC v. Houston*, 146 F.3d 1118, 1128 (9th Cir. 1998). In analogizing the *Houston* case to the instant dispute, NGO Petitioners join the State of New Mexico in erroneously assuming as a foundation to their argument the very point that they have to prove: that the PSD permit violates the ESA. Both Petitioners quote the statement that the *Houston* court did "not think that an agency should be permitted to skirt the procedural requirements of § 7(d) by including such a catchall savings clause in illegally executed contracts." State of New Mexico's Reply Br. at 7; NGO Petitioners' Reply Br. at 18. The water contracts in *Houston*, however, were not illegally executed under ESA § 7(a), but rather were illegally executed because they constituted an "irreversible and irretrievable commitment of resources" during the ESA § 7 consultation, which is forbidden under ESA § 7(d). As was pointed out in Desert Rock Energy's Response Brief, the Petitioners'

---

§ 7 consultation. *See* NGO Petitioners' Reply Br. at 17-18 ("In *Conner* . . . [w]e rejected the Fish and Wildlife Service's suggestion that projects it unilaterally determined were not irreversible and irretrievable commitments of resources could go forward even though it had not obtained an adequate biological opinion as required by § 7(a)(2)") (citing *Pacific Rivers Council*, 30 F.3d at 1056). In the context of the *Pacific Rivers Council* opinion, however, it is important to remember that, at the time of the Ninth Circuit's decision, (1) the FWS had failed to even initiate the ESA § 7 consultation on the land resource management programs, (2) the FWS had initiated projects that might have affected the threatened species, (3) the FWS had unilaterally declared that those projects were not "irreversible and irretrievable commitments of resources," and (4) the FWS had argued that the Ninth Circuit was required to defer to the FWS's interpretation of ESA § 7(d). In both *Conner* and *Pacific Rivers Council*, the FWS argued that it did not need to prepare comprehensive ESA § 7 biological opinions where it had decided that the action did not violate § 7(d). This situation is clearly not the case here, where a comprehensive ESA § 7 consultation is nearly complete for the Desert Rock Project. NGO Petitioners' interpretation of this language in *Pacific Rivers Council* disregards the context of the statement and is squarely at odds with the Ninth Circuit's observation that an activity could go forward after consultation was initiated if the activity satisfied ESA § 7(d). *Pacific Rivers Council*, 30 F.3d at 1057 n.15.

interpretation of the Ninth Circuit's *dicta* in *Houston* is illogical because it would mean that (1) the Bureau could not include the modifying clause to save the contracts from being illegally executed, (2) the contracts were illegally executed because they were an "irreversible and irretrievable commitment of resources," and (3) the contracts were an "irreversible and irretrievable commitment of resources" because the modifying clause did not withhold for the Bureau enough power to modify the contracts. *Houston*, 146 F.3d at 1128. The mere fact that this fallacy was embraced by non-binding authority in *dicta* does not require the Board to perpetuate it insensibly, especially when such *dicta* is not only contrary to other federal case law but also inconsistent with the FWS's own guidance on ESA § 7 consultation. *See* ESA § 7 Handbook at 2-7 ("Resource commitments may occur as long as the action agency retains sufficient discretion and flexibility to modify its action to allow formulation and implementation of an appropriate reasonable and prudent alternative").

Every party to this appeal agrees that under ESA § 7(d) an "irreversible and irretrievable commitment of resources" cannot occur prior to completion of the ESA § 7 consultation. *Houston*, *Conner* and *Pacific Rivers Council* are only useful to the extent that they demonstrate what may or may not be an "irreversible and irretrievable commitment of resources." *Conner* and *Pacific Rivers Council* demonstrate that courts by and large treat agreements that do not prevent surface-disturbing activities during the pendency of ESA § 7 consultation as *per se* "irreversible and irretrievable commitments of resources." *Conner*, 848 F.2d at 1457 n.38 (oil and gas leases); *Pacific Rivers*, 30 F.3d at 1057 (timber sales). In *Houston*, the water contracts fell afoul of ESA § 7(d) because they did not permit a reduction in the quantity of water delivered, which foreclosed the reasonable and prudent alternatives that would have come out of the ESA § 7 consultation. *Houston*, 146 F.3d at 1128.

The PSD permit issued by EPA Region 9 here shares none of the problems found in *Houston*, *Pacific Rivers Council* or *Conner*. Condition II.A prevents any commitment of resources by EPA or the applicant: Desert Rock Energy cannot commence any construction under the PSD permit without completing the ESA § 7 consultation; and EPA possesses total authority to reopen or modify the permit, or to compel Desert Rock Energy to re-file its application, leaving EPA Region 9 total authority over reshaping the PSD permit in any manner necessary to reflect any reasonable and prudent alternative measures developed during the remainder of the ESA § 7 consultation. *See* EPA Region 9's Response Br. at 117-18; AR 122.

2. *Significant Case Law Supports EPA Region 9's Application of Condition II.A in This Context, Which Demonstrates that EPA Region 9's Actions Are Not Clearly Erroneous.*

Desert Rock Energy's Response Brief discusses a plethora of cases demonstrating that EPA Region 9's issuance of a PSD permit complies with ESA § 7(d)'s prohibition of "irreversible and irretrievable commitments of resources" during ESA § 7 consultation where the permit does not allow any construction of the PSD source without future agency approval. Petitioners attempt to disregard a subset of these cases, the so-called Outer Continental Shelf Lands Act or "OCSLA" cases, arguing that the Ninth Circuit in *Conner* distinguished the OCSLA cases due to "unique procedural requirements of OCSLA." NGO Petitioners' Reply Br. at 19; State of New Mexico's Reply Br. at 8.

Petitioners' argument here is founded in the same misreading of the *Conner* case that was discussed above. In *Conner*, the Ninth Circuit appropriately noted that the OCSLA statutes permitted segmented ESA § 7 consultation for different phases of offshore exploration and development, and thus the OCSLA cases were of no value to the FWS's argument in *Conner* that the OCSLA cases permitted them to disregard the requirement for a comprehensive ESA § 7

consultation where the FWS unilaterally determined that an action was not an "irreversible or irretrievable commitment of resources." *Conner*, 848 F.2d at 1455-57. *Conner* thus does not speak to the precedential value of the OCSLA cases in defining what is and what is not an "irreversible or irretrievable commitment of resources" under ESA § 7(d), which has nothing to do with interpreting the OCSLA statute and everything to do with interpreting the ESA. And in that context, the OCSLA cases provide solid support of EPA Region 9's position. *See N. Slope Borough v. Andrus*, 642 F.2d 589, 611 (D.C. Cir. 1980) (preliminary activities permitted by lease did not violate ESA § 7(d) where they were reversible in the future, per the lease); *Village of False Pass v. Clark*, 733 F.2d 605, 611 (9th Cir. 1984) (special disclaimers that specified the Department of Interior's continuing control of post-sale drilling did not violate ESA § 7(d)); *Tribal Village of Akutan v. Hodel*, 869 F.2d 1185, 1193-94 (9th Cir. 1989) (stipulations in lease granting continued control to the Department of Interior meant that issuance of the lease prior to completion of ESA § 7 consultation did not violate ESA § 7(d)).

Other attempts to distinguish favorable case law are similarly unavailing. To distinguish *Nat'l Wildlife Fed. v. Nat'l Park Serv.*, 669 F.Supp. 384 (D. Wyo. 1987), and *Bays' Legal Fund v. Browner*, 828 F.Supp. 102 (D. Mass. 1993), NGO Petitioners rely on the same accusation that the State of New Mexico relied on in the State's original attack on the *Indeck* decision—namely, that because the consultation had progressed far enough along during the litigation for the court to see that there would be no harm to any species, the court engaged in a *post-hoc* rationalization borne out of convenience rather than correctness. Such baseless assumptions might be easy (and even necessary, lacking any other ground on which to distinguish the case), but should not form the basis for disregarding judicial precedent.

Even if the Board were to disregard the OCSLA cases and those cases mentioned above which are on-point but with which the Petitioners simply do not agree, Desert Rock Energy and EPA Region 9 presented substantial case law supporting Condition II.A. Petitioners make no effort to distinguish those cases, which did not involve the OCSLA, and that were decided after the *Conner* case (including two within the Ninth Circuit). *See Nat'l Wilderness Inst. v. U.S. Army Corps of Eng'rs*, 2005 WL 691775 (D.D.C. Mar. 23, 2005) (issuance of National Pollution Discharge Elimination System permit did not violate ESA § 7(d)); *Pac. Coast Fed'n of Fishermen's Ass'ns v. Gutierrez*, 2008 WL 2223070, *68 (E.D. Cal. 2008) (water diversions did not violate ESA § 7(d)); *Pac. Rivers Council v. Thomas*, 1994 WL 908600, *6 (D. Or. 1994) (grazing permits did not violate ESA § 7(d)). EPA Region 9's approach to this PSD permit is consistent with the guidance provided by the FWS, this Board's precedent in *Indeck*, and with the way courts have applied ESA § 7(d) in other contexts as well. Petitioners have therefore failed to demonstrate clear error here.

C. Petitioners Have Not Demonstrated Clear Error in EPA Region 9's Balancing of Its Obligations Under the ESA and CAA § 165.

Contrary to Petitioners' Replies, Desert Rock Energy does not assert that there is any inherent conflict between CAA § 165 and ESA § 7; no one is arguing that the CAA "trumps" the ESA or that the ESA must be subordinate to the CAA. *See* State of New Mexico's Reply Br. at 10; NGO Petitioners' Reply Br. at 21-22. Far from being an "untenable procedure," EPA Region 9's use of Condition II.A was a reasonable accommodation of competing considerations that arose in this case—the need to fulfill its statutory duty to issue the PSD permit in a timely manner as compared to the need to allow an extremely wide-ranging ESA § 7 consultation

encompassing many different agency actions.[7] This approach is precisely the sort permitted by the pertinent case law and contemplated by this Board when it held in *Indeck* that coordination of the PSD and ESA reviews is all that is required of the PSD permitting authority, and only to the extent feasible and reasonable. *See Indeck*, slip op. at 110; *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S.Ct. 2518, 2536-37 (2007). Not only was EPA Region 9's decision not clearly erroneous; it was right.

VI. NGO PETITIONERS HAVE FAILED TO SHOW THAT EPA REGION 9 WAS REQUIRED TO SET MACT LIMITS FOR HAZARDOUS AIR POLLUTANTS PRIOR TO ISSUANCE OF THE PSD PERMIT.

NGO Petitioners' Reply Brief restates an earlier claim that EPA Region 9 committed reversible error by failing to set MACT limits for HAPs prior to or concurrent with setting the BACT limits contained in the PSD permit. *See* NGO Petitioners' Reply Br. at 22. Seemingly acknowledging the absence of any legal support for their prior claim, NGO Petitioners suddenly disavow any previous intent to either attack EPA's HAP regulations or to imply that MACT limits must be incorporated into the PSD permit. *See id.* at 23-24. Instead, NGO Petitioners now seek to shoehorn their original objection into the PSD permitting process by stating that EPA

[7] The State of New Mexico again argues that a flaw in EPA Region 9's issuance of the PSD permit is that it foreclosed consideration of information from the ESA § 7 consultation that could have informed the PSD permitting process. State of New Mexico's Reply Br. at 11. This argument was made and thoroughly rejected by this Board in the context of NEPA coordination in *Hadson Power* because it presumes that EPA Region 9 made the PSD permitting decision without all of the requisite information. *Hadson Power*, 4 E.A.D. at 299. EPA Region 9 squarely addressed this point in its Response to Comments, and, as has been demonstrated throughout this brief, Petitioners have not shown EPA Region 9's decision to be clearly erroneous. AR 120 at 168.

Region 9's BACT analysis must have been "substantively compromised" by EPA Region 9's failure to consider proper MACT controls under CAA § 112.[8] *Id.* at 24.

NGO Petitioners' attempt to restyle this objection amounts to a distinction without a difference. The substance of the claim—that EPA Region 9 erred in not completing a case-by-case MACT analysis before issuing the PSD permit—remains the same and remains fatally flawed for two reasons: (1) NGO Petitioners did not raise this objection with any reasonable specificity during the original comment period on the PSD permit; and (2) even if the Board were to consider this issue, NGO Petitioners have abjectly failed to show that EPA Region 9 was required by any statute or regulation to complete a MACT determination prior to or concurrent with the issuance of a PSD permit.

A. NGO Petitioners Did Not Object with Reasonable Specificity During the Public Comment Period to EPA Region 9's Failure to Issue MACT Limits.

NGO Petitioners have previously acknowledged that "in order to demonstrate that an issue has been preserved for appeal, a petitioner must show that any issues being appealed were raised with reasonable specificity during the public comment period," unless that issue was not reasonably ascertainable during the public comment period. NGO Petitioners' Supp. Br. at 127. NGO Petitioners claim to have satisfied this requirement by raising issues with EPA Region 9's coordination of the MACT and BACT analyses in two letters sent to EPA Region 9 dated March 4, 2008 and June 17, 2008. *See* NGO Petitioners' Reply Brief at 25. NGO Petitioners neglect,

---

[8] In Section IV of their reply brief, NGO Petitioners argue that EPA has improperly relied on section 165(c) of the CAA, which requires EPA to make a final decision on a PSD permit within one year after it has received a complete permit application. CAA § 165(c); 42 U.S.C. § 7465(c). Among other things, they argue that EPA should remand the permit "for further notice and comment proceedings on this issue." NGO Br. at 14. Inasmuch as section 165(c) was added to the CAA to ensure that the PSD program would not become "a vehicle for inaction and delay," S. REP. NO. 94-717 at 23 (1976), we hardly think that such a remand would be consistent with congressional intent.

however, the requirement to submit such comments "during the public comment period" and therefore overlook the fact that both of these letters were sent to EPA Region 9 almost two years after the public comment period ended on November 13, 2006. Furthermore, neither of NGO Petitioners' letters raised the instant statutory argument with the specificity that it is now raised by NGO Petitioners in this appeal.[9] NGO Petitioners have missed their opportunity to make this argument.

NGO Petitioners' Reply Brief fails to credibly show that the statutory issue now being raised was not reasonably ascertainable during the public comment period. As has been previously noted, the petition for review in *State of New Jersey v. EPA*—the decision relied upon by NGO Petitioners to show that their argument was not ascertainable during the comment period—was filed with the D.C. Circuit on May 18, 2005. NGO Petitioners had more than eighteen months to consider the possible impact of the *New Jersey* case on the Desert Rock PSD permit – more than ample time to consider these impacts, especially because one of their rank was a party to the case. Because NGO Petitioners have failed to show that the instant issue was not reasonably ascertainable during the public comment period, the Board should uphold EPA Region 9's BACT determination and issuance of the PSD permit.

---

[9] While EPA Region 9 did elect to respond to aspects of the March 4 letter, EPA Region 9's response emphasized that "these comments were submitted after the close of the public comment period" and 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. *In re City of Phoenix, Arizona Squaw Peak & Deer Valley Water Treatment Plants*, 9 E.A.D. 515, 531 (EAB 2000) (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).

B. EPA Region 9's Decision Not to Complete a MACT Determination Prior to Issuing the PSD Permit Was Not Reversible Error.

NGO Petitioners have failed to cite any statutory or regulatory authority for the proposition that EPA Region 9 was required to perform a case-by-case MACT analysis prior to issuing the PSD permit. *See* NGO Petitioners' Reply Br. at 22-26. NGO Petitioners' lack of citation to any authority is due to one simple reason: there is no authority to cite because HAP limits are very clearly excluded from the PSD program under both § 112(b)(6) and the PSD regulations. *See* 40 C.F.R. § 52.21(b)(50). While NGO Petitioners deem this statutory exclusion to be "entirely irrelevant," the fact remains that the PSD permit issued by EPA Region 9 is what is at issue in this proceeding, not any future MACT determinations, and NGO Petitioners have asserted no basis for their conclusion that EPA Region 9's decision to issue the PSD permit prior to making MACT determinations constitutes reversible error. *See* NGO Petitioners' Reply Br. at 23.

Perhaps realizing that there is no legal authority upon which to base their objection, NGO Petitioners instead attempt to attack EPA Region 9's BACT determination on the basis that it could not possibly have met the statutory requirement without taking into account the results of a case-by-case MACT determination. NGO Petitioners' Reply Br. at 26. This argument, however, is merely a restyled version of NGO Petitioners' previous claim and again rests on no legal authority. As EPA Region 9 states in its Response Brief, "Region 9 considered the possibility of interactions between the technology selected as BACT and potential technologies that may be required under the case-by-case MACT requirements . . . Region 9 chose to proceed with the PSD permit based [on] a reasoned conclusion that a dramatic alteration of the proposed source was unlikely to occur." EPA Region 9's Response Br. at 105-06. Other than their blanket allegation that this decision violated the BACT requirements, NGO Petitioners point to no legal

authority nor allege any factual basis for their contention that EPA Region 9's decision on this issue was arbitrary or unreasonable and constitutes reversible error.

VII. EPA REGION 9 PROPERLY CONSIDERED AND ENSURED ADEQUATE PUBLIC COMMENT ON THE BACT DETERMINATION FOR NO_X AND SO_2, INCLUDING THE NO_X OPTIMIZATION PLAN.

In an effort to prolong continuously the PSD permitting process, NGO Petitioners claim that EPA Region 9 did not seek public comment on the final BACT analysis currently under review by the Board. Tellingly, NGO Petitioners do not and cannot take issue with EPA Region 9's actual final BACT limit for SO_2 or NO_x. In fact, EPA Region 9 acted properly because the final BACT analysis in the permit process considered public comments and was improved from the proposed BACT analysis because of those comments. The NO_x optimization plan is part of the BACT process in this permitting action and it includes emission and design requirements added in response to specific comments from NGO Petitioners on the BACT analysis.

In their Reply Brief, NGO Petitioners do not claim that the final BACT analysis is deficient or inadequate in any way, but simply claim that the proposed BACT analysis was not as complete as the final BACT analysis. Once again, NGO Petitioners are requesting that the Board modify the existing PSD permitting process to add additional delay and uncertainty to the PSD permitting process. They have requested that the Board impose an endless public comment review period on BACT analyses along with a requirement to update BACT analyses continuously, disregarding the thoroughness and appropriateness of the final BACT analysis. The Board has rejected this type of request in the past, and the Board again should reject the imposition of an endless BACT cycle, which would prevent the issuance of any future PSD permits. *See Prairie State*, slip op. at 84-93. Once again, NGO Petitioners are requesting that the Board completely disregard its own established precedent and clear EPA guidance.

As noted in Desert Rock Energy's Response Brief (and ignored in NGO Petitioners' Reply Brief), Section IV.E of the NSR Manual states that "the ultimate BACT decision is made by the permitting agency after public review." NSR Manual at B-53 (emphasis added). The NSR Manual further states:

> The BACT emission limit in a new source permit is not set until the final permit is issued. The final permit is not issued until a draft permit has gone through public comment and the permitting agency has had an opportunity to consider any new information that may have come to light during the comment period.

Id. at B-54 to B-55 (emphasis added). NGO Petitioners' argument suggests that the Board read these passages out of the NSR Manual and ignore the "long-standing EPA policy [stating] that the BACT determination is made on the date that the permit is issued." *Prairie State*, slip op. at 85-86. NGO Petitioners submitted a vast number of comments on the BACT analysis, and EPA Region 9 addressed these comments. In fact, nowhere in this proceeding do NGO Petitioners provide information showing, nor do they claim, that re-opening or updating the BACT analysis would call into question EPA Region 9's final BACT limit for SO_2 or NO_x. The Board has recognized that there may be some circumstances where significant new information that becomes available after the close of the comment period should be considered, but NGO Petitioners in this case present no such information. *Id.* at 92. The Board should deny review of NGO Petitioners' claim that they there were not properly afforded public notice and comment on the BACT analysis and the NO_x Optimization Plan.

VIII. EPA REGION 9'S STARTUP AND SHUTDOWN BACT EMISSION LIMITATIONS WERE PROPERLY JUSTIFIED IN THE ADMINISTRATIVE RECORD.

NGO Petitioners claim that the startup and shutdown BACT emission limitation were not properly justified in the administrative record because for the first time EPA Region 9 identified the mathematical equation used to derive the lb/hr emission limits. This argument should fail

because the lb/hr emission limits were fully described in the administrative record and NGO Petitioners knew exactly how EPA Region 9 derived the lb/hr emission limits as evident in their own comments in the record.

As explained in Desert Rock Energy's Response Brief, EPA Region 9's approach is squarely consistent with how the Board directed permitting agencies to permit startup and shutdown emissions from coal-fired power plants. *Prairie State*, slip op. at 113-118. NGO Petitioners understood this approach as indicated by the comments they submitted on this issue during the public comment period. AR 23 at 49. NGO Petitioners recognized that the lb/hr limit was based on the "maximum hourly heat input capacity of 6,800 MMBTU/hr during startup and shutdown." *Id.*; *see also* AR 12 at 106. NGO Petitioners cannot at this point claim that they did not know how the lb/hr limits are calculated when their own comments in the administrative record demonstrated that they knew exactly how EPA Region 9 treated this issue and how the lb/hr limits were calculated.

Once again, NGO Petitioners seek that the Board reopen the public comment period to further delay the Desert Rock Project. Furthermore, NGO Petitioners provide no information regarding how reopening the permit on this issue would impact the final BACT limits during startup and shutdown. For these reasons, the Board should deny NGO Petitioners' request to re-open the final BACT limits for startup and shutdown operations.

IX. EPA REGION 9 FOLLOWED ESTABLISHED EPA NATIONAL GUIDANCE AND RULEMAKING REQUIREMENTS IN ITS PERMITTING OF $PM_{2.5}$ IN THE DESERT ROCK PERMIT.

NGO Petitioners are once again trying to impose regulatory burdens on permittees and permitting authorities that were never contemplated in the PSD program. Even though there is clear EPA guidance and direction, as upheld by the Board, on the use of PM_{10} as a surrogate for

$PM_{2.5}$ during an interim implementation period that includes this permitting action, NGO Petitioners are requesting that permitting authorities revisit and question this national policy and directive in case-by-case technical permit reviews. NGO Petitioners' Reply Br. at 38-39.

EPA has consistently provided sufficient justification for its PM_{10} surrogate policy. For example, EPA explained in its October 1997 memorandum that the PM_{10} surrogate policy was required because of technical difficulties with monitoring, estimating, and modeling $PM_{2.5}$ emissions. Memorandum from John S. Seitz, *Interim Implementation New Source Review Requirements for $PM_{2.5}$* (Oct. 23, 1997). EPA clarified that it "believes that PM_{10} may properly be used as a surrogate for $PM_{2.5}$ in meeting NSR requirements until these difficulties are resolved." *Id.* This policy was later endorsed in the 2005 memorandum from the Director of the Office of Air Quality Planning and Standards clearly directing permitting authorities to "assume that a major stationary source's PM_{10} emissions represent $PM_{2.5}$ emissions." Memorandum from Stephen D. Page, *Implementation of New Source Review Requirements in PM2.5 Nonattainment Areas* (Apr. 5, 2005). On May 16, 2008, EPA promulgated a final rule that allowed sources with pending permit applications to utilize PM_{10} 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. 73 Fed. Reg. 28,321, 28,340 (May 15, 2008) (the "Surrogate Policy"). This rulemaking also ended the surrogate policy in future permitting actions. These three documents established a clear bright line for PSD permitting authorities and have been relied upon in many permitting actions throughout the country.

None of these EPA policy directives impose a requirement to perform the type of analyses that NGO Petitioners seek through this appeal. NGO Petitioners now seek, in this late stage of the Surrogate Policy's implementation, to impose a requirement that PSD permitting

authorities (1) find that it is reasonable to apply the Surrogate Policy in each permitting matter, (2) calculate the fraction of PM_{10} to be assumed to be $PM_{2.5}$, and (3) compare the fraction of PM_{10} emissions assumed to be $PM_{2.5}$ to the $PM_{2.5}$ NAAQS. NGO Petitioners' Reply Br. at 39-40. Again, NGO Petitioners are requesting that the Board impose these requirements on PSD permittees, even though no such obligation exists in EPA permitting guidance or in any regulations.

For the Board to grant NGO Petitioners' request would essentially render all national guidance and directives useless because all guidance and directives will need to be justified on a case-by-case basis, thereby thwarting the intent of issuing national guidance. If such a ruling were issued by the Board, case-by-case analyses would still be necessary even where the issues presented were expressly considered in the development of the guidance and directives. Furthermore, to revise or impose additional requirements upon well-established and heavily applied EPA guidance would pull the rug out from under any permittee seeking a PSD permit where the permittee and permitting authority act in good faith and consistent with EPA established guidance. The Board should not revise the PM_{10} Surrogate Policy, as suggested by NGO Petitioners, at this late stage in its implementation and should uphold EPA Region 9's application of this national policy.

X. EPA REGION 9 COMPLIED WITH ALL APPLICABLE REQUIREMENTS RELATING TO THE PROTECTION OF VISIBILITY.

NGO Petitioners contend that EPA Region 9 committed reversible error by failing to accept the Federal Land Managers' ("FLM") adverse impact determinations on visibility and by failing to present evidence showing that implementation of the mitigation agreement signed on May 15, 2007 between Desert Rock Energy and the Navajo Nation (the "Mitigation Agreement")

would alleviate such impacts. *See* NGO Petitioners' Reply Br. at 40. These contentions are belied by both the relevant regulatory requirements, as well as the facts in this case.

A. The Letter Sent by U.S. Forest Service ("USFS") was Not an Adequate Adverse Impact Determination and EPA Region 9's Response was Appropriate.

On March 24, 2006, having determined that the modeling results showed no adverse impact on visibility from emissions, EPA Region 9 gave the FLMs notice that it intended to propose the PSD permit within 30 days. *See* AR 39; EPA Region 9's Response Br. at 82. On April 26, 2006, the USFS sent EPA Region 9 a letter (the "USFS Letter") stating that the Desert Rock Project may have a potential adverse impact on visibility if the Mitigation Agreement were not incorporated into the permit. *See* AR 120 at 142. The USFS letter did not provide any support or explanation for its conclusory statement and did not include any analysis performed by USFS showing any potential adverse impacts on visibility from the Desert Rock Project. *See* AR 120 at 142. The relevant regulatory requirement instructs EPA to "consider any analysis performed by a Federal land manager[.]" 40 C.F.R. § 52.21(p)(3). Lacking such an analysis, EPA Region 9 was entirely justified in concluding that the USFS Letter failed to meet the regulatory threshold of an adverse impact determination. AR 120 at 143.

NGO Petitioners attempt to explain away the inadequacy of the USFS Letter by improperly placing the blame for USFS's analysis on EPA Region 9. *See* NGO Petitioners' Reply Br. at 41. NGO Petitioners claim that EPA Region 9's failure to provide the USFS with adequate information and data "compromised the FLMs' ability to analyze and utilize the relevant data in a timely fashion." *See id.* This claim, however, blatantly ignores the FLMs' extensive participation in the PSD permitting process over the previous three years. *See, e.g.*, AR 11; AR 15; AR 20; AR 28; AR 32; AR 120 at 141-42. The FLMs examined Desert Rock's PSD permit application as early as 2004 and for more than three years have provided substantive

input to Desert Rock Energy and EPA Region 9 through numerous email and letter exchanges, regular conference calls, and meetings discussing all aspects of the visibility issue and other modeling issues. *See* AR 120 at 141. Given their active participation in the process, the FLMs clearly possessed sufficient information with which to develop an adequate adverse impact determination.

B. The Mitigation Agreement Was Not Incorporated into the PSD Permit to Remedy an Adverse Visibility Impact.

NGO Petitioners falsely characterize the Mitigation Agreement's inclusion in the PSD permit as being in response to the FLMs' adverse impact determination on visibility. *See* NGO Petitioners' Reply Br. at 43. NGO Petitioners then claim that EPA Region 9 committed reversible error because it did not show that the Mitigation Agreement was an adequate remedy for the adverse findings on visibility. *Id.* at 44. NGO Petitioners are wrong on both counts: first, as explained above, EPA Region 9 had determined that no adequate adverse impact determination had been presented by the FLMs. *See* EPA Region 9's Response Br. at 88. EPA Region 9 explained that the Mitigation Agreements' inclusion was entirely voluntary in order to respond to some of the FLMs' comments. *Id.* Finally, as explained in EPA's Response to Public Comments, because EPA did not receive an analysis from USFS showing that there may be an adverse impact, there was no need for EPA to show that the proposed Mitigation Agreement remedies such an impact. *Id.*

XI. EPA REGION 9'S SO_2 INCREMENT ANALYSIS AND MODELING SATISFIED ALL APPLICABLE REQUIREMENTS.

In their arguments about EPA Region 9's analysis of the SO_2 PSD increment consumption for the Desert Rock Project, NGO Petitioners again repackage the same objections they raised during the comment period, without even addressing the fact that EPA Region 9 fully responded

to their objections. It is clear from the record that EPA's analyses and modeling show that the Desert Rock Project will not exceed the Class I increment (or any other increment) for SO_2.

A. EPA Region 9 Fully and Adequately Responded to NGO Petitioners' Comments Regarding Baseline SO_2 Emissions for the San Juan Generating Station and the Four Corners Power Project.

The CAA establishes the SO_2 PSD increment as the maximum projected increase in SO_2 concentration as compared to the SO_2 baseline concentrations in place as of the relevant baseline date. 42 U.S.C. § 7473(b). NGO Petitioners' main objection is that EPA Region 9 failed to respond to their complaints relating to emissions from the San Jose Generating Station and the Four Corners Power Plant and their contribution to the baseline for SO_2 emissions. *See* NGO Petitioners' Br. at 45. Actually, EPA Region 9'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.

In addressing this issue, EPA Region 9 assumed that SO_2 emissions from every major source in the area, with the exception of emissions from two area power plants, consumed or reduced the increment available for SO_2 emissions from the Desert Rock Project. *Id.* By assuming that all major sources "consume the increment," the baseline dates were only relevant for the two area power plants raised in NGO Petitioners' comments: San Juan Generating Station and Four Corners Power Project. EPA Region 9's Response to Comments addressed this concern in detail; the Region even conducted additional SO_2 PSD increment modeling for the Class I areas using the precise emission scenario suggested by 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 NGO Petitioners. AR 120 at 132-34. Although these modeling scenarios resulted in "considerably less increment expansion," EPA Region 9 confirmed that even with the smaller increment expansion, the SO_2 emissions from Desert Rock would not exceed the PSD Class I increment. AR 120 at 132-34. EPA Region 9 made the modeling files available for NGO Petitioners and the rest of the public to review.

Taken together, the conservative calculation used by Desert Rock Energy 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. For both San Juan Generating Station and the Four Corners Power Project, NGO Petitioners repeat arguments raised during the comment period without responding to EPA Region 9's modeling that evaluates lower NAAQS emission limits in the baseline. Moreover, NGO Petitioners have not provided any factual basis or specific legal error that demonstrates that 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 fully and adequately to NGO Petitioners' comments relating to San Juan Generating Station and Four Corners Power Plant SO_2 emissions in the baseline and increment expansion, and the Board should deny this latest version of NGO Petitioners' old objection. *See* AR 66 at 14-16; AR 120 at 132.

B. EPA Region 9's Additional Modeling Does Not Require Reopening the Public Notice and Comment Period.

NGO Petitioners claim that additional modeling analyses undertaken by EPA Region 9 in response to public comments "are not sufficiently documented in the administrative record and should be subject to a new public notice and comment period." NGO Petitioners' Reply Br. at

48. This claim is without merit, at odds with the facts and the law in this case, and should be denied.

As discussed in the administrative record, five different modeling analyses were prepared and evaluated for this project before the draft permit was issued for public comment: (1) the original modeling included in the initial February 2004 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 Region 9 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 Region 9 in October 2006 (AR 120.8). None of the modeling studies predicted that SO_2 emissions from the Desert Rock project would exceed any Class I PSD increment.

Based upon comments submitted by NGO Petitioners during the comment period, EPA Region 9 conducted yet another modeling analysis that made the analysis even more conservative by reducing the PSD increment available for the Desert Rock Project – without taking any position as to whether such a reduction was appropriate under the regulations. The additional modeling increased the San Juan Generating Station SO_2 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 SO_2 emissions from the Desert Rock Project would not exceed the PSD increment in any Class I area.

Under 40 C.F.R. § 124.14, the Regional Administrator has discretion to determine whether additional public comment is warranted. The Board generally defers to the Regional Administrator's discretion regarding whether the public comment period should have been

reopened as a result of changes made in a final permit. *In re Thermalkem, Inc.*, 3 E.A.D. 355, 357 (EAB 1990); *see also In re Amoco Oil Co.*, 4 E.A.D. 954, 981 (EAB 1993); *In re GSX Services of S. Carolina, Inc.*, 4 E.A.D. 451, 467 (EAB 1992).

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 Region 9's basis for changing the terms of the permit. *Indeck*, slip op. at 29 (citing 40 C.F.R. § 124.17(a)(1); *In re City of Marlborough*, 12 E.A.D. 235, 244-45 (EAB 2005)). Here, the EPA modeling scenarios were described in EPA Region 9'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 decision-making 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)). NGO Petitioners have not shown that reopening the comment period will "expedite the decision-making process." *Id.* Therefore, the only issue remaining is whether the final Desert Rock Project permit raised "substantial new questions." *Id.* It did not.

The modeling prepared by EPA Region 9 functioned to support - not correct - the prior modeling analysis that determined the Class I increments were not exceeded. It simply showed that, even if EPA Region 9 agreed with NGO Petitioners' key arguments regarding baseline concentrations, the Desert Rock Project would still meet all the requirements related to PSD increments. This additional modeling did not alter any PSD permit term, emissions limit, or control requirements in the PSD permit; nor did the modeling results change EPA Region 9's proposed approval of the PSD permit. In short, EPA Region 9'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 EPA Region 9's determination; therefore, additional notice and comment beyond the extensive and documented exchange of information that has occurred since 2004 through the issuance of the PSD permit in 2008 is unnecessary.

XII. THE STATE OF NEW MEXICO HAS FOUND THAT THE OZONE DATA RELIED UPON IN THIS PROCEEDING BY PETITIONERS WAS FAULTY AND CANNOT BE USED TO DETERMINE ATTAINMENT.

The State of New Mexico in its reply argues that EPA Region 9 conducted an inappropriate analysis of Desert Rock's ozone impacts because EPA Region 9 "ignored current elevated ozone monitoring data because the area has not been formally designated for nonattainment and, in EPA's view, the implication of the data was 'uncertain.'" State of New Mexico's Reply Br. at 21. New Mexico challenges the modeling in the administrative record, alleging that it does not consider actual data from monitors in San Juan County, but instead relies on modeled background ozone levels. *Id.* As it turns out, EPA Region 9 was correct not to rely on newly collected monitoring data because of uncertainties. The State of New Mexico Environment Department, Air Quality Bureau ("NMED") has found that the data relied upon by New Mexico in this proceeding is faulty. NMED goes further and recommends that the San Juan County be designated as attainment with the new ozone standard.

On March 11, 2009, the Governor of New Mexico submitted to EPA Region 6 NMED's recommended area designations for the new ozone NAAQS. *See* Exhibit A, Letter from Governor Bill Richardson to the EPA Region 6 Acting Regional Administrator (Mar. 11, 2009) (enclosing *New Mexico Recommended Area Designations for the 2008 Revised Ozone NAAQS*).

The Governor recommends the San Juan County, which includes the Bloomfield, Navajo Lake, and Substation monitors, be classified as attainment. *Id.* at 4-5. This recommendation was based upon data from the very same monitors that the State of New Mexico relied upon in its petition to make the argument that EPA Region 9 performed an inadequate ozone analysis because it failed to consider actually monitoring data; in particular, the report discussed data from the Navajo Lake monitor. The report notes that

> NMED has recently determined that ozone monitoring data collected at the Navajo Lake site is likely not of sufficient quality to validate and certify for use in the attainment/nonattainment designation process. The NMED and EPA Region 6 are currently conducting a joint investigation into the validity of the data. However, as of this submittal, there is substantial doubt concerning the validity of the data, particularly data exceeding NAAQS collected in October 2008, and the resulting design value at Navajo Lake, excluding data that cannot be validated at this time is not in violation of the 8-hour ozone standard.
>
> The New Mexico Environment Department has recently determined that ozone monitoring data collected at the Navajo Lake site may not be of sufficient quality to certify for use in the attainment/nonattainment designation process. The NMED and USEPA are currently conducting a joint investigation into the validity of the data; however, at this time, there is substantial doubt that the data is valid, particularly data collected in October 2008 that would indicate that the area would not attain the federal ozone standard. Due to this recent development, the state of New Mexico will not recommend ozone nonattainment status for San Juan County and part of Rio Arriba County, as was previously posted on our website.

Id. at 5-6. Based upon these findings, on March 13, 2009, the State of New Mexico notified the Board that "those portions of New Mexico's Motion to Supplement and New Mexico's Reply Brief that are based on Navajo Lake monitoring data from October of 2008 will most likely need to be withdrawn." Letter from Seth T. Cohen, Assistant Attorney General to Erika Durr, Clerk of the Board, Environmental Appeals Board, at 1-2 (Mar. 13, 2009). The State of New Mexico also informed the Board of its intent "to file a notice with the Board immediately upon receiving the final determination from EPA and NMED regarding the invalidation of the Navajo Lake

data" in order to "confirm the precise implications of that determination for the arguments submitted by New Mexico in this appeal." *Id.* at 2. New Mexico anticipates that it could provide this notice, possibly narrowing New Mexico's ozone arguments, to the court by April 27, 2009. *Id.*

This new information and reversal by NMED demonstrates that the State of New Mexico's arguments on EPA Region 9's ozone modeling must fail and highlights the technical issues relating to ozone modeling. As stated in the Desert Rock Energy's Response Brief, the Board should defer to the technical expertise of EPA Region 9 in the highly technical issues of air modeling and find that Petitioners fail to provide the necessary evidence to overcome the deference granted to permitting authorities in matters requiring technical expertise. *In re Newmont Nevada Energy Investment*, 12 E.A.D. 429, 430 (EAB 2005).

XIII. EPA REGION 9 ADEQUATELY RESPONDED TO PETITIONER GLUSTROM'S COMMENTS AND WAS NOT OBLIGATED TO CONSIDER CONCENTRATING SOLAR POWER TECHNOLOGIES AS PART OF ITS BACT ANALYSIS.

In replying to Desert Rock Energy's Response Brief, Petitioner Glustrom merely reiterates the same facts and thin legal arguments to substantiate her position. Desert Rock Energy previously addressed the two issues raised by Petitioner Glustrom: (1) that EPA Region 9 erred by failing to respond to her comments regarding considering Concentrating Solar Power as BACT; and (2) that the Board should decline to grant EPA Region 9 discretion to utilize the Redefining the Source Policy to disregard Concentrating Solar Power as BACT. Although Petitioner Glustrom would like to distill the CAA down to a few concise sentences, Glustrom Reply Br. at 2, the CAA is much more complex and contains many other considerations beyond those mentioned by Petitioner Glustrom. As Desert Rock Energy has noted in Section I, *supra*, the PSD program was not meant to be used to force permittees into building sources they never

intended to build. Thus, as the Board has recently noted, "EPA has not considered the BACT requirement as a means to redefine of the source when considering available control alternatives." *N. Michigan Univ.*, slip op. at 26. Merely stating her preference for the construction of a Concentrating Solar Power Plant does not show clear error on the part of EPA Region 9 in either responding to her comments or in performing its BACT analysis. *See Indeck*, slip op. at 48 n.67 (noting that "clear error . . . is not established simply because petitioners document a difference of opinion"). Because EPA Region 9's decision complied with the meaning and intent of the CAA, the Board should uphold EPA Region 9's decision to grant Desert Rock Energy's PSD permit.

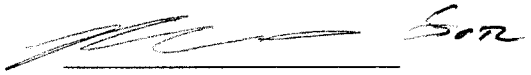
CONCLUSION

For the reasons stated above, Desert Rock Energy respectfully requests that this Board uphold the PSD permit because the Petitioners have failed to demonstrate clear error in EPA Region 9's decision to grant the permit.

[*Signature Page Attached*]

Date: March 27, 2009

Respectfully submitted,



Jeffrey R. Holmstead
Bracewell & Giuliani LLP
2000 K Street, N.W.
Washington, D.C. 20006
Telephone: 202-828-5800
Facsimile: 202-223-1225
jeff.holmstead@bgllp.com

Attorney for Desert Rock Energy Company, LLC