Thus, EPA Region 9 found that the cumulative impacts of the Desert Rock Project and all other sources of $SO_2$ and $PM_{10}$ in the area of influence are not expected to exceed a fraction of the NAAQS. EPA used this data, which was presented in both the PSD application and the EJ Assessment, to make its environmental justice assessment: "EPA believes that, as demonstrated by our modeling of the [Desert Rock Project's] emissions, there will be no exceedances of any of the National Ambient Air Quality Standards, which are indicators of healthful air." AR 120 at 163-64.[64]

### B. This Board's Precedent Supports the Conclusion 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 Where NAAQS are Satisfied.

EPA Region 9's conclusion regarding the lack of adverse effects on the identified environmental justice communities is grounded solidly in this Board's precedent. This Board has held repeatedly that a comparison of the maximum potential emissions of PSD pollutants from the proposed project to the underlying NAAQS and PSD increment may satisfy the Executive

[64] NGO Petitioners argue that EPA has "provided no details regarding its assessment of Environmental Justice concerns...." NGO Petitioners' Supp. Br. at 126 (citing *Knauf I*, in which this Board remanded a PSD permit on environmental justice grounds where there were "no details regarding Region IX's determination in the administrative record. As such we cannot judge the adequacy of the Region's analysis."). The administrative record contains the EJ Assessment, discussed in greater detail above, as well as EPA's eleven pages of discussion within the Response to Comments. AR 77; AR 120 at 155-66. Indeed, NGO Petitioners omit from their discussion any citation to *Knauf II*, in which the Board again addressed the sufficiency of the environmental justice determination on a petition for review of EPA Region 9's decision on remand. After remanding *Knauf I*, EPA Region 9 had provided for inclusion in the record two environmental justice assessment documents containing demographic and adverse impact analysis. *Knauf II*, 9 E.A.D. at 16. In *Knauf II*, the Board held that it would not address any challenge to the sufficiency of the environmental assessment where the petitioner could not demonstrate that the conclusion—that there was no adverse impact because NAAQS would not be exceeded—was clearly erroneous. *Id.* at 17. As is demonstrated in Section XI.B, NGO Petitioners fail to demonstrate that EPA's analysis here is clearly erroneous. Therefore, it is unnecessary for the Board to entertain on petition for review any challenge to other aspects of the EJ Assessment—including the methodology and data used for the demographic analysis or the scope of the adverse impact analysis. *Id.*

Order's required environmental justice analysis where the NAAQS are not violated. *See In re Shell Offshore, Inc.*, OCS Appeals 07-01 and 07-02, slip op. at 67-68 (EAB Sept. 14, 2007); *Ecoeléctrica*, 7 E.A.D. at 69; *Knauf II*, 9 E.A.D. at 17; *AES Puerto Rico*, 8 E.A.D. at 352.

In *Shell Offshore*, for example, this Board denied review of EPA Region 10's environmental justice analysis for two Outer Continental Shelf air regulation minor source permits ("OCS permits"). *Shell Offshore*, slip op. at 68. EPA Region 10 had determined that issuing the OCS permits would not cause "disproportionately high or adverse human health or environmental effects" on the identified environmental justice communities because the "emissions limits contained in a number of specific permit terms and conditions are expected to curb air pollution sufficiently so that air quality in the region continues to attain the NAAQS, national standards which EPA has established to protect human health and the environment." *Id.* The Board concluded that the petitioners in *Shell Offshore* had not established that EPA Region 10's rationale was clearly erroneous:

> As the Region points out, the NAAQS are the Agency's standards, designed to protect human health and welfare with an adequate margin of safety. *See* CAA § 109(b), 42 U.S.C. § 7409(b). Because EO 12,898 concerns itself with effects that are "adverse," and because the Region has determined that no such adverse effects cognizable under the PSD permit program will result from the issuance of the Permits in this case, we need not address NSB's argument regarding the need for additional comparative analysis. *See In re: Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 16-17 (EAB 2000) (stating that, given finding of no adverse impact based on conclusion that additional pollutants will not result in exceedance of NAAQS or PSD increment, the Board need not address objections to numerous aspects of Region's environmental justice analysis)....Finally, as stated above, the record before us indicates that the Region has complied with its statutory and regulatory obligations regarding public notice and comment. Accordingly, review is denied.

*Shell Offshore*, slip op. at 67-68; *see also Knauf II*, 9 E.A.D. at 16-17 (no adverse impact where "the air quality within the area surrounding the proposed site would remain well within the levels determined to [be] healthful and environmentally acceptable"); *Ecoeléctrica*, 7 E.A.D. at 68 ("the

modeled maximum emission impacts from this project are insignificant and well below NAAQS, and [the] project therefore should have insignificant impacts on the surrounding communities"); *AES Puerto Rico*, 8 E.A.D. at 351 (finding no adverse effect where "all maximum predicted concentrations of [carbon monoxide, sulfur dioxide, nitrogen dioxide and particulate matter were] below the corresponding NAAQS").

Against this significant weight of authority, NGO Petitioners offer no countervailing authority support for their position. Rather, NGO Petitioners argue that an adverse effect finding tied to NAAQS would "render[] any Environmental Justice assessment an empty exercise." NGO Petitioners' Supp. Br. at 259. This assertion is clearly untrue. For example, in *AES Puerto Rico*, though EPA Region 2 found no adverse effect because total emissions were below the NAAQS, EPA Region 2 nonetheless added additional PSD permit conditions requiring future ambient monitoring and multi-source air quality analysis for $SO_2$ because of concerns raised during the public comment period. *AES Puerto Rico*, 8 E.A.D. at 351. Furthermore, EPA can use its authority to analyze alternative technologies for criteria pollutants based on their relative ability to control emissions of pollutants not directly regulated under PSD as a basis for addressing environmental justice concerns.[65] *See* Memorandum from Office of General Counsel, *EPA Statutory and Regulatory Authorities Under Which Environmental Justice Issues May Be Addressed in Permitting*, at 12 (Dec. 1, 2000). Each of these examples concretely shows how an environmental justice assessment need not be an "empty exercise" despite a finding that there is no adverse effect because of NAAQS compliance.

[65] As is further discussed below, NGO Petitioners misinterpret this authority as bestowing on EPA an obligation under BACT to consider alternative sources that could achieve better emissions performance.

### C. EPA Meaningfully Responded to those Specific Issues Regarding Environmental Justice that Apply to the PSD Permitting Process.

Amid the purported "generalized failure to satisfy its Environmental Justice obligations," Petitioners assert that EPA also failed adequately to respond to several specific environmental justice comments. However, Petitioners conflate an adequate determination with a determination that Petitioners favor as if they were one and the same.

#### 1. *EPA's Soil and Vegetation Analysis Was Proper and EPA Therefore Properly Responded to Environmental Justice Concerns Regarding Impacts on Agriculture and Pastoral Communities.*

40 C.F.R. § 52.21(o)(1) requires the PSD permit applicant to "provide an analysis of the impairment to . . . soils and vegetation that would occur as a result of the source." The results of the soil and vegetation analysis "shall be available at the time of the public hearing on the application for such permit." CAA § 165(e)(3)(C), 42 U.S.C. § 7475(e)(3)(C). The NSR Manual describes the soil and vegetation analysis thusly:

> The analysis of soil and vegetation air pollution impacts should be based on an inventory of the soil and vegetation types found in the impact area. This inventory should include all vegetation with any commercial or recreational value, and may be available from conservation groups, State agencies, and universities.
>
> For most types of soil and vegetation, ambient concentrations of criteria pollutants below the secondary national ambient air quality standards (NAAQS) will not result in harmful effects. However, there are sensitive vegetation species (e.g., soybeans and alfalfa) which may be harmed by long-term exposure to low ambient air concentrations of regulated pollutants for which [there] are no NAAQS . . . .

NSR Manual at D.5. The question regarding the adequacy of this soil and vegetation analysis is essentially a scientific one, with respect to which the Board ordinarily gives substantial deference to the permitting agency. *Indeck*, slip op. at 48 n.67. The soil and vegetation analysis here relied on *A Screening Procedure for the Impacts of Air Pollution Sources on Plants, Soils, and*

*Animals*, EPA 450/2-81-078 (Dec. 12, 1980) (the "Screening Procedure"). *See* AR 120 at 40, 150. Table 3.1 of the Screening Procedure lists screening concentrations for sulfur dioxide, ozone, nitrogen oxide, carbon monoxide, sulfuric acid, ethylene, and fluorine, representing minimum concentrations at which adverse growth effects or tissue injury were reported in scientific literature. *See* AR 120.40 at 10-11. EPA has indicated that the Screening Procedure "is the only guidance currently available for conducting additional impacts assessments" regarding soil and vegetation. AR 120 at 150.

Desert Rock Energy's PSD Permit application identified more than 30 plant species that may occur in the vicinity of the project site. *See* AR 12 at A8-4 to A8-6. In addition, the EJ Assessment states that in its analysis of environmental justice concerns related to plants and animals, Desert Rock Energy relied on a 2005 floristic survey and ethnobotanical report for the impact area. *See* AR 77 at 7, 23, 36. The soil and vegetation analysis evaluated impacts on vegetation by comparing the predicted impacts attributable to the project with the screening levels presented in the Screening Procedure. AR 46 at 45; *see also* AR 6.1 at 6-37; AR 43 at 6-11. The modeling analysis showed all impacts to be well below the screening levels. AR 46 at 45. Because most of the designated vegetation screening levels are equivalent to or less stringent than the NAAQS and/or PSD increments, EPA determined that "satisfaction of NAAQS and PSD increments assures that sensitive vegetation will not be negatively affected." AR 46 at 45.

In their petition, NGO Petitioners state that certain comments "raised concerns about harm to communities with a pastoral lifestyle as a result of adverse air-quality impact on vegetation used for grazing." NGO Petitioners' Supp. Br. at 262. In response to these environmental justice concerns, EPA relied on its soil and vegetation analysis to demonstrate that there would be no adverse air quality impact on vegetation used for grazing. *See* AR 120 at 150.

Petitioners argue, however, that EPA's soil and vegetation analysis is "manifestly inadequate," and that, as a result, EPA's response to environmental justice concerns implicating the effect of air pollution on vegetation used for grazing is likewise inadequate. NGO Petitioners' Supp. Br. at 263.[66] Specifically, Petitioners argue that this soil and vegetation analysis conflicts with this Board's holding in *Indeck*.

Because the question regarding the adequacy of the soil and vegetation analysis is essentially a scientific one, the Board assigns a particularly heavy burden to a petitioner seeking review. *Indeck*, slip op. at 48 n.67. "Thus, when issues raised on appeal challenge a permit issuer's technical judgments, clear error...is not established simply because petitioners document a difference of opinion or an alternative theory regarding a technical matter." *Id.* The Board will instead "look to determine whether the record demonstrates that the permit issuer duly considered the issues raised in the comments and whether the approach ultimately adopted by the permit issuer is rational in light of all the information in the record." *Id.*

In *Indeck*, this Board upheld the stand-alone utility of the Screening Procedure while noting that "reliance on the Screening Procedures may be insufficient [to satisfy 40 C.F.R. § 52.21(o)(1)] in the face of site-specific concerns that plainly call the adequacy of that analysis into question." *Id.* at n.66. In *Indeck*, the "site-specific concerns" were the location "of a nationally protected prairie -- essentially a preservation site for vegetation of national and historic significance -- . . . adjacent to, and apparently downwind from, the site for [the] proposed power plant" and the failure of the permitting authority to reference the national

[66] NGO Petitioners also raise this argument in the context of EPA's purported failure to coordinate the PSD permitting process with its ESA § 7 consultation. *See* NGO Petitioners' Supp. Br. at 274-76. As indicated below in Section XII, this section serves as Desert Rock Energy's response to NGO Petitioners' argument regarding the sufficiency of EPA's soil and vegetation analysis in both contexts.

preserve in its public notice. *Id.* at 41. The Illinois Department of Natural Resources and the U.S. Forest Service submitted to public comments on the proposed PSD permit noting that the proposed power plant was a "direct threat to sensitive habitat areas" and would undermine the objectives for ecosystem restoration. *Id.* at 36-38. The Illinois Department of Natural Resources specifically noted that "direct application of the NAAQS standards to all flora and fauna associated with the permit action may not be sufficient to address all potential endpoints at this site." *Id.* at 38. In addition, public comments noted that the prairie reserve contained a number of species potentially more sensitive to particular pollutants than species considered in the studies underlying the Screening Procedures. *Id.* at 45.

In light of these "site-specific" comments, the Board in *Indeck* clarified that the permitting authority would either have to rely on analysis beyond the Screening Procedures or explain "how that analysis alone satisfactorily responds to the comments on the draft permit, ensures comparability with the approach envisioned by the NSR Manual, and provides reasonable assurance that the [prairie preserve] will not be adversely affected by emissions from Indeck's facility." *Id.* at 49. Applying the standard set forth in *Indeck*, NGO Petitioners have failed to demonstrate clear error here in EPA's soil and vegetation analysis for two reasons.

First, Petitioners have failed to demonstrate the existence of comments raising the sort of "site-specific" concerns discussed in the *Indeck* opinion. To be sure, Petitioners raise the same generalized problems with the Screening Procedure discussed in the *Indeck* opinion, but these comments cite purported procedural requirements rather than any specific impact on the soil and vegetation analysis, which is required in order to secure the Board's review.[67] While there are

[67] For example, NGO Petitioners assert that the *Indeck* opinion requires an inventory of "all local plant species." NGO Petitioners' Supp. Br. at 263 n.184. This statement is erroneous,

Class I areas within the analysis area for the Desert Rock Project, there is nothing close to the circumstance in *Indeck*, where there was a national vegetation preserve adjacent to the proposed power plant that was not even referenced in the agency's public notice or in its response to comments.[68] Furthermore, Petitioners do not identify any public comment submitted regarding the PSD permit from a regulatory agency such as the USFS stating that EPA's soil and vegetation analysis is insufficient. Such critical comments from regulatory agencies were of paramount concern to the Board in *Indeck*. Finally, Petitioners have not identified any plant species in the impact area that are "more sensitive" to particular pollutants than species considered in the studies underlying the Screening Procedures. *See Kawaihae Cogeneration*, 7 E.A.D. 107 (denying review of PSD permit where petitioner did not provide any information that soil and vegetation "would be negatively impacted" or that there were "sensitive plant species that would be harmed by exposure to concentrations of pollutants below the secondary NAAQS"). Therefore, in the absence of submitting site-specific comments, Petitioners have not demonstrated that an analysis beyond the comparison of projected emissions to the concentrations identified in the Screening Procedures was required here. *See Indeck*, slip op. at 48-49.

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as the *Indeck* opinion clearly requires only "some kind of baseline analysis of the vegetation and soils in the area." *Indeck*, slip op. at 50 n.69. As the *Indeck* decision recognizes, this baseline analysis can comprise the applicant's analysis 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). That analysis is hardly an inventory of "all local plant species," yet the Board in *Kawaihae Cogeneration* declined to review the soil and vegetation analysis where the petitioners did not show that vegetation would be negatively harmed by the power plant 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. NGO Petitioners fail to present that same information here.

[68] The closest Class I area here, Mesa Verde National Park, is approximately 75 kilometers away. *See* AR 46 at 1.

Second, even if Petitioners had raised a sufficient question regarding reliance on the Screening Procedure here, EPA provided an adequate explanation in its Response to Comments document of 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 Screening Procedure, EPA noted, is the only guidance currently available for conducting additional soil and vegetation impacts assessments. AR 120 at 150. Using the Screening Procedure to ensure that no vegetation suffers adverse growth effects or tissue injury at a concentration lower than the applicable NAAQS or PSD increment, EPA appropriately determined that in this case "satisfaction of NAAQS and PSD increments assures that sensitive vegetation will not be negatively affected." AR 46 at 45. In the absence of specific evidence demonstrating that there are sensitive plant species that would be harmed by exposure to concentrations of pollutants below the secondary NAAQS, review of EPA's determination must be denied. *See Kawaihae Cogeneration*, 7. E.A.D. at 130.

EPA recognized that because the purpose of the additional soil and vegetation impacts analysis is informational, where the analysis complies with the letter of the PSD regulations the informational purpose could be supplemented by referring to the biological assessment and DEIS required by the ESA and NEPA, respectively. *Id.* at 150-51 ("a more comprehensive assessment of the impact on soil, vegetation, and animal life, including the effects on livestock grazing, is underway as part of a biological assessment required under the [ESA], and for the [EIS]"); *see also* 43 Fed. Reg. 26,403 ("the impact assessment should generally be qualitative in nature and designed to inform the general public of the relative impact of the source on [air quality related] values"). It is true that, in *Indeck*, the Board noted that reliance by the permitting authority on an analysis conducted under the ESA consultation process would not save the permitting authority

from the public notice and comment problem. *Indeck*, slip op. at 50 n.70. However, EPA Region 9's statement in the Response to Comments document should not be read as deferring the soil and vegetation analysis to the ESA § 7 consultation and the NEPA process. Rather, EPA clearly intended to highlight a further opportunity for comment for those commenters unsatisfied with the soil and vegetation analysis conducted by EPA, but unable to articulate any "site-specific" concerns sufficient to require further analysis or response in the context of the PSD permitting process.

EPA also provided reasonable assurance that the soil and vegetation surrounding the Desert Rock Project will not be adversely affected by emissions from the facility:

> EPA notes that the final PSD permit contains a condition delaying permit effectiveness (and thus prohibiting any project construction) until completion of the ESA process and also allowing for amendment of the permit terms or application as appropriate to address the consultation's findings.

AR 120 at 151; *see also* AR 122 at 4 (Permit Condition II.A).

As Petitioners note, the inclusion of a permit condition cannot cure the failure to provide the soil and vegetation analysis prior to the public comment period. *See* NGO Petitioners' Supp. Br. at 275. For example, in *Indeck,* the permitting authority attempted to supplement its soil and vegetation analysis with a permit condition that required the project proponent in *Indeck* to compile information on soil conditions and the condition of the vegetation that could potentially be affected by pollutants emitted by the proposed plant. *Indeck*, slip op. at 51-52. The permit condition here, by contrast, does not purport to cure any deficiency in the soil and vegetation analysis but merely satisfies the *Indeck* opinion's third requirement by assuring that the soil and vegetation surrounding the Desert Rock Project will not be adversely affected. As discussed in greater detail in Section XII, under Permit Condition II.A, construction is barred absolutely until the ESA § 7 consultation is complete. EPA retains the power to reopen or modify the PSD

permit, and even to compel the applicant to refile its application. AR 122 at 4. Overall, EPA possesses total authority over reshaping the PSD permit in whatever way necessary to reflect any reasonable and prudent alternative measures developed during the consultation process. If the FWS finds a negative impact and specifies ameliorative conditions, EPA is not prevented from making changes to the PSD permit based on FWS's input.

This factual background distinguishes EPA's rational determination here as to the adequacy of Desert Rock Energy's soil and vegetation analysis from the situation in *Indeck*. *Indeck*, slip op. p. 48 n.67. In *Indeck*, this Board was faced with a PSD permit soil and vegetation analysis for a power plant directly adjacent to a sensitive vegetation preserve, with a record that made no mention of the endangered or threatened plant species. *Indeck*, slip op. at 41. The soil and vegetation analysis in *Indeck* was specifically criticized by multiple federal agencies charged with preserving sensitive vegetation in the area, and by public comments that identified specific vegetation with sensitivities exceeding those in the Screening Procedures. *Indeck*, slip op. at 47. Here, Petitioners' analysis of *Indeck* is devoid of the factual context that compelled the decision in that case, and is further devoid of any similar factual context that would compel a similar decision in this case.

Because EPA has properly determined that there is no adverse impact to soil or vegetation, it reasonably follows that such a determination supports the conclusion that there is no significant adverse impact to agriculture or grazing sufficient to trigger environmental justice concerns.

2. *Concerns Regarding Mercury and Water Resource Consumption Are Beyond the Scope of EPA's Environmental Justice Analysis in the PSD Permitting Process.*

NGO Petitioners also attempt to shoehorn another attack on EPA's BACT analysis into their petition by trying to tie that analysis to purported deficiencies in the environmental justice analysis. Specifically, Petitioners argue that consideration of other technology options such as IGCC in the BACT analysis would have addressed environmental justice concerns regarding mercury emissions and water resource consumption. NGO Petitioners' Supp. Br. at 267, 268 n.191.

Public comments identified the potential for mercury emissions from the Desert Rock Project to be deposited in local water bodies that may be used for subsistence fishing, thereby leading to the potential for unhealthy levels of mercury in fish. *See* AR 120 at 161. According to Petitioners, EPA has "not only the authority but the obligation under BACT to consider the collateral environmental impacts of its BACT decisions, including [hazardous air pollutant]-related impacts such as mercury emissions." NGO Petitioners' Supp. Br. at 266. Similarly, Petitioners allege that "depletion of water resources" should "be the subject of a collateral impact assessment (to ensure that that suite of technologies and control measures is optimized to require as little water as possible." *Id.* at 268. Petitioners allege that IGCC would use substantially less water than a pulverized coal boiler. *Id.* at 268 n.191.

a. Petitioners Misstate the BACT Collateral Impact Analysis and, in Any Event, the Sole BACT Alternative, IGCC, Was Appropriately Excluded from the BACT Analysis as Redefining the Source.

NGO Petitioners' arguments related to mercury absorption and water consumption are simply another means the NGO Petitioners have used to challenge EPA's exclusion of IGCC in the BACT analysis. This argument is addressed in great detail in Sections II and III, *supra.*

Because of EPA's determination that IGCC would impermissibly redefine the proposed source, EPA did not need to consider the collateral environmental impacts of IGCC in its BACT analysis. Thus, NGO Petitioners cannot demonstrate that the EPA's environmental justice analysis was clearly erroneous because it did not consider the collateral environmental impacts of a technology that does not qualify as BACT.

In any event, the NGO Petitioners misunderstand the examination of HAPs, including mercury, and consumption of water resources as collateral environmental impacts in the BACT process.

The CAA defines the term "BACT" as an emission limitation for a regulated (*e.g.*, criteria) pollutant based on the use of available control technology that will result in the maximum reduction of emissions of that pollutant and that is achievable at a specific facility in light of the technology's "energy, environmental, and economic impacts and other costs." CAA § 169(3), 42 U.S.C. § 7479(3). This last clause of the BACT definition—called the "collateral impacts" clause—"tempers the stringency of the technology requirements whenever one or more of the specified 'collateral' impacts—energy, environmental, or economic—renders use of the most effective technology for a particular PSD-regulated pollutant inappropriate." *Hillman Power*, slip op. at 683 (citing *Columbia Gulf Transmission*, 2 E.A.D. at 826). In construing the environmental component of the collateral impacts clause, this Board has determined that alternative technologies for a criteria pollutant could be analyzed based on their relative ability to control emissions of pollutants not directly regulated under PSD. *See Genesee Power*, 4 E.A.D. at 848-50; *Hillman Power Co.*, slip op. at 683. The primary purpose of the collateral impacts clause is to allow use of a less effective control technology only when source-specific energy, environmental or economic impacts or other costs constrain a source from using a more effective

technology. *World Color Press*, 3 E.A.D. at 478; *see also Columbia Gulf*, 2 E.A.D. at 827 ("[t]he 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"). For example, if a wet scrubber was considered BACT and if IGCC were considered a more effective control technology, but IGCC technology required significantly more water resources or increased mercury emissions, EPA could appropriately disregard IGCC in the BACT analysis. However, IGCC is not considered BACT, so such a hypothetical collateral impacts analysis does not apply here.

NGO Petitioners seek, however, to convert the collateral impacts clause from a "safety valve" for choosing a less effective control technology into an affirmative obligation to consider the allegedly positive collateral impacts of a control technology not part of the BACT analysis. This is simply an argument for the backdoor regulation of nonregulated pollutants, and it stretches the collateral impacts exception to the point where it swallows the rule.[69]

b. IGCC Is Not a Cost-Effective Method to Control Mercury Emissions and Would Not Decrease Consumption of Water Resources Compared to the Proposed Desert Rock Project.

As demonstrated by the BACT analysis, IGCC is not a cost-effective method to control mercury emissions at the Desert Rock Project.[70] Although the mercury emissions rate from an IGCC plant would be 29 lbs/year as compared to 103 lbs/yr for the Desert Rock Project as

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[69] Petitioners' arguments regarding IGCC and the BACT analysis are discussed in greater detail above, in Section II and Section III, *supra*. Furthermore, NGO Petitioners' argument that EPA is obligated to conduct its case-by-case MACT (which will specifically address mercury control options) in conjunction with the PSD permitting process is addressed in detail in Section IV, *supra*.

[70] Indeed, construction of IGCC may not even be viable at the Desert Rock site. *See* Section II, *supra*. While the general feasibility of IGCC is discussed in detail at Section II, *supra*, these points regarding mercury and water resources bear reemphasis in the context of NGO Petitioners' environmental justice argument.

proposed, the electrical costs of an IGCC plant would be at least $3.5/MWh to $6/MWh higher than the Desert Rock Project as proposed. *See* AR 34 at 3-5, 4-11. This cost increase is equivalent to more than $500,000 per pound of mercury controlled. AR 37 at 3-5. The Board has previously determined that it is not clear error to disregard such exceptionally costly alternatives from the BACT analysis. *See Prairie State*, slip op. at 48-49 (finding no clear error where the permitting authority did not require further BACT analysis of IGCC because of higher capital costs and higher operating costs than less expensive and less uncertain control methods).

With respect to the NGO Petitioners' arguments regarding water consumption, the BACT analysis of IGCC demonstrated that IGCC would actually require more water than the proposed Desert Rock Project. Specifically, the water consumption rates associated with using IGCC at the Desert Rock site would range from 21,000 acre-ft/yr to 39,000 acre-ft/yr, while the Desert Rock Project as proposed would have a permitted water consumption rate of just 4,500 acre-ft/yr. Thus, a collateral impacts analysis of the comparative water use of IGCC and pulverized coal boilers would weigh in favor of disregarding IGCC because of its greater depletion of water resources. *See World Color Press*, 3 E.A.D. at 479 n. 15 ("[a]n exceptional demand on water resources is an example of an environmental impact associated with a technology that would constrain a source from using that technology in favor of a less stringent, less water-intensive technology").

Therefore, assuming *arguendo* that (1) comments to the Desert Rock PSD permit specifically raised these points, and (2) EPA's rejection of IGCC as a BACT was clear error, the petition still does not demonstrate that EPA's decision here was clearly erroneous. IGCC is simply not a practical means of controlling mercury emissions at the Desert Rock Project and

would consume more water resources, thereby undercutting the NGO Petitioners' collateral impacts analysis argument.

3. *Concerns Regarding the Implications of Public Health Services and Physical Infrastructure Are Beyond the Scope of EPA's Environmental Justice Analysis in the PSD Permitting Process and, in Any Event, No Such Concerns Are Present Here.*

Consideration of public health services and physical infrastructure is clearly beyond the scope of the environmental justice analysis required in issuing a PSD permit. According to the Board's prior decisions, it is reasonable for EPA to elect not to address non-air quality related impacts in its PSD permitting proceeding, particularly where the non-air quality related impacts (1) do not directly implicate the conditions of the PSD permit, or (2) significantly affect the BACT determination, and which (3) will in any event be addressed in a separate proceeding. *See Commonwealth Chesapeake*, 6 E.A.D. at 781.

Here, the NGO Petitioners have not identified any specific condition of the PSD permit that could be modified, added or deleted from the permit that would address their concerns regarding public health services or physical infrastructure. Similarly, Petitioners do not demonstrate that public health services or physical infrastructure considerations would impact the BACT determination. In any event, as EPA recognizes, these considerations are addressed in Chapters 3 and 4 of the DEIS. AR 120 at 161. Therefore, it was reasonable for EPA to elect not to address these non-air quality related impacts in its PSD permitting process.[71]

[71] Indeed, the Chesapeake opinion provides even further support for EPA's response regarding water resources. Here, water resources do not directly implicate the conditions of Desert Rock Energy's PSD permit. As described above, consideration of water resources does not significantly affect the BACT determination for the Desert Rock Project. In any event, as recognized by EPA, the depletion of water resources has been addressed in Chapters 3 and 4 of the DEIS. Therefore, to the extent that EPA has discretion it was not clear error for EPA to elect not to address (in any more detail than it did) the impact of the Desert Rock Project on water resources.

Furthermore, as discussed in greater detail above, EPA found that there would be no adverse environmental impact on the identified environmental justice community. *See* AR 120 at 163-64. The NGO Petitioners' argument regarding "the implications of public health services and physical infrastructure" assume air-related health impacts that will allegedly be worsened by the unavailability of health care where EPA has already determined that there would be no air-related health impacts. NGO Petitioners' Supp. Br. at 269. It cannot be clearly erroneous for EPA to decline to address factors that will not aggravate air-related health impacts of emissions from the PSD-permitted source.

Similarly, the NGO Petitioners also claim that EPA improperly disregarded a "no-build" alternative to the proposed plant as part of its response to the environmental justice comments. Even assuming *arguendo* that the NGO Petitioners actually raised the "no-build" alternative with specificity in their comments to the PSD permit, EPA cannot be required to consider alternatives designed to address "disproportionately high and adverse human health or environmental effects" of issuing the PSD permit where EPA has already determined that issuing the PSD permit has no adverse human health or environmental effects. EPA is not required to address hypotheticals in its environmental justice analysis. *See, e.g., Kawaihae Cogeneration*, 7 E.A.D. at 117 (rejecting challenge of a permit for neglecting to consider "purely hypothetical catastrophic failure" of SCR ammonia system in its collateral environmental impact analysis).

NGO Petitioners argue that general "observations about the inadequacy of health care resources and physical infrastructure . . . effectively requested that EPA select a 'no build' alternative to the proposed plant." NGO Petitioners' Supp. Br. at 269. The NGO Petitioners contend that EPA's failure to consider the "no build" alternative is cause for remand. *Id.* However, this position ignores EPA's longstanding policy against "redefining the source" and

this Board's precedent holding that "the decision whether to consider alternatives that would 'redefine' the proposed source falls within the permit issuer's discretion." *See Prairie State,* slip op. at 43 (citing NSR Manual at B.13). EPA's policy against "redefining" the source is discussed in detail in Section II, but it is clear that not building the source is, to say the least, redefining it for the purposes of the PSD permitting process. "These limits on the permit issuer's obligation to consider alternatives are particularly important where, as would be the case with an evaluation of 'need' for additional electrical generation capacity, a rigorous and robust analysis would be time-consuming and burdensome for the permit issuer." *Id.* As the Board held in *Prairie State*:

> We thus reject Petitioners' argument that a commenter can require a permit issuer to perform a rigorous analysis simply by raising the subject of "need" in the public comments. Instead, the permit issuer is only required to consider the analysis submitted during the public comment period, and it may engage in additional analysis as it sees fit, provided that the permit issuer's response to comments is sufficient to "demonstrate that all significant comments were considered.

*Prairie State*, slip op. at 43. Here, Petitioners cannot force EPA to engage in a detailed analysis contrary to its own policy against redefining the source in response to comments evincing a general preference that the Desert Rock Project not be built. Such a result would be contrary to this Board's precedent and would require a time-consuming and burdensome analysis of the "no build" alternative every time anyone opposed any project on any ground.[72] That would be manifestly unreasonable, particularly where another agency (here, the BIA) has already been tasked with conducting the NEPA analysis. *Id.* at 44.

While NGO Petitioners have failed to show that Desert Rock Project will adversely affect human health or the environment in low-income or minority population areas, the administrative

[72] The NGO Petitioners provide a generous reading of comments opposing construction of the Desert Rock Project due to concerns regarding mercury and water depletion as advocating a "no build" alternative that EPA should have analyzed. The point made in this section applies equally to the NGO Petitioner's characterization of such comments.

record demonstrates that not foregoing the Desert Rock Project in favor of some ephemeral, as yet unproven technology will deprive the Navajo Nation of essential revenue. The Desert Rock Project will employ over 200 permanent workers and up to a peak of 3,000 workers during the three to four years of construction. AR 77 at 29. Revenue from the Desert Rock Project is projected to reach $50 million, or twenty-nine percent of the Navajo Nation's non-grant revenue. *Id.* at 31. The President of the Navajo Nation has written repeatedly to EPA emphasize that the Desert Rock Project is critical to the survival of the Navajo Nation:

> To put the urgency of your timely issuance of a permit in perspective, please consider the following. As of early 2004, approximately 48% of the population on the Navajo reservation was unemployed, with roughly 43% of the total population living below the poverty level (compared with 18% below the poverty level in New Mexico). As of early 2004, per capita income on the Navajo Nation is $7,412.00. (*Draft 2004-2005 Economic Development Strategy of Navajo Nation*). These grim statistics threaten the survival of the Navajo Nation. According to the Navajo Division of Community Development, the stagnation of economic development in Navajo country has forced Navajo families to move to far away cities to find their livelihoods. In 1996 the Division of Community Development projected that, without reducing outmigration, by 2012 more than half of the Navajo people may leave the Navajo reservation.
>
> The only solution to this problem is responsible economic development such as the Desert Rock project. Desert Rock will generate approximately one-third of the Navajo Nation's currently declining annual operating budget for the Navajo Nation. This represents revenue from a variety of sources, including coal royalties, coal sales and other taxes, water use fees and land lease payments. In addition, Desert Rock will create between 2000 and 3000 construction jobs at peak development. Construction of the Desert Rock Energy Project will take approximately four (4) years. Upon commencement of operations, the Desert Rock Energy Project will employ 200+ individuals and the related coal mining operation will employ another 200+ individuals; there will also be a multiplier effect creating significant additional service and secondary jobs. Desert Rock offers the opportunity for significant Navajo Nation ownership (25% outright, up to an aggregate of 49% depending on extent of other equity investment).
>
> Desert Rock is an "added value" project to the Navajo Nation. Navajo coal, water, land, and labor will stay on the Navajo Nation to produce greater revenues for the Navajo people. Desert Rock benefits will supplement, and in some cases, replace the revenues which are being lost from the shutdown of mining operations and impacts to other projects.

AR 29 at 2; *see also* AR 16. The Navajo Nation conceived of this project to harness its own resources to prevent the economic slide and subsequent dispersal of its people. "Navajo coal, water, land, and labor will stay on the Navajo Nation to produce greater revenues for the Navajo people." AR 29 at 2. It would be a perverse result for the federal government's concern for the welfare of the Navajo Nation to prevent the tribe from economic advancement of its own design where no adverse environmental effects have been shown.

For these reasons review of the PSD permit should be denied.

## XII. EPA'S ISSUANCE OF A CONDITIONED PSD PERMIT DOES NOT VIOLATE THE AGENCY'S ENDANGERED SPECIES ACT OBLIGATIONS.

The purpose of § 7(a)(2) of the ESA is to ensure "that any action authorized, funded, or carried out by such [federal] agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the . . . adverse modification" of designated critical habitat. 16 U.S.C. § 1536(a)(2). The statute provides for "consultation with . . . the Secretary" to assist the federal agency proposing an action (known as the "action agency") in assessing whether its action complies with the substantive standards in ESA § 7(a)(2). *Id.* The U.S. Fish and Wildlife Service ("FWS"), within the Department of the Interior, has ESA authority over the non-marine species of interest in the Desert Rock Project. The National Marine Fisheries Service ("NMFS") has authority over certain ESA marine species. (FWS and NMFS are collectively referred to herein as the "Services").

The Services have adopted joint rules describing their ESA § 7 consultation role in 50 C.F.R. § 402. Those rules do not require consultation prior to every federal agency action, and the rules provide for different types of consultation. No project-specific consultation is required unless the federal action agency determines that its proposed action "may affect listed species or critical habitat." 50 C.F.R. § 402.14(a). If the action agency makes a "may affect"

determination, it may then engage in "informal consultation," which "includes all discussions, correspondence, etc. between the Service and the Federal agency." 50 C.F.R. § 402.13(a). As will be developed below, the extensive "correspondence" shows that the BIA, the lead agency on the Desert Rock Project, has been in informal ESA consultation with FWS since at least April 2007. *See* AR 80; AR 82; AR 92; AR 94.

If the action agency and FWS determine that the proposed action is "likely to adversely affect listed species or critical habitat," formal consultation should be initiated. 50 C.F.R. §§ 402.13(a), 402.14(b). At the outset, the initiation of formal consultation takes considerable time. The action agency must prepare a biological assessment (here, for the major construction project) and provide FWS with other information that FWS deems necessary before the formal consultation time clock starts. *See* 50 C.F.R. §§ 402.12, 402.14(c)-(f).

After the conclusion of formal consultation, FWS issues a biological opinion. If the action is found to satisfy substantively ESA § 7(a)(2), FWS provides a statement that allows the unintended or incidental take of some members of a listed species if the regulated party agrees to adopt particular "reasonable and prudent measures" to reduce the adverse effects of a "take." *See* 16 U.S.C. §§ 1536(b)(3), (4); 50 C.F.R. §§ 402.14(g), (h), (i). If FWS finds that the action as proposed would jeopardize the continued existence of an entire species, a variant of the action can still go forward if there is a "reasonable and prudent alternative" that avoids such jeopardy impacts. *See* 16 U.S.C. § 1536(b)(3); 50 C.F.R. § 402.14(h)(3).

Under ESA § 7(a)(2) and (b), action agencies like EPA make the final decision on whether an action complies with ESA § 7. Because EPA has the final decisionmaking authority, FWS's biological opinion is advisory, rather than legally binding. *See Bennett v. Spear*, 520 U.S.

154, 170-71 (1997); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 568-70 (1992); 50 C.F.R. § 402.16; 51 Fed. Reg. 19,926, 19,928 (June 3, 1986).

The ESA § 7 rules also encourage "consolidating" ESA "consultation" with the procedures required by other statutes, such as NEPA. 50 C.F.R. § 402.06. Similarly, another regulation provides that consultation can encompass "a number of similar individual actions within a given geographical area or a segment of a comprehensive plan." 50 C.F.R. § 402.14(b)(6). To achieve an efficient consultation process another rule provides that, "[w]hen a particular action involves more than one Federal agency, the consultation and conference responsibilities may be fulfilled through a lead agency . . . The Director shall be notified of the designation in writing by the lead agency." 50 C.F.R. § 402.07.

All the Federal agencies involved in the siting and permitting of the Desert Rock Project, including the BIA, the Bureau of Land Management ("BLM"), and EPA, have agreed to coordinate the ESA § 7 consultation, with BIA, as the agency charged with administering lands held in trust for the Indian tribes, serving as the "lead agency" for that purpose. *See* AR 80 at 1; AR 92 at 1. As a result, consultation is underway, and Desert Rock has every confidence that it will yield a thoughtful, deliberate result based on the expertise of the agencies and other parties involved. This expectation is reinforced by the extensive discussions between BIA and FWS during the informal consultation process and by the fact that consultation has begun. *See* Letter from Field Supervisor, USFS, to Regional Director, Navajo Regional Office, BIA (Jan. 5, 2008) (the "Consultation Letter"); *see also* AR 80 (BIA's proposed Biological Assessment ("BA") and Request for Formal Consultation); AR 82 (FWS comments submitted to BIA on July 2, 2007); AR 92 (BIA's revised BA and Request for Formal Consultation); AR 94 (FWS request for further information).

After the initiation of an ESA § 7 consultation, ESA § 7(d) and the implementing rules prevent the federal agency and permit applicant from making "any irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternatives" under ESA § 7(b)(3), in the unlikely event that FWS finds the proposed project is likely to jeopardize the existence of an entire species or adversely modify designated critical habitat. 16 U.S.C. § 1536(d); 50 C.F.R § 402.09.

### A. NGO Petitioners' Challenge to EPA's Role Relates Directly to the Sufficiency of the Consultation which Is Beyond EAB's Jurisdiction, and, Alternatively, EPA's Role as Cooperating Agency Is Reasonable.

NGO Petitioners have presented a veiled attempt to challenge the sufficiency of the § 7 consultation already under way when they argue that EPA has somehow violated its responsibility under the ESA by coordinating with BIA in its role as the lead agency, rather than taking on the lead agency role itself.[73] Not only does this argument fall beyond the jurisdictional scope of this Board, it is incorrect on the merits.

#### 1. *The Substantive Decision to Name the BIA as the Lead Agency for ESA § 7 Consultation Is Not Within the Jurisdiction of this Board.*

As this Board has observed, the PSD regulations neither reference ESA procedures nor do they make the ESA decision-making process an inherent part of the PSD permit issuance process. *Indeck*, slip op. at 118. However, PSD permits are federal actions covered by the ESA, such that consultation pursuant to the ESA is, when required, essentially a condition precedent to

[73] Despite the *Indeck* decision's clear statement of the limits of this Board's jurisdiction, the NGO Petitioners engage in pages of argument regarding the merits of the "adverse effects" on determination under the ESA. Desert Rock Energy declines to waste any more of the Board's time on that issue, especially because adjudication of the issue would require reference to the administrative record in the ESA consultation, which is not complete and, in any event, is not available to the Board or any of the parties to this appeal. However, if the Board should reverse itself and take up this line of argument, Desert Rock Energy respectfully requests the opportunity to supplement its brief to address the record from the ESA § 7 consultation.

final agency action on the permit. *Id.* A failure to conduct a required ESA consultation calls into question the legality of the permit in its entirety and is thus reviewable by the Board. *Id.* On the other hand, the Board appropriately regards substantive decisions as separately operative and beyond this Board's jurisdiction, with challenges to such decisions proceeding as challenges under the APA. *Indeck,* slip op. at 118; *see also* New Mexico's Supp. Br. at 16.

Despite this jurisdictional bar, the NGO Petitioners argue that the EPA has "abused" the lead agency regulation by assenting to the designation of BIA as the lead agency for this § 7 consultation. *See* NGO Petitioners' Supp. Br. at 280. In assenting to the designation of BIA, the NGO Petitioners argue that EPA has indulged in "an incorrect reading of the lead agency provisions," which read:

> When a particular action involves more than one Federal agency, the consultation and conference responsibilities may be fulfilled through a lead agency. Factors relevant in determining an appropriate lead agency include the time sequence in which the agencies would become involved, the magnitude of their respective involvement, and their relative expertise with respect to the environmental effects of the action. The Director shall be notified of the designation in writing by the lead agency.

50 C.F.R. § 402.07. The NGO Petitioners proceed then to interpret the phrase "particular action" to mean issuance of the PSD permit, and further proceed to apply the non-inclusive factors listed in the regulation to "dictate" the result that EPA is the proper agency to consult with FWS. NGO Petitioners' Supp. Br. at 280.

In making this argument, the NGO Petitioners do not limit their position to arguing that issuance of a PSD permit is a "Federal agency action" that requires EPA to comply with the ESA. Rather, the NGO Petitioners ask this Board to hold that BIA improperly included the issuance of the PSD permit within the coordinated ESA review. *Id.* Furthermore, the NGO Petitioners ask this Board to hold that even if the PSD permit is properly included within the

scope of the current consultation, BIA erred in assuming the "lead agency" role. *Id.* On a broader level, the NGO Petitioners are asking this Board to overturn the ESA § 7 consultation framework established by FWS in interpreting the meaning of its own regulations, whereby FWS has set the permissible scope of a "particular action" and committed the designation of a "lead agency" to the discretion of the consulting action agencies. NGO Petitioners' Supp. Br. at 280-81.

As other Petitioners have indicated, these requests are clearly beyond the Board's jurisdiction. *See* Center for Biological Diversity Pet. at 6 ("In the Center's view, legal challenges to an agency's failure to consult under section 7(a)(2) are properly brought in federal district court pursuant to the Act's citizen suit provision"). The NGO Petitioners are challenging not one but two substantive decisions made by FWS during the still-developing ESA § 7 consultation process. "Plainly, challenges to the actions of FWS belong in a different forum; the Board does not have jurisdiction to review [FWS's] decisions." *Indeck*, slip op. at 117. Such concerns should have been—indeed, still may be—pursued as a separate APA challenge to FWS's decision-making.

Furthermore, to the extent that Petitioners challenge not only the decisions of the FWS but also EPA's substantive decision to assent to BIA's designation as the lead agency, EPA's decision is appropriately regarded as separately operative from its compliance with the PSD permitting process, and Petitioners' challenge to the ESA decision should proceed as an APA challenge separate from this PSD permit appeal. *Id.*

The Board should reject this attempt to shoehorn Petitioners' challenge to substantive ESA decisions into a challenge of the PSD permit because there is a different, more appropriate venue for this particular argument when it is ripe for review. In limited circumstances, the Board

has found it appropriate to review substantive decisions deriving from other statutory regimes, but such review has only been exercised when the applicable legal framework explicitly incorporates the requirements of the other statute by reference, or when no other path for review is available. *Indeck*, slip op. at 118 n.162.

Here, the PSD permitting regulations do not incorporate the requirements of the ESA statute. Furthermore, the APA presents a clear path to review both the designation of the lead agency and the scope of the ESA action. In *National Wilderness Institute v. U.S. Army Corps of Engineers* ("*NWI*"), for example, the District Court for the District of Columbia entertained a challenge under the APA to EPA's designation as "lead agency" over the Army Corps following the issuance of a National Permit Discharge Elimination System ("NPDES") permit for discharges from the Washington Aqueduct. 2005 WL 691775 (D.D.C. Mar. 23, 2005); *see also Oregon Natural Res. Council v. Allen*, 476 F.3d 1031 (9th Cir. 2007) (challenge to scope of ESA § 7 consultation under APA). Given that the APA provides such means to address Petitioners' grievances the NGO Petitioners should be required to follow those procedures.

2. *Alternatively, EPA's Role In The ESA § 7 Consultation Is Reasonable.*

Even if the Board elects to examine the sufficiency of the ESA § 7 consultation, the substantive decisions regarding EPA's role were reasonable and should be upheld by the Board.

a. The Designation of the BIA as the Lead Agency is Well Within the Discretion of the Federal Agencies Involved.

The designation of a lead agency is explicitly contemplated by the ESA regulations. *See* 50 C.F.R. § 402.07 ("Designation of a Lead Agency"). Within the Department of Interior, FWS has been charged with working with the Federal agencies in the consultation process. 50 C.F.R. § 402.01(b). To that end, FWS compiled the Endangered Species Consultation Handbook –

Procedures For Conducting Consultation and Conference under Section 7 of the Endangered Species Act (FWS and NMFS 1998), http://www.fws.gpv/endangered/consultations/s7hndbk/S7hndbk.htm ("ESA § 7 Consultation Handbook"). This handbook provides in detail the FWS's interpretation of the ESA and regulations promulgated thereto. *See generally* ESA § 7 Consultation Handbook, Forward. The FWS's ESA § 7 Consultation Handbook envisions a role where one agency leads the coordinated consultation and the other agencies provide their expertise on an as-needed basis: "[a]lthough one agency has the lead, the other still has to provide data for effects analyses and development of reasonable and prudent alternatives and measures if its activities may affect listed species or critical habitat." ESA § 7 Consultation Handbook, § 2.2(A) at 2-6.

The ESA regulations provide a non-inclusive list of factors that the coordinating agencies may use to determine the appropriate lead agency, including "the time sequence in which the agencies would become involved, the magnitude of their respective involvement, and their relative expertise with respect to the environmental effects of the action." 50 C.F.R. § 402.07. The FWS has summarized the current practice as "based on which agency has the principal responsibility for the project." ESA § 7 Consultation Handbook, at 2-6 2.2(A).

The project here is the construction and maintenance of a power plant on land held in trust for the Navajo Nation. BIA is the federal agency with the primary responsibility for administering trust land and, as such, it must ensure that the ESA and NEPA requirements are met before it approves this use of the land. BIA has thus been designated as the lead agency for preparation of the Desert Rock Project's environmental impact statement ("EIS"), which considers all the federal approvals for the project in a comprehensive manner. AR 170. As part of its role as lead agency for the EIS review, BIA will account for all impacts of the proposed

project, including impacts associated with EPA's PSD permitting action. The ESA regulations provide that "[c]onsultation, conference and biological assessment procedures under section 7 may be consolidated with interagency cooperation procedures required by other statutes, such as [NEPA] . . . ." 50 C.F.R. § 402.06. For EPA to consult separately on the PSD permit when there is a project-level, consolidated review currently underway would be an incredible duplication of effort. It is reasonable to conclude that BIA can serve in the same lead "agency" role in a consolidated ESA § 7 consultation. *See NWI*, 2005 WL 691775 at *13 (finding it reasonable to designate a lead agency where "it would be unnecessary and inefficient for both the Corps and the EPA to consult on the matter").

More fundamentally, the "lead agency" decision is for the action agencies to determine amongst themselves, with no subsequent review by FWS or the courts. The Services' rule only identifies a non-exclusive set of factors the action agencies can "include" in "determining the appropriate lead agency." 50 C.F.R. § 402.07. Because the list of factors does not purport to be exclusive, and the weight attached to any factor is not specified, there are no reviewable standards to follow in determining the lead agency. *See* 5 U.S.C. § 701 (no Administrative Procedure Act review where "agency action is committed to agency discretion by law"); *Ness Inv. Corp. v. U.S. Dep't of Agric.*, 512 F.2d 706, 712-16 (9th Cir. 1975).

Further, 50 C.F.R. § 402.07 concludes with a sentence that the FWS "Director shall be notified of the designation in writing by the lead agency." This requirement to provide mere notification to the FWS Director implies that FWS has no authority to override the action agency's consensual judgment. Given that FWS lacks the authority to review the designation of a lead agency, neither the Board nor the courts should have the right to override such a decision.

The NEPA rule, which is analogous to the ESA, encourages the designation of a single "lead agency" on a single comprehensive EIS, instead of having each federal agency prepare a separate EIS on its portion of an overall action that has "functional interdependence." 40 C.F.R. § 1501.5. Like the ESA rule, the NEPA rule is structured so that the involved federal agencies themselves can determine the appropriate "lead agency." *Id.* One appellate court has correctly found that this common structure means that lead agency decisions are not judicially reviewable.

> We conclude that the designation of a lead agency or joint lead agencies is a matter committed to agency discretion, and we find nothing in NEPA or the regulations suggesting that the courts may overrule the determination by the agencies that are involved that one or more of them will be lead agency or agencies.

*Sierra Club v. U.S. Army Corps of Engr's*, 701 F.2d 1011, 1041 (2d Cir. 1983).

BIA adhered to the regulations and formally notified FWS in writing that it is the designated lead federal agency for the purposes of consultation regarding the impact of the Desert Rock Project. *See* AR 80 at 1; AR 92 at 1. FWS accepted BIA's designation as the lead agency without question. *See* AR 82; AR 94. Thus, BIA was properly designated as the lead agency for the purposes of consultation with FWS, and EPA is not required to engage in consultation separately. EPA has been monitoring BIA's ESA compliance process and lending its expertise where appropriate. *See, e.g.*, AR 120 at 170, 173. This process is sufficient to meet the requirements of the ESA. *See NWI*, 2005 WL 601775 at *13 (Army Corps' notification to NMFS and NMFS's acceptance of Army Corps' lead agency status released EPA from ESA consultation requirement).

b. EPA Appropriately Defined the "Particular Action" Being Evaluated as the Construction and Operation of the Desert Rock Project, Not Merely the Issuance of the PSD Permit.

The NGO Petitioners incorrectly limit the permissible scope of the ESA § 7 consultation to EPA's issuance of the PSD permit. It is undisputed, as EPA recognized in its comments, that "the issuance of the PSD permit is a single federal action and that EPA is responsible for that federal action." AR 120 at 169. As EPA noted, however, BIA was designated to act as the lead agency for § 7 compliance in relation to the whole project – meaning the entire Desert Rock Project. *Id.*

A review of 50 C.F.R. §§ 402.06 and 402.07 in combination shows why the NGO Petitioners' view that "particular action" refers only to EPA's issuance of a PSD permit is unpersuasive. Sections 402.06 and 402.07 should be interpreted harmoniously, especially because they were complementary subsections (§ 402.10(c) and (d)) in the proposed rules. 51 Fed. Reg. 19,938-39 (June 3, 1986).

Section 402.06(a) provides that "[c]onsultation, conference, and biological assessment procedures under section 7 may be consolidated with interagency cooperation procedures required under other statutes, such as the National Environmental Policy Act." Thus, § 402.06(a) allows a consolidated ESA consultation of the same breadth as is being considered in a NEPA document. The Draft EIS on the Desert Rock Project covers the authorizing actions by BIA, BLM, the Army Corps, and EPA. AR 22 at 1. Accordingly, 50 C.F.R. § 402.06 authorizes a consolidated ESA consultation of the same breadth, which includes EPA's CAA action, and which retains BIA as the lead agency for both the NEPA and ESA analyses.

FWS's regulatory intent was to "encourage" such consolidated ESA § 7 consultations and to leave it to the action agencies to determine the "most efficient" mechanisms:

> The Service encourages Federal agencies to coordinate those responsibilities, but believes it is preferable to allow Federal agencies to do so in a manner that best conforms to their particular actions and which they believe is most efficient . . . . Several commenters applauded these paragraphs because the coordination of environmental reviews would reduce duplication of paperwork and save time . . . . [Section 402.06(a)] also express[es] the intent of the Service to avoid a fragmented analysis of environmental concerns through the Service's direct efforts to provide coordinated review.

51 Fed. Reg. 19,938 (June 3, 1986). Accordingly, §§ 402.06 and 402.07 are best interpreted as not requiring "fragmented analysis" of the ESA effects of part of a project – here, an ESA § 7 consultation on only the CAA impacts within EPA's purview. Rather, the regulations encourage a comprehensive ESA consultation and deferring to the action agencies' judgment on when doing so would be "most efficient."

The § 402.07 language on a "particular action [that] involves more than one Federal agency" can be comfortably read to refer to the entire federal action of approving the Desert Rock Project, not just EPA's PSD permit. Such a reading fulfills § 402.06's purpose of encouraging a consolidated ESA § 7 consultation on different federal agency actions. Moreover, that reading avoids tension or conflicts with the §§ 402.02 and 402.14 provisions requiring consideration of "interrelated" activities in the same consultation and the *Conner v. Burford* requirement for a "comprehensive biological opinion." The § 402.07 reference to when a "particular action involves more than one agency" should not be read to prohibit the broad ESA § 7 consultation that the other ESA § 7 rules encourage or require.

It is evident from the ESA § 7 Consultation Handbook that FWS considers and treats the term "particular action" in 50 C.F.R. § 402.07 to include action at the project-level, not simply at the permit-level. The ESA § 7 Consultation Handbook states:

> When two or more Federal agencies are involved in an activity affecting listed species or critical habitat, one agency is designated as the lead (50 C.F.R. § 402.07), often based on which agency has the principle responsibility for the

> project (e.g., a dam is maintained to provide a pool for generating electricity—a Federal Energy Regulatory Commission (FERC) responsibility, but the capacity behind the dam also provides flood storage, a Corps responsibility. In this case, FERC has lead for the consultation as the dam would probably not be there except for the power generation need).

ESA § 7 Consultation Handbook, 2.2(A) at 2-6. Construction and maintenance of a dam is obviously a project in which many federal agencies would be involved, as is the siting, construction and operation of a power plant on lands held in trust for the Navajo Nation. The interrelated portions of the Desert Rock Project require authorizations from different federal agencies. The Desert Rock Project includes: (1) construction and operation of a coal-fired electrical power plant, which requires, among other authorizations, approval of land leases and rights-of-way by BIA and issuance of CAA and Clean Water Act permits by EPA; (2) construction and operation of a water well field and water uses, which require approvals by at least the Army Corps; (3) expansion of surface coal mining operations at the Navajo Mine to provide the fuel for the power plant, which requires permits from the Department of Interior's Office of Surface Mining and BLM; and (4) transmission line and other rights-of-way, which require authorizations from BIA. AR 92 at 1-8. Yet the NGO Petitioners would require every single federal agency involved to prepare its own Biological Assessment, to consult separately with FWS, each no doubt moving on its own timeline, generating multiple Biological Opinions with no mechanism to avoid the possibility of conflicting conclusions or proposed alternatives.

FWS certainly thinks BIA's definition of the proposed action is consistent with its regulations. In its correspondence with FWS and its final BA for the Desert Rock Project, BIA described the proposed action as "the construction and operation of a 1,500 MW coal-fired power plant" including "the power plant, access roads, electrical transmission lines and a water well field," as well as "necessary coal mining operations." *See* AR 80 at 1; AR 92 at 1. FWS

accepted the BIA's definition of the proposed action without question, and the BIA and FWS are now in formal consultation. *See* AR 82; AR 94; Consultation Letter at 1.

BIA's definition of the proposed action here is also consistent with the way in which such an action would be (indeed, is, in this case) defined in the context of similar environmental consultations. NEPA, for example, mandates designation of a lead agency if more than one federal agency "is involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity." 40 C.F.R. § 1501.5(a)(2). In fact, for the Desert Rock Project, BIA was similarly designated as the lead agency for NEPA purposes. *See* AR 22 (70 Fed. Reg. 12,005, (Mar. 10, 2005) (BIA's Amendments to Notice of Intent to Prepare an EIS for Desert Rock Project) (citing 69 Fed Reg. 65,215 (Nov. 10, 2004) (Notice of Intent to Prepare an EIS for Desert Rock Project)).

After all, the primary purpose of § 402.07 was to state that the action agencies can choose a "lead agency" for ESA § 7 consultation purposes, just as the agencies can under NEPA. *Compare* 40 C.F.R. § 1501.5 *with* 50 C.F.R. § 402.07. As discussed above, the "lead agency" concept includes situations where different federal agencies have jurisdiction to issue different permits for portions of an interrelated project. For example, consolidated ESA § 7 consultation took place on a "combined highway and flood control project" which involved the Army Corps as the "federal sponsor of the flood control channel and [the agency] providing funding for it," and the "Federal Highway Administration . . . supervising and funding the highway construction." *Sierra Club v. Marsh*, 816 F.2d 1376, 1378 (9th Cir. 1987). More recently, the U.S. Court of Appeals for the Ninth Circuit stated that "section 7 covers development projects 'interrelated or interdependent with' the discharge permitted by the permit" – and that logic requires an ESA § 7 consultation on the entire Desert Rock Project, not just impacts from air

emissions to protected species and their habitats. *Defenders of Wildlife v. EPA*, 420 F.3d 946, 973 (9th Cir. 2005), *rev'd in part on other grounds sub nom. Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518 (2007) ("*NAHB*"); *see also NWI*, 2005 WL 691775 at *13 (approving a consolidated consultation on permits being issued by EPA and the Army Corps). Thus, the concept of a single ESA § 7 consultation for many federal permits needed for the larger project, with a single "lead agency," is well entrenched in case law. Moreover, because 50 C.F.R. §§ 402.06 and 402.07 were intended to allow a single "lead agency" to take the lead on ESA § 7 consultation in a multiple-permits-from-multiple-agencies situation, the "particular action" language should not be read to frustrate that objective.

Arguments by the NGO Petitioners and the Center for Biological Diversity suggest that EPA had to engage in a piecemeal ESA consultation on its "particular action" (50 C.F.R. § 402.07) – issuing a PSD permit that is one of many federal authorizations needed for the Desert Rock Project. NGO Petitioners' Supp. Br. at 280-81; Center for Biological Diversity Pet. at 21-25. Petitioners' view is contrary to considerable ESA case law and the regulatory thrust that interrelated actions can or must be analyzed together in a consolidated ESA § 7 consultation that results in FWS's comprehensive biological opinion. Given that law and regulatory thrust, either (1) "particular action" permissibly refers to the entire Desert Rock Project, not to EPA's issuance of a PSD permit in isolation; or (2) the meaning of "particular action" is irrelevant, because the agencies must or can engage in ESA § 7 consultation on the larger interrelated Desert Rock Project action.

i. The ESA Requires Consideration of the Effects of Interrelated or Interdependent Actions.

Regardless of which federal agency action is deemed the triggering action for ESA § 7 consultation, the ESA § 7 rules require that the federal agencies provide information on and that

consultation be conducted on the "effects of the action." 50 C.F.R. §§ 402.12(a), 402.14(c), 402.14(g)(3); *see* 16 U.S.C. § 1536(a)(2) and (b). The ESA § 7 rules define the "effects of the action" to include not only the "direct and indirect effects of a [particular federal] action," but also the "effects of other activities that are interrelated or interdependent with that action." 50 C.F.R. § 402.02. The same rule goes on to state that "[i]nterrelated actions are those that are part of the larger action and depend on the larger action for their justification." *Id.* The PSD permit, land leases approved by BIA to allow construction of the power plant and transmission lines to connect to the grid, and federal permits regarding the coal mine and water needed for the power plant obviously are "interrelated or interdependent" federal actions. Accordingly, the ESA § 7 rules direct or allow consultation on the "larger action" – the entire Desert Rock Project.

A "'but for' test should be used to assess whether an activity is interrelated with or interdependent to the proposed action." 51 Fed. Reg. 19,926, 19,932 (June 3, 1986) (preamble explaining final ESA § 7 rules); *see* ESA § 7 Consultation Handbook at 4-26; *Marsh*, 816 F.2d at 1387. But for BIA's approval of land leases and several other federal agency actions, the Desert Rock Project will not be built, and EPA's issuance of a PSD permit will not result in activities that might affect listed species. Consequently, the regulatory requirement to consider all interrelated actions in a single ESA § 7 consultation means that EPA and other federal agencies are acting properly in seeking a consolidated consultation, and that Petitioners' demand for piecemeal consultation on one of many related permits is discouraged by applicable law.

Moreover, under some case law, FWS must issue a "comprehensive biological opinion." *See, e.g., Conner*, 848 F.2d at 1445, 1452-56. An ESA § 7 consultation that just looks at EPA's PSD permitting role with respect to air emissions impacts, and that does not address the potential

water and land-based effects on listed species that are under the purview of other federal agencies and other permits, would not produce a comprehensive biological opinion.

The ESA § 7 Consultation Handbook removes any regulatory ambiguity in stating that:

> When one or more Federal actions are determined . . . to be interdependent or interrelated to the proposed action, or are indirect effects of the proposed action, they are combined in the consultation and a lead agency is determined for the overall consultation.

ESA § 7 Consultation Handbook at 4-27. Thus, regardless of whether EPA's PSD permitting is a "particular action" under 50 C.F.R. § 402.07, the result remains under the ESA § 7 rules that all federal agency actions related to the Desert Rock Project are "combined in the consultation."[74]

ii. Consolidation of Interrelated Activities In ESA Consultation May Be Analogized to Coordinated Environmental Review Under NEPA.

A single ESA consultation on a consolidated set of federal authorizations needed for an interrelated action accords with the encouraged practice under NEPA. *See* 40 C.F.R. §§ 1501.5, 1502.4. The U.S. Supreme Court has found that courts must grant a wide berth to agency decisions on the scope of a NEPA document.

> The determination of the region, if any, with respect to which a comprehensive statement is necessary requires the weighing of a number of relevant factors, including the extent of the interrelationship among proposed actions and practical considerations of feasibility. Resolving these issues requires a high level of technical expertise and is properly left to the informed discretion of the responsible federal agencies.

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[74] That is, even assuming *arguendo* that "particular action" must refer solely to EPA's issuance of a PSD permit – an assumption we show is mistaken above – the consulation process here still complies with the ESA. The action agencies must provide FWS with information on, and FWS must consider, the full "effects of the action" including "interrelated and interdependent" activities – that is, the whole Desert Rock Project. 50 C.F.R. §§ 402.02, 402.12(a), 402.14(c), (g)-(h). Thus, regardless of the meaning of "particular action," the agencies are complying with the ESA rules by preparing a coordinated biological assessment that looks at the effects on listed species of all interrelated actions, and by consulting with FWS on the larger action.

*Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976). The same principles support the Board's deference to the responsible federal agencies' collective judgment on the meaning of "particular action" and the scope of the ESA § 7 consultation.

In sum, the ESA § 7 rules, other agency guidance, and case law allow or require that the ESA § 7 consultation take place on the larger Desert Rock Project action. The piecemeal, fragmented approach to consultation that is advocated by the NGO Petitioners and the Center for Biological Diversity is discouraged by law.

Consequently, the ESA legal issue is not whether EPA procedurally violated ESA § 7 by issuing a conditional PSD permit prior to the completion of an ESA consultation that concerns solely the effects on listed species of the PSD permit. Rather, the central ESA legal issue for the Board's consideration in these appeals is whether or not (1) in a situation where multiple federal permits are required from different federal agencies before the larger Desert Rock Project action can go forward, and where BIA is the lead agency for a consolidated ESA § 7 consultation on the interrelated Desert Rock Project actions; and (2) where BIA has been in informal consultation with FWS since 2007 and in formal consultation since January 5, 2009; and (3) where the various federal permits are being considered in different timeframes, but CAA § 165(c) compels a one-year timeframe for issuance of a PSD permit and a consent decree required EPA's action on that permit by July 31, 2008; EPA violated the ESA § 7(d) constraint against "irreversible or irretrievable" resource commitments by issuing a PSD permit (on the time deadline in the consent decree) that contains conditions barring construction without further notification from EPA and allowing EPA to amend the permit if needed after the conclusion of the comprehensive consultation. We show in the next section that EPA's action was allowed by, and did not violate, ESA § 7(d).

**B. ESA § 7(D) was not Violated when EPA Issued a Conditioed PSD Permit Before the Completion of a Desert Rock Project Project-Wide ESA Consultation Because the Permit does not Authorize Construction that Might Affect Listed Species, and EPA Retained the Authority to Amend the Permit Based on the Results of ESA Consultation.**

Petitioners argue that the issuance of the PSD permit represents an irreversible or irretrievable commitment of resources prior to the conclusion of consultation and so violates § 7(d). This is not so because when an appeal is filed, as is the case here, it postpones final agency action on the permit. *Indeck*, slip op. at 111 n.150. Accordingly, a consultation conducted during the pendency of an appeal can meet the legal requirements of ESA § 7. *Id.* BIA is now in formal consultation with FWS. *See* Consultation Letter at 1. The formal consultation period is expected to be completed in no more than 150 days because the 90-day deadline is extendable to 150 days without applicant approval. Consultation Letter at 2; 50 C.F.R. § 402.14(e). After concluding the formal consultation, FWS has an additional 45 days to provide the Biological Opinion, which will state the "opinion of [FWS] as to whether or not the Federal Action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitats." 50 C.F.R. §§ 402.02, 402.14(e).

ESA § 7(a)(2) allows federal actions to proceed unless a proposed action is "likely to jeopardize the continued existence" of a listed species. 16 U.S.C. § 1536(a)(2). ESA § 7(b)(3) still allows some form of the action to proceed if the agency adopts a "reasonable and prudent alternative" that "would not violate subsection (a)(2)." 16 U.S.C. § 1536(b)(3). However, § 7(d) of the ESA prohibits a federal agency from making "any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures" after consultation with FWS is initiated. 16 U.S.C. § 1536(d). The purpose of this restriction is to ensure that the status

quo is maintained throughout the ESA § 7 consultation process. *Lane County Audubon Soc. v. Jamison*, 958 F.2d 290, 294 (9th Cir. 1992).

These precise protections have been incorporated into the conditioned PSD permit here:

> Construction under this permit may not commence until EPA notifies the Permittee that it has satisfied any consultation obligations under Section 7(a)(2) of the Endangered Species Act with respect to issuance of the permit. EPA shall have the power to reopen and amend the permit, or request that the Permittee amend its permit application, to address any alternatives, conservation measures, reasonable and prudent measures or terms and conditions deemed by EPA to be appropriate as a result of the ESA consultation process.

AR 122 at 4 (Permit Condition II.A). Condition II.A prevents any commitment of resources by EPA or the applicant. Construction is barred absolutely until the ESA § 7 consultation is complete. EPA retains the power to reopen or modify the permit, and even to compel the applicant to refile its application. EPA possesses total authority over reshaping the PSD permit in any manner necessary to reflect any reasonable and prudent alternative measures developed during the consultation process, thereby satisfying § 7(d). *See* 16 U.S.C. § 1536(d). If FWS finds a negative impact and specifies ameliorative conditions, EPA is not prevented from making changes to the PSD permit based on FWS's input. *See Indeck*, slip op. at 113.

EPA's issuance of the PSD permit here is consistent with the law, and there is no cause for this Board to take up the permit on review. The NGO Petitioners' position that the issuance of a PSD permit with such conditions attached still constitutes an "irretrievable and irreversible commitment of resources" foreclosing reasonable alternatives recommended at the end of consultation is at odds with the statute, with the case law interpreting the statute, and with the practical facts of this case.

1. *The Sequence of the ESA § 7 Consultation Does Not Affect the Validity of the PSD Permit Here Because There is No Final Agency Action*

This Board held in *Indeck* that appeal of the PSD permit decision has the effect of deferring final agency action on the permit. *Indeck*, slip op. at 112-13. Up to the time of final agency action, EPA retains the legal capacity to adjust the terms of the permit. *Id.* at 113. In other words, there is not yet an irretrievable commitment to the permit by EPA Region 9 within the meaning of ESA § 7(d) where an appeal is pending before this Board. *Id.* In *Indeck*, the Board concluded that "waiting to consult as late as during the pendency of a PSD appeal can meet minimum legal requirements, although it is prudentially inadvisable." *Indeck*, slip op. at 112-13 n.154.

There has been no final agency action on the PSD permit here, and so even leaving aside Condition II.A, discussed in greater detail below, there has been no irretrievable commitment of resources by EPA Region 9.

The State of New Mexico suggests that the Board in *Indeck* engaged in *post hoc* rationalization, that the Board would not have so held without "the benefit of hindsight" and was comforted by the knowledge that FWS had already found no adverse affect. New Mexico's Supp. Br. at 11. But the State of New Mexico's explanation of *Indeck* gives short shrift not only to the Board's prior decision but also to the PSD regulations: the Board's acknowledgement in *Indeck* that the PSD permit was not "final agency action" was a legal conclusion that was—and still is—compelled by the regulations governing the PSD permitting process. *See* 40 C.F.R. § 124.19(f)(1). The substance related to the participants' roles and sufficiency of the ESA consultation cannot affect that finding.

EAB recognizes in *Indeck* that "an ESA compliance strategy that acknowledges ESA only in the event of an appeal is not a compliance strategy at all, in that [such an approach]

would tolerate an ESA violation whenever an appeal is not taken." *Indeck*, slip op. 114. The ESA's compliance strategy was of particular concern in *Indeck*, where EPA Region 5's position was that no ESA § 7 consultation was even required. *Id.* at 99. If the *Indeck* petitioners had not appealed EPA Region 5's decision, the ESA § 7 consultation would never have occurred. *Id.* at 114. This lack of consultation is the danger that the Board was addressing: if EPA's policy was not to engage in consultation until issuance of the PSD permit was appealed, then its ESA compliance strategy would acknowledge the ESA only in the event of an appeal, and would, per the Board's decision in *Indeck*, not be a compliance strategy at all. *Id.*

Here, however, the Administrative Record demonstrates that it was always EPA's intent to complete the ESA § 7 consultation, and that EPA intended to do so in advance of issuing the PSD permit, consistent with the best practice indicated by the Board in the *Indeck* decision. As NGO Petitioners point out in their Petition, EPA found that it was bound to consult with FWS under ESA § 7 as early as 2006. *See* NGO Petitioners' Supp. Br. at 279; AR 47. In a 2006 letter, EPA stated that it would not proceed with the permit issuance until the consultation was concluded, FWS's Biological Opinion was reviewed and EPA determined that issuance of the PSD permit would be consistent with the ESA. AR 47.

NGO Petitioners chose to characterize EPA's 2006 statements as "admissions" of the relevant legal requirements, which is an uncharitable and inaccurate characterization. NGO Petitioners' Supp. Br. at 279. EPA's 2006 letter should be read as evidence of EPA's good faith intent to implement the best practices prescribed by the Board in the *Indeck* opinion. *See Indeck*, slip op. at 112, 112 n. 153 (advantages to early engagement include having more flexibility to make and implement modifications, using ESA-generated materials as part of the record supporting the permit decision, and recommending additional efficiencies for the applicant).

However, what is a best practice, or most advantageous to the applicant and EPA, or even what is the "ordinary course," is not, in this case, what is legally required. *Indeck*, slip op. at 110, 112. In *Indeck,* the Board held that the PSD and ESA processes are separate and need not necessarily be performed simultaneously or in a wholly integrated fashion. *Id.* at 110. Rather, 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 110 n.149.[75]

If there has been any procedural violation of the ESA, *Indeck* suggests the relief should instead be a stay of the EAB appeal (so there will be no final agency action before the completion of ESA consultation), not vacating or setting aside the permit. *See Indeck*, slip op. at 20.[76] This conclusion accords with the injunction "halt[ing] all [future] construction," issued in *Marsh*, 816 F.2d at 1389. There, the Ninth Circuit did not change the current status quo by unwinding activities that had already occurred. *Id.*; *see also* Consultation Letter at 1.[77]

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[75] Despite the State of New Mexico's contention, an "after-the-fact consultation" does not give rise to procedural defects. New Mexico argues that the ESA § 7 consultation will necessarily impact any further EPA action on the PSD permit. New Mexico's Supp. Br. at 16-17. The Board in *Indeck* made perfectly clear that "to the extent that ESA-related documentation is relied upon by a permitting authority" "in making PSD determinations," "such documentation must be included in the administrative record for the permit." *Indeck,* slip op. at 116 n.159. The State of New Mexico also argues that Petitioners will be precluded from applying the ESA-related determinations to other aspects of the permit. State of New Mexico Supp. Br. at. 17. Yet, in *Indeck*, this Board found "nothing in the CAA, the ESA, or the relevant implementing regulations that supports Petitioners' contention that they must, as part of their participation in the PSD permit decision, be afforded public process concerning the ESA consultation." *Indeck*, slip op. at 116.

[76] *Indeck*, slip op. at 20 (citing Order Denying Respondent's Motion for Voluntary Partial Remand and Petitioners' Cross Motion for Complete Remand, and Staying the Board's Decision on the Petition for Review (May 20, 2004)).

[77] Likewise, in *Natural Res. Def. Council v. Houston*, the Ninth Circuit only found that the district court did engage in an "an abuse of discretion" in setting aside the contracts (here, CAA permit), and noted that the "court had the discretion to preserve the contracts if the procedural flaw could have been rectified in another way." 146 F.3d 1118, 1129 (9th Cir. 1998).

According to FWS, formal consultation should be concluded by April 20, 2009. *See* Consultation Letter at 2; 50 C.F.R. §§ 402.02, 402.14(e).

2. *EPA's Issuance of a Conditioned PSD Permit Was Subject Only to ESA § 7(d) Constraints Because the Agencies Had Initiated Informal Consultation by the Time of EPA's Action. In Any Event, ESA § 7(a) and 7(d) Constraints Should Be Equivalent.*

NGO Petitioners argue that EPA "violated [ESA] § 7(a) by issuing the PSD permit prior to initiation of consultation." NGO Petitioners' Supp. Br. at 284-85. Notably, the other Petitioners do not join in this mistaken argument.

ESA § 7(d) applies "[a]fter initiation of consultation." 16 U.S.C. § 1536(d). As introduced above, the ESA § 7 rules provide for two relevant types of consultation: (1) informal consultation under 50 C.F.R. § 402.13; and (2) formal consultation under § 402.14. "Informal consultation includes all discussions, correspondence, etc., between the Service and the Federal agency" and is "designed to assist the Federal agency" on compliance with "formal consultation" requirements. 50 C.F.R. § 402.13(a). BIA's first "correspondence" with FWS occurred at least when BIA transmitted its initial ESA § 7(c) biological assessment on Desert Rock Project on April 30, 2007. AR 80. Since that time, there have been numerous exchanges of correspondence between BIA and FWS, where BIA has attempted to provide the information FWS would like before it prepares a biological opinion. *See* AR 82; AR 92; AR 94.

Thus, BIA and FWS have been in the correspondence and discussions that constitute informal ESA § 7 consultation on the entire Desert Rock Project since at least April 30, 2007. The Services' guidance is that ESA § 7(d) constraints: (1) begin when a lead federal agency

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Thus, even that Ninth Circuit opinion confirms the Board has the discretion to not vacate the conditioned ESA permit.

determines that the related actions "may affect" listed species and (2) include the informal consultation period.

> This section 7(d) restriction remains in effect from the determination of "may affect" until the action agency advises the Services which reasonable and prudent alternative will be implemented, if the biological opinion finds jeopardy or adverse modification. . . . [Then, Figure 2-1 on the "Application of section 7(d): irreversible or irretrievable commitment of resources" states] Agency requests consultation, either formal or informal. "May affect" situation exists. . .section 7(d) prohibition begins.

ESA § 7 Consultation Handbook at 2-7, 2-9 (emphasis added). "Section 7(d) was triggered by informal consultation." *Envtl. Prot. Info. Ctr. v. Pac. Lumber Co.*, 229 F. Supp. 2d 993, 1002 (N.D. Cal. 2002).

Consequently, ESA § 7(d) became the operative constraint on EPA's PSD permitting action by at least early 2007, when BIA made a "may affect" determination and began the correspondence and discussion with FWS that constitutes informal consultation. Accordingly, when EPA issued the conditional PSD permit on July 31, 2008, informal ESA consultation had been initiated and in process for over a year. As a result, the pertinent constraint on EPA's PSD permit, at the time it was issued, was ESA § 7(d), not § 7(a).

Further, the administrative record shows that Desert Rock Energy sought to enforce the time deadline under CAA § 165(c), and that EPA granted the conditioned PSD permit, only after informal consultation had dragged on for considerable time. AR 96; AR 98. EPA did not grant the PSD permit prematurely, but rather complied with both CAA § 165(c) and ESA § 7.

Even assuming *arguendo* that a relevant ESA § 7 consultation had not been initiated by the time the conditional PSD permit was granted, ESA § 7(d) still provides the relevant standards. It does so for two reasons.

First, some courts have noted that ESA § 7(d) applies only after consultation has been initiated – before then, ESA § 7(a)(2) creates the relevant constraint. *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1056 (9th Cir. 1994). Since, however, ESA § 7(a)(2) provides no particular constraint, the content of the constraint should be borrowed from ESA § 7(d). That is, since Congress in ESA § 7(d) allowed certain preliminary activities to proceed that are not irreversible and irretrievable resource commitments, it makes no sense to require a more stringent standard to apply before the initiation of ESA consultation. Thus, as a matter of logic, ESA § 7(a)(2) and 7(d) constraints should be equivalent.

The ESA § 7 constraints seem to be equivalent under a Ninth Circuit statement that "section 7(d) clarifies the requirements of section 7(a)(2), ensuring that the status quo will be maintained during the consultation process." *Conner*, 848 F.2d at 1455 n.34. The status quo now is that a PSD permit has been issued, but it does not authorize development. That status quo will be maintained, even without an EAB order, until the completion of ESA § 7 consultation under the terms of Permit Condition II.A.

Second, as BIA and FWS are now in formal consultation, the facts by the time of the Board's decision will very likely be that BIA, on behalf of EPA and other federal agencies, will have concluded formal consultation with FWS on Desert Rock Project.[78]

The facts here do not, therefore, call for a set aside and remand of the PSD permit. If ESA § 7(d) would allow EPA to issue the same conditioned PSD permit at the time of the Board's decision, then any "early" issuance of the permit in not prejudicial error, but harmless

[78] Under the ESA § 7 rules, formal consultation should be completed within 150 days unless the permit applicant consents to a time extension, and FWS should deliver its biological opinion within 45 days thereafter. 50 C.F.R. § 402.14(e). This 190-day period is often exceeded in practice.

error. The Administrative Procedure Act provides that agency actions should not be disturbed for such harmless error. 5 U.S.C. § 706. An alleged error is harmless if it did not prejudice the outcome or if the matter is clarified by the time it reaches the reviewing body. *See, e.g., NAHB*, 127 S. Ct. at 2530; *Nevada v. Dep't of Energy*, 457 F.3d 78, 90 (D.C. Cir. 2006); *City of Sausalito v. O'Neill*, 386 F.3d 1186 (9th Cir. 2004). The Board's precedent in *Indeck* confirms that what matters is the status of ESA § 7 compliance at the time of the Board's order and its role as the final agency action for EPA.

3. *The Services' Guidance on ESA § 7 Consultation Confirms that ESA § 7(d) Does Not Bar the Issuance of Such a Conditioned Permit Prior to the Completion of Project-Wide ESA Consultation.*

While the law does not require that the ESA § 7 consultation precede issuance of the PSD permit, as a practical matter, to avoid running afoul of ESA § 7(d), "[i]n the ordinary course, the issuance of a final PSD permit would appear to be the point at which the permitting agency has irretrievably committed itself with respect to the discrete act of permitting a given activity." *Indeck*, slip op. at 111 (emphasis added).

FWS has interpreted ESA § 7(d) and found that not all irreversible and irretrievable commitments of resources are prohibited. ESA § 7 Consultation Handbook at 2-7. According to FWS, the formulation or implementation of any reasonable and prudent alternative must be foreclosed by the resource commitment to violate § 7(d). *Id.* Thus:

> [R]esource 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. Destroying potential alternative habitat within the project area, for example, could violate section 7(d).

*Id.* Because the PSD permit does not allow construction "[d]estroying potential alternative habitat" and the permit does retain EPA's "discretion and flexibility to modify" the permit after

the conclusion of ESA § 7 consultation, there is no ESA § 7(d) violation under the Services' compelling interpretation.

On this point, Petitioners disregard FWS's interpretation of its own regulations and seek to turn the Board's observation regarding the logical effect of ESA § 7(d) into a rigid rule preventing the issuance of any permit, regardless of the circumstances under which the permit is issued, before the completion of the ESA § 7 consultation. In doing so, Petitioners elevate form over substance, disregarding the substance of the existing authority on and the policies underlying ESA § 7(d).

4. *There Is No ESA § 7(d) Violation Under the Relevant Case Law.*

Under the relevant case law, issuance of a permit that does not allow any construction on the PSD source without future agency approval does not violate ESA § 7(d). For example, one court has found that the issuance of a right-of-way permit before ESA § 7 consultation had been completed did not violate ESA § 7, where the permit required a later issuance of a Notice to Proceed with construction (equivalent to the "construction. . .may not commence until EPA notifies the Permittee" language here). *No Oilport! v. Carter*, 520 F. Supp. 334, 364-65 (W.D. Wash. 1981).[79] Thus, because the PSD permit does not authorize construction, its issuance prior to the completion of ESA § 7 consultation conforms to ESA § 7(d) limits.

Moreover, the PSD permit contains a condition giving EPA the power to amend the permit terms, if and as needed to ensure ESA § 7 compliance. Similar conditions have been

[79] ESA § 7(d) "was enacted by Congress [in 1978] mainly to prevent incidents such as the more than $50 million loss at Tellico Dam as a result of *TVA v. Hill*." *Nat'l Wildlife Fed'n v. Nat'l Park Serv.*, 669 F. Supp. 384, 390 (D. Wyo. 1987). The Services included the forerunner to § 7(d) in 1978-adopted regulations to prevent the "waste of millions of dollars" if construction occurs and the "activity is subsequently enjoined for noncompliance with section 7"). 43 Fed. Reg. 870, 872-73 (Jan. 4, 1978). Because the conditioned PSD permit issued to Desert Rock Energy does not allow federal "construction" losses, this background regarding the legislative history of ESA § 7(d) further suggests the permit does not violate ESA § 7(d).

found to not violate ESA § 7(d) by three U.S. Courts of Appeals in OCS oil and gas leasing contexts. Those appellate courts found no ESA § 7(d) violation where the lease sale occurred before the completion of ESA § 7 consultation because "stipulations" or "disclaimers" on future ESA compliance had been inserted into the leases. *Tribal Village of Akutan v. Hodel*, 869 F.2d 1185, 1193-94 (9th Cir. 1989); *Village of False Pass v. Clark*, 733 F.2d 605, 610-12 (9th Cir. 1984); *North Slope Borough v. Andrus*, 642 F.2d 589, 611 (D.C. Cir. 1980); *Conservation Law Found. v. Andrus*, 623 F.2d 712, 714-16 (1st Cir. 1979). The "special disclaimers in the Final Notice of Sale that specify [the Interior Secretary's] continuing control of any post-sale drilling" were found sufficient in *Village of False Pass*, 733 F.2d at 611. The "preliminary activities permitted by this lease sale entail no 'irreversible or irretrievable commitment of resources'"; thus, actions that are reversible in the future, with only the loss of private capital, are not "irreversible" commitments. *North Slope Borough*, 642 F.2d at 611. Similarly, another court found that the issuance of a NPDES permit under the Clean Water Act "does not fit into what Congress intended as an 'irreversible or irretrievable commitment of resources' in part because EPA retains authority to reopen and modify the permit or rescind it altogether." *NWI*, 2005 WL 691775 at *16.[80] Hence, a disclaimer like Permit Condition II.A here avoids an ESA § 7(d) violation even under several Ninth Circuit precedents.[81]

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[80] In *NWI*, EPA issued an NPDES permit to the U.S. Army Corps of Engineers authorizing certain discharges from the Washington Aqueduct into the Potomac River several months before the conclusion of its consultation with FWS. *NWI*, 2005 WL 691775 at *4. NWI sued, claiming that the issuance of the final NPDES permit prior to the conclusion of consultation constituted an "irreversible or irretrievable commitment of resources" in violation of § 7(d). *Id.* at *16. The district court disagreed, noting that issuance of the NPDES permit would not have the effect of foreclosing the formulation or implementation of any reasonable or prudent alternative measures. *Id.* The district court reached this conclusion because the EPA retained "authority to reopen and modify the permit or rescind it altogether." *Id.* In other words, EPA

As one court recently and aptly summarized, the "relevant inquiry is whether the Bureau's actions permanently commit resources in a way that ties its hands for future actions." *Pac. Coast Fed'n of Fishermen's Ass'ns v. Gutierrez*, 2008 WL 2223070 at *68 (E.D. Cal. 2008).[82] Here, because Permit Condition II.A does not tie EPA's hands, EPA did not permanently and irreversibly commit resources in a fashion that violates ESA § 7 when EPA issued the PSD permit before the completion of Desert Rock Project-wide ESA § 7 consultation.

The purpose of ESA § 7(d) is "to prevent Federal agencies from 'steamrolling' activity in order to secure completion of the projects regardless of their impact on endangered species." *Thomas*, 936 F. Supp. at 745. ESA § 7(d) "is more a restraint than a bar" – it restrains irreversible resource commitments during the consultation period to prevent "'steamrolling' a project towards completion during consultation," but it does not bar all preliminary activities.[83]

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retained the right to revise its action to provide "alternative measures" that otherwise would not be available if the permit were a true "irreversible or irretrievable commitment of resources." *Id.*

[81] Petitioners cite only self-selected cases from the Ninth Circuit. Those cases are distinguished at Section XII.B.8 below. Moreover, the Navajo Nation lands associated with the Desert Rock Project sit within the Tenth Circuit. This Board owes no greater deference to an individual Ninth Circuit opinion than it does to, say, Third Circuit decisions.

[82] That court found that water diversions, unlike timber harvests, were reversible and did not violate ESA § 7(d). *Id.* at 69. *See also Pac. Rivers Council v. Thomas*, 1994 WL 908600 at *6 (D. Or. 1994) (ongoing grazing permits are not "irreversible because they are subject to amendment and modification by the [USFS] at any time"); *Forest Conservation Council v. Espy*, 835 F. Supp. 1202, 1216 (D. Id. 1993) (preliminary road work before completion of consultation found not to violate ESA § 7). All of those factors support a conclusion here that an amendable PSD permit that does not allow construction is not an irretrievable commitment of resources within the meaning of ESA § 7(d) and 50 C.F.R. § 402.09.

[83] Illustrating that ESA § 7(d) is not necessarily a bar to preliminary activities, one court has even found that ESA § 7(d) allows construction as long as its does not foreclose a site-specific alternative.

> The plaintiffs seem to believe that § 7(d) prohibits absolutely all construction activities during the period of formal consultation. . . . Such a rigid construction of the statute, however, is not justified. The statute does not prohibit each and every

Houck, *The "Institutionalization of Caution" under § 7 of the Endangered Species Act: What To Do When You Don't Know*, 12 ENVT'L L. REP. (ENVT'L L. INST.) 15001 (April 1982). That is: (1) the Permit Condition against "construction" ensures there will not be "completion of the project" or truly irreversible impacts; and (2) EPA's ability to amend the permit in light of the consultation results shows a good-faith effort to comply with the ESA and CAA § 165(c), not to shunt aside the ESA. Thus, ESA § 7(d) does not "bar" preliminary actions such as the issuance of a conditional PSD permit that prohibits construction until completion of the consultation process.[84] Because the Desert Rock Project has not been "steamrolled" through the ESA requirements here, there is no ESA § 7(d) violation.

5. *The Practical Limitations of the Desert Rock Project Preserve the Integrity of the Consultation Process and Conserve Resources Pending Conclusion of the ESA § 7 Consultation.*

NGO Petitioners assert that "the illegally-issued PSD permit can, and probably has, sped the project along, limited options, and decreased flexibility for protecting species." NGO

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> permanent commitment of resources, only those which have the "the effect of foreclosing" the formulation of alternatives. . . . Thus, the statute calls for some judicial discretion to determine whether an agency's decision to proceed with action, prior to completion of formal consultation with NMFS, could have "the effect of foreclosing" alternatives and could, therefore, be considered arbitrary and capricious. . .[C]ontinued construction. . .will not foreclose the possible development of alternative avenues of wastewater removal.

*Bays' Legal Fund v. Browner*, 828 F. Supp. 102, 112-13 & n.24 (D. Mass. 1993). Consequently, the less-intrusive conditional PSD permit issued here – which does not authorize construction and does not foreclose EPA from modifying the permit if needed to create an alternative that complies with ESA § 7 – does not violate ESA § 7(a) or 7(d).

[84] Indeed, other agencies include permitting conditions similar to Condition II.A, designed to accommodate §7(d). FERC, for example, sometimes includes conditions in certificates of public convenience issued under Sections 3 and 7(c) of the Natural Gas Act (permitting the construction and operation of natural gas terminals and pipelines) that prohibit construction activities until completion of consultation with the Services. *See, e.g., In re Bradwood Landing LLC/NorthernStar Energy LLC*, 124 FERC ¶ 61,257 (Sept. 18, 2008).

Petitioners' Supp. Br. at 286. Consistent with the rest of their Petition, NGO Petitioners' allegation minimizes the importance of the ESA § 7 consultation to the overall Desert Rock Project and disregards the existence of many other federal actions governing the project's development process.

As a practical matter, the ESA § 7 consultation itself forestalls any meaningful action with regard to the Desert Rock Project until the interagency consultation is completed. Desert Rock Energy cannot conduct any construction activities under the PSD permit until the ESA § 7 consultation is complete. In addition, until the conclusion of the BIA-led ESA consultation, the BIA approval of the lease for the project land cannot be obtained. Furthermore, Desert Rock Energy likely cannot obtain any financing for the proposed project until construction can begin and it has obtained rights to the project land. To date, Desert Rock Energy has merely committed project development resources to this project which are needed to complete the permitting process and the ESA § 7 consultation.[85]

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[85] Furthermore, as discussed above, ESA § 7(d) is not designed to bar any action but, rather, only the "irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation of any reasonable and prudent alternative measures which would not violate subsection (a)(2)." 16 U.S.C. § 1536(d). Accordingly, "non-jeopardizing agency action may take place during the consultation process in light of. . .Section 7(d) where the action will not result in substantive violations of the Act." *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 307 F.3d 964, 972-73 (9th Cir. 2002) (later vacated as moot) (emphasis added). The first court to interpret § 7(d) similarly found that Congress enacted § 7(d) to preclude the investments of a "massive amount of resources" in any endeavor if at the time of the investment there was a reasonable likelihood that the project, at any stage of development, would violate § 7(a)(2). *North Slope Borough v. Andrus*, 486 F.Supp. 326, 330 (D.D.C. 1979), *aff'd in relevant part*, 642 F.2d 589 (D.C. Cir 1980).

Here, NGO Petitioners have not carried their burden of showing the issuance of the conditional PSD permit is likely to jeopardize any ESA-listed species. NGO Petitioners could not credibly make that showing, as the PSD permit does not authorize construction. Consequently, the issuance of a permit that has not been shown to jeopardize any ESA-listed species, which does not allow construction before the completion of ESA § 7 consultation does not violate ESA § 7.

Furthermore, Condition II.A preserves the integrity of the ESA § 7 consultation process. As mentioned briefly above, NGO Petitioners suggest that issuance of the PSD permit somehow inherently "limited options," and "decreased flexibility for protecting species." *See* NGO Petitioners' Supp. Br. at 287 ("EPA will be less willing to make modifications. . .that may be necessary to protect endangered or threatened species and their habitat"). This same argument was raised and rejected in *Indeck*. *Indeck*, slip op. at 113 n.156.

Despite FWS's finding of no adverse effect, the *Indeck* petitioners argued that the sequence of the consultation in that case—following issuance of the PSD permit—unlawfully curtailed the ability of FWS to propose mitigation measures and impacted the integrity of the consultation process because the agencies approached the issue with a view to defending a decision the agencies had already made. *Id.* at 103 n.143.[86] The Board, however, noted that FWS stated in its concurrence that it stood by the process and the conclusions made during the consultation; therefore, the Board saw no reason to question FWS's willingness to arrive at a different substantive conclusion regarding the impact of the proposed action on endangered species or designated habitat. *Id.* at 113 n.156. Accordingly, the Board did not believe that the consultation process's integrity had been compromised. *Id.* Indeed, EPA's and FWS's actions are entitled to a presumption of regularity, and one cannot assume that government agencies will

[86] In *Indeck*, EPA Region 5 declined to consult with the FWS during the PSD permitting process, and various environmental groups filed a petition for review to the Board. *Indeck*, slip op. at 99. During the pendency of the appeal, EPA Region 5 initiated ESA § 7 consultation with FWS and, while the appeal was still pending, the consultation concluded, with FWS issuing a concurrence in Region 5's finding that the PSD permit was not likely to adversely affect any listed species or designated habitat. *Id.* at 21.

not comply with their statutory obligations in later stages of development. *See Conner*, 846 F.2d at 1448 (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971)).[87]

Finally, Petitioners' argument that EPA's investment of staff and time in the issuance of the PSD permit constituted an irretrievable and irreversible commitment of resources in violation of § 7(d) is an over-expansive and impermissible interpretation of the limitation. *See* NGO Petitioners' Supp. Br. at 285. If the Petitioners' position were the test, then it is difficult to see how the Board in *Indeck* did not reach the conclusion that EPA Region 5 had violated § 7(d) in that case. *See Indeck*, slip op. at 112.

6. *NGO Petitioners' Position Impermissibly Assumes that EPA and FWS Will Not Fulfill Their Future ESA Duties.*

NGO Petitioners' argument that Permit Condition II.A does not protect against ESA § 7 violations rests ultimately on the assumption that EPA and other federal agencies will not fulfill their ESA duties in the future. The viability of such a presumption has been litigated and rejected in the OCS leasing cases; the required presumption is that a federal agency will comply with the ESA and other laws in the future. *Overton Park*, 401 U.S. at 415; *FCC v. Schreiber*, 381 U.S. 279, 296 (1965); *Tribal Village of Akutan*, 869 F.2d at 1194; *Village of False Pass*, 733 F.2d at 611; *North Slope Borough*, 642 F.3d at 608; *Conservation Law Found.*, 623 F.2d at 713-14. This Board and courts cannot presume that EPA will violate its ESA § 7 duties in its future implementation of Permit Condition II.A.

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[87] The State of New Mexico attacks the Board's reasoning in *Indeck* by asserting that the decision was made "with the benefit of hindsight," and "all parties knew the outcome and implications of the completed ESA consultation before [the] Board began its review." State of New Mexico's Supp. Br. at 11. This point suggests that the Board would otherwise be concerned with the integrity of the consultation after issuance of the PSD permit. Yet, a careful examination of the *Indeck* opinion indicates that the Board assumed, as a matter of principle, that FWS would fulfill its charge and did not engage in the *post hoc* rationalization that the State of New Mexico suggests. *Indeck*, slip op. at 113 n.156.

As a result, ESA § 7 should not be read, as NGO Petitioners would read it, to "telescop[e] . . . every project hazard to endangered life and to the environment into one overwhelming statutory obstacle." *North Slope Borough*, 642 F.2d at 609; *see also Tribal Village of Akutan*, 869 F.2d at 1193-94.

7. *EPA Has Appropriately and Reasonably Balanced Its Obligations Under the CAA and the ESA.*

EPA's decision is an admirable accommodation of two different statutory mandates. This accommodation is permissible under *NAHB*, 127 S. Ct. 2518. In *NAHB*, the U.S. Supreme Court decided that where a statute (Clean Water Act § 402(b)) created a mandatory "shall" duty and did not give EPA discretion to consider impacts to ESA-listed species, it was permissible for the federal agencies to conclude that ESA § 7 does not apply and does not override the CWA mandate. 127 S. Ct. at 2525.[88] Accordingly, contrary to NGO Petitioners' position that ESA interests always prevail under *dicta* in *TVA v. Hill*, 437 U.S. 153 (1978), under the more recent holding in *NAHB* the policy interests Congress stated in ESA § 7 do not necessarily prevail against "shall" mandates that Congress has created in other statutes.[89]

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[88] *See NAHB,* 127 S. Ct. at 2525, 2532 (the Ninth Circuit's overridden reading of ESA § 7(a)(2) "would effectively repeal the mandatory and exclusive list of criteria set forth in [CWA] § 402(b), and replace it with a new, expanded list that includes [ESA] § 7(a)(2)'s no-jeopardy requirement"); 2532-36 (concluding that "we read [50 C.F.R.] § 402.03 to mean what it says: that § 7(a)(2)'s no-jeopardy duty covers only discretionary agency actions and does not attach to actions (like the NPDES permitting transfer authorization) that an agency is required by statute to undertake once certain specified triggering events occur"); 2536-37 (distinguishing *TVA v. Hill*, 437 U.S. 153 (1978), as a situation where no statute compelled an action that is arguably inconsistent with ESA § 7); 2538 (summarizing the holding that, "[s]ince the transfer of NPDES permitting authority [to a State] is not discretionary, but rather is mandated once a State has met the criteria set forth in § 402(b) of the CWA, it follows that a transfer of NPDES permitting authority does not trigger § 7(a)(2)'s consultation and no-jeopardy requirements. Accordingly, the judgment of the Court of Appeals for the Ninth Circuit is reversed").

[89] NGO Petitioners are essentially arguing ESA § 7 is a super-statute that prevails over all other laws. There is some unnecessarily-broad *dicta* in *TVA v. Hill* supporting that view.

Here, CAA § 165(c) mandates that a PSD permit application "shall be granted or denied not later than one year after the date of filing of such completed application." 42 U.S.C. § 7475(c). Notably, CAA § 165(c) does not say "shall grant unless ESA § 7(a)(2) consultation takes longer." Under the U.S. Supreme Court's decision in *NAHB*, EPA can lawfully and permissibly resolve this tension between the CAA and ESA by (1) granting the PSD permit near the time mandated by CAA § 165(c), and (2) inserting a permit condition that prohibits the commencement of construction until the ESA consultation is completed and allows for modification of the permit if that appears appropriate to EPA after completion of the ESA § 7 consultation.

Indeed, EPA might have had the authority under *NAHB* to issue an unconditioned final permit once ESA § 7 compliance dragged on past the one-year "shall grant" period specified in CAA § 165(c). That is, just as the Supreme Court found the agencies could conclude that CWA § 402(b) renders ESA § 7 inapplicable, EPA might be able to conclude that the delays here mean CAA § 165(c) renders ESA § 7 inapplicable.

Instead, EPA accommodated the two statutory mandates in a permissible manner. That fulfills the principle that statutes should be construed harmoniously if possible, and to not unnecessarily repeal another statute by implication. *See, e.g., Morton v. Mancari*, 417 U.S. 535, 549-50 (1974); *NAHB*, 127 S. Ct. at 2544-48 (Stevens, J., dissenting). EPA belatedly obeyed the

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However, NGO Petitioners' view garnered only four dissenting votes in *NAHB*. *Compare TVA*, 127 S. Ct. at 2536-37 *with* 127 S. Ct. at 2538-43 (Stevens, J., dissenting).

"shall be granted. . .not later than one year" language in CAA § 165(c) by issuing a PSD permit where compelled by the statute and a consent decree.[90]

EPA also inserted Permit Condition II.A into the PSD permit to provide for a possible permit amendment after the completion of ESA § 7 consultation. This condition does not allow any construction before the ESA § 7 consultation is concluded. This approach complies with the ESA § 7 case law discussed above. Further, even if the Board were to conclude that EPA's approach is not fully compliant with ESA § 7, EPA's approach is still lawful in light of its ability to reconcile conflicting statutory mandates under *NAHB*.

The NGO Petitioners note that in 2006 EPA had suggested it would wait until the completion of ESA § 7 consultation before issuing the PSD permit. NGO Petitioners' Supp. Br. at 279-80. But this preliminary view clearly does not bar EPA from changing its mind. As the Supreme Court stated in rejecting an environmental group's similar claim that EPA had arbitrarily changed its view:

> the only "inconsistency" respondents can point to is the fact that the agencies changed their mind – something that, as long as the proper procedures were followed, they were fully entitled to do. The federal courts ordinarily are empowered to review only an agency's final action, see 5 U.S.C. § 704, and the fact that a preliminary determination by a local agency representative is later overruled at a higher level within the agency does not render the decisionmaking process arbitrary and capricious.

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[90] Long after the one-year period had been exceeded, Desert Rock Energy sued EPA to force its final permit decision, as required by CAA § 165(c). EPA entered into a consent decree providing that "[o]n or before July 31, 2008, EPA shall issue a final permit decision on the Permit Application." EPA's Unopposed Motion to Lodge Consent Decree (June 5, 2008), Exhibit A, Proposed Consent Decree, in *Desert Rock Energy Co., LLC v. EPA*, No. 4:08-cv-872 (S.D. Tex.). Thus, the July 31 permit decision was required both by the CAA statute and a consent decree.

*NAHB*, 127 S. Ct. at 2530. The agency's final and current interpretation receives *Chevron* deference, not preliminary views held by the agency. *Nat'l Cable & Tel. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981-82 (2005).

EPA's Response to Public Comments provides a cogent, rational explanation as to why, in the circumstances presented here, the agency decided to grant a conditional PSD permit before the completion of ESA § 7 consultation:

> With regard to the Desert Rock project, EPA believes that issuance of the final permit prior to the conclusion of the ESA process is both appropriate and consistent with ESA requirements. . . . [T]he PSD and ESA processes must also be considered in light of statutorily mandated PSD obligations – the CAA requires EPA to either grant or deny a PSD permit within one year of receiving a complete application. 42 U.S.C. § 7475(c). EPA determined that this permit application was complete in 2004. In this case, the Desert Rock permit applicant and Dine Power Authority have filed suit against EPA for failure to comply with this statutory requirement. *See Desert Rock Energy Company LLC and Dine Power Authority v. EPA*, No. 4:08cv00872 (S.D. TX; filed March 18, 2008). For several reasons, including the time that has elapsed in this permitting process and the need to address the statutory timing requirements raised in the pending *Desert Rock* litigation, EPA believes that issuance of the final decision prior to conclusion of the ESA process is consistent with ESA requirements.

AR 120 at 171. EPA's accommodation of the mandates of both the CAA and the ESA is eminently reasonable and lawful. Accordingly, EPA's preliminary view at an earlier time is irrelevant.

8. *The Cases Cited by Petitioners Are Distinguishable, or at Least Are Contrary to the Above-Described Majority View in the Courts.*

In support of their ESA § 7 arguments, all three Petitioners primarily rely on *Natural Res. Def. Council v. Houston*, 146 F.3d 1118 (9th Cir. 1998). Two of the Petitioners miscite *Houston* as meaning that EPA could not, as a matter of law or *per se*, issue a conditioned permit before the completion of ESA § 7 consultation. *See State of* New Mexico's Supp. Br. at 15; NGO Petitioners' Supp. Br. at 285-86. But the Ninth Circuit panel declined to create a *per se* rule that

executing a water contract before the completion of ESA § 7 consultation violates the ESA, if the contract contains a "catchall savings clause" for modification of the contract based on the results on the ESA § 7 consultation. *Houston*, 146 F.3d at 1128. In refraining from such a ruling, the Ninth Circuit avoided a conflict with the Federal Courts of Appeals and District Court authorities cited above (including Ninth Circuit precedents like *Village of Akutan* and *Village of False Pass*), which allowed such arrangements in lease contract settings. *See Village of Akutan*, 869 F.2d at 1193-94; *Village of False Pass*, 733 F.2d at 610-12.

Instead, the holding in *Houston* relied on its distinguishable case-specific facts. In *Houston*, the Bureau of Reclamation renewed applications for water and irrigation from the Friant Dam during its ESA consultation with FWS. *Houston*, 146 F.3d at 1127. The contracts executed by the Bureau contained a provision allowing some contract modification to reflect the results of the ESA consultation, but limited such modification to minor adjustments and prohibited an adjustment to the amount of water delivered under the contract. *Id.* at 1127-28. NRDC sued, and the district court held that there was a *per se* violation of the ESA due to the Bureau's failure to conclude consultation before executing the water contracts, and on that basis, the District Court rescinded the contracts. *Id.* at 1128 n.5.

On appeal, the Ninth Circuit declined to address the District Court's sweeping conclusion in *Houston*, but rather affirmed the outcome on the basis that the water contracts constituted an "irreversible and irretrievable commitment of resources" in violation of § 7(d). *Id.* at 1128.

The Bureau argued that, even assuming the water contracts were a *per se* irreversible and irretrievable commitment of resources, the contract provision permitting modification prevented the foreclosure of reasonable and prudent alternatives and, therefore, § 7(d) was not violated. *Id.* The Ninth Circuit rejected this argument, noting that the contract condition was utterly

inadequate to serve that purpose because it did not permit a reduction in the quantity of water delivered, thus foreclosing the reasonable and prudent alternative of reallocating contracted water from irrigation to conservation. *Houston,* 146 F.3d at 1128. ("Article 14 is inadequate to serve that purpose here because it limits conservation-based modification to minor adjustments and prohibits an adjustment in the amount of water delivered.") The contract, therefore, represented an irreversible and irretrievable commitment of a resource—water—without regard to any alternative developed during the § 7 consultation process. *Id.* That logic does not apply here, because Permit Condition II.A allows EPA, without restriction, to modify the permit after and in accordance with the ESA § 7 consultation.[91] For the issuance of the PSD permit here to resemble the water contracts from *Houston*, it would, for example, have to guarantee that EPA would not change the permit given alternatives developed in the ESA § 7 consultation.[92] This

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[91] Under ESA § 7(a)(2) and (b), action agencies like EPA make the final decision on whether their action complies with ESA § 7. FWS's biological opinion is advisory, not legally binding. *See Bennett*, 520 U.S. at 170-71; *Lujan*, 504 U.S. at 568-70; 50 C.F.R. 402.16; 51 Fed. Reg. 19,926, 19,928 (June 3, 1986). Courts have found that an agency action satisfies ESA § 7 even where the action agency did not adopt all of the "reasonable and prudent alternatives" that FWS recommended to avoid jeopardy in its biological opinion. *Tribal Village of Akutan*, 869 F.2d at 1193-94. Given EPA's discretion, Condition II.A is appropriately not phrased in terms of compelling compliance with whatever FWS states in its biological opinion. Rather, it is appropriately phrased in terms of EPA's "power to reopen and amend the permit . . . to address any alternatives, conservation measures, reasonable and prudent measures, or terms and conditions deemed by EPA to be appropriate as a result of the ESA consultation process."

[92] NGO Petitioners make much of the Ninth Circuit's *dicta* in *Houston* that it 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." *Houston*, 146 F.3d at 1128. This statement is curious in the context of the Ninth Circuit's opinion and in the context here before the Board. The statement presupposes the illegality of the PSD permit, which, as the *Indeck* opinion demonstrates, need not necessarily be issued before completion of the ESA § 7 consultation. *Indeck*, slip op. at 110. Rather, 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 110 n.149 (citing *Hadson Power Co.*, 4 E.A.D. at 299).

For application here, then, one must assume that NGO Petitioners posit that the PSD permit was illegally executed because it is an "irreversible and irretrievable commitment of

case is more like the fact patterns in the cases discussed above. In any event, even the outlier *Houston* decision does not compel adoption of Petitioners' view that there is an ESA § 7(d) violation under the facts of the conditioned permit. Thus, while the fact pattern of the *Houston* case should be distinguished, the reasoning of the decision supports the legality of EPA's action in issuing the Desert Rock Project's conditional PSD permit.

The Petitioners also rely on the famous snail darter/Tellico Dam decision in *TVA*. 437 U.S. 153. The holding in *TVA* – that an injunction must issue to prevent TVA from closing the dam gates – was based on the dire circumstances that dam closure would substantively violate ESA § 7(a)(2) by causing the extinction of the snail darter and adversely modifying its critical habitat behind the dam. *See, e.g., Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 543 n.9 (1987). As the Supreme Court later clarified, *TVA*'s language is closely tied to its facts and may not apply in other contexts. *Id.* (the "Ninth Circuit erroneously relied on *TVA*" which involved a "distinguishable" situation where "it was conceded that completion of the dam would destroy. . . the snail darter" and its critical habitat). The Desert Rock Project does not present any situation that is close to the facts and holding in *TVA*.

*TVA* did include considerable *dicta* on the legislative judgment in favor of protecting ESA-listed species. Petitioners strive to translate those *dicta* into a flat legal prohibition against issuing a heavily-conditioned PSD permit before the completion of ESA § 7 consultation that has

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resources." Yet this conclusion would be illogical in the context of the rest of the Ninth Circuit's opinion in *Houston*, because, as applied here, 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 contract clause did withhold for the Bureau enough power to modify the contracts. *Houston*, 146 F.3d at 1128.

extended beyond a CAA deadline. But, as shown above, the lower courts have not read ESA § 7(d) in the manner that Petitioners suggest.

Petitioners "expect more from the *TVA* case than its facts and holding will allow." *Nat'l Wildlife Fed'n v. Burlington Northern RR*, 23 F.3d 1508, 1512 (9th Cir. 1994); *accord Platte River Whooping Crane Trust v. FERC*, 962 F.2d 27, 34 (D.C. Cir. 1992) (it is "far-fetched" and unpersuasive to interpret *TVA* as obliging the Services to do "whatever it takes" to conserve listed species). Petitioners' harsh view of the ESA "frustrates rather than effectuates legislative intent [by] assum[ing] that whatever furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (emphasis in original).

Tellingly, as shown above, the Supreme Court more recently found in *NAHB* that other statutory mandates can operate to constrain the ESA's reach. *See* 127 S.Ct. at 2525. Accordingly, EPA had the legal authority to accommodate its ESA § 7 and CAA § 165(c) mandates in the manner it did in issuing a conditional PSD permit.

Petitioners also rely on dubious implications from other Ninth Circuit decisions. Those decisions include *Washington Toxics Coalition v. EPA*, 413 F.3d 1024 (9th Cir. 2005); *Pacific Rivers*, 30 F.3d 1050; *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985); and *Conner*, 848 F.2d 1441. These citations cannot overcome the fact that Ninth Circuit precedent *en toto* does not compel a conclusion that EPA is barred from issuing a conditioned permit before the completion of Desert Rock Project-wide consultation because (1) similar conditions were found not to violate ESA § 7(d) in *Village of Akutan* and *Village of False Pass* and (2) the Ninth Circuit declined to establish a *per se* prohibition on conditioned permits/contracts in *Houston.*

In *Conner*, the plaintiff challenged BLM's practice of granting oil and gas leases without preparing either an EIS under NEPA, or undergoing consultation with the FWS pursuant to ESA

§ 7. 848 F.2d at 1444. Each of BLM's oil and gas leases contained a Threatened and Endangered Species ("T&E") stipulation providing that BLM was responsible for determining the effects of any surface-disturbing activities upon any listed species or their habitat prior to the commencement of such activity, and that BLM's determination might result in restrictions or even disallowance of use and occupancy. *Id.* at 1455. The BLM argued that this T&E stipulation dispensed with the need for a comprehensive biological opinion at the initial lease phase, and that its determination that the leases did not constitute an "irreversible or irretrievable commitment of resources" under § 7(d) released it from its obligations under § 7(a)(2). *Id.* The Ninth Circuit rejected that argument, recognizing that § 7(d) does not obviate § 7(a)(2) whenever an irreversible or irretrievable commitment of resources is absent, but rather ensures that the status quo will be maintained during the § 7(a)(2) consultation. *Id.* at 1455 n.34. Here, EPA Region 9 does not contend that Condition II.A dispenses with its ESA § 7 consultation obligations, but only that Condition II.A serves to comply with § 7(d) during the consultation process. AR 120 at 172.

In fact, certain aspects of the *Conner* case support EPA's position. Some of the leases in *Conner* also contained a "No-Surface Occupancy" ("NSO") provision absolutely prohibiting surface disturbance in the absence of specific government approval. *Conner*, 848 F.2d at 1447. BLM argued that these leases made no irreversible or irretrievable commitment of resources sufficient to trigger NEPA's EIS requirement because the government retained absolute authority to decide whether any activities would ever take place on the leased land. *Id.* The Ninth Circuit agreed, holding that what the permitee really received was a priority right, a right of first refusal to develop the resources in question, should BLM allow such development. *Id.* at 1447-48 (citing *Sierra Club v. FERC*, 754 F.2d 1506 (9th Cir. 1985) (FERC's grant of preliminary permit

for construction and maintenance of a hydroelectric facility did not trigger NEPA because the permit issued gave the applicant no right to develop land without further agency approvals, including other permits)).[93]

One portion of *Peterson* required that a road and a timber sale be considered together in the same NEPA document. 753 F.2d at 758-60. This portion of *Peterson* reinforces why the responsible federal agencies are preparing consolidated NEPA documents on, and are engaging in a consolidated ESA consultation on, the entire project. The ESA portion of *Peterson* did not concern ESA § 7(d). Rather, the panel found that because the Forest Service had not prepared a biological assessment, it committed a substantial procedural violation of the ESA. 753 F.2d at 763-65. That finding does not materially assist Petitioners, as BIA has prepared a biological assessment on the entire Desert Rock Project. AR 92; *see also* Consultation Letter at 1.

*Pacific Rivers* does not support Petitioners' position either. *Pacific Rivers* found that USFS timber sales "constitute *per se* irretrievable and irreversible commitments," because they allow the cutting of trees and alteration of wildlife habitat. 30 F.3d at 1057. Therefore, *Pacific Rivers* does not assist Petitioners here because of the materially different fact pattern. In Desert Rock Energy's case, Permit Condition II.A prohibits construction and thereby does not allow the type of irreversible changes to the environment involved in *Pacific Rivers*.

*Pacific Rivers* also found that "§ 7(d) applies only after an agency has initiated consultation under § 7(a)(2)" – before that time, constraints are governed by ESA § 7(a)(2) and not ESA § 7(d). 30 F.3d at 1056. Similarly, this portion of *Pacific Rivers* does not apply here.

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[93] Indeed, the main import of *Conner* in the ESA context is that an ESA biological opinion must consider the totality of connected federal agency actions. *Conner*, 848 F.2d at 1453-58. By conducting a consolidated ESA consultation on all aspects of the Desert Rock Project, EPA, BIA and FWS have complied with this requirement.

BIA has been in informal ESA consultation since 2007 and is currently in formal ESA consultation. Instead, *Pacific Rivers* confirms that ESA § 7(d) sets the current constraints, and the case law discussed above shows that the issuance of the conditional PSD permit pending completion of ESA consultation does not violate ESA § 7(d).

Center for Biological Diversity also cites *Washington Toxics* for the proposition that an agency must comply with both the ESA and its other statutory duties. Center for Biological Diversity Pet. at 24-25.[94] But here, EPA is complying with both its CAA § 165(c) duty to issue some type of PSD permit in a time certain, and with its ESA § 7(d) duty to not allow construction or other irreparable impacts until ESA § 7 compliance is completed. Therefore, *Washington Toxics* does not apply here, either.

To conclude, the Board should deny review of the PSD permit because Petitioners have not demonstrated clear error; EPA's issuance of a conditioned PSD permit is consistent with EPA's CAA obligations and, to the extent that the question is within the Board's jurisdiction based on *Indeck*, within EPA's ESA obligations.

## XIII. EPA HAS COORDINATED ITS PSD PERMITTING PROCESS WITH THE DESERT ROCK PROJECT'S NEPA PROCESS TO THE MAXIMUM EXTENT FEASIBLE AND REASONABLE, AND DID NOT CLEARLY ERR IN ISSUING THE PSD PERMIT PRIOR TO CONCLUSION OF THE NEPA PROCESS.

The Energy Supply and Coordination Act of 1974, 15 U.S.C. § 793(c)(1), specifically exempts the PSD permitting process from NEPA. However, the PSD regulations themselves require EPA to coordinate the PSD permitting process with the NEPA process in certain circumstances:

(s) *Environmental impact statements.*

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[94] Because the Supreme Court later ruled to the contrary where there are conflicting statutory duties, in *NAHB*, some portions of *Washington Toxics* may no longer be good law. *See NAHB*, 127 S.Ct. at 2525.

> Whenever any proposed source or modification is subject to action by a Federal Agency which might necessitate preparation of an environmental impact statement pursuant to the National Environmental Policy Act (42 U.S.C. § 4321), review by the Administrator conducted pursuant to this section shall be coordinated with the broad environmental reviews under that Act and under section 309 to the maximum extent feasible and reasonable.

40 C.F.R. § 52.21(s).

NGO Petitioners contend that EPA has violated the PSD regulations "by failing to conduct the permit proceedings in parallel with the NEPA proceedings, by failing to obtain from BIA and consider in the PSD proceedings (including the public comment process) relevant information generated through the NEPA process, and by approving the PSD permit before the NEPA process is completed." NGO Petitioners' Supp. Br. at 290-91. As with its argument regarding the ESA, NGO Petitioners seek to transform a common-sense coordination policy into an inflexible mandate holding the PSD permit hostage to a much broader, much larger and much longer administrative environmental process evaluating considerations well beyond the scope of the PSD permit.

### A. The Record Reflects Coordination of the NEPA Process and the PSD Permitting Process.

EPA Region 9 described its compliance with 40 C.F.R. § 52.21(s) in its Response to Comments:

> Region 9 has coordinated with the Bureau of Indian Affairs (BIA) to provide them with all information needed regarding the PSD permit and our Air Quality Analysis as they undergo the EIS process as follows: 1) we are a coordinating agency for the preparation of the Environmental Impact Statement, 2) we have provided BIA with extensive technical information from our review of the project, and 3) we have provided BIA with copies of public comments on the proposed PSD permit, and contact information for persons who have expressed interest in the proposed Desert Rock Project.

AR 120 at 168. In addition, in response to comments received in the PSD permitting process discussing issues beyond the scope of the PSD permit, EPA provided citations to the sections of

the draft EIS ("DEIS") specifically addressing such issues. *See, e.g.*, AR 120 at 161 (public health services), 166 (access to water). Through these actions, EPA Region 9 harmonized the PSD permit process and the NEPA process in a reasonable manner that extended beyond its role as a coordinating agency for the NEPA review; in its role as the PSD permitting authority, EPA Region 9 shared its data, relevant public comments and contact information with BIA.

By the time EPA Region 9 issued the PSD permit in July 2008, the DEIS had been issued, the public had already provided comments on the DEIS, and BIA had already published its response to comments. Indeed, the timelines of the PSD permitting process and the issuance of the DEIS were sufficiently contemporaneous that EPA was able to compare the air quality information received during the PSD permitting process with that developed during the NEPA process. EPA's Response to Comments indicates that it was aware of and participated in the NEPA process, and nothing raised during the NEPA process affected EPA's conclusion it had obtained all necessary information for issuing the PSD permit through the permitting process. AR 120 at 168, 170. In the face of this, NGO Petitioners allege that EPA's coordination of the NEPA and PSD permitting processes was clearly erroneous, without providing any specificity as to how. NGO Petitioners' Supp. Br. at 293. Due to this shortcoming, NGO Petitioners' claim must fail. *See* 40 C.F.R. § 124.19(a); *Steel Dynamics*, 9 E.A.D. at 744.

### B. EPA Is Not Required to Conduct the PSD Permit Process "In Parallel" With the NEPA Proceeding, Nor Is EPA Required to Wait to Issue the PSD Permit Until After the NEPA Process is Complete.

NGO Petitioners list as separate "fatal" errors EPA's alleged "failing to conduct the permit proceedings in parallel with the NEPA proceedings" and EPA's "approving the PSD permit before the NEPA process is completed." NGO Petitioners' Supp. Br. at 290-91. Both of these arguments lack any basis in the law.

NGO Petitioners neglect to identify in their Petition a specific requirement that EPA must conduct its PSD permit proceeding "in parallel with the NEPA proceedings." *Id.* at 290. There is not such requirement in either this Board's precedent or in federal case law. Furthermore, the regulation requiring coordination during the PSD permitting process, likewise des not contain a requirement that such proceedings must be conducted "in parallel." *See* 40 C.F.R. § 52.21.

Moreover, NGO Petitioners have failed to specifically clarify what "in parallel" means in this context. As a result, NG Petitioners' Supplemental Brief provides no example of any case in which a court or agency has adopted this phrase to describe the coordination required by 40 C.F.R. § 52.21. In any event, it is difficult to see how the NEPA process and the PSD permitting process could be run "in parallel"; for the Desert Rock Project, for example, the scoping of the DEIS took almost a year, the statutory time period within which the EPA must complete the PSD permitting process upon receipt of a completed application. *See* AR 22; 42 U.S.C. § 7475(c). Requiring one year to scope a DEIS is not an unusual NEPA timeframe for a project like the Desert Rock Project. NGO Petitioners' position—that EPA must conduct the PSD permitting process "in parallel" with the NEPA process and must not issue the PSD permit until the NEPA review process is complete—would eviscerate the timeframe established under the CAA, rendering 42 U.S.C. § 7475(c) a nullity as a practical matter wherever a project requiring a PSD permit also triggered NEPA.[95]

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[95] As discussed, *supra*, in Section XII.B.7, in the context of EPA's coordination of the PSD permitting process and ESA consultation, EPA has reasonably and permissibly accommodated two statutory mandates, fulfilling the principle that statutes should be construed harmoniously if possible, and to not unnecessarily repeal another statute by implication. *See, e.g.*, *Morton*, 417 U.S. at 549-50. Notably, CAA § 165(c) does not say "shall grant unless the NEPA process takes longer." 42 U.S.C. § 7475(c).

This illogical result is perhaps why this Board has held that 40 C.F.R. § 52.21 "does not require a [permitting authority] to refrain from issuing a PSD permit until the NEPA review process is complete." *Hadson Power*, 4 E.A.D. at 300. In *Hadson Power,* the Board stated that:

> Under the plain language of this regulation, coordination is all that is required of the PSD permitting authority, and only to the extent feasible and reasonable. As used in this regulation, "coordinate" is best given its everyday meaning, namely to harmonize or to act together in a concerted way. In our view, then, this regulation does not require a state to refrain from issuing a PSD permit until the NEPA review process is complete.

*Hadson Power*, 4 E.A.D. at 300. According to *Hadson Power*, then, not only is EPA not required to conduct its PSD permitting process "in parallel" with the NEPA process, it is not required to wait for the NEPA review to be complete.

Unable to cite to any Board or federal court decision remanding a PSD permit issued prior to finalization of a related EIS, NGO Petitioners rely instead on two cases, *Hadson Power* and *Prairie State*, in which this Board held precisely the opposite—that issuance of a PSD permit prior to finalization of the EIS was reasonable. NGO Petitioners acknowledge this inconsistency, but argue that "the facts presented in those cases did not compel coordination as they do here." NGO Petitioners' Supp. Br. at 291. Specifically, NGO Petitioners argue that, in both *Hadson Power* and *Prairie State* the NEPA review did not pertain to any part of the project subject to PSD regulation, whereas here, "the NEPA proceedings for [the Desert Rock Project] are for the 'source' for which the PSD permit is sought." NGO Petitioners' Supp. Br. at 291.[96]

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[96] As NGO Petitioners recognize, the Board's decision in *Prairie State* is not even relevant here. In *Prairie State*, the Board declined a petition to review issuance of a PSD permit for failure to comply with 40 C.F.R. § 52.21 where the record did not show that there was any NEPA review pending or that any potential NEPA reviews covered any aspect of the proposed facility subject to PSD regulation. *Prairie State*, slip op. 163; *see also* NGO Petitioners' Supp. Br. at 291.

The Board's holding in *Hadson Power* is broader than Petitioners suggests. In *Hadson Power*, the applicant, Hadson Power, submitted an application for a PSD permit to build a coal-fired power plant in Buena Vista, Virginia. *Hadson Power*, 4 E.A.D. at 260. In order to offset its emissions, Hadson planned to provide a certain percentage of its steam generation to a manufacturer located across the Maury River from Hadson Power's proposed facility (in exchange for the steam, the manufacturer would shut down its own boilers). *Hadson Power*, 4 E.A.D. at 261, n.6. To effectuate this part of the project, Hadson Power needed to secure the Department of Interior's approval to run coal conveyance and utility improvements through Glen Maury Park, which triggered the need for NEPA review. *Id.* at 297. The coal conveyance was considered as part of the PSD permitting process as well. *Id.* at 298. During the NEPA review, however, Hadson Power abandoned its plans to use the coal conveyor, announcing instead its intention to rely on truck delivery of coal. *Id.*

In its comments to the proposed PSD permit, various local environmental groups requested that the permitting authority, the Virginia Department of Air Pollution Control ("VDAPC"), defer consideration of the PSD permit application until completion of the NEPA review. *Id.* VDAPC declined, noting that since the only portion of the NEPA review relevant to the PSD permitting process was the coal conveyance, its abandonment in favor of truck delivery eliminated any need to await completion of the NEPA review. *Hadson Power,* 3 E.A.D. at 298. On appeal, the Board agreed, and in fact went on to note that even if the coal conveyance option were still pending, the record demonstrated that VDAPC based its decision on air quality analysis that included the truck delivery option, and therefore the outcome of the NEPA review was irrelevant. *Id.* at 299-300. According to the *Hadson Power* Board, coordination with the

NEPA process was not even required "[b]ecause the outcome of the NEPA review would not provide any significant new information to the proceeding, or change the outcome." *Id.* at 300.

At this point, NGO Petitioners' analysis of the *Hadson Power* case stops. The Board also held, however, that where coordination was required, coordination did not mean that a permitting authority had to refrain from issuing a PSD permit until the NEPA process was complete. *Id.* at 299. The environmental groups in *Hadson Power* argued that deferring the PSD permit was necessary because "the NEPA review would provide a wealth of information relating to the impact of the proposed facility." *Id.* The Board again disagreed, holding that "[t]o the extent information would be relevant to the PSD permit, such information should have already been supplied in the PSD permit process." *Id.*

Here, as in *Hadson Power*, EPA Region 9 had all the information it required to make the PSD determination. AR 120 at 168. EPA Region 9 recognized that some comments made during the public comment on the PSD permit were relevant to the NEPA process, and it shared that information with BIA. EPA Region 9 provided relevant air quality impact data to BIA in its role as a coordinating agency. *Hadson Power*, the only relevant authority on this issue does not state that the PSD permitting authority is required to defer issuance of a PSD permit pending the completion of the NEPA process. *Hadson Power*, 3 E.A.D. at 299. Therefore, based upon this precedent, EPA Region 9 has made a reasonable attempt to harmonize the NEPA and PSD permitting processes in this case, and so NGO Petitioners have failed to demonstrate clear error requiring this Board's intervention.

### C. 40 C.F.R. § 52.21 Is an Inappropriate Avenue by which to Challenge the Substance of EPA's PSD Permit Determination.

Despite the fact that the same argument was put forward and rejected by the Board in *Hadson Power*, NGO Petitioners argue that EPA Region 9 improperly issued the PSD permit

because it failed to obtain from BIA and consider in the PSD proceedings relevant information generated through the NEPA process. NGO Petitioners' Supp. Br. at 290-91. EPA Region 9, however, affirmed in its Response to Comments that it "has obtained all necessary information for issuing the PSD permit through the permitting process. There is no need to delay issuing this PSD permit." AR 120 at 168.

It is evident from the arguments they advance that NGO Petitioners' dispute is actually with the scope and outcome of the PSD permitting process itself, not EPA 9's coordination with the separate, BIA-led NEPA process. *See, e.g.*, NGO Petitioners' Supp. Br. at 294 ("the [NEPA coordinating] measures, however, have proven insufficient, as the record for the PSD permit proceeding, remains incomplete in some significant ways (as discussed throughout this brief)"). NGO Petitioners also assert that purported errors in the PSD permitting analysis—EPA's rejection of IGCC as BACT, for instance, or EPA's determination of the scope of its environmental justice analysis—somehow translate into failure in its coordination with the NEPA process:

> The deferred analyses that have rendered this permit proceeding structurally unsound include assessment of environmental justice concerns (including the impacts to public health in local Navajo communities, impacts to soil, vegetation, species and assessment of collateral environmental impacts associated with solid waste, water use and water quality); assessment of impact on threatened and endangered plant and animal species; and meaningful consideration of alternatives to the proposed project (including consideration of need and a no-build alternative).

NGO Petitioners' Supp. Br. at 290. This argument only makes sense if one accepts that the analyses are indeed "deferred," that is, that EPA believed the analyses were necessary to the PSD permitting process but decided nonetheless to defer them to the NEPA process. In this context, EPA would therefore have issued the PSD permit without the information necessary to make the PSD determination. However, NGO Petitioners point to no statement in the record in which

EPA acknowledged that certain information relevant to its PSD determination would not be available until the final project-level EIS is issued.

Overall, this NEPA argument merely reiterates the other points on which NGO Petitioners attack the legality of the PSD permit, and which have been thoroughly rebutted throughout this brief. The sufficiency of EPA's environmental justice analysis is discussed *supra* at Section XI. The sufficiency of EPA's analysis of the possible impact to soil and vegetation is discussed *supra* at Section XI.B.2. The sufficiency of EPA's actions under the Endangered Species Act is discussed *supra* at Section XII. The sufficiency of EPA's analysis of alternatives to the proposed project is discussed *supra* at Sections II and III. Because NGO Petitioners discuss the "need" and "no-build" alternatives in the context of environmental justice, the sufficiency of EPA's analysis of those particular alternatives is discussed *supra* at Section XI.B.3.

As demonstrated by the administrative record, EPA Region 9 clearly took its coordinating responsibilities seriously. *See* AR 120 at 168. NGO Petitioners' characterization of EPA's substantive determinations as "deferring" analysis to the NEPA process is inaccurate and appears to be simply another manufactured basis for their legal challenge. EPA Region 9 is not "deferring" anything to the NEPA process; it has made a PSD determination fully supported by the record. To the extent that NGO Petitioners disagree with that assessment, the grounds for the legal challenge are the substance of the PSD determination itself, not EPA's coordination of the PSD permitting process with the NEPA process. Hence, there is no need for this Board to review the issuance of the PSD permit on this ground.

## XIV. EPA REGION 9 ADEQUATELY RESPONDED TO PETITIONER GLUSTROM'S COMMENTS, AND WAS NOT OBLIGATED TO CONSIDER CONCENTRATING SOLAR POWER AS PART OF THE BACT ANALYSIS FOR THE DESERT ROCK PERMIT.

In her Petition for Review, Petitioner Glustrom makes two primary arguments: (1) that EPA Region 9 clearly erred by failing to consider and adequately respond to her comments that Concentrating Solar Power ("CSP") should be considered in the BACT analysis for the Desert Rock Project, and (2) that the Board should review EPA Region 9's exercise of discretion to decline to consider technology such as CSP that would redefine the source, and therefore fall outside of the BACT evaluation process.

Petitioner Glustrom submitted two comments to EPA Region 9 during the comment period preceding the issuance of the Desert Rock PSD permit. AR 63; AR 63.1. These comments urged that CSP should be part of the BACT analysis for the Desert Rock plant. *Id.* Petitioner Glustrom acknowledges that EPA Region 9 addressed her comments, and solar power generally, in Appendix A of its Response to Comments. *See* Pet. of Glustrom at 9 ("EPA has responded to the comments on page 10 and in Appendix A to their Response to Comments."). In its Response to Comments, EPA Region 9 went beyond Petitioner Glustrom's initial focus of urging that CSP be included as an alternative BACT technology and even evaluated the potential of solar power as an alternative technology in its own right. *See* AR 120, Appendix A. EPA Region 9 considered not only Petitioner Glustrom's comments and attachments, but also other comments addressing the potential of solar power. EPA Region 9's response to these comments addressed the established evidence in the comments – rather than the conjectural inferences that could be drawn from omissions in the evidence, on which many of Petitioner Glustrom's arguments now lie – and concluded that "the commenters' assertions about solar power are not adequate to demonstrate its suitability as an alternative to the proposed plant." AR 120 at 222.

Thus, Petitioner Glustrom's comments were adequately addressed by EPA Region 9 with respect to their general subject content – solar power.

Further, with respect to Petitioner Glustrom's actual comments – that CSP should be considered as an alternative source technology in the BACT analysis for the Desert Rock PSD permit – the Response to Comments clearly explains why EPA Region 9 will not use "the BACT requirement as a means to fundamentally redefine the basic scope of a proposed project[,]" which is the result sought by Petitioner Glustrom. *See* AR 120 at 13-21; Pet. of Glustrom at 28. Thus, Petitioner Glustrom's comments were also adequately addressed by EPA Region 9 to the extent they urged that EPA Region 9 consider using BACT analysis to redefine the source of the Desert Rock Project to CSP. The legal support for EPA Region 9's position has been thoroughly discussed in its Response to Comments, AR 120, and Section II, *supra*, of this Brief. These discussions establish that EPA Region 9's exercise of discretion, and ultimate refusal to consider redefining the source of the proposed technology through BACT, are not clearly erroneous.

Accordingly, EPA Region 9 has fully addressed Petitioner Glustrom's comments, and EPA Region 9's Response to Comments is complete and nothing in the permitting action was clearly erroneous. The Board should deny review of Petitioner's Glustrom's issues.

## CONCLUSION

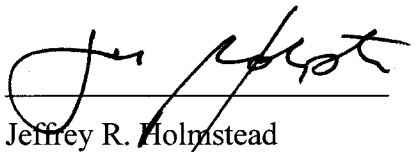
For the reasons stated above, Desert Rock Energy respectfully requests that this Board deny review of Desert Rock Energy's PSD permit or, in the alternative, uphold the PSD permit because the Petitioners have failed to demonstrate clear error in EPA Region 9's decision to grant the permit.

## REQUEST FOR ORAL ARGUMENT

Due to the numerous factual and legal issues involved in this case, counsel for Desert Rock Energy believe that oral argument would be beneficial to the Court. Therefore, counsel for Desert Rock Energy respectfully request that oral argument be scheduled in this case.

[*Signature Page Attached*]

Respectfully submitted,



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January 8, 2009

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing DESERT ROCK ENERGY COMPANY'S RESPONSE TO PETITIONS FOR REVIEW in the matter of Desert Rock Energy Company, LLC, PSD Permit No. AZP 04-01 were served by United States First Class Mail on the following persons, this 8th day of January 2009:

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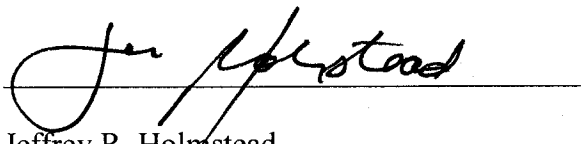

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