MAJOR DEFINED TERMS

ANPR = Advanced Notice of Proposed Rulemaking

BA = Biological Assessment

BACT = Best Available Control Technology

BIA = Bureau of Indian Affairs

BLM = Bureau of Land Management

BO = Biological Opinion

CAA = Clean Air Act

CAMR = Clean Air Mercury Rule

CFB = Circulating Fluidized Bed

CO_2 = Carbon Dioxide

CSP = Concentrating Solar Power

EAB or Board = Environmental Appeals Board

EIS = Environmental Impact Statement

EPA = Environmental Protection Agency

ESA = Endangered Species Act

FWS = U.S. Fish and Wildlife Service

GHG = Greenhouse Gas

HAPs = Hazardous Air Pollutants

IGCC = Integrated Gasification Combined Cycle

MACT = Most Advanced Control Technology

NAAQS = National Ambient Air Quality Standards

NEPA = National Environmental Policy Act

NMFS = National Marine Fisheries Service

NSPS = New Source Performance Standard

NSR = New Source Review

PM = Particulate Matter

PM_{10} = Particulate Matter with a diameter of 10 microns

$PM_{2.5}$ = Particulate Matter with a diameter of 2.5 microns

PSD = Prevention of Significant Deterioration

SCR = Selective Catalytic Reduction

SIL = Significant Impact Levels

SIP = State Implementation Plan

SNCR = Selective Non-Catalytic Reduction

SO_2 = Sulfur Dioxide

INTRODUCTION

The Desert Rock Prevention of Significant Deterioration ("PSD") permit was issued on July 31, 2008 – more than 4 years after the Environmental Protection Agency ("EPA" or "the Agency") found that the permit application was complete, and more than 2 years after a draft permit was developed and issued for public comment. The review process for this permit involved years of studies and intra-agency, inter-agency, and tribal consultations, as well as an extended public comment period. Legal and technical experts from EPA Region 9 and EPA Headquarters considered every issue raised during the public comment period to ensure that the permit meets all applicable requirements. Later, they also considered and responded to certain late-filed comments that the NGO Petitioners submitted as much as a year after the comment period ended.[1] Ultimately, after more than 4 years of review, EPA Region 9 issued a final permit that imposes the most stringent emission limits for any coal-fired power plant in the United States (and, as far as Desert Rock Energy knows, for any such plant in the world) and also includes additional requirements, such as an obligation to purchase offsets for all the plant's sulfur dioxide ("SO_2") emissions, that go well beyond any statutory or regulatory requirements.

Despite these efforts, Petitioners claim to have found an astonishing number of legal flaws in the permit and the permitting process. The permit, they argue, must be remanded for more review, more process, and more delay. Most of the Petitioners have been very public in stating that they oppose the construction of any new coal-fired power plants, and that they are using all available means to block or delay the construction of any such plant. Of course, they have the right to express their views, but the Board should not allow them to abuse or misuse the

[1] "NGO Petitioners" consist of Diné Care, Environmental Defense Fund, Grand Canyon Trust, Natural Resources Defense Council ("NRDC"), San Juan Citizens' Alliance, Sierra Club and Wild Earth Guardians.

PSD permitting process. It was not intended to allow opponents of a project – no matter how committed and well funded they may be – to stop a project that meets the requirements established by Congress and EPA, or to delay it in the hope that it will eventually become uneconomic.

As the Board well knows, the PSD program was designed to strike a balance that allows for economic development while at the same time protecting human health, air quality, and sites of natural value. U.S. EPA Office of Air Quality Planning and Standards, New Source Review Workshop Manual (Draft Oct. 1990) at 3 ("NSR Manual"). The PSD regulations require that major new sources be reviewed prior to construction to ensure that they will use the "best available control technology" ("BACT") to limit their emissions of regulated air pollutants and that they will not cause or contribute to a violation of a national ambient air quality standard ("NAAQS") or the applicable PSD air quality increments. If a proposed project meets these requirements, it is entitled to receive a permit in a timely fashion.

In creating the PSD program, Congress expressly stated that it did not want the program to be misused as "a vehicle for inaction and delay." *See* S. REP. NO. 94-717 at 23 (1976). In fact, Congress anticipated – and ultimately required by statute – that the process for developing a PSD permit be completed within one year after the submission of a complete permit application. CAA § 165(c), 42 U.S.C. § 7465(c). As a legal matter, this requirement is no less important – and no less binding on EPA – than any of the other statutory requirements of the PSD program, and Desert Rock Energy respectfully requests that the Board consider this requirement as it evaluates the arguments made by Petitioners in this case. Several of their arguments, if accepted, would make it impossible for EPA – or any other permitting agency – to issue a permit within the one-year timeframe prescribed by Congress. Desert Rock Energy has made every reasonable

effort to accommodate public comments and performed numerous time-consuming studies at the request of EPA, the National Park Service and the U.S. Forest Service, all of whom were seeking to address concerns raised by Petitioners. Desert Rock Energy not only complied with the protective requirements of the PSD permitting process, but has gone well beyond them in many respects. For its accommodation and responsible partnership with all the parties to the public comment process, Desert Rock Energy has been rewarded with these petitions. It is clear from Petitioners' voluminous briefs, as well as their public statements, that they would very much like to turn the PSD program into "a vehicle for inaction and delay." Desert Rock Energy urges the EAB not to allow this result.

In this case, the Board must also consider the federal government's trust obligation with respect to Indian tribes and the impacts of its actions on the Navajo Nation in particular. All Executive branch departments and agencies have been directed, by Executive Order, to "respect Indian tribal self-government and sovereignty[2] . . . and strive to meet the responsibilities that arise from the unique legal [trust] relationship between the Federal Government and Indian tribal governments" when taking actions that have tribal implications. Consultation and Coordination with Indian Tribal Governments, Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000). Pursuant to its trust relationship, the federal government is obligated to protect resources on tribal lands – not only by preventing exploitative misuse of those resources, but also by allowing them to be used to advance the interests of the beneficiary tribes.

[2] The right of Indian tribes to self-government and self-determination is well recognized. *See* Exec. Order No. 13,17525, 65 Fed. Reg. 67,249 (Nov. 9, 2000) ("*Consultation and Coordination with Indian Tribal Governments*"); *see also* 25 C.F.R. Title V ("*Indian Self-Determination and Education Assistance Act*"). As domestic dependent nations under the protection of the United States, Indian nations retain fundamental inherent self-determination governance authority and responsibility over their territories, which authority extends to their right and ability to develop energy projects, in compliance with federal law. *See* 25 C.F.R. Title V.

Although Desert Rock Energy is the permit applicant in this case, the Desert Rock project was conceived entirely by the Navajo Nation. In light of the depressed economic conditions on the Navajo reservation (more than 50% of working-age Navajo are unemployed and Navajo per capita income is roughly $7,400[3]) and the natural resources on tribal lands, the Navajo Nation created the Diné Power Authority ("DPA") to develop energy resources on Navajo land for the benefit the Navajo people and the promotion of economic development in the Navajo Nation.[4] Through DPA, the Navajo Nation has been working for more than a decade to develop the Desert Rock Project. Because of the Navajos' respect for nature, DPA sought a partnership with a developer that would be "willing to push the environmental standards to a new high."[5] After interviewing a number of potential developers, DPA selected Desert Rock Energy as the one that would best reflect tribal values and best address the economic needs of the Navajo Nation.

The Navajo Nation has spoken, resolutely, in support of the Desert Rock Project. The Navajo Nation Council voted 66-7 to issue the necessary leases, and the Eastern Agency Council, representing the 31 Navajo chapters located closest to the project, voted 96-0 to support it. As a result, there is no question that the Navajo government has exercised its right of self-determination to pursue the construction of the Desert Rock Project. The Navajo Nation has declared that the Desert Rock Project "is absolutely critical to the economic future of the Navajo Nation."[6] President Joe Shirley, Jr., the Navajo Nation's elected leader, has sent several letters that are part of the public record, noting the importance of the project for the Navajo economy and for the government of the Navajo Nation. According to President Shirley, direct payments

[3] AR 29.

[4] Steven C. Begay, Testimony before the Senate Committee on Indian Affairs, Oversight Hearing on Indian Energy Development – Regaining Self-Determination Over Reservation Resources, May 1, 2008, at 2 (hereinafter *Begay Testimony*).

[5] *Begay Testimony* at 3.

[6] *Begay Testimony* at 3.

from the project will provide about one-third of the total annual operating budget for the government of the Navajo Nation, which loses more than $5 million in tax revenue every *month* the permit is delayed.

As discussed in the many pages that follow, the Desert Rock PSD permit meets all applicable substantive requirement, and the process by which it was developed was fully consistent with all applicable procedural requirements. For these reasons, and in light of the federal government's trust obligation to the Navajo Nation and Congress's express desire that the PSD permit process not be used "as a vehicle for inaction and delay," Desert Rock Energy urges the Board to deny the Petitions for Review in this case.

SUMMARY OF ARGUMENTS

The issues on this appeal are not complicated. Though Petitioners have submitted voluminous pleadings that purport to raise ten different, "independent" reasons for vacating the PSD permit, they really offer only six, restated ten different ways. The six arguments involve: (1) regulation of CO_2, (2) EPA Region 9's BACT analysis, including the consideration of IGCC in such analysis, (3) consideration of the case-by-case MACT determination in the BACT analyses for NO_x and SO_2, (4) modeling issues, (5) coordination of the PSD program with other environmental requirements, and (6) environmental justice. Of those six arguments, four simply rehash well-settled law and only one could arguably be characterized as a new question for this Board when Petitioners filed their appeals. And that matter of first impression—whether the PSD regulations require EPA to regulate CO_2 emissions through its BACT analysis—has since been resolved by the *Deseret* decision and Administrator Johnson's December 18, 2008 Memorandum.

Regulation of CO_2. This argument has been effectively resolved by the *Deseret* decision and Administrator Johnson's December 18, 2008 Memorandum. Petitioners here offer no new compelling arguments beyond those advanced in the *Deseret* matter, and the deficiencies the Board found in the administrative record in *Deseret* are not present in the administrative record here. Here, the administrative record includes the Advanced Notice of Proposed Rulemaking confirming that EPA does not consider CO_2 to be a "regulated pollutant" for PSD permitting purposes. EPA's conclusion in this case, fully supported by the administrative record before this Board, has also been reinforced, and conclusively so, by Administrator Johnson's December 18, 2008 Memorandum, confirming EPA's position in light of the *Deseret* decision.

Consideration of IGCC. Petitioners argue that it was clear error for EPA to exclude IGCC technology at step one of the BACT analysis. Petitioners make this argument in the face of a clear, consistent string of Board decisions both affirming EPA's broad discretion in disregarding proposed control technology that would redefine the proposed source, and finding that the sort of fundamental redesigns that IGCC would require at the Desert Rock Project constitute such redefinition of the source. In any event, consideration of IGCC would not have had a material effect on the PSD permit because the many IGCC studies in the record demonstrate that IGCC was not a viable or cleaner technology in this case.

Despite the fact that their position is at odds with well-settled law, it is easy to see why Petitioners would seize upon IGCC (a technology which they have otherwise relentlessly challenged where IGCC is actually being deployed) in this appeal: it gives them a foothold to throw so many more arguments at the Board. According to Petitioners, the failure to consider IGCC had a cascading effect that created subsequent clear error in (1) EPA's collateral impact analysis, (2) EPA's NEPA analysis, (3) EPA's environmental justice analysis, and (4) EPA's

endangered species analysis. Because EPA did not commit clear error in the first instance by disregarding IGCC as redefining the source, these derivative arguments necessarily fail as well.

MACT Issue. Petitioners raise for the first time in this appeal an argument related to the regulation of HAPs, including mercury, alleging that a case-by-case MACT analysis must be conducted concurrently with the PSD permitting process. This argument can and should be disregarded by the Board because Petitioners failed to preserve the issue by timely comment during the public comment period. Even if the Board were to reach the merits of this issue, the Board would see that there is no provision the CAA that requires that a case-by-case MACT determination be prepared concurrently with the development of the PSD permit. In fact, HAPs were expressly exempted from regulation under the PSD requirements in section 112(b)(6) of the Act and the Petitioners' argument must therefore fail.

BACT Issues. Petitioners challenge a bevy of technical determinations made during the PSD permitting process, including (1) how the NO_x and SO_2 emissions limits were set during the BACT analysis, (2) the start-up, shutdown and malfunction emissions limits set during the BACT analysis, and (3) whether PM10 could be used as a surrogate for $PM_{2.5}$. In this category, Petitioners simply retread old arguments, unfortunately forcing this Board to retread its old decisions in validating those arguments.

In its BACT analysis, EPA Region 9 selected the top NO_x and SO_2 control options for the Desert Rock Project. To arrive at the appropriate BACT and emissions limits, EPA considered a huge volume of data derived from more than half a dozen similar sources. Petitioners' central complaint is, as discussed above, that EPA did not consider IGCC and sources utilizing IGCC during the BACT process. During the public comment period, Petitioners also requested that EPA Region 9 examine certain similar plants' operations and emissions levels. EPA Region 9

did so, and now Petitioners appeal on the basis that EPA Region 9's analysis came after the close of the public comment period. The issue Petitioners raise fails to present any detailed and specific description of error in EPA's response to the comments. Rather, Petitioners seek to force EPA into a position where, if it acknowledges and acts on comments made during the public comment process, it is subject to appeal, but if it disregards the comments, it is likewise subject to appeal.

Regarding EPA's analysis of $PM_{2.5}$, Petitioners' complaint has less to do with the analysis as it relates to the Desert Rock Project and more to do with EPA's grandfathering rule permitting certain sources, of which Desert Rock is one, to use PM_{10} as a surrogate for $PM_{2.5}$ due to the difficulty in estimating and modeling $PM_{2.5}$ emissions. A challenge like this to EPA's rulemaking is beyond the Board's jurisdiction, and the appeal of a specific permit to challenge an agency-wide rule is inappropriate.

Modeling Issues. Petitioners likewise take issue with the regional haze modeling, and the PSD increment modeling. Similar to the BACT category, Petitioners simply retread old arguments, unfortunately forcing this Board to retread its old decisions invalidating those arguments.

Petitioners' challenge to EPA's ozone modeling relies on data derived from a monitor installed in 2006, two years after Desert Rock Energy's PSD permit application was deemed complete. In 2008, four years after Desert Rock Energy's PSD permit application was deemed complete, EPA's ozone modeling that the region was still within NAAQS, though ozone levels for that monitor were slightly higher. No causal connection has been drawn between emissions sources like the proposed Desert Rock Project and the increased ozone levels detected at that isolated data point. Petitioners make the unfounded assertion that this isolated data point is

sufficient to demonstrate clear error where EPA modeling (which relies on ozone concentration assumptions higher than the monitored levels) indicates that the Desert Rock Project will not violate the 8-hour ozone standard, which, incidentally, was established in 2008, four years after the Desert Rock Energy's PSD permit application was deemed complete.

Furthermore, the "remedy" desired by Petitioners here is equivalent to modeling that has already been done. Petitioners request remand so that ozone modeling can be conducted to assess the impacts of a small number of sources on ozone NAAQS attainment issues. The NM Demonstration includes 2007 and 2012 future case modeling with specific, source apportionment scenarios that demonstrate minimal impact on 8-hour ozone levels.

Aside from challenging substantive rules beyond this Board's jurisdiction, Petitioners even attack measures taken beyond what is required by the PSD permitting process. As required, EPA coordinated with the National Park Service and the U.S. Forest Service to protect Class I areas from adverse impacts on visibility, after which no adverse impact was found. Nonetheless, in an attempt to accommodate comments regarding the visibility analysis for the PSD permit, EPA and Desert Rock Energy entered into a memorandum of understanding implementing SO_2 reductions beyond those required to meet PSD requirements. In a tactic seen throughout their briefing, Petitioners attack this voluntary measure by asserting, without any demonstrated basis, that it would not remedy the adverse impact of SO_2 emissions on visibility. This argument, of course, presupposes an adverse impact that EPA did not find, hence the issuance of the PSD permit, and attacks a voluntary reduction made by Desert Rock Energy as an insufficient "remedy" to a problem that does not exist. There is no satisfying this sort of complaint, made again and again in the face of scientific determinations by EPA. Similarly, Petitioners attack a NO_x optimization plan designed to achieve a NO_x rate lower than the level that the comments

claimed represented BACT by arguing that Desert Rock Energy will simply falsify its data. EPA and Desert Rock Energy are faced not just with hypotheticals, but hypotheticals that presuppose fraudulent behavior. This is precisely why the PSD permitting process here has become interminable.

As with its challenge to the BACT analysis, Petitioners' approach to PSD increment determination would render the PSD permitting process an endless circle of procedure. EPA began with very conservative "significant impact levels" to identify Class I Areas, for which EPA then conducted full cumulative PSD increment analyses utilizing emissions assumptions that would overstate possible impacts by using inflated emissions levels and the "worst case scenario" for different load conditions. After EPA published its initial PSD increment analysis, Petitioners lodged comments proposing different emissions rates, and EPA ran the models again using the Petitioners' proposed emission rates, describing in the Response to Comments how those models also indicated that the Desert Rock Project satisfied every increment requirement. According to Petitioners, EPA should have subjected those new models to further public comment, at which point, one suspects, subsequent issues would be raised. This is needless where EPA's additional modeling did not change the substantive conclusion that the Desert Rock Project does not exceed the relevant PSD increments.

Coordination of the PSD Permitting Process with Other Environmental Requirements. In a trio of process arguments, Petitioners allege that EPA was required to coordinate the PSD permitting process with the MACT analysis, the endangered species consultation, and the NEPA process. On the MACT analysis argument, Petitioners fail to overcome the uncomfortable facts that coordination of the PSD permitting process with the case-by-case MACT is not required by any statute, regulation or case law, and hazardous air pollutants—the focus of the case-by-case

MACT—are expressly exempted from the PSD permitting process. Petitioners' position regarding coordination of the PSD permitting process and the ESA § 7 consultation process suffers from a similar lack of statutory or regulatory support, a problem compounded by the fact that this Board has acknowledged in *Indeck* that it has no jurisdiction to determine the sufficiency of the ESA § 7 consultation itself, which it would have to do to resolve Petitioners' baseless complaints. In any event, EPA and the permittee, well aware of their independent duties under the ESA, have ensured that no irretrievable or irreversible commitment of resources will occur before completion of the ESA § 7 consultation by conditioning the permit accordingly. On the final coordination argument, EPA did coordinate the PSD permitting process with the NEPA process to the maximum extent feasible and reasonable; Petitioners can only make an argument here by manufacturing a strict coordination standard—that the PSD permit process proceed "in parallel" with the NEPA process and that the PSD permit not be issued until the FEIS is issued—that is nowhere to be found in any statute, regulation or decision by this Board.

Environmental Justice. Petitioners use the rubric of environmental justice to shoehorn into their petitions a litany of generalized grievances that might possibly be associated, whether in truth or not, with the Desert Rock Project. Petitioners' arguments here disregard the limited focus of a PSD permit itself and the extensive environmental justice analysis conducted by both Desert Rock Energy and EPA. Most of Petitioners' environmental justice claims are irrelevant to the PSD permitting process itself, *i.e.*, focus on infrastructure concerns or alleged health effects are more appropriately considered in another process. As far as the air-quality related environmental justice considerations go, in the face of a well-reasoned analysis concluding that there is no adverse impact on any low-income minority population, Petitioners simply disagree without providing any demonstration of EPA's purported clear error, aside from trotting out the

hobby horse that consideration of IGCC would obviate Petitioners' concerns. This is deeply ironic, as Petitioners' appeals seek to prevent, under the guise of environmental justice, a low-income minority population from achieving economic advancement through the exploitation of local resources. Distilled to their essence, Petitioners' PSD-relevant environmental justice arguments are a backdoor challenge to the NAAQS themselves, grounded in a disbelief that the NAAQS are indicators of healthful air. Appeal of a specific permit is an inappropriate forum in which to air these arguments.

Petitioners add paper to their appeals by simply repeating as arguments to the Board comments, sometimes verbatim, made to EPA during the public comment period for the PSD permit, without any further explanation as to why EPA's Response to Comments failed to address the comment. Another reason that Petitioners' appeals are so voluminous that they do not bother limiting themselves to issues raised during the public comment period. Petitioners' BACT analysis, MACT, ozone, $PM_{2.5}$, regional haze and environmental justice arguments all suffer from one or both of these deficiencies. Desert Rock Energy would ask the Board to excuse some amount of repetitive language in its brief; there is a limited vocabulary for characterizing this error common to so many of Petitioners' otherwise disparate arguments.

This appeal has the unintended, but inevitable, consequence of hurting the Navajo Nation, the sovereign people that conceived of this project to ensure that "Navajo coal, water, land and labor will stay on the Navajo Nation to produce revenue for the Navajo people." AR 29 at 2. The Desert Rock Project has met the spirit and the letter of the PSD regulations, and continued delay grounded in frivolous appeals like the BACT, MACT, $PM_{2.5}$, ESA, NEPA and environmental justice arguments here is not only a waste of EPA's resources but a meaningful

detriment to the Navajo people. The passage of time caused by these appeals is a strategic victory for these Petitioners, but an unfair, and costly, defeat for everyone else.

STANDARD OF REVIEW

Review of a final Prevention of Significant Deterioration ("PSD") permit by the Environmental Appeals Board ("EAB" or "the Board") is not a matter of right, but rather, falls within the Board's discretion. A PSD permit will ordinarily not be reviewed unless it meets one of two factors: (i) it is based on a clearly erroneous finding of fact or conclusion of law, or (ii) it involves an "exercise of discretion [by the permit issuer] or an important policy consideration" which the Board believes, in its discretion, it should review. 40 C.F.R. § 124.19(a); *In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490 (EAB 2006); *accord e.g., In re Inter-Power of N.Y., Inc.*, 5 E.A.D. 130, 144 (EAB 1994); *In re Zion Energy, LLC*, 9 E.A.D. 701, 705 (EAB 2001); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126-27 (EAB 1999) ("*Knauf I*"); *In re Commonwealth Chesapeake Corp.*, 6 E.A.D. 764, 769 (EAB 1997). Absent such clear error or policy issue, the Board will generally defer to the permit issuer's judgment. *Inter-Power*, 5 E.A.D. at 144. Therefore, it is infrequent for the Board to grant review in a PSD permit appeal. *In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 7 (EAB 2000) ("*Knauf II*").

The heavy burden of demonstrating that review is warranted rests on the petitioner. 40 C.F.R. § 124.19(a); *Commonwealth Chesapeake*, 6 E.A.D. at 769. In order to establish that the Board should grant review, the petitioner must "state the objections to the permit that are being raised for review, and . . . explain why the permit decision maker's previous response to those objections (*i.e.* the decision maker's basis for the decision) is clearly erroneous or otherwise warrants review." *Commonwealth Chesapeake*, 6 E.A.D. at 769. Further, petitions for review must include "a demonstration that any issues being raised were raised during the public

comment period (including any public hearing) to the extent required by these regulations[.]" 40 C.F.R. §§ 124.13, 124.19(a).

The Board has not articulated how this general standard of review changes, if at all, once review of a PSD permit has been granted. *See generally In re Dominion Energy Brayton Point*, 12 E.A.D. at 508-11 (discussing standard of review in a final order after previously granting review of a National Pollutant Discharge Elimination System ("NPDES") permit). However, the Board acknowledges that its "power of review should be only sparingly exercised," as "most permit conditions should be finally determined at the [permit issuer's] level." 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *accord Zion Energy*, 9 E.A.D. at 705. Accordingly, the Board frequently defers to permit authorities in its review of permit appeals, absent a clear error of law or fact. *See In re Three Mountain Power, LLC*, 10 E.A.D. 39, 54 (EAB 2001).

ARGUMENT

I. BACT IS NOT REQUIRED FOR CO_2 BECAUSE IT IS NOT SUBJECT TO REGULATION UNDER THE CLEAN AIR ACT.[7]

As a result of recent developments, it has been clearly established by the U.S. Environmental Protection Agency ("EPA" or "the Agency"), through its interpretative statements as well as the Desert Rock administrative record, that carbon dioxide ("CO_2") is not subject to regulation under the Clean Air Act ("CAA" or "the Act"), and therefore BACT is not required for CO_2.

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[7] On January 7, 2009, EPA Region 9 filed a Notice of Partial Withdrawal of Permit, (the "Notice"), informing the Board that EPA Region 9 was thereby withdrawing section II.B.3.b (pages 25-27) of its Response to Public Comments and section 5 (pages 8-15) of its Responses to Late-Filed Public Comments. According to EPA Region 9, these portions of the Region's permitting decision contain EPA Region 9's basis for not including limitations on emissions of CO_2 in the permit. Although Desert Rock Energy is the holder of the permit, it had not been given any indication that EPA or EPA Region 9 was considering such an action, and it received the Notice by e-mail less than 24 hours before this Brief was due. Given the exceptionally short notice provided by EPA Region 9, Desert Rock Energy is still examining this Notice and its implications for the matter before the Board, and reserves the right to brief the Board further on the Notice. Based on a cursory review of the issues raised by the Notice, however, Desert Rock Energy questions its legality, particularly because EPA Region 9's determination on the CO_2 question is non-discretionary in light of the December 18, 2008 Memorandum from Administrator Johnson entitled *EPA's Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Program* (the "Johnson Memorandum") and given the resolution of *Desert Rock Energy Company, LLC and the Diné Power Authority v. EPA*, No. 4:08-CV-872 (S.D. Texas, filed Mar. 18, 2008). It is puzzling that EPA Region 9 would solicit public comment on an issue already decided by the EPA Administrator, especially in light of the statements in the Johnson Memorandum making it clear that the interpretation made therein on this precise issue is not subject to public comment. *Johnson Memorandum* at 2, 16. Moreover, EPA Region 9 purports to withdraw certain sections of its Response to Comments document "under the authority of 40 C.F.R. 124.19(d)," which only allows a permitting authority to withdraw portions of an actual permit – not a section of the administrative record. The proper approach for changing or supplementing the administrative record is to seek a voluntary remand, not to "withdraw" a section of the administrative record under 40 C.F.R. 124.19(d). In any event, regardless of the merits of the Notice, Desert Rock Energy believes that the Board may benefit from symmetrical briefing on the CO_2 issue, and so respectfully submits its arguments on the same.

In November 2008, the Board addressed and dismissed many of Petitioners' arguments on this issue and ruled that it is not clearly erroneous for EPA to use its discretion to interpret the phrase "each pollutant subject to regulation under the act," and for an EPA regional office to decline to treat CO_2 as subject to PSD Best Achievable Control Technology ("BACT") requirements.[8] *In re Deseret Electric Power Cooperative*, PSD Appeal No. 07-03, slip op. at 20 (EAB Nov. 13, 2008) ("*Deseret*"). However, given the incomplete administrative record in that matter, *Deseret* left unresolved two remaining issues relating to whether a BACT analysis is required for CO_2: whether EPA has interpreted this phrase as requiring actual control of an emission, and (ii) if it has, whether that interpretation is clearly erroneous. On December 18, 2008, the EPA Administrator, Stephen L. Johnson (the "Administrator"), issued a reasoned memorandum in response to *Deseret* that definitively resolved those two questions. The Administrator interpreted the PSD permitting program requirements as excluding pollutants like CO_2 which are subject only to monitoring and reporting requirements, not actual control. All of the CO_2 BACT arguments raised by Petitioners in their briefs have been addressed either by the Board or the Agency, and it has been clearly established that a BACT is not required for CO_2, in a PSD permitting action. There are no remaining issues in controversy for the Board to review, and review must therefore be denied with respect to this issue.

The CAA requires anyone who wants to build a major new facility to obtain a PSD permit before beginning construction. CAA § 165(a)(4), 42 U.S.C. § 7475(a)(4). PSD permits are required to contain BACT emissions limits for "each pollutant subject to regulation under the Act." *Id*. The meaning of this phrase has been a point of significant debate since the U.S.

[8] *See generally* NGO Petitioners' Supp. Br., Section I.1.B.i.a–f (contending that the unambiguous plain meaning of sections 165 and 169 of the Clean Air Act is conclusive and requires BACT limits for CO_2).

Supreme Court ruled in *Massachusetts v. EPA*, 549 U.S. 497 (2007), that CO_2 is an "air pollutant" as defined under the Act. Litigants challenging PSD permits, including some of the present petitioners, have contended in multiple proceedings before the Board[9] that existing monitoring and reporting requirements, which have been in place since 1993, unequivocally constitute "regulation" of CO_2, making it a "pollutant" that is "subject to regulation under the Act." As a result, they allege, section 165 of the Act demands a BACT limit for CO_2 in PSD permits. The EPA has consistently stated that section 165 is not as clear as these litigants contend, and requires interpretation. EPA has further contended that it has historically interpreted section 165 so that monitoring and reporting requirements do not equate to "regulation," because they do not impose actual control of emissions of that pollutant.

In November 2008, the Board weighed in on the debate with its *Deseret* opinion. In *Deseret*, the Board held that section 165 "is not so clear and unequivocal as to . . . dictate whether the [EPA] must impose a BACT limit for CO_2 in the permit[]" and, "by its terms, does not foreclose the . . . meaning suggested by [EPA Region 8 and the Permittee.]" *Deseret*, slip op. at 29, 33. However, the Board also found that, while such an interpretation was not foreclosed, the administrative record before it did not support the EPA Regional Office's view that the Agency had actually interpreted "subject to regulation" to require actual control either. *Id*. at 3. The primary shortcomings of the record the Board identified were that the Regional Office "did not identify in its response to comments any Agency document expressly stating that 'subject to regulation' has this meaning[,]" and that "the historical Agency statements the Region identified

[9] *See In re Christian County Generation, LLC*, PSD Appeal No. 07-01; *In re Deseret Power Electric Cooperative*, PSD Appeal No. 07-03; *In re Northern Michigan University*, PSD Appeal No. 08-02.

in its response to comments are [not] sufficiently clear and consistent articulations of an Agency interpretation[.]" *Id.* at 3, 37.

Building on the Board's *Deseret* opinion, the Administrator recently issued a memorandum, "*EPA's Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program*" (the "Johnson Memorandum"). Acknowledging the Board's concern that the *Deseret* record was insufficient to verify the Agency's adherence to any particular meaning underlying the PSD BACT requirements, the Johnson Memorandum formally establishes the Agency's interpretation of "regulated NSR pollutant" – which, by definition, includes "any pollutant subject to regulation under the Clean Air Act" – as comprising only those pollutants subject to actual control. *See Johnson Memorandum* at 1. The Johnson Memorandum answers EAB's in *Deseret* for an action of nation-wide scope by promulgating a universally applicable explanation of existing regulatory requirements that eliminates confusion in those cases with sparse records akin to the *Deseret* record, and resolutely establishing that "permits already under review [need not] require limitations on pollutants subject only to monitoring and reporting requirements." *Id.* at 16; *see also id*. at 2.[10]

The Johnson Memorandum and the strength of the Desert Rock administrative record (should the Board decline to consider the Johnson Memorandum when addressing the present petitions for review of the Desert Rock PSD Permit) reveal that all of Petitioners' arguments to the effect that BACT is required for CO_2 have been resolved. EPA has interpreted the phrase

[10] Though issued after the Desert Rock PSD permit was granted, the clear statements of EPA interpretation and nationwide application of that interpretation directly inform the present debate (in a manner urged by the Board in *Deseret*). Section I.D.1, *infra*, discusses why the Board should consider and apply the Johnson Memorandum in its evaluation of Petitioners' CO_2 BACT arguments.

"subject to regulation" as excluding CO_2, and this interpretation as explained by the Johnson Memorandum and supported by the Desert Rock administrative record, is not erroneous. Because there are no longer any issues in controversy with respect to this issue, the Board must therefore deny review of this issue.

A. The *Johnson Memorandum* Definitively Establishes that CO_2 is Not a Pollutant Subject to Regulation Under the Clean Air Act.

1. *The Johnson Memorandum Presents a Clear Agency Interpretation of The Phrase "Subject To Regulation."*

The Johnson Memorandum is a formal, interpretative embodiment of what has consistently been EPA's historical practice of excluding from the PSD program CO_2 and other pollutants not subject to actual control. Answering the Board's call in *Deseret* for a clear Agency statement to guide the Board in pending cases such as the present appeal, the Johnson Memorandum explains that the existing regulatory requirements of the PSD program "exclude pollutants for which EPA regulations only require monitoring or reporting but . . . include each pollutant subject to either a provision in the [CAA] or regulation adopted by EPA under the [Act] that requires actual control of emissions of that pollutant." *Johnson Memorandum* at 1, 2; *see also Deseret*, slip op. at 64. This interpretation was based on the language and structure of the PSD regulations as well as significant policy considerations and a review of EPA's historical understanding of "regulated," which revealed that "as a matter of practice, EPA has not issued PSD permits containing emission limitations for pollutants that are only subject to monitoring and reporting requirements," nor has EPA made any statements or produced any documents inconsistent with this interpretation. In light of these considerations, and the thorough analysis undertaken by the Administrator in the Johnson Memorandum, this interpretation is neither

clearly erroneous nor contrary to the wording of the regulation. For a more detailed discussion of the reasonableness of this interpretation, see *infra*, Section I.D.

2. *As A Formal Agency Interpretation, Any Deviation from The Position Taken In The Johnson Memorandum Would Require Notice and Comment Rulemaking.*

In *Deseret*, EPA established, and the Board agreed, that in 1977 and 1978, EPA introduced an interpretation of the phrase "subject to regulation," as meaning "regulated under the Act." *Part 52 – Approval and Promulgation of State Implementation Plans*, 43 Fed. Reg. 26,388, 26,397 (June 19, 1978) (the "1978 Preamble"); *Deseret*, slip. op. at 37-38. The interpretation did not go so far as to interpret what "regulated under the Act" meant. The *Deseret* administrative record referenced several documents, statements and decisions that EPA Region 8 said clearly linked the word "regulated" to EPA's purported agency definition of "actual control." The Board reviewed each of these citations and ultimately concluded that none of them contained a clear statement actually making that connection. Thus, the Board held that there was no evidence that EPA had actually considered the issue or offered a definitive interpretation either way. *Deseret*, slip op. at 35. The Johnson Memorandum provides that definitive interpretation.

The Johnson Memorandum explains how EPA interprets the phrase "subject to regulation" in both the statutory and regulatory text establishing the PSD program. The Administrator considered EPA's historical statements and conduct since 1977 to support the interpretation it sets forth: that "regulation" requires "actual control." *See Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 629 (5th Cir. 2001) ("existing practice" evidence of current interpretation of regulation). It is important to note that in setting forth this interpretation, the Administrator considered public comments received in pending discussions of greenhouse gases, but did not

solicit public comments specifically on its interpretation. Under the Administrative Procedures Act ("APA"), this is the Administrator's prerogative when issuing an interpretation that does not reverse an existing position of the agency.

As the Board recognized in *Deseret*, such an interpretation can only be changed – to the result Petitioners seek, or otherwise – through notice and comment rulemaking. *See Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, 100 (1995); *Paralyzed Veterans of Am. v. D.C. Arena, L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997)(citing 5 U.S.C. § 551(5)); *Syncor Int'l Corp v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997). Absent such a rulemaking, EPA's interpretation should stand as the definitive interpretation from which the APA prohibits deviation without proper notice and comment rulemaking.

B. The Desert Rock Administrative Record Also Shows that EPA Has Understood "Subject To Regulation" as Requiring Actual Control of Emissions of a Pollutant.

1. *The Desert Rock Administrative Record is More Detailed than the Deseret Administrative Record, and Clearly States EPA's Position.*

In further support of EPA Region 9's decision to issue the Desert Rock PSD Permit without CO_2 BACT analysis and to the extent that the Board does not consider the Johnson Memorandum in this matter, it should be noted that the Desert Rock administrative record does not have the same shortcomings as the *Deseret* record was found to have. Independent of the Johnson Memorandum, the Desert Rock administrative record clearly establishes that an EPA-wide understanding of the meaning of "subject to regulation" constrained EPA Regional Offices from imposing BACT limits for CO_2 in PSD permits, and that that constraint is entitled to deference from the Board.

The administrative record for a final PSD permit is comprised of the administrative record for the draft permit, all comments received during the public comment period, the

transcripts or tapes of hearings, and written materials submitted at hearings, the EPA's response to comments, other documents contained in the supporting file for the permit, "any documents cited in the response to comments," and the final permit. 40 C.F.R. §§ 124.17(b), 124.18. While documents are generally required to be added to the administrative record, "published materials which are generally available and which are included in the administrative record need not be physically included in the same file as the rest of the record as long as it is specifically referred to in the statement of basis or fact sheet or in the response to comments." 40 C.F.R. § 124.19.

In *Deseret*, the public comment period lasted thirty days, during which time the EPA received one comment letter and one comment e-mail that expressed concerns with the draft permit and/or Statement of Basis. Only one additional letter expressing concern about the project was received by EPA after the close of the public comment period. The response to comments concerning the CO_2 issue spanned 5 pages (of 20). *See* Response to Public Comments on Draft Air Pollution Control PSD Permit to Construct for Permit No. PSD-OU-0002-04.00 (August 30, 2007) (available at http://www.epa.gov/ Region8/air/pdf/ResponseToComments.pdf). After a review of the *Deseret* record, the EAB concluded that neither the response to comments nor any document referenced therein[11] pointed to a clear statement by EPA that it understood "subject to regulation" as requiring actual control of emissions.

[11] The *Deseret* record cited to the following sources of authority on EPA's interpretation: the 1978 Preamble; *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR)*, 61 Fed. Reg. 38,250, 38,309-10 (proposed July 23, 1996) (the "1996 Regulations"); *Final Rule: Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Baseline Emissions Determination, Actual-to-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects*, 67 Fed. Reg. 80,186, 80,230 (Dec. 31, 2002) (the "2002 Final Rule").

Because the Desert Rock permit was issued almost a year later than the *Deseret* permit, the Desert Rock administrative record is much stronger and presents new support and sources that the Board has not yet considered, as well as addresses the impact of intervening events. It also includes clear articulations of the Agency's considered position. The Desert Rock public comment period for the proposed permit lasted sixteen weeks, and included informal and formal public hearings. AR 120 at 1. Prior to the close of the public comment period on November, 13, 2006, EPA received 681 comment letters by mail, in person or via fax; 246 e-mails or letters submitted via e-mail; and 61 comments given by oral testimony at the formal hearings. EPA also accepted late comments received up to April 15, 2007, and responded to them in its supplemental response to comments. The Response to Comments exceeded 220 pages. AR 120 ("Response to Comments"). Three additional late comments were submitted on October 4 and October 10, 2007 and on March 4, 2008.[12] *See* AR 121 at 1. Because of events that had occurred after the close of the comment period, EPA exercised its discretion and responded to these later comments via a 23-page Supplemental Response to Comments ("Response To Late Comments"). *Id*. As a document prepared to address issues that arose after the close of the Desert Rock (and *Deseret*) comment period, the Response to Late Comments includes a more developed discussion about issues the Board felt were not fully developed in *Deseret*, such as the relationship of section 821 of the Clean Air Act Amendments of 1990 and the BACT requirements, and the historical consistency of EPA's interpretation of "subject to regulation."

The Desert Rock administrative record also cites to and incorporates sources of authority on EPA's understanding of the PSD program requirements that were not included in the *Deseret*

[12] Additional late comments were received after March 2008; however, EPA declined to consider them because they were untimely.