

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC

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)	
IN THE MATTER OF:)	
)	
DESERT ROCK ENERGY COMPANY, LLC)	PSD APPEAL NOS. 08-03, 08-04,
)	08-05 & 08-06
PSD PERMIT NO. AZP 04-01)	
)	
_____)	

MOTION TO PARTICIPATE

Pursuant to 40 C.F.R. § 124.19 and the Environmental Appeals Board Practice Manual the American Coalition for Clean Coal Electricity (“ACCCE”) respectfully requests this Board to grant leave to file a brief opposing Region IX of the U.S. Environmental Protection Agency’s (“EPA”) Motion for Voluntary Remand (the “Motion for Remand”) no later than June 11, 2009.

ACCCE is a non-profit organization formed by the nation's coal-producing companies, railroads, a number of electric utilities, and related organizations for the purpose of educating the public (including public-sector decision-makers) about the benefits of affordable, reliable and environmentally compatible coal-fueled electricity. ACCCE, originally named the Center for Energy and Economic Development (CEED), was created in 1992. CEED combined with Americans for Balanced Energy Choices (ABEC) to become the American Coalition for Clean Coal Electricity “ACCCE” in 2008. On behalf of its members, ACCCE has long been an advocate of policies that advance environmental improvement, economic prosperity, and energy security. ACCCE is committed to continued and enhanced U.S. leadership in developing and deploying new, advanced coal technologies that protect the environment.

As part of its mission, ACCCE frequently participates in state and federal administrative agency proceedings, including before the U.S. EPA, on energy policy and environmental issues, including climate change, mercury, ozone, and regional haze, as well as the siting of new coal-fueled power plants. For instance, ACCCE has successfully participated in *CEED v. EPA*, 398 F.3d 653 (D.C. Circuit 2005), *American Corn Growers v. EPA*, 291 F.3d 1 (D.C. Cir. 2002), and *Utility Air Regulatory Group (UARG) v. EPA*, Case No. 05-1353.

On April 27, 2009, EPA filed in the above captioned proceeding its Motion for Remand. In its Motion for Remand, EPA seeks the Board's approval to remand back to EPA the PSD permit issued to Desert Rock Energy Company, LLC ("DREC") on July 31, 2008 to construct a coal fired power plant (the "Permit"). The basis for EPA's request for remand of the Permit is so that it may conduct further analysis and study in connection with authorization of the Permit. Specifically, in its Motion for Remand EPA requests that it be permitted to consider the effect of repeal of the grandfathering provision contained in 40 CFR 52.21(i)(1)(xi) relating to PM10 standards. Pursuant to Administrator Jackson's April 24, 2009 letter to EarthJustice, EPA intends to propose to repeal the grandfathering provision contained in 40 CFR 52.21(i)(1)(xi) relating to PM10 standards. Under this existing federal regulation, EPA may use PM10 as a surrogate to comply with the PSD requirements for PM 2.5. EPA applied this grandfathered provision when considering the Permit. EPA no longer wishes to apply the PM10 surrogate when considering the Permit. While EPA may intend to seek the repeal of this grandfathering provision, the regulation has not yet been repealed.

EPA also request that it be permitted to conduct further analysis under the Endangered Species Act ("ESA"). The Permit was issued with an express condition that construction of the DREC plant could not commence until completion of additional analysis required under the ESA. Initial analysis from the Fish and Wildlife Service indicates that emissions from the DREC

plant “may” impact wildlife, which EPA now says increases “the likelihood that the ESA consultation will lead to an amendment to the permit application or a modification of the PSD permit.” Motion for Remand at 10. As such EPA, wishes to conduct the analysis now because it anticipates that there will be amendments to the Permit, though there is no certainty that once the analysis is completed any amendments to the Permit will be required.

In its Motion for Remand EPA further requests that the Permit be remanded so that it may coordinate the BACT and MACT analysis, and consider integrated gasification combined cycle technology (“IGCC”) under BACT. Nothing requires EPA to coordinate BACT and MACT review or include IGCC under BACT. Nonetheless, EPA asserts that there is a likelihood of an overlap between BACT and MACT analysis and that they should be conducted concurrently. Similarly, EPA has rejected the prior EPA Administrator’s policy that IGCC need not be included under BACT and desires now to reconsider the scope of its BACT analysis.

Finally, EPA asserts in its Motion for Remand that the additional impacts analysis conducted relied heavily on a 1980 EPA document, which provides procedures for screening for the impacts of air pollution on plants, soils and animals. EPA now believes that additional screening is necessary to “strengthen compliance” with the appropriate regulations. Motion for Remand at 24. However, no order of this Board or EPA decision has rendered the 1980 analysis obsolete or inapplicable. EPA now merely desires to conduct further analysis based upon its conclusion that the 1980 analysis is not sufficient.

The effect of the Motion for Remand is to allow EPA to effectively withdraw the Permit after this Board has already accepted review of the Permit, which is prohibited. No new law, regulation or ruling has been adopted which directly affects the Permit and whether it should be withdrawn. Nowhere within the Motion for Remand does EPA assert that there has been an

error in its analysis; new evidence; misapplication of the law; failure to consider required data or information; or any similar circumstance that would cast doubt on whether the Permit was properly issued. EPA is asking this Board to remand the Permit for further review based not upon a legal premise, but because the new Administration disagrees with its predecessor's policies.

If granted, EPA's Motion for Remand will negatively affect the interests of ACCCE's members. Members of ACCCE are suppliers of coal. BHP Billton, a member of ACCCE and owner of BHP Navajo Coal Company, would be the supplier of coal to the DREC plant. BHP Navajo Coal Company is located on the New Mexico Navajo Indian Reservation, employing 433 people. If the Motion for Remand is granted it will indefinitely delay construction of the DREC plant. Such delay will cause harm to BHP Navajo Coal Company the supplier of coal to the DREC plant, and ACCCE's members.

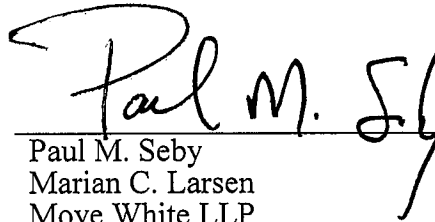
Further, if the Motion for Remand is granted it will negatively affect the interests of ACCCE's members many of whom are now, or in the future, seeking PSD permits. The effect of granting the Motion for Remand will set the precedent to allow current and future PSD permits, issued either by the EPA or under State PSD permit programs, to be effectively withdrawn and reevaluated causing great uncertainty and harm to the members of ACCCE. EPA has not established a legal basis for seeking remand of the Permit. If EPA's Motion for Remand is granted it will essentially allow EPA to change any issued PSD permit based upon a change in policy.

Finally, EPA is asking this Board to permit it to effectively deny the application for Permit more than one year from the date of filing, which it is not permitted to do under Section 165(c) of the Clean Air Act. "Any completed permit application under section 110 for a major emitting facility in any area to which this part applies shall be granted or denied not later than

one year after the date of filing of such completed application.” *Id.* The disruptive consequences that granting the Motion for Remand will have upon current and pending PSD permits is significant.

For these reasons ACCCE respectfully requests this Board grant its Motion to Participate and file a brief in opposition to EPA’s Motion for Remand no later than June 11, 2009.

Respectfully submitted this 19th day of May, 2009

A handwritten signature in black ink that reads "Paul M. Seby". The signature is written in a cursive style with a large, sweeping initial "P".

Paul M. Seby
Marian C. Larsen
Moye White LLP
1400 16th Street #600
Denver, Colorado
Phone: 303-292-2900
Facsimile: 303-292-4510
Paul.seby@moyewhite.com
Mimi.larsen@moyewhite.com

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion to Participate in the matter of Desert Rock Energy Company, LLC, PSD Appeal Nos. 08-03, 08-04, 08-05 & 08-06, were sent this 19th day of May via First Class Mail and Facsimile to the following persons:

Brian L. Doster
Air and Radiation Law Office
Office of General Counsel
Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, DC 20460
Fax: (202) 564-5603

Elliott Zenick
Air and Radiation Law Office
Office of General Counsel
Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, DC 20460
Fax: (202) 564-5603

Kristi M. Smith
Air and Radiation Law Office
Office of General Counsel
Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, DC 20460
Fax: (202) 564-5603

Ann Lyons
Office of Regional Counsel
EPA Region 9
75 Hawthorne Street
San Francisco, CA 94 105-3901
Fax: (41 5) 947-3570

Deborah Jordan
Director, Air Division (AIR-3)
EPA Region 9
75 Hawthorne Street
San Francisco, CA 94105-3901.
Fax: (41 5) 947-3579

Leslie Barnhart
Eric Ames
Special Assistant Attorney General
New Mexico Environment Department
PO Box 26110
Santa Fe, NM 87502-6110
Fax: (505) 827-1628

Seth T. Cohen
Assistant Attorney General
P.O. Drawer 1508
Santa Fe, NM 87504-1508
Fax: (505) 827-4440

Anne Brewster Weeks
Clean Air Task Force
18 Tremont Street, Suite 530
Boston, MA 02108
Fax: (617) 624-0230

Nicholas Persampieri
Earth Justice
1400 Glenarm Place, #300
Denver, CO 80202
Fax: (303) 623-8083

Kevin Lynch
Environmental Defense Fund
Climate and Air Program
2334 N. Broadway
Boulder, CO 80304
Fax: (303) 440-8052

Patrice Simms
Natural Resources Defense Council
1200 New York Avenue, N.W. Suite 400
Washington, DC 20005
Fax: (202) 289-1060

John Barth
PO Box 409
Hygiene, CO 80533
Fax: (303) 774-8899

Amy R. Atwood
Public Lands Program
Center for Biological Diversity
PO Box 11374
Portland, OR 97211-0374
Fax: (503) 283-5528

Stephanie Kodish
Clean Air Counsel
National Parks Conservation Association
706 Walnut Street, Suite 200
Knoxville, TN 37902

Louis Denetsosie, Attorney General
D. Harrison Tsosie,
Deputy Attorney General
Navajo Nation Department of Justice
PO Box 2010
Old Club Building
Window Rock, AZ 86515
Fax: (928) 871-6177

Leslie Glustrom
4492 Burr Place
Boulder, CO 80303

Jeffrey R. Holmstead
Richard Alonso
Bracewell & Giuliani LLP
2000 K Street, N.W.
Washington, DC 20006
Fax: (202) 857-4812
Fax: (202) 857-4824

Douglas C. MacCourt
Michael J. Sandmire
AterWynne, LLP
1331 NW Lovejoy
Portland, OR 97209-2785
Fax: (503) 226-0079

Kristen Welker-Hood, DSC MSN RN
Director of Environment and Health Progs.
Physicians for Social Responsibility
1875 Connecticut Avenue, N.W.
Suite 1012
Washington, DC 20009
Fax: (202) 667-4201

Justin Lesky
Law Office of Justin Lesky
8210 La Miranda Place NE, Ste 600
Albuquerque, NM 78109

Paul Seby & Marian C. Larsen
Moye White LLP
1400 16th Street #600
Denver, Colorado
Phone: 303-292-2900
Facsimile: 303-292-4510
Attorneys for ACCCE