

BEFORE THE ENVIRONMENTAL APPEALS BOARD  
U.S. ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, DC

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In re Desert Rock Energy Company, LLC )  
PSD Permit Number AZP 04-01 ) PSD Appeal No. \_\_\_\_\_  
\_\_\_\_\_ )

**PETITION FOR REVIEW,  
MOTION FOR EXTENSION OF TIME TO FILE SUPPLEMENTAL BRIEF,  
AND MOTION FOR STAY OF CERTAIN ISSUES PENDING THE BOARD'S  
DECISION IN *IN RE DESERET POWER ELECTRIC COOPERATIVE* (PSD  
APPEAL NO. 07-03)**

**I. INTRODUCTION**

Pursuant to 40 C.F.R. § 124.19(a), Petitioners Dine Care, Environmental Defense Fund, Grand Canyon Trust, Natural Resources Defense Council, San Juan Citizens Alliance, Sierra Club, and WildEarth Guardians file this petition for review of the Prevention of Significant Deterioration ("PSD") Permit issued by the U.S. Environmental Protection Agency, Region 9 ("Region 9" or "the Region") on July 31, 2008, to Desert Rock Energy Company, LLC ("Desert Rock"). The permit authorizes construction of the Desert Rock Energy Project, a 1,500 Megawatt (MW) coal-fired power plant on Navajo Land approximately 25 miles southwest of Farmington, New Mexico (the "Desert Rock Permit"). EPA Region 9 issued this PSD permit because the proposed coal plant is on Navajo Land and the Navajo do not have an EPA-approved Tribal PSD program. A copy of the Desert Rock Permit is attached as Exhibit 1.

Petitioners contend that EPA committed numerous significant substantive and procedural errors in connection with issuing the Desert Rock Permit. Many of the errors

are attributable to EPA's decision to issue the permit in response to a lawsuit filed by the permittee, Desert Rock, before completing various analyses that are essential to the legality of the permitting process. These analyses may ultimately compel changes to the proposed plants that would significantly affect the terms of the PSD permit, or may compel denial of the permit. For example, EPA issued the permit without an Endangered Species Act consultation, Maximum Achievable Control Technology ("MACT") analysis for hazardous air pollutants, or proper analysis of whether the plant will cause or contribute to violations of the recently revised National Ambient Air Quality Standard ("NAAQS") for ground level ozone. EPA issued the permit without setting emission limitations for carbon dioxide, and without considering carbon dioxide emissions in making BACT determinations for other pollutants through the collateral impacts analysis required by Section 169(3) of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. § 7479(3). EPA failed to assess collateral impacts by illegally issuing the permit before conducting the mandatory ESA consultation and MACT analysis, and before completion of an environmental impact statement ("EIS") by the Bureau of Indian Affairs ("BIA"). In so doing, EPA issued the permit without considering a number of issues, including mining-related impacts, coal combustion waste issues, issues related to the use and contamination of scarce water resources, and impacts on species and their habitat, soil, vegetation and agriculture. This approach has placed the public health, welfare and environment at risk, fundamentally undermined the PSD permitting process, and deprived the public of an ability to provide input on the appropriateness of the permit terms in light of these significant related effects. Based on these errors and the other errors listed below, Petitioners request that that the Environmental Appeals Board ("EAB" or "Board") grant

the petition for review and remand the Desert Rock Permit to Region 9 with instructions for EPA to correct all substantive and procedural shortcomings and provide for appropriate supplemental public notice and comment after the required analyses have been completed and the permit has been corrected. If, after briefing, the Board does not remand the permit to EPA, it must, at a minimum, stay the proceedings and retain jurisdiction over the permit, pending completion of the critical analyses.<sup>1</sup>

For the reasons discussed more fully below, including the number and complexity of the issues, the volume of relevant materials, and the unavailability of Petitioners' expert witnesses, Petitioners request a 45 day extension of time, until October 17, 2008, to file a supplemental brief with a complete and detailed description of each objection to the Desert Rock Permit and the factual and legal justifications for such objections.<sup>2</sup> Additionally, Petitioners request that the Board stay briefing of Petitioners' claim that EPA was required in this instance to conduct a BACT analysis and establish BACT emission limitations for carbon dioxide, until the Board resolves the pending challenge for which it granted review in *In re Desert Power Electric Cooperative*, PSD Appeal No. 07-03.

## **II. PETITIONERS HAVE STANDING AND THE BOARD HAS JURISDICTION OVER THIS APPEAL.**

Each Petitioner satisfies the threshold requirements for filing a petition for review under 40 C.F.R. Part 124. In particular, each organizational Petitioners have standing to petition for review of the permit decision because each organization participated in the

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<sup>1</sup> Petitioners reserve the right to request additional relief in briefing or motions.

<sup>2</sup> Petitioners request this extension of time to submit "specific information" to "demonstrate why the permitting authority's response to [Petitioners'] objections warrants review," in order to fully comply with the Board's filing requirements as outlined in the EAB Practice Manual. EAB Practice Manual at 33.

public comment period and/or in public hearings on the draft permit. *See* 40 CFR §124.19(a). Petitioners filed written comments during the public comment period. *See, egs.,* Comment Letters 15 (Sierra Club)(Ex. 2), 16 (SJCA)(Ex. 3), 17 (SJCA)(Ex. 4) and 23 (all Petitioners) (Ex. 5).<sup>3</sup> The issues raised by Petitioners here were either raised with EPA during the public comment period or were not reasonably ascertainable during the public comment period. Consequently, the Board has jurisdiction to hear Petitioners' timely request for review. *See* 40 C.F.R. § 71.11(g).

### III. STATEMENT OF FACTS

On May 7, 2004 Steag Power LLC submitted a PSD permit application to Region 9 for the proposed Desert Rock coal plant. Doc. No. 1110-0012. The permit application was 123 pages in length and included 7 voluminous attachments. *Id.* On May 21, 2004, Region 9 notified the permit applicant that the permit application was complete. Doc. No. 1110-0014. The permit applicant subsequently submitted to Region 9 numerous additional volumes of information in support of the application. *See, egs.,* Doc. Nos. 1110-0037, 0038, 0043 and 0077. On or about September 10, 2004 Steag Power LLC

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<sup>3</sup> EPA's Response to Public Comments includes an index of the public comments received as of November 13, 2006. *See* Doc. No. 1110-0120, at 196. Petitioners filed additional supplemental comments after November 13, 2006, raising issues related to significant events that occurred after the close of the public comment period. *See, egs.,* Comment Letters 1011 (10/4/07 all Petitioners)(Ex. 6), 1012 10/9/07 Environmental Defense Fund(Ex. 7), and 1013 (3/4/08 several Petitioners)(Ex. 8); Doc. No. 1110-0055 (4/24/08 all Petitioners)(Ex. 9); Doc. No. 1110-0106 (4/25/08 several Petitioners)(Ex. 10). Doc. No. 1110-0062 (6/17/08) (all Petitioners)(Ex. 11); Doc. Nos. 1110- 0123 – 0123.4 (EDF 7/31/08)(Ex. 12). EPA agreed to respond to some, but not all of the supplemental comments submitted after the close of the public comment period. *See* EPA Response to Late-filed Public Comments, Doc. No. 1110-0121, at 1. Petitioners hereby adopt and incorporate by reference into this Petition all of the comments filed by one or more of the Petitioners. We are filing a version of Ex. 5 with a corrected formatting error that previously was submitted to EPA and should be included in the administrative record in lieu of the version that EPA has placed in the record.

sold the rights to the Desert Rock coal plant, and those rights were acquired by Sithe Global Power LLC (“Sithe”). Doc. No. 1110-0017. On July 17, 2006, Region 9 proposed to issue a PSD air permit to Sithe for the Desert Rock coal plant. Doc. No. 0010-0045. The deadline for submitting public comments on the proposed PSD permit was November 13, 2006. Doc. No. 1110-0019. EPA conducted public hearings on the draft permit on September 14-17, 2006 in Arizona, New Mexico, and Colorado—including at locations on the Navajo Nation. EPA received over 1,000 public comment letters on the draft PSD permit comprising thousands of pages of comments. Doc. No. 1110-0019. Petitioners submitted over 100 pages of comments, including four expert reports assessing the scientific veracity of the draft permit. *See* Pages 3 - 4, above, and Exs. 2-12.

Several important events occurred subsequent to the close of the public comment period on the draft PSD permit. First, the United States Supreme Court issued its ruling in *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007) holding that carbon dioxide is an “air pollutant” under the Clean Air Act. The Desert Rock coal plant will emit 12.7 million tons/year of carbon dioxide and over 635 million tons of the greenhouse gas over its expected 50-year lifetime. Regulation of carbon dioxide emissions from the Desert Rock plant is prominent in the comments submitted by Petitioners and others. *See, egs.*, Ex. 5, at 4-12; Ex. 6, at 1-23. Second, the Intergovernmental Panel on Climate Change issued its Fourth Report concluding that climate change is being caused by man-made emission of greenhouse gases. *See* Ex. 6, at 2-6. Third, on March 14, 2008, the U.S. Circuit Court for the District of Columbia issued the Mandate in *New Jersey v. EPA* concluding that electric generating units such as Desert Rock are subject to a case-by-case Maximum

Achievable Control Technology (“MACT”) regulation for all hazardous air pollutants (“HAPs”). *See* Ex. 8; Ex. 11, at 15-18. Further, on May 20, 2008, the Court denied the petition for reconsideration filed by EPA and industry intervenors. *See* Ex. 11, at 15-18. The finality of the D.C. Circuit’s review demonstrates compellingly that EPA (or an otherwise appropriate permitting authority) must issue a 112(g) MACT determination for Desert Rock prior to issuance of the final PSD permit.

Petitioners submitted the above-referenced information to Region 9 to supplement their initial comment letter. Moreover, in light of this new information and the deficiencies of the draft permit, on April 25, 2008 Petitioners requested that Region 9 withdraw its May 21, 2004 determination of completeness of Sithe’s permit application. Ex. 10. Region 9 never responded to this request.

On July 31, 2008, Region 9 issued its PSD permit. Region 9’s response to public comments is over 250 pages in length and responds to Petitioners’ initial comment letter and certain supplemental comment letters. It took Region 9 twenty months from the close of the public comment period to finalize the PSD permit and respond to comments.

#### **IV. ISSUES PRESENTED FOR REVIEW**

Petitioners identify here the general issues that were raised in public comments on the Draft Permit, which Petitioners preliminarily believe provide grounds for Board review. The issues justifying review and remand of this Permit include:

A. EPA’s failure to conduct a best available control technology (“BACT”) analysis and set forth in the permit emission limitations for carbon dioxide (CO<sub>2</sub>) as

required by CAA § 165(a)(4) in light of the U.S. Supreme Court's decision in *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007);

B. EPA's failure to consider collateral environmental, energy and economic costs and impacts associated with emissions of CO<sub>2</sub> from the proposed Desert Rock coal plant, including their contribution to global warming and its devastating impacts and the collateral costs associated with complying with anticipated future regulation of carbon dioxide emissions from power plants;

C. EPA's failure to require CO<sub>2</sub> emission reductions, facility changes, or other CO<sub>2</sub> mitigation options, or alternative electricity-generation, energy conservation and efficiency methods, in connection with its exercise of authority under CAA § 165(a)(2) to consider and require alternatives to the proposed project;

D. EPA's failure to require detailed consideration of production processes, fuel cleaning, and innovative fuel combustion techniques such as integrated gasification combined cycle (IGCC), as available emission control technologies in performing a top-down BACT analysis;

E. EPA's failure to complete, or even meaningfully begin, consultation under section 7 of the Endangered Species Act prior to issuing the Permit, and unlawful delegation of its duty to consult to the BIA;

F. EPA's failure to require an analysis of Desert Rock's obligation to achieve reductions in hazardous air pollutant emissions under section 112(g) of the Act, 42 U.S.C. § 7412, through application of case-by-case MACT, and failure to consider, or meaningfully evaluate in any way, the implications of MACT analysis on plant design,

configuration, or operation, and corresponding implications for PSD pollutant control options, BACT, alternatives analysis, or collateral environmental impacts;

G. EPA's failure to adequately consider collateral environmental, energy, and economic costs and impacts of the proposed power plant and related operations, including those associated with coal mining, coal combustion waste, emission of hazardous air pollutants (including mercury), impacts on species and habitat, use of limited water resources, impacts to water quality, and impacts to agriculture;

H. EPA's failure to coordinate its PSD permit proceedings with the continuing National Environmental Policy Act ("NEPA") EPA proceedings being conducted by the BIA and EPA's own review of and comments on BIA's draft Environmental Impact Statement, including the failure to adequately consider comments submitted on the Draft Environmental Impact Statement ("DEIS") in the PSD permit proceeding, and the unlawful deferral of consideration of a number of issues relevant to the establishment of the permit's terms and conditions to the as yet uncompleted final environmental impact statement, including issues associated with impacts of mining operations, coal combustion waste, use of limited water supplies, impacts to water quality, and impacts to agriculture.

I. EPA's failure to conduct satisfactory BACT analyses and set forth in the permit appropriate BACT emission limitations for sulfur dioxide ("SO<sub>2</sub>"), nitrogen oxides ("NO<sub>x</sub>"); particulate matter ("PM") ; fine particulates (" PM 2.5") ; Sulfuric Acid Mist; Fluorides; Volatile Organic Compounds ("VOC"), Carbon Monoxide ("CO"); and Lead;



J. EPA's failure to identify appropriate emissions limitations for periods of startup, shutdown and malfunction, and for auxiliary boilers and emergency generators;

K. EPA's failure to require an adequate assessment of impacts on soil and vegetation, and corresponding failure to require that a full and robust soil and vegetation impacts analysis be made available prior to any public hearing;

L. EPA's failure to adequately assess and model the impacts of the proposed plant on ambient levels of ozone, PM, PM 10, PM 2.5, NO<sub>x</sub> (NO<sub>2</sub>), and SO<sub>2</sub>, and failure to demonstrate or require the permit applicant to demonstrate that emissions from the plant will not cause or contribute to violations of the NAAQS for those pollutants, and applicable maximum allowable increases or maximum allowable concentrations (increments) for Class I and Class II areas. These errors include failure to adequately assess and model emissions from the Desert Rock Energy Project, use of inappropriate models, modeling inputs and assumptions, unlawful reliance on significant impact levels, failure to use appropriate background concentrations, and failure to adequately account for emissions from other sources, including the San Juan Generating Station, Four Corners Power Plant, and extensive, expanding oil and gas operations;

M. EPA's failure to adequately assess and model the impacts of the proposed plant on ambient air quality and air quality related values (including visibility and regional haze) for Class I areas, and failure to take appropriate action in response to federal land manager objections to the project's impacts to air quality related values in Class I areas;

N. EPA's failure to disclose to the public the entity to which it issued the permit in advance of action on the permit;

O. EPA's improper reliance on Sithe's unenforceable mitigation strategy to avoid adverse air impacts;

P. EPA's failure to identify in its public notice, the degree of increment consumption expected in all areas to be impacted by the facility;

Q. EPA's failure to include in the permit a requirement that the permittee be bound by representations made in the permit application;

R. EPA's failure to comply with environmental justice requirements;

S. EPA's failure to take into account information and analyses generated in connection with the State of New Mexico's government-to-government consultation with the Navajo Nation; and

T. EPA's failure with regard to numerous issues, to provide meaningful and adequate notice and opportunity to comment by failing to conduct or deferring until after issuance of the permit (and after the sole public comment period) numerous analyses (including those described in issues A-S, above) that must inform EPA's decision whether to issue the permit and EPA's setting of the permit's terms and conditions.

In their supplemental brief, Petitioners may narrow the list of issues described above to focus on those issues that Petitioners believe, after full examination of the record, most warrant Board review. Petitioners may also supplement the issues described above if their continuing review identifies additional issues that warrant Board review.

**V. MOTION FOR EXTENSION OF TIME TO FILE SUPPLEMENTAL BRIEF**

Petitioners hereby move for a 45-day extension of time, until October 17, 2008, to file a supplemental brief in support of their Petition for Review. In general, the Board will grant reasonable extensions of time for good cause shown. The Board routinely

grants such extensions in PSD cases. *See In re Northern Michigan University*, Order Granting Motion for Extension of Time to File Response (July 10, 2008) (granting a 20 day extension where Michigan requested “additional time to evaluate and respond to the petition due to the number and complexity of legal arguments . . .”); *In re Deseret Power Electric Cooperative*, Order Granting Extension of Time (Feb. 12, 2008) (granting permittee’s 30 day extension request because “briefs raise several new legal arguments and introduce a substantial amount of additional factual, scientific, and technical information;” the Board granted additional extensions in this case on February 20 and July 10, 2008); *In re ConocoPhillips Co.*, Order (Oct. 1, 2007) (granting an extension of 33 days for Illinois EPA to file a supplement response brief, even in light of permittee’s motion for expedited consideration of the Permit).

Additionally, the Board will, where appropriate, grant extensions of time to file supplemental briefing on an initial petition for review. As the Board has explained, “[t]he Board has, on occasion and for good cause shown, granted this kind of motion and entertained such supplemental briefs.” *In re Town of Marshfield*, NPDES Appeal 07-03, slip op. at fn.10 (EAB, March 27, 2007). The Board has in fact granted such an extension in at least one PSD case. *See In re BP Cherry Point*, 12 E.A.D. 209, 215 (EAB 2005) (in which the Board granted multiple requests from a pro-se petitioner for a total extension of 40 days to file a supplemental brief in support of a petition for review).

In this instance, a 45-day extension of time is reasonable and appropriate. The administrative record in this case is voluminous. In addition to the hundreds of pages of application materials, there are hundreds of supporting documents (now available at <http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=EPA->

R09-OAR-2007-1110), reflecting new factual, scientific, and technical information.

There were more than 1,000 comments filed on EPA's Draft Permit during the public comment period, and at least another six significant supplemental comment letters filed by conservation organizations after the close of the comment period. *See* Page 4, and Exs. 6-12. Moreover, EPA's Response to Comment ("RTC") documents addressing the numerous significant issues raised by the public comments total some 250 pages.

The number and complexity of significant issues raised in this case are illustrated by the 20 months it took EPA after the close of the public comment period to digest and respond to public comments, and perform any necessary investigation and analysis prior to issuing the final permit. Petitioners have begun to evaluate the record in light of EPA's RTCs. However, it would be unreasonable to expect Petitioners to process this administrative record, including supporting materials that have only recently become available, fully evaluate EPA's responses to the numerous (and often very technical) substantive comments, and prepare a complete and robust factual and legal analysis in support of a petition for review in just 30 days. It is, in fact, in the best interest of the Board to allow sufficient time for a well crafted and fully developed briefing.

Moreover, Petitioners will need to consult with their expert witnesses regarding EPA's response to comments and how, if at all, EPA has altered the Permit to address Petitioners' comments. Petitioners also intend to have their experts review the Petition for scientific accuracy. At least one of Petitioners' expert witnesses is unavailable until October 1, 2008 due to other concurrent deadlines. Accordingly, allowing the requested extension will allow Petitioners to confer with their expert witnesses and further the scientific accuracy of their Petition.

In addition, Petitioners include numerous conservation and citizen organizations, and some coordination must occur between these groups to allow for a joint petition for review (which is in the interest of judicial economy). The complicated technical nature of some of the central issues in this proceeding also requires that Petitioners consult with the technical experts who were involved in the generation of certain public comments. The issuance of this final permit mid-summer has resulted in scheduling conflicts that, absent an extension, will affect Petitioners' ability to adequately respond to EPA's analysis in support of the final permit.<sup>4</sup>

Finally, neither EPA nor the permittee would be prejudiced by the Board's grant of the requested extension of time.<sup>5</sup> Although the permittee may not begin construction until after a final permit has been issued by the Regional Administrator following the Board's review, the requested extension is unlikely to delay the permittee's plans to proceed with the project because a number of other regulatory actions or approvals must be secured before construction may commence. The Desert Rock Permit acknowledges that construction may not commence until consultation obligations under the Endangered Species Act are satisfied. Ex. 1, Permit Condition II.A. Furthermore, before construction may commence EPA must perform a comprehensive, source-specific MACT analysis for the proposed plant and establish emission limitations based on MACT for each hazardous air pollutant that the facility will emit. CAA § 112(g). In addition, the Bureau of Indian

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<sup>4</sup> If the Board requests, Petitioners will file appropriate declarations regarding these scheduling conflicts.

<sup>5</sup> Counsel for Petitioners contacted counsel for EPA during the week of August 4, 2008 and was advised that EPA was not taking a position on Petitioner's request at that time. Petitioners' request has changed since that discussion. Counsel for Petitioners unsuccessfully attempted to reach counsel for EPA on August 12, 2008 to ascertain whether EPA has a position on the precise extension of time and request for stay that Petitioners are now requesting.

Affairs must issue a Final Environmental Impact Statement before it decides whether to approve a lease required for the project. For these reasons, it is unlikely that granting the requested extension would prejudice the permittee. Any resulting prejudice would likely be relatively minor given the relatively short length of the requested extension—45 days.

Due to the existing September 2, 2008 deadline to file a Petition for Review that fully briefs all objections, and the extraordinary commitment of time and resources that Petitioners must continue to make in an effort to meet that deadline, Petitioners respectfully request the Board to expedite its consideration of this request for extension of time. For the reasons outlined above, Petitioners have good cause for an extension of time and the Board should grant Petitioners' request for a 45-day extension of time, until October 17, 2008, to file a supplemental brief in support of their Petition

**VI. REQUEST FOR STAY OF BRIEFING ON WHETHER EPA HAS UNLAWFULLY FAILED TO CONDUCT A BACT ANALYSIS AND SET EMISSION LIMITATIONS FOR CARBON DIOXIDE.**

In addition to requesting an extension of time to file a supplemental brief until October 17, 2008, Petitioners respectfully request a stay of all briefing on the issue of whether a remand is required because EPA has unlawfully failed to conduct a BACT analysis and include in the permit BACT emission limitations for carbon dioxide. Petitioners request a stay of briefing on this issue until the Board resolves the pending challenge to EPA's failure to include such emissions limitations in the PSD permit for Deseret Power Electric Cooperative, PSD Appeal No. 07-03.<sup>6</sup> In *Deseret*, Petitioner

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<sup>6</sup> Petitioners request a stay of briefing of only this issue. Petitioners desire to include in their supplemental brief for which they are requesting an extension of time until October 17, 2008, briefing of related issues, including EPA's failure to consider collateral impacts associated with carbon dioxide emissions from the plant in setting BACT emission

Sierra Club raised, and the Board granted review of the precise issue raised by Petitioners here—whether Section 165(a)(4) of the Clean Air Act and the Supreme Court’s decision in Massachusetts v. EPA, 127 U.S. 1438 (2007) require EPA to set emission limitations for carbon dioxide in a PSD permit because carbon dioxide is a “pollutant subject to regulation under [the Clean Air Act].” Deferring briefing of this issue until the Board rules on the issue in *Deseret* may spare the parties the time and expense of unnecessary briefing, would promote judicial economy, and would not unduly delay the Board’s consideration of this case.

On the one hand, a ruling by the Board that EPA’s failure to include BACT emission limitations for carbon dioxide in the *Deseret* permit was based on a clearly erroneous conclusion of law would likely be dispositive of the identical legal issue raised in this case. Indeed, EPA asserted the same basis for refusing to include emission limitations for carbon dioxide in the Desert Rock and Deseret permits. Specifically, EPA asserted that it lacks authority to impose such emission limitations because pollutants “subject to regulation under [the Clean Air Act]” are limited to pollutants “that are presently subject to a statutory or regulatory provision that requires actual control of emissions of the pollutant,” and carbon dioxide is not presently subject to such a statutory or regulatory provision. *See* Desert Rock Response to Comment II.B.3.b.i; Deseret Comments and Responses, Response # 1.a. (Ex. 3 to Petition for Review and Request for Oral Argument, Filing # 1, 10/1/2007). This is the precise issue for which the Board granted Sierra Club’s petition for review in *Deseret*.

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limitations for other pollutants, and EPA’s failure to require CO2 emission reductions, facility changes or other CO2 mitigations options under CAA § 165(a)(2).

On the other hand, a ruling by the Board that EPA's determination in *Deseret* was not clearly erroneous may allow the parties in this case to tailor their briefing to emphasize significant additional arguments that were not presented in *Deseret*. In *Deseret*, Sierra Club relies principally on monitoring and reporting requirements set forth in CAA § 821 to support its position that carbon dioxide is "subject to regulation under the Clean Air Act." In their comments on the Desert Rock Permit, Petitioners, in addition to relying on CAA § 821, asserted that carbon dioxide is subject to regulation under CAA Sections 111 and 202. Sections 111 and 202 require EPA to establish by regulation standards applicable to emissions of air pollutants from sources subject to those sections which "causes or contributes to air pollution which may reasonably be anticipated to endanger the public health and welfare." Ex. 6, October 4, 2007 Comments, Pages 11-17. Petitioners assert that pollutants "subject to" regulation include not only pollutants that are "currently regulated," but also pollutants for which EPA and the States have the authority to impose regulatory requirements, but have not yet exercised such authority. *Id.*, at 8. EPA is not only authorized to regulate carbon dioxide emissions, but due to the extensive, undisputed evidence that carbon dioxide is endangering and will continue to endanger the public health and welfare, EPA cannot lawfully conclude that the threshold for regulating carbon dioxide emissions under Sections 111 and 202 is not met. *Id.* at 1-20. Carbon dioxide is, therefore, subject to regulation under Sections 111 and 202 because EPA is not only authorized to, but is required to regulate carbon dioxide under those sections. *Id.* In support of this argument, Petitioners submitted with their comments extensive evidence of harm to public health and welfare attributable to carbon dioxide emissions. *Id.* Such evidence was not submitted with the comments on the



Deseret permit, and this argument was not briefed in that case. A ruling by the Board in favor of EPA on the carbon dioxide regulation issue in *Deseret*, may allow the parties in this case to focus their briefing on this and other issues that were not briefed in Deseret.

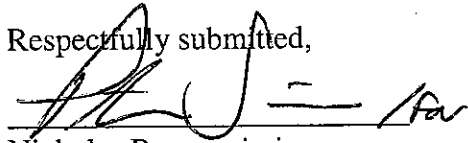
Thus, regardless of how the Board resolves the issue in *Deseret*, its ruling may enable the parties to avoid unnecessary briefing or to focus their briefing in this case on arguments that are more useful to the Board's consideration of this case. Further, because the parties would file their initial briefs on this issue after the Board's opinion in *Deseret*, there would be no need to file supplemental briefs based on the *Deseret* decision.

Petitioners do not know when the Board will render its decision in *Deseret*. On June 16, 2008, the Board ordered further briefing on the issue, which is to be completed by September 12, 2008. Filing No. 97. The Board will therefore likely be in a position to decide *Deseret* within a time-frame that would not unduly delay this appeal if the request to stay briefing of the carbon dioxide regulation issue is granted. For the reasons described above, a relatively brief delay in the resolution of this appeal is unlikely to prejudice either EPA or the permittee. See Page 13, above.

Due to the existing September 2, 2008 deadline to file a Petition for Review that fully briefs all objections, and the extraordinary commitment of time and resources that Petitioners must continue to make in an effort to meet that deadline, Petitioners respectfully request the Board to expedite its consideration of this request for stay. For the reasons described above, good cause exists to stay briefing on the issue of whether a remand is required because EPA has failed to conduct a BACT analysis and failed to

include in the permit BACT emission limitations for carbon dioxide pending the Board's ruling in *Deseret*, and the Board should grant the requested stay.

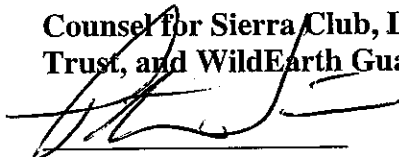
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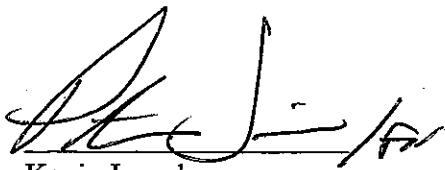
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**Of Counsel for Dine Care, San Juan Citizens Alliance, Grand Canyon Trust, and  
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August 13, 2008

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on August 13, 2008 he caused a copy of the foregoing to be served by mail on:

Deborah Jordan  
Director, Air Division (Attn: AIR-3)  
EPA Region 9  
75 Hawthorne Street  
San Francisco, CA 94105-3901

and

Brian Doster  
U.S. Environmental Protection Agency  
Office of General Counsel  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

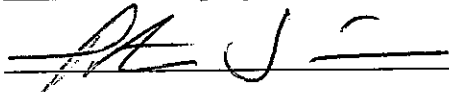
and by electronic mail to

[DesertRockAirPermit@epa.gov](mailto:DesertRockAirPermit@epa.gov)

[R9AirPermits@epa.gov](mailto:R9AirPermits@epa.gov)

and

[doster.brian@epa.gov](mailto:doster.brian@epa.gov)



A handwritten signature in black ink, appearing to read "B. Doster", is written over a horizontal line.