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

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

CONSERVATION PETITIONERS' REPLY TO DESERT ROCK ENERGY COMPANY AND AMERICAN COALITION FOR CLEAN COAL ELECTRICITY REGARDING THE ENVIRONMENTAL PROTECTION AGENCY'S MOTION FOR VOLUNTARY REMAND

Petitioners Center for Biological Diversity ("CBD"), Diné Care, Environmental Defense Fund, Grand Canyon Trust, Natural Resources Defense Council, San Juan Citizens Alliance, Sierra Club, and WildEarth Guardians (collectively "Conservation Petitioners") hereby file this reply to Desert Rock Energy Company ("DREC") and American Coalition for Clean Coal Electricity ("ACCCE") in support of the Environmental Protection Agency, Region 9's ("Region 9") Motion for Voluntary Remand ("Remand Motion").

I. DREC HAS NO FINAL PERMIT AND HAS NO VESTED RIGHT OR PROPERTY INTEREST BASED ON A PENDING PSD PERMIT APPLICATION.

In each of their arguments, DREC and ACCCE incorrectly presume that DREC has a protectable property or other vested interest in a Prevention of Significant Deterioration ("PSD") permit based upon a pending application and a non-final permit decision by Region 9. This presumption makes a shaky foundation for DREC and ACCCE as it is incorrect and unsupportable under the law.

When a petition for review is filed with the Environmental Appeals Board

("EAB"), final agency action does not occur until all administrative processes, including the EAB review process, are exhausted. 40 C.F.R. § 124.19(f)(1). Only after completion of the appeal may "[a] final permit decision" be "issued by the Regional Administrator," which must thereafter be "promptly published in the Federal Register." 40 C.F.R. § 124.19(f)(1)-(2). See also 40 C.F.R. § 124.15(b) (a final permit decision by the agency becomes effective 30 days after service of notice of the decision unless, *inter alia*, review is requested under 40 C.F.R. § 124.19). No permit applicant, including DREC, may reasonably rely on the terms of a permit as reflecting the final determination of the Agency until the entire administrative process is complete and a final permit has been issued.[1] As noted by the D.C. Circuit in American Corn Growers Ass'n. v. EPA, 291 F.3d 1, 12 (D.C. Cir. 2002), nothing in the PSD permitting program or the Clean Air Act generally, creates an entitlement to a permit to emit air pollutants, nor issuance of a PSD permit as a matter of right.[2]

To date, the EAB has not issued any final rulings regarding the Permit and in fact part of the Permit has already been withdrawn. At this juncture, DREC has not received a final and effective permit from the Environmental Protection Agency ("EPA").

[1] In fact DREC and EPA have repeatedly argued that the PSD permit at issue here isn't final in responses to Conservation Petitioners' arguments regarding completion of Section 7 Consultation under the Endangered Species Act.

[2] See similar reasoning in Belle Company LLC v. State ex rel. Dept. of Environmental Quality, ___ So. 3d ___, 2009 WL 1643337, *8 (La. App. 2009) where the court finds permit applicant's ability to operate a landfill entirely subject to the state's regulatory power, and that any expectation arising from a permit application did not constitute a property right protected by the Louisiana Constitution. "While Belle does have a right to timely consideration…of its permit application…given the heavily regulated nature of solid waste disposal practices and given the public health and safety issues concerned, we find that such a right is not a property right…" Id.

II. SECTION 124.19(d) DOES NOT PROHIBIT REMAND OF THE PERMIT

DREC and ACCCE are also wrong in their characterization of 40 C.F.R. § 124.19(d). Section 124.19(d) speaks only to the Region 9's ability to unilaterally withdraw permits before review is accepted. Contrary to DREC and ACCCE's arguments, there is no converse prohibition on request for remand, nor can one be inferred.[3] Under EPA's regulations, a permitting authority may withdraw a permit without seeking leave to do so, prior to the EAB accepting a matter for review. After review is granted, a permitting authority may no longer unilaterally withdraw a permit, but may request full or partial withdrawal (in the form of remand) and the EAB may grant such request.[4] This is precisely what Region 9 has done in this instance and this Board, having provided ample notice and opportunity for the other interested parties to be heard, should judge the request on its merits.

III. SECTION 165(c) OF THE CLEAN AIR ACT DOES NOT BAR REMAND AND IS NOT AT ISSUE IN THIS APPEAL.

DREC's argument that EPA's request for voluntary remand violates CAA section 165(c), 42 U.S.C. § 7475(c), miscomprehends the limits of that section of the statute and must fail. Indeed, DREC's Response fails to identify what relief it seeks or could seek under Section 165(c), or whether this Board has jurisdiction to hear claims or grant under Section 165(c). See DREC Resp. at pp.13-16.

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[3] Moreover, it is absurd for DREC and ACCCE to suggest there is such a prohibition in light of the fact that motions for remand are frequently requested and granted even after a matter has moved past the administrative review stage into the judicial review stage. It makes no sense that there would be an interim period of time, while the matter is still effectively before the agency, where remand is completely prohibited.

[4] Again, it should be noted that this case is in the same procedural posture today as when the EAB granted review, meaning there is no prejudice to DREC from a remand at this point in the case.

First, section 165(c) has clearly been satisfied in this case.[5] EPA clearly has "granted" a permit for DREC, having done so pursuant to the suit brought by DREC.[6] But section 165(c) clearly cannot be read to bar subsequent remand of a permit once it has been issued, whether remand is by action of the EAB after an administrative appeal, or on a motion for voluntary remand. Otherwise the administrative appeals process would be rendered a nullity.[7]

Second, the EAB must reject DREC's attempt to insert issues related to section 165(c) into this appeal. DREC audaciously and without a shred of support, claims that Section 165(c) is "at the center of this proceeding" before the EAB. DREC's assertions are wrong. The scope of this proceeding is governed by the Petitions for Review. None of the Petitions for Review alleges a violation of Section 165(c), nor did DREC appeal any aspects of the PSD permit to this Board. Therefore, DREC failed to raise any violation of section 165(c) at the proper time to do so. Accordingly, no party has directly

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[5] Section 165(c) provides that EPA must issue a permitting decision within one year of determination that a permit application is deemed complete. 42 U.S.C. § 7475(c). In analogous circumstances EPA has interpreted its obligations as demanding either a denial or an initial issuance of the requested administrative action. For example, EPA reads its obligations under CAA section 112(b)(3) to mean that it must either deny the petition or issue a notice of proposed rulemaking that "proposes a modification of the HAPs list and presents the reasoning for doing so" within the time allotted. See, e.g., Notice of receipt of a complete petition to delist methyl ethyl ketone from the list of Hazardous Air Pollutants (HAPs), 64 Fed. Reg. 33453 (June 23, 1999). Requiring a complete processing of a petition, public comment, agency review, and a completed rulemaking within the 18 months required by section 112(b)(3) would hopelessly truncate the administrative process and undermine the quality of EPA's decision-making. The same is true here. Thus, a permitting authority should be considered to have met its obligation to "grant" a PSD permit when it issues that permit, even though final agency action may not occur until the permit decision has survived administrative review.

[6] Administrative Record ("AR") at Document 98.

[7] Indeed, the explicit mention of remand in the EAB rules at 40 C.F.R. § 124.19(d) indicates that voluntary remand after permit issuance is clearly within the EPA's authority without running afoul of the section 165(c) requirements.

raised a violation of section 165(c) in this proceeding.

Finally, the EAB does not have jurisdiction to hear and consider a section 165(c) claim as the party alleging a violation of Section 165(c) must bring such claim in the U.S. District Court. U.S. District Courts have exclusive jurisdiction to "compel…agency action unreasonably delayed." See, 42 U.S.C. § 7604(a). The plain language of the CAA provides that the proper forum for raising a claim under Section 165(c) is federal district court, not the EAB within the context of a motion for voluntary remand.[8]

The EAB should reject DREC's Section 165(c) arguments as a reason to deny Region 9's Remand Motion.

IV. VOLUNTARY REMAND IS NOT AN IMPERMISSABLE RETROACTIVE APPLICATION OF LAW

Sprinkled through ACCCE and DREC's response briefs is the unfocused argument that granting Region 9's Remand Motion would somehow violate a general prohibition against the retroactive application of law to DREC's non-final, non-effective Permit. DREC's retroactivity argument must fail because: 1) DREC does not have a final and effective permit; 2) Region 9 has discretion to apply new policy and guidance to existing non-final permitting decisions; 3) DREC's retroactivity argument is not ripe and is being made in the wrong forum; and 4) Congress has specifically directed that future rules and regulations must be applied to major stationary sources.

A. Retroactivity Is Not Implicated by Region 9's Remand Motion Because DREC Does Not Have a Final and Effective Permit.

As argued above, DREC does not have a final permit and thus issues of

[8] DREC recognized this jurisdictional requirement when it earlier challenged EPA's delay in making this permit decision in federal district court in Texas. Administrative Record ("AR") at Doc. 98.

retroactivity are not implicated. The unspoken assumption underlying DREC and ACCCE's "retroactivity" argument is that DREC presently possesses a final and unappealable permit to construct and operate the Desert Rock facility. This is a false assumption and therefore the foundation for any retroactivity argument is absent.[9]

B. Region 9's Request to Reexamine the $PM_{2.5}$ Provisions of the Permit Is Within Region 9's Sound Discretion and Is Not an Impermissible Reversal or Retroactive Application of New Law or Policy.

1. Region 9's request for remand to assess the $PM_{2.5}$ issue is not a reversal of rule or policy.

EPA had discretion to require a $PM_{2.5}$ National Ambient Air Quality Standards ("NAAQS") compliance analysis at the time DREC submitted its permit application and throughout the course of this proceeding. Further, the fact that the EPA has determined that the "grandfather" provision was illegally promulgated requires EPA to withdraw this portion of the Permit and reissue either a new permit, a new response to comments on this point, or both.

The history of the PM_{10} surrogate provision demonstrates that EPA has discretion to require further $PM_{2.5}$ compliance analysis at this time. DREC argues that the EAB cannot allow Region 9 to take a remand for the purpose of assessing DREC's $PM_{2.5}$ modeling and analysis and to conduct a $PM_{2.5}$ NAAQS compliance analysis, because use of PM_{10} surrogate modeling and assessment of emissions was "grandfathered" based on regulatory amendments promulgated and effective a few weeks before Region 9 issued the initial Permit to DREC. See DREC Resp. at pp. 18-20. DREC's rigid reliance on this

[9] Conservation Petitioners emphasize that DREC's Permit states, "EPA shall have the power to reopen and amend the permit …". See AR Doc. 122 at p. 2. The Permit contains no deadline by which EPA must file its request to reopen or amend the Permit. DREC did not appeal this provision of the Permit to EAB.

provision is not supported by EPA's position over the years.

DREC filed its PSD permit application with Region 9 in 2004. At that time, EPA's clearly-stated position was that its PM_{10} surrogate policy was nonbinding and permitting authorities could require a $PM_{2.5}$ NAAQS compliance analysis in a PSD permit application on a case-by-case basis. See Exhibit A "Interim Implementation for the New Source Review Requirements for $PM_{2.5}$ (Seitz Memo). EPA's position was also clear that use of PM_{10} as a surrogate was simply a stop-gap measure that EPA would use only until certain technical difficulties were worked out. Seitz Memo. See also 73 Fed. Reg. 28321, 28340 (May 16, 2008).

On May 16, 2008 (effective date July 15, 2008), EPA, without notice and comment, promulgated a "grandfather" rule excusing certain previously-filed PSD permit applications from the requirement to conduct a $PM_{2.5}$ compliance analysis and allowing PM_{10} analysis to serve as a surrogate. 73 Fed. Reg. 28321 (May 16, 2008). Less than three weeks after the new "grandfather" rule's effective date, Region 9 issued the Permit to DREC, relying on the new *ultra vires* "grandfather" regulation as its basis for not requiring a $PM_{2.5}$ NAAQS compliance analysis. See AR Doc. 120 at pp. 76-77. On July 15, 2008, the final $PM_{2.5}$ grandfather rule was challenged in court and by an administrative request for reconsideration and in response, then-Administrator Johnson wrote "[w]e emphasize that the continued use of the PM_{10} surrogate policy is not mandatory, and case-by-case evaluation of the use of PM_{10} in individual permits is allowed to determine its adequacy of [sic] as a surrogate for $PM_{2.5}$." See Exhibit B at p. 3 (emphasis added). Clearly, even after promulgation of the grandfather rule, EPA still considered its application subject to the full discretion of the agency, depending upon the

individual permit. Finally, on April 24, 2009, Administrator Jackson granted the administrative Petition for Reconsideration noting that the grandfather provision was illegally promulgated.

This history demonstrates that EPA is not attempting to change the law to "retroactively" require a $PM_{2.5}$ compliance analysis, but rather to satisfy the law. At all times throughout the existence of the Seitz memo, the "grandfather" rule and DREC's permitting proceeding, EPA has had full discretion to not apply the PM_{10} surrogate policy on a case-by-case basis. It certainly has full authority to do so now.

2. Region 9 has discretion to apply new policies and regulations to non-final and non-effective permitting actions.

Even if the EAB were to find that Region 9's request for remand on the $PM_{2.5}$ matter reflects a change in EPA policy, it is entirely within the discretion of this Board and Region 9 to apply new policy to this Permit. DREC's Response acknowledges Region 9's unlimited discretion to withdraw and amend a PSD permit any time prior to a ruling by EAB granting or denying review. DREC Resp. at p.10.[10] At this point in the proceedings, while Region 9 must now request authorization for remand from the EAB, discretion still plays a large part in the decision to remand. See above. Part of that discretion concerns to what extent new law or regulation or policies should or may be factored into the final PSD permit decision. This Board's precedent on this issue provides that new law or regulation or policy does not automatically apply to a permit on appeal before the EAB, but that Region 9 and the EAB may exercise discretion to apply new law or regulation or policy in situations where it is deemed appropriate. See In re

[10] Note that this admission directly contradicts DREC's "understanding" that it would only ever be subject to rules and regulations in existence at the time it submitted its permit application, infra.

Dominion Energy Brayton Point, L.L.C., 12 E.A.D. 490, 616 (EAB 2006) (citing In re J&L Specialty Prods. Corp., 5 E.A.D. 31, 66, n.201 (EAB 1994)).

In this case, Region 9 is simply asking the EAB to allow it to exercise its discretion and assess whether and to what extent earlier modeling and reliance on that modeling was a proper application of the law, regulation, and EPA policies, and whether and to what extent additional modeling may be necessary in order to ensure compliance with ambient air quality standards. Region 9 Remand Motion, p. 8 and Exhibit A to Remand Motion. Nonetheless, to the extent that Region 9's decision on remand might apply new law or policies, it is a proper exercise of discretion for the EAB to allow Region 9 to apply those new policies and for the reasons set forth in Conservation Petitioners' initial brief in support of the Remand Motion, Conservation Petitioners' request the EAB allow the remand.

C. DREC's "Retroactivity" Argument Is Made in the Wrong Place at the Wrong Time.

1. DREC's "retroactivity" argument is made in the wrong forum.

DREC fails to cite any legal authority for the propositions that the EAB has jurisdiction in a permit appeal to: 1) determine whether rules and policies were adopted according to procedural requirements; or, 2) decide whether a new Administrator can change rules and policies. The EAB lacks jurisdiction to address either of these issues.

In any PSD permit appeal, the EAB's jurisdiction is limited to review of the terms and conditions of the PSD permit and to either uphold the legal validity of the permit or remand the permit for correction of legal deficiencies. In the In re Phelps Dodge Corp., 10 E.A.D. 460, 493 (EAB 2002) case, the EAB noted its limited jurisdiction on challenges to the substance of regulations stating: "the Board has refused to review final

[EPA] regulations that are attacked because of their substantive content or alleged invalidity, both in the exercise of the Board's permit review authority and in the enforcement context") (quoting In re Woodkiln, Inc., 7 E.A.D. 254, 269-70 (EAB 1997)); and In re B.J. Carney Indus., 7 E.A.D. 171, 194 (EAB 1997) ("there is a strong presumption against entertaining challenges to the validity of a regulation in an administrative enforcement proceeding * * * 'and a review of a regulation will not be granted absent the most compelling circumstances'") (quoting In re Echevarria, 5 E.A.D. 626, 634 (EAB 1994)). "We are charged in this part 124 proceeding with reviewing permit conditions, not with reviewing regulatory criteria that may bear on how those permit conditions are shaped." Phelps Dodge, 10 E.A.D. at 517. Therefore, in accordance with this Board's own precedent, the EAB should not address DREC and ACCCE's claims challenging the substance of policies and regulations.

The CAA further provides that "[a] petition for review of action of the Administrator in promulgating" rules and regulations "or any other final action of the Administrator…may be filed only in the United States Court of Appeals for the appropriate circuit." 42 U.S.C. § 7607(b)(1). DREC and ACCCE challenge, and request a decision on their challenge, from the EAB within the context of a motion for remand, whether the new Administrator may change rules and regulations (putting aside whether that is actually what is happening here) and whether such changes were made consistent with procedural requirements. DREC and ACCCE's arguments go well beyond the EAB's jurisdictional limitations and seek a decision on the promulgation (or eventual promulgation) of rules and regulations or the implementation of policy. These arguments are simply in the wrong forum. The EAB should decline to engage on issues that DREC

must bring to the federal courts of appeal.

2. DREC's "retroactivity" argument is not ripe.

DREC is asking the EAB to prejudge the outcome of Region 9's motion for voluntary remand and to assume that Region 9 will apply changes to DREC's permit application arguing that "[t]he Board must now decide whether a new Administrator can simply change rules and policies without regard for procedural requirements and then apply these changes retroactively to a permit application that was submitted and found to be complete many years ago." DREC Resp. at p. 4 (emphasis added). In effect, DREC and ACCCE ask EAB to look into the future and decide that Region 9 will make certain decisions, that those decisions will be in violation of the law, and therefore the EAB should deny Region 9 a remand opportunity because it will all go wrong anyway. DREC and ACCCE lose sight of the fact that the sole issue before the EAB is whether Region 9 should be allowed to take a voluntary remand of the Permit. The EAB cannot assume that Region 9 will retroactively change rules and policies applicable to the Permit without regard to procedural requirements. Rather, the EAB should grant Region 9's motion for voluntary remand upon which Region 9 will ultimately either issue or deny the Permit, possibly even in the same form as previously. At that time, all parties are entitled to file petitions for review which may address the legality of the permit terms and conditions. The EAB cannot and should not prejudge the results of that remand proceeding.

D. DREC's Expectations Aside, Congress Has Specifically Directed That Future Rules and Regulations Be Applied to Major Stationary Sources by Incorporation Into Existing Permits.

Without any supporting legal authority, DREC states, "Desert Rock has operated on the understanding that it would be subject to the laws and policies actually in existence when it submitted its permit application, or at the very least when Region 9

found it to be complete." DREC Resp. at p. 5. DREC's "understanding" runs counter to the plain language of the CAA which requires application of subsequently enacted rules and regulations to existing CAA permits.

DREC's facility will be a major stationary source of criteria air pollutants, subject to both PSD pre-construction permitting and Title V operations permitting. The eventual terms of DREC's Permit will be incorporated into a Title V operating permit. 42 U.S.C. §§ 7661b and 7661c. Section 502(b)(9) of Title V requires Title V permitting programs to require the addition of new requirements to a major source's permit: "revisions to the [Title V] permit to incorporate applicable standards and regulations promulgated under this chapter after issuance of such permit." 42 U.S.C. § 7661a(b)(9) (emphasis added). Thus, Congress specifically directed the application of new CAA laws and regulations to existing permits. Accordingly, DREC's "understanding" that the Desert Rock Energy Station would only ever be subject to laws and requirements actually in existence when it submitted its permit application is a simple failure to read the law as it is inconsistent with the plain language of the Clean Air Act.

Overall, DREC's arguments regarding improper retroactive rulemaking by EPA are unsupported by the facts and law applicable to this Permit. There is no evidence that EPA has or is engaging in improper rulemaking. To the extent that such an argument could at some point be made, it is premature and irrelevant to the matter under consideration here and is outside the jurisdiction of the EAB.

V. REGION 9'S INTENT TO COMPLY WITH THIS BOARD'S PRIOR DIRECTION IN THE INDECK-ELWOOD DECISION AND WITH REGION 9'S OBLIGATIONS UNDER THE ENDANGERED SPECIES ACT ARE NOT INDICATIVE OF BAD FAITH OR FRIVOLOUS DECISION-MAKING.

DREC's vague suggestion of bad faith or frivolousness related to Region 9's

desire to complete Endangered Species Act ("ESA") Section 7 consultation is unexplained and unsupported, providing no grounds for denying Region 9's Remand Motion. Region 9 seeks a remand so that it may satisfy its affirmative duties under section 7(a)(2) of the ESA, i.e., to consider the effects of the insure no "jeopardy" to the continued existence of the pikeminnow and other listed fish in the area and no "adverse modification" of their designated critical habitat. 16 U.S.C. § 1536(a)(2). The possibility of jeopardy and the need to insure against it has been reinforced here, where FWS recently informed Region 9 that "mercury may be adversely affecting the [endangered] Colorado pikeminnow…." See Exhibit B to Region 9's Remand Motion ("Murphy Letter"). This could have consequences for the Desert Rock project, including a determination that the Desert Rock plant's cumulative effects to the pikeminnow amount to "jeopardy." See, e.g., Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 481 F.3d 1224, 1236 (9th Cir. 2007) ("an agency may not take action that will tip a species from a state of precarious survival into a state of likely extinction").

In light of this information and the EAB's earlier admonitions that ESA consultations should ordinarily be concluded prior to issuance of a final PSD permit to provide Region 9 with "more flexibility to make, and to implement suggested ESA-related modifications" in the final permit, In re Indeck-Elwood, PSD Appeal No. 03-04, slip op. at 112-13 (EAB Sept. 27, 2006), it is hardly "frivolous" or "bad faith" that Region 9 seek a remand of the Permit on the basis given. See Nat'l Wildlife Fed'n, 481 F.3d at 1234 ("Given 'the imperative nature of the [ESA],'…agencies may not simply disregard their ESA duties even where there is tension among competing interests" as "they have an affirmative duty to satisfy the ESA's requirements, as a first priority.")

(quoting ALCOA v. Administrator, Bonneville Power Admin., 175 F.3d 1156, 1163 (9th Cir. 1999)) (additional citations omitted).

Moreover, contrary to the implications of DREC's arguments here, DREC's own recalcitrance has prolonged the ESA consultation process. As Region 9's Remand Motion reflects, DREC has repeatedly failed to provide the information necessary for a "definitive analysis of mercury emissions" and the potential mercury reductions that might be achieved. FWS notes the "difficulties we have encountered in receiving additional information from the applicant …." Murphy Letter. Without this information, FWS cannot evaluate the "precise amount of mercury emissions that would be added to this area" as it attempts to consider the effects of DREC in combination with other "sources and deposition of mercury" and "source-attribution information regarding atmospheric deposition and transport" in order to determine the effects of the plant to endangered species like the pikeminnow. Region 9 Remand Request at 5 (citing Murphy Letter). DREC cannot seriously suggest "frivolous grounds" and "bad faith" in light of its own failure to provide basic information that would allow for a definitive analysis of the coal plant's mercury emissions, particularly when those emissions could undermine the survival and recovery of endangered fish.

Conservation Petitioners request that the EAB disregard DREC's baseless allegations of bad faith. Region 9's desire to take remand of the Permit in order to preserve maximum flexibility to conclude the Section 7 consultation process and to ensure full protections for the Colorado pikeminnow is entirely reasonable and required under this Board's prior decisions and the law regarding Section 7 consultations.

VI. DREC'S CLAIMS OF CONSTITUTIONAL VIOLATIONS ARE UNTENABLE AND WITHOUT MERIT

As set forth in detail above, the EAB's jurisdiction and scope of review in this matter is limited to issuance of the Permit and the Permit terms. EAB does not have wide latitude to assess challenges to substantive law or arguments concerning violations of the U.S. Constitution. However, even if EAB believes that it must consider DREC's constitutional claims, the EAB should find that DREC's claims are both legally and factually unsupported and as such should be disregarded.

A. DREC Has No Valid Claim of Equal Protection Violations.

1. It is DREC's burden to demonstrate malicious disparate treatment and DREC has offered no viable evidence of such treatment.

DREC's claims of disparate treatment and attendant equal protection violations are entirely unsupported and cannot serve as a bar to voluntary remand of the Permit as requested by Region 9. DREC does not claim (and could not claim) that it is a member of a protected or suspect class, nor does DREC claim (and could not claim) that Region 9's Remand Motion burdens a fundamental constitutional interest. In cases where there is no suspect class and no fundamental right at issue, courts are reluctant to overturn government action and judicial intervention is generally considered unwarranted no matter how unwise the court may think the agency action to be. Vance v. Bradley, 440 U.S. 93, 96-97, 99 S. Ct. 939, 942-43 (1979). In such cases, a court will assess the government's action by the rational basis test: that a claimant's challenge will not succeed "if there is any reasonably conceivable state of fact that could provide a rational basis for the classification" or action. Bower v. Village of Mount Sterling, 44 Fed. Appx. 670, 677 (6th Circ. 2002) (quoting FCC v. Beach Communications, Inc., 508 U.S. 307, 313, 113 S.Ct. 2096 (1993)). It is DREC's burden to demonstrate that there is no

conceivable basis that might support the Region 9's request for remand. Id.[11] DREC is unable to do so.

DREC alleges that it is a "class of one" and that it has unfairly, inexplicably, and irrationally been treated differently than other power plants similarly situated. DREC's claims are supported by the evidence if proffers. First, there is no evidence of disparate treatment by Region 9. The "evidence" regarding power plants permitted by the states of Georgia, Louisiana, and Florida is clearly not part of the administrative record before the EAB at this time and therefore are not properly considered by the EAB. Moreover, even if DREC purports to supplement the administrative record at this time (something that must be done by motion), DREC makes no effort to support its attorneys' stories in the response in opposition to Region 9's Remand Motion, choosing instead to make bare allegations about what did or did not happen in what were likely lengthy and complex regulatory matters before each of the state agencies. DREC doesn't even bother to file an affidavit with agency decisions attached. While the rules of procedure and evidence may not be strictly applicable in administrative proceedings, some semblance of proper process, foundation, and proof is generally required. DREC's Response pp. 37-39 should be stricken and/or disregarded.

Second, the "evidence" proffered by DREC, even if part of the record or properly offered, does not support DREC's claims. The "evidence" is unsupported narrative regarding state-level permitting in Georgia, Louisiana, and Florida, not other power plant

[11] See also Travis v. Park City Mun. Corp, 565 F.3d 1252, 1257 (10th Cir. 2009) where the court found a claimant failed to establish intentional disparate treatment by making unsubstantiated claims about differences in the display and sale of artwork under an ordinance.

permitting decisions by Region 9 or even EPA generally. That is, there are four different government entities making four different government decisions. There is no evidence of disparate treatment by Region 9 or even EPA, the only relevant government entities here.

2. DREC's claim that it is a "class of one" is not valid in the context of PSD permitting.

Federal courts have limited the use of the "class of one" concept, recognizing that "[t]here are some forms of state action…which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments." Engquist v. Oregon Dept. of Agriculture, ___ U.S. ___, 128 S.Ct. 2146, 2154 (2008). In those cases, the Supreme Court finds that treating one person (or entity) differently from others is "an accepted consequence of the discretion granted." Id. The Engquist case involved alleged disparate treatment of a government employee, and in illustrating the concept that highly-discretionary government decisions necessarily involve some level of different treatment for different individuals, the court also used the example of government discretion in catching and prosecuting speeders. In both instances, the court emphasized that there is no equal protection challenge to actions that by their very nature are subjective, individualized decisions. Id. See also, Flowers v. City of Minneapolis, Minn., 558 F.3d 794, 799 (8th Cir. 2009) (where the court applies similar reasoning to a police officer's decision regarding whom to investigate and how to investigate, finding that the wide discretion inherent in the many small decisions that are made in such cases dictates against a "class of one" equal protection challenge), and Walsh v. Town of Lakeville, 431 F. Supp. 2d 134, 145 (D. Mass. 2006) (where the court outlines the First Circuit's interpretation and application of the "class of one" concept which involves a standard that is "exceptionally" deferential to government in assessing malice or bad faith

on the part of government and setting a high evidentiary standard for the claimant to demonstrate such malice and bad faith that must be "scrupulously met".)

Decisions regarding the issuance of PSD permits, or their remand for further assessment and consideration under the CAA is exactly the kind of decision that is necessarily subjective, involving discretion and professional judgment based upon an array of technical, scientific, and policy considerations and application of an array of legal standards under more than one federal statute. As such, even if the EAB were to consider DREC's unsupported evidence of different permitting decisions made in three different states, such evidence does not allow the EAB to find that DREC is a "class of one" that has been unfairly treated by Region 9 seeking remand of a non-final PSD permit. Furthermore, the CAA, in addition to requiring a fair amount of discretionary decisionmaking by EPA, also contemplates the very disparity between states and Region 9 of which DREC complains. The CAA follows a "cooperative federalism" model wherein states have a certain amount of autonomy, subject to some basic protective minimums. Different decisions by different decision-makers on different permits means nothing other than the CAA at work.

3. DREC's disparate treatment claims are premature and misplaced.

Finally, DREC's equal protection claims are simply misplaced in the context of a motion for voluntary remand. Region 9 simply requests remand for further consideration of several matters. Even with respect to the $PM_{2.5}$ policy changes, Region 9 may ultimately determine after further modeling or review of the existing modeling, that changes to DREC's permit aren't necessary. And, in the context of the mercury and ESA consultation issues, changes to the PSD permit were always a possibility. Therefore, DREC's claims that it is being treated unfairly and outside the scope of Region 9's

legitimate obligations and authority are at best premature. If, upon remand and final action by Region 9, DREC is ultimately dissatisfied with the end result and believes it was treated unconstitutionally, DREC can raise that argument in court.

In sum, DREC's arguments regarding equal protection violations are unaccompanied by any valid evidence of disparate treatment, malicious or otherwise, and would likely fail nonetheless due to the discretion that is inherent in the PSD permitting process. Finally, it would be premature for the EAB to make judgments on such claims as the process is not concluded, a remand motion being an improper place to judge important constitutional claims. The EAB should reject DREC's equal protection claims as a reason to deny remand.

B. DREC Has No Valid Claim of Due Process Violations.

1. As set forth in detail above, DREC has no permit and therefore no property interest.

In order to raise a failure of due process, DREC must demonstrate that it has a protectable property interest and that there is a significant risk that it will be mistakenly deprived of that interest without a chance to be heard. DREC's arguments fail on both counts.

Under the basic three-part test from Mathews v. Eldridge, a court shall assess whether there has been a violation of procedural due process by considering: (1) the private property or liberty interest affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedures would entail. Mathews v. Eldridge, 424 U.S. 319,

335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Therefore, the first step in assessing DREC's claim is determining whether a property or liberty interest is affected by Region 9's request for remand.

"Property rights do not arise from simple wants and desires; they must be based on legitimate claims of entitlement. Kerley Industries, Inc. v. Pima County, 785 F.2d 1444, 1446 (9th Circ. 1986) (citing Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709 (1972)). "Property rights are created and 'their dimensions are defined by existing rules or understandings that stem from an independent source such as state law…" Id. In this case, those existing rules and understandings stemming from a source of law are the rules regarding PSD permitting and review of initial permit decisions. Under those rules and understandings, DREC does not yet have a property interest so there is no deprivation of due process. See Part I supra. Rather, DREC wants and desires a PSD permit, which does not give rise to a private property interest which must receive due process protections.

2. Even if DREC's expectations, wants, and desires are entitled to process protections, DREC is currently involved in due process making its claims of deprivation meritless.

DREC appears to claim that in granting Region 9's motion for voluntary remand, on a permit that DREC does not yet have, DREC will be deprived of due process for the protection of its permit expectations. This makes absolutely no sense as this argument is made within the context of a process designed to ensure that DREC and all other interested parties are heard on the matter.[12] It is extraordinarily unclear what other or

[12] It is important to emphasize that due process is about providing process protections when there is a deprivation of a property or liberty interest. It is not a guarantee that a party will not or should not be deprived of that interest, but only that the party will have a meaningful chance to be heard on the issue. If DREC seeks to claim that it cannot be

additional process DREC thinks it may be due.

Assuming for the sake of this prong of the Mathews test that DREC has a protectable property interest, DREC is actually receiving due process. The matter is pending before the EAB, an administrative decision-making body that employs various processes and protections for parties to the administrative proceeding. The matter currently under consideration is Region 9's request for voluntary remand of a non-final PSD permit. Region 9 is proceeding by motion to the EAB with notice and opportunity for response to DREC and all other interested parties. In fact, DREC requested and received additional time to respond to Region 9's motion. DREC has availed itself of the Freedom of Information Act and has sought information from EPA, presumably in order to fully respond to Region 9's motion and fully protect DREC's interest in the non-final permit. DREC has filed an extensive response objecting to Region 9's motion. At some point, the EAB will rule on that motion. EAB may decide not to remand the permit in which case, presumably, DREC will be satisfied and will consider its rights protected. EAB may decide to remand the permit or portions thereof in which event DREC will have an opportunity to continue to work with Region 9 on a final permit, including making arguments regarding the applicability of the $PM_{2.5}$ "grandfather" provision or carbon control technologies.

DREC is also afforded plenty of process relative to the $PM_{2.5}$ matter. First, EPA has published its intentions, including the administrative stay, in the Federal Register and solicited comment. Second, the appeal period to contest those actions is still open to

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denied a permit at this stage of the proceedings, arguing procedural due process, DREC is simply employing the wrong legal concepts and arguments for what it seeks.

DREC and other interested parties. Third, EPA will presumably follow administrative procedure and give DREC notice and opportunity to be heard on changes to the $PM_{2.5}$ matter, including EPA exercising its discretion (recognized by the Johnson memo) to not allow DREC to rely on PM_{10} modeling. Should Region 9 ultimately make that decision, DREC will have full opportunity to petition this Board for review. And finally, should Region 9 ultimately deny DREC's permit application, DREC will have an opportunity to appeal that final agency decision. DREC has layers and layers of process.

In sum, there is no violation of procedural due process in Region 9's motion for remand or in this Board's potential granting of that motion. DREC has failed to show that it has a property interest of which it could be deprived and even if it did, DREC is receiving all the process that is due. The EAB should reject DREC's arguments regarding due process violations and remand the permit as requested by Region 9.

CONCLUSION

DREC and ACCCE have failed to provide this Board with any valid reason to deny Region 9's Remand Motion and Conservation Petitioners request that the EAB grant the motion. DREC does not have a final, effective permit and therefore has no foundation for many of the claims it makes. Even putting aside this basic lack of foundation, the EAB lacks jurisdiction to consider and decide many of the substantive and constitutional matters DREC and ACCCE raise. Finally, DREC and ACCCE are unable to factually or legally substantiate their claims of bad faith, frivolous behavior, improper rulemaking, or constitutional harms. Conservation Petitioners respectfully request that this Board grant Region 9's request for remand.

Respectfully submitted this 29th day of June, 2009.

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CERTIFICATE OF SERVICE

On June 29, 2009, a true and correct copy of the following document(s) were served on the parties listed below:

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I, Patrice Simms, declare under penalty of perjury that the foregoing is true and correct. Executed on this 29th day of June, 2009, at Washington, D.C.

Patrice Simms

EXHIBIT A

(REF: OZPMRH-2-97)

MEMORANDUM

SUBJECT: Interim Implementation of New Source Review Requirements for $PM_{2.5}$

FROM: John S. Seitz, Director
Office of Air Quality Planning & Standards (MD-10)

TO: See Addressees

This memorandum addresses the interim use of PM_{10} as a surrogate for $PM_{2.5}$ in meeting new source review (NSR) requirements under the Clean Air Act (Act), including the permit programs for prevention of significant deterioration of air quality (PSD). The revised national ambient air quality standards (NAAQS) for particulate matter, which include the revised NAAQS for PM_{10} and new NAAQS for $PM_{2.5}$, became effective on September 16, 1997. In view of the significant technical difficulties that now exist with respect to $PM_{2.5}$ monitoring, emissions estimation, and modeling (described below), EPA believes that PM_{10} may properly be used as a surrogate for $PM_{2.5}$ in meeting NSR requirements until these difficulties are resolved. The EPA's views on implementing the ozone and PM_{10} NAAQS during the interim period following the effective date of the new 8-hour ozone and revised PM_{10} NAAQS will be set forth in a separate EPA memorandum.

Section 165(a)(1) of the Act provides that no new or modified major source may be constructed without a PSD permit. Moreover, section 165(a)(3) provides that the emissions from any such source may not cause or contribute to a violation of any NAAQS. Also, section 165(a)(4) requires best available control technology for each pollutant subject to regulation under the Act. The EPA's recent promulgation of the primary and secondary standards for $PM_{2.5}$ marks the first time that EPA has specifically regulated fine particles--less than 2.5 microns in diameter--as a discrete indicator for particulate matter. Hence, this memorandum addresses how to implement PSD for $PM_{2.5}$ in light of significant technical difficulties which presently exist.

Of specific concern is the lack of necessary tools to calculate emissions of $PM_{2.5}$ and related precursors and project ambient air quality impacts so that sources and permitting authorities can adequately meet the NSR requirements for $PM_{2.5}$. Any comprehensive system for regulating $PM_{2.5}$ must take into account not only the fine particles emitted directly by stationary sources but also the various precursors, emitted by certain sources, which result in secondarily-formed fine particles through chemical reactions in the atmosphere. Recent studies suggest that

secondary particulate matter may account for over half of total ambient $PM_{2.5}$ nationwide. Emissions factors for the fine particles emitted directly by stationary sources, and for some important precursors (e.g., ammonia), are largely unavailable at the present time.

The EPA is in the process of developing a comprehensive modeling system which will be designed to include precursor emissions and account for secondary fine particle formation. The modeling system will also incorporate a method for nesting small local impacts from individual point sources within a greater modeling domain. Before this can be completed, it will be necessary to collect sufficient monitoring data to verify and validate protocol modeling results.

Ambient monitoring for PSD purposes must be collected from appropriately designed monitors. Sufficient quantities of such monitors will not be available specifically for PSD monitoring purposes in the near future. Initially, as these monitors become available, they will be needed to establish the new monitoring stations for the national network of $PM_{2.5}$ sites, including the required core $PM_{2.5}$ State and local air monitoring stations. A high priority has been placed on the establishment of the necessary $PM_{2.5}$ monitoring sites nationwide so that the information from these sites can be analyzed and evaluated in order to establish plans and priorities for implementing the $PM_{2.5}$ NAAQS, including the promulgation of section 107 designations.

For the reasons stated above, EPA believes that it is administratively impracticable at this time to require sources and State permitting authorities to attempt to implement PSD permitting for $PM_{2.5}$. The EPA has projects underway that will address the current technical and informational deficiencies, but it will take 3-5 years to complete these projects. Until these deficiencies are corrected, EPA believes that sources should continue to meet PSD and NSR program requirements for controlling PM_{10} emissions (and, in the case of PM_{10} nonattainment areas, offsetting emissions) and for analyzing impacts on PM_{10} air quality. Meeting these measures in the interim will serve as a surrogate approach for reducing $PM_{2.5}$ emissions and protecting air quality.

This memorandum presents EPA's views on the issues associated with implementation of the new $PM_{2.5}$ NAAQS under Federal, State and local NSR programs. The statements do not bind State and local governments and the public as a matter of law. When the technical difficulties are resolved, EPA will amend the PSD regulations under 40 CFR 51.166 and 52.21 to establish a $PM_{2.5}$ significant emissions rate, and EPA will also promulgate other appropriate regulatory measures pertinent to $PM_{2.5}$ and its precursors. Because the earliest date on which $PM_{2.5}$ nonattainment areas will be designated is in 2002, and nonattainment NSR does not apply until after nonattainment designations are made, implementation of the nonattainment NSR requirements under part D of title I of the Act need not be addressed at this time.

If you have any questions concerning this memorandum or wish to address any issues raised herein, please contact Dan deRoeck at (919) 541-5593.

Addressees:
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Director, Air, Radiation, and Toxics Division, Region III
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revised: 10/21/97

EXHIBIT B

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

THE ADMINISTRATOR

JAN 14 2009

Mr. Paul R. Cort
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Dear Mr. Cort:

This letter is in response to your July 15, 2008, Petition for Reconsideration and request for a stay on behalf of the Natural Resources Defense Council (NRDC) and Sierra Club (SC) related to the U.S. Environmental Protection Agency's (EPA's) final rule titled "Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$)," which was published in the *Federal Register* on May 16, 2008, and effective on July 15, 2008. The specific provisions for which you requested reconsideration include (1) EPA's transition schedule and requirements for Prevention of Significant Deterioration (PSD) programs in State Implementation Plan (SIP)-approved states; (2) EPA's grandfathering provisions concerning use of the Particulate Matter Less Than 10 Micrometers (PM_{10}) surrogate policy contained in the regulations governing the federal PSD permitting program; (3) EPA's transition period for condensable particulate matter (CPM) emissions; and (4) EPA's preferred interpollutant trading ratios under the nonattainment NSR program. Due to the limited resources of the Agency, and for the reasons stated previously in support of the rule and as explained further below, EPA denies this petition for reconsideration and request for a stay.

The NRDC and SC petition requires EPA to consider the staff time and other resources that would be expended to reconsider this final rule in light of the many responsibilities of the Agency and the limited resources available to the Agency. EPA's conclusion is that the resources that would be required to complete the reconsideration process if the Agency granted your petition are more appropriately used on other matters.

Having considered your arguments with respect to each of the provisions for which you request reconsideration, EPA concludes that they do not demonstrate a need for reconsideration, for the reasons stated previously in support of the rule and as explained further below.

Transition Period for PSD Programs in SIP-approved States

In its petition, NRDC and SC claim that in our final rule we included new requirements governing the way in which states with SIP-approved PSD programs will come into compliance with the new PSD rules for $PM_{2.5}$ that are unlawful and arbitrary. The new PSD rules require

states to submit revised programs within three years from the publication of amended requirements in the *Federal Register* in accordance with 40 CFR 51.166(a)(6)(i). During the interim period prior to EPA approval of the revised rules, states may continue to implement the PM_{10} surrogate policy as a means of satisfying the new requirements for $PM_{2.5}$.

Consistent with past practice, we believe that it is reasonable to allow states up to three years to revise and submit SIP revisions containing the new requirements for the $PM_{2.5}$ PSD program, while allowing states the opportunity to rely on the PM_{10} surrogate policy in the interim if it is necessary to do so. Reconsideration is not warranted because the public had notice of the potential that EPA would give states this amount of time to submit SIP revisions. The three-year period within which states must adopt the new $PM_{2.5}$ requirements into SIP-approved programs is provided by the pre-existing PSD rules to allow states to revise their own regulations to reflect newly amended requirements. As stated in the May 16, 2008, preamble, "This rule follows our established approach for determining when States must adopt and submit revised SIPs following changes to the NSR regulations, but does not revise otherwise applicable SIP submittal deadlines." 73 FR 28321, 28341. The May 16, 2008, rule requires revision to the initial "infrastructure" SIPs that EPA required states to submit within three years of the promulgation of the $PM_{2.5}$ National Ambient Air Quality Standards (NAAQS). Thus, the deadline in section 110(a)(1) of the Act does not apply to the SIP revisions submitted in response to the May 16, 2008, rule. The Act does not specifically address the timeframe by which states must submit SIP revisions. Nevertheless, we looked to section 110(a)(1) of the Act to guide our development of the previous rule that allows up to a 3-year SIP development period for states to incorporate new or amended PSD program requirements.

Petitioners' recommendation that upon reconsideration EPA should impose new $PM_{2.5}$ requirements under the existing federal PSD program (40 CFR 52.21) for all states until adequate SIP revisions have been approved fails to account for the time required to legally act to disapprove all affected state programs and undertake the necessary rulemaking to begin implementation of federal PSD for $PM_{2.5}$. Many states have already indicated that they have the general authority to regulate $PM_{2.5}$ under their existing SIPs even though specific regulatory changes are needed to fully implement the program in accordance with EPA's newly amended rules.

Use of the PM_{10} surrogate policy does not "waive" or "exempt" sources from complying with the statutory requirements; states with existing authority to implement the new $PM_{2.5}$ program will not need to continue implementing the PM_{10} surrogate policy. The surrogate policy remains in place to provide states lacking clear authority in state law to directly regulate $PM_{2.5}$ with the ability to issue permits satisfying the $PM_{2.5}$ requirements without unnecessary delay. As we explained in the May 16, 2008, preamble, "PM_{10} will act as an adequate surrogate for $PM_{2.5}$ in most respects, because all new major sources and major modification that would trigger PSD requirements for $PM_{2.5}$ would also trigger PM_{10} requirements because $PM_{2.5}$ is a subset of PM_{10}." 73 FR 28321, 28341. Nevertheless, we disagree with your contention that "The new transition scheme purports to allow source [sic] to be constructed or expanded even if they result in long-term contributions to violations of the $PM_{2.5}$ NAAQS."

We emphasize that the continued use of the PM_{10} surrogate policy is not mandatory, and case-by-case evaluation of the use of PM_{10} in individual permits is allowed to determine its adequacy of as a surrogate for $PM_{2.5}$. If, under a particular permitting situation, it is known that a source's emissions would cause or contribute to a violation of the $PM_{2.5}$ NAAQS, we do not believe that it is acceptable to apply the PM_{10} surrogate policy in the face of such predicted violation. Accordingly, each permit that relies on the PM_{10} surrogate policy to satisfy the new $PM_{2.5}$ requirements is subject to review as to the adequacy of such presumption.

Continuation of PM_{10} Surrogate Policy for Certain Pending Permit Applications Under the Federal PSD Program ("Grandfathering Provision")

NRDC and SC contend that our policy of allowing sources with complete applications submitted prior to the July 15, 2008, effective date of the federal PSD regulations at 40 CFR 52.21 to continue relying upon the PM_{10} surrogate policy is unlawful and arbitrary. Your contention was in part that we failed to present this grandfathering provision and accompanying rationale to the public for comment, and also that the Clean Air Act (Act) provides no authority for EPA to ground the grandfathering provision on the date of a source's permit application. You stated that upon reconsideration we "must require that $PM_{2.5}$ be addressed in all permits for sources that did not commence construction before the effective date of the $PM_{2.5}$ NAAQS." Your approach would require that we retroactively review all permits issued since the effective date of the $PM_{2.5}$ NAAQS, i.e., either July 18, 1997 – the date of the original $PM_{2.5}$ NAAQS, or October 17, 2006 – the date we revised the original $PM_{2.5}$ NAAQS. We do not consider this the best use of limited agency resources.

With regard to the petition's premise that the Act does not authorize EPA to grandfather sources on the basis of a complete application, we disagree. Section 168(b) of the Act provides for certain grandfathering based on a commence construction date, but says nothing – either explicitly or implicitly – about whether other grandfathering may occur or what criteria should be applied in allowing for additional grandfathering by regulation. Moreover, we believe that a decision to re-evaluate sources already grandfathered would unnecessarily disrupt state permitting programs by requiring such permits to be re-evaluated for impacts on the $PM_{2.5}$ NAAQS.

Even if we were to consider eliminating the new grandfathering provision that became effective on July 15, 2008, it could be of little consequence because we have determined that only nine sources actually submitted applications relying on the PM_{10} surrogate policy prior to July 15, 2008, such that they fall within the grandfather provision. Of these, interested persons submitted comments on the use of the surrogate policy with respect to only six of these applications. Moreover, we believe that control technologies qualifying as Best Available Control Technology (BACT) for PM_{10} are likely in many cases to serve as BACT for $PM_{2.5}$ as well.

Finally, as we noted above, the use of the surrogate policy for the sources grandfathered under the federal PSD program does not "waive" or "exempt" sources from complying with statutory requirements; rather, it presumes that assessing control technologies and modeling air

quality impacts for PM_{10} is an effective means of fulfilling those statutory requirements for $PM_{2.5}$ as well as for PM_{10} during the transition period being allowed.

Condensable Particulate Matter Emissions

NRDC and SC claim that our decision in the final NSR rule to allow states to exclude CPM from NSR applicability determinations and emissions control requirements until January 1, 2011, is unlawful and arbitrary. You further note that we did not propose such exclusion for public review and comment.

The final provisions on condensable particulate matter emissions were not adopted without notice, as you have claimed. As discussed in the notice of proposed rulemaking, the states and EPA have not consistently applied the NSR program to CPM. The final rule merely deferred the effective date of the proposed action and preserved the status quo in the interim – requiring continued enforcement of those SIPs and permits that clearly address CPM. Our decision in the final rules to allow states that have not previously addressed CPM to continue to exclude CPM during a transition period is the direct response to comments we received questioning whether available test methods and modeling techniques were reliable enough to support a requirement that all states immediately begin addressing CPM as originally proposed. See 73 FR at 28,335 (discussing comments and EPA's response).

The transition period is temporary, and the total time allowed could be shortened in conjunction with a faster-than-anticipated rulemaking for new or revised CPM test methods. Also, as discussed above, states with SIP provisions requiring CPM to be addressed are not allowed to exclude CPM, and other states at their discretion have opted to include CPM in their permit processes. In addition, some sources have elected to include CPM in their estimates of potential emissions in order to avoid possible delays (resulting from adverse public comment) in the issuance of needed permits.

Even where sources are not being required to address CPM, control technologies being selected as BACT for PM_{10} and $PM_{2.5}$ are capable of controlling CPM.

Interpollutant Trading Ratios

Finally, NRDC and SC claim that our decision to include preferred interpollutant trading ratios to facilitate the interpollutant trading of emissions offsets under the NSR program is unlawful and arbitrary. NRDC and SC assert that such ratios were developed and finalized without public input. Moreover, you claim that the Act does not permit interpollutant offset trading.

We believe the Act contains the necessary authority for us to regulate precursor emissions, including allowing offset trading of such precursors. As defined under section 302(g) of the Act, the term "air pollutant" "includes any precursors to the formation of any air pollutant, to the extent that the Administrator has identified such precursor or precursors for the particular purpose for which the term 'air pollutant' is used."

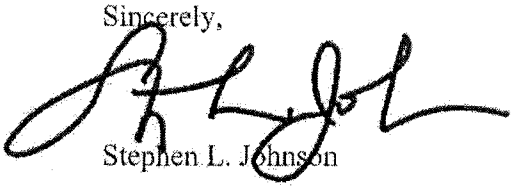
The rule does not require use of the preferred ratios, and public notice and comment is built into the process through which the interpollutant trading program is incorporated into the state NSR program. That is, each SIP revision containing an interpollutant trading program, including the preferred offset ratios or any other ratios independently adopted by the state, must be subjected to public notice and comment as part of the EPA approval process for the SIP (in addition to the public process required as part of the state's adoption of such provisions in their own rules.) Under 40 CFR part 51 appendix S, the interim authority for issuance of major permits in nonattainment areas by states, states may allow $PM_{2.5}$ precursor offsets "if such offsets comply with an interprecursor trading hierarchy and ratio approved by the Administrator." See new section IV.G.5 of appendix S. Moreover, each permit which relies on the interpollutant trading program to allow precursor emissions to offset new $PM_{2.5}$ emissions must undergo public review prior to approval and issuance.

Request for Stay of Implementation

NRDC and SC also request that EPA stay implementation of the final rule pending reconsideration or the rule. Because EPA is denying the petition for reconsideration in its entirety, a stay pending reconsideration is unnecessary.

We appreciate your comments and interest in this important matter.

Sincerely,



Stephen L. Johnson

cc: Mr. David S. Baron, Earthjustice
Mr. Timothy J. Ballo, Earthjustice