BRACEWELL
&GIULIANI

Texas
New York
Washington, DC
Connecticut
Dubai
Kazakhstan
London

Jeffrey R. Holmstead
Partner

202.828.5852 Office
202.857.4812 Fax

jeff.holmstead@bgllp.com

Bracewell & Giuliani LLP
2000 K Street NW
Suite 500
Washington, DC
20006-1872

June 11, 2009

By Messenger

U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board
Colorado Building
1341 G Street, N.W., Suite 600
Washington, DC 20005

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

Dear Clerk of the Board:

Enclosed please find an original and five copies of the DESERT ROCK ENERGY'S RESPONSE TO EPA REGION 9'S MOTION FOR VOLUNTARY REMAND, and an original and five copies of Exhibit A to the same, for filing on behalf of Desert Rock Energy Company, LLC, in the above-referenced matter. Please feel free to contact me if you have any questions.

Very truly yours,

Bracewell & Giuliani LLP

Jeffrey R. Holmstead

Enclosure

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

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

DESERT ROCK ENERGY'S RESPONSE TO EPA REGION 9'S MOTION FOR VOLUNTARY REMAND

Jeffrey R. Holmstead
Richard Alonso
Matthew J. Armstrong
Bracewell & Giuliani LLP
2000 K Street, N.W.
Washington, D.C. 20006
Telephone: 202-828-5800
Facsimile: 202-223-1225
jeff.holmstead@bgllp.com
richard.alonso@bgllp.com
matt.armstrong@bgllp.com

Attorneys for Desert Rock Energy Company, LLC

Jeremiah P. Sheehan
Sithe Global Power, LLC
245 Park Avenue, 38th Floor
New York, NY 10167
Telephone: 212-351-0030
Facsimile: 212-351-0002
sheehan@sitheglobal.com

Attorney for Desert Rock Energy Company, LLC

TABLE OF CONTENTS

Page

Table of Contents
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES

(continued)

Page

TABLE OF AUTHORITIES

(continued)

TABLE OF AUTHORITIES

(continued)

TABLE OF AUTHORITIES

(continued)

OTHER AUTHORITIES

EXHIBITS

INTRODUCTION AND SUMMARY

The matter now before the Board is unprecedented. Although it arises in the context of a challenge to a Clean Air Act permit, the Board's decision in this case will reflect on the integrity of EPA as an institution and its respect for basic notions of fairness and due process. Because of the procedural posture of this case, it is the Board that must decide these issues on behalf of EPA. *See* 40 C.F.R. § 124.19; 40 C.F.R. § 1.25(e). We urge the Board to deny EPA Region 9's Motion for Voluntary Remand ("the Remand Motion") and send a clear message – to regulated industries, the environmental community, and both current and future Agency officials – that EPA will respect the rule of law.

The history of this case has been well documented in prior briefings before the Board.[1] It can be summarized as follows: More than a decade ago, the Navajo Nation, acting through a tribal entity known Diné Power Authority ("DPA"), began looking for ways to develop its energy resources, including the supply of coal available on Navajo lands. After extensive due diligence and negotiations, DPA invited Desert Rock Energy to build a state-of-the-art coal-fired power plant on tribal land.

In 2002 and 2003, DPA and Desert Rock Energy met and communicated with career officials at EPA Region 9 to gain an understanding of the procedural and substantive requirements for obtaining a PSD permit. On February 22, 2004, Desert Rock Energy submitted its PSD permit application. AR 6. Because of the pre-filing consultations between Desert Rock Energy and EPA Region 9 permitting officials, Region 9 was able to issue a formal determination that the permit application was complete just a month later – on May 21, 2004.

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[1] Desert Rock Energy adopts in its Response to EPA Region 9's Motion for Voluntary Remand the Major Defined Terms listed on pages *i* and *ii* of Desert Rock Energy's Response Brief.

Such a "completeness determination" is a step in most permitting actions and is specifically required under EPA regulations. 40 C.F.R. § 124.3(c). As the Board knows, the Clean Air Act requires that EPA make a final decision on a PSD permit within one year of receiving a complete permit application. 42 U.S.C. § 7475(c).

Over the next three years, however, Desert Rock Energy and DPA worked to address the concerns raised about the proposed plant, including all the concerns raised during the comment period on the draft PSD permit. In an effort to secure the permit, Desert Rock Energy also agreed to several conditions that go well beyond anything required by law. In fact, EPA Region 9 has publicly stated that the permit will ensure that the plant will be the cleanest coal-fired power plant in the country. Despite this fact, and despite statements by EPA Region 9 career officials that the permit was ready to be issued, Desert Rock Energy and the Navajo Nation could not persuade EPA headquarters to allow EPA Region 9, reportedly because of political concerns in Washington. Finally, Desert Rock Energy and DPA brought a lawsuit to compel EPA Region 9 to make a final decision on the permit because the Agency had clearly violated its legal duty under Section 165(c) to make PSD permitting decisions within one year.

In response to this lawsuit, the U.S. Department of Justice ("DOJ") signed a consent decree on behalf of the U.S. Government, promising that EPA Region 9 would make a final decision on the permit by August 1, 2008. EPA Region 9 issued the final permit on July 31, 2008, meeting the deadline with a day to spare. After the permit was issued, EPA Region 9 and DOJ said that there was no reason to go to the trouble of formally entering the consent decree with the Court, since EPA Region 9 had already complied with it. Somewhat naively, perhaps, Desert Rock Energy and DPA agreed. No one at Desert Rock Energy or DPA imagined that Region 9 might issue the permit and then take it back. Based on conversations with career EPA

officials, we are confident that none of the career officials representing EPA Region 9 and DOJ at that time ever imagined such a result, either.

A number of parties then filed petitions for review with the EAB to challenge the permit. This appeals process has now dragged on for nearly a year, with this Board receiving five rounds of briefing: petitions, supplemental briefs, responses, replies and surreplies. Most importantly, on January 8, 2009, EPA Region 9 submitted a comprehensive 135-page brief responding to the issues raised by the various petitioners and defending the permit that it had issued the previous July.[2]

On January 22, 2009, this Board issued an Order granting review of the permit and setting a briefing schedule for all remaining briefs. Then, on April 27, 2009, without any consultation with Desert Rock Energy DPA, or the Navajo Nation, EPA Region 9 filed its extraordinary and unprecedented Remand Motion requesting "a complete remand of the Final PSD Permit and administrative record." Remand Motion at 8. Thus, after a permitting process that has already taken more than four years longer than allowed by statute, EPA Region 9 has decided that it wants to start the process over again – not because it has identified any legal flaw in the existing permit, but because the new EPA Administrator wants to exercise her discretion to reconsider certain policies and conduct the PSD permitting process in a different way.

The Remand Motion makes it clear, in numerous places, that EPA Region 9 and EPA's Office of General Counsel continue to believe that the permit is legally valid and was issued in accordance with all procedural requirements *See* Remand Motion at 11, 15, 17, 18, 21, 24.

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[2] EPA Region 9 withdrew the portion of its Response to Comments that explained the basis for not evaluating CO_2 emissions in the BACT analysis. EPA Region 9 intiated a new public comment period, which closed on March 25, 2009, though EPA Region 9 has not yet released a new basis for its decision regarding CO_2.

Although the Remand Motion is styled as a motion from EPA Region 9, the Remand Motion also makes it clear that it is the new Administrator, not EPA Region 9, who wants the permit to be remanded so that the permitting process can be redone in accordance with her policy preferences. *See* Remand Motion at 3, 4, 9, 11, 18, 21.

The new Administrator clearly has discretion to change rules and policies, as long as these changes are (1) consistent with underlying statutory requirements and (2) the Agency follows the required procedures for changing existing rules and policies. She may then apply these changes *prospectively*. The 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. At immediate stake are the millions of dollars already invested in the Desert Rock Project, hundreds of millions of dollars in revenue and thousands of jobs for the Navajos, and a reliable source of energy for an area of the country that desperately needs it. In the longer term, however, this decision may affect the development of energy resources in this country.

As the Board well knows, energy infrastructure does not spring into existence out of wishful thinking, and it is not free. Any energy project depends on the rule of law to provide clear standards and some degree of certainty so that engineers can design a proposed project and assess its impacts, project developers can gauge the likelihood of a return on investment in the project, and lenders can weigh the risk of lending money to finance the project. *See Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994) ("[i]n a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions").

Desert Rock Energy 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 EPA Region 9 found it to be complete. In practice, these laws and policies have been somewhat of a moving target, as the voluntary remand of the CO_2 portion of the PSD permitting decision demonstrates. What EPA Region 9 is now seeking, however, is far different and entirely inconsistent with the rule of law.

EPA Region 9 now proposes to "re-do" a PSD permitting process of which EPA Region 9 admits no error. In the case of $PM_{2.5}$, EPA Region 9 wants a re-do to apply a new rule that has yet to be proposed, much less finalized. In the case of IGCC, EPA Region 9 wants a re-do so that it can effectuate the Administrator's new policy of establishing a "level playing field" for IGCC. EPA Region 9's attempt to apply new laws and policies retroactively is inconsistent with a jurisprudential presumption against such retroactive rulemaking that, in the words of Justice Stevens, "embodies a legal doctrine centuries older than our Republic." *Landgraf*, 511 U.S. at 265. "Those regulated by an administrative agency are entitled to'know the rules by which the game will be played." *Alaska Professional Hunters Ass., Inc. v. FAA*, 177 F.3d 1030, 1035 (D.C. Cir. 1999) "). To attempt to apply a new law or policy retroactively before such law or policy has even been written is such an absurd proposition that legal precedent barely remarks upon it.

In the case of the additional impacts analysis, EPA Region 9 wants a re-do so it can "strengthen compliance" with 40 C.F.R. § 52.21(o), despite the fact that compliance is a binary state (the analysis either complies or it does not) and that this Board is poised to make that very determination presently. In the case of coordinating the PSD permitting, ESA consultation and case-by-case MACT processes, EPA Region 9 wants a re-do so it can establish a "more efficient planning and permitting process." EPA Region 9 does not explain how repeating a valid,

completed PSD permitting process is "more efficient" than simply applying better procedures in the future. As an analogy, if Henry Ford determined after building a Model T that it would be more efficient to establish an assembly line, he presumably would not disassemble the Model T that was already built through the less-efficient method.

The assertion that EPA Region 9 has the right to change the rules of the PSD permitting process as it goes along will naturally lead to procedural abuses and, indeed, EPA Region 9's Motion blithely disregards the deadline imposed by Congress in section 165(c) and demonstrates complete disinterest in abiding by the appellate procedures and role for this Board mandated by 40 C.F.R. Part 124. Both of these laws are designed to protect applicants against the sort of arbitrary and capricious actions EPA Region 9 now proposes.

Granting the Remand Motion would violate both the Clean Air Act and EPA's own implementing regulations, and offend elementary considerations of fairness. The effects of a voluntary remand would have severe collateral reverberations throughout the regulated community, slowing the already-glacial pace of development and shaking the trust of participants in every stage of all sorts of permit proceedings. Desert Rock Energy therefore respectfully requests that this Board deny the Remand Motion.

In general, courts avoid addressing constitutional issues if a case can be decided based on the interpretation of statutes or regulations. *Jean v. Nelson*, 472 U.S. 846, 854 (1985) (collecting cases); *Blum v. Bacon*, 457 U.S. 132, 137 (1982) (courts must first address statutory argument in order to avoid unnecessary resolution of the constitutional issue). Thus, we first explain why the Remand Motion is inconsistent with EPA's own regulations, the Clean Air Act and the Administrative Procedure Act. We then turn to the constitutional issues presented by the Remand Motion and EPA's efforts to apply new policies and rules retroactively.

ARGUMENT

I. PART 124 PROHIBITS EPA REGION 9 FROM VOLUNTARILY WITHDRAWING THE PSD PERMIT AND THE BOARD CANNOT OVERRIDE THAT PROHIBITION.

Part 124 was designed to provide a clear, predictable appellate process that conferred "on the Board the dignity and stature that is appropriate for the Agency's highest adjudicative body," and to combat the perception that appeals within EPA were done on an "ad hoc, provisional" basis. *See* 57 Fed.Reg. 5320 (Feb. 13, 1992). The regulated community's perception of fairness in EPA's decisionmaking was a significant justification for the creation of this Board. *See* 57 Fed.Reg. 5320, 5322 (Feb. 13, 1992).

EPA Region 9 requests that this Board either grant a "Motion for Voluntary Remand" or, in the alternative, that the Board reverse its decision to grant review of the PSD permit, EPA Region 9's logic being that after reversal of the decision to grant review, it can simply voluntarily withdraw the PSD permit under 40 C.F.R. § 124.19.

40 C.F.R. § 124.19(d) expressly limits the timeframe during which EPA Region 9 may withdraw the PSD permit to "any time prior to the rendering of a decision...to grant or deny review of a permit decision." This Board granted review of all non-stayed issues raised by the petitions concerning EPA Region 9's PSD permitting decision for the Desert Rock Project on January 22, 2009. EPA Region 9 acknowledges that section 124.19(d) therefore explicitly bars EPA Region 9 from withdrawing the PSD permit. *See* Remand Motion at 7.

To get around this problem, EPA Region 9 requests that this Board simply grant EPA Region 9 permission to do what the PSD permitting regulations otherwise prohibit. *See Nat. Resources Defense Council v. Nuclear Regulatory Commission*, 666 F.2d 595, 601 (D.C. Cir. 1981) (court denied petitioner from "do[ing] indirectly what it is forbidden by statute from doing

directly"). EPA Region 9 concedes that there is nothing in "[t]he regulations, EAB Practice Manual, and EAB precedent" to support its request for voluntary remand. Remand Motion at 7. Nonetheless, EPA Region 9 argues that the Board should grant its motion based on an analogy to a federal court's "equitable power to remand an agency decision for reconsideration without completing judicial consideration when the agency has so requested." *Id.* EPA Region 9 asserts that voluntary remand is appropriate here because the remand involves a change in agency policy or interpretation to which EPA Region 9 is afforded deference. *See* Remand Motion at 8. This analogy is flawed in two ways.

A. EPA Region 9's Assertion that the Board Should "Defer" to EPA Region 9's Desire to Apply Newly Announced Policies to the PSD Permit Is Unfounded and Contrary to this Board's Precedent.

The Board owes no deference to EPA Region 9 with regard to the asserted changes in agency policy or interpretation. Unlike the federal courts cited by EPA Region 9, the Board is not bound to apply the doctrine of administrative deference established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *In re Lazarus, Inc.*, 7 E.A.D. 318, 351 n.55 (EAB 1997) ("parties before the Board may not ordinarily raise the doctrine of administrative deference as grounds for requiring the Board to defer to an interpretation of statutory or regulatory requirements advanced by any individual component of the EPA"). The deference doctrine does not apply during Board review because the Board serves as the final decision maker for the Agency. *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 543 n.22 (EAB 1998) (construing civil penalties provisions in Clean Air Act without granting deference to EPA Region 1's interpretation); *In re Mobil Oil Corp.*, 5 E.A.D. 490, 508-09 and n. 30 (EAB 1994) (interpreting liability provisions of CERCLA without deference to EPA's interpretation).

The federal courts cited by EPA Region 9 justify remand during appeal based on the presumption under *Chevron* that "agencies are entitled to formulate policy and make rules." Remand Motion at 8 (citing *SKF USA Inc. v. U.S.*, 254 F.3d 1022, 1029-30 (Fed. Cir. 2001). This presumption that does not apply here; indeed, to the extent that any branch of EPA should be making substantive decisions regarding Desert Rock Energy's PSD permit at this point in the process, it is supposed to be the Board, *not* EPA Region 9. *In re Mobil Oil Corp.*, 5. E.A.D. at 509 n. 30; *In re Lazarus*, 7 E.A.D. at 351 n. 55.

B. 40 C.F.R. Part 124 Prohibits EPA Region 9 From Withdrawing Its Permit After the Board Has Granted a Petition for Review.

Part 124 presents a series of clear steps that define the contours of the administrative permit appeals process. Within 30 days after a PSD final permit decision has been issued, any person who filed comments on that draft permit or participated in the public hearing may petition this Board to review any condition of the permit decision. 40 C.F.R. § 124.19(a). Section 124.19(c) provides that "[w]ithin a reasonable time following the filing of the petition for review, the Environmental Appeals Board shall issue an order granting or denying the petition for review." 40 C.F.R. § 124.19(c). A permitting authority may, "at any time prior to the rendering of a decision...to grant or deny review of a permit decision...withdraw the permit and prepare a new draft permit under § 124.6 addressing the portions so withdrawn." 40 C.F.R. § 124.19(d). A petition to this Board is a prerequisite to the seeking of judicial review of the final agency action, which occurs when a PSD permit decision is issued by EPA and agency review procedures are exhausted. 40 C.F.R. §§ 124.19(e), (f)(1). A final permit decision is issued where (1) the Board denies review of the permit; (2) the Board issues a decision without remanding the proceeding; or (3) upon completion of remand proceedings, unless the Board

specifically requires that appeal of the remand decision will be required to exhaust administrative remedies. 40 C.F.R. § 124.19(f)(1)(i) through (iii).

1. The Board Cannot Abrogate Procedural Requirements of Section 124.

EPA Region 9 apparently believes that, even though Section 124.19 does not allow the Region to unilaterally withdraw the permit at this stage of the permit appeal, it does allow the Board to give Region 9 permission to withdraw the permit despite the fact that a petition for review has been granted. However, as this Board had repeatedly stated, it too is bound by the regulations governing this proceeding. *See In re Carlton, Inc. North Shore Power Plant*, 9 E.A.D. 690, 692 (EAB 2001) (the Board is "limited by the statutes, regulations, and delegations that authorize and provide standards for such review"); *see also* 57 Fed.Reg. 5,320 (Feb. 13, 1992); EAB Practice Manual at 2 ("[t]he jurisdiction of the Board is established primarily by regulation"). The Board cannot grant EPA Region 9 permission to do what 40 C.F.R. Part 124 prohibits.[3]

Section 124.19(d) provides only one way for EPA Region 9 to withdraw a PSD permit that it has already issued. Any permitting authority such as Region 9 may withdraw a permit (or

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[3] NGO Petitioners assert that "[t]he Board's authority to grant the requested remand is clear." NGO Petitioners' Response to Desert Rock Energy Company's and Dine Power Authority's Joint Motion for Reconsideration of Order Establishing Deadline for Responses to Region's Motion for Voluntary Remand ("NGO Petitioners' Response") at 3. Despite this statement, NGO Petitioners cannot marshal even a single instance in which this Board has authorized a permitting authority to withdraw a permit after the Board has granted review. In each of the three cases cited by NGO Petitioners, the permitting authority's withdrawal of the permit appears to have come before the Board rendered a decision granting or denying review, which is entirely consistent with section 124.19(d) and not at all the case here. *See In re In deck-Elwood, L.L.C.*, PSD Appeal No. 03-04 (May 20, 2004 Order) (issued roughly two years prior to the Board's denial of review); *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 563 (EAB 1998) (acknowledging in procedural discussion past dismissal of petitions for review where EPA voluntarily remanded the permit); *In re GMC Delco Remy*, 7 E.A.D. 136, 154 (EAB 1997) (acknowledging, in a decision denying a petition for review, EPA's previous agreement to remand permit condition to add a provision).

a section of a permit) upon notification to the Board and the parties, but only up *until* the time that the Board renders a decision to grant or deny a petition for review. 40 C.F.R. § 124.19(d). It would be arbitrary and capricious for this Board to grant EPA Region 9's Motion where to do so would negate the very regulations defining its authority.

EPA Region 9's logic would grant the Boardthe authority to modify any of the procedures and requires set forth in Part 124. For example, under 40 C.F.R. § 124.19(a), "any person who filed comments on [a PSD] permit or participated in the public hearing may petition the Environmental Appeals Board to review any condition of the permit decision." By EPA Region 9's reasoning, the Board could ignore the requirement that a petitioner file comments or participate in the public hearing simply by issuing an order granting anyone permission to file a petition, regardless of whether he or she had participated in the process by which the permit was developed. This is clearly incorrect.

2. *Applying Rules That Have Yet to Be Issued On Permits That Have Already Been Issued Is Arbitrary and Capricious.*

The Remand Motion is based on the expectation of future changes in EPA rules or policies that might, in the Region's view, affect the validity of the Desert Rock permit that already has been issued. This is a remarkable proposition: EPA apparently wants the Desert Rock Project to be subject to *rules that have yet to be written.* The Remand Motion essentially seeks the Board's approval for a new permitting approach that would allow EPA to take permits that were issued in the past and invalidate them in the present based on rules to be developed in the future. This is the very definition of arbitrary decision-making and is a violation of the Administrative Procedure Act in more ways than one. *See Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 220 (1988) (invalidating cost-limit regulations issued in 1984 for application to Medicare reimbursements for the years 1981 and 1982) ("purported rules

that...change what was the law in the past" are arbitrary and capricious; "a rule is an agency statement 'of future effect,' not 'of future effect and/or reasonable past effect"); *see* 5 U.S.C. §§ 551(4) and 553(d) (defining an agency rule as a "statement of general or particular applicability and future effect"), 706 (defining "arbitrary" and "capricious" rulemaking).

To accomplish this goal, EPA Region 9 wants to "reconsider" certain aspects of the PSD permitting program in order to hold a valid permit hostage until new rules can be issued. The Board must reject this proposition and deny the Remand Motion if for no other reason that to preserve the integrity of the permitting process and reassure permit applicants that they will be treated fairly in this process.

C. EPA Region 9's Alternative Request, that the Board Withdraw or Amend its January 22, 2009 Order Granting Review of the Pending Petitions for Review Is Essentially a Motion for Reconsideration, and Is Therefore Untimely.

EPA Region 9 makes a misguided request, in the alternative, that the Board "withdraw or amend its Order dated January 22, 2009 granting review of the pending Petitions for Review so that Region 9's Air Division Director can withdraw the Final PSD Permit pursuant to the authority set forth in 40 C.F.R. § 124.19." Remand Motion at 6. EPA Region 9's alternative request presumes that it is somehow possible to return to the *status quo ante*—just to the point which would conveniently allow EPA Region 9 to do what it wants.

The Remand Motion asks that this Board "withdraw" or "amend" its order granting review of the petitions—essentially, that it reconsider its prior ruling. This attempt to "unring the bell" through a Motion for Voluntary Remand is inconsistent with the plain language of § 124.19(d), which provides the mechanism for requesting the Board to reconsider its orders. Section 124.19(g) states that any "motion to reconsider a final order shall be filed within ten (10) days after service of the final order." 40 C.F.R. § 124.19(g). The Board issued its order granting

the petitions for review on January 22, 2009; the Remand Motion was not filed until April 23, 2009, well beyond the 30 day deadline. Section 124.19(g) will be rendered meaningless if parties to PSD permit appeals are allowed to skirt its procedural requirements simply be coming up with a new label for the motion. There will be no finality to any permit appeal—and hence to any permit—if the opportunities to revisit the Board's rulings are limited only by the parties' creativity in labeling. As the D.C. Circuit has recognized, time limits like that in section 124.19(g) "serve[] the important purpose of imparting finality into the administrative process, thereby conserving administrative resources and protecting the reliance interests of regulates who conform their conduct to the regulations." *Nat. Res. Defense Council*, 666 F.2d at 602.

II. THE REMAND MOTION IS A CLEAR VIOLATION OF SECTION 165(C) OF THE CLEAN AIR ACT

CAA § 165(c) mandates that a PSD permit application "shall be granted or denied not later than one year after the date of filing of such completed application." 42 U.S.C. § 7475(c). Although this requirement has been at the center of this proceeding from the beginning and is discussed in virtually all the previous pleadings submitted to this Board, EPA Region 9 makes no mention of it in the Remand Motion. There is no attempt to explain how the Remand Motion could possibly be consistent with this statutory requirement. Apparently, the new Administrator's policy preferences override the laws enacted by Congress – or perhaps simply cause at least one of them to disappear.

Congress included Section 165(c) as part of the 1977 Amendments to the Clean Air Act to address concerns that the PSD program could otherwise become a vehicle through which special interest groups could delay much-needed construction projects. In the Senate Committee on Public Works Report, a key part of the legislative history of the 1977 Amendments, Congress stated:

> Inherent in any review-and-permit process is the opportunity for delay. The Committee does not intend that the permit process to prevent significant deterioration should become a vehicle for inaction and delay. To the contrary, the States and Federal agencies must do all that is feasible to move quickly and responsibility on permit applications and those studies necessary to judge the impact of an application. *Nothing could be more detrimental to the intent of this section and the integrity of this Act than to have the process encumbered by bureaucratic delay.*

S. Rep. No. 94-717, at 23 (1976) (emphasis added). As noted above, EPA Region 9 determined that Desert Rock Energy's PSD permit application was complete more than five years ago. Such a "completeness determination" is a step in most permitting actions and is specifically required under EPA regulations. 40 C.F.R. § 124.3(c). After waiting for more than three years, Desert Rock Energy finally had to sue EPA Region 9 to compel the Agency to meet its obligation under CAA § 165(c). To resolve that litigation, the U.S. Department of Justice entered into a consent decree with Desert Rock Energy and DPA in which EPA Region 9 agreed to make a final decision on the Desert Rock Energy permit by a date certain. Region 9 met that deadline, but now, almost a year into the administrative appeals process on that permit, and without any consultation with the other parties to the consent decree, EPA Region 9 seeks to take that permit back – while at the same time reaffirming that it contains no legal flaws.

It is especially galling that, as a rationale for seeking a remand, EPA Region 9 is now saying that certain aspects of (not errors in) the Desert Rock Energy PSD permit "might cause delays in the permitting or appeal action," pose "potential inefficiencies and wasted efforts," be an "inefficient use of EPA resources," or even "effectively require portions of the permits to be subject to public comment and appeal to the EAB twice." Remand Motion at 13, 15. EPA Region 9's remedy for these "potential inefficiencies and wasted efforts" is to snatch the PSD permit away from the Board right before a decision on the merits, after five rounds of briefing over nearly a year, to reconsider the very issues on which this Board was about to rule.

Apparently, the Agency's preferred approach for addressing the *possibility* of having certain portions of the permit be subject to public comment and appeal to the EAB twice is to subject *the entire permit* to public comment and appeal twice.

In previous pleadings, other parties to this case have suggested that EPA Region 9 can get around Section 165(c) by saying, almost 5 years after the fact, that the permit application wasn't complete after all. Their position, however, effectively reads Section 165(c) out of the statute and renders it a complete nullity. Section 165(c) would obviously mean nothing if EPA Region 9 could make a completeness determination on a permit application and then, months or years or perhaps even decades later, simply decide that it wants additional information to make the application *really* complete.

In the view of the NGO Petitioners, EPA Region 9 should have required Desert Rock Energy to complete an ESA consultation, the NEPA process for other related actions, and its case-by-case MACT application (and perhaps other things), before finding that its permit application was complete. However, they cannot point to any rule, regulation, or policy to suggest that any of these things must be part of a PSD permit application.

It appears from the Remand Motion that EPA may now believe that it would be preferable to have all these things in hand before issuing a PSD permit. Like the NGO Petitioners, however, it does not even attempt to argue that there is anything in any statute, regulation, or policy statement that even hints that all these things should be part of the PSD permitting process. *See, e.g.*, Remand Motion at 17 (completing a BACT analysis and a case-by-case MACT analysis at the same time " is not a mandatory requirement under EPA regulations at this time.")

If EPA wants to change the way it coordinates various permitting activities and environmental reviews, including the requirements for PSD permit applications, then it must go through the necessary procedures to change those requirements. Assuming those new requirements are consistent with the underlying statutes and are not arbitrary and capricious, then the Agency may require anyone who submits a PSD permit application *in the future* to submit additional information before getting a completeness determination. However, it cannot now decide, without notice-and-comment, to impose new requirements for PSD permit applications and then apply those requirements to a permit application that was found to be complete more than 5 years ago – especially when the permitting authority (in this case, Region 9) has already issued the permit.

III. EPA REGION 9'S MOTION FOR VOLUNTARY REMAND IS MADE ON FRIVOLOUS GROUNDS AND IN BAD FAITH AND THEREFORE SHOULD BE DENIED.

As demonstrated above, the Board does not have the authority to do what EPA Region 9 requests. However, if the Board finds that it does have the authority to grant the Remand Motion, a further question arises as to the contours of the Board's authority. Continuing its flawed analogy to federal court cases, EPA Region 9 argues that under *SKF USA Inc. v. U.S.*, 254 F.3d 1022 (Fed. Cir. 2001), remand is required "absent the most unusual circumstances verging on bad faith." Remand Motion at 8 (citing *SKF USA*, 254 F.3d at 1029-30. This standard is applied, however, only where the agency "believes that its original decision is incorrect on the merits and wishes to change the results." *SKF USA*, 254 F.3d at 1029.

Nowhere in the Remand Motion does EPA Region 9 indicate that its decision to issue the Desert Rock Energy PSD permit was incorrect on the merits. Rather, EPA Region 9 requests this remand to "reconsider its approach for demonstrating that this permit complies" with the

PSD requirements for $PM_{2.5}$; "coordinate the completion" of the PSD permit review, ESA consultation, and section 112(g) review; "reconsider its decision not to evaluate IGCC as a BACT option for this project"; and "strengthen compliance" with the additional impacts analysis. These were all issues addressed in EPA Region 9's Response to Comments and justified on legal grounds to this Board in its briefs in this matter. AR 120 at 12-21, 35, 76-88, 140-51, 166-72; EPA Region 9's Response to Petitions for Review, Supplemental Briefs, and Amicus Brief at 14-23, 68-75, 90-128. Where an agency requests remand to reconsider its previous position without confessing error, the reviewing court (here, if one accepts the analogy to the federal court case law, the Board) has *discretion* over whether to remand, and it should deny remand where it finds the request for remand is made in bad faith or is frivolous. *SKF USA*, 254 F.3d at 1029. EPA Region 9's Remand Motion is both.

A. EPA Region 9's Request Is An Attempt to Stall Previously-Permitted Projects While EPA Develops New Rules.

EPA Region 9 is engaging in a naked attempt to stall previously-permitted projects so that no new coal-fired power plants are approved before EPA can overhaul the PSD permitting program to align it with the new Obama adminstration's policy goals. While EPA certainly has the discretion to formulate new policies and new interpretations of established policies, it is not entitled to develop pretexts for holding up a validly-issued PSD permit on the eve of a decision on the merits by this Board. A closer look at the rationales submitted by EPA Region 9 in favor of each of its substantive points indicates that this request is steeped in the desire to achieve a certain outcome by new and different methods, not to address the merits of the Desert Rock Energy PSD permit honestly.

1. EPA Region 9's Request to Reconsider the PSD Permit's Compliance with $PM_{2.5}$ Requirements Is an Attempt to Bind Desert Rock Energy to a Prospective Change in Agency Policy and Is Therefore Frivolous and Contrary to Law.

The Board should reject a request for remand based on prospective policy statements, which is precisely what has occurred here with EPA Region 9's request for remand on the $PM_{2.5}$ issue. *See SKF USA Inc.*, 254 F.3d at 1029 (citing *Lutheran Chuch-Missouri Synod v. Fed. Communications Comm'n*, 141 F.3d 344, 349 (D.C. Cir. 1998)).

EPA Region 9 requests that the Board remand Desert Rock Energy's PSD permit because, "[g]iven the Administrator's stated intent to propose repealing the grandfathering provision, it now appears unlikely that the current administrative record will be sufficient to establish compliance with the PSD requirements for $PM_{2.5}$." Remand Motion at 9. EPA Region 9 continues: "Therefore, Region 9 requests voluntary remand so that it may reconsider its approach for demonstrating that this permit complies with the PSD requirements for $PM_{2.5}$ applicable under the existing regulations." Remand Motion at 9.

EPA Region 9's argument is at best incoherent and, at worst, an utterly frivolous argument contrary to established law and made in bad faith. The argument could charitably be viewed as incoherent because EPA Region 9's conclusion—that it needs to reconsider the PSD permit's compliance with "existing regulations," does not flow from the predicate fact, that the Administrator has "stated" the "intent to propose repealing the grandfathering provision." An intent to propose to repeal existing regulations does not affect the validity of the existing regulation; therefore, the Administrator's intent to propose to repeal the grandfathering provision does not affect the validity of the $PM_{2.5}$ analysis done in support of Desert Rock Energy's PSD permit many years ago. To hold otherwise would be contrary to the very nature of administrative rulemaking. The Administrative Procedure Act defines an agency "rule" as "the

whole or a part of an agency statement of general or particular applicability *and future effect...*" *See* 5 U.S.C. § 551(4). The Supreme Court has noted that "a rule is an agency statement of future effect, not of future effect and/or reasonable past effect." *See Bowen*, 488 U.S. at 220. In the *Bowen* case, the Supreme Court held that purported rules that "change what was the law in the past" are arbitrary and capricious. *Id.*

Even if EPA adopts a new rule regarding $PM_{2.5}$, it could not use the new rule to invalidate a PSD permit issued in the past. This is the rule of law that EPA Region 9 seeks to avoid by withdrawing the Desert Rock Energy PSD permit at this time. The Board should conclude, therefore, that EPA Region 9's request has been made in bad faith and is frivolous.

There is precedent for such a conclusion. The Federal Circuit in *SKF USA Inc.* characterized a similar argument advanced by the Federal Communications Commission ("FCC") in *LutheranChurch-Missiouri Synod* "frivolous" and "in bad faith." *SKF USA Inc.*, 254 F.3d at 1029. In *Lutheran Church-Missouri Syndod*, a church sought review of an FCC order denying the church's broadcasting license based on purported equal employment opportunity violations through the church's religious hiring preferences. After the appeal had been fully briefed, the FCC filed a motion for partial remand of the record asking that almost the entire case be sent back to the Commission. *Lutheran Church-Missouri Synod*, 141 F.3d at 348. According to the FCC, a recently released "policy statement" modified the FCC's previous position to permit religious broadcasters to use a religious preference for all positions. *Id.* FCC's counsel asserted that if the case were remanded, the FCC would apply the new "policy statement" retroactively and vacate those portions of the order related to the equal employment opportunity violation. *Id.* at 348-49. The Federal Circuit denied the FCC's motion, noting that it could not, as a matter of administrative law, consider a post-argument "policy statement" directed only

towards the future. *Id.* at 349. The Federal Circuit found that the FCC was deploying the argument for reasons other than the actual merits of the case before the court. *Id.*

This is precisely what EPA Region 9 is attempting here. Having already demonstrated persuasively in *its own briefing* that the Desert Rock Energy PSD permit satisfies CAA section 165(a) for $PM_{2.5}$ (not just based on the grandfathering provisions in the $PM_{2.5}$ implementation rule but also in light of long-standing agency guidance and decisions from this Board), EPA Region 9 seeks to avoid a Board decision on this issue by requesting remand so it can attempt to apply a different rule retroactively. This is the same course of action rejected and criticized by the Federal Circuit in *Lutheran Church-Missouri Synod*, but the error is compounded here by the fact that EPA Region 9 requests remand to impose a rule *that has not even been proposed* yet. All the Administrator has done is grant a request to reconsider the $PM_{2.5}$ rule, and stay the grandfathering provision. The Administrator did not and could not revoke application of the grandfathering provision to the Desert Rock Energy PSD permit through the letter announcing EPA's reconsideration of the rule and subsequent Federal Register notice staying the grandfathering provision. EPA would have to propose and finalize a draft rule to replace the $PM_{2.5}$ rule in place when EPA Region 9 issued the Desert Rock Energy PSD permit. It has yet to do so. EPA Region 9's substantive legal justification for requesting remand on this issue is non-existent.

2. *EPA Region 9's Request to Reconsider Its Decision to Exclude IGCC From the BACT Analysis Relies on the Willful Misstatement of EPA Region 9's Own Record and Is Therefore Made in Bad Faith or at Least Frivolous.*

EPA Region 9's argument in favor of remand on its BACT analysis does not even admit the prospective change in agency policy on "redefining the source" implicit in the Remand Motion. Rather, EPA Region 9 asserts that it misunderstood EPA's "redefining the source"

policy when it issued Desert Rock Energy's PSD permit. To create the appearance of a misunderstanding, EPA Region 9 distorts its own record in this case. A review of the record that is, rather than the record EPA Region 9 presents in its Motion, demonstrates that EPA Region 9 knew exactly what the existing EPA policy on "redefining the source" was when it excluded IGCC from the BACT analysis. There is no legal error in EPA Region 9's application of the policy—the problem here is simply that the Administrator does not care for it. This is insufficient to justify the extraordinary measure sought by EPA Region 9.[4]

EPA Region 9 explains its request for remand on the IGCC issue thusly:

> At the time of its Final PSD Permit issuance and in its Response Brief on appeal, Region 9 determined *that it was precluded under headquarters policy from evaluating IGCC* technology as part of BACT analysis for this facility. Region 9 has consulted with the Administrator's office during the 45-day extension the Board granted in this matter. *Administrator Jackson does not support a policy that would preclude permitting authorities from exercising their discretion to evaluate this option.* While the Agency has not previously required consideration of IGCC in the BACT analysis for such sources, permitting authorities conducting a top-down BACT analysis as part of the review of an application to construct a new coal-fired electric generating unit *have the discretion under existing EPA interpretations* to list IGCC technology as a potentially applicable control technique at Step 1 of the analysis and complete the remaining steps of the top-down process. Therefore, rather than continue to contest this issue on appeal, Region 9 prefers at this point to reconsider the scope of its BACT analysis for this facility.

Remand Motion at 18 (emphasis added). Nowhere in the administrative record before the Board is there a hint that EPA Region 9 "was precluded under headquarters policy from evaluating IGCC technology as part of BACT." EPA Region 9 states that the Administrator's "clarification

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[4] As argued above, EPA Region 9's request does violence to the appellate procedures mandated by 40 C.F.R. Part 124. However, EPA Region 9's request on the IGCC issue in particular denigrates the statutory and regulatory role of this Board. Presumably, if EPA Region 9 did apply the "redefining the source" policy incorrectly, this Board will so find and remand the Desert Rock Energy PSD permit on that issue with guidance on the appropriate path forward on remand.

that permitting authorities have discretion in this area" leads it to seek "to more thoroughly consider PSD in the BACT analysis for this new coal-fired electric generating unit..." Remand Motion at 21. EPA Region 9's statements regarding the record in this matter are simply false.

From EPA Region 9's description of its underlying BACT analysis, one would expect to see some explanation in the record that EPA Region 9 found itself bound by EPA policy to disregard IGCC mechanically. What one finds in the record, however, is an extensive and cogent explanation of the history of EPA's policy against "redefining the source," analysis of the underlying statutes and legislative history, and citation to many EAB and federal court decisions on the matter. *See* Response to Comments at 13-20. As a matter of fact, EPA Region 9 relied heavily on *In re Prairie State Generating Company*, PSD Appeal No. 05-05 (EAB Aug. 24, 2006) in its Response to Comments, the same EAB opinion which EPA Region 9 now holds up as "recently" addressing the analysis that a permitting authority should complete in assessing whether an option would redefine the proposed source. *Compare* Response to Comments at 14-19; Remand Motion at 22-23. In its Response to Comments, EPA Region 9 cited the *Prairie State* case specifically to *support* its exercise of discretion to exclude IGCC:

> The Board observed that one of the permit issuer's tasks at step 1 of the BACT analysis is to "discern which design elements are inherent to [the applicant's] purpose, articulated for reasons independent of air quality permitting, and which design elements may be changed to achieve pollutant emissions reductions without disrupting the applicant's basic business purpose for the proposed facility." *Prairie State*, slip. op. at 30.
>
> Since this line can be difficult to draw in each case, the Administrator and Environmental Appeals Board have generally recognized that the decision on whether to include a lower polluting process in the list of potentially-applicable control options compiled at Step 1 of the top-down BACT analysis is *a matter within the discretion of the PSD permitting authority.*

Response to Comments at 18. The problem, therefore, cannot be that EPA Region 9 failed to understand the fact that it had discretion in scoping the BACT analysis. The problem is rather

that the manner in which EPA Region 9 exercised its discretion in 2008 does not comport with the new administration's preference for IGCC. This cannot be a basis for remanding Desert Rock Energy's PSD permit.

EPA Region 9 does not even bother to disguise the political nature of its request. It explains that remand is sought "so that IGCC can compete on a level playing field with other coal-fired power generation technologies, creating incentives for improving the environmental performance and reducing the overall cost of future coal-fired power generation technologies." Remand Motion at 21-22. Essentially, Desert Rock Energy's legally-sufficient, validly-issued PSD permit is being sacrificed *post hoc* to further the greater good. That is illegal.

3. *EPA Region 9's Arguments Regarding Coordination of the ESA and Case-by-Case MACT Analyses and the Sufficiency of Its Additional Impacts Analysis Are Insubstantial and Made Simply to Provide a Justification to Remand the Entire PSD Permit to Achieve EPA's Goal of Subjecting the Desert Rock PSD Permit to Its Proposed $PM_{2.5}$ and BACT Analysis Policies. These Arguments Are Therefore Made In Bad Faith and Frivolous.*

The rest of EPA Region 9's substantive arguments also amount to a plea to the Board to allow EPA Region 9 to re-do the permit to reflect the changed policy objectives of the new Administrator. Regarding these issues, EPA Region 9 can point to no new change (or even proposed change) in agency rules and no purported "misunderstanding" of established EPA policy that justify throwing out the permit or even simply letting this Board do its job.

EPA Region 9 asserts without submitting any evidence for the Board's consideration that the threat of subsequent litigation justifies permitting EPA Region 9 to withdraw Desert Rock Energy's PSD permit. *See* Remand Motion at 14. EPA Region 9 would have this Board assume that after conclusion of the ESA consultation and MACT determination EPA Region 9 will be incapable of conducting any—as yet unknown—modifications to the PSD permit in a manner

that will comply with the law and satisfy all interested parties. This argument is premised either on the ineptness of EPA Region 9 (which Desert Rock Energy has not experienced thus far in this PSD permitting process) or on the bad faith of the NGO Petitioners (*i.e.*, that they will abuse the appeals process by making meritless appeals simply to cause delay). Neither justification should support such an extraordinary measure as that requested by EPA Region 9 here, that the Board allow an entire PSD permit to be withdrawn when all that is left in the appeals process is a decision on the merits. Desert Rock Energy deserves a PSD permit decision based on the substance of its permit and the underlying record, not based on the likelihood that some party will challenge EPA Region 9's future actions. "Members of the public are entitled to assume that public officials will act in accordance with law." *Buccaneer Point Estates, Inc. v. United States*, 729 F.2d 1297, 1299 (11th Cir. 1984). Likewise, courts do not presume that the government will behave illegally in the future. *See Mazaleski v. Treusdell*, 562 F.2d 701, 717 n. 38 (D.C. Cir. 1977) (administrative actions of agency are presumed to be valid); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 585 (1992) (Stevens, J., concurring (the Court assumes that all agencys abide by regulations and perform requisite tasks). This Board cannot assume future error by EPA Region 9, and to make this decision based on a naked threat of future litigation on some as yet unidentified grounds would be to hold the PSD permitting process hostage to intimidation.

To the extent that the Board wishes to consider EPA Region 9's unsupported conjecture as a basis for deciding this Motion, Desert Rock Energy respectfully submits the following offsetting observation: the threat of subsequent litigation already exists, and remanding the permit at this point does nothing to alleviate that danger. EPA Region 9 believes it would be an "inefficient use of EPA resources (including EAB resources) to proceed with permitting in a manner that may effectively require portions of the permit to be subject to public comment and

appeal to the EAB twice—once before the ESA consultation is complete and once again if permit requirements are changed as a result of the completed consultation." EPA Region 9's Motion at 15. To forestall the inefficiency created by two public comment and appeals processes, EPA Region 9 requests *a second public comment and appeals process*. This is a frivolous argument; as a general rule one does not spend a penny to save a penny.

Likewise, EPA Region 9's argument that coordinating processes would "result in a more efficient planning and permitting process," which may or may not be true in the general sense, cannot be true where to coordinate the processes requires EPA Region 9 to jettison a completed process that already took the Region four years to finish. It bears repeating, if Henry Ford determined after building a Model T that it would be more efficient to establish an assembly line, he presumably would not disassemble the Model T that was already built through the less-efficient method. Yet that is the nature of the request being made by EPA Region 9 to this Board.

As significant as the flaws in EPA Region 9's argument are, perhaps more significant are those arguments not made. Having conceded no error in its permitting decision, EPA Region 9 has provided absolutely no justification or reasoning as to why remand now is preferable to whatever remand may be required after this Board has rendered a decision on the merits. If any one of the issues raised by Petitioners (and now raised by EPA Region 9 in its Motion) render this PSD permit invalid, this Board will so find. It simply does not make sense to proceed with a new permitting process on all of these issues without the benefit of the Board's decision and direction. Not only is a decision by the Board guaranteed to Desert Rock Energy by Part 124, as discussed *supra*, but it ensures an efficient use of EPA Region 9's resources. EPA Region 9 is requesting this Board's permission to redo what EPA Region 9 believes is a valid, legally-issued

PSD permit. It cannot be a more efficient use of EPA Region 9's resources to redo everything—the valid and the invalid—when all that is left in this appeal is for the Board simply to direct EPA Region 9 on which, if any, parts of the permit are invalid and need to be addressed in a remand.

B. EPA Held Discussions with NGO Petitioners About This PSD Permit During the Time In Which EPA Region 9 Had Requested an Extension of Time to File Its Surreply.

On April 28, 2009, Bracewell & Giuliani LLP filed a request for records under the Freedom of Information Act, 5 U.S.C. § 552, as amended ("FOIA"), requesting all documents and other records from the date of January 20, 2009 to the present that related to (1) EPA Region 9's Motion for Voluntary Remand; (2) any communications among or between any of the parties to this PSD permit appeal, the Executive Office of the President of the United States, and EPA; and (3) whether any current EPA official should be or is recused from any involvement in this Desert Rock Energy permitting process.

EPA Region 9 responded to the FOIA request on June 2, 2009 but with only a partial response. EPA Region 9 indicated that there are additional responsive documents that have not yet been released. Despite the shortcomings in EPA Region 9's response, the documents produced by EPA Region 9 indicate at least two meeting between upper-level political appointees and several of the Petititioners—specifically, the National Resources Defense Council, Sierra Club and Diné Care.[5] The stated purpose of the meeting with Sierra Club and NRDC was, according to David Bookbinder, "to discuss what non-CO2 steps EPA might be

[5] Diné CARE appears to have met with EPA and EPA Region 9 about the Desert Rock Project on March 19, 2009 to discuss the technical flaws in the proposed Desert Rock PSD permit and to propose alternatives to the project. *See* Exhibit A.2, E-mail from A. Wood to B. Doster, dated March 18, 2009, *and* E-mail from B. Doster to A Lyons and attached letter, dated March 18, 2009.

taking as to coal plant permits[.] There is a whole mess o' Title V and PSD issues out there re Hg, HAPS, NOx, SOx, PM 2.5, etc." *See* Exhibit A.1, Feb. 19, 2009 E-Mail from D. Bookbinder to L. Heinzerling. Mr. Bookbinder followed up this request with a list of the PSD permits NRCD and Sierra Club were "expecting between now and June 1. Putting aside CO2, each of these present at least one, and usually several of the following issues: NOx, SOx, Hg, HAPs, PM and SSM." *See* Exhibit A.1, Feb. 25 E-mail from D. Bookbinder to R. Ossias. The Desert Rock Energy PSD Permit was on that list. Despite the fact that EPA was actively defending the Desert Rock PSD permit in an active appeal before this Board, Robert M. Sussman, Senior Policy Counsel to Administrator Jackson, met with Mr. Bookbinder and Bruce Nilles of Sierra Club on March 2, 2009, to discuss the Desert Rock PSD permit, among others, without notifying any of the other parties to this appeal. At least one of EPA Region 9's attorneys in this appeal attended this meeting and took notes. *See* Exhibit A.1, Handwritten Notes Entitled "3/2 Power Plant Permits, Sierra Cub – meeting w/ Sussman."

According to these notes, Mr. Bookbinder revealed in that meeting that NRDC's strategy is simply to litigate every proposed coal-fired power plant in the United States, in response to which Mr. Sussman mused that the economy might be affecting coal-fired power development, noting that that only eight new plants were proposed in 2008. These notes also illuminate the discussion between EPA, NRDC and Sierra Club regarding the $PM_{2.5}$ surrogate policy: "get rid of Seitz memo;" "revoke Seitz memo;" "get rid of it so state [sic] take PM2.5 seriously." Eleven days later, EPA Region 9 filed a motion with this Board requesting an additional 45-day extension of time to file its surreply in this matter. Through a letter signed on April 24, 2009, EPA granted a petition for reconsideration of the $PM_{2.5}$ surrogate rule and administratively stayed the grandfathering provision that applies to the Desert Rock Project.

Petitioners' right to petition the government is beyond doubt, but this sequence of events raises serious concerns about the integrity of EPA Region 9's actions in this case. Two petitioners in this case had a closed-door meeting with EPA political appointees and at least one EPA staff attorney on this case, during which the petitioners laid out their litigation strategy regarding the development of projects like the Desert Rock Project, called out for discussion the Desert Rock PSD permit specifically, and then specifically requested that EPA revoke an established EPA rule related to the defense of the Desert Rock PSD permit. Within two weeks of that meeting, EPA Region 9 was asking this Board for more time to file its final brief in this matter. Within two months of that meeting, EPA had stayed the $PM_{2.5}$ surrogate rule. Now EPA Region 9 is asking this Board to allow EPA Region 9 to redo the PSD permitting process from square one because "[g]iven the Administrator's stated intent to propose repealing the grandfathering provision, it now appears unlikely that the current administrative record will be sufficient to establish compliance with the PSD requirements for PM2.5." Remand Motion at 9. This Motion for Voluntary Remand is the culmination of a strategic end-run around this Board's authority and the law that applies to Desert Rock Energy *today*, as opposed to the law that might apply to Desert Rock Energy if it were forced to begin the PSD permitting process again. This Board could and, Desert Rock Energy respectfully submits, should see this strategy as evidence of bad faith sufficient to deny the Motion for Voluntary Remand.

IV. EPA REGION 9 SEEKS IMPERMISSIBLY TO CHANGE LONG-STANDING AGENCY POSITIONS WITHOUT NOTICE AND COMMENT

EPA Region 9's Remand Motion seeks to fundamentally change existing Agency practice and regulation on issues that have already been decided by EPA Region 9 in Desert Rock Energy's PSD permit and defended before the Board by the Agency in this case. EPA Region 9's attempt to seek a voluntary remand is based on: (1) the use of a PM_{10} analysis as a surrogate for

compliance with the $PM_{2.5}$ standards; and (2) the decision to issue a final PSD permit without considering IGCC in the BACT analysis, is therefore in contravention of the Administrative Procedures Act (APA) and should be denied.

It is well established that agencies may not make fundamental changes to established agency practice or regulation without going through the public notice and comment requirements of the APA. *See Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997); *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 626 (5th Cir. 2001). In *Paralyzed Veterans*, the D.C. Circuit stated that "[w]hen an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment." *Paralyzed Veterans*, 117 F.3d at 586; *Alaska Professional Hunters*, 177 F.3d at 1033-34. As discussed in more detail below, Remand Motion meets this standard by admitting that the motivating purpose behind the voluntary remand is the new Administrator's requested change to EPA's established views on PM_{10} surrogacy and the inclusion of IGCC in BACT analysis.

A. EPA Region 9 May Not Reconsider the $PM_{2.5}$ Grandfathering Provision Without Notice-and-Comment Rulemaking.

On October 23, 1997, EPA issued a guidance document entitled, "Interim Implementation for the New Source Review Requirements for PM2.5" (John S. Seitz, EPA, October 23, 1997) (the "Seitz Guidance"). The Seitz Guidance stated that sources would be allowed to use implementation of a PM_{10} program as a surrogate for meeting $PM_{2.5}$ requirements.

On April 5, 2005, EPA issued a guidance document entitled "Implementation of New Source Review Requirements in PM-2.5 Nonattainment Areas" (Stephen D. Page, EPA, April 5, 2005) (the "Page Guidance"). The Page Guidance affirmed the continuation of the Seitz Guidance and recommended that, until $PM_{2.5}$ major NSR regulations are issued, states should use

a PM_{10} nonattainment major NSR program as a surrogate to address the requirements of nonattainment major NSR for $PM_{2.5}$.

On May 16, 2008, EPA promulgated its final rule entitled "Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers (PM2.5)" (the "PM 2.5 Rule"). 73 Fed. Reg. 28321 (May 16, 2008). The $PM_{2.5}$ Rule ended the Agency practice of allowing sources to use PM_{10} as a surrogate for $PM_{2.5}$, however, the Rule also stated that "EPA will allow sources or modifications who previously submitted applications in accordance with the PM_{10} surrogate policy to remain subject to that policy for purposes of permitting if EPA or its delegate reviewing authority subsequently determines the application was complete as submitted." (the "Grandfather Provision") *Id.* at 28340.

The $PM_{2.5}$ Rule set forth basic criteria to determine whether a source should be grandfathered and allowed to use PM_{10} as a surrogate. The rule merely requires that the source have been subject to the $PM_{2.5}$ criteria in 40 C.F.R. § 52.21 before July 15, 2008 and that "the owner or operator submitted an application for a permit under this section before that date" consistent with the 1997 policy to use PM_{10} as a surrogate for $PM_{2.5}$ and that the application was administratively complete. 40 C.F.R. § 52.21(i)(1)(xi).

Desert Rock Energy submitted its PSD permit application to EPA Region 9 on February 22, 2004. AR 6. EPA Region 9 deemed the application administratively complete on May 21, 2004. AR 14. Without question, Desert Rock Energy's PSD permit was administratively complete well in advance of the July 14, 2008 deadline. As a result, EPA Region 9 determined that Desert Rock Energy's permit was consistent with the 1997 guidance regarding the use of PM_{10} as a surrogate. Therefore, EPA Region 9 appropriately determined that Desert Rock Energy may utilize PM_{10} as a surrogate for $PM_{2.5}$. 40 C.F.R. § 52.21(i)(1)(xi). Desert Rock

Energy's permit therefore complies with the Grandfathering Provision that enables certain sources to use PM_{10} as a surrogate for $PM_{2.5}$.

Petitioners in this case have argued to the Board that EPA Region 9's use of PM_{10} as a surrogate for $PM_{2.5}$ was clear error. In response, EPA Region 9 argued to this Board that Petitioner's contention should be denied as Petitioners' arguments on PM_{10} surrogacy were unsupported by any permit-specific information or arguments. Additionally, EPA Region 9 stated that the fact that the Grandfather Provision has been challenged in the D.C. Circuit should have no effect on the issues presented in this case. As EPA Region 9 stated, "[i]f the implementation rule is vacated by the D.C. Circuit, this remedy would reinstate the pre-existing PM_{10} surrogacy policy for all federal PSD permits (because the grandfather provision is part of the provision that ended the surrogate policy for federal PSD permits), and so the issue here (again) will be whether petitioners have shown that the use of PM_{10} surrogacy was clear error."

After staking out a clear position on PM_{10} surrogacy in the $PM_{2.5}$ Rule, and before the Board in this case, EPA Region 9 now states that it needs time to reconsider its position and consult further with Desert Rock Energy on establishing compliance with the $PM_{2.5}$ standard without using PM_{10} as a surrogate because it does not like the effective grandfathering provision. As EPA Region 9 states, "the Administrator's stated intent to propose repealing the grandfathering provision[.]" This statement is remarkable in that it not only effectively alters the application of the existing EPA $PM_{2.5}$ Rule but nowhere does EPA Region 9 suggest it will "do away with the Seitz Memo" as requested by the Sierra Club. *See* Exhibit A.1. Of course no one contests the EPA Administrator's right to propose new rules or amend existing rules, including the PM2.5 Rule. Indeed, the Agency recently published a notice in the Federal Register that it has "administratively stayed" the "grandfathering provision' until September 1, 2009. *See* 74

Fed. Reg. 26098 (June 1, 2009). However, until such revisions are promulgated in the context of notice and comment rulemaking, EPA cannot simply change long-standing Agency practice based on statements of the Administrator relating to what she might or might not do in the future. *See Paralyzed Veterans*, 117 F.3d at 586; *See also In re Pontiki Coal Corp.*, 3 E.A.D. 572, 578 (Adm'r 1991) (holding that the scope of review under 40 C.F.R. § 124.19 only contemplates challenges to specific permit decisions, not to constitutional validity of regulations themselves).

As EPA Region 9 stated in this case, the only issue before the Board is whether EPA Region 9's use of PM_{10} as a surrogate for $PM_{2.5}$ compliance was clear error and not the validity or future of the $PM_{2.5}$ Rule. EPA Region 9's attempt to deny Desert Rock Energy resolution of this question alters Agency practice, amends the existing $PM_{2.5}$ Rule, and is therefore in violation of the APA. *See Paralyzed Veterans*, 117 F.3d at 586.

B. EPA May Not Reconsider Including IGCC in THE BACT Analysis Without Notice-and-Comment Rulemaking.

EPA's 1990 Draft NSR Manual recommends a standardized "top-down" process for BACT determinations. NSR Manual. As the Board has repeatedly pointed out, the "top-down" BACT analysis is not mandatory, but it is frequently used by permitting authorities to ensure that a defensible BACT determination, involving consideration of all requisite statutory and regulatory criteria, is reached. The "top-down" approach accomplishes this through the completion of five basic steps: (1) identifying all available control options for a targeted pollutant, (2) analyzing the technical feasibility of each control option, (3) ranking the feasible options in order of effectiveness, (4) evaluating the energy, environmental, and economical impacts associated with each option, and (5) selecting as BACT a pollutant emission limit that is achievable by the most effective control option that was not eliminated in a preceding step. NSR Manual at B-6.

The EPA and this Board have long recognized that there are limits on the degree to which a permitting authority can and should dictate the design and scope of a proposed facility through the BACT analysis. The NSR Manual states:

> Historically, EPA has not considered the BACT requirement as a means to redefine the design of the source when considering available control alternatives. For example, applicants proposing to construct a coal-fired electric generator, have not been required by EPA as part of a BACT analysis to consider building a natural gas-fired electric turbine although the turbine may be inherently less polluting per unit product (in this case electricity). *However, this is an aspect of the PSD permitting process in which [permitting authorities] have the discretion to engage in a broader analysis if they so desire.*

NSR Manual at B-13 (emphasis added). This passage in the NSR Manual is referred to as EPA's "redesign policy" and has been implemented by EPA for some time. The EAB has upheld this policy of not redefining the sources of a proposed facility in many other PSD permitting proceedings and has stated that the NSR Manual "makes clear that the permitting authority is entitled to wide latitude in how broad a BACT analysis it wishes to conduct in this regard." *In re Hawaiian Commercial & Sugar Co.*, 4 E.A.D. 95, 100 (EAB 1992). Indeed, as EPA Region 9 has stated in this case, "the Administrator and this Board have long maintained a policy against utilizing the BACT requirement as a means to fundamentally redefine the basic design or scope of a proposed project." EPA Region 9's Response at 9.

Consistent with this long-standing position, EPA Region 9 reviewed the record in this case and concluded that the IGCC process would fundamentally change the nature of the proposed source because it would change the basic design of the equipment Desert Rock Energy had proposed to construct. EPA Region 9's Response at 14-18.

As part of their appeal, Petitioners have challenged EPA Region 9's decision not to consider IGCC as a control option in the BACT determination. In its response before this Board, EPA Region 9 stated "Petitioners have not shown anything in the record that contradicts Region

9's conclusion that the use of IGCC technology and its consideration in Step 1 of the BACT analysis would result in a fundamental change to the equipment DREC sought approval to construct in its permit application. Nor have Petitioners demonstrated that fundamental differences in equipment design are an insufficient basis to conclude that an inherently lower polluting process would redefine the proposed source and need not be listed as an option at Step 1 of the BACT analysis." EPA Region 9's Response at 15.

Once again, after long-standing agency practice and after the submission of contrary arguments to the Board relating to the exclusion of IGCC in the BACT determination, Remand Motion now extraordinarily claims that it "prefers" to reconsider its position on this issue because "Administrator Jackson does not support a policy that would preclude permitting authorities from exercising their discretion" to evaluate an IGCC option even though this policy was never used as a justification in the Desert Rock Energy permit by EPA Region 9. As discussed *supra*, EPA Region 9's argument would require the Board to disregard EPA Region 9's own Response to Comments in this matter, in which EPA Region 9 clearly displayed awareness of and appropriately exercised the very discretion it now protests it thought it was "precluded" from exercising.

In its Motion, EPA claims that "Region 9 is not seeking to change EPA's longstanding policy that the BACT analysis should not be used to fundamentally redefine the proposed source and the Agency's interpretation that the Clean Air Act provides some discretion for a permitting authority to decline to evaluate such options in detail as part of the BACT review." As EPA Region 9's own filings in this case state, Region 9 *did* adequately consider IGCC and elected to exclude it from its BACT determination based on the Agency's long-standing policies. Nothing the new EPA Administrator has said or not said since taking office alters Region 9's conclusions

or requires any reconsideration. Should the new Administrator desire to alter the standard by which permitting authorities use their discretion, she may do so through notice and comment rulemaking. *See Paralyzed Veterans*, 117 F.3d at 586.

As the D.C. Circuit stated in *Alaska Professional Hunters*, "[t]hose regulated by an administrative agency are entitled to 'know the rules by which the game will be played.'" *Alaska Professional Hunters*, 177 F.3d at 1035. Where, as in this case, an agency has established a settled interpretation, the courts have repeatedly held that an agency cannot escape notice and comment requirements when it decides to alter that interpretation. *Iyengar v. Barnhart*, 233 F.Supp.2d 5, 14 (D. D.C. 2002). EPA Region 9's Remand Motion should therefore be denied.

V. EPA REGION 9'S MOTION VIOLATES FIFTH AMENDMENT EQUAL PROTECTION PRINCIPLES.

EPA Region 9's Remand Motion constitutes an attempt to intentionally administer a facially neutral statute—the Clean Air Act—unequally against Desert Rock Energy. *Syngenta Crop Protection, Inc. v. U.S. E.P.A.*, 444 F.Supp.2d 435, 448 (M.D. N.C. 2006). This attempt should be rejected as a violation of the equal protection principles inherent in the due process clause of the Fifth Amendment of the U.S. Constitution. *See Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954).

The Supreme Court has repeatedly recognized the doctrine of equal protection of the laws in the due process clause of the Fifth Amendment. *See Bolling*, 347 U.S. at 498-99. Under the doctrine of equal protection, the Court has recognized three broad categories of claims: (1) a claim that a statute discriminates on its face; (2) a claim that a neutral application of a facially neutral statute has a disparate impact; and (3) a claim that a defendant is unequally administering a facially neutral statute. *See E & T Realty v. Strickland*, 830 F.2d 1107, 1112 n. 5 (11th Cir. 1987).

As part of this third category—the unequal administration of a facially neutral statute—the Supreme Court has held that the government may not intentionally treat one party differently from others similarly situated with no rational basis. *See Engquist v. Oregon Dept. of Agr.*, 128 S. Ct. 2146, 2153 (2008); *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). In order to succeed on this so-called "class of one" claim, a plaintiff must allege that: (1) it has been intentionally treated differently than others with whom it is similarly situated; and (2) there is no rational basis for the difference in treatment or the cause of the treatment is a totally illegitimate animus toward it. *See World Outreach Conference Center v. City of Chicago*, 2008 WL 4686164 (N.D. Ill. May 13, 2008).

1. EPA Region 9 Has Treated Desert Rock Energy Differently Than Other Similarly Situated Parties.

In an analysis of whether parties who have experienced disparate treatment are similarly situated, courts carefully at the underlying facts. In *Village of Willowbrook v. Olech*, the U.S. Supreme Court recognized a class of one equal protection claim where the plaintiff was the only applicant from whom the county demanded a 33-foot easement, as opposed to the standard 15-foot easement which was required of all other applicants. 528 U.S. at 563. The Court found that the plaintiff was similarly situated to her neighbors as they were all submitting the same request to connect to the municipal water supply. The Court then found that she was treated differently in that only her approval was subject to the additional 18-foot concession. *Id. See also Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*, 488 U.S. 336 (1989) (holding that a country could not maintain a tax assessment policy that assessed land value based primarily on the purchase price of land which subjected the class of one plaintiff's recently acquired property to a tax rate 8 to 33 times that of property with similar geologic characteristics).

EPA Region 9's extraordinary request for a voluntary remand in this case constitutes intentionally unequal treatment of Desert Rock Energy with respect to other prospective coal-fired power plants similarly situated in the permitting process under the Clean Air Act. *See Syngenta*, 444 F.Supp.2d at 448 (stating that "[t]o establish the first element of an equal protection claim, the plaintiff must allege not only that it was treated differently than other entities, but also that those entities were similarly situated to the plaintiff."). For example, on November 22, 2004, exactly ten months after Desert Rock Energy submitted its own PSD permit application, Longleaf Energy Associates, LLC ("Longleaf") applied for a PSD Permit. On May 14, 2007, the Director of the Environmental Protection Division of the Georgia Department of Natural Resources ("GA EPD"), issued a final PSD permit to Longleaf for the construction and operation of a 1,200 megawatt coal fired steam electric generating station. As a coal fired power plant operator seeking a PSD permit to construct and operate a new plant, Longleaf is similarly situated to Desert Rock Energy. *See U.S. v. Olvis*, 97 F.3d 739, 744 (4th Cir. 1996) (holding that a court should examine all relevant factors to determine whether persons are similarly situated).

While the Longleaf PSD permit was issued by the GA EPD, the approval was authorized under the Clean Air Act and subject to Georgia's EPA-approved state implementation plan (SIP). Since the GA EPD issued the final PSD permit, various groups have filed legal challenges in state court challenging the permit on bases analogous to this case (i.e. consideration of IGCC in the BACT analysis, etc.). However, neither the GA EPD nor EPA has taken any steps analogous to the remand being sought in this case.

Another example of a similarly situated facility is the Big Cajun II coal-fired power plant operated by NRG Energy in New Road, Louisiana. On April 28, 2006, more than two years after Desert Rock Energy submitted its PSD permit application, NRG Energy applied for a permit to

construct and operate a 705 MW supercritical coal-fired unit as an expansion of Big Cajun II. On December 15, 2008, the Louisiana Department of Environmental Quality ("LDEQ") issued the final PSD permit for the expansion of Big Cajun II. Since the permit was issued, various groups have sought review before state court challenging the final permit. However, despite the fact that the Big Cajun II permit challenges presents many of the same issues presented in this case, neither LDEQ nor EPA has taken any steps analogous to the remand being sought in this case.

Finally, another example of a similarly situated facility is the Seminole 3 coal fired power plant operated by Seminole Electric Power Cooperative ("Seminole Electric") in Florida. In February 2006, approximately *two years* after Desert Rock Energy applied for its PSD permit, Seminole Electric applied for a permit to construct and operate a 750 MW supercritical pulverized coal-fired unit as an expansion of the existing Seminole Generating Station. On September 3, 2008, the Florida Department of Environmental Protection (FDEP) issued a final PSD permit, pursuant to the EPA-approved SIP, for Seminole 3. Since the permit was issued, various groups have sought review before state court and the Board challenging the determinations reach in the final permit. However, despite analogous issues presented by the Seminole 3 plant, neither FDEP nor EPA has taken any steps analogous to the remand being sought in this case.

Even though the permitting agencies in the three permitting cases are not EPA, all of the PSD permits were issued pursuant to the Clean Air Act. If EPA wished, the Agency has the ability to seek a "SIP Call" to force equal treatment of these issues throughout the United States. *See* 42 U.S.C. § 7410(k). EPA has chosen not to do so. Instead, EPA has directed its actions

solely at Desert Rock despite the presence of analogous issues that would impact the PSD permitting of other similarly situated sources.

2. EPA Region 9's Dissimilar Treatment of Desert Rock Energy Has No Rational Basis and Violates Equal Protection.

Against the backdrop of the history of its actions in this case and contrasted with its treatment of other similarly situated permittees, Remand Motion constitutes a discriminatory action against Desert Rock Energy that is unsupported by any rational basis. *See Olech*, 528 U.S. at 564 (citing *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445 (1923) ("purpose of the equal protection clause...is to secure every person...against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly executed agents.")). A court must overturn a government action where "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [it] can only conclude that the [government's] actions were irrational." *Kimel v. Florida Bd. Of Regents*, 528 U.S. 62, 84 (2000). However, a showing that government actions are contrary to established law has been held to overcome the presumption of rationality and to demonstrate a lack of rational basis. *Bower v. Village of Mount Sterling*, 44 Fed. Appx. 670, 678 (6th Cir. 2002).

As recounted earlier, CAA § 165(c) mandates that a PSD permit application "shall be granted or denied not later than one year after the date of filing of such completed application." 42 U.S.C. § 7475(c). EPA Region 9 determined that Desert Rock Energy's PSD permit application was complete more than five years ago. The Desert Rock PSD permit was issued on July 31, 2008 – more than 4 years after the EPA Region 9 found that the permit application was complete, and more than 2 years after a draft permit was developed and issued for public comment. The review process for this permit involved years of studies and intra-agency, inter-

agency, and tribal consultations, as well as an extended public comment period. Legal and technical experts from EPA Region 9 and EPA Headquarters considered every issue raised during the public comment period to ensure that the permit meets all applicable requirements. Later, they also considered and responded to certain late-filed comments that the NGO Petitioners submitted as much as a year after the comment period ended.

Following issuance of the final permit, 40 C.F.R. § 124.19(d) expressly limits the timeframe during which EPA Region 9 may withdraw the PSD permit to "any time prior to the rendering of a decision...to grant or deny review of a permit decision." This Board granted review of all non-stayed issues raised by the petitions concerning EPA Region 9's PSD permitting decision for the Desert Rock Project on January 22, 2009. EPA Region 9 has already acknowledged in its Motion that section 124.19(d) bars EPA Region 9 from withdrawing the PSD permit.

Now, one day prior to the deadline to respond to NGO Petitioners' Petition for Review in this case, EPA Region 9 filed the instant motion seeking a voluntary remand to consider issues that were well within its purview over the past five years and that, despite the change in political leadership, relate to well-established EPA practice and regulations. EPA Region 9's actions are, therefore violative of CAA Section 165(c) and 40 C.F.R. § 124.19(d) and the presumption of their rationality should accordingly not attach. *See Bower v. Village of Mount Sterling*, 44 Fed. Appx. 670, 678 (6th Cir. 2002).

The basis adduced by EPA Region 9 for its dissimilar treatment of Desert Rock Energy is twofold: (1) a voluntary remand will promote "efficiency in the Agency's decision-making;" and (2) EPA Region 9 wishes to reconsider issues relating to the appeal. As explained previously, it is absurd for EPA Region 9—after waiting for 4 years to issue a permit—to suggest that

remanding Desert Rock Energy's PSD permit and subjecting it to new policy decisions in any way promotes administrative efficiency. An efficient process has been set forth by Congress in CAA § 165(c) and by the Agency in 40 C.F.R. § 124.19(d). This process promotes an efficient and timely resolution of permit applications and appeals. It is difficult to understand how EPA Region 9's further violation of this process will in any way promote efficiency. Additionally, this explanation does not provide a basis for treating Desert Rock Energy dissimilarly for other similarly situated coal-fired power plant in the PSD process. These permits present many of the same issues as the one at issue in this case and yet nowhere does Remand Motion set forth a basis that explains why remand of Desert Rock Energy's permit is essential to Agency efficiency and no other. As explained earlier, if the Agency were truly interested in efficiency, it has the ability to issue SIP calls for all other similarly situated permits. Instead, EPA Region 9 has taken actions solely in regards to the Desert Rock Energy permit that are unprecedented and contrary to the procedures laid out in the Clean Air and not in any way analogous to EPA's treatment of those similarly situated permittees described above.

EPA Region 9's second basis for supporting a remand is to reconsider issues relating to the appeal in this case. The Agency has had over 5 years to develop its positions on issues relating to this appeal. The only fact that has changed in that time period is a change in EPA political leadership. As explained above, the new Agency leadership is welcome to alter prior Agency views; however, it cannot alter established agency practices and regulations without subjecting such changes to the notice and comment requirements of the Clean Air Act. *See Paralyzed Veterans*, 117 F.3d at 586. Seeking to do so via a remand in this case is violative of the APA and cannot provide a rational basis for the dissimilar treatment of Desert Rock Energy. *Id.*

Accordingly, Remand Motion sets forth no rational basis for the dissimilar treatment of Desert Rock Energy as compared to other coal-fired power plants similarly situated in the permitting process. Remand Motion should therefore be denied.

VI. VOLUNTARY REMAND IN THIS CASE WOULD EFFECTIVELY WITHDRAW DESERT ROCK'S PSD PERMIT WITHOUT HEARING OR REVIEW IN VIOLATION OF DUE PROCESS

Remand Motion for voluntary remand is, simply put, a naked attempt by the new political leadership within the Agency to withdraw a permit previously granted by the prior administration without due process.

Procedural due process imposes constraints on government decisions which deprive individuals of life, liberty, or property interests that fall within the Due Process Clause of the Fifth Amendment. *Matthews v. Eldridge*, 424 U.S. 319, 332 (1976). Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents of State Colls. v. Roth,* 408 U.S. 564, 577 (1972). The Supreme Court has consistently held that "some form of hearing is required before an individual is deprived of a property interest[,]" and that due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Matthews*, 424 U.S. at 333 (citing *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)).

In order to establish a procedural due process claim, a plaintiff must show that (1) he had a life, liberty, or property interest protected by the Due Process Clause; (2) he was deprived of this protected interest; and (3) the state did not afford him adequate procedural rights prior to depriving him of the property interest. *See Hahn v. Star Bank,* 190 F.3d 708, 716 (6th Cir. 1999).

Courts have long held that the threshold determination for a procedural due process claim is whether the plaintiff has a constitutionally protected property interest at issue. In situations where an applicant's permit had been validly denied in accordance with agency discretion, courts have been reluctant to find such protections apply. *See Outdoor Media Group, Inc. v. City of Beaumont,* 506 F.3d 895, 903 (9th Cir. 2007) ("Therefore we find that the district court correctly determined that [the plaintiff] lacked a vested property right in its unapproved billboard permit application, and therefore its procedural due process claim was properly dismissed."). In situations where a permit has been issued, however, several courts, and this Board, have recognized a constitutionally protected property interest in the permit.

In *In the Matter of: General Electric Co.*, this Board recognized a protected property interest in a Resource Conservation and Recovery Act (RCRA) permit issued by EPA Region 1 to General Electric Company (GE). 4 E.A.D. 615 (EAB 1993). In that case, the Agency sought to revise the previously issued RCRA permit to require compliance with a revision to an interim submission. *Id.* In assessing whether a deprivation of property had occurred, the Board stated that "once a permit has been granted, the permittee has a constitutionally protected property interest in that permit" sufficient to state a due process claim. *Id.* Because the interim RCRA revisions in question frequently have a material and substantial effect in defining the permittee's obligations under the permit, the Board held that Region 1 must provide GE the opportunity for a hearing. *Id.*

Likewise, in *Weinberg v. Whatcom County*, the court held that where subdivision plat permits had been approved, property rights in the plats had vested and could not be rescinded without due process protections. 241 F.3d 746 (9th Cir. 2001). In an evaluation of the due process claim, the court in *Weinberg* found that by "vacating the plats, the [defendant]

effectively deprived [the plaintiff] of the economic value of his property and rendered nugatory his prior efforts and expenses incurred to develop it" without sufficient procedural safeguards, in violation of procedural due process. *Id.* at 754; *see also 3883 Conn. LLC v. District of Columbia,* 336 F.3d 1068, 1074 (D.C. Cir. 2003) (holding that a permit holder has a "substantial interest in the continued effect of the permit" which could not be removed without appropriate due process); *Kerley Ind., Inc. v. Pima County*, 785 F.2d 1444 (9th Cir. 1986) (holding that "[h]aving granted appellant a permit to operate its plant, the county could not take it away arbitrarily [citation omitted] for improper reasons, or without procedural safeguards."). It is important to note that Desert Rock Energy does not rely on these cases to claim any right or entitlement to produce emissions or even to obtain a PSD permit. Instead, these cases show that once a permit has been granted, there is a protected property right that cannot be revoked without due process.[6]

Similarly, in this case, EPA Region 9 has already issued a final PSD permit to Desert Rock Energy and now seeks to have the Board remand that permit back to the Agency to revisit issues that have previously been decided by Region 9, and on which any alteration in interpretation will cause a material impact on Desert Rock Energy's permit—an impact that is very likely derail the entire project. Such an action would ultimately deprive Desert Rock Energy of its previously issued final permit without the benefit of its statutorily prescribed

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[6] NGO Petitioners cite to the text of the *Clean Air Act and American Corn Growers Ass'n v. EPA*, 291 F.3d 1, 12 (D.C. Cir. 2002), for the proposition that Desert Rock has no constitutionally protected property interest in a PSD permit. While it is true that issuance of a PSD permit is not a "matter of right," this misses the decisive point relevant to the instant case. In this case, EPA has already issued the final PSD permit to Desert Rock. As the cases cited above hold, once the permit has been issued, a constitutionally protected property right does attach and Desert Rock is owed due process before it can be taken away. *In the Matter of: General Electric Co.*, 4 E.A.D. 615.

hearing before the Board to resolve the legal claims. As in *In the Matter of: General Electric Co.*, Desert Rock Energy has a constitutional property interest in the final permit issued to it by EPA Region 9 that the Agency is now seeking to effectively revoke. Prior to such action and in accordance with the CAA procedural due process protections currently in place, Desert Rock Energy is entitled to a determination by the board on the merits of the permit.

This is a violation of the due process clause contained in the Fifth Amendment of the U.S. Constitution, and this Board should not countenance it. *See Walters v. National Association of Radiation Survivors*, 473 U.S. 305, 320 (1985) (stating that due process involves "defining the process necessary to ensure fundamental fairness."); *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia J., concurring) (noting that retroactivity in cases pending or on appeal is "contrary to fundamental notions of justice…[t]he principal that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal.").

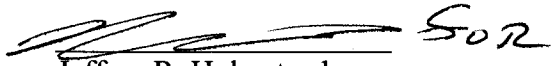
CONCLUSION

For the foregoing reasons, Desert Rock Energy respectfully requests that the Board deny the Remand Motion and rule on the merits of the Petitions based on the administrative record and the pleadings before the Board. No future briefing is required for the Board to render its decision.

[*Signature Page Attached*]

Date: June 11, 2009

Respectfully submitted,



Jeffrey R. Holmstead
Bracewell & Giuliani LLP
2000 K Street, N.W.
Washington, D.C. 20006
Telephone: 202-828-5800
Facsimile: 202-223-1225
jeff.holmstead@bgllp.com

Attorney for Desert Rock Energy Company, LLC

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Response to EPA Region 9's Motion for Voluntary Remand in the matter of Desert Rock Energy Company, LLC, PSD Permit No. AZP 04-01 were served by United States First Class Mail on the following persons, this 11th day of June 2009:

Janette K. Brimmer
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98 1 04
jbrimmer@earthjustice.org

John Barth
P.O. Box 409
Hygiene, CO 80533
barthlaw@aol.com

Patrice Simms
Natural Resources Defense Council
1200 New York Avenue NW, Suite 400
Washington, D.C. 20005
psimms@nrdc.org

Kevin Lynch
Environmental Defense Fund
Climate and Air Program
2334 N. Broadway
Boulder, CO 80304
klynch@edf.org

Ann Brewster Weeks
Clean Air Task Force
18 Tremont Street, Suite 530
Boston, MA 02108
aweeks@catf.us

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

George E. Hays
Attorney at Law
236 West Portal Ave. #110
San Francisco, CA 94127

Brian Doster
Kristi M. Smith
Elliott Zenick
Air and Radiation Law Office
U.S. Environmental Protection Agency
Office of General Counsel
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460
doster.brian@epa.gov

Ann Lyons
Office of the Regional Counsel
EPA Region 9
75 Hawthorne St.
San Francisco, CA 94105-3901
lyons.ann@epa.gov

Seth T. Cohen
Assistant Attorney General
Office of the Attorney General of New Mexico
Water, Environment and Utilities Division
P.O. Drawer 1508
Santa Fe, NM 87504-1508
scohen@nmag.gov

Leslie Barnhart
Eric Ames
Special Assistant Attorneys General
New Mexico Environment Department
P.O. Box 26110
Santa Fe, NM 87502-6110
leslie.barnhart@state.nm.us
eric.ames@state.nm.us

Amy R. Atwood
Public Lands Program
Center for Biological Diversity
P.O. Box 11374
Portland, OR 97211-0374
atwood@biologicaldiversity.org

Leslie Glustrom
4492 Burr Place
Boulder, CO 80303
lglustrom@gmail.com

Mark Wenzler
National Parks Conservation Association
1300 19th St NW Suite 300
Washington, D.C. 20036
mwenzler@npca.org

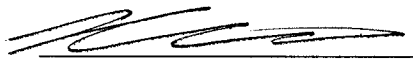
Douglas C. MacCourt
Michael J. Sandmire
Ater Wynne LLP
1331 NW Lovejoy Street, Suite 900
Portland, Oregon 97209-3280
dcm@aterwynne.com

Paul M. Seby
Marian C. Larsen
Moye White LLP
1400 16th Street # 600
Denver, CO 80202-1486
Paul.seby@moyewhite.com
Mimi.larsen@moyewhite.com

Stephanie Kodish
Clean Air Counsel
National Parks Conservation Association
706 Walnut Street, Suite 200
Knoxville, TN 37902
skodish@npca.org

Louis Denetsosie, Attorney General
D. Harrison Tsosie, Deputy Attorney General
Navajo Nation Department of Justice
P.O. Box 2010
Old Club Building
Window Rock, AZ 86515
Louisdenetsosie@yahoo.com
eputyag@hotmail.com

Justin Lesky
Law Office of Justin Lesky
8210 La Mirada Place NE Suite 600
Albuquerque, NM 78109
jlesky@leskylawoffice.com



Jeffrey R. Holmstead
Jason B. Hutt
Richard Alonso
Bracewell & Giuliani LLP
2000 K Street, N.W.
Washington, D.C. 20006
(202) 828-5800
Attorneys for Desert Rock Energy Company, LLC