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

IN RE:	)	
DESERT ROCK ENERGY COMPANY, LLC	)	PSD Appeal Nos. 08-03 & 08-04, 08-05 & 08-06
PSD Permit No. AZP 04-01	)	

STATE OF NEW MEXICO'S REPLY BRIEF

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INTRODUCTION

The State of New Mexico respectfully submits this reply brief pursuant to the Board's January 22, 2009 Order. The reply addresses the arguments raised by EPA Region 9 ("EPA"), Desert Rock Energy Company, LLC ("DREC") and Diné Power Authority ("DPA") in their response briefs filed on January 8, 2009, and the arguments raised by EPA and DREC in their responses, filed respectively on January 8, 2009 and December 3, 2008, opposing New Mexico's Motion to Supplement the Record, or, in the Alternative, for Remand and Reopening of the Public Comment Period. In accordance with the Board's Order staying further briefing and consideration of the carbon dioxide BACT issue, New Mexico reserves its right to address that issue after EPA finalizes the revised statement of basis.

The response briefs fail to resolve the clear errors identified in the petitions and supplemental briefing. In several instances, EPA attempts, through its response brief, to provide *post hoc* rationalizations for its permitting decisions. Even if such rationalizations had merit, they do not undo the defects in EPA's permitting decision. As the Board has made clear, "allowing the permit issuer to supply its rationale after the fact, during the briefing for an appeal, does nothing to ensure that the original decision was based on the permit issuer's 'considered judgment' at the time the decision was made." *In re Deseret Power Electric Cooperative*, PSD Appeal No. 07-03, 13 E.A.D.___, slip op. at 19 (Nov. 13, 2008)(internal quotations and citations omitted).

In its introduction, DREC suggests that the long duration of this permitting process is an indication of thoroughness and quality. *DREC Resp.* at 1. In actuality, this permitting process took several years because of serious deficiencies in the permit application, as well as EPA and

the Federal Land Managers' concerns about the legal sufficiency and accuracy of the modeling and other information provided by DREC.

For example, EPA acknowledges that deficiencies in and disagreements regarding DREC's application led EPA and the Federal Land Managers to request additional modeling "of the potential impacts to Class I areas with respect to visibility and increment consumption." *EPA Resp.* at 3; *see also,* AR 81 at 2 (September 2004 letter from National Park Service ("NPS") noting "pervasive" problems with the applicant's cumulative impacts analysis); AR 26 (April 25, 2005 letter from U.S. Forest Service ("USFS") identifying "major issues" related to visibility impacts).

The administrative record also shows that DREC's failure to submit accurate information about Desert Rock's impacts repeatedly derailed the consultation process required by the Endangered Species Act ("ESA"). *See e.g.,* AR 82 (July 2, 2007 letter from U.S. Fish and Wildlife Service ("FWS") noting extensive deficiencies in proposed biological assessment); AR 94 (January 7, 2008 letter from FWS noting extensive deficiencies in revised biological assessment).[1] The permitting process concluded abruptly after DREC sued EPA to issue the permit, leaving these significant issues unresolved and resulting in an invalid permit.

DREC and DPA attempt to reframe this appeal by reference to ancillary economic issues related to the Desert Rock power plant. *See* DPA's Resp.; DREC Resp. at 4. New Mexico strongly supports Navajo Nation economic development. The question presented in this appeal, however, is whether EPA's issuance of the PSD permit presents clear error or raises significant policy concerns under the Clean Air Act (the "Act"). The purpose of the PSD section of the Act is "to insure that economic growth will occur in a manner *consistent with the preservation of*

[1] Although BIA is the lead agency responsible for seeking consultation, DREC has been actively involved in the consultation process.

existing clean air resources." 42 U.S.C. § 7470 (emphasis added). The Act does not allow EPA to violate these requirements in order to promote economic development.

DREC also suggests that the Board should consider "the federal government's trust obligation with respect to Indian tribes and the impacts of its actions on the Navajo Nation." DREC Resp. at 3.[2] But the "trust responsibility can only arise from a statute, treaty, or executive order," and DREC cites no authority that this trust obligation compels issuance of a deficient PSD permit or requires the EAB to overlook procedural defects in the permitting process. *North Slope Borough et al. v. Andrus*, 642 F.2d 589, 611 (D.C. Cir. 1980). Indeed, the federal government best satisfies its trust obligation by ensuring that the PSD permit provides the maximum protection available to the Navajo people and other citizens of the region under the Act.

ARGUMENT

II. EPA IMPROPERLY ISSUED THE PERMIT PRIOR TO COMPLETION OF THE ENDANGERED SPECIES ACT CONSULTATION.

EPA's issuance of the permit prior to completing (or even initiating) formal consultation under the Endangered Species Act ("ESA") contravenes the Board's decision in *Indeck*, as well as applicable federal case law, and cuts against basic public policy and procedural considerations. *See* NM Supp. Br. at 7-18. None of the arguments advanced by EPA and DREC alter this conclusion.

EPA and DREC emphasize the irrelevant fact that "the project could not proceed absent certain approvals by the BIA," which "alone virtually guaranteed that no disturbance in the action area would occur prior to completion of ESA compliance." EPA Resp. at 117; DREC Resp. at 251 ("Desert Rock Energy cannot conduct any construction activities under the PSD

[2] DREC, the permitee, is a private non-tribal entity.

permit until the ESA § 7 consultation is complete."), *see also* RTC at 171. The law makes abundantly clear, however, that the EPA's *issuance of the permit*—not DREC's construction—is the action that must be informed by a completed ESA consultation. *See* 50 C.F.R. § 402.02 (c) (defining the agency action requiring consultation as "the granting of licenses, contracts, leases [or] permits"); *Indeck*, slip op. at 110 (consultation should be completed prior to *issuance* of the PSD permit).

In addition, contrary to DREC's suggestion, New Mexico's focus on the invalidity of EPA's ESA argument regarding Section 7(d) of the ESA should not be construed as a rejection of the NGO Petitioners' arguments with respect to Section 7(a) of the ESA. *See* DREC Resp. at 243. The NGO Petitioners correctly argue that Section 7(d) is inapplicable because it does not allow an agency that has not completed a consultation to take the very action for which Section 7(a)(2) requires a consultation. As the NGO Petitioners demonstrate, Section 7(d) only permits an agency to take limited ancillary activities before the completion of the consultation, as opposed to the principal action that requires consultation. New Mexico's argument complements the NGO Petitioners' position. New Mexico argues that EPA's issuance of the permit is an action that cannot be saved by Section 7(d), notwithstanding the pendency of an appeal or the inclusion of Condition II.A.

A. EPA and DREC Misread Indeck.

The Board's decision in *Indeck* establishes a general rule that ESA consultation should be completed prior to issuance of PSD permits. *Indeck Elwood, LLC* PSD Appeal No. 03-04 (EAB 2006). In *Indeck*, the Board allowed a narrow exception to this general rule, but Desert Rock does not fit within the unique circumstances present in that case. NM Supp. Br. at 10-14.

The Board in *Indeck* emphasized that ESA consultation "should in the ordinary course conclude prior to *issuance* of the final federal PSD permit." *Id.* at 110 (emphasis added). As the Board explained, "to avoid violating" ESA's Section 7(d) prohibition on the "irreversible or irretrievable commitment of resources," EPA "should complete the ESA process prior to *issuance* of the final permit." *Id.* at 111 (emphasis added). The Board "would expect that ESA consultation would ordinarily be completed, at the very latest, prior to issuance of the permit and, optimally, prior to the comment period on the permit, where the flexibility to address ESA concerns is the greatest." *Id.* at 114.

DREC improperly extends the holding in *Indeck*, asserting that post-issuance consultation is lawful so long as the consultation is completed before the permit is final. DREC Resp. at 240. In fact, *Indeck* recognized that under exceptional circumstances consultation after permit issuance could satisfy the minimum legal requirement, not that this would always be the case. *Id.* at 112-3 n. 154 ("*In this case*, we find that, as a technical matter...the consultation *in this case* met minimum legal standards.")(emphasis added).

DREC argues that because a PSD permit is not "final agency action" until a pending appeal is decided, "there [can be] no irretrievable commitment of resources by Region 9." DREC Resp. at 240 (citing 40 C.F.R. §124.19(f)(1)). But DREC disregards the Board's finding in *Indeck* that the permitting authority cannot rely on an appeal to extend the time to complete (or, as in this case, begin) an ESA consultation. *Id.* at 114. As the Board explained, doing so improperly makes the legality of an agency's issuance of a permit contingent on whether the permit has been challenged. *Id.* DREC's suggestion that the Board was only addressing the question of *whether* a consultation is undertaken as opposed to *when* the consultation occurs is incorrect and, in any case, misses the point. DREC Resp. at 241 *citing Indeck* at 114. Neither the

decision to undertake nor the ability to timely complete a consultation can be premised on a filing of an appeal because either approach would give rise to "an ESA violation whenever an appeal is not taken." *Indeck* at 114. *Indeck* prohibits a permitting authority from prospectively relying on the uncertainty of an appeal to render its permit issuance legal. *Indeck* at 114. Under *Indeck*, EPA has erred to the extent that it based its pre-consultation issuance of the permit on the rationale that "it is highly likely that the permit will be appealed to the EAB" and that "there will likely be an opportunity for the ESA process to reach resolution while the appeal is pending." AR 120, RTC at 171.

DREC also ignores the Board's repeated recognition that an irretrievable commitment of resources *does* occur upon issuance of a permit:

> The fact that a permit once issued may subsequently be amended does not diminish the irretrievable nature of the decision to issue the permit as amendments are discrete actions independent from the decision to issue the permit in the first instance.

Id. at 111, n. 151; *and see* NM Supp. Br. at 14, n. 4. The EPA's foreclosure of the option not to issue the permit in the first instance, standing alone, violates of Section 7(d) of the ESA.

Even if *Indeck* allowed EPA to complete the ESA consultation during the pendency of this appeal, it would not save the Desert Rock permit because there is little chance that the consultation will be complete before this appeal is resolved. DREC acknowledges that the formal consultation process, which began on January 5, 2009, will require at least 195 days, and that this "period is often exceeded in practice." DREC Resp. at 245, n. 78. This will be a lengthy consultation because the FWS has already determined that the facility "is likely to adversely affect" several animal and plant species, and almost certainly will recommend alterations to the permit. AR 92, AR 94. In *Indeck*, by the time the Board began its review, the FWS had already

determined that there was no likely adverse affect on listed species, that no formal consultation was necessary, and that there would be no ESA implications for the PSD permit.

B. Courts Have Clearly Rejected Savings Clauses Like Permit Condition II.A.

Applicable case law compels the conclusion that EPA's attempted circumvention of the ESA by way of Permit Condition II.A is unlawful. NM Supp. Br. at 15-16. In response, DREC and EPA provide inaccurate interpretations of the case law and attempt to counter relevant decisions with cases that are wholly inapplicable.

Neither EPA nor DREC distinguish the 9th Circuit's holding in *NRDC v. Houston* that a savings clause cannot remedy a violation of the ESA consultation requirement. 146 F.3d 1118, 1128 (9th Cir. 1998). In *Houston*, the agency argued that a savings clause that "prevented the foreclosure of reasonable and prudent alternatives" avoided the irreversible and irretrievable commitment of resources. *Id.* at 1128. The court rejected this argument, ruling that "[w]e do not think that an agency should be permitted to skirt the procedural requirements of § 7(d) by including such a catchall savings clause in illegally executed contracts." *Id.* EPA and DREC distort this holding by conflating it with the court's separate and distinct determination that the savings clause would, in any event, be deficient to prevent a violation of Section 7(d). DREC Resp. at 258-59; EPA Resp. at 124-25. The court's decision was clear: after unequivocally rejecting the use of a savings clause to avoid a violation of the ESA, the court states, in *dicta*, that "*even if* such a clause could preserve the contacts"—a statement that underscores its conclusion that such clause *can never* preserve the contracts—"...[the clause] is inadequate to serve that purpose." *Id.* at 1128 (emphasis added).

In *Conner v. Burford* the court similarly held that the agency's deferral of ESA consultation until after the issuance of oil and gas leases contravened the ESA, even if the leases

prohibited the irreversible or irretrievable commitments of resources pending completion of the ESA consultation. *Conner v. Burford*, 848 F.2d 1441, 1451-8 (9th Cir. 1988). EPA and DREC attempt to distinguish *Conner* by emphasizing that it decided the permissibility of an "incremental" consultation, rather than the "scope of federal agency activity that may proceed consistent with Section 7(d)." EPA Resp. at 122; DREC Resp. at 262.[3] This is a distinction without a difference because, in effect, the court barred the agency from relying on a savings clause to postpone the ESA consultation. The court held that the agency's deferral of part of the required ESA consultation for issuance of oil and gas leases was illegal, even though the issuance of the leases was done pursuant to a completed, if partial, ESA consultation, and even though permission for oil and gas development under those leases was conditioned on further ESA review. *Id.* at 1455, n. 34. In other words, the court prohibited the agency from doing part of the consultation prior to the issuance of leases and the rest later, even if the agency ensured that nothing irreversible happened until full consultation was complete. The present circumstances are even less compelling than those rejected by the court in *Conner*. Here, DREC and the Region seek the Board's approval of a process in which no consultation was done prior to issuance of the permit, and all of the consultation will be done at a later point in time.

Finally, EPA and DREC attempt to counteract these clear holdings by citing cases that concern the unique and irrelevant issues arising from the interaction of ESA and the Outer Continental Shelf Lands Act ("OCSLA"). DREC Resp. at 247-50 (*citing Tribal Village of Akutan v. Hodel*, 869 F.2d 1185 (9th Cir. 1989); *Village of False Pass v. Clark*, 733 F.2d 605 (9th Cir. 1984); *North Slope Borough et al. v. Andrus*, 642 F.2d 589 (D.C. Cir. 1980);

[3] DREC erroneously suggests that court's NEPA holding in *Conner* "support[s] EPA's position" on the ESA issue. DREC Resp. at 262. In fact, the court in *Conner* made a point of explicitly distinguishing its NEPA holding from its ESA holdings, explaining that "the strict substantive provisions of the ESA justify more stringent enforcement of its procedural requirements, because the procedural requirements are designed to ensure compliance with the substantive provisions." *Id.* at 1458, n. 40.

Conservation Law Found. v. Andrus, 623 F.2d 712 (1st Cir. 1979)); EPA Resp. at 120-121 (*citing North Slope Borough v. Andrus*). As the Ninth Circuit made abundantly clear in *Conner*, theses cases turned on issues unique to the OSCLA, and therefore have no relevance to the application of ESA in other contexts. *Conner*, 848 F.2d at 1455-6 (distinguishing OSCLA cases because OSCLA requires "graduated compliance with environmental and endangered life standards," and ensures an elaborate system of "checks and balances" to assess and avoid wildlife impacts).

C. Section 165(c) of the Clean Air Act Neither Compels Nor Justifies EPA's Violation of the ESA.

EPA and DREC attempt to justify issuance of the PSD permit before completion (much less initiation) of the ESA consultation by pointing to EPA's violation of the one-year deadline for acting on PSD applications under Section 165(c) of the Clean Air Act. DREC Resp. at 254-7; EPA Resp. at 126-7. EPA contends that DREC's lawsuit to enforce the time limit presented "circumstances [that] necessitated [deviation from the] preferred practice of completing ESA consultations before issuance of a permit." EPA Resp. at 126-7; DREC Resp. at 256, n. 90. EPA's violation of the one-year time limit—a limit that EPA had already exceeded by more than three years at the time of the lawsuit —does not trump the congressional mandate that EPA "give endangered species priority" over the agency's "primary missions." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 185 (1978).

DREC's lawsuit to enforce the time limit in Section 165(c) raises more questions than it answers about EPA's decision to issue the permit. Less than three months after the lawsuit was filed, and before filing an answer, EPA moved to lodge a consent decree which committed the agency to grant or deny DREC's permit by July 31, 2008. *See* EPA's June 5, 2008 Unopposed Motion to Lodge Consent Decree, *Desert Rock Energy Co., LLC v. EPA*, No. 4:08-cv-872 (S.D.

Tex.). EPA represented to the court that after publishing notice and taking public comment on the consent decree as required by the Clean Air Act, it would "move the Court for entry of the proposed Consent Decree if that is appropriate in light of the comments received." *Id.* at 1-2. New Mexico filed comments pointing out that issuing the permit would violate ESA, and moved to intervene in the lawsuit to assert its position, *inter alia*, as to the timing of the ESA consultation. Faced with comments contending that the deadline in the proposed consent decree prevented the agency from complying with its ESA obligations, EPA abandoned the proposed consent decree and simply issued the permit on July 31.

DREC has not presented any compelling grounds to suggest that Section 165(c) trumps the agency's obligation to comply with the ESA. The record reflects that DREC's failure to provide complete and adequate information is largely responsible for the delays in both the PSD permitting process and ESA consultation. *See supra at* 1-2. To the extent that DREC believed that the ESA consultation might hinder completion of the PSD permit process, it could have invoked ESA provisions that accelerate the process. *See Indeck*, 112, n. 153 (citing 16 U.S.C. § 1536(a)(3) and 50 C.F.R. § 402.11(b)).

Finally, DREC's reliance on *National Association of Home Builders v. Defenders of Wildlife*, 127 S.Ct. 2518 (2007) ("*NAHB*") is entirely misplaced. DREC suggests that *NAHB* stands for the proposition that the ESA's substantive consultation mandate does "not necessarily prevail" against the Clean Air Act's purely procedural mandate that a permit application "shall be granted or denied no later than one year after the date of filing of such completed application." DREC Resp. at 254-55. *NAHB* neither compels nor supports the ESA's subordination to the timing requirement of Section 165(c) of the Clean Air Act. It instead stands for the proposition that ESA consultation is not required for non-discretionary agency actions.

NAHB, 127 S.Ct. at 2531-35. Neither EPA nor DREC question that ESA consultation is required for the agency's substantive PSD permit decision. *NAHB* is therefore irrelevant. The question here was how to reconcile the conflict between ESA's substantive consultation mandate with the Act's procedural requirement for action on PSD permits within one year. EPA could have complied with the ESA before issuing the PSD permit, but made a tactical decision to issue the permit. That decision may have averted a continuing violation of section 165(c), but cannot justify a violation of the ESA. In light of the congressional intent that the ESA "be afforded the highest of priorities," the EPA's decision to ignore its ESA obligation in favor of a routinely exceeded procedural requirement was improper. *TVA v. Hill*, 437 U.S. at 174.

D. Condition II.A Establishes an Untenable Procedure.

Condition II.A sets in motion a process that will almost inevitably require two separate, piecemeal permit appeals because the EPA's analysis and permit modification stemming from the ESA consultation will not be part of this current review. NM Supp. Br. at 16. EPA confirms this concern:

> EPA notes that, should the ESA process identify appropriate modifications of the permit, such changes would be implemented consistent with EPA's PSD permitting regulations, including any required public procedures and rights to appeal the amended action.

EPA Resp. at 127, n. 47. This is inefficient and wasteful. Moreover, the ESA information has a direct bearing on the issues pending in this appeal. For example, because the FWS has already determined that Desert Rock "is likely to adversely affect" the Mesa Verde Cactus, the ESA consultation will provide vital information for the PSD-mandated soil and vegetation analysis. *Indeck* at 114 (noting that ESA information could have a bearing on the PSD-mandated soil and vegetation analysis).

II. EPA VIOLATED SECTION 165(A)(3)OF THE ACT BY FAILING TO CONSIDER IGCC IN THE BACT ANALYSIS.

EPA violated section 165(a)(3) of the Act by failing to consider IGCC in the BACT analysis. Its original decision, as stated in the Response to Comments, relied on a narrow interpretation of the policy against "redefining the source." Apparently recognizing that this interpretation was neither faithful to Congress' intent in section 165(a)(3) nor consistent with EAB decisions, EPA proclaims its absolute and unquestionable discretion to exclude technology from the BACT analysis. For its part, DREC resorts to post-hoc rationalization, packing the brief with pages of technical information about IGCC and ultra-critical PC boilers, its preferred operating scenario, none of which is relevant to EPA's narrow interpretation of the policy.

A. EPA Does Not Have Unfettered Discretion To Exclude IGCC from the BACT Analysis.

EPA's exercise of discretion in the BACT analysis is constrained by the plain meaning and intent of Section 165(a)(3). EPA acted arbitrarily when it interpreted the source definition policy so narrowly that it eviscerated the BACT analysis. EPA defined the project as "a facility to combust pulverized coal in a boiler to generate steam to drive an electric turbine." EPA Resp. at 14 (*citing* AR 120 at 19). This definition goes well beyond the basic business purpose defined by applicant itself, which calls for combusting coal to produce electricity.

The BACT requirement turns in part on the meaning of "facility." EPA tries to define the term as the specific facility proposed by the applicant, but this construction is not consistent with the statute, which focuses on the source type as specified in the SIC and NAICS codes. The BACT requirement must also be applied in a manner consistent with Congress' intent to force the improvement of technology. Defining the facility too narrowly allows only the known and done

to be considered in the BACT analysis. Senator Huddleston confirmed this intent when he proposed to amend the statute to ensure that IGCC be considered in the BACT analysis:

> And I believe it is likely that the concept of BACT is intended to include such technologies as low Btu gasification and fluidized bed combustion. But, this intention is not explicitly spelled out, and I am concerned that without clarification, the possibility of misinterpretation would remain.

123 Cong. Record S9421, *op. cit.*[4]

In response, EPA raises a strawman argument, asserting that the State would "require mandatory evaluation" of the IGCC in all circumstances. *See also* EPA Resp. at 19 (the State would "mandate[s] evaluation of every conceivable option that might be covered by such terms."). The State made no such argument. Rather, the State argued that EPA's own policy mandates consideration of IGCC *in this case*. EPA's policy was designed to implement BACT, not thwart it.

Finally, EPA suggests that because it considered combustion fluidized bed technology ("CFB"), its failure to consider IGCC cannot violate the BACT requirement. On this point, EPA displays a certain schizophrenia, on the one hand suggesting that its consideration of CFB demonstrates its willingness to consider technologies that require "significant changes to parts of the pulverized coal facility", and on the other hand arguing that such consideration does not mean its exclusion of IGCC for the same reason is erroneous. EPA Resp. at. 20.

EPA's compliance with the BACT requirement for one technology does not excuse its noncompliance for another. And its willingness to consider CFB despite the need to redesign the

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[4] EPA in its Response no longer relies on selective quotations and post-enactment reports to cast doubt on Sen. Huddleston's statements, but continues to insist that the senator "is far from clear" and "could have been clearer" about his intent. The Senator's statements are clear enough on this point.

facility demonstrates the reasonableness of considering IGCC.[5] EPA claims that it has the discretion to decide to consider CFB but not IGCC, but it never explains the rationale for exercising its discretion in this way. EPA Resp. at 18-24.

B. EPA's Decision Ignores this Board's Precedent.

This Board's most recent decision regarding the source definition policy makes clear that the touchstone of the analysis is the applicant's basic business purpose. In *Prairie State*, which EPA acknowledges as the "most recent (and perhaps the most thorough)" articulation of the policy, the Board stated that EPA must evaluate "how the *permit applicant*, in proposing the facility, defines the goals, objectives, purposes, or basic design for the proposed facility." *In re Prairie State Generating Company, LLC*, PSD Appeal No. 05-05, slip op. at 30 (EAB Aug. 24, 2006) (*emphasis added*). This standard is compelled by the statute itself. *Id.* at 28 ("The statute contemplates that the permit issuer looks to how the permit applicant defines the proposed facility's purpose or basic design in its application, at least where that purpose or design is objectively discernible, as it is here.")

The Board observed that the applicant—not EPA—defines the project. *Id.* at 29 ("The permit applicant initiates the process and, in doing so, we conclude, defines the proposed facility's end, object, aim, or purpose - that is the facility's basic design"). For this reason, EPA must take a "hard look" at the applicant's definition to prevent the applicant from circumventing BACT review. *Id.* at 34.

The Board in *Prairie State* then applied these principles to the proposed project, which the applicant had defined as the "development of an electric power generating plant that would be co-located and co-permitted with a 30-year supply of fuel." *Id.* at 36. The Board agreed with

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[5] Notably, as indicated in the quotation reprinted above, Sen. Huddleston explicitly referred to both IGCC and CFB as technologies that should be considered in the BACT analysis.

the Illinois EPA that the applicant's purpose was broad enough to require the consideration of IGCC in the BACT review:

> The IEPA explained that [given this purpose] "IGCC is a 'production process' that can be used to produce electricity from coal, that 'IGCC is a technically feasible production process', and that IEPA 'has determined that IGCC qualifies as an alternative emission control technique that must be fully addressed in the BACT demonstration for the proposed plant.

Id. at 35 n.30. The Board then decided that a different alternative, shipped-in coal, fell outside the scope of the project. The Board's decision was affirmed by the Seventh Circuit, which observed that EPA must use reason in applying the policy, and that it would not be reasonable to apply the policy to read technology options such as clean fuels out of the BACT definition. *Sierra Club v. EPA*, 499 F.3d 653, 656 (7th Cir. 2007).

EPA fails to satisfy the standard established by *Prairie State*. Like the applicant in *Prairie State*, the applicant here defined the project as a mine-mouth coal-fired electricity plant. The applicant acknowledged that this basic business purpose could be achieved through several designs, including IGCC. The applicant's definition of the project—as expressed clearly in the permit application—has never been disputed or modified by DREC.

Rather than evaluating BACT on the basis of the applicant's articulated business purpose, EPA substitutes its own formulation. In both the Response to Comments and Response brief, EPA characterizes the business purpose as "the equipment Sithe proposes to install". AR-120 at 19. This narrow definition of the project is nothing more than the applicant's preferred operating scenario of supercritical pulverized coal-fired boilers. EPA never explains the rationale for substituting its own formulation for the applicant's definition of the project. EPA may have discretion to review an applicant's definition of the project, but it must exercise that discretion in accordance with the applicable law and provide a rational explanation. EPA's approach in this

case falls well short of that standard, and fails to provide the "hard look" required by *Prairie State*.[6]

C. EPA and DREC Rely on *Post Hoc* Rationalizations to Defend EPA's Failure to Take a Hard Look at the Project Definition.

EPA and DREC rely on their counsel's *post hoc* rationalizations to defend the agency's failure to comply with *Prairie State*. Their briefs contain many pages of technical information explaining why IGCC would constitute a fundamental redesign of the project. But this misses the point. The issue is whether EPA improperly defined the project to circumvent BACT, not whether IGCC would constitute a redesign of that improperly defined project.

EPA never explains how its current position regarding IGCC squares with its original decision to require the applicant to evaluate IGCC in the BACT review. Early in the process, EPA directed the applicant to include IGCC in the BACT analysis. AR 66 at 23; AR 28. However, the applicant refused, and EPA did not pursue the matter. The record contains no explanation for EPA's decision to abandon IGCC.

EPA may be accorded discretion in the BACT process, but such discretion is not a blank check. EPA must exercise its discretion consistent with the applicable law, and must explain how it has reached its decision. Here, EPA arbitrarily substitutes the applicant's own definition of the project with a narrow definition that precludes the consideration of IGCC, and provides no reasoned explanation for this decision. Because EPA abused its discretion in applying the source definition policy for Desert Rock, its decision should be reversed.

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[6] Instead of explaining its decision to define the project in a manner that excludes IGCC from the BACT analysis, EPA accuses the State of "narrowing the circumstances that may constitute 'redefining the source' based on only a select few of the Board's decision in this area." EPA Resp. at 17. The State's analysis merely repeats the words of *Prairie State* which calls for EPA to take a hard look at the project definition to avoid circumventing BACT. *Prairie State* flows naturally from a line of cases in which the Board sought to ensure that the source definition policy supported the statutory intent of BACT review. *See*, e.g., *In re Knauf Fiber Glass, GMBH*, 8 E.A.D. 121, 140 (February 4, 1999)(the applicant cannot "circumvent the purpose of BACT, which is to promote the use of the best control technologies as widely as possible" by limiting the BACT review to the proprietary plant process and design desired by the applicant.)

III. EPA VIOLATED SECTIONS 165(A)(3) AND 110(J) OF THE ACT BY ISSUING THE PERMIT BEFORE COMPLETING THE CASE-BY-CASE MACT DETERMINATION.

Sections 165(a)(3) and 110(j) require the EPA to make the MACT determination for Desert Rock before issuing the PSD permit. In its rush to issue the permit, EPA failed to make the determination, and now justifies its failure by selective misreading of the relevant statutory provisions.

A. Clean Air Act

EPA is prohibited from issuing a PSD permit for a major emitting facility until it has demonstrated compliance with section 112(g) of the Act. This obligation arises from section 165(a)(3), which requires the facility's owner or operator to demonstrate, "as required pursuant to section 110(j) of the Act," that emissions from the construction or operation of such facility will not cause or contribute to air pollution in excess of "any other applicable emission standard" under the Act. In turn, section 110(j) requires the owner or operator demonstrate such compliance "[a]s a condition for issuance" of the permit. Section 112(g)—the case-by-case MACT determination—is an "applicable emission standard" for Desert Rock.

B. EPA Response

1. There is no conflict between sections 112 (b)(6) and 165(a)(3).

EPA begins by repeating the argument that section 112(b)(6) prohibits the agency from any consideration of the case-by-case MACT determination in the PSD context. *EPA Resp.* at 97 ("Section 112(b)(6) of the CAA exempts hazardous air pollutants listed under section 112 (b)(1) from the PSD requirements in part C of Title I of the CAA."); AR 120 at 35 ("Because the HAPs listed in section 112 (b)(1) of the Clean Air Act, including mercury, are excluded from the PSD provisions of part C, it is not appropriate to include limits for those emissions in this permit.");

AR 120 at 61 ("EPA does not have the authority to add permit terms in a PSD permit to regulate mercury emissions.").[7]

EPA reads too much into section 112 (b)(6). Section 112(b)(6) says only that PSD "shall not apply to pollutants listed under this section." This Board has stated that section 112(b)(6) means that hazardous air pollutants are not subject to PSD review. *In re Knauf Fiber Glass GMBH*, 8 E.A.D. 121, 162-163 (February 4, 1999). Here, the State does not argue that EPA must incorporate emission limits for hazardous air pollutants into the PSD permit, but that EPA must make the MACT determination before issuing the PSD permit as required by sections 165(a)(3) and 110(j).

EPA reads section 112(b)(6) to negate the plain meaning of sections 165(a)(3) and 110(j). On their face, these sections require EPA to demonstrate that the facility will comply with the applicable emission standard in Section 112(g) before issuing the permit. Section 112(b)(6) may prohibit EPA from imposing emission limits for hazardous air pollutants in the PSD permit, but it does not nullify EPA's statutory obligation to develop these limits before issuing the permit.[8]

2. The sequence of enactment for sections 112(b)(6), 165(a)(3), and 110(j) has no effect on their plain meaning.

EPA next suggests that the adoption of section 112(b)(6) after section 165(a)(3) and 110(j) negates their plain meaning. EPA Resp. at 97-98. EPA's theory is that "the more-specific,

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[7] EPA also complains that this is the first time it has heard this statutory argument. *EPA Resp.* at 97 ("Petitioners resort to an interpretation of sections 165(a)(3) and 110(j) of the CAA not previously espoused by anyone in the relevant agency rulemakings to implement PSD and section 112(g)"). The State cannot speak to the comments submitted during PSD and MACT rulemakings, but EPA was on notice of this argument before EPA issued the RTC and permit. AR 62.

[8] Developing these limits before issuing the PSD permit also is good policy. EPA has stated "Once a project is subject to BACT due to the emission of nonexempted pollutants, the EPA believes that the BACT analysis should therefore consider the impact of the various control options under consideration on all pollutants, including the section 112(b)(1) listed HAP previously subject to PSD, in determining which control strategy is best." Prevention of Significant Deterioration and Nonattainment New Source Review, Proposed Rule, 61 Fed. Reg. 38249, 38310 (July 23, 1996)(citing *North County Resource Recovery Associates*, PSD Appeal No. 85-2 (August 15, 1986).

later-enacted provision excluding hazardous air pollutants from Part C of Title I of the Act would control" over the admittedly "broader effect" of section 165(a)(3). EPA never alleges a conflict between the provisions or an ambiguity that calls for their interpretation. It does not cite any legislative history or principle of statutory construction to narrow the admittedly broad scope of section 165(a)(3).[9]

The plain meaning of sections 165(a)(3), 110(j), and 112(b)(6) are not affected by the sequence of enactment. The provisions can be harmonized to give each its plain meaning: EPA cannot subject hazardous air pollutants to PSD review, but it cannot issue the PSD permit until it completes the MACT determination. EPA cannot read sections 165(a)(3) and 110(j) out of the statute because the timing of its MACT obligation is not convenient.

3. Section 110(j) includes MACT emission standards.

EPA suggests that "[s]ome of the language in CAA 110(j) can be read to support an interpretation that CAA section 110(j) was not intended to apply to PSD permits." *EPA Resp.* at 100. According to EPA, the reference to "standard of performance" means that section 110(j) is limited to new source performance standards ("NSPS") under section 111.

EPA's argument fails for three reasons. First, section 165(a)(3) explicitly requires, "pursuant to section 110(j)", that the owner or operator of a facility demonstrate compliance with "any other applicable *emission standard* or standards of performance under this chapter." EPA's narrow reading of section 110(j) would read "emission standard" out of the statutory requirement. Second, on its face, the language cited by EPA is not limited to NSPS. While the

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[9] In the end, EPA can only argue that this reading "is consistent with [its] existing PSD regulations, which do not require any demonstration that a source will meet standards established under Part 63 in order to obtain a PSD permit." EPA Resp. at 99. EPA's regulations cannot change the plain meaning of a statute. To the extent that EPA's rules are not consistent with the statute, they should be changed.

term "standard of performance" is defined in section 111, the definition of the term is broad enough to include technology-based emission standards under section 112. Third, EPA ignores the second requirement in section 110(j), which requires the owner or operator of a facility to demonstrate, prior to issuance of a permit, that "the construction or modification and operation of such source will be in compliance with all other requirements of this chapter." There is no dispute that MACT is a requirement of "this chapter."

4. Section 165(a)(3) cannot be satisfied by a promise of future compliance.

Finally, EPA suggests that section 165(a)(3)'s the requirement to ensure that "construction or modification and operation of such source will be in compliance with all other requirements of this chapter" would be satisfied by requiring MACT before construction commences on the facility. EPA Resp. at 100-101. By emphasizing the words "will be", EPA substitutes a promise of future compliance for a past-due obligation. Its unnatural reading of the language changes a condition precedent (before issuing the permit, EPA must make a MACT determination) into a condition subsequent (EPA can issue the permit as long as it makes a MACT determination before construction of the facility). EPA has no authority to rewrite its obligations under the Act, nor should an agency's promise of future compliance be substituted for an existing obligation.[10]

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[10] EPA rationalizes its failure to comply with sections 165(a)(3) and 110(j) by suggesting that it needed to issue the permit quickly in order to resolve another violation of the Act. EPA Resp. at 104. In essence, EPA tries to excuse one violation by reference to another. EPA could have negotiated for more time to comply with the MACT requirement, but it chose to rush into an agreement that favored the applicant's interest in obtaining final action on the permit. Whatever the reasons for that decision, it does not excuse EPA's issuance of the permit without a MACT determination as required by sections 165(a)(3) and 110(j) of the Act.