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

In re: Desert Rock Energy Company, LLC	)
PSD Permit Number AZP 04-01	)
	)

PETITION FOR REVIEW

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II. INTRODUCTION

Pursuant to 40 C.F.R. § 124.19(a), the Center for Biological Diversity ("Petitioner" or "Center") petitions for review of a condition of Prevention of Significant Deterioration ("PSD") Permit No. AZP 04-01 ("Permit") (Administrative Record ("AR") 112),[1] which was issued to Desert Rock Energy Company, LLC ("DREC"), a subsidiary of Sithe Global Power, LLC ("Permittee" or "Sithe Global"), on July 31, 2008 by Region 9 of the Environmental Protection Agency ("EPA"). The Permit, which was issued pursuant to the Clean Air Act and its implementing regulations, Clean Air Act, 42 U.S.C. § 7401 *et seq*., *as amended* ("CAA"), authorizes Sithe Global and DREC to construct and operate a 1,500 megawatt ("MW") coal-fired power plant on Navajo Land approximately 25 miles southwest of Farmington, New Mexico, within 100 miles of three other very large coal-fired power generating stations, and to discharge millions of tons of air pollutants into the atmosphere every year, including greenhouse gases.

The EPA violated the Endangered Species Act, 16 U.S.C. § 1531, *et seq*. ("ESA" or "Act"), by issuing the Permit without initiating and completing ESA section 7(a)(2) "consultation" with the U.S. Fish and Wildlife Service ("FWS"), 16 U.S.C. § 1536(a)(2); 50 C.F.R. Part 400, to consider the effects of its issuance of the PSD Permit to numerous threatened and endangered species and their critical habitat, including the highly-imperiled Colorado pikeminnow and razorback sucker, two species that are already suffering the impacts of global

[1] Citations to documents that are included in the administrative record for the Desert Rock Energy Project PSD Permit are referenced in this Petition for Review by the last digits of their Document ID number for the administrative record that is maintained by EPA for the permit. For example, the Desert Rock Permit Application that was submitted to EPA on May 7, 2004 has a Document ID number of EPA-R09-OAR-2007-1110-0012, and is cited as "AR 12." Similarly, the final PSD Permit has a Document ID number of EPA-R09-OAR-2007-1110-0112, and is cited as "AR 112."

warming as well as water depletion and contamination from other energy development projects in the San Juan River and Colorado River basins.[2]

EPA admits that it has a mandatory duty under the ESA to ensure that the Desert Rock Energy Project will not jeopardize the continued existence of threatened and endangered species or adversely modify their critical habitat, pursuant to section 7(a)(2) of the ESA. 16 U.S.C. § 1536(a)(2). As the Supreme Court made clear over 30 years ago, this duty "admits of no exception", *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 173 (1978); yet, EPA has indisputably refused to satisfy it here. By issuing the final PSD Permit without first ensuring that its section 7 duties are satisfied, EPA has committed a straightforward procedural violation of section 7 of the ESA.

In an attempt to address this legal violation, EPA included a "condition" in the recently-issued final Permit, which was not included in the draft Permit, *see* final PSD Permit With Changes Shown (AR 120.1), that prohibits construction under the Permit until EPA notifies the

[2] In the Center's view, legal challenges to an agency's failure to consult under section 7(a)(2) are properly brought in federal district court pursuant to the Act's citizen suit provision. *See* 16 U.S.C. § 1540(g)(1)(A) (the district courts "shall have jurisdiction" to enforce "violation of any provision of this chapter or regulation issued under the authority thereof"); *see also Bennett v. Spear*, 520 U.S. 154, 173 (1997) (section 11(g)(1)(A) authorizes any person to enforce the substantive provisions of the ESA against regulated parties, including federal agencies). However, to the degree that a court or the Environmental Appeals Board ("EAB") were to hold that such a challenge must be brought before the EAB in the first instance, the Center is filing this appeal to preserve all of its rights. *See In re: Indeck-Elwood*, 2006 EPA App. LEXIS 44 (EPA App. 2006) at 178-79 and n. 138 (a challenge to EPA's failure to consult, pursuant to Section 7(a)(2) of the ESA, over the effects of issuing a PSD permit is a "challenge to the validity of the entire permit" that must be appealed to the EAB); *id*. at 210 (stating that a challenge to the inadequacy of an ESA section 7 consultation that has actually taken place should, in contrast to failure-to-consult claims, must be pursued as a Administrative Procedure Act, 5 U.S.C. 551 *et seq*. ("APA") challenge—*i.e.*, in federal district court).

Permittee that it has satisfied its ESA Section 7(a)(2) consultation obligations. That condition states in full:

> **II. Commencement of Construction and Startup**
>
> A. Construction under this permit may not commence until EPA notifies the Permittee that it has satisfied any consultation obligations under Section 7(a)(2) of the Endangered Species Act with respect to the issuance of the permit. EPA shall have the power to reopen and amend the permit, or request that the Permittee amend its permit application, to address any alternatives, conservation measures, reasonable and prudent measures, or terms and conditions deemed by EPA to be appropriate as a result of the ESA consultation process.

See id. at 2. As demonstrated below, this condition ("Condition II(A)") is clearly erroneous, 40 C.F.R. § 124.19(a), because it is based on the incorrect and unlawful position that EPA can somehow transfer its duty to satisfy section 7(a)(2) of the ESA to another agency. Here, EPA points to the Bureau of Indian Affairs' ("BIA's") review and approval of a business land lease for the Desert Rock Energy Project and a proposed coal mine expansion on adjacent Navajo Land. However, EPA cannot reasonably claim that its duties will be met by another agency's consultation on its separate and distinct action—particularly when BIA itself has not completed, or even initiated, an ESA section 7(a)(2) formal consultation for its approvals related to the Desert Rock Energy Project ("Project"). Thus, as demonstrated below, EPA cannot avoid its mandatory duties under the ESA through the last-minute inclusion of Condition II(A).

Condition II(A) is also clearly erroneous because even if it could be reasonably said that BIA is a "lead agency" for any and all federal activities relating to the Desert Rock Energy Project, it was unlawful for EPA to issue the final PSD Permit prior to the completion of the BIA-led ESA section 7(a)(2) consultation. By issuing the final PSD Permit before completion of that consultation—which, again, has yet to be initiated, let alone completed—and by including

Condition II(A) in a misguided attempt to mitigate its failure to engage in ESA consultation at all, EPA took final action to permit the construction and operation of the Desert Rock coal-fired power plant, which will emit large quantities of air pollutants, including greenhouse gases, and deplete up to 4,500 af/yr of precious water resources every year, before the direct and indirect impacts of the Project to listed species like the pikeminnow and razorback sucker and their critical habitat are fully analyzed and understood. As such, and as also demonstrated below, EPA's issuance of the final PSD Permit is an unlawful, *per se* "irretrievable and irreversible commitment of resources" that is expressly prohibited, by section 7(d) of the ESA, pending the agency's satisfactory completion of section 7(a)(2) formal consultation. *See* 16 U.S.C. § 1536(d).

III. FACTUAL AND STATUTORY BACKGROUND

A. The ESA's Statutory and Regulatory Scheme

Congress enacted the ESA to provide "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . . [and] a program for the conservation of such endangered species and threatened species . . . ." 16 U.S.C. § 1531(b). The Supreme Court has explained that "the plain intent of Congress . . . was to halt and reverse the trend toward species extinction, whatever the cost." *TVA v. Hill*, 437 U.S. at 184.

Section 7(a)(2) of the ESA requires every federal agency to "insure" that its actions are "not likely to jeopardize the continued existence of any endangered species" or result in the adverse modification of listed species' designated "critical habitat." 16 U.S.C. § 1536(a)(2); *Thomas v. Peterson*, 753 F.2d 754, 763 (9th Cir. 1985). The ESA's implementing regulations set forth a specific process, fulfillment of which is the only way to ensure that action agency's affirmative duties under section 7 of the ESA are satisfied. By this process, each federal agency

must review its "actions" "at the earliest possible time" to determine whether any action may affect listed species or critical habitat. 50 C.F.R. § 402.14. If such a determination is made, formal consultation is required. *Id*.

Formal consultation is a process between the federal agency proposing to take an action (the "action agency") and, for activities affecting terrestrial species, FWS. Formal consultation commences with the action agency's written request for consultation and concludes with FWS's issuance of a "biological opinion" (also "BiOp"). 50 C.F.R. § 402.02. The BiOp issued at the conclusion of the formal consultation "states the opinion" of FWS as to whether the federal action is "likely to jeopardize the continued existence of listed species" or "result in the destruction or adverse modification of critical habitat." 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(c). If FWS concludes that the activities are not likely to jeopardize listed species, it must provide an "incidental take statement" with the BiOp that specifies the amount or extent of such incidental take, the "reasonable and prudent measures" that FWS considers necessary or appropriate to minimize such take, the "terms and conditions" that must be complied with by the action agency or any applicant to implement any reasonable and prudent measures, and other details. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i). "Take" means an action would "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect," or "attempt to engage in any such conduct." 16 U.S.C. § 1532(19). Thus, a BiOp with a no-jeopardy finding effectively green-lights a proposed action under the ESA, subject to an incidental take statement's terms and conditions. *Bennett v. Spear*, 520 U.S. at 170.[3]

[3] Prior to commencing formal consultation, the federal agency may prepare a "biological assessment" ("BA") to "evaluate the potential effects of the action on listed and proposed species and designated and proposed critical habitat" and "determine whether any such species or habitat are likely to be adversely affected by the action." 50 C.F.R. § 402.12(a). While the action agency is required to use a BA in determining whether to initiate formal consultation, FWS may

B. The EPA Did Not Consult With FWS Over The Effects Of Issuing The Desert Rock PSD Permit To ESA-Listed Species And Their Critical Habitat.

On May 7, 2004, EPA Region 9 received an application for the proposed Desert Rock coal plant from Steag Power, LLC ("Steag Power"), which sought a PSD Permit to construct and operate a 1,500 MW coal-fired power plant and related facilities on about 580 acres of Navajo Land, adjacent to a Navajo Nation coal mine, approximately 25 miles southwest of Farmington, New Mexico. *See* Desert Rock Energy Facility: Supplemental PSD Permit Application. Applicant: Steag Power, LLC (May 7, 2004) ("PSD Permit Application") (AR 12) at 2-1.

On May 21, 2004, Region 9 notified Steag that the application was complete. Letter from EAP to Steag Power, LLC (May 21, 2004) (AR 14). In September 2004, Steag sold its rights to the Desert Rock coal plant, which were acquired by Sithe Global. Letter from Steag to EPA (Sep. 10, 2004) (AR 17).

On July 27, 2006, EPA's Region 9 released a proposed PSD permit for Desert Rock which included no mention or conditions pertaining to ESA section 7(a)(2) consultation. *See* Proposed PSD Permit (July 27, 2006) (AR 54). EPA conducted public hearings on the draft permit during September 2006. The deadline for submission of public comments on the draft PSD permit ended on November 13, 2006.

In March 2008, Sithe Global and Diné Power Authority ("DPA") filed suit against EPA for failure to comply with the Clean Air Act's provision that provides that a completed 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); *Desert Rock Energy Company LLC and Dine*

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use the results of a BA in determining whether to request the action agency to initiate formal consultation or formulating a BiOp. 50 C.F.R. § 402.12(k)(1)-(2). If a BA concludes that the action is "not likely to adversely affect" ("NLAA") a listed species, and FWS concurs in writing, that is the end of the "informal consultation" process. 50 C.F.R. § 402.13.

Power Authority v. EPA, Civ. No. 08-00872 (S.D. Tex.) (filed March 18, 2008). On July 31, 2008, Region 9 of the EPA issued the final PSD Permit to Sithe Global and its subsidiary, Desert Rock Energy Company, LLC ("DREC"), *see* Permit (AR 122), for construction and operation of the 1,500 MW coal-fired power plant ("Facility").

In connection with construction and operation of the plant, the Permit authorizes Sithe Global to discharge numerous air pollutants, including sulfur dioxide (SO_2), nitrous oxide (NO_x), carbon monoxide (CO), volatile organic compounds (VOC), particulate matter concentrations ($PM_{2.5}$ and PM_{10}), opacity, sulfuric acid (H_2SO_4), lead, and hydrogen fluoride. The plant will also emit at least 12.7 million tons of carbon dioxide (CO_2) per year—which is over 635 million tons of carbon dioxide over its 50-year lifespan, or nearly twice the entire carbon dioxide emissions of the State of California. *See* Revised Biological Assessment for the Proposed Desert Rock Energy Project (Oct. 25, 2007) ("Desert Rock BA") (AR 92) at 75. The Project will also require extensive water, depleting up to 4,500 acre feet of water every year for 40 years from the Morrison Aquifer. *Id*. Electricity generated by the Project would not stay wholly on the Navajo Nation, but serve markets in the "western United States." Letter from Forrest, URS Corporation to FWS Field Supervisor (Feb. 18, 2004), Attachment 8-A to PSD Permit Application (AR 12).

In addition to the Navajo Mine, the Project would be sited near two existing coal-fired generating stations that are located near Farmington, New Mexico: the San Juan Generating Station, a 1,800 MW facility, which is located 15 miles west of Farmington, New Mexico; and the Four Corners Power Plant, a 2,040 MW plant that is located 25 miles west of Farmington. *See* PNW, San Juan Generating Station (Exhibit ("Ex.") 1); PNW, Four Corners Power Plant (Ex 2). The Project would also be located within 100 miles of the Navajo Generating Station, a 2,250 MW station located on the Navajo Nation near Page Arizona. *See* SRP, Navajo

Generating Station (Ex. 3). The Four Corners Power Plant and San Juan Generating Station are two of the largest and highest-polluting coal fired power plants in the nation; according to EPA data, Four Corners Power Plant was ranked first in the U.S. in 2006 for nitrogen oxide (NOx) emissions at 44,698 tons per year ("tpy"), while San Juan Generating Station was 18th in the U.S. for NOx emissions at 27,503 tpy. EIP (2007) (excerpts attached as Ex. 4). The Four Corners Power Plant was also ranked number 18 in the U.S. for tons of carbon dioxide (CO_2), at 16.395 million tpy. *Id*. San Juan Generating Station is ranked 35th in the U.S. for CO_2 with 13.054 million tpy. *Id*. Recent analysis by Purdue University resulted in San Juan County being documented as sixth in the U.S. for CO_2 emitted in a county, at 8.25 million tpy. *See* Project Vulcan, Top Twenty Emitting Counties (Ex. 5) (available at www.purdue.edu/eas/carbon/vulcan/index.php).

In issuing the final PSD Permit for Desert Rock Energy Project, EPA did not consult with FWS over the effects of permitted activities to ESA-listed species or critical habitat. EPA claimed that it is not required to consult because BIA is the "lead agency" for the power plant's approval and may fulfill the section 7 duties for all participating federal agencies, including EPA. *See* EPA, Responses to Public Comments on the Proposed PSD Permit (July 31, 2008) ("EPA Responses to Public Comments") (AR 120) at 169. However, formal consultation between BIA and FWS has not even commenced due to disagreements over the effects to listed species, including Colorado pikeminnow and razorback sucker, and those species' critical habitat, as well as repeated, unanswered requests from FWS for information from BIA. *See infra* at 23-24, 30 n.13. Thus, EPA issued the final PSD Permit to Sithe Global before any section 7 consultation was completed on the effects of the Desert Rock Energy Project to ESA-listed species or critical habitat at all.

In its response to public comments on the permit, EPA identified three rationales for issuing the final permit before completion of an ESA consultation, citing: (1) the agency's inclusion of Condition II(A) in the final Permit, which precludes commencement of construction under the Permit until EPA notifies the permittee that it has satisfied consultation obligations under Section 7(a)(2) of the ESA, *see* final PSD Permit (AR 122) at 1; (2) the "time that has elapsed in this permitting process" and the need for EPA to issue a final permit in order to "address" *Desert Rock Energy Company LLC and Dine Power Authority v. EPA*, Civ. No. 08-00872, *see* EPA Reponses to Public Comments (AR 120) at 171; and (3) the high likelihood that the permit will be appealed to the Environmental Appeals Board ("EAB") anyway, which will "afford an opportunity for the ESA process to reach resolution while appeals are pending." *See id*. at 168-72.

IV. THRESHOLD PROCEDURAL REQUIREMENTS

Petitioner satisfies the requirements for filing a petition for review under 40 C.F.R. Part 124. The Center has standing to petition for review of the permit decision because the Center is petitioning for review of Condition II(A) in the final Permit, which was not included in the draft Permit, and thus constitutes a change from the draft to the final permit decision that was not reasonably ascertainable. 40 C.F.R. §§ 124.13, 124.19. Prior to the inclusion of Condition II(A), the Center had no way to know that the EPA would ignore its duty to consult on the impacts of the PSD Permit for the Desert Rock Energy Project on ESA-listed species and their critical habitat. *See, e.g., Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 854 (9th Cir. 1982) ("[C]itizens have a right to assume that federal officials will comply with applicable law and to rely on that assumption" in the first instance.")

V. ARGUMENT

As demonstrated below, EPA's failure to engage in ESA section 7 consultation regarding the effects to listed species and critical habitat from its issuance of the PSD Permit for the Desert Rock Energy Project contravenes the statute's plain and unremitting requirements. *See TVA v. Hill*, 437 U.S. at 173 (section 7's duty "admits of no exception"). EPA's issuance of the final PSD Permit is indisputably an agency action that may—and indeed, will—affect a number of listed species and critical habitat. EPA is well aware that coal-fired generating stations pollute the air and lead to mercury and selenium contamination of critically endangered Colorado River fish, as well as other impacts. Yet, EPA has never engaged in section 7 consultation for the Desert Rock Energy Project. Its refusal to do so further imperils Colorado pikeminnow, razorback sucker, and other species that the ESA was enacted to protect.

A. EPA FAILED TO CONSULT AS REQUIRED BY THE ESA OVER THE EFFECTS TO LISTED SPECIES AND CRITICAL HABITAT FROM ITS ISSUANCE OF THE PSD PERMIT FOR THE DESERT ROCK ENERGY PROJECT.

The EPA's issuance of the PSD Permit is indisputably a federal agency "action" that triggers section 7's consultation requirements. The implementing regulations for section 7 define "action" broadly to include "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas," and specifically include "permits" as well as "actions directly or indirectly causing modifications to the land, water, or air." 50 C.F.R. § 402.02. EPA acknowledged that "issuance of the PSD permit is a single federal action and that EPA is responsible for that federal action" under the ESA. EPA Responses to Comments (AR 120) at 169; *see also Indeck-Elwood*, 2006 EPA App. LEXIS 44 at *196-97 (finding that "federal PSD permits . . . fall within the meaning of federal "action" as that term is used in the ESA" and "[a]ccordingly, ESA consultation is required . . .

when the permitting decision 'may affect' listed species or designated critical habitat"). There is no dispute that EPA was required to satisfy its obligations under section 7 in issuing the PSD Permit.

There also can be no question that issuance of the PSD Permit can, and will, affect listed species and/or their designated critical habitat. Indeed, EPA is well aware that issuing the PSD Permit will adversely impact these species. *See, e.g.*, Memo. from FWS to BIA (Jan. 7, 2008) (AR 94) at 1 (concluding that Project are "likely to adversely affect" the endangered Colorado pikeminnow, razorback sucker, and southwestern willow flycatcher, and adversely modify critical habitat for the two endangered fish); *see also infra* at 14-20.

Despite these adverse effects, EPA indisputably did not meet its duty to "insure," through section 7 formal consultation with FWS, that its issuance of the PSD Permit will not "likely . . . jeopardize the continued existence of" the Colorado pikeminnow, razorback sucker, southwestern willow flycatcher, and other listed species, or result in the adverse modification of the fishes' designated "critical habitat," before it issued the final PSD Permit. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14; *Natural Resources Defense Council v. Houston*, 146 F.3d 1118, 1125 (9th Cir. 1998) ("If an agency determines that its proposed action 'may affect' an endangered or threatened species, the agency must formally consult with the relevant Service."). EPA's failure to consult with FWS and satisfy its obligations under the ESA before issuing the PSD Permit is a patent, straightforward violation of the ESA. *See TVA v. Hill*, 437 U.S. at 173 (section 7's duty "admits of no exception").

B. ENDANGERED AND THREATENED SPECIES AND CRITICAL HABITAT WILL BE AFFECTED BY THE FACILITY.

While this appeal deals with the EPA's straightforward violation of the ESA for failing to consult under the ESA—and therefore the precise scope of that required consultation is not

currently before the EAB here—it is clear that the issuance of the PSD permit not only "may affect," but in fact "*will* affect" species listed under the ESA, including the endangered Colorado pikeminnow, razorback sucker, southwestern willow flycatcher, black-footed ferret, Knowlton's cactus, Mancos milkvetch, and California condor, the threatened Mexican spotted owl and Mesa Verde cactus, and other species. In addition, emissions from the Facility will affect designated critical habitat for the Colorado pikeminnow and razorback sucker within the San Juan River through the northern portion of the analysis area.[4]

The Colorado pikeminnow (*Ptychocheilus lucius*) (commonly known as the Colorado squawfish until 1998) is a large, long-lived fish that is endemic to the Colorado River Basin. FWS (2002a) (excerpts attached as Ex. 6). The pikeminnow was listed as endangered in 1967 under provisions of the Endangered Species Conservation Act of 1969, a precursor statute to the ESA. 16 U.S.C. 668aa; 32 Fed. Reg. 4001 (Mar. 11, 1967), and was listed as endangered under Section 4(c)(3) of the original ESA of 1973. 16 U.S.C. § 1533(c)(3). The pikeminnow has been extirpated from the lower Colorado River Basin but has been reintroduced into the Gila River subbasin, where it exists in small numbers in the Verde River. There are small numbers of wild pikeminnow in the San Juan River subbasin.

[4] These nine species are listed in BIA's October 25, 2007 revised biological assessment for the Desert Rock Energy Project. *See* Desert Rock BA (AR 92) at 16-17. However, that BA limited its analysis of affected species to those which physically occur in the "analysis area," which was narrowly defined to include San Juan County, New Mexico and Apache County, Arizona—*i.e.*, a 50 kilometer radius around the coal-fired power plant. *See* Memo. FWS to BIA (Jan. 7, 2008) (AR 94) at 4 (observing that FWS "found no information that would suggest that the 50 km radius around a point source would be the appropriate scope for an effects analysis to federally listed species"). As FWS observed, this analysis area is "not adequately defined" and omits areas of "contaminant deposition," and at the very least, must include surface waters that support endangered species (*e.g.*, San Juan River, Dead Mans Wash, nearby ponds, etc.). *See id*. Thus, this list of species is certainly not exhaustive and serves only to highlight some examples of species and critical habitat that will be potentially affected by EPA's issuance of the Permit for the Desert Rock coal-fired power plant.

The razorback sucker (*Xyrauchen texanus*) is also a large fish that is endemic to the Colorado River Basin. FWS (2002a) (excerpts attached as Ex. 7). The razorback sucker is currently found in small numbers in the Green River, upper Colorado River, and San Juan River subbasins, as well as the lower Colorado River between Lake Havasu and Davis Dam, the reservoirs of Lakes Mead and Mohave, small tributaries of the Gila River subbasin (Verde River, Salt River, and Fossil Creek). FWS (2002b) (Ex. 17). The razorback sucker was listed as "endangered" on October 23, 1991. 56 Fed. Reg. 54957 (Oct. 23, 1991).

Critical habitat was designated for these and two additional endangered species of Colorado River fish in 1994, 59 Fed. Reg. 13374 (Mar. 21, 1994), and includes stretches of the San Juan River and its 100-year floodplain, *id*., that are located within 31 miles of the Desert Rock Energy Project. Desert Rock BA (AR 92) at 11, 17-18. As FWS observed in the critical habitat designation, the Colorado pikeminnow and razorback sucker are threatened with extinction due to the cumulative effects of habitat loss, including alterations to natural flows and changes to temperature and sediment regimes, proliferation of non-native introduced fish, and other man-induced disturbances. 59 Fed. Reg. 13374 (Mar. 21, 2004). These native Colorado River fish have declined as a result of large mainstem dams, water diversions, degraded water quality, habitat modification, nonnative fish species, and degraded water quality. FWS (2002a) (Ex. 6); FWS (2002b) (Ex. 7). Remaining wild populations of these species are in serious jeopardy. FWS (2002a) (Ex. 6); FWS (2002b) (Ex. 7).

In addition to many other threats, the Colorado pikeminnow, razorback sucker and other species are adversely affected by power plant water withdrawals and deposition of air-born pollutants in soils and surface waters. Mercury and selenium contamination are of particular concern to the endangered fish species and to fish-eating birds along the San Juan River. As the

Desert Rock BA observes, even "[m]inor increases" in mercury, selenium, and other toxic elements reaching the San Juan River from air pollution deposition could adversely affect Colorado pikeminnow and razorback sucker, and hinder their ability to recover. Desert Rock BA (AR 92) at 27. FWS acknowledged that "[b]oth mercury and selenium are of concern for endangered fish" in the San Juan River and that fish tissue samples exceed recommended mercury thresholds, putting the birds that eat them at risk for mercury toxicity. *Id.* Studies also show that diet items for Colorado pikeminnow, including small fish, speckled dace, and red shiners, exceed threshold levels of concern and compromise the species' ability to reproduce. *Id.* ("[e]xceed the selenium dietary criterion of 3.0µg/g"); *id*. (observing that "[o]ne (1) plant sample, 45% of invertebrate samples and 76% of fish samples (including one razorback sucker) had selenium concentrations above thresholds of concern" and that "[r]eproductive failure was expected to occur with a low-to-moderate occurrence in endangered fish species given selenium concentrations found in tissues and diets").

Continued upwind coal burning at Desert Rock and other facilities nearby—including the Four Corners Power Plant, San Juan Generating Station, and Navajo Generating Station—will exacerbate these effects. Like the other three coal-fired power plants, Desert Rock will discharge mercury, selenium, and other toxins, as well as many air pollutants like sulfur dioxide (SO_2), nitrous oxide (NO_x), carbon monoxide (CO), volatile organic compounds (VOC), sulfuric acid (H_2SO_4), lead, and hydrogen fluoride, and will contribute to global warming by discharging 12.7 million tons of carbon dioxide per year. Desert Rock BA (AR 92) at 75.[5]

[5] As explained above, the Four Corners Power Plant and San Juan Generating Station are some of the largest and highest-polluting coal-fired power plants in the United States. *See supra* at 10-11.

In addition, global warming—a consequence of the anthropogenic generation of greenhouse gases into the atmosphere, primarily from the burning of fossil fuels like coal—is further compromising the ability of these species to survive. IPCC Climate Change 2007 Synthesis Report (2007) (Ex. 8). Warming of the global climate system is unequivocal and evidenced in observations of increases in global average air and ocean temperatures, widespread melting of snow and ice, and rising global average sea level. *Id*. Global warming is already affecting water resources in the arid western United States. *Id*. Arid regions such as the western United States are projected to continue to suffer a decrease of water resources as a result of global warming; the Intergovernmental Panel on Climate Change projects that impacts to North America from climate change will include severe heat waves, reduced water supplies, an increase in ozone formation and air quality related fatalities. *Id*.

Indeed, the effects of global warming are already showing up in the arid western United States, where spring and summer snow cover is decreasing, a greater fraction of annual precipitation falling as rain rather than snow, and stream snow peaks are occurring weeks earlier. *Id*. Modeling results are suggesting that future warming is jeopardizing the ability to meet water allocation requirements of the Colorado River Compact. McCabe and Worlock (2007) (Ex. 9). Reductions in precipitation and increases in temperature are conservatively modeled to lead to reductions in annual runoff in the Colorado River Basin of 14-18 percent over the coming century, causing a 36-40 percent decrease in reservoir storage in the Colorado River Basin, which includes the San Juan River Basin and Navajo Reservoir. Christensen et al. (2004) (Ex. 10). A recent study found that human-induced, detrimental climate-related trends to river flow, winter air temperature, and snow pack portend "a coming crisis in water supply for the western United States." Barnett and Pierce (2008) (Ex. 11).

These effects will be aggravated further by water depletions for Desert Rock, which will consume 4,500 acre feet annually from the Morrison aquifer, as well as other ongoing and proposed projects like the Navajo-Gallup Pipeline, which will divert 35,893 acre feet annually from the San Juan River. Navajo-Gallup Water Supply Project DEIS Executive Summary (2007) (excerpts attached as Ex. 12). In addition, the San Juan Basin is one of the largest natural gas fields in the nation and has been under development for more than 50 years. BLM (2003) (excerpts attached as Ex. 13). It supports approximately 18,000 active oil and gas wells and virtually all of the area with high potential for oil and gas development has already been leased. *Id*. On Bureau of Land Management ("BLM") land in the Farmington Field Area, almost 10,000 new natural gas wells have been approved, adding to 18,000 existing wells. *Id.* These facilities will add over 70,000 tons per year of NOx by 2023, *id.—i.e.*, more NOx than that emitted by the Four Corners Power Plant and San Juan Generating Station.

Surface water depletion from global warming and water withdrawals exacerbate contamination threats to Colorado pikeminnow, razorback sucker, and other species. Surface water depletion reduces dilution ratios of contaminates, magnifies their concentrations, and intensifies the other effects to the survival and recovery of these and other species. *See, e.g.*, Hamilton *et al*. (2002) (Ex. 14); Hamilton (2004) (Ex. 15); Hamilton *et al*. (2003) (Ex. 16). Decreased runoff and water storage at Navajo Reservoir will also likely increase the frequency and duration of dam releases below minimum volumes needed to maintain those species' critical habitat in the San Juan River. Memo. from FWS to BIA (Jan. 7, 2008) (AR 94) at 18. Meanwhile, increases in San Juan River water temperatures resulting from the Desert Rock Energy Project could exacerbate the plight of the pikeminnow and sucker by favoring warm-water, non-native predatory and/or competitive fish species. Desert Rock BA (AR 92) at 76

(noting that warmer water may be an additional factor that benefits non-native fish and stresses endangered fish.)

EPA's failure to consult with the FWS over the effects of issuing the PSD Permit prevented the agency from analyzing the direct, indirect, and the cumulative effects to these and other species of decreased river flows due to climate-impacted drought, and mercury and selenium deposition from the Desert Rock Energy Project, in combination with similar effects resulting from the Four Corners Power Plant, San Juan Generating Station, and Navajo Generating Station and other activities. Such an analysis was required before EPA issued the final PSD Permit to Sithe Global.

C. CONDITION II(A) IS CLEARLY ERRONEOUS BECAUSE IT IS BASED ON THE UNLAWFUL POSITION THAT BIA IS THE "LEAD AGENCY" FOR ALL FEDERAL ACTIVITIES CONCERNING THE DESERT ROCK ENERGY PROJECT AND MAY FULFILL THE SECTION 7 OBLIGATIONS FOR ALL FEDERAL AGENCIES, INCLUDING EPA.

In issuing the Permit, EPA decided not consult with FWS pursuant to section 7 over the effects of issuing the PSD Permit by claiming that BIA is the "lead agency" for the Facility's approval and therefore may fulfill the section 7 duties for all participating federal agencies, including EPA. *See* EPA Responses to Public Comments (AR 120) at 169. EPA's position is unlawful under the plain language of the Act's implementing consultations, which do not allow federal agencies to subsume multiple, though complementary, agency "actions" into one ESA consultation process. 50 C.F.R. Part 400.

Where multiple agencies are involved in a single, "particular" action, the ESA's implementing regulations do permit designation of a "lead agency" that is responsible for fulfilling the ESA's consultation responsibilities for all federal agencies that are involved in that single action. *See* 50 C.F.R. § 402.07. However, the regulatory definition of "action" is broad

and includes "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas," and specifically includes "leases" and "permits" as well as "actions directly or indirectly causing modifications to the land, water, or air." 50 C.F.R. § 402.02. Under this definition, it is clear that BIA and EPA are proposing to take (or have already finalized) fundamentally *separate* agency "actions," both of which relate to the Project and are complementary, but which are carried out pursuant to unique regulatory authorities.

Thus, BIA is proposing to approve a 25-year "business land lease" between Desert Rock Energy and the Navajo Nation, grant rights-of-way for the entire Desert Rock Energy Project ("Project"), and approve BNCC's proposed expansion of the Navajo Mine. *See* BIA, Desert Rock Energy Project: Draft Environmental Impact Statement ("DEIS") (excerpts attached as Ex. 17) at 1-2.[6] Project facilities include the coal-fired power plant itself, which will emit air pollutants including greenhouse gases, as well as related facilities, including the Navajo Mine, a well field that would draw 4,500 acre-feet per year (af/yr) from the Morrison Aquifer for project-related purposes and an another 450 af/yr for local municipal use, a water-supply pipeline extending from the well field to the power plant, 500 kilovolt (kV) transmission lines, other upgrades and ancillary facilities required for the production and transmission of electricity, and new access roads. *See id*. at ES-1. In connection with its review and approval of the business land lease, BIA is consulting with FWS pursuant to the ESA, but has refused to provide FWS with basic information that would allow the consultation process to move forward.

[6] BIA's approval of the lease and mine expansion is necessary because the Navajo Nation cannot, under federal law, convey an interest in Navajo Reservation land that is held in trust without the approval of the United States. 25 U.S.C. § 415.

Indeed, despite repeated requests, BIA are Sithe Global have refused to provide FWS with basic information about the composition of the coal that would be used at the power plant, the cumulative effects of emissions from three adjacent coal-fired power plants and all of the plants' anticipated contribution to greenhouse gas emissions, as well as the effect of climate change to listed species like the Colorado pikeminnow and razorback sucker and those species' critical habitat. *See* Email from Campbell to Milsap, et al. (July 23, 2007) (Ex. 18) (stating that Sithe Global refused to provide information about the "results of modeling of future water availability" and "the effects of any changes in hydrology and water resources of the San Juan River basin on Colorado pikeminnow, razorback sucker, bald eagle, and Southwest[ern] willow flycatcher"); *See* Memo. from FWS to BIA (July 2, 2007) (AR 82) at 1 (FWS "has not received all of the information necessary to initiate formal consultation on the Desert Rock Energy Project as outlined in the regulations governing interagency consultations"); Memo. from FWS to BIA Jan. 7, 2008) (AR 94) at 1 ("Because many of the questions asked in the Service's July 2, 2007, letter were not specifically addressed and only some of the information was provided in the revised BA, the BA still does not provide sufficient information to complete a thorough analysis of the effects of their action on federally listed species."). The fact that BIA and the permittee are stonewalling FWS only underscores the practical need for EPA to fulfill its own obligations under the Act.[7]

In contrast to BIA's review and approval of a land lease and mine expansion, EPA has proposed (and finalized) a wholly separate action: issuance of a PSD *permit* for construction and

[7] Apparently because, in Sithe Global's view, FWS employees apparently were not acting quickly enough to "get this [ESA consultation] process completed as soon as possible," *id*., Sithe Global representatives took the issue "back to 'Washington, D.C.'" and told FWS staff that they "would soon be instructed by 'Washington' not to address or pursue the climate change questions." *See* Email from Johns to Campbell, *et al*. (July 12, 2007) (Ex. 19); Email from Campbell to Milsap, *et al*. (Ex. 18).

operation of the Desert Rock Energy Facility—the coal-fired power plant—pursuant to the Clean Air Act and its implementing regulations, which provide that no major emitting facility like the coal plant may be constructed or modified unless a PSD permit is issued. 42 U.S.C. § 7475(a)(1). As explained above, the Permit authorizes Sithe Global to discharge air pollutants, including sulfur dioxide (SO_2), nitrous oxide (NO_x), carbon monoxide (CO), volatile organic compounds (VOC), particulate matter concentrations ($PM_{2.5}$ and PM_{10}), opacity, sulfuric acid (H_2SO_4), lead, and hydrogen fluoride, as well as 12.7 million tons of CO_2 into the atmosphere every year for 50 years.

BIA's approval of the land lease and mine expansion and EPA's issuance of a PSD permit are complementary but distinctly separate federal actions. As the EAB noted in *Indeck-Elwood*, the CAA requires EPA to consider "'energy, *environmental,* and economic *impacts* and other costs'" when approving discharges of air pollutants, including "ESA-identified impacts to endangered or threatened species." *See Indeck-Elwood,* 2006 EPA App. LEXIS 44 at *195 (quoting 42 U.S.C. § 7479(3)) (emphasis in original). The EAB recognized that that Clean Air Act's PSD requirements and the ESA requirements are "appropriately viewed as complementary in nature," *id*. at 195-96, and as the Ninth Circuit has held, "an agency cannot escape its obligation to comply with the ESA merely because it is bound to comply with another statute that has consistent, complementary objectives." *Washington Toxics Coal*. v. EPA, 413 F.3d 1024, 1032 (9th Cir. Wash. 2005). EPA was required to consult with FWS over the effects of its issuance of the PSD Permit, and its failure to do so is a patent violation of section 7(a)(2) of the Act. *TVA v. Hill*, 437 U.S. at 179 (1978) (the language of section 7 "admits of no exception").

Hence, EPA's position that it is not required to meet its obligations under section 7(a)(2) by consulting directly with FWS should be rejected, as should Condition II(A).[8]

D. CONDITION II(A) IS CLEARLY ERRONEOUS BECAUSE EPA'S ISSUANCE OF THE PSD PERMIT PRIOR TO THE COMPLETION OF BIA'S CONSULTATION CONSTITUTES AN UNLAWFUL IRRETRIEVABLE AND IRREVERSIBLE COMMITMENT OF RESOURCES.

Condition II(A) is also clearly erroneous because EPA's issuance of the PSD permit prior to the completion of consultation constitutes an "irretrievable and irreversible commitment of resources" that is expressly prohibited pending the completion and outcome of formal consultation by Section 7(d) of the Act. 16 U.S.C. § 1536(d) (prohibiting federal agencies and permit applicants from making an "irreversible or irretrievable commitment of resources . . . which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures"); 50 C.F.R. § 402.09.

Congress enacted section 7(d) "to prevent Federal agencies from 'steamrolling' activity in order to secure completion of the projects regardless of their impact on endangered species." *Pacific Rivers Council v. Thomas*, 936 F. Supp. 738, 745 (D. Idaho 1996) (quoting *North Slope Borough v. Andrus*, 486 F. Supp. 332, 356 (D.D.C.), *aff'd in part and reversed in part on other grounds*, 206 U.S. App. D.C. 184, 642 F.2d 589 (D.C. Cir. 1980)). Section 7(d) thus "clarifies

[8] Indeed, the two major federal actions—BIA's lease and EPA's permit—are even more distinct than the pesticide registrations that were at issue in *Washington Toxics*. *Washington Toxics* involved a challenge to EPA's refusal to conduct Section 7(a)(2) consultation over its registration, pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y ("FIFRA"), of 54 pesticides. There, EPA argued (and the district court agreed) that the "entire universe of pesticide registrations is not a single agency action" for purposes of section 7(a)(2), but rather, that "*each pesticide registration constitutes a distinct agency action*." *See Washington Toxics Coal. v. EPA*, 2002 U.S. Dist. LEXIS 27654 at *25 (W.D. Wash. July 2, 2002) (emphasis added). EPA's position in *Wash. Toxics* conflicts with its position here, where there are two entirely different agencies involved, where the agencies are administering two distinct regulatory schemes, and where they are undertaking two distinct federal actions.

the requirements" of section 7(a) in order to "ensur[e] that the status quo will be maintained during the consultation process." *Conner v. Burford*, 836 F.2d 1521, 1536 & n.34 (9th Cir. 1988); *see also Southwest Ctr. for Biological Diversity v. Babbitt*, 2000 U.S. Dist. LEXIS 22477 (D. Ariz. Sept. 22, 2000) ("the purpose of Section 7(d) is to 'ensure that the status quo will be maintained during the consultation process'") (quoting *Conner v. Burford*, 848 F.2d 1441, 1455 (9th Cir. 1986)).[9]

In *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994) and *Lane County Audubon Soc'y v. Jamison*, 958 F.2d 290 (9th Cir. 1992), the Ninth Circuit determined that "timber sales constitute *per se* irreversible and irretrievable commitments of resources under section 7(d) and cannot go forward during the consultation period." *Silver v. Babbitt*, 924 F. Supp. 976, 983 (D. Ariz. 1995) (citing *Jamison*, 958 F.2d at 295; *Pacific Rivers*, 30 F.3d at 1057). These decisions turned on contents of the contracts at issue, not on the ground-disturbing activities that were actually taking place.[10]

Here, it is precisely the "status quo" that EPA foreclosed by issuing the final PSD Permit. Thus, EPA executed a final PSD Permit that authorizes Sithe Global to construct and engage in long term operation of a coal-fired power plant that would emit very large quantities of air

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[9] Section 7(d) of the ESA provides in full:

> *After initiation of consultation* required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant *shall not* make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.

16 U.S.C. § 1536(d) (emphasis added).

[10] In those cases, the Ninth Circuit held that the district court erred in not enjoining all activity and found that only after the U.S. Forest Service complied with section 7(a)(2) could activity that may affect the protected species go forward.

pollutants every year. In so doing, EPA foreclosed its ability not to choose to issue the Permit at all, *e.g.*, in order to avoid jeopardy to listed species and/or adverse modification to critical habitat, or to choose alternatives to construction and operation of the plant. Because the agency's opportunity to make these choices has been eliminated, "all that remains is the limited ability to make the path chosen as palatable as possible." *Id*. at 1129. This is insufficient for meeting the requirements of section 7. *See, e.g., NRDC v. Kempthorne*, 539 F. Supp. 2d 1155, 1160 (E.D. Cal. 2008) (holding that federal agency took actions "that could foreclose implementation of reasonable and prudent alternatives that would avoid jeopardy . . . in violation of section 7(d)" by issuing water compact).

EPA's excuses for its failure to ensure against jeopardy to listed species or adverse modification of their critical habitat prior to issuing the PSD permit must fail. To begin with, EPA claims that although it issued the final PSD Permit in July 2008—*i.e.*, prior to completion, and indeed, commencement, of formal consultation between BIA and FWS—there was no irreversible or irretrievable commitment of resources due to the inclusion of Condition II(A) in the final PSD Permit, which prohibits construction pending EPA's notification that it has completed its obligations under Section 7 of the Act. *See* EPA Responses to Comments (AR 120) at 172. Specifically, EPA claims that by including Condition II(A), it "retained authority to ensure that the permit application or terms can be amended to address any issues regarding protection of listed species . . .." *See id*. at 172.

However, while "a permit once issued may subsequently be amended" this "does not diminish the irretrievable nature of the decision to issue the permit" because "amendments are discrete actions" that are "independent from the decision to issue the permit in the first instance." *Indeck-Elwood*, 2006 EPA App. LEXIS 44 at n.151. In addition, Section 7(d) does not "amend"

Section 7(a)(2) to provide that a biological opinion is not required before the initiation of agency action "so long as" there is no irreversible or irretrievable commitment of resources. *See Conner v. Burford*, 836 F.2d at 1536 & n.34. Rather, section 7(d) seeks to "ensur[e] that the status quo will be maintained during the consultation process." *Id*.; *see also id*. ("Section 7(d) is not an independent authorization for 'incremental-step' consultation."); *Southwest Ctr. for Biological Diversity v. Babbitt*, 2000 U.S. Dist. LEXIS 22477 at *51 ("the purpose of Section 7(d) is to 'ensure that the status quo will be maintained during the consultation process'") (quoting *Conner v. Burford*, 848 F.2d at 1455). Thus, the inclusion of Condition II(A) does not mitigate EPA's *per se* violation of section 7(d). *See NRDC v. Houston*, 146 F.3d at 1128 (a federal agency is not be permitted to "skirt the procedural requirements" of section 7(d), for example, by including a "catchall savings clause" in water contracts that were "illegally executed" before the completion of formal consultation).[11]

Indeed, as the EAB has made clear, "to ensure compliance with the law" and avoid an irreversible or irretrievable commitment of resources that is prohibited by section 7(d) of the ESA, "any consultation required under the ESA should in the ordinary course conclude prior to issuance of the final federal PSD permit." *Indeck-Elwood*, 2006 EPA App. LEXIS 44 at *198; *id*. at n.148. EAB reasoned that this is due to the "complementary" nature of the CAA and ESA—that is, because the CAA provides "authority [for EPA] to address ESA-related concerns

[11] In any event, even accepting the notion that BIA is properly viewed as the "lead agency" for all Section 7 consultation matters related to the Project, and that EPA was simply one of multiple agencies participating in that BIA-led consultation, by issuing the final PSD Permit in July, EPA effectively *exited* that BIA-lead process before it was complete. Thus, by issuing the PSD Permit (with Condition II(A)) before completion of that consultation, EPA made a final permit decision to change the status quo and authorize the Facility to emit air pollutants—*before the direct and indirect impacts to threatened and endangered species are fully considered and understood*. This fact totally undermines EPA's position that it is cooperating in any BIA-led section 7 consultation.

through the provision of ameliorative conditions in the permit", it is prudent to retain the discretion to include any such conditions before issuing a final permit. *Id.* at *195; *id*. at 195-96 (impacts to listed species "can be taken into account when considering a PSD permit application and establishing a permit's terms and conditions"); *cf. Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 977 (9th Cir. 2003) (a statute allowing action agency to issue permits entrusted action agency with discretion to condition permits to inure to the benefit of listed species). EPA failed to justify its patent violation of section 7(d) here.[12]

EPA alternatively argues that issuance of the final Permit was necessary in order to allow the agency to defend itself against a lawsuit filed by DREC and Diné Power Authority ("DPA") in March 2008. *See* EPA Responses to Comments (AR 120) at 171. That lawsuit alleges that EPA failed to comply with a section of the CAA, 42 U.S.C. § 7475(c), by failing either to grant or deny the final PSD permit within one year of receiving the completed application. *Desert Rock Energy Company LLC and Diné Power Authority v. EPA*, Civ. No. 08-00872 (S.D. Tex.) (filed March 18, 2008). However, this rationale also fails because EPA "'cannot escape its obligation to comply with the ESA merely because it is bound to comply with another statute," even one (such as the CAA) that has "consistent, complementary objectives.'" *Indeck-Elwood*, 2006 EPA App. LEXIS 44 at *195 (quoting *Washington Toxics Coal. v. EPA*, 413 F.3d at 1031); *cf. Washington Toxics*, 413 F.3d at 1031 ("compliance with FIFRA requirements does not overcome an agency's obligation to comply with environmental statutes with different purposes," in particular, the ESA); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 531-32 (9th Cir. 2001) (finding that FIFRA and the Clean Water Act, 33 U.S.C. § 1251 *et seq.*

[12] Indeed, EAB observed that it may even be "prudent" for EPA to "move consideration of ESA even farther up the permit development chain, where there is 'more flexibility to make, and . . . implement, suggested [ESA-related] modifications.'" *Indeck-Elwood*, 2006 EPA App. LEXIS 44 at *202 (quoting *NRDC v. Houston*, 146 F.3d at 1129).

("CWA") have different and complementary purposes and thus the registration and labeling of a substance under FIFRA does not exempt a party from its CWA obligations). Hastening final action on issuance of the PSD Permit may appear to bolster EPA's litigation posture against the corporations' lawsuit, but it only compounds its violations of the ESA. To the extent that there is a conflict in EPA complying with both statutes, "the balance [must be] struck in favor of affording endangered species the highest of priorities . . .." *See TVA v. Hill*, 437 U.S. at 194 (internal citation omitted).[13]

Moreover, this rationale cannot be squared with EPA's third reason for acting outside of the "ordinary course" and issuing the final PSD Permit prior to completion of formal consultation, which is that "it is highly likely that the permit will be appealed to the EAB" and that "such an appeal would effectively stay final agency action (*i.e.*, issuance of the final PSD permit) until the conclusion of the appeal process and implementation of any actions needed to address the outcome of the appeal." EPA Responses to Comments (AR 120) at 171.

EPA cannot, on the one hand, claim that it is defending itself against a lawsuit by issuing a "final" PSD permit for purposes of complying with the CAA, and on the other hand, claim that the Permit is not "final" until conclusion of the appeal process for the purpose of arguing that completing the ESA consultation process during the appeal is prudent in these circumstances. The implementing regulations for the PSD program make clear that the final Permit is indeed

[13] It is particularly instructive that Sithe Global went to great lengths to avoid providing FWS with the information and analyses that would have allowed BIA's section 7 consultation process to move forward, but then sued EPA when it could not get its air permit through normal means. Indeed, Sithe Global apparently took the issue "back to 'Washington, D.C." and threatened FWS employees that they "would soon be instructed by 'Washington' not to address or pursue the climate change questions." *See* Email from Campbell to Milsap, *et al*. (July 23, 2007) (Ex. 18). Whatever the intended effect of this, so far it seems that it has resulted in Sithe Global securing its final PSD Permit without having to provide the requested information or completing an ESA section 7 consultation.

"final"; the regulations specify that following the close of the public comment period on a draft PSD permit, the EPA Regional Administrator "shall" issue a "final permit decision," which means a "final decision to issue, deny, modify, revoke and reissue, or terminate a permit." 40 C.F.R. § 124.15. The regulations also provide that a "final permit" becomes "effective" 30 days after service of the notice of the final permit decision unless a later date is specified in the decision itself or review is requested pursuant to the appeal procedures in 40 C.F.R. § 124.19, or immediately upon issuance if no comments were received on the draft permit. *Id*. Thus, while resolution of the appeals of EPA's final permit decision may delay the "effective" date of the Permit, it does not change the fact that the Permit was made "final" upon EPA's "final permit decision" of July 31, 2008, and that was *the point at which the permitting agency . . . irretrievably committed itself* with respect to the discrete act of permitting" the power plant. *Indeck-Elwood*, 2006 EPA App. LEXIS 44 at *200 (emphasis added).[14]

By issuing the final PSD Permit before any ESA section 7(a)(2) consultation over the effects of the Desert Rock Energy Project was complete, let alone the agency's own section 7 formal consultation with FWS, EPA committed a *per se* violation of section 7(d) of the ESA, and none of the excuses offered by the agency change or mitigate this patent violation of the Act.[15]

VI. CONCLUSION

For the reasons explained above, EPA violated the ESA by failing to consult with FWS over the effects of its issuance of the final PSD Permit for the Desert Rock Energy Project, and

[14] Again, as the EAB has made clear, "the Agency should complete the ESA process prior to the issuance of the final permit." *Indeck-Elwood*, 2006 EPA App. LEXIS 44 at *200.

[15] Indeed, EPA also cannot avoid the protections of Section 7(d) simply by failing to initiate formal consultation in the first instance. *See, e.g., NRDC v. Houston*, 146 F.3d at 1128 ("The district court also correctly concluded that if the Bureau is not permitted to execute contracts that constitute an irreversible and irretrievable commitment of resources during the formal consultation, it also was not permitted to do so before it had initiated formal consultation. 16 U.S.C. § 1536(d); *see Pacific Rivers*, 30 F.3d at 1056-57; *Conner v. Burford*, 848 F.2d at 1455.

by making irreversible and irretrievable commitments of resources by issuing the final PSD Permit to Sithe Global prior to completion of the required ESA section 7 consultations with FWS. Accordingly, the Center respectfully requests the EAB to grant this Petition for Review and ultimately, to remand these proceedings.

VII. LIST OF EXHIBITS

1. PNW, San Juan Generating Station (available at www.pnm.com/systems/sj.htm)
2. PNW, Four Corners Power Plant (available at www.pnm.com/systems/4c.htm)
3. SRP, Navajo Generating Station (available at www.srpnet.com/about/stations/navajo.aspx)
4. Environmental Integrity Project, Dirty Kilowatts: America's Most Polluting Power Plants (July 2007) (EIP 2007)
5. Project Vulcan, Top Twenty Emitting Counties (available at www.purdue.edu/eas/carbon/vulcan/index.php)
6. U.S. Fish and Wildlife Service. 2002a. Colorado pikeminnow (*Ptychocheilus lucius*) Recovery Goals: amendment and supplement to the Colorado Squawfish Recovery Plan. U.S. Fish and Wildlife Service, Mountain-Prairie Region (6), Denver, Colorado.
7. U.S. Fish and Wildlife Service. 2002b. Razorback sucker (*Xyrauchen texanus*) Recovery Goals: amendment and supplement to the Razorback Sucker Recovery Plan. U.S. Fish and Wildlife Service, Mountain-Prairie Region (6), Denver, Colorado.
8. Intergovernmental Panel on Climate Change. 2007. Climate Change 2007: Synthesis Report.
9. McCabe, G.J. and Wolock, D.M. 2007. Warming may create substantial water supply shortages in the Colorado River basin. Geophysical Research Letters, Vol. 34, L22708.
10. Christensen, N. S., A. W. Wood, N. Voisin, D. Lettenmaier, and R. N. Palmer (2004), The effects of climate change on the hydrology and water resources of the Colorado River basin, Clim. Change, 62, 337– 363.
11. Barnett, T.P. and Pierce, D.W. 2007. When will Lake Mead go dry? Water Resources Research, Vol. 44, W03201.
12. U.S. Bureau of Reclamation, Navajo-Gallup Water Supply Project Planning Report and Draft Environmental Impact Statement (Mar. 2007)
13. U.S. Bureau of Land Management, Farmington Resource Management Plan with Record of Decision (2003)
14. Hamilton, S.J., K.M. Holley, K.J. Buhl, F.A. Bullard, L.K. Weston, S.F. McDonald. 2002. Impact of selenium and other trace elements on the endangered adult razorback sucker. Environmental Toxicology 17(4): 297-323.
15. Hamilton, S.J. 2004. Review of selenium toxicity in the aquatic food chain. The Science of the Total Environment. June 29; 326 (1-3):1-31.

16. Hamilton, S.J., K.M. Holley, K.J. Buhl, F.A. Bullard, L.K. Weston, S.F. McDonald. 2004. Evaluation of flushing of a high-selenium backwater channel in the Colorado River. Environmental Toxicology 19(1): 51-81.
17. BIA, Desert Rock Energy Project: Draft Environmental Impact Statement
18. Electronic Mail Communication from David Campbell, FWS to Brian Milsap, FWS, *et al*. (July 23, 2007)
19. Electronic Mail Communication from Thomas A. Johns, Senior Vice President Development, Sithe Global to David Campbell, FWS, *et al*. (July 23, 2007)

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