

**ATTORNEYS GENERAL OF NEW YORK, CALIFORNIA, CONNECTICUT,  
DELAWARE, MAINE, MASSACHUSETTS, OREGON, and VERMONT**

March 25, 2009

**VIA ELECTRONIC MAIL** ([DesertRockAirPermit@epa.gov](mailto:DesertRockAirPermit@epa.gov))

Mr. Joseph Lapka  
Air Permitting Program  
U.S. Environmental Protection Agency, Region 9  
75 Hawthorne Street  
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**Re: Desert Rock Energy Facility/Comments on Addendum to Statement of  
Basis for PSD Draft Permit**

Dear Mr. Lapka:

The Attorneys General of New York, California, Connecticut, Delaware, Maine, Massachusetts, Oregon, and Vermont jointly submit these comments to voice our concerns regarding the proposed issuance of a Prevention of Significant Deterioration (PSD) air quality permit to Desert Rock Energy Company, LLC for the construction of a 1,500 megawatt coal-fired power plant near Farmington, New Mexico. Specifically, we write to comment on Region 9's Addendum to Statement of Basis for the Desert Rock power plant (Jan. 14, 2009). The Addendum relies upon a December 18, 2008 memorandum authored by former Administrator Johnson entitled "Interpretation of Regulations that Determine Pollutants Covered by the Federal PSD Program," ("Johnson Memo") as the basis for declining to require that Desert Rock implement the Best Available Control Technology ("BACT") to limit the plant's emissions of carbon dioxide (CO<sub>2</sub>). In the memorandum, then-Administrator Johnson concluded that CO<sub>2</sub> is not a pollutant "subject to regulation" under the Clean Air Act ("Act").

The Attorneys General believe that Region 9 cannot properly rely on the Johnson Memo as the basis for refusing to impose the BACT requirement for CO<sub>2</sub>. As is more specifically set forth below, the Johnson Memo's interpretation of the Act is erroneous. The deficient procedure used to issue the Johnson Memo further undermines its legal authority. EPA Administrator Jackson's announcement last month that the Agency is reconsidering the Johnson Memo reflects an acknowledgment of these concerns.

Given that the Desert Rock power plant is expected to emit 12-13 million tons of CO<sub>2</sub> annually, applying the flawed legal interpretation in the Johnson Memo could lead to the addition of several hundred million tons of global warming pollution into the atmosphere over the life of the plant. Such a result would be wholly inconsistent with the Obama Administration's pledge to deal with global warming pollution from power plants. Because of the legal defects in the Johnson Memo and the harmful consequences of its application in the case of Desert Rock, the Attorneys General ask that Region 9 not make a decision about including a BACT limit for CO<sub>2</sub> in the Desert Rock permit until EPA headquarters completes its reconsideration of the Johnson Memo.

## **Background**

Climate change is the single greatest environmental challenge facing the world today. Although climate change is a global problem, effective action at the national, regional, and state level is needed to achieve the necessary reductions in CO<sub>2</sub> emissions. Scientists overwhelmingly agree that the global community must reduce the emission of greenhouse gases, including CO<sub>2</sub>, to well below 1990 levels within a few decades if we are to stabilize the climate at an acceptable level. According to the experts, taking action to reduce greenhouse gas emissions is needed immediately. As the chairman of the United Nations Intergovernmental Panel on Climate Change recently declared: “If there’s no action before 2012, that’s too late. What we do in the next two to three years will determine our future.”

To that end, many states have made the reduction of CO<sub>2</sub> emissions a priority. For example, ten northeastern states (Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont) participate in the Regional Greenhouse Gas Initiative (RGGI), a mandatory cap-and-trade program to reduce CO<sub>2</sub> emissions from power plants. By 2019, the RGGI states will achieve a 10% reduction in CO<sub>2</sub> emissions, with a cumulative reduction below baseline of roughly 50 million tons. Similarly, California passed the Global Warming Solutions Act, AB 32, in 2006, which requires the state’s utilities, oil refiners, cement makers, and other large industrial greenhouse gas emitters to reduce their CO<sub>2</sub> emissions to 1990 levels by 2020. Also, Arizona, Montana, New Mexico, Oregon, Utah, and Washington have partnered with California in the Western Climate Initiative, through which partner states are engaged in a regional effort to reduce emissions by 15% below 2005 levels by 2020. Further, six midwestern states have signed the Midwestern Regional Greenhouse Gas Reduction Accord committing to a regional cap-and-trade program for CO<sub>2</sub>. Along with the states participating in RGGI and the Western Climate Initiative, this Midwestern accord brings the number of states participating in a regional trading systems to twenty-three. In addition to enacting cap-and-trade programs to reduce greenhouse gas emissions, several states now require new power plants to meet emission rates that will limit the generation of greenhouse gas emissions.<sup>1</sup>

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<sup>1</sup> See, e.g., Cal. Public Utilities Code § 8340 (2007) & Cal. Public Utilities Comm’n Proceeding No. R.06-04-009 (Jan. 25, 2007), available at [http://www.cpuc.ca.gov/PUC/energy/electric/Climate+Change/070411\\_ghgeph.htm](http://www.cpuc.ca.gov/PUC/energy/electric/Climate+Change/070411_ghgeph.htm) (requiring all new long-term commitments for baseload generation for consumers be with power plants that have CO<sub>2</sub> emissions of no greater than a combined cycle gas turbine plant, established at 1,100 pounds of CO<sub>2</sub> per megawatt hour ); Mont. Code Ann. § 69-8-421 (2007) (requiring new coal plants to capture and sequester minimum of 50 percent of CO<sub>2</sub> produced); Wash. Rev. Code § 80.80.040 (2007) (requiring all baseload electric generation for which electric utilities enter into long-term financial commitments to have greenhouse gas emissions per megawatt hour of lower of 1,100 pounds or average available output of new combined cycle natural gas turbines).

### **The Johnson Memo**

The Johnson Memo, issued about a month before the Bush Administration left office, sets forth an interpretation of which pollutants are “subject to regulation” under the PSD program of the Act. Under EPA’s regulations, PSD permits must include a BACT emission limitation for each pollutant that is “subject to regulation.” See 40 C.F.R. § 52.21(b)(50). The Johnson Memo construes the term “subject to regulation” as applying only if there is a regulation in place “that requires actual control of emissions of that pollutant.” Johnson Memo at 1. The Administrator further opined that even a federally-enforceable regulation that requires the actual control of CO<sub>2</sub> emissions, such as the recent Delaware state implementation plan (SIP) revision approved by EPA, does not make CO<sub>2</sub> a pollutant “subject to regulation” under the Act if such regulation is only contained in one state’s SIP. Johnson Memo at 15. In addition, then-Administrator Johnson announced that, even if EPA makes a formal endangerment determination for a pollutant, the pollutant is not “subject to regulation” under the Act until the Agency promulgates the actual emission standards. Id. at 14.

Several environmental groups have petitioned EPA to reconsider the Johnson Memo and separately filed a petition for review in the D.C. Circuit Court of Appeals. Subsequently, the State of California filed its own challenge in the D.C. Circuit. On February 17, 2009, EPA Administrator Jackson notified counsel for the environmental petitioners that EPA was granting the petition for reconsideration and would be taking public comment on “the issues raised in the memorandum” along with “any issues raised in the opinion of the Environmental Appeals Board [in the Deseret PSD permit appeal], to the extent that they are not coextensive with the issues raised in the memorandum.” See Letter from EPA Administrator Jackson to David Bookbinder, Sierra Club (Feb. 17, 2009) at 1. The D.C. Circuit litigation has been stayed pending EPA’s completion of its reconsideration of the Johnson Memo.

### **The Proposed Desert Rock Power Plant**

As proposed, the 1,500-megawatt Desert Rock power plant would utilize traditional coal-burning technology, which emits massive amounts of CO<sub>2</sub>. The proposed plant is projected to emit 12-13 million tons of CO<sub>2</sub> per year, thereby seriously undermining the concerted efforts being undertaken by multiple states to address global warming. For instance, over the period covered by the RGGI program, cumulative emissions from this plant would be more than 120-130 million tons CO<sub>2</sub>, more than canceling the reductions relative to baseline resulting from RGGI. In fact, emissions from just one of the two proposed boilers would more than cancel the RGGI reductions. With a lifetime of more than 50 years, this plant, if built as proposed, might well emit more than 600 million tons of CO<sub>2</sub> in total, thus significantly contributing to the public health and environmental harms associated with global warming.

EPA Region 9 issued a PSD permit for the proposed plant in July 2008. When it issued the permit, EPA Region 9 declined to include a BACT limit for CO<sub>2</sub> based on the

rationale that it lacked the authority to do so given previous Agency interpretations. Several parties, including the State of New Mexico, appealed the permit decision to the EPA Environmental Appeals Board (EAB). The effectiveness of the final permit was stayed pending its review by the EAB. On January 7, 2009, Region 9 withdrew the aspect of its Response to Comments document explaining its rationale for declining to include a BACT limit for CO<sub>2</sub> in light of the EAB's decision in In re Deseret Electric Power Cooperative, PSD Appeal No. 07-03 (Nov. 13, 2008). In the Deseret case, the EAB had rejected the same argument advanced by EPA Region 8 justifying its refusal to include a BACT limit for CO<sub>2</sub> in the permit for Deseret plant, namely that it lacked the authority to do so given previous Agency interpretations. Subsequently, on January 14, Region 9 issued its Addendum to the Statement of Basis, in which it relied upon the Johnson Memo's interpretation of "subject to regulation" to reaffirm its decision not to require Desert Rock to comply with BACT for CO<sub>2</sub>. See Addendum at 5. However, when the Addendum was posted on EPA's website, Region 9 included a disclaimer suggesting that its reasoning was subject to change:

The public notice and the addendum to statement of basis posted to this website on January 22, 2009 were initiated by the prior Administration on January 14, 2009. The new EPA Administrator will review this proposed action and make any future decisions regarding this matter.

<http://www.epa.gov/region09/air/permit/desert-rock/index.html>.

### **EPA Region 9 Cannot Properly Rely on the Johnson Memo**

EPA Region 9 cannot properly rely on the Johnson Memo in deciding whether to require a BACT emission limit for CO<sub>2</sub> in the Desert Rock PSD permit. The Johnson Memo, an eleventh hour attempt by the outgoing EPA Administrator to preclude EPA regions and delegated state agencies from utilizing the Act's PSD regulations to address CO<sub>2</sub>, is wholly inconsistent with the announced policy of the Obama Administration to address global warming pollution. Rushed through without an opportunity for public comment, the Johnson Memo was issued in violation of the Administrative Procedure Act (APA). Moreover, the legal interpretation of "subject to regulation" in the Johnson Memo is inconsistent with the Act.

The Obama Administration has made clear that tackling climate change is a high priority. In a memorandum to EPA staff, Administrator Jackson made clear the importance of addressing global warming pollution:

The President has pledged to make responding to the threat of climate change a high priority of his administration. He is confident that we can transition to a low-carbon economy while creating jobs and making the investment we need to emerge from the current recession and create a strong foundation for future growth. I share this vision. EPA will stand ready to help Congress craft strong, science-based climate legislation that

fulfills the vision of the President. As Congress does its work, we will move ahead to comply with the Supreme Court's decision recognizing EPA's obligation to address climate change under the Clean Air Act.

Memorandum from EPA Administrator Jackson to All EPA Employees (Jan. 23, 2009) at 2. As the new Administration strives toward "a new energy frontier," we must ensure that continued reliance on carbon-intensive energy production in the interim includes a commitment to using the best available control technology to avoid, reduce or mitigate the potentially massive greenhouse gas emissions from new power plants such as the Desert Rock facility. As Administrator Jackson has stated, the Act can and should be used right now to address global warming pollution. Indeed, according to recent press accounts, EPA is on track to issue an endangerment determination for CO<sub>2</sub> and other greenhouse gases from motor vehicles in the next month. By contrast, the Johnson Memo would make the already daunting task of addressing climate change even more difficult, and the goal of creating a new energy economy ever more distant. Indeed, likely prompted in part by this concern, Administrator Jackson announced last month that EPA was reconsidering the Johnson Memo and that, as a result, "PSD permitting authorities should not assume that the memorandum is the final word on the appropriate interpretation of Clean Air Act requirements." See Letter from EPA Administrator Jackson to David Bookbinder at 1.

Aside from reflecting a policy that is demonstrably at odds with that of the new administration, the Johnson Memo is legally flawed. As discussed above, the Johnson Memo is currently subject to both administrative reconsideration by EPA and court review in the D.C. Circuit. As discussed below, the Johnson Memo is both procedurally and substantively erroneous.

Contrary to Administrator Johnson's assertions, the Johnson Memo does not qualify as an "interpretive rule," which would be exempt from APA notice and comment requirements. See 5 U.S.C. § 553(b)(A). The Johnson Memo changes the Agency's previous interpretation found in the preamble to the 1978 regulations, under which permitting agencies had the discretion under the Act and EPA regulations to require a BACT emissions limitation for greenhouse gas emissions. However, federal agencies cannot lawfully change an established interpretation of their regulations without affording the opportunity for notice and comment under the APA. See, e.g., Paralyzed Veterans of America v. D.C. Arena, LP, 117 F.3d 579, 586 (D.C. Cir. 1997). Even assuming *arguendo* that the Johnson Memo did not change the interpretation of "subject to regulation" announced by EPA in the 1978 preamble, the Memo goes even further, announcing that even a federally-enforceable regulation in a SIP (Delaware's) that requires the actual control of emissions would not make a pollutant "subject to regulation." Thus, contrary to Region 9's statement in the Addendum of Basis (p. 5), the Johnson Memo does not represent a "properly adopted interpretive rule."

The Johnson Memo is also substantively flawed, for several reasons. First, the EAB found in Deseret that the interpretation of "subject to regulation" that the Johnson

Memo subsequently adopted is unsupported by the language of the regulations as initially interpreted by EPA. The EAB found that the same interpretation of “subject to regulation” contained in the Johnson memorandum, *i.e.*, applying only to pollutants that are covered by regulations requiring the actual control of emissions, is unsupported by the only definitive statement to date by the Agency, which is set forth in the preamble to the 1978 PSD regulations. Deseret, slip op. at 40. Furthermore, the 1978 preamble interpretation lends no support to the Johnson Memo’s determination to exclude regulation of a pollutant through an EPA-approved SIP, such as the EPA-approved SIP revision submitted by Delaware establishing emission limits for CO<sub>2</sub> from distributed generators. See 73 Fed. Reg. 23,201. Even under the narrow interpretation of EPA’s authority contained in the Johnson memorandum, a federally-approved regulatory provision that requires “actual control” of CO<sub>2</sub> emissions should make such emissions “subject to regulation” under the Act. The Johnson Memo’s attempt to split hairs as to what type of actual control of emissions is sufficient to constitute “regulation” of a pollutant is plainly arbitrary and capricious.

Second, the Johnson Memo’s interpretation is inconsistent with the legislative purpose and intent of the PSD program. The broad, protective purposes of the PSD program are set forth in Section 160 of the Act. For example, Section 160(1) states that one of the program’s goals is “to protect the public health and welfare from any actual *or potential* adverse effect which in the Administrator’s judgment may reasonably be anticipated to occur from air pollution,” *i.e.*, to protect against anticipated threats to air quality, not waiting until those threats become realized. 42 U.S.C. § 7470(1) (emphasis added). Unlike Sections 108, 111 and 202, the PSD program does not specifically require EPA to make an endangerment determination for a particular pollutant before establishing generally applicable emission standards for that pollutant. The language of the PSD provisions evidence a lower threshold for regulation: a pollutant should be “subject to regulation” if it has any “potential adverse effect” on public health or welfare. See 42 U.S.C. § 7470(1). The Johnson Memo’s requirement that there be regulations in place requiring actual control of emissions is inconsistent with Section 160 and undermines the broad, protective purposes of the PSD program to protect public health and welfare from potential adverse effect. Instead, having permit agencies, on a case-by-case basis, set emission limits for pollutants emitted by power plants, such as CO<sub>2</sub>, that have a *clear* adverse affect on public health and welfare is fully consistent with this core principle of the PSD program.

Third, the Johnson memorandum’s interpretation of “subject to regulation” is unreasonable in light of EPA’s acknowledgment of the global warming threat and given that power plants collectively are the biggest source of greenhouse gases. EPA has already publicly endorsed the scientific consensus reflected in the IPCC’s Summary for Policymakers that global warming is unequivocal, that emissions of CO<sub>2</sub> and other greenhouse gases are contributing to global warming, and that such warming poses numerous dangers to public health and welfare. See “California State Motor Vehicle Pollution Control Standards; Notice of Decision Denying a Waiver of Clean Air Act Preemption for California’s 2009 and Subsequent Model Year Greenhouse Gas

Emissions Standards for New Motor Vehicles,” 73 Fed. Reg. 12,156, 12,165-67 (Mar. 6, 2008). Most recently, in the ANPR entitled “Regulating Greenhouse Gas Emissions Under the Clean Air Act,” EPA acknowledged that global warming from greenhouse gas emissions poses a danger to public health, including “likely increases in mortality and morbidity, especially among the elderly, young, and frail.” 73 Fed. Reg. 44,354, 44,426 (July 30, 2008). In light of the overwhelming scientific evidence that greenhouse gases harm public health and welfare, and the fact that major stationary sources such as the Desert Rock power plant can be expected to operate for 50 or more years – generating enormous amounts of global warming pollution – it is unreasonable for EPA to unnecessarily constrain its authority and the authority of delegated state agencies to require that PSD permits being issued today limit CO<sub>2</sub> emissions.

At a minimum, the obligation under the PSD program to include a BACT limit for CO<sub>2</sub> from power plants is triggered once EPA issues a positive endangerment determination for CO<sub>2</sub>. The Johnson memorandum’s position that a pollutant is not “subject to regulation” under the PSD program *even if* a positive endangerment determination has been made (*i.e.*, unless and until actual regulations have been promulgated controlling such emissions), Johnson Memo at 14, overlooks the fact that once the agency has made such a determination under Section 111 or 202, the establishment of emission standards is mandatory. *See* 42 U.S.C. §§ 7411(b)(1), 7521(a)(1). Given that the Johnson Memo’s interpretation flies in the face of the statutory language and in light of the fact that EPA is poised to issue an endangerment determination for greenhouse gas emissions, EPA Region 9 should not finalize the PSD permit until after the Agency completes its reconsideration of the Memo.

### **Conclusion**

EPA Region 9’s proposed reliance on the Johnson Memo as basis for its decision in the Desert Rock proceeding is contrary to law, runs counter to the articulated policy of the Obama Administration, and prematurely takes a position on an issue of global significance while EPA’s pending reconsideration of the Memo remains unresolved. More importantly, Region 9’s reliance on the Johnson Memo would result in the unrestrained generation of hundreds of millions of tons of CO<sub>2</sub> over the lifetime of the Desert Rock power plant. Under the circumstances, we respectfully ask that you refrain from making a final decision on the CO<sub>2</sub> issues for the Desert Rock PSD permit until EPA headquarters has completed its reconsideration of the Johnson Memo, and the serious legal questions regarding its validity have been resolved.

We thank you for considering our view on this important matter.

Sincerely,

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cc: Hon. Lisa Jackson, EPA Administrator