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	)	

ORDER GRANTING REVIEW,[1] STAYING THE CARBON DIOXIDE BACT ISSUE, AND GRANTING MOTIONS TO FILE AMICUS/NONPARTY BRIEFS AND MOTIONS TO FILE REPLY BRIEFS

I. Background

On July 31, 2008, Region 9 ("Region") of the United States Environmental Protection Agency ("EPA" or "Agency") issued a prevention of significant deterioration ("PSD") permit decision (number AZP 04-01) (the "Permit") to Desert Rock Energy Company, LLC ("Desert Rock") for the construction of a new 1,500-megawatt coal-fired electric generating facility to be located approximately 25 miles southwest of Farmington, New Mexico. The Region is the permitting authority for the Permit because the proposed facility will be located within the Navajo Indian Reservation and the Navajo Nation does not have an EPA-approved tribal PSD permitting program.

The Environmental Appeals Board ("Board") received four petitions for review of the Permit pursuant to 40 C.F.R. § 124.19(a): one from Diné Care, Environmental Defense Fund,

[1] This order is not intended to be an adjudication on the merits of any of the issues raised in the Petitions or Supplemental Briefs.

Grand Canyon Trust, Natural Resources Defense Council, San Juan Citizens Alliance, Sierra Club, and WildEarth Guardians (collectively "NGO Petitioners"); one from the State of New Mexico ("New Mexico"); one from the Center for Biological Diversity ("CBD"); and from Ms. Leslie Glustrom. New Mexico also requested oral argument. *See* New Mexico's Petition for Review and Request for Oral Argument at 2.

Two of the petitioners, New Mexico and the NGO Petitioners, requested additional time to file supplemental briefs in support of their petitions for review, which the Board granted in part. *See* Order Granting Desert Rock's Motion to Participate, Granting a 30-Day Extension of Time, and Denying a Stay of Briefing on Certain Issues at 3 (Aug. 21, 2008). At that time, the Board also granted a motion from Desert Rock requesting that it be allowed to participate. *Id.* at 3. The Board subsequently granted a motion from Diné Power Authority ("DPA") that had requested leave to participate and granted a motion from National Parks Conservation Association ("NPCA") that had requested leave to file an amicus curiae brief. *See* Order Granting Motion to Participate, Motion to File Amicus Curiae Brief, and Motion for Extension of Time to File Responses (Oct 14, 2008).

New Mexico and NGO Petitioners both timely filed their supplemental briefs on October 2, 2008. Several weeks after filing its supplemental brief, on November 18, 2008, New Mexico filed a Motion to Supplement the Record on Appeal or, in the Alternative, for Remand and Reopening of the Public Comment Period. NGO Petitioners joined and concurred with this motion.

Following the granting of several motions for extensions of time, the Region, Desert Rock, and DPA timely filed their responses on January 8, 2009. In addition to responding to the

petitions, Desert Rock, DPA, and the Region all oppose New Mexico and the NGO Petitioners' motion to supplement the record or remand. In its response brief, Desert Rock requests oral argument be held on the petitions. *See* Desert Rock's Response to Petitions for Review at 275.

Significantly, in addition to filing its response to the petitions on January 8, 2009, the Region filed a notice withdrawing the portion of its response to comments documents that addressed the Region's rationale for not including BACT limitations on emissions of carbon dioxide in the Permit. Notice of Partial Withdrawal of Permit at 1 (withdrawing sections II.B.3.b of the Responses to Public Comments and section 5 of the Responses to Late-Filed Public Comments). The Region "intends to prepare a new statement of basis addressing the issue of whether the permit should contain an emissions limitation for carbon dioxide," provide notice of the revised statement, and provide an opportunity for comment. *Id.* at 3. The Region states that it is not seeking comment on any other portion of the permit decision. *Id.* The Region requests the Board sever this issue from the others on appeal not affected by the Notice of Partial Withdrawal and continue to consider those other issues. Region's Response to Petitions for Review, Supplemental Briefs, and Amicus Briefs at 2.

On January 8, 2009, the Board also received two requests to participate and file briefs, one from the Navajo Nation and one from the New Mexico Building and Construction Trades Council (NMBCTC). *See* Navajo Nation Motion to Intervene or File Non Party Brief;[2]

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[2] The Navajo Nation filed its motion electronically. The Board notes that it has not yet received the original copy of this motion. As stated on the Board's website, while the Board will accept electronically filed documents, an electronic copy is not considered a substitute for filing an original copy of a document with the Clerk of the Board. This is particularly important where a due date is prescribed. The Clerk must actually receive the original document by the document's due date in order for it to be considered timely filed. Because the Board is granting review, this deficiency was not critical to the Navajo Nation's motion.

NMBCTC Motion for Leave to File a Brief as *Amicus Curiae* in Opposition to Petitions for Review. The NMBCTC attached its brief to its motion.

Following the Region's, Desert Rock's, and DPA's submission of response briefs, NGO Petitioners and CBD filed a motion requesting leave to file a consolidated reply brief to those responses and to any amicus or other briefs opposing their petitions on or before February 13, 2009. NGO Pet'rs Mot. For Leave to File Reply and Clarification of Effect of Notice Of Partial Withdrawal of Permit at 1. In their motion, NGO Petitioners and CBD also request that the Board clarify their right to appeal the Region's ultimate decision on the carbon dioxide BACT issue upon completion of the Region's further proceedings. *Id.* at 1, 12-13. New Mexico filed a motion similarly requesting leave to reply to the responses by February 13, 2009, and to reply to the opposition to its motion to supplement the record. *See* N.M. Mot. For Leave to File Reply and For Stay of Issue Withdrawn by Region 9. In its motion, New Mexico requests that the Board stay the BACT carbon dioxide issue pending the Region's issuance of its new statement of basis on that issue. *Id.* at 1.

II. Stay of Carbon Dioxide BACT Issue

As noted above, the Region has withdrawn a portion of its permit decision: its decision whether to impose limitations on emissions of carbon dioxide in the Permit. Two petitioners have challenged the Region's decision on that issue. In light of the Region's withdrawal of that portion of its permit decision for additional analysis, notice, and comment, we are **STAYING**

further consideration or briefing of that issue pending the Region's final determination on the issue.[3]

III. Grant of Review

In this case, the Board has been presented with a number of issues of significant regional interest, with potential tribal and interstate implications. Due to the potential impacts on the regional air quality, the permitting process has already involved not only the Region, the permittee, and several petitioners, but at least one tribe and one State. In addition, some of the issues raised by petitioners also appear to be relatively complicated and/or unique in nature. Under part 124, if the Board grants review of a permit, public notice is provided which allows for the filing of amicus briefs by "any interested person." 40 C.F.R. § 124.19(c). Thus, with the granting of review, other interested persons, in addition to the two entities that currently have motions pending with the Board requesting involvement, may also have an opportunity to participate.

Although it would be within the range of options available to the Board to grant review only on a particular set of issues at this time and defer the decision on whether to grant review on

[3] Because the issue of whether to establish emission limitations in the Permit for carbon dioxide has been challenged by several petitioners and the Region's determination on this issue is an integral part of the permit decision, we believe this particular issue cannot be completely severed from the current permit appeal process. Thus, a stay of this particular issue is the most appropriate course of action at this time. The other issues, however, may proceed through the permit appeal process while the Region takes further action on the carbon dioxide issue to expedite a final resolution although the Board recognizes that the carbon dioxide issue could possibly impact other issues as well. Once the Region completes action on this issue, any person participating in the proceeding who is dissatisfied with the Region's decision may appeal to the Board pursuant to 40 C.F.R. § 124.19.

other issues until a later date, in view of case management considerations,[4] the fact that issues may be interrelated, the complexity of some of the issues raised, and the significant interest by outside parties regarding this Permit, we instead grant review pursuant to 40 C.F.R. § 124.19(c) on all non-stayed issues raised by the four petitions. The carbon dioxide BACT issue has been stayed; consequently, that issue is not covered by this grant of review.

IV. Briefing Schedule

Section 124.19(c) provides that, if the Board grants review of a permit, public notice shall be provided setting forth a briefing schedule for the appeal and stating that any interested person may file an amicus brief. 40 C.F.R. § 124.19(c). Because we are granting review, we have established a briefing schedule below which will allow New Mexico and NGO Petitioners to file a reply brief as they have requested, provide for surreply briefs, and allow all other interested persons to file amicus briefs in this matter.

By virtue of our decision to grant review of the permit, the following motions to file nonparty or amicus briefs are **GRANTED**: Navajo Nation's Motion to Intervene or File Non Party Brief and NMBCTC's Motion for Leave to File a Brief as *Amicus Curiae* in Opposition to Petitions for Review. The Navajo Nation may file its brief no later than the date established for the filing of amicus briefs as set forth below.[5] NMBCTC has already submitted a brief on the

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[4] We believe that, in this case and with this number of participants, taking review of the entire permit will expedite consideration of the four petitions, whereas piecemeal consideration may delay the resolution of the permit appeal.

[5] Note that the original document must be received by the Clerk of the Board by the due date. *See supra* note 2.

substantive issues in this matter and therefore need not re-file or reargue those same issues. We will consider its previously filed brief in making our decision, and NMBCTC's Brief as *Amicus Curiae* in Opposition to Petitions for Review has been filed in the docket for this matter.

As required by 40 C.F.R. §§ 124.10(a)(iv) and 124.19(c), the EPA Regional Administrator for Region 9 (or an authorized representative) is **DIRECTED** to promptly give public notice of this grant of review in compliance with the procedures in 40 C.F.R. §§ 124.10 and 124.19(c). Such notice shall be consistent with the directives in this Order. The Region shall file a notification with the Board, on or before February 13, 2009, describing the manner in which public notice was provided.

Over 900 pages of legal argument have already been filed in this matter. Consequently, the Board is establishing a 50-page limit for any future briefs.[6] We discourage all participants, including amicus, from filing briefs merely duplicating or reiterating arguments already submitted.

The briefing schedule is established as follows:

- Reply briefs from New Mexico and NGO Petitioners are due on or before Friday, February 13, 2009.[7]
- The Region, Desert Rock, and DPA may file surreply briefs by no later than Friday, March 6, 2009.

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[6] The Board cautions against using such devices as atypically small font size or margins or incorporation of additional argument by reference in meeting this page limit.

[7] The reply briefs may address opposition to the Motion to Supplement but the total brief cannot exceed the 50-page limit.

- Amicus briefs from any interested person are due no later than twenty-one days from the date on which the Region publishes a public notice of this grant of review in compliance with the part 124 procedures.

No further briefing will be permitted except by order of the Board.[8] Briefs or notices filed pursuant to this Order shall be served on all other persons who have already filed motions, briefs, and/or memoranda in this matter as a party or amicus.[9]

V. Oral Argument

It is the Board's intention to hold oral argument in this matter, as requested by Desert Rock and New Mexico. An order scheduling oral argument will be issued shortly after the conclusion of the briefing period.

So ordered.

ENVIRONMENTAL APPEALS BOARD

Edward E. Reich
Environmental Appeals Judge

Date: January 22, 2009

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[8] While the Board recognizes that parties may want to file responses to any amicus briefs that may be filed in response to the public notice of the grant of review, in light of the significant amount of argument already before the Board on these issues, the Board is reserving judgment on whether to allow further filings, if requested, until after the amicus briefs are filed.

[9] We note that Ms. Stephanie Kodish has filed a notice of appearance on behalf of NPCA in place of Mr. Mark Wenzler. *See* Notice of Appearance (received Jan. 9, 2009)).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Granting Review, Staying the Carbon Dioxide BACT Issue, and Granting Motions to File Amicus/Nonparty Briefs Motions to File Reply Briefs in the matter of Desert Rock Energy Company, LLC, PSD Appeal Nos. 08-03, 08-04, 08-05, & 08-06 were sent to the following persons in the manner indicated:

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Dated: JAN 22 2009

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