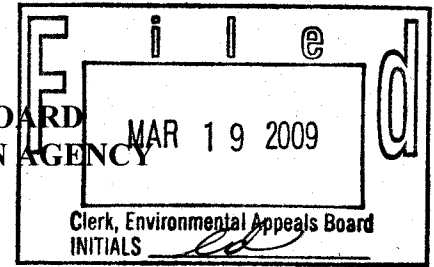


BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.



In re: )

Desert Rock Energy Company, LLC )

PSD Permit No. AZP 04-01 )

PSD Appeal Nos. 08-03, 08-04,  
08-05 & 08-06

**ORDER DENYING DESERT ROCK AND DINÉ POWER AUTHORITY'S  
JOINT MOTION FOR EXTENSION OF TIME TO FILE SURREPLY BRIEFS**

On March 17, 2009, the Environmental Appeals Board (“Board”) granted a motion from Region 9 (“Region”) of the United States Environmental Protection Agency (“EPA” or “Agency”) in which the Region had requested an additional 45-day extension of time for it to file its surreply brief in the above-captioned matter. *See* Order Granting Motion for Extension of Time to File Surreply Brief (“March 17 Order”) at 4-5. The Region had provided a lengthy justification for its request, including the argument that because “[s]everal issues addressed in the [January 8, 2009] Response Brief are based on policy positions held by EPA offices at the time of Region’s 9’s final permit decision and the filing of the Region’s Response Brief,” the time was necessary “to ensure that the positions previously advocated by EPA attorneys on behalf of Region 9 in this matter have the support of the Agency’s current leadership before the submission of an additional EPA brief in this matter.”<sup>1</sup> *Id.* at 3. Thus, argued the Region, “the

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<sup>1</sup> EPA’s new Administrator, Lisa P. Jackson, was sworn in after the Response was filed, on January 26, 2009. *See* March 17 Order at 2.

unique circumstances of the transition from one Presidential Administration to the next in the midst of this proceeding warrant affording Region 9 additional time” to file its surreply brief. *Id.* The Board found these “unique and extraordinary circumstances” to be compelling and thus granted the motion. *Id.* at 5.

In the March 17 Order, the Board noted that Diné Power Authority (“DPA”) had filed a response to the Region’s motion for extension of time, in which it had stated that it did not oppose the Region’s motion and had requested that it be granted a corresponding extension to file its surreply brief. *Id.* at 2 (citing DPA Response to EPA Region 9’s Motion for an Extension of Time to File Surreply Brief (“DPA Response to Region Motion”) at 1). DPA’s response, however, did not include a justification for its request of an extension of time. *See* DPA Response to Region Motion at 1. The Board also noted in its March 17 Order that, according to the Region, the applicant – Desert Rock Energy Company, LLC (“Desert Rock”) – opposed a 45-day extension but did not oppose a 7-day extension of time provided Desert Rock was granted the same extension. March 17 Order at 3. Desert Rock did not, however, submit a response on its own behalf. At that time, therefore, Desert Rock had not presented any reasons why it too deserved a 45-day extension of time. Based on these considerations, the Board concluded that “[n]either Desert Rock nor DPA have presented persuasive reasons for receiving a similar 45-day extension of time in which to file their surreply briefs. The reasons supporting the Region’s request are not mirrored with respect to either Desert Rock or DPA.” *Id.* at 5. Consequently, the Board, in the March 17 Order, did not grant Desert Rock or DPA the same extension of time it had granted the Region. Instead, the Board allowed the two participants an additional week from the original deadline to file their surreplies, until March 20, 2009. *See* Order at 5.

On March 18, 2009, Desert Rock and DPA submitted a joint motion requesting the Board reconsider granting them an extension of time to file their respective surreply briefs equivalent to the extension granted the Region. *See* Joint Motion Requesting Reconsideration of Extension of Time to File Surreply Briefs (“Joint Motion”). In their Joint Motion, Desert Rock and DPA request the additional time for a number of reasons, primarily “to maintain consistency in the overall briefing schedule and to afford Desert Rock Energy and DPA the opportunity to respond to any additional issues or filings that may be brought before the Board, or otherwise arise, between Desert Rock Energy’s and DPA’s current deadline for submission of their respective surreplies, March 20, 2008 [sic], and April 27, 2009, including but not limited to additional information regarding data gathered from the Navajo Lake ozone monitor.”<sup>2</sup> *Id.* at 1. Desert Rock and DPA also point to several occasions where the Board has granted a motion for extension of time to one participant “for consistency in the overall briefing schedule” where another participant has been granted an extension.<sup>3</sup> *E.g., id.* at 5, 7.

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<sup>2</sup> As the Board noted in the March 17 Order, the Board received a letter from New Mexico on March 13, 2009, reporting that the State had recently learned that EPA Region 6 had determined that the Navajo Lake ozone monitor had malfunctioned and thus “data collected at that monitor from mid-October of 2008 to the present are believed to be invalid.” March 17 Order at 4 (quoting Letter from Seth T. Cohen, Assistant Attorney General, New Mexico, to Eurika Durr, Clerk of the Board, Environmental Appeals Board (Mar. 13, 2009) [hereinafter N.M. Letter]). According to New Mexico, it is currently working with EPA “to determine the precise cause of the monitor malfunction” and to “reach a definitive conclusion regarding the data invalidation.” N.M. Letter at 2. New Mexico has stated that this development has altered New Mexico’s position on San Juan County’s designation status under the Clean Air Act and has impacted certain arguments raised in the State’s Motion to Supplement and its Reply Brief. *Id.* at 1-2. Thus, New Mexico plans to file a notice with the Board immediately upon receiving the final determination regarding the invalidation of the Navajo Lake data that “would present the final determination on the matter and would confirm the precise implications of that determination” on New Mexico’s arguments in this appeal. *Id.* New Mexico believes that it should be able to provide this notice within the time frame of the Region’s 45-day extension. *Id.*

<sup>3</sup> We note that several of these extensions of time were for one week.

While it is true that, for consistency's sake, we often grant concurrent extensions of time to participants with overlapping and/or similar positions in a matter before us, this is not always the case. We are especially disinclined to grant concurrent extensions where one participant has a significantly more compelling reason necessitating the additional time and where the extension is for a more lengthy period of time. In this case, as we noted in our March 17 Order, and as we find in response to Desert Rock and DPA's additional arguments in support of their request for reconsideration, Desert Rock and DPA's reasons for requesting a 45-day extension of time (now a 38-day extension) are not nearly as persuasive or as compelling as the Region's nor do their reasons mirror those of the Region. Moreover, their reasons do not outweigh the benefit to the Board of having their briefs at an earlier time. Desert Rock and DPA have pointed out on more than one occasion that they would prefer the schedule be tightened to more quickly move this matter along. *See, e.g.*, Joint Motion at 7. Receiving their surreplies earlier will allow the Board to move this matter more quickly.

We recognize that, depending on the result of the Navajo Lake data and New Mexico's notice regarding the data, Desert Rock and DPA may wish to file an additional response to that notice. However, that hypothetical possibility does not dictate a different outcome. By denying Desert Rock and DPA's Joint Motion today, we do so without prejudice to any further request that participants make to file a response to New Mexico's notice once that notice is filed.

On balance, therefore, in this case, we conclude that consistency of briefing does not outweigh the benefits of moving forward in deciding the merits of the case. Accordingly, the Board DENIES Desert Rock and DPA's Joint Motion. In light of the fact that the deadline for filing would be tomorrow, however, the Board will grant Desert Rock and DPA an additional

five working days in which to submit their briefs. Accordingly, Desert Rock's and DPA's surreply briefs will be due on or before March 27, 2009.

So ordered.

ENVIRONMENTAL APPEALS BOARD



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Kathie A. Stein  
Environmental Appeals Judge

Date: March 19, 2009

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Order Denying Desert Rock and Diné Power Authority's Joint Motion for Extension of Time to File Surreply 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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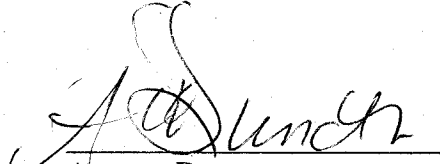
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Dated: MAR 20 2009



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