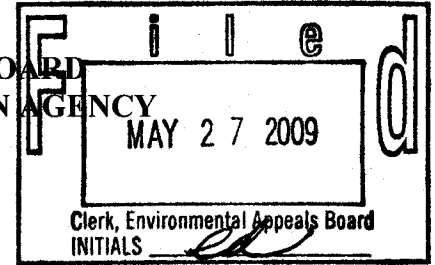


BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.



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 GRANTING MOTION REQUESTING RECONSIDERATION OF  
MOTION TO PARTICIPATE AND PERMISSION TO FILE  
AMICUS CURIAE BRIEF OUT OF TIME**

On April 27, 2009, United States EPA Region 9 (“Region”) filed a motion with the Environmental Appeals Board (“Board”) requesting a voluntary remand of the final prevention of significant deterioration (“PSD”) permit (number AZP 04-01) (“the Permit”) it had issued to Desert Rock Energy Company, LLC (“Desert Rock”) on July 31, 2008. *See generally* EPA Region 9’s Motion for Voluntary Remand (“Motion for Voluntary Remand”). The Permit is the subject of four petitions for review currently before the Board pursuant to 40 C.F.R. § 124.19.<sup>1</sup> The Board instructed the other ten current participants in the above-captioned permit appeal who wished to respond to the Region’s Motion for Voluntary Remand to do so by June 11, 2009. *See*

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<sup>1</sup> The following parties filed petitions in this matter: Diné Care, Environmental Defense Fund, Grand Canyon Trust, Natural Resources Defense Council, San Juan Citizens Alliance, Sierra Club, and WildEarth Guardians; the State of New Mexico; Center for Biological Diversity; and Ms. Leslie Glustrom. In addition to the four Petitioners and the Region, the following entities have filed responses, amicus curiae, and/or nonparty briefs in the matter: the Navajo Nation, Desert Rock, the National Parks Conservation Association, the Diné Power Authority, the New Mexico Building and Construction Trades Council, and Physicians for Social Responsibility.

Revised Order Granting Motion for Extension of Time to Respond to Region's Motion for Voluntary Remand at 3 (May 5, 2009).

On May 19, 2009, the Board received a motion from the American Coalition for Clean Coal Electricity ("ACCCE") requesting the Board grant it leave to file a brief opposing the Region's motion. *See generally* Motion to Participate at 1. ACCCE characterizes itself as "a non-profit organization formed by the nation's coal-producing companies, railroads, a number of electric utilities, and related organizations for the purpose of educating the public (including public-sector decision-makers) about the benefits of affordable, reliable and environmentally compatible coal-fueled energy." *Id.* Some of ACCCE's members include suppliers of coal, including BHP Billiton, the "owner of BHP Navajo Coal Company, [which] would be the supplier of coal to the [Desert Rock] plant." *Id.* at 4.

The Board denied ACCCE's motion, explaining that the Board had previously established March 5, 2009, as the deadline by which all persons wanting to participate in this proceeding were to file a brief and that ACCCE's motion was therefore untimely filed. *See* Order Denying Motion to Participate at 2-3 (May 21, 2009). The Board further noted that ACCCE had not explained why it had failed to file a timely request to participate in this matter under the schedule previously outlined by the Board in its Order Granting Review and in the public notice issued by the Region. *Id.* at 3.

On May 22, 2009, ACCCE filed a motion asking the Board to reconsider its Motion to Participate in which it provided a further explanation regarding its late amicus curiae request. *See* Motion Requesting Reconsideration of Motion to Participate and Permission to File Amicus Curiae Brief Out of Time ("Motion Requesting Reconsideration"). ACCCE argues that "[w]ith

EPA's filing of its Voluntary Motion for Remand, the agency materially changed the circumstances of the appeal pending before this Board." *Id.* at 1-2. ACCCE explains that it had "elected not to participate prior to EPA's filing of its Motion for Voluntary Remand because EPA had not taken a position that could be of harm to ACCCE's members, as EPA has now done." *Id.* at 2. ACCCE points out that EPA filed its Motion for Voluntary Remand 53 days after the deadline for filing amicus briefs. *Id.* at 1. ACCCE also argues that, if granted, EPA's Motion for Voluntary Remand "will significantly alter the process by which EPA may consider and evaluate PSD permits" and that "[t]he potential adverse precedential effect of this change" will be significant. *Id.* at 2. ACCCE asserts that, unlike any other current participant in this proceeding, it "represents the interests of so many entities and organizations related to the coal-fueled electricity industry." *Id.* Finally, ACCCE states that it does not want time to respond beyond that already afforded to the current participants. *Id.*

The mere fact that the Agency is reconsidering its position is not, by itself, sufficient grounds for the Board's acceptance of a late-filed motion to participate and/or amicus curiae brief. In this case, however, the Region has indicated that it is reconsidering its position on several issues. *See, e.g.,* Motion for Voluntary Remand at 8-25 (referring to, among other things, reconsideration of its determinations regarding MACT for hazardous air pollutants, the use of Integrated Gasification Combined Cycle Technology under its BACT analysis, and its approach to the Endangered Species Act). Furthermore, as ACCCE notes, the Region's request for a voluntary remand in order to reconsider its position occurred after the close of the period for the filing of amicus curiae briefs by interested persons. Motion Requesting Reconsideration at 1. ACCCE, moreover, contends that it represents interests beyond those represented by the current

participants in this matter, such as coal suppliers. *See, e.g., id.* at 5; Motion to Participate at 4. Finally, because the Board has granted the current participants time to respond to the Region's motion, allowing ACCCE to file a brief within this same time frame will not delay this proceeding. Thus, on balance, the Board concludes that, in light of the unique circumstances in this case and the fact that no prejudice will result from granting the motion, it is appropriate to grant the belated motion to participate and allow for the filing of an out of time brief.

Accordingly, based upon the foregoing, the Board hereby GRANTS ACCCE's motion requesting reconsideration of its motion to participate and permission to file an amicus curiae brief out of time. ACCCE may file an amicus curiae brief in this proceeding no later than June 11, 2009, the date the Board has established for the filing of all responses to the Region's Motion for Voluntary Remand. The same length and formatting restrictions apply to ACCCE as outlined in the Board's May 5, 2009 Order. *See Revised Order Granting Motion for Extension of Time to Respond to Region's Motion for Voluntary Remand* at 3.

So ordered.

ENVIRONMENTAL APPEALS BOARD



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Kathie A. Stein  
Environmental Appeals Judge

Date: May 27, 2009

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Order Granting Motion Requesting Reconsideration of Motion to Participate and Permission to File Amicus Curiae Brief Out of Time 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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