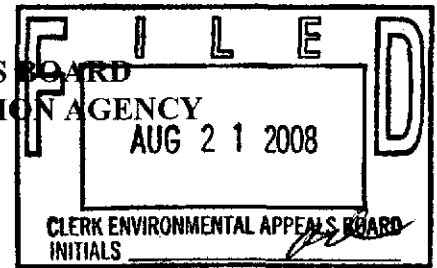


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:)
)
)

Desert Rock Energy Company, LLC)

PSD Permit No. AZP 04-01)
)
)

PSD Appeal Nos. 08-03 & 08-04

**ORDER GRANTING DESERT ROCK'S MOTION TO PARTICIPATE,
GRANTING A 30-DAY EXTENSION OF TIME,
AND DENYING A STAY OF BRIEFING ON CERTAIN ISSUES**

On July 31, 2008, the United States Environmental Protection Agency, Region 9 ("Region") issued a prevention of significant deterioration ("PSD") permit (number AZP 04-01) (the "Permit") to Desert Rock Energy Company, LLC ("Desert Rock") for the construction of a new 1500 mega-watt (MW) coal-fired electric generating facility to be located approximately 25 miles southwest of Farmington, New Mexico. The Region is the permitting authority for this 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. As more particularly described below, before the Board at this time are two requests for extension of time to file briefs in support of petitions for review, a request for stay of briefing on certain issues, a request for oral argument, and a motion by Desert Rock to participate in this appellate proceeding.

More specifically, on August 14, 2008, the Environmental Appeals Board received a petition requesting that the Board grant review of the Region's permitting decision filed jointly by Dine Care, Environmental Defense Fund, Grand Canyon Trust, Natural Resources Defense Council, San Juan Citizens Alliance, Sierra Club, and WildEarth Guardians (hereinafter, the "NGO Petitioners"). As part of their petition, the NGO Petitioners request an extension of time to file a supplemental brief in support of their petition, and they request a stay of certain issues pertaining to carbon dioxide emissions pending the Board's decision in another case that also raises issues concerning carbon dioxide. The NGO Petitioners request that they be granted an extension of time through October 17, 2008, to file a supplemental brief providing a complete and detailed description and the factual and legal basis for each objection they have to the Permit. The NGO Petitioners state that the additional time is needed because of the number and complexity of issues, the volume of relevant material, and the unavailability of their expert witnesses, among other things. The NGO Petitioners also request that the Board stay briefing on their contention that the Region was required to conduct a best available control technology ("BACT") analysis and establish a BACT emissions limit for carbon dioxide. They request that briefing of issues related to this contention be stayed until the Board resolves a pending challenge to the absence of a carbon dioxide BACT limit in the case of *In re Deseret Power Electric Cooperative*, PSD Appeal No. 07-03, currently pending before the Board.

On August 15, 2008, the State of New Mexico also filed a petition requesting that the Board grant review of the Permit. As part of its petition for review, New Mexico requested that the Board grant oral argument on its petition, and New Mexico filed a separate motion also requesting an extension of time through October 17, 2008, to file a supplemental brief in support

of its petition. New Mexico states that it needs the extra time for its supplemental brief to adequately analyze and brief issues raised in New Mexico's petition. New Mexico observes, among other things, that the Region's response to comments on the draft permit is 220 pages long and includes an additional 42 attachments totaling several hundred pages.

On August 20, 2008, the permittee, Desert Rock, filed a motion requesting to be allowed to participate in this administrative appellate proceeding and an opposition to the requests for extension of time and stay. In addition, on August 20, 2008, the Board also received a response by the permit issuer, Region 9, filed in consultation with EPA's Office of Air and Radiation ("OAR"), in which those EPA offices state that they do not oppose a 30-day extension of time for filing of supplemental briefs, but oppose a longer extension of time and also oppose a stay of briefing on the CO₂ issues.

Upon consideration, the Board hereby grants Desert Rock's request to participate in this proceeding. The Board also hereby grants a 30-day extension of time until Thursday, October 2, 2008, for the NGO Petitioners (collectively) and the State of New Mexico to file supplemental briefs setting forth in full detail all arguments in support of their petitions for review. As Desert Rock recognizes (Desert Rock Motion at 5, ¶ 8), the Board has discretion to relax or modify procedural rules for the orderly decisionmaking process. *See, e.g., Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970); *see also, e.g., In re Indeck-Elwood, LLC*, PSD Appeal No. 03-04 (EAB, Feb. 3, 2004) ("Order (1) Granting Motion for Leave to File Amended Petition and (2) Requesting Region 5 and/or OGC to File a Response"); *accord, In re BP West Coast Products, LLC, Cherry Point Co-generation Facility*, PSD Appeal No. 05-01 (EAB, Feb. 18,

2005) (“Order Granting Petitioner’s Motion for Extension of Time and Establishing Briefing Schedule”); *In re Genesee Power Station*, 4 E.A.D. 832, 837 n.6 (EAB 1993).

As we have frequently explained, the petitioner’s burden on appeal to the Board requires them to go beyond their previous filings during the permitting process below – specifically, the petitioners must describe each objection they are raising and explain why the permit issuer’s previous response to each objection is clearly erroneous or otherwise deserving of review. *See, e.g., In re Indeck-Elwood*, PSD Appeal No. 03-04, slip op. at 23 (Sept. 27, 2006), 13 E.A.D. at ___ (citing *In re Tondu Energy Co*, 9 E.A.D. 710, 714 (EAB 2001); *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 252 (EAB 1999)). Among other things, we find significant the fact that the petitioners in the present case must digest and address in their appellate briefs the relevant portions of the Region’s 220-page response to comments and additional attachments amounting to hundreds of pages.¹ The Region and OAR acknowledge that this case involves a large number of issues, many of which are complex, raised by the public comments, and addressed at length in the response to comments. Under these circumstances and others apparent from the filings before the Board, the Board concludes that its decisionmaking process will

¹ We also recognize that to the extent that the Region’s response to comments may set forth technical analysis for the first time, or in greater detail, than was made available in the record for the draft permit (*see* 40 C.F.R. 124.17 & .18, which allows the permit issuer to supplement the administrative record in responding to comments), the petitioners may need to consult their experts in order to fully prepare their arguments on appeal. On a record as voluminous as the present one, we find the NGO Petitioners’ concern regarding the unavailability of their expert witness to be an additional relevant consideration in our decision to grant the 30-day extension of time for full briefing of argument on appeal.

benefit from affording the petitioners the additional time provided in this order to fully present their arguments.²


Under the particular circumstances of this case, the Region's and OAR's request that the petitioners be required to specify with some degree of particularity the issues being raised on appeal by no later than September 2, 2008, is denied. Given the voluminous record, as previously alluded to, the Board recognizes that the petitioners might need the extended time period to identify and articulate with sufficient specificity the precise issues for which review is being sought. The Board believes that, on balance, this will lead to a more efficient briefing process and potentially expedite the Board's analysis.

Finally, the request for stay of briefing on certain issues pertaining to a BACT limit for CO₂ emissions is hereby denied. The request for oral argument is taken under advisement.

So ordered.

Dated: 8/21/08

ENVIRONMENTAL APPEALS BOARD

By: 
Edward E. Reich
Environmental Appeals Judge

² We find that the petitions filed by the NGO Petitioners and the State of New Mexico are sufficient to invoke the Board's jurisdiction under 40 C.F.R. § 124.19.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Granting Desert Rock's Motion to Participate, Granting a 30-day Extension of Time, and Denying a Stay of Briefing on Certain Issues in the matter of Desert Rock Energy Company, LLC, PSD Appeal Nos. 08-03, & 08-04, were sent to the following persons in the manner indicated:

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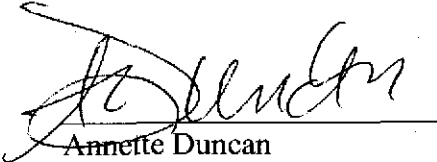
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Dated: 8/21/08


Annette Duncan
Secretary