

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)	
_____)	

PETITIONERS’ MOTION FOR LEAVE TO FILE REPLY BRIEF

Petitioners Center for Biological Diversity (“CBD”), Diné Care, Environmental Defense Fund (“EDF”), Grand Canyon Trust, Natural Resources Defense Council (“NRDC”) San Juan Citizens Alliance, Sierra Club, and WildEarth Guardians (collectively “Conservation Petitioners”) hereby move the Environmental Appeals Board (the “Board”) for leave to file, no later than June 23, 2009, a single consolidated brief in reply to the responses of Desert Rock Energy Company (“DREC”) and to the *amicus* filing of the American Coalition for Clean Coal Electricity (“ACCCE”) to the Environmental Protection Agency’s (“EPA”) Motion for Remand. As set forth in more detail below, Conservation Petitioners request this opportunity to reply to DREC and ACCCE because their response briefs raise arguments that Conservation Petitioners could not anticipate and respond to in their response in support of EPA’s Motion. Further, ACCCE’s first substantive filing in this matter was on June 11 and as a result Conservation Petitioners have had no opportunity to respond to ACCCE’s arguments.

Conservation Petitioners have contacted counsel for EPA, DREC, DPA and *amicus* ACCCE. Counsel for EPA do not oppose Conservation Petitioners’ request for reply. DREC, DPA, and *amicus* ACCCE oppose Conservation Petitioners’ request.

BACKGROUND

On July 31, 2008, EPA Region 9 issued the initial Prevention of Significant Deterioration (“PSD”) Permit to DREC authorizing construction of a 1500 megawatt (“MW”) coal-fired power plant on Navajo land (the “Permit”). On August 13, 2008, Conservation Petitioners (with the exception of CBD) filed a petition for review of the initial Permit. On September 2, 2008, CBD filed its petition for review of the initial Permit. Conservation Petitioners, in accordance with the grant of an extension from the Board, filed their Statement of Reasons supporting their petitions on October 2, 2008.

On January 7, 2009, EPA filed a Notice of Partial Withdrawal of the Permit, withdrawing portions of the permitting decision that contain Region 9’s basis for not including limits on emissions of carbon dioxide and not including an assessment of Best Achievable Control Technology (“BACT”) for carbon dioxide emissions. EPA based its withdrawal on the Board’s decision in Deseret Electric Power Cooperative, PSD Appeal No. 07-03, and advised that it intended to reconsider the carbon dioxide/BACT issue.

On January 8, 2009, EPA, DREC, and DPA each filed responses to Conservation Petitioners’ Statement of Reasons and Petitions. On February 20, 2009, with leave of the Board, Conservation Petitioners filed a reply brief. On April 27, 2009, EPA filed a Motion for Voluntary Remand in lieu of a surreply brief, in order to allow EPA Region 9 the opportunity to reconsider several issues related to the Permit.

On May 19, 2009, ACCCE filed a Motion to Participate as *Amicus* in this case, which the Board initially denied. The Board reconsidered and allowed ACCCE to participate by order dated May 27, 2009.

A number of the issues EPA asked to reconsider involve regulatory and factual developments during the pendency of this appeal. For example, EPA notes that a

“grandfathering” provision of the particulate matter (“PM”) rules had been stayed by Administrator Jackson with a stated intent to reconsider and likely discontinue that provision; a provision on which EPA Region 9 relied in issuing the Permit. As a result, EPA believes it must reconsider the Permit’s PM_{2.5} requirements as they may not have been fully-analyzed due to the “grandfather” provision. Further, based upon the decision in Deseret, EPA states that it must now consider integrated gasification combined cycle (“IGCC”) technology in its BACT analysis. EPA also notes Endangered Species Act (“ESA”) consultation with the U.S. Fish and Wildlife Service (“FWS”) has progressed and that FWS opines that mercury from the DREC facility may adversely affect endangered species. As a result, there is an increased likelihood that the initial Permit will need to be amended to include mitigation measures to protect endangered species. This in turn necessarily requires additional analysis by DREC and EPA, including Maximum Achievable Control Technology (“MACT”) analysis for potential mercury emission controls to be included in the Permit. See generally EPA Motion.

By order dated May 5, 2009, the Board gave all parties in the appeal and newly-included *amicus* ACCCE, until June 11, 2009 to respond to EPA’s Motion. As set forth in Conservation Petitioners’ June 11 response, Conservation Petitioners support EPA’s Remand Motion. Unfortunately, DREC and ACCCE oppose EPA’s Motion and raise many new issues in their opposition briefs. Due to the simultaneous briefing on June 11, Conservation Petitioners have not had an opportunity to address DREC and ACCCE’s arguments and request leave to do so.

ARGUMENT

I. CONSERVATION PETITIONERS REQUEST UNTIL JUNE 23, 2009, TO RESPOND TO DREC AND ACCCE'S NEW ARGUMENTS IN OPPOSITION TO REMAND.

The Board's Practice Manual provides that "petitioners who believe that the permitting authority's response requires a reply may, upon motion explaining why a reply brief is necessary, be granted leave to file a reply brief." EAB Practice Manual at page 36 (June 2004). The Board has, in other cases, granted leave to file a reply where "good cause is shown," and where filing a reply brief will assist the Board in resolution of the issues before it. See, e.g., In re Northern Michigan University, Ripley Heating Plant, PSD Appeal No. 08-02, Order filed August 14, 2008; In re Conoco Phillips, Co., PSD Appeal No 07-02, Order filed November 6, 2007; In re District of Columbia Water and Sewer Authority, NPDES Appeal Nos. 05-02, 07-10, 07-11, and 07-12, Order filed July 26, 2007, slip op. at 3-4. (Copies of each of the cited Orders available on the Board's website.) While the cited Orders concern reply briefs in support of petitions for review, EPA's Motion goes to the core of many of the issues raised by Conservation Petitioners and Conservation Petitioners should have an opportunity to fully address such an important action on the issues underlying Conservation Petitioners' case.

Conservation Petitioners' request for an opportunity to reply to DREC and ACCCE's opposition to remand will be targeted at the specific issues and arguments that Conservation Petitioners did not have the opportunity to address in the June 11 response because they had not yet been raised. For example, DREC and ACCCE challenge EPA's ability to reassess policy decisions regarding PM_{2.5} and IGCC technology as part of a BACT analysis. DREC and ACCCE's arguments that EPA's request is legally improper due to its allegedly "retroactive" nature are new and could not have been part of

Conservation Petitioners' response. Yet, these arguments go to the heart of many of Conservation Petitioners' issues and claims in this case. Also by way of example, DREC makes two Constitutional arguments—equal protection and procedural due process—in its brief, neither of which were part of EPA's arguments in favor of its Motion and therefore neither could possibly be part of Conservation Petitioners' initial brief in support of remand. A final example of arguments to which Conservation Petitioners have not had an opportunity to respond is *amicus* ACCCE's claims that its members will be harmed by EPA's Motion. ACCCE's response to EPA's Motion is the first substantive filing by ACCCE in this case, being admitted into the proceeding merely two weeks before the responses were due. Clearly, ACCCE's positions are squarely contrary to the interests of Conservation Petitioners and Conservation Petitioners should have an opportunity to address those arguments.

Allowing Conservation Petitioners the opportunity to make a targeted reply to matters that could not have been addressed in the June 11 responses will also aid the Board in ensuring that the Board has a full discussion and understanding of these very important issues prior to making its decision.

Finally, allowing Conservation Petitioners a short time to make a targeted reply to DREC and *amicus* ACCCE's arguments will not prejudice EPA, DREC, ACCCE, or any other participants. As EPA's Motion provides, with or without remand, DREC would not be commencing construction soon due to the need to complete a number of different tasks, including Endangered Species Act consultation. Even the initial Permit terms, without regard to EPA's Motion, require a number of obligations, for example consultation under the ESA, to be completed before construction may begin. Allowing

less than two weeks for Conservation Petitioners to respond to DREC's arguments is unlikely to affect construction, and certainly not the ultimate completion, of the DREC facility.

Based upon the foregoing, Conservation Petitioners respectfully request an opportunity to file a consolidated reply brief responding to issues raised by DREC and ACCCE, by June 23, 2009.

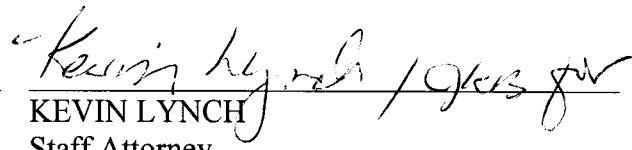
Respectfully submitted this 15th day of June, 2009.



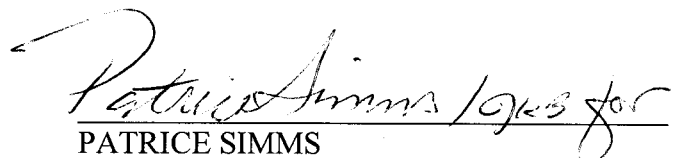
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CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party to this action. My business address is 705 Second Avenue, Suite 203, Seattle, Washington 98104.

On June 15, 2009, a true and correct copy of the following document(s) were served on the parties listed below:

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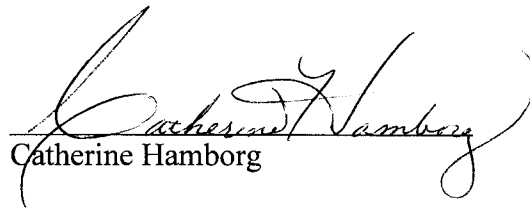
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I, Catherine Hamborg, declare under penalty of perjury that the foregoing is true and correct. Executed on this 15th day of June, 2009, at Seattle, Washington.


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