

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
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**MOTION FOR EXTENSION OF TIME TO RESPOND TO PETITIONS AND
SUPPLEMENTAL BRIEFS**

Respondent, EPA Region 9, moves for a 35-day extension of time (until January 8, 2009) to submit its response to the Petitions for Review, Supplemental Briefs, and Amicus Curiae Brief in this matter. The Region requests additional time in order to allow Region 9, prior to submitting its response, to evaluate how the Desert Rock permit and this appeal are affected by the Environmental Appeals Board's recent decision in *In re Deseret Power Electric Cooperative*, PSD Appeal No. 07-03. In support of this motion, EPA Region 9 states the following:

1. On October 14, 2008, the Environmental Appeals Board ("Board") issued an order granting EPA Region 9's motion for an extension of time to file responses to the pending petitions, supplemental briefs, and amicus brief.¹ The Board ordered EPA Region 9, Desert Rock Energy Company, and Dine Power Authority to file responses by December 3, 2008. As described in its first motion for an extension filed on October 9, 2008, Region 9 initially requested a 30-day extension of time on the grounds that this is a

¹ Petitions have been filed by the NGO Petitioners (Dine Care, Environmental Defense Fund, Grand Canyon Trust, Natural Resources Defense Council, San Juan Citizens Alliance, Sierra Club, and WildEarth Guardians), State of New Mexico, the Center for Biological Diversity, and Leslie Glustrom. The NGO Petitioners and State of New Mexico also filed supplemental briefs in accordance with the Board's Order of August 21, 2008.

complex case, two Petitioners had previously obtained a 30-day extension of time for submitting their supplemental briefs, and the Petitioners submitted a combined total of more than 450 pages of argument in this matter. In the October 14 order, the Board also granted Dine Power Authority leave to participate in this proceeding and National Parks Conservation Association leave to file an amicus brief.

2. On November 3, 2008, in accordance with the Board's Order of October 6, 2008, Region 9 filed the Certified Index of the Administrative Record in this matter.

3. On November 13, 2008, the Board issued an Order Denying Review in Part and Remanding in Part the Region 8 permit at issue in *In re Deseret Power Electric Cooperative*, PSD Appeal No. 07-03. Although the Board concluded that the Clean Air Act does not compel BACT limits for carbon dioxide under the PSD program at this time, the Board found deficiencies in the record supporting Region 8's decision not to impose emissions limitations on carbon dioxide in the Deseret Power permit. *Id.*, 13 E.A.D. ___, slip op. at 63 (Nov. 13, 2008). The Board remanded the permit to Region 8 with instructions to "reconsider whether or not to impose a [carbon dioxide] BACT limit in the Permit." *Id.* at 64.

4. In issuing the *Deseret* Order, the Board recognized that "the application of BACT to limit [carbon dioxide] emissions" is an issue with far-reaching implications. *Id.* at 63. Given these implications, EPA offices are currently evaluating the Agency's overall approach to this issue in light of the Board's order in the *Deseret* matter.

5. In this case involving an appeal of the Desert Rock permit issued by Region 9, Petitioners – much like the Petitioners in *Deseret* – contend, among other things, that the permit must include an emission limitation for carbon dioxide. However,

not all arguments raised by Petitioners in this case regarding this issue were addressed by the *Deseret* Remand Order. Given the fact that Petitioners raise similar, although not identical, issues in this case, one implication of the Board's Remand Order in *Deseret* includes a possible impact on the Desert Rock permit and this appeal. Region 9 is currently evaluating the record for the Desert Rock permit in an effort to determine the extent to which the Desert Rock permit may be affected by the Board's order in *Deseret*.

6. Accordingly, the calendaring of this case is potentially affected by the Agency's response to the EAB's decision in *Deseret*, and any possible impacts such action may have on pending cases like Desert Rock. Thus, the efficient disposition of the issues in this case is best served by allowing additional time for the Region to complete its evaluation and determine its recommended path forward before the submission of response briefs addressing the carbon dioxide issues in this case and any motions practice that may ensue thereafter.

7. Region 9 is mindful that the *Deseret* decision was issued after the Petitioners filed supplemental briefs addressing the carbon dioxide issues and that the NGO Petitioners initially requested that the Board defer briefing on the carbon dioxide issues in this case until after the Board's decision in *Deseret*. Region 9 opposed the request to defer briefing, preferring instead that the Petitioners raise and preserve all their arguments with respect to carbon dioxide regulation at the outset of the case and be required to demonstrate good cause as to why they should be afforded an opportunity for additional briefing after the *Deseret* decision. The Board denied the NGO Petitioners' request to defer briefing. Region 9 continues to believe that severing issues for separate briefing is not warranted in this case. However, an extension of time at this juncture will

allow Region 9 time to make a determination of the appropriate path forward in light of *Deseret* and promote the efficiency of any ensuing motions practice regarding further briefing in this matter.

8. Region 9 is also mindful that it opposed Petitioners' request for a 45-day extension and represented that it would not seek more than a 30-day extension in this case unless the Petitioners raised a matter of first impression that required extensive deliberation within the Agency. While the Petitioners' filings in the case did not themselves raise issues of first impression, the opinion in *Deseret* now presents circumstances that require further deliberation within the Agency as to how to respond to the issues raised by the Board's decision, including any impact on the Desert Rock permit and how this appeal should proceed. These circumstances were not apparent at the time Petitioners' request for leave to file supplemental briefs and Region 9's initial 30-day extension request were pending.

9. The same headquarters personnel that have been assisting Region 9 with preparation of the response brief in this appeal (due to the large number of issues raised and the significance of several issues) are also engaged in evaluating the effect of the *Deseret* decision. These efforts have consumed, and will continue to consume, EPA staff and management time that was previously allocated for completion of Region 9's response brief in this matter. As a result, it has become difficult under the current schedule for EPA offices to evaluate the full impact of the *Deseret* decision, recommend an overall Agency response, determine a path forward on the Desert Rock permit and this appeal, and simultaneously complete Region 9's response brief.

10. Given all the above, Region 9 requests an additional 35 days in order to afford EPA offices time to evaluate the Agency's response to the *Deseret* decision, and for Region 9 and headquarters staff to complete its evaluation of the impact of the *Deseret* decision on the carbon dioxide issues in the case. While the Agency and Region 9 are moving expeditiously on these important issues, Region 9 requests more than 30 days to account for the intervening holiday period when several EPA staff and managers involved in completing the above tasks will be taking scheduled leave.

11. Region 9 requests an extension of the existing response deadline, rather than indefinitely holding this case in abeyance, out of consideration of the interests of the permit applicant for expedited resolution of this proceeding and final action on its permit application.

12. Region 9 also moves as part of this extension request for leave to respond to New Mexico's motion to supplement the Administrative Record (dated November 17, 2008) as part of Region 9's response on the merits to the petitions and briefs of Petitioners and amicus. Filing a separate response to the administrative record motion within the customary 15 days set forth in the Board's Practice Manual (page 38) would require additional EPA staff time that is best used in evaluating the impact of the *Deseret* decision and the preparation of Region 9's response and recommended path forward.

13. As a courtesy and to ensure an orderly presentation of argument, Region 9 also requests that the Board permit Desert Rock Energy Company and Dine Power Authority until January 8, 2009 to file their responses.

14. Counsel for Region 9 have conferred with Petitioner Leslie Glustrom and counsel for the NGO Petitioners, State of New Mexico, Center for Biological Diversity,

Desert Rock Energy Company, and Dine Power Authority to determine their respective positions concerning this motion. Leslie Glustrom and Dine Power Authority do not oppose Region 9's request for a 35-day extension. NGO Petitioners, State of New Mexico, and Center for Biological Diversity do not oppose subject to specific conditions that Region 9 does not agree to and that should be articulated by those parties. Desert Rock Energy Company opposes a 35-day extension of time but do not oppose a 20-day extension of time.

WHEREFORE, due to the demands on EPA staff and management caused by the need to complete a response in this matter and determine the path forward (for the Agency generally and for Region 9 with respect to the Desert Rock permit specifically) after the *Deseret* decision, and the fact that allowing time for decisionmaking in response to *Deseret* could make further briefing or motions practice in this case more efficient, Region 9 requests an additional 35 days to prepare its response to the petitions and briefs in this matter. Region 9 requests that the Board grant a 35-day extension of time (until January 8, 2009) for submitting responses to the Petitions for Review, the Supplemental Briefs, and Amicus Curiae Brief in this matter and that such extension apply to the responses of Region 9 and any other parties that have intervened in defense of Region 9's permitting decision. Furthermore, Region 9 requests that this extension also include the same amount of additional time to submit the relevant portions of the administrative record supporting the responses that were not previously filed and to respond to Petitioner New Mexico's motion for leave to supplement the administrative record.

Date: November 26, 2008

Respectfully submitted,



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CERTIFICATE OF SERVICE

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