

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

IN RE:)
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DESERT ROCK ENERGY COMPANY, LLC)
)
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PSD Permit No. AZP 04-01)
_____)

PSD Appeal No. _____

**STATE OF NEW MEXICO'S PETITION FOR REVIEW
AND REQUEST FOR ORAL ARGUMENT**

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INTRODUCTION

Pursuant to 40 C.F.R. § 124.19(a), the State of New Mexico (“Petitioner” or “New Mexico”) petitions for review of the Prevention of Significant Deterioration (“PSD”) Permit No. AZP 04-01 (“the Permit”), which was issued to Desert Rock Energy Company, LLC (“Permittee”) by Region IX of the United States Environmental Protection Agency (“EPA”) on July 31, 2008. A copy of the Permit is attached as Exhibit 1. The Permit authorizes construction of the Desert Rock Energy Facility (“Desert Rock”), a 1500 MW coal-fired power plant proposed to be built approximately 25 miles southwest of Farmington, New Mexico. Because Desert Rock will be located within the Navajo Indian Reservation, and the Navajo Nation does not have an EPA-approved tribal NSR permitting program under the Clean Air Act, the EPA is the permitting authority for this Permit.

As is more particularly set forth below, Petitioner contends that EPA failed to take necessary procedural steps in the issuance of this Permit, failed to make certain necessary findings, and failed to conduct required analyses. EPA’s issuance of the Permit involved clearly erroneous findings of fact and conclusions of law, and implicates important policy issues that the Environmental Appeals Board (“Board”) should review. Based on the issues identified herein, Petitioner requests that the Board grant the Petition for Review and remand this Permit to EPA.

Petitioner also requests oral argument in the above-captioned matter. Oral argument would assist the Board because several of the issues presented by this Permit raise questions of first impression for the Board, are a source of significant public interest, and are of a nature such that oral argument could materially assist in their resolution.

Concurrent with this Petition, the Petitioner is filing a Motion for Extension of Time to File a Supplemental Brief on the issues the Petitioner will present to the Board for review. As is more fully set forth in that Motion, the Petitioner requires more time to review the changes EPA made to the final Permit and the EPA's extensive response to comments and attachments that accompanied the Permit.¹ This Petition sets forth Petitioner's satisfaction of the threshold requirements for seeking review and identifies the issues for which Petitioner seeks review. Pursuant to the relief requested in the Motion for Extension of Time, Petitioner proposes to present the substantive arguments in support of this Petition in a subsequent Supplemental Brief.

THRESHOLD PROCEDURAL REQUIREMENTS

Petitioner satisfies the threshold requirements for filing a petition for review under Part 124. Petitioner has standing to petition for review of the permit decision because it participated in the public comment period on the permit. *See* 40 CFR 124.19(a). *See* comments filed by State of New Mexico dated October 8, 2004, October 12, 2006, June 19, 2008 and EPA's response of July 29, 2008, and Notes from USEPA Region 9 and NMED Meeting, July 16, 2008, attached hereto as Exhibit 2. Furthermore, each issue raised by Petitioner below was either raised with EPA during the public comment period, concerns changes to the Permit made after the close of the public comment period, or is a new issue arising after the period for public comments that was not reasonably ascertainable during the public comment period. Consequently, the Board has jurisdiction to hear the Petitioner's request for review.

¹ Based on its ongoing consideration of the extensive materials that accompanied the Permit, Petitioner may request review of additional issues in its Supplemental Brief.

ISSUES PRESENTED FOR REVIEW

1. Whether EPA's failure to complete a consultation with the U.S. Fish & Wildlife Service pursuant to Section 7 of the Endangered Species Act ("ESA") prior to issuance of the final permit is a procedural error that constitutes a clearly erroneous conclusion of law or presents an important policy consideration that the Board should review and reverse.
2. Whether EPA's failure to consider emissions reduction technologies for carbon dioxide (CO₂) as part of a top-down BACT analysis, or to consider CO₂ in the BACT collateral impacts analysis, was a clearly erroneous conclusion of law, or presents an important policy consideration that the Board should review and reverse.
3. Whether EPA's conclusion that Desert Rock would not "cause or contribute" to non-attainment of the NAAQS for ozone was based on a clearly erroneous finding of fact and/or conclusion of law, or presents an important policy consideration that the Board should review and reverse.
4. Whether EPA's failure to conduct modeling and BACT analysis for particulate matter with an aerodynamic diameter of less than 2.5 microns ("PM_{2.5}") constitutes a clearly erroneous finding of fact and/or conclusion of law, or presents an important policy consideration that the Board should review and reverse.
5. Whether EPA's issuance of this PSD permit without conducting a MACT determination for hazardous air pollutants under Section 112 of the Clean Air Act constitutes a clearly erroneous finding of fact and/or conclusion of law, or presents an important policy consideration that the Board should review and reverse.
6. Whether EPA's failure to consider Integrated Gasification Combined Cycle ("IGCC") technology in its top-down BACT analysis constitutes a clearly erroneous

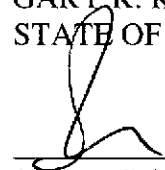
finding of fact and/or conclusion of law, or presents an important policy consideration that the Board should review and reverse.

7. Whether EPA's failure to consider the Federal Land Manager's conclusion that Desert Rock would have an adverse impact on visibility constitutes a clearly erroneous finding of fact and/or conclusion of law, or presents an important policy consideration that the Board should review and reverse.

Date: August 14, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 14, 2008 he caused a copy of the foregoing to be served by mail on:

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and

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