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December 3, 2008

By Messenger

U.S. Environmental Protection Agency  
Clerk of the Board  
Environmental Appeals Board  
Colorado Building  
1341 G Street, N.W., Suite 600  
Washington, DC 20005

Re: Desert Rock Energy Company, LLC  
PSD Appeal No. 08-03, 08-04, 08-05, & 08-06  
PSD Permit No. AZP 04-01


RECEIVED  
U.S. EPA  
DEC 3 11 11 03  
ENVIRONMENTAL APPEALS BOARD

Dear Clerk of the Board:

Enclosed please find an original and five copies of the RESPONSE TO STATE OF NEW MEXICO AND NGO PETITIONERS' MOTION TO SUPPLEMENT THE RECORD ON APPEAL OR, IN THE ALTERNATIVE, FOR REMAND AND REOPENING OF THE PUBLIC COMMENT PERIOD for filing on behalf of Desert Rock Energy Company, LLC, in the above-referenced matter. Please feel free to contact me if you have any questions.

Very truly yours,

Bracewell & Giuliani LLP



Jeffrey R. Holmstead

Enclosure

BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, DC

RECEIVED  
U.S. EPA

DEC -3 11 4: 03

ENVIRONMENTAL APPEALS BOARD

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) )  
IN THE MATTER OF: ) PSD APPEAL NOS. 08-03, 08-04,  
) 08-05 & 08-06  
DESERT ROCK ENERGY COMPANY, LLC ) )  
) )  
PSD PERMIT NO. AZP 04-01 ) )  
) )  
\_\_\_\_\_)

**DESERT ROCK ENERGY COMPANY'S RESPONSE TO  
STATE OF NEW MEXICO'S AND NGO PETITIONERS' MOTION TO SUPPLEMENT  
THE RECORD ON APPEAL OR, IN THE ALTERNATIVE, FOR  
REMAND AND REOPENING OF THE PUBLIC COMMENT PERIOD**

**INTRODUCTION**

The events described and facts alleged in the State of New Mexico's and NGO Petitioners<sup>1</sup> ("New Mexico" or collectively "Petitioners") motions have no bearing on this appellate proceeding. The administrative record in this case closed on July 31, 2008, the date Environmental Protection Agency ("EPA") Region 9 issued the Prevention of Significant Deterioration ("PSD") permit for the Desert Rock Energy Company ("Desert Rock") facility, and Petitioners' cannot be allowed to supplement it at this point. Further, their motion does not provide any basis for remanding the permit to reopen the public comment period. The Desert Rock PSD permit was validly issued by EPA Region 9 pursuant to all applicable statutes and regulations and upon consideration of all appropriate and relevant information and circumstances, including those comments raised by Petitioners. Therefore, the administrative

<sup>1</sup> NGO Petitioners are Dine Care, Environmental Defense Fund, Grand Canyon Trust, Natural Resources Defense Council, San Juan Citizens Alliance, Sierra Club, and WildEarth Guardians (joinder and concurrence filed Dec. 1, 2008).

record should not be supplemented to include any of the "new" facts or arguments suggested by Petitioners.<sup>2</sup>

### ARGUMENT

#### **A. PETITIONERS MAY NOT SUPPLEMENT THE RECORD BECAUSE THE ADMINISTRATIVE RECORD IS CLOSED**

1. On July 31, 2008, Region 9 issued a PSD permit authorizing construction and operation of the Desert Rock facility. Region 9 fully considered the permitted source's impacts on the ozone National Ambient Air Quality Standards ("NAAQS") as reflected in the record. *See, e.g.*, AR120 at 123-26. The permit was validly issued by the Agency under the Clean Air Act and all applicable regulations, and the administrative record has consequently closed.

2. The evidentiary record for the Desert Rock permit is closed. Under EPA's permitting rules, the administrative record for a PSD permit is considered complete on the date the final permit is issued. 40 C.F.R. § 124.18(c). The Board has repeatedly interpreted § 124.18(c) to mean that "the record is closed at the time of permit issuance and that documents submitted subsequent to permit issuance cannot be considered part of the administrative record."<sup>3</sup> *In re Keene Wastewater Treatment Plant*, NPDES Appeal No. 07-18, slip op. at 22 (EAB Mar. 19, 2008). Other Board decisions have echoed this principle, pointing out that allowing new substantive issues to be raised after permit issuance "would run contrary to the principle that the administrative record for a permitting decision is complete at the time of permit issuance." *In re BP Cherry Point*, 12 E.A.D. 209, 220 n.27 (EAB June 21, 2005). *See also In re*

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<sup>2</sup> Petitioners' motions request procedural relief and Desert Rock responds accordingly. However, Desert Rock reserves the right to respond to the substance of the information proffered by Petitioners at the appropriate time, if warranted by the Board's ruling on the motion.

<sup>3</sup> Footnote 5 of Petitioner's motion seeks to cast doubt on this clear principle by making reference to 40 C.F.R. § 124.19(f)(1)'s definition of "final" for purposes of judicial review. The language of the Board's opinion in *Keene*, however, makes clear that, for purposes of establishing an administrative record, the relevant date of record closure is when the permit is issued by EPA - in this case July 31, 2008. *Keene*, slip op. at 23.

*Prairie State Generating Co.*, PSD Appeal No. 05-05, slip op. at 63 (EAB Aug. 24, 2006) (rejecting petitioner's attempt to introduce new evidence as "simply not a sufficient basis for introducing further delay in issuing the Permit at this late stage in the administrative decisionmaking process"); *In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 518-19 (EAB 2006) (refusing to admit into the administrative record items that arrived several hours *after* the permit issued because the "key distinction" "is the time of their submission and not their content"); *In re Gen. Motors Corp.*, 5 E.A.D. 400, 405 (EAB 1994) ("to accept such information would be to invite unlimited attempts by permittees to reopen and supplement the record after the period for submission of comments has expired").

3. In *Keene*, the Board determined that the Region was not obliged to consider in its permitting analysis oxygen data collected subsequent to permit issuance and therefore declined review of the permit on that ground. *Keene*, slip op. at 23. Likewise, Region 9 is not obliged to consider new data that was generated and submitted by Petitioners subsequent to the issuance of the Desert Rock permit. As it stands, the present motion seeks to reopen the administrative record for the improper purpose of extending the permitting process beyond its necessary limit, as the Board has defined it.

4. Petitioners attempt to rely on language from the Board's decision in *In re Dominion* as precedent for their attempt to alter the administrative record. This reliance is misplaced. As an initial matter, *Dominion* does not stand for the proposition that the Regional Office has the authority to supplement the record *after* it has already made a decision on the permit. See *In re Dominion*, 12 E.A.D. at 695-96. Rather, in *Dominion*, the Board emphasized that under 40 C.F.R. § 124.17(b), the Region has authority to add new materials to the administrative record where "new points are raised or new material [is] supplied during the

public comment period . . . ." *Id.* (citing 40 C.F.R. § 124.17(b)). Petitioners' request to add additional data to the record is simply not analogous to the Region needing to supplement the record in response to comments or materials raised during the public comment process.

*Dominion* also acknowledges that the Regional Office has discretion to "[r]eopen or extend the comment period" where "data[,] information[,] or arguments submitted *during* the public comment period . . . appear to raise substantial new questions . . . ." *Id.* 695 (emphasis added). Petitioners' situation does not merit reopening or extending the comment period because their comments were not submitted *during* the comment period. *Id.*; see also *Prairie State*, PSD Appeal No. 05-05, slip op. at 65 n.52 (EAB Aug. 24, 2006) (noting that "[b]y extending the permit issuer's discretionary authority to reopen the public comment period in such circumstances, we do not alter the requirement that commenters 'must raise all *reasonable and ascertainable issues and submit all reasonably available arguments* supporting their position by the close of the comment period.'" (emphasis in original) (quoting *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 585 (EAB 1998))).

**B. A REMAND ORDER IS INAPPROPRIATE WHERE NEW DATA SUBMITTED BY PETITIONER DOES NOT RAISE SUBSTANTIAL NEW QUESTIONS**

1. The PSD permit issued by Region 9 should not be remanded to reopen the public comment period simply because Petitioner has come across new information it believes supports its original comments. As explained above, the administrative record in this matter is closed. As New Mexico itself points out, the standard for reopening public comment periods and permitting records is extremely high. See, e.g., New Mexico Motion at 4. The Board in *Keene* articulated that standard as requiring that "new data, information, or arguments 'appear to raise substantial new questions' about a permitting analysis that the permit issuer should, in its discretion, choose to hear." *Keene*, slip op. at 23 (citing *Prairie State*, slip op. at 65-66 n.51-52) (emphasis added).

In the instant case, the issue of the Desert Rock facility's impact on ozone levels in the area is certainly not a "substantial new question," as the issue was addressed at length in the permitting process and in the administrative record.

2. The Board has consistently held that "permitting authorities are under no obligation to consider comments received after the close of the public comment period." *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 194 n.32 (EAB 2000). As the Board stated in *Keene*, and Petitioner reminds us, "it is an exceptional case in which data developed *after* the issuance of a final permit will be deemed *substantial* enough to warrant a reopening of the permitting record." *Keene*, slip op. at 23 (emphasis in original). The Board cited as justification for this extremely high standard the very danger posed by New Mexico's present motion: "that the permitting processes provided under existing statutory and regulatory authorities might never be brought to an end." *Id.* The permit process for the Desert Rock facility has already been underway for almost five years<sup>4</sup> and must come to an end. When the record validates the Region's decision to issue a permit, it is unreasonable to subject the applicant to an unnecessary delay. *In re Carlota Copper Co.*, 11 E.A.D. 692, 786 (EAB 2004).

3. The Board in *Keene* went on to deny review of the wastewater discharge permit and the petitioning city's request that the public comment period be reopened. The Board noted that the city had failed to seek admittance of its data until the reply stage of the appeal proceedings, while the Region had chosen in its discretion "not to reach beyond the time parameters of the permitting process," and that the Region could not be faulted for its choice. *Keene*, slip op. at 24. The matter before the Board is indistinguishable from *Keene* in this respect. Region 9 gave due consideration to comments submitted by Petitioner and others during

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<sup>4</sup> Desert Rock submitted its initial permit application to EPA in February 2004. EPA notified Desert Rock by letter dated May 21, 2004, that the permit application was deemed complete.

the public comment period, even going so far as to exercise its discretion to respond to late-filed comments. AR 120 (responding to timely comments); AR121 (exercising discretion by responding to late filed comments). Petitioners attempt to translate this accommodation of late-filed comments into an indefinite waiver by EPA of its right—indeed, its regulatorily imposed duty—to end the comment period. This self-serving interpretation, however, clearly runs counter to the guiding principle of agency deference employed by the Board in its review of permitting decisions.

4. Petitioners' reliance on *In re St. Lawrence* is also unavailing. That case involved the challenge of a PSD permit on the basis that the permit issuer had not considered in its analysis a New Source Performance Standard ("NSPS") rule that had been proposed after the close of the public comment period but *before* the permit's issuance. *In re St. Lawrence County Solid Waste Auth.*, PSD Appeal No. 90-9, 1990 EPA App. LEXIS 37, at \*2-\*4 (Adm'r July 27, 1990). As the Board understands, however, a *proposed* NSPS has immediate legal consequences, since anyone constructing a new plant after the date of *proposal* must meet the proposed emission limits unless the final NSPS is less stringent. As the Administrator noted in his review of the Agency's permit analysis in that case, the proposed rule would apply retroactively and thereby constituted a preliminary determination by the agency that more stringent limits were "currently achievable." *Id.* at \*2. Conversely, here, Petitioners seek to introduce new data generated *after* the permit's issuance. As Petitioners recognize, such data certainly does not have any immediate legal consequences and does not constitute even a preliminary determination by the agency that nonattainment requirements apply in New Mexico.<sup>5</sup> Ozone concentrations in the area were fully considered by Region 9 in its Desert Rock PSD

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<sup>5</sup> The State of New Mexico specifically does not allege "that the area now be treated as a legally designated nonattainment area for purposes of permitting Desert Rock." New Mexico Motion at 3 n.2.

permitting decision. Petitioners have not overcome the heavy burden of overcoming the general principle of agency deference afforded to scientific and technical matters. *Keene*, slip op. at 13.

5. In their efforts to stop or further delay final action on this permit, Petitioners seek to make much of (1) two data points from a newly installed ozone monitor and (2) supposedly "updated" information regarding oil and gas development in the area (development that, in many cases, was specifically authorized by New Mexico, one of the Petitioners). As the administrative record makes clear, before issuing the permit, Region 9 considered substantial amounts of information regarding ozone measurements and emissions of ozone precursors in the area. Under these circumstances, the Board should not entertain a motion to undermine the fundamental rules regarding the review of an administrative record.

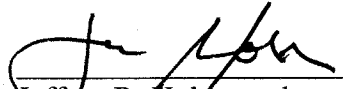
### CONCLUSION

The State of New Mexico's and NGO Petitioners' motions are an attempt to recast arguments that EPA Region 9 has already heard, responded to, and considered during the permitting process for the Desert Rock facility and the related public comment period. Moreover, Petitioners have not met their burden of showing that the issues set forth in its motion rise to the level of "substantial new questions" either warranting the reopening of the public comment period through a remand of the permit or justifying supplementation of the record on appeal to the Board, particularly in light of the "heightened deference" to be afforded Region 9 given the technical nature of the issues Petitioners raise.



Therefore, Desert Rock respectfully request that the Board deny Petitioners' Motions for the reasons stated above.

Respectfully submitted,



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Date: December 3, 2008

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing RESPONSE TO STATE OF NEW MEXICO AND NGO PETITIONERS' MOTION TO SUPPLEMENT THE RECORD ON APPEAL OR, IN THE ALTERNATIVE, FOR REMAND AND REOPENING OF THE PUBLIC COMMENT PERIOD in the matter of Desert Rock Energy Company, LLC, PSD Permit No. AZP 04-01, were served by United States First Class Mail on the following persons, this 3<sup>rd</sup> day of December 2008:

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