

# Attorney General of New Mexico



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Attorney General

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DATE: March 13, 2009

TO: Clerk of the Board, Environmental Appeals Board

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FROM: Kate Cotner for Seth T. Cohen

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TOTAL NUMBER OF PAGES, INCLUDING THIS PAGE: 6

Please find attached New Mexico's letter to the Board of March 13, 2009 for filing with the Board today. An original, signed copy of this letter is being sent via overnight mail to the Board this afternoon. The motion will also be submitted electronically. Please contact our office if you have any questions or have difficulty with the transmission.

Thank you,

Kate Cotner, Administrator for Seth T. Cohen

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## Attorney General of New Mexico

**GARY K. KING**  
Attorney General

**ALBERT J. LAMA**  
Chief Deputy Attorney General

March 13, 2009

Ms. Erika Durr  
U.S. Environmental Protection Agency  
Clerk of the Board  
Environmental Appeals Board  
Colorado Building  
1341 G Street N.W. Suite 600  
Washington, D.C. 20005

**Re: *In re Desert Rock Energy Company, LLC*, PSD Appeal Nos. 08-03, 08-04, 08-05 & 08-06; Docket No. AZP 04-01**

Dear Ms. Durr:

Petitioner the State of New Mexico writes to advise the Environmental Appeals Board ("Board") of a recent development with implications for the ozone issues raised in the above-referenced appeal. As is explained below, EPA Region 6 determined in the past week that the Navajo Lake ozone monitor malfunctioned, and that the data collected at that monitor from mid-October of 2008 to the present are believed to be invalid.

This unanticipated development affects certain aspects of the arguments regarding ozone that New Mexico has presented to the Board in this appeal. In particular, based on ozone levels measured at Navajo Lake on October 15 and 18 of 2008, New Mexico indicated in previous filings with the Board that a recommendation for a nonattainment designation for San Juan County was imminent. *See* New Mexico's Motion to Supplement the Record on Appeal, or, in the Alternative for Remand and Reopening of the Public Comment Period (EAB Filing No. 39, November 18, 2008), *and see* New Mexico's Reply Brief, at 21-25 (EAB Filing Nos. 123-24, February 19, 2009). Because these October 2008 monitoring data are now believed to be invalid, New Mexico, over the course of this week, changed the proposed recommendation for San Juan County's designation from nonattainment to attainment.

Although no final determination has been made about the cause or extent of the monitor malfunction, those portions of New Mexico's Motion to Supplement and New Mexico's Reply Brief that are based on Navajo Lake monitoring data from October of

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2008 will most likely need to be withdrawn. EPA is working collaboratively with NMED to determine the precise cause of the monitor malfunction at Navajo Lake. Once that determination has been made, EPA and NMED can reach a definitive conclusion regarding the data invalidation. It is unclear precisely how long this process will take, but it is estimated to require several weeks.

The October 2008 data from Navajo Lake had been subject to rigorous measures to confirm their validity. Upon initial receipt of these data, the New Mexico Environment Department ("NMED") undertook an internal quality assurance process. The quality assurance process, which involved a review by NMED technical staff to ensure that the data were free of defects or abnormalities, resulted in a determination that the data were valid. *See* NM Motion to Supplement at 4 n. 3. Further, on November 13, 2008, NMED installed a temporary, co-located monitor at Navajo Lake to confirm the performance of the permanent monitor. From November 13, 2008 until February 9, 2009 the co-located monitor tracked the permanent monitor very closely (within 0.002 ppm to 0.003 ppm). Also, both monitors were well within EPA's calibration specifications.

In mid-February, a co-located monitor gave readings that deviated from the permanent monitor. Deviations continued intermittently thereafter, with an apparent correlation to the configuration of the monitoring equipment. On March 4, 2009, at New Mexico's request, EPA Region 6 conducted a "Through-the-Probe" performance audit of the permanent monitor and the co-located monitor to test the monitoring systems. Both monitors passed the audit and showed no sign of malfunction. Nonetheless, because of continued deviations with the co-located monitor and unseasonable readings, EPA has preliminarily indicated, based on a statistical analysis, that Navajo Lake data from October 14, 2008 to the present are believed to be invalid.

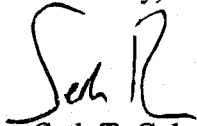
Under these rather unusual circumstances, New Mexico would welcome the Board's guidance on how best to proceed. New Mexico currently intends to file a notice with the Board immediately upon receiving the final determination from EPA and NMED regarding the invalidation of the Navajo Lake data. That notice would present the final determination on the matter and would confirm the precise implications of that determination for the arguments submitted by New Mexico in this appeal.

EPA filed a Motion for Extension of Time on March 12, 2009, seeking a 45-day extension, until April 27, to file its surreply in this case. New Mexico does not oppose this request. New Mexico expects to be able to provide the Board with the above-mentioned notice regarding the status of the ozone data in a timeframe that is comparable with EPA's requested extension. Because that notice would, in effect, only narrow the arguments presented by New Mexico as to ozone, it should not require further briefing or

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reply from other parties and should pose minimal disruption to the progress of this proceeding. Please feel free to contact me at (505) 827-6087 if you have any questions or would like any additional information.

Sincerely,

A handwritten signature in black ink, appearing to read "Seth T. Cohen". The signature is stylized with a large, looped initial "S" and a long horizontal stroke at the end.

Seth T. Cohen  
Assistant Attorney General

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on March 13, 2009 he caused a copy of the foregoing letter to be served by U.S. mail and electronic mail on:

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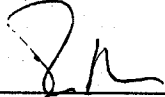
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