

**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

EPA REGION 9's MOTION FOR LEAVE TO FILE REPLY

EPA Region 9 moves for leave to file a reply to the response and oppositions filed by Desert Rock Energy Company (DREC), Dine Power Authority (DPA), and the American Coalition for Clean Coal Electricity (ACCCE) to Region 9's Motion for Voluntary Remand in this matter. In support therefore, Region 9 states the following.

On April 27, 2009, EPA Region 9 filed a motion for voluntary remand in this matter in lieu of a surreply brief. Region 9 has requested a remand by the Environmental Appeals Board ("EAB" or "Board") so that Region 9 may reconsider several elements of the permitting decision that are contested in this appeal. Region 9 filed the motion requesting a remand by the Board because 40 C.F.R. § 124.19(d) of EPA's regulations does not permit Region 9 to withdraw the permit without the permission of the Board after the Board has granted review. On May 27, 2009, the Board granted ACCCE leave to intervene in this matter and file an amicus brief in opposition to Region 9's motion for a remand. On June 11, 2009, ACCCE, DPA, and DREC filed arguments in opposition to Region 9's request for voluntary remand.

On June 16 and June 17, the Board granted motions by the Conservation Petitioners and the State of New Mexico to submit replies to the responses and

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oppositions to Region 9's Motion for Voluntary Remand. In its June 17 order, the Board established June 29 as the deadline for all reply briefs permitted to date regarding the voluntary remand motion. Consistent with this order and to avoid disruption of the existing schedule, EPA Region 9 requests leave to file a reply on the same date (June 29) by which the Conservation Petitioners and New Mexico are required to file their replies. Since the Board has already granted several Petitioners leave to file replies on this date, an additional reply by Region 9 will not delay these proceedings.

Furthermore, consistent with the request of the State of New Mexico, Region 9 does not require more than 20 pages for its reply. Thus, if the Board grants this request, Region 9 will not submit a reply exceeding 20 pages.

Region 9 should have an opportunity to file a reply in order to respond to several inaccurate and misleading statements by Desert Rock Energy Company regarding the grounds upon which Region 9 is requesting a voluntary remand of the permit in this matter. In particular, DREC has charged in its response that Region 9 has exhibited bad faith by requesting a voluntary remand on the basis of (1) a change in regulatory requirements that is prospective in nature and not presently effective; (2) a willful misrepresentation of the administrative record in this matter; (3) grounds that are frivolous and serve only as pretext for other purposes; and (4) improper communications between the Petitioners and EPA officials (including the undersigned counsel). Region 9 disputes these assertions and requests an opportunity to demonstrate that these charges are erroneous.

Furthermore, several parties have responded to the voluntary remand motion by raising new issues that were not addressed in Region 9's motion. DREC has argued that

Region 9's motion is unconstitutional in two respects and also precluded by section 165(c) of the Clean Air Act. ACCCE alleges that Region 9's motion would cause harm to members that have not previously participated in this proceeding or established that they presently have a PSD permit under review in the EAB that is affected by Region 9's motion. DPA asserts that EPA's failure to fulfill its consultation obligations with the Navajo Nation government provides grounds for denial of Region 9's request to reconsider elements of its permitting action that are disputed by citizens of the Navajo Nation participating as Petitioners in this proceeding.

Counsel for Region 9 contacted counsel for DREC and DPA to determine their position with respect to this motion. In light of the fact that the Board has already granted the Petitioner's requests for the opportunity to file reply on the established schedule, DREC and DPA do not oppose Region 9's request. The undersigned counsel was unable to reach the attorneys for ACCCE before filing this motion. Counsel for Region 9 did not attempt to contact parties or amicus in this matter that have not expressed opposition to the voluntary remand.

WHEREFORE, for the grounds stated above, Region 9 moves for leave to file a reply (not to exceed 20 pages) to the response and oppositions of DREC, DPA, and ACCCE to Region 9's motion for voluntary remand by June 29, 2009.

Dated: June 19, 2009

Respectfully Submitted,



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CERTIFICATE OF SERVICE

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