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

IN THE MATTER OF:	
DESERT ROCK ENERGY COMPANY, LLC	PSD Appeal Nos. 08-03, 08-04, 08-05 & 08-06
PSD PERMIT NO. AZP 04-01	

JOINT MOTION REQUESTING RECONSIDERATION OF EXTENSION OF TIME TO FILE SURREPLY BRIEFS

Desert Rock Energy Company, LLC ("Desert Rock Energy"), the permittee in this matter, and Diné Power Authority ("DPA") respectfully bring this Joint Motion Requesting Reconsideration of Extension of Time to File Surreply Briefs. In light of Region 9 of the Environmental Protection Agency's ("EPA Region 9's") request to obtain an additional 45-day extension of time to file its surreply (until April 27, 2009), Desert Rock Energy and DPA respectfully request that the Board issue an Order granting an equivalent extension to Desert Rock Energy and DPA to file their respective surreplies on or before April 27, 2009. Desert Rock Energy and DPA request this additional time to maintain consistency in the overall briefing schedule and to afford Desert Rock Energy and DPA the opportunity to respond to any additional issues or filings that may be brought before the Board, or otherwise arise, between Desert Rock Energy's and DPA's current deadline for submission of their respective surreplies, March 20, 2008, and April 27, 2009, including but not limited to additional information regarding data gathered from the Navajo Lake ozone monitor.

In support of this motion, Desert Rock Energy and DPA state the following:

1. Desert Rock submitted its PSD permit application to EPA Region 9 on February 22, 2004. AR 6. EPA Region 9 deemed the application administratively complete on May 21, 2004. AR 14.

2. On July 31, 2008, EPA issued a Prevention of Significant Deterioration ("PSD") permit to Desert Rock Energy. AR 122.

3. On August 14, 2008, NGO Petitioners[1] filed a petition with this Board to review the PSD permit issued to Desert Rock Energy. NGO Petitioners' Petition for Review, Motion for Extension of Time to File Supplemental Brief, and Motion for Stay of Certain Issues Pending the Board's Decision in *In Re Deseret Power Electric Cooperative*.

4. On August 15, 2008, the State of New Mexico also filed a petition to review. State of New Mexico's Petition for Review and Request for Oral Argument.

5. On August 21, 2008, the Board granted the NGO Petitioners and the State of New Mexico a 30-day extension of time until October 2, 2008 to file supplemental briefs in support of their petitions for review. Order Granting Desert Rock's Motion to Participate, Granting a 30-Day Extension of Time, and Denying a Stay of Briefing on Certain Issues.

6. Additional petitions for review were filed on September 2, 2008 by the Center for Biological Diversity and on September 5, 2008 by Leslie Glustrom. Center for Biological Diversity Petition for Review; Leslie Glustrom Petition for Review with Attachments.

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[1] "NGO Petitioners" consist of Diné Care, Environmental Defense Fund, Grand Canyon Trust, Natural Resources Defense Council, San Juan Citizens' Alliance, Sierra Club, and Wild Earth Guardians.

7. On October 6, 2008, this Board issued an Order scheduling a response date of no later than November 3, 2008 for the submission of responses from EPA Region 9 and Desert Rock Energy. Order Scheduling Response Date.

8. On October 9, 2008, EPA Region 9 submitted a motion for a 30-day extension of time to respond to the petitions and supplemental briefs until December 3, 2008. Motion for Extension of Time to Respond to Petitions and Supplemental Briefs.

9. The Board granted EPA Region 9's motion for a 30-day extension on October 14, 2008, and ordered that EPA Region 9, Desert Rock Energy, and DPA file their responses to the petitions, supplemental briefs, and/or amicus curiae brief no later than December 3, 2008. Order Granting Motion to Participate, Motion to File Amicus Curiae Brief, and Motion for Extension of Time to File Responses.

10. On November 26, 2008, five working days before the December 3rd deadline imposed by the Board, EPA Region 9 submitted a motion to the Board requesting an additional 35-day extension of time based primarily upon the Board's decision in *In re Deseret Power Electric Cooperative* case, PSD Appeal No. 07-03 (Nov. 13, 2008). Region's Motion for Extension of Time to Respond to Petitions and Supplemental Briefs.

11. The Board granted EPA Region 9's request for an additional 35-day extension of time on December 1, 2008 and ordered EPA Region 9 to file its response no later than January 8, 2009. Order Granting Motion for Extension of Time to Respond to Petitions and Supplemental Briefs.

12. On December 1, 2008, Desert Rock Energy submitted a request to the Board to receive the same 35-day extension of time granted to EPA Region 9. Motion for Extension of Time to Respond to the Petitions for Review and Supplemental Briefs.

13. On December 2, 2008, the Board granted Desert Rock Energy's request for an extension of time to allow time "to ensure an orderly presentation of argument in this proceeding, and to further explore the implications of the Board's decision in *In re Deseret Power Electric Cooperative*, PSD Appeal No. 07-03, which was issued on November 13, 2008, and New Mexico's recent motion to supplement the administrative record." Order Granting Desert Rock's Motion for Extension of Time to Respond to Petitions and Supplemental Briefs. Thus, Desert Rock Energy was ordered to file its response by the same deadline granted to EPA Region 9: January 8, 2009. *Id.*

14. On January 7, 2009, the day before EPA Region 9's response was due, EPA Region 9 withdrew section II.B.3.b (pages 25-27) of its Response to Public Comments (Docket No. EPA-R09-OAR-2007-1110-120) and section 5 (pages 8-15) of its Responses to Late-Filed Public Comments (Docket No. EPA-R09-OAR-2007-1110-121) pursuant to 40 C.F.R. § 124.19(d). These portions of the administrative record dealt with the issue of the Best Available Control Technology ("BACT") for carbon dioxide.

15. On January 22, 2009, this Board issued an Order granting review of the permit. The Board also set a briefing schedule that ordered the State of New Mexico and NGO Petitioners to submit their respective reply briefs on or before February 13, 2009, and that EPA Region 9, Desert Rock Energy and DPA submit their respective surreplies on or before March 6, 2009.

16. On February 4, 2009, the Board granted Petitioner Leslie Glustrom's motion for leave to file a reply brief in this matter. Order Granting Motion to File Reply Brief. The Board ordered that Ms. Glustrom's reply brief be filed on or before February 13, 2009 – the same deadline as that issued to the State of New Mexico and NGO Petitioners. *Id.* Given all of the

previous extensions requested in this matter, resulting in undue delays, Desert Rock Energy was pleased that the Board appeared to be setting a tighter schedule by ordering Ms. Glustrom to respond to the same deadline as that imposed on the State of New Mexico and the NGO Petitioners.

17. On February 10, 2009, Petitioner State of New Mexico filed a Motion for Extension of Time to File Reply Brief. State of New Mexico's Motion for Extension of Time to File Reply Brief. The State of New Mexico's request was based upon two unrelated medical emergencies that occurred to the counsel for the State of New Mexico. *Id.* Desert Rock Energy did not oppose this motion due to its nature as a medical emergency.

18. On February 11, 2009, the Board granted the State of New Mexico's motion for an extension of time and ordered that the State of New Mexico file its reply brief on or before February 20, 2009. Order Granting Motion for Extension of Time to File Reply Brief. Through this order, the Board also ordered that all surreply briefs be due on or before March 13, 2009. *Id.*

19. On February 11, 2009, NGO Petitioners filed a Motion for Extension of Time to File Reply Brief, requesting that the deadline for their reply brief and that of Petitioner Leslie Glustrom be extended to February 20, 2009, "in order to ensure consistency in the overall briefing schedule." NGO Petitioners' Motion for Extension of Time to File Reply Brief.

20. In contrast to Petitioner State of New Mexico, which required an extension for medical emergencies in order to allow counsel time to recuperate, NGO Petitioners formulated no basis for their extension request other than consistency in the overall briefing schedule. The medical emergencies of counsel for the State of New Mexico did not impact NGO Petitioners' ability to prepare their reply briefs.

21. On February 12, 2009, the Board granted the NGO Petitioners' request, noting that "[w]hile the justification for the extension is thin," the Board was granting the extension because "there will be no prejudice to any party since the date for filing surreplies has been extended and . . . an extension of time to file the NGO reply brief will not affect the overall timing of Board action. . . ." Order Granting Motion for Extension of Time to File Reply Brief at 3.

22. On March 13, 2009, the day that its surreply brief was due, EPA Region 9 filed a motion with the Board requesting an additional 45-day extension of time, until April 27, 2009, to file its surreply. EPA Region 9's Motion for an Extension of Time to File Surreply Brief.

23. Also on March 13, 2009, the State of New Mexico submitted a letter to the Board reporting that the Navajo Lake ozone monitor had malfunctioned and therefore "data collected at that monitor from mid-October of 2008 to present are believed to be invalid." Letter from Seth T. Cohen, Assistant Attorney General, New Mexico, to Erika Durr, Clerk of the Board, Environmental Appeals Board (Mar. 13, 2009). Therefore, the State of New Mexico indicated that it would be working with EPA "to determine the precise cause of the monitor malfunction at Navajo Lake." *Id.* The State of New Mexico also noted its intention to file a notice with the Board "immediately upon receiving the final determination" regarding the malfunction at Navajo Lake and stated that the State of 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 Region 9's] extension." *Id.*

24. On March 17, 2009, the Board granted EPA Region 9's extension of time, such that its surreply brief is due on or before April 27, 2009. Order Granting Motion for Extension of Time to File Surreply Brief. The Board also instructed the State of New Mexico "to file a

notice regarding the implications of its final determination regarding the Navajo Lake data on this matter as soon as it is able to do so." *Id.* However, the Board did not grant corresponding extensions of time to Desert Rock Energy or DPA. *Id.* Instead, the Board ordered that Desert Rock Energy and DPA file their respective surreply briefs on or before March 20, 2009. *Id.*

25. As participants on the same side of the case as EPA Region 9, granting Desert Rock Energy and DPA's request would maintain "consistency in the overall briefing schedule." As with the extension previously granted to NGO Petitioners, granting Desert Rock Energy and DPA's request will not cause any prejudice to any of the other parties to the case and it would not impact the overall timing of the Board's action.

26. Furthermore, Desert Rock Energy and DPA note that such an extension would allow Desert Rock Energy and DPA to respond as of right to any additional information submitted to the Board or otherwise arising between March 20, 2009 and April 27, 2009, including but not limited to the notice the State of New Mexico plans to submit to the Board "in a timeframe that is comparable with [EPA Region 9's] extension" regarding the validity of the data from the Navajo Lake ozone monitor. Letter from Seth T. Cohen, Assistant Attorney General, New Mexico, to Erika Durr, Clerk of the Board, Environmental Appeals Board (Mar. 13, 2009).

27. This permitting matter has been plagued with undue delays since Desert Rock Energy's application was deemed administratively complete on May 21, 2004. EPA did not issue a PSD permit to Desert Rock Energy until over four years later on July 31, 2008. While Desert Rock Energy does acknowledge the Board's need to verify that EPA Region 9 appropriately issued a PSD permit to Desert Rock Energy, Desert Rock Energy would prefer that the schedule for all parties be tightened. However, given that the Board has seen fit to grant yet

another extension to EPA Region 9, Desert Rock Energy and DPA request that the Board extend the same extension to them as provided to EPA Region 9. The Board has previously granted extensions to Petitioners where "the justification for the extension is thin" and "there will be no prejudice to any party . . . and . . . an extension of time . . . will not affect the overall timing of Board action. . . ." Order Granting Motion for Extension of Time to File Reply Brief at 3. In the interest of fairness, Desert Rock Energy and DPA should be afforded the same time as EPA.

28. For the aforementioned reasons and in the interest of fairness, Desert Rock Energy and DPA respectfully request that this Board grant Desert Rock Energy and DPA the same courtesy previously extended to the NGO Petitioners by granting an extension equivalent to that which was granted to EPA Region 9 (on or before April 27, 2009) to ensure the "consistency in the overall briefing schedule." *See* Order Granting Motion for Extension of Time to File Reply Brief at 2.

29. Counsel for Desert Rock Energy contacted counsel for Respondent State of New Mexico and NGO Petitioners, who oppose this motion. Counsel for United States Environmental Protection Agency had not yet been able to form an opinion regarding whether EPA opposed this motion at the time of this filing. Counsel for Desert Rock Energy attempted to contact counsel for the Center for Biological Diversity and Leslie Glustrom, who were unavailable to indicate whether they do or do not oppose that the Board set April 27, 2009 as the deadline for submission of Desert Rock Energy's and DPA's surreplies in this matter.

Respectfully submitted,

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March 18, 2009

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing JOINT MOTION REQUESTING RECONSIDERATION OF EXTENSION OF TIME TO FILE SURREPLY BRIEFS 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 13th day of March 2009:

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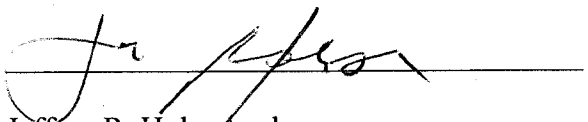

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