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August 20, 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; PSD 08-04
PSD Permit No. AZP 04-01

Dear Clerk of the Board:

Enclosed please find an original and five copies of a Motion to Participate and Opposition to Petitioners' Motions for Extension to File a Supplemental Brief and for Stay of Certain Issues 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

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ENV. APPEALS BOARD

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U.S. E.P.A.

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

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ENVIR. APPEALS BOARD

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IN THE MATTER OF:)
)
DESERT ROCK ENERGY COMPANY, LLC)
)
PSD PERMIT NO. AZP 04-01)
)
_____)

PSD APPEAL NOS. 08-03 and 08-04

**MOTION TO PARTICIPATE AND OPPOSITION TO PETITIONERS'
MOTIONS FOR EXTENSION TO FILE A SUPPLEMENTAL BRIEF AND
FOR STAY OF CERTAIN ISSUES**

Desert Rock Energy Company, LLC ("Desert Rock"), the permittee in this matter, requests leave to participate in the above-captioned proceeding in accordance with Section III.D.4 of the Environmental Appeals Board ("EAB" or "Board") Practice Manual. Desert Rock has conferred with the Environmental Protection Agency ("EPA") and all of the Petitioners regarding this request. EPA Region 9, the NGO Petitioners (as defined below), and the State of New Mexico do not oppose participation through the filing of briefs on the merits of their appeals by Desert Rock in this EAB proceeding.¹

Desert Rock opposes the motions for extension of time to file supplemental briefs submitted by Petitioner New Mexico and Petitioners Diné Care, Environmental Defense Fund, Grand Canyon Trust, Natural Resources Defense Council, San Juan Citizens Alliance, Sierra Club, and WildEarth Guardians ("NGO Petitioners"). By means of this motion, Petitioners not only seek further delay in a permitting process that has already lasted for more than 5 years

¹ Petitioners requested that Desert Rock make it clear to the Board that while the Petitioners do not oppose Desert Rock's participation to file briefs on the merits of their appeal, they oppose the legal arguments advanced in Desert

(much longer than allowed by statute), but also seek to avoid the jurisdictional content requirements for a Petition for Review, which are set forth in 40 C.F.R. § 124.19 and clearly explained in the EAB Practice Manual and a number of EAB decisions. EAB Practice Manual, Section III.D.2.(c); *In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 5 (EAB 2000); *In re Commonwealth Chesapeake Corp.*, 6. E.A.D. 764, 772 (EAB 1997); *In re SEI Birchwood, Inc.* 5 E.A.D. 25, 26-27 (EAB 1994).

Desert Rock also opposes the NGO Petitioners Motion for Stay of Certain Issues Pending the Board's Decision in *In Re Deseret Power Electric Cooperative*. This motion is an unprecedented attempt to misuse the EAB appeals process to add further delay and get a second chance at another EAB appeal on the same permit. In support of its motion and opposition, Desert Rock states as follows:

1. On July 31, 2008, more than 4 years after EPA found that the permit application was complete, EPA issued PSD Permit No. AZP 04-01 ("PSD Permit"), authorizing Desert Rock to construct a 1,500 megawatt coal-fired power plant on Navajo Land (the "Project"). The PSD Permit conditions include the most stringent emission limits of any coal-fired power plant in the country. Detailed technical studies show that the Project will not violate any air quality standards and that the proposed emission limits will safeguard public health and the environment.

2. EPA regulations creating the EAB and governing its jurisdiction require that anyone seeking to challenge such a permit must file a Petition for Review within 30 days of a final permit decision under 40 C.F.R. § 124.15(a). These regulations also state that any such petition

Rock's opposition to their motions.

shall include a statement of the reasons supporting that review, including a demonstration that any issues being raised were raised during the public comment period (including any public hearing) to the extent required by [the] regulations and when appropriate, a showing that the condition in question is based on (1) a finding of fact or conclusion of law which is clearly erroneous, or (2) an exercise of discretion or an important policy consideration which the [EAB] should, in its discretion, review.

40 C.F.R. § 124.19(a) (emphasis added).

3. By simply listing issues that may or may not be subject to review and then requesting an extension to provide a supplemental brief, as Petitioners have done in this case, Petitioners are simply attempting to bypass the 30-day filing deadline and the substantive prerequisites for a proper Petition for Review. Petitioners have been aware of, and involved with, issues related to this PSD Permit process for years, having filed their first comments as early as November of 2006. *See* letters attached to Petitioners' Motion as Exhibits 2-11. They certainly do not need additional time to understand the issues involved in this proceeding.

4. The EAB has recognized that its jurisdiction is narrow and is defined by its enabling regulations. *In re Sunoco Partners Marketing & Terminals, LP*, UIC Appeal No. 05-01 (EAB, June 2, 2006). "The burden of demonstrating that review is warranted rests with the petitioner, who must state objections to the permit and explain why the permit issuer's response to those objections is clearly erroneous or otherwise warrants review." *Id.* (citing 40 C.F.R. § 124.19(a)). "In this regard, a petitioner does not meet this burden merely by relying on its previous statements or objections, such as comments on a draft permit." *Id.* (citing *In re LCP Chems. – NY*, 4 E.A.D. 661, 664 (EAB 1993)). Yet this is exactly what Petitioners are seeking to do in this case.

5. The EAB has clearly stated that "a petition for review under § 124.19 is not analogous to a notice of appeal that may be supplemented by further briefing. Although briefing

may occur after review has been granted, the discretion to grant review is to be sparingly exercised, and therefore ... a petition for review must specifically identify disputed permit conditions and demonstrate why review is warranted." *In re LCP Chemicals – NY*, 4 E.A.D. at n.9. Petitioners' filings fall well short of this standard. As the NGO Petitioners themselves state, they have simply identified "the general issues that were raised in public comments on the Draft Permit, which Petitioners *preliminarily* believe provide grounds for Board review." Petitioners' Motion at p. 6 (emphasis added). They further state that

In their supplemental brief, Petitioners may narrow the list of issues described above to focus on those issues that Petitioners believe, after full examination of the record, most warrant Board review. Petitioners may also supplement the issues described above if their continuing review identifies additional issues that warrant Board review.

Petitioners' Motion at p. 10. The NGO Petitioners' filing simply lists twenty issues, and does not even identify the specific issues on which they seek review. They even suggest that they may want to add to this list well past the 30-day deadline. It is well established in EAB decisions that such "notice" of appeals does not meet the jurisdictional requirements of the EAB.

6. New Mexico is in a somewhat different position. It has listed seven specific issues on which it seeks review, but in its Motion for Extension of Time, it does not explain why it needs additional time to explain to the Board why it should grant review on any of these issues. New Mexico has submitted several extensive filings on each of these issues in the past – to EPA and in its separate effort to intervene in a federal district court case in the Southern District of Texas. It is puzzling, in light of all the time and effort the State has already spent on these same issues, that it would need additional time to satisfy the EAB's requirements regarding petitions for review.

7. Petitioners' filing also fails to invoke the jurisdiction of the EAB because Petitioners did not even attempt to demonstrate that the "issues being raised were raised during the public comment period." 40 C.F.R. § 124.19(a). "It is not incumbent upon the Board to scour the record to determine whether an issue was properly raised below." *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, n.10 (EAB 1999).

8. Desert Rock recognizes that the EAB has discretion to relax or modify procedural rules to allow for an orderly appeal process, and that the EAB has allowed for variances from these rules in "special" situations such as delay in reaching the EAB attributed to EPA's response to anthrax contamination concerns, hurricane aftermath issues, and even FedEx aircraft problems. *In re Town of Marshfield*, NPDES Appeal 07-03, slip op. at 5 (EAB, March 27, 2007). The EAB may also grant relief from the strict procedural rules in situations where the permitting authority did not provide proper and timely notice to the petitioner of the permit decision or misled or made mistakes causing the delay of an otherwise properly filed Petition for Review. *Id.* Petitioners' filing does not present any such special circumstances warranting a deviation from the jurisdictional requirements. Petitioners simply request more time to perform analyses and prepare a robust filing. In *In re Town of Marshfield*, the EAB specifically rejected this notion in stating that "having to conduct legal and technical research in preparation for an appeal does not, without more, fall into the category of circumstances the Board would consider special." *Id.* at 8. This is exactly what Petitioners request here. In their Motion, the NGO Petitioners cite to footnote 10 of the *In re Town of Marshfield* decision, in which the EAB mentioned the possibility of supplementing a Petition for Review. This footnote, however, does not address the jurisdictional requirement of the substantive content of a Petition for Review. *See* Petitioners' Motion at p. 11. In order to accommodate the request of the Petitioners, the EAB

would need to go through proper notice and comment rulemaking to change the jurisdictional requirements for Petitions for Review in 40 C.F.R. § 124.19(a).

9. Petitioners in this case are highly sophisticated organizations and cannot be compared to a *pro se* petitioner, as Petitioners suggest in their reference to *In re BP Cherry Point*, 12 E.A.D. 209, 215 (EAB 2005). See Petitioner's Brief at p. 11. Unlike the individual petitioner to whom the EAB granted an extension of time to file supplemental briefing in *Cherry Point*, Petitioners are well versed in the issues they present in their filing and have addressed many of them in other appeals initiated by them before the EAB and other litigation throughout the country. At least one of the NGO Petitioners, Sierra Club, maintains an active website to support the efforts of environmental activists from around the country to stop or delay all new coal-fired power plants. <http://www.sierraclub.org/environmentallaw/coal/>. Among other things, Sierra Club tracks the permitting status of every proposed coal-fired power plant in the country (more than 100), and provides a password-protected database of “technical and legal” resources that can be used to challenge permits. Given the resources that the Sierra Club and several of the other NGO Petitioners are investing in these efforts, and the time they have already taken to prepare and submit filings to various courts and permitting agencies regarding virtually any possible issue related to coal-fired power plants, it is hard to understand why they need to delay the EAB’s proceeding to submit a petition for review that meets the EAB’s requirements.

10. Petitioners' reliance on the EAB's decisions to grant extensions of time in three other cases—*In re Northern Michigan University*, *In re Deseret Power Electric Cooperative*, and *In re ConocoPhillips Co.*—is equally unavailing. See NGO Petitioners' Motion at pp. 10-11. The procedural circumstances in those cases were entirely different from those in the instant

case. In each of the three cases, the *EAB had already received a timely petition for review*, had granted review on at least one issue, and was considering a motion for extension of time filed by either the permittee or a regulatory agency to respond to the issues raised by petitioner. Thus, the jurisdictional substantive requirements of a petition for review had already been met and were not implicated as they are here. Moreover, the orders in two of the cases indicate that the opposing party had consented to the extension of time. *In re Northern Michigan University*, Order Granting Motion for Extension of Time to File Response (July 10, 2008); *In re Deseret Power Electric Cooperative*, Order Granting Extension of Time (Feb. 12, 2008). The third order does not indicate whether or not the extension was opposed. *In re ConocoPhillips Co.*, Order (Oct. 1, 2007).

11. The NGO Petitioners Motion for Stay of Certain Issues Pending the Board's Decision in *In Re Deseret Power Electric Cooperative* is a transparent attempt to achieve further delay. It is clear from their motion that they seek two separate chances to appeal this permit – one starting now (on the non-CO₂ issues, although they have not yet even decided which ones) and a second one on CO₂-related issues that will not even start until after the Board issues a decision in the *Deseret* matter. The NGO Petitioners should identify and justify EAB review of all issues relating to CO₂. There is nothing in EAB practice that would not allow issues to be withdrawn during the course of a permit appeal, but the rules are clear and all issues to be reviewed must be identified and their review justified in the initial petition for review. This motion is an unprecedented attempt to misuse the EAB appeals process to add further delay.

12. Petitioners' claim that the requested extension will not prejudice Desert Rock is patently false. Petitioners had no contact with Desert Rock on which to base such an assertion, and it is well known that obtaining a PSD permit is a key aspect in the timeline for any major

construction project subject to the PSD program in the United States. The EAB recognizes this fact by assigning permit appeals involving new source construction the highest priority. *See In re Hawaii Electric Light Company, Inc.*, 10 E.A.D. 219, 223, n. 7 (EAB 2001). Since 2003, the Navajo Nation, Diné Power Authority, and Desert Rock (or its predecessors) have been working with EPA to secure a PSD permit for the Project. The PSD Permit Application for the Desert Rock Energy Project was initially submitted to EPA in February 2004, and the final Permit Application was submitted on May 7, 2004. EPA issued a letter finding the application to be complete on May 21, 2004. The delay of the decision on this permit prejudiced Desert Rock to the extent that it was forced to take judicial action for force EPA to issue a final decision on the permit and start the EAB review process. *See Desert Rock Energy Company, LLC, et al. v. U.S. EPA, et al.*, Civ. Action No. 4:08-CV-872 (S.D. Tex. 2008).

13. Petitioners correctly note that other regulatory actions must be completed before Desert Rock may begin construction on the Project, including an ESA Consultation and a so-called MACT Determination, but Desert Rock expects those actions to be finalized in the near future. Although Petitioners may well try to challenge those actions in court, they are not subject to the automatic stay provision that applies to a PSD permit. Thus, a final decision from the EAB is likely to be the last step that is necessary before construction may begin. Under these circumstances, any delay in the EAB process will almost certainly delay the Project and will further prejudice Desert Rock and the Navajo Nation.

14. It is pure speculation on the part of Petitioners to suggest that the delay in the permitting process was caused by the number and complexity of significant issues. *See* NGO Petitioners' Motion at p. 12. Desert Rock will not here attempt to speculate as to the reasons for the delay as the Petitioners have done, but Desert Rock does not believe that complexity was the

reason for the delay in the permit decision. While PSD permitting is complicated, any permitting process for a new source that goes beyond four years is clearly unreasonable and caused by many factors well beyond technical considerations.

15. The EAB should not deny Petitioners' attempt to further delay the much-needed Desert Rock project and the PSD permitting process. Such delay is contrary to Congress' intent in developing the PSD permit program. In the Senate Committee on Public Works Report, a key part of the legislative history of the 1977 Amendments, Congress stated:

Inherent in any review-and-permit process is the opportunity for delay. The Committee does not intend that the permit process to prevent significant deterioration should become a vehicle for inaction and delay. To the contrary, the States and Federal agencies must do all that is feasible to move quickly and responsibly on permit applications and those studies necessary to judge the impact of an application. *Nothing could be more detrimental to the intent of this section and the integrity of this Act than to have the process encumbered by bureaucratic delay.*

S. Rep. No. 94-717, at 23 (1976) (emphasis added).

Therefore, Desert Rock respectfully requests leave to participate in this matter and further requests that the EAB deny Petitioners' Motions for the reasons stated above.

Respectfully submitted,



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Date: August 20, 2008

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion to Participate and Opposition to Petitioner's Motion for Extension to File a Supplemental Fried and for Stay of Certain Issues 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 20th day of August 2008:

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