

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

_____)	
IN RE:)	
)	
DESERT ROCK ENERGY COMPANY, LLC)	PSD Appeal Nos. 08-03, 08-04,
)	08-05 & 08-06
PSD Permit No. AZP 04-01)	
_____)	

**NEW MEXICO’S MOTION FOR LEAVE TO FILE REPLY AND FOR STAY OF
ISSUE WITHDRAWN BY REGION 9**

Petitioner the State of New Mexico (“New Mexico”) respectfully moves for leave to file a reply on or before February 13, 2009 to the Responses to Petitions for Review and Supplemental Briefs filed by Desert Rock Energy Company, LLC (“DREC”), Region 9 of the EPA (“Region 9”), and the Dine Power Authority (“DPA”).¹ In addition, New Mexico respectfully requests leave to file a reply on or before February 13, 2009 to the Responses by Region 9 and DREC to New Mexico’s Motion to Supplement the Record on Appeal or, in the Alternative, for Remand and Reopening of the Public Comment Period. Also, because Region 9 has withdrawn those portions of the response to comments document regarding its position as to whether the PSD provisions of the Clean Air Act require limits on carbon dioxide emissions, New Mexico requests that the Board stay any further briefing or consideration of that issue pending the Region’s final issuance—pursuant to notice and public comment—of its new statement of basis as to that matter.

¹ Desert Rock Energy Company, LLC and the Dine Power Authority were granted the right to participate in these proceedings by orders of the Board on August 8, 2008 and October 14, 2008, respectively.

New Mexico conferred with counsel for EPA regarding this motion; counsel indicated that EPA would be unable to determine its position on the motion until at least January 21. Both the Dine Power Authority and DREC oppose the request for leave to reply and have not yet have taken a position on the request for a stay as to the carbon dioxide issue. In support of this Motion, New Mexico states as follows:

PROCEDURAL BACKGROUND

The relevant procedural background provides the context for New Mexico's request. Region 9 issued the above-referenced PSD permit to Desert Rock Energy Company, LLC on July 31, 2008 for construction of a 1500 MW coal-fired power plant on the Navajo Nation in northwestern New Mexico. A coalition of NGOs filed a petition for review of the permit on August 14, 2008. On August 15, 2008, New Mexico filed its petition for review. In an August 21, 2008 order, the Board granted Petitioners' request for an extension until the October 2, 2008 to file supplemental briefing in support of the petitions for review, noting the "large number" of "complex" issues and the substantial quantity of new materials issued in conjunction with the final permit. *See Order of August 21, 2008, Granting Desert Rock's Motion to Participate, Granting a 30-day Extension of Time, and Denying Stay of Briefing on Certain Issues*, at 4. Accordingly, New Mexico and the NGO petitioners each filed supplemental briefing with the Board on October 2, 2008.

On October 6, 2008, the Board issued an Order Scheduling Response Date, pursuant to which Region 9 and DREC were given 30 days, until November 3, 2008, to file responses to the petitions and supplemental briefs. On October 9, 2008, the Region filed a motion seeking a 30-day extension of time to submit its response brief due to the

“complexity and volume” of the issues presented. *See* Motion for Extension of Time to Respond to Petitions and Supplemental Briefs at 2. On October 14, 2008, the Board granted the Region’s motion and extended the deadline for responses to petitions and supplemental briefs until December 3, 2008.

On November 18, 2008, New Mexico filed a motion to supplement the record on appeal, or, in the alternative, for remand because elevated ozone levels caused NAAQS nonattainment in area in which Desert Rock would be built. Additionally, new materials issued by the National Park Service raised concern about the Region’s ozone analysis for Desert Rock and presented new information regarding ozone impacts from oil and gas development.

On November 26, 2008, Region 9 moved the Board for an additional 35-day extension to file response briefs in order “to evaluate how the Desert Rock permit and this appeal are affected by the Environmental Appeals Board’s recent decision in *In re Deseret Electric Power Cooperative*, PSD No. 07-03.” *See* Motion for Extension of Time to File Response to Petitions and Supplemental Briefs, at 1. Region 9 also indicated that the need to respond to New Mexico’s motion to supplement the record provided an additional ground for the requested extension. *Id.* at 5. In response to the Region’s request, and similar requests submitted by DREC and the Dine Power Authority, the Board extended the deadline for responses to the petitions, supplemental briefs and New Mexico’s motion to supplement the record until January 8, 2009.²

On January 8, Region 9 filed a Notice of Partial Withdrawal of Permit indicating that it was withdrawing those portions of its response to comments that addressed the question of whether the Region bore an obligation to impose limits on Desert Rock’s

² DREC filed its response to New Mexico’s motion to supplement on December 3, 2008.

emissions of carbon dioxide. According to the Notice, Region 9 will newly issue a statement of basis as to that issue pursuant to the notice and comment requirements in Part 124. Also on January 8, 2009, DREC, the Dine Power Authority and the Region filed responses to the petitions and supplemental briefs, and Region 9 filed its response to New Mexico's Motion to Supplement the Record on Appeal, or, in the Alternative, for Remand.

ARGUMENT

I. THE CIRCUMSTANCES OF THIS APPEAL JUSTIFY SUBMISSION OF REPLY BRIEFS.

Pursuant to the EAB Practice Manual, a petitioner may be granted leave to file a reply brief upon a motion "explaining why a reply brief is necessary." EAB Practice Manual § III.D.5, at 36. Accordingly, the Board has granted leave to file a reply where reply briefing would "assist in the resolution of the issues" raised in the petitions and would provide an opportunity to reply to arguments made for the first time in the response briefing. Order of July 26, 2007, *In Re District of Columbia Water and Sewer Authority*, NPDES Appeal Nos. 05-02, 07-10, 07-11, 07-12. *NPDES Permit No. DC0021199*; and see Order of August 14, 2008, *In re Northern Michigan University*, PSD Appeal No. 08-02 (granting leave to reply because petitions raised novel issues). In a variety of recent, complex permit appeals, the Board has granted petitioners leave to submit replies. See, e.g., Order of Nov. 6, 2007, *In re ConocoPhillips Co.*, PSD Appeal No. 07-02; Order of Aug. 19, 2005, *In re: Prairie State Generation*, PSD Appeal No. 05-05.

Here, ample good cause exists to justify reply briefing. First, the arguments raised in the petitions present several questions that, to petitioner's knowledge, have

never before been addressed by the Board. For example, the Board is presented with a question of first impression as to whether Region 9 can satisfy its obligation to issue the permit only *after* completion of a formal Endangered Species Act consultation by issuing a permit with a term that purportedly addresses the implications of a post-permit consultation. As another example, New Mexico has argued that gasified combustion technology (integrated gasification combined cycle technology or “IGCC”) must be considered in the BACT analysis. The Board must therefore address the novel question of whether Region 9 appropriately excluded IGCC from consideration in the BACT analysis under the rationale that IGCC requires a “redefining of the source.” The petitions also raise the unanswered question of whether the Clean Air Act requires completion of a MACT determination for hazardous air pollutants prior to issuance of a PSD permit. Likewise, the combined circumstances of this unusual permitting process and the actual measured ozone conditions raise novel questions regarding ozone.

Second, an initial review indicates that DREC and Region 9 have asserted new arguments in the response briefs that were not presented in the response to comments. For example, EPA, for the first time in its response brief, purports to rely on U.S. Fish and Wildlife Service guidance document in support of its issuance of the permit prior to initiation of the required Endangered Species Act consultation. (Region 9 Resp. at 119-120).

Finally, as set forth above, Region 9 and the Board have acknowledged that the issues presented in this case are especially complex and the materials relating to those issues are especially voluminous. Indeed, the NGO petitioners submitted 295 pages of briefing and New Mexico submitted 80 pages. DREC filed a 274 page response brief and

Region 9's response was 137 pages. Especially in a case of such magnitude, reply briefing serves the purpose of refining the key issues, thereby assisting the Board in its review.

In addition, good cause supports a grant of leave to reply to responses to New Mexico's motion to supplement the record. That motion raises issues integrally intertwined with complex ozone issues presented in the petitions and supplemental briefing. Responses from DREC and Region to the motion raise further questions about the legal and factual significance and implications of the new information. Moreover, because the new data change the attainment status of the region, this issue raises public policy issues of great significance to New Mexico. The Board's consideration of this issue would be aided by reply briefing.

II. THE BOARD SHOULD STAY BRIEFING AND CONSIDERATION OF WHETHER CARBON DIOXIDE LIMITS MUST BE IMPOSED PENDING THE REGION'S ISSUANCE OF A REVISED STATEMENT OF BASIS.

New Mexico's petition and supplemental brief challenged the basis for Region 9's refusal to impose BACT requirements on Desert Rock's emissions of carbon dioxide. Following the submission of New Mexico's supplemental briefing, on November 13, 2008, the Board issued its decision in *In re Deseret Electric Power Cooperative*, PSD No. 07-03. In the *Deseret* decision, the Board rejected EPA's contention that its prior interpretations of the Clean Air Act precluded it from considering carbon dioxide to be covered by PSD provisions that address pollutants "subject to regulation" under the Act. Region 9 made the same contention in its response to comments for the Desert Rock permit.

As noted in the procedural background set forth above, Region 9 filed a "Notice of Partial Withdraw of Permit" on January 8, 2009, in which the Region announced its

withdrawal of those portions of the response to comments document that contain “substantially the same reasoning that the Board found inadequate in *Deseret Power*.” Notice of Withdrawal, at 2. The Region further indicated it would provide “a new statement of basis addressing the issue of whether the permit should contain an emissions limit for carbon dioxide,” and would give notice of the new statement of basis and provide an opportunity for public community in accordance with the regulations at Part 124. *Id.* at 3. Without a full opportunity to respond to the partial withdrawal, DREC submitted substantial briefing addressing the carbon dioxide issue, noting its reservation of rights to challenge the validity of the partial withdrawal. DREC Resp. at 15, n. 7.

As a result of the partial withdrawal, it would be more efficient for all parties to prepare further briefing of the carbon dioxide issue only once EPA has reissued its statement of basis on the matter. New Mexico therefore requests that the Board stay all further briefing and consideration of this issue until such time as the Region’s new statement of basis has been finally issued and can, if warranted, be presented for review to the Board.

As stated above, Region 9’s Notice of Withdrawal indicates that it will reissue a statement of basis pursuant to Part 124, including public notice, comment, and, presumably, the right to review. As Region 9 has acknowledged, with respect to this issue, the Administrative Record is currently deficient. Region 9 Resp. at 4. New Mexico’s request for a stay of further briefing or consideration of the carbon dioxide issue is therefore contingent upon New Mexico having the opportunity to address this issue upon final issuance of the new statement of basis by Region 9, consistent with the procedures set forth in Part 124. Further, in requesting a stay of briefing or consideration

on the carbon dioxide issue until Region 9 has completed this process, New Mexico reserves the right to reply to arguments asserted by DREC in its response to the petitions on this issue.

CONCLUSION

For the foregoing reasons, New Mexico respectfully requests that the Board grant leave to submit a reply to the responses to its petition for review and supplemental briefing, as well as a reply to the responses to its Motion to Supplement the Record on Appeal, or, in the Alternative for Remand on or before February 13, 2009. In addition, New Mexico requests that the Board stay any further briefing or consideration of the issue concerning the Region's obligation to impose limits on carbon dioxide emissions pending the Region's issuance of a new statement of basis for its position on that issue.

Date: January 16, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 16, 2009 he caused a copy of the foregoing *State of New Mexico's Motion for Leave to File Reply and for Stay of Issue Withdrawn by Region 9*, to be served via facsimile, by U.S. mail and electronic mail (except as otherwise indicated) on:

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