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Attorney General of New Mexico

ENVIR. APPEALS BOARD

GARY K. KING
Attorney General

ALBERT J. LAMA
Chief Deputy Attorney General

August 14, 2008

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

Sender's Direct Contact Information:
Water, Environment, and Utilities Division
P.O. Drawer 1508
Santa Fe, NM 87504-1508
Direct Dial: (505) 827-6087
Facsimile: (505) 827-4440
Email: scohen@nmag.gov

Re: Petition for Review of PSD Permit No. AZP 04-01 and Accompanying Motion

Dear Clerk of the Board:

Enclosed please find an original and six copies each of the State of New Mexico's Petition for Review and its Motion for Extension of Time. Please return a file-marked copy to us in the enclosed self-addresses stamped envelope.

Please feel free to contact me at (505) 827-6087 if you have any questions or need any additional information.

Sincerely,

A handwritten signature in black ink, appearing to read "Seth T. Cohen".

Seth T. Cohen
Assistant Attorney General

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

AM 11: 23

ENVIR. APPEALS BOARD

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IN RE:)
)
DESERT ROCK ENERGY COMPANY, LLC)
)
PSD Permit No. AZP 04-01)
_____)

PSD Appeal No. ____

**NEW MEXICO'S MOTION FOR EXTENSION OF TIME TO FILE
SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR REVIEW AND
REQUEST FOR EXPEDITED CONSIDERATION**

Petitioner the State of New Mexico ("New Mexico") respectfully requests that the Environmental Appeals Board ("EAB") grant a 45-day extension of time (from September 2, 2008 until October 17, 2008) to file its supplemental brief in support of its Petition in the above-captioned matter.¹ New Mexico is petitioning for review of the Environmental Protection Agency's ("EPA") decision of July 31, 2008 to issue a Prevention of Significant Deterioration ("PSD") permit ("Permit") to Desert Rock Energy Company, LLC ("DREC"). The permit authorizes DREC to construct the Desert Rock Energy Facility ("Desert Rock"), a 1500 megawatt coal-fired power plant on the Navajo Indian Reservation in northwestern New Mexico. In support of this motion, New Mexico states the following:

As is described below, this permitting process has been one of exceptional scope and complexity. New Mexico anticipates that it cannot adequately analyze and brief the

¹ The permit was issued on July 31, 2008, 30 days from which is August 30, a Saturday. Pursuant to 40 CFR 124.20(c), the deadline for petitions would be the next business day, or Monday, September 1, 2008. Because that date, however, is a federal holiday, the petition would be due on Tuesday, September 2, 2008.

issues presented by this Permit and EPA's Response to Public Comments within the standard 30-day period. The EAB has held that "for good cause shown" the Board will allow a party that has filed "a timely petition identifying all of the issues on appeal" an "extension of time to file a supplemental brief to support the legal issues raised in the petition." *In re: Town of Marshfield Massachusetts*, NPDES Appeal No. 7-03, slip op. at fn. 10 (EAB, March 27, 2007). *See, In re: BP Cherry Point*, 12 E.A.D. 209, 215 (EAB 2005)(granting petitioner two extensions of time totaling more than two months from date of permit issuance for filing substantive brief in support of issues identified in petition). EAB has also granted extensions of briefing deadlines to participants in recent cases involving PSD permits, with the express purpose of receiving thorough briefing "in order for the Board to give appropriate consideration to the issues presented to it for resolution." Order of Oct. 26, 2007, *In re ConocoPhillips Co.*, PSD Appeal No. 07-02 (granting a second motion for extension of time for briefing); Order of Jan. 20, 2006, *In re: Prairie State Generation*, PSD Appeal No. 05-05 (granting 45-day extension of time for briefing); Order of July 10, 2008, *In re Northern Michigan University, Ripley Heating Plant*, PSD Appeal No. 08-02 (granting three-week extension of time for briefing).

Petitioner has good cause for its extension request in this matter. The circumstances surrounding the issuance of this Permit make clear that this has been an exceptionally involved permitting process. Although the application for this Permit was deemed administratively complete on May 21, 2004, EPA Region IX required more than four years—until July 31, 2008—to issue the Permit. Region IX has repeatedly explained in public media that the lengthy duration of this permitting process is a function of the unusual complexity and volume of issues presented by Desert Rock.

In fact, several aspects of this permitting process reflect its unusually extensive scope. The extended public comment process lasted 120 days, making it four times longer than the required comment period. EPA received in excess of 1,000 public comments. Those comments, in turn, resulted in substantial additional air modeling and analysis by EPA prior to its issuance of the final Permit. New Mexico is still reviewing the Response to Public Comments, however it appears that EPA conducted substantial amounts of new modeling after issuance of the proposed permit and prior to issuance of the final permit that has yet to be reviewed by the public. For instance, EPA states in response to Comment 9:

EPA agrees that SO₂ increment expansion for Cameo Station was not properly documented. In addition, the emission rates and stack parameters used in the modeling do not appear to match those in the supporting documentation, which relied on data supplied by the Colorado Department of Public Health and Environment. Accordingly, EPA re-examined the source data, corrected the emissions and stack parameters, and incorporated these into CALPUFF modeling.

And in response to Comment 10:

EPA disagrees with most of the comments, but does agree that baseline emissions for San Juan Generating Station (SJGS) may have been overestimated. Accordingly, EPA carried out CALPUFF modeling to examine the effect of several alternative methods and emission assumptions, including those of the commenters.

And in response to Comment 17:

EPA agrees that while the Navajo Nation sources are relatively small, they should have been included in the modeling analyses. EPA extracted data on these sources from documentation for Navajo Nation source permits under Title V of the Clean Air Act and 40 CFR §71, and performed CALPUFF modeling to assess their impact.

In the Response to Public Comments, EPA acknowledges that numerous emission sources, including major emitting sources such as Four Corners Power Plant, were

omitted from the original modeling on impacts on NAAQS for criteria pollutants and has conducted subsequent modeling to include these sources.² Given the scope of the additional modeling, more time is needed to analyze the results to determine whether EPA erred in its analysis of this modeling.

EPA's final permit is accompanied by more than 220 pages of responses to comments as well as 42 attachments totaling several hundred pages. Several hundred pages of modeling data compiled by EPA as part of its effort to respond to comments are also included in the materials accompanying the final permit. In addition, multiple additional comments were submitted after the close of the comment period due to new legal or factual developments. EPA separately responded to those comments, again with substantial supporting materials. Under these exceptional circumstances, the 30-day time limit set forth in 40 C.F.R. 124.19 for filing of a complete petition prejudices Petitioner's ability to explore and brief the issues for which it seeks review. Finally, EPA has changed several emission limits in the final permit, added new conditions for ESA consultation and sulfur dioxide mitigation, and created optimization test periods for criteria pollutant controls, among several other changes.

The issues for which Petitioner seeks review also include multiple issues that have not previously been addressed by the Board. *See* Order of July 10, 2008, *In re Northern Michigan University, Ripley Heating Plant*, PSD Appeal No. 08-02 (identifying the existence of issues of first impression as grounds for extension). For example, the Board has never before addressed the specific question of whether EPA must consider

² In response to Comment 19, EPA states: "EPA agrees that FCPP was omitted, and should have been included in the Class II cumulative analysis for PM10. In response to this comment, EPA used CALPUFF to model FCPP using emission rates derived from the Potential to Emit from FCPP's Clean Air Act Title V permit."

Integrated Gasification Combined Cycle (or "IGCC") combustion technology as an alternative in its BACT analysis. The Administrative Record contains several comments related to IGCC to which EPA provided extensive responses in its Response to Comments and in the associated Appendix. Also, EPA proposes an unusual approach for compliance with the Endangered Species Act consultation requirement, an approach that has never before been addressed by the EAB. An extension of time will provide New Mexico an opportunity to fully brief these issues for the Board and EPA.

Petitioner conferred with EPA as to this Motion, and EPA does not oppose the motion. This motion is made in good faith and not intended to cause delay. EPA's decision not to oppose this Motion suggests that EPA suffers no prejudice from the requested extension. To the contrary, EPA (and the Board) will benefit from allowing Petitioner adequate time to prepare thorough briefing. Moreover, because of the scope and complexity of issues posed by this Permit, Petitioner would stipulate to reasonable requests for extensions from EPA and/or other parties who may participate in this matter.

Nor would the Permittee, not yet a party to this proceeding, suffer any prejudice from the requested extension. As suggested above, in the Permit at issue, Region IX has taken the unusual step of adding a permit condition that states:

Construction under this permit may not commence until EPA notifies the Permittee that it has satisfied any consultation obligations under Section 7(a)(2) of the Endangered Species Act with respect to the issuance of the permit.

PSD Permit No. 04-01, II (A). The administrative record in this case makes clear that no such consultation has begun because the United States Fish and Wildlife Service has yet to receive a satisfactory Biological Assessment (BA). Thus, even if Petitioner's request

for review/remand were to be denied, the Permittee could not proceed with construction until this condition is satisfied, which is likely to take several more months.³

Consistent with the practice in prior cases where such extensions have been sought, Petitioner has filed with this Motion its timely Petition for Review of the Permit. The Petition establishes, pursuant to 40 C.F.R. 124.19(a), Petitioner's satisfaction of the threshold requirements for seeking review from the Board. The Petition also identifies the issues that Petitioner is raising in its appeal of this Permit. The extension requested in this Motion is only for the preparation of a supplemental substantive brief in support of the issues raised in the Petition. Should this motion for an extension of time to file a supplemental brief to the Petition for Review be denied, the Petitioner reserves the right to file a supplemental brief by the original filing deadline.

For the foregoing reasons, Petitioner respectfully requests that the Board enter an order extending the time by which Petitioner may file a brief in support of its petition until October 17, 2008. The Petitioner also requests expedited consideration of this request by the EAB so that it may file a substantive brief by the appropriate filing date.

³ The January 7, 2008, letter from the U.S. Fish and Wildlife Service regarding the BA for Desert Rock indicates that the project "may affect, [and is] likely to adversely affect" several endangered species and their habitat, thus necessitating the preparation of a full Biological Opinion once a satisfactory BA is completed.

Date: August 14, 2008

Respectfully submitted,

GARY K. KING, ATTORNEY GENERAL
STATE OF NEW MEXICO



Seth T. Cohen
Assistant Attorney General
P.O. Drawer 1508
Santa Fe, New Mexico 87504-1508
Phone: (505) 827-6087 Fax: (505) 827-4440

Leslie Barnhart
Eric Ames
Special Assistant Attorneys General
New Mexico Environment Department
P.O. Box 26110
Santa Fe, New Mexico 87502-6110
Phone: (505) 827-0293

Attorneys for Petitioner, State of New Mexico

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 14, 2008 he caused a copy of the foregoing to be served by mail on:

Deborah Jordan
Director, Air Division (Attn: AIR-3)
EPA Region 9
75 Hawthorne Street
San Francisco, CA 94105-3901

and

Brian Doster
U.S. Environmental Protection Agency
Office of General Counsel
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 40460

and by electronic mail to:

DesertRockAirPermit@epa.gov

R9AirPermits@epa.gov

and

Doster.Brian@epa.gov



Seth T. Cohen