

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

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ENVIR. APPEALS BOARD

IN RE:)

DESERT ROCK ENERGY COMPANY, LLC)

PSD Permit No. AZP 04-01)
_____)

PSD Appeal Nos. 08-03 & 08-04

**STATE OF NEW MEXICO'S MOTION TO SUPPLEMENT
THE RECORD ON APPEAL OR, IN THE ALTERNATIVE,
FOR REMAND AND REOPENING OF THE PUBLIC COMMENT PERIOD**

Petitioner State of New Mexico ("New Mexico") respectfully requests that the Environmental Appeals Board ("Board") consider new ozone evidence as part of the record on appeal in this matter. In the alternative, given the significance of this new evidence, New Mexico requests that the Board remand the Desert Rock PSD permit now and require EPA Region IX to reopen the public comment period so that it may consider the new ozone evidence. New Mexico conferred with EPA, Desert Rock Energy Company, LLC, and the Diné Power Authority regarding this motion; each of these parties opposes this motion. In support of this motion, New Mexico states the following:

INTRODUCTION

As is more particularly described below, two events with profound implications for the ozone issues raised in this case have occurred since New Mexico filed its Supplemental Brief on October 2, 2008. ~~First, high October ozone levels have now pushed the region in which Desert Rock would be built into nonattainment. See Exhibit Z, attached hereto.~~ Second, on October 3, 2008, the National Park Service ("NPS") submitted new information to EPA Region IX showing

EXHIBIT

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ozone impacts from the oil and gas industry that significantly exceed the impacts Region IX had assumed in its Desert Rock ozone analysis. See Exhibit AA, attached hereto. Both events provide direct support for positions asserted in the comment period and raised in New Mexico's Supplemental Brief. See AR 66, at 52-54; AR 57.9; AR 67; and see N.M. Supp. Br. at 41-56. Because this new information definitively shows that EPA's determination that Desert Rock would not "cause or contribute" to ozone nonattainment was clearly erroneous, the Board should consider the information in this appeal. The Board cannot fully and fairly evaluate the ozone issues raised in the Desert Rock petitions without taking this significant new ozone information into account.

As an alternative, the Board should remand the permit to EPA now to address the substantial new questions raised by the ozone information and to reopen the public comment period as to this issue.¹ A remand is an appropriate approach here because, given the significant difference between actual ozone conditions and the ozone conditions considered by EPA, the permitting record is inadequate and incomplete without additional analysis on this issue.

ARGUMENT

I. THE NEW OZONE INFORMATION WARRANTS CONSIDERATION.

As the EPA's "final decision maker," the Board has "on occasion considered requests to supplement the administrative record." *In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 516 (EAB 2006); and see *In re Marine Shale Processors, Inc.*, 5 E.A.D. 751, 797 n. 65

¹ New Mexico acknowledges that the decision regarding reopening of the public comment period under 40 C.F.R. 124.14(b) "largely depends on the Region's discretion," however, where, as here, very substantial new questions have been raised, a failure to reopen the permitting record would constitute an abuse of that discretion. *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 584 (EAB 1998); *In re Keene Wastewater Treatment Plant*, NPDES Appeal No. 07-18, slip op. at 23 (EAB, March 19, 2008). Moreover, to the extent that the Board remands this permit on any other issue—including, as may now be inevitable, for reconsideration of the carbon dioxide analysis in the light of the recent decision in *In re Desert Electric Power Cooperative*, PSD Appeal No. 07-03, slip op. (EAB Nov. 13, 2008), 13 E.A.D. at ___—such a remand should include an order that EPA redo its ozone analysis, including consideration the new information presented in this motion as well as opportunity for public comment.

(EAB 1995)(granting petitioner's requests to add exhibits to the record on appeal and considering those exhibits prior to ruling). By limiting the circumstances under which new information may reasonably be considered, the Board has ensured that it does not undermine the general preference for finality in the administrative process. *See, e.g., In re Keene Wastewater Treatment Plant*, NPDES Appeal No. 07-18, slip op. at 23 (EAB, March 19, 2008). Such an approach comports with the Board's recognition that an "[a]gency may relax procedural rules if the ends of justice so require." *In re Marine Shale Processors, Inc.* 5 E.A.D. 751, 763 n.11 (EAB 1995) citing *American Farm Lines v. Black Ball Freight Services*, 397 U.S. 532, 539 (1970). Board decisions provide an indication of the kinds of circumstances that justify consideration of new evidence. Such circumstances converge in the present case.

A. The Significance of The New Ozone Information Justifies Its Consideration by The Board in This Appeal or Compels a Remand.

~~The recent ozone data from the Four Corners region have enormous significance for the issues before the Board in this appeal; those data push the region into nonattainment.² Under the Clean Air Act's PSD permitting provisions, EPA's principal obligation is to ensure that a new source "will not cause or contribute to air pollution in excess of" the NAAQS. 42 U.S.C. § 7475(a) (3). The new data demonstrate that the EPA made a clear error on this fundamental point: Desert Rock's significant emission of ozone precursors (NO_x and volatile organic compounds) will necessarily "cause or contribute" to the ozone nonattainment in the region. The new information conclusively corroborates New Mexico's argument that even using EPA's~~

²~~The area is currently in nonattainment as a matter of fact. The formal legal process for redesignating the area begins with New Mexico's recommendation for redesignation, which must be submitted to EPA for approval by March 12, 2009. 73 Fed. Reg. 16436, 16503 (March 27, 2008). New Mexico is not suggesting here that the area now be treated as a legally designated nonattainment area for purposes of permitting Desert Rock. Rather, the fact that the area is now in nonattainment bears directly on EPA's obligations with respect to permitting under the PSD provisions of the Act.~~

estimation of Desert Rock's impacts on ozone levels, Desert Rock "would certainly 'cause or contribute' to a violation of the 8-hour ozone NAAQS." N.M. Supp. Br. at 51.

The Board has repeatedly made clear that it may properly exercise its discretion to consider new issues or information where such issues or information are of great significance. The Board has indicated, for example, that even when an issue was not preserved for review, the Board may still consider it if it is of sufficient significance. In *In re Campo Landfill Project*, 6 E.A.D. 505, 519 n.19 (EAB 1996). Likewise, where "significant new information" emerges after the close of the public comment period, it "appropriately should be considered" in finalizing a permit's terms. *In re Prairie State Generating Co.*, PSD Appeal No. 05-05, slip op. at 91 (EAB Aug. 24, 2006), 13 E.A.D. at _____. The Board has also indicated that where "new data, information, or arguments" arise after the issuance of a permit, such data, information or arguments may properly be considered if the new data "appear to raise substantial new questions." *In re Keene Wastewater Treatment Plant*, NPDES Appeal No. 07-18, slip op. at 23 (EAB, March 19, 2008). As the Board explained in *Keene*, "[i]t is the exceptional case in which data developed *after* the issuance of a final permit will be deemed *substantial* enough to warrant a reopening of the permitting record." *Id.* Desert Rock presents just such an exceptional case.

~~1. Elevated Ozone Levels Measured in October of 2008 Have Pushed
The Region Above The NAAQS.~~

~~On October 15 and 18, 2008, the Navajo Lake Monitoring Station in San Juan County,
New Mexico registered 8-hour ozone readings of 0.076 and 0.077 parts per million,
respectively.³ See Ex. Z. As a result of these two readings, the fourth highest 8-hour ozone level
for 2008 is 0.075 ppm. *Id.* This brings the three-year average (2006-2008) of the fourth highest
yearly 8-hour ozone levels to 0.077 ppm. *Id.* The new data therefore compel New Mexico to~~

~~³ Upon receipt of these data, the New Mexico Environment Department undertook a quality assurance process for
the data and also verified the proper functioning of the monitoring equipment.~~

~~redesignate the air quality control region encompassing the proposed Desert Rock site as nonattainment for ozone.~~

~~In addition to its serious practical consequences for New Mexico, nonattainment raises substantial issues regarding the Desert Rock permitting process. EPA based its issuance of the permit on its determination that, even with Desert Rock's substantial emission of ozone precursors, the area "would still be well below the 75 ppb level of the 8-hour ozone NAAQS." (EPA Response to Comments ("RTC") at 125.) New Mexico's Supplemental Brief contested this determination, asserting that EPA had relied on inherently deficient modeling, that EPA had not and could not reconcile the projected background ozone levels with actual data, and that the modeling provided an insufficient basis for proper assessment of Desert Rock's full impacts on ozone levels. See New Mexico's Supp. Br. at 41-52.~~

~~The new data provide conclusive support for New Mexico's arguments.⁴ Contrary to EPA's conclusion that the area could absorb what it estimated to be Desert Rock's 4 ppb contribution to ozone levels and remain "well below" the NAAQS (RTC at 125), we now know as a matter of fact that the area is already in nonattainment. This means that Desert Rock's emissions will necessarily "cause, or contribute to, air pollution in excess of any...national ambient air quality standard" in violation of 42 U.S.C. § 7475(a)(3). New Mexico should not bear the burden of reducing ozone levels that are unduly exacerbated as a result of EPA's error. EPA's opposition to the consideration of such information now elevates discretionary matters of procedure over achievement of the fundamental purposes of the Clean Air Act.~~

~~⁴ The recent ozone data showing nonattainment also provide conclusive support for New Mexico's argument that EPA's ozone analysis failed to consider ozone impacts over a sufficiently representative timeframe. EPA improperly relied on ozone modeling using only a 4-day span in June of 2002. New Mexico challenged the validity of such an approach because its narrow timeframe excluded consideration of changing variables over the course of an "ozone season [that] spans five months." Supp. Br. at 47. Indeed, the new data show that peak ozone levels occur as late as October, and therefore result from factors (climate, transport, etc.) very different from those typically exhibited in June.~~

2. Oil And Gas Activities Will Have A Much Greater Impact On Ozone Levels Than EPA Estimated.

In an October 3, 2008 letter to EPA Region IX, the NPS urged EPA to take a “harder look at [its ozone] analysis,” and cautioned that areas surrounding Desert Rock were on the brink of nonattainment. Ex. AA. The NPS also provided a new analysis of the ozone impacts of oil and gas development in the region. Ex. AA, (“National Park Service Technical Comments on EPA’s Response to Comments on the Desert Rock Prevention of Significant Deterioration (PSD) Permit Application,” at 3). That analysis concludes that “the maximum 8-hr ozone enhancement from oil and gas, up to 10 ppb, could affect southwestern Colorado and northwestern New Mexico.” *Id.* (Emphasis added).

This contrasts sharply with a key assumption underlying EPA’s flawed ozone assessment. EPA relied on section 4.2 of a 2004 modeling report for the proposition that, as to ozone, oil and gas development would “be insignificant and in fact, lead to net lowering of ambient ozone levels.” RTC at 125, n. 12; *and see* Ex. A (attached to New Mexico’s Supplemental Brief) at 4.2.2. Thus, EPA concluded that even with “substantial oil and gas development in the area,” the “area is projected to remain well below the 8-hour ozone standard.” RTC at 124. As suggested in *Keene*, this new information ought to be considered because it raises “substantial new questions” about key determinations underlying the Region’s ozone analysis. *Keene*, slip op. at 23, NPDES Appeal No. 07-18.

B. The Long Duration Of This Permitting Process Justifies Consideration Of The New Ozone Information.

The unusually long duration of the Desert Rock permitting process additionally makes this the kind of “exceptional case” in which “data developed *after* the issuance of a final permit” warrants consideration. *Keene*, slip op. at 23, NPDES Appeal No. 07-18. More than four years

elapsed between the completion of the ozone modeling in 2004 and permit issuance in 2008. In addition, approximately 20 months passed between the close of the public comment period in late 2006 and the issuance of the permit.

The Board has recognized that such gaps can render determinations made in the permitting process outdated, particularly when significant new developments occur. In *Prairie State*, the Board recognized that “gaps” between the close of comments and agency action can give rise to new information that, if “significant enough,” should be considered. Slip op. at 91-3, 13 E.A.D. at _____. In *In re St. Lawrence County Solid Waste Disposal Authority*, the Administrator noted that while an administrative record is normally closed at the end of the public comment period, “[i]n cases of unusual delay...the record may have to be reopened.” PSD Appeal No. 90-9, at 3 n. 3 (Adm’r July 27, 1990). The Administrator found such delay in *St. Lawrence* because, in that case, the public comment period closed in March of 1989 but the final permit was not issued until June of 1990. *Id.* Due to the “unusual” 15-month interval between the close of comments and the issuance of the permit, the Administrator found it appropriate to consider the implications of the new NSPS proposed during that interval. *Id.*

Region IX has already determined that consideration of post-comment-period developments is appropriate in this case. The Region considered and responded to comments received well after the close of the comment period regarding significant new developments: the Supreme Court’s decision regarding EPA’s authority to regulate carbon dioxide under the Clean Air Act in *Massachusetts v. EPA*, ___ U.S. ___, 127 S. Ct. 1438 (2007); and D.C. Circuit Court of Appeal’s nullification of the Clean Air Mercury Rule in *New Jersey v. EPA*, D.C. Cir. Case No. 05-1097 (decided Feb. 8, 2008). See EPA Responses to Late-filed Public Comments, at 1.

By the same token, consistent with the Board's opinion in *Keene*, the significant ozone developments that have arisen during the course of this appeal warrant consideration.⁵ The passage of time in this case has yielded new ozone data showing conditions about which the Region has, in this permitting process, only loosely speculated, and as to which we now know the Region was clearly in error. Such data should not be ignored.

C. The New Ozone Information Should Be Considered Because It Could Not Be Reasonably Ascertained Until Now.

The regulations governing the Board's review of this permitting decision require a petitioner to have raised "all *reasonably ascertainable* issues and submit all *reasonably available* arguments supporting their positions" during the public comment period. 40 C.F.R. § 124.13 (emphasis added). The Board has accordingly recognized that it may properly consider a new issue (or information) on appeal if that issue could not have been reasonably ascertained during the comment period. *See In re Campo Landfill Project*, 6 E.A.D. 505, 518-19 (EAB 1996)(allowing consideration of issues not reasonably ascertainable during comment period); *In re AES Puerto Rico L.P.*, 8 E.A.D. 324, 336 (EAB 1999)(refusing to consider new modeling information because of petitioner's failure to establish that such modeling was not reasonably ascertainable during the public comment period).

The Board may properly consider the new ozone information in this case because it was not reasonably ascertainable until now. ~~Here, as is shown on Ex. Z, the final NAAQS exceedance that pushed the area into nonattainment did not occur until October 18, 2008. Clearly, such information could not have been reasonably ascertained at any prior point in this~~

⁵ The Desert Rock permit is not final until the resolution of this appeal. 40 C.F.R. § 124.19(f)(1). Thus, as suggested by *Keene*, in the face of new developments of sufficient significance, there is no compelling jurisprudential distinction between the consideration, on appeal, of new developments arising after the close of comments but prior to permit issuance (as in *St. Lawrence*), and the consideration of new developments arising after permit issuance but while an appeal is pending.

~~permitting process. It bears noting that New Mexico did raise this issue to the extent it could by repeatedly warning the EPA at various times throughout the permitting process that the area was on the brink of nonattainment. N.M. Supp. Br. at 50.~~ Likewise, the current assessment of ozone impacts from oil and gas development was provided to EPA Region IX by the NPS on October 3, 2008, and could not have been reasonably ascertained by New Mexico at an earlier stage in this permitting process.


CONCLUSION

For the foregoing reasons, New Mexico respectfully requests that the Board consider the new ozone information presented herewith in the course of its review of the Desert Rock PSD Permit. In the alternative, New Mexico requests that the Board remand the Desert Rock Permit now, with an order requiring Region IX to reopen the public comment period, so that this new ozone information may be properly considered.

Date: November 17, 2008

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 17, 2008 he caused a copy of the foregoing *State of New Mexico's Motion to Supplement The Record on Appeal Or, In The Alternative, for Remand and Reopening of The Public Comment Period*, with attachments, to be served by U.S. mail and electronic mail (except as otherwise indicated) on:

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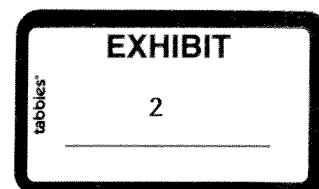
IV. THE PERMIT MUST BE REMANDED FOR AN APPROPRIATE ANALYSIS OF DESERT ROCK'S OZONE IMPACTS.

EPA issued the Desert Rock permit with almost total disregard for years of monitoring data showing that ambient ozone levels in San Juan County were at or approaching the NAAQS. EPA instead adhered to demonstrably flawed modeling from 2004 that projected ozone impacts for 2012 using a single four-day set of data from 2002. EPA simply ignored current elevated ozone monitoring data because the area has not been formally designated for nonattainment and, in EPA's view, the implication of the data was "uncertain."

~~In mid-October 2008, just as this permit appeal was getting under way, ozone data collected from a monitor downwind of the Desert Rock site in San Juan County demonstrated that the area had exceeded the 75 ppb ozone NAAQS.¹⁷ In other words, nonattainment of the ozone NAAQS in San Juan County was no longer "uncertain." On November 18, 2008, New Mexico moved the Board either to consider the new ozone information in this appeal or to remand the permit so that EPA could revisit this issue. See New Mexico's Motion to Supplement the Record on Appeal, or, in the Alternative, for Remand and Reopening of the Public Comment Period (hereinafter, "New Mexico's Motion"). During the pendency of this appeal, San Juan County has continued to violate the ozone NAAQS by a wide margin. The Navajo Lake Monitor recorded 8-hour ozone averages of 77 ppb (February 4, 2009), 78 ppb (February 6, 2009), 78 ppb (February 7, 2009), and 83 ppb (February 16, 2009).~~

~~EPA and DREC opposed New Mexico's Motion, but fail to offer a sound reason for disregarding the current ozone information or the more accurate oil and gas impact assessments throughout this permitting process. Instead, they bury their heads in the sand and insist that the~~

¹⁷ Attainment status is measured using a 3-year average of the annual fourth highest daily maximum 8-hour average. 73 Fed. Reg. 16,436 at 16,483 (Mar. 27, 2008).



~~2004 modeling reflects the best available data. Their disregard of the current data undermines the Act and reflects poor public policy.~~

~~**A. San Juan County's Exceedance of the Ozone NAAQS Must Be Taken into Account.**~~

~~EPA and DREC fail to provide a sound basis for disregarding the fact that the area in which Desert Rock would be built has ozone levels that currently exceed the NAAQS.¹⁸ Instead, they urge strict adherence to rules of administrative procedure, notwithstanding the fact that in the face of significant new information, the Board has discretion as to the application of those rules. Because neither DREC nor EPA can contest the Board's discretion, they are forced to argue that the exceedances of the ozone NAAQS are not "substantial" and do not raise "substantial new questions." EPA Resp. to NM Motion at 2; DREC Resp. to NM Motion at 4-5. These arguments lack merit.¹⁹~~

I. The ozone NAAQS is the relevant benchmark for determining nonattainment.

DREC suggests that the new information is insubstantial because the 75 ppb standard is "not automatically imposed" on its PSD permit.²⁰ DREC Resp. at 127. EPA, however, does not dispute the relevance to this permit of the 8-hour ozone standard of 75 ppb, which was

~~¹⁸ The area that New Mexico will recommend for nonattainment designation in less than a month includes all of San Juan County, which contains the proposed Desert Rock site, as well as the monitors referenced by the parties in this appeal (Substation, Bloomfield, and Navajo Lake).~~

¹⁹ EPA suggests that "existing ozone concentrations in the Four Corners area are appropriately addressed in the context of New Mexico's State Implementation Plan for the area, and not in the context of a PSD permit." EPA Resp. at 60. New Mexico's SIP obligations, however, do not relieve EPA, the permitting authority, from its obligation to ensure that a new source does not cause or contribute to a NAAQS violation under 42 U.S.C. § 7475(a)(3).

²⁰ New Mexico presented this ozone data in its Supplemental Brief, as well as data from the Administrative Record and data from EPA's public databases collected and published prior to issuance of the permit. *See* NM Supp. Br. at 49-52 and Ex. D attached thereto. New Mexico presented the October 2008 data in its Motion to demonstrate that San Juan County had exceeded the ozone NAAQS as measured by the three-year average of the fourth highest 8-hour average. Arguments pertaining to the Board's consideration of either set of data overlap to some degree in the briefing.

promulgated on March 27, 2008 and became effective on May 27, 2008. AR 121 at 7; Region Resp. at 67. In fact, EPA specifically considered, in its final permitting decision on July 31, 2008, whether Desert Rock would cause or contribute to ozone NAAQS. AR 120 at 125 (the “result [of Desert Rock’s maximum impacts] would still be well below the 75 ppb level of the 8-hour ozone NAAQS.”) Because the ozone NAAQS is the benchmark against which Desert Rock’s impacts must be (and were) measured, the fact that actual background ozone levels exceed that benchmark is of the utmost relevance to this permitting decision.

According to DREC, the ozone NAAQS would only be relevant to a PSD permitting process after the imposition of new “emission limits” pursuant to a state SIP, which would occur after submission (and, presumably, EPA approval) of a SIP by the May 12, 2014 deadline. DREC Resp. at 129-30. This argument ignores the fact that the Act now requires—and has required since before this permit was issued—that New Mexico use the 75 ppb ozone NAAQS as the benchmark for evaluating the attainment status for all areas of the State. Section 107(d)(1)(A) of the Act specifically requires states to submit attainment designations no later than one (1) year after promulgation of a revised NAAQS. Pursuant to the EPA’s March 12, 2008 rule promulgating the new ozone NAAQS, New Mexico must submit its designations by March 12, 2009. 73 Fed. Reg. 16,436 at 16,503 (Mar. 27, 2008). For purposes of determining attainment, this process immediately implements the ozone 2008 NAAQS, and no further rulemaking or administrative process is necessary.

Moreover, the PSD program is intended to prevent air quality problems before a new facility is permitted. Despite this fact, EPA and DREC would have the facility permitted now only to be swept up in a SIP process for the region that will likely reduce permitted emissions limits. This approach places the burden on the state of New Mexico to develop a plan to reduce

Desert Rock's ozone levels, when the issue must be considered now and could more effectively be addressed before the Desert Rock facility is permitted and constructed.

2. In the face of background levels in excess of the NAAQS, Desert Rock would presumptively contribute to a NAAQS violation.

In dismissing the relevance of the fact that San Juan County is now above the ozone NAAQS, DREC also errantly suggests that it falls on Petitioners "to substantiate" that "emissions from the Desert Rock Project would cause or contribute to ozone exceedances in the area generally or specifically at the Navajo Lake Monitor." DREC Resp. at 140. But, in view of San Juan County's exceedance of the ozone NAAQS, not only does the burden fall upon DREC as to this issue, but DREC must also overcome the strong presumption that Desert Rock would contribute to an ozone NAAQS violation in San Juan County. As EPA guidance directs:

[A] PSD source with significant new emissions of the applicable pollutant which constructs in an area adjacent to a nonattainment area should be presumed to contribute to the violation if it would have a significant impact at any point in the nonattainment area. However, if the proposed PSD source can demonstrate that its new emissions would not have a significant impact at the point of the violation when that violation is actually occurring, then the proposed source would meet the requirements of 40 CFR 52.21 (k)(1) provided that it would not cause any new violations of the NAAQS. This answer would apply whether the nonattainment area was newly discovered or was formally designated nonattainment under Section 107. I should like to add that, while such a demonstration is allowed, it will be extremely difficult to prove an insignificant contribution, especially in the short term.

EPA Memorandum from Richard G. Rhodes, Director of Control Programs Development Division to Alexandra Smith, Director Air & Hazardous Materials Division, Region X, Regarding Interpretation of "Significant Contribution" (December 16, 1980): ("Rhodes Memo") at 1-2.²¹ The Rhodes Memo indicates that the presumption is applicable to new sources

²¹ The Rhodes Memo forms the basis of and is expressly reaffirmed by the Emison Memo cited by DREC regarding spatial/temporal considerations as to a source's impacts. See DREC Resp. at 123.

proposed to be built adjacent to “newly discovered,” but not yet formally designated nonattainment areas.

B. EPA Erred in Relying on the 2004 Modeling.

Even leaving aside San Juan County’s exceedance of the ozone NAAQS, EPA’s reliance on the 2004 modeling for its ozone determination was clearly erroneous. Regardless of the model’s suitability for assessing Desert Rock’s ozone impacts in 2004, which Petitioners have contested, it became abundantly clear during the course of this permitting process—and long before EPA’s permitting decision—that the modeling was deficient.

EPA and DREC make a concerted effort to shield the Region’s flawed ozone determination behind the deference that the Board generally accords to the Region’s technical analysis. DREC Resp. at 116, 119, 124, 127, 131; Region Resp. at 59. That deference, however, is far from absolute, and cannot foreclose review of the Region’s rationale for its conclusions in the ozone analysis. *In re Indeck-Elwood, LLC*, 13 E.A.D.____, slip op. 47-48, n. 67 (EAB: Sept. 27, 2006)(remanding PSD permit due to technical shortcomings in analysis, noting that even as to technical determinations, the “permit issuer’s rationale for its conclusions must be adequately explained and supported in the record”); *In re Gov’t of D.C. Mun. Separate Sewer Sys.*, 10 E.A.D. 323, 348 (EAB 2002)(the Board “look[s] to determine whether the record demonstrates that the [permit issuer] duly considered the issues raised in the comments and whether the approach ultimately adopted by the [permit issuer] is rational.”) Here, EPA should not be accorded deference. EPA acknowledges that the ozone modeling suffered from “problems,” did not provide “a precise estimate of DREF’s impacts,” and did not reflect “high ambient ozone concentrations in the Four Corners Area.” AR 120 at 125; EPA Resp. at 64.

I. EPA has failed to address data that conflicted with the 2004 modeling.

As New Mexico asserted in its Supplemental Brief, a fundamental failing in EPA's analysis is its continued reliance on modeled background ozone levels in the face of actual data that demonstrated substantially higher levels. NM Supp. Br. 49-52. New Mexico's Supplemental Brief referenced monitoring data--compiled and published by EPA—that reflected eight-hour average ozone levels in San Juan County ranging up to 87 ppb, and that indicated, months before the permit was issued, that the three-year average of the fourth highest eight-hour average in San Juan County was 75 ppb, or exactly at the NAAQS. *Id. and see* Ex. D to NM Supp. Br. EPA admits that it “oversees the monitoring network, and is aware of the high ambient ozone concentrations in the Four Corners Area,” but declines to address the implications of those data, instead stating obliquely that the issue of “model adequacy” was addressed and that the “modeling should be considered as illustrative of the magnitude of impacts from a large power plant.” EPA Resp. at 64. Thus, EPA neither refutes the conclusion that, given ozone levels at or above 75 ppb, Desert Rock would contribute to an exceedance of the ozone NAAQS, nor provides any real explanation for disregarding those data.

The 2004 model performed poorly in part because it relied on an emissions inventory that grossly underestimated emissions from the oil and gas industry. NM Supp. Br. at 48. The fact that oil and gas development contributes significantly to ozone levels in the Four Corners Region was corroborated by a study submitted by the NPS to EPA—with the admonition to take a “harder look” at ozone in the Four Corners—in reference to the Desert Rock permit. *See* New Mexico Motion, at 6, and Ex. AA thereto. EPA has failed to address this issue.

EPA and DREC attempt to dispel the 2004 modeling's failings by citing data to suggest that the 2004 modeling made accurate projections of 2007 ozone levels at two monitoring

stations. In particular, EPA and DREC observe that the 2007 monitored design values for the Substation and Bloomfield monitors were slightly *less* than what was projected. EPA Resp. at 64 n. 22; DREC Resp. at 139-40.²² But this does not explain the model's severely inaccurate prediction for the Navajo Lake Monitor. The 2004 model projected a 2007 maximum ozone level of 62 ppb at Navajo Lake, but the fourth-highest eight-hour average at that monitor in 2007 was 79 ppb. *See* NM Supp. Br. at 50 and Exs. C (at 4-5), and D.

EPA cannot ignore higher ozone levels at one monitor in favor of lower readings at another location. The Navajo Lake monitor was installed in 2006 for the specific purpose of better measuring the full extent of the ozone levels in San Juan County. Its location downwind of the proposed Desert Rock site was selected specifically so that pollutants emitted upwind would have time to photochemically react to form ozone before reaching the monitor.

Additionally, the 2007 levels should be viewed in the context of the design values (rolling, three-year averages of the fourth highest 8-hour average in ppb) for the Substation and Bloomfield monitors at the time of permit issuance:

	2003	2004	2005	2006	2007
Bloomfield	74	72	72	69	69
Substation	75	73	72	71	72

See NM Supp. Br. at Ex B; data compiled from <http://www.epa.gov/air/data/>. These data suggest that Desert Rock's estimated contribution of up to 4 ppb would cause or contribute to ozone violations of the 75 ppb standard in the area in the average year.

²² It bears noting, as EPA is well aware, that excess NO_x levels in the vicinity of the Bloomfield monitor "scavenge" the ozone in that immediate vicinity by chemically reacting with it and, thereby, reducing ozone levels at the monitor. As a result, ozone levels recorded at Bloomfield under-reflect actual levels in the area.

2. EPA's spatial-temporal argument lacks support in the record.

Because Desert Rock's ozone contribution pushes the area up to the ozone NAAQS even using EPA's background levels, DREC and EPA suggest that the ozone analysis should be accorded a margin for error because of EPA's determination that "the projected 4 ppb impact of DREF...does not coincide in time or space with the maximum predicted ozone concentration." EPA Resp. at 66; DREC Resp. at 122-23. The record does not support this assertion.

The *only* support in the record for EPA's determination that Desert Rock's impacts would not occur at the same time as background peak levels can be found in the 2004 modeling report at Table 5-2, p. 5-4. *NM Growth and Control Strategy Modeling*, attached to NM Supp. Br. at Exh. A. That table uses only four days of data from June of 2002 to show that the projected maximum baseline ozone level for 2012 would occur on June 7 whereas the projected maximum impact from a power plant would occur on June 6. Based on that one-day difference in a single four-day ozone episode alone, EPA concludes that Desert Rock's maximum impact would *never* correspond with peak ozone levels.

The unreasonableness of resting such an important conclusion on a single four-day ozone episode is readily apparent in light of the actual ozone data for the area. The monitoring network overseen by EPA at the time this permit was issued had recorded 8-hour average ozone levels that exceeded the NAAQS at times throughout the calendar year with conditions that differ significantly from those in June. For example, monitors registered 8-hour averages of 80 ppb on April 20, 2006, and 79 ppb on August 25, 2007. *See* NM Supp. Br., Ex D. ~~Moreover, New Mexico cited a recent example of an ozone episode with 8-hour averages of 76 and 77 ppb on October 15 and 18, 2008. NM Motion at 4. Finally, as indicated above, the Navajo Lake Monitor recorded a peak 8-hour average of 83 ppb and three other 8-hour average levels~~

~~exceeding the ozone NAAQS on four days in February of 2009.~~ For these or any of the other numerous ozone episodes at various times throughout the years since the 2004 modeling, EPA simply has not and cannot demonstrate that Desert Rock's contribution at such times would not be significant.

The severe inadequacy of EPA's temporal analysis also undermines its conclusion about the correlation between Desert Rock's spatial impacts with ozone violations in the area. In an area with numerous ozone violations occurring throughout the year, it is not appropriate to base a conclusion about the spatial interrelation between Desert Rock's emissions and high background levels upon a single four-day episode from June of 2002. Moreover, to the limited extent that the 2004 modeling even considered the spatial ozone impacts of a new power plant, it did so principally in a manner that registered only those impacts greater than 2 ppb. *See* "Air Quality Modeling Analysis for the San Juan Early Action Ozone Compact: Maintenance for Growth and Control Strategy Modeling," at Section 4.2.1, attached to NM Supp. Br. at Ex. A, cited by EPA at AR 120, p 125. Because, however, EPA must double the impacts considered in that modeling to make it applicable to Desert Rock, the analysis is inadequate. For example, if the ozone impact of power plant emissions in the 2004 modeling were projected to be 1.5 ppb at a given location, it would not have appeared in the model's spatial projection for power plant impacts because of the 2 ppb cutoff. However, if that value were doubled to correct for the actual size of Desert Rock, those impacts (of roughly 3 ppb) would have registered over a much broader area than the 2004 modeling projected.

V. EPA FAILED TO ANALYZE THE NAAQS AND BACT FOR PM_{2.5}, OR ALTERNATIVELY, TO DEMONSTRATE THAT PM₁₀ IS AN ADEQUATE SURROGATE FOR PM_{2.5}.