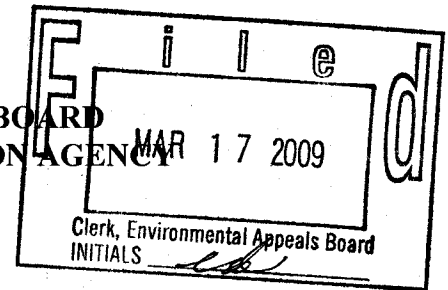


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:

Desert Rock Energy Company, LLC

PSD Permit No. AZP 04-01

PSD Appeal Nos. 08-03, 08-04,
08-05 & 08-06

ORDER GRANTING MOTION FOR EXTENSION OF TIME
TO FILE SURREPLY BRIEF

On January 22, 2009, the Environmental Appeals Board ("Board") granted review of a prevention of significant deterioration ("PSD") permit decision (number AZP 04-01) (the "Permit") issued by Region 9 ("Region") of the United States Environmental Protection Agency ("EPA" or "Agency") to Desert Rock Energy Company, LLC ("Desert Rock") on July 31, 2008. *See generally* Order Granting Review, Staying the Carbon Dioxide BACT Issue, and Granting Motions to File Amicus/Nonparty Briefs Motions to File Reply Briefs ("Order Granting Review"). In the Order Granting Review, the Board established a schedule for the filing of various briefs in the matter, including the filing of surreply briefs by the Region, Desert Rock, and Diné Power Authority ("DPA").¹ *See id.* at 7.

¹ The Board notes that, in response to the Order Granting Review, it received a timely amicus brief from the Physicians for Social Responsibility ("PSR"). For this reason, the Board has added PSR to the certificate of service in this case.

On March 13, 2009, the Region filed a motion with the Board requesting that it be granted an additional 45-day extension of time, until April 27, 2009, to file its surreply in the above-captioned case. EPA Region 9's Motion for an Extension of Time to File Surreply Brief ("Motion") at 1. DPA filed a response to EPA's motion. *See* DPA Response to EPA Region 9's Motion for an Extension of Time to File Surreply Brief. In its response, DPA states that it does not oppose the Region's motion but requests that it be granted a corresponding extension to file its surreply brief. *Id.* at 1. Because the Region filed its Motion on the date the surreply briefs were due, the Board issued an order that day suspending the obligation of all parties to file their surreply briefs but did not reschedule the due date of the briefs. *See* Order Suspending Obligation to File Surreply Briefs on March 13, 2009. The Board indicated that it would issue a further order in this matter the following week. *Id.* at 1.

In its Motion, the Region states that it needs additional time "to afford EPA officials appointed since the recent Presidential inauguration an adequate opportunity to consider the issues raised in the appeal and the positions previously advocated by EPA offices in briefs to the EAB." Motion at 1. More specifically, the Region states that "[s]everal issues addressed in the [January 8, 2009] Response Brief are based on policy positions held by EPA offices at the time of Region's 9's final permit decision and the filing of the Region's Response Brief." *Id.* The Region points out that EPA's new Administrator, Lisa P. Jackson, was sworn in after the Response was filed, on January 26, 2009, and that she and her advisers "have been reviewing many of the Agency's policies under the Clean Air Act and other statutes" since that time. *Id.* at 2. The Region avers that it has "apprised several EPA officials appointed since the Presidential inauguration of the issues raised in the appeal" and had "anticipated that they would

be able to complete the ongoing review of these issues with the Agency's current leadership in time to file a response to the Reply Briefs by March 13, 2009, but [that] this process has taken longer than initially expected." *Id.* Thus, the Region requests additional time "to ensure that the positions previously advocated by EPA attorneys on behalf of Region 9 in this matter have the support of the Agency's current leadership before the submission of an additional EPA brief in this matter." *Id.*

The Region further explains that it is requesting a 45-day extension because of the volume and complexity of this case as well as the fact that "the President has not nominated a Regional Administrator for Region 9 or General Counsel and the nominee for Assistant Administrator for the Office of Air and Radiation has not been confirmed." *Id.* The Region argues that "the unique circumstances of the transition from one Presidential Administration to the next in the midst of this proceeding warrant affording Region 9 additional time" to file its surreply brief. *Id.*

The Region states that it attempted to contact petitioners and Desert Rock and DPA in this matter to determine their positions on the Region's request for an extension. *Id.* at 3. The Region reports that Desert Rock does not oppose a 7-day extension of time provided Desert Rock is allowed the same extension. *Id.* Desert Rock does, however, oppose a 45-day extension of time. *Id.* The State of New Mexico does not oppose granting the Region a 45-day extension but does oppose granting other parties, presumably Desert Rock and DPA, an extension. *Id.* The Conservation Petitioners do not oppose the request. *Id.* The Region notes that it was unable to determine the other participants' positions prior to filing its motion. *Id.* As mentioned above, DPA has submitted a response regarding this motion.

On March 13, 2009, the Board also received a letter from New Mexico reporting that the State had recently learned that EPA Region 6 had determined that the Navajo Lake ozone monitor had malfunctioned and thus “data collected at that monitor from mid-October of 2008 to the present are believe to be invalid.” Letter from Seth T. Cohen, Assistant Attorney General, New Mexico, to Eurika Durr, Clerk of the Board, Environmental Appeals Board (Mar. 13, 2009). New Mexico is currently working with EPA “to determine the precise cause of the monitor malfunction” and to “reach a definitive conclusion regarding the data invalidation.” *Id.* at 2. The State believes this process may take several weeks. *Id.* According to New Mexico, this development has altered New Mexico’s position on San Juan County’s designation status under the Clean Air Act. *Id.* at 1. New Mexico states that this development also impacts certain arguments raised in the State’s Motion to Supplement and its Reply Brief that were based on the data. *Id.* at 1-2. New Mexico indicates that it “currently intends to file a notice with the Board immediately upon receiving the final determination from EPA and NMED regarding the invalidation of the Navajo Lake data. That notice would present the final determination on the matter and would confirm the precise implications of that determination for the argument by New Mexico in this appeal.” *Id.* Finally, the State notes that it expects it should be able to provide this notice in a time frame comparable to the Region’s requested extension. *Id.* The State requests the Board’s guidance on how best to proceed. *Id.*

Based upon the unique and extraordinary circumstances reported by the Region and summarized above, the Board GRANTS the Region’s motion for a 45-day extension of time to file its surreply brief. It would be highly inefficient to proceed without a clarification of whether the position of the Agency on fundamental issues has changed in light of the change of

Administration. Accordingly, the Region is ordered to file its surreply brief on or before April 27, 2009.

Neither Desert Rock nor DPA have presented persuasive reasons for receiving a similar 45-day extension of time in which to file their surreply briefs. The reasons supporting the Region's request are not mirrored with respect to either Desert Rock or DPA. Consequently, the Board is not granting their requests for corresponding extensions of time. As a courtesy to those participants, however, the Board GRANTS them several extra days in which to file their briefs. Accordingly, Desert Rock's and DPA's surreply briefs will be due on or before March 20, 2009.

With respect to New Mexico's request for guidance, the Board agrees with New Mexico's proposed approach as cited above and instructs the State 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.

So ordered.

ENVIRONMENTAL APPEALS BOARD



Edward E. Reich
Environmental Appeals Judge

Date: March 17, 2009

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Granting Motion for Extension of Time to File Surreply Brief in the matter of Desert Rock Energy Company, LLC, PSD Appeal Nos. 08-03, 08-04, 08-05, & 08-06 were sent to the following persons in the manner indicated:

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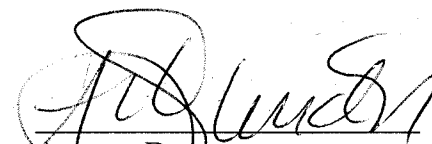
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Dated: MAR 17 2009



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