

**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

**CONSERVATION PETITIONERS' RESPONSE TO DESERT ROCK ENERGY
COMPANY'S AND DINE POWER AUTHORITY'S JOINT MOTION FOR
RECONSIDERATION OF ORDER ESTABLISHING DEADLINE FOR
RESPONSES TO REGIONS'S MOTION FOR VOLUNTARY REMAND**

Desert Rock Energy Company's and Dine Power Authority's (collectively "DREC") request for a forty-five day period of time to respond to EPA's Motion for Voluntary Remand filed April 27, 2009 should be denied. In an April 28, 2009 letter DREC notified the Board that it intends to respond to the motion and that it "will file the response on or before May 13, 2009, unless the Board establishes a different deadline." The Board's April 29, 2009 Order established a deadline of May 8, 2009 "for all participants who wish to respond to the Region's motion" to file responses. DREC now requests an extension of time until June 11, 2009—45 days from the date of filing of EPA's Motion for Voluntary Remand—to respond to the Motion. The motion for extension of time should be denied because DREC has not shown good cause for the requested extension and the request is unreasonable.

The Board applies a "good cause" standard to requests for extension of time. See, egs., In re Euclid of Virginia, Inc., RCRA 3008 Appeal No. 06-05 (February 2, 2007 Order Granting Respondent's Motion for Extension of Time) ("Euclid"); In re Dry Creek Rancheria, NPDES Appeal Nos. 07-14 & 07-15 (February 19, 2008 Order Denying Motion for Extension of Time)

(“Dry Creek Rancheria”). The Board grants reasonable extensions of time for good cause shown. See, eg., Euclid (granting additional 7-day extension of time to file appeal brief where case involved many novel issues and an extensive record). However, the Board denies requests for extension of time where the movant fails to show good cause for the requested extension. See, egs., Dry Creek Rancheria (denying request for additional time to respond to petitions for review pending continuing efforts to settle case where movants failed to show good cause); In re Massachusetts Correctional Institute- Norfolk Water Pollution Control Facility, NPDES Appeal No. 08-24 (October 30, 2008 Order Denying Motion for Extension of Time to File Petition for Review). Further, where the movant shows good cause for an extension, the Board grants an extension only for a period of time that is reasonably necessary and appropriate under the circumstances. See In re Conoco Phillips Co., PSD Appeal No. 06050052 (October 1, 2007 Order) (granting state permitting agency an extension of approximately 33 days rather than the 50 days it requested to respond to issues raised in a petition for review); In re Prairie State Generation Company, LLC, PSD Appeal No. 05-05 (January 20, 2006) (granting EPA an extension of 45 days rather than the 60 days it requested to file a brief).

The Board should deny DREC’s request for a 45 days to respond to EPA’s Motion for Voluntary Remand because DREC has not shown good cause for an extension or time and the length of the requested extension is unreasonable. DREC states that it requires 45 days to respond to the Motion for Remand because it is unprecedented, unexpected, and raises a number of legal issues for which DREC needs additional time to research and brief. Joint Motion 6. The Motion for Remand, however, does not raise complicated legal issues that justify an extension. To the contrary, the Motion is straightforward. The issues it raises are whether the Board is authorized to grant Region 9’s request to remand the permit to allow the Region to address a

number of shortcomings in the analysis supporting the permit, and whether, if the Board has such authority, it should grant the requested remand. DREC does not and cannot show that it needs additional time- let alone 45 days- to address these straightforward issues. The Board's authority to grant the requested remand is clear. See In re Indeck-Elwood, L.L.C., (May 20, 2004 Order Denying Respondent's Motion for Voluntary Partial Remand and Petitioners' Cross Motion for Complete Remand, and Staying the Board's Decision on the Petition for Review), slip op. at 5 (citing In re NE Hub Partners, L.P., 7 E.A.D. 561, 563, n.14 (EAB 1998), and In re GMC Delco Remy, 7 E.A.D. 136, 154, 167 (EAB 1997)). Absent extraordinary circumstances, the Board should defer to a Region's remand request, consistent with the fundamental principle that "most permit conditions should be finally determined at the Regional level," and, the "power of review should be only sparingly exercised." See 45 Fed. Reg. 33, 390, 33,412 (May 19, 1980). DREC does not require 45 days to address the issues raised in the Motion for Voluntary Remand.

Rather than explain why it needs time to address the straightforward issues raised by EPA's motion, DREC raises a litany of unsupported allegations, including allegations that EPA is changing existing policies without complying with public notice and comment requirements,¹ and has violated due process² and equal protection rights and the terms of an alleged agreement

¹The request for remand is based only in part on changes in policy, and DREC will be afforded public notice and an opportunity to comment on remand.

² DREC's due process allegations are frivolous. DREC cannot show that it has a claim of entitlement supporting a property interest in issuance of a PSD permit to which due process rights attach. Nothing in the Clean Air Act requires issuance of a PSD permit even if minimum requirements for issuance of a permit are met. Rather than require issuance of a permit where minimum requirements are met, the Act prohibits issuance of a permit unless specified requirements are met (42 U.S.C. § 7475(a)), and states that a permit "shall be granted or denied." 42 U.S.C. § 7475(c); see also American Corn Growers Ass'n v. U.S. Environmental Protection Agency, 291 F.3d 1, 12 (D.C. Coir. 2002) ("nothing in the [Clean Air Act] provides for issuance of a PSD permit as a matter of right."); S. Rep. 95-127, at 31 (May 16, 1977) (noting that State may reject PSD permit application based on "analysis of energy, economic or

between DREC and the United States.³ DREC provides no factual or legal basis for its claims that would provide a sound justification for the Board to decline to remand the permit even if proved.

Further, it appears that DREC's and DPA's real reasons for requesting a filing extension are to allow time for a fishing expedition for evidence of bad faith by EPA and to seek to undo EPA's remand request through political channels. In an April 28, 2009 letter to the Board, counsel for DREC stated that it plans to file with the Board a "Motion to Compel Retention of Documents" relating to EPA's decision to request a voluntary remand and that "it may seek discovery regarding EPA's actions in this case and its communications with parties that are opposing the permit at issue in this proceeding." The letter further states that DREC has "reason to believe" that "unusual circumstances verging on bad faith" may exist in this case.

environmental considerations"); Hearings Before the Subcomm. on Health and Environment of the Comm. On Interstate and Foreign Commerce, Statement of Roger H. Watts, on behalf of the American paper Inst. and the National Forest Products Ass'n, 95th Cong., 1st Sess. (1977), at 95)("[i]n the end, the permitting authority might deny the request in spite of demonstrated compliance with everything in the Act required.") Further, a voluntary remand itself is not final agency action, but merely reflects a continuation of the administrative process, and DREC could and would be afforded any process to which it is due on remand.

³ The United States cannot bind itself to issue a permit through a contract. Even assuming that the United States agreed to issue a permit by August 1, 2008 and did so, this provides no basis for opposition to a request for remand based on EPA's determination that the analysis supporting the permit is deficient. Like any other permit, the permit issued by DREC was subject to appeal. An agreement by the Region to initially issue the permit cannot foreclose the range of options available to either the Board or the Region on appeal with regard to remand. Further, DREC's discussion of the Consent Decree between the United States and DREC neglects to mention that Court approval of the Consent Decree was not sought in the face of lengthy objections to the Decree submitted by a number of the Conservation Petitioners. Petitioners' objections pointed to numerous deficiencies in the analysis supporting the requested permit, which supported defenses to any obligation to take action on the permit under CAA § 165(c). Rather than confront the objections, EPA refrained from seeking Court approval of the Consent Decree and simply issued the permit. EPA now agrees that deficiencies in the analysis, which are amply supported by the record and described at length in the briefs filed in this case, support remand of the permit.

Additionally, DREC has filed a request for information related to these allegations with EPA. DREC Motion 10. Furthermore, Navajo President Joe Shirley, Jr., reportedly has requested a meeting with President Barack Obama regarding Desert Rock. Ex. A attached. The Board should not countenance an extension for these purposes. Petitioners carry a heavy burden to make a strong showing of bad faith to justify supplementing the administrative record. In re Port Authority of New York and New Jersey, 10 E.A.D. 61, 97-98 (EAB May 30, 2001) (citing Elf Atochem North America, Inc. v. United States, 882 F. Supp. 1499, 1502 (E.D. Pa. 1995); United States v. Amtreco, Inc., 806 F. Supp. 1004, 1006 (M.D. Ga. 1992).⁴ DREC has presented no evidence whatsoever to support its allegations of bad faith. Furthermore, EPA's Motion for Remand is solidly based on a number of legitimate justifications for a remand, including:

(1) a stay by EPA's Administrator of a rule relied on by the Region as the basis for its finding that DREC met its burden to show that the proposed Desert Rock Energy Project will not cause or contribute to a violation of the National Ambient Air Quality Standard for PM 2.5 (Motion for Voluntary Remand 8);

(2) concerns recently expressed by the United States Fish and Wildlife Service to Region 9 regarding affects of the proposed plant's mercury emissions on the endangered Colorado Pike Minnow (Id. 9-15);

(3) a determination to coordinate the PSD review for the plant with the required case by case MACT analysis under Section 112(g) of the Clean Air Act (Id. 15-17);

⁴ As the Board has previously explained "[t]he standard for establishing bias and 'overcoming the presumption of honesty and integrity attaching to the actions of government decisionmakers' is . . . very high." In re Dominion Energy Brayton Popint, L.L.C., 2006 WL 3361084, NPDES Appeal 03-12 (February 1, 2006) (citing Marine Shale, 5 E.A.D. at 788-89).

(4) a desire to consider further whether Integrated Gasification Combined Cycle Technology should be evaluated through the BACT analysis for the facility (Id. 18-23); and

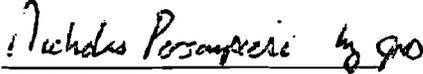
(5) a desire to consider site-specific concerns more carefully to ensure that the permit complies with additional impact analysis requirements of 40 C.F.R. 52.21(o) (Id. 23-25).

EPA's detailed discussion of its rationale for requesting a remand belies any allegation that the request for remand is motivated by bad faith. DREC and DPA offer no evidence whatsoever suggesting that EPA's stated reasons for requesting the remand are a pretext for an unstated, impermissible rationale grounded in bad faith.

Nor does DREC's lengthy recitation of the Board's prior grant of extensions in this case provide good cause for an extension here. While it is appropriate for the Board to grant extensions on the order of 30 days for substantive briefing of complicated and novel legal issues based on a lengthy administrative record, such an extension is not appropriate given the straightforward issues presented here.

For these reasons, DREC's motion for extension of time should be denied.

Respectfully submitted this 4th day of May 2009.

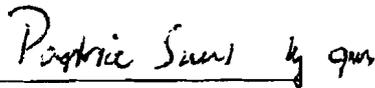

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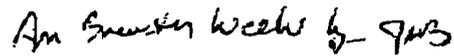
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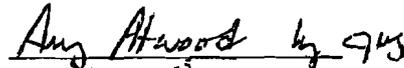
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⁵ DREC in its motion failed to acknowledge that counsel for the Center for Biological Diversity advised it of the Center's opposition to this motion through informing counsel for DREC that the Center's position on DREC's motion is consistent with the position of the other Conservation Petitioners.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 4, 2009 he caused a copy of the foregoing to be served by mail on:

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EXHIBIT A



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Associated Press

EPA seeks remand of Navajo power plant permit

By SUSAN MONTOYA BRYAN , 04.28.09, 08:41 AM EDT



The U.S. Environmental Protection Agency has asked an appeals board to allow the agency to

reconsider an air permit issued last year for a planned coal-fired power plant on the Navajo Nation in northwestern [New Mexico](#).

Regional EPA officials want to reconsider the parts of the permit for the \$3 billion Desert Rock Energy Project that were appealed by the state of New Mexico and environmentalists who were concerned about [air quality](#), carbon dioxide emissions and violations of the Endangered Species Act.

EPA spokesman Darrin Swartz-Larson said Monday it was unclear when the Environmental Appeals Board will rule on the EPA's request, but environmentalists were already hailing the agency's motion as a big roadblock for Desert Rock.

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"It's still our position that the project should not be built," said Nick Persampieri, an attorney with Earthjustice, which represents a coalition of environmental groups. "There's no demonstrated need for the project and we are hopeful that the final outcome will be that the project will not be built."

The tribe's Dine Power Authority and Houston-based Sithe Global LLC have partnered to build the 1,500-megawatt power plant on the Navajo reservation south of Farmington. They have said Desert Rock would be one of the cleanest coal-burning plants in the nation and it would generate more than \$50 million in annual revenues and create jobs on a reservation where more than half of people are unemployed.

Navajo President Joe Shirley Jr. said Monday he was disappointed to learn of the EPA's move only after the motion was filed. He said he had hoped that a new administration in Washington would mean a change in the way the federal government has consulted with his tribe.

Shirley has requested a meeting with President Barack Obama to talk about Desert Rock.

"This isn't just about energy," Shirley said. "This is about sovereignty. This is about saving self. This is about the Navajo Nation regaining its independence by developing the financial wherewithal to take care of its own problems."

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Jeff Holmstead, lead attorney in the fight to build Desert Rock and a former assistant administrator for air at EPA, was surprised by the EPA's action and said the agency seems to have little regard for due process or fairness.

"We are well into the appeals process, and now EPA wants the Navajo Nation and its partners to go back and start over again under different rules," he said.

If the motion to remand the permit is granted, it will be sent back to the EPA for further analysis, something that could take many months and another round of public comment.

According to the EPA motion, the agency wants to reassess the limits for particulate matter emissions and whether the plant would use the best available pollution control technology.

The agency also wants to finish consulting with the U.S. Fish and Wildlife Service about endangered species issues and fully analyze methods for controlling hazardous emissions.

Mike Eisenfeld of the San Juan Citizens Alliance said the permit should not have been issued in the first place, but he was hopeful that EPA "will take its responsibilities seriously" under the new administration.

The environmental groups have argued that Desert Rock - which would be the third coal-fired power plant in the Four Corners region - would further degrade air quality, harm the environment and impact human health.

State officials, including Gov. [Bill Richardson](#) and Environment Secretary Ron Curry, applauded the EPA's move.

"We still have work to do to make sure that this project only moves forward with the proper environmental safeguards," Richardson said in a statement.

Shirley has said that tribal leaders would not have supported such a project if it endangered their people or residents in neighboring states.

"We're talking clean coal. We're talking carbon capture," Shirley said in a recent interview. "We want the Desert Rock power plant to be not only a model for the United States of America but for the world regarding the use of clean coal technology."

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