

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)	
)	

STATE OF NEW MEXICO’S NOTICE REGARDING OZONE DATA

Petitioner State of New Mexico (“Petitioner” or “New Mexico”) files this Notice pursuant to the March 17, 2009 Order of the Environmental Appeals Board for the purposes of reporting the final status of data from the ozone monitor at Navajo Lake and addressing the implications of the invalidation of certain portions of those data on Petitioner’s arguments in this appeal.

I. BACKGROUND

On August 15, 2008, New Mexico filed its original Petition with the Board in this matter, listing EPA’s ozone analysis as one of many issues that warranted review. On October 2, 2008, New Mexico filed its Supplemental Brief in support of its Petition, identifying several clear errors in EPA’s ozone analysis. Specifically, New Mexico argued that EPA failed to justify its determination that Desert Rock’s emissions of ozone precursors would not cause or contribute to violations of the NAAQS because: (1) the ozone modeling relied upon by EPA did not adequately support EPA’s determinations; (2) EPA failed to reconcile its ozone analysis with actual ozone data that show that San Juan County had much higher background ozone levels than were projected, including a

design value at the Navajo Lake Monitor that was exactly equal to the ozone NAAQS of 75 ppb (parts per billion) (EPA also failed to address the fact that the projections it relied upon from the 2004 monitoring underestimated actual ozone levels by 17 ppb in parts of San Juan County); and (3) EPA failed to address evidence in the record that its modeling analysis severely underestimated ozone impacts from oil and gas development. *See* NM Supp. Br. at 41-52.

The October Data from the Navajo Lake Monitor

On October 15 and 18 of 2008, less than three months after the Desert Rock permit was issued, and two weeks after New Mexico had submitted its opening brief in this appeal, the ozone monitor at Navajo Lake in San Juan County, New Mexico (the county in which the proposed Desert Rock Energy Facility would be built) registered 8-hour averages of 76 ppb and 77 ppb, respectively. These data appeared to be quite significant because they resulted in a three-year average that, for purposes of attainment designation, put San Juan County over the NAAQS.

On November 18, 2008, New Mexico filed a Motion to Supplement the Record on Appeal, or, in the Alternative, for Remand and Reopening of the Public Comment Period (“Motion to Supplement”) so that these newest ozone data and the resultant consequences for San Juan County’s attainment status could be considered in the Desert Rock permitting decision. *See* NM Motion to Supplement. The Motion to Supplement simultaneously sought to add to the record new materials from the National Park Service that raised substantial questions about ozone impacts from oil and gas development in the region. *Id.* at 6.

New Mexico filed its reply brief with the Board on February 20, 2009. The Reply was based, in part, on what was, at the time of filing, New Mexico's imminent nonattainment recommendation for San Juan County as a result of the October 2008 monitoring data from Navajo Lake. *See* NM Reply at 22, n. 18.¹

Anomalous Readings at the Navajo Lake Monitor

After the Navajo Lake monitor recorded higher-than-anticipated readings in October of 2008 and unusually high readings in mid- to late February of 2009, the New Mexico Environment Department (NMED) and the U.S. EPA undertook extensive measures to evaluate the accuracy and performance of the monitor. These measures included the use of co-located monitors, varied reconfigurations of the plumbing used to draw air samples into the monitor, and an extensive physical audit of the monitoring equipment.

EPA and NMED determined, through the course of this testing, that the Navajo Lake monitoring equipment was functioning properly. The recent anomalous readings at the Navajo Lake Monitoring Station in late 2008 and early 2009, however, led EPA to conclude that the elevated data recorded in mid-October of 2008 could not properly be certified, and could not, therefore, serve as the basis for a nonattainment designation. As a result, in the days before EPA's March 12, 2009 deadline for designation recommendations, New Mexico changed its recommendation for the status of San Juan County from non-attainment to attainment.

On March 13, 2009, Petitioner New Mexico submitted a letter advising the Board that certain data from the Navajo Lake ozone monitor may be invalid. Petitioner also

¹ Pursuant to EPA's March 12, 2008 rule promulgating the 75 ppb 8-hour ozone standard, states were required to submit their recommendations for attainment designations by March 12, 2009. 73 Fed. Reg. 16,436 at 16,503 (Mar. 27, 2008).

proposed to file further notice with the Board in this matter “upon receiving the final determination from EPA and NMED regarding the invalidation of the Navajo Lake data.” Letter from Seth T. Cohen, Assistant Attorney General, New Mexico, to Eurika Durr, Clerk of the Board, Environmental Appeals Board (Mar. 13, 2009). The State explained that the notice would serve two functions: (1) present the final determination from the U.S. Environmental Protection Agency (EPA) and the New Mexico Environment Department (NMED) regarding the extent of the invalidation of the Navajo Lake data; and (2) address the precise implications of that final determination for the arguments made by New Mexico in this appeal. In a March 17, 2009 Order, the Board instructed New Mexico to file the proposed notice as soon as possible. Section II, below, provides the final determination regarding the data. Sections III and IV address the implications of that final determination for New Mexico’s arguments in this appeal.

II. THE FINAL DETERMINATION REGARDING NAVAJO LAKE MONITORING DATA

After extensive testing of the Navajo Lake monitoring equipment and analysis of data, EPA and NMED made a final determination earlier this month that Navajo Lake ozone data from October 15, 2008 until March 4, 2009 were invalid. Based on an analysis of the historical monitoring data from Navajo Lake and the physical review and testing of the monitor, EPA and NMED concluded that Navajo Lake data collected prior to October 15, 2008 remain valid, and the design value for the Navajo Lake monitor—comprised of the three-year average of the fourth highest eight-hour reads—remains at 75 ppb.

III. WITHDRAWAL OF PORTIONS OF PLEADINGS SUBMITTED IN THIS APPEAL

As a result of the invalidation of certain data from the Navajo Lake monitor, New Mexico hereby withdraws portions of its briefing in this matter, as is further set forth below.² For the sake of clarity, in addition to identifying below the key portions of pleadings that are withdrawn, copies of the relevant portions of the original filed versions of those pleadings with lines through the withdrawn portions are attached hereto as exhibits.

A. New Mexico's Motion to Supplement the Record on Appeal or, in the Alternative, for Remand and Reopening of the Public Comment Period (November 18, 2008)

The Motion sought consideration of the October 2008 Navajo Lake ozone data and the resulting implications for New Mexico's attainment status. It also sought consideration of new information regarding the ozone impacts of oil and gas development in the Four Corners region. New Mexico withdraws those portions of the Motion specifically related to the October 2008 Navajo Lake ozone data. (A copy of the filed version of the Motion with lines through the withdrawn portions is attached hereto as Exhibit 1.) Most significantly, the argument under sub-heading "1." on pages 4 and 5 is withdrawn. Those portions of the Motion relating to the new information regarding oil and gas impacts on the ozone levels in the Four Corners region are unaffected by the partial invalidation of Navajo Lake ozone data.

B. New Mexico's Reply Brief (Feb. 20, 2009)

New Mexico withdraws those portions of its reply that address the implications of the Navajo Lake data from after October 15, 2008; it also withdraws those portions of the

² New Mexico's Supplemental Brief (October 2, 2008) is not affected by the partial invalidation of the Navajo Lake ozone data.

reply that address the merits of New Mexico's Motion to Supplement as to the October 2008 Navajo Lake data. (A copy of the ozone section of the filed version of the reply brief with lines through the withdrawn portions is attached hereto as Exhibit 2.) the withdrawn sections include: (1) all but the first paragraph of the introductory section directly under the heading "IV." and beginning on page 21 and extending to the top of page 22; (2) the entire paragraph under sub-heading "A." on page 22, however, the argument made on p. 22, n. 19 is not withdrawn to the extent that EPA continues to argue that New Mexico's SIP is the best vehicle for addressing Desert Rock's contribution to the elevated ozone levels in San Juan County; and (3) the argument under sub-heading "2." on pages 24 and 25 is withdrawn only insofar as it is based on the expected nonattainment designation, however, as explained below in this Notice, New Mexico believes that the guidance quoted therein is instructive under the present circumstances, notwithstanding the invalidation of the October 2008 Navajo Lake data. (For this reason, that portion of the reply is not stricken in Exhibit 2 attached hereto.)

The remainder of New Mexico's reply brief addressing the ozone issue (including pp. 22-24; and pp. 25-29) is unaffected by the invalidation of the October 2008 Navajo Lake data.

IV. IMPLICATIONS OF THE PARTIAL INVALIDATION OF NAVAJO LAKE MONITORING DATA

The invalidation of the Navajo Lake data from October 15, 2008 through early March 4, 2009 does not alter the fundamental deficiencies in EPA's ozone analysis. EPA's conclusion that the San Juan airshed could absorb Desert Rock's substantial emissions of ozone precursors and remain "well below the 75 ppb level of the 8-hour ozone NAAQS" remains indefensible in the face of valid data that put background ozone

levels in San Juan County exactly at the 75 ppb NAAQS. AR 120, RTC at 125; NM Supp. Br. at 50-51, *citing* Ex. D.

Even without the October 2008 data that put San Juan County into nonattainment, New Mexico's principal contention—that EPA improperly disregarded actual ozone data in making its determinations for this permit—compels a remand. As New Mexico asserted in its briefing, EPA's July 31, 2008 permitting decision was improperly based on the background "ozone maximum" of 69 ppb derived from 2004 modeling to conclude that Desert Rock's estimated peak impact of 4 ppb would, at most, result in a level of 73 ppb, which is "less than the new standard of 75 ppb." AR 121, RTLFC at 7. EPA conceded its awareness "of high ambient ozone concentrations in the Four Corners Area" and that it "oversees the monitoring network," from which these data originate, but improperly chose to ignore the implications of those data. EPA Resp. Br. at 64. Thus, even though, at the time EPA issued the permit in July of 2008, the Navajo Lake monitor had a design value of 75 ppb, and design values at the Shiprock Substation monitor in San Juan County exceeded 69 ppb by two to six ppb each year since 2003, EPA maintained its improper reliance on the outdated background projection of 69 ppb from the 2004 modeling. *See* NM Reply Br. at 27.

Nor does the invalidation of the October 2008 Navajo Lake data alter other deficiencies in EPA's analysis. Given San Juan County's background level of 75 ppb, Desert Rock's EPA-estimated impact of as much as a 4 ppb ozone would very likely cause or contribute to violations of the NAAQS in contravention of 42 U.S.C. § 7475 (a)(3). EPA attempts to avoid this result by suggesting that Desert Rock's peak impacts would not correspond in space or time with peak background ozone levels. As

Petitioner's prior briefing makes clear, however, EPA's contention lacks adequate support in the record. NM Supp. Brief at 45-48; NM Reply at 28-9. It is based solely on 2004 modeling that uses a single four-day ozone episode from June of 2002 to project that while the peak background ozone level years later would occur on June 7, the peak ozone impact from a new power plant would occur on June 6. NM Reply at 28-9. EPA has a similarly limited and flawed basis for its contention regarding the spatial correlation of Desert Rock's impacts and elevated background ozone levels. *See* NM Reply at 28-9. Regardless of the partial invalidation of the Navajo Lake data, EPA's contention regarding spatial-temporal impacts lacks the support it would need to bear the weight that necessarily rests upon it.

The addition of a new major source of ozone precursors in a county that is on the brink of exceeding the NAAQS will likely cause or contribute to violations of the NAAQS. In its reply brief, New Mexico cited EPA guidance that established a presumption that a new source built adjacent to a nonattainment area—even one that had not yet been formally designated—would contribute to violations of the NAAQS. NM Reply at 24, *citing EPA Memorandum from Richard G. Rhodes, Director of Control Programs Development Division to Alexandra Smith, Director of Air & Hazardous Materials Division, Region X, Regarding Interpretation of "Significant Contribution"* (December 16, 1980); ("Rhodes Memo.") at 1-2. This presumption is "extremely difficult" for a permit applicant to rebut. Although, at present, San Juan County remains at the ozone NAAQS, Petitioner believes that the Rhodes Memo is still instructive. If, for example, in accord with the Rhodes Memo, a new major source of ozone precursors is presumed to contribute to a violation in an area with a background ozone level of 76 ppb

(or, just above the NAAQS), it stands to reason that the same source would presumably contribute to a violation in an area with a background ozone level of 75 ppb (or, just at the NAAQS).

In sum, the invalidation of a limited set of data from the Navajo Lake monitor does not rehabilitate EPA's erroneous ozone analysis. EPA's determination that Desert Rock's ozone contribution of up to 4 ppb would not cause or contribute to violations of the NAAQS in an airshed with a background level that is exactly at the NAAQS lacks adequate support in the record and is in error.

CONCLUSION

As set forth above, New Mexico hereby withdraws the aforementioned portions of pleadings it has filed in this appeal, but retains all other arguments made in its pleadings regarding ozone. Notwithstanding these withdrawals, the arguments regarding EPA's ozone analysis set forth in the briefing in this matter compel a remand.

Respectfully submitted,


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 19, 2009 he caused a copy of the foregoing State of New Mexico's Notice Regarding Ozone Data to be served by U.S. mail and electronic mail on:

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