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VIA OVERNIGHT MAIL

November 17, 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

**Re: *In re Desert Rock Energy Company, LLC*, PSD Appeal No. 08-03; 8-04;
Docket No. AZP 04-01**

Dear Clerk of the Board:

Enclosed please find an original and five copies of the 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* for filing with the Board in the above-referenced matter. Two exhibits are attached to each copy of the motion.

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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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

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 of 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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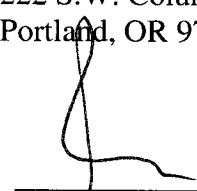
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