

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
)	
)	

**PARTIAL OPPOSITION TO MOTIONS FOR EXTENSION OF TIME
AND OPPOSITION TO MOTION FOR STAY OF CERTAIN ISSUES**

In response to the Environmental Appeals Board’s order of August 18, 2008 in this matter, Respondent, EPA Region 9, in consultation with the EPA Office of Air and Radiation (OAR), partially opposes the motions for extension of time filed by the State of New Mexico and the NGO Petitioners.¹ In addition, Region 9 and OAR² (hereinafter “the EPA offices”) oppose the NGO Petitioners’ motion for stay of briefing on certain issues.

Specifically, the EPA offices oppose the requests of both Petitioners for a 45-day extension of time. However, given the unique circumstances of this particular case, the EPA offices are not opposed to the Board granting a 30-day extension (until October 2, 2008) for these parties to file a supplement brief to support those issues identified with particularity in timely Petitions for Review submitted by the customary 30-day deadline for Petitions for Review (September 2, 2008). As discussed further below, the EPA offices request that the Board require a more specific list of issues from the NGO

¹ Although counsel for EPA Region 9 previously communicated to Petitioners’ counsel that Region 9 took no position on (neither supporting nor opposing) the motions for extension of time described orally to counsel, the written extension motions filed by these parties differ in certain respects from the motions that EPA counsel understood that these parties intended to file. See Paragraphs 19-20 below for further clarification of the prior statements of EPA counsel to counsel for Petitioners.

² In light of the broader policy implications Petitioners’ motions raise for EAB review of PSD permits, OAR joins in this partial opposition as amicus.

Petitioners by September 2 but consider the New Mexico Petition for Review sufficient to identify and preserve the specific issues (and reasons supporting review) to be addressed by New Mexico in a supplemental brief. The EPA offices oppose NGO Petitioners reservation of the right to raise additional issues in a supplemental brief that have not been previously identified with particularity in a timely Petition for Review. Consistent with the latter opposition, the EPA offices also oppose the request for a stay of all briefing on the issue of whether Region 9 has unlawfully failed to conduct a BACT analysis and include in the permit emissions limitations for carbon dioxide.

In sum, given the circumstances of this particular case, the EPA offices do not oppose providing the Petitioners some additional time to articulate their reasons supporting review in detail in supplemental briefs, but oppose the length of additional time requested and also oppose the NGO Petitioners attempt to seek authorization to raise additional issues or reasons supporting review after the initial 30-day deadline for a Petition for Review.

In support of this partial opposition, the EPA offices state the following:

1. The Board's regulations specify that any person may petition the Board to review any condition of a permit decision within 30 days after a final PSD permit decision. 40 C.F.R. § 124.19(a). These regulations further specify that such a Petition "shall include a statement of the reasons supporting that review." *Id.* The Board's regulations specify a two-step process in which the Board first considers whether to grant review on particular issues based on the Petition. 40 C.F.R. § 124.19(a), (c); EAB Practice Manual at 30. If the Board grants review, it may provide an opportunity for additional briefing by the parties on such issues. EAB Practice Manual at 30, 37.

However, because the Board frequently issues dispositive decisions on the basis of the Petition for Review and responses thereto, the Board advises Petitioners to submit Petitions that set forth, in detail, all of the issues and all of the arguments in their favor. EAB Practice Manual at 31.

2. Except in certain exceptional circumstances,³ the Board does not consider late-filed appeals and has likewise declined to consider issues presented for the first time after the filing of a Petition for Review. *See Knauf Fiber Glass*, 8 E.A.D. 121, 126 n.9 (EAB 1999) (“New issues raised for the first time at the reply stage of these proceedings are equivalent to late filed appeals and must be denied on the basis of timeliness.”); *See also Deseret Power Electric Cooperative*, PSD Appeal No. 07-03, Order Granting Motion to Strike (May 20, 2008) at 2-5 and cases cited therein (dismissing as untimely issues raised for the first time in supplemental briefs filed after the Petition for Review).

3. Thus, the procedure requested by Petitioners in this case does not comport with the standard practice of the Board. It is unusual for initial Petitions to the Board to merely identify issues on which review is requested with little or no “reasons supporting that review” as required by the regulations. The Board has held that “a petition for review under § 124.19 is not analogous to a notice of appeal that may be supplemented by further briefing.” *In re LCP Chemicals – N.Y.*, 4 E.A.D. 661, 665 n.9 (EAB 1993).

³ These have included circumstances not present here, such as where the permitting authority provided misleading information, the permitting authority did not provide adequate notice, or a natural disaster or other extraordinary event impeded delivery of filings. *See, In re: Town of Marshfield, Massachusetts*, NPDES Appeal No. 07-03, Slip op. at 5 (summarizing such circumstances); *In Re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 123-124 (EAB 1997) (permitting authority advised Petitioners to file a Petition in the wrong office); *In Re: Russell City Energy Center*, PSD Appeal No. 08-01, Slip. Op. at 27 n. 23 (inadequate notice to Petitioner of the opportunity to submit public comments, which also prejudiced the ability to file a timely petition for review); *AES Puerto Rico*, 8 E.A.D. 324, 328-29 (EAB 1999) (hurricane and aircraft problems experienced by overnight courier service).

As discussed further below, the Board has only granted leave to follow such a practice in limited circumstances.

4. The Office of Air and Radiation (OAR) is concerned that, without the reservations expressed here, the process requested by the Petitioners could become customary, and thus unreasonably prolong appeals of, and final agency action on, PSD permits. While OAR agrees that the right of commenters to seek administrative review of PSD permits is important and should not be compromised by unduly restrictive procedures, EPA must also consider the competing interests of permit applicants in having a timely, orderly, and efficient decision on their pending permit applications. *See In Re Zion Energy, L.L.C.*, 9 E.A.D. 701, 707 (EAB 2001) (denying a request for exceptional process in consideration of “the permittee’s interest in a timely resolution of the permitting process.”) The latter consideration takes on greater significance in the case of a PSD permit where a timely Petition for Review delays the effective date of the entire permit, rather than only staying the contested permit conditions, pending complete consideration of the particular objections of the Petitioner. *See* 40 C.F.R. § 124.15(b); 40 C.F.R. § 124.16; *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 110 n. 5 (EAB 1997); EAB Practice Manual at 40-41.

5. Furthermore, since the normal 30-day deadline for filing a Petition for Review has not yet passed in this case, it is not yet clear that the State of New Mexico and the NGO Petitioners are the only Petitioners that may seek review of Region 9’s permitting decision for the Desert Rock project. Additional parties may be unaware of the Petitioners’ requests and subsequently seek an equal accommodation after filing a

more thorough Petition for Review, which could introduce further delay and inefficiency in the review process.

6. Thus, for these policy reasons, OAR is generally reluctant to support requests for supplemental briefing to support the issues raised in a Petition for Review. The Board's custom of advising Petitioners to submit a single comprehensive Petition for Review within 30 days of permit issuance (stating in full all the reasons that support review) is normally the most efficient way to ensure that all concerns of all Petitioners are heard without unduly delaying the proceedings. The widespread filing of what is essentially a two-part, bifurcated Petition for Review of this nature could effectively convert each case into the equivalent of a grant of review on all issues raised to the Board in an initial Petition, which would be contrary to the Board's observation that "the discretion to grant review is to be sparingly exercised." *In re LCP Chemicals – N.Y.*, 4 E.A.D. 661, 665 n. 9 (EAB 1993). Thus, to the extent a supplemental brief supporting a Petition for Review is allowed by the Board, OAR's view is that this practice should only be permitted in limited cases where the parties have presented clear justification for doing so, consistent with general principles of fairness to all parties with an interest in the proceedings – including Petitioners and the permit applicant. The Board's statements cited by Petitioners from *In Re: Town of Marshfield Massachusetts* indicate that such exceptional process may only be justified in "unusual circumstances" and "for good cause shown." NPDES Appeal No. 07-03, Slip op. at 8 n. 10.

7. In the one example cited by Petitioners where the Board accepted a Petition for Review and supplemental briefing in support of the Petition in appeal of a PSD permit, the petitioner was not represented by an attorney and also requested

flexibility on the basis of a cognitive disability. *In Re: BP Cherry Point*, PSD Appeal No 05-01, Petitioner's Motion for Extension of Time and for ADA Accommodation (Feb. 3, 2005). The Board's orders in that case made clear that it affords more flexibility in general to pro se parties. *In Re: BP Cherry Point*, PSD Appeal No. 05-01, Order Granting In Part and Denying in Part Petitioner's Second Motion for Extension of Time to File Arguments In Support of Petition for Review, at 5 n. 6 (Mar. 10, 2005).

8. In the other case cited by Petitioners, involving an NPDES permit, the effect of the appeal under section 124.16 of the Board's rules was a stay of only the challenged permit condition regarding fecal coliform bacteria. Furthermore, in that case, the Board did not grant a specific request for supplemental briefing after the filing of an initial Petition for Review to preserve all issues on appeal, and thus did not provide a clear indication of reasonable grounds for such a motion. *In re: Town of Marshfield, Massachusetts*, NPDES Appeal No 07-03, Slip op. at 8 n. 10. The Board denied review of the appeal on the basis of an untimely petition and merely suggested this procedure as a basis to avoid such an outcome in unusual circumstances. *Id.* However, the Board did not specifically determine that the circumstances experienced by the petitioner in that case would justify a Petition for Review and supplemental brief.

9. Although the Desert Rock permit appeal presents a different set of circumstances than in the examples cited by Petitioners, the EPA offices nevertheless do not wholly oppose Petitioners' requests for an extension of time to file supplemental briefs supporting initial petitions under the particular circumstances of this case. Given the volume and complexity of issues raised by commenters and addressed at length in the Region's comment response documents, the EPA offices in this case do not oppose a

process in which the Petitioners file within 30 days of the permit decision an initial petition identifying the issues for review and the basic reasons supporting review (supported with citation to the relevant regulations allegedly violated), and then the Petitioners have a reasonable amount of additional time (not to exceed 30 days) to submit a supplemental brief that provides more detailed arguments supporting the reasons for review initially identified in the initial petition.

10. Region 9 also recognizes the efficiencies inherent in having the NGO Petitioners file a joint Petition for Review and coordinating their advocacy in this matter. Thus, Region 9 does not oppose a reasonable extension to afford these parties time to coordinate their supplemental brief. However, if the Board grants an extension, the individual NGO Petitioners should not be permitted to file independent and uncoordinated supplemental briefs at a time after the initial 30-day period for filing a Petition for Review. Granting extra time that is not used for such coordination would not be justified.⁴

11. In circumstances such as in this case, where Petitioners in a complex case are represented by counsel and the complexity and breadth of the issues in the Region's

⁴ While the EPA offices generally believe Petitioners have provided sufficient justification for more time under the particular circumstances of this case, Region 9 and OAR do not consider all the reasons cited by NGO Petitioners to provide sufficient grounds to justify an exceptional process in this case. In particular, NGO Petitioners state that they need the extension of time to allow Petitioners to "confer with their expert witnesses and further the scientific accuracy of their Petition." NGO Petition at 12. However, they have not demonstrated the need for expert witnesses to be available in order to articulate reasons for granting review. Permit appeals before the Board are based on the record already established, and there is no opportunity to present expert testimony that was not previously incorporated into public comments. Given that the Board reviews permits on the existing record, it is reasonable to expect that competent counsel can articulate its clients' basis for review using the existing record without the need for extensive assistance from expert witnesses. Even to the extent NGO Petitioners counsel can show the need for a consulting expert to help prepare its Petition for Review, in this case NGO Petitioners have alleged only that a single expert is occupied with other matters; they have not characterized the expert as wholly unavailable due to a medical emergency or other circumstances that completely denies counsel access to the advice of the expert. Neither do they explain why this particular expert is indispensable. Thus, Region 9 opposes the Board basing any grant of an extension on this ground.

Response to Comments were driven in large measure by the public comments submitted by the petitioning parties, it is reasonable to expect that Petitioners already have substantially familiarity with the issues and the record in this case.⁵ In such a case, an additional 45 days is an excessive amount of time for these parties to review the final record and fully articulate reasons supporting review. None of the prior extensions cited by the Petitioners was for 45 days, and the pro-se petitioner that received a total of 40 days (in two successive extension requests) requested an accommodation for a disability. Furthermore, given the possibility that Region 9 may also need to request additional time to respond to Petitioners supplemental briefs in light of the volume and complexity of issues Petitioners seek to raise, an initial 45-day extension would be unduly prejudicial to the permit applicant if Region 9 were to identify cause to seek an extension of the same amount of time.⁶

12. Furthermore, given the reasonable expectation that these Petitioners have substantial familiarity with the issues raised in the public comments, it is also reasonable to expect such parties, in order to preserve issues for review, to be able to articulate with some minimal specificity their basic reasons for seeking review of the permit within the first 30 days after receiving notice of Region 9's final permit decision. Thus, Region 9 opposes the NGO Petitioners open-ended reservation that they "may supplement the issues described above if their continuing review identifies additional issues that warrant Board review." Such an opportunity to raise new issues after the 30-day deadline for filing a Petition for Review is prejudicial to Region 9 and any other parties that may file

⁵ Indeed, such participation is a predicate to filing this appeal.

⁶ In light of this partial opposition, the EPA offices would not seek an extension of more than 30 days unless the Board grants Petitioners' a 45-day extension or Petitioners' supplemental briefs present an issue of first impression requiring extensive deliberation and coordination within the Agency.

petitions for review who do not request such an accommodation. In the *In Re: Town of Marshfield Massachusetts* order cited by Petitioners, the Board recommended “a timely petition identifying all of the issues on appeal” and a motion “for an extension of time to file a supplemental brief to support the issues raised in the petition.” NPDES Appeal No. 07-03, Slip. op. at 8 n. 10.

13. Furthermore, the Board has established requirements for the specificity of pleadings in initial Petitions. EAB Practice Manual at 33. Petitioners are required to “include specific information supporting their allegations” and “may not simply repeat objections made during the comment period.” *In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 5 (EAB 2000). Petitioners must demonstrate why the permitting authority’s response to objections raised in public comment warrants review. *Id.* The Board has also held that “mere allegations of error” are not sufficient to warrant review. *In re Puerto Rico Electric Power Authority*, 6 E.A.D. 253, 255 (EAB 1995). In addition, the Board has stated that “a petition for review must specifically identify disputed permit conditions.” *In re LCP Chemicals – N.Y.*, 4 E.A.D. 661, 665 n. 9 (EAB 1993). Consistent with these obligations to state their objections with particularity, Petitioners should not be permitted to file a shell Petition within the jurisdictional timeframe while providing no specific reasons supporting review and reserving the opportunity to raise any additional issue they deem appropriate at a later date. Indeed, in certain parts of their Petition, the NGO Petitioners have merely identified areas of disagreement without making any specific allegations of error.

14. In addition to their attempt to reserve a right to raise additional issues later, several of the issues listed by NGO Petitioners are so broadly drawn that they

effectively amount to an open-ended reservation of the right to raise any issue for review in certain categories. In particular, paragraphs I, L, and T of section IV of NGO Petitioners motion are completely open-ended, and the Board should require more specific articulation of the basic reasons supporting review if the NGO Petitioners are to be permitted to file a supplemental brief supporting these issues in their Petition for Review. Paragraph I is so broad that it would effectively give Petitioners *carte blanche* to raise virtually any new issue associated with the BACT analysis in the permit for any pollutant that they are able to identify at a later date. Likewise, paragraph L is similarly broad with respect to the air quality analysis. In turn, paragraph T's blanket reference to "EPA's failure with regard to numerous issues" fails to articulate with any degree of specificity a reason for review. These items do not fulfill the section 124.19(a) requirement to include a "statement of reasons supporting review" in the initial Petition. NGO Petitioners should be required -- within the 30-day period for petition for review (September 2 in this case) -- to more precisely articulate their basic reasons for objection to the BACT and air quality analyses for specific pollutants in order to preserve such issues for supplemental briefing. In contrast to the NGO Petitioners, New Mexico's Petition provides minimally sufficient notice of the reasons for review that New Mexico seeks to preserve for supplemental briefing. Accordingly, the EPA offices do not request further specificity in the issues listed by New Mexico.

15. For reasons similar to those supporting opposition of NGO petitioners reservation of the right to raise new issues after the first 30 days, Region 9 opposes the NGO petitioners motion for a stay of briefing of certain issues pending the Board's decision in *Deseret Power Electric Cooperative*, PSD Appeal No. 07-03. In their

motion, NGO Petitioners seek to have the opportunity to “tailor their briefing to emphasize significant additional arguments that were not presented in *Deseret*.” Inherent in this statement is the recognition that counsel for NGO Petitioners already know what these arguments are and could raise them in this proceeding at this time. To the extent these arguments are presently ascertainable, Petitioners should be required to raise them in their initial pleadings and articulate them fully in their Petition for Review or any supplemental briefing filed pursuant to any extension granted by the Board.

16. Moreover, the record in this case differs from the *Deseret* case, and thus the ability of the Petitioners to raise additional issues will depend on the record for the Desert Rock permit. To the extent any questions arise about the Petitioners’ ability to raise new arguments regarding the inclusion of an emissions limitation for carbon dioxide, it would be more timely and efficient for the parties to identify those issues and address them in briefing that proceeds while the *Deseret* matter remains pending.

17. Furthermore, Region 9 is prejudiced by Petitioners’ pre-emptive effort to preserve the opportunity to tailor their arguments to the outcome of the *Deseret* case. The *Deseret* case has been affected by a constant series of changes and shifts in the argument of the Petitioners and amici (and in turn the response by Region 8 and OAR), which has made briefing and oral argument in that case cumbersome and inefficient. To avoid a repeat of those circumstances and inefficiencies, Petitioners should be required to preserve all reasonably ascertainable arguments in the initial pleadings in this case (the Petition for Review for review and any supplement brief in support). The NGO Petitioners should only be allowed additional briefing after the *Deseret* opinion is issued if, at that time, they can demonstrate new issues have arisen as a result of that opinion.

18. This opposition should not be construed as opposition of the EPA offices to constructive suggestions to streamline and avoid duplicative briefing with the *Deseret* case, so long as all the issues to be briefed are identified in the initial Petitions for Review and supporting supplemental briefs. The efficiencies the NGO Petitioners seek to achieve by their motion can just as easily be accomplished by the Petitioners incorporating by reference arguments made in the *Deseret* case into their petitions or supplement briefs in this case, without the attendant prejudice to Region 9 and other potential parties of NGO Petitioners reserving a special right for further briefing after the *Deseret* decision, without any demonstration of good cause for that privilege.

19. The EPA offices would also like to take this opportunity to clarify for the record the earlier statements of the undersigned counsel (Brian L. Doster) from OGC to Petitioners' counsel regarding Region 9's position on the pending scheduling motions. Given the competing considerations discussed above, in response to oral representations by Petitioners' counsel concerning the nature of their extension requests, the undersigned counsel from the EPA Office of General Counsel left voice messages for Petitioners' counsel at approximately 5:00 p.m. EST on August 8, 2008 stating that the EPA offices could not join in any motion for extension and were at that time taking no position on previously-articulated oral requests for Region 9's position on an extension of 30 days. In response to an additional inquiry by counsel for NGO Petitioners; the undersigned counsel also communicated at the same time that EPA offices could not support the additional motion of Petitioners for stay of briefing on certain issues. EPA counsel did not understand at that time that NGO Petitioners were seeking to preserve the opportunity to raise new issues after the initial filings of a Petition for Review. The undersigned

counsel also communicated to counsel for both Petitioners that he would be on leave from August 11 to August 15 and thus unavailable to address further questions on the scheduling motions, but that counsel from the Region 9 Office of Regional Counsel should be consulted with anything further.

20. The undersigned counsel for EPA subsequently spoke directly by phone to counsel for the State of New Mexico later on August 8, and, upon learning that New Mexico intended to file its request for extension during the week of August 11, authorized New Mexico's attorney to represent that Region 9 would take no position on New Mexico's extension motion and further clarified that the Region neither opposed nor supported New Mexico's request for an extension, which was understood by the undersigned counsel at that time to still be a request for an extension of 30 days. However, New Mexico's motion for extension stated only that Region 9 did not oppose the motion, and did not more accurately reflect that Region 9 had no position and did not necessarily support the motion either. Thus, Region 9 opposes the inference of no prejudice that New Mexico seeks to draw from Region 9's lack of opposition to what was then understood to be a request for a 30-day extension by New Mexico. Counsel for EPA Region 9 did not intend to authorize any representations with respect to a 45-day extension and was unavailable when counsel for the NGO Petitioners apparently attempted to reach only the undersigned counsel from OGC on August 12 and no one from Region 9 ORC.

WHEREFORE, EPA offices request that the Board deny the Petitioners' motion for a 45-day extension, but do not oppose the grant of a 30-day extension (until October 2, 2008) to submit substantive arguments addressing solely those issues raised with

particularity in timely Petitions for Review (filed by September 2, 2008). EPA offices further request that the Board order the NGO petitioners to submit a more specific list of issues and basic reasons supporting review by September 2 to preserve issues for further briefing. Finally, EPA offices request that the Board deny NGO Petitioners motion for a stay of certain issues and require Petitioners to raise by October 2, 2008 all reasonably ascertainable grounds for objection to the Region's failure to conduct a BACT analysis and include in the permit BACT emissions limitations for carbon dioxide.

Date: August 20, 2008

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of EPA Region 9's Partial Opposition to Motions for Extension of Time and Opposition to Motion for Stay of Certain Issues were served on the following persons:

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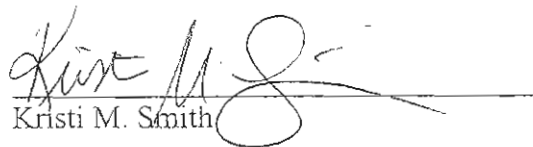
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