

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

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In re: )  
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Desert Rock Energy Company, LLC )

PSD Permit No. AZP 04-01 )  
\_\_\_\_\_)

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

**REGION 9'S OPPOSITION TO 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**

Petitioner State of New Mexico filed a Motion on November 17, 2008, requesting leave to supplement the Administrative Record on appeal in this matter, or alternatively seeking an order from this Board remanding Region 9's Prevention of Significant Deterioration ("PSD") permit to reopen the public comment period. The specific information Petitioner seeks to introduce are records regarding current monitored ozone levels in northern New Mexico and the Four Corners area. Petitioner contends the new information demonstrates that Region 9's determination in July 2008 that emissions from the Desert Rock Energy Facility ("DREF") would not cause or contribute to a violation of the National Ambient Air Quality Standards (NAAQS) for ozone was erroneous.

The Motion should be denied because the information fails to demonstrate the exceptional circumstances necessary to supplement the administrative record. The Administrative Record in this matter is extraordinarily comprehensive and Region 9 has

exercised its discretion liberally to respond to late filed comments. The appeal of this PSD permit should proceed on the merits of the arguments in the Petitions and Response Briefs.

## ARGUMENT

### **A. PETITIONER HAS NOT JUSTIFIED THAT IT IS APPROPRIATE TO SUPPLEMENT THE ADMINISTRATIVE RECORD ON APPEAL IN THIS MATTER BECAUSE THE INFORMATION DOES NOT PRESENT EXCEPTIONAL CIRCUMSTANCES**

Petitioner has failed to provide an adequate legal or factual justification to allow supplementing the comprehensive Administrative Record being considered in this appeal. The regulations plainly provide that “[t]he record shall be complete on the date the final permit is issued.” 40 C.F.R. 124.18(c). Supplementation of the record is disfavored because “[i]f it were otherwise, the permitting processes provided under existing statutory and regulatory authorities might never be brought to an end.” *In Re Keene Wastewater Treatment Plant*, NPDES Appeal No. 07-18, slip op. at 23 (EAB Mar. 19, 2008). It is only under exceptional circumstances that new information will be substantial enough to warrant reopening the record. *Id.* For the reasons noted below, Petitioner has failed to meet this burden.

Region 9 issued the final permit decision and posted its complete Administrative Record on July 31, 2008. Petitioner submitted its Brief in this appeal on October 2, 2008. In its Brief, Petitioner argued that Region 9 erroneously determined that emissions from DREF would not cause or contribute to a violation of the ozone NAAQS, in part based on Petitioner’s view that monitored ozone levels in the Four Corners area were very close to exceeding the current 8 hour ozone NAAQS. New Mexico Petition at 49-51. On



November 18, 2008, New Mexico moved to supplement the Administrative Record with information it claims shows a violation.

The Administrative Record that Region 9 relied upon in reaching its final permit decision on July 31, 2008, adequately addresses the substance of the argument raised in the October 2, 2008 brief. As stated in Region 9's Response to Comments and argued in the Response Brief filed concurrently with this Opposition, Region 9's conclusion that DREF's emissions would not cause or contribute to a violation of the ozone NAAQS was based on a number of considerations, not exclusively monitored levels of ozone in the Four Corners area. Ozone is a regional pollutant. Modeling for ozone is complex because of the chemistry and chemical reactions involved in ozone formation. Therefore, any single source contributions to regional ozone levels are complicated and difficult to evaluate. In addition, as stated in the Response to Comments and Response Brief, the area has not been redesignated to nonattainment.<sup>1</sup> Redesignation, if and when it occurs, will trigger a regional planning effort including consideration of the emissions regionally from all sources. Monitored data fails to demonstrate the Region's determination was erroneous.

The EAB decisions cited by Petitioner do not support the request to supplement the Administrative Record with the material submitted in November 2008, and this Board's practice appears to discourage such requests. *See, e.g., In Re Prairie State Generating Co.*, PSD Appeal No. 05-05, slip op. at 63 (EAB Aug. 24, 2006); *In Re BP*

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<sup>1</sup> Petitioner states that "[t]he area is in non-attainment as a matter of fact" and "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." New Mexico Motion at 3 n 2. Petitioner, however, fails to cite any authority supporting its proposition that Region 9's permitting requirements are altered at this point. Region 9 interprets its obligations to comply with the requirements of 40 C.F.R. § 52.21 and Part 124 to remain fully in effect until the area is redesignated to a different status at which point different requirements will apply.

*Cherry Point*, 12 E.A.D. 209, 220 n.27 (EAB June 21, 2001); *In Re General Motors Corp.*, 5 E.A.D. 400, 405 (EAB 1994). Petitioner's reliance on the Board's opinion in *In Re Marine Shale Processors, Inc.*, 5 E.A.D. 751, 797 n.65 (EAB 1995) is not persuasive. Although the Board in a sentence appears to have allowed a petitioner to submit additional material, the Board did not provide any discussion of the standard that should be applied or the circumstances of its decision. *Id.* Petitioner's reliance on *In Re Dominion Energy Brayton Point, L.L.C.*, 12 E.A.D. 490 (EAB 2006) is also misplaced. In that appeal, the Board allowed a petitioner to file certain supplemental documents in response to new material added to a region's permitting decision after a remand. First the Board upheld the region's decision not to seek public comment on the additional material added on remand. When the region's action on remand was appealed, the petitioner requested the Board to consider additional material. The Board stated:

BPS does not contend that any of the documents it seeks to have added to the record were relied on either directly or indirectly by the Region. Nor does BPS contend that the documents it seeks to add fall under any of the provisions governing the record in Part 124. Accordingly, to the extent that BPS seeks to supplement the administrative record for the Final Permit that was before the Region at the time the Final Permit was issued, as defined in 40 C.F.R. §124.18, that request is denied. *See* Remand Order at 38-41; *In Re Gen. Motors Corp.*, 5 E.A.D. 400, 405 (EAB 1994) (declining to consider post-decision data developed after the final permit was issued and stating that to accept such information "would be to invite unlimited attempts by permittees to reopen and supplement the administrative record after the period for submission of comments has expired").

*Id.* at 516. However, the Board allowed the petitioner to file additional documents in response to new material added by the region during the remand proceedings. Those circumstances are not presented here and the Board's decision does not support Petitioner's Motion.



Petitioner cites *In Re Keene Wastewater Treatment Plant*, NPDES Appeal No. 07-18, slip op. (EAB Mar. 19, 2008) for the proposition that “[b]y 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.” New Mexico Motion at 3. The Board, however, declined to consider additional material in the *Keene* appeal that was not part of the administrative record. In declining to consider new information, the Board stated:

It is the exceptional case in which data developed *after* the issuance of the final permit will be deemed *substantial* enough to warrant a reopening of the permitting record. If it were otherwise, the permitting processes provided existing statutory and regulatory authorities might never be brought to an end. *See, e.g., BP Cherry Point*, 12 E.A.D. at 219-20 (describing the importance of the procedural rules, including information submittal deadlines, in ensuring efficiency, predictability, and finality of permitting processes).

*Id.* at 24.

Petitioner’s additional citations to *In re Campo Landfill Project*, 6 E.A.D. 505 (EAB 1996) and *In Re Prairie State Generating Co.*, PSD Appeal No. 05-05, slip op. (EAB Aug. 24, 2006) 13 E.A.D. \_\_\_, do not support Petitioner’s argument to supplement the Administrative Record. Those decisions considered when petitioners should be allowed to argue issues on appeal that had not been preserved for review during the public comment period.

Although Petitioner cites *Keene* in support of its Motion, the information appended to Petitioner’s Motion fails to present an exceptional case where new data is substantial enough to warrant reopening the permitting record. This Board, therefore, should deny the Motion.

**B. PETITIONER HAS NOT DEMONSTRATED THAT THE OZONE  
INFORMATION APPENDED TO ITS MOTION COMPELS A REMAND  
OF THE PERMIT.**

For largely the same reasons discussed above, the information submitted by Petitioner fails to compel a remand of the PSD permit with orders to reopen the public comment period. The regulations at 40 C.F.R. §124.14(b) authorize the Regional Administrator (or his delegatee, Region 9's Air Division Director) to re-open the public comment period. The decision to reopen the public comment period, however, rests with the Regional Administrator, who has substantial discretion to determine whether data, information or arguments raise substantial new questions. In fact, however, no such request is pending as Petitioner has not requested Region 9's Regional Administrator or Air Division Director to reopen the public comment period.

Notably, Region 9 exercised its discretion in the permitting action to accept late filed comments liberally, including accepting late filed comments in March 2008. One such late filed comment in October 2007, voiced concerns about high levels of ozone in the Four Corners area, to which Region 9 responded. See Responses to Late Filed Comments at 7, Administrative Record Document 121 at 7.

No request is currently pending with Region 9 to reopen the public comment period. It would be unusual for the Board to reopen the comment period without also reaching a decision on the merits of Petitioner's argument, and Petitioner has not pointed to any precedent for such a process.

## CONCLUSION

For the reasons set forth herein, Region 9 respectfully requests this Board to deny Petitioner 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.

Date: January 8, 2009

Respectfully Submitted,



Ann Lyons  
Office of Regional Counsel  
EPA Region 9  
75 Hawthorne St.  
San Francisco, CA 94105  
Telephone: (415) 972-3883  
Fax: (415) 947-3570  
Email: [Lyons.ann@epa.gov](mailto:Lyons.ann@epa.gov)

Brian L. Doster  
Elliott Zenick  
Air and Radiation Law Office  
Office of General Counsel  
Environmental Protection Agency  
1200 Pennsylvania Ave., N.W.  
Washington, D.C. 20460  
Telephone: (202) 564-7606