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	)	

NOTICE OF PARTIAL WITHDRAWAL OF PERMIT

Under authority of 40 C.F.R. 124.19(d), Region 9 of the Environmental Protection Agency hereby withdraws a portion of the PSD permit on appeal in this matter in light of the Board's opinion in *In re Deseret Power Electric Cooperative*, PSD Appeal No. 07-03. Region 9 withdraws section II.B.3.b. (pages 25-27) of its Responses to Public Comments (Docket No. EPA-R09-OAR-2007-1110-120) and section 5 (pages 8-15) of its Responses to Late-Filed Public Comments (Docket No. EPA-R09-OAR-2007-1110-121). These portions of the Region's permitting decision contain Region 9's basis for not including limitations on emissions of carbon dioxide in the permit.

Pursuant to 40 C.F.R. § 124.19(d), a Regional Administrator may withdraw a PSD permit at any time prior to the issuance of a decision by the Board granting or denying review and prepare a new draft permit addressing the portions so withdrawn. Since the Board has not yet issued a decision granting or denying review in this matter, the Regional Administrator is authorized under section 124.19(d) to withdraw a portion of the permit at this time. This notice to the Board, which Region 9 is serving on all parties to this matter, provides the necessary notice to the Board and interested parties of the withdrawal of a portion of the permit on appeal in this matter.

Section 124.19(d) does not precisely define the meaning of a "portion" of a permit. In this case where a Petitioner seeks review of an omission from a permit that has

no corresponding permit condition, Region 9 is construing the response to comments to be a portion of the permit for purposes of section 12.19(d). The Board reviews both the conditions of a PSD permit and the record supporting that permit. Under section 124.17 of EPA's regulations, a response to comments document must be issued at the time of a final permit decision. The Board has strictly construed this requirement and vacated and remanded permits that are not accompanied by a response to comments document. *See,* Remand Order, *In re Prairie State Generation Station*, PSD Appeal No. 05-02 (Mar. 25, 2005). Thus, the response to comments document is an integral portion of the Regional Administrator's permit decision. Region 9 therefore concludes that section 124.19(d) may be construed to authorize the withdrawal of part of a response to comments document as a portion of the permit.

Region 9 is withdrawing the sections of the response to comment documents identified above because they contain substantially the same reasoning that the Board found inadequate in *Deseret Power*. In that case, the Board found that Region 8 erroneously believed it was required to follow a historic agency interpretation concerning the scope of the phrase "subject to regulation" used in the regulatory definition of the term "regulated NSR pollutant," 40 C.F.R. 52.21(b)(50), and the Clean Air Act (sections 165(a)(4) and 169(3)). *Deseret*, slip op. at 37. The Board found that the permitting record failed to set forth "sufficiently clear and consistent articulations of an Agency interpretation to constrain the authority" of the Region in the manner explained in the Region's response to public comments. *Id.* In issuing the permit to Desert Rock, Region 9 likewise viewed prior actions of the Agency to establish a controlling interpretation of the PSD regulations with respect to this issue. Since the Board has made clear in its *Deseret* order that it does not consider the prior Agency actions and statements cited by Region 9 to be sufficient to establish a controlling interpretation, Region 9 is withdrawing

this portion of the Desert Rock permit to reconsider this issue in light of the Board's opinion in *Deseret* and subsequent action by the Administrator.

In accordance with section 124.19(d) of the regulations, Region 9 intends to prepare a new statement of basis addressing the issue of whether the permit should contain an emissions limitation for carbon dioxide. The Region will not seek comment on any other portion of the permit, since Region 9 is only withdrawing the portion of the permit described above. In accordance with the Part 124 regulations, Region 9 will provide notice of this revised statement of basis and provide an opportunity for public comment.

With respect to the remaining issues in this matter that are not affected by this withdrawal or the *Deseret* decision, Region 9 intends to file its Response to the Petitions for Review, Supplemental Briefs, and Amicus Brief with the Board on January 8, 2008.

The Region 9 Air Division Director is authorized to issue this withdrawal pursuant to Delegation No. R9 1265.02 from the Regional Administrator. This delegation re-delegates authority to the Director of the Air Division to implement the procedures for preconstruction review for Prevention of Significant Deterioration for new or modified stationary sources under the regulations at 40 C.F.R. section 52.21. The final permit decision was signed by the Region 9 Air Division Director in accordance with this delegation of authority, which applies equally to decision to withdraw a PSD permit or a portion of the permit.

Dated: January 7, 2009

Deborah Jordan
Director, Air Division

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached Notice of Partial Withdrawal of Permit were served on the following persons by U.S. Mail and electronic mail:

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