



Desert Rock Power Plant Plan Faces Further Review

By **Nick Malinowski**

Law360, New York (September 28, 2009, 3:52 PM EDT) -- Federal regulators will take a second look at Desert Rock Energy Co. LLC's proposal to construct a new 1,500-megawatt coal-fired power plant in northwest New Mexico, with the U.S. Environmental Protection Agency's Environmental Appeals Board remanding the project's permits to the agency for further review.

At issue is the the so-called final prevention of significant deterioration permit, which several environmental groups and the New Mexico Attorney General's Office took issue with, prompting the EPA, which issued the permit in July 2008, to ask the board for remand because of lingering questions as to whether the power plant would create excessive pollution in violation of the Clean Air Act.

On appeal, the state and organizations such as the Sierra Club and the Natural Resources Defense Council argued that the permit — which had essentially approved the construction of the plant — failed to uphold emissions standards and botched the air quality analyses supporting the permit.

The EAB said in its ruling that remanding the permit for a second review was appropriate both because it would promote administrative and judicial efficacy and because the board had “substantial concerns” about the EPA's approach in green-lighting the project to begin with.

In passing the permit without considering a new control technology that would limit pollution at the plant, the EPA “abused its discretion,” constituting a reason to remand the permit on its merits, the ruling said.

The 79-page appellate board ruling effectively returns the permit to square one, erasing much of a four-year-long effort to get it passed, New Mexico Assistant Attorney General Seth Cohen said Monday.

“The new administration came through and recognized that some real short cuts were taken when the permit was issued and they have asked to redo substantial portions of it,” Cohen said. “[The former administration] did things that would have resulted in a coal plant that didn't give New Mexicans the full protection of the law.”

While some environmental groups might argue that any coal plant is problematic, the attorney general's contention was not ideological, but rather a rebuke of the EPA's careless consideration of the initial permit which, had the project moved forward, would have shortchanged public health and the environment, Cohen said.

“The former administration really cut some corners in, as I view it, a last minute effort to get the permit out the door before the administration change and they in a sense shot themselves in the foot by leaving it vulnerable to legal challenge,” he said. “The point of our appeal was for them to go back and adhere to the law.”

In granting the EPA's request for remand the board rejected arguments from Desert Rock, Dine Power Authority and the American Coalition for Clean Coal Electricity that included claims that the motion was made in bad faith, or at a minimum was frivolous, and violated due process principles and equal protection responsibilities the EPA owed Desert Rock, the ruling said.

The ruling is a huge setback for the power plant as the second permit review could take as long as two years and significant issues with the application remain, Cohen said.

“With all the uncertainty about [climate change] and a shift in public policy away from using coal as a key part of new energy acquisitions, things aren't looking good for the plant right now,” Cohen said. “This a question better left to them, but does it make sense to keep pushing this project?”

Representatives for Desert Rock did not immediately respond to requests for comment Monday.

New Mexico will continue to monitor the permit during the review process and should have opportunities to comment along the way, Cohen said.

“I can't say one way or another if we are going to like this next permit or not, but we're going to be better off no matter what happens because the permitting process will be done properly,” he said.

Desert Rock is represented in this mater by Bracewell & Giuliani LLP.

The case is In re: Desert Rock Energy Co. LLC, PSD Permit AZP 04-01, in the EPA Environmental Appeals Board.