



Energy Minerals Law Center

a nonprofit law firm serving communities impacted by energy development

1911 Main Avenue, Suite 238, Durango, Colorado 81301

Phone: (970) 247 9334 Fax: (970) 382 0316

Email: emlc@frontier.net

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VIA E-MAIL ATTACHMENT – BY FIRST CLASS MAIL

Mr. John Tinger
U.S. Environmental Protection Agency
Region IX, CWA Standards and Permits
75 Hawthorne Street
San Francisco, CA 94105
Email: Tinger.John@epamail.epa.gov

**Re: NPDES Permit Renewal: Peabody Black Mesa NPDES Permit No.
NN0022179: Black Mesa Mine Complex**

Dear Mr. Tinger,

On behalf of Black Mesa Water Coalition, Diné C.A.R.E., Dine Hataalii Association, Inc., To Nizhoni Ani, C-Aquifer for Diné, Sierra Club, Center for Biological Diversity (hereinafter, "Commenters"), the undersigned attorney hereby submits the following comments on the U.S. Environmental Protection Agency's ("EPA's") NPDES Permit Renewal for the Black Mesa Project (Peabody Black Mesa NPDES Permit No. NN0022179 ("NPDES")). These comments are timely filed within the fourteen (14) day extension of the comment period granted by EPA on March 17, 2009.

Request for Public Hearing

Pursuant to 40 C.F.R. §124.12, Commenters respectfully request a public hearing be held within sixty (60) days of receipt of this letter to address the very serious and substantial issues and concerns raised herein. The public hearing should be held in Kayenta, Arizona.

Many of the people directly impacted by EPA's permit issuance are Navajo and Hopi tribal members who, if they speak English at all, speak English primarily as a second language. Many Native American communities in the Black Mesa area bear a disproportionate share of Peabody's ongoing discharge of numerous pollutants onto tribal lands. These communities often lack the political agency and economic leverage required for effective participation in environmental decision-making processes. Further, EPA owes a trust obligation to indigenous people and therefore needs to ensure that tribal people and lands are not being disproportionately impacted by Peabody's massive mining operation and ongoing discharge of pollutants.

At the public hearing, we respectfully request that the agency make available in a culturally sensitive format and for public review and consumption: (1) copies of the proposed NPDES

permit; (2) a 2-3 page fact sheet or executive summary; (3) Peabody's application and all other related material; (4) copies of any and all relevant National Environmental Policy Act ("NEPA") documentation for this proposal; (4) detailed --and large size-- maps of the area and the discharges covered by the permit; (5) any other relevant information that, in particular, discusses Peabody's current violations of Water Quality Standards "(WQS)" and any "compliance schedule" being proposed by EPA to rectify such violations. Commenters respectfully request that, in addition to allowing public comment, EPA provide a detailed presentation using an interpreter as well as answer any questions put to the agency by members of the public.

Commenters also request a site visit of the outfalls (and in particular the J-7 dam and BMA-1) the day prior to the public hearing as well as the ability to conduct grab samples of any discharges.

Notice of EPA's public hearing should be provided at least 30-days in advance and published in tribal newspapers and announced on tribal radio. Additionally, EPA should directly contact impacted tribal members including, but not limited to, tribal members who hold grazing permits in areas affected by Peabody's outfalls. The Administrative Record suggests that multiple sites (some of which are highly contaminated) are currently being used for livestock watering.

Lastly, the U.S. Army Corp of Engineers, the Federal Office of Surface Mining Control and Enforcement and U.S. Fish and Wildlife Service staff should be present at the hearing to answer any related questions.

Remedying Violations of WQS Standards

Much of the limited background information contained in EPA's Administrative Record indicates a significant water quality problem at the Black Mesa Complex. Commenters respectfully assert that EPA's renewal permit (as currently proposed) would exacerbate the problem by authorizing Peabody to continue its unabated discharge of, in some instances, highly contaminated wastewater from over 110 outfalls--while directing Peabody to seek a "variance" to deal with ongoing exceedences of applicable WQS.¹

Commenters believe that EPA's approach to dealing with Peabody's ongoing violations of the Clean Water Act ("CWA") is flawed and that a fundamentally different approach needs to be immediately employed by the agency to deal with this very serious situation.

EPA provides no discussion or legitimate basis for the proposed use of "variances." See, EPA's "Fact Sheet." See e.g., 40 C.F.R. §124.8(5)(requiring EPA to "justify" use of variances). In particular, EPA provides no discussion or analysis of "the economic and social costs and the benefits to be obtained" from allowing Peabody to evade compliance with (even temporarily) applicable WQS. 33 U.S.C. §1312(b)(2).

¹ While nowhere defined in EPA's permit materials or Administrative Record, Commenters understand EPA's proposed "variance" to mean a period of time where water quality effluent limits would not apply to Peabody.

According to Peabody's website, "Peabody Energy (NYSE: BTU) is the world's largest private-sector coal company, with 2008 sales of 256 million tons and \$6.6 billion in revenues."² Peabody recently reported record revenues.³

Commenters expect EPA, consistent with the requirements of the CWA, to hold Peabody to the highest of standards and order to exercise the "maximum degree of control" of its discharge of pollutants. 33 U.S.C. §1312(b)(2). Achievement of WQS is achievable both from a technological and financial perspective as Peabody is clearly in a financial position to implement technological-based pollution controls that eliminate discharges (e.g. temporary/permanent wastewater treatment facilities, liners, etc.).

That said and instead of recommending that Peabody seek "variances" from WQS to deal with its ongoing Clean Water Act violations (presumably from the Navajo Nation), EPA should immediately issue a "compliance order" within the next 30 days. 33 U.S.C. §1319 (dealing with "compliance orders"); *see also*, 40 C.F.R. §131.12 (outlining EPA's antidegradation policy).

In particular, a compliance order should be issued for ponds BM-A1, J3-D, J-7A, J7-CD, J7-Dam, J7-JR, J16-A, J16-E, J19-D, J21-C, J27-A, J27-RC, N6-C, N6-F, N14-B, N14-H, N14-P, WW-9. According to EPA's "fact sheet," discharges from all of these ponds are currently non-compliant with one or more WQS. EPA's compliance order should establish a wastewater treatment process for each discharge point as well as a timeframe for compliance with WQS. Commenters believe 60-days is a sufficient time for Peabody to take any necessary corrective action to halt violations of the CWA.

Additionally, and according to the Final Environmental Impact Statement ("FEIS") for the Black Mesa Complex and prepared by the URS Corporation, at least two ponds, J-21A1 and N14-P-S1 which are violating WQS do not appear to be covered by Peabody's current NPDES permit. FEIS at 3-27. That said EPA needs to take immediate (and similar) enforcement actions to halt these unpermitted discharges.

EPA itself should monitor and sample discharges from the outfalls listed above to ensure compliance with WQS and ground-truth any argument (expected from Peabody) that certain exceedences of WQS somehow constitute "background levels" or are attributable to "natural processes"-- a claim that is not substantiated by any independent agency review or analysis in the Administrative Record.

Commenters recognize that in at least two situations (Ponds J-7 and BMA-1), and while temporary and immediate cleanup measures are necessary, a permanent wastewater treatment facility will need to be constructed by Peabody. This should be expressly accounted for in any compliance order. Establishment of a permanent wastewater treatment facility is certainly within the "economic capability" of Peabody. 33 U.S.C. §1312(b)(2).

² <http://www.peabodyenergy.com/default-netscape.asp>

³ http://www.peabodyenergy.com/pdfs/EarningsRelease_01_27_09.pdf

Additionally, Commenters affirmatively state their opposition to any Peabody proposal to dewater contaminated ponds and use the water for “dust control.” This is not a viable solution and poses significant environmental health and safety issues. Any such remediation proposals by Peabody should be rejected by EPA.

Other Outfalls

Because of the significant number of violations of WQS already occurring at Peabody’s Black Mesa Complex and because of the large number of discharges being covered by EPA’s NPDES permit (over 100 outfalls), EPA needs to conduct its own independent review of all of outfalls in the Black Mesa Complex to ensure compliance with WQS and existing permit conditions.

The administrative record suggests that EPA has conducted one (1) site visit over the last ten years and that the agency’s visit may have been limited to two ponds. One site visit does not constitute meaningful regulatory oversight of this operation. This is especially true where, as here, there are over 230 impoundments on the Black Mesa Complex and where Peabody intends to make at least 51 impoundments permanent.

Further, Peabody is requesting “deletion” of outfalls covered under its current NPDES permit for ponds J16-I, J16-J, J16-K, J21-J, N2-G, N7-A1, N8-A, N8-B and N14-M and WW-9D. However, there is no indication from the Administrative Record that EPA or any other regulatory agency (e.g. Navajo Nation Environmental Protection Agency) has verified and confirmed the permanent elimination of discharge from these ponds. Deletion should not occur unless and until EPA has physically verified elimination of discharges from these outfalls.

Additionally, Peabody has now requested the addition of 16 ponds to be covered under the NPDES permit. Given the problems (and violations of WQS) at existing Peabody impoundments, EPA (in conjunction with the U.S. Army Corps of Engineers) should be establishing design parameters and any necessary wastewater treatment processes up front. Design parameters should be established during the 404 permitting process.

Peabody’s Significant Permit Revision and EIS

EPA’s proposed permit draft (1/20/08)” states that EPA is a cooperating agency in review of Peabody’s Significant Permit Revision, Permit No. AZ-0001D, OSM Project No. AZ-0001-E-P-01 (SMCRA Permit Revision) and the production of the Environmental Impact Statement (“EIS”) evaluating the establishment of the Black Mesa Complex.

That said EPA was under a duty to notify the Federal Office of Surface Mining, Control and Enforcement (“OSM”) of Peabody’s ongoing violation of the CWA and WQS. Additionally, and because of these ongoing violations, EPA should have instructed OSM to deny Peabody’s Significant Permit Revision, Permit No. AZ-0001D, OSM Project No. AZ-0001-E-P-01. It was unlawful for OSM (and EPA) to authorize a SMCRA Permit Revision where, as here, Peabody is not meeting water quality standards.

Additionally, and equally troubling, is the fact that the EIS prepared for Peabody's SMCRA Permit Revision (in both draft and final form) did not analyze or even mention Peabody's pending NPDES application with EPA. *See e.g.*, 40 C.F.R. §124.61 According to EPA's "fact sheet", Peabody's NPDES renewal application was submitted to EPA in August of 2005 and was pending before the agency by February of 2006. The Draft EIS for Peabody's Black Mesa Complex was issued in November 2006. The Final EIS and Record of Decision ("ROD") was issued in November 2008. Thus, it appears that EPA and OSM unlawfully segmented the NPDES permit decision in violation of the National Environmental Policy Act ("NEPA"). *See e.g.*, 40 C.F.R. §1508.25(a)(1).

Further, the EIS for the Black Mesa Complex omitted analysis of highly relevant information including, but not limited to, Final Reports on the Seepage Management Plan for NPDES Permit No. NN0022179 and submitted to EPA in April and May of 2008 and a Sediment Control Plan which was submitted to EPA in September 24, 2008.⁴ These records constitute significant new information none of which was analyzed in the EIS for the Black Mesa Complex. *See e.g.*, 40 C.F.R. §1502.9(c).

At a minimum, OSM, EPA and U.S. Army Corp of Engineers need to prepare a new or supplemental EIS to analyze this information.

Other Issues

First, and as rightfully noted by EPA, there is no discussion in the EIS for the Black Mesa Complex or the Administrative Record for the NPDES permit of 404 permitting for the ponds and impoundments at Peabody's Black Mesa Complex. Because Peabody has now created over 230 impoundments on the Black Mesa Complex, this situation warrants intensive on-site investigation by EPA. The Army Corp of Engineers, unlike EPA, was not made a cooperating agency in production of the EIS. 404 permitting should also be addressed in a new or supplemental EIS.

Second, some of the data in the Administrative Record suggests that some of the "seeps" and discharges may be leeching into groundwater. EPA needs to analyze whether the Safe Drinking Water Act is implicated. This should be addressed in a new or supplemental EIS.

Third, and because of the Navajo Nation's treatment as a state status, EPA needs to discuss the application of much more stringent Navajo Nation laws to Peabody's operation. *See*, 4 N.N.C. §1301 *et seq.* (Navajo Nation Clean Water Act); 4 N.N.C. §§ 901, *et seq.* (Navajo Nation Environmental Protection Act) and *Diné Bi Beenahaz'áanii* (*Diné* Fundamental Law), 2 N.N.C. §§ 201-206. Navajo law would apply to all Navajo lands. As Hopi does not have treatment as state status, it is assumed that Federal law and EPA's effluent limitations would apply by default.

⁴ The Sediment Control Plan (September 24, 2008) was not released as part of EPA's Administrative Record. Commenters reserve the right to supplement their comments once the plan has been made public.

Approximately 25,000 acres of land are held exclusively by the Navajo Nation. However, approximately 40,000 acres of land are located in the former Hopi and Navajo Joint Minerals Ownership Lease Area and the surface has been partitioned with 6,000 acres partitioned to Navajo and 34,000 partitioned to Hopi. That said Navajo law does not govern on Hopi lands. EPA needs to identify which outfalls may be subject to more stringent Navajo Nation laws and which are on Hopi lands and would be subject to EPA standards. This should be addressed in a new or supplemental EIS.

Fourth, Commenters object to EPA's allowance to Peabody in the proposed permit to collect discharges resulting from precipitation events "from a sampling point representative of the type of discharge, rather than from each point of discharge." At a minimum, Peabody should be required to "show cause" for each instance where a use of a "representative sampling point" was necessary.

Fifth, Peabody's application does not contain a stormwater discharge plan. It is not clear whether such a plan is needed or whether stormwater issues are addressed in the Sediment Control Plan.

Last, EPA has failed to consult with U.S. Fish and Wildlife Service. Section 7(a)(2) of the Endangered Species Act ("ESA") states that each Federal agency shall, in consultation with the Secretary, insure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. 16 U.S.C. §1536(a)(2). In fulfilling these requirements, each agency is to use the best scientific and commercial data available. *Id.* This section of the ESA sets out the consultation process, which is further implemented by regulation, 50 C.F.R. §402. The Administrative Record indicates that this process has not been followed.

Conclusion

The proposed NPDES permit for Peabody is wholly deficient and requires significant investment of agency resources to become workable. Peabody has been given a free-pass to pollute with impunity. This situation is untenable and needs to be immediately corrected.

That said we respectfully request that EPA abide by its statutory duties and act as both regulator and enforcer.

We look forward to meeting you and discussing these matters with you face-to-face at the public hearing. If you have any comments or questions regarding this submittal, please do not hesitate to contact me at (970) 247-9334 or emlc@frontier.net.

Sincerely,

s/ Brad A. Bartlett, esq.

Brad A. Bartlett
Managing Attorney
Energy Minerals Law Center

Copy: Laura Yoshii, Director EPA Region IX (yoshii.laura@epa.gov)
Alexis Strauss, Director, EPA Region IX Water Division (strauss.alexis@epa.gov)