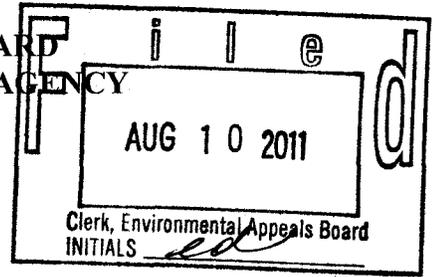


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



_____)
In re:)
Peabody Western Coal Co.,)
_____)
Permit No. NN-OP-08-010)
_____)
_____)

CAA Appeal No. 11-01

**ORDER GRANTING U.S. EPA, REGION 9'S MOTION FOR
LEAVE TO FILE BRIEF AS AMICUS CURIAE**

On April 14, 2011, the Navajo Nation Environmental Protection Agency (“NNEPA”), to which the U.S. Environmental Protection Agency (“EPA”), Region 9 (“Region”) delegated the authority to administer the federal Clean Air Act Title V operating permit program implemented through 40 C.F.R. part 71, issued a revised operating permit to Peabody Western Coal Company (“Peabody Western”). Peabody Western and NNEPA now dispute NNEPA’s reliance on the Navajo Nation Operating Permit Regulations when issuing the permitting decision. *E.g.* Petition at 2, 8; NNEPA’s Response to Petition at 3-4.

On August 1, 2011, the Region filed a motion for leave to file a brief as *amicus curiae*. Reply to Peabody Western Coal Company’s Motion for Order Requesting EPA to File a Brief and Motion of the U.S. EPA, Region 9, for Leave to File a Brief as *Amicus Curiae* (“Region 9 Motion”). Peabody Western sought leave to respond to the Region’s motion for leave on August 8, 2011. Peabody Western Motion for Leave to Respond to EPA Region 9’s Motion for

Leave to File a Brief as *Amicus Curiae* (“Peabody Western Motion for Leave”).

The Region notes that although Peabody Western previously moved for the Environmental Appeals Board (“Board”) to issue an order requesting U.S. EPA’s Office of Air and Radiation and Office of General Counsel to file a brief in this matter, the Region, “as the delegate office for implementing the Part 71 Program in the Navajo Reservation, is in fact the appropriate office to file the brief.” Region 9 Motion at 1 n.1. The Region further states that “given the importance of any ruling by the Board on the Petition as to how [the Region] delegates the Part 71 Program to State, Tribal and local agencies, as well as how delegate agencies should implement a Part 71 Program once delegated, [the Region] has a substantial interest in the outcome of this proceeding.” *Id.* at 2. The Region adds that its role and perspective differed from those of NNEPA, and that “[b]ecause of this, [the Region] believe[s] that the Board would benefit from understanding [the Region’s] view on the proper implementation of the Part 71 Program and how [the Region] delegates its administration of the Program.” *Id.* The Region proposes a September 15 filing date for its *amicus curiae* brief and indicated that NNEPA supported the Region’s participation as *amicus curiae*. *Id.* at 3.

The Board’s broad discretionary authority to manage permit appeal proceedings that arise from Part 71 extends to the disposition of motions, including those seeking non-party participation as *amicus curie* prior to the grant of permit review. *In re BP Am. Prod. Co.*, CAA Appeal No. 10-04 (EAB Mar. 11, 2011) (Order Granting Outstanding Motions); *see also In re Peabody W. Coal Co.*, CAA Appeal No. 10-01, slip op. at 8, 14 E.A.D. ____ (EAB Aug. 13,

2010).

The Board believes that briefing from the Region will assist in the Board's consideration of this matter.¹ Accordingly, the Region's request for leave to file to file a brief as *amicus curie* is **GRANTED**. The Region shall consult with the U.S. EPA Office of General Counsel and Office of Air and Radiation in preparing its brief.² The brief must be filed on or before **September 15, 2011**.³

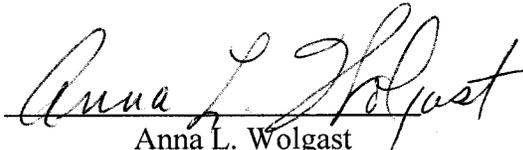
So ordered.

Dated:

August 10, 2011

ENVIRONMENTAL APPEALS BOARD

By:


Anna L. Wolgast
Environmental Appeals Judge

¹ The Board grants and accepts for filing Peabody Western's Motion for Leave to Respond to EPA Region 9's Motion for Leave to File a Brief as *Amicus Curiae*. In this motion, Peabody Western argues that the Region's motion should be denied because the Region, as party to the delegation agreement that includes allegedly erroneous statements of law, is partly responsible for "NNEPA's unlawful actions which the Petition now challenges," and the Office of Air and Radiation and Office of General Counsel "are the only fully informed, authoritative EPA spokespersons for assisting the Board's resolution of the legal issue of national significance in this proceeding." Peabody Western's Motion for Leave at 6. The Board is not persuaded by these arguments.

² The Board further denies Peabody Western's Motion for Order Requesting EPA's Offices of Air and Radiation and General Counsel to File a Brief.

³ Documents are "filed" with the Board on the day they are *received*.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Order Granting U.S. EPA, Region 9's Motion for Leave to File Brief as Amicus Curiae** in *Peabody Western Coal Co.*, CAA Appeal No. 11-01, were sent to the following persons in the manner indicated:

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Date: **AUG 10 2011**



Annette Duncan
Secretary