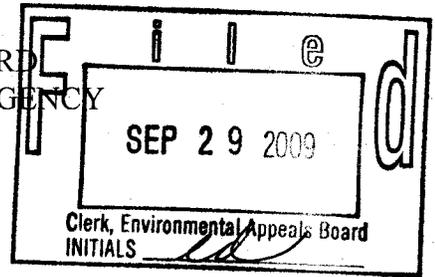


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re: Peabody Western Coal Company)
Black Mesa Complex) NPDES Appeal No. 09-10
NPDES Permit No. NN0022179)
)
)
)

ORDER GRANTING EXTENSION OF TIME TO SUPPLEMENT PETITION

On September 9, 2009, Petitioners Black Mesa Water Coalition, Diné C.A.R.E., To Nizhoni Ani, C-Aquifer for Diné, and Center for Biological Diversity (“Petitioners”) petitioned the Environmental Appeals Board (“EAB”) to review the NPDES Permit issued by U.S. EPA Region 9 (“Region”) to Peabody Western Coal Company (NPDES Permit No. NN0022179). The Petition itself contains a list of 13 issues presented for review with no further argument or discussion. Instead, Petitioners seek an additional 45 days, or until October 23, 2009, to file a supplemental brief substantiating its Petition, due to the number and complexity of the issues, the volume of relevant materials, and the unavailability of Petitioners’ expert witnesses. Petitioners also state that the permittee will not be prejudiced by the grant of an extension inasmuch as this is a permit renewal and, in all likelihood, operations will continue during the pendency of appeal. Petitioner at 10. The Region does not oppose the extension of time. *See* Letter from Julia Jackson, Office of Regional Counsel, U.S. EPA Region 9, to Brad A. Bartlett and Amy Atwood, Attorneys for Petitioners (dated Sept. 22, 2009) (Docket No. 2).

Pursuant to 40 C.F.R. § 124.19, “any person who filed comments on [a] draft [NPDES] permit or participated in the public hearing may petition the Environmental Appeals Board to review any condition of the permit decision” within 30 days after notice of the final permit decision is served, unless otherwise specified by the permit issuer.¹ Petitioners are required to state in the petition the reasons supporting review, including a demonstration that any issues being raised were raised during the public comment period. 40 C.F.R. 124.19(a). The Board has the discretion to relax or modify its procedural rules to facilitate an orderly decisionmaking process. *See, e.g. Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970); *see also, e.g., Desert Rock Energy Co., LLC*, PSD Appeal Nos. 08-03 & 08-04 (EAB, Aug. 21, 2008) (Order granting, inter alia, Desert Rock’s motion for extension of time to file brief in support of petition for review where Region’s response to comments was 220 pages and included 42 attachments totaling 700 pages).

The Final Permit in this case appears to have been issued by Region 9 on August 5, 2009. Thus, the petition and the motion for extension were filed one day after they were due.² Given the circumstances of delivery, however, the Board will exercise its discretion to treat this petition

¹ 40 C.F.R. § 124.20(d) provides for an additional three days to the prescribed time for appeal to account for service by mail.

² The Petition for Review and Motion for Extension of Time to File Supplemental Brief were mailed by Express Mail to the EAB on Friday, September 4, 2009. The U.S. Postal Service apparently attempted delivery to the EAB street address on September 8th, which would have rendered the Petition as timely filed, but for reasons unclear to the Board, but through no fault of Petitioner, the postal service diverted delivery to EPA’s headquarters’ mailing address. Thus, the Petition was not received by the Agency or the Board until September 9, 2009. Documents are “filed” with the Board on the date they are received, which in this case was one day after the appeal deadline.

as timely filed. *See In re AES Puerto Rico, LP*, 8 E.A.D. 324, 328-330 (EAB 1999) (relaxing a filing deadline where special circumstances warranted as much).

Although the Permit itself is only 21 pages and the Region's response to comments document is only 13 pages long, Petitioners state that the record in the case is "voluminous," and that "[t]here were hundreds of pages of application and related materials before the agency." Petition at 3, 8. Additionally, Petitioners assert that the experts they intend to consult are unavailable until after October 1, 2009. Petition at 9-10. Based on these assertions, and given the number of issues raised and the apparent lack of harm to the permittee in extending the time for briefing, the Board will grant Petitioners' motion for extension.

Although the Board determines here that the decisionmaking process will benefit from affording Petitioners additional time to fully present their arguments, the Board cautions Petitioners against waiting until the deadline to file an extension in the future. *See* EAB Practice Manual at 38 (June 2004) *available at* <http://www.epa.gov/eab/pmanual.pdf> (motions for extension of time must be filed sufficiently in advance of the due date so as to allow other parties sufficient time to respond and to allow the Board a reasonable opportunity to issue an order); *cf.* 40 C.F.R. § 22.7(b) (same). The Board also cautions Petitioners against assuming that motions which essentially seek to extend the filing deadline for a petition on the date the petition is due, such as the one filed here, will be routinely granted by the Board. The 30-day deadline is not an unreasonable deadline and, indeed, is routinely met. The Agency and the public have an interest in the timely resolution of permit proceedings.

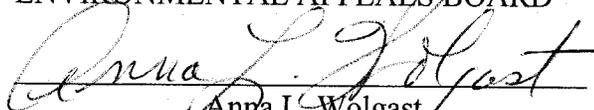
Nevertheless, upon consideration and for good cause shown, the Board GRANTS Petitioners an extension of time, until October 23, 2009, to file a brief supplementing its Petition. Petitioners are limited to the issues identified in their September 9, 2009, Petition.

Further, to assist the Board in determining whether the matters raised by the Petitioners should be reviewed, the Region should prepare a response to the Petition and any supplemental brief filed, together with a certified index of the entire administrative record, by December 7, 2009.³

So Ordered.

Date: September 29, 2009

ENVIRONMENTAL APPEALS BOARD


Anna L. Wölgast
Environmental Appeals Judge

³ The Environmental Appeals Board has an innovative system that allows parties to submit copies of documents, including exhibits, electronically in PDF. Instructions on registration and document submission, are available by using the "Electronic Submission" link on the Board's website. Please note that, at the present time, electronic submissions will not be considered a substitute for filing an original document with the Clerk of the Board. The Clerk of the Board still must actually receive the original document by the document's due date in order for it to be timely filed. However, Agency offices and private parties that use this system for submitting electronic copies will be excused from the requirement to submit multiple paper copies with their original filing.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Order Granting Extension of Time to Supplement Petition** in the matter of *Peabody Western Coal Company, Black Mesa Complex*, NPDES Appeal No. 09-10, were sent to the following persons in the manner indicated:

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Dated: SEP 29 2009


Annette Duncan,
Secretary