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August 6, 2011

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ENVIR. APPEALS BOARD

Office: 804-746-4501
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Via Federal Express

Eurika Durr, Clerk of the Board
Environmental Appeals Board
U. S. Environmental Protection Agency
Colorado Building
1341 G Street, N.W., Suite 600
Washington, D.C. 20005

Re: *In re Peabody Western Coal Company*, Appeal No. CAA 11-01;

Dear Ms. Durr:

On behalf of Peabody Western Coal Company, I have enclosed the original and five copies of each of the following documents for filing in the above-referenced matter:

- Peabody Western Coal Company's Motion for Leave to Respond to EPA Region IX's Motion for Leave to File a Brief as *Amicus Curiae*; and
- Peabody Western Coal Company's Response to EPA Region IX's Motion for Leave to File a Brief as *Amicus Curiae*.

Please do not hesitate to contact me at (804) 746-4501 if you have any questions or concerns about the enclosed.

Sincerely,


John R. Cline

Enclosures

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

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ENVIR. APPEALS BOARD

In the Matter of:)

Peabody Western Coal Company)

Title V Permit No. NN-OP 08-010)
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Appeal No. CAA 11-01

**PEABODY WESTERN COAL COMPANY'S MOTION
FOR LEAVE TO RESPOND TO EPA REGION IX'S MOTION
FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE**

On July 21, 2011, Petitioner, Peabody Western Coal Company ("Peabody") filed its Motion for Order Requesting EPA's Offices of Air and Radiation and General Counsel to File a Brief, Dkt No. 6 ("Motion for EPA Headquarters to File a Brief"). On July 26, 2011, EPA Region IX ("Region IX") filed a reply to Peabody's Motion for EPA Headquarters to File a Brief by requesting this Board to authorize Region IX to file a brief as *amicus curiae* in lieu of the brief from EPA Headquarters which Peabody had requested. See Reply to Peabody Western Coal Company's Motion for Order Requesting EPA to File a Brief and Motion of the United States Environmental Protection Agency, Region IX, for Leave to File a Brief as *Amicus Curiae*, Dkt No. 8 ("Region IX Reply" with "Region IX Motion"). Peabody now respectfully moves this Board for leave to respond to the Region IX Motion.

The part 71 regulations governing appeal of permits, 40 C.F.R. § 71.11(l), do not provide for motions practice. The Board's Practice Manual also does not address motions practice

during part 71 permit appeals. The Environmental Appeals Board Practice Manual (“EAB Practice Manual”) at V.C.1. Despite a similar lack of detailed procedures regarding motions in the context of permit appeals under part 124, the Board “has exercised broad discretion to manage its permit appeal docket by ruling on motions presented to it for various purposes[.]” *In re Peabody Western Coal Co.*, CAA Appeal No. 10-01, slip op. at 7 (EAB Aug. 13, 2010). Thus, in the context of motions filed in part 124 proceedings, the Board prescribes that, “[a]lthough the EAB may set a shorter or longer time for a response, a party should file its response to any written motion within 10 days after service of the motion.” EAB Practice Manual at IV.D.3.

The Board has concluded that “the broad case management discretion found in part 124 cases naturally extends to part 71 cases, which unfold in accordance with procedures very closely parallel to those of part 124.” *In re Peabody Western Coal Co.*, slip op. at 8. Petitioner therefore respectfully requests the Board to exercise its broad case management discretion in this part 71 proceeding by granting Petitioner’s instant motion to file the attached proposed response in opposition to the Region IX Motion.

In support of its motion, Peabody states first that the Region IX Motion inappropriately suggests that Peabody concurs with the Board’s grant of the Region IX Motion. Region IX did not solicit Peabody’s view on the pending Region IX Motion before it was filed. Instead, the Region IX Motion states matter-of-factly that “Peabody actively is seeking the Board to issue an order requesting EPA’s participation.” Region IX Motion at 3. Region IX’s implication that Peabody therefore concurs with the Region’s motion to file an *amicus* brief is incorrect. Peabody strongly opposes Region IX filing an *amicus* brief in this proceeding in lieu of a joint

brief from OAR and OGC as requested in Peabody's Motion for EPA Headquarters to File a Brief.

In support of this motion, Peabody also states that its attached proposed response to the Region IX Motion explains exactly why Peabody opposes the Region IX Motion so strongly. In short, the issue raised by Peabody's Petition is one of national significance. The Board's resolution of that issue will affect every administrative delegation of EPA's authority to a tribe to administer a federal program under the CAA. Given the importance of that nationally applicable issue, EPA Headquarters, i.e., OAR and OGC specifically, are the only fully informed, authoritative EPA spokespersons for assisting the Board's decision in this case. Moreover, Region IX's shared culpability for NNEPA's unlawful actions that have been challenged by Peabody should disqualify Region IX from now submitting a brief as a "friend of the Court." Region IX's own unlawful actions while delegating administrative federal authority to NNEPA under part 71 preclude the Region from now filing an objective assessment of the issue before the Board.

For the reasons identified above, Peabody respectfully requests the Board to grant this motion approving Peabody's filing of the attached proposed response in opposition to the Region IX Motion.

Respectfully submitted,



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Counsel for Peabody Western Coal Company

CERTIFICATE OF SERVICE

I certify that a copy of PEABODY WESTERN COAL COMPANY'S MOTION FOR LEAVE TO RESPOND TO EPA REGION IX'S MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* was mailed via Federal Express, overnight delivery, on this 6th day of August, 2011 to:


Jill E. Grant
Counsel to Navajo Nation EPA
Nordhaus Law Firm, LLP
Suite 801
1401 K Street, N.W.
Washington, D.C. 20005

I also certify that copies of PEABODY WESTERN COAL COMPANY'S MOTION FOR LEAVE TO RESPOND TO EPA REGION IX'S MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* were mailed via U.S. mail, postage prepaid, on this 6th day of August, 2011 to:

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Appeal No. CAA 11-01

**PEABODY WESTERN COAL COMPANY'S RESPONSE TO EPA
REGION IX'S MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE**

I. INTRODUCTION

On July 21, 2011, Petitioner filed with the Board Peabody Western Coal Company's ["Peabody's"] Motion for Order Requesting EPA's Offices of Air and Radiation and General Counsel to File a Brief, Dkt No. 6 ("Motion for EPA Headquarters to File a Brief"). On July 26, 2011, EPA Region IX ("Region IX") filed a reply to Peabody's Motion for EPA Headquarters to File a Brief by requesting this Board to authorize Region IX to file a brief as *amicus curiae* in lieu of the brief from EPA Headquarters which Peabody had requested. *See* Reply to Peabody Western Coal Company's Motion for Order Requesting EPA to File a Brief and Motion of the United States Environmental Protection Agency, Region IX, for Leave to File a Brief as *Amicus Curiae*, Dkt No. 8 ("Region IX Reply" with "Region IX Motion"). For the reasons explained herein, Peabody respectfully requests the Board to deny the Region IX Motion.

As an initial matter, however, Peabody seeks to emphasize that the Board has been asked to address a single legal issue in this proceeding. In keeping with 40 C.F.R. § 71.10(a), the Navajo Nation Environmental Protection Agency (“NNEPA”) has been delegated EPA’s authority to administer a part 71 federal permit program for certain stationary sources located within the exterior boundaries of the Navajo Nation. 69 Fed. Reg. 67,578 (Nov. 18, 2004) (“Informational notice”). As a delegate agency, NNEPA processed a revised part 71 federal permit for a stationary source owned and operated by Peabody by using NNEPA’s own tribal permitting procedures developed under Navajo Nation law. Pet. Ex. A. In issuing that part 71 federal permit as a delegate agency, NNEPA included permit conditions that are based on NNEPA’s tribal regulations. *Id.* Peabody has challenged those specific NNEPA actions in its appeal, Pet. at 8, and now asks the Board to resolve one issue, i.e., *whether EPA’s delegation of administrative authority to NNEPA under § 71.10(a) authorizes and requires NNEPA to have its own tribal authorities to administer the Part 71 program, including tribal authorities for permit processing, monitoring and reporting, and permit enforcement.* Pet. at 9.

II. ARGUMENT

A. EPA Headquarters Should Address This Proceeding’s Legal Issue of National Significance.

Under the Tribal Air Rule, EPA may authorize a tribe to administer and enforce its own tribal air program (substantive and procedural regulations) developed and implemented in accordance with tribal law. 40 C.F.R. §§ 49.1-49.11. Tribes have been reluctant to pursue that “program delegation” approach for a variety of reasons, including a lack of funds sufficient to develop a tribal program and then to provide adequate tribal resources to implement that program. EPA recognizes that some tribes nevertheless desire to be actively involved in CAA-related regulation of stationary sources located on their tribal lands. Consequently, EPA is

increasingly emphasizing its “administrative delegation” approach to implement the CAA, whereby tribes may build their own capacities to develop and implement air quality programs by “assist[ing] [EPA] in implementing the Federal program[s] by taking delegation of the administration of particular activities conducted under [EPA’s] authority in Indian country.” 76 Fed. Reg. 38,780 (July 1, 2011).

For example, in 2005 Region X promulgated an administrative delegation approach for specific federal air rules applicable only to certain tribes in Region X. 40 C.F.R. § 49.122. Region X has since delegated its authority to the Nez Perce Tribe for the Tribe to assist Region X in implementing some of those federal air rules. Pet., Ex. K. More recently, EPA promulgated an administrative delegation approach for a new federal new source review (NSR) rule for minor sources in Indian country. 40 C.F.R. § 49.161. At the same time, EPA also promulgated an administrative delegation approach for a new federal nonattainment NSR rule in Indian country. 40 C.F.R. § 49.173. EPA is now considering promulgation of an administrative delegation approach for tribes to assist EPA in administering the federal PSD program at 40 C.F.R. § 52.21. 76 Fed. Reg. 38,780 n.35 (July 1, 2011).

In other words, EPA’s administrative delegation of federal authority to individual tribes to assist with federal air programs almost certainly will increase substantially in the future. Every one of those administrative delegations will need to understand how the CAA governs the intersection of federal and tribal law in those delegations, i.e., to what extent, if any, does the delegation authorize and require the tribe to use its own tribal authorities to administer its delegated responsibilities for the federal program. In short, every future administrative delegation of EPA’s authority to a tribe to administer a federal program under the CAA will be affected by the Board’s resolution of the issue now before it.

The issue raised by the Petition is plainly one of national significance. Peabody shares Region IX's "substantial interest in the outcome of this proceeding," Region IX Motion at 2, that flows in part from the Region's understanding that the Board's decision will reach beyond administrative delegations only to tribes. *Id.* (importance . . . "as to how EPA delegates the Part 71 Program to State, Tribal and local agencies as well as how delegate agencies should implement a Part 71 program"). Peabody concurs with NNEPA's assessment that there is "a heightened need to ensure that the presentation of this matter to the Board contains as thorough and accurate a discussion of the relevant EPA rules, preambles, and other authorities as possible." Navajo Nation EPA's Motion for Leave to File a Surreply at 2. However, a brief from Region IX on the issue in this proceeding cannot satisfy that "heightened need."

EPA's stationary source regulations that are national in scope are developed primarily by EPA's Office of Air Quality Planning and Standards ("OAQPS") within the Agency's Office of Air and Radiation ("OAR"). EPA's Office of General Counsel ("OGC") generally provides legal guidance to those nationally applicable rulemakings with respect to Clean Air Act matters as well as to other, more general matters of law.

If the legal issue now before the Board is one of national significance, and if the Board's resolution of that issue would benefit from a thorough and accurate discussion of "the relevant EPA rules, preambles and other authorities," then a Board request for a brief on the issue at this time from anyone other than OAR and OGC would be neither reasonable nor appropriate. In previous instances of nationally important CAA issues, the Board has sought the particular rulemaking expertise and guidance of OAR and OGC. *See, e.g., In re Christian County Generation, LLC*, 13 E.A.D. 449 (EAB 2008) (Order Requesting That EPA's Offices of Air and Radiation and General Counsel File a Brief, July 20, 2007). Indeed, those Offices undoubtedly

were instrumental in crafting the Agency's administrative delegation provisions not only under part 71, but also under the recent federal rules for minor and nonattainment NSR programs in Indian country. Inasmuch as EPA's discussion of administrative delegation in the preambles to those latter two rules is so recent, who at this time could possibly be better equipped than OAR and OGC to further articulate what it means in a legal sense for a delegate tribal agency to "administer" elements of a federal permit program?

With all due respect to Region IX, a Regional Office simply cannot be expected to be as knowledgeable as OAR and OGC about the legal criteria which govern administrative delegation of EPA's authority to a tribe. OAR's and OGC's insights into such legal considerations have no doubt grown considerably in recent years as that type of delegation has increasingly become an important element of federal programs designed especially for tribes. Region IX has had no similar need to develop those same insights into legal principles of administrative delegations to tribes. Consequently, in the instant proceeding, Region IX cannot and should not be EPA's authoritative spokesperson that characterizes the legal interface between federal and tribal law under an EPA administrative delegation.

B. Region IX Shares Culpability for NNEPA's Unlawful Actions Challenged by the Petition.

Region IX's "substantial interest in the outcome of this proceeding," Region IX Motion at 2, also arises from the questionable actions that the Region already has taken leading up to this proceeding. The Board has solid ground for rejecting the Region IX Motion solely because of the Region's culpability for NNEPA's unlawful actions that the Petition now contests.

Region IX was one of two parties that prepared and executed the Delegation Agreement. Pet. Ex. B. Region IX authored the Eligibility Determination. Pet. Ex. C. Each of those documents contains statements which "confirm that NNEPA will be using its own authorities to

administer the Part 71 program.” *See, e.g.*, NNEPA Resp. at 6-8 (internal citations omitted). Those documents therefore evidence Region IX’s approval of NNEPA’s subsequent use of its own tribal permitting procedures as a delegate agency under part 71. NNEPA states clearly that Region IX agrees with NNEPA’s interpretation of 40 C.F.R. § 71.10(a) as authorizing and requiring NNEPA to have its own tribal authorities to administer the part 71 federal program. NNEPA Resp. at 6.

Region IX clearly has an inherent responsibility for the legal issue raised by Peabody’s Petition. Through the Delegation Agreement and its Eligibility Determination, Region IX authorized NNEPA to take the kind of unlawful permitting actions which Peabody now challenges. Region IX therefore exceeded its authority under the CAA by approving subsequent NNEPA actions that the Region had no authority to approve. Region IX’s approvals were void *ab initio* because they sought to authorize future actions that were unlawful under the CAA.

Because Region IX shares culpability for the NNEPA actions challenged in this proceeding, that prior involvement alone should disqualify Region IX from providing a “friend of the Court” brief on those NNEPA actions. An objective analysis of the issue presented cannot be provided by a party that comes to this proceeding without clean hands regarding the matter.

III. CONCLUSION

Because EPA’s OAR and OGC are the only fully informed, authoritative EPA spokespersons for assisting the Board’s resolution of the legal issue of national significance in this proceeding, and because Region IX is partly responsible for NNEPA’s unlawful actions which the Petition now challenges, Peabody respectfully requests the Board to deny the Region IX Motion.

Respectfully submitted,



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