ORIGINAL
RECEIVED
U.S. E.P.A.

2010 JUL -9 PM 4: 25

ENVIR. APPEALS BOARD

JOHN R. CLINE, PLLC
ATTORNEY AT LAW

P. O. Box 15476
Richmond, Virginia 23227

John R. Cline
Virginia Bar #41346

john@johnclinelaw.com

Office: 804-746-4501
Cell: 804-347-4017

July 8, 2010

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,* CAA Appeal No. 10-01;

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 ("Peabody's") Motion for Leave to File a Surreply to Navajo Nation EPA's ("NNEPA's") Reply to Peabody's Response to NNEPA's Motion for Voluntary Remand;
- Peabody Western Coal Company's ("Peabody's") Surreply to Navajo Nation EPA's ("NNEPA's") Reply to Peabody's Response to NNEPA's Motion for Voluntary Remand;
- Peabody Western Coal Company's Motion for Leave to File a Response to United States Environmental Protection Agency Region IX's *Amicus Curiae* Brief Moving for a Stay of the Proceedings, or in the Alternative, Seeking that the Board Grant Navajo Nation Environmental Protection Agency's Motion for Voluntary Remand; and
- Peabody Western Coal Company's Response to United States Environmental Protection Agency Region IX's *Amicus Curiae* Brief Moving for a Stay of the Proceedings, or in the Alternative, Seeking that the Board Grant Navajo Nation Environmental Protection Agency's Motion for Voluntary Remand.

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

ORIGINAL
RECEIVED
U.S. E.P.A.
2010 JUL -9 PM 4:25
ENVIR. APPEALS BOARD

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

In re:	)	
Peabody Western Coal Company	)	CAA Appeal No. 10-01
CAA Permit No. NN-OP-08-010	)	

PEABODY WESTERN COAL COMPANY'S ("PEABODY'S") MOTION FOR LEAVE TO FILE A SURREPLY TO NAVAJO NATION EPA'S ("NNEPA'S") REPLY TO PEABODY'S RESPONSE TO NNEPA'S MOTION FOR VOLUNTARY REMAND

The Navajo Nation EPA has requested the Environmental Appeals Board ("EAB" or the "Board") to voluntarily remand the part 71 federal operating permit issued by the NNEPA for the Black Mesa Complex owned and operated by the Petitioner, Peabody Western Coal Company ("Peabody" or the "Company"). Motion of the Navajo Nation EPA for Voluntary Remand and Memorandum in Support of Motion ("Motion for Remand") (May 28, 2010). Peabody has filed its response in opposition to the Motion for Remand. Peabody Western Coal Company's Response to the Navajo Nation EPA's Motion for Voluntary Remand and Memorandum in Support of Motion ("Peabody's Response") (June 11, 2010).

The Board has now granted NNEPA's Motion for Leave to File a Reply to Peabody's Response. Order Granting Extension of Time for NNEPA to File Response, Granting NNEPA's Motion to File Reply to Opposition to Motion for Voluntary Remand and Granting EPA Region 9's Motion to File Amicus Brief (July 2, 2010). Attached to NNEPA's Motion was the Navajo Nation EPA's Reply to Peabody Western Coal Company's Response to Motion for Voluntary

Remand ("NNEPA's Reply") (June 24, 2010). Peabody Western Coal Company, by and through its undersigned attorneys, hereby files this Motion for Leave to File a Surreply, accompanied by the proposed Surreply, and states the following in support of this Motion:

1. In its Reply, NNEPA asserts that Peabody's Response to the Motion for Remand impermissibly raises for the first time the question of whether NNEPA may use the procedures of its Navajo Nation Operating Permit Regulations ("NNOPR") to process the part 71 permit that is the subject of this proceeding. That NNEPA claim mischaracterizes the single, underlying legal issue that Peabody has consistently raised not only during the NNEPA's process for issuing that permit but also throughout this proceeding.

2. In its Reply, NNEPA asserts incorrectly that the Delegation Agreement authorizes NNEPA's use of NNOPR permit procedures when administering the delegated part 71 program. Furthermore, Peabody did not challenge that Agreement because it is not an EPA rulemaking that has the force of law under the Clean Air Act.

3. In its Reply, NNEPA incorrectly argues that it is not precluded from using its own permitting procedures when administering the delegated part 71 program.

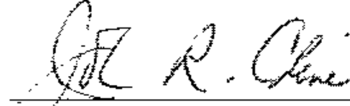
4. In its Reply, NNEPA's argument in support of its Motion for Remand continues to lack the necessary level of specificity for the Board to objectively determine whether good cause exists to justify the requested remand.

5. In its Reply, NNEPA for the first time supports the Board's stay of this proceeding as an alternative to its request for remand, and Peabody seeks to reply to that proposed alternative.

WHEREFORE, for the reasons stated above, Peabody respectfully requests the Board to grant this Motion for Leave to File a Surreply to NNEPA's Reply.

Counsel for NNEPA has advised counsel for Peabody that NNEPA objects to this Motion because NNEPA does not see the need for extra briefing on NNEPA's Motion for Voluntary Remand and because there is no provision for a surreply in any of the Board's rules.

Respectfully submitted,



John R. Cline
John R. Cline, PLLC
P. O. Box 15476
Richmond, Virginia 23227
(804) 746-4501 (direct & fax)
john@johnclinelaw.com

Peter S. Glaser
Troutman Sanders LLP
401 9th Street, N.W., Suite 1000
Washington, D.C. 20004-2134
(202) 274-2998
(202) 654-5611 (fax)
peter.glaser@troutmansaders.com

ATTORNEYS FOR PETITIONER
PEABODY WESTERN COAL COMPANY

CERTIFICATE OF SERVICE

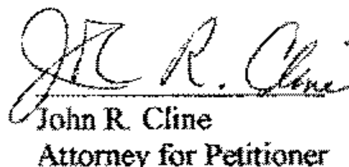
I hereby certify that a copy of the foregoing PEABODY WESTERN COAL COMPANY'S ("PEABODY'S") MOTION FOR LEAVE TO FILE A SURREPLY TO NAVAJO NATION EPA'S ("NNEPA'S") REPLY TO PEABODY'S RESPONSE TO NNEPA'S MOTION FOR VOLUNTARY REMAND in the matter of *In re Peabody Western Coal Company*, CAA Appeal No. 10-01, was served by United States First Class Mail, postage prepaid, on each of the following persons this 8th day of July, 2010:

Jill E. Grant, Esq.
Nordhaus Law Firm, LLP
1401 K Street, N.W., Suite 801
Washington, D.C. 20005

Anthony Aguirre, Assistant Attorney General
Navajo Nation Department of Justice
P. O. Box 2010
Window Rock, Arizona 86515

Stephen B. Etsitty, Executive Director
Navajo Nation Environmental Protection Agency
P. O. Box 339
Window Rock, Arizona 86515

Nancy J. Marvel, Regional Counsel
Ivan Lieben, Assistant Regional Counsel
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, California 94105



John R. Cline
Attorney for Petitioner

Date: July 8, 2010

ORIGINAL
RECEIVED
U.S. E.P.A.

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

PM 4: 26
ENVIR. APPEALS BOARD

In re:

Peabody Western Coal Company

CAA Permit No. NN-OP-08-010

CAA Appeal No. 10-01

PEABODY WESTERN COAL COMPANY'S ("PEABODY'S") SURREPLY TO NAVAJO NATION EPA'S ("NNEPA'S") REPLY TO PEABODY'S RESPONSE TO NNEPA'S MOTION FOR VOLUNTARY REMAND

BACKGROUND

The Environmental Appeals Board ("EAB" or the "Board") recently approved for submittal in this proceeding the Navajo Nation EPA's Reply to Peabody Western Coal Company's Response to Motion for Voluntary Remand (" NNEPA Reply") (June 24, 2010). Order Granting Extension of Time for NNEPA to File Response, Granting NNEPA's Motion to File Reply to Opposition to Motion for Voluntary Remand and Granting EPA Region 9's Motion to File Amicus Brief (July 2, 2010). The NNEPA Reply (1) mischaracterizes an argument in Peabody's Response to NNEPA's Motion for Remand as different from an argument in the Company's Petition for Review, (2) incorrectly describes the legal nature and effect of the Delegation Agreement between EPA Region IX and NNEPA, and (3) wrongly argues that NNEPA is authorized "to follow its own permit processing procedures when administering a delegated part 71 program."

Peabody's Surreply addresses these defects and demonstrates further why NNEPA's Motion for Remand must be denied. Indeed, as discussed below, the NNEPA Reply further highlights NNEPA's misunderstanding of the limitations on its Tribal authority when administering a part 71 federal permit program under a delegation of authority.

In addition, this Surreply addresses the NNEPA Reply's endorsement of a stay in this proceeding as an alternative to the originally requested remand. As Peabody has informed the Board previously, for purposes of aiding the ultimate resolution of this case, Peabody does not oppose a brief stay of this proceeding, subject to specific conditions, so that NNEPA can potentially make changes to the permit. Peabody Western Coal Company's Response to, and Conditional Support of, Motion of Navajo Nation EPA for Extension of Time to File Response to Peabody Western Coal Company's Petition for Review (June 29, 2010). Peabody does not believe that any of the changes that NNEPA contemplates will cure the legal defects that Peabody has identified in the permit. However, it may be that the best way to prove Peabody's point in this regard is to briefly stay this proceeding so that NNEPA can make the changes it wishes to make, provided that NNEPA acts quickly and subject to the conditions that Peabody identified to ensure that the case is not unduly delayed. This case could then be resumed with the revised permit before the Board.

ARGUMENT

I. NNEPA'S MOTION FOR REMAND MUST BE DENIED BECAUSE ITS MISUNDERSTANDING OF THE LIMITATIONS ON TRIBAL AUTHORITY AS A PART 71 DELEGATE AGENCY WILL CONTINUE TO PERMEATE NNEPA-INTENDED PERMIT REVISIONS.

A. Peabody's Response to the Motion for Remand Does Not Raise an Issue Different from the Issue Raised in the Company's Petition.

Peabody disputes the NNEPA Reply's assertion that "there is nothing that would allow PWCC to raise for the first time here the propriety of using the NNOPR permit procedures."

NNEPA Reply at 5. In its Motion for Remand, NNEPA repeatedly stated its intent, upon remand, to "reopen and revise . . . portions of the permit." NNEPA Motion for Remand at 2; *id.* at 4. In particular, NNEPA's Remand Motion stated that it would reopen the part 71 permit in accordance with the procedures at NNOPR § 406. *Id.* at 4. NNEPA's Remand Motion also stated that it would notice the draft revised permit for public comment in keeping with procedures at NNOPR § 403(B)-(D). *Id.* Inasmuch as NNEPA's Motion for Remand committed to a reliance on specific NNOPR permit procedures that are also specific conditions in the permit, which Peabody's Petition for Review has previously challenged, there is no reason why Peabody's Response to the Motion for Remand cannot address that Motion's stated intent to use those NNOPR permit procedures.

Furthermore, the NNEPA Reply asserts that Peabody's Petition only challenges the permit's inclusion of conditions based on NNOPR. Therefore, as NNEPA argues, the Company's Response in opposition to a remand of the permit cannot now lawfully raise a new challenge, i.e., whether NNEPA's use of the NNOPR to process that permit is lawful. NNEPA Reply at 4. However, NNEPA's Reply that juxtaposes those two allegedly different challenges by Peabody does little more than create an artificial distinction without a real difference.

Peabody's Petition for Review "challenges NNEPA's inclusion of requirements from the [NNOPR] as conditions in the Permit." Petition at 1. In particular, one of the permit conditions challenged by the Petition is Condition IV.L which authorizes the NNEPA to reopen the part 71 permit for cause in accordance with the procedures at NNOPR § 406. Similarly, the Petition challenges the permit's inclusion of Conditions IV.H, IV.I and IV.K which authorize the NNEPA to revise the permit using, respectively, procedures for administrative permit

amendments at NNOPR § 405(C), procedures for minor permit modifications at NNOPR § 405(D) and procedures for significant permit modifications at NNOPR § 405(E).

As those examples illustrate, Peabody's Petition challenges the permit's inclusion of conditions based on NNOPR because those conditions require, among other things, permit reopening and different types of permit revisions in accordance with NNOPR procedures. Peabody has consistently maintained that NNEPA as a delegate agency under the Clean Air Act is required to reopen and revise the subject part 71 federal permit only in accordance with part 71 federal procedures.

Contrary to the NNEPA Reply, Peabody has *not* "raise[d] for the first time here the propriety of using the NNOPR permit procedures." NNEPA's Reply at 5. Instead, Peabody's Petition challenges not only the propriety of using the NNOPR permit procedures but also the propriety of using any other NNOPR requirements that are included in that permit when administering the part 71 federal permit in accordance with a delegation of part 71 authority. Indeed, in its earlier comments on the draft part 71 permit issued by NNEPA, Peabody stated that "the NNOPR does not provide authority for any requirement within the Part 71 permit[,]" Petition, Ex. C at 4. "[A]ny requirement within the Part 71 permit" clearly included those permit conditions, challenged by Peabody's Petition, that required the use of NNOPR permit procedures.

B. NNEPA Misconstrues the Legal Nature and Effect of the Delegation of Authority Agreement.

1. The terms and conditions of the Delegation Agreement are not legally enforceable under the Clean Air Act.

The NNEPA Reply at page 6 states that the Delegation of Authority Agreement between EPA Region IX and NNEPA "contemplates NNEPA's use of the NNOPR for permit

processing." The NNEPA Reply at page 7 recites how that Agreement became effective on October 15, 2004 and was subsequently noticed in the Federal Register, but "PWCC did not challenge the Agreement."

The reason that Peabody never challenged the Delegation Agreement is straightforward, i.e., because that Agreement was not an EPA rulemaking that was subject to public comment. In developing the part 71 regulations, EPA deliberately chose to "follow the procedures for delegation agreements established for the PSD program under which EPA does not publish its delegation agreements." 61 Fed. Reg. 34,214 (July 1, 1996). As EPA explained,

> Delegation agreements reflect the understanding of EPA and the delegate agency as to their respective responsibilities and are not subject to any notice requirement. This approach allows EPA and the delegate agency to modify their agreement as circumstances change, without the burden of publishing a Federal Register notice.

Id. Thus, because it constitutes simply an agreement between two agencies rather than an EPA rulemaking, the Delegation Agreement between Region IX and NNEPA states that "by entering into this Delegation Agreement, neither NNEPA nor EPA intends to create a document that creates any enforceable rights in third parties who are not signatories to the agreement." Petition, Ex. B at 2.

In sum, counter to NNEPA's belief, the Delegation Agreement between NNEPA and Region IX does not constitute an EPA rulemaking having the force of law under the Clean Air Act. As a result, any authority which NNEPA alleges has been granted by that Delegation Agreement is not enforceable under the Act. That is, the Delegation Agreement cannot, and does not, authorize NNEPA's use of NNOPR permit procedures when administering its part 71 responsibilities under the Clean Air Act.

2. NNEPA must use federal part 71 procedures when administering the part 71 program on behalf of EPA.

As a consequence of the Delegation Agreement, the NNEPA Reply at page 6 claims that "NNEPA is not acting as a deputized agent of EPA in administering the Part 71 program, but rather as an independent permitting agency required by EPA to have its own legal authorities." This statement alone is sufficient cause for the Board to deny NNEPA's Motion for Remand and instead to resolve quickly the single legal issue presented by Peabody's Petition, before NNEPA issues any more permits or revises any existing permits under its delegation of part 71 authority. The NNEPA Reply plainly illustrates NNEPA's misunderstanding of the legal effect of the Delegation Agreement.

As pointed out above, the Delegation Agreement cannot, and does not, authorize NNEPA to use its NNOPR permit procedures as "an independent permitting agency." An agency that has been delegated EPA authority to administer a part 71 program under the Clean Air Act must use the federal procedures for processing part 71 permit applications. *See* Peabody's Response to Motion for Remand at 17-18 (quoting *In re West Suburban Recycling and Energy Center, L.P.*, 6 E.A.D. 692, 703-4 (1996) (finding a State agency's contention that its role in reviewing PSD permit applications as a delegate agency requires the use of substantive and procedural requirements of State law to be "both inexplicable and plainly erroneous")).

In order to be delegated part 71 authority, NNEPA had to demonstrate that it has adequate Tribal authority to carry out all aspects of the delegated part 71 program. 40 C.F.R. § 71.10(a). That requirement, however, does not mean that NNEPA is allowed to base any portion of a part 71 permit on that Tribal authority when it issues such a federal permit under its delegated federal authority. Rather, in order for EPA to delegate its federal part 71 authority,

EPA must first determine that any federal permit that would be issued under that delegated authority would also be a lawful act under the Tribe's laws and regulations.

Thus, a part 71 permit issued under a delegation of federal authority and in accordance with applicable federal permitting procedures will be enforceable under the Clean Air Act as long as the delegate agency also has concurrent authority under Tribal or State law to take such action. The NNOPR's incorporation of applicable part 71 regulations by reference would have been a sufficient showing of adequate Tribal authority. 4 NNR 11-2H-704; NNOPR § 704. To the extent that NNOPR actually provides specific permit procedures that parallel the federal part 71 procedures, those Tribal rules only serve as further assurance that NNEPA has adequate *Tribal* authority to be delegated part 71 federal authority. However, under the Clean Air Act, NNEPA has no authority to require the use of NNOPR permit procedures when processing a part 71 permit application or when revising a part 71 permit. Unless and until NNEPA understands this critical limitation on the use of its Tribal authority when it administers the delegated part 71 federal program, the Board's grant of NNEPA's requested remand would be pointless.

C. NNEPA Is Precluded from Using Its Own Reopening Procedures When It Administers the Part 71 Program.

The NNEPA Reply asserts that the "question whether NNEPA may use the NNOPR permitting procedures to reopen and revise the PWCC permit is not before the Board." NNEPA Reply at 7. Peabody has demonstrated above, however, why that assertion is wrong. Peabody's Petition specifically challenges particular conditions in its NNEPA-issued permit that require permit reopening and permit revisions in accordance with NNOPR permitting procedures. Moreover, in its Motion for Remand, NNEPA expressly stated that, upon remand, it would reopen and revise the permit in keeping with NNOPR permit procedures, and Peabody's Response to that Motion again challenges the use of those NNOPR permit procedures when

administering the part 71 federal permit for Black Mesa Complex. In short, the "question whether NNEPA may use the NNOPR permitting procedures to reopen and revise the PWCC permit" is clearly before the Board at this time.

Even if that issue is before the Board, "NNEPA maintains that Part 71 requires NNEPA to use its own permit processing procedures, and that *EPA has confirmed that interpretation.*" NNEPA Reply at 7 (emphasis added). First, Peabody is unaware that EPA has confirmed that particular interpretation, but if that is indeed the case, then EPA's action (presumably Region IX's) is all the more reason why the scope of NNEPA's Tribal authority as a part 71 delegate agency must be resolved at once by the Board.

Peabody concedes that a plausible interpretation of 40 C.F.R. § 71.7(f) could find that either EPA or a permitting authority delegated pursuant to § 71.10, such as NNEPA, could reopen a part 71 permit by determining that cause exists to do so. But Peabody strongly disagrees with the NNEPA Reply at page 8 which states that "the permitting authority must have its own reopening procedures to do so."

As explained above, a part 71 delegation of authority does not require the delegate agency to "have its own reopening procedures." Rather, the terms of that delegation require that a reopening of a part 71 permit must be done in accordance with federal part 71 procedures. For that reason, a delegate agency is not required to have its own reopening procedures, but instead must demonstrate that any permit reopening under part 71 would also be lawful under Tribal or State law. Once again, NNEPA's misconception of the scope of its Tribal authority under a delegated part 71 program is cause for the Board to deny NNEPA's requested remand and instead resolve that legal issue raised by Peabody's Petition, before NNEPA takes any further

actions on the part 71 permits for Black Mesa Complex and other major sources on the Navajo Reservation.

IV. THE NNEPA REPLY DOES NOT BOLSTER ITS MOTION FOR REMAND.

The Board also recently approved for submittal in this proceeding the United States Environmental Protection Agency Region IX's *Amicus Curiae* Brief Moving for a Stay in the Proceedings, or in the Alternative, Seeking that the Board Grant Navajo Nation Environmental Protection Agency's Motion for Voluntary Remand ("Region IX Amicus Brief") (June 24, 2010). Order Granting Extension of Time for NNEPA to File Response, Granting NNEPA's Motion to File Reply to Opposition to Motion for Voluntary Remand and Granting EPA Region 9's Motion to File Amicus Brief (July 2, 2010). The NNEPA Reply references Region IX's speculation in its Amicus Brief that the permit revisions intended by NNEPA after the Board's requested remand "*may* address PWCC's claims or change the analysis of those claims." NNEPA Reply at 3 (citing Region IX Amicus Br. at 9) (emphasis added). Based solely on that conjecture by Region IX, NNEPA opines that "[n]o further detail should be necessary" to demonstrate good cause for the requested remand.

NNEPA's conclusory claim that "no further detail [regarding its reason for requesting a remand] is necessary" lacks any persuasive support. Region IX has only *suggested* two possible reasons why NNEPA seeks a remand. In its Reply, however, NNEPA does not adopt either reason as the basis for seeking a remand. Indeed, NNEPA has stated only that it seeks to make "certain clarifications and corrections . . . to the permit conditions that PWCC contested in its Petition for Review." NNEPA Motion for Remand at 7.

The NNEPA Reply offers no proof that NNEPA's intended "clarifications and corrections" would actually be substantive revisions to the permit. Indeed, the intended revisions

could just as well be ministerial types of changes that are not sufficient cause to justify a remand. The inescapable point is that the NNEPA Reply does not enhance NNEPA's earlier argument in its Motion for Remand because NNEPA has still failed to identify sufficient details about its intended permit revisions that would allow the Board to make an informed decision whether NNEPA has demonstrated good cause for a remand.

V. PEABODY CAN SUPPORT THE NNEPA-ENDORSED STAY OF THIS PROCEEDING, PROVIDED THE BOARD ORDER FOR THAT ACTION CONTAINS SPECIFIC CONDITIONS.

The Region IX Amicus Brief requests the Board to grant a stay in this proceeding so that NNEPA may make its intended permit revisions and issue a revised permit by no later than November 15, 2010. Region IX Amicus Brief at 4-5. Peabody has consistently opposed a disposition of the permit at this time that would allow NNEPA to revise the permit because any revised permit would undoubtedly continue to contain conditions that are unlawfully based on NNOPR requirements. Throughout its Reply, NNEPA confirms that any revised permit would continue to be flawed by conditions based on NNOPR requirements. Peabody continues to believe that the only appropriate course of action for the Board is to find all of the current part 71 permit's conditions that are based on NNOPR requirements to be unlawful under the Clean Air Act. That decision would be of immense importance in guiding any future part 71 permit revisions contemplated by NNEPA for Black Mesa Complex and for other major sources on the Navajo Reservation.

Nevertheless, the Company has previously indicated its willingness to support a stay in the proceedings as proposed in the Region IX Amicus Brief, provided that the Board's order for such a stay stipulates certain conditions that must be met. Peabody Western Coal Company's Response to, and Conditional Support of, Motion of Navajo Nation EPA for Extension of Time

to File Response to Peabody Western Coal Company's Petition for Review (June 29, 2010). For ease of reference, Peabody repeats herein those conditions which any order for a stay would need to incorporate in order for Peabody to support that stay:

1. NNEPA shall issue the final revised permit by no later than November 15, 2010 in keeping with the interim deadlines provided in paragraph 8 of NNEPA's Motion for Extension of Time to File Response to Peabody Western Coal Company's Petition for Review (June 24, 2010);

2. NNEPA's revisions to the permit will consist only of changes to those permit conditions that Peabody has contested in its Petition;

3. The stay shall automatically terminate on the date of NNEPA's issuance of the final revised permit;

4. No later than 30 days after service of the final revised permit, Peabody shall either withdraw its existing Petition for Review or file an Amended Petition for Review with the Board;

5. No later than 30 days after service of Peabody's Amended Petition for Review, NNEPA shall file its Response to that Amended Petition with the Board; and

6. In the event that one or more of the preceding conditions is not satisfied, Peabody may seek appropriate relief from the Board.

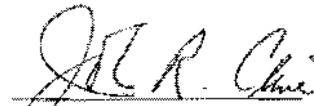
CONCLUSION

NNEPA's Reply to Peabody's Response in opposition to NNEPA's Motion for Remand contains several faulty arguments that go to the heart of the Company's Petition for Review. Given the number of arguments in which NNEPA has now consistently demonstrated a major misunderstanding of the scope of its Tribal authority when administering the part 71 program as

a delegate agency, Peabody respectfully urges the Board to deny NNEPA's Motion for Remand. Moreover, the NNEPA Reply does nothing to enhance NNEPA's Motion for Remand, because incorporation of Region IX's mere conjecture within that Reply does not cure the Motion for Remand's failure to provide sufficient specificity that would allow the Board to reasonably decide that NNEPA has demonstrated the requisite good cause for a voluntary remand of the permit.

Nevertheless, as an alternative to the requested remand, Peabody could support the Board's order of a stay in this proceeding, provided such an order contains specific conditions identified herein by the Company, including a requirement for a revised permit to be issued by November 15, 2010 and a provision that preserves Peabody's right to appeal the revised permit.

Respectfully submitted,



John R. Cline
John R. Cline, PLLC
P. O. Box 15476
Richmond, Virginia 23227
(804) 746-4501 (direct & fax)
john@johnclinelaw.com

Peter S. Glaser
Troutman Sanders LLP
401 9th Street, N.W., Suite 1000
Washington, D.C. 20004-2134
(202) 274-2998
(202) 654-5611 (fax)
peter.glaser@troutmansaders.com

ATTORNEYS FOR PETITIONER
PEABODY WESTERN COAL COMPANY

CERTIFICATE OF SERVICE

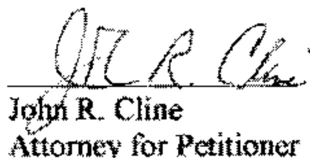
I hereby certify that a copy of the foregoing PEABODY WESTERN COAL COMPANY'S ("PEABODY'S") SURREPLY TO NAVAJO NATION EPA'S ("NNEPA'S") REPLY TO PEABODY'S RESPONSE TO NNEPA'S MOTION FOR VOLUNTARY REMAND in the matter of *In re Peabody Western Coal Company*, CAA Appeal No. 10-01, was served by United States First Class Mail, postage prepaid, on each of the following persons this 8th day of July, 2010:

Jill E. Grant, Esq.
Nordhaus Law Firm, LLP
1401 K Street, N.W., Suite 801
Washington, D.C. 20005

Anthony Aguirre, Assistant Attorney General
Navajo Nation Department of Justice
P. O. Box 2010
Window Rock, Arizona 86515

Stephen B. Etsitty, Executive Director
Navajo Nation Environmental Protection Agency
P. O. Box 339
Window Rock, Arizona 86515

Nancy J. Marvel, Regional Counsel
Ivan Lieben, Assistant Regional Counsel
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, California 94105



John R. Cline
Attorney for Petitioner

Date: July 8, 2010

ORIGINAL
RECEIVED
U.S. E.P.A.
2010 JUL -9 PM 4: 26
ENVIR. APPEALS BOARD

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

In re:	)	
Peabody Western Coal Company	)	CAA Appeal No. 10-01
CAA Permit No. NN-OP-08-010	)	

PEABODY WESTERN COAL COMPANY'S RESPONSE TO UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION IX'S *AMICUS CURIAE* BRIEF MOVING FOR A STAY OF THE PROCEEDINGS, OR IN THE ALTERNATIVE, SEEKING THAT THE BOARD GRANT NAVAJO NATION ENVIRONMENTAL PROTECTION AGENCY'S MOTION FOR VOLUNTARY REMAND

EXHIBIT

A. Letter from Jill Grant, counsel to NNEPA, to John Cline, counsel to Peabody, of Mar. 22, 2010 (explaining why NNEPA believes permit conditions based on NNOPR requirements are acceptable in NNEPA-issued part 71 permits)

NORDHAUS LAW FIRM, LLP

ATTORNEYS AT LAW

ALBUQUERQUE, NM
SANTA FE, NM
PHOENIX, AZ
WASHINGTON, DC

SUITE 801
1401 K STREET, N.W.
WASHINGTON, D.C. 20005
TELEPHONE 202-530-1270
FACSIMILE 202-530-1920

JILL ELISE GRANT
jgrant@nordhauslaw.com

March 22, 2010

John R. Cline
John R. Cline, PLLC
P.O. Box 15476
Richmond, VA 23227

Re: Peabody Western Coal Company Title V Permit No. NN-OP 08-010

Dear John:

Please find attached proposed revisions to the Part 71 permit issued by the Navajo Nation Environmental Protection Agency ("NNEPA") to Peabody Western Coal Company ("Peabody") for Peabody's Black Mesa Complex. NNEPA has taken into account the parties' telephone conference of February 23, 2010, as well as your letter and accompanying proposed permit revisions of February 26, 2010, in preparing this proposal. NNEPA understands your concern that the permit make clear which permit provisions are federally and tribally enforceable and which are tribe-only enforceable, and has provided this clarification in its proposed revisions. NNEPA does not, however, find it necessary to move all references to the Navajo Nation Operating Permit Regulations ("NNOPR") to a separate section at the end of the permit to achieve that purpose, as there is no such requirement in the Clean Air Act or the federal regulations. Indeed, NNEPA finds that it would be inappropriate to do so, as discussed below.

Before delegating to NNEPA the authority to administer the Part 71 operating permit program, EPA was required to and did determine that NNEPA had adequate independent authority to administer the permit program. 40 C.F.R. § 71.10(a); Deleg. Agr. at 1. EPA found such authority consisted of having adequate permit processing requirements and adequate permit enforcement-related investigatory authorities. Deleg. Agr. §§ IV, V, VI.1, IX.2. Moreover, before waiving its collection of fees under 40 C.F.R. § 71.9(c)(2)(ii), EPA was required to and did determine that NNEPA could collect sufficient revenue under its own authorities to fund a delegated Part 71 Program. *Id.*; Deleg. Agr. at 1 and § II.2. These three types of provisions - permit processing requirements, permit enforcement-related investigatory authorities, and permit fees - are the only Navajo-only provisions cited in the permit. Since they were a prerequisite for delegation of the program, NNEPA maintains it is appropriate for them to be cited in the permit. Moreover, NNEPA is not aware of anything in Part 71 or the Clean Air Act that prohibits NNEPA from doing so.

In fact, EPA specifically allows state and tribal requirements to be referenced in Part 70 permits. The Part 70 and Part 71 programs are parallel permitting programs implementing the same Clean Air Act Title V requirements, and they therefore mutually inform each other. Before a state or tribe may be approved to implement a Part 70 program it must demonstrate that its laws provide adequate authority, 40 C.F.R. § 70.4(b)(3), just as states and tribes must do to be eligible for a Part 71 delegation. Part 70 allows state- and tribe-only requirements to be cited in the permit together with federal requirements, as long as they are designated as not being federally enforceable. 40 C.F.R. § 70.6(b)(2); *see also* White Paper 2. It is equally appropriate in the Part 71 context to include permit conditions that are state- or tribe-only enforceable. Moreover, tribe-only requirements should be afforded the same consideration as state-only provisions. *See* 40 C.F.R. § 49.3. You quote White Paper 1 as requiring "careful segregation of terms implementing the Act from State-only requirements." However, neither White Paper 1 nor the other authorities cited above define "careful segregation" as requiring state- or tribe-only terms to be relegated to a separate section at the back of the permit, as if they comprised a separate permit. Indeed, "segregation" may be accomplished simply by identifying the "tribe-only" enforceable requirements, as NNEPA is proposing.

Many of the provisions identified by Peabody and in your letter as not being proper Title V conditions actually are identical to the federal requirements. For these provisions, NNEPA proposes to continue to streamline the federal and tribal provisions in one condition, as is done in Peabody's existing permit. To address Peabody's concerns, however, NNEPA proposes to take two steps: (1) explain in the statement of basis that compliance with the federal requirement will constitute compliance with its tribe-only counterpart, and therefore the provisions were streamlined; and (2) include a notation in the permit condition that the referenced parallel provision of the NNOPR is enforceable only by NNEPA. There is EPA precedent for this approach. In at least one Title V order, EPA found that local-only enforceable and federally enforceable requirements could be streamlined, citing White Paper 2. *Pacific Coast Bldg. Products, Inc.*, Permit No. A00011, Clark County Health Dist., Nev. (Order issued Dec. 10, 1999), at 5-6. In addition, NNEPA has an interest in citing tribal provisions in parallel with corresponding federal provisions to keep the permit as clear and simple as possible; to enable permittees to become familiar with the NNOPR, since the NNOPR applies to permittees within the Navajo Nation regardless of federal approval and since NNEPA intends to apply for primacy for a Part 70 program in the future; and to enable NNEPA permit writers to become familiar with the NNOPR in preparation for implementation of a Part 70 program.

In contrast, the permit fee requirements do not have a current federal counterpart, since EPA waived the federal fees when it found the tribal fees to be adequate. The fee provision already has its own section in the permit (§ IV.A), and NNEPA is proposing to delete references to the federal authorizing provisions, as you suggest. Like the other provisions of the NNOPR,

NNEPA also proposes to label this section as enforceable only by NNEPA.

NNEPA also proposes to revise the reopening provisions in the permit. As you pointed out, EPA may not delegate its authority to reopen a permit or to respond to a petition to reopen the permit. *See* 40 C.F.R. §§ 71.7(g), 71.10(h). NNEPA must retain its own authority to reopen a permit, however, in order to be delegated the Part 71 program, as discussed above. Indeed, under § 71.7(g), although EPA initiates the reopening process, EPA must provide the delegate authority an opportunity to revise the permit prior to EPA itself being able to take such action. NNEPA therefore will be following its own reopening procedures; it just will not be making the actual determination to reopen. *See also* § 71.7(f)(2) (reopening shall follow same procedures as for permit issuance). NNEPA therefore proposes to include two separate reopening provisions in the permit, one for NNEPA and one for EPA. As with the other provisions, these provisions will specifically designate which permitting authority can enforce the requirement.

Finally, you recommended removing references to EPA as a recipient of certain reports, such as the semi-annual reports and deviation reports. After conferring with EPA Region IX, NNEPA agrees with these proposed changes and will propose to revise the permit accordingly.

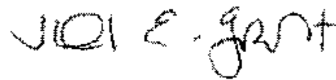
With regard to the process going forward, NNEPA will need to propose revisions to the permit and will follow the NNOPR reopening procedures to do so. These provisions mirror the authorities in 40 C.F.R. § 71.7(f), and dictate use of the same procedures as for initial permit issuance. The process will include public notice and an opportunity for comment on the proposed permit modifications. NNEPA will simultaneously provide EPA with its 45-day review period under 40 C.F.R. § 71.10(g). After the end of the public comment period and EPA's review, and after addressing any comments and/or objections, NNEPA will issue the final revised permit.

NNEPA believes that once it issues a final revised permit reflecting these changes, Peabody's concerns will be addressed. Therefore, we suggest that as soon as NNEPA proposes these permit revisions, the parties should jointly seek an additional 60-day extension for the proceedings at the EAB. This would allow time for issuance of the final permit, after which Peabody would withdraw its petitions from both the EAB and EPA.

I trust Peabody will find this approach to be acceptable. Please let me know if you have any questions or concerns.

Sincerely,

NORDHAUS LAW FIRM, LLP



Jill Elise Grant

cc: Ivan Lieben, EPA ORC Region 9
Eugenia Quintana, NNEPA Deputy Director, Air & Toxics [check title]
Charlene Nelson, NNEPA Air Quality Program Manager [check title]

ORIGINAL
RECEIVED
U.S. E.P.A.
2010 JUL -9 PM 4:26
ENVIR. APPEALS BOARD

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

In re:	)	
	)	
Peabody Western Coal Company	)	CAA Appeal No. 10-01
	)	
CAA Permit No. NN-OP-08-010	)	

PEABODY WESTERN COAL COMPANY'S MOTION FOR LEAVE TO FILE A RESPONSE TO UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION IX'S *AMICUS CURIAE* BRIEF MOVING FOR A STAY OF THE PROCEEDINGS, OR IN THE ALTERNATIVE, SEEKING THAT THE BOARD GRANT NAVAJO NATION ENVIRONMENTAL PROTECTION AGENCY'S MOTION FOR VOLUNTARY REMAND

The Environmental Appeals Board ("EAB" or the "Board") has granted EPA Region IX's Motion for Leave to File an Amicus Brief Moving for a Stay of Proceedings, or, in the Alternative, Seeking a Grant of Navajo Nation EPA's ("NNEPA's") Motion for Voluntary Remand in the above-captioned matter. Order Granting Extension of Time for NNEPA to File Response, Granting NNEPA's Motion to File Reply to Opposition to Motion for Voluntary Remand and Granting EPA Region 9's Motion to File Amicus Brief (July 2, 2010). EPA Region IX's Motion was accompanied by United States Environmental Protection Agency Region IX's *Amicus Curiae* Brief Moving for a Stay of the Proceedings, or in the Alternative, Seeking that the Board Grant Navajo Nation Environmental Protection Agency's Motion for Voluntary Remand ("Region IX Amicus Brief" or "Amicus Brief") (June 24, 2010).

Petitioner in this proceeding, Peabody Western Coal Company ("Peabody" or the "Company"), by and through its undersigned attorneys, hereby files this Motion for Leave to File a Response to EPA Region IX's Amicus Brief, accompanied by the proposed Response. In support of this Motion, Peabody states the following:

1. In its Amicus Brief, Region IX makes certain statements about the sufficiency of NNEPA's Motion for Remand which Peabody finds to be either inadequately supported by relevant facts or else inconsistent with the applicable facts.

2. In its Amicus Brief, Region IX asserts that the remand requested by NNEPA is supported by EAB precedent. Peabody questions whether the remand decisions cited by Region IX have significant relevance to the circumstances of this instant proceeding, including whether the Board has remanded a permit prior to the permitting authority responding to the petition for review.

3. In its Amicus Brief, Region IX incorrectly argues that a particular permit-withdrawal provision of 40 C.F.R. part 124 should guide the Board's decision to remand the part 71 permit at issue here.

4. In its Amicus Brief, Region IX moves for a stay of this proceeding until NNEPA's issuance of a revised permit by a date certain. Peabody seeks to voice its support for such a Board action, provided that the order for a stay is accompanied by specific conditions.

WHEREFORE, given the issues identified above, Peabody respectfully requests the Board to grant this Motion for Leave to File a Response to EPA Region IX's Amicus Brief.

Counsel for EPA Region IX has advised counsel for Peabody that EPA Region IX does not object to this Motion. Likewise, counsel for NNEPA has advised counsel for Peabody that NNEPA does not object to this Motion.

Respectfully submitted,

John R. Cline
John R. Cline, PLLC
P. O. Box 15476
Richmond, Virginia 23227
(804) 746-4501 (direct & fax)
john@johnclinelaw.com

Peter S. Glaser
Troutman Sanders LLP
401 9th Street, N.W., Suite 1000
Washington, D.C. 20004-2134
(202) 274-2998
(202) 654-5611 (fax)
peter.glaser@troutmansaders.com

ATTORNEYS FOR PETITIONER
PEABODY WESTERN COAL COMPANY

CERTIFICATE OF SERVICE

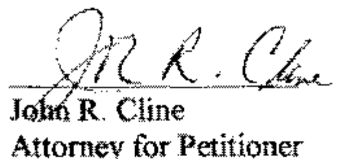
I hereby certify that a copy of the foregoing PEABODY WESTERN COAL COMPANY'S MOTION FOR LEAVE TO FILE A RESPONSE TO UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION IX'S *AMICUS CURIAE* BRIEF MOVING FOR A STAY OF THE PROCEEDINGS, OR IN THE ALTERNATIVE, SEEKING THAT THE BOARD GRANT NAVAJO NATION ENVIRONMENTAL PROTECTION AGENCY'S MOTION FOR VOLUNTARY REMAND in the matter of *In re Peabody Western Coal Company*, CAA Appeal No. 10-01, was served by United States First Class Mail, postage prepaid, on each of the following persons this 8th day of July, 2010:

Jill E. Grant, Esq.
Nordhaus Law Firm, LLP
1401 K Street, N.W., Suite 801
Washington, D.C. 20005

Anthony Aguirre, Assistant Attorney General
Navajo Nation Department of Justice
P. O. Box 2010
Window Rock, Arizona 86515

Stephen B. Etsitty, Executive Director
Navajo Nation Environmental Protection Agency
P. O. Box 339
Window Rock, Arizona 86515

Nancy J. Marvel, Regional Counsel
Ivan Lieben, Assistant Regional Counsel
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, California 94105



John R. Cline
Attorney for Petitioner

Date: July 8, 2010

ORIGINAL
RECEIVED
U.S. E.P.A.
2010 JUL -9 PM 4:26
ENVIR. APPEALS BOARD

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

In re:	)	
Peabody Western Coal Company	)	CAA Appeal No. 10-01
CAA Permit No. NN-OP-08-010	)	

PEABODY WESTERN COAL COMPANY'S RESPONSE TO UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION IX'S *AMICUS CURIAE* BRIEF MOVING FOR A STAY OF THE PROCEEDINGS, OR IN THE ALTERNATIVE, SEEKING THAT THE BOARD GRANT NAVAJO NATION ENVIRONMENTAL PROTECTION AGENCY'S MOTION FOR VOLUNTARY REMAND

BACKGROUND

The Environmental Appeals Board ("EAB" or the "Board") has granted EPA Region IX's Motion for Leave to File an Amicus Brief Moving for a Stay of Proceedings, or, in the Alternative, Seeking a Grant of Navajo Nation EPA's ("NNEPA's") Motion for Voluntary Remand in the above-captioned matter. Order Granting Extension of Time for NNEPA to File Response, Granting NNEPA's Motion to File Reply to Opposition to Motion for Voluntary Remand and Granting EPA Region 9's Motion to File Amicus Brief (July 2, 2010). EPA Region IX's Motion was accompanied by United States Environmental Protection Agency Region IX's *Amicus Curiae* Brief Moving for a Stay of the Proceedings, or in the Alternative, Seeking that the Board Grant Navajo Nation Environmental Protection Agency's Motion for Voluntary Remand ("Region IX Amicus Brief" or "Amicus Brief") (June 24, 2010).

Peabody disputes Region IX's characterization of NNEPA's argument for granting the requested remand as "comprehensive and cogent," Amicus Brief at 6, and Region IX's suspect statement that NNEPA's Motion for Remand "easily meets the standard set for by the Board [for granting a remand]." Amicus Brief at 10. Instead, Peabody asserts that an objective assessment of NNEPA's Motion for Remand, as previously provided by Peabody's Response to the Motion for Remand, can only reasonably conclude that NNEPA has failed to satisfy the Board's threshold criteria for granting a request for remand. *See* Peabody Western Coal Company's Response to the Navajo Nation EPA's Motion for Voluntary Remand and Memorandum in Support of Motion, 6-11 (June 11, 2010).

Moreover, Region IX has cited various remand decisions by the Board as precedent for the same decision in this case without demonstrating that the circumstances surrounding the Board's remands in those cases bear any similarity to the circumstances in this proceeding. In addition, Region IX's statement that the permit-withdrawal provision of 40 C.F.R. part 124 should guide the Board's decision to grant NNEPA's Motion for Remand in this part 71 permit appeal is simply incorrect. Furthermore, Peabody can find no rationale for Region IX's assertion that NNEPA's argument in support of a remand "is identical to the situation in *In Re Desert Rock*, and no more specificity [in NNEPA's Remand Motion] is needed." Amicus Brief at 11.

All told, the arguments within Region IX's Amicus Brief should not persuade the Board to grant NNEPA's Motion for Remand. However, Region IX has proposed an alternative to a remand, i.e., a stay of the proceeding with a date certain by which NNEPA would issue a revised permit. While Peabody continues to maintain that the Board's appropriate course of action in this proceeding is to decide the issue presented in Peabody's Petition prior to any NNEPA

revisions of the permit, the Company is willing to support the proposed stay, *so long as* the Board's order of a stay includes the conditions proposed herein by Peabody.

ARGUMENT

I. NNEPA's Motion for Voluntary Remand Should Not Be Granted.

As an alternative to the Region IX's proposed stay of this proceeding (addressed below), Region IX urges the Board to grant NNEPA's Motion for Voluntary Remand because, according to Region IX, "NNEPA set forth a comprehensive and cogent argument as to why the Board should remand the permit[.]" Amicus Brief at 6. However, Region IX's characterization of NNEPA's Remand Motion is inaccurate. Peabody has explained in substantial detail why NNEPA's argument in support of the requested remand is far from being "comprehensive and cogent." Peabody's Response to NNEPA's Motion for Voluntary Remand and Memorandum in Support of Motion at 6-11. As the Company's Response demonstrates, NNEPA's Motion for Remand does not satisfy the minimal threshold criteria required to demonstrate good cause for a remand because:

(1) that Motion and its accompanying memorandum fail to provide sufficient specificity regarding either permit revisions or issues to be reconsidered, committing instead to make some undefined "clarifications and corrections"; and

(2) the requested remand will not promote administrative or judicial efficiency because NNEPA's expectation of any narrowing of the issues in this matter is only illusory, i.e., the sole legal issue present by Peabody's Petition concerns the lawful scope of NNEPA's Tribal authority when administering the part 71 program, and that issue will remain after a remanded permit is revised.

Against that background, Region IX nevertheless opines that NNEPA's expressed intent to "clarify" or "correct" those permit conditions contested by Peabody "*easily* meets the standard set forth by the Board [for granting a requested remand]." Amicus Brief at 10 (emphasis added). Peabody can perhaps appreciate Region IX's efforts to enhance the skeletal argument in NNEPA's Motion for Remand, but the Region's assertion that NNEPA's Motion "easily" meets the Board's standard for granting a remand is simply not supported by the content of that Motion.

Indeed, the credibility of Region IX's defense of NNEPA's Remand Motion is strained considerably by Region IX's statement that the nature and content of NNEPA's Remand Motion "is identical to the situation in *In re Desert Rock*, and no more specificity is needed." Amicus Brief at 11. If that claim by Region IX were accurate, then Peabody must ask why Region IX's Remand Motion in *In re Desert Rock* contained substantive, multi-page discussions of each permit issue which the Region sought to reconsider upon remand. *In re Desert Rock Energy Company, LLC*, PSD Appeal Nos. 08-03, 08-04, 08-05 & 08-06, at 9-25, (EAB Apr. 27, 2009) (EPA Region 9's Motion for Voluntary Remand).

Region IX's Amicus Brief in this matter *suggests* that its Remand Motion in *In re Desert Rock* did little more than identify each permit condition that it wanted to reconsider upon the Board's grant of the requested remand. That clearly was not the case, and Peabody's Response to NNEPA's Motion for Remand contains an informative summary of the lengths to which Region IX's Remand Motion in *In re Desert Rock* went in an effort to build its case for why certain permit issues needed to be remanded for the Region's further consideration. *See* Peabody's Response to NNEPA's Motion for Remand at 6-7.

In sum, NNEPA's Motion for Remand and its accompanying memorandum do not constitute a "comprehensive and cogent argument" supporting a remand simply because Region IX has labeled it as such. An objective review of NNEPA's Motion and accompanying memorandum can only reasonably conclude that NNEPA has offered no compelling justification for a remand of the permit in question.

In its Amicus Brief, Region IX has made a clever, but unsuccessful, attempt to inappropriately shift the burden of persuasion concerning a remand to Peabody. That is, Region IX attacks the arguments made by Peabody in opposition to the requested remand for "provid[ing] no basis for the Board to deny . . . a remand of the permit decision back to NNEPA." Amicus Brief at 8.

For example, Region IX asserts that "Peabody's claim that the underlying legal issues necessarily will remain the same is based on speculation." *Id.* Peabody's Petition has, in fact, one single legal issue underlying all of its arguments in that Petition, i.e., whether NNEPA acting under its delegated part 71 authority can lawfully issue conditions in a part 71 permit that are based on requirements of the Navajo Nation Operating Permit Regulations. Based upon NNEPA's responses to Peabody comments on the draft part 71 permit for Black Mesa Complex, Petition, Ex. E at 9-10, based upon NNEPA's written response to Peabody after settlement discussions between those parties, Exhibit A, based upon NNEPA's Motion for Remand, and based upon NNEPA's recently filed Reply to Peabody's Response to that Motion for Remand, Peabody can state with a very high degree of confidence that some conditions in the revised permit that NNEPA would issue upon remand would continue to be based on NNOPR requirements, i.e., the issue raised in the Company's Petition.

While "the *precise* nature of any revised permit conditions is currently unknown[,]" Amicus Brief at 8 (emphasis added), neither NNEPA nor EPA Region IX can state unequivocally that the revised permit will not contain any condition based on a NNOPR requirement. In short, Region IX's attempt to discredit Peabody's Response in opposition to the Motion for Remand has ignored some basic facts regarding NNEPA's consistent position and, as such, Region IX's explanation is not compelling.

In addition, Region IX disagrees with Peabody's challenge to NNEPA's authority to reopen a part 71 permit as a delegate agency. Amicus Brief at 9. Peabody concedes that a plausible interpretation of 40 C.F.R. § 71.7(f) could find that either EPA or NNEPA, as the "permitting authority," is authorized to determine that cause exists to reopen a part 71 permit issued under a delegated part 71 program.

Nevertheless, Region IX has failed to address Peabody's major point related to reopening, i.e., that acting under its delegated part 71 authority, NNEPA has no authority under the NNOPR to reopen a part 71 permit. That is, contrary to NNEPA's Motion for Remand, NNEPA cannot use the procedures of NNOPR § 406 to reopen the part 71 permit for Black Mesa Complex.

It is this latter issue (raised initially by Peabody's Petition) that Region IX apparently has chosen not to address. Peabody cannot understand why Region IX declines to acknowledge that nothing under the Clean Air Act authorizes NNEPA as a delegated part 71 agency to use its NNOPR reopening procedure, or any other NNOPR permitting procedure, to process a part 71 federal permit. That is, why does Region IX refrain from confirming that only federal procedural requirements may be used by NNEPA to satisfy its delegated part 71 responsibilities?

In short, Region IX's Amicus Brief addresses only part of the reopening controversy in this matter, declining to take on the more onerous question posed by Peabody's Petition.

II. Region IX's Position that a Remand Is Supported by EAB Precedent Is Incorrect or Questionable.

A. Part 124 does not suggest a decision to remand a part 71 permit.

Region IX correctly notes that 40 C.F.R § 124.19(d) provides that "The Regional Administrator, at any time prior to the rendering of a [Board] decision . . . to grant or deny review of a permit decision, may, upon notification to the Board and any interested parties, withdraw the permit and prepare a new draft permit under § 124.6 addressing the portions so withdrawn." Amicus Brief at 7. Consequently, Region IX states that, while part 124 does not apply to appeals of part 71 permits, "it is instructive regarding how such appeals should proceed and fully supports . . . the granting of NNEPA's Motion for Voluntary Remand." *Id.* Region IX's statement is simply wrong because it fails to properly account for EPA decisions made during the development of the part 71 regulations.

While developing the part 71 regulations, EPA considered two alternative methods for establishing administrative review procedural requirements. One option was to amend existing procedures in part 124 to be compatible with the part 71 program, and those part 124 procedures would be incorporated by reference into part 71. The second alternative was to establish administrative appeal procedures as a separate section of part 71. *See* 60 Fed. Reg. 20,824 (Apr. 27, 1995).

As EPA explained, the Agency adopted the second alternative, setting out administrative appeals procedures in § 71.11 and basing those procedures "closely on *selected provisions* of part 124, subpart A." *Id.* (emphasis added). The permit-withdrawal provision of § 124.19(d), as discussed above, is included within part 124, subpart A. Yet, that provision at § 124.19(d) was

not selected for inclusion in the part 71 administrative appeals procedures. In other words, based upon the method by which part 71 appeals procedures were developed, EPA deliberately decided that part 71 would not include a permit-withdrawal provision comparable to § 124.19(d).

As Region IX asserts, the permit-withdrawal provision at § 124.19(d) may be instructive regarding how part 71 permit appeals proceed, but not in the way advocated by Region IX. Rather, the deliberate absence of a provision in part 71 comparable to § 124.19(d) strongly implies that EPA saw no need for part 71 permits to be withdrawn from the Board's consideration. Thus, rather than part 124 fully supporting the granting of NNEPA's Motion for Voluntary Remand, the deliberate absence of a permit-withdrawal provision in the part 71 administrative appeals procedures counsels against favoring a remand of such permits.

B. EAB precedent for remanding a permit under the circumstances of this proceeding is questionable.

Peabody does not disagree with Region IX's observation that "the Board often remands a permit to the permit issuer rather than making a decision on the merits." Amicus Brief at 6. Indeed, Region IX has cited a number of cases in which the Board has remanded a permit, suggesting those cases establish precedent for the Board's decision whether to grant NNEPA's Motion for Remand.

But, absent from the Region's discussion is any comparison of the similarities between those cited cases involving a remand and the instant case. For example, Peabody does not believe that the remand in any of the cases cited by Region IX was issued by EAB prior to the permitting authority's response to the petition for review. Remanding a permit before EAB even receives the permitting authority's response constitutes a highly unusual, if not extraordinary, act that may have no EAB precedent. Moreover, of the cases cited by Region IX as demonstrating precedent in support of the remand request in this proceeding, Region IX fails to disclose how

many of those cases involved a remand request by the permitting authority and how many involved the Board's own exercise of discretion to remand the permit after becoming familiar with the basic arguments of all parties.

Remands may be ordered by the Board generally if the permitting authority wishes to *substantively* change a permit condition or else wishes to reconsider some aspect of the permit decision. *In re Indeck-Elwood, LLC*, PSD Appeal No. 03-04, at 6 (EAB May 20, 2004) (Order Denying Respondent's Motion for Voluntary Partial Remand and Petitioner's Cross Motion for Complete Remand, and Staying the Board's Decision on the Petition for Review). However, Peabody questions the applicability of that general precedent in circumstances similar to the instant case where a petition for review demonstrates a clearly erroneous conclusion of law for which there is no alternative permit decision, and yet the permitting authority fails to commit to correcting that legal error if the Board grants the permitting authority's requested remand.

III. The Region's Proposed Stay Is Preferable to a Remand of the Permit.

Region IX requests the Board to grant a stay in this proceeding so that NNEPA may make its intended permit revisions and issue a revised permit by no later than November 15, 2010. Amicus Brief at 4-5. Peabody has consistently opposed a disposition of the permit at this time that would allow NNEPA to revise the permit because any revised permit would undoubtedly continue to contain conditions that are unlawfully based on NNOPR requirements. Statements by NNEPA throughout its Reply confirm that any revised part 71 permit would continue to be flawed, i.e., contain permit conditions based on NNOPR requirements. Thus, Peabody continues to believe that the only appropriate course of action for the Board is to proceed with Peabody's appeal and to find all of the current permit conditions based on NNOPR to be unlawful. That finding would serve as necessary and essential direction for any permit

revisions which NNEPA now contemplates. Otherwise, Peabody apparently will have no recourse but to return to the Board at some time in the future with the very same issue now presented by its existing Petition.

Nevertheless, the Company has previously indicated its willingness to support a stay in the proceedings as proposed in the Region IX Amicus Brief, *provided* that the Board's order for such a stay stipulates certain conditions that must be met. Peabody Western Coal Company's Response to, and Conditional Support of, Motion of Navajo Nation EPA for Extension of Time to File Response to Peabody Western Coal Company's Petition for Review (June 29, 2010). Among other features, the Region's proposed stay offers, for the first time, a date certain by which any revised permit would be issued. The certainty of that timing is highly favored over NNEPA's Motion for Remand which makes no commitment to any schedule.

For ease of reference, Peabody repeats herein those conditions which any order for a stay would need to incorporate in order for Peabody to support that stay:

1. NNEPA shall issue the final revised permit by no later than November 15, 2010 in keeping with the interim deadlines provided in paragraph 8 of NNEPA's Motion for Extension of Time to File Response to Peabody Western Coal Company's Petition for Review (June 24, 2010);

2. NNEPA's revisions to the permit will consist only of changes to those permit conditions that Peabody has contested in its Petition;

3. The stay shall automatically terminate on the date of NNEPA's issuance of the final revised permit;

4. No later than 30 days after service of the final revised permit, Peabody shall either withdraw its existing Petition for Review or file an Amended Petition for Review with the Board;

5. No later than 30 days after service of Peabody's Amended Petition for Review, NNEPA shall file its Response to that Amended Petition with the Board; and

6. In the event that one or more of the preceding conditions is not satisfied, Peabody may seek appropriate relief from the Board.

CONCLUSION

Region IX states that NNEPA's argument in support of a voluntary remand is "comprehensive and cogent" and "easily meets the standard set forth by the Board." But Region IX's opinion is not persuasive because its Amicus Brief lacks substantive facts to support its stated belief. Contrary to Region IX's assessment of Peabody's Response in opposition to the requested remand, Peabody's Response first identified the standard for the Board's granting of a remand and then provided an analysis of the NNEPA's Motion for Remand to demonstrate why that Motion must be denied.

Also, Region IX's arguments that (1) a particular administrative appeals provision in part 124 and (2) EAB precedent both support a remand in this case are either clearly erroneous or else incomplete with respect to relevant facts and therefore questionable. Finally, the Region's claim that NNEPA's demonstration of the need for a remand "is identical to the situation in *In Re Desert Rock*, and no more specificity is needed" can only be characterized as not credible.

Peabody continues to oppose NNEPA's Motion for Remand because Region IX's Amicus Brief does not cure that Motion's fundamental deficiencies. However, while Peabody remains frustrated with the continued delays in this proceeding and believes the Board should

proceed to resolve the single legal issue raised by the Company's Petition, Peabody could support Region IX's Motion for a Stay of the Proceedings, provided that appropriate conditions are contained in any Board order for a stay that, among other things, ensures NNEPA issuance of a revised permit by November 15, 2010 and preserves the Company's right to appeal that revised permit.

Respectfully submitted,

John R. Cline
John R. Cline, PLLC
P. O. Box 15476
Richmond, Virginia 23227
(804) 746-4501 (direct & fax)
john@johnclinelaw.com

Peter S. Glaser
Troutman Sanders LLP
401 9th Street, N.W., Suite 1000
Washington, D.C. 20004-2134
(202) 274-2998
(202) 654-5611 (fax)
peter.glaser@troutmansaders.com

ATTORNEYS FOR PETITIONER
PEABODY WESTERN COAL COMPANY

CERTIFICATE OF SERVICE

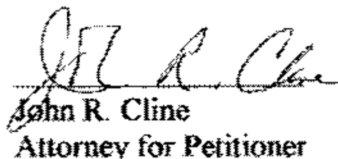
I hereby certify that a copy of the foregoing PEABODY WESTERN COAL COMPANY'S RESPONSE TO UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION IX'S *AMICUS CURIAE* BRIEF MOVING FOR A STAY OF THE PROCEEDINGS, OR IN THE ALTERNATIVE, SEEKING THAT THE BOARD GRANT NAVAJO NATION ENVIRONMENTAL PROTECTION AGENCY'S MOTION FOR VOLUNTARY REMAND in the matter of *In re Peabody Western Coal Company*, CAA Appeal No. 10-01, was served by United States First Class Mail, postage prepaid, on each of the following persons this 8th day of July, 2010:

Jill E. Grant, Esq.
Nordhaus Law Firm, LLP
1401 K Street, N.W., Suite 801
Washington, D.C. 20005

Anthony Aguirre, Assistant Attorney General
Navajo Nation Department of Justice
P. O. Box 2010
Window Rock, Arizona 86515

Stephen B. Etsitty, Executive Director
Navajo Nation Environmental Protection Agency
P. O. Box 339
Window Rock, Arizona 86515

Nancy J. Marvel, Regional Counsel
Ivan Lieben, Assistant Regional Counsel
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, California 94105



John R. Cline
Attorney for Petitioner

Date: July 8, 2010