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

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

MOTION OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION IX, FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* 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 United States Environmental Protection Agency ("EPA"), Region IX respectfully moves this Board for leave to file the accompanying brief as *amicus curiae* requesting a stay of these proceedings until November 15, 2010 to allow the Navajo Nation Environmental Protection Agency ("NNEPA") time to revise, as appropriate, the conditions of the referenced permit contested by Peabody Western Coal Company's ("Peabody") in its petition. In the alternative, to the extent that the Board does not support a stay in the proceedings at this time, EPA requests that the Board grant NNEPA's Motion for a Voluntary Remand of the permit back to NNEPA to reconsider those conditions. Support for these motions is contained in the attached *amicus curiae* brief. In sum, EPA agrees with NNEPA that the substantive issues raised by Peabody in its petition should not be addressed by the Board until such time as NNEPA is

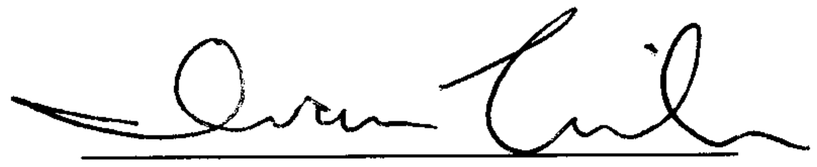
allowed to make any necessary changes to the contested permit conditions. Once NNEPA has completed the process of re-evaluating the permit conditions and making any necessary changes, which would likely include circulating a new proposed draft permit for public comment prior to issuance of a new permit decision, Peabody will have a renewed opportunity to raise its substantive concerns to the Board to the extent they were not addressed by the revisions.

Since NNEPA is administering a 40 C.F.R. part 71 Title V operating permits program on behalf of EPA as a delegate agency, and the challenged part 71 permit was issued pursuant to this delegation of authority, EPA has a substantial interest in how the Board rules upon the merits of the issues raised in Peabody's petition. Under the delegation agreement between NNEPA and EPA, NNEPA must issue permits in accordance with the part 71 requirements. *See* Delegation Agreement Between US Environmental Protection Agency Region IX and Navajo Nation Environmental Protection Agency, dated October 15, 2004 ("Delegation Agreement"), § IV, available at <http://www.epa.gov/region9/air/permit/pdf/navajodeleg.pdf>. Thus, any ruling by the Board on the scope of those requirements has the potential to impact EPA's issuance of part 71 permits in other circumstances.

The undersigned counsel for EPA left a voicemail for counsel for Petitioner, John Cline, on June 6, to see if Peabody would oppose this Motion. Mr. Cline returned the voicemail on June 11 indicating that Peabody would oppose it. Counsel for NNEPA has indicated to us that NNEPA supports EPA's filing of an *amicus curiae* brief, and the requests made in the brief.

For the reasons stated in the accompanying *amicus curiae* brief, the Board should either stay the proceedings or, in the alternative, grant a voluntary remand of the permit to NNEPA to make revisions, as appropriate, to the portions of the permit at issue in Peabody's petition.

Respectfully submitted,



Ivan J. Lieben
Region IX, Office of Regional Counsel
United States Environmental Protection Agency
75 Hawthorne St. (ORC-2)
San Francisco, CA 94105
(415) 972-3914
(415) 947-3570 (fax)

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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 Director of the Air Division of the United States Environmental Protection Agency, Region IX ("EPA"), through her counsel, submits to the Environmental Appeals Board ("Board") this *amicus curiae* brief moving for a stay of the proceedings until November 15, 2010 to provide an opportunity for the Navajo Nation Environmental Protection Agency ("NNEPA") to re-evaluate and, as appropriate, revise the permit to address the issues raised in Peabody Western Coal Company's ("Peabody") petition. In the alternative, to the extent that the Board does not believe that a stay of the proceedings is warranted, EPA urges the Board to remand the permit back to NNEPA for further consideration. Granting either the motion for a stay or NNEPA's Motion for a Voluntary Remand will serve to conserve the resources of this Board and the parties

by avoiding the necessity to address substantive issues at the present time that may become moot or changed through NNEPA's revision of permit requirements. Granting NNEPA's motion would also avoid the need for the Board to rule upon Peabody's Motion for Order Requesting EPA's Offices of Air and Radiation and General Counsel and EPA Region IX to File a Brief ("Motion Requesting an EPA Brief"), as the request for such a brief, while not necessarily opposed by EPA, is premature.

I. INTRODUCTION AND STATEMENT OF FACTS

EPA originally issued an operating permit to Peabody for its Black Mesa Complex pursuant to Title V of the Clean Air Act and 40 C.F.R. part 71 on September 23, 2003. EPA delegated the administration of the part 71 Program for the majority of the Title V sources located on the Navajo Nation, including the Black Mesa Complex, to NNEPA on October 13, 2004.[1] See 69 Fed. Reg. 67,578 (Nov. 18, 2004). On February 13, 2007, NNEPA issued a First Administrative Amendment to Peabody,[2] and on December 7, 2009, after noticing a proposed permit and seeking comment on it, NNEPA issued the part 71 renewal permit at issue in this proceeding to Peabody (the "Permit").

Peabody filed a Petition of Review of the Permit with the Board on January 7, 2010 (the

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[1] 40 C.F.R. § 70.4(a) required that each state submit a Title V operating permits program for approval by EPA by November 15, 1993. As a result, all states, including Arizona, currently operate Part 70 programs approved by EPA. However, EPA has not approved the State of Arizona to administer a Part 70 program for any area of Indian country, and the Navajo Nation has not independently sought or obtained approval of a Part 70 program for its areas. In these situations, 40 C.F.R. part 71 sets forth the relevant Title V regulatory provisions, and these provisions are implemented directly by EPA. 40 C.F.R. § 71.4(b). Pursuant to 40 C.F.R. part 49 and § 71.10, under certain circumstances, EPA is able to delegate administration of the part 71 program to a federally recognized Indian tribe, as it has done here in the case of the Navajo Nation.

[2] This administrative amendment was for the purpose of putting NNEPA requirements into the permit. Interestingly, though the same conditions that Peabody now challenges were included in the permit at that time, Peabody did not raise a challenge to them then.

"Petition"), challenging, among others, provisions in the Permit referencing non-federally enforceable Navajo Nation requirements. The Board directed NNEPA to file a substantive response to Peabody's Petition. The parties, together with EPA Region IX, then attempted a negotiated resolution to the Petition, and the Board granted two extensions of time for NNEPA to file its response during this period of negotiations. As a result, NNEPA's current deadline for filing a substantive response to the Petition is July 6, 2010. Indicating that it intends to re-evaluate and, as appropriate, revise the precise portions of the Permit at issue in Peabody's Petition, NNEPA filed a Motion for Voluntary Remand on May 28, 2010 ("Motion for Voluntary Remand"). Peabody subsequently filed its Motion Requesting an EPA Brief on June 3, 2010, and its Response to the Navajo Nation EPA's Motion for Voluntary Remand and Memorandum in Support of Motion on June 10, 2010 ("Response to Motion for Voluntary Remand").

II. STATUTORY AND REGULATORY PROCEDURAL PROVISIONS

This proceeding is governed by Title V of the 1990 amendments to the Clean Air Act ("CAA"), 42 U.S.C. §§ 7661-7661f, and 40 C.F.R. part 71. 40 C.F.R. § 71.10(i) provides a right of appeal to the Board of a Title V operating permit that was issued by a state, tribal, local, or other authority pursuant to a delegation of authority from EPA. 40 C.F.R. § 71.11(l) sets forth the specific, though limited, procedural standards governing such an appeal.

There are no regulatory requirements for motions filed in permit proceedings under a part 71 permit challenge, except for the requirements in section 40 C.F.R. § 71.11(l)(6) governing motions for reconsideration. As stated in its Practice Manual (Section III.D.7.b), the Board generally allows for motions, and "expects all motions to be in writing, state the grounds therefor

with particularity, state the relief sought, and be accompanied by any documentation on which the motion relies."[3]

III. ARGUMENT

A. The Board Should Stay the Proceedings While NNEPA Revises, As Appropriate, the Contested Permit Conditions

EPA Region IX's preferred approach is that the Board stay this permit appeal proceeding until such time as NNEPA has had an opportunity to re-evaluate and, as appropriate, revise the contested Permit conditions, which would likely include putting any proposed changes out for public comment, and as appropriate, issuing a new permit decision appropriately revising the contested Permit conditions based upon the record and public comments. The Board has often indicated in the past that a permitting authority may make revisions to a permit during a permit appeals process. See *In Re Los Mestenios Compressor Station,* CAA Appeal No. 09-01 (EAB 2009); *In re Indeck-Elwood, L.L.C.,* PSD Appeal No. 03-04, Order at 5-6 (EAB 2004); and *In Re Desert Rock Energy Company, LLC*, PSD Appeal Nos. 08-03, 08-04, 08-05, 08-06, 2009 WL 3126170 (EAB 2009). Moreover, under this approach, NNEPA need not reopen the contested Permit conditions because these Permit conditions will not become part of a final permit decision prior to the completion of the Board's appeals process.[4] See 40 C.F.R. 71.11(i)(2) ("[a] final permit decision shall become effective 30 days after the service of notice of the decision unless . . . [r]eview is requested under paragraph (l) of this section[dealing with appeal to the EAB] (in

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[3] While we recognize that this is in a section governing appeals under part 124, we believe that it is also instructive to a part 71 appeals process.

[4] This would also be the case if the permit is remanded to NNEPA rather than the proceedings being stayed. See 40 C.F.R. § 71.11(l)(5)(iii) (indicating that a final permit decision shall be issued by a permitting authority only after "the completion of a remand proceedings if the proceedings are remanded, ...")

which case the specific terms and conditions of the permit which are the subject of the request for review shall be stayed)") and 71.11(l)(5) ("For purposes of judicial review, final agency action occurs when a final permit is issued or denied by the permitting authority and agency review procedures are exhausted."). Hence, to make changes to the Permit at this point, it is appropriate for NNEPA to use the same procedures and authorities it used for initial permit issuance to simply re-propose for public comment those portions of the Permit it wishes to change, and issue an appropriate new permit without the need to actually "reopen" the Permit.

EPA is proposing that the period of the stay extend until November 15, 2010 to allow NNEPA sufficient time to process any necessary revisions to the Permit. In a call between counsel for EPA and counsel for NNEPA on June 17, NNEPA indicated that, after re-evaluating the issues, it could propose revisions to the Permit on or around August 1. Such a proposal would commence simultaneous 30-day public comment period and 45-day EPA Region IX review period[5] ending on or around September 15. NNEPA contemplates that it will then need 30 days to consider the comments and issue a final revised permit along with a response to comments, which would put permit issuance on our around October 15. The extra month until November 15 is necessary in case additional process is called for, such as the need to extend the comment period or hold a public hearing.

B. In the Alternative, NNEPA'S Motion for Voluntary Remand Should Be Granted

To the extent that the Board does not believe that a stay is warranted, EPA urges the Board to grant NNEPA's Motion for Voluntary Remand. In the Motion for Voluntary Remand

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[5] Pursuant to Paragraph IV.3 of the Delegation Agreement, EPA has 45 days to review and potentially object to a proposed Title V permit issued by NNEPA.

and supporting brief, NNEPA set forth a comprehensive and cogent argument as to why the Board should remand the permit back to NNEPA to re-evaluate and revise, as appropriate, the Permit conditions contested in Peabody's Petition. EPA generally supports the arguments set forth by NNEPA in that Motion, and, while EPA believes a stay of the proceedings is a more appropriate procedure, EPA also believes that a remand to NNEPA to reconsider and revise the Permit conditions at issue, to the extent NNEPA determines that such revisions are appropriate, may address some or all of Peabody's claims in the Petition. As such, it would be wasteful for the parties and the Board to expend resources at this point addressing the substantive claims in the Petition since these claims may ultimately be addressed or changed through additional permit processing by NNEPA.

C. A Stay or Remand is Supported by EAB Precedent

The Board has often stated that Agency policy favors allowing a permitting authority to make permit condition decisions rather than the Board. *E.g., In re Dominion Energy Brayton Point, LLC*, NPDES Appeal No. 07-01, slip op. at 9 (EAB Sept. 27, 2007), 13 E.A.D. at _, *appeal rendered moot by settlement*, No. 07-2059 (4th Cir. Dec. 17, 2007); *In re Teck Cominco Alaska Inc.*, 11 E.A.D. 457, 472 (EAB 2004); *In re Sutter Power Plant*, 8 E.A.D. 680, 687 (EAB 1999). Because of this, the Board often remands a permit to the permit issuer rather than making a decision on the merits. *See, e.g., Teck Cominco*, 11 E.A.D. at 496; *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 140-41, 175 (EAB 1999); *City of Hollywood*, 5 E.A.D. at 166-68; *see also In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 508-09 (EAB 2006) . Finally, allowing for remand requests makes sense in light of the purpose of the administrative appeals process, which is to ensure that a permitting authority fully considers the relevant issues and

makes a sound, reasoned final decision. *In Re Desert Rock Energy Company, LLC*, PSD Appeal Nos. 08-03, 08-04, 08-05, 08-06, 2009 WL 3126170 (EAB 2009). Consistent with this precedent, EPA believes that NNEPA is simply requesting the opportunity to "fully consider the relevant issues" and make a "sound, reasoned final decision" before the Board fully addresses the substantive issues, if necessary.

The permitting provisions found at 40 C.F.R. part 124, which cover various other permits, including the CAA Prevention of Significant Deterioration ("PSD") permits, also provide support for allowing the voluntary remand. In the context of a PSD permit appeal, 40 C.F.R. § 124.19(d) provides that the "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." In her letter dated January 14, 2010 to Stephen B. Etsitty, Executive Director of NNEPA, Eurika Durr, Clerk of the Board, indicated that review of the Petition has not yet been granted by the Board. As a result, under part 124, it would be permissible for NNEPA to notify the Board that it plans to revise the permit, and no voluntary remand would be necessary. While part 124 does not, by its terms, apply to appeals of Title V permits, it is instructive regarding how such appeals should proceed and fully supports a stay or the granting of NNEPA's Motion for Voluntary Remand.

D. None of the Arguments Made by Peabody Justifies the Board Not Granting A Stay of the Proceedings or A Voluntary Remand

Peabody raises various challenges in its Response to the Motion for Voluntary Remand as to why the Board should not grant NNEPA's Motion for Voluntary Remand. The points made by

Peabody, however, provide no basis for the Board to deny a stay of the proceedings or a remand of the permit decision back to NNEPA.

Peabody claims that any action taken by NNEPA on the Permit will not change the legal issues since it believes "NNEPA intends to make those permit revisions that the NNEPA had earlier proposed during settlement negotiations between the parties." Response to Motion for Voluntary Remand, at 9. According to Peabody, since the "NNEPA-revised permit for Black Mesa Complex would continue to include permit conditions based on that Tribe's regulations which have not been approved by EPA," the "key legal issue for the Board's resolution would still remain." *Id.* at 10. Peabody's claim that the underlying legal issues necessarily will remain the same is based on speculation. Peabody bases this belief on informal statements made to it by counsel for NNEPA. Even if these statements were made, they are not pre-determinative of the terms or conditions of a revised permit. The final terms and conditions will have to be decided upon by the Director of NNEPA, not counsel for NNEPA, as only he has the authority to issue a revised part 71 permit. See Navajo Nation Operating Permit Regulations § IV.401.D. Moreover, any final revised permit will have to be based upon the permitting record and comments received during the comment period. Therefore, any reliance by Peabody upon the informal statements made by legal counsel at this early stage is misplaced. Moreover, EPA, as the delegating agency for the part 71 program, has a strong interest in ensuring that all permits issued by NNEPA are consistent with the part 71 requirements. As such, EPA intends to informally confer with NNEPA on how best to revise the Permit in light of Peabody's concerns. For these reasons, and contrary to Peabody's claims, the precise nature of any revised permit conditions is currently unknown. Furthermore, even if NNEPA did ultimately revise the Permit as stated by counsel for

NNEPA, those proposed changes would surely change the nature of the claims and defenses presented during the appeals process in ways that are unpredictable at this point.

Peabody also challenges NNEPA's ability to reopen a permit under a part 71 delegated program. To support this challenge, Peabody claims that the "plain language of applicable regulations under 40 C.F.R. part 71 confirms that the NNEPA has no []authority under the CAA to reopen [a] federal operating permit. . . ." Response to Motion for Voluntary Remand, at 12-13. As previously discussed in Section III.A of this brief, however, because the contested Permit conditions are not yet in effect, NNEPA does not need to use its "reopening" authority to revise those conditions in the Permit. Rather, NNEPA may use the same authority it used to initially issue the Permit. Further, even if the Board has jurisdiction to consider whether NNEPA has underlying authority to issue permits,[6] EPA disagrees that part 71 strips NNEPA of the authority to reopen a permit. While Peabody focuses on reopening provisions found at 40 C.F.R. §§ 71.7(f) and (g) in its challenge, nothing in those provisions prevents NNEPA from reopening a part 71 permit. In fact, § 71.7(f) explicitly provides that a "permitting authority" has the ability to make a determination that cause exists for reopening of a permit, and part 71 defines permitting authority to include a delegate agency.[7] 40 C.F.R. § 71.2. For these reasons,

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[6] Part 71 appears to limit the Board's review to "any condition of the permit decision," and does not appear to contemplate Board review of the underlying authority of a permitting authority to issue a permit. 40 C.F.R. § 71.11(l)(1).

[7] 40 C.F.R. § 71.7(f)(1)(iii) and (iv) state that either the permitting authority or EPA, in the case of a delegated program, can make a determination that cause exists for a revision to the permit, which would then trigger the reopening provisions. While Peabody reads the reference to EPA as precluding a permitting authority from undertaking such a reopening, this reading of the provision would render the reference to "permitting authority" meaningless, and therefore would be disfavored as an interpretation. More important, Peabody misses the relevance of the reference to EPA, which is to synchronize this provision with 40 C.F.R. § 71.7(g). Section 71.7(g) creates an exclusive right on the part of EPA to reopen a permit for cause in the case of a part 71 delegated program, but only after providing notice to the delegate agency and providing the delegate agency the opportunity to make the revisions itself. The reference to a determination by EPA in 40 C.F.R. § 71.7(f) is necessary to ensure that the notice of such a

concerns about NNEPA's underlying authority to reopen the Permit are misplaced.

Finally, Peabody challenges the remand because the Motion for a Voluntary Remand does not contain "sufficient specificity to demonstrate good cause." Response to Motion for Voluntary Remand, at 6. This argument also misses the mark. As pointed out in *In Re Desert Rock,* and consequently by Peabody in its Response to the Motion for Voluntary Remand, the Board liberally grants remands whenever an agency specifies that it would like to "reconsider some element of the permit decision." *In Re Desert Rock,* 2009 WL 3126170, at *8. NNEPA, in its motion, clearly stated that it would like to "clarify" or "correct" the "very same permit conditions that [Peabody] is challenging in its appeal." Motion for Voluntary Remand, at 3. This stated purpose of NNEPA easily meets the standard set forth by the Board. Inherent in this standard is the principle that the changes are likely to occur during reconsideration and, thus, the issues on appeal are not fully determined prior to completion of the reconsideration process. Staying the proceedings, or remanding the Permit in the present circumstances, is consistent with the principle that issuance of permits should be based upon the permitting record, including comments received from the public and the permittee. This again demonstrates that the final terms and conditions of a permit cannot be accurately predicted prior to completion, much less the commencement, of that process.

While Peabody points to *In Re Desert Rock* as an example of a motion for a voluntary remand by a permitting authority that contains more specificity about the proposed changes, Peabody misstates the facts, and inaccurately compares the two situations. As recognized by the

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finding submitted to a delegate agency by EPA, as required by 40 C.F.R. § 71.7(g)(1), provides sufficient legal basis for the delegate agency to take action on the notice, and hence preserves the delicate balance achieved by these parallel reopening provisions.

Board in that Order, "the Region discusses several issues it proposes to reconsider on remand. . . . The Region also indicates that its reconsideration of some, if not all, of these issues may necessitate changes in some terms of the Permit." *In Re Desert Rock,* 2009 WL 3126170, at *8-9. Similarly, here, NNEPA has identified certain terms and conditions that it will reconsider, namely those terms and conditions being challenged by Peabody, and claims that changes may be made to those terms. This is identical to the situation in *In Re Desert Rock,* and no more specificity is needed.

IV. CONCLUSION

For the aforementioned reasons, EPA respectfully requests that the Board stay the proceedings until November 15, 2010 to allow time for NNEPA to re-evaluate the Permit conditions in the light of Peabody's claims, and likely issue a new draft permit containing proposed changes to the contested Permit conditions for public comment, and finalize, as appropriate, those changes. In the alternative, EPA urges the Board to grant NNEPA's Motion for a Voluntary Remand. The Board granting one of these motions will avoid the unnecessary expenditure of resources by the parties and the Board itself in addressing substantive issues which may be resolved or changed through additional permit processing by NNEPA. The granting of one of these motions will also have the added benefit of relieving the Board from the need to rule on Peabody's Motion Requesting an EPA Brief until later, or perhaps even eliminate the need to rule on the motion at all. Once NNEPA has completed its permitting process, and if Peabody believes that a revised permit decision does not address or change the concerns it raised in its Petition, Peabody will again have the opportunity to raise its substantive challenge.

Respectfully submitted,

Ivan J. Lieben
Region IX, Office of Regional Counsel
United States Environmental Protection Agency
75 Hawthorne St. (ORC-2)
San Francisco, CA 94105
(415) 972-3914
(415) 947-3570 (fax)

CERTIFICATE OF SERVICE

I hereby certify that this Motion of the United States Environmental Protection Agency, Region IX, for Leave to File a Brief as *Amicus Curiae* 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 the attached supporting Brief were electronically filed with the Environmental Appeals Board through its CDX Electronic Submission Page on June 24, 2010.

I also certify that copies of the same were sent via first class mail on June 24, 2010 to the following:

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

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

Peter S. Glaser
Troutman Sanders LLP
401 9th Street, NW, Suite 1000
Washington DC 20004-2134

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

Ivan J. Lieben
Region IX, Office of Regional Counsel
United States Environmental Protection Agency