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December 11, 2012

Via Federal Express

Eurika Durr, Clerk
Environmental Appeals Board
U.S. Environmental Protection Agency
1201 Constitution Avenue, NW
U.S. EPA East Building, Room 3332
Washington, DC 20004

Re: *In re Peabody Western Coal Company,* CAA Appeal No. 12-01;
PETITIONER'S RESPONSE TO JOINT MOTION OF U.S. EPA AND NAVAJO NATION EPA FOR SUMMARY DISPOSITION OF PEABODY WESTERN COAL COMPANY'S PETITION FOR REVIEW

Dear Ms. Durr:

On January 27, 2012, and on behalf of Peabody Western Coal Company ("Peabody" or "Company"), I mailed to the Board an original and five copies of Peabody's Motion for Leave to File a Response to Joint Motion of EPA and NNEPA for Summary Disposition of Peabody's Petition for Review and Peabody's Motion for an Order Setting the Deadline for That Response. The Board's website indicates that those motions were received and placed in the Board's docket for this proceeding on December 3, 2012.

To date I have not received notice of any action taken by the Board with respect to those two motions. Nevertheless, with this letter I am forwarding an original and five copies of the above-referenced *proposed* Response by Peabody. In the event that the Board grants Peabody's pending request for leave to respond to the subject EPA-NNEPA joint motion, Peabody respectfully asks that the enclosed *proposed* Response be accepted by the Board as the Company's Response to the EPA-NNEPA joint motion.

Should you have any question about the enclosures, please contact me at 804-746-4501 or at john@johnclinelaw.com. Thanking you in advance for your assistance, I am

Sincerely,

John R. Cline
Counsel for Peabody Western Coal Company

Enclosures

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

In the Matter of:	)	
Peabody Western Coal Company	)	CAA Appeal No. 12-01
Title V Permit No. NN-OP 08-010	)	

PETITIONER'S RESPONSE TO JOINT MOTION OF U.S. EPA AND NAVAJO NATION EPA FOR SUMMARY DISPOSITION OF PEABODY WESTERN COAL COMPANY'S PETITION FOR REVIEW

I. INTRODUCTION

Peabody Western Coal Company ("Peabody" or "Company") has requested the Environmental Appeals Board ("Board") to review an administrative amendment to the Title V federal operating permit for the Company's Kayenta Complex, a surface coal mining operation located on lands of the Navajo Nation near Kayenta, Arizona. *See* Peabody's Petition for Review, CAA Appeal No. 12-01, Dkt No. 1 (filed Oct. 1, 2012) ("Petition"). In a joint motion dated November 27, 2012, the U.S. Environmental Protection Agency ("EPA") and the Navajo Nation Environmental Protection Agency ("NNEPA") moved the Board "to deny the petition for lack of standing and jurisdiction[.]" *See* Joint Motion of U.S. EPA and Navajo Nation EPA for Summary Disposition of Peabody Western Coal Company's Petition for Review, CAA Appeal No. 12-01, Dkt No. 6 ("EPA-NNEPA Motion"). For the reasons explained herein, Peabody respectfully requests the Board to deny the EPA-NNEPA Motion.

II. PROCEDURAL HISTORY

In 2004 EPA delegated its authority under Title V of the Clean Air Act ("CAA") to NNEPA to administer the part 71[1] federal operating permit program for certain stationary sources located on lands of the Navajo Nation, including the Kayenta Complex. 60 Fed. Reg. 67,578 (Nov. 18, 2004). The EPA-NNEPA Motion recites the chronology of NNEPA's Title V permitting-related actions for Kayenta Complex (formerly "Black Mesa Complex") going back to 2009. EPA-NNEPA Motion at 2-4. However, the procedural history of material relevance to this proceeding only began in late-August 2012.

In particular, on August 31, 2012, while acting under federal authority delegated by EPA, NNEPA revised the part 71 federal operating permit for Kayenta Complex with an administrative permit amendment that changed the issuance and expiration dates for that existing permit. EPA-NNEPA Motion, Ex. D. With its Petition, Peabody challenged that permit amendment because it was based on a conclusion of law which is clearly erroneous. Pet. at 2. EPA and NNEPA thereafter moved the Board to deny the Company's Petition for lack of standing and jurisdiction. EPA-NNEPA Motion at 2.

On December 3, 2012, Peabody filed with the Board a Motion for Leave to File a Response to Joint Motion of EPA and NNEPA for summary disposition of Peabody's Petition for Review and Peabody's Motion for an Order Setting the Deadline for That Response ("Peabody Motions"). Dkt 7. As of 2:00 p.m. E.S.T. on December 11, 2012, counsel for Peabody had not received notice of any action taken by the Board with respect to those Peabody Motions. Therefore, Peabody is now filing this document as a *proposed* Response to the EPA-NNEPA Motion. In the event that the Board grants Peabody's pending request for leave to

[1] "Part 71" refers to 40 C.F.R. part 71, the codification of EPA's regulations for the Title V federal operating permit program.

respond to the EPA-NNEPA Motion, Peabody respectfully asks that this document be accepted by the Board as the Company's response to the EPA-NNEPA Motion.

III. ARGUMENT

The core argument of the EPA-NNEPA Motion consists of the following three prongs:

(1) That the Board has broad discretion to consider the agencies' joint motion to dismiss;

(2) That Peabody lacks standing to file its Petition; and

(3) That the Board lacks jurisdiction to review Peabody's Petition.

Accordingly, Peabody's rebuttal of EPA's and NNEPA's core argument addresses those three points in *seriatim*.

A. Board Authority to Consider the EPA-NNEPA Motion

Although part 71 does not provide any substantive motions practice, the Board has previously found that its "broad case management discretion found in part 124 cases naturally extends to part 71 cases, which unfold in accordance with procedures very closely parallel to those of part 124." *See, e.g., In re Peabody Western Coal Co.*, CAA Appeal No. 10-01, 14 E.A.D. __, slip op. at 8 (EAB Aug. 13, 2010). As EPA and NNEPA have noted, the Board has previously considered motions for summary disposition in part 124 proceedings. EPA-NNEPA Motion at 5 (citations omitted). Peabody therefore concludes that the Board could likely find that its broad case management discretion in part 71 proceedings includes the consideration of motions for summary disposition. Accordingly, in the context of this instant part 71 proceeding, Peabody believes that the Board has the authority to consider the EPA-NNEPA Motion.

B. Peabody Has Standing to File Its Petition.

Consistent with 40 C.F.R. § 71.7(d)(3)(i), NNEPA was not required to provide a public comment period for its administrative amendment of Peabody's part 71 federal permit. As EPA

and NNEPA have acknowledged, the standing requirements for a person seeking the Board's review of a part 71 federal permit provide that "a person who did not participate in the comment period may petition for review 'only to the extent of the changes from the draft to the final permit decision or other new grounds that were not reasonably foreseeable during the public comment period.'" EPA-NNEPA Motion at 7 (quoting 40 C.F.R. § 71.11(l)(1)).

Peabody's Petition challenges two revised conditions in the NNEPA-issued administrative permit amendment: (1) the revised permit issuance date and (2) the revised permit expiration date. Petition at 1. Furthermore, the Petition explains how those two revised permit conditions constitute "new grounds that were not reasonably foreseeable during the public comment period." Petition at 5-6. Moreover, EPA and NNEPA agree that the administrative amendment of Peabody's permit "may come within the category of 'new grounds that were not reasonably foreseeable during the public comment period.'" EPA-NNEPA Motion at 7 & n.8. Because the two NNEPA-revised conditions in Peabody's part 71 federal permit were not reasonably foreseeable during the public comment period, Peabody has standing under § 71.11(l)(1) to appeal those permit revisions.

Nevertheless, EPA and NNEPA assert that "Peabody lacks standing to bring this appeal because it does not concern the corrections made by the administrative permit amendment." EPA-NNEPA Motion at 6. Those agencies characterize Peabody's Petition as "a general attack on all provisions of its permit[.]" EPA-NNEPA Motion at 11. EPA's and NNEPA's statements misrepresent the actual content of Peabody's Petition which only challenges two permit conditions for being erroneously revised as a matter of law.

Indeed, EPA and NNEPA devote several pages of argument to support their basic premise that "Peabody is now limited to appealing only those permit conditions for which it was

'impracticable' to raise concerns earlier, namely, the effective date [sic] of the permit and the change in contact information."[2] EPA-NNEPA Motion at 10-11. However, Peabody does not disagree with the agencies' premise; the Company's appeal only addresses two revised permit conditions for which it was impracticable to raise concerns prior to this Petition.

The Company fully understands that it may only challenge permit conditions which were revised by NNEPA's administrative permit amendment. Two revised permit conditions are precisely and solely what Peabody's Petition addresses, i.e., the revised issuance and expiration dates of Peabody's permit. Petition at 1. Despite EPA's and NNEPA's verbiage, Peabody's Petition has challenged no other conditions in the Company's part 71 federal permit.

Without question, existing, uncontested conditions of the Company's permit are as legally deficient as the two permit conditions which Peabody has challenged because all of those conditions arise from the unlawful delegation provisions of part 71. But that widespread legal infirmity in the overall permit is not a factor in determining whether Peabody has standing to challenge the two revised permit conditions in question.

Peabody's Petition satisfies the standing requirement for a part 71 permit appeal by challenging two "condition[s] of the permit decision" that were "not reasonably foreseeable during the public comment period." 40 C.F.R. § 71.11(l)(1). The fact that Peabody's appeal also results in a collateral challenge to the delegation provisions of part 71 raises the separate question of whether the Board should review Peabody's Petition (which is addressed separately in the following section of Peabody's argument). Regardless of the Board's resolution of that latter question, Peabody's Petition satisfies the part 71 threshold requirements for standing.

[2] NNEPA's administrative permit amendment does not speak to the subject permit's "effective date." Rather, the permit conditions revised by NNEPA's administrative permit amendment consist of the "issue date" and "expiration date" of Peabody's part 71 federal permit. *See* EPA-NNEPA Motion, Ex. D.

C. Jurisdiction of the Board and Its Exercise Thereof

1. The Board Has Jurisdiction to Review the Two Revised Permit Conditions Challenged by Peabody's Petition.

EPA and NNEPA claim that the Board has no jurisdiction to review Peabody's Petition for the same reason that Peabody allegedly does not have standing to petition the Board for review, i.e., because Peabody's Petition "does not focus on any particular permit conditions." EPA-NNEPA Motion at 13-14. As explained above, EPA's and NNEPA's assertion is simply incorrect.

Peabody's Petition challenges both the permit issuance date and the permit expiration date which were each revised by the NNEPA-issued administrative permit amendment. Petition at 1. Indeed, EPA and NNEPA acknowledge that those dates are "permit conditions." EPA-NNEPA Motion at 10 (referring to "those *permit conditions* for which it was 'impracticable' to raise concerns earlier.") (emphasis added).[3]

EPA Region IX's guidance for reviewing Title V permits such as Peabody's part 71 federal permit advises that "[e]ach permit condition must contain a citation of origin." EPA Region IX, "Title V Permit Review Guidance," III-107 (Sept. 9, 1999). To that end, NNEPA revised the subject two conditions in Peabody's part 71 federal permit under the authority of 40 C.F.R. § 71.7(d) ("Administrative permit amendments"). EPA-NNEPA Motion, Ex. D.

In other words, 40 C.F.R. § 71.7(d) constitutes the "citation of origin" for both the revised issuance date and the revised expiration date in Peabody's part 71 federal permit. Peabody's Petition asks the Board to review that citation of origin for each of the two revised permit conditions because that citation is clearly erroneous as a matter of law. That is, NNEPA

[3] *See* n.2. The EPA-NNEPA Motion incorrectly identifies the specific dates in the permit that were revised by the administrative permit amendment. Although NNEPA revised the permit issuance date and the permit expiration date, for some unknown reason the EPA-NNEPA Motion addresses those revised dates collectively as "the effective date of the permit." EPA-NNEPA Motion at 10.

has no authority under 40 C.F.R. § 71.7(d) to revise either of the two challenged permit conditions because NNEPA has no lawful authority under the Clean Air Act to administer that provision of the part 71 federal operating permit program.

Peabody's Petition bears no resemblance to the petition cited by EPA and NNEPA which failed to clearly identify the permit conditions at issue and failed to provide argument that the conditions warrant review. EPA-NNEPA Motion at 11 (citing *In re Beeland Group LLC,* UIC Permit Appeal No. 08-02, slip op. at 9 (EAB Oct. 3, 2008)). Peabody's Petition under part 71 focuses solely on two revised conditions in its part 71 permit and consequently has nothing in common with those petitions cited by EPA and NNEPA which sought review of non-PSD matters within a PSD permit appeal, *In re Knauf Fiber Glass, GmbH,* 8 E.A.D. 121, 161-62 (EAB 1999), or which sought review of matters beyond the boundaries of the UIC permitting program itself during a UIC permit appeal, *In re Envtl. Disposal Systems, Inc.,* 12 E.A.D. 254, 266 (EAB 2005); *In re NE Hub Partners, L.P.,* 7 E.A.D. 561, 567 (EAB 1998).

In sum, the part 71 federal operating permit program authorizes the Board to review "any condition of the permit decision." 40 C.F.R. § 71.11(l)(1). NNEPA's administrative amendment of Peabody's part 71 federal permit constitutes a permit decision. Peabody's Petition requests the Board to review two conditions of NNEPA's permit decision, i.e., the revised permit issuance date and the revised permit expiration date. Therefore, the Board clearly has jurisdiction to review Peabody's Petition.

2. The Board Not Only Has Jurisdiction to Review the Validity of the Regulation Underlying This Permit Appeal But Also Has Compelling Reasons for Doing So.

EPA and NNEPA allege that Peabody's Petition "is purely an attack on the validity of part 71, and therefore *is not within the Board's jurisdiction*[.]" EPA-NNEPA Motion at 13

(emphasis added). Likewise, EPA and NNEPA claim that "the Board has repeatedly found that an attack on underlying regulations is not, in fact, a challenge to any particular permit condition and so *is outside its jurisdiction*." *Id.* EPA's and NNEPA's statements clearly misrepresent the scope of the Board's jurisdiction. As explained below, the Board's lack of jurisdiction is something far different from whether the Board chooses to rely on its broad case management discretion to exercise its jurisdiction.

Peabody's Petition has made no attempt to conceal or otherwise avoid the fact that its challenge to two revised permit conditions raises the fundamental question of whether NNEPA has authority under the CAA to make those permit revisions. We understand, and our Petition makes clear, that the core issue underlying that fundamental question is whether the CAA authorizes EPA to delegate its statutory authority to administer a Title V federal permit program, i.e., whether the delegation provisions of part 71 are lawful.

EPA and NNEPA are quick to highlight the fact that Peabody's Petition is "its third petition for review of the same" part 71 federal operating permit. EPA-NNEPA Motion at 1. On the other hand, EPA and NNEPA do not want to highlight that the administrative delegation process under part 71 has been badly broken for years and needs to be fixed before further, significant damage is inflicted upon agencies with delegated administrative authority under part 71 and upon the stationary sources which they purportedly regulate. As explained in its Petition, Peabody shares Judge Tatel's philosophy that "interested parties have . . . a responsibility as citizens not to encourage agencies to act beyond their authority." Pet. at 20. For that reason, the Company's instant Petition continues to seek the Board's review as a necessary and appropriate first step toward correcting a major flaw in the way that EPA currently administers the part 71 federal operating permit program.

To date, Peabody's explanations of the legal defects of the part 71 delegation provisions have fallen mostly on deaf ears, perhaps for an understandable, but nevertheless questionable, reason. More likely than not, there are those within EPA that now understand the significant magnitude of the underlying issue raised by Peabody's Petition. If, as a matter of law, EPA has never had authority to delegate its statutory authority to administer the federal Title V operating permit program, then existing part 71 permits issued by part 71 delegate agencies (tribal, state and local) would have no force of law.

Even more threatening perhaps is the implication of Peabody's Petition that EPA's prior and future delegations of its statutory authority to administer other CAA permit programs are likewise invalid, e.g., federal prevention of significant deterioration under 40 C.F.R. § 52.21, federal minor source review in Indian country under 40 C.F.R. §§ 49.151 *et seq.* and federal major new source review for nonattainment areas in Indian country under 40 C.F.R. §§ 49.166 *et seq.* In short, as Peabody's Petition explains, the issue raised in this proceeding presents an exceptional case of national significance. Pet. at 18-22.

Peabody concurs with EPA's and NNEPA's acknowledgment that the time for seeking *judicial* review of the part 71 delegation provisions under CAA § 307(b) "has long passed." EPA-NNEPA Motion at 14 (emphasis added). But the Company strongly disagrees with EPA's and NNEPA's statement that the statutory provision of CAA § 307(b) for judicial review of the Agency's regulations "is the *only* avenue for review of a CAA rule." *Id.* (emphasis added). As the Board has explained, "the effect of [CAA § 307(b)] is to make it unnecessary for an administrative agency to entertain *as a matter of right* a party's challenge to a rule subject to this statutory provision." *In re Echevarria,* 5 E.A.D. 626, 634 (EAB 1994) (emphasis added). In other words, contrary to EPA's and NNEPA's assertion, the Board does not lack jurisdiction to

review a regulation after the time for seeking judicial review of that regulation under CAA § 307(b) has passed. Rather, in those circumstances the Board may exercise its discretion to review a party's challenge to a regulation.

Not surprisingly, EPA's and NNEPA's joint argument for dismissing Peabody's Petition relies upon cases where the Board has noted that a permit appeal is not intended to be an appropriate forum for challenging Agency regulations. EPA-NNEPA Motion at 15 (citing, e.g., *In re Tondu Energy Co.*, 9 E.A.D. 710, 715-16 (EAB 2001)). However, the Board's actual policy on this matter is more nuanced. In particular,

> the Board has concluded that there is "an especially strong presumption" against entertaining a challenge to the validity of a regulation subject to a preclusive judicial review provision. *Echevarria*, 5 E.A.D. at 635. Because this presumption is a rule of practicality, there may be "an exceptional case" where an "extremely compelling argument" is made, such as where a regulatory decision has been effectively invalidated by a court but has yet to be formally repealed by the Agency. *Id.* at 635 & n.13 (other citations omitted); *see also In re B.J. Carney Indus.*, 7 E.A.D. 171, 194 (EAB 1997) (stating that review of a regulation may be appropriate only in the "most compelling circumstances").

Thus, while Board review of the delegation provisions of part 71 is not absolutely precluded by CAA § 307(b), the Board may decide to review Peabody's challenge to those delegation provisions only "if there are 'extremely compelling' circumstances warranting such review." *In re USGen New England, Inc. Brayton Point Station*, 11 E.A.D. 525, 558 (EAB 2004) (hereinafter "*USGen*").

In previous permit or enforcement appeals that have challenged the validity of an underlying regulation, the Board has found that such appeals typically have not presented circumstances that met the Board's standard of reviewability articulated in *Echevarria* and *B.J. Carney*. Applying that standard in *Carney*, for example, the Board denied review of an appeal

claiming the regulatory definition of the term "process wastewater" was unconstitutionally vague. *In re B.J. Carney Indus.*, 7 E.A.D. at 195. Similarly, the Board has declined to exercise its discretion by reviewing a constitutional challenge to a regulatory amendment which eliminated a previous requirement for holding an evidentiary hearing. *USGen*, 11 E.A.D. at 561. The Board has also declined to review the constitutionality of specific provisions that implement EPA's stormwater regulations. *In re City of Irving, Texas*, 10 E.A.D, 111, 124-25 (EAB 2001).

In other petitions for review of federal permits, the Board has declined review of a NPDES permit appeal that challenged inclusion of industrial wastewater treatment plants within the regulatory definition of publicly owned treatment works. *In re City of Port St. Joe and Florida Coast Paper Co.*, 7 E.A.D. 275, 286-87 (EAB 1997). In *Tondu Energy*, 9 E.A.D. at 715-16, the Board denied review of a PSD appeal that challenged the adequacy of a national ambient air quality standard.

Importantly, while Peabody's Petition includes a challenge to the validity of a federal permit regulation, the nature and scope of Peabody's part 71 appeal differ markedly from those same features associated with other appeals for which the Board has previously denied review because they contained challenges to regulations. Peabody's Petition, for example, clearly does not raise a constitutional question, *see e.g., Echevarria, Carney* and *City of Irving*, nor is the nature of Peabody's Petition a narrow challenge to EPA's interpretation of a regulatory definition, *see, e.g., Carney.*

Likewise, the scope of Peabody's Petition is not a question of whether a regulatory provision is permissible as applied to a specific source or to a particular source category. *See, e.g., City of Port Joe and Florida Coast Paper.* Peabody's Petition is clearly not a challenge to technical or scientific issues such as an ambient standard, *see, e.g., Tondu Energy,* or a work

practice standard, *see, e.g., Echevarria.* Peabody's Petition certainly does not challenge revision of a specific administrative procedure within a regulation. *See, e.g., USGen.*

Moreover, Peabody is not questioning the validity of a regulation that was "adopted only after recent and full consideration of the very . . . statutory issue[ ]" that is now addressed by the Company's Petition. *USGen*, 11 E.A.D. at 558. Indeed, during its development of the part 71 delegation provisions, EPA's discussion of the underlying authority which purportedly allows the Agency to delegate its statutory authority to administer the federal Title V program appears to have been nothing more than a conclusory statement that the CAA provided for such delegation. 60 Fed. Reg. 20,804, 20,822 (Apr. 27, 1995) ("Section 301(a)(1) of the Act provides that the Administrator is authorized to prescribe such regulations as are necessary to carry out his or her functions under the Act. Pursuant to this authority, proposed § 71.10 provides that a part 71 program may be delegated . . .").[4]

Peabody's Petition therefore is not the typical "run-of-the-mill" permit appeal which includes an inappropriate challenge to an underlying, and often narrow, regulatory provision that frequently has limited applicability. Instead, the Board in this proceeding has been presented with a broad-based, fundamental question of whether a major component of the Title V federal permit program has been unlawfully implemented since its inception. The nationwide significance of that question coupled with the magnitude of its potential impacts constitutes an "exceptional case" of "compelling circumstances" that demands the Board's attention.

Particularly compelling is recognition that, should the Board conclude that EPA lacks authority to delegate its statutory federal permitting authority under Title V, then presumably every existing part 71 federal operating permit that has been issued under EPA's delegated part

[4] Peabody's Petition clearly demonstrates that "the D.C. Circuit has already found the scope of EPA's title V authority to administer a federal operating permit program to be unambiguous and therefore beyond the reach of any EPA 'gap-filling' regulations under CAA § 301(a)." Pet. at 15.

71 administrative authority would be invalidated. In addition, the profound impact of such a decision by the Board becomes even more compelling when those agencies with purportedly delegated part 71 administrative authority could no longer administer that federal permit program.

Moreover, should the Board find the delegation provisions of part 71 to be unlawful, EPA not only would become the sole permitting authority for future part 71 federal permits, but the Agency would also be faced with curing the part 71 federal permits previously issued by delegate agencies. And last, but certainly not least, a Board conclusion that EPA lacks authority to delegate its statutory federal permitting authority under Title V has implications for the legal foundations of existing federal permits issued by tribal, state and local agencies under delegations of EPA's statutory authority for other CAA programs.

In sum, the nature and scope of the regulatory challenge presented by Peabody's Petition are much different from those of regulatory challenges contained in previous appeals which the Board has declined to review. The Board's resolution of the major legal flaw addressed by Peabody's Petition would re-structure the manner in which the Title V federal operating permit program is currently administered. EPA, as well as tribal, state, and local agencies with purportedly delegated federal authority to administer the part 71 program, would be affected significantly; existing part 71 federal permits already issued by "delegate agencies" would need to be revised. Finally, Board resolution of the regulatory issue inherent within Peabody's Petition would naturally raise the question of whether similarly situated federal permit programs administered by delegate agencies are, as a matter of law, authorized under the CAA. The "extremely compelling circumstances" associated with Peabody's Petition warrant the Board's

review of the Company's appeal as a first step in the Agency's corrective actions for the Title V federal permit program.

D. Conclusion

The Board's dismissal of Peabody Petition at this stage of the proceeding, without even considering the merits of that Petition, would send a strong signal to the regulatory and regulated communities alike that (1) the Agency's priorities for the federal title V permitting program place form over substance and thus (2) statutory commands may be ignored when the ends justify the means. For that reason, the Board should not simply "close the book" on the delegation provisions of part 71, turning its back on a legal issue having major consequences for both regulatory and regulated entities throughout the Nation.

Peabody understands that its Petition asks the Board to make a very difficult decision having the potential for widespread impacts for all parties involved with part 71 permitting by agencies with statutory authority ostensibly delegated by EPA. At the same time, however, the legal analysis within the Company's Petition is highly persuasive, providing the Board with a strong legal foundation to make that difficult decision. The Petition's argument relies on basic principles of statutory construction, controlling case law, and the Agency's own past analysis of a parallel delegation issue under the Clean Water Act to demonstrate convincingly that Congress never authorized EPA's delegation of its statutory authority to administer the federal title V permit program. Having now been advised of an existing, major legal defect in the part 71 federal permit program and recognizing that future unlawful permitting actions are inevitable without its intervention, the Board must reject EPA's and NNEPA's request to simply walk away from Peabody's Petition at this time. At a minimum, the Board needs to gain a better

understanding of, and appreciation for, the scope and magnitude of the existing legal deficiency in the Agency's Title V federal permit program by continuing this proceeding.

WHEREFORE, for all of the reasons discussed above, Peabody respectfully requests the Board to deny the EPA-NNEPA joint motion for summary disposition of Peabody's Petition.

Respectfully submitted,

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Counsel for Peabody Western Coal Company

CERTIFICATE OF SERVICE

I certify that copies of PETITIONER'S RESPONSE TO JOINT MOTION OF U.S. EPA AND NAVAJO NATION EPA FOR SUMMARY DISPOSITION OF PEABODY WESTERN COAL COMPANY'S PETITION FOR REVIEW were mailed via first-class U.S. mail, postage prepaid, on this 11th day of December 2012 to the following:

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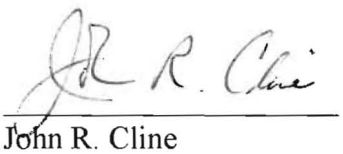

John R. Cline
Counsel for Peabody Western Coal Company

Date: December 11, 2012