

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

In the Matter of:)

Peabody Western Coal Company)
Permit No. NN-OP 08-010)

Appeal No. CAA 10-01

**RESPONSE OF NAVAJO NATION EPA TO PWCC MOTIONS FOR LEAVE TO FILE
RESPONSE TO EPA'S *AMICUS* BRIEF AND SURREPLY TO NAVAJO NATION
EPA'S REPLY BRIEF**

On July 8, 2010, Peabody Western Coal Company ("PWCC") filed two motions in this proceeding, together with proposed briefs. The first motion seeks leave to file a Surreply to the Navajo Nation EPA's ("NNEPA's") Reply regarding NNEPA's Motion for Voluntary Remand of the permit at issue in this proceeding ("Motion for Leave to File Surreply"). The second motion seeks leave to file a response to the U.S. Environmental Protection Agency Region IX's ("EPA's") *Amicus Curiae* Brief supporting a stay of the permit at issue or, alternatively, supporting NNEPA's motion for voluntary remand ("Motion for Leave to File Response").

In both of these motions and/or supporting briefs, PWCC states its willingness to agree to a stay of this proceeding until NNEPA issues a revised permit. *See, e.g.*, PWCC's Motion for Leave to File Response at 2; PWCC's Proposed Response at 3, 9, 10; PWCC's Proposed Surreply at 2, 10. In addition, PWCC notes that it previously agreed to a stay in this proceeding. *See* PWCC's Proposed Response at 10, citing PWCC's Response to, With Conditional Support of, NNEPA's Motion for Extension of Time (filed July 6, 2010), at 2. Since all parties agree that

a stay of this proceeding is acceptable pending NNEPA's revisions to PWCC's permit, NNEPA submits that there is no need for the Board to consider the substantive arguments that PWCC raises in its motions and/or proposed briefs concerning the permit and NNEPA's permit-processing procedures. Instead, NNEPA urges the Board to simply grant the stay, provided the Board determines that a stay is appropriate, and defer consideration of PWCC's substantive arguments and any response to those arguments ultimately filed by NNEPA and EPA as *Amicus Curiae* until the revised permit is before the Board for review at the end of the stay.

All parties also agree that the appropriate duration of the stay is until November 15, 2010, as this should allow NNEPA sufficient time to finalize revisions to the permit. *See, e.g.,* EPA's *Amicus Curiae* Motion for Stay at 2; PWCC Motion for Leave to File Response at 2. At the end of the stay, to the extent that NNEPA's revisions do not address PWCC's concerns, NNEPA agrees that PWCC should be afforded the opportunity to reinstate some or all of its arguments with the Board, but also requests that NNEPA and EPA as *Amicus Curiae* be provided time to file responses to PWCC's substantive claims. Thirty days for the agencies to file responses on the substantive issues should suffice.

NNEPA objects, however, to the additional conditions proposed by PWCC. *See, e.g.,* PWCC Proposed Response at 10-11. First, PWCC has identified no authority or precedent supporting the imposition of conditions by a party on a stay of a proceeding. Moreover, PWCC's proposed conditions would not add anything to the permit revision process. For instance, PWCC seeks as a condition that "NNEPA's revisions to the permit . . . consist only of changes to those permit conditions that Peabody has contested in its Petition." PWCC Response at 10. However, as stated in EPA's *Amicus Curiae* Brief filed on June 24, 2010, only the effectiveness of those

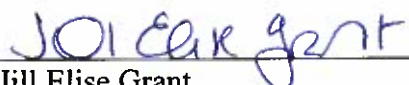
conditions actually contested by PWCC are stayed, and hence NNEPA's ability to make revisions without reopening the permit would likewise be limited to those provisions. *See* EPA's *Amicus Curiae* Brief, at 4-5; see also 40 C.F.R. § 71.11(i)(2) and (l)(5). The rest of PWCC's proposed conditions are related to the timing of the stay, something that would presumably be specified in any Order issued by the Board granting the stay. As such, the conditions are either unnecessary or unwarranted and encroach upon the Board's authority.

Counsel for EPA has informed counsel for NNEPA that EPA fully supports and concurs in this Response.

CONCLUSION

For the foregoing reasons, NNEPA requests that the Board stay this proceeding. The Board should also defer consideration of the substantive issues raised by PWCC until after the stay has been lifted, when PWCC may restate its claims and both NNEPA and EPA may respond to them.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this RESPONSE OF NAVAJO NATION EPA TO PWCC MOTIONS FOR LEAVE TO FILE RESPONSE TO EPA'S AMICUS BRIEF AND SURREPLY TO NAVAJO NATION EPA'S REPLY BRIEF was served via first class mail, postage prepaid, on this 21st day of July 2010, upon:

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