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**JOHN R. CLINE, PLLC**  
ATTORNEY AT LAW

2011 SEP 19 PM 2: 53

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ENVIR. APPEALS BOARD

To: Clerk of the Board

Fax: 202-233-0121

From: John Cline

Direct: 804-746-4501

Date: September 19, 2011

Total pages including cover sheet: 7

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

**Message**

Please be advised that the original and five copies of this motion are being mailed today via Federal Express.

John R. Cline

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**BEFORE THE ENVIRONMENTAL APPEALS BOARD** 09 PM 2:53  
**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
**WASHINGTON, D.C.** ENVIR. APPEALS BOARD

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In the Matter of: )  
 )  
Peabody Western Coal Company )  
 )  
Title V Permit No. NN-OP 08-010 )  
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Appeal No. CAA 11-01

**PEABODY WESTERN COAL COMPANY'S**  
**MOTION FOR LEAVE TO FILE A RESPONSE**

Petitioner, Peabody Western Coal Company ("Peabody" or "Company"), respectfully moves this Board for leave to file a response to the *amicus curiae* brief submitted in the above-captioned matter by the U.S. Environmental Protection Agency ("EPA"), Region IX ("Region").

On May 16, 2011, Peabody filed its petition for review of a revised federal operating permit issued to the Company by the Navajo Nation Environmental Protection Agency ("NNEPA"), acting under the Region's delegated authority to administer federal operating permit requirements codified at 40 C.F.R. Part 71. NNEPA filed its response to the Company's petition on July 5, 2011. On August 10, 2011, the Board granted the Region's motion for leave to file a brief as *amicus curiae*, and Region 9 subsequently filed that brief on September 15, 2011. *Amicus Curiae* Brief of the United States Environmental Protection Agency, Region IX ("Region IX Brief").

The part 71 regulations governing appeal of federal operating permits, 40 C.F.R.

§ 71.11(l), do not provide for motions practice. The Environmental Appeals Board Practice Manual also does not address motions practice during part 71 permit appeals. "EAB Practice Manual" at V.C.1. Nevertheless, "[t]he Board has broad discretionary authority to manage the permit appeal proceedings that arise from Part 71[.]" including the authority to grant and deny motions. *In re BP America Prod. Co.*, CAA Appeal No. 10-04 (EAB Mar. 11, 2011) at 1 (Order Granting Outstanding Motions) (citing *In re Peabody Western Coal Co.*, CAA Appeal No. 10-01, slip op. at 8, 14 E.A.D. \_\_\_ (EAB Aug. 13, 2010)). In particular, prior to granting review of a petition, "the Board retains discretion to grant or deny *amicus curiae* briefs as it deems appropriate." *In re BP America Prod. Co.* at 3.

Acting under that particular authority, the Board previously has granted a non-party's motion for leave to file an *amicus curiae* brief in a part 71 proceeding and then granted a party's request to file a response to that *amicus curiae* brief. *In re BP America Prod. Co.* at 3. Therefore, Peabody respectfully requests the Board to grant the Company's motion in this part 71 proceeding for leave to file a response to Region IX's *amicus curiae* brief.

In support of its motion, Peabody first emphasizes that, contrary to the perception created by the Region IX Brief, the Company's Petition does not constitute an all-out assault on NNEPA's authority to implement its own tribal permitting regulations, i.e., the Navajo Nation Operating Permit Regulations ("NNOPR"). Indeed, the Company supports the Tribe's overall efforts as a delegate agency under part 71 and encourages NNEPA to seek EPA approval of the NNOPR as a part 70 tribal operating permit program. It must be clear to the Board, however, that the instant proceeding involves a narrow point of law under the Clean Air Act regarding the intersection of federal and tribal laws during a tribe's administration of federal permit program

requirements. After reviewing the Region IX Brief, Peabody believes its response is necessary to ensure that the Board's focus in this proceeding is on the pertinent legal inquiry.

Much of the Region IX Brief is based on an irrelevant, and therefore confusing, permitting scenario where NNEPA's permitting actions are characterized as "applying tribal laws in parallel with the [part 71] federal requirements." Reg. IX Br. at 6 (emphasis added). However, in issuing Peabody's part 71 federal permit, NNEPA acted solely as a delegate agency under the Clean Air Act, ostensibly to administer part 71 requirements. With one exception,<sup>1</sup> NNEPA did not take any permitting action solely under tribal law, i.e., separate from its delegated part 71 federal authority. Thus, the Region IX Brief fails to address the narrower, fundamental legal issue raised by the Company's Petition, i.e., "[w]ith EPA's delegation to NNEPA of authority to administer a part 71 federal operating permit program, does 40 C.F.R. § 71.10(a), as NNEPA asserts, authorize and require NNEPA to have its own tribal authorities to administer the Part 71 program, including tribal authorities for permit processing, monitoring and reporting, and permit enforcement?" Pet. at 9. Region IX's misrepresentation of the nature of NNEPA's challenged permitting actions in this proceeding permeates the Region's arguments throughout its Brief.

In further support of its motion, Petitioner states that the Region IX Brief posits a wholly inappropriate test for evaluating the acceptability of NNEPA's challenged actions. Region IX asserts repeatedly that Peabody's Petition has not demonstrated that the challenged conditions

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<sup>1</sup> In circumstances such as NNEPA's where EPA's authority to administer a part 71 federal program has been "fully delegated," EPA may suspend its collection of part 71 permit fees when the delegate agency collects fees from part 71 sources under the appropriate state or tribal law sufficient to fund the delegated part 71 responsibilities. 40 C.F.R. § 71.9(c)(2)(ii). NNEPA has elected to collect the necessary "sufficient" fees from part 71 sources such as Peabody's and has included Peabody's fee-payment requirement based solely on tribal law as Condition IV.A in the subject Permit. *See* Pet. Ex. A. That condition in Peabody's Permit, and only that condition, represents a separate exercise of tribal authority which does not conflict with NNEPA's federal authority to administer part 71 federal requirements. Accordingly, Peabody has not objected to NNEPA's inclusion of that particular tribal requirement with the part 71 federal permit requirements.

“are procedurally or substantively deficient in regard to Part 71 requirements,” or “are inconsistent with Part 71,” or “interfere with NNEPA’s ability to fulfill the requirements of federal law.” Reg. IX Br. at 1, 7 and at 8; *see also, e.g., id.* at 2, 17, 18, 23 and 24. Instead, the test should be whether NNEPA’s challenged actions as a delegate agency are authorized under federal law. Peabody therefore requests the opportunity to demonstrate that a delegate tribal agency may not use tribal law to modify a part 71 federal permit program without prior EPA rulemaking. That demonstration would also rebut the Region’s erroneous, related assertion that the scope of a petition for review under part 71 is limited to “challenges to part 71 permit conditions.” Reg. IX Br at 8 (emphasis added).

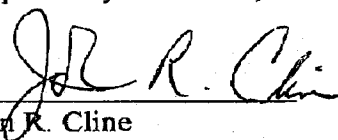
Moreover, Peabody is troubled by EPA’s statement that references to requirements of the Navajo Nation Operating Permit Regulations “in the NNEPA Delegation Agreement, the Permit, or elsewhere is [sic] merely for informational purposes.” Reg. IX Br. at 10 (emphasis added). The Company seeks to respond by identifying particular provisions in those documents which expressly, and unlawfully, acknowledge that NNEPA will process part 71 permits using procedures contained in NNOPR.

The number of EPA delegations to tribes of federal administrative authority to run portions of federal permit programs will undoubtedly increase in the future. All parties involved, i.e., many regulated and regulatory entities throughout the United States, will greatly benefit from a certainty that such federal programs will be administered not only consistently but also in full accordance with the Clean Air Act. All parties involved need to know when the Act allows “tribal-only” requirements to be incorporated into a federal permit as well as when the Act prohibits such requirements. The Region’s mischaracterization of the nature of NNEPA’s challenged permitting actions as well as the post-hoc rationalizations and “we’ve-always-done-it-

this-way" explanation in the Region IX Brief demonstrate a basic misunderstanding of the limited, but necessary, constraints on a delegate agency under the Act.

For the foregoing reasons, the Company respectfully requests the opportunity to respond to the Region IX Brief before the Board completes its consideration of whether to grant Peabody's Petition for Review. Counsel for Region IX has advised the undersigned that the Region neither concurs nor will object to the Company's motion, and counsel for NNEPA has advised that NNEPA objects to Peabody's request.

Respectfully submitted,



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

*Counsel for Peabody Western Coal Company*

**CERTIFICATE OF SERVICE**

I certify that PEABODY WESTERN COAL COMPANY'S MOTION FOR LEAVE TO FILE A RESPONSE was filed with the Board by facsimile on this 19<sup>th</sup> day of September, 2011. I further certify that the original and five copies of PEABODY WESTERN COAL COMPANY'S MOTION FOR LEAVE TO FILE A RESPONSE were mailed to the Board via Federal Express, overnight delivery, on this 19<sup>th</sup> day of September, 2011.


I also certify that copies of PEABODY WESTERN COAL COMPANY'S MOTION FOR LEAVE TO FILE A RESPONSE were served via U.S. first class mail, postage prepaid, on this 19<sup>th</sup> day of September, 2011 upon:

Ivan Lieben  
Region IX, Office of Regional Counsel  
U.S. Environmental Protection Agency  
75 Hawthorne Street  
San Francisco, CA 94105

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

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

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

  
\_\_\_\_\_  
John R. Cline  
Attorney for Petitioner

Date: September 19, 2011