

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

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

**JOINT MOTION OF EPA AND NNEPA FOR EXTENSION OF TIME  
TO FILE RESPONSE TO PEABODY'S PETITION FOR REVIEW**

On October 1, 2012, Peabody Western Coal Company ("Peabody" or "Petitioner") filed a petition for review of an administrative amendment to a federal Clean Air Act Title V Operating Permit ("Permit") issued to Peabody by the Navajo Nation Environmental Protection Agency ("NNEPA") under the delegated 40 C.F.R. Part 71 Operating Permits Program ("Part 71 Program"). Peabody's petition raises threshold procedural and jurisdictional issues. The Office of General Counsel ("OGC") and Region 9 of the Environmental Protection Agency (collectively, "EPA"), together with NNEPA, intend to file a joint motion for summary disposition to address these issues by the due date of November 27, 2012, established by this Board's letter of October 12, 2012. In an effort to conserve the resources of all the parties and the Board, EPA and NNEPA jointly request that any response to Peabody on the merits of its arguments be delayed pending the Board's decision on the motion for summary disposition. If the Board denies that motion, then EPA and NNEPA request an additional 45 days from the time of the Board's decision on the motion for summary disposition to file a response on

the merits of Peabody's petition. In support of this request for an extension, EPA and NNEPA state the following:

1. In its October 12, 2012 letter, the Board requested that EPA and NNEPA file a response by November 27, 2012 that "addresses the petitioner's contentions and whether petitioner has satisfied the requirements for obtaining review under 40 C.F.R. § 71.11." The Board's letter also required EPA and NNEPA to submit relevant portions of the administrative record and the certified index of the entire administrative record by November 27, 2012.

2. EPA and NNEPA are currently drafting a motion for summary disposition of this matter to be filed by the Board's November 27, 2012 deadline for responsive briefs, which will address certain threshold procedural and jurisdictional issues pertaining to the Board's review.<sup>1</sup> EPA and NNEPA believe that an economy of resources will be enjoyed by the parties and this forum if these procedural and jurisdictional issues are fully vetted and ruled upon prior to the parties undertaking and the Board considering briefing of the substantive issues. *See, e.g., In re Circle T Feedlot, Inc.*, NPDES Appeal Nos. 09-02 & 09-03, slip op. at 4-5 (EAB June 7, 2010), 14 E.A.D. \_\_\_\_, ("In determining whether to grant review . . . the Board first considers whether the petitioner has met threshold pleading requirements. . . . Assuming that the petitioner satisfies its threshold pleading obligations, the Board then evaluates the petition on its merits to determine if review is warranted."); *accord In re Beeland Group LLC*, UIC Permit Appeal No. 08-02, slip op. at 8 & n.7 (EAB Oct. 3, 2008), 14 E.A.D. \_\_\_\_ ; *In re Indeck-Elwood LLC*, 13

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<sup>1</sup> EPA and NNEPA also will file with the Board by November 27, 2012 the relevant portions of the administrative record and the certified index of the entire administrative record.

E.A.D. 126, 143 (EAB 2006). If the petitioner does not satisfy these threshold pleading obligations, then the Board “need not resolve the substantive issues raised in the petition.” *Indeck*, 13 E.A.D. at 170.

3. NNEPA and EPA will be prepared to file responsive pleadings to the substantive issues raised in the petition if the Board denies the dispositive motion. However, given the time necessary for inter- and intra-agency coordination (for instance, between Region 9 and OGC) on the substantive issues, NNEPA and EPA contemplate that they will need an additional 45 days from any denial by the Board of the dispositive motion to prepare and file such pleadings.<sup>2</sup> The Board’s granting of this extension of the filing date will ensure that the response filed by EPA and NNEPA will be fully informed and reflective of the positions of the agencies.

4. This morning, prior to filing this motion for an extension, counsel for NNEPA contacted counsel for Peabody to inquire whether Peabody would concur in a grant of this motion. *See* Environmental Appeals Board Practice Manual (June 2012) §§ III.D.1(c), IV.D.3. At the end of the day today, Peabody’s counsel informed NNEPA’s counsel that he had not been able to contact the appropriate personnel at Peabody to determine Peabody’s position.

WHEREFORE, EPA and NNEPA respectfully request that the Board grant this Joint Motion for Extension of Time to File Response to Peabody’s Petition for Review

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<sup>2</sup> The Board’s October 12, 2012 request for responses to Peabody’s petition for review gives both NNEPA and EPA 45 days from the date of the request to file a response, which is the typical response time that the Board provides. *See, e.g.*, EAB Manual § IV.D.7, at 48. The time being sought by this request is consistent with the time set forth in the Board’s briefing request.

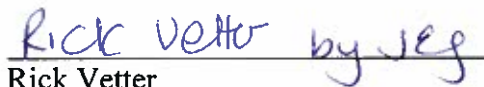
and thereby allow the filing of a response, if necessary, no later than 45 days from any decision on the forthcoming motion for summary disposition.<sup>3</sup>

Respectfully submitted,



Jill Elise Grant  
NORDHAUS LAW FIRM, LLP  
1401 K Street, NW, Suite 801  
Washington, DC 20005  
Telephone: (202) 530-1270  
Facsimile: (202) 530-1920

Attorneys for the Navajo Nation  
Environmental Protection Agency



Rick Vetter  
Air and Radiation Law Office  
Office of General Counsel  
Environmental Protection Agency  
1200 Pennsylvania Ave. N.W.  
Washington, DC 20460  
Telephone: (919) 541-2127  
Facsimile: (202) 564-5603

Ivan Lieben  
Noah Smith  
Associate Regional Counsel  
Environmental Protection Agency  
Office of Regional Counsel, Region 9  
75 Hawthorne Street  
San Francisco, CA 94612  
Telephone: (415) 972-3914  
Facsimile: (415) 947-3570

November 13, 2012

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<sup>3</sup> Through an email dated November 13, 2012, Counsel for EPA has authorized Counsel for NNEPA to sign and file this Joint Motion for Extension on behalf of EPA.

## CERTIFICATE OF SERVICE

I hereby certify that copies of this Joint Motion of EPA and NNEPA for Extension of Time to File Response to Peabody's Petition for Review were served on the following persons in the manner indicated below:

*By Email and First Class U.S. Mail*

John C. Cline, PLLC  
8261 Ellerson Green Close  
Mechanicsville, VA 23116  
[john@johnclinelaw.com](mailto:john@johnclinelaw.com)

Attorney for Peabody Western Coal Company

  
Jill Elise Grant