

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

In Re NPDES Permit Renewal:)
Peabody Black Mesa NPDES Permit No.)
NN0022179: Black Mesa Mine Complex)
_____)

NPDES Appeal No. _____

**PETITION FOR REVIEW AND
MOTION FOR EXTENTION OF TIME TO FILE SUPPLEMENTAL BRIEF**

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I. INTRODUCTION

Pursuant to 40 C.F.R. §124.19, Petitioners Black Mesa Water Coalition, Diné C.A.R.E., To Nizhoni Ani, C-Aquifer for Diné, and Center for Biological Diversity (hereinafter “Petitioners”) by and through the undersigned counsel hereby submits this petition for review of the U.S. Environmental Protection Agency’s (“EPA’s”) NPDES Permit Renewal for the Black Mesa Project: Peabody Black Mesa NPDES Permit No. NN0022179 (“NPDES”).¹ EPA’s NPDES permit authorizes continued discharge from over 111 outfall locations from permanent waste “ponds” at Peabody Western Coal Company’s (“Peabody’s”) Black Mesa Mine, many of which are exceeding Water Quality Standards (“WQS”). The permit does not address, cover or remedy “seeps” or discharges from many of the over 230 impoundments on the Black Mesa Complex—a number of which are exceeding WQS.

EPA issued this NPDES permit to Peabody because the Black Mesa Complex is on Navajo and Hopi lands. While both the Navajo and Hopi have approved programs and treatment as a state status, EPA is responsible for permit issuance and ensures compliance with applicable Federal and tribal WQS.

As set forward herein, Petitioners contend that EPA committed numerous significant and procedural errors in connection with issuing the NPDES to Peabody. Based on the errors listed below, Petitioners request that the Environmental Appeals Board (“EAB” or “Board”) grant the petition for review and remand the NPDES to EPA with instructions for EPA to correct all

¹ Available on the U.S. EPA’s website. See <http://www.epa.gov/region09/water/npdes/permits.html> (providing the permit, fact sheet and comment response).

substantive and procedural shortcomings and provide for appropriate supplemental public notice and comment after the required analyses have been completed and the permit has been corrected.

For the reasons discussed more fully below, including the number and complexity of the issues, the volume of relevant materials, and the unavailability of Petitioners' expert witness, Petitioners request a 45-day extension of time until October 23, 2009, to file a supplemental brief with a complete and detailed description of each objection to the NPDES permit and the factual and legal justifications for such objections.²

II. PETITIONERS HAVE STANDING AND THE BOARD HAS JURISDICTION OVER THIS APPEAL

Each Petitioner satisfies the threshold requirements for filing a petition for review under 40 C.F.R. Part 124. In particular, organizational Petitioners have standing to petition for review of the permit decision because each organization participated in the public comment period. *See* 40 C.F.R. §124.19(a). Petitioners filed written comments during the public comment period. *See*, Comment Letter (Exh. 1). As EPA denied Petitioners request for a public hearing on the NPDES, there was no opportunity for Petitioners to participate in a public hearing—thereby effectively denying Petitioners the ability to gain additional information, ask questions in a culturally sensitive format and raise additional issues or objections. Regardless, and for now, the issues raised by Petitioners here were raised with EPA in writing during the public comment period. Consequently, the Board has jurisdiction to hear Petitioners' timely request for review. *See* 40 C.F.R. §71.11(g).

² Petitioners request this extension of time to submit "specific information" to "demonstrate why the permitting authority's response to [Petitioners'] objections warrants review," in order to fully comply with the Board's filing requirements as outlined in the EAB Practice Manual. EAB Practice Manual at 33.

III. STATEMENT OF FACTS

EPA's NPDES permit was issued in draft form and publicly noticed in the *Navajo Times* on February 19th, 2009. During the comment period, Petitioners timely submitted written comments on April 3, 2009 that, among other things, requested a public hearing. On August 5, 2009, EPA issued the NPDES permit to Peabody and, in so doing, denied Petitioners request for a public hearing. No public hearing was held on the permit.

EPA's NPDES permit authorizes continued discharge from over 111 outfall locations from permanent waste "ponds" at Peabody's Black Mesa and Kayenta Mines, many of which are already are exceeding WQS. The permit does not address, cover or remedy "seeps" or discharges from many of the over 230 impoundments on the Black Mesa Complex—a number of which are exceeding WQS.

In a related matter, the Office of Surface Mining, Reclamation and Enforcement ("OSM"), on December 22, 2008, issued a Record of Decision ("ROD") which included a life-of-mine ("LOM") permit for Peabody creating the Black Mesa Complex. The ROD was the result of a National Environmental Policy Act ("NEPA") process, which included an Environmental Impact Statement ("EIS"), on Peabody's LOM permit. EPA was a cooperating agency in this process.

The ROD and LOM permit approved the creation of a 62,930 acre program permit area by adding the 18,857 acre program area for the Black Mesa mine (including surface facilities and coal reserves) to the 44,073 acre Kayenta mine. The Kayenta mine currently supplies coal to the Navajo Generating Station in Arizona. The Kayenta mine provides all of the coal needed by the Navajo Generating Station through 2026. The Black Mesa mine historically supplied coal to the

Mohave Generating Station in Nevada. Due to closure of the Mohave Generating Station in 2005, the Black Mesa mine has not been in operation since January of 2006. OSM's approval of the LOM permit authorizes Peabody to renew mining of coal at the Black Mesa mine.

Approximately 5,950 acres of mineable coal remain at the Black Mesa mine.

EPA's NPDES permit was not available for public review during the comment period for the LOM permit and ROD for the Black Mesa Complex. Further, EPA's NPDES permit was not analyzed as part of the agency's NEPA compliance and EIS for the Black Mesa Complex and even though EPA was a cooperating agency on the Black Mesa EIS.

IV. ISSUES PRESENTED FOR REVIEW

Petitioners identify herein the general issues that were raised in public comments on the draft permit, which Petitioners preliminarily believe provide grounds for Board review. The issues justifying review and remand of this permit include:

(1) EPA's failure to hold a public hearing in the impacted community. Many of the people directly impacted by EPA's permit issuance are Navajo and Hopi tribal members who, if they speak English at all, speak English primarily as a second language. Many Native American communities in the Black Mesa area bear a disproportionate share of Peabody's ongoing discharge of numerous pollutants onto tribal lands.

(2) EPA's failure to comply with the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321, et seq., in permit issuance and by failing to consider and take a 'hard look' at the environmental impacts.

(3) EPA's failure to ensure through consultation with U.S. Fish and Wildlife Service that no jeopardy to the continued existence of threatened and endangered species would occur or that

adverse modification of their critical habitat would occur and as required by Section 7(a)(2) of the Endangered Species Act (“ESA”). 16 U.S.C. §1536(a)(2).

(4) EPA’s failure to control and regulate “seeps” or discharges (including use of Best Management Practices) from many of the over 230 impoundments on the Black Mesa Complex—a number of which are exceeding WQS—in violation of the Clean Water Act.

(5) EPA’s failure to make public a “Seep Management Plan” during the public comment period on the NPDES permit and in issuance of the final NPDES permit.

(6) EPA’s failure to address compliance with WQS (including issuance of a compliance order) for ponds BM-A1, J3-D, J-7A, J7-CD, J7-Dam, J7-JR, J16-A, J16-E, J19-D, J21-C, J27-A, J27-RC, N6-C, N6-F, N14-B, N14-H, N14-P, WW-9, J-21A1 and N14-P-S1 in violation of the Clean Water Act. According to EPA’s “fact sheet” and the Final EIS for Black Mesa discharges from all of these ponds are currently noncompliant with one or more WQS.

(7) EPA’s failure to conduct its own inspections, monitoring and sampling of discharges on the Black Mesa Complex.

(8) EPA’s “deletion” of outfalls covered under its current NPDES permit for ponds J16-I, J16-J, J16-K, J21-J, N2-G, N7-A1, N8-A, N8-B and N14-M and WW-9D is inappropriate because EPA has not confirmed that discharge has ceased because of “limited agency resources.”

(9) EPA’s failure to address designed parameters for the addition of 16 ponds to be covered under the NPDES permit and as required by Section 404 of the Clean Water Act.

(10) EPA’s failure to analyze the application of much more stringent Navajo Nation laws to Peabody’s operation. See, 4 N.N.C. §1301 et seq. (Navajo Nation Clean Water Act); 4 N.N.C. §§ 901, et seq. (Navajo Nation Environmental Protection Act) and Diné Bi Beenahaz’áanii (Diné

Fundamental Law), 2 N.N.C. §§ 201-206. Navajo law would apply to all Navajo lands.

Similarly, EPA failed to make any “401 WQS certification” by the Navajo Nation public—as part of the administrative record.

(11) EPA’s failure to analyze the application of much more stringent Hopi Nation laws to Peabody’s operation—in fact, EPA erroneously informed the public that the Hopi tribe did not have treatment as state status. Hopi law would apply to all Hopi lands. Additionally, EPA failed to make any “401 WQS certification” by the Hopi Nation public—as part of the administrative record.

(12) EPA’s allowance to Peabody in the proposed permit to collect discharges resulting from precipitation events “from a sampling point representative of the type of discharge, rather than from each point of discharge” is unlawful and violates the Clean Water Act. At a minimum, Peabody should be required to “show cause” for each instance where a use of a “representative sampling point” was necessary.

(13) EPA’s failure to require a stormwater management plan for the Black Mesa Complex in violation of the Clean Water Act.

V. MOTION FOR EXTENSION OF TIME TO FILE SUPPLEMENTAL BRIEF

Petitioners hereby move for a 45-day extension of time, until October 23, 2009, to file a supplemental brief in support of their Petition for Review. In general, the Board will grant reasonable extensions of time for good cause shown. The Board routinely grants such extensions. *See In re Northern Michigan University*, Order Granting Motion for Extension of Time to File Response (July 10, 2008)(granting a 20 day extension where Michigan requested “additional time to evaluate and respond to the petition due to the number and complexity of

legal arguments...”; *In re Deseret Power Electric Cooperative*, Order Granting Extension of Time (Feb. 12, 2008); *In re ConocoPhillips Co.*, Order (Oct. 1, 2007).

Additionally, the Board will, where appropriate, grant extensions of time to file supplemental briefing on an initial petition for review. As the Board has explained, “[t]he Board has, on occasion and for good cause shown, granted this kind of motion and entertained such supplemental briefs.” *In re Town of Marshfield*, NPDES Appeal 07-03, slip op. fn. 10 (EAB, March 27, 2007).

In this instance, a 45-day extension of time is reasonable and appropriate. The administrative record in this case and the draft permit stage was voluminous. There were hundreds of pages of application and related materials before the agency. However, EPA has yet to make available the full administrative record before the agency and for purposes of appeal. See <http://www.epa.gov/region09/water/npdes/permits.html> (providing only the permit, fact sheet and comment response). As part of Petitioners’ comments, Petitioners noted that the administrative record was incomplete. See, Petitioners’ Comments (Exh. 1) at 5, fn. 4. This issue has not been remedied by the agency and for purposes of preparing the present appeal.

Additionally, EPA failed to hold a public hearing thus making it difficult for Petitioners, who are primarily small grass-roots tribal organizations whose membership includes impacted Navajo and Hopi tribal members, to understand both the nature and ramification of EPA’s permit decision.

For example, and as set forward in Petitioners’ comment letter, Petitioners requested a public forum so that the following information could be made available to tribal members in a culturally sensitive format: (1) copies of the permit materials permit; (2) a 2-3 page fact sheet or

executive summary; (3) Peabody's application and all other related material; (4) copies of any and all relevant NEPA documentation for this proposal; (4) detailed --and large size-- maps of the area and the discharges covered by the permit; (5) any other relevant information that, in particular, discusses Peabody's current violations of Water Quality Standards "(WQS)" and any "compliance schedule" being proposed by EPA to rectify such violations. Exh. 1 at 1-2.

Petitioners also requested an interpreter. *Id.* EPA rejected this request outright and in so doing made it extremely difficult for Petitioners to understand the nature and impact of EPA's actions.³

Petitioners respectfully assert that it would be unreasonable to expect Petitioners to process this (incomplete) administrative record, fully evaluate EPA's very technical response—and in a manner appropriate with the interests of tribal petitioners, and prepare a complete and robust factual and legal analysis in support of a petition for review in just 30 days. Petitioners respectfully assert that it is in the best interest of the Board to allow sufficient time for a well crafted and fully developed briefing.

Moreover, and because of the technical nature of EPA's response and due to EPA's failure to hold any type of public hearing to explain EPA's NPDES permitting for Black Mesa, Petitioners will now need to acquire and consult with an expert witness regarding EPA's response to comments. Petitioners also intend to have their expert review the Petition for scientific accuracy. At least one of Petitioners' proposed expert witnesses is unavailable until

³ Petitioners also requested that EPA directly contact impacted tribal members including, but not limited to, tribal members who hold grazing permits in areas affected by Peabody's outfalls (and because the Administrative Record suggests that multiple sites some of which are highly contaminated are currently being used for livestock watering. Exh. 1 at 2. EPA rejected this request.

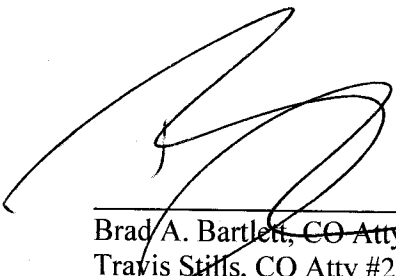
October 1, 2009. Accordingly, allowing the requested extension will allow Petitioners to confer with their expert and further the scientific accuracy of their Petition.

In addition, the issuance of the final permit in August (which includes the Labor day weekend holiday) has resulted in scheduling conflicts that, absent an extension, affect Petitioners' ability to adequately respond to EPA's analysis in support of the final permit.

Finally, neither EPA nor the permittee would be prejudiced by the Board's grant of the requested extension of time. The NPDES permit is a renewal, not a new permit. Thus, Peabody's operations will, in all likelihood, continue to go forward.

For the reasons set forward above, Petitioners have good cause for an extension of time and the Board should grant Petitioners' request for a 45-day extension of time, until October 23, 2009 to file a supplemental brief in support of their Petition.

RESPECTFULLY SUBMITTED on Friday, September 4, 2009.



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CERTIFICATE OF SERVICE

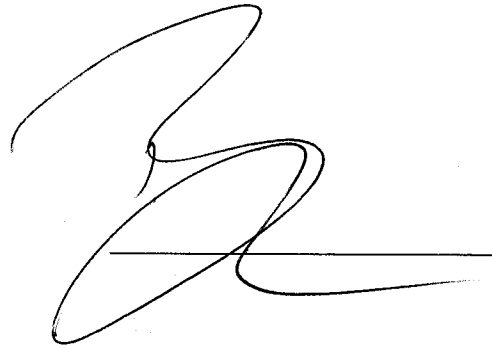
The undersigned hereby certifies that on September 4, 2009 he caused a copy of the foregoing to be served by mail on:

Douglas E. Eberhardt, Chief
NPDES Permits Office
U.S. EPA
75 Hawthorne Street
San Francisco, CA 94105-3901

U.S. Environmental Protection Agency
Office of General Counsel
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 40460

And by electronic mail to:

John Tinger
U.S. EPA Region IX
NPDES Permits Branch
Tinger.John@epamail.epa.gov

A handwritten signature in black ink, appearing to be 'John Tinger', written over a horizontal line. The signature is stylized and cursive.



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April 3, 2009

VIA E-MAIL ATTACHMENT – BY FIRST CLASS MAIL

Mr. John Tinger
U.S. Environmental Protection Agency
Region IX, CWA Standards and Permits
75 Hawthorne Street
San Francisco, CA 94105
Email: Tinger.John@epamail.epa.gov

**Re: NPDES Permit Renewal: Peabody Black Mesa NPDES Permit No.
NN0022179: Black Mesa Mine Complex**

Dear Mr. Tinger,

On behalf of Black Mesa Water Coalition, Diné C.A.R.E., Dine Hataalii Association, Inc., To Nizhoni Ani, C-Aquifer for Diné, Sierra Club, Center for Biological Diversity (hereinafter, “Commenters”), the undersigned attorney hereby submits the following comments on the U.S. Environmental Protection Agency’s (“EPA’s”) NPDES Permit Renewal for the Black Mesa Project (Peabody Black Mesa NPDES Permit No. NN0022179 (“NPDES”). These comments are timely filed within the fourteen (14) day extension of the comment period granted by EPA on March 17, 2009.

Request for Public Hearing

Pursuant to 40 C.F.R. §124.12, Commenters respectfully request a public hearing be held within sixty (60) days of receipt of this letter to address the very serious and substantial issues and concerns raised herein. The public hearing should be held in Kayenta, Arizona.

Many of the people directly impacted by EPA’s permit issuance are Navajo and Hopi tribal members who, if they speak English at all, speak English primarily as a second language. Many Native American communities in the Black Mesa area bear a disproportionate share of Peabody’s ongoing discharge of numerous pollutants onto tribal lands. These communities often lack the political agency and economic leverage required for effective participation in environmental decision-making processes. Further, EPA owes a trust obligation to indigenous people and therefore needs to ensure that tribal people and lands are not being disproportionately impacted by Peabody’s massive mining operation and ongoing discharge of pollutants.

At the public hearing, we respectfully request that the agency make available in a culturally sensitive format and for public review and consumption: (1) copies of the proposed NPDES

permit; (2) a 2-3 page fact sheet or executive summary; (3) Peabody's application and all other related material; (4) copies of any and all relevant National Environmental Policy Act ("NEPA") documentation for this proposal; (4) detailed --and large size-- maps of the area and the discharges covered by the permit; (5) any other relevant information that, in particular, discusses Peabody's current violations of Water Quality Standards "(WQS)" and any "compliance schedule" being proposed by EPA to rectify such violations. Commenters respectfully request that, in addition to allowing public comment, EPA provide a detailed presentation using an interpreter as well as answer any questions put to the agency by members of the public.

Commenters also request a site visit of the outfalls (and in particular the J-7 dam and BMA-1) the day prior to the public hearing as well as the ability to conduct grab samples of any discharges.

Notice of EPA's public hearing should be provided at least 30-days in advance and published in tribal newspapers and announced on tribal radio. Additionally, EPA should directly contact impacted tribal members including, but not limited to, tribal members who hold grazing permits in areas affected by Peabody's outfalls. The Administrative Record suggests that multiple sites (some of which are highly contaminated) are currently being used for livestock watering.

Lastly, the U.S. Army Corp of Engineers, the Federal Office of Surface Mining Control and Enforcement and U.S. Fish and Wildlife Service staff should be present at the hearing to answer any related questions.

Remedying Violations of WQS Standards

Much of the limited background information contained in EPA's Administrative Record indicates a significant water quality problem at the Black Mesa Complex. Commenters respectfully assert that EPA's renewal permit (as currently proposed) would exacerbate the problem by authorizing Peabody to continue its unabated discharge of, in some instances, highly contaminated wastewater from over 110 outfalls--while directing Peabody to seek a "variance" to deal with ongoing exceedences of applicable WQS.¹

Commenters believe that EPA's approach to dealing with Peabody's ongoing violations of the Clean Water Act ("CWA") is flawed and that a fundamentally different approach needs to be immediately employed by the agency to deal with this very serious situation.

EPA provides no discussion or legitimate basis for the proposed use of "variances." See, EPA's "Fact Sheet." See e.g., 40 C.F.R. §124.8(5)(requiring EPA to "justify" use of variances). In particular, EPA provides no discussion or analysis of "the economic and social costs and the benefits to be obtained" from allowing Peabody to evade compliance with (even temporarily) applicable WQS. 33 U.S.C. §1312(b)(2).

¹ While nowhere defined in EPA's permit materials or Administrative Record, Commenters understand EPA's proposed "variance" to mean a period of time where water quality effluent limits would not apply to Peabody.

According to Peabody's website, "Peabody Energy (NYSE: BTU) is the world's largest private-sector coal company, with 2008 sales of 256 million tons and \$6.6 billion in revenues."² Peabody recently reported record revenues.³

Commenters expect EPA, consistent with the requirements of the CWA, to hold Peabody to the highest of standards and order to exercise the "maximum degree of control" of its discharge of pollutants. 33 U.S.C. §1312(b)(2). Achievement of WQS is achievable both from a technological and financial perspective as Peabody is clearly in a financial position to implement technological-based pollution controls that eliminate discharges (e.g. temporary/permanent wastewater treatment facilities, liners, etc.).

That said and instead of recommending that Peabody seek "variances" from WQS to deal with its ongoing Clean Water Act violations (presumably from the Navajo Nation), EPA should immediately issue a "compliance order" within the next 30 days. 33 U.S.C. §1319 (dealing with "compliance orders"); *see also*, 40 C.F.R. §131.12 (outlining EPA's antidegradation policy).

In particular, a compliance order should be issued for ponds BM-A1, J3-D, J-7A, J7-CD, J7-Dam, J7-JR, J16-A, J16-E, J19-D, J21-C, J27-A, J27-RC, N6-C, N6-F, N14-B, N14-H, N14-P, WW-9. According to EPA's "fact sheet," discharges from all of these ponds are currently non-compliant with one or more WQS. EPA's compliance order should establish a wastewater treatment process for each discharge point as well as a timeframe for compliance with WQS. Commenters believe 60-days is a sufficient time for Peabody to take any necessary corrective action to halt violations of the CWA.

Additionally, and according to the Final Environmental Impact Statement ("FEIS") for the Black Mesa Complex and prepared by the URS Corporation, at least two ponds, J-21A1 and N14-P-S1 which are violating WQS do not appear to be covered by Peabody's current NPDES permit. FEIS at 3-27. That said EPA needs to take immediate (and similar) enforcement actions to halt these unpermitted discharges.

EPA itself should monitor and sample discharges from the outfalls listed above to ensure compliance with WQS and ground-truth any argument (expected from Peabody) that certain exceedences of WQS somehow constitute "background levels" or are attributable to "natural processes"-- a claim that is not substantiated by any independent agency review or analysis in the Administrative Record.

Commenters recognize that in at least two situations (Ponds J-7 and BMA-1), and while temporary and immediate cleanup measures are necessary, a permanent wastewater treatment facility will need to be constructed by Peabody. This should be expressly accounted for in any compliance order. Establishment of a permanent wastewater treatment facility is certainly within the "economic capability" of Peabody. 33 U.S.C. §1312(b)(2).

² <http://www.peabodyenergy.com/default-netscape.asp>

³ http://www.peabodyenergy.com/pdfs/EarningsRelease_01_27_09.pdf

Additionally, Commenters affirmatively state their opposition to any Peabody proposal to dewater contaminated ponds and use the water for "dust control." This is not a viable solution and poses significant environmental health and safety issues. Any such remediation proposals by Peabody should be rejected by EPA.

Other Outfalls

Because of the significant number of violations of WQS already occurring at Peabody's Black Mesa Complex and because of the large number of discharges being covered by EPA's NPDES permit (over 100 outfalls), EPA needs to conduct its own independent review of all of outfalls in the Black Mesa Complex to ensure compliance with WQS and existing permit conditions.

The administrative record suggests that EPA has conducted one (1) site visit over the last ten years and that the agency's visit may have been limited to two ponds. One site visit does not constitute meaningful regulatory oversight of this operation. This is especially true where, as here, there are over 230 impoundments on the Black Mesa Complex and where Peabody intends to make at least 51 impoundments permanent.

Further, Peabody is requesting "deletion" of outfalls covered under its current NPDES permit for ponds J16-I, J16-J, J16-K, J21-J, N2-G, N7-A1, N8-A, N8-B and N14-M and WW-9D. However, there is no indication from the Administrative Record that EPA or any other regulatory agency (e.g. Navajo Nation Environmental Protection Agency) has verified and confirmed the permanent elimination of discharge from these ponds. Deletion should not occur unless and until EPA has physically verified elimination of discharges from these outfalls.

Additionally, Peabody has now requested the addition of 16 ponds to be covered under the NPDES permit. Given the problems (and violations of WQS) at existing Peabody impoundments, EPA (in conjunction with the U.S. Army Corps of Engineers) should be establishing design parameters and any necessary wastewater treatment processes up front. Design parameters should be established during the 404 permitting process.

Peabody's Significant Permit Revision and EIS

EPA's proposed permit draft (1/20/08)" states that EPA is a cooperating agency in review of Peabody's Significant Permit Revision, Permit No. AZ-0001D, OSM Project No. AZ-0001-E-P-01 (SMCRA Permit Revision) and the production of the Environmental Impact Statement ("EIS") evaluating the establishment of the Black Mesa Complex.

That said EPA was under a duty to notify the Federal Office of Surface Mining, Control and Enforcement ("OSM") of Peabody's ongoing violation of the CWA and WQS. Additionally, and because of these ongoing violations, EPA should have instructed OSM to deny Peabody's Significant Permit Revision, Permit No. AZ-0001D, OSM Project No. AZ-0001-E-P-01. It was unlawful for OSM (and EPA) to authorize a SMCRA Permit Revision where, as here, Peabody is not meeting water quality standards.

Additionally, and equally troubling, is the fact that the EIS prepared for Peabody's SMCRA Permit Revision (in both draft and final form) did not analyze or even mention Peabody's pending NPDES application with EPA. *See e.g.*, 40 C.F.R. §124.61 According to EPA's "fact sheet", Peabody's NPDES renewal application was submitted to EPA in August of 2005 and was pending before the agency by February of 2006. The Draft EIS for Peabody's Black Mesa Complex was issued in November 2006. The Final EIS and Record of Decision ("ROD") was issued in November 2008. Thus, it appears that EPA and OSM unlawfully segmented the NPDES permit decision in violation of the National Environmental Policy Act ("NEPA"). *See e.g.*, 40 C.F.R. §1508.25(a)(1).

Further, the EIS for the Black Mesa Complex omitted analysis of highly relevant information including, but not limited to, Final Reports on the Seepage Management Plan for NPDES Permit No. NN0022179 and submitted to EPA in April and May of 2008 and a Sediment Control Plan which was submitted to EPA in September 24, 2008.⁴ These records constitute significant new information none of which was analyzed in the EIS for the Black Mesa Complex. *See e.g.*, 40 C.F.R. §1502.9(c).

At a minimum, OSM, EPA and U.S. Army Corp of Engineers need to prepare a new or supplemental EIS to analyze this information.

Other Issues

First, and as rightfully noted by EPA, there is no discussion in the EIS for the Black Mesa Complex or the Administrative Record for the NPDES permit of 404 permitting for the ponds and impoundments at Peabody's Black Mesa Complex. Because Peabody has now created over 230 impoundments on the Black Mesa Complex, this situation warrants intensive on-site investigation by EPA. The Army Corp of Engineers, unlike EPA, was not made a cooperating agency in production of the EIS. 404 permitting should also addressed in a new or supplemental EIS.

Second, some of the data in the Administrative Record suggests that some of the "seeps" and discharges may be leeching into groundwater. EPA needs to analyze whether the Safe Drinking Water Act is implicated. This should be addressed in a new or supplemental EIS.

Third, and because of the Navajo Nation's treatment as a state status, EPA needs to discuss the application of much more stringent Navajo Nation laws to Peabody's operation. *See*, 4 N.N.C. §1301 *et seq.* (Navajo Nation Clean Water Act); 4 N.N.C. §§ 901, *et seq.* (Navajo Nation Environmental Protection Act) and *Diné Bi Beenahaz'áanii* (*Diné* Fundamental Law), 2 N.N.C. §§ 201-206. Navajo law would apply to all Navajo lands. As Hopi does not have treatment as state status, it is assumed that Federal law and EPA's effluent limitations would apply by default.

⁴ The Sediment Control Plan (September 24, 2008) was not released as part of EPA's Administrative Record. Commenters reserve the right to supplement their comments once the plan has been made public.

Approximately 25,000 acres of land are held exclusively by the Navajo Nation. However, approximately 40,000 acres of land are located in the former Hopi and Navajo Joint Minerals Ownership Lease Area and the surface has been partitioned with 6,000 acres partitioned to Navajo and 34,000 partitioned to Hopi. That said Navajo law does not govern on Hopi lands. EPA needs to identify which outfalls may be subject to more stringent Navajo Nation laws and which are on Hopi lands and would be subject to EPA standards. This should be addressed in a new or supplemental EIS.

Fourth, Commenters object to EPA's allowance to Peabody in the proposed permit to collect discharges resulting from precipitation events "from a sampling point representative of the type of discharge, rather than from each point of discharge." At a minimum, Peabody should be required to "show cause" for each instance where a use of a "representative sampling point" was necessary.

Fifth, Peabody's application does not contain a stormwater discharge plan. It is not clear whether such a plan is needed or whether stormwater issues are addressed in the Sediment Control Plan.

Last, EPA has failed to consult with U.S. Fish and Wildlife Service. Section 7(a)(2) of the Endangered Species Act ("ESA") states that each Federal agency shall, in consultation with the Secretary, insure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. 16 U.S.C. §1536(a)(2). In fulfilling these requirements, each agency is to use the best scientific and commercial data available. *Id.* This section of the ESA sets out the consultation process, which is further implemented by regulation, 50 C.F.R. §402. The Administrative Record indicates that this process has not been followed.

Conclusion

The proposed NPDES permit for Peabody is wholly deficient and requires significant investment of agency resources to become workable. Peabody has been given a free-pass to pollute with impunity. This situation is untenable and needs to be immediately corrected.

That said we respectfully request that EPA abide by its statutory duties and act as both regulator and enforcer.

We look forward to meeting you and discussing these matters with you face-to-face at the public hearing. If you have any comments or questions regarding this submittal, please do not hesitate to contact me at (970) 247-9334 or emlc@frontier.net.

Sincerely,

s/ Brad A. Bartlett, esq.

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