

Comment Coding for Comment Response Document
 Peabody Western Coal Company - Black Mesa Complex
 NPDES Permit No. NN0022179

Written Comments Received

| Commenter | Representing | Comments |
|------------------|-----------------------------------|---|
| Michael Boyd | Californians for Renewable Energy | 11a, 11b, 11c, 2 , 11b; 5a; 3a, 3b; |
| Brad Bartlett | Energy Minerals Law Center | 2; 1 |
| Vernon Masayesva | Black Mesa Trust | 3; 5; 11b; |
| Ben Nuvamsa | KIVA Institute | 2; 3;3c |
| Andy Bessler | Sierra Club | 3b |
| Rob Smith | Sierra Club | 3b |
| Charles Pace | | 10b, 10c |
| Anna Frazier | | 3b |
| Vernon Masayesva | Black Mesa Trust | 11e |
| Vernon Masayesva | Black Mesa Trust | 11d |
| Tyler Tawahongva | | 4, 5a |
| Vincent Yazzie | | 7d |
| John Cochran | PWCC | 7e |
| Marcie Lane | Protect Sacred Sites | 4 |
| John Cochran | PWCC | 7e |
| Vernon Masayesva | Black Mesa Trust | 11d |
| William Cody | | 4 |
| Brad Bartlett | Energy Minerals Law Center | 3a, 9, 5b, 11d, 7a, 6a, 6b, 10a, 1, 7d, 7b, 8 |
| Elsie Benally | | 4 |
| Norman Benally | | 4, 5d |
| Vincent Yazzie | | |
| CARE | | 11a, 11d, 5a, 11b, 6a, 11e |
| | | |
| | | |

Comment Forms Submitted at Public Hearing

Note: Comments repeated in written comments above are not duplicated here. Full audio recording of oral testimony is available in public record and is not repeated here to the extent that comments repeat

| | | |
|----------------|-----------|-----------------------|
| Jerome Yazzie | Testimony | 4, 5d, |
| Lillie Johnson | | 4, 5d, 11c |
| Helenn B. | | 4, 11c, 10a, 5d, 10c, |
| Rose Yazzie | | 4, 11c, 5 |

| | | |
|--|---------------------------------------|---------------|
| Leland Grass, Irene Freeman | Diné Medicine Men Association | 4, 11c, 3b |
| Don Yellowman, Marsha Monestersky Robert Begay, Caroline Tohannie | Forgotten People | 2, 3a, 3b, 4, |
| Leonard Gorman | Navajo Nation Human Rights Commission | |
| Marsha Monesterksy | | 4, 2 |
| Jennifer | | 4, 5 |
| Simon Crank | | 4, 5 |
| Fern Benally | | 4 |
| Jonathan Nez | | 4, 11f |
| Simon Crank | | 4, 11c, |
| Dijon Sherlock | | 4 |
| Caroline Tohannie | | 4 |
| Robert Begay | | 4 |
| Phillip Etcitty | | 4, 5, |
| Kevin Biscenti | | 4, 5, 7c |
| Jimmy Bizardi | | 4 |
| Lucille Benally | | 4, |
| Mabel Benally | | 4 |
| | | |

PWCC
Categorization of Comments 1/11/10

Joseph G. Pizarchik, Director
1951 Constitution Ave., NW
South Interior Building, Rm. 233
Washington, DC 20240
(202) 208-4006
(202) 219-3106 (telefax)
Email: jpizarchik@osmre.gov

Dear Joe,

I attended your recent January 11, 2010 meeting with the Hopi people at the Hopi Veterans Center in Kykotsmovi Arizona where you stated that OSM would not be appealing ALJ Holt's order vacating the decision issued by OSM on December 22, 2009 approving a life-of-mine permit for the Peabody Western Coal Company's operation of the so-called Black Mesa Complex.

These Black Mesa Complex operations constituted the operation of the Keyenta mine which has an existing permit and the Black Mesa mine which has been operated since 1990 on something called an "administrative delay". Therein lays the issue in contention with the Hopi people. Since there appears to me to be no statutory basis for an administrative delay of 20 years in issuing a permit that Congress enacted; the Black Mesa mine portion of the Complex has been operating without a permit. Based on my reading of ALJ Holt's order it appears he provides you a basis to revoke the administrative delay of 20 years and require a new application for the operation of the Black Mesa mine by Peabody, or any other operator chosen by the Hopi-Tewa and Navajo people. I think the Hopi-Tewa people made it crystal clear to you they want to control their own destiny on the future operations of the Black Mesa mine; not leave this up to Peabody.

11 a

At the January 11, 2010 meeting I spoke to you personally about the need to conduct the permitting processes for the life-of-mine permit concurrently with US EPA's Clean Water Act (CWA) and Clean Air Act (CAA) permitting process so as not to piecemeal and compartmentalize the opportunities for public participation which is required by the Congress in all these permitting decisions or other agency actions.

11 a, b, c

I am forwarding the notice from John Tinger of US EPA announcing Public Hearings for Black Mesa Mine Wastewater Permit under the CWA. US EPA is treating Black Mesa and Kayenta as one mine, they are not. It is no longer a "complex", that decision was overturned. The two mines are permitted separately and hence the US EPA needs to issue separate permits for each of mine. Going forward with one for the Kayenta mine makes sense as it is still in operation. US EPA should include groundwater issues for the Black Mesa permit as it is in the reclamation phase. Neither has US EPA yet to issue the required permits for the mine operations under the CAA.

2-2 mines

11
groundwater
Air permits

Essentially what I am asking is that you issue an "abatement order" on Peabody to cease and desist its operations of the Black Mesa mine effective on its posting the necessary bonds and providing the necessary reclamation plans to stop operating the mine but no longer than 180 days from the issuance of this abatement order.

11 a

11 a
In regards to the Keyenta mines continued operations the ALJ's order appears to call in to question the validity of the existing life-of-mine permit since the mine lacks its necessary CWA and CAA permits to operate. I am asking for you to issue an abatement order on the Keyenta mine operator to bring the mine's operations in to consistency with current regulatory requirements to obtain a valid life-of-mine permit including compliance with the US EPA, Hopi-Tewa and Navajo regulatory standards under CWA and CAA. The operator Peabody must provide evidence of compliance and/or a schedule for compliance as soon as possible but no longer than 180 days from the issuance of this abatement order.

I am also asking you contact US EPA and asking them to conduct the permitting for the Keyenta mine's continued operations under OSM's and US EPA's regulatory authority concurrently going forward. This may require US EPA to delay their public hearing for the Black Mesa Mine Wastewater Permit. I don't know?

Respectfully,

Michael E. Boyd – President, CARE
CALifornians for Renewable Energy, Inc.
5439 Soquel Dr.
Soquel, CA 95073-2659
Tel: (408) 891-9677
E-mail: michaelboyd@sbcglobal.net

PS I left a message on Deputy Director Glenda Owens' voice mail today too.

Sent by e-mail 1/21/2010



Re: Admin Record 6/7

Brad Bartlett o John Tinger

01/28/2010 08:52 AM

Cc: Erica Maharg, Amy Atwood

History: This message has been forwarded.

Thank you Mr. Tinger. Please send a hard copy of the AR to both my office as well as my co-counsel Amy Atwood. Ms. Atwood's address is pasted below and I have copied her on this email.

Amy Atwood, Senior Attorney
Center for Biological Diversity
PO Box 11374
Portland, OR 97211-0374

--

Brad A. Bartlett, Managing Attorney
Energy Minerals Law Center
1911 Main Avenue, Suite 238
Durango, Colorado 81301
Phone: (970) 247 9334
Fax: (970)382-0316

This message is intended only for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential and exempt from disclosure under applicable laws. You are hereby notified that any dissemination, distribution, or copying of this communication or other use of a transmission received in error is strictly prohibited. If you have received this transmission in error, immediately notify me at the telephone number above.

~~~~~

Tinger.John@epamail.epa.gov wrote:

> Mr. Bartlett,  
> Apparently the 6th email was too large for the server. Attached are  
> the 6th and following 7th emails for the complete admin record.  
>  
> I would appreciate if you could confirm that you have received all 7  
> emails and the corresponding attachments.  
>  
> Thank you,  
>  
>  
> John Tinger  
> U.S. EPA Region IX  
> NPDES Permits Branch  
> (415) 972-3518  
>  
> -----

>

Re: John Tinger request for scoping hearing on CWA discharge permit--Re: EPA announces Public Hearings for Black Mesa Mine Wastewater Permit

Michael Boyd

to:

jpizarchik, martinhomec, sgnant, wmhavens, wolfv, dragood, jpallen, kuuyi, AWronski, rob, Lynn\_Gibson, tanyahayeslee, ffonseca, DWinterringer, RPruska, PClark, panto41815, ronnieben, jpmason60, brad.bartlett, atwood, ben, Karilee.Ramaley, Imm, stills, wmmorris, abneymaturin, fcornejo, mickharrisonsq, l\_brown369, John Tinger

02/01/2010 11:06 PM

Cc:

'Alph Secakuku', 'Al Qoyawayma', 'Joe Browder'

Show Details

Dear John Tinger,

Mr. Vernon Masayesva of Kykotsmovi AZ asked me to request that the USEPA conduct a public hearing on the "scope" of the proposed project permit to allow the continued discharge of treated stormwater related to mining activities.

2-2 mines

US EPA is treating Black Mesa and Kayenta as one mine, they are not. It is no longer a "complex", that decision was overturned. The two mines are permitted separately and hence the US EPA needs to issue separate permits for each of mine. Going forward with one for the Kayenta mine makes sense as it is still in operation. US EPA should include groundwater issues for the Black Mesa permit as it is in the reclamation phase. Neither has US EPA yet to issue the required permits for the mine operations under the CAA since the Title V permit issued by Navajo Nation EPA is for the "complex", again that decision was overturned.

Ground wa  
Air

The impact to agricultural users of allowing the continued discharge of treated stormwater related to mining activities is of particular concern as the effluent limitations and standards based on national effluent limitation guidelines do not ensure that the Hopi-Tewa water quality standards are met. In addition, the renewed permit proposes to incorporate new regulatory requirements for reclaimed mine areas and proposes to require the implementation of plans to control sediment and seepage from stormwater treatment impoundments. The Hopi-Tewa peoples wish to have input in determining the scope of the project that is being permitted by USEPA not just leave this up to the applicant Peabody.

SWQSCA

Respectfully,

Michael E. Boyd – President, CARE  
CALifornians for Renewable Energy, Inc. (CARE)  
5439 Soquel Dr.  
Soquel, CA 95073-2659  
Tel: (408) 891-9677  
michaelboyd@sbcglobal.net

--- On Thu, 1/21/10, Michael Boyd <michaelboyd@sbcglobal.net> wrote:

From: Michael Boyd <michaelboyd@sbcglobal.net>  
Subject: Letter 2 OSM Director Joeph Pizarchik---Re: EPA announces Public Hearings for Black Mesa Mine Wastewater Permit  
To: jpizarchik@osmre.gov, martinhomec@gmail.com, sgnant@cmbrewer.com,

wmhavens@cox.net, wolfv@swlaw.com, dragood@swlaw.com, jpallen@swlaw.com, kuuyi@aol.com, AWronski@foley.com, rob@redwoodrob.com, Lynn\_Gibson@doioig.gov, tanyahayeslee@gmail.com, ffonseca@ap.org, DWinterringer@osmre.gov, RPruska@osmre.gov, PClark@osmre.gov, panto41815@aol.com, ronnieben@navajo.org, jpmason60@gmail.com, brad.bartlett@frontier.net, atwood@biologicaldiversity.org, ben@kivainstitute.com, Karilee.Ramaley@srpnet.com, lmm@slwplc.com, stills@frontier.net, wmmorris@charlottesville.net, abneymaturin@aol.com, fcornejo@cmbrewer.com, mickharrisesq@earthlink.net, l\_brown369@yahoo.com, Tinger.John@epamail.epa.gov  
 Cc: "Alph Secakuku" <alph@wildblue.net>, "Al Qoyawayma" <alqoy@cableone.net>, "Joe Browder" <jbb@dunlapbrowder.org>  
 Date: Thursday, January 21, 2010, 11:15 AM

Joseph G. Pizarchik, Director  
 1951 Constitution Ave., NW  
 South Interior Building , Rm. 233  
 Washington , DC 20240  
 (202) 208-4006  
 (202) 219-3106 (telefax)  
 Email: [jpizarchik@osmre.gov](mailto:jpizarchik@osmre.gov)

Dear Joe,

I attended your recent January 11, 2010 meeting with the Hopi people at the Hopi Veterans Center in Kykotsmovi Arizona where you stated that OSM would not be appealing ALJ Holt's order vacating the decision issued by OSM on December 22, 2009 approving a life-of-mine permit for the Peabody Western Coal Company's operation of the so-called Black Mesa Complex.

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separate permits for each of mine. Going forward with one for the Kayenta mine makes sense as it is still in operation. US EPA should include groundwater issues for the Black Mesa permit as it is in the reclamation phase. Neither has US EPA yet to issue the required permits for the mine operations under the CAA.

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Respectfully,

Michael E. Boyd – President, CARE  
 CALifornians for Renewable Energy, Inc.  
 5439 Soquel Dr .  
 Soquel , CA 95073-2659  
 Tel: (408) 891-9677  
 E-mail: [michaelboyd@sbcglobal.net](mailto:michaelboyd@sbcglobal.net)

PS I left a message on Deputy Director Glenda Owens' voice mail today too.

--- On Wed, 1/20/10, Tinger.John@epamail.epa.gov <[Tinger.John@epamail.epa.gov](mailto:Tinger.John@epamail.epa.gov)> wrote:

From: Tinger.John@epamail.epa.gov <[Tinger.John@epamail.epa.gov](mailto:Tinger.John@epamail.epa.gov)>  
 Subject: EPA announces Public Hearings for Black Mesa Mine Wastewater Permit  
 To: martinhomec@gmail.com, sgnant@cmbrewer.com, wmhavens@cox.net, wolfv@swlaw.com, dragood@swlaw.com, jpallen@swlaw.com, kuuyi@aol.com, AWronski@foley.com, rob@redwoodrob.com, Lynn\_Gibson@doioig.gov, tanyahayeslee@gmail.com, ffonseca@ap.org, DWinterringer@osmre.gov, RPruska@osmre.gov, PClark@osmre.gov, panto41815@aol.com, ronnieben@navajo.org, jpmason60@gmail.com, tanyahayeslee@gmail.com, brad.bartlett@frontier.net, atwood@biologicaldiversity.org, ben@kivainstitute.com,

michaelboyd@sbcglobal.net, Karilee.Ramaley@srpnet.com,  
lmm@slwplc.com, brad.bartlett@frontier.net, stills@frontier.net,  
wmorris@charlottesville.net, abneymaturin@aol.com,  
fcornejo@cmbrewer.com, mickharrisonsq@earthlink.net,  
l\_brown369@yahoo.com

Date: Wednesday, January 20, 2010, 4:09 PM

*Please share with all who may be interested in attending the hearings or who may wish to submit comments on the proposal.*

EPA is announcing two public hearings to solicit comments on EPA's proposed wastewater discharge permit for the Peabody Black Mesa/Kayenta Mine located on Navajo and Hopi lands in northeastern Arizona. The proposed permit will allow the continued discharge of treated stormwater related to mining activities. The proposed permit will establish effluent limitations and standards based on national effluent limitation guidelines and to ensure that Navajo Nation and Hopi water quality standards are met. In addition, the renewed permit proposes to incorporate new regulatory requirements for reclaimed mine areas and proposes to require the implementation of plans to control sediment and seepage from stormwater treatment impoundments.

EPA will host public hearings at the following locations to receive comments from all interested parties:

- Kayenta, Arizona, February 23, 2009. 6:00 pm to 9:00 pm, at the Kayenta Chapter House, Highway 163.
- Kykotsmovi, Arizona, February 24, 2009. 6:00 pm to 9:00 pm, at the Veterans Memorial Center.

Please find attached EPA's public notice for additional information. The comment period will close on March 1, 2010.

For more information, including copies of the proposed permit and fact sheet, see <http://www.epa.gov/region09/water/npdes/pubnotices.html>

Please feel free to contact me for additional information or questions,  
John

John Tinger  
U.S. EPA Region IX  
NPDES Permits Branch  
(415) 972-3518

Re: John Tinger request for scoping hearing on CWA discharge permit--Re: EPA announces Public Hearings for Black Mesa Mine Wastewater Permit

Michael Boyd

to:

jpizarchik, martinhomec, sgnant, wmhavens, wolfv, dragood, jpallen, kuuyi, AWronski, rob, Lynn\_Gibson, tanyahayeslee, ffonseca, DWinterring, RPruszka, PClark, panto41815, ronnieben, jpmason60, brad.bartlett, atwood, ben, Karilee.Ramaley, lmm, stills, wmmorris, abneymaturin, fcornejo, mickharrisonesq, l\_brown369, John Tinger

02/03/2010 01:49 PM

Cc:

'Alph Secakuku', 'Al Qoyawayma', 'Joe Browder'

Show Details

Dear John Tinger,

I spoke to Mr. Vernon Masayesva this morning about your response.

He is concerned that USEPA is making the same mistake OSM made by scheduling a public hearing during the month of February which is the Hopi-Tewa month of the "moon" ceremonies where they are unavailable because of purification ceremonies taking place to get ready for spring planting. He said it is very disrespectful for the Hopi-Tewa religious observances to schedule a meeting during this time and OSM made that same mistake and it led to OSM's Decision being vacated. He also said the meeting must be held at Moenkopi (which is east about 70 miles of where USEPA plans to hold its meeting) [not Kykotsmovi AZ] since that is where the impacted farmers are located whose water allotments are being adversely impacted by the mine operations by loss of well water there.

Hearings

Mr. Masayesva also said he spoke with Joseph G. Pizarchik the OSM Director about the problem of there being an "orchestra of musicians without a conductor" when it comes to the permitting for the mines operation, to which the Director agreed was the problem. Vernon said there are a myriad of federal agencies involved including OSM, USEPA, BIA, and Army Corps of Engineers, all that have a role in the process and all those interrelated agencies have their own agendas that just serve to confuse the public. He would like you to work with the Office of the OSM Director to come up with a flow chart of all the permits required for the mines operation to be presented at what ever meeting that is held for the public to help eliminate all the confusion. He is also asking you to contact Joseph G. Pizarchik to coordinate with OSM (at least) to do this.

11 a.m.  
3 Hearing  
3 Hearing

His contact information is:

Joseph G. Pizarchik, Director

1951 Constitution Ave., NW

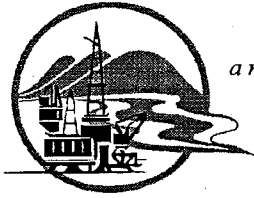
South Interior Building , Rm. 233

Washington , DC 20240

(202) 208-4006

(202) 219-3106 (telefax)





## Energy Minerals Law Center

a nonprofit law firm serving communities impacted by energy development

1911 Main Avenue, Suite 238, Durango, Colorado 81301

Phone: (970) 247 9334 Fax: (970) 382 0316

Email: emlc@frontier.net

February 11, 2010

### BY FIRST CLASS MAIL/ELECTRONIC MAIL

Julia Jackson, Esq.  
Erica Maharg, Esq.  
Office of Regional Counsel  
U.S. EPA Region 9  
75 Hawthorne St. (ORC-2)  
San Francisco, CA 94105  
Email: Jackson.Julia@epamail.epa.gov  
Email: Maharg.Erica@epamail.epa.gov

**Re: Peabody Western Coal Company's Black Mesa Complex,  
Proposed NPDES Permit No. NN0022179**

Dear Ms. Jackson and Ms. Maharg:

This letter is provided on the behalf of *Black Mesa Water Coalition, Diné C.A.R.E., Dine Hataalii Association, Inc., To Nizhoni Ani, C-Aquifer for Diné, Sierra Club, and Center for Biological Diversity* and follows up on our phone call and my email which provided Administrative Law Judge Holt's January 5, 2010 order vacating the underlying Life of Mine ("LOM") permit issued by the Federal Office of Surface Mining Reclamation and Enforcement ("OSM"). OSM's LOM permit allowed Peabody to operate the Black Mesa and Kayenta mines jointly as the Black Mesa Project (*a.k.a.* Black Mesa Complex).

As we discussed on the phone, and because there is no Black Mesa Complex, the U.S. Environmental Protection Agency ("EPA") should temporarily withdraw the proposed NPDES Permit for the Black Mesa Complex and reissue any proposed permit at some future date in accordance with Judge Holt's findings and the existing *status quo* (*i.e.* treating the mines as separate entities for permitting purposes).

Additionally, and because the LOM permit and related Environmental Impact Statement ("EIS") is now vacated, EPA must comply with the procedural and informational requirements of the National Environmental Policy Act ("NEPA"). Any proposed NPDES permit, as well as connected actions or cumulative impacts (such as issuance of 404 permits for Peabody's impoundments), must be analyzed in accordance with the requirements of NEPA in an Environmental Impact Statement ("EIS"). This includes NEPA's public participation requirements. 40 C.F.R. §1506.6.

Finally, and at a minimum, we appreciate your consideration of our request for a thirty-day extension of the written comment period up to and including March 31, 2010.

We look forward to your prompt written response to this letter. Please contact me at directly at (970) 257-9334 if you have any questions or would like to discuss this further.

Sincerely,

*s/Brad A. Bartlett*

Brad A. Bartlett  
Managing Attorney  
Energy Minerals Law Center

Copy: Amy Atwood, Senior Attorney, Center for Biological Diversity

February 2010  
2/12/10

John,

Your plan to hold public hearings on a proposal, regarding discharge of wastewater from Black Mesa complex into washes on our land is premature and must be rescheduled.

Like most Hopi and probably Navajo people living on Black Mesa region, I need time to study the proposal, including the baseline data used to analyze impacts, so I can make an informed comment on the proposal.

3- Hearing  
↑  
↓

In your email to Mike Boyd, you stated that "at the public hearing...EPA will give a short presentation on the components of proposed permit prior to accepting public testimony. [my emphasis]

A "short" presentation on a complex matter violates the spirit and the word of relevant environmental and coal mining laws. In particular, it denies peoples indigenous to Black Mesa region an opportunity for a full and genuine participating in EPA's decision-making process.

This mistake was one of the main reasons, the DOI Administrative Law Judge vacated OSMRE's decision to issue a Life-of-Mine permit to Peabody (Black Mesa Project EIS-Alternative B).

Another mistake made by OSMRE was combining the "Scoping" process with "public comment" on its preferred alternative. This is what EPA appears to be doing.

Denying the Hopi and Navajo people who are the real stakeholders to participate in defining the scope of the study and analysis of impacts of surface and subsurface, prior to crafting a proposal, is wrong.

In a letter to Gary Melvin, Peabody Western Coal Co., dated May 19, 1993, Mark Potter, Acting Division Engineer for Corp of Engineers noted that "Because of the fragile nature of the desert environment, and because of the significant impacts which may be caused by the absence of even a small amount of water to that environment, I have determined that the Los Angeles

district should perform an analysis as to whether the aforesaid impoundments had an adverse impact". [my emphasis]

I am not aware that the analysis was ever conducted.

Other matters of serious concern to local people are: 1) the confusion created by a myriad of federal agencies involved in regulating and enforcing NEPA, SMCRA, Clean Water and Clean Air Act. A clear outline of jurisdiction of each agency is long overdue.

2) The scheduled public hearing will take place when Hopi villages are concluding their Powamuy ceremonies. Powamuy or purification rituals is the last major traditional ceremony to be performed before the Hopi people enter the farming season.

For these reasons, I urge you to reconsider your plan. I also urge you and all effected agencies to conduct a workshop to explain who is responsible for what. This will also give the Navajo and Hopi people the opportunity to ask questions about the proposal so they can make informed comments when a hearing is held.

1 was } 3) In your email, you said the permit will use national standards. This suggests you will not use Hopi waste water standards adopted by the Hopi Tribal Council in 19\_\_.

11 6w } 4) The proposal suggests EPA will not address the adverse impacts of groundwater in its permitting decision. This I believe is a mistake.

Vernon Masayesva



**EPA extends comment period; Black Mesa Mine Wastewater Permit**

martinhomec, sgnant, wmhavens, wolfv, dragood, jpallen,  
kuuyi, AWronski, rob, Lynn\_Gibson, tanyahayeslee,  
ffonseca, DWinterringer, RPruszk, PClark, panto41815,

John Tinger to: ronnieben, jpmason60, tanyahayeslee, brad.bartlett, atwood,  
ben, michaelboyd, Karilee.Ramaley, Imm, brad.bartlett, stills,  
wmorris, abneymaturin, fcornejo, mickharrisonsq,  
|\_brown369, LPuhuyesva, Erica Maharg, DavidW Smith

02/17/2010 09:21 AM

*Please share with all who may be interested in attending the hearings or who may wish to submit comments on the proposal.*

EPA is announcing an extension to the comment period for the proposed wastewater discharge permit for the Peabody Black Mesa/Kayenta Mine located in northeastern Arizona. The comment period will be extended by 30 days, and will now close on March 31, 2010.

As a reminder, EPA will hold two public hearings next week to solicit comments on the proposal at the following locations:

- Kayenta, Arizona, February 23, 2010. 6:00 pm to 9:00 pm, at the Kayenta Chapter House, Highway 163.
- Kykotsmovi, Arizona, February 24, 2010. 6:00 pm to 9:00 pm, at the Veterans Memorial Center.

Comments may be submitted to EPA orally at the hearings, or may be sent by email or by writing to the contact below.

The proposed permit will allow the continued discharge of treated stormwater related to mining activities. The proposed permit will establish effluent limitations and standards based on national effluent limitation guidelines and to ensure that Navajo Nation and Hopi water quality standards are met. In addition, the renewed permit proposes to incorporate new regulatory requirements for reclaimed mine areas and proposes to require the implementation of plans to control sediment and seepage from stormwater treatment impoundments.

Please find attached EPA's public notice for additional information, or feel free to contact me with any questions.

John Tinger  
U.S. EPA Region 9  
75 Hawthorne St, (wtr-5)  
San Francisco, CA 94105

Tinger.John@EPA.gov  
(415) 972-3518



Public Notice Black Mesa time extension.pdf

Proposed Permit:

<http://www.epa.gov/region09/water/npdes/pdf/navajo/PeabodyBlackMesaDraftPermit.pdf>

Proposed Fact Sheet:

<http://www.epa.gov/region09/water/npdes/pdf/navajo/PeabodyBlackMesaFactSheetJan2010.pdf>



Feb 17 email:

Thank you Mr. Tinger for the extension of the comment period to March 31, 2010. However, I must emphatically urge that you:

- 2-2 mines 1. NOT consider the Black Mesa Mine and the Kayenta Mine as one Black Mesa Mine Complex. They are separate and distinct mines. Kayenta Mine is has a permanent mine status and Black Mesa Mine does not. The recent ruling by the Administrative Law Judge Holt concerning the Life of Mine Permit confirms that status, therefore the two mines must be treated as separate mines;
- 3-hearing 2. Postpone the scheduled public hearings to a later date to accommodate our ceremonial cycles; and if that is not possible, that you schedule another session where our citizens may be able to attend;
- 3-hearing 3. Hold another public hearing in the Moenkopi Village area because that is the area that will be most directly impacted by your proposal. The two Moenkopi villages are located in the watershed, or the APE, because they are downstream from the mine areas;
4. Provide an in-depth presentation, rather than a short cursory presentation, with an unbiased Hopi interpreter who is NOT a member of the Hopi Water and Energy Team nor a consultant to the Hopi Water and Energy Team, so that our Hopi and Tewa citizens can gain a full perspective of the proposal and its impacts.
5. Provide this presentation during the time that is appropriate given our ceremonial cycles.
6. In other words, do not make the same mistakes that the Office of Surface Mining (OSM) made during the Black Mesa Mine Project EIS process. Allow our citizens to be fully engaged in this process and that we have a true dialogue. Our citizens were not afforded this opportunity by our own tribal council during the Black Mesa Project EIS process.
- 3-consultation 7. Finally, we will not consider the hearings as "consultation" in the context of meaningful government-to-government consultation (President Clinton's Executive Order No. 13175; and President Obama's Memorandum of November 5, 2009), unless and when you have provided a full explanation to our Hopi and Tewa citizens in terms that they can understand; and that you have provided for full and open dialogue with our citizens. A one-way presentation is not consultation.

I am the former Tribal Chairman of the Hopi Tribe and will be submitting a formal statement soon. Thank you for the email notification. *Pai lol'ma ni.*

*Ben H. Nuvamsa*, President/CEO

**KIVA Institute, LLC**

*"Building Capacity in Indian Country"*

Toll Free: 1-866-202-KIVA

[www.kivainstitute.com](http://www.kivainstitute.com)

Message from Vernon Masayesva  
 Kuuyi  
 to:  
 John Tinger  
 02/18/2010 11:08 AM  
 Cc:  
 jbb, alqoy, ben, andy.bessler  
 Show Details

February 18, 2010

John,

Thank you for taking time to call me regarding the water discharge permit.

Your plan to hold public hearings or public comments on a proposal, regarding discharge of wastewater from Black Mesa complex into washes on our land is premature and must be rescheduled. I suggest you hold the hearing/comment in mid-March 2010.

*3 Hearings* Like most Hopi and probably Navajo people living on Black Mesa region, I need time to study the proposal, including the baseline data and subsequent research information used to analyze impacts, so I can make an informed comment on the proposal. I have yet to get a copy of the proposal.

In your email to Mike Boyd, you stated that "at the public hearing...EPA will give a short presentation on the components of proposed permit prior to accepting public testimony". [my emphasis]

A "short" presentation on a complex matter violates the spirit and the word of relevant environmental and coal mining laws. In particular, it denies peoples indigenous to Black Mesa region an opportunity for a full and genuine participation in EPA's decision-making process.

This failure to properly inform and involve the citizens was one of the main reasons the DOI Administrative Law Judge vacated OSMRE's decision to issue a Life-of-Mine permit to Peabody (Black Mesa Project EIS-Alternative B.)

Another mistake made by OSMRE was combining the "scoping" process with "public comment" on Alternative B. This is what EPA appears to be doing, mixing scoping and public comment.

*3-consultation* Denying the Hopi and Navajo people, who are the real stakeholder, to participate in defining the scope of the study and analysis of impacts of surface and subsurface, prior to crafting a proposal, is wrong and could lead to citizen's complaint against EPA and the US Army Corp. We hope this will be avoided.

In a letter to Gary Melvin, Peabody Western Coal Co., dated May 19, 1993, Mark Potter, Acting Division Engineer for Corp of Engineers noted that "Because of the fragile nature of the desert environment, and because of the significant impacts which may be caused by the absence of even a small amount of water to that environment, I have determined that the Los Angeles district should perform an analysis as to whether the aforesaid impoundments had an adverse impact". [my emphasis] EPA raised similar concerns. I am not aware that the analysis was ever conducted.

Other matters of serious concern to local people are: 1) the confusion created by a myriad of federal agencies involved in regulating and enforcing NEPA, SMCRA, Clean Water and Clean Air Act. A clear outline of jurisdiction of each agency is long overdue.

2) The scheduled public hearing will take place when Hopi villages are concluding their Powamuy ceremonies. Powamuy or purification rituals are the last major traditional ceremonies to be performed before the farming season.

For these reasons, I urge you to reconsider your schedule. I also urge you and all effected agencies to conduct a one-day workshop to explain the proposal and how each agency is involved. This would allow the Navajo and Hopi people the opportunity to ask questions so they can make informed comments when a hearing or public comment period is held.

3) In your e-mail, you said the permit will apply Nation-Wide water quality standards. This is treating Moencopi Wash no differently than any river in the U.S. Discharging reclaimed water from the mine requires its own individual permit and monitoring program

Your e-mail suggests EPA is finally taking its regulatory enforcement responsibility seriously after close to 40 years of allowing Peabody to release water from the mine site under a generic "nation-wide" permit. I commend you for this.

I am mailing you a list of Suggestions Regarding Investigation of Surface Water Impoundment Impacts which was submitted to EPA when I was Chairman of the Hopi Tribe.

Vernon Masayesva

FW: EPA extends comment period; Black Mesa Mine Wastewater Permit  
 Harvey Paymella  
 to:  
 John Tinger, Ben Nuvamsa  
 02/21/2010 10:38 AM  
 Show Details

*5 - Hearings*  
 As a member of the Village of Tewa and clan leader for the Tewa Kachina & Parrot Clan, we fully endorse the message from Mr. Ben H. Nuvamsa of the KIVA Institute in the seven (7) points identified herein. This is a crucial time in the Hopi & Tewa ceremonial cycle, especially during the months of Feb/March/April. Though there still remains the additional three months, activities taper off and your proposed presentations/hearings could well be scheduled during that time. It is imperative that there is clean understanding by the people affected by these decisions and therefore point #4 is emphasized.

---

Date: Wed, 17 Feb 2010 11:39:36 -0800  
 From: badgerwoman1@yahoo.com  
 Subject: Fw: EPA extends comment period; Black Mesa Mine Wastewater Permit  
 To: badgerwoman1@yahoo.com

FYI. Please note the two meetings scheduled for February 23rd and February 24th (below).

----- Forwarded Message -----

**From:** "KIVA Institute, LLC" <ben@kivainstitute.com>  
**Sent:** Wed, February 17, 2010 11:20:39 AM  
**Subject:** RE: EPA extends comment period; Black Mesa Mine Wastewater Permit

Thank you Mr. Tinger for the extension of the comment period to March 31, 2010. However, I must emphatically urge that you:

- 2 - 2 permits*
1. NOT consider the Black Mesa Mine and the Kayenta Mine as one Black Mesa Mine Complex. They are separate and distinct mines. Kayenta Mine is has a permanent mine status and Black Mesa Mine does not. The recent ruling by the Administrative Law Judge Holt concerning the Life of Mine Permit confirms that status, therefore the two mines must be treated as separate mines;
  2. Postpone the scheduled public hearings to a later date to accommodate our ceremonial cycles; and if that is not possible, that you schedule another session where our citizens may be able to attend;
  3. Hold another public hearing in the Moenkopi Village area because that is the area that will be most directly impacted by your proposal. The two Moenkopi villages are located in the watershed, or the APE, because they are downstream from the mine areas;
  4. Provide an in-depth presentation, rather than a short cursory presentation, with an unbiased Hopi interpreter who is NOT a member of the Hopi Water and Energy Team nor a consultant to the Hopi Water and Energy Team, so that our Hopi and Tewa citizens can gain a full perspective of the proposal and its impacts.
  5. Provide this presentation during the time that is appropriate given our ceremonial cycles.
  6. In other words, do not make the same mistakes that the Office of Surface Mining (OSM) made during the Black Mesa Mine Project EIS process. Allow our citizens to be fully engaged in this process and that we have a true dialogue. Our citizens were not afforded this opportunity by our own tribal council during the Black Mesa Project EIS process.
  7. Finally, we will not consider the hearings as "consultation" in the context of meaningful government-to-government consultation (President Clinton's Executive Order No. 13175; and President Obama's Memorandum of November 5, 2009), unless and when you have provided a full explanation to our Hopi and Tewa citizens in terms that they can understand; and that you have provided for full and

open dialogue with our citizens. A one-way presentation is not consultation.

I am the former Tribal Chairman of the Hopi Tribe and will be submitting a formal statement soon. Thank you for the email notification. *Pai lol'ma ni.*

**Ben H. Nuvamsa**, President/CEO

**KIVA Institute, LLC**

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---

**From:** Tinger.John@epamail.epa.gov [mailto:Tinger.John@epamail.epa.gov]

**Sent:** Wednesday, February 17, 2010 10:21 AM

**To:** martinhomec@gmail.com; sgnant@cmbrewer.com; wmhavens@cox.net; wolfv@swlaw.com; dragood@swlaw.com; jpallen@swlaw.com; kuuyi@aol.com; AWronski@foley.com; rob@redwoodrob.com; Lynn\_Gibson@doioig.gov; tanyahayeslee@gmail.com; ffonseca@ap.org; DWinterringer@osmre.gov; RPruszka@osmre.gov; PClark@osmre.gov; panto41815@aol.com; ronnieben@navajo.org; jpmason60@gmail.com; tanyahayeslee@gmail.com; brad.bartlett@frontier.net; atwood@biologicaldiversity.org; ben@kivainstitute.com; michaelboyd@sbcglobal.net; Karilee.Ramaley@srpnet.com; lmm@slwplc.com; brad.bartlett@frontier.net; stills@frontier.net; wmorris@charlottesville.net; abneymaturin@aol.com; fcomejo@cmbrewer.com; mickharrisoneseq@earthlink.net; l\_brown369@yahoo.com; LPuhuyesva@hopi.nsn.us; Maharg.Erica@epamail.epa.gov; Smith.DavidW@epamail.epa.gov

**Subject:** EPA extends comment period; Black Mesa Mine Wastewater Permit

*Please share with all who may be interested in attending the hearings or who may wish to submit comments on the proposal.*

EPA is announcing an extension to the comment period for the proposed wastewater discharge permit for the Peabody Black Mesa/Kayenta Mine located in northeastern Arizona. The comment period will be extended by 30 days, and will now close on March 31, 2010.

As a reminder, EPA will hold two public hearings next week to solicit comments on the proposal at the following locations:

- Kayenta, Arizona, February 23, 2010. 6:00 pm to 9:00 pm, at the Kayenta Chapter House, Highway 163.
- Kykotsmovi, Arizona, February 24, 2010. 6:00 pm to 9:00 pm, at the Veterans Memorial Center.

Comments may be submitted to EPA orally at the hearings, or may be sent by email or by writing to the contact below.

The proposed permit will allow the continued discharge of treated stormwater related to mining activities. The proposed permit will establish effluent limitations and standards based on national effluent limitation guidelines and to ensure that Navajo Nation and Hopi water quality standards are met. In addition, the renewed permit proposes to incorporate new regulatory requirements for reclaimed mine areas and proposes to require the implementation of plans to control sediment and seepage from stormwater treatment impoundments.

Please find attached EPA's public notice for additional information, or feel free to contact me with any questions.

John Tinger  
U.S. EPA Region 9  
75 Hawthorne St, (wtr-5)  
San Francisco, CA 94105

Tinger.John@EPA.gov  
(415) 972-3518



Winter weather and NDPEs permit hearings for Black Mesa and Kayenta Mines

Andy Bessler

to:

John Tinger, Jason Brush

02/22/2010 12:04 PM

Cc:

"Rob Smith", "amy atwood", "Brad Bartlett", "Wahleah Johns", mariegladue

Show Details

Dear Mr. Tinger and Mr. Brush:

I work in Flagstaff for the Sierra Club and coordinate with tribal communities on Black Mesa on various EJ and environmental issues. I have consulted with many communities members from both Navajo and Hopi communities on Black Mesa for a decade now and I wish to share with you my concerns and urge you to postpone and/or reschedule these public hearings for the reissue of Peabody Western's National Pollutant Discharge Elimination System (NPDES) permit NN0022179 on Black Mesa, AZ.

From everything I have heard from people living on Black Mesa, travel on the roads of Black Mesa is treacherous today and will most likely remain so the remainder of the week. The region is under a Winter Storm Warning and here in Flagstaff, we have around 8 inches and it is still snowing.

I was planning on attending and driving a shuttle for 6 other community members from Black Mesa interested in attending and living in remote locations on Black Meas. However, due to storm, we will not be attending.

I wanted to make sure that you were aware of the weather situation and that community members on Black Mesa would be better served by rescheduling these hearings when people can attend safely.

Please let me know if you will be flexible and adjust your regulatory duties to the unique challenges of holding public hearings in this region at this time of year and preserve public safety or continue with these hearings without regard for public safety.

I am happy to answer any questions or concerns you may have otherwise; I look forward to your response.

Sincerely,

Andy Bessler

Community Partnerships

[www.sierraclub.org/ej](http://www.sierraclub.org/ej)

[andy.bessler@sierraclub.org](mailto:andy.bessler@sierraclub.org)

928-774-6103 office

928-380-7808 cell

928-774-6138 fax

P.O. Box 38 Flagstaff, AZ 86002



Not a day for man nor beast

Rob Smith

to:

John Tinger, Jason Brush

02/22/2010 03:02 PM

Cc:

"Rob Smith"

Show Details

Mr. Tinger and Mr. Brush,

*hearing weather*  
I was planning to drive up to the Kayenta hearing tomorrow evening regarding the NPDES permit for Black Mesa mines, and I was going to bring some others with me who live in the area who wanted to come. However, local people have advised against this due to the winter storm warning we have today and the high likelihood of impassable or unsafe roads for the rest of the week. As a result I've cancelled my plans and I fear that many who would be interested in coming and participating will do likewise for the same reasons.

Please consider rescheduling this hearing at a time and place where those people affected by the decisions can attend.

Thank you.

Rob Smith

Rob Smith  
Senior Field Organizing Manager  
Sierra Club  
202 E. McDowell Road, #277  
Phoenix, AZ 85004  
602-254-8362  
fax: 602-258-6533  
rob.smith@sierraclub.org



comment, Public Notice #: AZ-10-W-001A

charles pace

to:

John Tinger

02/23/2010 09:20 PM

Cc:

charlespace

Show Details

EPA:

I have read your environmental analysis and have two comments.

10-b { First, it appears that you have failed to address the impacts of the proposed infrequent discharges on invasive species, particularly salt cedar. I believe that if you assess this potential you will find that the kind of discharges contemplated will encourage growth of this species.

10-c { Second, it appears that the "discharges" are essentially managing themselves. For example, additional discharge outputs will be added to the permit depending upon things like precipitation events. A better approach would be to focus on managing discharges to eliminate the need to continually add new points.

Thank you for considering my views.

Regards,

Charles Pace



EPA Public Hearing for Black Mesa on Navajo/Hopi Reservation

Anna M Frazier

to:

John Tinger

02/23/2010 09:01 AM

Show Details

Mr. Tinger:

*3 Hearings  
weather*  
I respectfully request that you postpone the public hearings on Peabody Coal Waste Water issue at Kayenta, AZ (Navajo Nation) on February 22 and also for Kykotmovi on February 23. US. EPA had schedule the public hearings at 6 p.m. to 9 p.m. at both places. We had snow storms yesterday and the day before here on the Navajo reservation. The gravel roads are bad with snow and mud again and most places on Black Mesa roads are impassable. A lot of our people who are directly impacted by Peabody Coal operation on Black Mesa live on Black Mesa and want to attend the public hearings.

I really don't know how much you are acquainted with the Navajo and Hopi reservation and know about the conditions of the roads and the living conditions of the Native American people here. We are ranchers and live scattered (miles apart) throughout the area different from city life like in California. We have very few paved roads - with access roads to our homes all dirt roads. During the months of Dec., Jan and February we had over a foot of snow in the lower elevation and two to three feet of snow in the mountains. The road conditions on Black Mesa are not back to normal and at the lower level we are back to muddy roads due to the snow storm this week. For the US Government to hold important hearings that affect our people during weather and road conditions like today, is a violation of environmental justice.

Most of the Native people are ranchers and have responsibility to feed their animals daily - morning and evenings and the best time for us to get out for meetings is during the daylight hours - noon to early afternoon. Night travel is not recommended due to road conditions and below freezing temperatures at night. Some of us have to drive 1 to 2 hrs. to get to Kayenta and pick up other folks through muddy roads along the way so we could make a statement at the hearings. The public hearing is very important to us since it concerns our way of life and the future of children and grandchildren.

Your re-consideration of the public hearing schedule for Black Mesa Mine would be appreciated. Thank you.


Anna M. Frazier, Dilkon, Navajo Nation, Arizona.

---

Hotmail: Free, trusted and rich email service. [Get it now.](#)





Re: NPDES Public Hearings 

John Tinger to Cochran, John N.

03/19/2010 02:34 PM

cc: "Wendt, Gary W."

John,

Please find attached the Administrative Record materials related to the Public Hearings. Note that the record also contains recordings of the oral testimony if you would also like a copy of these, but we do not have transcripts of the hearings and therefore are not included in the scanned materials being provided,

John



Public Hearing Materials Record.pdf

John Tinger  
U.S. EPA Region IX  
NPDES Permits Branch  
(415) 972-3518

"Cochran, John N."

John: Now that the public hearings in Kayenta...

03/01/2010 03:55:21 PM

From: "Cochran, John N." <JCochran@PeabodyEnergy.com>  
To: John Tinger/R9/USEPA/US@EPA  
Cc: "Wendt, Gary W." <GWendt@PeabodyEnergy.com>  
Date: 03/01/2010 03:55 PM  
Subject: NPDES Public Hearings

John:

Now that the public hearings in Kayenta and Kykotsmovi on Peabody Western Coal Company's NPDES Permit have been concluded, I'd like to receive copies of materials related to the public hearings when you get them compiled.

Thanks for your attention in this matter.

John Cochran  
Manager Environmental Hydrology  
Peabody Investments Corporation  
3001 W. Shamrell Blvd., Suite 110  
Flagstaff, AZ 86001  
Office: 928.913.9218  
Cell: 928.890.7146

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Message from Vernon  
Kuuyi  
to:  
John Tinger  
03/18/2010 04:30 PM  
Cc:  
Jared Blumenfeld  
Show Details

**March 18, 2010**

**Mr. Tinger,**

Since our meeting in San Francisco concerning my request for a workshop on the EPA water discharge permit, I have tried to meet with Moencopi villages to inform the people about the reasons for a workshop.

Upper and Lower Moencopi villages are directly impacted by the de-watering of water that used to run through their fields. Many of the farmers have now abandoned the fields because the wash is now bone dry most of they year. They blame the impoundment ponds for denying them the water needed to maintain their farms.

Due to many cultural activities, I did not get a response until today. My schedule now is to make my presentation at the Lower Moencopi village on March 30, and Upper Moencopi village on April 13. Based on the feedback from the presentations, I will set a date for the workshop and inform you immediately.

I will be extending invitations to OSMRE, US Army COE, Bureau of Reclamation and the U.S. Bureau of Indian Affairs. The question of who are responsible for what area(s), as it relates to impoundments, has never been explained.

I realize this will create inconvenience but, after close to 40 years of mining and impounding Hopi Reserved waters, it is not unreasonable to ask EPA to postpone issuing a permit and ask all regulating agencies why absence of enforcement continues to take place.

*He*  
*3/18/2010*  
*water rights*

Any water impoundment and water discharge permit issued without the resolution of Hopi Reserved Water Rights of Moencopi farmers and the rights of Moencopi land allottees, who use to rely on water from the Moencopi Wash is premature and illegal. Another matter critical to pending de-watering permit is the lack of enforcement of Special Condition 12, which is part of the Kayenta Mine Life-of-Mine permit.

Permitting construction of sediment ponds and release of water from these ponds makes no sense if waters are, for all practical purposes, permanently impounded.

Thank you for taking time out from your busy schedule to meet with us.

Vernon Masayésva

Cc: Jared Blumenfeld



kuuyi  
to:  
John Tinger  
03/24/2010 12:55 PM  
Show Details

March 23, 2010

Dear Mr. Tinger,

Thank you for meeting with me concerning issues related to Peabody Western Coal Co. impoundments and impacts on environmental and hydrologic systems, including impacts on reserve water rights of the Hopi Tribe.

After reviewing my records, beginning from the time I was the Chairman of the Hopi Tribe (1990-1994), I have come to the conclusion that the crux of impoundment issues rest with the U.S. Army Corps of Engineers, U.S. Office of Surface Mining Reclamation Enforcement (OSMRE), and the U.S. Bureau of Indian Affairs.

OSMRE, in particular, has authority to enforce Peabody to treat and release impounded water under Special Conditions 12, which was incorporated into the Kayenta Mine lease, but has failed to do so because of objection from Peabody on the primary basis that OSMRE has no jurisdiction over adjudicating Indian Water Rights between Hopi and Navajo. The issue was argued in the Federal Administrative Court and was dismissed by the Administrative Law Judge. The issue, however, is very much alive, and of concern to the Hopi people, particularly the Moencopi farmers.

The result of the Court decision is that Special Condition 12 is invalid and Peabody cannot be forced to dewater the impoundment ponds even when evidence shows that the impoundment is causing significant material damage to the environment and is creating hardship for Moencopi farmers.

From a technical standpoint, I do not have a serious problem with EPA's proposal to issue water discharge permit to Peabody. It is my position that the proposal, no matter how good it is, is of no significant practical benefit when the sediment ponds are virtually never dewatered, and will not change as a result of the Court decision.

For all practical purposes, all the waters in the ponds are permanently prevented from going into Dinnebito and Moencopi Washes. Waters, however, are released into the atmosphere (evaporation) and into the ground water. This is an issue EPA can help us address.

The cumulative adverse impacts on the arid environment, the fragile hydrologic system and Indian Reserved Water Rights, is significant enough to warrant permitting

impoundments on an individual basis. This, of course, will require comprehensive investigation of impacts on wetlands, downstream flow, riparian, wildlife habitat, and groundwater.

Therefore, I recommend that you incorporate into your proposal justification for an Individual Permit. EPA in its comment on the 1989 Draft Black Mesa-Kayenta Mine EIS, did recommend permitting impounds on individual basis and that sufficient data exists to discontinue permitting under Nationwide Permit 21.

*11 d  
404 permit*

Therefore, based on my review, I do not feel that bringing you to Hopi to give a workshop on the EPA proposal will produce beneficial results at this time. I will, however, continue to work on setting up a workshop on the regulatory framework regarding Peabody mining. It is my goal to bring all the agencies that have regulatory jurisdiction on some aspect of the mining operation to explain their roles.

My comments do not necessarily represent the official position of Black Mesa Trust Board of Directors.

Sincerely,

Vernon Masayesva  
Executive Director  
Black Mesa Trust

Cc: BMT Board of Directors  
Jarred Blumenfeld, Regional Director

NPDES discjarge permit Kayenta mine  
TYLER TAWAHONGVA  
to:  
John Tinger  
03/25/2010 09:37 AM  
Show Details

4 oppor  
5 WQS

My name is Tyler Tawahongva, Hopi from Hotelvilla. I oppose the permit on the grounds that the permit does not address possible non compliance by Peabody to make sure they are not violating the permit. Testimony has been giving that shows negligence on the part of Peabody in the past, which establishes precedent, in maintaing the discharge of wastewater from the mine. I feel there is no appropriate oversight of Peabody to continue safely discharging water into the Dinebitto and Moencopi washes. I currently reside in Tuba City near the Moencope Wash. I also farm along the Dinebitto wash on the Hopi reservation. I feel that based on the history of negligence of wastewater dscharge from the Peabody coal mine I am at risk of potential contamination of my drinking water and runoff water that runs pass my fields. I strongly suggest, for the sake of the health and well-being of citizens, to reconsider the permit and find alternatives to wastewater removal. I feel that Peabody cannot be held accountable for their actions as testimony has proven. Sincerely Tyler Tawahongva.





Comment on NPDES permit NN0022179 Black Mesa

Vincent Yazzie for John Tinger

03/27/2010 09:14 AM

mariegladue

March 27, 2010

Vincent Yazzie  
10080 Palomino Road  
Flagstaff, Arizona 86004

e-mail: vinceyazzie@yahoo.com

I give permission for public use.

Dear Mr. Tinger,

I used Google Maps and assumed WGS 84 for the coordinate system.

The Discharges resulting from precipitation events says it must be a 24 hour event or a 10 year event. Looking at some of the latitudes and longitudes of some of the outfalls reveals one on a sand dune 126TSA which would be a 100 to 1000 year flood area. Outfall 118TPCA only covers 1 discharge point another discharge point needs to be placed at 36 degrees, 33 minutes, 0.71 seconds latitude North and 110 degrees 29 minutes and 7.42 seconds West longitude.

Outfall 136KMPB is located on the top of a hill which is a 10,000 year flood. An actual gauge needs to be put in the wash.

Many of the outfall gauges are measuring for 1000 to 100 year flood events as they are too high up the wash. Many of the gauges need to be inside the wash. My mom says Dinnebito Wash would rise 20 feet up for a 100 year flood and that was at Sand Springs, Arizona which is many miles from the coal mine.

The gauges need to be reset and relocated to the proper positions. At the present locations the gauges might read something when Noah's Ark arrives. This is bad science.

The location of the outfalls are in latitude and longitude, but which coordinate system, NAD27, WGS84, etc.

APPENDIX A - "Alkaline Mine Drainage"

| Serial Number/ | Latitude     | Longitude    | Receiving            |
|----------------|--------------|--------------|----------------------|
| Outfall Number | Deg.Min.Sec. | Deg.Min.Sec. | Water                |
| 005/N5-A       | 36-31-15     | 110-24-45    | Coal Mine Wash       |
| 008/N10-A1     | 36-32-45     | 110-22-30    | Coal Mine Wash       |
| 010/J3-A       | 36-28-45     | 110-25-00    | Coal Mine Wash Trib. |
| 012/N6-E       | 36-30-30     | 110-25-15    | Coal Mine Wash Trib. |
| 013/N10-B      | 36-33-00     | 110-22-15    | Coal Mine Wash Trib. |
| 018/J3-D       | 36-28-15     | 110-24-00    | Moenkopi Tributary   |
| 024/N14-F      | 36-30-30     | 110-18-30    | Moenkopi Tributary   |
| 025/N14-G      | 36-30-30     | 110-18-15    | Moenkopi Tributary   |
| 026/MW-A       | 36-27-30     | 110-23-45    | Moenkopi Wash        |
| 027/MW-B       | 36-27-30     | 110-23-45    | Moenkopi Wash        |
| 030/J16-D      | 36-30-00     | 110-18-30    | Moenkopi Tributary   |
| 031/J16-E      | 36-30-00     | 110-18-30    | Moenkopi Tributary   |
| 032/J16-F      | 36-30-00     | 110-18-45    | Moenkopi Tributary   |
| 033/J16-G      | 36-29-45     | 110-19-00    | Moenkopi Tributary   |
| 039/N14-H      | 36-30-45     | 110-17-30    | Moenkopi Tributary   |

045/WW-6 36-30-00 110-22-15 Moenkopi Tributary  
048/J7-G 36-25-00 110-24-15 Red Peak Valley  
052/J7-K 36-24-30 110-23-00 Sagebrush Wash  
069/J7-I 36-24-45 110-24-30 Yucca Flat Wash Trib.  
070/J7-J 36-24-30 110-24-30 Yucca Flat Wash Trib.  
071/J7-M 36-24-15 110-24-15 Yucca Flat Wash Trib.  
079/J21-A 36-26-15 110-14-45 Dinnebito Wash  
081/N1-O 36-32-00 110-24-00 Coal Mine Wash  
082/N5-E 36-31-15 110-25-00 Coal Mine Wash  
086/WW-4 36-26-45 110-24-45 Moenkopi Wash  
087/WW-9 36-23-45 110-24-45 Yucca Flat Wash Trib.  
088/WW-9A 36-23-45 110-24-45 Yucca Flat Wash Trib.  
089/WW-9B 36-23-45 110-24-45 Yucca Flat Wash Trib.  
090/WW-9C 36-24-15 110-24-30 Yucca Flat Wash Trib.  
141/J3-F 36-28-00 110-25-15 Coal Mine Wash Trib.  
142/J3-G 36-28-00 110-25-15 Coal Mine Wash Trib.  
143/N7-D 36-32-30 110-25-45 Yellow Water Canyon Trib.  
144/N7-E 36-32-30 110-25-30 Yellow Water Canyon  
147/J7-A 36-25-30 110-23-30 Red Peak Valley  
148/J21-C 36-26-00 110-15-30 Dinnebito Wash  
150/N6-G 36-29-30 110-23-00 Coal Mine Wash  
151/N6-H 36-29-30 110-23-00 Coal Mine Wash  
153/N6-I 36-31-45 110-24-15 Coal Mine Wash  
157/N6-J 36-31-45 110-24-00 Coal Mine Wash  
159/N11-A 36-32-20 110-22-40 Coal Mine Wash  
160/N11-C 36-32-25 110-22-35 Coal Mine Wash  
161/N11-E 36-32-35 110-22-25 Coal Mine Wash

Page 19 of 21

NPDES Permit No. NN0022179

162/N11-G 36-32-30 110-21-40 Coal Mine Wash  
APPENDIX A - "Alkaline Mine Drainage" - Continued  
163/J7-B1 36-25-10 110-23-58 Red Peak Valley  
164/N6-L 36-31-58 110-23-58 Coal Mine Wash  
165/N6-M 36-32-12 110-23-27 Coal Mine Wash  
168/N14-T 36-30-20 110-18-20 Moenkopi Tributary  
169/J7-R 36-24-05 110-24-00 Moenkopi Tributary  
170/J7-S 36-24-05 110-23-50 Yucca Flat Wash  
171/J7-T 36-24-00 110-23-40 Yucca Flat Wash  
172/J7-U 36-24-10 110-23-30 Yucca Flat Wash  
173/J7-V 36-24-10 110-23-20 Yucca Flat Wash  
176/J21-F 36-25-23 110-16-00 Dinnebito Wash  
177/J21-G 36-24-44 110-16-40 Dinnebito Wash  
178/J27-RC 36-27-08 110-23-02 Moenkopi Tributary  
179/J7-JR 36-26-13 110-19-52 Red Peak Valley Wash  
180/J19-A 36-27-28 110-19-24 Reed Valley Wash  
181/J19-B 36-27-16 110-20-10 Red Peak Valley Wash  
182/J19-D 36-26-50 110-19-55 Red Peak Valley Wash  
183/J19-E 36-26-42 110-19-55 Red Peak Valley Wash  
184/N9-A 36-34-49 110-23-56 Yellow Water Canyon  
185/N9-B 36-33-49 110-24-13 Yellow Water Canyon  
186/N9-C 36-33-23 110-24-49 Yellow Water Canyon  
187/N9-D 36-33-18 110-25-02 Yellow Water Canyon  
188/N9-E 36-32-56 110-25-24 Yellow Water Canyon  
189/N9-F 36-32-44 110-25-31 Yellow Water Canyon  
190/N9-G 36-33-27 110-25-51 Yazzie Wash  
191/N9-H 36-33-58 110-25-46 Yazzie Wash  
192/N9-I 36-34-13 110-25-32 Yazzie Wash  
193/N9-J 36-34-25 110-25-24 Yazzie Wash  
194/N9-K 36-33-43 110-25-57 Yazzie Wash  
194/J21-H 36-24-29 110-17-04 Dinnebito Wash

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NPDES Permit No. NN0022179

APPENDIX B - "Coal Preparation & Associated Areas"

Serial Number/ Latitude Longitude Receiving  
Outfall Number Deg.Min.Sec. Deg.Min.Sec. Water  
001/N1-F 36-31-45 110-24-45 Coal Mine Wash  
002/N1-L 36-31-45 110-24-15 Coal Mine Wash  
003/N1-M 36-32-45 110-24-15 Coal Mine Wash  
009/N10-C 36-32-00 110-24-00 Coal Mine Wash  
014/N10-D 36-32-30 110-23-00 Coal Mine Wash Trib.  
016/N12-C 36-32-15 110-23-15 Coal Mine Wash Trib.  
017/BM-A1 36-26-30 110-24-00 Moenkopi Tributary  
043/N14-Q 36-30-00 110-19-15 Moenkopi Tributary  
047/J7-DAM 36-25-30 110-23-30 Red Peak Valley  
054/N1-AC 36-32-00 110-25-45 Yellow Water Canyon  
083/N5-F 36-31-15 110-25-00 Coal Mine Wash  
094/N10-B1 36-33-00 110-22-15 Coal Mine Wash Trib.  
095/KM-D 36-31-30 110-25-15 Coal Mine Wash Trib.  
098/BM-SS 36-27-00 110-23-45 Moenkopi Tributary  
099/J3-E 36-28-45 110-23-30 Moenkopi Tributary  
103/N14-B 36-31-00 110-20-30 Moenkopi Tributary  
104/N14-C 36-30-00 110-19-15 Moenkopi Tributary  
105/BM-B 36-26-45 110-24-00 Moenkopi Tributary  
106/KM-A3 36-31-45 110-26-00 Yellow Water Canyon  
107/KM-B 36-31-30 110-26-00 Yellow Water Canyon  
118/TPC-A 36-33-00 110-29-15 Long House Valley Trib.  
126/TS-A 36-33-45 110-31-00 Klethla Valley  
127/J16-A 36-30-00 110-18-15 Moenkopi Tributary  
130/N14-P 36-31-00 110-20-30 Moenkopi Tributary  
133/J16-L 36-30-45 110-19-30 Reed Valley  
136/KM-TPB 36-31-15 110-28-00 Yellow Water Canyon Trib.  
137/KM-TPB1 36-33-00 110-28-00 Yellow Water Canyon Trib.  
139/KM-E 36-31-15 110-25-30 Coal Mine Wash Trib.  
140/J2-A 36-29-00 110-25-45 Wild Ram Valley  
149/J27-A 36-27-15 110-23-15 Moenkopi Tributary  
152/TS-B 36-33-30 110-31-15 Klethla Valley  
167/TPF-E 36-32-00 110-26-02 Yellow Water Canyon

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NPDES Permit No. NN0022179

APPENDIX C - "Western Alkaline Reclamation Areas"

Serial Number/ Latitude Longitude Receiving  
Outfall Number Deg.Min.Sec. Deg.Min.Sec. Water  
021/N6-C 36-29-30 110-22-45 Moenkopi Tributary  
022/N6-D 36-29-15 110-23-00 Moenkopi Tributary  
037/N6-F 36-30-45 110-22-30 Moenkopi Tributary  
049/J7-CD 36-24-45 110-22-15 Sagebrush Wash  
050/J7-E 36-24-45 110-22-30 Sagebrush Wash  
051/J7-F 36-24-30 110-22-30 Sagebrush Wash  
174/J21-D 36-25-39 110-15-37 Dinnebito Wash  
175/J21-E 36-25-32 110-15-49 Dinnebito Wash

For the gauging stations and discharge points, I need Latitude and Longitude to comment to see if they are measuring anything. As the writing says the location of the gauging stations are and discharge points are unknown. How can I comment on something that I cannot find.

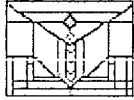
NPDES permit NN0022179 Black Mesa needs to be revoked until the outfalls are located correctly in streams, washes, and the science needs to be fixed (no mention of coordinate system). The location of the gauging stations and discharge points needs to be published for public comment. The only thing these gauging stations would be measuring is ZERO inches.

Another Bad Science project by Navajo EPA, just like how the USGS pumped out endangered Little Colorado River Spinedace near Leupp, Arizona.

I hold a BS in Physics.

Sincerely,

Vincent Yazzie



Re: NPDES Permit NN. 22179  
DavidW Smith to: Brad Bartlett  
Cc: Amy Atwood, Erica Maharg, Jason Brush, John Tinger

03/29/2010 02:31 PM

Mr Bartlett,

Thanks for your note. Your summary of our conversation is inaccurate on several points, which I'd like to clarify:

1. We have no current plans to conduct further public hearings, but have not reviewed comments received and have therefore made no final determinations on this point.
2. We have no current plans to conduct further public workshops, but have not reviewed comments received and have therefore made no final determinations on this point.
3. We will not be conducting a NEPA analysis on the reissuance of this existing NPDES permit as we are not required to do so by federal regulations.
4. We have maps showing outfall locations, which are in our administrative record. We used these maps during our public workshops preceding the two public hearings held last month. We have not completed additional maps as of this date but have made no final decisions as to whether we will create additional maps of outfall locations before we complete our permitting decision.
5. When we discussed 404 permitting for the Black Mesa/Kayenta mine complex, I emphasized that I was personally unfamiliar with the 404 permitting history at the site and that I did not personally recall seeing any 404 permitting issues raised during the period I managed EPA Region 9's Wetlands Office. My statements do not comprise a representation of EPA's collective knowledge concerning the 404 permitting history at that location.

I would be grateful if you would relay these clarifications to your clients. Thank you.

David Smith  
Manager  
NPDES Permits Office (WTR-5)  
EPA Region 9  
75 Hawthorne Street  
San Francisco, CA 94105  
(415) 972-3464  
(415) 947-3545 (fax)

Brad Bartlett

Mr. Smith: It was good talk with you on the phon...

03/29/2010 01:35:34 PM

From: Brad Bartlett <brad.bartlett@frontier.net>  
To: DavidW Smith/R9/USEPA/US@EPA  
Cc: Erica Maharg/R9/USEPA/US@EPA, John Tinger/R9/USEPA/US@EPA, Jason Brush/R9/USEPA/US@EPA, Amy Atwood <atwood@biologicaldiversity.org>  
Date: 03/29/2010 01:35 PM  
Subject: Re: NPDES Permit NN. 22179

Mr. Smith:

It was good talk with you on the phone Thursday, March 25, 2010. Based on our conversation, this email confirms that:

- (1) EPA will not be conducting any further public hearings on the NPDES permit;
- (2) EPA will not be conducting a community workshop on the NPDES permit;
- (3) EPA will not be conducting a NEPA analysis on the NPDES permit;
- (4) EPA does not have and does not intend to create maps showing the location of the outfalls; and,
- (5) EPA does not know which, if any, of the Peabody's impoundments and associated discharges (now subject to Sec. 402 of the CWA) were

permitted by the Army Corps. of Engineers pursuant to either a 404  
Nationwide Permit No. 21 or individual permit.

I will relay this information to my clients. Thank you.

Sincerely,

Brad A. Bartlett

Copy: Amy Atwood, Senior Attorney, Center for Biological Diversity

--

Brad A. Bartlett, Managing Attorney  
Energy Minerals Law Center  
1911 Main Avenue, Suite 238  
Durango, Colorado 81301  
Phone: (970) 247 9334  
Fax: (970)382-0316

This message is intended only for the use of the individual or entity to which  
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received this transmission in error, immediately notify me at the telephone  
number above.

~~~~~



March 31, 2010

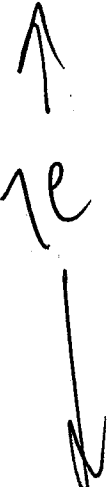
Mr. John Tinger
U.S. Environmental Protection Agency
Region IX (WTR-5)
CWA Standards and Permits
75 Hawthorne Street
San Francisco, CA 94105

RE: Comments on NPDES Permit No. NN0022179 – Black Mesa Complex

Dear Mr. Tinger:

Peabody Western Coal Company (PWCC) has reviewed the draft NPDES Permit No. NN0022179 dated January 2010 and developed by the U.S. Environmental Protection Agency (USEPA) for public comment during February and March 2010. PWCC's comments on the draft permit are provided in the following sections.

Fact Sheet

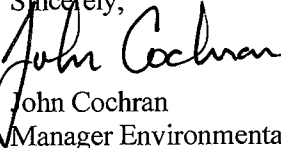
- 
1. Page 1, Section I., first paragraph – Update the stormwater permit number from AZR05A80F to AZR05F121 in sentence four. This permit became effective on February 2, 2009.
 2. Page 2, Section II. – Update the history for the life of mine permit by adding the following two sentences at the end of the second paragraph in this section: “The Life of Mine permit decision was appealed by several non-governmental organizations. Subsequently, on January 5, 2010, the administrative law judge vacated the Life of Mine permit with SMCRA authority reverting back to Kayenta Mine Permit AZ-0001D.”
 3. Page 3, Section III. – The last paragraph in Section III appears to summarize only the designated uses of the receiving waters established by the Navajo Nation Surface Water Quality Standards. This paragraph should summarize the designated uses of receiving waters established by both the Navajo Nation Surface Water Quality Standards and Hopi Tribe Water Quality Standards because the designated uses established by both Tribes' water quality standards are not equivalent.
 4. Page 3, Section IV., second paragraph – The number of outfalls in the first sentence should be changed from 112 to 111.
 5. Page 4, Section V.1.A. – The third sentence should be modified to add the word “Total” before “Iron”, since the permit establishes discharge limits for Total Iron, not just any form of Iron. In addition, the fourth sentence should also be modified to add the word “total” before “iron” for consistency.
 6. Page 5, Section V.1.B., first paragraph – The third sentence should be revised by deleting the language “...manganese (2.0 mg/l daily average and 4.0 mg/l daily maximum)”, and replacing it with the language “...oil and grease (15 mg/l daily maximum).”
 7. Page 15, Section XIII., item 4 – Review of the materials included with the August 3, 2005 NPDES permit renewal submittal indicate forms 1 and 2C were included, not forms 2A and 2S. This item should be revised accordingly.

Mr. John Tinger
March 31, 2010
Page 2 of 2

Draft NPDES Permit

1. Page 1 – Change “Yellow Water Canyon” to “Yellow Water Canyon Wash” in the list of washes under the heading “Receiving Water”.
2. Page 3, Section A.2., Table A-2 – The existing and administratively extended NPDES Permit established an effluent limitation for oil and grease of 15 mg/l as a daily maximum only (see Page 3 of 10), not a monthly average. Accordingly, Table A-2 should be revised to remove the number 15 under the “Monthly Average” column” for Oil and Grease and insert the number “15” under the “Maximum For any 1 day” column.
3. Page 8, Section A.6. – Delete Discharge Point number 194 in the list of discharge points for Peabody Gauge No. 10. Discharge point 194 (Pond N9-K) was permitted previously but was not constructed and mining plans in the N9 mining area have been revised to eliminate the need to build this pond.
4. Page 11, Section B. – The sentence for Item 14 of the Hopi Tribe General Standards should be modified to read as follows: “Activities conducted under this permit within the boundaries of the Hopi Reservation shall not result in the violations of any narrative and numeric criteria established in the Hopi Tribe’s Water Quality Standards.”
5. Page 12, Section C., second paragraph – The third sentence should be revised to read “...that occurs during the anticipated course...”
6. Page 12, Section D.1.a., second paragraph – The last sentence should be revised to read “...in narrative format due to the large number...”
7. Pages 16 and 17, Sections E. and F. – These sections of PWCC’s printed version of the draft permit contain what appear to be relic word processing software characters including “@”, “A”, and “=”. Revise the draft permit accordingly.
8. Page 19, Appendix A – Correct the heading at the top of page 19 so Site 162/N11-G appears below the heading. Delete Site 194/N9-K, since it was not constructed and mining plans in the N9 mining area have been revised to eliminate the need to build this pond. Rename Site 194/J21-H to 195/J21-H.

If you have any questions or need additional information please don’t hesitate to call me at (928) 913-9218, email me at jcochran@peabodyenergy.com, or write to me at the address below at your earliest convenience.

Sincerely,

John Cochran
Manager Environmental Hydrology
3001 W. Shamrell Blvd., Suite 110
Flagstaff, AZ 86001

JC

C: Gary Wendt (PWCC)
Jim Ohlman (PWCC)

file

To:

From: Marcie <catehokte1@yahoo.com>
To: Jared Vollmer/R9/USEPA/US@EPA
Date: 04/01/2010 10:01 AM
Subject: Black Mesa comment

Dear Mr. Vollmer,

I am writing to you today to submit my comments on Peabody Coal's Black Mesa Mine and the requested permit for public comment. All coal companies have a bad track record on pollution and not cleaning up their left over mess but Peabody's track record is horrendous. Most of us do not want any more mining of fossil fuels period.

It doesn't matter what conditions are put in a permit as they are ignored or efforts to cover up what hasn't been done according to code are made to look like they are in compliance. No matter what regulations are put in place to protect the environment and water

it has little impact on protection in the end. There is always the chance of human error or a natural disaster that will cause irreparable damage to the surrounding area. Many of these mining ventures are located on Native land through leases.

Our people have been through enough trauma over their removals and reservations being set on the most polluted and unusable land left. So many tribes face incurable diseases, birth defects etc. from the contaminants on their land left over from mining enterprises.

The deathly dust travels through the air, the poisons leach into the ground no matter what measures are taken to prevent it and the water supplies are poisoned, plants die, people die. Mountain tops are blown up, forests that help filter the air pollution are clearcut to accommodate these mining enterprises and the land ends up being decimated for decades. I think our lives and health are more important than a permit for more poisons to be released in our air and water supply.

Sincerely,

Marcie Lane.

Committee Member

Protect Sacred Sites " Indigenous People, One Nation"

Additional Comment on Peabody Western Coal Company's Draft NPDES Permit

Cochran, John N.

to:

John Tinger

04/05/2010 10:48 AM

Cc:

"Wendt, Gary W.", "Ohlman, James R."

Show Details

John:

Here's one more comment from Peabody Western Coal Company:

The second paragraph on Page 3 of Fact Sheet for Peabody Western Coal Company's (PWCC) Draft NPDES Permit (dated January 2010) indicates both the Navajo Nation and Hopi Tribe have received Treatment as a State for Sections 106 and 303 of the Federal Clean Water Act. PWCC understands both Tribes developed approved certifications for issuing the draft NPDES permit. Considering this, PWCC recommends revising the language to indicate Treatment as a State for Section 401 of the CWA has also been granted to both Tribes by USEPA.

7e

Not related to comments on the draft permit:

We don't have a copy of the Hopi Tribe's final certification for the NPDES permit. Would you please send us a copy for our files?

John Cochran
Manager Environmental Hydrology
Peabody Investments Corporation
3001 W. Shamrell Blvd., Suite 110
Flagstaff, AZ 86001
Office: 928.913.9218
Cell: 928.286.7116

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Black Mesa Trust

April 07, 2010

Jared Blumenfeld, Regional Administrator
U.S. Environmental Protection Agency
Region IX
75 Hawthorne St.
San Francisco, CA 94105-3901

Dear Blumenfeld:

I am very grateful to you and to EPA for extending through the end of the month the comment period on Peabody's National Pollutant discharge Elimination system permit application. It is an action which gives truth to the words of respect and understanding you spoke at our meeting in San Francisco last month. I sensed your trustworthiness, and I am heartened that it is so.

11-d
The impoundments and the damage they are causing both above and below ground threatens Hopi's quiet enjoyment of our ancestral lands, and have been of longstanding concern to me. It was so when I was Chairman, and it is so now that I am a Hopi farmer and Director of Black Mesa Trust.

These ongoing concerns will soon lead me to petition the U.S. Army Corps of Engineers to develop and enforce local, rather than national standards of protection, in its consideration of Peabody's permits and continuing Black Mesa mining operations. Moencopi Wash is not the Mississippi River and one size does not fit all.

I hope you will be willing to review and support my petition when the time comes. With your permission, I will keep you informed as matters progress.

Again, my thanks.

Yours Sincerely,

Vernon Masayesva
Executive Director

PO Box 33, Kykotsmovi, AZ 86039



Peabody Western Coal Correspondence 

Bessie Lee to: tinger.john

Cc: William Cody

04/15/2010 07:59 PM

John,

The e-mail below was forwarded to me by Bill Cody of OIG at EPA. Bill's contact information is below if you have any questions about the inquiry.

Bill Cody
Hotline Program Manager
US EPA OIG-OCI
202-566-1257

Bessie Lee

U.S. Environmental Protection Agency, Region 9
Drinking Water Office (WTR-6)
75 Hawthorne Street
San Francisco, California 94105-3901
Phone: (415) 972-3776
Fax: (415) 947-3549
E-mail: lee.bessie@epa.gov

-----William Cody/OIG/USEPA/US wrote: -----

To: Lee.bessie@epa.gov
From: William Cody/OIG/USEPA/US
Date: 04/15/2010 11:17AM
Subject: try #2

Bessie,

Forget the first one. I was in the wrong part of the data base. Please look at this one:

04/15/2010: Submitted by William Cody - On April 5, 2010, the Environmental Protection Agency (EPA) Office of Inspector General (OIG) received correspondence from Sharon L. Kitchen, PO Box 324, Townsend, GA (912-424-1260), who does not want Peabody Western Coal to have any operations on Native (Tribal) lands due to their recorded history, especially the Black Mesa/Kayenta mine which has operated since the early 1970's. Kitchen advised the current permit would allow storm water to be dumped into all type of waters that bring life to the plants, animals, and humans in that area. Kitchens wants the current permit cancelled. Kitchens references John Tinger, US EPA Region 9, Division of Water as a POC.

Sorry,

Bill

To: "Ellis, Lindsay A" <lellis@tulane.edu>
Cc:
Bcc:
Subject: Re: Black Mesa NPDES Permit

Lindsay, Please see below:

John Tinger
U.S. EPA Region IX
NPDES Permits Branch
(415) 972-3518

"Ellis, Lindsay A" Mr. Tinger, My name is Lindsay Ellis, I'm a law s... 04/20/2010 02:32:40 PM

From: "Ellis, Lindsay A" <lellis@tulane.edu>
To: John Tinger/R9/USEPA/US@EPA
Date: 04/20/2010 02:32 PM
Subject: Black Mesa NPDES Permit

Mr. Tinger,

My name is Lindsay Ellis, I'm a law student at Tulane University Law School currently researching CWA and tribal WQS issues. Specifically, I'm working on a research project surrounding the Black Mesa NPDES draft permit currently in comment period. I was hoping you might be able to answer a few questions for me.

(1) What are the designated waterbody uses at the outfalls-in question?
>>>> from the fact sheet

The Black Mesa/Kayenta Complex discharges to receiving waters located on the Navajo Nation and Hopi Tribe Reservations. The receiving waters are two principal drainages within the Black Mesa/Kayenta Complex, the Moenkopi Wash and Dinnebito Wash. Both are ephemeral washes with short intermittent reaches that drain southwest to the Little Colorado River system. Five large washes are tributaries to the Moenkopi Wash – the Coal Mine, Yellow Water Canyon, Yucca Flat, Red Peak Valley, and Reed Valley Washes. No waterbodies receiving discharges from Black Mesa/Kayenta Complex have been identified as impaired and therefore have not been listed on the Clean Water Act Section 303(d) list.

Both the Navajo Nation Surface Water Quality Standards (NNSWQS) and the Hopi Surface Water Quality Standards apply to the receiving waters previously mentioned, and thus, the proposed permit incorporates limits and standards for the protection of receiving waters in accordance with those standards. The Resources Committee of the Navajo Nation Council approved the NNSWQS on November 9, 1999 and amended the NNSWQS on July 30, 2004. Subsequently, the Navajo Nation received Treatment as a State for the purposes of Sections 106 and 303 of the CWA. EPA approved the Navajo Nation's water quality standards in March 2006. Similarly, the Hopi Tribe approved Surface Water Quality Standards in August 29, 1997, and subsequently on April 24, 2008, the Hopi Tribe received Treatment as a State for the purposes of Sections 106 and 303 of the CWA. EPA approved the Hopi water quality standards on July 8, 2008.

The designated uses of the receiving waters for the Moenkopi Wash and its tributaries

and Dinnebito Wash are Secondary Human Contact (ScHC), Ephemeral Warm Water Habitat (EphWWhbt), and Livestock and Wildlife Watering (L&W).

(2) Is it possible to get a copy of the Annual Seep Monitoring Reports, PWCC and the Technical Evaluation of Permit Revisions, OSRME, Jan 2009?

>>>>



Admin Record 2.pdf



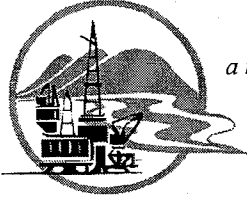
Admin Record 3.pdf

And more generally:

(3) How do you typically decide to issue a permit to a discharger that would violate tribal WQS but not state WQS?
>>> A permit must establish effluent limits to ensure that all water quality standards applicable at the discharge point are met.

Thank you very much for your time and I hope to hear from you soon -

Lindsay Ellis
Tulane Law School
J.D. 2010
(303) 475-1345



Energy Minerals Law Center

a nonprofit law firm serving communities impacted by energy development

1911 Main Avenue, Suite 238, Durango, Colorado 81301
Phone: (970) 247 9334 Fax: (970) 382 0316
Email: emlc@frontier.net

April 27, 2010

**BY CERTIFIED MAIL RETURN RECEIPT REQUESTED
BY ELECTRONIC MAIL**

John Tinger
U.S. EPA Region IX
NPDES Permits Branch
(415) 972-3518
Email: Tinger.John@epamail.epa.gov

Re: Comments on Proposed NPDES Permit No. NN0022179 (January 2010)

Dear Mr. Tinger:

On behalf of *Black Mesa Water Coalition, Diné C.A.R.E., To Nizhoni Ani, Center for Biological Diversity* and *Sierra Club* (hereinafter "*BMWC*"), the undersigned attorney(s) respectfully submit these comments on the proposed *Peabody Western Coal Company-Black Mesa Complex NPDES Permit No. NN0022179* (January 2010)(hereinafter "*NPDES Permit*").

I. Request for Additional Public Hearings and A Community Workshop

At the outset, we would like to thank the U.S. Environmental Protection Agency ("EPA") for holding two public hearings on the NPDES Permit. However, we are extremely disappointed that EPA elected to hold such hearings in February during a time when the Navajo Nation was under a state of emergency due to winter weather conditions and during the month when the Hopis traditionally undertake their religious ceremonies. Not only did we alert you to these conditions prior to the hearings, most if not all of the people who were able to attend the hearings mentioned the weather as a cause for the low turnout and decreased public participation.

Additionally, and although *BMWC* had specifically requested it in prior comments to the agency, the U.S. Army Corp of Engineers, the Federal Office of Surface Mining Control and Enforcement ("OSM") and U.S. Fish and Wildlife Service were not present at the hearings and were therefore unable to answer any related questions—such as how EPA's permitting decision is impacted by remand of the OSM's Life-of-Mine permit by Administrative Law Judge Holt.

Further, and as directly requested by *BMWC* and as suggested by the agency during our face-to-face meeting in San Francisco, California, EPA should have held additional hearings or a community workshop on the proposed permit and prior to the expiration of the deadline for public comment. Such actions would have gone a long way toward broadening community

understanding of EPA's permitting procedures and EPA's compliance with environmental justice requirements.

BMWC again requests an additional public hearing and/or community workshop be held within sixty (60) days of receipt of this letter to address the very serious and substantial issues and concerns raised herein.

Many of the people directly impacted by EPA's permit issuance were unable to make the public hearings which EPA knowingly scheduled in remote parts of the reservation in the middle of winter during a time of ceremony. Here, many impacted Navajo and Hopi tribal members, if they speak English at all, speak English primarily as a second language. Additionally, many Native American communities in the Black Mesa area bear a disproportionate share of Peabody's ongoing and potentially permanent 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.

EPA's public hearings were not meaningful and were carried out in such a manner so as to exclude (rather than maximize) public—and in particular tribal member—participation. Executive Order 12898 (Feb. 11, 1994) ("EO 12898") requires that each federal agency must: (1) identify and address the disproportionately high and adverse human health, environmental, social, and economic effects of agency programs and policies on communities of color and low-income; and (2) develop policies, programs, procedures, and activities to *ensure that these specific impacted communities are meaningfully involved in environmental decision-making*. 59 Fed. Reg. 7629 (Feb. 16, 1994). *BMWC* respectfully requests that EPA comply with these procedures and provide for more meaningful community involvement by, at a minimum, holding additional hearings and a community workshop.

II. Inadequacies in the Agency's Administrative Record

9-Record
The Administrative Record provided to *BMWC* by the agency is entirely inadequate. Although there are numerous documents cited in the permit application that would assist the public in assessing the validity of EPA's assertions and the adequacy of the proposed NPDES permit, these materials are not part of the agency's Administrative Record. Their absence precludes the public (and by extension the agency) from forming a defensible conclusion on the adequacy of the proposed permit.

In particular, the Administrative Record does not include the monitoring data upon which many of the assertions in the application rely. Rather than data that shows analyses and trends over the decades that have been monitored, the application and the Administrative Record include only summaries of the data. Further, these summaries are presented only for sites that have had exceedences and report only the number of exceedences and the ranges and averages. Absent entirely are time series data from which one might extract insights with respect to either typical trends or anomalous trends at specific points.

Letters in the Administrative Record seemingly acknowledge that meaningful trends may possibly exist (and allude to specific trends in general terms), but again no data is provided in the application, the permit or the Administrative Record from which to view or understand those discussed or others that may be present.

This inadequacy applies to both water chemistry and flow rates. Flow rates are simply (and generally) listed as the numbers of occasions with flow, with ponded water, with wetness, or with dry. The information on flow rates provided in the record provides no meaningful understanding of the sequencing, duration, or magnitude of flow.

Among the more important missing documents are the results of the annual seep investigations that track conditions at some impoundment locations over a period of about a decade. These reports are cited and clearly relied upon by the applicant and EPA, but are not part of the Administrative Record and accessible by the public for independent review and assessment.

Finally, the record fails to include maps showing the location of the outfalls. The record is also devoid of any related 404 permitting materials from the Army Corps of Engineers.

BMWC respectfully requests that these materials be incorporated into the agency's Administrative Record and that the draft permit be re-noticed for additional public review and comment.

BMWC notes that on March, 29, 2010, the *Center for Biological Diversity* submitted a Freedom of Information Act ("FOIA") request to EPA for all records related to the proposed NPDES permit. At a minimum, *BMWC et al.* should be allowed to supplement their comments on the NPDES permit 60-days after release of any records under FOIA by the agency.

III. Clean Water Act Compliance

A. TMDL's Are Not Established for Moenkopi and Dinnebito Drainages

5 WQS-B
It is unlawful for EPA to issue a NPDES Permit for new sources unless and until Water Quality Limited Segments ("WQLS") and Total Maximum Daily Loads ("TMDLs") are established for Moenkopi Wash Drainage and Dinnebito Wash Drainage.

Congress enacted the Clean Water Act, 33 U.S.C. § 1251, *et seq.* ("CWA") "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Act seeks to attain "water quality which provides for the protection and propagation of fish, shellfish, and wildlife." *Id.* at § 1251(a)(2). The primary means of accomplishing these goals include effluent limitations for point sources—implemented through NPDES permits—and TMDLs covering water bodies for which effluent limitations are not stringent enough to attain water quality standards. In achieving water quality restoration, EPA has ultimate responsible for the country's water quality. *Id.* at § 1251(d).

Specifically, Congress designed the NPDES and TMDL system to operate as follows:

1. Each state (or tribes who have received “Treatment as a State” status) has the responsibility in the first instance to identify waterbodies that are compromised despite permit-based limits on point-source pollutant discharges. 33 U.S.C. § 1313(d).
2. If a waterbody is not in violation of a water quality standard, NPDES permits may be issued so long as they do not violate effluent limits. 33 U.S.C. § 1342(a)(1).
3. If a waterbody is in violation of a water quality standard despite effluent limits, the State (or Tribe) must identify the waterbody as impaired on its § 303(d) list and establish a TMDL for it. 33 U.S.C. § 1313(d).
4. Where the State (or Tribe) has established a final TMDL, it may issue an NPDES permit so long as the applicant can show that the TMDL provides room for the additional discharge and establishes compliance schedules for current permit holders to meet the water quality standard. 40 C.F.R. § 122.4(i). Otherwise, no NPDES permits may be issued which allow new or additional discharges into the impaired waterbody. *Id.*

Section 303 of the CWA establishes three specific components that a state or tribe must adopt if it seeks to run its own water quality program. First, a state or tribe must designate the “beneficial uses” of its waters. 33 U.S.C. § 1313(c)(2)(A). Second, a state or tribe must establish “water quality criteria” to protect the beneficial uses. *Id.* Third, a state or tribe must adopt and implement an “antidegradation” policy to prevent any further degradation of water quality. *Id.* at § 1313(d)(4)(B); *see also* 40 C.F.R. § 131.12. These three components of a state or tribe’s water quality program are independent and separately-enforceable requirements of federal law. *PUD No. 1 of Jefferson County v. Washington Dep’t of Ecology*, 511 U.S. 700, 705 (1994).

In addition, and particularly important with respect to the Black Mesa, the CWA requires states (or tribes) to identify any degraded waterbodies within their borders, and to establish a systematic process to restore those waterbodies. States or tribes must periodically submit to the EPA for its approval a list of waterbodies that do not meet water quality standards—i.e., the state’s or tribe’s Section 303(d) list. 33 U.S.C. § 1313(d). The designated waterbodies are called “water quality limited,” 40 C.F.R. § 130.10(b)(2), which means they fail to meet water quality criteria for one or more “parameters”—including particular pollutants (such as selenium, aluminum or chloride) as well as stream characteristics such as temperature, flow, and habitat modification. The “water quality limited” designation also means that the waterbody is not expected to achieve water quality criteria even after technology-based or other required controls—such as NPDES discharge permits—are applied. 33 U.S.C. § 1313(d)(1); 40 C.F.R. § 130.7(b)(1).

For these degraded waterbodies, the state or tribe must develop and implement a “total maximum daily load” (“TMDL”) to restore water quality. *See* 33 U.S.C. § 1313(d)(1)(C) (explaining TMDLs). The TMDL process includes identifying sources of pollution that have caused or contributed to the degraded water quality, then establishing waste load allocations (for point sources of pollution) and load allocations (for nonpoint sources of pollution), for those sources

which have caused or contributed to the degraded water. 40 C.F.R. § 130.2(g) and (h). The final TMDL represents a “pie chart” of the pollution sources and their respective pollutant allocations which, if properly adhered to, is intended to result in restoration of the stream to water quality standards; it reflects an impaired waterbody’s capacity to tolerate point source, nonpoint source, and natural background pollution, with a margin of error, while still meeting state or tribal water quality standards.

Despite the fact that both the Navajo Nation and Hopi Tribe have received “Treatment as a State” status for purposes of Sections 106 and 303 of the CWA, 33 U.S.C. §§ 1256, 1313, EPA’s Administrative Record demonstrates that neither the Tribes (nor the State of Arizona) have submitted to EPA for its approval a list of waterbodies in the tribal land portion of the Little Colorado River Watershed (and in particular Moenkopi Wash Drainage and Dinnebito Wash Drainage) that do not meet water quality standards—*i.e.*, the state or tribe’s Section 303(d) list. These drainages have not been assessed by Arizona Department of Environmental Quality (“AZ DEQ”), EPA or the Tribes to determine whether they are “attaining” TMDLs or are “impaired.” See AZ DEQ 2006-2008 Status at 8 (identifying the drainages as “Tribal Land—Not Assessed”).¹ Further, there are at least two stream segments in the Little Colorado/San Juan Watershed that have been identified by AZ DEQ and EPA as being impaired or not attaining TMDL’s for copper, silver and suspended sediments. *Id.* at 9.

BMWC notes that the tribes’ water quality standards require monitoring of water quality to assess the effectiveness of pollution controls and to determine whether water quality standards are being attained as well as assessment of the probable impact of effluents on receiving waters in light of designated uses and numeric and narrative standards. See *e.g.* Hopi WQS §2.102(A)(1997); Navajo WQS §203 (2008).

In light of this, it is unlawful for EPA to issue a permit for new sources or increase permitted discharges² without first identifying whether these waterbodies are compromised despite permit-based limits on point-source pollutant discharges, and if so, without first ensuring that TMDLs are established for the tribal land portion of the Little Colorado River Watershed, and in particular, Moenkopi Wash Drainage and Dinnebito Wash Drainage. See, *e.g.*, *Friends of the Wild Swan v. U.S. Env’tl. Protection Agency*, 130 F. Supp. 2d 1199, 1203 (D. Mo. 2000) (holding that “[u]ntil all necessary TMDLs are established for a particular WQLS, the EPA shall not issue any new permits or increase permitted discharge for any permit under the [NPDES] permitting program”), *aff’d in part, rev’d in part, remanded by, Friends of the Wild Swan v. U.S. EPA*, 2003 WL 31751849, 2003 U.S. App. LEXIS 15271 (9th Cir. Mont. 2003).

BMWC’s request is consistent with, but not identical to, the Hopi Tribe’s 401 Certification for the NPDES Permit and the Tribe’s condition that “[w]ater discharged under this permit shall not contain settleable materials or suspended materials in concentrations greater than or equal to

¹ Available on AZ DEQ’s website:
<http://www.azdeq.gov/environ/water/assessment/download/2008/lg.pdf>.

² According to EPA, “several new outfall locations have been added...” Fact Sheet at 2 (January 2010)(emphasis supplied). The Fact Sheet does not identify the additional outfalls.

ambient concentrations present in the receiving stream that cause nuisance or adversely affect beneficial uses.” See June 12, 2009 Letter from Hopi Tribe to John Tinger (emphasis supplied). In this case, and until all necessary TMDLs are established for these WQLS (e.g. until EPA knows the “ambient concentrations” present in the receiving streams), a permit renewal incorporating new discharges and outfalls cannot be issued.

B. CWA Section 404 permitting

11-a-404
EPA seeks to issue the NPDES permit for discharges or outfalls from earthen impoundments with no indication that such impoundments have not been properly permitted in the first instance by the Army Corps of Engineers (“Corps”) under Section 404 of the CWA. 33 U.S.C. § 1344. It is impossible to discern from EPA’s administrative record which impoundments were subject to 404 permitting. When contacted, the head of EPA’s permitting office, David Smith, claimed that he “was personally unfamiliar with the 404 permitting history at the site and that I did not personally recall seeing any 404 permitting issues raised during the period I managed EPA Region 9’s Wetlands Office.” No other information has been provided by the EPA regarding this matter.

Additionally, and because EPA has acknowledged that “[t]he facility may also require authorization under a separate permit under the authority of Section 404 of the CWA for the discharge of fill material to a water of the U.S.,” Comment Response Document (August 3, 2009) at 8, *BMWC* requests that EPA: (1) identify all impoundments which will be subject to 404 permitting under the terms and conditions of the current NPDES permit renewal; (2) identify all of the impoundments (and outfalls) which are or have been subject to 404 permitting; and, (3) identify and provide any and all previously issued or to be issued 404 permits for inclusion in EPA’s administrative record. Additionally, *BMWC* requests that EPA identify and any and all requirements and design parameters that may be necessary to implement Section 404 of the CWA and as they relate to the 112 outfalls now covered by EPA’s NPDES permit.

C. All Outlets Covered by the NPDES Permit Must to be Monitored

7-a
EPA must require monitoring of all impoundments (or outlets) at the mine and covered by the NPDES Permit. According to EPA’s permit, there are over 230 impoundments that exist on the Black Mesa/Kayenta Complex and which are covered by the proposed permit. EPA’s Proposed NPDES Permit at 8.

In this case, PWCC argues without legal authority that, because the operation at Black Mesa is huge and results in many hundreds of individual outlets PWCC (and by extension EPA) can monitor less than all of the outlets. Only a small percentage of PWCC’s outlets are monitored and the results of monitoring this small subset is asserted as somehow indicative or representative of the total population of outlets.

First, designated outlets cannot legitimately be considered in compliance with the CWA without actual monitoring data. *BMWC* finds nothing in the CWA that would allow EPA to rely on a subset or sample of monitored outlets to determine CWA compliance for non-monitored outlets. Second, there is no discussion or rationalization for choosing data from one monitored outlet

over another for purposes of monitoring. Third, there is no indication that there is a feed-back or spot checking procedure to ensure the adequacy and appropriateness of the selected monitoring points or that all problematic monitoring locations are being evaluated. Finally, given the relative abundance of outlets with exceedences of one or more water quality standards, it seems exceedingly likely that there are many others not on the radar for lack of actual monitoring.

In sum, EPA must require monitoring of all outlets covered by the proposed NPDES permit. Additionally, EPA should require PWCC to recover at least 1-year's worth of data for all outlets prior to issuance of an NPDES permit renewal.

D. EPA must Enforce WQS and Address Exceedences

For outlets and seeps subject to monitoring and that have exceedences of water quality standards ("WQS"), EPA must enforce WQS standards and require PWCC to address the exceedences. See Proposed NPDES permit at 9-11 (identifying 21 impoundments with exceedences). Under the CWA, EPA may not issue NPDES permits for discharges that cause or contribute to an exceedence of water quality standards. 33 U.S.C. §1311(b)(1)(c); 40 C.F.R. §122.4(a) (no permit may be issued "[w]hen the conditions of the permit do not provide for compliance with the applicable requirements of CWA, or regulations promulgated under CWA"); 40 C.F.R. §122.44(d) (no permit may be issued "[w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States").³

26-a
seeps

Additionally, EPA should reject PWCC's extraordinary request for a waiver of the WQS standards so that the outlet can be considered in compliance. *BMWC* is aware of no legal basis for EPA to grant such a request.

66-waiver

E. Compliance with New EPA Guidance

New EPA guidance (April 1, 2010) provides instructions for improving EPA's of surface coal mining operations in Appalachian coal mines.⁴ As this guidance is equally applicable to the Black Mesa mine, *BMWC* asks EPA to use this new guidance in permitting for Black Mesa. Among other things, EPA should conduct a "reasonable potential analysis" of the permit's potential to contribute to narrative or numeric water quality standards to ensure the permit complies with the CWA.

10-a new guidance

³ Additionally, the permit application and some of the exchanges between the applicant and the agency establish that maintenance of leaking impoundments (of questionable design criteria and 404 permitting status) is being advanced as the preferred means to address problematic releases of polluted water. In one unusually straight forward example, and in response to a query by the agency about lining a pond to stop problem seeps below the impoundment, the idea was dismissed by the PWCC because doing so would result in substantial and frequent outlet discharges that do not currently occur. As discussed in more detail below, and among other things, EPA should use the NEPA process to address appropriate corrective enforcement measures to address these issues.

1-NEPA

⁴ http://www.epa.gov/wetlands/guidance/pdf/appalachian_mtntop_mining_summary.pdf

IV. NEPA Compliance

EPA must comply with the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.* (“NEPA”) in issuance of a NPDES permit. No NEPA document has ever analyzed EPA’s authorization of discharges at Peabody’s Black Mesa Complex which were first issued on December 29, 2000. That said, *BMW* requests that EPA analyze the impacts of the NDPE Permit in an Environmental Impact Statement (“EIS”) or, at a minimum, an Environmental Assessment (“EA”).

The trigger for an agency to be subject to NEPA mandates and the use of the NEPA procedural requirements to “prevent or eliminate damage” to the environment is a “major federal action.” 42 U.S.C. § 4332(2)(C); *Ross v. FHA*, 162 F.3d 1046, 1051 (10th Cir. 1998) (“major federal action” means that the federal government has “actual power” to control the project). The NEPA process must “analyze not only the direct impacts of a proposed action, but also the indirect and cumulative impacts of ‘past, present, and reasonable foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.’” *Custer County Action Ass’n v. Garvey*, 256 F.3d 1024, 1035 (10th Cir. 2001). Once a “federal action” triggers the NEPA process, an agency cannot define “the project’s purpose in terms so unreasonably narrow as to make the [NEPA analysis] ‘a foreordained formality.’” *City of Bridgeton v. FAA*, 212 F.3d 448, 458 (8th Cir. 2000) (quoting *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991), *cert. denied* 502 U.S. 994 (1991) (citing *Simmons v. U.S. Army Corps of Eng’rs*, 120 F.3d 664, 666 (7th Cir. 1997))).

NEPA applies to EPA’s decision to issue the first NPDES permit renewal. See 33 U.S.C. § 1371(c)(1) (CWA section specifically making EPA “new source” permit approvals subject to NEPA); 40 C.F.R. § 6.101. New source means “any source” the construction of which is commenced after the promulgation of Clean Water Act standards applicable to the source. 33 U.S.C. §1316(a)(2). Additionally, as stated by EPA’s *Notice of Policy and Procedures for Voluntary Preparation of National Environmental Policy Act (NEPA) Documents*:

EPA will prepare an EA or, if appropriate, an EIS on a case-by-case basis in connection with Agency decisions where the Agency determines that such an analysis would be beneficial. Among the criteria that may be considered in making such a determination are: (a) the potential for improved coordination with other federal agencies taking related actions; (b) the potential for using an EA or EIS to comprehensively address large-scale ecological impacts, particularly cumulative effects; (c) the potential for using an EA or an EIS to facilitate analysis of environmental justice issues; (d) the potential for using an EA or EIS to expand public involvement and to address controversial issues; and (e) the potential of using an EA or EIS to address impacts on special resources or public health.

63 Fed. Reg. 58045-58047 (Oct. 29, 1998).

In this case, "several new outfall locations have been added and several have been eliminated to reflect changes in ongoing mining activities." Fact Sheet at 2 (January 2010).⁵ The permit also "incorporates new regulatory requirements for the Western Alkaline Coal Mining Subcategory for reclamation areas that were promulgated in January 2002..." *Id.* In other words, EPA's permit specifically covers "new sources" as defined by Section 306 of the CWA, 33 U.S.C. § 1316, (*i.e.*, new outfalls) which should have been analyzed under NEPA. 33 U.S.C. § 1371(c)(1) ("discharge of any pollutant by a new source ... *shall* be deemed a major Federal action significantly affecting the quality of the human environment" within the meaning of NEPA) (emphasis supplied). For example, there are over eight (8) new sources that are now covered by the new regulations for Western Alkaline Coal Mining Subcategory for reclamation areas. *See* NPDES Permit at Appendix C. The environmental impacts of these new sources were never considered or analyzed pursuant to NEPA and must be analyzed in and EIS or EA.

Further, the proposed NPDES Permit is based on significant new information. According to EPA's Fact Sheet, "the proposed permit also incorporates revisions to the Seep Monitoring and Management Plan, which was created pursuant to the previous permit, in order to reflect the results of previous monitoring and to address the impoundments causing seeps." Fact Sheet (January 2010) at 2 (emphasis supplied). Again, this significant new information must be analyzed in a NEPA document.

Moreover, there are multiple connected actions that must be analyzed in an EIS or EA including, but not limited to, OSM's proposed permit renewal for the Kayenta Mine;⁶ OSM "technical review" of the PWCC's Sediment Control Plan (which was based on the now vacated Life of Mine permit issued by OSM); and/or, any and all 404 permitting by the U.S. Army Corps of Engineers. NEPA and its implementing regulations define "connected actions" as, among other things, actions that are "interdependent parts of a larger action and depend on the larger action for their justification," and require that they be addressed in the same NEPA review document. 40 C.F.R. § 1508.25(a)(1). Additionally, and from the public's perspective, NEPA compliance is clearly necessary to facilitate and increase agency cooperation and evaluation of these interrelated matters. *See* 40 C.F.R. §1501.6 (dealing with cooperating agencies).

Finally, a NEPA process would allow for meaningful public evaluation and understanding of EPA's NPDES permitting process and these complex environmental matters. It would also facilitate analysis of environmental justice issues, expand public involvement, address controversial issues and allow for analysis of impacts to special resources (such as livestock grazing) or public health. Many of the people directly impacted by EPA's permit issuance are downstream Navajo and Hopi tribal communities in the Black Mesa area (including tribal members who use these impoundments for livestock grazing) who 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. EPA should use the NEPA process to take the

⁵ Neither the draft permit nor the fact sheet identifies what outfalls have been added or eliminated. EPA must identify with specificity these changes.

⁶ Comments are due on the operating permit renewal on May 17, 2010. A highly incomplete version of the permit application is available on OSM's website: <http://www.wrcc.osmre.gov/>

37-d

required "hard look" and ensure that tribal people and lands are not being disproportionately impacted by Peabody's massive mining operation and ongoing discharge of pollutants.

Any NEPA process should include adequate public notice, comment, and participation pursuant to NEPA's implementing regulations at 40 C.F.R. §1506.6.

IV. EPA Cannot Rely on OSM's Technical Review Because of Remand and Vacation of OSM's LOM Permit

7-6-OSM review
Here, it is unlawful for EPA to rely on OSM's "technical review" of PWCC's Sediment Control Plan for purposes of approval of the NPDES Permit. According to EPA's Fact Sheet at 5, and based on a Memorandum of Understanding between EPA and OSM, EPA is relying on OSM's "technical review and approve[al of] the permittee's Sediment Control Plan." *Id.* Specifically, "OSMRE completed a technical review of PWCC's Sediment Control Plan, which PWCC submitted in order to re-categorize outfalls as Western Alkaline Reclamation Areas and to apply for a revision of its permit under the Surface Mining and [sic] Control Reclamation Act. See January 28, 2009 letter from Dennis Winterringer, OSMRE to Gary Wendt, PWCC." *Id.*

PWCC requested under the Clean Water Act Western Alkaline Drainage Category regulations to use "best management practices in lieu of eight existing sedimentation ponds in areas N6, J7 (ponds 021 (N6-C), 022 (N6-D), 037 (N6-F), 049 (J7-CD), 0505 (J7-E), 051 (J7-F), 174 (J21-D), and 175 (J21-E))." June 16, 2009 Letter from Dennis Winterringer, OSM to Gary Wendt, Peabody. OSM approved PWCC's request as "an application for minor revision of Black Mesa Complex permit AZ 0001D (project AZ-0001-D-J-58)." *Id.* (w/attached "Application for Miner Permit Revision").

As EPA is aware Administrative Law Judge Holt issued an *Order* on January 5, 2010 vacating the underlying Life of Mine ("LOM") permit from OSM. OSM's LOM permit allowed Peabody to operate the Black Mesa and Kayenta mines jointly as the Black Mesa Project (*a.k.a.* Black Mesa Complex). Because the LOM is now vacated, OSM's approval of a "minor revision" to the LOM permit should also be considered vacated.⁷ Any other interpretation would be inconsistent with Judge's Holt's *Order*.

Additionally, and as *BMWC* has already requested and because there is no Black Mesa Complex, EPA should temporarily withdraw the proposed NPDES Permit for the Black Mesa Complex and reissue any proposed permit at some future date in accordance with Judge Holt's findings and the existing *status quo* (*i.e.* treating the mines as separate entities for permitting purposes).

In sum, it is unlawful for EPA to rely on OSM's "technical review" and approval of a "minor revision" of the LOM and for purposes of approval of the NPDES Permit. At a minimum, EPA and OSM should use the NEPA process to evaluate any "technical review" and approval of the permittee's Sediment Control Plan and issuance of any proposed NPDES permit in accordance the existing *status quo* (*i.e.* treating the mines as separate entities for permitting purposes).

⁷ *BMWC* has copied the Solicitor's office on these comments and will be separately following up with the Solicitor on this matter.

V. EPA Cannot Rely on OSM's Biological Assessment for ESA Compliance.

A. The Endangered Species Act

8 ESA
EPA must comply with the Endangered Species Act, 16 U.S.C. § 1531, et seq. ("ESA") when issuing the NPDES permit. Section 7 of the ESA places affirmative obligations upon federal agencies. Section 7(a)(1) provides that all federal agencies "shall, in consultation with and with the assistance of the Secretary [of Commerce or the Interior], utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species." 16 U.S.C. § 1536(a)(1). Section 7(a)(2) mandates that:

Each Federal agency shall, in consultation with and with the assistance of the Secretary [of Commerce or the Interior], insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined ... to be critical, unless such agency has been granted an exemption for such action ... pursuant to subsection (h) of this section.

Id. § 1536(a)(2).

The ESA's implementing regulations set forth a specific process, fulfillment of which is the only means by which an action agency ensures that its affirmative duties under section 7(a)(2) of the ESA are satisfied. *In re Desert Rock Energy Company, LLC*, PSD Appeal Nos. 08-03, 08-04, 08-05 & 08-06, slip op. (EAB Sep. 24, 2009) at 36 (citing 50 C.F.R. § 402.14(a); *Sierra Club v. Babbitt*, 65 F.3d 1502, 1504-05 (9th Cir. 1995); *In re Indeck-Elwood, LLC*, PSD Appeal No. 03-04, slip op. (EAB Sep. 27, 2006) at 95). By this process, each federal agency must review its "actions" at "the earliest possible time" to determine whether any action "may affect" listed species or critical habitat in the "action area." 50 C.F.R. § 402.14. The "action area" is defined to mean all areas that would be "affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." 50 C.F.R. § 402.02. The term "may affect" is "broadly construed by FWS to include '[a]ny possible effect, whether beneficial, benign, adverse, or of an undetermined character,' and is thus easily triggered." *Indeck-Elwood*, slip op. at 96 (quoting 51 Fed. Reg. at 19926); *Desert Rock*, slip op. at 36 n. 33. If a "may affect" determination is made, "consultation" is required. *Id.*

Consultation is a process between the federal agency proposing to take an action (the "action agency") – here, EPA – and, for activities affecting terrestrial species, the U.S. Fish and Wildlife Service ("FWS"). "Formal consultation" commences with the action agency's written request for consultation and concludes with FWS's issuance of a "biological opinion" ("BiOp"). 50 C.F.R. § 402.02. The BiOp issued at the conclusion of formal consultation "states the opinion" of FWS as to whether the federal action is "likely to jeopardize the continued existence of listed

species” or “result in the destruction or adverse modification of critical habitat.” 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(c).⁸

Prior to commencing formal consultation, the federal agency may prepare a “biological assessment” (“BA”) to “evaluate the potential effects of the action on listed and proposed species and designated and proposed critical habitat” and “determine whether any such species or habitat are likely to be adversely affected by the action.” 50 C.F.R. § 402.12(a). While the action agency is required to use a BA in determining whether to initiate formal consultation, FWS may use the results of a BA in determining whether to request the action agency to initiate formal consultation or in formulating a BiOp. 50 C.F.R. §§ 402.12(k)(1), (2). If a BA concludes that the action is “not likely to adversely affect” a listed species, and FWS concurs in writing, that is the end of the “informal consultation” process. 50 C.F.R. § 402.13.

B. EPA Must Consult with FWS to Consider the Effects of the NPDES Permit to Threatened and Endangered Species in the Action Area.

Threatened and endangered species that are known to occur within the “action area” of the permit that may be affected directly, indirectly, and/or cumulatively by the activities authorized by the permitted discharges. At a minimum, such species include the endangered southwestern willow flycatcher, the threatened Mexican spotted owl, and the threatened Navajo sedge and its critical habitat, black-footed ferret as well as species and habitat that occur downstream from the discharges, such as the Little Colorado River spinedace, and species that are affected by the air emissions resulting from combustion of the coal at the Navajo Generating Station. The NPDES permit authorizes new and continued discharges from active mine areas, coal preparation areas, and reclamation areas within the Complex, including discharges of selenium and other pollutants that are known to affect flora and fauna such as these species. But rather than meeting its ESA section 7 duties and considering the full spectrum of such potential effects, EPA avoids its ESA section 7 duties altogether, choosing to skip consultation with FWS to consider the effects of the NPDES permit issuance to listed species and critical habitat.

As an initial matter, it must be noted that EPA’s attempt to apply the analysis contained in an ESA document prepared by a separate federal agency, the Office of Surface Mining Reclamation & Enforcement (“OSM”), for a different agency action, OSM’s now-invalidated issuance of a life-of-mine permit revision for the Black Mesa and Kayenta coal mines, to EPA’s separate issuance of the NPDES permit. Indeed, there is nothing in the ESA’s regulations, statutory

⁸ If FWS concludes that the activities are not likely to jeopardize listed species, it must provide an “incidental take statement” with the BiOp that specifies the amount or extent of such incidental take, the “reasonable and prudent measures” that FWS considers necessary or appropriate to minimize such take, the “terms and conditions” that must be complied with by the action agency or any applicant to implement any reasonable and prudent measures, and other details. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i). “Take” means an action would “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect,” or “attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). Thus, a BiOp with a no-jeopardy finding effectively green-lights a proposed action under the ESA, subject to an incidental take statement’s terms and conditions. *Bennett v. Spear*, *Bennett v. Spear*, 520 U.S. 154, 170 (1997).

language, or fundamental purposes that would EPA to do this, and EPA's attempt to do so here illustrates the problems with such an approach.

First, OSM's BA does not actually consider the effects of discharges to threatened and endangered species in the action area. As a result, it is palpably incorrect for EPA to suggest, as it does, that FWS concluded that there would not be "any effects on listed species due to the discharges that would be regulated by PWCC's NPDES permit." Fact Sheet at 13-14. FWS made no such conclusion, and OSM's BA contained no such analysis. Thus, EPA cannot escape its duties under ESA section 7 to consult with FWS directly over the effects of discharges – including by obtaining FWS's concurrence in its own determinations, as appropriate – on this basis.

Indeed, there are numerous other flaws in the OSM BA that would render EPA's reliance on it in the NPDES permitting context particularly arbitrary. For example, OSM's BA does not consider, at all, the effect of the mines' operations to the *recovery* of threatened and endangered species, and only considers the potential effects to species' survival. This is a patent violation of the letter and spirit of the ESA, as is particularly illustrated in the omission of any analysis of the effects of mining operations (again, not discharges) downstream from the source, such as to threatened and endangered species that occur in the Little Colorado River watershed including the Little Colorado spinedace and other listed species and their critical habitat. Instead, the BA dismisses these species out of hand by stating that such species have no "suitable" habitat in the action area. Completely unaddressed are, e.g., whether any listed species located downstream of the "project area" (i.e., within the "action area") have areas in the "action area" for the NPDES permit that are essential to their recovery, regardless of whether such areas are currently "suitable" or inhabited by listed species.⁹

In addition, in its BA OSM focused exclusively on *direct* effects – i.e., those effects occurring as a result of impacts in the direct footprint of the mines and their related infrastructure. For example, the OSM BA only considered the potential direct effects to the Southwestern willow flycatcher habitat within the footprint of the "project area" – an area that is not described in the BA but is depicted on a map included in the document. See OSM BA at 6-2 to 6-5 (discussing effects to Southwestern willow flycatcher within the "project area"); *id.* at 2-2 (Figure 2-1) (Map of "Project Area").¹⁰ The Final BA also focuses on impacts in areas occupied by listed species

⁹ For instance, how will the discharges affect the recovery of the Southwestern willow flycatcher? The southwestern willow flycatcher is a riparian-obligate species that relies on rivers, streams, and other wetlands for breeding. *Id.* at 6-1. Suitable foraging and resting habitat is known to exist in the area of the mines for this species, "near the black mesa mining operation", including in Moenkopi Wash. *Id.* at 6-3. Southwestern willow flycatchers are known to be threatened in part due to the "reduction, degradation, or elimination of riparian habitat, which has curtailed the range, distribution and populations of this species." *Id.* The loss of riparian habitat results from impoundments, among other things. *Id.*

¹⁰ The draft permit's Fact Sheet expressly adopts this flawed approach. See Fact Sheet at 13 (stating that EPA has reached a "no effect" determination for listed species because "as evidenced by OSMRE's Biological Assessment for the Life-of-Mine permit, no threatened or endangered species are located in the *project area*") (emphasis added).

or critical habitat and the area of “Mining Operations,” *see id.* at 6-5 (addressing potential effects to Mexican spotted owl), or the “Lease Area.” *Id.* (considering effects to black-footed ferret). Completely ignored throughout the OSM BA – as indirect or interrelated effects or as part of the environmental baseline – are the effects of emissions of mercury and selenium from coal combustion at the Navajo Generating Station that will occur within 300 km of the mines.

In evaluating the effects of the proposed Desert Rock Energy Project, a coal-fired power plant that is proposed to be sited on the Navajo Nation within New Mexico, the FWS determined that three hundred kilometers (300 km) is the appropriate distance for properly evaluating the effects of air emissions from major sources like coal-fired power plants on federally-listed species. FWS, Attachment A (Ex. 3) at 4. In this case, the desert tortoise, southwestern willow flycatcher, Colorado pikeminnow, and razorback sucker, as well as other listed species all occur within 300 km the Navajo Generating Station, as well as the Black Mesa Project area, and therefore are potentially affected by mercury and selenium emissions. *See* Center for Biological Diversity Maps. Some species, including Colorado pikeminnow, razorback sucker, humpback chub, Little Colorado spinedace, Mexican spotted owl, and Southwestern willow flycatcher, occur within 300 km of the San Juan Generating Station and Four Corners Power Plant as well. *See id.* There is also critical habitat for the desert tortoise, Colorado pikeminnow, razorback sucker, humpback chub, Little Colorado spinedace, southwestern willow flycatcher, Mexican spotted owl, and Navajo sedge within 300 km of the Black Mesa Project area.

Coal-fired power plants are the largest source of mercury emissions in the United States. Mercury levels in the Four Corners region are already high and adversely affecting the Colorado pikeminnow and razorback sucker. In fact, the Navajo Generating Station, which is within the 300km Black Mesa Project area, is a large source of mercury and selenium, particularly in combination with the San Juan Generating Station and Four Corners Power Plant. *See* EPA’s Emissions of Mercury by Plant – 1999 (Ex. 1).¹¹

The ESA’s implementing regulations are clear and require a biological assessment to discuss the “effects of the action,” which include both direct and indirect effects, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline. 50 CFR 402.02. Indirect effects are those that are caused by the proposed action and are later in time, but are still reasonably certain to occur. “Interrelated actions” are those that are part of a larger action and depend on the larger action for their justification; ‘interdependent actions’ are those that have no independent utility apart from the action under consideration. 50 CFR 402.02. Under this regulatory scheme, it is clear that the

¹¹ OSM does not define the Project’s “action area” in its BA for the life-of mine permit revision for the mines. Had OSM and FWS identified the “action area” for the life-of-mine permit, such a description would have been included in the Final BA. *See* 50 C.F.R. § 402.02 (“biological assessment” contains, by definition, “the information prepared by or under the direction of the Federal agency concerning listed and proposed species and designated and proposed critical habitat *that may be present in the action area* and the evaluation of potential effects of the action on such species and habitat”) (emphasis added). The fact that the Final BA contains no description of the action area simply confirms that the agencies never considered the effects to listed species and critical habitat, and EPA has not remedied this defect by adopting OSM’s BA.

effects of burning coal at the Navajo Generating Station must be considered as part of EPA's ESA section 7 consultation. Yet, the OSM BA does not consider these effects at all. Thus, it is unlawful for EPA to rely on its flawed analysis.

The "environmental baseline" must, for its part, include analysis of "the past and present impacts of all Federal, State, or private actions and other human activities in the action area." 50 C.F.R. § 402.02. Here, because emissions of air pollutants from the San Juan Generating Station and Four Corners Power Plant are affecting endangered fish in the San Juan River Basin, which is also within 300 km of the Black Mesa Project area, these plants' emissions should have been accounted for as part of the environmental baseline for the mines, and hence, the NPDES permit. The OSM BA omits consideration of these problems as well.

FWS has acknowledged that mercury and selenium contamination are of particular concern to the endangered fish species and to fish-eating birds along the San Juan River and that fish tissue samples exceed recommended mercury thresholds, putting the birds that eat them at risk for mercury toxicity. Biological Assessment for the Proposed Desert Rock Energy Project (Rev. Oct. 2007) ("Desert Rock BA") at 27. Studies also show that diet items for Colorado pikeminnow, including small fish, speckled dace, and red shiners, exceed threshold levels of concern and compromise the species' ability to reproduce. *Id.* Continued coal burning at Navajo Generating Station, together with coal combustion at the San Juan Generating Station and the Four Corners Power Plant, will only exacerbate these effects.¹²

The purpose of a biological assessment is to determine, based on the "best available scientific ... data", 16 U.S.C. § 1536(a)(2), whether an action "may affect" listed species or critical habitat, and the "may affect" threshold is low. 51 Fed. Reg. 19926 (June 3, 1986) (the "may affect" threshold is a "low threshold" that is "easily triggered" and "broadly construed" to include "[a]ny possible effect, whether beneficial, benign, adverse, or of an undetermined character")(emphasis added). Given the elevated levels of mercury and selenium in endangered fish within the action area of the mines, the indirect effects of such emissions from the Navajo Generating Station, San Juan Generating Station, and Four Corners Power Plant clearly "may affect" – and indeed, are affecting and will continue to affect – these and other species, and therefore should have been considered. By adopting OSM's flawed effects analysis, EPA fails also to consider these emissions is a violation of the plain language of the ESA's implementing regulations. *Nat'l Wildlife Fed'n v. Nat'l Marine Fish. Serv.*, 481 F.3d 1224, 1235 (9th Cir. 2007) (compliance with the ESA's implementing regulations is "not optional" and is the only way to ensure that action agency's affirmative duties under section 7 are satisfied).

Third, the OSM BA fails to incorporate into the environmental baseline any acknowledgement or analysis of the ongoing effects of global warming that are already being observed in the action area. The OSM BA does not incorporate an analysis of the ongoing and projected global warming-related changes to vegetation, fire regimes, or water availability, despite the plethora of information about such impacts in the southwestern United States that was available at the time OSM was engaging in ESA section 7 consultation for the life-of-mine permit revision – and

¹² The Navajo Generating Station, San Juan Generating Station, and Four Corners Power Plant are some of the largest and highest-polluting coal-fired power plants in the United States.

which is certainly available now, when EPA should be conducting its own ESA section 7 consultation for issuance of the NPDES permit.

Furthermore, despite being dated “November 2008,” the Final BA does not even refer to many studies dated after 2006.¹³ This is because the bulk of the ESA consultation history for OSM’s life-of-mine permit revision occurred between May 2005 and March 2007. OSM only spent June through November 2008, when the OSM BA is dated – or, less than six months – focused on considering the effects of the life-of-mine permit revision to listed species and critical habitat, and even then, simply revised the BA to omit discussion of certain aspects of the mines that have since been discontinued (such as the coal-slurry pipeline). Yet, numerous scientific studies and reports were released during 2007 through 2008 that document changing conditions due to climate change in the Southwest, and these should have been considered during the ESA consultation for the life-of-mine permit revision, but were not. These changing conditions, which are already occurring, include decreasing water availability and streamflows, and increasing temperatures and aridity. See *NRDC v. Kempthorne*, 506 F. Supp. 2d at 369 (citing *Pac. Coast Fed’n of Fishermen’s Ass’ns v. Nat’l Marine Fisheries Serv.*, 265 F.3d 1028, 1033 (9th Cir. 2001)) (“[a]t the very least, these studies suggest that climate change will be an ‘important aspect of the problem’ meriting analysis” during section 7 consultation); cf. *Greater Yellowstone Coal., et al. v. Servheen, et al.*, 9:07-cv-00134-DWM, slip op. at 26-29 (D. Mont. Sep. 21, 2009) (vacating rule delisting Yellowstone population of grizzly bears for failure to consider effects of decreasing whitebark pine due caused in part by climate change).¹⁴

Finally, even it could somehow be said that it is appropriate for EPA to rely on the OSM BA in this instance to comply with ESA procedural obligations, EPA still has not met its duty under section 7(a)(1), which “imposes a specific obligation upon all federal agencies to carry out programs to conserve each endangered and threatened species.” *Fla. Key Deer v. Paulison*, 522 F.3d 1133, 1146 (11th Cir. 2008) (citing *Sierra Club v. Glickman*, 156 F.3d 606, 616 (5th Cir. 1998)) (“Given the plain language of the statute and its legislative history, we conclude that

¹³ There are only three references, out of dozens listed in the References section of the Final EA, are dated after 2006, all of which are at least almost two years old. They are:

BIOME Ecological and Wildlife Research (BIOME). 2008. *Final report 2007: wildlife monitoring, Black Mesa, Arizona*. Submitted to Peabody Western Coal Company, Black Mesa and Kayenta Mines.

Roth, D. 2008. Personal communication by D. Roth, botanist, Navajo Natural Heritage Program, with Jean Charpentier, URS Corporation, June 25, 2008.

U.S. Department of the Interior, Fish and Wildlife Service (FWS). 2008a. Coconino County Listed Species. Accessed online July 2008.
<http://www.fws.gov/southwest/es/arizona/Documents/CountyLists/Yuma.pdf>.

¹⁴ Indeed, the OSM BA only mentions the term “climate change” twice – both times, in connection with a discussion about the anticipated effects to Navajo sedge. See Final BA at 6-15 (Bates # 3-01-01-001119). But even then, the OSM BA fails to actually consider what the converging effects of the Project and global warming to Navajo sedge would actually be.

Congress intended to impose an affirmative duty on each federal agency to conserve each of the species listed pursuant to [16 U.S.C.] § 1533. In order to achieve this objective, the agencies must consult with [the] FWS as to each of the listed species, not just undertake a generalized consultation.”). While EPA has some discretion to determine how it will meet section 7(a)(1)’s affirmative duty, “[t]otal inaction is not allowed.” *Id.* Yet, here EPA totally avoids its duty to comply with section 7(a)(1), an error which is corollary to its decision to simply adopt OSM’s flawed BA for its own purposes. *See id.* at 1147 (citing *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep’t of Navy*, 898 F.2d 1410, 1417 (9th Cir. Nev. 1990)). At the very least, section 7(a)(1) requires EPA to consult with FWS to ensure that OSM’s BA is adequate for this purpose, up-to-date, will significantly contribute to the recovery as well as the survival of listed species, and that nothing more will be required to conserve listed species affected by discharges. *See Pyramid Lake*, 898 F.2d at 1417 (in exercising their duty to conserve, non-Interior Department agencies must do so in consultation with the Secretary”).

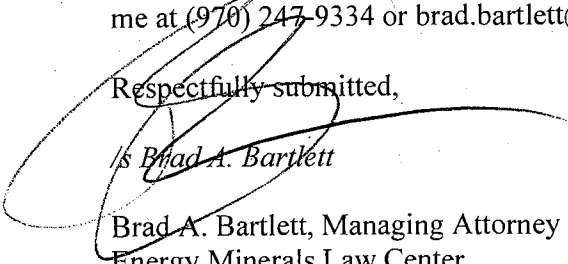
For all of these reasons, EPA has failed to comply with its affirmative duties under ESA section 7 in connection with its issuance of the NPDES permit.

V. Conclusion

In summary, *BMWC* requests that EPA re-notice the draft NPDES permit, hold additional hearings and a community workshop and provide to *BMWC* within ten (10) business days all of the supplemental information requested and identified herein as part of a revised Administrative Record. Additionally, and as a substantive matter, EPA must comply with both the Clean Water Act and Endangered Species Act in permit issuance. As a procedural and analytic matter, EPA must additionally comply with the requirements of the National Environmental Policy Act and develop an EIS or EA.

If you have any comments or questions regarding this request, please do not hesitate to contact me at (970) 247-9334 or brad.bartlett@frontier.net.

Respectfully submitted,


/s/ Brad A. Bartlett

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Dennis Witerringer, Office of Surface Mining, Reclamation and Enforcement
Marjorie Blaine, Senior Project Manager, U.S. Army Corps of Engineers
Steve Spangle, Field Supervisor, U.S. Fish and Wildlife Service

*Note : ~ 300 page attachment
Comments included
from Desert Rock EIS*

Fw: Waste Water Proposed NPDES Permit Peabody Black Mesa/Kayenta Mine
DavidW Smith
to:
John Tinger
04/29/2010 07:27 PM
Show Details

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-----Forwarded by DavidW Smith/R9/USEPA/US on 04/29/2010 07:26PM -----

To: DavidW Smith/R9/USEPA/US@EPA
From: Elsie Benally <elsiebenally@gmail.com>
Date: 04/29/2010 05:44PM
Subject: Waste Water Proposed NPDES Permit Peabody Black Mesa/Kayenta Mine

Elsie Benally, Black Mesa Resident within Lands leased to Peabody Western Coal
My comments is in support of not issuing a NPDES permit to Peabody Black Mesa/Kayenta Mine.
Thank you for being giving me the opportunity to make my comments at the Public Hearing that
was held in Kayenta. I am submitting this written document as the person holding the hearing
told me to cut my comments short and wrap it up. In addition, the translation of my comments
were not exactly as I stated. I know it is expected that there will be a level of mistranslation
from Navajo to English. However, I thought the translation on what I said was grossly
mistranslated.

4-opport

I am Elsie Benally. I grew up on Black Mesa within the area formally known as Black Mesa Pipeline and Peabody Coal Company's Black Mesa facilities. I currently still live in that area. These are my experiences with waste waters that are discharged from Peabody Western Coal Company Black Mesa Mining Operations and many of the same concerns exist on Black Mesa.

1. As a child I drank the black water (water contaminated with coal) that was allowed to run freely into the Buck Skin wash. No one monitored these discharged waters. There were no fences or encatchment ponds to keep children and animals out of these waste water discharges. Today, I am angry that I drank this water and possibly contaminated myself with chemicals unknown to me. Nonetheless, I am glad that I am given this opportunity to state my drinking of ugly water during this public hearing. Hopefully, we will be able to use my input to prevent other unsuspecting children from drinking any contaminated or any waste water on Black Mesa. When one is very thirsty then water is water.
2. Questionable possibly contaminated water is allowed to seep from facilities. These waters are not all contained by encatchment or fenced in. I don't think there is any corrective action or preventive measures to control these questionable waters. I see these discharges in many areas surrounding Peabody 's old Black Mesa Mine facilities. The waters which are not fenced in appear to be contaminated. There is no one monitoring or testing these waters. The waters are allowed to seep at least a mile or two from the facilities and they are further allowed to run into the Buck Skin and Moencopi Washes. The proposed permit does not appear to address these waters. These are contaminated waters remaining from coal mining activities. What will USEPA do about this?
3. A containment or impoundment pond near the mining facilities does not even catch any waste

water. That is interesting since the intent for building the impoundment pond was to catch waste or contaminated waters being discharged from the mines shop facilities. At most the impoundment pond near the Black Mesa mine truck shop and electrical shop probably caught a few buckets of waste water during its lifetime. As it is or was, the waste water runs along the road, past the impoundment pond and into an encatchment pond which is a mile away. The planning and placing of waste water encatchment ponds need to be properly planned and monitored so that the ponds do the job that they are supposed to. Not let waste waters by pass them to have children or animals drink the contaminated waters. I have never seen any corrective actions taken to insure this particular pond collects any waste water. If this was allowed to happen in an area that I know of - certainly, this is happening elsewhere on the lands that Peabody operates on. There is no real outside agencies to monitor these occurrences. How will USEPA ensure that encatchment ponds are catching the waste waters? Who will monitor these ponds on a regular basis and follow up on concerns from residents? Hopefully, not Peabody.

4. The permit and waste water comments do not seem to include the rain water that mix with contaminates or chemicals from the dust control for the roads. The Clean Water Act must cover all waters as rain waters become part of the water sources. However, when rain water mixes with the chemical that is used to control the dust on roads, there is a great hazard. As such, the National Pollutant Discharge Elimination System Permit must include corrective measures for these waters by containing these waters in an area until they have reached safe levels. Don't tell me that the dust control chemicals are safe. If it were safe then why do these calcium chloride have to be maintained on a material safety data sheet? The rain waters mixed with dust control chemical becomes surface waters and probably even drinking water. Again when one gets very thirsty water is water and one just needs to have a drink of water. How will USEPA control these waters until they are safe for drinking by people and animals? If Peabody Officials or its Shareholders or even US Environmental Protection Agency agents drink this water then I will believe it's safe and therefore does not need to be including on the NPDES Permit. As of yet, that has not been done so the dust control must be properly controlled.

Lastly, Black Mesa Mine does not exist. As I know it Black Mesa Mine closed operations on December 31, 2005. Then why is this Proposed NPDES Permit being referred to as Peabody Black Mesa/Kayenta Mine. Peabody Western Coal Company and USEPA must talk separately about these two mines. These two mines should not be joined together when discussion is on Kayenta Mine. I reside near the old Peabody's Black Mesa mine facilities and I am looking forward to this area being fully reclaimed as envision by my grandfathers and the waters returned to their safe drinking water status. Kayenta mine still operates and my relatives who reside up there have lots of waste water to deal with on a day to day basis.

There is so much to say but why go even further when USEPA seems to have already made a decision to issue a NPDES Permit to Peabody Western Coal Company. I feel USEPA just jumping through the hoops of getting comments from me. That is just so they can say we got a public hearing. I just hope my comments are taken seriously and preventive and corrective actions are put in place to really control all waste water and to keep all our drinking water safe.

Sincerely,
Elsie Benally
Black Mesa Resident

Norman Benally
PO Box 433
Kayenta, AZ 86033

March 29, 2010

John Tinger
U.S. Environmental Protection Agency
Region 9, WTR-5
75 Hawthorne Street
San Francisco, CA 94105-3901

To John Tinger,

The recent public hearings in Kayenta and Kykosmovi, leaves a lot to be desired. Much of what happen was not in the best interest of the people impact by the coal mining operations by Peabody (PWCC) on Black Mesa. Not to revisit the same issues raised by the attendees I am compel to write more towards what I feel is necessary for the people's concerns to be addressed, *and not just heard*, regarding the surface water pollution at Peabody's mining operations.

4-oppose
5-d
PWCC does in fact pollute the surface and ground water the people of Black Mesa depend on for their livelihood. It is the interest of the community and the regulator oversight agencies, the Office of Surface Mining and Enforcement (OSMRE) and the U.S. Environmental Protection Agency (USEPA) to enforce the Clean Water Act and Clean Air Act at Peabody's operations on Black Mesa. The commentary that the community financially benefitted and contributed to the environmental pollution is simply foolish and no excuse to ignore the ongoing large scale polluting by Peabody. The people of Black Mesa use small quantities of coal during the extreme winter months to keep warm. Compared to the large scale coal fires at Peabody's open pit strip mine, and at the dead storage coal piles that burn 24/7 fifty-two weeks out of the year. Clearly the indigenous people of Black Mesa have used small controlled fires, to Peabody's large uncontrolled fires on Black Mesa. The uncontrolled fires are possibly a source of ground and surface water pollutants.

The people were never properly informed by Peabody, the Federal government agencies, the Navajo Nation and the Hopi Tribe that the surface water, ground water, air quality, and the environment would be polluted permanently. The allegation that the two tribes were negligent is

The following information was obtained from the records of the Department of
 Health Services, Division of Health Planning and Statistics, dated 12/15/88:

On 12/15/88, the following information was obtained from the records of the
 Department of Health Services, Division of Health Planning and Statistics:

The following information was obtained from the records of the Department of
 Health Services, Division of Health Planning and Statistics, dated 12/15/88:

simply foolish. The revenue benefits mentioned is no excuse to continue to ignore federal regulations and over-sight.

The USEPA has been grossly negligent in its trust responsibly to enforce federal laws regarding surface and ground water pollution by Peabody at its mining operations on Black Mesa. USEPA admits it has been issuing National Pollutant Discharge Elimination System (NPDES) permits without active agency representatives collecting data on the leased area for more than thirty years. The impression left in the community's mind was that Peabody has been cooking data in this particular incident, water quality data, for the USEPA. And in turn the USEPA has been rewarding Peabody with an NPDES permit without a public notice, comment, or hearing in the communities impacted the hardest by Peabody's polluted water discharge in to the Dinnebito and the Moenkopi wash tributaries, and much of the Black Mesa plateau water shed.

The Indigenous people of Black Mesa have been dependant on the natural springs and surface water for thousands of years. Today the indigenous people of Black Mesa still depend on the natural springs and surface water for their livelihood, as many people still depend on natural springs and surface water supply for drinking water for themselves, for livestock, and wildlife. The polluted waste water discharge into the tributaries has been the cause of numerous livestock deaths as my family and others have experienced. Further the indigenous populations eat their livestock and the wildlife is also consumed as food. Why the USEPA translator failed to translate such comments during the hearing is appalling. As example are Simon Crank's comments and Irene Freeman's comments. Furthermore, the natural vegetation and crops which are also dependent on surface and ground water are consumed by the people of Black Mesa. This way of indigenous life is not going to change despite all the hype over money, power, and corruption brought by multinational corporations and their puppet government agents. Of course Peabody has bought all the corrupted people it can buy many times over and going for more rounds. Instead of business as usual Peabody and USEPA should focus their resources on protecting the quality of life on Black Mesa. And not be the adversaries of the indigenous people's way of life on Black Mesa. Because most people do not accept the corrupting ways of the ever corrupted Wall Street firms and the irresponsible government agents.

Revenues, the economy, royalties, are common references used instead of calling them for what they are "bribes." The USEPA must fulfill is fiduciary responsibility and not to show favoritism to Peabody and its supporters by not enforcing or even circumventing federal environmental laws on Black Mesa. Continuing to allow Peabody to pollute the environment on Black Mesa is not protecting the quality of life on Black Mesa. The USEPA has an obligation to protect the quality of life.

Self monitoring by Peabody equates to no over sight, and non-enforcement of federal law by the USEPA, or OSMRE. A perfect example is the seepages at Peabody's sediment ponds. The J-7 dam has had seepages since it was built in the mid-1970s, and the BM-A1 pond also has had seepages since it was built in the early 1980s. Simon Crank, Phillip Etsitty, and others stated

The information and records of the Department of the Interior, Bureau of Land Management, are hereby made available to the public under the provisions of the Freedom of Information Act, 5 U.S.C. 552, and the Department of the Interior, Bureau of Land Management, is hereby notified that the public has the right to request access to these records. The Department of the Interior, Bureau of Land Management, is hereby notified that the public has the right to request access to these records. The Department of the Interior, Bureau of Land Management, is hereby notified that the public has the right to request access to these records.

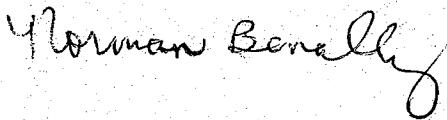
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during the hearing in Kayenta there are other Peabody ponds seeping below the containment dams. These seepages have discolored contaminates and do have a sulfuric smell to them. On the same note there is no reason to refer to these sediment ponds as treatment ponds. There is not a single treatment facility associated with these ponds. They are strictly ponds. Changing the description of the ponds does not relieve the USEPA or Peabody of any of its liability to the indigenous people of Black Mesa. The proof that the sediment ponds are not treated ponds is the J-7 dam has fish in it. And periodically the fish do die en mass leaving a terrible stench in the pond. The dead fish float to the surface and rot. So obviously the J-7 dam is contaminated.

In other instances Peabody has built sediment ponds over natural springs the people, livestock and wildlife depend on as a source of drinking water. The J-7 dam is once again a good example of that. Plus the sediment ponds along the now abandon haul road crossing the Moenkopi wash are built above natural springs. These natural springs, for centuries, served as potable drinking water for household use. Today they are no longer viable even for livestock. The people are now forced to haul water for their livestock as well as for domestic use. No one ever agreed to the fact that the community water supply would permanently be impaired or polluted. The public water stand is insufficient to alleviate access to quality water supply. Especially during severe drought conditions experienced the past two decades. Attached to this document are pictures that represent visual pollutants in the seepages discussed.

Finally the endangered species listed in the permit application live in the wet lands of Moenkopi and Dennebito wash and should be protected from the coal mines pollutant discharge. Therefore Peabody's NPDES permit should be revoked permanently, because PWCC and the federal government did not or do not offer a better alternative solution.

Sincerely,

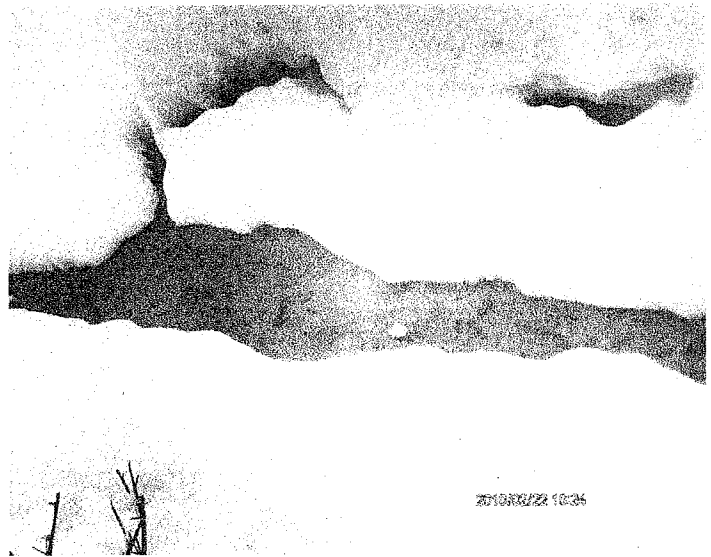
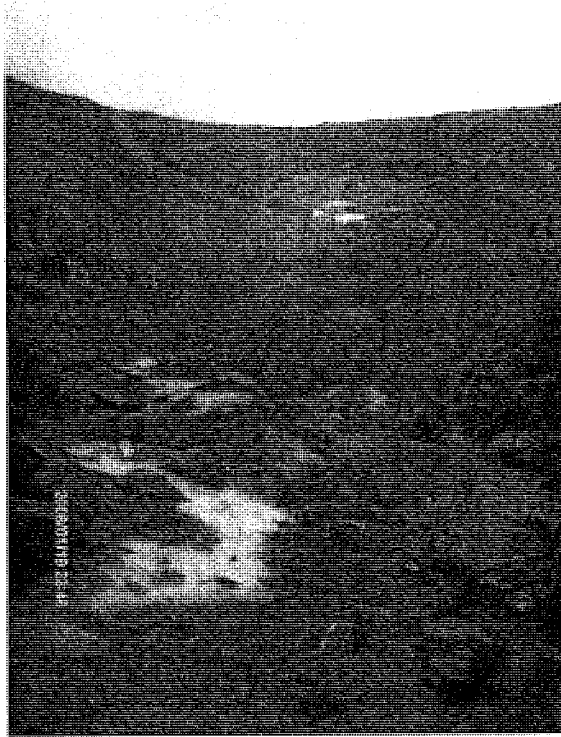


Norman Benally

Attachments: Photos

Note: The photos are dated wrong, the actual photo date is 2-21-10 on the prints dated 1-19-08.

Taken by me of seepage along N-41 road and below the J-7 dam in the background. The 2-22-10 dated photo has the correct date with snow, is seepage below the BM-A1 pond.



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NPDES PERMIT NO. NN 0022179 Comments Amendment and Additional
Comment

Vincent Yazzie to: John Tinger, mariegladue, Andy Bessler

04/30/2010 03:35 AM

History: This message has been replied to.

March 30, 2010

Vincent Yazzie
10080 Palomino Road
Flagstaff, Arizona 86004

(928) 526-4847

John Tinger
U.S. Environmental Protection Agency
Region 9, WTR-5
75 Hawthorne Street
San Francisco, CA 94105-3901

Subject: NPDES PERMIT NO. NN 0022179 Comments Amendment and Additional
Comment

Dear Mr. Tinger,

More measurement locations need to be added.

This comes from Geochemistry of sediments in the US from the NURE-HSSR database Geochemical analyses of sediment samples throughout the U.S. collected by the hydrogeochemical and stream sediment reconnaissance (HSSR) phase of the National Uranium Resource Evaluation (NURE) program. This database contains 397,625 records.
<http://tin.er.usgs.gov/nure/sediment/>

Aluminum has to be another element to be measured.

Data for 5202454
At latitude 36.5362 Longitude -110.4563 collected 1979/11/22
<http://tin.er.usgs.gov/nure/sediment/show.php?labno=5202454>
Aluminum measured at 4.89% which can be toxic.

Data for 5202453
At Latitude 36.5117 Longitude -110.4561 Date collected 1979/11/22
<http://tin.er.usgs.gov/nure/sediment/show.php?labno=5202453>
Aluminum measured at 4.64% which can be toxic.

Data for 5202452
At Latitude 36.5136 Longitude -110.4217 Date collected 1979/11/22
<http://tin.er.usgs.gov/nure/sediment/show.php?labno=5202452>
Aluminum measured at 4.64% which can be toxic.

Data for 5202451
At Latitude 36.5355 Longitude -110.3918 Date collected 1979/11/22
<http://tin.er.usgs.gov/nure/sediment/show.php?labno=5202451>
Aluminum measured at 2.96% which can be toxic.

Data for 5202450
At Latitude 36.5214 Longitude -110.3636 Date collected 1979/11/22
<http://tin.er.usgs.gov/nure/sediment/show.php?labno=5202450>

Aluminum measured at 4.04% which can be toxic.

Data for 5202437

At Latitude 36.5779 Longitude -110.4194 Date collected 1979/11/21

<http://tin.er.usgs.gov/nure/sediment/show.php?labno=5202437>

Aluminum measured at 2.85% which can be toxic.

Data for 5202436

At Latitude 36.5823 Longitude -110.3761 Date collected 1979/11/21

<http://tin.er.usgs.gov/nure/sediment/show.php?labno=5202437>

Aluminum measured at 2.57% which can be toxic.

Data for 5202435

At Latitude 36.5719 Longitude -110.3344 Date collected 1979/11/21

<http://tin.er.usgs.gov/nure/sediment/show.php?labno=5202437>

Aluminum measured at 1.79% which can be toxic.

Aluminum oxide powder which is found in the soil can cause lung problems. A determination must be made if the bauxite is fibrous.

Sincerely,

Vincent Yazzie

<http://gis.wvdep.org/tri/cheminfo/csfs97.txt>

Common Name: Aluminum Oxide, CAS Number: 1344-28-1

DOT Number: None

Date: January, 1989

HAZARD SUMMARY

- * Aluminum Oxide can affect you when breathed in.
- * Exposure to Aluminum Oxide can irritate the eyes, nose, and throat.
- * Repeated exposure to high levels of Aluminum Oxide dust may cause scarring of the lungs ("pulmonary fibrosis") with shortness of breath. This condition can be fatal.

IDENTIFICATION

Aluminum Oxide is a white, crystalline (sand like) powder. It is used as an adsorbent, in abrasive and aluminum manufacturing, in paper, spark plugs, fluxes and heat resistant fibers, and in chromatographic analysis.

REASON FOR CITATION

- * Aluminum Oxide is on the Hazardous Substance List because it is cited by EPA and ACGIH.
- * Definitions are attached.

HOW TO DETERMINE IF YOU ARE BEING EXPOSED

- * Exposure to hazardous substances should be routinely evaluated. This may include collecting personal and area air samples. You can obtain copies of sampling results from your employer. You have a legal right to this information under OSHA 1910.20.
- * If you think you are experiencing any work related health problems, see a doctor trained to recognize occupational diseases. Take this Fact Sheet with you.

WORKPLACE EXPOSURE LIMITS

ACGIH: The recommended airborne exposure limit for Aluminum

metal and oxide is 10 mg/m³ averaged over an 8 hour workshift.

WAYS OF REDUCING EXPOSURE

- * Where possible, enclose operations and use local exhaust ventilation at the site of chemical release. If local exhaust ventilation or enclosure is not used, respirators should be worn.
- * Wear protective work clothing.
- * Wash thoroughly at the end of the workshift.
- * Post hazard and warning information in the work area. In addition, as part of an ongoing education and training effort, communicate all information on the health and safety hazards of Aluminum Oxide to potentially exposed workers.

This Fact Sheet is a summary source of information of all potential and most severe health hazards that may result from exposure. Duration of exposure, concentration of the substance and other factors will affect your susceptibility to any of the potential effects described below.

HEALTH HAZARD INFORMATION

Acute Health Effects

The following acute (short term) health effects may occur immediately or shortly after exposure to Aluminum Oxide:

- * Exposure to Aluminum Oxide can irritate the eyes, nose, and throat.

Chronic Health Effects

The following chronic (long term) health effects can occur at some time after exposure to Aluminum Oxide and can last for months or years:

Cancer Hazard

- * According to the information presently available to the New Jersey Department of Health, Aluminum Oxide has been tested and has not been shown to cause cancer in animals.

Reproductive Hazard

- * According to the information presently available to the New Jersey Department of Health, Aluminum Oxide has been tested and has not been shown to affect reproduction.

Other Long Term Effects

- * Repeated exposure to large amounts of Aluminum Oxide dust may damage the lungs, leading to pneumonia and to scarring of the lungs (pulmonary fibrosis), with shortness of breath. This condition can be fatal.

MEDICAL

Medical Testing

If there has been a long history of high exposure, or if lung symptoms develop, a chest x ray and pulmonary function tests are recommended.

Any evaluation should include a careful history of past and present symptoms with an exam. Medical tests that look for damage already

done are not a substitute for controlling exposure.

Request copies of your medical testing. You have a legal right to this information under OSHA 1910.20.

Mixed Exposures

Because smoking can cause heart disease, as well as lung cancer, emphysema, and other respiratory problems, it may worsen respiratory conditions caused by chemical exposure. Even if you have smoked for a long time, stopping now will reduce your risk of developing health problems.

WORKPLACE CONTROLS AND PRACTICES

Unless a less toxic chemical can be substituted for a hazardous substance, ENGINEERING CONTROLS are the most effective way of reducing exposure. The best protection is to enclose operations and/or provide local exhaust ventilation at the site of chemical release. Isolating operations can also reduce exposure. Using respirators or protective equipment is less effective than the controls mentioned above, but is sometimes necessary.

In evaluating the controls present in your workplace, consider: (1) how hazardous the substance is, (2) how much of the substance is released into the workplace and (3) whether harmful skin or eye contact could occur. Special controls should be in place for highly toxic chemicals or when significant skin, eye, or breathing exposures are possible.

Good WORK PRACTICES can help to reduce hazardous exposures. The following work practices are recommended:

- * Workers whose clothing has been contaminated by Aluminum Oxide should change into clean clothing promptly.
- * Contaminated work clothes should be laundered by individuals who have been informed of the hazards of exposure to Aluminum Oxide.
- * Wash any areas of the body that may have contacted Aluminum Oxide at the end of each workday, whether or not known skin contact has occurred.
- * Do not eat, smoke, or drink where Aluminum Oxide is handled, processed, or stored, since the chemical can be swallowed. Wash hands carefully before eating or smoking.
- * Use a vacuum or a wet method to reduce dust during cleanup. DO NOT DRY SWEEP.

PERSONAL PROTECTIVE EQUIPMENT

WORKPLACE CONTROLS ARE BETTER THAN PERSONAL PROTECTIVE EQUIPMENT. However, for some jobs (such as outside work, confined space entry, jobs done only once in a while, or jobs done while workplace controls are being installed), personal protective equipment may be appropriate.

The following recommendations are only guidelines and may not apply to every situation.

Clothing

- * Avoid skin contact with Aluminum Oxide. Wear protective gloves and clothing. Safety equipment suppliers/manufacturers can provide recommendations on the most protective glove/clothing

material for your operation.

- * All protective clothing (suits, gloves, footwear, headgear) should be clean, available each day, and put on before work.

Eye Protection

- * Wear dust proof goggles when working with powders or dust, unless full face piece respiratory protection is worn.

Respiratory Protection

IMPROPER USE OF RESPIRATORS IS DANGEROUS. Such equipment should only be used if the employer has a written program that takes into account workplace conditions, requirements for worker training, respirator fit testing and medical exams, as described in OSHA 1910.134.

- * Where the potential exists for exposures over 10 mg/m³, use a MSHA/NIOSH approved respirator equipped with particulate (dust/fume/mist) filters. More protection is provided by a full facepiece respirator than by a half mask respirator, and even greater protection is provided by a powered air purifying respirator. Particulate filters must be checked every day before work for physical damage, such as rips or tears, and replaced as needed.
- * If while wearing a filter, cartridge or canister respirator, you can smell, taste, or otherwise detect Aluminum Oxide, or in the case of a full facepiece respirator you experience eye irritation, leave the area immediately. Check to make sure the respirator to face seal is still good. If it is, replace the filter, cartridge, or canister. If the seal is no longer good, you may need a new respirator.
- * Be sure to consider all potential exposures in your workplace. You may need a combination of filters, prefilters, cartridges, or canisters to protect against different forms of a chemical (such as vapor and mist) or against a mixture of chemicals.
- * Where the potential for high exposures exists, use a MSHA/NIOSH approved supplied air respirator with a full facepiece operated in the positive pressure mode or with a full facepiece, hood, or helmet in the continuous flow mode, or use a MSHA/NIOSH approved self contained breathing apparatus with a full facepiece operated in pressure demand or other positive pressure mode.

Common Name: Aluminum Oxide

DOT Number: None

DOT Emergency Guide code: No Citation

CAS Number: 1344-28-1

| Hazard rating | NJDOH | NFPA |
|---------------|-------|-----------|
| FLAMMABILITY | 1 | Not Rated |
| REACTIVITY | 1 | Not Rated |

Hazard Rating Key: 0=minimal; 1=slight; 2=moderate; 3=serious; 4=severe

FIRE HAZARDS

- * Use dry chemical, CO₂, or foam extinguishers.
- * If employees are expected to fight fires, they must be trained and equipped as stated in OSHA 1910.156.

SPILLS AND EMERGENCIES

If Aluminum Oxide is spilled, take the following steps:

- * Restrict persons not wearing protective equipment from area of spill until cleanup is complete.
- * Collect powdered material in the most convenient and safe manner and deposit in sealed containers.
- * It may be necessary to contain and dispose of Aluminum Oxide as a HAZARDOUS WASTE. Contact your Department of Environmental Protection (DEP) or your regional office of the federal Environmental Protection Agency (EPA) for specific recommendations.

=====
FOR LARGE SPILLS AND FIRES immediately call your fire department.
=====

HANDLING AND STORAGE

- * Prior to working with Aluminum Oxide you should be trained on its proper handling and storage.
- * Store in tightly closed containers in a cool, well ventilated area.
- * Aluminum Oxide is not compatible with hot chlorinated rubber.

FIRST AID

POISON INFORMATION

Eye Contact

- * Immediately flush with large amounts of water for at least 15 minutes, occasionally lifting upper and lower lids. Seek medical attention.

Skin Contact

- * Remove contaminated clothing. Wash contaminated skin with water.

Breathing

- * Remove the person from exposure.
- * Begin rescue breathing if breathing has stopped and CPR if heart action has stopped.
- * Transfer promptly to a medical facility.

PHYSICAL DATA

Water Solubility: Insoluble

OTHER COMMONLY USED NAMES

Chemical Name:
Aluminum Oxide

Other Names and Formulations:
Alumina; Aloxite; Aluminite 37.

Not intended to be copied and sold for commercial purposes.

NEW JERSEY DEPARTMENT OF HEALTH
Right to Know Program
CN 368, Trenton, NJ 08625 0368

ECOLOGICAL INFORMATION

Aluminum oxide occurs naturally in the environment in the minerals bauxite, baerites, boehmite, corundum, diaspore and gibbsite. Aluminum oxide is a white solid. It is used as an absorbent, desiccant, abrasive, and filler for paints and varnishes; in the manufacture of alloys, ceramic materials, electrical gems; and as a catalyst for chemical reactions. Aluminum oxide occurs naturally in the aquatic environment and can be added to by discharges from industry or spills.

ACUTE (SHORT-TERM) ECOLOGICAL EFFECTS

Acute toxic effects may include the death of animals, birds, or fish, and death or low growth rate in plants. Acute effects are seen two to four days after animals or plants come in contact with a toxic chemical substance. Aluminum oxide has slight acute toxicity to aquatic life, but its toxicity will be increased under alkaline conditions. Insufficient data are available to evaluate or predict the short-term effects of aluminum oxide to plants, birds, or land animals.

CHRONIC (LONG-TERM) ECOLOGICAL EFFECTS

Chronic toxic effects may include shortened lifespan, reproductive problems, lower fertility, and changes in appearance or behavior. Chronic effects can be seen long after first exposure(s) to a toxic chemical.

Aluminum oxide has slight chronic toxicity to aquatic life, but its toxicity will be increased under alkaline conditions. Insufficient data are available to evaluate or predict the long-term effects of aluminum oxide to plants, birds, or land animals.

WATER SOLUBILITY

Aluminum oxide is slightly soluble in water. Concentrations of 1 milligram or less will mix with a liter of water.

DISTRIBUTION AND PERSISTENCE IN THE ENVIRONMENT

Aluminum oxide is highly persistent in water, with a half-life greater than 200 days. The half-life of a pollutant is the amount of time it takes for one-half of the chemical to be degraded.

BIOACCUMULATION IN AQUATIC ORGANISMS

Some substances increase in concentration, or bioaccumulate, in living organisms as they breathe contaminated air, drink contaminated water, or eat contaminated food. These chemicals can become concentrated in the tissues and internal organs of animals and humans.

Aluminum oxide will not accumulate in edible tissues of aquatic species that are consumed by humans.

SUPPORT DOCUMENT: AQUIRE Database, ERL-Duluth, U.S. EPA.

4/30/10

John Tinger
U.S. Environmental Protection Agency
Region 9, WTR-5
75 Hawthorne Street
San Francisco, CA 94105-3901
Phone: (415) 972-3518
E-mail: Tinger.John@epa.gov

In behalf of Californians for Renewable Energy, Inc. (CARE) Hopi-Tewa members we provide the following comments on the Peabody Western Coal Company's Authorization to Discharge under the National Pollutant Discharge Elimination System, NPDES Permit No. NN 0022179.

11-a

The US EPA NPDES should not be closed for public comments until after Office of Surface Mining and Reclamation and Enforcement (OSMRE) has completed its process for permitting the Kayenta Mine's operation but no sooner than June 2010. US EPA, OSMRE, and Army Corp permit activities need to be conducted concurrently. I have included as an attachment a January 21, 2010 letter to Joseph G. Pizarchik, Director of OSMRE in this regard.

OSMRE relies solely on Peabody's 3-D hydrologic "Model" to assert its claim, that the model provides "incontrovertible technical information" to support the conclusion that the hydrologic consequences of Peabody's past, present and projected usage of Navajo Aquifer are negligible. Peabody has never submitted surface water reclamation plan.

For this reason, OSMRE does not require Peabody to post a groundwater and surface water reclamation plan and bond.

11-a

The US EPA NPDES should include a restoration plan for surface and ground water uses by the mine and require Peabody to post bonds.

11-d

The NPDES needs to address the lack of Section 404 permits for the hundreds of impound ponds. These impoundments are part of the NPDES permit.

According to Hopi Water Quality Standards:

5-a

15. Require that surface and ground-water withdrawals do not cause degradation of unique surface or ground-water bodies.

11-b

17. Ensure that ground-water withdrawals do not occur in quantities that will cause degradation of springs or riparian habitat.

11-b

J. Ground-Water Recharge (GWR). Ground-water recharge use means any surface water that recharges ground water. Surface waters designated as ground-water recharge must meet the standards for the aquifer being recharged as well as the surface water standards.

11-b

Ground-water recharge: The use of a surface water as a source of recharge to ground water.

5-a
11-b

The impound ponds are contaminating the surrounding aquifers with contaminated ground-water recharge that fails to meet the standards for the aquifer being recharged and therefore violates the Hopi standards and US EPA must follow Hopi standards under federal law, i.e., the Clean Water Act.

6-a

The baseline data on which the permit relies is inadequate. It is common for such documents to rely on insufficient data. EPA specifies that a hydrogeologic study should be conducted to evaluate the flow of water to the seeps. This can be accomplished by conducting a dye trace study, but this has apparently not happened. Also, the receiving streams of the outfalls are listed, but there is no indication that sub-watersheds have been delineated or that stormwater calculations have been completed to evaluate the increase in stormwater discharge from outfalls which may flow into the same sub-watershed. This is important because the increased stormwater discharge can cause stream bank erosion, resulting in increased sedimentation downstream.

11-e

The Permit needs to address the water allotment rights of Moenkopi farmers whose water rights are being adversely impacted by the mine's impounds and water usage.



March 29, 2010

**VIA ELECTRONIC AND CERTIFIED MAIL,
RETURN RECEIPT REQUESTED**

Regional Freedom of Information Officer
U.S. EPA, Region 9
75 Hawthorne Street (OPPA-2)
San Francisco, CA 94105
r9foia@epa.gov

Re: **Freedom of Information Act Request**

Dear Regional Freedom of Information Officer:

The Center for Biological Diversity ("the Center") is a non-profit, public interest, conservation organization whose mission is to conserve imperiled native species and their threatened habitat and to fulfill the continuing educational goals of its membership and the general public in the process. Consistent with this mission, and pursuant to the Freedom of Information Act, 5 U.S.C. § 552, *et. seq.* ("FOIA"), I respectfully request the following categories of information on behalf of the Center:

1. Any and all maps showing the Black Mesa coal mine, Kayenta coal mine, and/or the Black Mesa Complex, and water quality monitoring sites, impoundments, ponds, seeps, and/or points of discharge
2. Any and all other records related to the construction and operation of earthen impoundments at the Black Mesa coal mine, Kayenta coal mine, and/or the Black Mesa Complex
3. Any and all compliance or monitoring records for Clean Water Act permits for the Black Mesa coal mine, Kayenta coal mine, and/or the Black Mesa Complex
4. Any and all records of communications between the Environmental Protection Agency ("EPA") and the Office of Surface Mining Reclamation and Enforcement ("OSM"), Peabody, and/or the U.S. Army Corps of Engineers regarding permits under the Clean Water Act for the Black Mesa coal mine, Kayenta coal mine, and/or the Black Mesa Complex, including but not limited to any compliance or monitoring records
5. Any and all records related to Clean Water Act permitting for the Black Mesa coal mine, Kayenta coal mine, and/or the Black Mesa Complex that purport to comply with the requirements of the National Environmental Policy Act
6. Any and all records related to Clean Water Act permitting for the Black Mesa coal mine, Kayenta coal mine, and/or the Black Mesa Complex that purport to comply with the requirements of the Endangered Species Act

This request is being sent to the Regional Freedom of Information Officer for EPA Region 9 with the understanding that it will be forwarded to any other offices that may contain the requested information. The Center is willing to receive responsive records in phases and electronic format, where possible.

REQUEST FOR FEE-WAIVER

The Center requests that you waive all fees in connection with this request. As demonstrated below, the Center meets the two-pronged test under FOIA for a fee-waiver, 5 U.S.C. § 552(a)(4)(A)(iii), as implemented by the EPA's fee-waiver regulations at 40 C.F.R. § 2.107, because "disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 40 C.F.R. § 2.107(k)(1).

In considering whether the Center meets the fee-waiver criteria, it is imperative that EPA remember that FOIA carries a presumption of disclosure, and that the FOIA fee-waiver amendments of 1986 were designed specifically to facilitate access to government records for non-profit, public interest groups such as the Center without the payment of fees. As stated by one Senator, "agencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information . . ." 132 Cong. Rec. S. 14298 (statement of Sen. Leahy). In interpreting this amendment, the Ninth Circuit has stated that the amended statute "is to be liberally construed in favor of waivers for noncommercial requesters." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (citing Sen. Leahy). The Ninth Circuit has likewise explicitly pointed out that the amendment's main purpose was "to remove the roadblocks and technicalities which have been used by various Federal agencies to deny waivers or reductions of fees under the FOIA." *Id.*

Thus, both Congress and the courts are clear in their interpretation that the main legislative purpose of the amendments is to facilitate access to agency records by "watchdog" organizations, such as environmental groups, which use FOIA to monitor and challenge government activities. As a District of Columbia Circuit Court has stated, this waiver provision was added to FOIA "in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests," in clear reference to requests from journalists, scholars, and, most importantly for our purposes, non-profit public interest groups. *Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 93-94 (D.C. Cir. 1986) (quoting *Ettlinger v. FBI*, 596 F. Supp. 867, 876 (D. Mass. 1984) (emphasis added)).

- I. **Disclosure of this information is in the public interest because it will significantly contribute to public understanding of the operations or activities of the EPA in connection with its renewal of a Clean Water Act permit for the Black Mesa and Kayenta coal mines.**

The requested information will significantly contribute to public understanding of the issues involved, as required by the EPA at 43 C.F.R. § 2.107(k)(1).

A. The subject of the request concerns the operations and activities of the EPA in connection with its renewal of a Clean Water Act permit for the Black Mesa and Kayenta coal mines.

The subject matter of this request relates to the effects to water quality and availability resulting from the Black Mesa and Kayenta coal mines (also known as the Black Mesa Complex), which are located on the Navajo Nation and Hopi Reservation. In particular, the requested records reflect the manner by and extent to which EPA is considering the environmental consequences of renewal of a National Pollutant Discharge Elimination System (“NPDES”) permit, pursuant to the Clean Water Act, 33 U.S.C. § 1251, *et seq.*, for the Black Mesa Complex. These records therefore are clear and identifiable activities of the government, *see* 43 C.F.R. § 4130.6-1—in this case, the executive branch agency EPA. *See Judicial Watch*, 326 F.3d at 1313 (“[R]easonable specificity’ is ‘all that FOIA requires’ with regard to this factor.”) (internal quotations omitted).

B. The disclosure is “likely to contribute” to an understanding of EPA operations or activities.

The requested information concerns the environmental impacts of the Black Mesa and Kayenta coal mines, particularly to water. Thus, the requested information will allow the Center to understand such impacts. As such development would result in impacts to surface- and ground-water, the requested records will also allow the Center to better educate the public about the costs and environmental consequences of the mines. The information requested will contribute to an understanding of whether EPA is fulfilling its obligations under existing laws and regulations with respect to its evaluation of the impacts of the mines to water resources. The public is always well served when it knows how government activities have been conducted. *See Judicial Watch*, 326 F.3d at 1314 (“the American people have as much interest in knowing that key [agency] decisions are free from the taint of conflict of interest as they have in discovering that they are not”). These records are not currently in the public domain. Their release is therefore not just “likely,” but is in fact *certain*, to contribute to better public understanding of EPA’s operations and activities.

In *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d at 1286, the Ninth Circuit made clear that “[FOIA] legislative history suggests that information [has more potential to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations....” In this instance, all the requested documents will provide new information about the impacts of coal mining—in particular, the Black Mesa and Kayenta coal mines—to water resources. *See Western Watersheds Project v. Brown*, 318 F. Supp. 2d 1036, 1040 (D. Idaho 2004) (“WWP asserted in its initial request that the information requested was either not readily available or never provided to the public, facts never contradicted by the BLM. Therefore, the Court finds that WWP adequately demonstrated that the information would contribute significantly to public understanding.”); *see also Community Legal Services v. HUD*, 405 F.Supp.2d 553 (D. Pa. 2005) (“Thus, as in *Forest Guardians*, the CLS request would likely shed light on information that is new to the interested public.”); *see also Institute for Wildlife Protection v. U.S. Fish and Wildlife Service*, 290 F.Supp.2d 1226, 1230 (D. Or. 2003) (finding

that the FOIA request was informative of government operations because “there is substantial public interest in agency activities relating to endangered species.”).

C. The disclosure is likely to contribute significantly to public understanding of the EPA's operations or activities.

The documents will allow the Center to understand the environmental consequences of the Black Mesa and Kayenta coal mines, and therefore allow the Center to better educate the public about the public policies implicated by, and the costs of, such development. Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of the FOIA. The Center intends to fulfill its well-established function of public oversight of agency action. The Center is not requesting these documents merely for their intrinsic informational value. It is irrelevant whether any portion of the Center's request may currently be in the public domain, because the Center requests considerably more than any piece of information that may currently be available to other individuals. *Judicial Watch*, 326 F.3d at 1315.

In addition, the Center plans to use the information it learns from the disclosed information to educate the public about the environmental consequences of coal development and whether and how EPA's analysis adequately takes all of the environmental consequences affecting natural resources into account. *See Western Watersheds Project*, 318 F.Supp.2d at 1040 (requester “adequately specified the public interest to be served, that is, educating the public about the ecological conditions of the land managed by the BLM and...how management strategies employed by the BLM may adversely affect the environment.”). The requested information will reveal in greater detail the public policy costs and benefits of coal development. There can be no dispute that disclosure of the requested documents will provide information that will significantly enhance the public's understanding of such development. Even if the documents fail to reveal that certain actions need to be taken, this does not mean the documents do not serve the public interest. *See Judicial Watch*, 326 F.3d at 1314.

II. Obtaining the information is of no commercial interest to the Center.

Access to government documents, disclosure forms, and similar materials through FOIA requests is essential to the Center's role of educating the general public. The Center, a non-profit organization, has no commercial interest and will realize no commercial benefit from the release of the requested information.

III. The Center has a recognized ability to disseminate this information broadly.

The Center is a non-profit organization that informs, educates, and counsels the public regarding environmental issues, policies, and laws relating to environmental issues. The Center has been substantially involved in the management activities of numerous government agencies for years, and has consistently displayed its ability to disseminate information granted to it through FOIA.

In consistently granting the Center's fee-waivers, agencies have recognized that (1) the Center's requested information contributes significantly to the public understanding of the operations or activities of the government, (2) the Center's requested information enhances the public's

understanding to a greater degree than currently exists, (3) the Center possesses the expertise to explain the requested information to the public, (4) the Center possesses the ability to disseminate the requested information to the public, and (5) the news media recognizes that the Center is an established expert in the field of imperiled species and biodiversity.

Public oversight and enhanced understanding of the environmental consequences of coal development is absolutely necessary. The Center members' track record of active participation in oversight of governmental agency activities and its consistent contribution to the public's understanding of agency activities as compared to the level of public understanding prior to disclosure are well established. In determining whether the disclosure of requested information will contribute significantly to public understanding, a guiding test is whether the requester will disseminate the disclosed records to a *reasonably broad audience of persons interested in the subject*. *Carney v U.S. Dept. of Justice*, 19 F.3d 807 (2d Cir. 1994) (emphasis added). The Center need not show how it intends to distribute the information, because "[n]othing in FOIA, the [agency] regulation, or our case law require[s] such pointless specificity." *Judicial Watch*, 326 F.3d at 1314. It is sufficient for the Center to show how it distributes information to the public generally. *Id.*

Again, the requested information will be used to inform the Center's and the public's understanding about the environmental consequences of the Black Mesa and Kayenta coal mines to surface- and ground-water. Concurrent with any action which the Center may take after obtaining the requested documents, the Center will publicize these consequences. This is certain to result in a significant increase in public understanding of government agency activity, and in particular of EPA operations and activities. The Center has publicized agency compliance with the provisions of various environmental laws, as well as the policy costs and benefits of pending activities, many times through information gained from FOIA requests like this one. The Center intends to use the documents requested in this request in a similar manner.

Moreover, the Center's informational publications supply information not only to our membership, but also to the memberships of most other conservation organizations, locally as well as nationally and internationally. Our informational publications continue to contribute information to public media outlets, as well. For example, information such as that presently requested is often disseminated through our e-mail Biodiversity alerts, which is sent to nearly 180,000 people approximately once a week, and our web page, which is accessed several hundred-thousand times each month. Information concerning the Black Mesa and Kayenta coal mines will likely be disseminated through all of these means. *See Forest Guardians v. Dep't of Interior*, 416 F.3d 1173, 1180 (10th Cir. 2005) ("Among other things, Forest Guardians publishes an online newsletter, which is e-mailed to more than 2,500 people and stated that it intends to establish an interactive grazing web site with the information obtained from the BLM. By demonstrating that the records are meaningfully informative to the general public and how it will disseminate such information, Forest Guardians has shown that the requested information is likely to contribute to the public's understanding of the BLM's operations and activities.").

I hope that this letter has demonstrated to your satisfaction that the Center qualifies for a full fee waiver. Please send all materials to my attention at the address on the letterhead. Please call me at 503-283-5474 if you have any further questions about this request. Thank you.

Center for Biological Diversity
FOIA Request

March 29, 2010
Page 5 of 6

Sincerely,

A handwritten signature in black ink, appearing to read 'A. Atwood', with a stylized flourish at the end.

Amy Atwood
Senior Attorney, Public Lands Energy Director
CENTER FOR BIOLOGICAL DIVERSITY
PO Box 11374
Portland, OR 97211-0374
503-283-5474 phone
atwood@biologicaldiversity.org



Amy Atwood
<atwood@biologicaldiversity.org>

03/29/2010 01:45 PM

To R9FOIA@EPA

cc 'Amy Atwood' <atwood@biologicaldiversity.org>

bcc

Subject FOIA Request

Please see attached. Please confirm receipt. Contact me with any questions. Thank you.

Amy Atwood
CENTER FOR BIOLOGICAL DIVERSITY
PO Box 11374, Portland OR 97211-0374
503-283-5474 o * 541-914-8372 c * 503-283-5528 f
atwood@biologicaldiversity.org



FOIA request NPDES maps EPA march 29 2010.pdf



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

Ms. Amy Atwood
Center for Biological Diversity
PO Box 11374
Portland, OR 97211-0374

May 7, 2010

Re: Freedom of Information Act Request # 09-FOI-00247-10

Dear Ms. Atwood:

This letter responds to your Freedom of Information Act (FOIA) request, dated March 29, 2010 which included six categories of documents pertaining to Clean Water Act permits for the Black Mesa coal mine, Kayenta coal mine, and/or the Black Mesa Complex. Enclosed you will find copies of most of the documents responsive to your request. In an effort to save paper, EPA did not print out any attachments to emails if the attachment was already included in documents being released.


We are unable to provide you with documents, or portions of documents, which have been determined to be exempt from mandatory disclosure by virtue of 5 U.S.C. 552(b) (5). An itemized list by categories of the withheld material along with the basis for withholding is provided on the enclosure to this letter.

You may appeal this partial denial to the National Freedom of Information Officer, U.S. EPA, FOIA and Privacy Branch, 1200 Pennsylvania Avenue, N.W. (2822T), Washington, DC 20460 (U.S. Postal Service Only), FAX: (202) 566-2147, E-mail: hq.foia@epa.gov. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania Avenue, NW. If you are submitting your appeal via hand delivery, courier service or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, N.W., Room 6416J, Washington, DC 20004. Your appeal must be made in writing, and it must be submitted no later than 30 calendar days from the date of this letter. The Agency will not consider appeals received after the 30 calendar day limit. The appeal may include as much or as little related information as you wish, as long as it clearly identifies the determination being appealed (including the assigned FOIA request number 09-FOI -00247-10). For quickest possible handling, the appeal letter and its envelope should be marked "Freedom of Information Act Appeal."

Please note that it has come to our attention that there may be additional documents which have not been located by EPA staff. We anticipate that if any additional responsive documents are located, they will be provided to you no later than May 14, 2010. The deadline for any appeal of today's partial denial will be extended if this response is amended to identify additional withheld documents.

Please contact John Tinger of my staff at (415) 972-3518, or Erica Maharg of our Office of Regional Counsel at (415) 972-3943, should you have any questions concerning this matter.

Sincerely,


Alexis Strauss
Director, Water Division

Enclosures

EPA May 7, 2010 Response to
Center for Biological Diversity's March 29, 2010 FOIA Request # 09-FOI-00247-10

List of Categories of Withheld Material

- EPA comments on the Office of Service Mining's ("OSM's") Preliminary Draft EIS – Such comments are primarily unresponsive, but the few comments, which may be responsive to the FOIA request, are being withheld pursuant FOIA exemptions 5 (deliberative process privilege), because they are comments on OSM's predecisional document.
- EPA and U.S. Army Corps of Engineers discussions concerning timing of 401 certifications and 404 permits – In many cases, the discussion concerns related -- but unresponsive -- matters, and thus the documents are outside the scope of the FOIA request. If the discussion is responsive to the FOIA request, EPA is withholding them pursuant to FOIA Exemption 5 (deliberative process privilege), because they are pre-decisional discussions between agency staff.
- Internal EPA discussions on legal analysis of "new source" – Such documents are being withheld pursuant to FOIA exemption 5 (deliberative process and attorney-client privileges), because they are pre-decisional documents and confidential communications between an EPA attorney and EPA staff seeking legal advice.
- Discussion between agency staff and attorney regarding effect of OSM's ESA analysis on EPA – This discussion is being withheld pursuant to Exemption 5 (attorney-client privilege) because it was a confidential communication between an EPA attorney and EPA staff seeking legal advice.
- Draft documents, and communications concerning these documents, created in preparation for publishing draft NPDES permit– These documents and communications are being withheld pursuant to FOIA Exemption 5 (deliberative process and attorney-client privileges) because they are pre-decisional documents and confidential communications between an EPA attorney and EPA staff seeking legal advice.
- Notes and Drafts briefs created by EPA attorney in order to respond to NPDES permit appeal – Information in these documents are largely non-responsive. To the extent the information is responsive to the FOIA request, EPA is withholding the information pursuant to FOIA Exemption 5 (attorney work-product privilege).



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

75 Hawthorne Street

San Francisco, CA 94105-3901

Ms. Amy Atwood
Center for Biological Diversity
PO Box 11374
Portland, OR 97211-0374

May 31, 2010

Re: Freedom of Information Act Request # 09-FOI-00247-10

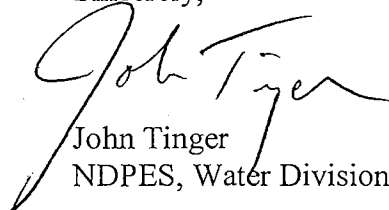
Dear Ms. Atwood:

This letter responds to your Freedom of Information Act (FOIA) request, dated March 29, 2010 which included six categories of documents pertaining to Clean Water Act permits for the Black Mesa coal mine, Kayenta coal mine, and/or the Black Mesa Complex. Enclosed you will find additional copies of documents responsive to your request.

As indicated in our May 7, 2010 letter, EPA noted that there may be additional documents which were not identified at that time. Please find enclosed additional materials from the 404 Permitting section.

Please contact me at (415) 972-3518 should you have any questions concerning this matter.

Sincerely,


John Tinger
NDPES, Water Division

Enclosures

RE: Additional Info request for NDPES permit renewal

Cochran, John N.

to:

John Tinger

06/25/2010 09:05 AM

Cc:

"Wendt, Gary W."

Show Details

John:

I've attached the MSDS for the chemical binder we use periodically on our haul roads for dust control. The majority of runoff from haul roads where this binder is applied is captured and treated in NPDES permitted sediment ponds. Stormwater runoff from limited areas associated with haul road crossings are covered by Best Management Practices under the 2008 Multi-Sector General Stormwater Permit.

We are working on the summary for documenting the sheep kill incident that occurred back in the late 1980's, and will get that to you either today or early next week.

Please don't hesitate to call or reply via email if you have questions or need additional information.

John Cochran

Manager Environmental Hydrology

Peabody Investments Corporation

3001 W. Shamrell Blvd., Suite 110

Flagstaff, AZ 86001

Office: 928.913.9218

Cell: 928.286.7116

From: Tinger.John@epamail.epa.gov [mailto:Tinger.John@epamail.epa.gov]

Sent: Thursday, June 24, 2010 12:01

To: Cochran, John N.

Cc: Wendt, Gary W.

Subject: Additional Info request for NDPES permit renewal

John,

We are in the process of finalizing our response to comments for the PWCC NPDES permit. There are two comments which I would like to request some additional information on in order to respond to commenters concerns:

1) do you have any information regarding dust control practices ? Specifically, commenters have expressed concern that PWCC is using magnesium chloride or other chemicals for dust control, and that these chemicals run off the mine site and flow to the washes. If any chemicals are being used, could you provide me with the MSDS?

2) do you have a short summary for documentation of the incident involving the contractor who improperly

washed out a tank which polluted a pond and killed some sheep? We received a number of comments generally alleging this issue, and would like to include the specifics in the Admin Record.

Thank you very much,

We hope to issue a final decision on the permit shortly,

John

John Tinger
U.S. EPA Region IX
NPDES Permits Branch
(415) 972-3518

E-mail Disclaimer: The information contained in this e-mail, and in any accompanying documents, may constitute confidential and/or legally privileged information. The information is intended only for use by the designated recipient. If you are not the intended recipient (or responsible for the delivery of the message to the intended recipient), you are hereby notified that any dissemination, distribution, copying, or other use of, or taking of any action in reliance on this e-mail is strictly prohibited. If you have received this email communication in error, please notify the sender immediately and delete the message from your system.

FW: Benally sheep kill

Cochran, John N.

to:

John Tinger

06/28/2010 07:46 AM

Cc:

"Wendt, Gary W.", "Dunfee, Brian P."

Show Details

John:

I'm forwarding notes from Brian Dunfee that summarize what took place during the June 1989 incident.

Please don't hesitate to call or reply via email if you have questions.

John Cochran
 Manager Environmental Hydrology
 Peabody Investments Corporation
 3001 W. Shamrell Blvd., Suite 110
 Flagstaff, AZ 86001
 Office: 928.913.9218
 Cell: 928.286.7116

From: Dunfee, Brian P.
Sent: Saturday, June 26, 2010 21:46
To: Cochran, John N.
Cc: Wendt, Gary W.
Subject: Benally sheep kill

As I stated, I do not think we have much in the file that will be useful to EPA. However, here is what I recall about the incident (and this can be shared with EPA).

1. We were notified of the incident on June 23, 1989.
2. Upon notification, we immediately notified USEPA, NNEPA, OSM, and the Chairman of the Navajo Nation of the incident.
3. The incident involved rinsing out a tanker truck tank containing Ammonium Nitrate-based blasting emulsion residue at the truck wash facility at the Black Mesa Mine.
4. Water from the truck wash area collects in a small drainage that flows to sediment control structure BM-A1.
5. A herd of sheep drank from the drainage to BM-A1 coincident with the cleaning of the truck tank.
6. Eighty-six sheep and goats were killed as a result of ingesting abnormally large concentrations of the emulsion product in the drainage.
7. In the morning after learning of the incident, PWCC environmental personnel sampled the water in the drainage and downstream sediment pond and documented the high salt concentrations. This data was provided to the NNEPA. Follow-up sampling the next day indicated the problem had attenuated.
8. The next day, NNEPA personnel arrived on site and sampled water in the drainage and pond, and sediment in the pond. PWCC was not provided the results of this sampling, so PWCC assumed the samples showed normal

results similar to those of PWCC's follow-up samples.

9. PWCC immediately changed the policy of cleaning out the emulsion trucks to ensure the incident would not be repeated. The trucks were washed out at the blast sites in the active mining areas from that point forward. The incident has never been repeated, so the corrective action was effective.

10. PWCC entered into an agreement with the family after the incident to compensate them for the loss of the livestock and install an isolated water source for livestock among other commitments.

Brian P. Dunfee
Peabody Energy
307.680.9724 (Blackberry)

E-mail Disclaimer: The information contained in this e-mail, and in any accompanying documents, may constitute confidential and/or legally privileged information. The information is intended only for use by the designated recipient. If you are not the intended recipient (or responsible for the delivery of the message to the intended recipient), you are hereby notified that any dissemination, distribution, copying, or other use of, or taking of any action in reliance on this e-mail is strictly prohibited. If you have received this email communication in error, please notify the sender immediately and delete the message from your system.

MATERIAL SAFETY DATA SHEET

Product: **MAGNESIUM CHLORIDE BRINE**
HAZMIN: 2728

Company Data

Company: REILLY INDUSTRIES, INC.
151 NORTH DELAWARE STREET
SUITE 1500
INDIANAPOLIS, IN 46204

Emergency Phone: 317-247-8141
Information Phone: 317-247-8141

Manufacturer/Supplier: REILLY WENDOVER, A DIVISION OF REILLY
INDUSTRIES, INC.
151 NORTH DELAWARE STREET
SUITE 1500
INDIANAPOLIS, IN 46204

Emergency: 317-247-8141
Information: 317-247-8141

Product Data

Formula: $MgCl_2 \cdot 6H_2O$
Revised: 9/18/1998
Prepared: 9/18/1998

Component Data

Component: MAGNESIUM CHLORIDE HEXAHYDRATE
Cas No: 7791186
Percent: Between 28 And 34
Limit Note: PEL & TLV: Not established

Component: WATER
Component Note: (Remainder of solution)

Physical and Chemical Data

Boiling Point: = 244.6°F
Specific Gravity: = 1.30 (H₂O=1) NOTE: @ 68°F

Vapor Density: (Air=1) NOTE: Not available
Evaporation Rate: NOTE: Not available
Melt/Freeze Point: = -13°F NOTE: MELTING POINT: Not available
pH: = 7
Vapor Pressure: (mm Hg) NOTE: Not available
Molecular Weight: = 203.31
Oct/H2O Par. CoEf.: NOTE: Not available
Odor Threshold: (ppm) NOTE: Not available
Solubility in Water: Miscible
Appearance/Odor: Clear, odorless liquid
Physical State: Liquid
Hazard Rating A: MFG. Rating: Health = 1 Flammability = 0 Reactivity = 0

Fire and DOT Data

Flash Point Closed: NOTE: Not avail. (aqueous)
Flash Point Open: NOTE: Not avail. (aqueous)
Auto Ignition: NOTE: Not available
LEL/LFL: % NOTE: Not available
UEL/UFL: % NOTE: Not available
Preparer Information: Paul M. Rivers, Ph.D., Director of Corporate
Environmental Affairs, 317-247-8141

Proper Shipping Name: Chemicals, n.o.i., (Magnesium Chloride Brine)

SECTION I PRODUCT INFORMATION

PRODUCT NAME: Magnesium Chloride Brine
CHEMICAL NAME: Magnesium Chloride Solution
PRODUCT NUMBER: Not applicable
SYNONYMS: Magnesium Chloride Hexahydrate Brine
CAS NUMBER: See Section II
MOLECULAR WEIGHT: 203.31
CHEMICAL FORMULOA $MgCl_2 \cdot 6H_2O$
DOT NUMBER: Non-Hazardous
PRODUCT USE: Dust control.
IMD: Non-Hazardous
HEALTH: 1
FLAMMABILITY: 0
REACTIVITY: 0
HAZARD CODE: (0 = NONE; 1 = SLIGHT; 2 = MODERATE; 3 = SEVERE; 4 = EXTREME)
EMERGENCY TELEPHONE NUMBER: 317-247-8141

SUPPLIER INFORMATION: Reilly Industries, Inc

MANUFACTURER'S NAME AND ADDRESS:

REILLY WENDOVER
A DIVISION OF REILLY INDUSTRIES, INC.
300 NORTH MERIDIAN STREET
SUITE 1500
INDIANAPOLIS, INDIANA 46204

SECTION II HAZARDOUS INGREDIENTS

SEE COMPONENT PAGE(S) FOR ADDITIONAL INFORMATION.

HAZARDOUS INGREDIENTS LD 50 (ORAL)/LC 50
Magnesium Chloride Hexahydrate 8100 mg/kg (rat); Not available
(Remainder of solution is water.)

SECTION III PHYSICAL DATA

SEE DATA PAGES FOR ADDITIONAL INFORMATION.

SECTION IV REACTIVITY DATA

PHYSICAL (REACTIVITY) HAZARD WARNING: Not applicable

STABLE: Yes

IF NO, UNDER WHICH CONDITIONS:

INCOMPATIBILITIES: Mildly corrosive to metals (<0.050 inches/year in carbon steel). Keep away from strong acids.

REACTIVE: No

IF YES, UNDER WHAT CONDITIONS:

HAZARDOUS DECOMPOSITION PRODUCTS: If evaporated to dryness, and to a minimum of 500 C, NCl Vapors could be liberated.

SECTION V FIRE AND EXPLOSION HAZARDS

PHYSICAL HAZARD WARNING: Not applicable

SENSITIVITY TO:

STATIC DISCHARGE: No
MECHANICAL IMPACT: No

FLAMMABLE: No

IF YES, UNDER WHICH CONDITIONS:

FLASHPOINT (METHOD): Not avail. (aqueous)

FLAMMABLE LIMITS (% BY VOL.):

UEL: Not available

LEL: Not available

AUTO IGNITION TEMPERATURE: Not available

HAZARDOUS COMBUSTION PRODUCTS: Not available

MEANS OF EXTINCTION: Water spray, carbon dioxide, dry chemical. As this material is virtually non-flammable, use proper equipment to fight surrounding fire.

UNUSUAL FIRE/EXPLOSION HAZARDS: None

SPECIAL FIRE FIGHTING PROCEDURES: Firefighters should wear full protective equipment and use normal firefighting procedures.

SECTION VI TOXICOLOGICAL PROPERTIES

HEALTH HAZARD WARNING: Irritant.

ROUTES OF ENTRY:

SKIN CONTACT: X
SKIN ABSORPTION: X
EYE CONTACT: X
INHALATION: X
INGESTION:

EFFECTS OF ACUTE EXPOSURE: This material may be irritating to the skin and eyes on contact. If inhaled it may also be irritating to the respiratory tract.

IRRITANCY OF PRODUCT: Skin/eye irritant.

SENSITIZATION TO PRODUCT: Not applicable

EFFECTS OF CHRONIC EXPOSURE: Not applicable

CARCINOGEN:
REPRODUCTIVE EFFECTS:
TERATOGENICITY:
MUTAGENICITY:

BRIEF DISCRIPTION: Not applicable

SYNERGISTIC MATERIALS: None known

MEDICAL CONDITIONS AGGRAVATED: None known

SECTION VII FIRST AID MEASURES

SKIN: Wash exposed area twice with soap and water. The exposed area should be examined by medical personnel if irritation or pain persists after the area has been washed.

EYE: Rinse eyes immediately with large amounts of water for at least 15 minutes, occasionally lifting the eyelids. GET MEDICAL ATTENTION.

INHALATION (BREATHING): Remove from exposure area to fresh air immediately. If breathing has stopped, give artificial respiration. Keep affected person warm and at rest. GET MEDICAL ATTENTION.

INGESTION (SWALLOWING): If conscious induce vomiting to prevent further absorption. Give oxygen if respiration is shallow. GET MEDICAL ATTENTION. Do not give anything by mouth to an unconscious person.

DECONTAMINATION PROCEDURES: Use emergency shower if available. Remove all contaminated clothing to prevent further irritation. Wash all clothing and exposed areas of the body twice with soap and water.

SECTION VII PREVENTIVE MEASURES

PERSONAL PROTECTIVE EQUIPMENT:

GLOVES (SPECIFY): Impervious gloves
FOOTWEAR (SPECIFY): Boots
EYE (SPECIFY): Safety glasses or chemical goggles
CLOTHING (SPECIFY): Not applicable

RESPIRATORY (SPECIFY): Where magnesium chloride brine mist may create an exposure hazard, use appropriate NIOSH/MSHA-approved dust / mist respirator.

OTHER (SPECIFY): Use additional appropriate protective equipment as conditions necessitate.

PERSONAL HYGIENE PRACTICES: Contact lenses should not be worn when handling this material. Do not smoke or eat in areas where this material is handled. Wash hands thoroughly before eating or smoking.

ENGINEERING CONTROLS: All operations should be conducted in well-ventilated conditions. Local exhaust ventilation should be provided.

LEAK AND SPILL PROCEDURE: For small spills use suitable absorbent material and collect for later disposal. For large spills the area may require diking to contain the spill. Material can be collected (eg. suction) for later disposal. Wear protective equipment as needed during clean-up. After collection of material flush area with water.

WASTE DISPOSAL METHOD: Dispose of the material in accordance with standard practice for disposal of potentially hazardous materials as required by applicable federal, state, or local laws. Wear protective equipment as necessary.

HANDLING PROCEDURES AND EQUIPMENT: Protect containers against physical damage. Wear protective equipment as necessary when performing maintenance on contaminated equipment.

STORAGE REQUIREMENTS: Store in dry, well ventilated area. Keep away from strong acids to prevent release of HCl.

SPECIAL SHIPPING INFORMATION: Chemicals, n.o.i., (Magnesium Chloride Brine), Non-Hazardous.

SECTION IX ADDITIONAL COMMENTS

HAZARDOUS MATERIALS GUIDE NUMBER: Not applicable

No OSHA or ACGIH exposure limits have been established for this compound.

"FOR CHEMICAL EMERGENCY" Spill, Leak, Fire, Exposure, or Accident Call CHEMTREC - Day or Night

