



# Energy Minerals Law Center

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## Facsimile Transmittal

**To:** U.S. Environmental Appeals Board **Fax:** (202) 233-0121

**From:** Brad A. Bartlett, Esq. **Date:** 11/2/2010

**Re:** *In Re NPDES Permit Renewal: NPDES Permit Renewal No. 10-15 Reply In Support of Extension to File Supplemental Brief* **Pages:** 6 (including this cover sheet)

**CC:**

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Please find a <sup>Reply Motion</sup> Supplemental Brief. Please confirm via fax or email that you are in receipt of this fax. 970 382-0316 or [brad.bartlett@frontier.net](mailto:brad.bartlett@frontier.net)

ENVIR. APPEALS BOARD

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

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ENVIR. APPEALS BOARD

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In Re NPDES Permit Renewal: )  
Peabody Black Mesa NPDES Permit No. ) NPDES Appeal No. 10-15  
NN0022179: Black Mesa Mine Complex )  
)

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**PETITIONERS' REPLY IN SUPPORT OF MOTION FOR EXTENSION OF  
TIME TO FILE SUPPLEMENTAL BRIEF**

Petitioners Black Mesa Water Coalition, Diné C.A.R.E., To Nizhoni Ani, Center for Biological Diversity and Sierra Club (hereinafter "Petitioners") by and through the undersigned counsel hereby submit this reply in support of Petitioners' motion for extension of time to file a supplemental brief in support of Petitioner's petition for review of the U.S. Environmental Protection Agency's ("EPA's") NPDES Permit Renewal for the Black Mesa Project: Peabody Black Mesa NPDES Permit No. NN0022179 ("NPDES") which was timely filed on October 18, 2010.

Petitioners originally sought until November 18, 2010 to file their supplemental brief and in an effort to give EPA additional time to file the administrative record in this matter. Further, there is no dispute that Petitioners, in good faith, exercised due diligence and contacted both EPA staff and regional counsel to determine when EPA anticipated filing of the administrative record and to confer over Petitioners' request for extension.

Petitioners' extension request was based on EPA's representation to Petitioners that the agency would be able to submit a "certified" administrative record within a "week or two" of Petitioners filing of its *Petition for Review*. See e.g., EPA's Exhibit 13.

Instead of filing the administrative record within two weeks of Petitioners' initiation of the present appeal. EPA has now filed a response in opposition to Petitioners' motion for extension.

For the reasons set forward below, EPA's opposition to Petitioners' 30-day extension should be rejected.

**I. EPA's Opposition Is Now Moot**

Based on EPA's newly stated opposition, Petitioners timely filed a supplemental brief was filed with the Environmental Appeals Board on November 1, 2010. Therefore, Petitioners request for a 30-day extension (until November 18, 2010) and EPA's belated opposition is now moot.<sup>1</sup>

While Petitioners continue to believe that the Environmental Appeals Board ("EAB") and all parties involved in this matter would have greatly benefited from submission of an administrative record prior to briefing on this matter, EPA's about face has left Petitioners no other choice than to file its supplemental brief without the benefit of the full record before the agency.

**II. EPA Provides No Evidence That Petitioners Have Received the Administrative Record On Appeal**

EPA's argument that Petitioners are somehow in possession of the agency's administrative record on appeal is wrong and should be rejected. EPA has provided no evidence that Petitioners have received or are in possession of the agency's full administrative record on appeal. Petitioners affirmatively state that they have never received the agency's administrative record in support of the agency's *final* NPDES

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<sup>1</sup> Petitioners have already notified EPA counsel that Petitioners would not oppose providing EPA additional time (beyond December 6, 2010) to file a response brief.

permit challenged by the present appeal.

In this case, EPA's asserts that, as a factual matter, Petitioners are in possession of the full administrative record before the agency based, in part, on EPA's response to a Freedom of Information Act ("FOIA") request. *See e.g.* EPA's Exhibit 8 and 9. However, EPA's filing contains no list of documents provided by the agency to Petitioners (or the public) that would constitute the administrative record in this matter. *See e.g.* EPA's FOIA Response (Exhibit 9)(which does not provide a list of records released or withheld by the agency). Further, EPA's FOIA response indicates the agency's failure to release responsive records. *See* EPA's FOIA Response (Exhibit 9)("it has come to our attention that there may be additional documents which have been located by EPA staff.")(emphasis supplied).

Similarly, electronic communications from January 2010 indicate that EPA provided Petitioners, and at Petitioners' request, the agency's record on EPA's *draft* NPDES permit. *See* Exhibit 6 and 7. There is no dispute that no record was provided to Petitioners in support of EPA's *final* NPDES permit.

For the reasons set forward above, EPA's argument that Petitioners are in possession of the agency's full administrative record on appeal should be rejected as unsupported. EPA has provided no evidence that the agency has released records to Petitioners that would constitute the full administrative record on appeal. That said, Petitioners reserve the right to file a reply brief or supplement their opening brief and/or claims once the agency has certified the record in this matter.

### III. **Petitioners' Supplemental Brief Does Not Provide "Additional Issues" for Review**

EPA suggests that Petitioners' supplemental brief should be rejected because it included "additional issues" for review. This is wrong. Petitioners' supplemental brief mirrors (almost verbatim) the comments which were submitted to the agency on the *draft* NPDES permit and which were provided to the EAB as an attached to the *Petition for Review*. See *Petition for Review* Exhibit 1; compare *Petitioners' Supplemental Brief*.

For this reason, EPA would not be prejudiced by the any alleged late filing of *Petitioners' Supplemental Brief* and EPA does not argue that it would be harmed or prejudiced by any alleged 'late filing.'

That said, and in the unlikely event that the EAB adopts EPA's argument in opposition to extension, Petitioners stand on the arguments properly and timely raised and presented before the EAB in the *Petition for Review* and as referenced and articulated in Exhibit 1.

### V. **Conclusion**

For the reasons set forward above, Petitioners request for an extension is now moot. In the unlikely event that the EAB adopts EPA's argument in opposition to extension, Petitioners stand on the arguments properly and timely raised and presented before the EAB in the *Petition for Review* and as referenced and articulated in Exhibit 1.

RESPECTFULLY SUBMITTED on Monday, November 2, 2010.

  
~~s/Brad A. Bartlett~~

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### CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 2, 2010 he caused a copy of the foregoing to be served by fax or email and first-class mail on:

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Environmental Appeals Board 1103B  
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~~s/Brad A. Bartlett~~