

JOHN R. CLINE, PLLC
ATTORNEY AT LAW

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ENVIR. APPEALS BOARD

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Fax: 202-233-0121

From: John Cline

Direct: 804 - 746 - 4501

Date: July 12, 2011

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U.S. E.P.A.**JOHN R. CLINE, PLLC**
ATTORNEY AT LAW

JUL 12 PM 1

P. O. Box 15476
Richmond, Virginia 23227

ENVIR. APPEALS BOARD

John R. Cline
Virginia Bar #41346

john@johncline.com

Office: 804-746-4501
Cell: 804-347-4017

July 12, 2011

Via FacsimileEurika Durr, Clerk of the Board
Environmental Appeals Board
U. S. Environmental Protection Agency
Colorado Building
1341 G Street, N.W., Suite 600
Washington, D.C. 20005

Re: *In re Peabody Western Coal Company*, Appeal No. CAA 11-01;
Petitioner's Notices of Intent to File a Motion for Leave to File a Reply and
of Intent to File a Motion for an Order Requesting EPA's Office of Air and
Radiation and Office of General Counsel to File Jointly a Brief Addressing the
Legal Issue Raised by the Petition

Dear Ms. Durr:

On July 5, 2011 the Navajo Nation Environmental Protection Agency ("NNEPA") filed its Response to Peabody Western Coal Company's ("Peabody's") Petition for Review in the above-referenced matter involving a permit appeal under 40 C.F.R. Part 71. I write to advise the Board that Peabody intends to file, on or before July 21, 2011, a motion for leave to reply to NNEPA's Response, along with the Company's proposed reply. In addition, Peabody also intends to file at that same time a motion for an order by the Board requesting EPA's Office of Air and Radiation and Office of General Counsel to file jointly a brief addressing the key legal issue raised in the above-referenced matter.

Neither the regulations governing Part 71 permit appeals nor the Board's Practice Manual specifically provide for motions practice in the context of a permit appeal. See 40 C.F.R. § 71.11(l); The Environmental Appeals Board Practice Manual ("EAB Practice Manual") at V.C.1. The Board has recently held, however, that it has "broad discretionary authority to manage the permit appeal proceedings that arise from Part 71," which includes granting and denying motions. *In re BP America Production Co.*, Appeal No. CAA 10-04 (EAB Mar. 11, 2011) at 1 (Order Granting Outstanding Motions) (internal citation omitted). In a similar permit appeal proceeding under Part 124, the Board regularly considers motions from parties even though those regulations also do not specifically provide for motions practice. EAB Practice Manual at IV.D.3. In such a proceeding, the Board suggests that any motion for leave to file a reply brief

Eurika Durr, Clerk of the Board

July 12, 2010

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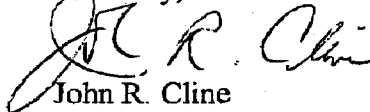
should be filed "as soon as possible upon receipt of the permitting authority's response." *Id.* at IV.D.7.

Peabody therefore concludes, by analogy, that any motion for leave to file a reply brief in the context of this Part 71 permit appeal should likewise be filed as soon as possible upon receipt of NNEPA's Response. Similarly, because the nature of the permitting authority's response in this proceeding strongly indicates that direct input from EPA to the Board is both necessary and appropriate, Peabody concludes that any motion seeking the Board to request EPA's brief on the narrow question of law presented by Peabody's Petition should also be filed as soon as possible upon receipt of NNEPA's response. Thus, Peabody shall file both of the subject motions no later than July 21, 2011, unless the Board decides to establish a different deadline.

The sole legal issue raised by the Company's Petition is one of first impression that almost certainly will establish broad precedent for how future Clean Air Act permits are issued by tribal agencies acting under a delegation of administrative authority to administer a federal permit program. Peabody therefore respectfully requests the Board's consideration of both of the Company's pending motions before deciding whether to grant the Petition.

Please do not hesitate to contact me at (804) 746-4501 if you have any questions.

Sincerely,



John R. Cline