

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

2012 DEC -3 PM 12:39  
ENVI. APPEALS BOARD

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

**PEABODY’S MOTION FOR LEAVE TO FILE A RESPONSE TO JOINT  
MOTION OF EPA AND NNEPA FOR SUMMARY DISPOSITION OF  
PEABODY’S PETITION FOR REVIEW AND PEABODY’S MOTION  
FOR AN ORDER SETTING THE DEADLINE FOR THAT RESPONSE**

Petitioner, Peabody Western Coal Company (“Peabody” or “Company”), filed its petition for review in this proceeding on October 1, 2012. Dkt No. 1. By letter dated October 12, 2012, the Clerk of the Board requested the Navajo Nation Environmental Protection Agency (“NNEPA”) and the U.S. Environmental Protection Agency (“EPA”) to “prepare a response that addresses the petitioner’s contentions and whether petitioner has satisfied the requirements for obtaining review under 40 C.F.R. § 71.11[.]” Dkt No. 3. However, in response to a subsequent joint motion of EPA and NNEPA, Dkt. No. 4, the Board issued an order on November 16, 2012 which granted EPA’s and NNEPA’s request to file by no later than November 27, 2012 a motion for summary disposition of Peabody’s petition. Dkt No. 5. Subsequently, in an electronic mail of November 21, 2012 counsel for NNEPA advised counsel for Peabody that “[o]n Tuesday,

Nov. 27, NNEPA plans to file with the EAB a motion for summary disposition of Peabody's petition for review" and that "EPA supports the motion[.]"

For the reasons explained herein, Peabody respectfully moves this Board for leave to file a response to the NNEPA (or NNEPA-EPA) motion for summary disposition of Peabody's petition for review. Furthermore, should the Board grant Peabody's motion, the Company respectfully requests the Board to order that Peabody's response be filed no later than December 14, 2012, for the reasons explained herein.

The part 71 regulations governing appeal of permits, 40 C.F.R. § 71.11(l), do not provide for motions practice. The Board's Practice Manual also does not address motions practice during part 71 permit appeals. The Environmental Appeals Board Practice Manual ("EAB Practice Manual") at V.C.1. Despite a similar lack of detailed procedures regarding motions in the context of permit appeals under part 124, the Board "has exercised broad discretion to manage its permit appeal docket by ruling on motions presented to it for various purposes[.]" *In re Peabody Western Coal Co.*, 14 E.A.D. \_\_\_\_, CAA Appeal No. 10-01, slip op. at 7 (EAB Aug. 13, 2010). The Board also has concluded that "the broad case management discretion found in part 124 cases naturally extends to part 71 cases, which unfold in accordance with procedures very closely parallel to those of part 124." *Id.* at 8.

In the context of part 124 proceedings, the EAB Practice Manual only addresses minimal criteria to be met by motions and associated responses. Based on the Board's past practice for allowing responses to motions in part 124 proceedings, it is reasonable to conclude that the Board may allow responses to motions filed in a part 71 proceeding such as this.

In support of its motion herein for leave to respond to the NNEPA (or NNEPA-EPA) motion for summary disposition, Peabody states the following:

1. Regardless of whether the subject motion for summary disposition is filed either solely by NNEPA or jointly by NNEPA and EPA, Peabody strongly objects to the Board's granting of that motion.

2. On Wednesday, November 28, 2012, one day after that motion for summary disposition is scheduled to be filed with the EAB, the undersigned counsel for Peabody will be out of his office for the purpose of settlement discussions in an unrelated matter through Friday, November 30, 2012, and will return to his office on Monday, December 3, 2012. Consequently, the date on which the undersigned counsel may actually receive the subject motion for summary disposition is uncertain due to counsel's business travel. Because of that schedule conflict, Peabody has found it necessary to seek on this date, November 27, 2012, the Board's leave to respond to the subject motion for summary disposition without knowing the specific claims and arguments of that motion.

3. Peabody firmly believes that the issue underlying its petition for review is a matter of national significance regarding the fundamental lawfulness of EPA's past and current delegations of its statutory authority to administer a Title V permit program under the Clean Air Act. For that reason, Peabody also strongly believes that the Board must be fully informed of the substantive matters raised by the Company's petition in order to understand both the gravity of the underlying issue and the compelling need for the Board to initiate corrective action by the Agency. Therefore, even without knowing on this date the specific claims and arguments of the subject motion for summary disposition, Peabody has no doubt that it must defend against any challenge to the continuation of Peabody's petition before the Board.

WHEREFORE, in light of the above considerations, Peabody respectfully asks the Board to allow Peabody to respond to the NNEPA (or NNEPA-EPA) motion for summary disposition.

In the context of part 124 proceedings, the EAB Practice Manual acknowledges that the Board has ruled on motions presented to it for various purposes. EAB Practice Manual at IV.D.3. In that same context, the EAB Practice Manual also notes that, “[a]lthough the EAB may set a shorter or longer time for a response, a party should file its response to any written motion within 10 days after service of the motion.” *Id.* Given the parallels between the Board’s motions practice under parts 71 and 124, it is reasonable to conclude that the Board’s flexible period of time for responding to motions under part 124 may also apply to the Board’s allowable period of time for responding to motions under part 71.

Assuming that the EAB grants Peabody’s motion for leave to respond to the NNEPA (or NNEPA-EPA) motion for summary disposition, Peabody states the following in support of its related motion herein for a Board order setting December 14, 2012 as the deadline for that Peabody response:

1. The date on which Peabody’s undersigned counsel will actually receive the motion for summary disposition is uncertain due to that counsel’s business travel, as explained above.
2. Although the Board typically specifies that a response to a written motion must be filed within 10 days after service of the motion, the Board may set a longer time for a particular response.
3. Motions for summary disposition of a petition of review and any responses to such motions are not commonplace in Board proceedings under the Clean Air Act. Peabody is unaware of any such motion and related response having been filed in any past part 71 proceeding before the Board.

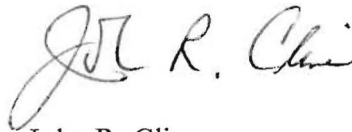
4. The NNEPA (or NNEPA-EPA) motion for summary disposition will not address the substantive matters raised in Peabody's petition for review, but will instead, according to the referenced email from NNEPA's counsel, raise procedural matters such as standing and jurisdiction for the first time in this proceeding. When a petition for review in a part 71 proceeding naturally raises substantive matters for the first time in that proceeding, the respondent is typically allowed 45 days to respond to those matters. A similar timeframe for Peabody's response to new procedural matters raised for the first time in this proceeding would not be unreasonable.

WHEREFORE, in light of the above considerations, should the Board grant Peabody's motion for leave to respond to the subject motion for summary disposition, Peabody respectfully asks the Board to order that Peabody's response shall be filed no earlier than December 14, 2012. Moreover, given the relative rarity of motions for summary disposition in the Board's CAA proceedings, and given that the subject motion for summary disposition will be raising procedural matters for the first time in this proceeding, Peabody respectfully requests the Board to acknowledge in the requested order that Peabody may, for good cause shown, request an extension of time to file its response to the subject motion for summary disposition.

On November 21, 2012, counsel for Peabody inquired of counsel for NNEPA via electronic mail (1) whether NNEPA concurs or objects to the Board granting Peabody's request to respond to NNEPA's motion for summary disposition, and (2) whether NNEPA concurs or objects to the Board setting a deadline of no earlier than December 14, 2012 for Peabody to file the subject response. Via the same electronic mail from counsel for Peabody, the same inquiry was made to counsel for EPA.

Counsel for NNEPA has subsequently notified counsel for Peabody that NNEPA does not object to Peabody's request to file a response to NNEPA's motion for summary disposition, and that NNEPA does not object to Peabody's request for an extension of time. As of 10:00 a.m. on this date, November 27, 2012, counsel for EPA had yet to reply to the inquiry from Peabody's counsel.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J.R. Cline". The signature is written in a cursive style with a large initial "J" and "R".

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*Counsel for Peabody Western Coal Company*

**CERTIFICATE OF SERVICE**

I certify that copies of PEABODY'S MOTION FOR LEAVE TO FILE A RESPONSE TO JOINT MOTION OF EPA AND NNEPA FOR SUMMARY DISPOSITION OF PEABODY'S PETITION FOR REVIEW AND PEABODY'S MOTION FOR AN ORDER SETTING THE DEADLINE FOR THAT RESPONSE were mailed via first-class U.S. mail, postage prepaid, on this 27<sup>th</sup> day of November 2012 to the following:

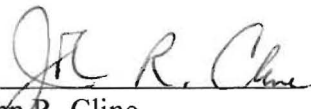
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John R. Cline  
*Counsel for Peabody Western Coal Company*

Date: November 27, 2012