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

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

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

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I. INTRODUCTION

Pursuant to 40 C.F.R. §124.19, Petitioners Black Mesa Water Coalition, Diné C.A.R.E., To Nizhoni Ani, Center for Biological Diversity and Sierra Club (hereinafter “Petitioners”) by and through the undersigned counsel hereby submits this petition for review of the U.S. Environmental Protection Agency’s (“EPA’s”) NPDES Permit Renewal for the Black Mesa Project: Peabody Black Mesa NPDES Permit No. NN0022179 (“NPDES”).¹ EPA’s NPDES permit authorizes continued discharge from over 111 outfalls from both permanent and temporary waste “ponds” at Peabody Western Coal Company’s (“Peabody’s”) Black Mesa and Kayenta Mines, many of which are exceeding Water Quality Standards (“WQS”).

The permit only covers a limited number of outfalls and does not address or analyze possible discharges from all of the over 230 permanent and temporary impoundments at the Black Mesa and Kayenta mines. EPA’s NPDES Permit authorizes Peabody to monitor only “20%” (*i.e.* 22) of the 111 outfalls covered by the permit and as identified and determined by Peabody. EPA *Fact Sheet* at 19-20. Of the sites selectively monitored by Peabody, discharges from 21 impoundments are currently in violation of Water Quality Standards (“WQS”). *See* Proposed NPDES permit at 9-11. Additionally, and despite the fact that EPA’s permit adds “several new outfall locations”² and is being issued concurrent with the Federal Office of Surface

¹ Available on the U.S. EPA’s website. *See* <http://www.epa.gov/region9/water/npdes/permits.html>. (providing the permit, fact sheet and comment response).

² To date, EPA has refused to identify which outfalls have been added to or eliminated from the NPDES issued to Peabody. Instead, the agency has placed the burden on the reviewing public to figure out which outfalls have been added or eliminated. As stated by the agency, “[w]hile EPA did not present a detailed description...of each of the more than 100 outfalls, a comparison of the

Mining Reclamation and Enforcement's ("OSM's") decision to renew Peabody's operating permit for the Kayenta Mine (a connected action), EPA did not analyze the impacts of permit issuance in an Environmental Impact Statement ("EIS") or Environmental Assessment ("EA").

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

As set forward herein, Petitioners contend that EPA committed numerous significant and procedural errors in connection with issuing the NPDES to Peabody. Based on the errors listed below, Petitioners request that the Environmental Appeals Board ("EAB" or "Board") grant the petition for review and remand the NPDES to EPA with instructions for EPA to correct all substantive and procedural shortcomings and provide for appropriate supplemental public notice and comment after the required analyses have been completed and the permit has been corrected.

For the reasons discussed more fully below, including EPA's representation that the agency's administrative record will be available in "1 to 2 weeks," Petitioners request a 30-day extension of time until November 18, 2010, to file a supplemental brief with a complete and detailed description of each objection to the NPDES permit and the factual and legal justifications for such objections.³ Beginning on October 11, 2010, Petitioners attempted to

two permits [*i.e.* the previous permit and the newly proposed permit] provides a list of the outfall [sic] eliminated or added." *EPA Response to Comment* at 23.

³ Petitioners request this extension of time to submit "specific information" (in this case, EPA's administrative record) to "demonstrate why the permitting authority's response to [Petitioners'] objections warrants review," in order to fully comply with the Board's filing requirements as outlined in the EAB Practice Manual. EAB Practice Manual at 33.

confer on multiple occasions with EPA Region 9, Regional Counsel Julia Jackson and Samuel Brown via multiple voice and electronic mails. EPA did not provide a timely response to and position on Petitioners' request for a 30-day extension of time to file a supplemental brief.

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

Each Petitioner satisfies the threshold requirements for filing a petition for review under 40 C.F.R. Part 124. In particular, organizational Petitioners have standing to petition for review of the permit decision because each organization participated in the public comment period. *See* 40 C.F.R. §124.19(a). Petitioners filed written comments during the public comment period. *See*, Comment Letter (Exh. 1). Members of petitioners' organizations also participated in public hearing on the NPDES. The issues raised by Petitioners herein were raised with EPA both orally and in writing during the public comment period. Consequently, the Board has jurisdiction to hear Petitioners' timely request for review. *See* 40 C.F.R. §71.11(g).

III. STATEMENT OF FACTS

EPA issued a NPDES permit for the mine complex in 2009 and later, after appeal to the EAB by Petitioners, voluntarily withdrew the permit on November 20, 2009 to provide for additional public review and comment. EPA's NPDES permit was re-issued in draft form on January 20, 2010 whereby "EPA modified the permit several times to incorporate new outfalls and eliminated expired outfalls due to the ongoing mining activities." *See Proposed Permit Fact Sheet* (January 2010) at 1. During the comment period, Petitioners timely submitted written comments on April 27, 2010. Members of Petitioners' organizations also participated in public hearings in Kaytenta, Arizona and February 24, 2010 in Kykostmovi, Arizona. On September 16, 2010, EPA issued the NPDES permit to Peabody.

EPA's NPDES permit authorizes continued discharge from over 111 outfall locations from permanent and temporary waste "ponds" at Peabody's Black Mesa and Kayenta Mines. At least 21 discharges from Peabody's impoundments are already exceeding WQS. *EPA Fact Sheet* at 10-12. In authorizing Peabody's continued discharge of pollutants in violation of WQS, EPA relies on a *Seep Monitoring and Management Plan* developed by Peabody. *Id.* Peabody's plan, in turn, calls for and relies upon EPA issuance of "regulatory variances" for at least twelve of the ongoing WQS violations. *Id.*

Additionally, EPA's issuance of a NPDES permit to Peabody relies, in whole or in part, on a, now vacated, "technical review" and approval by the Federal Office of Surface Mining Control and Enforcement ("OSM") of Peabody's *Sediment Control Plan*. OSM's authorization would have allowed Peabody to eliminate numeric effluent limitations at the wastewater discharge points and replace these limitations with Best Management Practices ("BMPs") implemented via a *Sediment Control Plan*. However, OSM's authorization, which was part of a Life of Mine operating permit amendment, was vacated on January 5, 2010 by an Administrative Law Judge.

Finally, and as EPA was in the process of renewing an NPDES for the Kayenta and Black Mesa Mines, OSM was in the process of renewing an operating permit for Peabody's Kayenta Mine. As of the date of filing of this *Petition for Review*, OSM has not approved permit a renewal for the Kayenta Mine and no federal agency has initiated a NEPA process which is required for these connected "major federal actions."

IV. ISSUES PRESENTED FOR REVIEW

This petition for review is necessarily limited to three pieces of information (final permit, fact sheet and response to comments) available from the agency at the date of filing and reflects the issues that were raised in public comments on the draft permit. The information available to Petitioners provides grounds for Board review. However, Petitioners reserve the right to supplement this petition once Petitioners receive and are able to review the administrative record. The issues justifying review and remand of this permit include:

Failure to comply with the Clean Water Act, 33 U.S.C. § 1251, et seq. (“CWA”)

(1) EPA’s failure to first identify whether the receiving waterbodies are compromised despite permit-based limits on point-source pollutant discharges, and if so, without first ensuring that Total Maximum Daily Loads (“TMDLs”) are established for the tribal land portion of the Little Colorado River Watershed, and in particular, Moenkopi Wash Drainage and Dinnebito Wash Drainage. Comment Letter (Exh. 1) at 3-6.

(2) EPA’s failure to require monitoring of discharge from all 111 outfalls covered by the NPDES permit. EPA’s NPDES Permit authorizes the operator to monitor only “20% of outfalls” as identified and determined by Peabody. Comment Letter (Exh. 1) 19-20.

(3) EPA’s failure to provide effluent limits on Peabody’s discharge for anything but suspended solids, iron, and pH. NPDES Permit at 3.

(4) EPA’s failure to enforce Water Quality Standards (“WQS”) and require Peabody to address and terminate ongoing WQS exceedances prior to permit issuance. See Proposed NPDES permit at 9-11 (identifying 21 impoundments with WQS exceedances).

(5) EPA's failure to ensure that the permitted discharges or outfalls from earthen impoundments have been or will be properly permitted in the first instance by the Army Corps of Engineers ("Corps") under Section 404 of the CWA—especially where as here, EPA's permit covers and "addresses the construction of new impoundments." NPDES Permit at 8.

(6) EPA's failure to properly determine that discharges from Peabody's 111 outfalls and 230 impoundments do not present a "reasonable potential" to cause or contribute to an exceedence of water quality standards based on actual monitoring data from all outfalls and impoundments. Comment Letter (Exh. 1) at 7.

(7) EPA's reliance in whole or in part on OSM's, now vacated, "technical review" of Peabody's *Sediment Control Plan* for purposes of approval of the NPDES Permit is an abuse of discretion. Comment Letter (Exh. 1) at 10.

Failure to comply with the National Environmental Policy Act 42 U.S.C. § 4321, et seq. ("NEPA")

(8) EPA's failure to analyze the impacts of adding and eliminating new discharges to Peabody's NPDES permit in an environmental impact statement ("EIS") or environmental assessment ("EA"). Fact Sheet at 2 (January 2010) ("several new outfall locations have been added and several have been eliminated to reflect changes in ongoing mining activities.")⁴ 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. Even if a lawful NEPA document had been prepared in 2000, changed circumstances prevent reliance on determinations made in 2000.

⁴ Neither the draft permit nor the fact sheet identifies what outfalls have been added or eliminated.

(9) EPA's permit also "incorporates new regulatory requirements for the Western Alkaline Coal Mining Subcategory for reclamation areas that were promulgated in January 2002... ." *Id.* 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).

(10) 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;⁵ OSM's "technical review" of Peabody's Sediment Control; and/or, any and all 404 permitting by the U.S. Army Corps of Engineers.

Failure to Comply with the Endangered Species Act, 16 U.S.C. §§1531, et seq. ("ESA")

(11) EPA's failure to ensure through consultation with U.S. Fish and Wildlife Service ("FWS") that no jeopardy to the continued existence of threatened and endangered species would occur or that adverse modification of their critical habitat would occur and as required by Section 7(a)(2) of the Endangered Species Act ("ESA"). 16 U.S.C. §1536(a)(2). Comment Letter (Exh. 1) at 11-17.

Failure to Comply with Other Federal Statutes, Regulations and Executive Orders

(12) EPA's failure to make public during the draft permitting stage the monitoring data upon which many of the assertions in Peabody's application rely. Rather than data that shows analyses and trends over the decades that have been monitored, Peabody's application and data

⁵ A highly incomplete version of the permit application is available on OSM's website: <http://www.wrcc.osmre.gov/>

made publicly available from EPA include only summaries of the data and only for sites that have had exceedences. The absence of a complete monitoring data precludes the public (and by extension the agency) from forming a defensible conclusion on the adequacy of the permit.

Comment Letter (Exh. 1) at 2-3.

(13) EPA's failure to hold meaningful public hearings in the impacted community. EPA's hearings were held 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. Additionally, agency officials from the Corps, OSM and FWS were not present at the hearings and were therefore unable to answer any related questions. Comment Letter (Exh. 1) at 1-2.

V. MOTION FOR EXTENSION OF TIME TO FILE SUPPLEMENTAL BRIEF

Petitioners hereby move for a 30-day extension of time, until November 18, 2010, to file a supplemental brief in support of their Petition for Review. In general, the Board will grant reasonable extensions of time for good cause shown. The Board routinely grants such extensions. *See In re: Peabody Western Coal Company Black Mesa Permit*, Order Granting Extension of Time to File Response (September 29, 2009)(granting a 30-day extension of time based on voluminous records and unavailability of experts); *In re Northern Michigan University*, Order Granting Motion for Extension of Time to File Response (July 10, 2008)(granting a 20 day extension where Michigan requested "additional time to evaluate and respond to the petition due to the number and complexity of legal arguments..."; *In re Desert Power Electric Cooperative*, Order Granting Extension of Time (Feb. 12, 2008); *In re ConocoPhillips Co.*, Order (Oct. 1, 2007).

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

In this instance, a 30-day extension of time is reasonable and appropriate. The complete administrative record has not been provided to Petitioners. As stated by Petitioners in their comment letter,

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.

Comment Letter (Exh. 1)(emphasis in original) at 2-3. EPA has yet to make available the full administrative record before the agency and for purposes of appeal. *See* <http://www.epa.gov/region9/water/npdes/permits.html> (providing only the permit, fact sheet and comment response). This issue has not been remedied by the agency and for purposes of preparing the present appeal.

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

Petitioners exercised due diligence and contacted both EPA staff and regional counsel to determine when EPA anticipated filing of the administrative record. Based on the email representation of Mr. John Tinger, EPA Region 8 NPDES Permits Manager dated October 13,

2010, EPA state that the Administrative Record for the Black Mesa Complex NPDES will be available and submitted to both the Board and Petitioners within "a week or two" of filing of the present *Petition for Review*.

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

For the reasons set forward above, Petitioners have good cause for an extension of time and the Board should grant Petitioners' request for a 30-day extension of time, until November 18, 2010 to file a supplemental brief in support of their Petition.

RESPECTFULLY SUBMITTED on Monday, October 18, 2010.

s/Brad A. Bartlett

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 18, 2010 he caused a copy of the foregoing to be served by fax and overnight mail on:

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