Exhibit 1

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

In Re NPDES Permit Renewal: Peabody Black Mesa NPDES Permit No. NN0022179: Black Mesa Mine Complex	)	NPDES Appeal No. 10-15 & 10-16

RESPONSE TO PETITIONERS' MOTION FOR EXTENSION OF TIME TO FILE SUPPLEMENTAL BRIEF

This filing is in response to a motion filed by Petitioners Black Mesa Water Coalition, Diné C.A.R.E., To Nizhoni Ani, Center for Biological Diversity and Sierra Club (hereinafter "Petitioners") for a 30-day extension of time to file a supplemental brief in support of their petition for review. This request is based on their alleged need to obtain and review the administrative record. Additionally, Petitioners have included in their filing a request to supplement their petition for review with additional issues. The United States Environmental Protection Agency, Region 9 ("the Region") opposes Petitioners' motion for a 30-day extension to file a supplemental brief and opposes Petitioners' request to supplement the petition for review with additional issues.

I. Overview of Black Mesa Petition

On Monday, October 18, 2010 Petitioners submitted a petition ("Black Mesa Petition") (Exhibit 1) for review of the U.S. Environmental Protection Agency's ("EPA's") National Pollutant Discharge Elimination System ("NPDES") Permit Renewal for the Black Mesa Project:

Peabody Black Mesa NPDES Permit No. NN0022179 ("Black Mesa Permit") to the Environmental Appeals Board ("EAB" or "Board").[1]

As part of the Black Mesa Petition, Petitioners seek to "reserve the right to supplement this petition once Petitioners receive and are able to review the administrative record." Black Mesa Petition at 6. Additionally, Petitioners moved for a 30-day extension of time, until November 18, 2010, to file a supplemental brief in support of their petition for review. In support of their motion Petitioners state that "[i]n this instance, a 30-day extension of time is reasonable and appropriate [as] [t]he complete administrative record has not been provided to Petitioners." Black Mesa Petition at 10. Petitioners further stated that "EPA has yet to make available the full administrative record before the agency and for the purpose of appeal." Black Mesa Petition at 11. The Region opposes Petitioners' request to supplement the Black Mesa Petition with additional issues for review and opposes Petitioners' motion for an extension of 30 days to file a supplemental brief in this proceeding.

II. Statement of Facts Regarding the Administrative Record

The renewal of the Black Mesa Permit was first proposed on February 19, 2009. *See* Notice of Proposed Action, February 19, 2009 (Exhibit 2). In that Notice the Region stated that "the administrative record...is open for public inspection during normal business hours [at the Region's office]" and that requests to obtain or review the administrative record should be made to the Region. In response to a request from Petitioners, the Region, on March 10,

[1] EPA received a second petition for review for the Black Mesa Permit on October 18, 2010 from Former Hopi Tribal Chairman Ben Nuvamsa and Californians for Renewable Energy.

2009, provided the administrative record to Petitioners. *See* E-mail from John Tinger to Brad Bartlett, March 10, 2009 (Exhibit 3).

On August 5, 2009 the Region issued the Black Mesa Permit. On December 3, 2009 the Region withdrew the reissuance of the Black Mesa Permit in order to hold public hearings to ensure that interested parties were given full opportunity to meaningfully participate in the permit proceedings.[2] The Region provided a second public notice of the draft Black Mesa Permit on January 20, 2010 to hold public hearings and take additional public comment. *See* Notice of Public Hearings, January 20, 2010 (Exhibit 5). On January 23, 2010 and January 28, 2010 the Region provided an update to the administrative record to Petitioners. *See* E-mail from John Tinger to Brad Bartlett, January 23, 2010 (Exhibit 6) and E-mail from John Tinger to Brad Bartlett, January 28, 2010 (Exhibit 7). After two public hearings on tribal lands, on February 23, 2010 and February 24, 2010, and the close of the public comment period, the Region received a Freedom of Information Act (FOIA) request from Petitioners on March 29, 2010. (Exhibit 8). EPA responded to Petitioners' FOIA request on May 7, 2010 and May 31, 2010. The Region's responses to the FOIA request included additional administrative record materials as of those dates, including all materials generated during the public hearings and second public comment period. *See* Letter from John Tinger to Amy Atwood, May 7, 2010 (Exhibit 9); Letter from John Tinger to Amy Atwood, May 31, 2010 (Exhibit 10).

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[2] The same Petitioners, minus Sierra Club, filed a petition for review on the August 5, 2009 Black Mesa Permit. In that petition Petitioners raised issues similar to those they raise in their October 18, 2010 petition. After the Region withdrew the August 5, 2009 Black Mesa Permit the Board issued an order dismissing their August 5, 2009 petition for review with prejudice. *See In re Peabody Western Coal Co.*, NPDES Appeal No. 09-10 (EAB 2009) (Order Dismissing Petition for Review with Prejudice) (Exhibit 4).

The Region issued the final renewal for the Black Mesa Permit on September 16, 2010. On September 16, 2010 the Region sent a letter to the permitee, with a "CC: w/attachments" to Petitioners' counsel, notifying them of the permit reissuance, outlining the procedures for a permit appeal and offering, again, the opportunity to review and/or obtain any documents they would like from the administrative record. *See* Letter from David W. Smith to Gary Wendt, CC Brad Bartlett, *et al* (Exhibit 11). Enclosed in that September 16, 2010 letter was the final permit, fact sheet and response to comment document, which were the final documents for the complete administrative record. In that September 16, 2010 letter the Region stated that "[i]f you have any questions regarding the [appeal] procedures...or if you would like to review or request any documents from the Administrative Record, please contact [David W. Smith or John Tinger]." Additionally, on September 17, 2010 the Region, again, notified Petitioners of the final renewal for the Black Mesa Permit in an e-mail, which, again, included the permit, fact sheet, response to comment document and the September 16, 2010 issuance letter. *See* E-mail from John Tinger to Brad Bartlett, on September 17, 2010 (Exhibit 12). The final permit, fact sheet, response to comment document and issuance letter, which were given to Petitioners on September 16, 2010 and September 17, 2010 are the only additions to the administrative record since EPA's May 7, 2010 and May 31, 2010 FOIA response to Petitioners that included the complete administrative record as of those respective dates.

On October 11, 2010, twenty five (25) days after the final permit decision, Petitoners asked "[w]hen will EPA's administrative record be available." *See* E-mail from Brad Bartlett to John Tinger (Exhibit 13). EPA responded to Petitioners stating that they "should have the entire Admin Record with the possible exception of comments received during the comment period (I think I may have sent these to you but I cant [sic] remember). I should have the

indexed/paginated version for the EAB in a week or 2." *See* E-mail from John Tinger to Brad Bartlett on October 13, 2010 (Exhibit 13). The "comments received during the comment period" referred to in the October 13, 2010 e-mail were included in the May 7, 2010 and May 31, 2010 FOIA response to Petitioners from EPA. Thus, Petitioners currently have the complete administrative record and they have had the complete administrative record since September 16, 2010. In addition, had there been any question as to whether Petitioners had all record materials, Petitioners were on notice as of September 16, 2010 that the administrative record was available for review. *See* Exhibit 11.

III. Reservation of Right to Supplement Petition with Additional Issues

In addition to the motion for extension of time to file a supplemental brief in support of their petition for review, Petitioners have also included in their filing a request to reserve their right to supplement their petition with additional issues. *See* Black Mesa Petition at 6.

Pursuant to EPA regulations a petitioner who is seeking review of any condition of an NPDES permit must file a petition with the Board within 30 days after a final permit decision.[3] 40 C.F.R. 124.19(a). *See In re Town of Marshfield*, NPDES Appeal No. 07-03, at 4 (EAB 2007) (Order Denying Review). The "failure to ensure that the Board receives a petition for review by the filing deadline will generally lead to dismissal of the petition on timeliness grounds." *In re Town of Marshfield*, NPDES Appeal No. 07-03, at 4; *see also In re AES Puerto Rico LP*. 8 E.A.D. 324, 329 (EAB 1999); *In re Knauf fiber Glass GmbH*, 9 E.A.D. 1,

[3] In this case, since notification of the final permit decision was served by mail, Petitioner had three additional days in which to file a petition for review, for a total of 33 days. *See* 40 C.F.R. 124.20(d).

5 (EAB 2000); *In re Envotech, L.P.*, 6 E.A.D. 260, 266 (EAB 1996). In addition, a petition filed with the Board "must specifically identify disputed permit conditions and demonstrate why review is warranted" since "the discretion to grant review is to be sparingly exercised" *In re LCP Chemicals – N.Y.*, 4 E.A.D. 661, 665 n.9 (EAB 1993). The Board "strictly construes threshold procedural requirements" like the filing of a thorough, adequate and timely petition and "'will relax a filing deadline only where special circumstances exist.'" *In re City & County of Honolulu*, NPDES Appeal No. 09-01, at 2 (EAB 2009) (Order Granting Alternative Motion Extension of Time to File Petitions for Review). The types of "special circumstances" that have arisen where the Board has allowed issues for review to be filed after the deadline for the petition has passed have included mistakes by the permitting authority that have directly precipitated delays in the appeal proceedings and in cases where delays were the result of natural disasters or possible terrorist attacks. *See e.g., In re Avon Custom Mixing Serv., Inc.*, 10 E.A.D. 700, 703 n.6 (EAB 2002) (delay in reaching the Board attributable to EPA's response to anthrax contamination concerns); *In re Hillman Power Co., LLC*, 10 E.A.D. 673, 680 n.4 (EAB 2002) (final permit decision not properly served); *AES Puerto Rico*, 8 E.A.D. at 328-29 (extraordinary circumstances created by hurricane and its aftermath warranted relaxation of deadline).

In this case there is no such "special circumstance," and the Region opposes Petitioners' request to present additional issues for review before the Board. The Region issued the Black Mesa Permit on September 16, 2010. The Region sent Petitioners a letter on September 16, 2010 and an e-mail on September 17, 2010 notifying them of the final Black Mesa Permit in addition to giving Petitioners a further opportunity to review the complete administrative record, if necessary. *See* Exhibits 11-12. Despite adequate notice and

opportunity to review the administrative record, most of which they long had access to, Petitioners now attempt to reserve the right to raise additional issues "once Petitioners receive and are able to review the administrative record." Black Mesa Petition at 6. Since Petitioners have the complete administrative record, and there are no additional documents for Petitioners to review, Petitioners have not presented any "special circumstance" that would warrant the Board allowing them to raise additional issues that were not raised in their Black Mesa Petition filed on October 18, 2010. Thus, Petitioners should be denied permission to supplement their Black Mesa Petition with additional issues for review.

IV. Motion for 30-Day Extension to File Supplemental Briefs

Petitioners' motion formally requests a thirty (30) day extension of time to file a supplemental brief. This request is based on their alleged need to obtain and review the administrative record.

For those issues that have been raised in timely petitions for review "the Board has, on occasion, and for good cause shown, granted motions seeking leave to file supplemental briefs in support" of those issues. *In re Town of Marshfield*, NPDES Appeal No. 07-03, at 8 n.10. The Region believes that Petitioners have not shown "good cause" for an extension of time to file a supplemental brief in this case.

As a threshold matter, a petition should contain all supporting argumentation. As the Board has said "[a] petition for review under [40 C.F.R. 124.19] is not analogous to a notice of appeal that may be supplemented by further briefing. Although additional briefing may occur in the event formal review is granted, the discretion to grant review is to be sparingly exercised, and therefore...a petition for review must specifically identify disputed permit

conditions and demonstrate why review is warranted. *In re LCP Chemicals*, 4 E.A.D. 661, 665 n.9. In cases in which the Board has granted extensions, it has done so based on considerations such as the large volume of the record, complexity of the issues and/or the unavailability of experts. Indeed, these were the exact bases for the Board's decision to grant a 30-day extension to file a supplemental brief in an appeal filed by most of the same Petitioners when the Region first issued the Black Mesa Permit in 2009. *See In re Peabody Western Coal Co.*, NPDES Appeal No. 09-10, (EAB 2009) (Order Granting Extension of Time to Supplement Petition). At that time the Region did not oppose a 30-day extension to file a supplemental brief, though took no position of whether there was "good cause" shown, based on several factors raised by Petitioners. *See* Letter from Julia Jackson to Brad Bartlett and Amy Atwood, September 22, 2009 (Exhibit 14). It should thus be clear that the Region does not categorically oppose requests to file supplemental briefs. In their October 18, 2010 motion, however, Petitioners have not argued that any factors such as the large volume of the record, the complexity of the issues or the unavailability of experts exists. Thus, the Region does not believe there is good cause to warrant supplemental briefing in this case based on any arguments related to the volume of the record, any alleged complexity of the issues or the unavailability of experts as Petitioners in their motion have not alleged any such facts exist.[4]

Petitioners' request is solely based on the alleged lack of availability of the complete administrative record. Based on this request, the Region has little choice but to oppose Petitioners' request for a 30-day extension. As discussed above, in Part II, the allegation that

[4] The Region does not concede that in this case, given the change in circumstances, that if Petitioners had raised such factors the Region would not have opposed their request for a 30-day extension.

the administrative record is incomplete or unavailable is factually untrue. Petitioners have the complete administrative record and there is no merit to the argument that they need an extension of time in order to review additional administrative record materials. Given that most of the Petitioners are the same entities that filed the petition for review of the August 5, 2009 Black Mesa Permit, they have had a long period of time to review the administrative record, consult with any relevant experts and draft their legal arguments.[5] As the Board has stated, "[t]he 30-day deadline is not an unreasonable deadline and, indeed, is routinely met. The Agency and the public have an interest in the timely resolution of permit proceedings." *In re Peabody Western Coal Co.*, NPDES Appeal No. 09-10.

Petitioners' reliance on Mr. Tinger's e-mail statement that he "should have the indexed/paginated version for the EAB in a week or 2" is misplaced. Exhibit 13. Petitioners are confusing the preparation of a certified and indexed copy of the administrative record for Board review in anticipation of an appeal (which requires the application of page numbers to the entire record as well as preparation of a separate certified index) with the assembly of the underlying administrative record and availability for public viewing. *See* The Environmental Appeals Board Practice Manual, at 48 (2010). In that same e-mail on October 18, 2010, which was in response to an inquiry from Petitioners, Mr. Tinger told Petitioners "you should have the entire Admin Record." Exhibit 13. In addition, Petitioners were on notice as of September 16, 2010 that the administrative record was available for review. *See* Exhibit 12.

[5] Notably, during the last petition for review on October 22, 2009, before EPA withdrew the Black Mesa Permit on December 3, 2009, Petitioners filed their supplemental brief. *See* Appellants' Supplemental Brief in Support of Petition for Review (Exhibit 15). That supplemental brief contains similar arguments that Petitioner outlines it the October 18, 2010 petition for review.

Additionally, in the Black Mesa Petition at 10-11, in the section where Petitioners are seeking a 30-day extension, they repeat the comments they raised in their April 27, 2010 comment letter on the proposed Black Mesa Permit. In those comments Petitioners raise substantive issues with EPA's administrative record. As outlined in the response to comment document for the final Black Mesa Permit, EPA does not agree with Petitioners that the administrative record is incomplete or deficient. *See* Comment Response Document at 34-37 (Exhibit 16). The administrative record that is in Petitioners' possession and has been available at the Regional Office since permit issuance includes "all documents, materials, and information that the agency relied on directly or indirectly in making its decisions." *See In re: Dominion Energy Brayton Point*, L.L.C., 12 E.A.D. 490, PPT (EAB 2006) (citing *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993). If Petitioners believed that there is, indeed, any merit to the argument that the administrative record was incomplete, and that EPA's response was inadequate, the appropriate forum for addressing this issue is in the petition for review.[6] However, Petitioners improperly seek to also use any alleged issue with the administrative record as a basis for good cause for an extension of time to file a supplemental brief.

V. Conclusion

For the reasons set forth above, the Board should deny the Petitioners' request for additional time to both file a supplemental brief and to supplement their petition with

[6] Petitioners do include one issue related to the adequacy of the administrative record, but it is limited to a specific claim that monitoring data should have been made publicly available during the public comment period on the draft permit. *See* Black Mesa Petition at 8-9.

additional issues. If the Board were to grant an extension of time, however, it should limit its ruling to allow Petitioners to file a supplemental brief only on issues already included in their October 18, 2010 Black Mesa Petition.

If the Board does grant Petitioners' motion for a 30-day extension of time to file a supplemental brief in support of their Black Mesa Petition, the Region notes that a 45-day period by the Region to respond the Black Mesa Petition would result in the Region's response being due Monday, January 3, 2011. Due to the federal holidays and the potential absence of essential staff leading up to January 3, 2011 the Region therefore requests to have at least one additional week (and perhaps more, depending on staff schedules over the holidays, which are not yet known) to respond to the Black Mesa Petition or January 10, 2011. Thus, the Region requests that if the Petitioners supplemental brief is due November 18, 2010 the response from the Region be due no earlier than January 10, 2011.

RESPECTFULLY SUBMITTED on Wednesday, October 27, 2010

s/ Samuel L. Brown

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 27, 2010 he caused a copy of the foregoing to be served by Central Data Exchange and overnight express mail on:

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