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June 16, 2010

Erika Durr, Clerk of the Board
Environmental Appeals Board
U.S. Environmental Protection Agency
1341 G Street NW
Suite 600
Washington, DC 20005

RECEIVED
U.S. E.P.A.
2010 JUN 16 PM 4: 26
ENVIR. APPEALS BOARD

Re: *Peabody Western Coal Company*, Appeal Number CAA 10-01


Dear Ms. Durr:

Please find enclosed for filing the Navajo Nation Environmental Protection Agency's ("NNEPA") Response to Peabody Western Coal Company's ("PWCC") Motion for an Order Requesting EPA to File a Brief in the above-referenced matter. PWCC apparently filed its motion with the Board on June 3, 2010; however, the undersigned attorney for NNEPA did not receive a copy of it until June 11, 2010. In any event, this response is within the 15-day timeframe prescribed under the EAB Practice Manual, §III.D.7(b), whether service is calculated from the filing date or the date of receipt.

In addition, yesterday, June 15, 2010, I received PWCC's Response to NNEPA's Motion for a Voluntary Remand in this case. Please be advised that NNEPA intends to file a motion for leave to reply to PWCC's Response, together with a proposed reply, by June 25, 2010 (ten days from receipt), unless the Board establishes a different deadline. NNEPA respectfully requests that the Board consider NNEPA's motion for leave and reply before reaching a decision on NNEPA's Motion for Voluntary Remand.

Very truly yours,

NORDHAUS LAW FIRM, LLP


Jill E. Grant

cc: John R. Cline
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**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

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2010 JUN 12 PM 4: 26

ENVIR. APPEALS BOARD

In the Matter of:)	
)	
Peabody Western Coal Company)	Appeal No. CAA 10-01
Permit No. NN-OP 08-010)	
)	
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)	

RESPONSE TO PWCC MOTION FOR ORDER REQUESTING EPA TO FILE A BRIEF

Pursuant to Sections III.D.7(b) and IV.C.1 of the Environmental Appeals Board (“EAB”) Practice Manual, Respondent Navajo Nation Environmental Protection Agency (“Navajo Nation EPA” or “NNEPA”) responds to Peabody Western Coal Company’s (“PWCC”) Motion for Order Requesting EPA’s Offices of Air and Radiation and General Counsel and EPA’s Region IX to File a Brief (“PWCC’s Motion”) and requests that the EAB deny PWCC’s Motion as premature.

BACKGROUND

On January 7, 2010, PWCC filed a Petition for Review in this case. In the Petition for Review, PWCC challenged certain provisions in its Part 71 permit that referenced the Navajo Nation Operating Permit Regulations (“NNOPR”). The Navajo Nation EPA’s response to PWCC’s Petition for Review is currently due on July 6, 2010.

As a result of the parties’ negotiations regarding the permit, NNEPA determined that certain clarifications and corrections should be made to the specific permit conditions that PWCC contested in its Petition for Review. NNEPA therefore filed a Motion for Voluntary Remand in order to reopen and revise these portions of the permit. *See* Motion of the Navajo

Nation EPA for Voluntary Remand and Memorandum in Support of Motion (“Motion for Voluntary Remand”) (filed May 28, 2010), at 2-4. On June 3, 2010, PWCC filed its current Motion, requesting a brief from EPA on matters raised in PWCC’s Petition for Review.¹ A week later, on June 10, 2010, PWCC filed a response objecting to NNEPA’s Motion for Voluntary Remand.²

NNEPA requests that the EAB deny PWCC’s Motion for EPA briefing because it requires EPA to respond to matters that are proposed for remand and that could become moot under the revised permit. PWCC’s Motion is therefore premature and would be better raised after NNEPA has had the opportunity to revise the permit, if PWCC still wishes to appeal the permit after it is revised.

ARGUMENT

THE EAB SHOULD DENY PWCC’S MOTION BECAUSE IT IS PREMATURE, AND GRANTING THE MOTION NOW COULD RESULT IN AN INEFFICIENT USE OF ADMINISTRATIVE RESOURCES.

PWCC’s Motion requests a brief from EPA on a question raised in the Petition for Review in this case, namely, whether the Part 71 permit at issue here may include conditions based on tribal requirements. PWCC Motion at 4. NNEPA’s Motion for Voluntary Remand of the permit is pending before the Board, however, and so the Board is not currently considering PWCC’s Petition for Review. Indeed, as noted above, NNEPA’s response to the Petition for Review is not yet due. Until the Board rules on NNEPA’s Motion for Voluntary Remand,

¹Not only did PWCC file its Motion without contacting NNEPA regarding NNEPA’s concurrence or objection, but also PWCC’s Motion, which was dated June 3, 2010, was not received by counsel for NNEPA until June 11, 2010.

² Counsel for NNEPA received this Response on June 15, 2010.

therefore (and, if that motion is granted, until the permit is revised), the PWCC Motion is premature.

Moreover, NNEPA has already recognized that it should revise the permit conditions that cite tribal requirements, *see* NNEPA's Motion for Voluntary Remand at 2-4 (May 28, 2010), and has asked the EAB to remand the permit back to NNEPA so that it may make the proposed revisions, *see id.* NNEPA has acknowledged that a voluntary remand to reopen and revise the permit conditions may not completely dispose of the issues in PWCC's Petition for Review, but it will certainly narrow the issues on appeal and re-frame those which remain. *See id.* at 3. An EPA brief at this point in the proceeding may not address the issues that are raised by a revised permit, and it would thus be a waste of the Board's and EPA's resources for EPA to file a brief now, before the Board rules on NNEPA's Motion for Voluntary Remand.

Not one of the cases cited in PWCC's Motion for Order supports the proposition that the EAB should request briefing from EPA on matters that could be disposed of by a voluntary remand to the permitting agency. *See* PWCC's Motion for Order ¶ 17 (citing *In re Seminole Elec. Coop., Inc.*, PSD Appeal No. 08-09 (EAB May 19, 2009); *In re Christian Cty Generation, LLC*, PSD Appeal No. 07-01 (EAB July 20, 2007); *In re Prairie State Generation Co., LLC*, PSD Appeal No. 05-05 (EAB Dec. 12, 2005)). Rather, the cases cited support EPA briefing on matters that are actually and necessarily before the EAB. The EAB is identified in its own Practice Manual as the "final agency decisionmaker on administrative appeals under all major environmental statutes that EPA administers." EAB Practice Manual § I. For such matters, where, as here, the EAB is exercising its delegated authority, the EAB is not a body engaged in

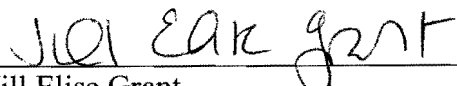
issuing advisory opinions. The issues that PWCC raised in its Petition for Review may not be before the EAB if the EAB grants NNEPA's request for voluntary remand.

NNEPA has no general objection to EPA briefing matters that are actually before the EAB.³ In that situation, an EPA brief could help clarify matters for the Board and advance the appeals process. Here, however, where the EAB has not yet ruled on NNEPA's Motion for Voluntary Remand, and so where it is unclear just which issues will be before the EAB, an EPA brief would be premature and a likely waste of agency resources.

CONCLUSION

Respondent Navajo Nation EPA therefore respectfully requests that this Board deny PWCC's Motion and grant NNEPA's Motion for Voluntary Remand so that NNEPA may reopen and revise portions of the permit to address issues raised in PWCC's Petition for Review. Once the permit is revised, or if the EAB denies NNEPA's Motion for Voluntary Remand, then the EAB may determine whether there is a need for an EPA brief.

Respectfully submitted this 16th day of June 2010.



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³ Here, counsel for PWCC did not inquire as to whether NNEPA's counsel objected to the request for an EPA brief. Had counsel for PWCC inquired, NNEPA would have explained that its objection would not be to an EPA brief, in general, but to an EPA brief that was premature.

CERTIFICATE OF SERVICE

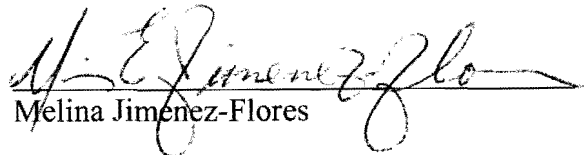
I HEREBY CERTIFY that a copy of this Response to PWCC's Motion for Order Requesting EPA to File a Brief was served via first class mail, postage prepaid, on this 16th day of June 2010, upon:

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