

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

In the Matter of:)	
)	
Peabody Western Coal Company)	Appeal No. CAA 11-01
Title V Permit No. NN-OP 08-010)	
)	
)	
)	
)	
)	

**REPLY TO PEABODY WESTERN COAL COMPANY’S MOTION FOR ORDER
REQUESTING EPA TO FILE A BRIEF AND MOTION OF THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY, REGION IX, FOR LEAVE TO FILE A
BRIEF AS *AMICUS CURIAE***

The United States Environmental Protection Agency, Region IX (“EPA”) respectfully files this Reply to Peabody Western Coal Company’s (“Peabody”) Motion For Order Requesting EPA’s Offices of Air and Radiation and General Counsel File a Brief (“Motion for EPA to File a Brief”), filed with the Board on July 21, 2011, by moving the Board for leave to file by Thursday, September 15, 2011, a brief as *amicus curiae* to present EPA’s position regarding Peabody’s Petition for Review filed on May 16, 2011 (“Petition”).¹ In its Petition, Peabody challenges the Title V renewal permit issued to it on April 2011 (the “Permit”) by the Navajo Nation Environmental Protection Agency (“NNEPA”). NNEPA issued the Permit pursuant to

¹ While Peabody requested in its Motion that EPA’s Offices of Air and Radiation and General Counsel be the ones to file the *amicus* brief, EPA Region IX’s office, as the delegate office for implementing the Part 71 Program in the Navajo Reservation, is in fact the appropriate office to file the brief. EPA Region IX intends to coordinate closely with those other EPA offices, however, in preparing any brief.

EPA's delegation to it of the administration of the 40 C.F.R. Part 71 federal Title V operating permits program (the "Part 71 Program") pertaining to air pollution sources located on the Navajo Reservation. See Delegation of Authority to Administer a Part 71 Operating Permits Program, October 13, 2004. The standards for effectuating such delegation to a State, eligible Tribe, local, or other non-State agency, as well as how the delegated program should be administered, are set forth at 40 C.F.R. § 71.10.

Specifically, in its Petition, Peabody argues that NNEPA is prohibited from using tribal laws to process Part 71 permits under the delegation or include citations to tribal requirements in the final Permit. See Petition at 8. In a May 20, 2011 letter, the Board requested that NNEPA file a response to the Petition by July 5, 2011, and NNEPA filed its response by that date. Given the importance of any ruling by the Board on the Petition as to how EPA delegates the Part 71 Program to State, Tribal and local agencies, as well as how delegate agencies should implement a Part 71 Program once delegated, EPA has a substantial interest in the outcome of this proceeding.

While EPA works closely with NNEPA to implement the Part 71 Program on the Navajo Reservation, the roles and perspective of the two agencies are not identical. Because of this, we believe that the Board would benefit from understanding EPA's view on the proper implementation of the Part 71 Program and how EPA delegates its administration of the Program. Moreover, the September 15 date for filing the *amicus* brief is appropriate because it will afford EPA adequate time to fully consider the matter, review the pleadings of the other parties including legal references, fully consult with all relevant EPA offices, and draft the

pleadings.²

Finally, all parties to this proceeding seek EPA's participation, therefore there will be no prejudice or hardship by allowing EPA to file an *amicus* brief by September 15. As previously discussed, Peabody actively is seeking the Board to issue an order requesting EPA's participation. Moreover, counsel for NNEPA has communicated to the undersigned that NNEPA supports EPA filing an *amicus* brief. For the reasons stated above, it is reasonable and appropriate for the Board to grant EPA's Motion for Leave to File an *Amicus Curiae* Brief by September 15, 2011.

Respectfully submitted,



Ivan Lieben, Assistant Regional Counsel
Region IX, Office of Regional Counsel
United States Environmental Protection Agency
75 Hawthorne St. (ORC-2)
San Francisco, CA 94105
(415) 972-3881
(415) 972-3914
(415) 947-3570 (fax)

² EPA believes that this is the minimum time necessary to file a well-drafted pleading expressing the Agency's views, especially because certain key EPA employees will be on vacation during the next month.

CERTIFICATE OF SERVICE

I hereby certify that this "Reply to Peabody Western Coal Company's Motion for Order Requesting EPA to File A Brief and Motion of the United States Environmental Protection Agency, Region IX, for Leave to File a Brief as *Amicus Curiae*" was electronically filed with the Environmental Appeals Board through its CDX Electronic Submission Page on July 26, 2011.

I also certify that copies of the same were sent via first class mail on July 27, 2011 to the following:

Jill E. Grant
Nordhaus Law Firm, LLP
1401 K. Street, NW, Suite 801
Washington, D.C. 20005

John R. Cline
John R. Cline, PLLC
P.O. Box 15476
Richmond, VA 23227

Peter S. Glaser
Troutman Sanders LLP
401 9th Street, NW, Suite 1000
Washington DC 20004-2134

Anthony Aguirre
Asst. Attorney General
Navajo Nation Department of Justice
P.O. Box 2010
Window Rock, AZ 86515



Ivan Lieben, Assistant Regional Counsel
Region IX, Office of Regional Counsel
United States Environmental Protection Agency