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June 3, 2010

Via Federal Express

Eurika Durr, Clerk of the Board
Environmental Appeals Board
U. S. Environmental Protection Agency
Colorado Building
1341 G Street, N.W., Suite 600
Washington, D.C. 20005

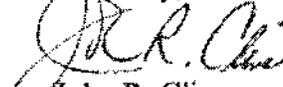
Re: In re Peabody Western Coal Company
CAA Permit No. NN-OP-08-010
CAA Appeal No. 10-01

Dear Ms. Durr:

Enclosed please find an original and five copies of Peabody Western Coal Company's Motion for Order Requesting EPA's Offices of Air and Radiation and General Counsel and EPA's Region IX to File a Brief in the above-referenced matter.

Please do not hesitate to contact me at (804) 746-4501 if you have any questions or concerns about the enclosed.

Sincerely,


John R. Cline

Enclosures

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ENVIR. APPEALS BOARD

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

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ENVIR. APPEALS BOARD

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

MOTION FOR ORDER REQUESTING EPA'S OFFICES OF AIR AND RADIATION AND GENERAL COUNSEL AND EPA'S REGION IX TO FILE A BRIEF

Petitioner, Peabody Western Coal Company ("Peabody" or the "Company"), by and through its undersigned attorneys, hereby moves this Environmental Appeals Board ("EAB" or the "Board") for an order requesting that the U.S. Environmental Protection Agency's ("EPA's" or the "Agency's") Office of Air and Radiation ("OAR") and Office of General Counsel ("OGC") as well as the Agency's Region IX jointly file a brief addressing the key legal issue raised in the above-captioned matter.

For permit proceedings under 40 C.F.R. part 71, such as the instant case, there are no regulatory requirements for filing motions. However, consistent with the Board's expectation for motions that are not "routine procedural motions" in permit proceedings under 40 C.F.R. part 124, Petitioner's counsel has not contacted Opposing Counsel to determine whether the Appellant concurs or objects to granting the request set forth in this motion. Environmental Appeals Board, *Practice Manual*, (June 2004).¹

¹ The EAB Practice Manual explains that "[t]he EAB further expects routine procedural motions, such as motions for extensions of time, to state whether the opposing party concurs or objects to granting the request set forth in the motion." (Section III.D.7, page 38).

In support of this motion, Petitioner states the following:

1. Title V of the Clean Air Act ("CAA" or the "Act") requires each State to establish an EPA-approved program for the issuance of State operating permits to specific types of stationary sources located within that State. 42 U.S.C. § 7661a.

2. Under title V, an "eligible Indian Tribe," 40 C.F.R. § 71.2, is allowed, but is not required, to establish an EPA-approved program for the issuance of Tribal operating permits to specific types of stationary sources located within lands of that Tribe. *See, e.g.*, 64 Fed. Reg. 8,248 (Feb. 19, 1999).

3. To be approved by EPA as a "part 70 program," a State or Tribal operating permit program must meet the requirements of 40 C.F.R. part 70. 40 C.F.R. § 70.1(a).

4. The Navajo Nation Environmental Protection Agency ("NNEPA") has adopted the Navajo Nation Operating Permit Regulations ("NNOPR"). 4 N.N.R. §§ 11-2H-101 *et seq.* However, the NNOPR have not been approved by EPA as a "part 70" Tribal operating permit program, and, as a consequence, no requirement of the NNOPR is federally enforceable.

5. In keeping with title V, EPA has developed its own federal operating permit program consisting of the requirements of 40 C.F.R. part 71, i.e., a "part 71 program."

6. If a Tribe does not have an EPA-approved part 70 Tribal operating permit program, specific types of stationary sources located within lands of that Tribe are subject to the part 71 federal operating permit program implemented by EPA. 40 C.F.R. § 71.4(b).

7. If a Tribe does not have an EPA-approved part 70 Tribal operating permit program, the Tribe may be delegated authority by EPA to administer a part 71 federal operating permit program for specific types of stationary sources located within lands of that Tribe. 40 C.F.R. § 71.10(a).

8. On October 15, 2004, Region IX delegated authority to the NNEPA to administer and enforce a part 71 federal operating permit program applicable to Peabody's Black Mesa Complex and to certain other stationary sources on the Navajo Reservation. 69 Fed. Reg. 67,578 (Nov. 18, 2004).

9. On December 7, 2009 under its delegated "part 71" authority, the NNEPA issued a document that is designated as a "Part 71 Operating Permit" and a "Title V Permit to Operate" for Black Mesa Complex (the "Permit"). Petition, Ex. A.

10. The NNEPA-issued permit for Black Mesa Complex (the "Permit") contains conditions based on federal substantive regulatory requirements and federal procedures for processing applications and making permit decisions under the federal operating permit program, 40 C.F.R. part 71. The Permit also contains conditions based on Tribal substantive regulatory requirements and Tribal procedures for processing applications and making permit decisions under the NNOPR, i.e., under the Tribal operating permit program that has not been approved by EPA. *Id.*

11. While EPA has delegated its authority to administer various federal CAA programs over the years, such delegations to eligible Tribes have been uncommon. The Navajo Nation remains the only Tribe that has been delegated authority to administer a part 71 federal operating permit program. EPA, <http://www.epa.gov/oar/tribal/backgrnd.html> (last updated on Mar. 18, 2010), last visited on May 20, 2010. Nevertheless, the Agency encourages more Tribes to seek delegated authority to administer a part 71 federal operating permit program. 61 Fed. Reg. 34,203 (July 1, 1996) (benefit of part 71 delegation to State); 59 Fed. Reg. 43,964 (Aug. 25, 1994) (treatment of Tribes in the same manner as States).

12. EPA will soon finalize rules for a federal minor new source review (NSR) permit program in Indian country and rules for a federal nonattainment NSR permit program in Indian country. EPA, "Spring 2010 Regulatory Agenda," RIN 2060-AH37, Apr. 26, 2010. EPA will be providing Tribes the opportunity to be delegated authority to administer those federal NSR permit programs. 71 Fed. 48,696, 48,721 (Aug. 21, 2006).

13. Peabody's Petition in this matter objects to the NNEPA-issued part 71 federal operating permit's inclusion of conditions based on requirements of the NNOPR. Petition at 1. As Peabody argues, a Tribal agency with delegated authority to administer and enforce a part 71 federal operating permit program acts only to implement federal operating permit requirements. Petition at 7-8.

14. The issue raised by Peabody's Petition is a case of first impression and addresses a narrow question of law, i.e. whether a Tribe that has been delegated authority to administer and enforce a part 71 federal operating permit program may issue such a permit containing conditions based on Tribal-only requirements that are not federally enforceable. Petition at 6.

15. As the "permitting authority" which issued the Permit, the NNEPA is charged by the Board with the responsibility to respond to Peabody's Petition. Letter from Eurika Durr, Clerk of the Board, to Stephen B. Etsitty, Navajo Nation Environmental Protection Agency (Jan. 14, 2010).

16. Because Peabody's Petition raises a novel question of law under title V of the CAA, and because resolution of that question may establish precedent for the scope of conditions allowed in federal operating permits and federal NSR permits issued in the future by Tribes with appropriate delegations of federal authority, OAR's, OGC's and Region IX's views on the issue

raised by Peabody's Petition are appropriate and necessary means for informing the Board's resolution of this case.

17. In previous petitions for review of PSD permits issued by State agencies under delegations of authority where those State agencies have been the respondents to such petitions, the Board has issued orders requesting briefs by various EPA Offices on issues raised by those petitions as a means of assisting the Board's resolutions of those cases. *See, e.g., In re Seminole Electric Cooperative, Inc.*, PSD Appeal No. 08-09 (EAB May 19, 2009) (Order Requesting EPA Region 4 to File Brief); *In re Christian County Generation, LLC*, PSD Appeal No. 07-01 (EAB July 20, 2007) (Order Requesting that EPA's Offices of Air and Radiation and General Counsel File a Brief); *In re Prairie State Generation Company, LLC*, PSD Appeal No. 05-05 (EAB Dec. 12, 2005) (Order Requesting EPA's Office of General Counsel and EPA's Region 5 to File a Brief).

WHEREFORE, Peabody Western Coal Company requests that the Board grant the Company's motion for an order requesting the EPA Office of Air and Radiation, the EPA Office of General Counsel, and EPA Region IX to file a joint brief on the narrow question of law presented by Peabody's Petition.

Respectfully submitted,



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ATTORNEYS FOR PETITIONER
PEABODY WESTERN COAL COMPANY

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion for Order Requesting EPA's Offices of Air and Radiation and General Counsel and EPA's Region IX to File a Brief in the matter of Peabody Western Coal Company, CAA Appeal No. 10-01, were served by United States First Class Mail, postage prepaid, on the following persons, this 3rd day of June, 2010:

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Attorney for Petitioner

Date: June 3, 2010