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NPDES Permit No. NN 0022179  
NPDES Appeal Nos.: 10-15 and 10-16

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November 2, 2010

Client-Matter: 40813-060

**VIA FACSIMILE AND FEDEX**

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

**Re: In re: Peabody Western Coal Company, Black Mesa Complex,  
NPDES Permit No. NN 0022179  
NPDES Appeal Nos.: 10-15 and 10-16**

Dear Sir or Madame:

Enclosed for filing in the above-referenced matter is the original and five copies of Peabody Western Coal Company's Motion for Leave to Intervene and Request for Leave to Respond to Petition. Enclosed is also a copy to be date stamped and returned in the self-addressed prepaid envelope.

Please do not hesitate to contact me if you have any questions.

Sincerely,

  
Peter Duchesneau

Enclosure

cc: Counsel of Record

300170818.1

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

In re:

NPDES Appeal Nos.: 10-15 and 10-16

Peabody Western Coal Company,  
Black Mesa Complex

NPDES Permit No. NN 0022179

**PEABODY WESTERN COAL COMPANY'S MOTION FOR LEAVE TO INTERVENE  
AND REQUEST FOR LEAVE TO RESPOND TO PETITION**

Peabody Western Coal Company ("Peabody") hereby moves for leave to intervene as a party in the above-captioned matter and requests leave to respond to the petitions of Black Mesa Water Coalition, Diné C.A.R.E., To Nizhoni Ani, Center for Biological Diversity and Sierra Club (NPDES Appeal No. 10-15) and Californians for Renewable Energy (CARE) and former Hopi Tribal Chairman Ben Nuvamsa (NPDES 10-16) (collectively, the "Petitions").<sup>1</sup>

**I. BACKGROUND**

Pursuant to 40 C.F.R. § 124.19(a), Petitioners filed appeals with regard to the September 16, 2010 renewal by U.S. Environmental Protection Agency ("EPA"), Region IX, of

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<sup>1</sup> The undersigned counsel for Peabody has conferred over the telephone and via email with respective counsel for EPA and the Petitioners with regard to whether they intend to oppose the subject motion. Samuel Brown, Assistant Regional Counsel, EPA Region IX, indicated that EPA did not intend to oppose the motion. Brad Bartlett, Energy Minerals Law Center, counsel for Petitioners Black Mesa Water Coalition, et al., indicated that he would not take a position without having had an opportunity to review the motion, but was unlikely to file an opposition. David Abney, Law Office of David L. Abney, counsel for Petitioners Former Hopi Tribal Chairman Ben Nuvamsa, et al., indicated he needed to consider the matter and confer with his clients. As of the time of filing the motion, counsel for Peabody had not yet heard back from Mr. Abney.

the National Pollutant Discharge Elimination System ("NPDES") Permit (No. NN 0022179) for Peabody's Black Mesa Complex. The Black Mesa Complex consists of the Kayenta and Black Mesa coal mining operations, which date back to the early 1970s, and is located on the Navajo Nation and Hopi Tribe Reservations, southwest of Kayenta, Arizona. *See* Fact Sheet, Peabody Western Coal Company – Black Mesa Complex, NPDES Permit No. NN0022179, U.S. EPA (2010). The Kayenta mining operation supplies coal to the Navajo Generation Station, located near Page, Arizona. *Id.*

The original NPDES permit was issued in 1983 and most recently re-issued on December 29, 2000. The permit regulates discharges of runoff from active mine areas, coal preparation plant areas and reclamation areas. On August 3, 2005, Peabody filed a timely renewal of its NPDES permit. Pending renewal, EPA has administratively continued the permit. *Id.*

On February 19, 2009, EPA proposed a permit renewal and issued the final permit on August 5, 2009. Thereafter, certain appeals were filed with the Environmental Appeals Board ("EAB") by essentially the same petitioners in the above-captioned case. *See In re: Peabody Western Coal Company, Black Mesa Complex Permit No. NN0022179*, NPDES Appeal No. 09-10. In response, on December 1, 2009, EPA filed a notice withdrawing the August 5, 2009, permit and opted to re-open the public comment period, prepare a new fact sheet, and hold public hearings on Navajo and Hopi lands. As a result, EAB dismissed the petitions with prejudice, but without a determination on the merits of any arguments. *In re: Peabody Western Coal Company, Black Mesa Complex Permit No. NN0022179*, NPDES Appeal No. 09-10 (Dec. 3, 2009) (Order Dismissing Petition for Review with Prejudice).

The Petitions in this matter raise substantially the same unfounded arguments made in the previous appeal, including the need to establish Total Maximum Daily Loads; a failure to require monitoring at all outfalls; inadequate effluent limits under the permit; violations of previous Water Quality Standards; a failure to have a Clean Water Act Section 404 permit; a failure to comply with the National Environmental Policy Act, the Endangered Species Act, and other requirements; and a failure to hold adequate public hearings. Yet again, certain petitioners have requested an extension of time to file a supplemental brief.

## **II. GOOD CAUSE EXISTS FOR PEABODY TO INTERVENE AND FILE A RESPONSE TO THE PETITION CONCERNING ITS NPDES PERMIT**

Good cause exists for Peabody to intervene and file a response to the Petitions.

As the permittee, Peabody has a direct and substantial interest in the renewed NPDES permit and matters raised by the Petitions. Peabody's interests are not adequately represented by the existing parties to the subject appeal.

### **The EAB Has Discretion to Allow the Permittee to Participate in Permit Appeals**

The EAB has discretion to allow intervention and for a party to respond to a petition. "[T]he EAB . . . will ordinarily grant a timely request by the permittee to participate in the proceeding and respond to the petition for review." U.S. EPA, Environmental Appeals Board, Practice Manual at 45-47 (Sept. 2010).<sup>2</sup> See *In re USGen New Eng., Inc.*, NPDES Appeal No. 03-12, at 7 & n.13 (Feb. 20, 2004) (Order Granting Review), *perm. remanded sub nom.* (Citing that the EAB typically allows permittees not already a party to the proceeding to participate as intervenors); See, also, *In re District of Columbia Water and Sewer Authority*, NPDES Appeal No. 07-12, slip op. at 2 (EAB, June 15, 2007) (Order Granting Motion For

<sup>2</sup> See, e.g., *In re: Los Alamos National Laboratory*, NPDES Permit No. NM0030759, NPDES Appeal No. 09-05, slip op. (April 21, 2009) (granting leave for permittees to file a response to the petition and otherwise participate in proceeding).

Leave to Intervene as Party Respondent and Request to Respond to Third Party Petitioners' Petition for Review) (Granted intervention for permittee based upon a timely motion indicating that permittee would be substantially and specifically affected by the outcome; that its interests were not the same as EPA's since it would bear the burden of the liabilities and costs to comply with the permit if the petitioners were successful; and that it was uniquely situated to provide the EAB with insight and perspective as to the issues raised in the petition).<sup>3</sup>

3. **As the Permittee, Peabody has a Direct and Substantial Interest that Could be Impaired as a Result of the Proceedings**

Peabody has a direct and substantial interest in this case since the Petitions pertain to Peabody's NPDES permit. In light of being the permittee, it is consistent with due process to grant Peabody an opportunity to participate in the proceedings. Peabody's interests could be impaired by the outcome of the proceedings were new or changed legal obligations to be imposed, or if the permit were to be rescinded altogether. Peabody has a significant financial investment in the Black Mesa Complex, which employs over 420 workers, and has numerous contractual obligations tied to the operations, including to supply coal to the Navajo Generation Station. Moreover, while Peabody and EPA share some common positions with respect to the permit, their interests also diverge. Unlike EPA, Peabody is responsible for the continued viability of its Black Mesa Complex operations and will ultimately bear the burden of compliance with the permit. Last, as the permittee, Peabody has unique familiarity with and knowledge of its operations and implications of the permit terms and would therefore offer an important perspective to the EAB as to the issues at hand.

<sup>3</sup> See, also, 40 C.F.R. § 22.11 (Regarding intervention under the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Proceedings and the Revocation/Termination or Suspension of Permits: "The Presiding Officer shall grant leave to intervene in all or part of the proceeding if: the movant claims an interest relating to the cause of action; a final order may as a practical matter impair the movant's ability to protect that interest; and the movant's interest is not adequately represented by existing parties"); see, also, Fed. R. Civ. P. § 24(a)(2).

**III. CONCLUSION**

For the reasons set forth above, Peabody respectfully requests that it be given leave to intervene in this matter and file a response to the Petitions.

Respectfully Submitted,

Dated: November 2, 2010

By: 

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Counsel for Peabody Western Coal Company

300166173.

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certified that on November 2, 2010, I caused a copy of the foregoing to be served by facsimile and Federal Express on:

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