

February 13, 2019

BY CERTIFIED MAIL/RETURN RECEIPT REQUESTED

Peabody Western Coal Company
P.O. Box 650
Navajo Rt. 41
Kayenta, Arizona 86033

Peabody Energy Corporation
Attn: Randy Lehn, Director, Environmental Services-Southwest
2836 West Shamrell Boulevard
Flagstaff, Arizona 86005

Peabody
Attn: Chris Walker, Vice President Contract Management and Marketing Support
Peabody Plaza
701 Market Street
St. Louis, MO 63101-1826

RE: *In Re Kayenta Coal Mine: 60-Day Notice of Intent to Sue Under the Surface Mining Control and Reclamation Act.*

Peabody Western Coal Company and Peabody Energy Corporation:

Pursuant to 30 U.S.C. §1270(b) of the Surface Mining Control and Reclamation Act (“SMCRA”), To’ Nizhoni Ani, Black Mesa Water Coalition and the Sierra Club (hereinafter, “To’ Nizhoni Ani”) notify you, Peabody Western Coal Company and Peabody Energy Corporation (“Peabody”), that sixty (60) days after receipt of this notice, or as soon thereafter as counsel may prepare and file the necessary papers, To’ Nizhoni Ani intends to initiate a civil action against you under Section 520 of SMCRA.

Unless the violations alleged herein are corrected by you or the U.S. Secretary of the Department of Interior has commenced a civil action in an effort to address the allegations herein, To’ Nizhoni Ani intends to commence legal action in U.S. District

Court to compel your company to comply with Federal Office of Surface Mining Reclamation and Enforcement's ("OSM's") rules and regulations implementing SMCRA and governing coal mining and reclamation on Indian lands (hereinafter, "OSM's regulations").

As set forward herein, Peabody has violated OSM's regulations by:

- 1) Failing to disclose changes or revisions to Peabody's Kayenta Coal Mine operation in the form of permanent cessation of coal production at the Kayenta Mine on or before December 22, 2019; and,
- 2) Knowingly making or knowingly failing to correct statements, representations, or certifications in any application, record, report, plan, or other document filed or required to be maintained pursuant to a Federal program.

Peabody's violations of OSM's regulations are ongoing and carry civil and criminal penalties.

I. FACTUAL BACKGROUND.

Peabody is the permittee of the Kayenta Coal Mine, a nearly half-century old, 44,000 acre-strip mine located on the Navajo Nation which serves as the exclusive provider of coal to the Navajo Generating Station ("NGS"), a 2,250 megawatt ("MW") coal fired power plant also located on the Navajo Nation. The two operations are physically, economically, and temporally connected by a dedicated 83-mile rail line

which ships coal to the plant. The Kayenta Coal Mine is the sole supplier of coal to the plant, and NGS is the sole purchaser of coal from the mine.

On February 26, 2015, Peabody submitted a permit renewal application package to OSM (“renewal application”) for a five-year term from July 6, 2015 to July 6, 2020.

Exhibit 1. Peabody’s renewal application states and certifies that during the five-year permit renewal term “[t]he renewal does not propose any revisions to the approved mining and reclamation plan.” *Id.* at 1.

On June 29, 2015, OSM administratively delayed agency action on Peabody’s renewal application in order to “ensur[e] compliance with the National Environmental Policy Act (“NEPA”) and other laws” and further stated that OSM “cannot render a decision on the permit renewal until after that effort is complete.” Exhibit 2.

On February 13, 2017, the owners of NGS announced closure of NGS on December 22, 2019. Exhibit 3.

On April 3, 2017, Peabody sent a *Notice to Navajo Participants of Responsibility for the Funding and Payment of Liabilities under the CSA and other Related Documents* (hereinafter, “Peabody Notice Letter”) to the eleven “Navajo Participants” in NGS including the U.S. Bureau of Reclamation, a sub-agency within U.S. Department of Interior.¹ Exhibit 4. The Peabody Notice Letter advised the Navajo Participants of

¹ According to Peabody, the Navajo Participants are the Salt River Project, Arizona Public Service, Department of Water and Power of the City of Los Angeles, Nevada Power Company, Tucson Electric Power Company, and the U.S. Bureau of Reclamation.

“liabilities and the funding and payment issues associated with [the] contemplated premature plant and mine closure” on December 22, 2019 including, but not limited to, final reclamation costs for the Kayenta Mine. *Id.* at 1.

In the Peabody Notice Letter, Peabody asserts that the Navajo Participants are responsible for 71.4% of mine’s final reclamation costs which include costs associated with final pit closure, facilities, roads and infrastructure removal, topsoil replacement in mined areas, revegetation and maintenance, post-reclamation monitoring, bonding, and other costs. Exhibit 4 at 2. Peabody estimated final reclamation costs for the mine to be \$187.9 million dollars. *Id.* These costs were based on a “Final Reclamation Cost Full Interim True-Up valuation” prepared by Golder Associates “utilizing a December 22, 2019 mine closure date” (hereinafter, “Final Reclamation Cost Valuation”). *Id.* The Final Reclamation Cost Study was released to the Navajo Participants on January 13, 2017. *Id.*

Upon information and belief, Peabody failed to disclose to OSM the Peabody Notice Letter.

Upon information and belief, Peabody failed to disclose to OSM the anticipated cessation of coal production at the Kayenta Mine on or before December 22, 2019.

Upon information and belief, Peabody failed to disclose to OSM the Final Reclamation Cost Valuation prepared by Golder Associates.

From August 17, 2017 to September 15, 2017, OSM initiated public participation and solicited comments on an Environmental Assessment (“EA”) prepared by a third-party contractor to evaluate the environmental effects of the proposed renewal of permit AZ-0001E.

On October 3, 2017, OSM issued a letter (“Approval Letter”) stating that the agency had approved Peabody’s renewal application based on “its review and processing of Peabody Western Coal Company’s (‘PWCC’s’) submittal for the Kayenta Mine Permit Renewal Application submitted on February 26, 2015” and that “[t]his permit authorizes the continuation of mining and reclamation operations until July 6, 2020, within the designated area.” Exhibit 5. OSM’s Approval Letter was accompanied by three relevant documents.

The first was OSM’s Findings and Approval of Permit Renewal for Peabody Western Coal Company’s Kayenta Mine OSMRE Project Tracking Code: NN.AZ0001E.00037 (“Findings and Approval”) dated October 3, 2017 which states that “OSMRE has reviewed Peabody Western Coal Company’s (PWCC’s) permit renewal application for the Kayenta Mine, and finds there is no basis for denying the requested permit renewal.” Exhibit 6.

The second was OSM’s Finding of No Significant Impact (“FONSI”) dated October 3, 2017 which states that “[t]he proposed Renewal does not include any revisions to the mining and operations plan or the addition of any new mining areas. For the

proposed five year Renewal period, coal operations are assumed to continue at the recent historical pace and existing facilities will be used for ongoing operations.” Exhibit 7.

The final document was OSM’s Responses to Public Comments where the agency states that “[t]he future operation or cessation of NGS is uncertain at this time and therefore does not necessitate the submission of an application for revision of the mine permit at this time, and does not affect SMCRA reclamation requirements or the reclamation plan.” Exhibit 8 at 5.

II. SMCRA’S CITIZEN SUIT PROVISIONS.

SMCRA’s citizen suit provisions provide that,

any person having an interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this chapter— [...] against any other person who is alleged to be in violation of any rule, regulation, order or permit issued pursuant to this subchapter.

30 U.S.C. §1270(a)(1). Person under the Act means “an individual, partnership, association, society, joint stock company, firm, company, corporation, or other business organization.” *Id.* §1291(19). Prior to bringing an action, the plaintiff must give sixty days notice in writing to “any alleged violator.” 30 U.S.C. §1270(b)(1)(A).

This letter fulfills To’ Nizhoni Ani’s notice requirements.

III. REQUIREMENTS OF OSM'S REGULATIONS.

OSM regulations set forward minimum requirements for permit applications for surface coal mine and reclamation obligations. 30 C.F.R. §778 *et seq.* Among other things, in submission of a permit application a permittee or permit applicant is required to:

1. Swear or affirm, under oath and in writing, that all information provided in an application is accurate and complete.
2. After approval of an application, but before OSM issues a permit, the permittee or permit applicant must update, correct, or indicate that no change has occurred in the information previously submitted.
3. State the anticipated or actual starting and termination date of each phase of the surface coal mining and reclamation operation and the anticipated number of acres of land to be affected during each phase of mining over the life of the mine.

Id. §§778.9(b) & (d), 778.17(a); *accord*, §§777.11(a)(1) & (c), 750.12(c)(1) (applying these requirements to Indian Country).² SMCRA provides civil and criminal penalties for making false statements to the regulator. *See* 30 U.S.C. §§1268(a) & (g).

² *See also*, 30 U.S.C. §1257(b)(8) (all applications “shall contain” “the anticipated or actual starting and termination date of each phase of the surface coal mining and reclamation operation and the anticipated number of acres of land to be affected during each phase of mining over the life of the mine.”).

Additionally, OSM regulation governing renewal of operating permits state that “[i]f an application for renewal includes any proposed revisions to the permit, those revisions must be identified and processed in accordance with § 774.13 of this part.” 30 C.F.R. §775.14(b)(4). Part 774.13 governs permit revisions and, unlike the regulations for permit renewals, contain the following requirement: “no application for a permit revision shall be approved unless the application demonstrates and the regulatory authority finds that reclamation as required by the Act and the regulatory program can be accomplished...” *Id.* §775.14.3

IV. PEABODY’S VIOLATIONS OF OSM’S REGULATIONS.

A. Peabody Withheld Information Regarding Permanent Cessation of Coal Production.

Peabody violated OSM’s regulations by withholding information from OSM regarding changes or revisions to Peabody’s Kayenta Coal Mine operation in the form of permanent cessation of coal production at the Kayenta Mine on or before December 22, 2019. Peabody became aware of such changes on or before April 7, 2017 and during the pendency of Peabody’s five (5) year permit renewal application before OSM. After becoming aware of these changes, Peabody actively prepared final reclamation cost estimates and actively sought to subrogate the company’s liability for mine reclamation costs prior to OSM’s approval of Peabody’s renewal permit on October 3, 2017.

At no time prior to OSM's approval of Peabody's permit renewal application on October 3, 2017 did Peabody seek to update or correct its permit renewal application in an effort to disclose to OSM that Peabody would cease coal production during the permit renewal period which ends on July 6, 2020.

B. Peabody Withheld Information Regarding Final Reclamation Costs.

Peabody violated OSM's regulations by withholding information from OSM regarding Peabody's final reclamation costs. Peabody estimated final reclamation costs for the mine to be \$187.9 million dollars. These costs were based on a Final Reclamation Cost Valuation prepared by Golder Associates. The Final Reclamation Cost Valuation was released to the Navajo Participants on January 13, 2017.

At no time prior to OSM's approval of Peabody's permit renewal application on October 3, 2017 did Peabody seek to update or correct its permit renewal application in an effort to disclose to OSM the Final Reclamation Cost Valuation prepared by Golder Associates.

C. Peabody's Violations Are Ongoing and Have Not Been Corrected.

By knowingly withholding information regarding changes or revisions to Peabody's operation from OSM in the form of permanent cessation of coal production at the Kayenta Mine on or before December 22, 2019 and/or Peabody's Final Reclamation Cost Valuation, Peabody led OSM to incorrectly determine that "[t]he proposed Renewal does not include any revisions to the mining and operations plan or the addition of any

new mining areas. For the proposed five year Renewal period, coal operations are assumed to continue at the recent historical pace and existing facilities will be used for ongoing operations.” Exhibit 7.

By knowingly withholding information regarding changes or revisions in Peabody’s operation from OSM, Peabody avoided: 1) processing of Peabody’s cessation of coal production in accordance with 30 C.F.R. § 774.13; and, 2) the legal requirement and regulatory determination that permit applications containing any revisions “demonstrate[] and the regulatory authority find[] that reclamation as required by [SMCRA] and the regulatory program can be accomplished,” 30 C.F.R. §775.14. Specifically, Peabody avoided submission of an updated or revised reclamation plan, including an updated reclamation schedule, necessary to address permanent cessation of coal production on or before December 22, 2019.

Upon information and belief, Peabody’s violations are ongoing and have not been corrected.

IV. CONCLUSION.

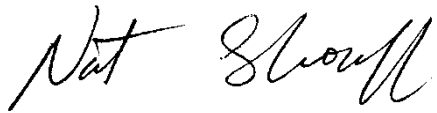
As set forward herein, Peabody violated OSM’s regulations by failing to disclose changes or revisions to Peabody’s Kayenta Coal Mine operation in the form of permanent cessation of coal production at the Kayenta Mine on or before December 22, 2019 and/or Peabody’s Final Reclamation Cost Valuation. Specifically, Peabody violated OSM’s regulations: 1) by knowingly failing to make statements, representations, or certifications

in its permit renewal application that coal production would cease at the Kayenta Mine on or before December 22, 2019; 2) failing to update or correct its permit renewal application before OSM when Peabody became aware of cessation of operations; and, 3) failing to disclose to OSM Peabody's Final Reclamation Cost Valuation and the information contained therein when it became available to Peabody during the pendency of Peabody's permit renewal application.

By failing to disclose changes or revisions in its mining operations in the form of cessation of mining activities and/or Peabody's Final Reclamation Cost Valuation during the pendency of Peabody's permit renewal application before OSM, Peabody avoided a determination from OSM that reclamation as required by SMCRA could be accomplished by Peabody as detailed in the permit application materials submitted to OSM on February 26, 2015 upon permanent cessation of coal production on or before December 29, 2019.

As relief To Nizhoni Ani intends to seek vacatur of the October 3, 2017 permit renewal as well as the imposition of all of penalties available under SMCRA.

Please direct any future communications or questions regarding this notice letter to the undersigned attorneys.



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2/13/19

Date



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2/13/19

Date

Copy: David Bernhardt, Acting U.S. Secretary of the Department of Interior
Glenda H. Owens, Acting Director of OSM
Dave Barry, OSM Western Regional Director
Mychal Yellowman, OSM Indian Program Branch
Amy McGregor, OSM Kayenta Mine Team Leader
Art Kleven, U.S. Solicitor's Office
Ethyl Branch, Attorney General of the Navajo Nation
Ahktar Zaman, Director of the Navajo Nation Division of Natural
Resources Minerals Department

EXHIBIT LIST

- Exhibit 1 Peabody's Permit Renewal Application, February 26, 2015
- Exhibit 2 OSM's Administrative Delay Letter, June 29, 2015
- Exhibit 3 SRP News Release, "Owners Vote on Navajo Coal Plant Lease," February 13, 2017
- Exhibit 4 Peabody's Notice to Navajo Participants of Responsibility for the Funding and Payment of Liabilities under the CSA and Other Related Documents, April 3, 2017
- Exhibit 5 OSM's Approval of Permit Renewal Application, October 3, 2017
- Exhibit 6 OSM's Findings and Approval of Permit Renewal, October 3, 2017
- Exhibit 7 OSM's Finding of No Significant Impact, October 3, 2017
- Exhibit 8 OSM's Responses to Public Comments, October 3, 2017