STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION

IN THE MATTER OF THE TRIENNIAL REVIEW
OF PROPOSED AMENDMENTS FOR INTERSTATE
AND INTRASTATE SURFACE WATERS, 20.6.4 NMAC WQCC No. 14-05(R)

PEABODY ENERGY'S
NOTICE OF INTENT TO PRESENT REBUTTAL TECHNICAL TESTIMONY

Peabody Energy (Peabody) hereby submits, pursuant to the Procedural Order, its Notice of Intent to Present Rebuttal Technical Testimony in support of its application to amend portions of Title 20, Chapter 6, Part 4 of the New Mexico Administrative Code ("NMAC"). The rebuttal testimony of the Peabody witnesses is filed in complete and narrative form in the attached exhibits to this filing.

1. Identify the person for whom the witness(es) will testify.

   Peabody Energy

2. Identify each technical witness the person intends to present and state the qualifications of that witness including a description of their educational and work background.

   Steven P. Canton
   Vice President/Senior Principal and Certified Senior Ecologist
   GEI Consultants, Inc.

   John Cochran
   Manager of Environmental Hydrology
   Peabody Energy

   Copies of Mr. Canton's and Mr. Cochran's resumes were submitted with Peabody's December 2014 *Notice of Intent to Present Technical Testimony*. Peabody reserves the right to offer additional technical witnesses if warranted, in response to the direct and rebuttal testimony of other parties in this proceeding.

3. Attach the full testimony of each technical witness.

   A copy of Mr. Canton's and Mr. Cochran's rebuttal testimony is attached to this notice.

4. State the anticipated duration of the direct testimony of each technical witness.

Peabody anticipates that Mr. Canton's direct testimony should take approximately 30 minutes to complete; Mr. Cochran's direct testimony should take approximately 30 minutes to complete.

5. Include the text of any recommended modification to the proposed regulatory change.

The proposed regulatory change to Section 20.6.4.J (selenium criteria) remains as presented in Peabody's *Proposed Changes to 20.6.4 NMAC* that was submitted to the New Mexico Water Quality Control Commission (Commission) on September 30, 2014.

However, Peabody wishes to modify its pond-related proposed amendments offered in its December 2014 *Notice of Intent* and *Pre-filed Testimony of Mr. John Cochran* to clarify and narrowly tailor these proposed amendments. Peabody now believes that there is a much simpler way to achieve the common sense outcome of relieving—to the extent possible consistent with the Clean Water Act—all who would be burdened by the time-consuming, expensive and unnecessary UAA process as the means of avoiding application of human contact standards to features destined for use as livestock watering ponds both during and following mine reclamation. The simpler way would be to unambiguously state that certain artificial waters, which both the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) explicitly recognize are not waters of the United States, would not need to meet human contact standards. The language of the proposed amendment as now revised mirrors language EPA and the Corps used in their proposed rule on what constitutes a water of the United States. *See* 79 Fed. Reg. 22188, 22218 and 22263. Peabody's modified proposal is as follows:

20.6.4.900 CRITERIA APPLICABLE TO EXISTING, DESIGNATED OR ATTAINABLE USES UNLESS OTHERWISE SPECIFIED IN 20.6.4.97 THROUGH 20.6.4.899 NMAC.

D. Primary Contact: the monthly geometric mean of *E. coli* bacteria of 126 cfu/100 mL and single sample of 410 cfu/100 mL and pH within the range of 6.6 to 9.0 apply to this use. Notwithstanding the listing of designated uses for perennial or intermittent unclassified waters, it is not the intent of this regulation to require artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, or settling basins to meet primary human contact criteria.

E. Secondary Contact: the monthly geometric mean of *E. coli* bacteria of 548 cfu/100 mL and single sample of 2507 cfu/100 mL apply to this use. Notwithstanding the listing of designated uses for ephemeral, unclassified

waters, it is not the intent of this regulation to require artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, or settling basins to meet secondary human contact criteria.

Peabody hereby reserves the right to offer additional technical witnesses if warranted, in response to the submissions of any other parties in this proceeding.

Respectfully Submitted,

MODRALL, SPERLING, ROEHL,
HARRIS & SISK, P.A.

By:_____
Stuart R. Butzier

Attorneys for Peabody Energy
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Peabody Energy's Notice of Intent To Present Technicial Testimony was served on the following persons by regular mail, or, where an e-mail address is specified, by e-mail, this 13th day of February, 2015:

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STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION

IN THE MATTER OF THE TRIENNIAL REVIEW
OF PROPOSED AMENDMENTS FOR INTERSTATE
AND INTRASTATE SURFACE WATERS, 20.6.4 NMAC WQCC No. 14-05(R)

REBUTTAL TESTIMONY OF MR. STEVEN P. CANTON,
A WITNESS ON BEHALF OF PEABODY ENERGY

I am submitting this rebuttal testimony on behalf of Peabody Energy (Peabody) in response to the direct testimony presented by Amigos Bravos on December 12th, 2014. Amigos Bravos opposed Peabody's proposal to modify the wildlife habitat selenium criterion from 5µg/L total recoverable selenium to 50 µg/L dissolved selenium.

Amigos Bravos states that the wildlife habitat use and criteria are meant to protect all wildlife, not just livestock. The direct testimony submitted by Peabody on December 12th, 2014 has already addressed this concern and discusses studies that examined the effects of elevated selenium on ruminant wildlife species, small mammals, and birds. A detailed description of these studies and their outcomes is provided in the direct testimony. These studies indicate that a selenium standard of 50 µg/L would be protective of the wildlife habitat use based on the available scientific data on the effects of selenium on wildlife.

Amigos Bravos also concludes that because there are other New Mexico criteria where wildlife habitat is substantially more protective than the livestock watering criteria (using mercury, residual chlorine, total recoverable cyanide, and DDT as examples) that wildlife habitat use is more sensitive than livestock watering uses. The commission and EPA have found this to be true for some contaminants, but this does not necessarily mean it should apply to all of them. Peabody's proposal is based on the available scientific data for selenium, and should not be evaluated based on its consistency with prior unrelated Commission and EPA actions.

STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION

IN THE MATTER OF THE TRIENNIAL REVIEW OF PROPOSED AMENDMENTS FOR INTERSTATE AND INTRASTATE SURFACE WATERS, 20.6.4 NMAC **WQCC No. 14-05(R)**

AFFIDAVIT OF STEVEN P. CANTON

STATE OF COLORADO)
) ss.
COUNTY OF DENVER)

I, Steven P. Canton being first duly sworn, depose and state that I am the individual whose prepared Rebuttal Testimony accompanies this Affidavit, and that said Rebuttal Testimony is true and correct to the best of my knowledge and belief.

Steven P. Canton

SUBSCRIBED AND SWORN TO before me this 13th day of February 2015.

Sharon Korver
Notary Public

SHARON KORVER NOTARY PUBLIC STATE OF COLORADO

My Commission Expires: April 30, 2015.

STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION

IN THE MATTER OF THE TRIENNIAL REVIEW
OF PROPOSED AMENDMENTS FOR INTERSTATE
AND INTRASTATE SURFACE WATERS, 20.6.4 NMAC WQCC No. 14-05(R)

REBUTTAL TESTIMONY OF MR. JOHN COCHRAN,
A WITNESS ON BEHALF OF PEABODY ENERGY

I am submitting this rebuttal testimony on behalf of Peabody Energy (Peabody) to modify its pond-related amendments made in my December, 2014 *Pre-filed Testimony of Mr. John Cochran*, and in response to the direct testimony presented by Amigos Bravos on December 12, 2014.

I. PEABODY'S PROPOSED PONDS AMENDMENTS, AS FURTHER REFINED

Peabody wishes to further modify its pond-related amendments made in its December, 2014 *Notice of Intent* and *Pre-filed Testimony of Mr. John Cochran* (December Proposal) to better clarify and narrowly tailor the proposed amendments. In the December Proposal, Peabody incorporated subparagraph language into its amendment to categorize water in three ways depending on whether they do or do not constitute "waters of the United States" for Clean Water Act (CWA) purposes, and/or "waters of the State" as defined in the Water Quality Control Commission's (Commission) surface water regulations at 20.6.4.7(S)(5) NMAC. Peabody's primary purpose for doing so was to clarify when a Use Attainability Analysis (UAA) will be required, in light of the Surface Water Quality Bureau (SWQB) 2008 Guidance Memorandum (*see* Cochran Direct, Exhibit 5). Peabody attempted to make it clear that features deemed to be "waters of the United States" would only be relieved of the requirement to meet human contact standards pursuant to appropriate findings of a Use Attainability Analysis (UAA), but that a UAA would not be needed if the feature did not constitute "waters of the United States."

Peabody now believes that there is a much simpler way to achieve the common sense outcome of relieving—to the extent possible consistent with the CWA—all who would be burdened by the expensive, time-consuming and unnecessary UAA process as the means of avoiding application of human contact standards to features destined for use as livestock

watering ponds both during and following mine reclamation. The simpler way would be to unambiguously state that certain artificial waters, which both the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) explicitly recognize are not waters of the United States, would not need to meet human contact standards regardless of whether the waters might be waters of the State. The language of the proposed amendment as now revised mirrors language EPA and the Corps (collectively "Federal Agencies") used in discussing their proposed rule on what constitutes a water of the United States. *See* 79 Fed. Reg. 22188. Peabody's modified proposal is as follows:

> **20.6.4.900 CRITERIA APPLICABLE TO EXISTING, DESIGNATED OR ATTAINABLE USES UNLESS OTHERWISE SPECIFIED IN 20.6.4.97 THROUGH 20.6.4.899 NMAC.**
>
> > **D. Primary Contact:** the monthly geometric mean of *E. coli* bacteria of 126 cfu/100 mL and single sample of 410 cfu/100 mL and pH within the range of 6.6 to 9.0 apply to this use. Notwithstanding the listing of designated uses for perennial or intermittent unclassified waters, it is not the intent of this regulation to require artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, or settling basins to meet primary human contact criteria.
> >
> > **E. Secondary Contact:** the monthly geometric mean of *E. coli* bacteria of 548 cfu/100 mL and single sample of 2507 cfu/100 mL apply to this use. Notwithstanding the listing of designated uses for ephemeral, unclassified waters, it is not the intent of this regulation to require artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, or settling basins to meet secondary human contact criteria.

Peabody believes that these further refinements of its proposed amendment will improve clarity and promote efficiency in a narrowly tailored fashion. I will explain Peabody's reasoning in this testimony.

II. DISCUSSION SUPPORTING THE PROPOSED PONDS AMENDMENTS

Peabody's amended proposal makes effective use of the Federal Agencies' language discussing their jointly proposed rule defining "waters of the United States." In doing so, Peabody's proposed amendment, if adopted by the WQCC, will be immune from criticism by EPA when it reviews the WQCC's coming round of Triennial Review amendments.

On the subject of what constitutes a water of the United States, the Federal Agencies jointly state that the following would be excluded:

- Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.
- Ditches that do not contribute flow either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or impoundment.
- The following features:
  - Artificially irrigated areas that would revert to upland should application of irrigation water to the area cease;
  - *Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing*;
  - Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;
  - Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;
  - Water-filled depressions created incidental to construction activity;
  - Groundwater, including groundwater drained through subsurface drainage systems; and
  - Gullies and rills and non-wetland swales.

79 Fed. Reg. 22188, 22218 and 22263 (April 21, 2014) (emphasis added).

Peabody employs the italicized language above in its further revised proposal to avoid the application of human contact standards to the described features because many artificial ponds on mining, industrial and farming lands are not used and never were intended to be used for recreation, making human contact standards inappropriate. Peabody, along with other mining companies, uses impoundments to treat or contain water at its surface coal mining operations in New Mexico. At Peabody's mine sites, surface owners have specifically requested Peabody to leave as many ponds as possible after active mining to enhance the land for the approved post-mining use of livestock grazing. Even if an artificial pond on a mining site is categorized as a waste treatment system during active mining and reclamation (and hence exempt from water quality standards), the waste treatment exclusion will likely expire when the pond is turned over to the prospective landowner for providing a viable source of water for livestock and wildlife.

At the time of Phase III final bond release, which under NMSA 1978, § 69-25A-19 will be approximately ten years after mining operations have ceased, Peabody will be expected to

make a demonstration that these ponds and impoundments are meeting applicable water quality standards, and the demonstration will be subject to approval by the Coal Mining Reclamation Bureau (Coal Bureau) at the Mining and Minerals Division (MMD). MMD's Coal Bureau likely will interpret the SWQB 2008 Guidance Memorandum as requiring that Peabody's ponds meet human contact standards. As such, there is a real threat that these artificial ponds would need to meet human contact standards post-mining regardless of the fact that they have been regulated in the past to meet the designated uses of livestock and wildlife watering and will be used solely for such purposes in the future.

As explained below, Peabody's amended proposal addresses the regulatory issues entities like Peabody face. It provides clarity for agencies, stakeholders and the regulated public by formally exempting these categories of water from meeting human contact standards. The proposed amendment avoids undue burdens and costs, by not requiring an unnecessary and costly UAA for waters that are not waters of the United States.

a. Peabody's amended proposal improves clarity for regulators, stakeholders and the regulated public.

By specifically making human contact standards inapplicable to certain categories of waters that the Federal Agencies themselves recognize are not waters of the United States, the further revised proposal achieves the twin goals of retaining Commission jurisdiction where it may currently exist, while also allowing entities like Peabody to operate with surety and promote cost effective and eco-friendly land use in the post-mining phases of operations. For example, without Peabody's proposed amendment, mining companies like Peabody may be incentivized to remove those impoundments as part of their reclamation programs and then eliminate any possibility of future opportunistic sources of water, specifically requested by the landowners, that could have been used to support the intended post-mining land uses. As it stands today, if it is determined by the regulatory authority at the time of Phase III final bond release that the permanent impoundments constructed after implementing the approved reclamation plans do not meet human contact standards, all water collected in the impoundments will need to be removed, the landscape will need to be completely re-disturbed and reclaimed, again, and a minimum of 10 years will need to pass before an application for Phase III final bond release can be submitted. Under this scenario, the time period for reclamation of the mined land is more than doubled, and

features no opportunistic sources of water that is not only preferred by landowners, but also specifically requested by them in writing. Instead, with regulatory assurance, mining entities like Peabody can implement reclamation plans that have been approved by MMD more efficiently to produce reclaimed landscapes that support the approved post-mining land uses and ultimately benefit the landowner.

Additionally, Peabody adopted the terminology used by the Federal Agencies in their proposed rule because the language is easily understood. In clarifying the list of waters not subject to CWA jurisdiction, the Federal Agencies were careful and deliberate in their choice of language. Thus, for example, they did not include "puddles" in the list of waters not considered jurisdictional not because puddles are considered jurisdictional, but "because puddles is not a sufficiently precise hydrologic term or a hydrologic feature capable of being easily understood." 79 Fed. Reg. 22188, 22218 (April 21, 2014) (internal quotations omitted). The Federal Agencies note that "[b]ecause of the lack of common understanding and precision inherent in the term "puddles," the agencies determined that *adding puddles would be contrary to the agencies' stated goals of increased clarity, predictability, and certainty.*" *Id.* (emphasis added). In contrast, the Federal Agencies used the terms in the proposed rule because they have a common identifiable understanding and are not susceptible to misconception. Therefore, by adopting the federal language in Peabody's amended proposal, the Commission gives the regulated public guidance and understanding. This expectation mirrors one of the principal goals of SMCRA, which is to reclaim surface mined lands in order to support post-mining land uses approved by the regulatory agency.

b. Peabody's amended proposal promotes efficiency.

Requiring Peabody and other entities to go through the UAA process for the listed categories, unconnected to waters of the U.S. or groundwater, is unnecessary considering NMED's stated view in the last Triennial Review that livestock ponds do not pose a real regulatory issue and the Federal Agencies proposal to formally relinquish jurisdiction. In their proposed rule, the Federal Agencies "have by longstanding practice generally considered . . . artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing . . . not to be waters of the United States." 79 Fed. Reg. 22188, 22218 (April 21, 2014). By formally excluding these

categories of water that are in practice not considered to be waters of the United States, the Federal Agencies expect to reduce documentation requirements and the time it takes to make approved jurisdiction determinations. 79 Fed. Reg. 22188, 22194 (April 21, 2014).

Equally, by exempting the same categories of water from human contact standards, New Mexico retains jurisdiction over artificial livestock ponds without wasting resources on unneeded case-specific analyses. As New Mexico's sole rulemaking authority for adoption of surface water quality standards, the Commission is uniquely situated to adopt a sensible regulatory framework that prevents crowding the Commission's docket with UAA-related proceedings. If Peabody's proposal is not adopted, the Commission risks drowning NMED in paperwork and unnecessary site visits merely because of the absence of any clear guidance.

In addition, federal and state uniformity facilitates inter-agency cooperation to improve the regulatory process overall. In their proposed rule, the Federal Agencies highlight that "[t]he EPA and the Corps are working in partnership with states to develop new tools and resources that have the potential to improve precision of desk based jurisdictional determinations at lower cost and improved speed than the existing primarily field-based approaches." 79 Fed. Reg. 22188, 22195 (April 21, 2014). The Federal Agencies note that "[i]n the normal course of making jurisdictional determinations, information derived from field observation is not always required in cases where a desktop analysis furnishes sufficient information to make the requisite findings." *Id.* (internal quotations omitted). Consequently, by mirroring the proposed federal rule, the Federal Agencies and NMED are in a better position to prioritize their goals and therefore save time and money by focusing on identifying emerging technologies or approaches for waters that do pose a regulatory issue.

c. Peabody's amended proposal is narrowly tailored.

Peabody's amended proposal is specifically targeted to only make human contact standards inapplicable to artificial lakes or ponds that are not waters of the United States, which have been created by excavating and/or diking dry land and used exclusively for stock watering, irrigation, settling basins or rice growing. If the water at issue is a natural lake or pond, or alternatively, is used for a category other than those listed, even if used in conjunction with a permissive use, then Peabody agrees that the water likely will be subject to human contact

standards. Importantly, Peabody's amended proposal does not in any way challenge any state or federal agency's jurisdiction. Rather, it carefully delineates those waters both the Federal Agencies and, Peabody believes, New Mexico consider unnecessary for regulatory review.

Further, Peabody's amended proposal does not replicate the entire cohort of waters the Federal Agencies have proposed. Instead, Peabody seeks to exempt from human contact standards only a small subset of those waters the Federal Agencies deem not to be waters of the United States. In essence, Peabody has narrowly tailored its proposal to address the regulatory uncertainties it faces at its mines.

d. Amigos Bravos' jurisdiction and identification concerns are meritless.

Amigos Bravos states that Peabody's December Proposal is contrary to the CWA, and proposes to remove uses, primary and secondary contact, without conducting a UAA as required by 40 C.F.R. § 131.10(j). Peabody's proposal as previously revised already addressed that concern, and the proposed amendment represented in this rebuttal testimony even more clearly identifyies the waters that would not require a UAA in order to make human contact standards inapplicable.

In addition, Amigos Bravos states that Peabody's proposal is deficient as it did not identify the specific water bodies it has proposed for downgrading. Peabody did not identify water bodies proposed for downgrade as this proposed revision is not intended for specific water bodies, but rather a class of water bodies that are not waters of the U.S, and may include artificial lakes used by the mining, agriculture and ranching sectors.

e. Conclusion.

For these reasons, and for other related points I may make in my live testimony, I strongly urge the Commission to end a period of uncomfortable uncertainty that has existed since the SWQB's 2008 memorandum, and adopt Peabody's proposal. I thank the Commission for the opportunity to present this rebuttal testimony, and for considering it carefully in the course of this proceeding.

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STATE OF NEW MEXICO

BEFORE THE WATER QUALITY CONTROL COMMISSION

IN THE MATTER OF THE TRIENNIAL REVIEW OF STANDARDS FOR INTERSTATE AND INTRASTATE SURFACE WATERS, 20.6.4 NMAC **WQCC No. 14-05(R)**

AFFIDAVIT OF JOHN N. COCHRAN

STATE OF ARIZONA)
) ss.
COUNTY OF COCONINO)

I, John N. Cochran, being first duly sworn, depose and state that I am the individual whose prepared Direct Testimony accompanies this Affidavit, and that said Direct Testimony is true and correct to the best of my knowledge and belief.

John N. Cochran

SUBSCRIBED AND SWORN TO before me this 13th day of February 2015.

Notary Public

My Commission Expires: 07/09/2017

STEPHEN SEDILLO
Notary Public - State of Arizona
COCONINO COUNTY
My Commission Expires
July 9, 2017