

EXHIBIT F

**Peabody's Comments on NNEPA's Draft Responses to Comments on NNEPA-issued
Draft Part 71 Permit and Draft Statement of Basis (November 2009)**



Charlene Nelsen
Program Supervisor
Navajo Air Quality Program
P.O. Box 529
Fort Defiance, AZ 86504

November 3, 2009

Re: Title V Operating Permit #NN-OP-07; Renewal Application

Dear Ms Nelsen:

Peabody Western Coal Company (PWCC) thanks the Navajo Nation Environmental Protection Agency (NNEPA) for the opportunity to review the draft document entitled "Responses to Comments on the Draft Part 71 Permit Renewal to Operate Peabody Western Coal Company – Black Mesa Complex" (hereinafter "Draft RTC"). We sincerely appreciate NNEPA's diligent efforts in processing that draft permit renewal, for thoroughly reviewing our various comments on that draft permit, and for thoughtfully explaining your comments in the subject document. PWCC continues, however, to have substantive concerns about three issues raised in our earlier comments, and we respectfully request NNEPA to further consider our position with respect to each. PWCC also has a few editorial comments on the current draft of the permit, as explained herein.

UNAUTHORIZED INCLUSION OF NNOPR REQUIREMENTS

"On October 15, 2004, EPA granted NNEPA's request for full delegation of authority to administer the Part 71 federal operating permits program for [PWCC's Black Mesa Complex and] certain [other] Part 71 sources." 69 Fed. Reg. 67,578 (Nov. 18, 2004) (emphasis added). NNEPA has now noticed a draft Part 71 federal operating permit for PWCC's Black Mesa Complex. The Part 71 regulations require that draft permit to contain "the permit conditions required under [40 C.F.R.] § 71.6." 40 C.F.R. § 71.11(a)(4). On the other hand, the Part 71 regulations *neither authorize nor require* that draft permit to contain any permit conditions required under the Navajo Nation Operating Permit Regulations (NNOPR). In short, there is something fundamentally inappropriate at this time with a draft Part 71 federal operating permit that contains permit conditions required under the NNOPR.

1. The Delegation Agreement Repeatedly Recognizes that Requirements under NNOPR Are Not Part of PWCC's Part 71 Federal Operating Permit.

EPA has "fully delegate[ed] the authority to administer the federal operating permits program as set forth under 40 CFR Part 71 and in the [Delegation] Agreement." 69 Fed. Reg. 67,578. That Agreement makes clear that requirements of the NNOPR are not part of a Part 71 federal operating permit. For example, in discussing NNEPA's obligation to incorporate all Part 71 requirements into each Part 71 permit, the Delegation Agreement states:

Although not a requirement of the Delegation Agreement and not part of the administration of the federal Part 71 program, NNEPA intends to supplement the requirements in § 71.11(b) with the requirements in the Navajo Nation Operating Permit Regulation § 401(B).

Delegation Agreement between U.S. Environmental Protection Agency Region IX and Navajo Nation Environmental Protection Agency, "Delegation of Authority to Administer a Part 71 Operating Permits Program," 5 (Oct. 15, 2004) (emphases added) (hereinafter "Delegation Agreement"). EPA's statement could not be more clear, i.e., requirements in NNOPR § 401(B) are not part of the federal Part 71 program and permits issued thereunder.

Furthermore, in discussing NNEPA's obligation to conduct all administrative proceedings in accordance with 40 C.F.R. § 71.11, the Delegation Agreement states:

Although not a requirement of the Delegation Agreement and not part of the administration of the federal Part 71 program, NNEPA intends to supplement the requirements in § 71.11 concerning administrative permit proceedings with the requirements in the Navajo Nation Operating Permit Regulation.

Id. (emphases added). Again, EPA's position is unequivocal, i.e., NNOPR requirements concerning administrative permit proceedings are not part of the federal Part 71 program and permits issued thereunder.

Finally, in discussing NNEPA's obligations involving revisions and renewal of Part 71 federal operating permits, the Delegation Agreement states:

Although not a requirement of this Delegation Agreement and not part of the administration of the federal Part 71 program, NNEPA intends to supplement the requirements in Part 71 with the requirements in the Navajo Nation Operating Permit Regulation.

Id. at 7 (emphases added). Thus, the Delegation Agreement repeatedly emphasizes the legal status of the NNOPR program with respect to the Part 71 federal program, i.e., the NNOPR program and its requirements are not part of the Part 71 federal program and permits issued thereunder.

2. EPA Rulemaking Is Necessary Before Current NNOPR Requirements May Be Added to a Part 71 Federal Operating Permit.

Indeed, EPA rulemaking is necessary to authorize NNEPA's addition of NNOPR requirements to the Part 71 federal operating permit for Black Mesa Complex. In particular, 40 C.F.R. § 71.4(f) provides:

The Administrator ... may adopt, through rulemaking, portions of a ... Tribal permit program in combination with provisions of this part to administer a Federal program ... in Indian country in substitution of or addition to the Federal program otherwise required by this part.

In this instance, the Delegation Agreement and the Federal Register notice thereof do not constitute that requisite rulemaking. In sum, not only the Delegation Agreement but also the Part 71 rules themselves make clear that NNEPA has no authority to add any requirements of the NNOPR to PWCC's Part 71 federal operating permit.

3. The Scopes of NNEPA's Alleged Federal and Tribal Authorities Are Constrained by Law.

In its draft Response to Comments, NNEPA explains why it believes that it has both federal authority and tribal authority to apply NNOPR requirements to the Part 71 permit for Black Mesa Complex. Draft RTC at 10-12. PWCC respectfully submits that NNEPA has misconstrued the scopes of those authorities with respect to its delegated administration of the Part 71 federal operating permit program.

a. Federal Authority

PWCC does not dispute NNEPA's assertion that "there is a federal requirement for tribes to have their own authorities to administer the Part 71 program." Draft RTC at 10 (citing 40 C.F.R. § 71.10(a)). Nor does PWCC dispute EPA's finding that NNEPA "has adequate authority ... to administer the Part 71 federal permitting program." 69 Fed Reg. 67,578. The problem, however, is that NNEPA is attempting to exercise authority far beyond what is appropriate and necessary to administer the Part 71 federal operating permit program.

In particular, Part 71 does not require a delegate agency to have in place its (the delegate agency's) own operating permit regulations. Indeed, the basic concept of delegation of a federal program is that the delegate agency is authorized to administer the federal regulations of that program. In effect, as a delegate agency for the Part 71 federal operating permit program, NNEPA is authorized by EPA at this time to administer the regulations within Part 71 ... period.

EPA Region IX could not delegate to NNEPA more authority under Title V than the Part 71 regulations allow EPA to delegate. As explained above, the Part 71 federal operating permit program to be administered by NNEPA cannot contain portions of the NNOPR unless EPA has authorized, through rulemaking, the addition of those NNOPR regulations as part of the Part 71 federal program for sources on the Navajo Reservation. See 40 C.F.R. § 71.4(f). Simply put, the requisite federal rulemaking to authorize addition of NNOPR requirements to Part 71 federal operating permits for sources on the Navajo Reservation has not occurred.

The prevailing legal status of the NNOPR with respect to the Part 71 federal operating permit program is why the Delegation Agreement repeatedly refers to NNEPA's intent "to supplement the requirements in Part 71 with the requirements in the Navajo Nation Operating Permit Regulations." That is, as "supplements" rather than "substitutions" or "additions," any NNOPR requirements contained in the Part 71 federal operating permit for Black Mesa Complex are something other than Part 71 federal program requirements.

b. Tribal Authority

EPA has acknowledged "a legal opinion from [the Navajo Nation attorney general] that the Navajo Nation Air Pollution Prevention and Control Act and the Navajo Nation Air Quality Control Program Operating Permit regulations provide [NNEPA] adequate authority to carry out all aspects of the delegated program." 69 Fed. Reg. 67,578 (emphasis added). Authority "to carry out all aspects" of the Part 71 federal operating permit program falls short of the authority that NNEPA is attempting to exercise, i.e., the authority to add NNOPR requirements to requirements of the Part 71 federal operating permit program.

PWCC does not dispute NNEPA's tribal authority, i.e., that the NNOPR authorize NNEPA to take a variety of actions with respect to Part 71 federal operating permits and to require certain NNOPR provisions in Part 71 federal operating permits. RTC at 11-12. But, the existence of tribal authority with respect to Part 71 permits does not negate the need for EPA's approval of the exercise of such tribal authority with respect to Part 71 federal operating permits. Unless and until EPA specifically approves, through rulemaking, the NNEPA-proposed additions of NNOPR provisions to a Title V permit, those NNOPR requirements (1) are applicable only under tribal law, (2) are not federally enforceable under the Clean Air Act, and thus (3) have no place within a Part 71 federal operating permit.

4. PWCC Objects to Issuance of a "Hybrid" Permit

The existing draft permit for PWCC that NNEPA has noticed for public comment consists of a "hybrid" permit. That is, it consists not only of (1) a Part 71 federal operating permit incorporating all applicable Part 71 requirements, but also of (2) portions of a tribal operating permit incorporating certain NNOPR requirements. That Part 71 federal operating permit is enforceable under the federal Clean Air Act; the NNOPR requirements are not.

As a general matter, PWCC is neither challenging any specific NNOPR requirements at this time, nor does PWCC challenge NNEPA's tribal authority to issue so-called "Part H" permits at this time. We simply object to NNEPA's unauthorized and ill-advised incorporation of NNOPR requirements within the Part 71 federal operating permit for Black Mesa Complex.

Our objection to NNEPA's proposed action is based solely on legal and administrative considerations. With a single operating permit containing requirements from two separate operating permit regulations, questions about the applicability of a particular requirement and its federal and tribal enforceability are inevitable. With two different sets of administrative procedures applying to a single operating permit, sorting out the appropriate procedure for a particular issue could be a daunting task each time such an issue arises. In short, NNEPA's merger of two operating permit regulations under different authorities for the purpose of issuing a single operating permit establishes a "slippery slope" -- with decisions about which substantive and procedural requirements apply to a particular permit requirement becoming progressively more difficult with the passage of time.

Because the instant proceeding only involves renewal of a CAA Title V permit for Black Mesa Complex, PWCC has a reasonable expectation of being issued a Part 71 federal operating permit, and nothing more. For that reason, PWCC respectfully declines the incorporation of any NNOPR requirements within the pending renewal of the Part 71 federal operating permit for Black Mesa Complex.

PSD APPLICABILITY AND POTENTIAL TO EMIT

NNEPA states that it prefers to keep the PTE of PM information in the Statement of Basis (SoB) because SoBs are used in part to document the applicability or nonapplicability of a variety of CAA requirements, including NSPS, NESHAP, PSD, etc. The SoB is a description of the source that provides the basis for making applicability determinations for other CAA requirements, including PSD. PM is a "regulated NSR pollutant" as that term is defined in EPA's PSD regulations at 40 CFR 52.21. Therefore, NNEPA believes that the SoB should provide an estimate of what the emissions are, to ensure all applicability determinations are correct. Draft RTC at 26-27.

PWCC can find no statutory or regulatory basis that supports NNEPA's "belief" regarding the need to include estimates of emissions in a Title V statement of basis, especially "to ensure all applicability determinations are correct." Indeed, EPA's "White Paper for Streamlined Development of Part 70 Permit Applications," July 10, 1995, takes a far different view of the role that emission estimates play in Title V permitting. In particular, EPA states that emission estimates may be needed for determining Title V applicability, but, in general, Part 70 requires the application to "describe" emissions of all regulated air pollutants for each emissions unit." 40 C.F.R. § 70.5(c). Part 71 likewise requires the application only to "describe" the emissions. 40 C.F.R. § 71.5(c). As EPA explained, "part 70 does not require detailed emissions inventory building." There is no reason why Part 71 would be any different.

PWCC also notes that EPA Region IX, in commenting on another NNEPA draft statement of basis for a Part 71 federal operating permit, recommended deletion of language regarding the treatment of fugitive emissions for PSD applicability purposes and regarding the impression that NNEPA was making a PSD applicability determination for a past modification at the facility. Region IX explained that since the facility was not making a physical change or change in method of operation at the time of the Part 71 permitting, there was no need to address the issue of PSD applicability in that statement of basis for a Title V permit. "EPA Region 9 Comments: Proposed Part 71 Permit Renewal, Four Corners Steam Electric Station," ¶¶ 5-6 (date unknown).

In short, counter to NNEPA's assertion, the Statement of Basis for a Title V permit has no need to include potential to emit values for PM or for any other regulated air pollutant. That purpose of a Title V Statement of Basis is most definitely not "to ensure all applicability determinations are correct." PWCC therefore respectfully requests that presentation of PTE for Black Mesa Complex be deleted from the subject Statement of Basis.

INCLUSION OF FUGITIVE EMISSIONS IN THE PTE

Another reason that independently supports deletion of the PTE presentation in the Statement of Basis is because the PTE calculation does not correctly "count" fugitive particulate matter emissions. NNEPA explains that it "has added a note under the PTE table in Section 1.1 of the SoB stating that fugitive emissions are considered in determining whether this source is a Part 71 major stationary source because this source is subject to NSPS, Subpart Y, which was in effect prior to August 7, 1980." Draft RTC at 27.

Threshold applicability determinations for major stationary sources must include fugitive emissions only if the source category at issue has been "listed" by EPA in accordance with section 302(j) of the Clean Air Act. 40 C.F.R. § 71.2 (definition of "major source"). The stationary source in question, the Black Mesa Complex, is a surface coal mine, a category of sources that has not been "listed" under § 302(j). However, "nested" within the surface mine at Black Mesa Complex are several coal preparation plants. By virtue of the NSPS for coal preparation plants having been promulgated prior to August 7, 1980, that particular source category – coal preparation plants – is listed under § 302(j).

Therefore, in the case of a surface coal mine, the PTE for that source category is calculated as the sum of the stack (non-fugitive) emissions from the mining activities and the stack and fugitive emissions from the coal preparation activities. See, e.g., attachment to letter from Cheryl Newton, EPA Region V, to Janet McCabe, Indiana Dep't of Environmental Management, of Mar. 6, 2003.

Calculation of the PTE for Black Mesa Complex in the NNEPA's Statement of Basis did not follow that protocol for when fugitive emissions are included in Title V applicability determination. In particular, that NNEPA calculation of PTE includes estimated PM10 fugitive emissions from the Overland Conveyor System, Bulldozing and Unpaved Roads. Those particular "emissions units" do not belong to the source category of coal preparation but rather to the source category of surface mining, for which fugitive emissions are not included in any Title V applicability determination.

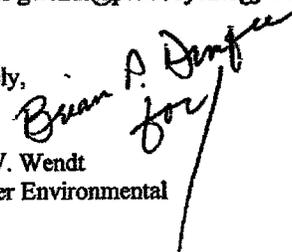
In summary, PWCC has demonstrated that a source's PTE is not required to be included in its Title V Statement of Basis, and indeed the PTE provided by NNEPA for Black Mesa Complex is very much in error. For those reasons, we respectfully request deletion of the PTE table and associated erroneous discussion from the Statement of Basis for Black Mesa Complex.

COMMENTS ON FINAL DRAFT OF PERMIT

PWCC also has two minor editorial comments on the current permit draft. First, on Page 3 Section II.C, the title should be "Monitoring Requirements." Second, on Page 11, Section II.C.1, PWCC requests NNEPA add the following sentence at the end of the paragraph: "If any emission unit is not operating at the time the observer arrives, the emission survey is not required for that emission unit during that week." A similar statement was included in the previous 5-year permit. The reason it was included is because of PWCC's operating situation at the Black Mesa Complex. Due to varying coal quality and blending requirements, all emission units are rarely operating at the same time. They operate when needed to satisfy coal quality demands.

PWCC appreciates this opportunity to provide comments on the current draft of the permit and associated documents. We look forward to finalizing this process, and are committed to working with NNEPA to accomplish this. If you have any questions, please contact me at (928) 677-5130 or gwendt@peabodyenergy.com.

Sincerely,


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Manager Environmental

cc:

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