IN RE PEABODY WESTERN COAL COMPANY

CAA Appeal No. 12-01

ORDER DENYING PETITION FOR REVIEW

Decided January 25, 2013

Syllabus

The Navajo Nation Environmental Protection Agency ("NNEPA"), acting with authority delegated by the U.S. Environmental Protection Agency ("EPA") in 2004 pursuant to EPA regulations at 40 C.F.R. part 71, issued a federal Clean Air Act Title V operating permit to Peabody Western Coal Company ("Peabody") governing air emissions from Peabody's mining operation at the Kayenta Complex in Arizona. Peabody appealed NNEPA's issuance of that permit to the Environmental Appeals Board. The petition for review was denied on March 13, 2012, and the permit became final. Peabody now petitions the Board for a ruling that NNEPA's August 31, 2012 administrative amendment of the permit to correct its issuance and expiration dates was contrary to law, raising for the first time the argument that the delegation provisions of the part 71 regulations, finalized in 1996, exceeded EPA's statutory authority under the Clean Air Act.

Held: The Board denies the petition for review.

- The part 71 regulations governing Title V permits and their appeals to the Board require the petitioner to show that the issues being raised on appeal were previously raised no later than the close of the public comment period on the draft permit, unless it was "impracticable" to do so. Thus, the regulations both prescribe a prerequisite for permit appeals and limit the time period in which that prerequisite must be completed. Peabody failed to raise this issue in prior proceedings for this permit and has failed to demonstrate that it timely raised its challenge to the legality of the part 71 regulations.

- The scope of this appeal is limited to the administrative decision that Peabody is challenging, NNEPA's August 31, 2012 decision to update the issuance and expiration dates and contact information for the Kayenta Complex permit by administrative amendment. Peabody's challenge – the legality of the delegation provisions of the part 71 regulations that underlay NNEPA's authority to issue the Kayenta Complex permit – far exceeds the scope of that minor ministerial decision by NNEPA.

- The Board has established a strong presumption against review of underlying Agency regulations in the context of an administrative appeal. This presumption reflects and is consistent with Congress' intent in enacting the judicial review statutory provisions, e.g., section 307(b)(1) of the Clean Air Act, which limit the time and forum for challenges to Agency regulations. As the

Board has explained repeatedly, the regulations that govern the Board's review of permits authorize the Board to review conditions of the permit, not the statutes or regulations that are the predicates for such conditions.

- Although there may be "an exceptional case" where an "extremely compelling argument" would persuade the Board to consider review of Agency regulations, Peabody's arguments that part 71 has nationwide applicability do not present such circumstances. Peabody has failed to demonstrate compelling circumstances that overcome the presumption against Board review of the part 71 regulations underlying the Kayenta Complex permit issued by NNEPA.

Before Environmental Appeals Judges Leslye M. Fraser, Catherine R. McCabe, and Kathie A. Stein.

Opinion of the Board by Judge McCabe:

I. *STATEMENT OF THE CASE*

The Navajo Nation Environmental Protection Agency ("NNEPA"), acting with authority delegated in 2004 by the U.S. Environmental Protection Agency ("EPA" or "Agency") pursuant to EPA regulations at 40 C.F.R. part 71, issued a federal Clean Air Act Title V operating permit to Peabody Western Coal Company governing air emissions from Peabody's mining operation at the Kayenta Complex in Arizona. Peabody challenged NNEPA's issuance of that permit on appeal to the Environmental Appeals Board. The petition for review was denied on March 13, 2012, and the permit became final. Peabody now petitions the Board for a ruling that NNEPA's August 31, 2012 administrative amendment of the permit to correct its issuance and expiration dates was contrary to law, raising for the first time the argument that the delegation provisions of the part 71 regulations, finalized in 1996, exceeded EPA's statutory authority under the Clean Air Act.

II. *ISSUES ON APPEAL*

The Petition raises the following issues for the Board to resolve:

1. Has Peabody demonstrated that its challenge to the legality of the part 71 regulations is timely?

2. Has Peabody demonstrated that its challenge to the legality of the part 71 regulations is within the appropriate scope of Board review of NNEPA's administrative amendment of the Kayenta Complex permit under 40 C.F.R. § 71.11(*l*)?

3. Has Peabody demonstrated compelling circumstances that overcome the presumption against Board review of the underlying part 71 regulations?

III. *STATUTORY AND REGULATORY FRAMEWORK*

A. *Title V of the Clean Air Act*

Title V of the Clean Air Act requires that certain sources of air pollution, including major stationary sources, obtain comprehensive operating permits to assure compliance with the requirements of the Act. CAA §§ 502(a), 504(a), 42 U.S.C. §§ 7661a(a), 7661c(a). The Act contemplates that these operating programs will be administered primarily by state and local air pollution control agencies. CAA § 502(b), 42 U.S.C. § 7661a(b). Each state is required to develop and submit for EPA's approval a Title V program under state or local law or under an interstate compact. CAA § 502(d), 42 U.S.C. § 7661a(d). Congress also authorized EPA to treat Indian tribes as states. CAA § 301(d)(1), 42 U.S.C. § 7601(d)(1); *see also* 40 C.F.R. pt. 49 (EPA implementing regulations). If a state, local, or eligible tribal government does not obtain EPA approval of an authorized Title V program within a time deadline specified in the statute, EPA is required to administer a federal Title V program in that jurisdiction. CAA § 502(d)(3), 42 U.S.C. § 7661a(d)(3).

B. *Part 70 Regulations*

EPA promulgated its minimum requirements for authorizing state, local or tribal Title V programs in 1992. *See* Operating Permit Program, 57 Fed. Reg. 32,250, 32,295 (July 21, 1992) (codified at 40 C.F.R. pt. 70); *see also* 40 C.F.R. pt. 49 (authorizing EPA to treat Indian tribes as states in 1998). Upon approval, the state or local air pollution control agency is "authorized" to implement its approved part 70 permit program under its own state or local laws, in lieu of federal law.

C. *Part 71 Regulations*

EPA promulgated regulations governing federal Title V programs in 1996.[1] *See* Federal Operating Permits Program, 61 Fed. Reg. 34,202 (July 1, 1996) (codified at 40 C.F.R. pt. 71). The part 71 regulations allow EPA to delegate, in whole or in part, its authority to administer the federal Title V program to a state, eligi-

[1] Clean Air Act section 307(b) limits opportunities to challenge regulations issued under the Act to petitions filed in the Court of Appeals for the District of Columbia Circuit within sixty days following promulgation of the final regulation. CAA § 307(b), 42 U.S.C. § 7607(b)(1).

ble tribe, local, or other agency. 40 C.F.R. § 71.10(a). To obtain this delegated authority, the state, tribe, local, or other agency must demonstrate to EPA that its laws provide adequate authority to carry out all aspects of the delegated program and enter into a "Delegation of Authority Agreement" with EPA that sets forth the terms and the conditions of the delegation. *Id.* Under part 71, the state, the tribe, or other air pollution control agency administers the federal program with "delegated" federal authority from EPA.

D. *The Part 71 Permitting Process*

Part 71 prescribes procedures for permit applications, preparing draft permits, and issuing final permits, as well as for filing petitions for review of final permit decisions. *See generally id.* pt. 71. Part 71 also contains provisions for public notice of and public participation in federal permitting actions. *Id.* § 71.11(d) (public notice of permit actions and public comment period); *id.* § 71.11(e) (public comments and requests for public hearings); *id.* § 71.11(f) (public hearings).

Once a draft permit is prepared, the permit issuer provides a public comment period. This requirement to provide a public comment period is the primary vehicle for public participation under part 71. Section 71.11(e) provides that "any interested person may submit written comments on the draft permit and may request a public hearing, if no public hearing has already been scheduled." *Id.* § 71.11(e). "At the time any final permit decision is issued, the permitting authority shall issue a response to comments" raised during the public comment period. *Id.* § 71.11(j); *see, e.g., In re Russell City Energy Ctr., LLC*, 15 E.A.D. 1, 59-60 (EAB 2010) (explaining that the permit issuer must provide an adequate response to comments).

The regulations that govern appeals of part 71 permit decisions require petitioners to have participated in the public review process either by filing written comments or by participating in a public hearing. 40 C.F.R. § 71.11(*l*)(1). If a petitioner did not participate in the public review process, he or she only may appeal issues pertaining to changes from the draft to the final permit. *Id.*; *e.g.*, *In re Envotech, LP*, 6 E.A.D. 260, 266-67 (EAB 1996) (construing part 124 permit appeal provisions) (quoting *In re Beckman Prod. Servs.*, 5 E.A.D. 10, 16 (EAB 1994)).

The petition for review must demonstrate that any issues or arguments raised on appeal were raised previously during the public comment period (including the public hearing) on the draft permit, or were not reasonably foreseeable at that time. 40 C.F.R. § 71.11(*l*)(1); *e.g.*, *In re Shell Offshore, Inc.*, 13 E.A.D.

357, 394 n.55 (EAB 2007); *In re Hecla Mining Co.*, 13 E.A.D. 216, 223 (EAB 2006); *In re Westborough*, 10 E.A.D. 297, 304 (EAB 2002).

E. *Modification and Amendment of Part 71 Permits*

Once a permit has been issued, it may be revised by administrative amendment (40 C.F.R. § 71.7(d)), by minor modification (*id.* §§ 71.7(e)(1) and 71.7(e)(2)), or by significant modification (*id.* § 71.7(e)(3)). Significant permit modifications must meet all the requirements of part 71 as they apply to permit issuance and renewal, including the public participation requirements. In contrast, administrative amendments and minor modifications to part 71 permits consist of sufficiently minor revisions that public participation is not required prior to making the changes. *Id.* § 71.11; *see also id.* § 71.7(a)(1)(ii) (exempting minor modifications from public participation requirements); *id.* § 71.7(d)(3) (providing administrative amendment procedures).

Administrative amendments may include, for example, correction of typographical errors, changes in mailing address, ownership of the facility, contact persons, and persons who have assigned responsibilities under the permit. 40 C.F.R. § 71.7(d)(1); *see also* 61 Fed. Reg. at 34,222. Administrative amendments may be appealed to the Board under 40 C.F.R. § 71.11(*l*), which provides that the thirty-day period for appeal of an administrative amendment begins upon the effective date of such action to revise the permit.

IV. *PROCEDURAL AND FACTUAL HISTORY OF PERMIT PROCEEDINGS*

EPA Region 9 ("Region") issued a final Title V operating permit to Peabody Western Coal Company ("Peabody") governing its mining operation at the Kayenta Mine, Black Mesa Complex[2] in Arizona in 2004. *See In re Peabody W. Coal Co.*, 12 E.A.D. 22 (EAB 2005) [hereinafter *Peabody I*] (denying review of Region's decision not to include potential to emit limit on technical grounds and denying review of permit monitoring, recordkeeping, and recording requirements for failure to adequately explain why they were unreasonably burdensome).

In 2004, NNEPA obtained delegated authority from EPA under the part 71 regulations to administer the federal Title V operating permits program within the Navajo Nation's boundaries. Announcement of the Delegation of the Title V Permitting Program, Consistent with Federal Operating Permit Programs to NNEPA,

[2] The facility is now known as the "Kayenta Complex" and for consistency is referred to as such throughout the remainder of this decision.

69 Fed. Reg. 67,578, 67,578 (Nov. 18, 2004) (citing Delegation of Authority Agreement between U.S. EPA Region IX and NNEPA (Oct. 15, 2004)).

Thereafter, NNEPA assumed delegated responsibility for the continued administration of the federal Title V permit for the Kayenta Complex. When Peabody applied to renew that permit in 2008, NNEPA proposed the renewed permit, sought public comment, and issued the permit on December 7, 2009. Peabody submitted comments on the draft renewal permit and filed a petition with this Board to challenge that permit, objecting primarily to NNEPA's inclusion of citations in the permit to Navajo Nation regulations. NNEPA moved for a voluntary remand to "reopen and revise the permit." *In re Peabody W. Coal Co.*, 14 E.A.D. 712, 713 (EAB 2010) [hereinafter *Peabody II*]. The Board granted NNEPA's motion and dismissed the petition for review without prejudice. *Id.* at 14.

Following the *Peabody II* remand, NNEPA prepared a revised draft permit and again sought public comment. *In re Peabody W. Coal Co.*, 15 E.A.D. 524 (EAB 2012) [hereinafter *Peabody III*], *appeals docketed*, No. 12-73395 (9th Cir. Nov. 22, 2012) and No. 12-1423 (D.C. Cir. Nov. 19, 2012). Peabody again submitted written comments. *Id.* at 6. NNEPA issued a final revised permit on April 14, 2011.[3] *Id.* On May 16, 2011, Peabody filed a petition for review by the Board, again objecting primarily to NNEPA's inclusion of citations to Navajo Nation regulations in the permit. *Id.* Specifically, Peabody challenged ten conditions of the final revised permit on the grounds that the challenged conditions included citations to Navajo Nation regulations (in addition to citations to the applicable federal regulations at 40 C.F.R. part 71) and that NNEPA used Navajo Nation procedures to process the permit. *Id.* at 3, 6. The Board rejected Peabody's challenges and denied this petition for review on March 13, 2012. *Id.* at 15.

Following the Board's decision in *Peabody III*, on August 31, 2012, NNEPA issued an "administrative amendment" to the Kayenta Complex permit, explaining to Peabody that the amendment was needed to correct the permit issuance and expiration dates to April 14, 2011, and April 14, 2016, respectively, as well as to update contact information.[4] *See* Letter from Stephen B. Etsitty, Executive Director, NNEPA, to G. Bradley Brown, President, Peabody W. Coal Co., *Re: Administrative Permit Amendment to Clean Air Act Title V Operating Permit for Peabody Western Coal Co. – Kayenta Complex; NN-OP 08-010* (Aug. 31, 2012) (Petition Ex. B).

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[3] The April 11, 2011 permit still contained the same issuance and expiration dates (December 7, 2009, and December 7, 2014, respectively) of the original renewal permit issued by NNEPA on December 7, 2009.

[4] As explained in footnote 3 above, NNEPA had not updated the permit's issuance and expiration dates when it revised the permit following the voluntary remand in *Peabody II*.

On October 1, 2012, Peabody filed this petition for review [hereinafter *Peabody IV*], raising for the first time the argument that EPA exceeded its statutory authority when it promulgated the provisions of part 71 that allowed delegation of EPA's authority to issue and administer Title V permits to states and Indian tribes. NNEPA and EPA filed a Joint Motion for Summary Disposition of Peabody Western Coal Company's Petition for Review ("Joint Motion for Summary Disposition") on November 27, 2012. NNEPA and EPA argue that Peabody does not have standing under 40 C.F.R. § 71.11(*l*) to raise the issue of the legality of the underlying part 71 regulations in this appeal of the administrative amendments to the permit and that, in any event, the Board does not have jurisdiction to decide this issue. Peabody filed a response to the Joint Motion for Summary Disposition on December 12, 2012.

V. *STANDARD OF REVIEW*

The Board will grant a petition for review of a permit issued under part 71 if the petitioner has demonstrated that the permitting authority's decision was based on a clearly erroneous finding of fact or conclusion of law, or that the decision involves an exercise of discretion or important policy consideration that warrants review. 40 C.F.R. § 71.11(*l*)(1); *see also Peabody III*, 15 E.A.D. at 528-29; *Peabody I*, 12 E.A.D. 22, 32-33 (EAB 2005). The Board grants such review "only sparingly," and "most permit conditions should be finally determined at the Regional level." Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *see also Peabody I*, 12 E.A.D. at 32-33 & n.26 (discussing and applying part 124 standard of review to part 71 proceeding).

VI. *ANALYSIS*

The issue that Peabody raises on this appeal is fundamentally a legal challenge to the part 71 regulations, which were first proposed in 1995 and finalized in 1996. Peabody contends that EPA lacked statutory authority under the Clean Air Act for the part 71 regulations that allow EPA to delegate its authority to issue federal Title V operating permits to states and Indian tribes. Petition at 2.[5] This is a new argument that Peabody has not raised previously, either in a timely challenge to the 1996 regulations (or their subsequent revisions, as applicable), a timely challenge to EPA's 2004 decision to delegate Title V permitting authority

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[5] Specifically, Peabody's Petition states that NNEPA's August 31, 2012 administrative amendment to the Kayenta Title V permit was "based on a conclusion of law which is clearly erroneous * * * [i]n particular * * * that NNEPA has erroneously concluded that EPA was authorized under the Clean Air Act to delegate to NNEPA the authority to issue and now to amend Peabody's permit." Petition at 2.

for the Navajo Nation to NNEPA, or in Peabody's prior administrative challenges to NNEPA's issuance of the Kayenta Complex operating permit.

For the reasons explained below, the Board concludes that Peabody's argument on this appeal is untimely and beyond the legitimate scope of this appeal of a minor administrative amendment to a permit. Moreover, Peabody has failed to provide any compelling justification for the Board to depart from its well-established practice of declining to review challenges to agency regulations in the context of permit appeals to the Board. Congress provided clear mechanisms and deadlines for challenging agency regulations in the Clean Air Act, and the time for challenging the part 71 regulations has long since passed.

A. *Peabody's Challenge to the Legality of the Regulations Underlying Its Title V Permit is Untimely*

The regulations governing Title V permits require that all objections to a permit be raised no later than the close of the public comment period on the draft permit:

> All persons, including applicants, who believe any condition of a draft permit is inappropriate or that the permitting authority's initial decision to deny an application, terminate a permit, or prepare a draft permit is inappropriate, must raise all reasonably ascertainable issues and submit all reasonably ascertainable arguments supporting their position by the close of the public comment period (including any public hearing).

40 C.F.R. § 71.11(g). Further, the regulations governing appeal of Title V permits to the Board require petitioners to demonstrate that "any issues raised were raised during the public comment period * * * unless the petitioner demonstrates that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period." *Id.* § 71.11(*l*)(1).

As described above in Section IV, NNEPA provided two opportunities for public comment on the Title V renewal permit for the Kayenta Complex, and Peabody took advantage of both those opportunities to submit written comments. *Supra* Section IV (discussing *Peabody II* and *Peabody III*); *see also Peabody III*, 15 E.A.D. at 528; Petition of Peabody W. Coal Co. at 6, *Peabody II*. Peabody did not raise its objection to EPA's statutory authority to delegate administration of the Title V program to NNEPA during either of those public comment periods. *See* Joint Motion for Summary Disposition at 10. Peabody does not contend on this appeal that it was "impracticable" to raise its objections to the legality of the part 71 regulations during the public comment period or that the grounds for its objection arose after the public comment period.

Peabody further failed to raise its objection to the legality of the regulations when it filed two previous petitions with the Board challenging NNEPA's issuance of the renewal permit for the Kayenta Complex. *See generally supra* Section IV (discussing *Peabody II* and *Peabody III*). Altogether, Peabody failed to raise this objection in at least four prior submissions to NNEPA and to this Agency (two sets of public comments and two appeal petitions) regarding the NNEPA-issued Title V permit.[6] Peabody offers no explanation for its failure to raise this issue at an earlier time in the permitting process.

It is too late for Peabody to raise this issue now. The public comment period and the thirty-day limit of 40 C.F.R. § 71.11(*l*)(1) for appealing the permit to the Board have long since expired. The Board repeatedly has made clear that it will not review objections to permits that are not timely made in the appropriate appeal proceedings. *See In re Carlota Copper Co.*, 11 E.A.D. 692, 735 (EAB 2004) (declining to review issues raised in second petition related to discharges from abandoned mine sites when they could have been raised in first petition), *vacated and remanded on other grounds sub nom. Friends of Pinto Creek v. U.S. EPA*, 504 F.3d 1007 (9th Cir. 2007);[7] *see also In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 7 (EAB 2000);[8] *cf. In re Upper Blackstone Water Pollution Abatement Dist.*, 15 E.A.D. 297, 302 (EAB 2011) (citing cases where the Board has declined to consider issues raised in later briefs that were not raised in the initial petition for review), *aff'd* 690 F.3d 9 (1st Cir. 2012), *petition for cert. filed*, 81 U.S.L.W. 3394 (U.S. Dec. 21, 2012) (No. 12-797); *In re Dominion Energy Brayton Point, LLC*, 13 E.A.D. 407, 439 (EAB 2007) (same), *appeal rendered moot by settlement*, No. 07-2059 (4th Cir. Dec. 17, 2007).

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[6] Additionally, there is no indication that Peabody disputed NNEPA's authority to issue in February 2007 an administrative amendment to the Kayenta Complex permit. The Board also notes that at the time Peabody submitted its permit renewal application in 2009, there was no indication that Peabody acquiesced to NNEPA's delegated authority under protest or otherwise believed the delegation was improper.

[7] Although the Ninth Circuit determined that one claim, which had been dismissed due to comment defects, was timely raised and should not have been deemed forfeited, the scope of the Ninth Circuit's review did not consider the timeliness of claims raised for the first time in the second petition that could have been raised in the first petition. *See* 504 F.3d at 1016.

[8] As the Board noted in *Knauf*, "[t]he only exception to the limitation on the scope of review as established by the remand order is for issues pertaining to permit conditions that were modified during the remand period. Such permit conditions may qualify for review because the conditions have not been previously subject to the appeal process." 9 E.A.D. at 7.

B. *Peabody's Challenge is Beyond the Appropriate Scope of Review of NNEPA's Administrative Amendment of the Kayenta Complex Title V Permit*

Under the regulations governing this matter, the scope of this appeal is necessarily limited to the administrative decision that Peabody is challenging:

> Within 30 days after a final permit decision has been issued, any person who filed comments on the draft permit or participated in the public hearing may petition the Environmental Appeals Board to review any condition of the permit *decision*.

40 C.F.R. § 71.11(*l*)(1) (emphasis added).[9] The permit *decision* challenged here is NNEPA's August 31, 2012 decision to update the issuance and expiration dates and contact information for the Kayenta Complex permit by administrative amendment. Peabody's challenge in this Petition far exceeds the scope of that minor ministerial decision by NNEPA.

While Peabody recites that it is challenging the new issuance and expiration dates of the permit, it raises no substantive objections to those date changes. Petitioner's Response to Joint Motion for Summary Disposition at 5; *see generally* Petition. Instead, Peabody's submissions to the Board make it abundantly clear that the sole issue raised on this appeal is its challenge to the legality of the delegation provisions of the part 71 regulations that underlay NNEPA's authority to issue the Kayenta Complex permit.[10]

NNEPA's administrative amendment of the permit to make minor administrative changes does not provide a new opportunity for Peabody to raise a completely new legal argument to challenge the regulations underlying NNEPA's authority to administer the permit. While the regulations allow appeals to the Board of administrative amendments, the scope of such appeals is necessarily limited to the changes made to the permit. NNEPA's administrative amendment of the Kayenta Complex permit to change its issuance and expiration dates has no effect on the issue Peabody seeks to raise. That is not a new issue raised for the first

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[9] As explained above in Section III of this decision, no public comment period was required for the administrative amendment that is the subject of this appeal, but 40 C.F.R. § 71.11(*l*)(1) authorizes challenges to administrative amendments to be brought before the Board within thirty days of the effective date of the action to revise the permit.

[10] *See* Petitioner's Response to Joint Motion for Summary Disposition at 8 ("We understand, and our Petition makes clear, that the core issue underlying that fundamental question [of whether NNEPA has authority under the [Clean Air Act] to make those permit revisions] is whether the [Clean Air Act] authorizes EPA to delegate its statutory authority to administer a Title V federal permit program, i.e., whether the delegation provisions of part 71 are lawful.").

time by the administrative amendment but, as discussed above, a fundamental issue that could and should have been raised much earlier in the process. The Board will not allow petitioners to use the excuse of minor administrative amendments to raise untimely new challenges to permits that already have been appealed and finally decided. Such a practice would be inconsistent with the regulations and would disrupt the orderly process for permit appeals and the finality of permits.

In any event, permit appeals are not the appropriate procedural context for asserting challenges to underlying agency regulations, as explained below.

C. *Peabody Has Not Demonstrated Compelling Circumstances That Would Warrant Board Review of the Underlying Part 71 Regulations*

It is well established that the Board generally will not consider challenges to underlying Agency regulations in the context of permit appeals. *In re Circle T Feedlot, Inc.*, 14 E.A.D. 653, 677 (EAB 2010); *In re USGen New Eng., Inc.*, 11 E.A.D. 525, 555, 557-58 (EAB 2004) (National Pollution Discharge Elimination System ("NPDES") permit appeal), *appeal dismissed for lack of juris.*, 443 F.3d 12 (1st Cir. 2006); *In re City of Irving*, 10 E.A.D. 111, 123-25 (EAB 2001) (NPDES permit appeal), *petition for review denied sub nom. City of Abilene v. U.S. EPA*, 325 F.3d 657 (5th Cir. 2003); *In re Tondu Energy Co.*, 9 E.A.D. 710, 715-16 (EAB 2001) (Clean Air Act Prevention of Significant Deterioration permit appeal); *In re City of Moscow*, 10 E.A.D. 135, 160-61 (EAB 2001) (NPDES permit appeal); *In re City of Port St. Joe*, 7 E.A.D. 275, 286 (EAB 1997) (NPDES permit appeal); *In re City of Hollywood*, 5 E.A.D. 157, 175-76 (EAB 1994) (NPDES permit appeal); *In re Suckla Farms, Inc.*, 4 E.A.D. 686, 699 (EAB 1993) (Underground Injection Control permit appeal).

As the Board has explained repeatedly, the regulations that govern the Board's review of permits authorize the Board to review conditions of the permit, not the statutes or regulations that are the predicates for such conditions. *Circle T*, 14 E.A.D. at 677; *see* 40 C.F.R. § 71.11(*l*); *id.* § 124.19.[11] This fundamental rule has governed the Agency's permit appeal proceedings since prior to the establishment of the Board. *See*, *e.g.*, *In re Ford Motor Co.*, 3 E.A.D. 677, 682 n.2 (Adm'r 1991) ("Section 124.19 * * * is not intended to provide a forum for entertaining challenges to the validity of the applicable regulations.").

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[11] As the part 71 permit appeal procedures very closely parallel those of part 124, *see* Federal Operating Permits Program, 61 Fed. Reg. 34,202, 34,225 (July 1, 1996) (explaining that administrative review procedures in 40 C.F.R. § 71.11 are "based closely on the provisions of 40 CFR part 124"), the Board applies cases construing part 124 permit appeals as precedent for part 71 cases. *See Peabody II*, 14 E.A.D. at 717.

In declining to review challenges to underlying regulations in the context of administrative permit appeals, the Board has cited the judicial review provisions of underlying statutes, which define and limit litigants' opportunities to challenge the validity of agency regulations. *See USGen*, 11 E.A.D. at 557-58 (citing Clean Water Act section 509(b)); *see also City of Moscow*, 10 E.A.D. at 160-61 (stating that the Board will not review "the validity of prior, predicate regulatory decisions that are reviewable in other fora"). Section 307(b) of the Clean Air Act is one such provision that limits opportunities to challenge regulations issued under that Act to petitions filed within sixty days following promulgation of the final regulation. CAA § 307(b), 42 U.S.C. § 7607(b)(1).

Citing these statutory judicial review provisions, the Board and its predecessors have established a strong presumption against Board review of underlying Agency regulations in the context of administrative appeals of both permit decisions and administrative enforcement actions.[12] As the Board explained in *In re Echevarria*, 5 E.A.D. 626 (EAB 1994), a case involving an appeal of an administrative enforcement decision:

> This presumption against challenges to the validity of a regulation in enforcement proceedings is a rule of practicality. While it is true * * * that Clean Air Act § 307(b) only makes direct reference to preclusions of judicial review, not administrative review, the effect of this statutory provision is to make it unnecessary for an administrative agency to entertain as a matter of right a party's challenge to a rule subject to this statutory provision. Thus, ordinarily, the only way for a regulation that is subject to a preclusive review provision to be invalidated is by a court in accordance with the terms of the preclusive review provision.

5 E.A.D. at 634.

The presumption against review of underlying Agency regulations in the context of an administrative appeal reflects and is consistent with Congress' intent in enacting the judicial review statutory provisions that limit the time and forum for challenges to Agency regulations. The judicial review limitation of section 307(b)(1) of the Clean Air Act provides a clear indication of congressional

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[12] *See*, *e.g.*, *In re Coast Wood Preserving, Inc.*, 11 E.A.D. 59, 76 n.28 (EAB 2003) (enforcement action under Emergency Planning and Community Right-to-Know Act); *In re B.J. Carney Indus., Inc.*, 7 E.A.D. 171, 194 (EAB 1997) (enforcement action under Clean Water Act); *see also In re South Coast Chem., Inc.*, 2 E.A.D. 139, 145 (CJO 1986) (pre-Board, enforcement action under Federal Insecticide, Fungicide, and Rodenticide Act).

intent that any objections to the Agency's implementing regulations, including the part 71 regulations, be raised and resolved promptly following their promulgation. This statutory scheme provides certainty and finality for those who are subject to the Agency's regulations. Providing subsequent review of those regulations in case-by-case permit appeals would disturb the settled expectations of the regulated community that are essential to consistency in compliance and the orderly conduct of business. *See*, *e.g.*, *Natural Res. Def. Council v. Nuclear Regulatory Comm'n*, 666 F.2d 595, 602 (D.C. Cir. 1981) (purpose of time limits in statutory judicial review provisions is to "impart[] finality into the administrative process, thereby conserving administrative resources and protecting the reliance interests of regulatees who conform their conduct to the regulations").

The Board has recognized, however, that "[b]ecause the presumption [against review of Agency regulations] is a rule of practicality, there may be 'an exceptional case' where an 'extremely compelling argument' is made, such as where a regulatory decision has been effectively invalidated by a court but has yet to be formally repealed by the agency." *USGen*, 11 E.A.D. at 557. In practice, the only Agency case in which administrative review of an underlying regulation has been permitted is a pre-Board administrative enforcement case decided by the Administrator in 1980. In *In re 170 Alaska Placer Mines, More or Less*, 1 E.A.D. 616 (Adm'r 1980), the Administrator overruled an administrative enforcement decision that had relied on an NPDES procedural rule governing the burden of proof that the Administrator had determined was "wholly contrary to the [Clean Water Act's] allocation of the burden of persuasion." 1 E.A.D. at 626-27. The Administrator previously had rejected the procedural rule at issue, and the rule was revised after the appeal. *See USGen*, 11 E.A.D. at 557 n.53 (summarizing *170 Alaska Placer Mines*).

Peabody urges the Board to find that this appeal presents an "exceptional case" of "compelling circumstances" warranting review of the part 71 regulations because those regulations have nationwide significance and allegedly exceed the Agency's authority. Petitioner's Response to Joint Motion for Summary Disposition at 12 ("[T]he Board * * * has been presented with a broad-based, fundamental question of whether a major component of the Title V federal permit program has been unlawfully implemented since its inception."). Peabody cites as a "compelling circumstance" its legal argument that, contrary to the statutory language of other Clean Air Act programs that authorize program delegation, the language of Title V does not explicitly authorize the delegation of EPA's authority to issue Title V permits. Petition at 9-10. Therefore, Peabody argues, "the Agency acts unlawfully every time it purports to delegate its Part 71 authority to a tribe, and a violation of the Clean Air Act occurs every time a tribe acts under its supposed federal authority, as NNEPA did in issuing the subject permit amendment." *Id.* at 21.

The Board does not find Peabody's arguments for "compelling circumstances" persuasive. There is nothing unique or unusual about the nationwide applicability of the part 71 regulations. Indeed, most of the Agency's regulations have nationwide applicability. Similarly, it is not unusual for parties challenging the Agency's regulations to contend that they exceed the Agency's statutory authority. In fact, other parties filed a timely judicial petition to challenge certain provisions of the part 71 regulations on the ground that the Agency had exceeded its statutory authority. *See Michigan v. EPA*, 268 F.3d 1075 (D.C. Cir. 2001).[13] This is precisely the type of challenge that Congress decided should be brought and resolved in the Court of Appeals for the District of Columbia Circuit promptly after a regulation is issued. The Board does not agree that this common type of argument presents a "compelling circumstance" that would warrant departure from the strong presumption against the Board's review of underlying Agency regulations in the context of permit appeals.

The arguments presented by Peabody bear no resemblance to the "compelling circumstances" presented in *170 Alaska Placer Mines* or postulated in *USGen* (underlying Agency regulations had been rejected or invalidated but not yet formally repealed at the time the challenged administrative decision is made). There is no indication here that the Agency is reconsidering its 1996 decision to allow delegation of the Title V program to states and Indian tribes or its 2004 decision to delegate that authority to the NNEPA within the boundaries of the Navajo Nation. Peabody is alone, and very late, in raising the argument that these decisions were illegal. The finality of the part 71 regulations allowing delegation has been established for over sixteen years.

Accordingly, the Board declines to exercise its discretionary jurisdiction to review the legality of the regulations at 40 C.F.R. part 71 underlying NNEPA's issuance of the Title V permit for the Kayenta Complex and its August 31, 2012 administrative amendment of that permit.

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[13] In *Michigan v. EPA*, the State of Michigan argued, and the D.C. Circuit agreed, that the Agency exceeded its statutory authority in its 1999 amendments to the part 71 regulations by including areas where Indian country status was "in question" as within the scope of "Indian country" for purposes of the part 71 program delegation provisions. 268 F.3d at 1087 (vacating portion of 1999 rule revision authorizing treatment of lands for which EPA has deemed "Indian country" status to be "in question" as "Indian country" for purposes of implementing part 71 federal program in those areas); *see also* Federal Operating Permits Program, 64 Fed. Reg. 8247, 8262-63 (Feb. 19, 1999), amended by Revisions to Regulation Implementing the Federal Permits Program in Areas for Which Indian Country Status is in Question, 67 Fed. Reg. 38,328 (June 3, 2002) (amending 40 C.F.R. § 71.4(b) (part 71 programs for Indian country) and removing 40 C.F.R. § 71.9(p)).

VII. *CONCLUSIONS OF LAW*

For the reasons explained above, the Board concludes that:

1. Peabody has failed to demonstrate that its challenge to the legality of the part 71 regulations is timely;

2. Peabody has failed to demonstrate that its challenge to the legality of the part 71 regulations is within the appropriate scope of Board review under 40 C.F.R. § 71.11(*l*) of NNEPA's administrative amendment to the Kayenta Complex permit; and

3. Peabody has failed to demonstrate compelling circumstances that overcome the presumption against Board review of the part 71 regulations underlying the Kayenta Complex permit issued by NNEPA.

VIII. *ORDER*

Peabody's Petition for Review is denied.

So ordered.