

## **EXHIBIT G**

**Peabody's Petition for EAB Review of NNEPA-issued  
Part 71 Permit (Exhibits Omitted) (January 2010)**

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

APPEALS BOARD

In the Matter of:

Peabody Western Coal Company  
Title V Permit No. NN-OP 08-010

Title V Appeal No.

**PETITION FOR REVIEW**

Pursuant to 40 C.F.R. §§ 71.10(i) and 71.11(l), Peabody Western Coal Company ("Peabody") submits this Petition for Review of the Title V Operating Permit ("Permit") issued by the Navajo Nation Environmental Protection Agency ("NNEPA") under a delegation of authority from EPA Region IX for Peabody's Black Mesa Complex near Kayenta, Arizona. A copy of the Permit is attached as Exhibit A.

This Petition challenges NNEPA's inclusion of requirements from the Navajo Nation Operating Permit Regulations ("NNOPR") as conditions in the Permit. For the reasons explained herein, Peabody respectfully requests the Environmental Appeals Board ("Board") to order the removal of any conditions based on Tribal regulations from the four corners of the Federal Operating Permit for Black Mesa Complex.

## **I. INTRODUCTION**

Title V of the Clean Air Act as amended in 1990 ("Act"), 42 U.S.C. §§ 7661 *et seq.*, requires "major sources" of air pollutant emissions to have an operating permit. When a State or Tribe does not have an EPA-approved operating permit program that meets the requirements of 40 C.F.R. part 70 ("part 70 program"), EPA implements a Federal operating permit program under 40 C.F.R. part 71 ("part 71 program") for the affected area.

The Navajo Nation Environmental Protection Agency ("NNEPA") has developed Tribal operating permit regulations, i.e., the Navajo Nation Operating Permit Regulations ("NNOPR"). The NNOPR have not been approved by EPA under part 70. Although the EPA initially implemented a part 71 program for sources on the Navajo Reservation, the NNEPA has since been delegated authority by EPA to administer a part 71 Federal operating permit program.

Under that delegation, the NNEPA has issued a part 71 Federal operating permit for Peabody's Black Mesa Complex. Certain conditions in that Permit consist of requirements based not only on the part 71 regulations but also on the NNOPR. Other conditions in that Permit consist of requirements based solely on the NNOPR. In defending the Permit's inclusion of requirements based on its Tribal regulations, the NNEPA seems to be saying that delegation of part 71 authority to the Tribe has authorized the creation of federally enforceable conditions that are based on Navajo regulations.

Peabody, however, does not believe that delegation of part 71 authority to NNEPA grants federal approval of the NNOPR. Adding requirements from Tribal regulations as conditions in a Federal operating permit not only creates confusion as to which permit conditions are enforceable under the Clean Air Act but also establishes a dangerous precedent for future Federal operating permits that are issued by delegate Tribal agencies. Because it is unlawful for the

NNEPA to include requirements from its Tribal regulations as conditions in a part 71 Federal operating permit, Peabody requests the Board to require all such permit conditions based on the NNOPR to be removed from the part 71 Federal operating permit for Black Mesa Complex.

It is important to note that Peabody's request does not involve the removal of numerous conditions from the Permit. All of the conditions in question, except one, are independently authorized by part 71 regulations and must remain in the Permit as valid Federal requirements. For those conditions, only the citations of the NNOPR as authority for the conditions must be removed from the part 71 Federal permit. However, as explained further herein, the Permit's condition for collection of permit fees from Peabody is authorized solely by the NNOPR; there is no Federal counterpart for collecting part 71 permit fees in this particular instance. Accordingly, the Permit condition requiring collection of fees is the only NNOPR-based condition that must be removed in its entirety from the four corners of the part 71 permit for Black Mesa Complex.

Peabody also emphasizes that this appeal should not be construed as a challenge to the Navajo Nation's authority to develop, implement and enforce its own operating permit program. Rather, this appeal seeks the Board's assistance in clarifying the interface under the Clean Air Act between Tribal and Federal authorities related to operating permit programs.

## **II. BACKGROUND**

### **A. The Black Mesa Complex**

The Black Mesa Complex (Complex) is a surface coal mine located twenty miles southwest of Kayenta, Arizona and within the exterior boundaries of the Navajo Nation. The Complex includes surface mining operations, coal processing and preparation facilities, an overland conveyor system, several coal storage systems, several open storage piles, and various

storage tanks. Because the Complex is classified as a "major source," 42 U.S.C. § 7661(2), it must have an operating permit issued in accordance with title V. 42 U.S.C. § 7661a(a).

**B. Structure of Title V Operating Permit Programs**

Title V imposes on each State the duty to develop, administer and enforce an operating permit program that complies with the requirements of title V. Section 502(b) of the Act requires that EPA promulgate regulations containing provisions under which each State must develop an operating permit program and submit it to EPA for approval prior to its implementation. EPA has promulgated 40 C.F.R. part 70 which specifies the minimum elements to be contained in each State operating permit program. 57 Fed. Reg. 32,250 (July 21, 1992).

Sections 502(d)(3) and 502(i)(4) of the Act require EPA to promulgate a Federal operating permit program to apply whenever a State has failed to submit an approvable part 70 program to EPA or has been deficient in the administration or enforcement of its part 70 program. EPA has promulgated 40 C.F.R. part 71 which contains all of the requirements of the Federal operating permit program. 61 Fed. Reg. 34,202 (July 1, 1996). Issued under a Federal program, Part 71 permits contain only federally enforceable requirements. *Id.* at 34,221.

Unlike States, Indian Tribes are not required to develop and run their own part 70 operating permit programs, although EPA encourages them to do so. *See, e.g.*, 64 Fed. Reg. 8,248 (Feb. 19, 1999). EPA has revised its original part 71 Federal operating permit program in order for the Agency to administer and enforce that program within Indian country unless a part 70 Tribal program has been approved by EPA for the area. 40 C.F.R. § 71.4(b). The part 71 Federal operating permit program became effective in Indian country throughout the United States on March 22, 1999. 40 C.F.R. § 71.4(b)(2)

Part 71 provides that EPA may delegate, in whole or in part, responsibility for administering the part 71 program to a State or eligible Tribe. 40 C.F.R. § 71.10(a). The provisions governing delegation of part 71 program authority are prescribed at 40 C.F.R. § 71.10. A Delegation of Authority Agreement is required to set forth the terms and conditions of the delegation and to specify the provisions that the delegate agency is authorized to implement. 40 C.F.R. § 71.10(a). Once delegation becomes effective, the delegate agency is responsible, to the extent specified in the Agreement, for administering the part 71 program. *Id.* Delegation does not constitute approval of a State or Tribal operating permit program under part 70. 40 C.F.R. § 71.4(j); *see also* 61 Fed. Reg. 34,206.

#### **C. The Navajo Nation Operating Permit Regulations**

Under authority of the Navajo Nation Air Pollution Prevention and Control Act, 4 N.N.C. §§ 1134-40, NNEPA has developed the Navajo Nation Operating Permit Regulations, 4 NNR §§ 11-2H-101 *et seq.* The NNOPR are patterned after the requirements of 40 C.F.R. part 70. Indeed, the language of many provisions within the NNOPR is identical to the language of their part 70 counterparts because NNEPA intends to seek EPA's part 70 approval of the NNOPR. *See* October 15, 2004 Delegation of Authority Agreement ("Delegation Agreement"), attached as Exhibit B, at 2. However, because EPA has not yet approved the NNOPR as a part 70 Tribal operating permit program, major sources located on the Navajo Reservation are subject to the part 71 Federal operating permit program.

#### **D. NNEPA's Delegated Part 71 Authority**

On October 15, 2004 EPA Region IX delegated to the NNEPA authority to administer the part 71 Federal operating permit program for the Black Mesa Complex and certain other part 71 sources on the Navajo Reservation. 69 Fed. Reg. 67,578 (Nov. 18, 2004). The Delegation

Agreement between EPA and NNEPA sets forth terms and conditions of that delegation, consistent with the provisions of part 71. (Ex. B).

#### **E. The Permit at Issue**

The original part 71 Federal operating permit for Black Mesa Complex was issued by EPA Region IX and became effective on July 1, 2004. Under its delegated authority to administer a part 71 program, the NNEPA issued a renewal part 71 Federal operating permit for Black Mesa Complex on December 7, 2009. (Ex. A).

During the public comment period for the draft version of that renewal part 71 permit, Peabody objected to inclusion of requirements from the NNOPR as conditions in that part 71 permit. See August 2009 Peabody Comments, attached as Exhibit C, at 4-5. Peabody provided further comments on that issue to the NNEPA in November 2009. See November 2009 Peabody Comments, attached as Exhibit D, at 1-3. In response, the NNEPA asserted that particular statements within the Delegation Agreement authorized conditions in the NNEPA-issued part 71 permit to be based on NNOPR requirements. See NNEPA Responses to Comments, attached as Exhibit E, at 9-10. Peabody now petitions the Environmental Appeals Board to review NNEPA's practice of including specific requirements in the NNOPR as conditions in the renewed part 71 Federal operating permit for Black Mesa Complex.

#### **III. STANDING**

During the public comment period for the draft version of the Permit, Peabody timely submitted comments to NNEPA regarding the specific issue it now raises in this Petition for Review. (Ex. C). In accordance with 40 C.F.R. §§ 71.10(i) and 71.11(I)(1), Peabody has standing to appeal the Permit.

#### **IV. DISPUTED PERMIT CONDITIONS**

Peabody seeks the Board's review of the NNEPA's inclusion of requirements from the Navajo Nation Operating Permit Regulations in each of the following conditions in the Permit: III.B, IV.A, IV.C, IV.D, IV.E, IV.G, IV.H, IV.I, IV.K, IV.L and IV.Q.

#### **V. STATEMENT OF ISSUE SUPPORTING REVIEW**

The above-stated conditions within the NNEPA-issued part 71 Federal operating permit for Black Mesa Complex are based, in whole or in part, on requirements from the Navajo Nation Operating Permit Regulations. For the following reasons, Peabody believes, as a matter of law under the Clean Air Act, that any conditions based on NNOPR requirements have no lawful place in that title V permit.

##### **A. Delegation of part 71 authority does not confer EPA approval of Tribal operating permit regulations.**

In order for a Tribal agency to be delegated authority to administer the part 71 Federal operating permit program, EPA must conclude that the laws of the Indian Tribe provide "adequate authority to carry out all aspects of the delegated program." 40 C.F.R. § 71.10(a). A Tribe has "adequate authority to carry out all aspects of the delegated [part 71] program" when it has *sufficient legal authority and procedures under Tribal law* to administer and enforce a part 71 program. 60 Fed. Reg. 20,823 (Apr. 27, 1995) (*emphasis added*). As EPA has explained, each delegate agency has to comply with its own procedures, administrative codes, regulations, and laws as well as the requirements of part 71. *Id.*

The Delegation Agreement between the NNEPA and EPA makes clear that EPA "has determined that NNEPA meets all of the criteria for designation as a 'delegate agency' set forth at 40 C.F.R. Part 71." (Ex. B at 1). However, NNEPA appears to construe that EPA finding as conferring Federal approval of its Tribal operating permitting regulations for purposes of title V



permitting. For that reason, NNEPA believes that it is justified in including requirements from the NNOPR in several conditions in the part 71 Federal operating permit for Black Mesa Complex. (Ex. D at 9-10).

NNEPA has misinterpreted the legal effect of EPA's determination that NNEPA has "adequate authority to carry out all aspects of the delegated program." As explained above, EPA only approves Tribal or State operating permit regulations under part 70. In the absence of an EPA-approved part 70 program, EPA issues title V permits under the Federal part 71 program. Title V does not, however, provide for any hybrid permit, i.e., one with some conditions from a part 70 program and other conditions from a part 71 program. Nor does title V provide for the addition of either Tribal or State regulations to a part 71 Federal program.

EPA may delegate, in whole or in part, the authority to administer a part 71 operating permit program to a Tribe. 40 C.F.R. § 71.10(a). However, EPA has made clear that "delegation of a part of a part 71 program will not constitute any type of approval of a State or Tribal operating permits program under part 70." 40 C.F.R. § 71.4(j). Instead, with a partial delegation, the Tribe administers only the delegated portions of part 71, and EPA administers the remaining portions of the part 71 program for sources on that Tribe's lands. *Id.*

In sum, NNEPA's unapproved Tribal regulations do not become elements of the part 71 Federal operating permit program simply because EPA has delegated part 71 authority to the NNEPA. Even after that delegation, the NNOPR remain unenforceable under the Clean Air Act. Therefore, conditions in the part 71 Federal operating permit for Black Mesa Complex that are based on NNOPR requirements have no force of law under the Clean Air Act and must be removed from the title V permit for that source.

**B. The Delegation Agreement explicitly recognizes that NNOPR provisions are not part of the subject part 71 Federal operating permit.**

The Delegation Agreement plainly recognizes that NNEPA has promulgated its own Navajo Nation Operating Permit Regulations. However, the Delegation Agreement also notes the following: "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 Regulations." (Ex. B, § V.4 (emphasis added)).

In issuing the part 71 Federal permit for Black Mesa Complex, the NNEPA has established the following permit conditions based on NNOPR requirements:

<u>Permit Condition</u>	<u>NNOPR Provision</u>
III.B	§ 302(G)
IV.A	Subpart VI
IV.C	§ 302(I)
IV.D	§ 301(E)
IV.E	§ 702
IV.G	§ 406
IV.H	§ 405(C)
IV.I	§ 405(D)
IV.K	§ 405(E)
IV.L	§ 406
IV.Q	§ 404(B)

Region IX has clearly acknowledged that NNOPR requirements are not title V requirements of the Clean Air Act. The fact that most of the above-stated permit conditions are also based on part 71 requirements is irrelevant. For title V permitting under part 71, those permit conditions must be based only on part 71 requirements that apply. Because provisions within the NNOPR are not required by the Clean Air Act, Peabody respectfully requests any and all requirements from the NNOPR to be removed from the four corners of the NNEPA-issued title V permit for Black Mesa Complex.

**C. NNEPA's collection of fees under NNOPR Subpart VI cannot be a requirement of a NNEPA-issued part 71 Federal operating permit.**

The fee collection provisions from NNOPR Subpart VI cannot be included in the part 71 Federal permit for an additional reason.

The part 71 regulations contain provisions for determining and collecting part 71 permit fees under the following circumstances: when EPA administers the part 71 program, § 71.9(c)(1); when EPA administers the part 71 program with contractor assistance, § 71.9(c)(3); when part 71 programs are delegated in part, § 71.9(c)(4); and when part 71 programs are fully delegated but EPA has not suspended its part 71 fee collection, § 71.9(c)(2)(i).

However, the Agency found that EPA's collection of part 71 fees through a Federal program could cause problems for delegate agencies that have the independent authority under their State or Tribal laws to collect fees adequate to fund delegated part 71 programs. As a result, EPA concluded that the best approach to collecting revenue for those particular delegate agencies was to allow those agencies to collect sufficient revenues under their State or Tribal law and to suspend EPA collection of part 71 fees for those delegated part 71 programs. 61 Fed. Reg. 34,223-4.

EPA has determined that the NNEPA has adequate authority under Navajo Nation law to fund fully-delegated part 71 activities with fees collected from part 71 sources. (Ex. B at 4). Upon NNEPA's administration of the delegated part 71 authority, EPA agreed to suspend its collection of part 71 fees. *Id.* Under those circumstances, the part 71 regulations contain no provisions for determining and collecting part 71 permit fees. Instead § 71.9(c)(2)(ii) provides:

Where the delegate State [or Tribe] collects fees from part 71 sources under State [or Tribal] law which are sufficient to fund the delegated part 71 program, the EPA may suspend its collection of part 71 fees. The specific terms and conditions regarding the

suspension of fee collection will be addressed in the applicable delegation agreement pursuant to § 71.10.

The Delegation Agreement confirms that "NNEPA agrees to collect permit fees from all Part 71 sources in a manner consistent with Subpart VI of the NNOPR." (Ex. B, § II). Importantly, however, NNEPA's commitment to collect revenue from part 71 sources "in a manner consistent with Subpart VI of the NNOPR" does not make that Tribal regulatory requirement part of the part 71 Federal operating permit program. Rather, in circumstances such as NNEPA's, part 71 directs the delegate agency to collect revenue, according to State or Tribal requirements, sufficient to cover the costs of a part 71 program. *See, e.g.*, 61 Fed. Reg. 39,877 (July 31, 1996) (Under part 71 delegations to several States, sources would pay permit fees "according to the State statute.").

In sum, the part 71 Federal permit fee collection procedures that apply to EPA cannot be, and were not, delegated to NNEPA. The Delegation Agreement instead provides for a means of Tribal-authorized collection of permit fee payments consistent with NNOPR Subpart VI. That Agreement, however, does not confer Federal approval of NNOPR Subpart VI as part of the part 71 Federal operating permit program. Thus, although Peabody does not contest NNEPA's authority to determine and collect permit fees outside the four corners of Peabody's federally-enforceable operating permit, the Permit conditions based on NNOPR Subpart VI must be removed from the part 71 Federal permit for Black Mesa Complex.

**D. Tribal regulations can be the basis for part 71 permit conditions, but only after EPA rulemaking makes those regulations part 71 federal requirements.**

NNEPA has identified several "specific NNOPR provisions that apply to Part 71 permits." (Ex. D at 10). Based on that Tribal authority, i.e., that the language in certain NNOPR

provisions makes them applicable to part 71 permits, the NNEPA has justified citing those NNOPR provisions as authority for conditions in a part 71 Federal operating permit. *Id*

NNEPA's reliance on Tribal authority to confer Federal approval of a Tribal regulation is misplaced. All title V permit requirements – whether they are Tribal (or State) under part 70 or they are Federal under part 71 – can only be authorized by EPA. Neither a Tribe nor a State can unilaterally confer part 70 or part 71 approval of its operating permit regulations.

EPA designed the part 71 Federal operating permit program using a “national template” approach because the Agency believed that a uniform, standardized approach was still flexible enough to be an effective program in most areas. 61 Fed. Reg. 34,213. Nevertheless, 40 C.F.R. § 71.4(f) provides:

The Administrator . . . may adopt, through rulemaking, portions of a State or Tribal permit program in combination with provisions of this part [71] to administer a Federal program for the State or in Indian country in substitution of or in addition to the Federal program otherwise required by this part.

EPA has explained that this provision was intended to allow the Agency “the flexibility to meld portions of a . . . Tribal permit program with provisions of part 71 *to create a part 71 program that fits the needs of the area* for which it is being administered, regardless of whether the . . . Tribal program has gained EPA approval.” 64 Fed. Reg. 8,259 (emphasis added); *see also* 60 Fed. Reg. 20,811.

In other words, EPA has provided a mechanism whereby provisions within NNOPR *could* serve as the basis for conditions in the part 71 Federal operating permit for Black Mesa Complex. In particular, EPA rulemaking would be required to combine the relevant NNOPR provisions with portions of the standard part 71 program to create a hybrid part 71 Federal operating permit program unique to the Navajo Nation.

Importantly, however, the particular NNOPR provisions adopted through that EPA rulemaking would become, for title V purposes, part 71 Federal requirements specific to the Navajo Nation and *would be cited as such* in any part 71 permit issued by NNEPA under an EPA delegation of part 71 authority. Thus, although it has not been implemented, even the part 71 regulatory procedure for basing conditions in a Federal operating permit on Tribal permitting provisions still would not authorize permit conditions required by Tribal regulations in the part 71 permit. Under the Clean Air Act, Tribal operating permit regulations have no place in a part 71 Federal operating permit.

## VI. CONCLUSION

When promulgating requirements for the part 71 program, EPA stated:

The EPA understands the strong desire expressed by industry commenters to avoid having several regulating entities, e.g., EPA, a State, and a Tribe, seeking to assert regulatory authority over them. The EPA believes that Federal implementation of the title V program throughout Indian country will help provide certainty and clarity to regulated entities.

64 Fed. Reg. 8,253. Yet, the certainty and clarity that EPA expected from administration of its part 71 Federal program in Indian country has not materialized with the part 71 permit recently issued by the NNEPA for the Black Mesa Complex. While the delegation of part 71 authority to a Tribe clearly involves a "marriage" of Federal and Tribal permitting regulations, that marriage stops short of incorporating those Tribal rules into the part 71 Federal program.

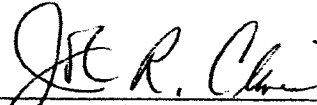
Title V conditions in a part 71 Federal operating permit are based on part 71 regulatory requirements. If a Tribal agency has been delegated part 71 program authority, title V conditions in a part 71 Federal operating permit must still be based on part 71 regulatory requirements. Although part 71 provides an EPA-rulemaking mechanism for combining part 71 Federal requirements with requirements from a Tribal operating permit regulation to forge a part 71

Federal program specific to that Tribe, EPA has not performed such rulemaking with the Navajo Nation Operating Permit Regulations.

Because the NNOPR are not part of the part 71 Federal operating permit program, any part 71 Federal permit issued by NNEPA under a delegation of part 71 authority may not contain conditions based on the NNOPR. Nevertheless, the NNEPA-issued part 71 Federal permit for Black Mesa Complex includes several conditions based on requirements from both part 71 and the NNOPR as well as certain fee collection conditions based solely on requirements from the NNOPR. Because Title V permitting under the Clean Air Act does not authorize title V permit conditions based on Tribal regulations, Peabody respectfully requests the Board to order the removal of all conditions based on requirements from the NNOPR from the part 71 Federal operating permit that has been issued for Black Mesa Complex. As previously indicated, that action would necessitate removal of only one NNOPR-based condition in its entirety and the deletion of citations to NNOPR in several other Permit conditions.

The solution in this instance may well be nothing more than segregation of all NNOPR-based permit conditions into a separate "NNOPR-only" attachment to the part 71 Federal permit. But the structure of the part 71 Federal permit for Black Mesa Complex must make clear that conditions in that title V permit are enforceable under the Clean Air Act, but that any related conditions required under Tribal law are not.

Respectfully submitted,



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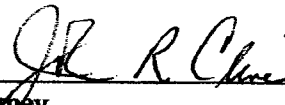
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**CERTIFICATE OF SERVICE**

I hereby certify that copies of this Petition for Review were mailed, via U.S. mail, postage prepaid, this 6<sup>th</sup> day of January, 2010, to:

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## **EXHIBITS**

- A. Title V Operating Permit for Black Mesa Mine Issued by NNEPA
- B. October 2004 Delegation Agreement between EPA and NNEPA
- C. August 2009 Peabody Comments on Draft Permit
- D. November 2009 Peabody Comments on Draft Permit
- E. December 2009 NNEPA Responses to Comments