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

In the Matter of:	)	
Peabody Western Coal Company Permit No. NN-OP 08-010	)	Appeal No. CAA 11-01

NAVAJO NATION EPA'S RESPONSE TO PEABODY WESTERN COAL COMPANY'S PETITION FOR REVIEW OF CLEAN AIR ACT PART 71 PERMIT

INTRODUCTION

Title V of the Clean Air Act ("CAA"), 42 U.S.C. §§ 7661-7661f, provides for the establishment of an operating permit program under which all applicable CAA requirements for a source will be contained in one document. *See, e.g.*, 57 Fed. Reg. 32250, 32251 (July 21, 1992) ("The [Title V] program will . . . clarify, in a single document, which requirements apply to a source and, thus, should enhance compliance with the requirements of the Act."). Title V requires the U.S. Environmental Protection Agency ("EPA") to promulgate the minimum requirements for the program, now codified in 40 C.F.R. Part 70, *see* 40 C.F.R. § 70.1(a), and requires the states to develop operating permit programs under state law that are consistent with the federal requirements. CAA § 502(b), (d)(1), 42 U.S.C. § 7661a(b), (d)(1). It also requires EPA to "promulgate, administer, and enforce a [Title V] program" for any state that lacks an approved program. CAA § 502(d)(3), 42 U.S.C. § 7661a(d)(3). EPA promulgated this program on a nationally uniform basis, as codified in 40 C.F.R. Part 71.

In general, the Title V operating permit provisions are subject to "treatment as a state" under

CAA § 301(d)(2), meaning that eligible Indian tribes may choose to implement operating permit programs but are not required to do so. *See* 40 C.F.R. §§ 49.3-.4.[1]

As stated in the preamble to proposed Part 71,

> The primary purpose of the proposed rule is to provide the mechanism by which EPA can assume responsibility to issue permits in situations where the State, local, or Tribal agency has not developed, administered, or enforced an acceptable permits program or has not issued permits that comply with the applicable requirements of the Act. Secondarily, the proposed rule provides for delegation of certain duties that may provide for a smoother program transition when State programs are approved.

60 Fed. Reg. 20804, 20805 (Apr. 27, 1995). *See also* 61 Fed. Reg. 34202, 34203 (July 1, 1996) (final Part 71 rule) ("EPA to function as a backstop"); 40 C.F.R. § 71.4(a)-(e) (itemizing when EPA will administer and enforce operating permit programs). The federal operating permit program "by which the Administrator will issue operating permits," § 71.1(a), is codified in §§ 71.1-.9 & 71.11-.12. The delegation provisions by which EPA "may delegate . . . the authority to administer a part 71 operating permits program to a State, eligible Tribe, local, or other non-State agency," § 71.10(a), are found in § 71.10.[2]

On April 14, 2011, the Navajo Nation Environmental Protection Agency ("Navajo Nation EPA" or "NNEPA") issued a Part 71 operating permit to Peabody Western Coal Company

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[1] There are a few Title V provisions that are not applicable to tribes. These provisions involve deadlines for states to implement operating permit programs and sanctions for their failure to do so, since tribes implement CAA programs by choice rather than by mandate. 40 C.F.R. § 49.4(h)-(m). Tribes also are not required to establish a Compliance Advisory Panel for small businesses, § 49.4(n), or to provide for judicial review, 40 C.F.R. § 49.4(p), since not all tribes have their own courts, although some type of review is required. The Navajo Nation has a robust court system and provides for judicial review, including of Title V permits.

[2] In addition, § 71.10 references other sections of Part 71 with which a delegated program must be consistent.

("PWCC") for PWCC's Kayenta Complex.[3] NNEPA acted as a "delegate agency," defined in § 71.2 as a state, local, tribal, or other agency "authorized by the [EPA] Administrator pursuant to § 71.10 to carry out all or part of a permit program under part 71." NNEPA issued the permit pursuant to its authority under the Navajo Nation Clean Air Act ("NNCAA"), 4 N.N.C. §§ 1101-1162, and the specific permit processing requirements of the Navajo Nation Operating Permit Regulations ("NNOPR") and cited the NNOPR accordingly in the permit. The NNOPR are consistent with 40 C.F.R. Part 71.[4]

PWCC claims that the Navajo Nation EPA was not authorized to use its own permit processing regulations to issue the permit, but instead was required to use the same Part 71 regulations as EPA uses in its "backstop" role when tribal or state permit programs are not in effect, *see* 61 Fed. Reg. at 34203. PWCC also claims that NNEPA was not authorized to include references to the NNOPR in the Part 71 permit.

NNEPA asserts on the contrary that, in order for it to be a delegate agency, it must have its own independent authority to administer the Part 71 program for the Navajo Nation. Part 71 contains "the requirements and the corresponding standards and procedures by which the *Administrator* will issue operating permits," 40 C.F.R. § 71.1(a) (emphasis added). To be delegated

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[3] PWCC has twice changed the name of this source, first from "Black Mesa Complex" to "Kayenta Complex" and then to "Kayenta Mine at the Black Mesa Complex." However, PWCC has neglected to submit a proper request to NNEPA for an administrative permit amendment for the name change. Instead, PWCC requested the first name change in its comments on the revised draft permit (proposed November 2010), and requests the second name change in its Pet. at 36 n.5. The proper procedure would be to submit the request by letter to the NNEPA Director, to ensure that NNEPA is aware of the request. NNOPR § 405(C). The source is referred to in this Response as the Kayenta Complex, consistent with the final permit.

[4] The NNCAA and the NNOPR are attached as Exhibits A and B, respectively, to this Response. They are cited as "Resp. Ex. _."

authority to administer a Part 71 program, a permitting agency must show that "the laws of the *State, locality, interstate compact or Indian Tribe* provide adequate authority to carry out all aspects of the delegated program." 40 C.F.R. § 71.10(a) (emphasis added).

PROCEDURAL HISTORY

On December 7, 2009, NNEPA issued a Part 71 renewal permit to PWCC for its Kayenta Complex.[5] On January 7, 2010, PWCC filed a Petition for Review of the permit with the Environmental Appeals Board ("Board"), claiming that the permit should not reference the NNOPR. PWCC and NNEPA, together with EPA Region 9, attempted to resolve this dispute. Although they were unable to do so, as a result of the parties' negotiations NNEPA determined that revisions should be made to the specific permit conditions that PWCC contested in its Petition for Review. NNEPA filed a Motion for Voluntary Remand in order to revise those portions of the permit, and EPA filed an *amicus* brief supporting NNEPA's motion. The Board granted NNEPA's motion and remanded the permit to NNEPA. *PWCC*, CAA Appeal No. 10-01, 14 E.A.D. __ (Order issued Aug. 13, 2010).

Pursuant to the Board's Order, NNEPA proposed revisions to Conditions III.B, IV.A-IV.E, IV.G-IV.L, and IV.Q of the permit. NNEPA provided notice to PWCC and the general public of the revised draft permit in November 2010, received comments from PWCC, and issued the final permit and response to comments on April 14, 2011. The revised conditions clarify that the provisions of tribal law referenced in the permit are tribally enforceable only. All the permit terms and conditions are still federally enforceable, pursuant to the cited federal law provisions and consistent with 40 C.F.R. § 71.6(b). NNEPA provided further as follows:

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[5] EPA issued the original Part 71 permit for this facility on September 23, 2003 and delegated the Part 71 program to NNEPA with respect to this facility on October 15, 2004.

> When federal and tribal provisions are cited in parallel, the tribal provisions are identical to the federal provisions and NNEPA has determined that compliance with the federal provisions will constitute compliance with the tribal counterparts. These parallel tribal citations do not create any new requirements, nor do they impact the federal enforceability of the cited Part 71 requirements.

Statement of Basis, Pet. Ex. I, at 3.[6]

NNEPA also proposed revisions to the permit fee condition in Section IV.A of the permit and made some revisions to the permit in the nature of administrative permit amendments, as explained in the Statement of Basis, Pet. I, at 3-4 and n.1. PWCC does not contest these provisions.[7]

PWCC filed its current Petition for Review ("Pet.") with the Board on May 16, 2011.

ARGUMENT

I. PART 71 REQUIRES DELEGATE AGENCIES TO USE THEIR OWN ADMINISTRATIVE AUTHORITIES TO IMPLEMENT THE OPERATING PERMIT PROGRAM.

A. Section 71.10(a) Requires Delegate Agencies to Have Independent Permitting

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[6] The Statement of Basis and other portions of the Administrative Record that are already attached as exhibits to PWCC's May 16, 2011 Petition for Review are not attached again to this Response; instead, citations to those documents are made to the PWCC exhibits, as "Pet. Ex. __."

[7] The revision NNEPA proposed to Permit Condition IV.C is of a somewhat different nature from the other revisions discussed above. As NNEPA explained in the Statement of Basis,

> Section IV.C (Compliance Certifications) has been revised so that compliance certifications are provided to both NNEPA and USEPA on a semiannual basis, instead of requiring different schedules for each agency. This revision is consistent with 40 C.F.R. §71.6(c)(5)(i). NNEPA, as the delegated permitting authority, has determined that semiannual rather than annual compliance certification is appropriate because it provides greater assurance that the facility is operating in compliance on an ongoing basis. Accordingly, the previous § IV.C.2, which was a tribally enforceable-only compliance certification requirement, has been deleted.

Pet. Ex. I at 3. Section 71.6(c)(5)(I) provides that the permitting authority may specify the frequency for submissions of compliance certifications, as long as they are required to be submitted at least annually. NNOPR § 302(I)(3) requires compliance certifications to be submitted semiannually.

Authority.

Part 71 distinguishes between EPA's role in implementing the Part 71 regulations, on the one hand, and the role of a state or tribe in implementing a Part 71 program as a delegate agency, on the other. *See* discussion *supra* at 1-4. EPA uses Part 71 to administer operating permit programs on behalf of states and tribes "lacking an EPA-approved or adequately administered operating permits program." 60 Fed. Reg. at 20804. To receive a delegation to administer a Part 71 program, in contrast, a state or tribe must demonstrate that "the laws of the *State. . . or Indian Tribe* provide adequate authority to carry out all aspects of the delegated program." § 71.10(a) (emphasis added). The plain language of this provision makes clear that tribes must have their own authorities to administer the Part 71 program, including authorities for permit processing, monitoring, and reporting.

Indeed, in proposing the Part 71 regulations, EPA explained that it "would not demand that each delegate agency administer a part 71 program in precisely the same way because each delegate agency would have to comply with its own procedures, administrative codes, regulations, and laws as well as the requirements of this part." 60 Fed. Reg. at 20823. Having the delegate agency use its own procedures also facilitates the purpose of § 71.10, which was added to Part 71 in order to provide for a "smoother program transition when State [or tribal] programs are approved," *id.* at 20805.[8]

EPA confirmed this interpretation of § 71.10 when EPA processed NNEPA's request for delegation. Section 71.10(a) provides that EPA may delegate the program to an "eligible" tribe,

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[8] NNEPA has stated on numerous occasions that it intends to implement a Part 70 program, as NNOPR § 703 indicates. *See, e.g.*, Deleg. Agr., Pet. Ex. B, at § IX; Trans. Plan, Pet. Ex. D, at § V(A).

which is defined in § 71.2 as "a Tribe that has been determined by EPA to meet the criteria for being treated in the same manner as a State" under 40 C.F.R. Part 49. EPA's Eligibility Determination for the Navajo Nation states as follows:

> The Navajo Nation has enacted laws providing all relevant authorities to enable the Tribe to carry out administration of the [Part 71] program. . . . The Tribe has a permitting office . . . that is duly authorized under Tribal law to issue federal Part 71 permits pursuant to a delegation agreement with EPA. In addition, . . . the Tribe has enacted the Navajo Nation Air Pollution Prevention and Control Act and the Navajo Nation Air Quality Control Operating Permit Regulations; they contain all relevant authorities and procedures for administration of the federal program. In particular, the Tribal statute and regulations establish administrative authorities and procedures for the receipt, processing, and issuance or denial of permit applications, the collection of permitting fees, and the pursuit of various enforcement-related activities.

Elig. Determ., Pet. Ex. C, at 3. The Eligibility Determination therefore confirms that NNEPA will be using its own authorities to administer the Part 71 program.

Section 71.10(a) also requires EPA and the delegate agency to enter into a "Delegation of Authority Agreement," which "shall set forth the terms and conditions of the delegation, [and] shall specify the provisions that the delegate agency shall be authorized to implement." EPA and NNEPA entered into a Delegation Agreement effective October 15, 2004. The Delegation Agreement, like the Eligibility Determination, finds that the Navajo laws satisfy all the criteria for delegation. *See* Deleg. Agr., Pet. Ex. B, at 1; *see also* 69 Fed. Reg. 67578, 67578 (Nov. 18, 2004) (Notice of Delegation) ("NNEPA submitted a legal opinion . . . stating that [the Navajo Nation CAA and the NNOPR] provide it adequate authority to carry out all aspects of the delegated program. NNEPA provided all necessary documentation to demonstrate that it has adequate authority . . . to administer the Part 71 federal permitting program.") The Delegation Agreement specifically contemplates NNEPA's use of the NNOPR for permit processing. Deleg. Agr., Pet. Ex. B, at § IV(1)-(2) (permit

development and review); § V(4) (permit revisions and renewals); § IX(2) (revising, reopening, terminating, or revoking and reissuing permits).

Moreover, the Delegation Agreement is required to specify that NNEPA will comply with the public notice provisions of §§ 71.7 and 71.11, 60 Fed. Reg. at 20824 (item (3)), and that NNEPA may not waive any permit requirement or issue any order that violates Part 71, *id.* (item (8)). These provisions are included in the Delegation Agreement, Pet. Ex. B, at §§ I(1)(b), III(5), IV(2), IV(6). If NNEPA were administering these Part 71 provisions directly, as PWCC contends, the requirement to include them in the Delegation Agreement would not be necessary.

The Delegation Agreement also incorporates by reference NNEPA's Transition Plan of July 16, 2004 for administering the Part 71 program, stating in § IV(5) that "NNEPA agrees to follow its transition plan for permit issuance, provided for in Attachment '2' of this agreement." The Transition Plan specifically requires NNEPA to follow the NNOPR. Trans. Plan, Pet. Ex. D, at § V.C (NNEPA "will process permit applications pursuant to the procedures described in 40 C.F.R. § 71.5, subpart IV of the NNOPR and the Delegation Agreement."). *See also id.* at § V.E ("All new permits will be issued in the manner described in 40 C.F.R. [Part] § 71.7 and in subpart IV of the Navajo Nation Operating Permit Rule and section 212 of the Navajo Uniform Rules, which are consistent with § 71.7"); § V.G ("All terms and conditions in a permit . . . are enforceable by the Administrator pursuant to the CAA and by the Director [of NNEPA] pursuant to Subpart V of the Navajo Operating Permit Rule, Subpart 3 of the Navajo Uniform Rule[s], and Subchapter 3 of the Navajo Nation Clean Air Act.").[9]

[9] The Navajo Nation Uniform Rules contain NNEPA's procedures for permitting and other administrative actions. They are attached as Exhibit C to this Response.

PWCC acknowledges that statements in the Eligibility Determination, Delegation Agreement, and Transition Plan "could conceivably be construed as supporting NNEPA's assertion that a pre[re]quisite for NNEPA being delegated federal administrative authority under part 71 is that it must have its own tribal authorities to administer the part 71 program." Pet. at 20. PWCC's attempt to rely on three provisions in the Delegation Agreement to counter this conclusion is unavailing. The three provisions that PWCC references, Pet. at 21, which state that NNEPA must administer the Part 71 program "pursuant to," "in accordance with," and "under the procedures required under" Part 71, simply mean that NNEPA's procedures must be consistent with Part 71 requirements, not that NNEPA must act under federal rather than tribal authority.[10]

B. The Structure of Part 71 Reflects the Requirement that Delegate Agencies Have Their Own Permitting Authorities.

The overall structure of Part 71 confirms the need for delegate agencies to have independent authority to implement a federal operating permit program. First, EPA intended Part 71 to follow the same approach as Part 70, *see* 60 Fed. Reg. at 20804 ("EPA intends that proposed part 71 generally follow the approach taken in 40 CFR part 70"); *see also* 61 Fed. Reg. at 34203 ("it is appropriate to model part 71 procedures on those required by part 70"), and the provisions in Part 71 do in fact parallel those in Part 70. Under Part 70 states and tribes must comply with the federal requirements listed in Part 70 but must have their own authorities and procedures for implementing those requirements. *See* § 70.4(b)(3). The same holds true for Part 71. *See* § 71.10(a).

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[10] NNEPA does not maintain that EPA has approved the NNOPR for purposes of a Part 70 program, but rather that EPA examined the NNOPR in detail and determined that it contained all the authorities necessary to implement Part 71. NNEPA agrees that its permitting procedures must be consistent with the Part 71 requirements and, in fact, they are virtually identical, as PWCC has acknowledged. *See* PWCC Resp. to the Navajo Nation EPA's Mot. for Vol. Remand, CAA Appeal No. 10-01, at 14; *see also* PWCC Pet. for Review, CAA Appeal No. 10-01, at 3.

It follows that the bulk of Part 71 contains the procedures "by which the Administrator will issue operating permits," § 71.1(a), while a single section, § 71.10, contains the procedures by which EPA "may delegate . . . the authority to administer a part 71 operating permits program" to a state or tribe, § 71.10(a). The lack of detail in § 71.10 supports the conclusion that delegate agencies must have their own authorities to implement the Part 71 program. The delegate agency's authorities must be consistent with the federal requirements in Part 71, just as a state or tribal agency's procedures for implementing a Part 70 program must be consistent with the federal requirements in Part 70. The delegate agency may not, however, simply follow the Part 71 procedures any more than a state or tribal agency may simply follow the Part 70 procedures.[11]

C. Specific Part 71 Regulations Confirm the Requirement that Delegate Agencies Use Their Own Authorities and Procedures.

The specific regulations for the issuance of Part 71 permits reflect the fact that a tribal or state permitting agency receiving delegation under § 71.10 must use its own authorities in implementing the program. For example, § 71.5(c) allows a permitting authority (defined in § 71.2 to mean EPA, a delegate agency, or an agency authorized to implement Part 70) to develop its own application form "that best meet[s] program needs," as long as the form includes the elements listed in that subsection. If the delegate agency were not using its own authorities and procedures, it could not develop its own form, nor would its program needs likely be any different from those of EPA. Similarly, § 71.6(c)(6) allows a permitting authority to add compliance requirements to a permit in addition to those required by § 71.6(c)(1)-(5) to be included in the permit. The permitting authority

[11] The delegate agency may of course adopt the federal procedures into its own laws, in which case the agency will still be using its own authorities to implement the program, as discussed *infra* Part II(A).

also may add its own requirements for compliance certifications. *See* § 71.6(c)(5)(iii)(D).

The Part 71 reopening provisions are similarly based on the requirement that a delegate agency must use its own authorities. The only reopening provision in § 71.10 is in subsection (h), which allows an interested person to petition EPA to reopen a permit for cause under § 71.11(n). EPA is prohibited by § 71.10(j)(2) from delegating its authority to act on such petitions. Instead, EPA may direct the permitting authority to reopen the permit and will then either agree with the permitting authority's decision on reopening or issue its own decision, pursuant to § 71.7(g). The tribal or state permitting authority clearly must have its own reopening procedures to respond to EPA's directive.

Moreover, § 71.11(n) provides that petitions for reopening may be made to the "permitting authority," which can be either EPA or a tribal or state permitting authority. These dual options are recognized by § 71.7(f)(1)(iii) & (iv), which refers to the grounds for a reopening by either a tribal or state permitting authority or EPA, as the Board noted in its prior decision in this case. *PWCC*, slip op. at 14 n.6. Thus Part 71 contemplates two sets of permit reopening procedures, one administered by EPA under federal authority and the other by a tribal or state agency under that agency's own authorities.[12]

Section 71.10(f)(2) provides yet another example. The provision states that, in order for a delegate agency to be delegated signature authority for Part 71 permits, the agency must certify that:

> no applicable provision of State, local or Tribal law requires that a part 71 permit or renewal be issued after a certain time if the delegate agency has failed to take action on the application.

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[12] In effect, § 71.10(h) provides petitioners with guaranteed recourse to EPA in the matter of permit reopenings, in addition to § 71.11(n) providing that requests may be made to the permitting authority.

This requirement could not be clearer in recognizing that the delegate agency will be using its own procedures and authorities to process Part 71 permits.

Indeed, the distinction between an approved Part 70 program and a delegated Part 71 program is not with the source of authority for the procedures used by the tribal or state agency at issue – under both programs the agency must use its own procedures – but rather with the authority for the substantive requirements of the permit. Under Part 70, the substantive permit requirements are both federal and tribal or state requirements, whereas under Part 71 they are federal requirements only (with the exception of the permit fee provisions, which are tribal or state requirements, discussed *infra* Part III, and which PWCC does not challenge here). A tribe's use of its own procedures, as opposed to its substantive requirements, is consistent with the structure of Part 71, as long as the tribe's procedures comply with the procedural requirements set forth in Part 71.[13]

II. PWCC'S CLAIM THAT NNEPA MUST USE FEDERAL AUTHORITY TO ADMINISTER THE PART 71 PROGRAM IS ENTIRELY UNFOUNDED.

A. Nothing in Part 71 Supports PWCC's Argument.

PWCC argues that because EPA has the authority to administer a Part 71 program, it may delegate that authority to a tribal or state agency. Pet. at 14. While perhaps EPA could have chosen to proceed in this fashion, that is simply not the choice that EPA made when promulgating Part 71.

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[13] Thus the preamble to the Part 71 final rule explains that EPA did not include a Part 71 equivalent to § 70.6(b)(2) (requiring designation of permit conditions that are not federally enforceable) because "part 71 permits will not include any non-federally enforceable *applicable requirements*." 61 Fed. Reg. at 34219 (emphasis added). The "applicable requirements" of a permit are the substantive terms and conditions of the permit, as distinguished from the permit processing and enforcement provisions. *See* § 71.2 (defining "applicable requirement" as any one of list of substantive federal standards); § 71.10(g) (distinguishing between "applicable requirements" and "requirements of this part"); *see also MacClarence v. U.S. EPA*, 596 F.3d 1123, 1126 (9th Cir. 2010) (citing CAA § 504(a), 42 U.S.C. § 76616c(a)).

Instead, § 71.10(a) plainly requires a tribe or state to show that its own laws provide the authority needed to implement Part 71, and this requirement is confirmed by the structure of Part 71, the remainder of its requirements, and all the documentation supporting EPA's delegation to NNEPA, as discussed *supra* Part I(A).[14]

PWCC also notes that § 70.4(b)(3) lists the specific authorities a state or tribe must have under its own laws in order to implement a Part 70 program, while § 71.10(a) does not contain the same level of detail. PWCC relies on this distinction to argue that EPA must be delegating its authority under Part 71. Pet. at 15. This argument completely ignores the requirement in § 71.10(a) that "the Delegation of Authority Agreement . . . shall set forth the terms and conditions of the delegation." It also ignores the fact that both EPA's Eligibility Determination and its Notice of Delegation found that the Navajo Nation laws, and specifically the NNCAA and the NNOPR, "contain all relevant authorities and procedures for administration of the federal program." Elig. Determ., Pet. Ex. C, at 3; Notice of Deleg., 69 Fed. Reg. at 67578; *see also* discussion *supra* Part I(A). Furthermore, the rest of Part 71 spells out the specific requirements of an operating permit program with which a delegate agency must comply, and these requirements were designed to parallel Part 70. *See* 60 Fed. Reg. at 20804-05, 61 Fed. Reg. at 34203; *see also* discussion *supra* Part I(B).

Finally, PWCC argues that all that is needed for a tribal agency to show adequate authority under § 71.10(a) to implement a Part 71 program is "the tribal government's authorization" to use

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[14] There is nothing to the contrary in the *Technical Support Document for Federal Operating Permits Program*, "Part 71 Response to Comments Document," Dec. 21, 1998, cited by PWCC. Pet. at 28. In fact, this document reiterates that "[t]o be eligible to administer a delegated part 71 program, a Tribe must show that the laws of the Tribe provide adequate authority to carry out all aspects of the delegated program, as required in § 71.10(a)."

Part 71 to implement the program. Pet. at 15. This argument in fact completely undermines PWCC's claim: it demonstrates that § 71.10 does not itself authorize a tribe to use Part 71 procedures, but rather the tribe would need to take affirmative action to incorporate by reference the provisions of Part 71 into the tribe's own laws. Indeed, NNOPR § 704(A) incorporates the provisions of Part 71 into tribal law by reference, as PWCC notes, Pet. at 16. However, as just explained, this incorporation takes place under tribal, not federal, law. Besides, NNOPR §§ 701, 704(B), and 705 specifically provide for NNOPR procedural provisions to be used in issuing Part 71 permits. *See also* NNOPR, Pet. Ex. B, at § 101(C) (NNOPR becomes effective "immediately upon Part 71 delegation or Part 70 approval by USEPA Region IX, whichever is sooner.").[15]

B. The NSR Rule for Indian Country Directly Contradicts PWCC's Position.

To support its argument, PWCC relies on EPA's proposed Federal Implementation Plan ("FIP") for new source review ("NSR") in Indian country, 71 Fed. Reg. 48696 (Aug. 21, 2006), Pet. at 27-28, which recently was finalized, 76 Fed. Reg. 38748 (July 1, 2011) ("NSR rule"). The NSR rule is a permitting rule, like Part 71. *See id.* at 38749-50. Its delegation process is similar to the Part 71 delegation process: EPA states in the preamble to the NSR rule that "[t]he [delegation] process we will follow . . . is similar to the process we follow to delegate the administration of

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[15] As PWCC notes in Pet. at 36, NNEPA stated in its Response to Comments, Pet. Ex. J, at 9-10, that it would make PWCC's requested administrative permit amendments pursuant to NNOPR § 405(C) because it did not have the authority to do so under 40 C.F.R. § 71.7(d)(3). NNEPA clarifies here that it had the authority to make the amendments pursuant to NNOPR § 704(A), which incorporates § 71.7(d)(3) by reference into tribal law, but it also was required by NNOPR § 704(B) to use NNOPR § 405(C). Both are provisions of tribal law, but NNEPA emphasized the latter in its Response to Comments because it more obviously refuted PWCC's position that the NNOPR was not applicable. In addition, PWCC's claim, Pet. at 37, that NNEPA's action on its request for the amendments was untimely lacks all validity because PWCC never properly requested the administrative permit amendments in the first place; NNEPA made them as a matter of courtesy. *See supra* n. 3.

Federal programs under [40 CFR §§ 52.21(u), 71.4(j) and 71.10, and 49.122].”). 76 Fed. Reg. at 38780. The NSR rule is therefore instructive with regard to the Part 71 delegation process at issue in this appeal, and its provisions support all the arguments NNEPA makes regarding that process, namely that Part 71 requires delegate agencies to use their own authorities to process permits.

Significantly, the NSR rule, like § 71.10(a), requires a tribe to provide a “description of *the laws of the Tribe* that provide adequate authority to administer the Federal rules and provisions for which delegation is requested.” 40 C.F.R. §§ 49.161(b)(1)(iii)(C), 49.173(b)(1)(iii)(C) (emphasis added). *Compare with* § 71.10(a) (“the laws of the . . . Tribe provide adequate authority to carry out all aspects of the delegated program”). As EPA explains in the preamble to the final NSR rule:

> Tribes will . . . need to show that their laws provide adequate capacity and authority to carry out the delegated activities. For example, where a Tribe seeks administrative delegation for permit issuing activities of the Federal program, the Tribe may, among other things, need to show it has in place an appropriate agency with legal authority to review applications and issue permits on behalf of the delegate Tribal government.

76 Fed. Reg. at 38780. *Accord* 71 Fed. Reg. at 48722; *see also id.* at 48721 n.10 (tribal agency must describe the “laws of the tribe that provide adequate authority to administer the Federal rules and provisions for which the delegation is requested”); 76 Fed. Reg. at 38781 (“Tribes would . . . need to show that their laws provide adequate capacity and authority to carry out the delegated activities”).

In addition, as with Part 71, the NSR rule contains various other provisions which support the fact that delegate tribal agencies must rely on their own authorities to administer the federal NSR programs for Indian country. *See, e.g.*, 40 C.F.R. §§ 49.161(b)(1)(C) (tribal agency seeking delegation must submit to EPA a description of “the *laws of the Tribe* that provide adequate authority to administer the Federal rules and provisions for which delegation is requested”) (emphasis added); 49.173(b)(1)(C) (same); 49.161(b)(8) (tribe must certify that *tribal* law does not

require automatic issuance of permits after certain time); 49.173(b)(8) (same).

C. Neither the Region 10 FIP Nor the PSD Program Supports PWCC's Position.

PWCC also relies, Pet. at 26-27, on the delegation of authority provision in the CAA Federal Implementation Plan ("FIP") that EPA issued for Indian reservations in Region 10 ("Region 10 FIP"). A FIP is not a procedural document, unlike a Title V permit, *see, e.g.*, 40 C.F.R. § 70.1(b) ("title V does not impose substantive new requirements"), but instead is a set of substantive requirements, equivalent to a State or Tribal Implementation Plan. *See* CAA § 110, 42 U.S.C. § 7410. Thus the Region 10 FIP "establish[es] emission limitations and other requirements for air pollution sources . . . in order to ensure a basic level of air pollution control and to protect public health and welfare." 40 C.F.R. § 49.121(a). These include limits on visible emissions, particulate matter, fugitive emissions, and sulfur dioxide. §§ 49.124-.130. To the extent that the Region 10 FIP provides for permit programs for various open burning activities, §§ 49.132-.134, it does not specify the permitting procedures in any detail, except for non-Title V operating permits issued to provide federally enforceable limitations on actual emissions or potential to emit, § 49.139.

The Region 10 FIP for Indian country is not, therefore, directly comparable to the Part 71 program at issue in this case, unlike the NSR rule discussed above. Nevertheless, the Region 10 FIP provides for a partial delegation of authority to tribes that is consistent with the delegations of authority in the NSR rule and in Part 71. Section 49.122(c), like § 71.10(a), requires a tribe to show that "*the laws of the Indian Tribe* . . . provide adequate authority to carry out the aspects of the provisions for which delegation is requested" (emphasis added), and, even though it is silent as to the partial delegation process it authorizes, nothing in § 49.122(c) contradicts the delegation process set forth in Part 71 or the NSR rule. *See* 76 Fed. Reg. at 38779-80 (stating that the NSR rule

delegation process is similar to that followed under § 49.122(c) and Part 71).

The Region 10 FIP leaves all the details of delegation to the "Partial Delegation of Administrative Authority Agreement" between EPA and the tribe at issue. PWCC refers specifically to the partial delegation agreement between EPA and the Nez Perce Tribe, saying that it refers only to federal regulations and does not provide for the tribe to use its own procedures. Pet. at 27. Since the FIP is a federal rule, it is not surprising that it contains federal requirements. As for the relevant procedures, the agreement provides for the tribe to process and issue open burning permits. Agr., Pet. Ex. K, at § IV(C)-(E). Since no federal permit-processing procedures are provided for these activities, presumably the tribe would be using its own authorities. Moreover, while the agreement provides that EPA will issue federal Inspector Credentials to qualified tribal employees, these credentials are merely to "enhance the ability of inspectors to gain access to source facilities and source operating information," *id.* at § VI(C); they do not replace the tribe's own authorities, which the tribe continues to be free to use to conduct inspections and enforcement under its own laws.[16] In any event, this particular agreement applies only to Nez Perce, and does not establish the extent of other tribes' delegated authorities under this or other CAA programs.

PWCC relies in addition on the Board's decision in *West Suburban Recycling & Energy Center, L.P.*, 6 E.A.D. 692 (1996), which it claims supports its position that a Part 71 delegate agency may not use independent authorities to implement the Part 71 program. Pet. at 17-19. *West Suburban* involves the denial of a "prevention of significant deterioration" ("PSD") permit by a state

[16] For example, a tribe may choose to use federal inspector credentials when the operator of a source denies the tribe access under tribal authorities, such as when the operator contests tribal jurisdiction over the source. For sources where tribal authority is not contested, the tribe may choose to conduct inspections under tribal law.

agency that was delegated authority pursuant to 40 C.F.R. § 52.21(u). The PSD program, unlike Part 71, consists largely of substantive requirements, *see generally* § 52.21, although it contains permit processing requirements in § 52.21(q) and 40 C.F.R. Part 124. The PSD delegation provision in § 52.21(u) is silent as to the requirements for delegation. Further, it does not currently provide for delegation of the PSD program to tribes, *see* § 52.21(u)(3); 76 Fed. Reg. at 38780 n.35, and any decision based on it would therefore be distinguishable from the case at hand. Nevertheless, nothing in § 52.21(u) contradicts the delegation process set forth in Part 71 or the NSR rule, nor does the decision in *West Suburban.*

In *West Suburban*, the delegate state agency rejected a permit application without referencing any failure by the source to comply with the substantive federal PSD requirements. 6 E.A.D. at 696-98. The Board therefore issued an order requiring the agency to show "why it should not be required to issue, in accordance with the governing regulations at 40 C.F.R. Part 124, the PSD permit." *Id.* at 698.[17] The delegate agency argued that its procedures prevented it from issuing a PSD permit that did not "demonstrate compliance with all applicable state requirements." 6 E.A.D. at 700. The Board rejected this contention, explaining that "EPA would not be free to deny a federal PSD permit solely on the basis of failure to comply with state permitting requirements" and the delegate agency "stands in the shoes" of EPA. *Id.* at 707.

The Board's decision did not, therefore, find that a delegate agency may not use its own authority in issuing a federal PSD permit, but rather found that the scope of the delegate agency's authority cannot exceed federal authority and its procedures must be consistent with the federal

[17] Unlike NNEPA in the instant appeal, the delegate agency in *West Suburban* also did not comply with basic permit processing procedures, such as referencing appeal provisions, providing a response to comments, and compiling a complete administrative record. 6 E.A.D. at 709.

procedures. The permit NNEPA issued to PWCC in the instant case satisfies this standard. The permit contains only federal substantive requirements (with the exception of permit fees, discussed *infra* Part III) and it was processed according to tribal procedures that are consistent with the federal Part 71 requirements. *See* discussion *supra* n.13 and accompanying text.

Finally, nowhere does NNEPA claim that permit conditions referencing the NNOPR are equivalent to "non-PSD" issues under the PSD program and hence not reviewable by the Board. *See* Pet. at 30-32. On the contrary, NNEPA maintains that these NNOPR provisions are an integral part of the Part 71 permit, pursuant to the § 71.10 delegation provision.

D. PWCC May Not Challenge the Delegation Agreement in This Proceeding.

PWCC acknowledges that the Delegation Agreement "could conceivably be construed as supporting NNEPA's assertion that a pre[re]quisite for NNEPA being delegated federal administrative authority under part 71 is that it must have its own tribal authorities to administer the part 71 program." Pet. at 20. Since the Delegation Agreement supports NNEPA's position, PWCC resorts to challenging the validity of the Agreement, claiming that it may do so because it commented on and NNEPA relied on the Agreement during the public comment process on the permit at issue here. Pet. at 19-20.

The Delegation Agreement was entered into and became effective on October 15, 2004, *see* § 71.10(a) (Delegation Agreement becomes effective on date of signature), and notice of the Agreement was published in the Federal Register the following month, 69 Fed. Reg. 67578 (Nov. 18, 2004); *see also* § 71.10(b) (requiring publication of notice). If the Delegation Agreement is reviewable at all, it is reviewable as a final agency action under CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1). PWCC therefore was required to bring any challenge to the Agreement within sixty days

of November 18, 2004, in federal court. Neither condition was met here.[18] PWCC could assert that its permit was not issued consistent with the Delegation Agreement, if that were in fact the case, but it may not challenge the Agreement itself at this late date or in a proceeding before the Board.[19]

PWCC's argument that to the extent the Delegation Agreement recognizes NNEPA's enforcement authorities it is void *ab initio*, Pet. at 25, is similarly without merit. Although EPA "has consistently withheld enforcement in Federal court from any administratively delegated entity, whether a state or a Tribe," 76 Fed. Reg. at 38782; *see also* § 71.6(b) (all terms and conditions in a Part 71 permit are federally enforceable); § 71.12 (same), a delegated agency still may enforce its own requirements in its own courts. The Delegation Agreement therefore recognizes that NNEPA may bring enforcement actions "under its independent authorities," Deleg. Agr., Pet. Ex. B, at § VI(2). *Accord* 76 Fed. Reg. at 38782 ("such [delegated] entities may pursue enforcement in their own courts of parallel non-Federal air quality requirements"). In addition, the fact that the Delegation Agreement recognizes the Navajo Nation's independent enforcement authorities is yet another factor weighing against the position PWCC takes in its petition for review.[20]

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[18] Since the Delegation Agreement was not a rulemaking, *see* Pet. at 22, the judicial review provisions of CAA § 307(d), 42 U.S.C. § 7606(b)(1), do not apply, but in any event the time for review under that subsection is the same as under § 307(b) and review under subsection (d) also is required to take place in federal court.

[19] Moreover, the Board's jurisdiction is limited to matters "expressly delegated to it," 40 C.F.R. § 1.25(e)(2), which consist of permit decisions and enforcement matters, *see* EAB Practice Manual at 3, 39-40, 43-44. Its jurisdiction does not encompass interagency agreements, unless otherwise directed by the Administrator. *See* 40 C.F.R. § 1.25(e)(2).

[20] Although the Delegation Agreement recognizes EPA's federal enforcement role, it requires NNEPA to assist EPA with federal enforcement by conducting "enforcement-related activities, including issuance of notices, findings, and letters of violation and development of cases up until the filing of a complaint or order," Deleg. Agr., Pet. Ex. B, at § VI(1)(c).

III. The Delegation Agreement and Section 71.9 Authorize NNEPA to Collect Permit Fees.

PWCC does not challenge the inclusion of the NNOPR fee requirements in Permit Condition IV.A. However, PWCC appears to base its consent to Condition IV.A at least in part on its mistaken belief that:

> for delegate agencies such as NNEPA, where it has been delegated full authority to administer the part 71 federal permit program and it also can collect fees from part 71 sources under tribal law that are sufficient to fund its designated part 71 responsibilities, there are no part 71 substantive and procedural requirements for the collection of fees.

Pet. at 33 (footnote omitted). It is incorrect that there are no Part 71 requirements for the collection of fees, as explained below. PWCC also states that "NNEPA does not assert that EPA's delegation of authority authorizes and requires Condition IV.A to be included in the revised part 71 permit," *id.*, and this statement too is inaccurate.

Section 71.9(c)(2)(ii) provides that EPA may suspend collection of fees when a fully delegated agency, under its own laws, collects fees that are sufficient to fund the program. In this way EPA authorizes NNEPA's collection of fees under tribal law, and this authorization further supports NNEPA's contention that a delegate agency uses its own laws to implement the Part 71 program.

Furthermore, once EPA entered into the Delegation Agreement with NNEPA, NNEPA was in fact required to use its own permit fee regulations. As noted above, § 71.9(c)(2)(ii) allows EPA to suspend its fees only when the delegate agency, under its own laws, collects fees sufficient to fund the program. This provision also provides that "[t]he specific terms and conditions regarding the suspension of fee collection will be addressed in the applicable delegation agreement." Deleg. Agr. § I(1) provides that NNEPA is fully delegated to administer the Part 71 program. Deleg. Agr. § II(2)

waives EPA's right to collect fees, and § II(4) specifically requires NNEPA to collect fees "pursuant to Subpart VI of the Navajo Nation Operating Permit Regulations."

In addition, the NNOPR must comply with the following Part 71 provisions relating to permit fees: § 71.9(c)(5)-(6) (specifying which emissions to include in fee calculations), (e) (submission of fee calculation worksheets), (h) (annual emission reports), (i) (recordkeeping requirements), (j) (fee assessment errors), (*l*) (interest rate and penalty charge), and (n) (adjustment of fee schedules). The requirement in subsection (e) that sources use EPA forms to calculate their fees, even when paying them to delegate agencies, is further evidence of EPA's authorization of NNEPA's fees. *See also* § 71.9(j) (EPA will determine whether the fee calculation worksheet is completed correctly and direct the permitting authority accordingly).[21]

Finally, PWCC indicates that it finds inclusion of the NNOPR permit fee requirements in the permit to be legitimate because "it consolidates all relevant requirements in one document." Pet. at 34, citing *Knauf I* at 62. The same reasoning holds true for all the other NNOPR provisions that are included in the permit. *See generally* 57 Fed. Reg. at 32251, *supra* page 1.

CONCLUSION

The requirement that a Part 71 delegate agency must use its own authorities to implement a Title V operating permit program is supported by the language, structure, and specific provisions of Part 71; by the Eligibility Determination and Delegation Agreement supporting EPA's delegation of the Part 71 program to the Navajo Nation EPA; and by EPA's rules delegating other federal CAA

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[21] These subsections apply to all Part 71 sources, which include sources subject to delegated programs. *See* §§ 71.2 (definition of "Part 71 source"); 71.9(e) & (h)-(j) (referring to "Part 71 source" or simply "source"). Subsections (c) and (n) refer specifically to delegated programs, and subsection (*l*) refers to "permitting authority," which includes a delegate agency under § 71.2.

programs to tribes and states. As discussed above, the NNOPR provisions cited in PWCC's permit must and do comply with the Part 71 requirements, as specified in § 71.11(a). The only substantive provisions of the permit are the fee provisions, and these replace federal fees, comply with the federal fee requirements, and have been authorized by EPA. Finally, where tribal and federal regulations are cited in parallel in the PWCC permit they are identical, and NNEPA has provided that compliance with the federal regulation shall be deemed compliance with the tribal counterpart. *See* Statement of Basis, Pet. Ex. I, at § 3. There is therefore no burden on PWCC to comply with both sets of provisions. For all the foregoing reasons, Respondent Navajo Nation EPA respectfully requests that the Board uphold the revised Part 71 permit issued by the Navajo Nation EPA pursuant to 40 C.F.R. § 71.10 and the Delegation Agreement of October 15, 2004 between NNEPA and EPA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this **NAVAJO NATION EPA'S RESPONSE TO PEABODY WESTERN COAL COMPANY'S PETITION FOR REVIEW OF CLEAN AIR ACT PART 71 PERMIT** was served via first class mail, postage prepaid, on this 5th day of July 2011, upon:

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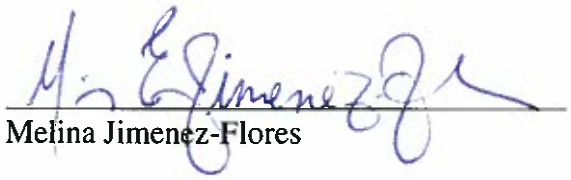

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