ORIGINAL

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

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

PETITION FOR REVIEW

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I. INTRODUCTION

The United States Environmental Protection Agency ("EPA") has delegated its authority to administer the federal operating permit program, 40 C.F.R. part 71 ("part 71"), to the Navajo Nation Environmental Protection Agency ("NNEPA"). Acting under that delegation of federal authority, NNEPA has issued a revised part 71 federal operating permit ("Permit") for Peabody Western Coal Company's ("Peabody's" or "Company's") Kayenta Mine at the Black Mesa Complex located on the Navajo Nation Reservation near Kayenta, Arizona. A copy of the Permit is attached as Exhibit A. Pursuant to 40 C.F.R. §§ 71.10(i) and 71.11(*l*)(1), Peabody petitions the Environmental Appeals Board ("Board" or "EAB") to review certain conditions of that revised federal operating permit.

This petition challenges NNEPA's authority, as an agency delegated EPA's authority to administer a federal operating permit program, (1) to use procedures of the Navajo Nation Operating Permit Regulations ("NNOPR") that are based solely on tribal law in processing revisions to Peabody's federal operating permit originally issued by NNEPA, and (2) to issue to Peabody a revised federal operating permit containing certain conditions that are based on tribal requirements of NNOPR. Peabody's challenge arises from NNEPA's application of its erroneous legal interpretation of a specific regulatory provision within the federal operating permit program. Accordingly, Board review of NNEPA's authority as a delegate agency under part 71 is appropriate.

II. BACKGROUND

A. <u>The Kayenta Mine at the Black Mesa Complex</u>

The Kayenta Mine at 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 has been classified as a "major source" under section 501 of the Clean Air Act ("CAA" or "Act"), it must have an operating permit issued in accordance with title V of the Act. CAA § 502(a).

B. Types of Operating Permit Programs

1. *Part 70 State or Tribal Operating Permit Program*

The Clean Air Act requires each state to develop, administer and enforce an operating permit program which EPA must first approve as meeting the requirements of title V of the Act. CAA § 502(d)(1). To that end, the Act requires EPA to promulgate regulations which establish the minimum elements of a state operating permit program under title V. CAA § 502(b). EPA has promulgated those regulations at 40 C.F.R. part 70. The term "part 70 state operating permit program" refers to a state regulatory program under state law that implements the requirements of title V of the Act after having been approved by EPA under 40 C.F.R. part 70.

Similarly, a tribe that satisfies the Tribal Air Rule's criteria for treatment as a state, 40 C.F.R. §§ 49.1-49.11, may (but is not required to) develop, administer and enforce its own part 70 tribal operating permit program under tribal law that implements the requirements of title V of the Act after having been approved by EPA under 40 C.F.R. part 70. Once a state or tribal permit program is approved by EPA under part 70, provisions of that part 70 operating permit program, enforceable under either state or tribal law, also become federally enforceable.

2. *Part 71 Federal Operating Permit Program*

If a state does not have its own EPA-approved part 70 permit program, then the Act requires EPA "to promulgate, administer, and enforce a program under [title V] for that state."

CAA § 502(d)(3). EPA has promulgated those regulations for its title V permit program at 40 C.F.R. part 71. In addition, effective March 22, 1999, if EPA has not approved a part 70 tribal permit program in Indian country, then EPA will administer and enforce its part 71 federal operating permit program in Indian country. 40 C.F.R. § 71.4(b). The term "part 71 federal operating permit program" refers to EPA's federal regulatory program under 40 C.F.R. part 71 that implements the requirements of title V of the Act for a state or a tribe in the absence of a part 70 state or tribal permit program. All provisions of a part 71 federal operating permit program are federally enforceable.

3. *Navajo Nation Operating Permit Program*

The "Navajo Nation Air Quality Control Program Operating Permit Regulations" or "NNOPR" were adopted by NNEPA in 2004. 4 NNR §§ 11-2H-101 *et seq.* NNEPA intends to seek EPA's future approval of NNOPR under part 70 as the Navajo Nation's tribal operating permit program. For that reason, many of the specific provisions in NNOPR parallel specific provisions in part 70, and some NNOPR provisions actually reference their part 70 counterparts.

Nevertheless, because the NNOPR have not been approved by EPA under part 70, the provisions of NNOPR are not federally enforceable. Rather, the provisions of NNOPR are enforceable only under tribal law. Consequently, the part 71 federal operating permit program continues to remain applicable to major sources that are located on the Navajo Nation Reservation, such as Kayenta Mine at the Black Mesa Complex.

C. Part 71 Permitting Chronology for Kayenta Mine at the Black Mesa Complex

The initial part 71 federal operating permit for Peabody's Black Mesa Complex (now Kayenta Mine at the Black Mesa Complex) was issued by EPA Region IX in 2004. Shortly thereafter, on October 15, 2004, EPA Region IX delegated its federal authority to NNEPA to

administer the part 71 federal permit program for certain sources on the Navajo Nation Reservation, including the Black Mesa Complex. 60 Fed. Reg. 67,578 (Nov. 18, 2004). Terms and conditions of EPA's delegation of administrative authority to NNEPA are specified in the *Delegation Agreement between U.S. Environmental Protection Agency Region IX and Navajo Nation Environmental Protection Agency,* "Delegation of Authority to Administer a Part 71 Operating Permits Program," (Oct. 15, 2004) ("Delegation Agreement"), attached as Exhibit B. The Delegation Agreement was accompanied by the following two documents: EPA Region IX, *Eligibility Determination for the Navajo Nation for Treatment in the Same Manner as a State for Purposes of Delegation of Administration of the Clean Air Act Title V, 40 CFR Part 71 Program,* (Oct. 13, 2004) ("Eligibility Determination"), attached as Exhibit C; NNEPA, *Program Description and Transition Plan for a Delegated Part 71 Program,* (July 16, 2004) ("Transition Plan"), attached as Exhibit D.

In response to Peabody's application for renewal of the part 71 federal operating permit for Black Mesa Complex, NNEPA issued a draft part 71 federal operating permit on July 15, 2009. The draft part 71 federal permit contained permit conditions that were based on part 71 federal requirements and that were essentially identical to their counterparts in the original part 71 federal permit for Black Mesa Complex. However, some of those conditions in that NNEPA-issued draft part 71 federal permit were also based on tribal provisions of NNOPR under tribal law. During the public comment period for the draft part 71 federal permit, Peabody objected that NNEPA's delegated federal authority to administer a part 71 permit program did not authorize NNEPA's inclusion of conditions in Peabody's part 71 federal permit that were based on specific tribal provisions of NNOPR. *See* Peabody's Comments on NNEPA-issued Draft Part 71 Permit and Draft Statement of Basis, attached as Exhibit E.

In October 2009 NNEPA issued a draft of its responses to comments that had been submitted on the draft part 71 federal operating permit for Black Mesa Complex. Peabody again commented that NNEPA's delegated federal authority to administer the part 71 federal permit program did not authorize NNEPA's inclusion of conditions in Peabody's part 71 federal permit that were based on specific tribal provisions of NNOPR. *See* Peabody's Comments on NNEPA's Draft Responses to Comments on NNEPA-issued Draft Part 71 Permit and Draft Statement of Basis, attached as Exhibit F.

On December 7, 2009, NNEPA issued a part 71 federal operating permit for Black Mesa Complex. That permit continued to contain conditions objectionable to Peabody, i.e., permit conditions based on non-federally-enforceable, tribal provisions of NNOPR.

Peabody thereafter timely filed a petition with EPA's Environmental Appeals Board, attached as Exhibit G, asking the Board to review NNEPA's issuance of a part 71 federal operating permit for Black Mesa Complex that contained certain conditions based on provisions of NNOPR under tribal law. However, on August 13, 2010, the Board remanded that NNEPA-issued part 71 federal permit to NNEPA in order for NNEPA to "clarify and correct" the permit conditions that Peabody had contested in its petition for review. *In re Peabody Western Coal Company,* CAA Appeal No. 10-01 (EAB Aug. 13, 2010), 14 E.A.D. __ (Order Granting Motion for Voluntary Remand) ("Remand Order").

In November 2010, NNEPA issued a draft revised part 71 federal operating permit for Black Mesa Complex along with a draft revised statement of basis. The draft revised part 71 federal permit continued to contain certain permit conditions based on both federal provisions of part 71 and tribal provisions of NNOPR. Furthermore, NNEPA made clear that it had processed the draft revised permit in accordance with tribal procedures in NNOPR. As shown in Exhibit H,

Peabody timely submitted comments on the draft revised permit and draft revised statement of basis, objecting to NNEPA's unauthorized actions as a delegate agency under part 71 that used tribal procedures under NNOPR to process and issue the revised part 71 federal permit for Black Mesa Complex and that included certain conditions based on provisions of NNOPR in that revised part 71 federal permit.

By letter dated April 14, 2011, NNEPA provided Peabody with a revised part 71 federal permit, identified as NN-OP 08-010, for the Kayenta Mine at the Black Mesa Complex. (Ex. A). That revised part 71 federal permit was accompanied by a revised statement of basis, attached as Exhibit I, and by NNEPA's responses to comments on the draft revised part 71 federal permit, attached as Exhibit J. The NNEPA-issued revised part 71 federal operating permit for Kayenta Mine at the Black Mesa Complex was processed in accordance with part 71 federal procedures and with NNOPR's tribal procedures. The NNEPA-issued revised part 71 federal operating permit contains certain permit conditions based on both provisions of part 71 and provisions of NNOPR.

Peabody now files this petition seeking the Environmental Appeals Board's review of NNEPA's actions as a delegate agency under part 71. In particular, Peabody challenges NNEPA's unauthorized use of tribal procedures of NNOPR to process revisions to Peabody's part 71 federal permit and NNEPA's unauthorized inclusion of ten revised conditions based on requirements of NNOPR under tribal law in Peabody's revised part 71 federal permit.

III. THRESHOLD PROCEDURAL REQUIREMENTS

During the public comment period for the NNEPA-issued draft revised part 71 federal permit for Peabody's Black Mesa Complex, the Company filed comments, in keeping with 40 C.F.R. § 71.11(g), stating that NNEPA had no authority as a delegate agency under part 71 either

(1) to issue the revised permit in accordance with tribal procedures in NNOPR, or (2) to base certain revised conditions in the revised permit on tribal requirements of NNOPR. (Ex. H at 3). Nevertheless, the final revised permit was subsequently issued in accordance with tribal procedures in NNOPR, and the final revised permit contains ten revised conditions based on tribal requirements of NNOPR. Because Peabody commented on those matters during the public comment period for its draft revised part 71 federal permit, the Company has standing to petition the Board for review of those same concerns that remain with the revised part 71 federal permit for Kayenta Mine at the Black Mesa Complex. 40 C.F.R. §§ 71.10(i) and 71.11(*l*)(1).

As noted earlier, the Board remanded the initial NNEPA-issued part 71 federal permit for Black Mesa Complex to NNEPA in order for NNEPA to "clarify and correct" the permit conditions that Peabody had contested in its earlier petition for Board review. The Board acknowledged with its remand that "Peabody retains a legal right to file a new petition for review with the Board pursuant to 40 C.F.R. § 71.11(*l*)(1) following NNEPA's issuance of a revised final permit decision on remand." *In re Peabody Western Coal Company,* CAA Appeal No. 10-01, slip op. at 14-15 (EAB Aug. 13, 2010), 14 E.A.D. __. With this new petition for Board review, Peabody is exercising that right.

IV. ISSUE PRESENTED

Peabody objects to NNEPA's use of tribal permit-processing procedures of NNOPR to process and issue the revised part 71 federal permit for the Kayenta Mine at the Black Mesa Complex. Peabody also objects to that revised part 71 federal permit containing the following conditions that are based on NNOPR requirements under tribal law: Condition Nos. III.B (Reporting Requirement); IV.C (Compliance Certifications); IV.D (Duty to Provide and Supplement Information); IV.E (Submissions); IV.G (Permit Actions); IV.H (Administrative

Permit Amendments); IV.I (Minor Permit Modifications); IV.K (Significant Permit Modifications); IV.L (Reopening for Cause); and IV.Q (Off Permit Changes).

The Company's two objections are inextricably linked to the following single issue that this petition asks the Board to decide: *With EPA's delegation to NNEPA of authority to administer a part 71 federal operating permit program, does 40 C.F.R. § 71.10(a), as NNEPA asserts, authorize and require NNEPA to have its own tribal authorities to administer the Part 71 program, including tribal authorities for permit processing, monitoring and reporting, and permit enforcement?*

V. NNEPA'S ASSERTION AND RESULTANT PERMITTING ACTIONS UNDER TRIBAL LAW ARE ERRONEOUS AS A MATTER OF FEDERAL LAW.

With respect to operating permit programs under the CAA, there are two basic, but very different, kinds of authority which EPA typically delegates. In the first type, a state or tribe develops an operating permit program that contains all of the minimum elements required by the CAA, including a variety of different authorities, *under state or tribal law*. Once EPA approves that state or tribal permit program as satisfying the CAA, EPA delegates "program authority" to the state or tribe. This means that the state or tribe is responsible for implementing (administering and enforcing) that CAA permit program in accordance with state or tribal law, including all required state or tribal legal authorities. Once EPA has approved the part 70 state or tribal program, that program is also federally enforceable.

The second type of authority delegated by EPA involves a federal permit program for which EPA delegates its authority to a state or tribe to administer. With that type of delegation, the federal permit program remains a federal program under federal law (CAA). That is, EPA simply delegates its federal "administrative authority" to the state or tribe. The state or tribe is then responsible for using its delegated federal authority to run those portions of the federal

program agreed to by EPA and the delegate agency. This type of delegation means that EPA and the delegate state or tribal agency must administer their respective portions of the federal permit program solely in accordance with federal procedures applicable to that program. As a result of the state or tribe being given EPA's federal administrative authorities to run designated portions of the federal program, the state or tribe has no need for any administrative procedures based on tribal law to carry out its delegated responsibilities.

This proceeding involves EPA's delegation of administrative authorities to NNEPA, where only federal procedures must be used to administer the federal permit program. NNEPA's permitting actions in this case, however, go beyond the mere use of delegated federal administrative authorities. In particular, NNEPA has acted under a purported type of authority that does not actually exist, i.e., one where NNEPA, as a condition for being delegated authority to administer a federal permit program, must use its own tribal administrative and enforcement authorities based solely on tribal law.

NNEPA asserts that the language of 40 C.F.R. § 71.10(a) "makes clear that it is federal requirement for tribes to have their own authorities to administer the Part 71 program, including authorities for permit processing, monitoring and reporting, and permit enforcement." *Id.* at 2. Thus, NNEPA has processed and issued the revised part 71 federal permit for Peabody's Kayenta Mine at the Black Mesa Complex in accordance with NNOPR's procedural requirements under tribal law. NNEPA has also cited requirements in NNOPR as authority for ten different conditions in that federal permit. For the reasons explained herein, NNEPA's assertion and its subsequent permitting actions under tribal law are erroneous as a matter of federal law.

A. NNEPA's Interpretation of the Meaning of "Adequate Authority under Tribal Law" in 40 C.F.R. § 71.10(a) Is Erroneous.

NNEPA's challenged actions arise from its erroneous interpretation of the language in 40 C.F.R. § 71.10(a) which states: "[T]he laws of the . . . Indian Tribe [must] provide adequate authority to carry out all aspects of the delegated program." The disposition of this petition depends on what "adequate authority under tribal law" means in the context of 40 C.F.R. § 71.10(a).

1. *Adequate Authority under Tribal Law to Administer and Enforce a Part 70 Tribal Permit Program*

In submitting its state (or tribal) operating permit program for EPA approval under part 70, a state (or tribe) must submit a legal opinion "that the laws of the State [or Tribe] . . . provide adequate authority to carry out the program."[1] CAA § 502(d). Importantly, the statute also specifically identifies what constitutes "adequate authority under state (or tribal) law."

In particular, § 502(b)(5) mandates that each state (or tribal) operating permit program must ensure that the state (or tribal) permitting agency has been provided "adequate authority under state (or tribal) law" to:

> (A) issue permits and assure compliance by all sources required to have a permit under this subchapter with each applicable standard, regulation or requirement under [the Clean Air Act];
>
> (B) issue permits for a fixed term . . . ;

[1] Unlike each state, a tribe is not required to have an implementation plan that includes an EPA-approved part 70 permit program. Under the Tribal Air Rule, however, a tribe may seek EPA's "treatment as a state" for the purpose of administering and enforcing its own part 70 tribal operating permit program. 40 C.F.R. §§ 49.1-49.7.

(C) assure that upon issuance or renewal permits incorporate emission limitations and other requirements in an applicable implementation plan;

(D) terminate, modify, or revoke and reissue permits for cause;

(E) enforce permits, permit fee requirements, and the requirement to obtain a permit . . . ; and

(F) assure that no permit will be issued if the Administrator objects . . ;

Other authorities that each state (or tribal) operating permit program under part 70 must contain, for example, are (1) "adequate authority" and procedures under state (or tribal) law to provide for the permitting agency's failure to act timely and appropriately on a permit application, CAA § 502(b)(7), and (2) "authority" and reasonable procedures under state (or tribal) law to make available to the public any permit application, compliance plan, permit, and monitoring and compliance report, CAA § 502(b)(8).

In other words, those "§ 502(b) authorities," i.e., individual authorities that collectively constitute "adequate authority under tribal law" to administer and enforce a *part 70* tribal operating program, are specified throughout § 502(b) of the Act. Those same individual authorities that collectively constitute "adequate authority under tribal law" for a tribal permitting agency to carry out its own *part 70* tribal permit program are also specified throughout 40 C.F.R. § 70.4(b).

Notably, when a tribe provides a letter stating that it has "adequate authority under tribal law" to administer and enforce a *part 70* tribal permit program, that statement must also contain "citations to the specific [tribe's] administrative regulations, and, where appropriate, judicial decisions that demonstrate adequate authority." 40 C.F.R. § 70.4(b)(3). Furthermore, in

demonstrating that it has "adequate authority under tribal law" to administer and enforce a *part 70* tribal permit program, a tribe must also describe its "applicable [tribal] procedures and any [tribal] administrative . . . procedures." 40 C.F.R. § 70.4(b)(8).

Thus, both the Act and part 70 identify an array of individual authorities which collectively constitute the "adequate authority under tribal law" that a tribe must have in order to administer and enforce its own *part 70* tribal permit program. EPA's approval of a tribal operating permit program under part 70 is an example of EPA's delegation of "program authority" discussed previously, i.e., where the tribe implements the particular CAA permit program in keeping with tribal law.

2. *EPA's Adequate Authority under Federal Law to Administer and Enforce a Part 71 Federal Permit Program*

If a state or tribe does not have an EPA-approved part 70 state or tribal operating permit program under title V, then CAA § 502(d)(3) requires EPA to "promulgate, administer, and enforce a program under [title V] for that state [or tribe]."[2] As described above, CAA § 502(b) identifies the specific individual authorities that are needed by a state or tribe to administer and enforce a state or tribal operating permit program under title V. If EPA must administer and enforce such a permit program under title V for a state or tribe, the Agency would need to rely on those same "§ 502(b) authorities."

Section 301(a) of the Act provides the Administrator with the authority "to prescribe such regulations as are necessary to carry out [her] functions under [the Clean Air Act]." Thus, the broad rulemaking power of CAA § 301(a) coupled with the enabling authority of CAA § 502(d)(3) provides EPA with the necessary "§ 502(b) authorities." That is, the Act provides

[2] *See* n.1.

EPA with "adequate authority under federal law" to "promulgate, administer and enforce" its own part 71 federal operating permit program.

3. *Adequate Authority under Tribal Law to Administer a Delegated Part 71 Federal Permit Program*

EPA may "delegate part of the responsibility for *administering* the part 71 program to the . . . eligible Tribe in accordance with the provisions of § 71.10." 40 C.F.R. § 71.4(f) (emphasis added). Section 71.10 also prescribes that EPA "may delegate . . . the authority to *administer* a part 71 operating permits program to a[n] . . . eligible Tribe." (Emphasis added). Finally, 40 C.F.R. § 71.10(a) provides that "[i]n order to be delegated authority to *administer* a part 71 program, the [tribe] must submit a legal opinion . . . stating that the laws of the . . . Indian Tribe provide adequate authority to carry out all aspects of the delegated program." (Emphasis added).

As explained above, the Act provides EPA with specific "§ 502(b) authorities" in order for the Agency to *administer and enforce* the part 71 federal program. Examination of those individual "§ 502(b) authorities" reveals that many of them are *administrative* authorities, e.g., authority to issue permits to all sources required to have a permit under title V; authority to issue permits for a fixed term; authority to assure that permits incorporate emission limitations and other requirements in an applicable implementation plan; authority to terminate, modify, or revoke and reissue permits for cause; etc. Thus, when EPA delegates its authority to *administer* a part 71 federal permit program, EPA actually provides the tribal agency with all of the federal administrative authorities under § 502(b) that are necessary for the delegate tribal agency to administer a part 71 federal program.[3]

[3] Unless the regulations or the delegation agreement identify specific administrative authorities that either cannot or will not be delegated. *See, e.g.*, 40 C.F.R. § 71.10(j) (EPA's authority to object to the issuance of a part 71 permit and EPA's authority to act upon public petitions to reopen a part 71 permit for cause are "nondelegable conditions.").

Contrary to NNEPA's assertion, unlike seeking EPA approval of a tribal permit program under part 70, a tribe seeking delegation to administer a part 71 federal program is not required to have all of the "§502(b) authorities" under state or tribal law. The part 70 regulations identify each of the "§ 502(b) authorities" that a tribe must have under tribal law for EPA approval of the tribe's own part 70 permit program. In contrast, the part 71 regulations do not list any "§ 502(b) authorities" that a tribe must have *under tribal law* to administer a part 71 federal program because EPA's delegation provides the tribe with the necessary federal administrative authorities under § 502(b).

Consequently, if a tribal agency will be delegated all of the administrative authorities that it needs to administer a part 71 federal program, then what authority under tribal law would it still need? Quite simply, the tribal agency would still need its own tribal government's approval to exercise those delegated federal authorities. Thus, for a tribal agency seeking delegation of EPA's authority to administer a part 71 federal program, "adequate authority under tribal law" for the agency "to carry out all aspects of the delegated program" consists only of the tribal government's authorization of the tribal agency to use the delegated federal authorities in the administration of its agency's responsibilities under that program.

4. *NNEPA's Adequate Authority under Navajo Nation Law to Administer a Delegated Part 71 Federal Program*

A provision under Navajo Nation law provides that "the Director [of NNEPA] may . . . enter into a delegation agreement with USEPA providing for the Director to implement a CAA Title V operating permit program pursuant to 40 C.F.R. part 71, . . ." 2 N.N.C. § 1134(A)(3). That straightforward statutory provision is the necessary enabling authority under tribal law that allows NNEPA to exercise federal administrative authority that it may be delegated to administer a part 71 federal permit program.

A Navajo Nation regulation implements that statutory authorization by incorporating 40 CFR part 71 by reference into NNOPR. That implementing authority confirms that NNEPA will use its delegated federal administrative authority, including the delegated part 71 procedures, when acting as a delegate agency under part 71. NNOPR § 704(A).

That single tribal statutory provision and that one tribal regulatory provision are all of the "adequate authority under tribal law" that NNEPA needs to carry out all aspects of the delegated program. Contrary to its interpretation of 40 C.F.R. § 71.10(a), NNEPA is not required to have its own tribal authorities for permit processing because NNEPA has been provided the federal administrative authorities for permit processing. Contrary to NNEPA's assertion, the "adequate authority under tribal law" which NNEPA must possess in order to be delegated federal authority to administer a part 71 permit program consists only of the Navajo Nation government's authorization of NNEPA to exercise its delegated federal administrative authorities.

5. *Conclusion*

NNEPA has been delegated federal *administrative* authority to carry out its assigned responsibilities under the part 71 federal permit program. That delegated authority provides NNEPA with all of the *federal* authority, including part 71 federal procedures, required to administer its responsibilities for that federal program. Nevertheless, for NNEPA's exercise of that delegated federal authority to be lawful under tribal law, NNEPA must be authorized by the Navajo Nation government to exercise that delegated federal authority, including part 71 federal procedures. That particular tribal government authorization constitutes the "adequate authority under tribal law" addressed by 40 C.F.R. § 71.10(a). Contrary to NNEPA's assertion, § 71.10(a) neither authorizes nor requires NNEPA to use its own tribal permit-processing procedures when acting as a delegate agency under part 71.

B. A Prior EAB Decision Means NNEPA's Assertion and Challenged Permitting Actions Are Erroneous as a Matter of Law.

In commenting on NNEPA's draft revised permit, Peabody noted that the Board has previously addressed the fundamental issue underlying Peabody's objections to NNEPA's particular actions in this proceeding. (Ex. H at 8-10). However, in its responses to comments, NNEPA did not directly reply to that Company comment. Peabody therefore addresses that matter again in this appeal. In particular, based on the Board's decision in *In re West Suburban Recycling and Energy Center, L.P. 6 E.A.D. 692 (EAB Dec. 11, 1996) ("WSREC")*, Peabody believes that the Board's view of what controls NNEPA's role in reviewing part 71 permit applications and issuing part 71 federal permits is far different from what NNEPA asserts its authority to be.

In *WSREC,* a state agency had been delegated authority by EPA to administer the federal PSD program. Nevertheless, the state agency contended that its role in reviewing PSD permit applications was controlled by the substantive and procedural review requirements of state law. *WSREC* at 704. The Board flatly disagreed, explaining that "a permit issuer exercising delegated PSD permit authority only 'stands in the shoes' of the U.S. EPA." *Id. at 707.* Finding the state agency's contention "both inexplicable and plainly erroneous," *id.* at 704, the Board concluded that:

> [w]e find nothing in the Delegation Agreement that would so expand [the state agency's] federal PSD review authority; indeed, . . . , the Delegation Agreement plainly limits [the state agency] to exercising only the federal PSD review authority . . . To read the Delegation Agreement as [the state agency] suggests would be to equate [the state agency's] delegated PSD authority with a state PSD program that has been duly authorized by EPA as part of a state SIP. This we cannot do.

Id.

The parallel between the delegate agency's misguided reliance on state law in *WSREC* and NNEPA's reliance on tribal law in the instant proceeding is obvious. The Board held in *WSREC* that delegation of EPA's authority to a state permitting agency to administer a federal PSD program does not authorize that state agency to apply state procedural and substantive requirements to process and issue the federal PSD permit. Thus, Peabody concludes that the Board's decision in *WSREC* means that delegation of EPA's authority to NNEPA to administer a part 71 federal permit program does not authorize NNEPA to apply tribal procedural and substantive requirements to process and issue Peabody's revised part 71 federal permit.

NNEPA however argues that nothing in the Clean Air Act prohibits it either from applying tribal procedural requirements to process and issue part 71 federal permits or from basing conditions in part 71 federal permits on NNOPR-based permit-processing requirements or on NNOPR-based permit enforcement-related investigatory authorities. (Ex. J at 4). According to NNEPA, because those NNOPR-based provisions under tribal law "were a prerequisite for delegation of the program, it is appropriate for them to be cited in the permit." *Id.*

That latter statement reveals the underlying fundamental flaw in NNEPA's argument. As demonstrated earlier, NNEPA was *not* required to have "adequate permit processing requirements" under tribal law and "adequate permit enforcement-related investigatory authorities" under tribal law as a prerequisite for delegation of EPA's authority to administer a part 71 federal permit program. Consequently, because there was no requirement for NNEPA as a delegate agency to have those various NNOPR-based provisions under tribal law, there can be no requirement to apply any of those NNOPR-based provisions when processing and issuing part 71 federal permits as a delegate agency. Without any requirement for NNEPA, as a delegate

agency under part 71, to have and use those NNOPR-based provisions, clearly it is *not* "appropriate for them to be cited in the permit."

As discussed further below, NNEPA's actions in this case consist solely of processing and issuing Peabody's revised part 71 federal permit in keeping with NNEPA's delegated federal authority to administer the part 71 federal permit program. NNEPA has not acted separately in this case to issue a tribal permit to Peabody in keeping with NNEPA's tribal authority to administer NNOPR.

Thus, the Board's holding in *WSREC* applies here, i.e., acting solely as a delegate agency under the part 71 federal permit program, NNEPA's issuance of a revised part 71 federal permit to Peabody must rely only on substantive and procedural requirements of that federal program.

C. Terms of the Delegation Agreement Are Conflicting, and Those Terms Are Not Separately Enforceable under the Clean Air Act.

1. *Peabody's Comments on the Delegation Agreement and Accompanying Documents During the Public Comment Period Were Related to NNEPA's Revisions to the Permit.*

NNEPA has stated several times that Peabody's comments regarding the Delegation Agreement and accompanying documents during the public comment period for the draft revised permit and the draft revised statement of basis "are not comments on the permit, and are not properly part of this comment process." (Ex. J at 6-9). Peabody disagrees.

In the NNEPA-issued draft revised permit, NNOPR's procedural requirements as well as corresponding requirements under part 71 were cited as authorities for ten different conditions in that federal permit. As the NNEPA-issued draft revised statement of basis explained, "NNEPA had adequate independent authority to administer the program, as required by 40 C.F.R. § 71.10(a). USEPA found such authority consisted of having adequate permit processing

requirements and adequate permit enforcement-related investigatory authorities." (Ex. I at 3). NNEPA then cited "Deleg. Agr. §§ IV, V, VI.1, IX.2" as the basis for its explanation. *Id.*

Because NNEPA's reliance on the contents of the Delegation Agreement are directly related to ten different revised conditions in the draft revised permit, the Company was well within its rights to comment on the Delegation Agreement's contents during the public comment period for the draft revised permit and its draft revised statement of basis. Moreover, by commenting on the Delegation Agreement's relationship to the draft revised permit conditions, Peabody preserved its right to address those concerns in the context of this petition. *See* 40 C.F.R. § 71.11(*l*).

2. *Terms of the Delegation Agreement and Accompanying Documents Are Contradictory.*

NNEPA has referenced a number of statements in the Delegation Agreement and accompanying documents that, on their face and out of context, could conceivably be construed as supporting NNEPA's assertion that a prequisite 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, including authorities for permit processing. That alleged support for NNEPA's assertion becomes very questionable, however, when other statements in that same Delegation Agreement are also examined.

The following are examples of sharply conflicting statements in the Delegation Agreement and accompanying documents.

Questionable Statements

- "NNEPA agrees to continue to revise, reopen, terminate or revoke and reissue Part 71 permits, as necessary and appropriate, *using the procedures of Subpart IV of the [NNOPR].*" (Ex. B, §IX.2 (emphasis added));

- "[T]he 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 . . ." (Ex. C at 3 (emphasis added));

- NNEPA "will *process permit applications pursuant to . . . subpart IV of the NNOPR.*" (Ex. D at 6 (emphasis added)); and

- "All new permits *will be issued in the manner described . . . and in subpart IV of the [NNOPR] and section 212 of the Navajo Uniform Rules.*" (Ex. D at 8 (emphasis added)).

Statements Consistent with 40 C.F.R. § 71.10(a)

- NNEPA acknowledges that by operation of the CAA, *NNEPA will administer the existing federal operating permit program pursuant to 40 C.F.R. Part 71 . . .*" (Ex. B at 2 (emphasis added));

- "*NNEPA agrees to conduct all administrative permit proceedings in accordance with 40 C.F.R. § 71.11 . . .*" (Ex. B, § IV.2 (emphasis added)); and

- "EPA shall object to a Part 71 permit if NNEPA fails to do any of the following: . . (c) *process the permit under the procedures required under 40 C.F.R. § 71.7 and 71.11 . . .*" (Ex. B, § IV.7 (emphasis added));

Peabody is simply at a loss in trying to explain those multiple contradictions in the Delegation Agreement and its accompanying documents regarding NNEPA's authority to rely on its own tribal permitting procedures when processing and issuing part 71 federal permits. The documents' numerous approvals to use those tribal permitting procedures fly in the face of conventional principles of delegation of federal authority to administer a federal permit program.

Peabody cannot conceive of any credible explanation for the Delegation Agreement's undue focus on specific tribal procedures and other requirements under tribal law.

Nevertheless, as explained below, the Delegation Agreement and its accompanying documents do not constitute EPA rulemaking, so NNEPA cannot rely solely on any particular provision in those documents when issuing part 71 permits as a delegate agency.

3. *Terms of the Delegation Agreement and Accompanying Documents Are Not Separately Enforceable under the CAA.*

During the public comment period for the draft revised permit and draft revised statement of basis, Peabody's comments acknowledged NNEPA's reliance on the Delegation Agreement and accompanying documents as support for NNEPA's revised conditions in the draft revised permit. (Ex. H at 13). In those comments, the Company also acknowledged that those documents standing alone had no force of law under the Clean Air Act with respect to Peabody. (Ex. H at 14-15). NNEPA did not respond directly to those Company comments. Instead, NNEPA asserted that those Company comments were untimely because Peabody did not challenge the Delegation Agreement or any portion of it after notice of that delegation was published in the Federal Register in 2004. (Ex. J at 6-7).

Simply put, a delegation agreement under part 71 does not constitute a rulemaking under the Clean Air Act. Consequently, Peabody did not comment on EPA's 2004 *notice* of the execution of the Delegation Agreement between EPA and NNEPA, 69 Fed. Reg. 67,578 (Nov. 18, 2004), because that notice and its accompanying documents did not constitute a proposed EPA rulemaking for which public comment was sought.

As EPA explained when it promulgated part 71:

> EPA disagrees that notice and comment is required prior to delegation. . . . [W]hen EPA delegates part 71 program implementation duties, EPA is merely passing implementation responsibility of an already

> promulgated program to an eligible delegate entity. The program that is delegated under part 71 has already been subject to notice-and-comment rulemaking and would not be changed as a result of the delegation. The delegation itself is not a rulemaking procedure.

EPA, *Technical Support Document for Federal Operating Permits Program,* "Part 71 Response to Comments Document," 32 (Dec. 21, 1998).

The basic purpose of a delegation agreement under part 71 is to specify EPA's and the delegate agency's mutual understanding of the extent to which the delegate agency is responsible for administering the part 71 federal program. See, e.g., 40 C.F.R. § 71.10(a). Thus, as its name implies, the Delegation Agreement is essentially a contract between the two parties – EPA and NNEPA.

The terms and conditions of the Delegation Agreement and its accompanying documents are expected to be legally sound, i.e., to comply with applicable requirements of part 71 and any related provisions of the CAA. If, however, terms and conditions within those documents are at odds with requirements of part 71 and related provisions of the Act, such terms and conditions are not separately enforceable as a matter of federal law.

In sum, the EPA-NNEPA Delegation Agreement and its two accompanying documents have no independent force of law under the CAA with respect to third parties, in general, and with respect to Peabody and its revised part 71 permit, in particular. Consequently, when NNEPA acts as a delegate agency under part 71, those documents cannot lawfully authorize NNEPA's use of NNOPR procedures in the issuance of Peabody's revised part 71 federal permit, nor can they lawfully authorize NNEPA's imposition of NNOPR requirements as conditions in Peabody's revised part 71 federal permit.

4. *Terms of the Delegation Agreement and Accompanying Documents Unrelated to a Delegation of EPA Authority to Administer a Part 71 Federal Permit Program Are Void Ab Initio.*

The Delegation Agreement between EPA and NNEPA has been styled as a "Delegation of Authority to Administer a Part 71 Operating Permits Program," (Ex. B, cover). The Agreement was announced as the "Delegation of the Title V Permitting Program, Consistent with Federal Operating Permit Programs to the [NNEPA]." 69 Fed. Reg. 67,578. The part 71 federal regulations, i.e., the "Federal Operating Permit Program," repeatedly characterizes the nature of such a delegation with language such as ". . . delegat[ing] part of the responsibility for *administering* the part 71 program," 40 C.F.R. § 71.4(j) (emphasis added); ". . . delegated authority to *administer* part 71 permits," 40 C.F.R. § 71.4(*l*) (emphasis added); ". . . delegate . . . the authority to *administer* a part 71 operating permit program," 40 C.F.R. § 71.10(a) (emphasis added); and ". . . the delegate agency will be responsible . . . for *administering* the part 71 program," *id.* (emphasis added).

EPA is authorized under the Act to "administer and enforce" its part 71 federal permit program. CAA § 502(d)(3); 40 C.F.R. § 71.4(a). Notably, however, when EPA delegates its authority to *administer* a part 71 federal permit program, the transferred federal responsibilities are only administrative in nature. Thus, a delegation of federal authority to administer a part 71 federal program does just that, i.e., it transfers federal administrative authority to carry out the delegated parts of the federal program but it does not transfer any federal enforcement authority for that program.

Since promulgating the part 71 program, EPA has confirmed during its development of other federal programs under the CAA that the Agency does not delegate its authority to *enforce* that federal program. *See, e.g.,* 71 Fed. Reg. 48,722 (Aug. 21, 2006) ("For these administratively

delegated programs, Federal program requirements will continue to be subject to enforcement by us [EPA], not the delegate tribal agency, under Federal law."); 67 Fed. Reg. 11,752 (Mar. 15, 2002) ("With delegated Federal programs, the Federal requirement administered by the delegated Tribe is subject to enforcement by EPA, not the Tribe, under Federal law.").

Nevertheless, in responding to Peabody's comments on the draft revised permit and draft statement of basis, NNEPA stated that 40 C.F.R. § 71.10(a) means that "it is a federal requirement for tribes to have their own authorities to administer the Part 71 program, including authorities for . . . permit enforcement." (Ex. J at 2). However, as demonstrated above, enforcement under part 71 is simply not a responsibility that EPA is authorized to delegate when it delegates its authority to *administer* the part 71 federal program. If NNEPA lacks federal authority to enforce a part 71 federal permit, it clearly would have no authority under tribal law to enforce a federal permit.

Therefore, any terms within the Delegation Agreement and its accompanying documents that address NNEPA having authority to enforce a part 71 federal permit are void *ab initio*. As a delegate agency under part 71, NNEPA lacks any federal or tribal authority to enforce Peabody's part 71 federal permit.

D. Other EPA Delegations of Authority and Related Agency Policy Do Not Support NNEPA's Assertion.

As explained above, the meaning of "adequate authority" under tribal law in 40 C.F.R. § 71.10(a) does *not* include tribal authority to rely on its own permitting procedures and other tribal requirements when a tribe acts as a delegate agency under part 71. Another EPA delegation of administrative authority similar to the delegation in this proceeding confirms that meaning of "adequate authority" under tribal law. Likewise, the Agency has also described that limited nature of a delegate agency's authority in a variety of statements.

1. *Region X Delegation of Authority to Administer Federal Requirements*

EPA Region X has promulgated general federal implementation plan (FIP) provisions applicable to Indian reservations located in Region X. 40 C.F.R. §§ 49.121 *et seq.* In addition, Region X has promulgated specific FIP provisions applicable to the Nez Perce Tribe of Idaho. 40 C.F.R. §§ 49.10401-49.10411.

Federal regulations at 49 C.F.R. § 49.122 provide that EPA may delegate to an Indian Tribe partial authority to administer one or more of the FIP requirements in effect for that particular Indian Tribe. In particular, an Indian Tribe that requests such partial delegation of federal administrative authority must provide Region X with a "description of the laws of the Indian Tribe that provide adequate authority to carry out all aspects of the provisions for which delegation is requested. 40 C.F.R. § 49.122(b)(3)(iii). That latter part 49 requirement for a delegate tribe to have "adequate authority" under tribal law is almost identical to the language in 40 C.F.R. § 71.10(a) that also requires a delegate tribe to have "adequate authority" under tribal law to carry out all aspects of the delegated program.

EPA Region X has executed a delegation agreement with the Nez Perce Tribe for the partial delegation of certain FIP requirements for the Nez Perce Reservation. *Agreement for Partial Delegation of the Federal Implementation Plan for the Nez Perce Reservation by the United States Environmental Protection Agency, Region 10, to the Nez Perce Tribe,* (June 27, 2005) ("Region 10 Delegation Agreement"), attached hereto as Exhibit K . In discussing the Nez Perce's "adequate authority" under tribal law to carry out all aspects of the delegated provisions, that delegation agreement states succinctly that "[t]he Nez Perce Tribe has authority to conduct activities in support of this delegation." (Ex. K at 1).

That delegation agreement between Region X and the Nez Perce Tribe identifies the specific *federal* regulations that the Nez Perce Tribe will administer. Notably, however, that delegation agreement says nothing about authorizing or requiring the Tribe to use any tribal procedures or other tribal requirements. Contrary to NNEPA's assertion of what constitutes "adequate authority" under 40 C.F.R. § 71.10(a), EPA's delegation of authority to the Nez Perce Tribe to administer specific federal regulations does *not* require the Tribe "to have [its] own authorities to administer the [federal] program, including authorities for permit processing, monitoring and reporting, and permit enforcement."

The way that the role of the delegate agency is described in the above-referenced delegation agreement with the Nez Perce Tribe casts further doubt on NNEPA's asserted authority in this proceeding. That agreement "identifies those provisions [of the Nez Perce FIP] where the Nez Perce Tribe *will assist EPA* with implementing delegated provisions." (Ex. K, § IV (emphasis added)). That delegation agreement also discusses EPA's issuance of Inspector Credentials to qualified employees of the Nez Perce Tribe and how those Credentials will "identify[ ] the Tribal staff as an *authorized representative of EPA*." (Ex. K § VI.B (emphasis added)). Indeed, when EPA Region X promulgated its general FIP, EPA explained that a tribal government could be delegated authority to administer specific federal air rules, ***with tribal government employees acting as authorized representatives of EPA***. 70 Fed. Reg. 18,080 (Apr. 8, 2005) (emphasis added).

2. *Other EPA Descriptions of a Delegate Agency's Limited Authority*

That same limited role of a delegate agency was also explained in EPA's preamble to its proposed FIP that would implement both a federal minor new source review (NSR) program and a federal nonattainment major NSR program in Indian country. 71 Fed. Reg. 48,696 (Aug. 21,

2006). EPA explained that the delegation approach provides for EPA to delegate administration of the federal program operating under federal law to interested tribes. *Id.* at 48,722. Under a delegation of administrative authority, delegated program functions would remain part of the FIP administered under federal law, and the delegate tribal agency would *simply assist EPA* with administration of the program to the extent of the functions delegated. *Id.* at 48,721 (emphasis added).

The Board has explained many times that, because a delegate agency only exercises such federal authority as was delegated to it by EPA, the delegate agency "stands in the shoes of EPA" for purposes of implementing the federal program. *See, e.g., WSREC* at 695, n.4. In general, EPA has described a delegate agency's limited role as an authorized representative of EPA in many ways. "When EPA delegates part 71 program implementation duties, EPA is merely passing implementation responsibility of an already promulgated program to an eligible delegate entity." EPA, *Technical Support Document for Federal Operating Permits Program,* "Part 71 Response to Comments Document," 32 (Dec. 21, 1998). "The delegation means that the state has the responsibility to review proposed construction projects in accordance with the federal permitting regulations; the state acts on behalf of EPA." Letter from Valdas Adamkus, EPA Region V, to Woodrow Myers, M.D., Indiana State Board of Health, of Sept. 11, 1985 (concerning delegation of authority to administer federal PSD program). "With a delegation to administer EPA's new source review rules for Indian country, tribes would implement and issue permits under EPA's authority as written." EPA, "Tribal New Source Review Training," Dec. 20-21, 2006.

The consistent manner in which EPA has characterized the role of a state or tribal agency which has been delegated authority to administer a federal program must be compared to

NNEPA's description of its role and related authority as a delegate agency under part 71. In particular, NNEPA asserts that it "is not EPA's deputized agent in administering the Part 71 program, rather it is an independent permitting agency that is required to have its own legal authorities to administer the federal program." (Ex. J at 2). NNEPA's assertion simply cannot be reconciled with EPA's view of the law with respect to the role and authority of a delegate agency.

In summary, NNEPA asserts that the language of 40 C.F.R. § 71.10(a) "makes clear that it is federal requirement for tribes to have their own authorities to administer the Part 71 program, including authorities for permit processing, monitoring and reporting, and permit enforcement." *Id.* EPA's explanation of its specific delegation of administrative authority to the Nez Perce Tribe to implement specific air rules of a FIP as well as numerous EPA characterizations of the limited role of a delegate agency provide no support for NNEPA's assertion. EPA's delegation of authority to NNEPA to administer a part 71 federal program does not authorize or require NNEPA "to have [its] own authorities to administer the Part 71 program."

E. NNEPA's Erroneous Assertion Results in Unlawfully Adding New Requirements to Peabody's Revised Part 71 Federal Permit.

Peabody objects to its NNEPA-issued revised part 71 federal permit containing ten different permit conditions for which both a part 71 requirement and a NNOPR requirement have been cited as the underlying authorities for each condition. NNEPA appears to take a "no harm, no foul" approach to Peabody's concern, stating that "[t]hese parallel citations do not create any new requirements." (Ex. J at 3 and 5). That response, however, demonstrates that NNEPA does not appreciate Peabody's increased legal liability that attaches with permit conditions that are now based on NNOPR requirements.

The facts are indisputable. Peabody's original part 71 federal permit was issued by EPA and contained permit conditions based on part 71. Peabody's revised part 71 federal permit

issued by NNEPA still contains permit conditions based on part 71, but ten of those conditions are now also based on provisions of NNOPR under tribal law.

The tribal requirements of NNOPR are not federally enforceable. Rather, they are enforceable only under Navajo Nation law. Nevertheless, Peabody's NNEPA-issued revised part 71 federal permit contains ten former permit conditions which for the first time are now enforceable under tribal law. In other words, NNEPA's action as a delegate agency has resulted in Peabody becoming subject for the first time to ten non-federal requirements.

As a delegate agency under part 71, NNEPA "stands in EPA's shoes" and is legally obligated in that capacity to issue only a part 71 federal permit. *Importantly, NNEPA has not acted in any other permitting capacity in this proceeding.* In particular, coincident with issuance of Peabody's revised part 71 permit, NNEPA has not also acted to issue a tribal permit under NNOPR for the Company's Kayenta Mine at the Black Mesa Complex. In short, this is not like a situation where a source has submitted a single permit application addressing both state and federal requirements. *See, e.g., WSREC* at 695. In this instance Peabody has submitted a permit application only for a federal part 71 permit.

Nevertheless, NNEPA claims that, as a delegate agency under part 71, it has independent authority under tribal law to add NNOPR requirements to a part 71 federal permit. There simply is no basis under the Clean Air Act for a tribal agency to take such action when it acts solely as a delegate agency under part 71.

F. NNEPA's Assertion Is Not Analogous to a "Non-PSD" Issue.

The Board has likely reviewed more issues under the federal prevention of significant deterioration ("PSD") program at 42 C.F.R. § 52.21 than any other program under the Clean Air Act. In some of those past cases, a permit issued by a state agency acting under a delegation of

federal PSD authority has contained conditions required under federal law and other conditions required only under state law. In such cases, "the Board will not assume jurisdiction over issues unrelated to the federal PSD program." *In re Knauf Fiber Glass, GMBH,* 8 E.A.D. 121, 162 (EAB 1999) ("Knauf I") (quoting *WSREC* at 704). The Board refers to such permit conditions based only on state law as "non-PSD" issues, i.e., "issues that are not explicit requirements of the PSD provisions of the Clean Air Act or EPA's implementing regulations and *have not been otherwise linked to the federal PSD program in the context of this case.*" *Knauf I* at 162 (emphasis added). However, in the instant proceeding, the issue before the Board is not analogous to a "non-PSD" issue.

With the typical "non-PSD" issue, a state with delegated authority to administer the federal PSD program will also have one or more requirements based only on state law that also apply to the source that requires the PSD permit. For example, requirements for odorous emissions are frequent provisions under state law, but they have no federal counterparts under the Act. The Board has acknowledged that inclusion of such "state-only" requirements in a PSD permit "is legitimate, it consolidates all relevant requirements in one document and obviates the need for separate federal [and state] permits." *Knauf I* at 162.

In this proceeding NNEPA has issued a revised federal part 71 permit that includes requirements under both federal and tribal law. That situation, however, is not analogous to a "non-PSD" issue because the permit requirements under tribal law are, as NNEPA asserts, linked directly to EPA's delegation of federal authority to NNEPA. In NNEPA's view, but for EPA's delegation of federal part 71 authority, NNEPA would have no authority to process and issue Peabody's revised part 71 permit using procedures from NNOPR. Likewise, but for EPA's

delegation of federal part 71 authority, NNEPA also believes that it would have no authority to cite NNOPR requirements as the basis for conditions in that revised federal part 71 permit.

In this proceeding, ten different revised permit conditions based on "tribal-only" provisions are not standalone tribal requirements similar to state odor regulations or other "non-PSD" state requirements. As addressed above, in this proceeding NNEPA has not taken any separate tribal permitting action under NNOPR for which tribal-only permit-processing procedures of NNOPR would be applicable. Instead, NNEPA simply asserts that it is appropriate for those NNOPR provisions to be cited in the revised part 71 federal permit for Peabody because those provisions "were a prerequisite for delegation of the [part 71 federal] program." (Ex. J at 4).

The ten revised permit conditions based on NNOPR requirements do not create a situation analogous to a "non-PSD" issue because their inclusion in the revised part 71 federal permit for Peabody is a direct consequence of NNEPA's interpretation of its authority as a delegate agency under part 71. That is, in the Board's words, those ten NNOPR-based conditions in Peabody's part 71 federal permit "are linked to the federal [part 71] program in the context of this case." Therefore, the presence of those ten NNOPR-based conditions in Peabody's revised part 71 federal permit constitutes an issue that falls within the Board's jurisdiction.

1. *The NNOPR-based Condition for "Fee Payment" Is Different.*

As a delegate agency under part 71, NNEPA has included with Peabody's revised part 71 federal permit a single condition that is not based on any part 71 or other federal requirement. Instead, Condition IV.A ("Fee Payment") is based solely on a provision of NNOPR.

The part 71 regulations contain provisions that address substantive and procedural requirements for the collection of fees from part 71 sources. 40 C.F.R. § 71.9. However, for delegate agencies such as NNEPA, where it has been delegated full authority[4] 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 from part 71 sources.

Thus, because there is no part 71 requirement to collect "permit fees" from Peabody's Kayenta Mine at the Black Mesa Complex, Condition IV.A in Peabody's revised part 71 permit contains substantive and procedural requirements of NNOPR Subpart VI under tribal law to collect fees from Peabody. The following disclaimer has been provided with Condition IV.A: "The NNOPR provision is enforceable by NNEPA only. This provision shall not be considered a term or condition of a Part 71 permit."

Unlike NNEPA's justification for the other NNOPR-based conditions in Peabody's revised part 71 federal permit, NNEPA does not assert that EPA's delegation of authority authorizes and requires Condition IV.A to be included in the revised part 71 federal permit. To the contrary, NNEPA has recognized that EPA's delegation of authority does not provide the delegate agency with any authority to collect "permit fees" from part 71 sources. Thus, NNEPA understands that any fee collection from part 71 sources must be authorized solely under tribal law.

Unlike NNEPA's inclusion of the other NNOPR-based conditions in Peabody's revised part 71 federal permit, inclusion of the tribal-only provision for fee collection in that permit is, in

[4] The regulatory label of "full" delegation is a misnomer in the sense that certain EPA administrative authorities under part 71 cannot be delegated. *See, e.g.,* 40 C.F.R. § 71.10(j) ("Nondelegable conditions")

the Board's words, "legitimate, it consolidates all relevant requirements in one document." *Knauf I* at 162.

G. NNEPA Is Not Authorized to Reopen Peabody's Revised Part 71 Federal Permit Using Tribal Procedures of NNOPR, and NNEPA Is Not Authorized to Act upon Public Petitions to Reopen that Part 71 Federal Permit for Cause.

In commenting on the NNEPA-issued draft revised part 71 federal permit, Peabody took particular exception to Condition IV.L of that draft permit, i.e., NNEPA's authorization solely under tribal procedures of NNOPR to reopen Peabody's revised part 71 federal permit for cause. (Ex. H at 10-11). NNEPA responded that "Part 71 requires NNEPA to use its own permit processing procedures" because NNEPA is required by Part 71 to "have independent authority to administer a delegated program." (Ex. J at 6).

First, it should be clear from Peabody's prior explanations herein that NNEPA's assertion that "Part 71 requires NNEPA to use its own permit processing procedures" constitutes a conclusion of law which is clearly erroneous. Because NNEPA acts only as a delegate agency under part 71 with respect to Peabody's revised part 71 permit, the tribal permit reopening procedure under NNOPR § 406 is completely irrelevant. That is, the CAA prohibits the processing of a part 71 federal permit using a tribal procedure enforceable only under tribal law.

In addition, NNEPA's response to Peabody's comment provided cause for further Company concern regarding the scope of NNEPA's federal permit-reopening authority under part 71. To bolster its argument that NNEPA had authority to reopen part 71 permits for cause, NNEPA referenced 40 C.F.R. § 71.11(n) which "provides that public petitions for reopening may be made to the 'permitting authority' (defined in § 71.2 as including states and tribes), not just to EPA." (Ex. J at 6). However, a closer examination of this issue reveals that the part 71

regulations and the Delegation Agreement expressly prohibit NNEPA from acting on public petitions to reopen a part 71 federal permit for cause.

In particular, provisions within § 71.10 ("Delegation of part 71 program") explicitly prohibit NNEPA, as a delegate agency, from acting upon public petitions to reopen a part 71 permit for cause. 40 C.F.R. § 71.10(h) ("Public petitions") states: "In the case of a delegated program, any interested person may petition the Administrator to reopen a permit for cause[.]" Furthermore, 40 C.F.R. § 71.10(j) ("Nondelegable conditions") provides that "[t]he Administrator's authority to act upon petitions submitted pursuant to paragraph (h) of this section cannot be delegated to an agency not within EPA."

Moreover, the Delegation Agreement expressly provides that "EPA shall receive and act upon *all petitions from any interested person to reopen a permit for cause in accordance with 40 C.F.R. § 71.11(n).* (40 C.F.R. §§ 71.10(h) and (j)(2))." (Ex. B, § IV.9 (emphasis added)). The Delegation Agreement further provides that "EPA is not delegating . . . its authority to act upon petitions submitted by the public. (40 C.F.R. § 71.10(j))." (Ex. B, § IV.11).

Thus, provisions within § 71.10 as well as explicit prohibitions in the Delegation Agreement make clear that NNEPA does *not* have authority as a delegate agency to act upon a public petition to reopen a permit for cause. In fact, a provision in the Delegation Agreement makes clear that NNEPA cannot rely on § 71.11(n) as authority to act upon a public petition to reopen a part 71 federal permit for cause.

In sum, NNEPA's federal authority as a delegate agency to reopen a part 71 federal permit for cause is more limited that NNEPA has alleged. Specifically, NNEPA does not have authority to act upon any public petition to reopen such a permit for cause. That prohibition

means that the scope of NNEPA's federal authority to reopen a part 71 federal permit for cause is constrained to the particular circumstances listed in 40 C.F.R. § 71.7(f).

H. NNEPA Is Not Authorized to Make Administrative Amendments to Peabody's Part 71 Federal Permit Using Tribal Procedures of NNOPR.

Peabody needed to change the name of the source from "Black Mesa Complex" to "Kayenta Complex"[5] and also needed to change the name and contact information for the Responsible Official identified in its part 71 permit. Therefore, when Peabody commented on the draft revised part 71 federal permit, the Company also requested NNEPA, as a matter of administrative efficiency, to include those administrative amendments in the final revised part 71 federal permit. (Ex. H at 29).

NNEPA responded to each Peabody-requested administrative amendment by stating "NNEPA agrees to this administrative permit amendment, but will make the proposed revision pursuant to NNOPR § 405(C), as it does not have authority to do so under 40 C.F.R. § 71.7(d)(3)." (Ex. J at 9-10). NNEPA's response in this matter is illustrative of how NNEPA has misconstrued the nature of an EPA delegation of federal administrative authority.

EPA has authority to administer all aspects of the part 71 federal program, including the authority to make administrative amendments to a part 71 federal permit in accordance with the "administrative permit amendment procedures" at 40 C.F.R. § 71.7(d)(3). EPA's delegation to NNEPA of federal authority to implement a part 71 federal permit program includes the authority for NNEPA to make administrative permit amendments using the procedures of § 71.7(d)(3). Peabody therefore is at a loss to understand why NNEPA claims that it cannot make the administrative amendments requested by Peabody in accordance with the procedures at § 71.7(d)(3).

[5] The Company now realizes that it incorrectly stated the requested replacement name for the source. The requested source name to replace "Black Mesa Complex" should have been "Kayenta Mine at the Black Mesa Complex."

If NNEPA is alleging a lack of authority under § 71.7(d)(3) because that regulation provides that "the permitting authority shall take no more than 60 days from receipt of a request for an administrative permit amendment to take final action on such a request," NNEPA's position is not compelling. Given the nature of Peabody's requested permit amendments, NNEPA could have simply asked Peabody to waive the 60-day period in § 71.7(d)(3) for NNEPA's action. Alternatively, NNEPA should have proceeded to act separately on Peabody's requested administrative permit amendments during the specified 60-day period rather than deferring the amendments until it also issued a final revised part 71 federal permit to Peabody.

NNEPA's inability to satisfy that 60-day period for final action on an administrative amendment cannot justify NNEPA's issuance of the requested amendments in accordance with tribal procedure of NNOPR. Any changes to Peabody's part 71 federal permit that NNEPA would make using NNOPR procedures would not be federally enforceable, i.e., the changes would not be lawful revisions to the part 71 federal permit.

NNEPA's assertion that it must use its own tribal procedures of NNOPR to administer the part 71 federal program is an erroneous interpretation of 40 C.F.R. § 71.10(a). This simple matter of an administrative permit amendment request and NNEPA's response thereto illustrates clearly why tribal law cannot independently authorize NNEPA to administer the part 71 program.

VI. CONCLUSION

A tribal agency requesting EPA's delegation of federal authority to administer a part 71 federal operating permit program must demonstrate that its tribal law provides "*adequate authority* to carry out all aspects of the delegated program." 40 C.F.R. § 71.10(a) (emphasis added). NNEPA asserts that language of 40 C.F.R. § 71.10(a) "makes clear that it is federal

requirement for tribes to have their own authorities to administer the Part 71 program, including authorities for permit processing, monitoring and reporting, and permit enforcement." (Ex. J at 2, 4, 6, 7 and 9). Thus, a revised part 71 federal permit for Peabody's Kayenta Mine at the Black Mesa Complex has been processed and issued by NNEPA using its own tribal procedures under NNOPR while acting as a delegate agency under part 71. Acting under that delegation of federal administrative authority, NNEPA has issued that revised part 71 federal permit with ten different conditions that are based on NNOPR requirements under tribal law.

For all the reasons explained herein, NNEPA's interpretation of the term "adequate authority under tribal law" in the context of § 71.10(a) is erroneous as a matter of law. Consequently, NNEPA's actions with respect to processing and issuing Peabody's revised part 71 federal permit, i.e., reliance on tribal procedures of NOPR and inclusion of permit conditions based on NNOPR requirements, are unlawful under the Clean Air Act.

Accordingly, Peabody respectfully requests the Board to remand the revised part 71 federal permit to NNEPA and to order NNEPA (1) to process and issue Peabody's revised part 71 permit only in accordance with EPA-delegated federal administrative procedures and (2) notwithstanding inclusion of the NNOPR-based fee collection provision (Condition IV.A) in the same document, to cease the designation of any NNOPR provision under tribal law as legal authority for any condition in Peabody's revised part 71 federal permit.

Moreover, because much of NNEPA's misunderstanding of EPA's delegation of administrative authority appears to arise either from conflicting statements in the Delegation Agreement and its accompanying documents or from other statements in those documents that suggest delegation of federal authorities beyond the scope of administrative authority addressed

by 40 C.F.R. §§ 71.4(j) and 71.10(a), Peabody respectfully requests the Board to order appropriate revisions to those documents to correct or eliminate those statements.

Respectfully submitted,

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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, on the 13th day of May, 2011, to:

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EXHIBITS

A. NNEPA-issued Revised Part 71 Permit (April 2011)

B. EPA-NNEPA Delegation Agreement, "Delegation of Authority to Administer a Part 71 Operating Permits Program" (October 2004)

C. EPA Eligibility Determination (October 2004)

D. NNEPA Transition Plan (July 2004)

E. Peabody's Comments on NNEPA-issued Draft Part 71 Permit and Draft Statement of Basis (August 2009)

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

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

H. Peabody's Comments on NNEPA-issued Draft Revised Part 71 Permit and Draft Revised Statement of Basis (December 2010)

I. NNEPA-issued Revised Statement of Basis (April 2011)

J. NNEPA-issued Responses to Comments on Draft Revised Part 71 Permit and Draft Revised Statement of Basis (February 28, 2011; received by Peabody in April 2011)

K EPA and Nez Perce Tribe Delegation Agreement (June 2005)