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	)	Appeal No. CAA 11-01

AMICUS CURIAE BRIEF OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION IX

On July 26, 2011, the U.S. Environmental Protection Agency ("EPA"), Region IX filed a motion with the Environmental Appeals Board ("Board") seeking leave to file an *amicus curiae* brief in the above referenced proceeding by September 15, 2011. Through an August 10, 2011, Order, the Board granted EPA Region IX's motion. This filing constitutes EPA Region IX's *amicus curiae* brief. EPA Region IX consulted with the U.S. EPA Office of General Counsel and Office of Air and Radiation in preparing this brief.

For at least two reasons, EPA believes that the Board should deny review of Peabody's Petition challenging a Title V permit ("Permit") issued to it on April 14, 2011, by Navajo Nation Environmental Protection Agency ("NNEPA") under the delegated 40 C.F.R. Part 71 Operating Permits Program ("Part 71 Program"). First, Peabody fails to challenge any specific conditions of the Permit on the basis that they are procedurally or substantively deficient in regard to Part 71 requirements or make any claims that NNEPA otherwise issued the Permit in a manner

inconsistent with the Part 71 procedures. Hence Peabody's claims fall outside the scope of the Board's review authority. Second, even if the Board finds the claims reviewable, NNEPA's actions on the Permit, i.e. using its own authorities and procedures to process the Permit and including tribal citations in addition to the appropriate Part 71 citations for certain conditions are an acceptable approach to implementing a delegated federal program, and hence do not constitute "clear error" and are not a "policy consideration" that otherwise warrants review. On either basis, and as further explained below, the Board should reject Peabody's Petition to review the Permit.

I. INTRODUCTION AND STATEMENT OF FACTS

Title V of the Clean Air Act ("CAA" or the "Act") requires that major stationary sources, and certain other sources, of air pollution obtain comprehensive operating permits to assure compliance with all applicable requirements under the CAA.[1] 42 U.S.C. §§ 7661a(a) and 7661c(a); 40 C.F.R. §§ 71.1(b), 71.3 and 71.6(a)(1). Section 502(d)(1) of the Act and the EPA implementing regulations set forth at 40 C.F.R. Part 70 mandate that each state develops and submits to EPA an operating permit program for approval ("Part 70 Program"). Under the Tribal Authority Rule ("TAR"), contained at 40 C.F.R. Part 49, tribes are not subject to this requirement, but may apply for treatment as a State ("TAS") to be eligible to seek approval of a Part 70 Program. *See* 40 C.F.R. § 49.4(h) (establishing that the regulatory deadline for applying for a Part 70 Program approval does not apply to tribes); 40 C.F.R. §§ 49.6, 49.7 (establishing

[1] Title V generally does not create new requirements (which are referred to as "applicable requirements"). It does, however, call for permitting authorities to impose additional requirements, such as monitoring, reporting and recordkeeping, if necessary to assure compliance with the CAA. *See* 57 Fed. Reg. 32250, 32251 (July 21, 1992); 40 C.F.R. § 71.2 (defining "applicable requirement"); *In re Peabody Western Coal Company*, 12 E.A.D. 22, 27 (EAB 2005).

the requirements whereby a tribe may apply for TAS eligibility for a "Clean Air Act program approval," including under Part 70). In areas where a Part 70 Program has not been approved, including in "Indian country,"[2] EPA administers and enforces the federal operating permits program contained at 40 C.F.R. Part 71 ("Part 71 Program"). 40 C.F.R. § 71.4(b). The Part 71 Program is largely equivalent to the Part 70 Program, except the permitting authority is EPA rather than a state, tribe or local agency.

For states, eligible tribes or local agencies that have not obtained approval of a Part 70 Program, delegation of the Part 71 Program provides another mechanism for an interested permitting authority to administer a Title V program. *See* Federal Operating Permits Program, Final Rule, 61 Fed. Reg. 34202, 34203 (July 1, 1996) (discussing how in the case where a "State that for whatever reason has not been successful in developing its own statutes and regulations to implement title V is nevertheless capable of running a Federal program, EPA sees no reason not to offer the State the opportunity to more efficiently run the permit program than EPA believes the Agency could" through delegation of the Part 71 Program). Under 40 C.F.R. § 71.10(a), the Administrator may delegate, in whole or part, the authority to administer a federal Part 71 Program. To be eligible for such a delegation, a "State, eligible Tribe, local, or other non-State agency" must submit a legal opinion from the attorney general or an attorney representing the entity stating 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). Section 71.10(a) does not prescribe the form of the laws and regulations that the opinion is based

[2] "Indian country" is defined under the Part 71 regulations as all lands within a reservation including right-of-ways, all dependent Indian communities, and all Indian allotments including right-of-ways. 40 C.F.R. § 71.2.

on, but rather allows the entity seeking delegation to structure the program as best suites its particular circumstances so long as it provides the necessary authority. An "eligible" tribe must also obtain TAS approval prior to receiving the delegation. *See* 40 C.F.R. § 71.2 (defining eligible tribe as a "Tribe that has been determined by EPA to meet the criteria for being treated in the same manner as a State, pursuant to the regulations implementing section 301(d)(2) of the Act."). Assuming EPA determines that the permitting authority meets all of the elements for delegation, including obtaining TAS approval in the case of a tribe, EPA and the delegate agency enter into a delegation agreement setting forth the terms of the Part 71 Program delegation.

On June 17, 2004, NNEPA submitted a request for a determination by EPA that the Navajo Nation meets the 40 C.F.R. Part 49 eligibility requirements for TAS approval for Part 71 Program delegation purposes. Shortly thereafter, on July 16, 2004, NNEPA submitted a request to EPA Region IX seeking delegation of the Part 71 Program.[3] After appropriate notice, which included notice to neighboring states and bordering tribes, on October 13, 2004, the Regional Administrator for EPA Region IX issued an eligibility determination finding that the Navajo Nation was approved for TAS for Part 71 Program delegation purposes. Shortly after the TAS determination, on October 15, 2004, EPA Region IX and NNEPA entered into a delegation agreement that delegated administration of the Part 71 Program to NNEPA for the sources and areas covered in the tribe's application and the TAS determination. Delegation Agreement Between US Environmental Protection Agency Region IX And Navajo Nation Environmental Protection Agency, dated October 15, 2004 ("NNEPA Delegation Agreement"). The NNEPA

[3] Although this particular delegation request did not cover all sources located on the Navajo Reservation, it did include Peabody's facility.

Delegation Agreement was noticed in the Federal Register on November 18, 2004. 69 Fed. Reg. 67,578. EPA's decision to grant delegation was based in part on a legal opinion from the Navajo Nation Attorney General which met the requirement in 40 C.F.R. § 71.10(a). Legal Opinion of the Navajo Nation Attorney General Prepared for the Navajo Nation's Application for a Delegated Part 71 Operating Permit Program, dated July 15, 2004[4] (included as Attachment A).

Through a May 16, 2011, petition ("Petition") filed with the Board, Peabody Western Coal Company ("Peabody") challenges its Permit issued to it by NNEPA pursuant to the NNEPA Delegation Agreement.[5] The Permit allows operation of Peabody's Black Mesa Complex ("Facility"), which includes the Kayenta Mine, located within the exterior boundaries of the Navajo Nation's formal Reservation. In its Petition, Peabody argues that it was impermissible for NNEPA to (a) use its own permit-processing procedures contained in the Navajo Nation Operating Permits Regulations ("NNOPR") to issue the Permit, and (b) include certain NNOPR requirements citations in the Permit. *See* Petition at 8. Peabody also challenges the legality of the NNEPA Delegation Agreement based upon these same claims. NNEPA filed its Response to the Petition on July 5, 2011 ("Response"), and Peabody filed a Reply to the Response on July 20, 2011 ("Reply"), along with a motion requesting that the Board issue an order requesting EPA to file an *amicus curiae* brief. On July 26, 2011, EPA Region IX filed a Reply to Peabody's motion, along with its own motion seeking leave from the Board to file an *amicus curiae* brief by September 15, 2011. The Board granted EPA Region IX's motion on August 10, 2011.

---

[4] The legal opinion specifically references the Navajo Nation Operating Permit Regulations as part of the authority on which the opinion is based. Opinion at 3.

[5] Since Peabody and NNEPA's briefs contain a complete history of the permitting record, EPA will not recount that history here.

The permit appeal standards of Part 71 allow for "any person who filed comments on the draft permit" to "petition the [Board] to review any condition of the permit decision." 40 C.F.R. § 71.11(l). In general, the Board only grants petitions for review if a petitioner has established that a permitting authority's decision involved a clearly erroneous finding of fact or conclusion of law, or that the decision involves an important policy consideration which the Board, in its discretion, should review. *See* 40 C.F.R. § 71.11(l)(1); *In re Teck Cominco Alaska Inc.,* 11 E.A.D. 457, 472 (EAB 2004); *In re City of Moscow*, 10 E.A.D. 135, 140-41 (EAB 2001). Moreover, the Board should exercise its broad powers of review "only sparingly," and "most permit conditions should be finally determined at the Regional level." 45 Fed.Reg. 33,290, 33,412 (May 19, 1980) (preamble to rulemaking that establishing 40 C.F.R. Part 124); *see Teck Cominco,* 11 E.A.D. at 472; *In re Rohm & Hass Co.,* 9 E.A.D. 499, 504 (EAB 2000). A petitioner has the burden of demonstrating that review is warranted. *See Rohm & Hass,* 9 E.A.D. at 504; *In re Wash. Aqueduct Water Supply Sys.*, 11 E.A.D. 565, 573 (EAB 2004).

II. ARGUMENTS

Peabody has not demonstrated that any condition of the permit is based on a finding of fact or conclusion of law that is clearly erroneous. Peabody has not demonstrated that NNEPA has failed to comply with the procedural and substantive requirements of Part 71 of EPA's regulations in accordance with its obligations under the Delegation Agreement. Peabody shows no failure by NNEPA to adhere to the applicable federal requirements in issuing its permit decision. Peabody's allegations of error appear to rest solely on the contention that NNEPA is precluded from applying tribal laws in parallel with the federal requirements. There is nothing in the Clean Air Act or EPA's regulations that precludes NNEPA from also applying tribal law in parallel where

implementation of such laws does not interfere with NNEPA's ability to fulfill the requirements of federal law that the NNEPA is empowered to implement on behalf of EPA Region 9 under the Delegation Agreement.

A. The Claims In The Petition Are Not Within The Scope Of The Board's Review Authority

1. The Board's Review Authority under Part 71

The Board's jurisdiction to review final Part 71 operating permit decisions under 40 C.F.R. § 71.11(l) is limited in scope to reviewing whether "conditions of the permit decision" are procedurally or substantively deficient. If a party raises claims before the Board regarding matter that are not properly considered conditions of the permit decision, i.e. are outside the scope of the permitting program being challenged, the Board has consistently found that it lacks authority to hear those claims. *See, e.g., In re Harquahala Generating Project*, PSD Appeal No. 01-04, at 12 (EAB 2001) (holding that the Board will not review state-only affirmative defense and state opacity requirements as part of a PSD permit challenge); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, slip op. at 10, 62-63 (EAB 1999), (holding that the Board will not review requirements that do not bear sufficient nexus to the federal PSD program); *In re Envtl. Disposal Sys., Inc. ("EDS")*, 12 E.A.D. 254, 266-67 (EAB 2005) (describing that the bounds of the Board's authority to review Underground Injection Control ("UIC") permits under Section 124.19(a) is limited to the boundaries of the UIC permitting program itself); *In re Am. Soda, L.L.P.*, 9 E.A.D. 280, 286 (EAB 2000) (holding that the Board can only review UIC permitting decisions under 124.19(a) to the extent that the permitting decision affects the well's compliance with the applicable regulations); and *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 567 (EAB

1998) ("protection of interests outside of the UIC program [is] beyond our authority to review in the context of [a UIC] case"), *review denied sub nom. Penn Fuel Gas, Inc. v. U.S. EPA*, 185 F.3d 862 (3d Cir. 1999).[6]

2. The Petition Claims are Not Challenges to Part 71 Permit Conditions

The claims raised by Peabody are not challenges to the "conditions of [a] permit decision," as contemplated by 40 C.F.R. § 71.11(l) and 40 C.F.R. § 124.19(a). Peabody objects to the Permit because it cites to "both a part 71 requirement and a NNOPR requirement." Petition at 29. However, nowhere in its Petition does Peabody argue that the challenged conditions are inconsistent with Part 71. Moreover, Peabody does not claim that NNEPA failed to act consistently with Part 71 in issuing the Permit. Rather, Peabody focuses its complaints merely on NNEPA's use of tribal procedures, set forth in the NNOPR, in processing the Permit and inclusion of citations to these provisions in the Permit. As such, since Peabody's complaint is not, at its core, a challenge to any particular *permit condition* governed by Part 71, nor a claim that NNEPA failed to act consistent with Part 71 in issuing the permit, review of these allegations is not within the jurisdiction of the Board per 40 C.F.R. § 71.11(l).

---

[6] Even though Peabody filed its Petition under 40 C.F.R. § 71.11(l), it is appropriate for the Board to consider 40 C.F.R. Part 124 requirements and rulings under those requirements when considering Peabody's Petition, as the grounds for appeal under 40 C.F.R. § 71.11 and 40 C.F.R. § 124.19 are identical. Both allow that "any person . . . may petition the Environmental Appeals Board to review any condition of the permit decision. " *See* 40 C.F.R. § 71.11(l) and 40 C.F.R. § 124.19(a); *see also In re Peabody Western Coal Company*, 14 E.A.D. _--, slip opinion at 11-13 (EAB 2010); *In re Peabody Western Coal Company*, 12 E.A.D. 22 (EAB 2005). Providing additional support for consideration of 40 C.F.R. § 124.19, the regulatory preamble pertaining to Section 71.11 highlights EPA's intention to mirror the regulatory requirements of Section 124.19 for review of Part 71 permits. *See* Federal Operating Permits Program, Proposed Rule, 60 Fed. Reg. 20,804 (Apr. 27, 1995) ("The proposed . . . administrative appeals procedures are set out at § 71.11 and are based closely on selected provisions of part 124, subpart A."). As such, Board rulings under 40 C.F.R. Part 124 provide important guidance for the application of the review provisions of 40 C.F.R. Part 71.

Solidifying this point, NNEPA has clearly identified the challenged provisions of tribal law, which are cited in the Permit to support conditions pertaining to reporting (Condition III.B), compliance certification (Condition IV.C), information submittal (Conditions IV.D and IV.E), and amendment, modification, and reopening (Conditions IV.H, IV.I, IV.K, IV.L and IV.Q), as "tribal enforceable only,"[7] meaning that they are not included as support for any federally enforceable Part 71 permit conditions, and hence are outside the scope of the Part 71 Program. Peabody acknowledges that the aspects of the Permit that it is asking the Board to review are not federally enforceable. Petition at 29-30. As Peabody states, "The tribal requirements of the NNOPR are not federally enforceable. Rather, they are enforceable only under Navajo Nation law." Petition at 30. Moreover, each of the tribal citations being challenged are included with Permit conditions that otherwise contain a legal and valid Part 71 citation. Based on these facts, Peabody has no compelling argument why the Board should review its claims that challenge these tribal-only provisions given the limits on the scope of the Board's review authority.

Peabody attempts to link its challenge to the Part 71 Program by arguing that the NNOPR requirements became "enforceable under tribal law" for the first time only after inclusion in "Peabody's NNEPA-issued revised part 71 federal permit." Petition at 30. This assertion, however, is false, and does not revive Peabody's claims. While it may be true that, per their terms, the NNOPR requirements only became effective upon the date of the delegation of the Part 71 Program to NNEPA, their legal applicability after that point is completely independent from operation or authority of the Part 71 Program or issuance of any particular Part 71 permits. *See* NNOPR § 101(C) ("These regulations shall become effective immediately upon Part 71

[7] Peabody also recognizes that these provisions "are enforceable . . . under Navajo Nation Law," indicating that it is not disputing the applicability of these requirements under tribal law. Petition at 30.

delegation or Part 70 approval by USEPA Region IX, whichever is sooner"); NNOPR § 301 (A) (For each Part H source, the owner or operator shall submit a timely and complete written permit application . . .); NNEPA Delegation Agreement §§ IV.1, IV.2, V.4 ("Although not a requirement of the Delegation Agreement and not part of the administration of the federal Part 71 program, NNEPA intends to supplement the requirements in Part 71 with the requirements in the [NNOPR]"). In other words, their applicability is based purely upon tribal law, and references to them in the NNEPA Delegation Agreement, the Permit, or elsewhere is merely for informational purposes. Nothing in Peabody's argument demonstrates that the NNOPR provisions are anything other then what they appear to be, simply tribal law.

Peabody also argues that the NNEPA Delegation Agreement is illegal based on the theory that the Agreement "cannot lawfully authorize NNEPA's use of NNOPR procedures in the issuance of Peabody's revised part 71 federal permit, nor can [it] lawfully authorize NNEPA's imposition of NNOPR requirements as conditions in Peabody's revised part 71 federal permit." Petition at 23. This point also is not a challenge to any particular Part 71 permit condition as procedurally or substantively deficient but rather a challenge to the NNEPA Delegation Agreement itself and hence likewise falls outside of the scope of what is reviewable by the Board. More importantly, this challenge is an attempted end-run around Peabody's true window for obtaining review of the NNEPA Delegation Agreement, established by Section 307(b) of the Act, a window that has long since closed. In pertinent part, the judicial review provisions of the CAA state that "[a]ny petition for review" of "any . . . final action of the Administrator . . . shall be filed within sixty days from the date notice of such . . . action appears in the Federal Register" in "the United States Court of Appeals for the appropriate circuit." 42 U.S.C. § 7607(b). Region

IX noticed the existence of the NNEPA Delegation Agreement in the Federal Register in 2004 69 Fed. Reg. 67,578 (Nov. 18, 2004), and Peabody failed to file a petition with the appropriate court of appeals court challenging the Agreement within the 60-day review period. As such, Peabody cannot now, seven years after the expiration of Peabody's right of appeal, challenge the NNEPA Delegation Agreement through this appeal. *See* Response at 19-20.

3. Past EPA Administrative Orders Support the Argument that Peabody's Claims are Not Reviewable

Past Orders by the Board and the Administrator support the position that the claims raised by the Petition relating to the NNOPR are outside the scope of the Board's review authority. For instance, challenges to permits issued under authority of the CAA's Prevention of Significant Deterioration ("PSD") program[8] resulted in rulings that non-federally enforceable conditions are not considered "conditions of the permit" for purposes of the Board's review authority.

In one of the more pertinent rulings on the subject, a citizen's group, Don't Waste Arizona ("DWA"), filed a petition for review of a PSD permit issued by a non-federal delegated permitting authority, the Maricopa County Environmental Services Department ("MCESD"), to the Harquahala Generating Station ("HGS") Project. *In re Harquahala Generating Station Project*, PSD Appeal No. 01-04 (EAB 2001). In denying review of the petition, the Board recognized that it is common for delegate permitting authorities to consolidate "conditions based upon federal PSD requirements, as well as the approved [SIP] and local . . . laws" in a PSD permit. *Id.* at 3. By this recognition, it is apparent that the Board did not view anything patently

[8] The PSD Program requires permits for "major sources" of certain air pollutants prior to commencing construction of a new or modified facility. *See generally* 42 U.S.C. § 7475(a). As such, it is a parallel permitting program to the Title V permitting program, which also requires issuance of permits to "major sources." Moreover, as with the Part 71 Program, administration of the federal PSD program found at 40 C.F.R. § 52.21 is delegable to states and local agencies. *See* 40 C.F.R. § 52.21(u).

objectionable about MCESD including "local" laws in an otherwise federal permit.

Through its petition, DWA specifically challenged the inclusion and incorporation of two MCESD-enforceable only provisions in HGS's permit, namely an affirmative defense and an opacity requirement. *Id.* at 10-12, 21-23. For both claims, the Board found that they did not "bear a sufficient nexus to the federal PSD program," and hence did not "merit Board review." *Id.* at 12. In regard to the opacity requirements, the Board held that the claim merits denial of review "because opacity limits are not required by the PSD program, and DWA does not otherwise demonstrate how [the] issue implicates the federal PSD program." *Id.* at 23, n.11; *In re Knauf Fiber Glass, GmbH,* 8 E.A.D. 121, slip op. at 9 (EAB 1999) (holding that emissions offset conditions in PSD permit that were based on local rules and not required by PSD regulations did not bear sufficient nexus to federal PSD program to warrant Board review). This principle, as espoused by the Board in the *Harquahala* and *Knauf* rulings, is directly applicable to Peabody's challenge, as the challenged substantive and procedural laws are not required Part 71 conditions nor federally enforceable, and hence do not have sufficient "nexus" with the requirements of the Part 71 Program to warrant review.

The Administrator of the EPA came to the same conclusion in responding to a petition to object to the HGS' Title V permit. In that Order, the Administrator found that non-federal provisions should not be reviewed in the context of a challenge to a Title V permit.[9] *In re Harquahala Generating Station Project*, Permit No. V99-015, Order Denying Petition to Object to Permit, 2003 WL 25972933, at *3-4 (E.P.A. July 2, 2003). The Order specifically recognized

[9] While this was in the context of a Part 70 Program, there is no reason why it should not provide guidance in regard to a Part 71 analysis regarding the reviewability of claims, as non-Title V requirements are equally outside the scope of both programs.

that "State-only terms are not subject to the requirements of Title V and hence are not to be evaluated by EPA unless those terms are drafted in a way that might impair the effectiveness of the permit or hinder a permitting authority's ability to implement or enforce the permit." *Id.* at *3. Similarly, the NNEPA-enforceable only NNOPR provisions cannot be challenged within the context of a challenge to the Part 71 permit, unless they somehow "impair the effectiveness of the permit or hinder [the] permitting authority's ability to implement or enforce the permit." Peabody has made no such argument here.

The Board's rulings on this issue also cut across different EPA regulatory programs. For instance, the Board has a long history of ruling on permits issued under the Underground Injection Control ("UIC") program contained in the Safe Drinking Water Act ("SDWA"), 42 U.S.C. §§ 300h -300h-8, where it has continually ruled that it lacks jurisdiction to review claims that are outside the scope of the permit conditions included as part of the UIC program. The Board has stated that the "protection of interests outside of the UIC program [is] beyond our authority to review in the context of [a UIC] case" *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 567 (EAB 1998); See also *In re EDS*, 12 E.A.D. 254, 266-67 (EAB 2005). In *EDS,* petitioners appealed the issuance of a UIC permit on the grounds of property rights, Resource Conservation and Recovery Act permitting issues, and other challenges not directly involving UIC permit conditions. *Id.* at 254-56, 296. The Board dismissed all of these claims, finding that Section 124.19(a) grants the Board jurisdiction only to decide challenges to UIC permit conditions and therefore its review is limited to ensuring that EPA's permit decisions comport with the applicable requirements of the federal SDWA/UIC program. *Id.* at 294-95. This analysis equally applies in the Part 71 context.

In sum, on numerous occasions, the Board has opined that it is "not at liberty to resolve every claim brought before [it] in a permit appeal but must restrict [its] review to conform to [its] regulatory mandate." *Id.*; *See also In re Phelps Dodge Corp.*, 10 E.A.D. 460, 514 (EAB 2002) (no jurisdiction to consider ground water pumping regulated by state law); *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 259-60 (EAB 1999) (no jurisdiction to consider acid rain, noise, and water-related issues in Clean Air Act ("CAA") permitting context). Based upon this principle, Peabody's claims do not meet the standard for review by the Board set forth in 40 C.F.R. § 71.11(l).

Peabody itself recognized this case law by referring to the Board's ruling in *Knauf,* and what it terms as the Board's inability to review "non-PSD" issues when considering a challenge to a PSD permit. Petition at 30-32. Peabody attempts to distance the instant facts from the ruling in *Knauf* because "the permit requirements under Tribal law [at issue in Peabody's Petition] are, as NNEPA asserts, linked directly to EPA's delegation of federal authority to NNEPA." Petition at 31. Peabody goes on to claim that "but for EPA's delegation of the federal part 71 authority, NNEPA would have no authority to process and issue permits" or "cite NNOPR requirements as the basis for conditions in the revised part 71 permit." Petition at 31-32. This is a distinction without a difference in regard to the applicable case law. While it is true that the NNOPR requirements pertaining to Part 71 permits only became effective upon the delegation of the program to NNEPA, and the existence of the NNOPR was one of the elements EPA Region IX considered when delegating the program, once delegated, neither Part 71 nor the NNEPA Delegation Agreement require in any way the use of those provision or augment their enforceability or applicability. As a result, the tribal-only NNOPR authorities remain purely

tribal law outside the scope of Part 71 Program implementation. Hence, as with the conditions at issue in the *Knauf* and *Harquahala* Orders, there is not a sufficient "nexus" between the NNOPR and federal Part 71 Program requirements to make them reviewable components of the permit decision under a Part 71 challenge.

The Board need look no further than the NNEPA Delegation Agreement itself to understand the peripheral role of the NNOPR requirements in regard to the ongoing administration of the Part 71 Program by NNEPA. That Agreement expressly and unambiguously states, when referencing the NNOPR requirements, that these requirements are "not a part of the Delegation Agreement and not part of the administration of the federal Part 71 program." *See* NNEPA Delegation Agreement §§ IV.1, IV.2, V.4. A clearer statement is not possible. As such, the NNOPR requirements are indistinguishable from the state-only conditions at issue in the long line of Board rulings on this issue.

B. Peabody Has Failed to Establish How NNEPA's Use of Its Own Authorities Is Impermissible Under a Part 71 Delegation

Even if the Board does find a basis to analyze some or all of Peabody's substantive claims, it should still deny review as Peabody has failed to identify "clear error" or an "important policy consideration" that should be addressed by the Board regarding NNEPA's use of its own authorities.

1. Peabody Misinterprets the Meaning of "Adequate Authority under Tribal Law" in 40 C.F.R. Section 71.10(a)

Peabody claims that NNEPA has erroneously interpreted 40 C.F.R. § 71.10(a)'s reference to "adequate authority to carry out all aspects of the delegated program." Petition at 9-16. However, it is Peabody that has erroneously interpreted this provision. Peabody argues that

NNEPA is not allowed to have its own tribal authorities beyond two very basic provisions in tribal law, one allowing NNEPA to enter into a delegation agreement with EPA and another allowing NNEPA to incorporate Part 71 by reference into the NNOPR.[10] Petition at 16. As explained below, Peabody's arguments that NNEPA is prohibited from using other tribal authorities beyond the ones it references is misplaced and unnecessarily restrictive with regard to the demonstration of "adequate authority" necessary to receive delegation.

The crux of Peabody's argument is that, under a Part 71 delegation, the tribe is precluded from implementing tribal laws that do more than just adopt by reference applicable requirements of federal law. Peabody argues "the state or tribe has no need for any administrative procedures based on tribal law to carry out its delegated responsibilities." Petition at 10. Peabody further states that "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." Petition at 14. While each of these statements may be true for purposes of ensuring NNEPA has the necessary authority to implement federal law, these premises do not establish that NNEPA is precluded from applying additional procedures grounded in tribal law. Peabody provides no credible argument why a delegated permitting authority could not also follow procedures grounded in state or tribal law as long as it ensures that its actions satisfy the Part 71 requirements.

By referencing the two tribal provisions that NNEPA needs to implement the Part 71

[10] According to Peabody, these can be accomplished by a "single tribal statutory provision" and "one tribal regulatory provision" to carry out all aspects of the delegated program.

program, Peabody necessarily recognizes that some level of organic tribal or state "authority" must exist to enable a non-federal agency to implement a delegated Part 71 Program.[11] However, this is a minimum requirement and nothing in Part 71 precludes a state or tribe from applying additional tribal laws and regulations so long as they do not conflict with implementation of the Part 71 Program. Arguing to the contrary, Peabody compares the greater detail required by 40 C.F.R. § 70.4(b)(3) for the "adequate authority" showing necessary to receive approval of a Part 70 Program to the lesser detail required by 40 C.F.R. § 71.10(a) for a Part 71 Program delegation. Petition at 11-13. According to Peabody, this difference somehow limits or cabins the "adequate authority" that can be considered in the Part 71 delegation context. However, Peabody nowhere explains how that difference precludes EPA from delegating Part 71 to a state or tribe that also intends to implement its own rules in parallel with Part 71 requirements, whatever those rules may be, so long as EPA finds that the state or tribal rules do not prevent the delegate from fulfilling its responsibilities to implement Part 71. This should be the appropriate test to apply.

So, at its core, it appears that Peabody is asking the Board to accept its argument that a provision under Navajo Nation law authorizing NNEPA to enter into a delegation agreement with EPA to implement Part 71 and a provision in the NNOPR incorporating Part 71 by reference are somehow "all of the adequate authority under tribal law" necessary to effectuate a delegation, and no more can be allowed. Petition at 16. The question, however, is not whether

[11] The NNEPA provisions incorporating by reference the Part 71 requirements into the NNOPR are tribal law. This is because "[w]hen a document incorporates outside material by reference, the subject matter to which it refers becomes a part of the incorporating document just as if it were set out in full." *See Cunha v. Ward Foods, Inc.*, 804 F.2d 1418, 1428 (9th Cir. 1986). In other words, the Part 71 requirements incorporated by reference into the NNOPR became Navajo law just as if they "were set out in full."

these two provisions are an adequate basis on which to grant delegation of Part 71 – the real question, and the one not answered by Peabody, is whether NNEPA can apply other tribal laws or rules beyond the bare minimum for implementing Part 71. Nothing in Peabody's brief or Part 71 dictates that the answer to this question must be no.

Peabody's argument might have more traction if it could point out a single instance where the existence or use of NNEPA's tribal laws somehow conflict with operation of the Part 71 Program. Peabody's brief includes no such examples. Therefore, Peabody requests that the Board invalidate the Permit simply because NNEPA has crossed some undefined line in regard to creation or use of its own laws, even though Part 71 neither prescribes nor precludes the use of a particular approach to establishing the required authority. This does not constitute "clear error" nor rise to the standard set by the Board for "an important policy consideration which the Board, in its discretion, should review."

2. Part 71 Contemplates That Delegate Agencies Will Have State or Tribal Authority to Administer Delegated Programs

Through its actions, NNEPA has acted in accordance with the legal framework established by Part 71. Neither Section 502(d)(3), the primary underlying statutory authority for Part 71, nor 40 C.F.R. § 71.10(a) prescribe nor preclude the use of a particular approach to establishing the requisite "adequate authority" utilized by a delegate agency to administer the Part 71 Program. EPA maintains discretion to analyze and determine this "adequacy" on a case-by-case basis. Here, as evidenced in the NNEPA Delegation Agreement, EPA Region IX determined that the NNOPR provisions provided such "adequate authority." *See* NNEPA Delegation Agreement, at 1 ("WHEREAS, EPA has reviewed NNEPA's request for delegation and the accompanying opinion of the Navajo Nation Attorney General in support of that request

and has determined that NNEPA meets all of the criteria for designation as a 'delegate agency' set forth at 40 C.F.R Part 71."). Peabody has presented no persuasive arguments why this determination should be second-guessed.

3. Past Delegations Under the PSD Program Support a Range of Different Types of Independent Authority That May Be Permissible in the Delegation Context

EPA has routinely allowed non-federal agencies to utilize their own laws in parallel when implementing federal PSD delegations.[12] EPA's practice is evidenced through numerous PSD delegation agreements entered into by EPA and non-federal delegate agencies that identify state or local regulations that may also be applied by the delegate agency when implementing the federal PSD program requirements.[13] *See, e.g.,* Attachments B-E. Given the parallel nature – at least from procedural and delegation standpoints – of the PSD and Title V permitting programs, these practices in the PSD realm support the application of a range of permissible independent laws in conjunction with the implementation of Part 71.

4. The TAS Process is Independent From the Programmatic Requirement of "Adequate Authority" For Delegation Purposes

EPA recently promulgated the Review of New Sources and Modifications in Indian

---

[12] As with Title V, EPA promulgated a "federal" PSD permitting program to be applied in all areas without an approved PSD program. 43 Fed. Reg. 26388 (June 19, 1978).

[13] For instance, the delegation agreement with the Washington Department of Ecology ("WDE") indicates that WDE adopted by reference the federal regulations into its own code, Attachment B, at 1; the delegation agreement with the Bay Area Air Quality Management District ("BAAQMD") indicates that BAAQMD will use its own District Regulation 2, Rule 2 to administer the program, Attachment C, at 2; the delegation agreement with the Nevada Division of Environmental Protection ("NDEP") indicates that NDEP has adopted by reference the federal PSD requirements into the Nevada Code, Attachment D, at 1; and the delegation agreement with the Massachusetts Department of Environmental Protection ("MassDEP") states that "Massachusetts has demonstrated it has adequate legal authority to implement and enforce all requirements as they relate to PSD. This legal authority is contained in Massachusetts' enabling legislation and in regulatory provisions," Attachment E, at 1.

Country ("Tribal NSR Rule"), which establishes minor source and major source non-attainment permitting programs in Indian country. 76 Fed. Reg. 38748 (July 11, 2011). As with Part 71, the Tribal NSR Rule similarly requires that a tribe taking over delegation of all or some of the aspects of the program have their legal counsel submit a statement describing the "laws of the Tribe that provide adequate authority to administer the Federal rules. . . ." 40 C.F.R. § 161(b)(1)(iii). Peabody argues in its Reply that EPA's decision not to subject these delegations to a TAS process means that the tribe can accept the delegation "*without needing to first develop tribal air programs under tribal law*," and that this supports its argument that Part 71 delegations also do not require tribes to *first develop tribal air programs* (emphasis in original). Reply at 4.

First, as previously discussed, TAS determinations are specifically required for Part 71 delegations to eligible tribes, *see* 40 C.F.R. § 71.2, regardless of whether EPA is requiring them in the context of delegations under other programs, such as the Tribal NSR Rule. Therefore, what happens in the Part 71 context is distinguishable from the Tribal NSR Rule context. Second, it is perfectly reasonable that a tribe could and would develop its own rules and regulations to administer a delegated federal program, such as Part 71, without those rules and regulations rising to the level of the development of an actual "tribal air program," thus refuting Peabody's claim. This distinction is noted in the preamble to the Tribal NSR Rule, where EPA explained that "Tribal agencies will assist [EPA] in implementing the Federal program by taking delegation of the administration of particular activities conducted under [EPA's] authority in Indian country. Under final 40 CFR 49.161(b)(1)(iii)(C) and 49.173(b)(1)(iii)(C), Tribes will only *need to show that their laws provide adequate capacity and authority to carry out the delegated activities."* (emphasis added). 76 Fed. Reg. at 38780. This discussion highlights the

relevance – even in the context of the Tribal NSR Rule which does not require TAS for administrative delegations – of relevant tribal legal infrastructure to support the tribe's ability to carry out the delegated functions.

5. Nothing Contained in the NNEPA Delegation Agreement is Unlawful or Improper

Peabody spends 10 pages of its Petition challenging the NNEPA Delegation Agreement itself. Petition, at 19-29. While Board precedent and the scope of review set forth at 40 C.F.R. § 71.11(l) firmly establish that the challenge raised by Peabody to the NNEPA Delegation Agreement should not be allowed in this forum (see Section II.A.2, supra), even if allowed, Peabody fails to demonstrate that there is any flaw or failure in the document rising to the level of an "important policy consideration" warranting review. First, the NNEPA Delegation Agreement creates no new law; rather, it simply embodies the understanding between EPA and NNEPA as to how NNEPA will administer the Part 71 Program. *See, e.g.,* NNEPA Delegation Agreement, Section IV (Permit Development and Review); Petition at 23 (also recognizing this). Second, and as previously explained, the references to the NNOPR provisions in the NNEPA Delegation Agreement are for *informational purposes only* and do not create any new substantive or procedural requirements that must be followed by NNEPA. *See* NNEPA Delegation Agreement, §§ IV.1, IV.2, and V.4. Since the references to the NNOPR requirements in the NNEPA Delegation Agreement create neither substantive nor procedural obligations, in connection to the Part 71 Program or otherwise, there is no basis for the Board to review them under a review of the adequacy of the Part 71 Program as implemented by NNEPA.

There is also no merit to Peabody's attempt to prove a negative by identifying a single delegation agreement pertaining to the administration of the General Rules for Application to

Indian Reservations in EPA Region 10 (40 C.F.R. §§ 49.122-49.139) between the Nez Perce tribe and Region X, which it claims does not specifically identify the tribal authorities to be utilized by the delegate agency.[14] Petition at 26-27; *see* 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) ("Nez Perce Delegation Agreement"). Peabody fails to inform the Board about the most relevant provision of that Agreement, namely Section II.D's recognition that "[t]he Nez Perce Tribe has authority to conduct activities in support of this delegation" and that "[t]his Delegation Agreement neither creates nor diminishes any authority otherwise established by tribal or federal law." Hence, although it did not identify the specific tribal provisions that Region X considered as necessary for the showing of "adequate authority" to be delegated the program, the Agreement clearly indicates that Region X had made the determination that the Nez Perce Tribe had the requisite tribal authority.

On pages 27-28 of its Petition, Peabody also lists a number of other EPA sources that it claims support its argument that the NNEPA Delegation Agreement is unlawful because it includes references to tribal laws. While these citations clearly indicate that EPA expects delegate agencies to implement federal programs "on behalf of" or "standing in the shoes of" EPA, none of them in any way support that it would be inappropriate to reference state or tribal laws or rules in a delegation agreement. As such, these examples add little to the discussion.

[14] The regulation specifically requires that tribes taking over delegation of all or some of the aspects of the program on their Reservation have their legal counsel submit a statement describing the "laws of Tribe that provide adequate authority to administer the Federal rules. . . ." 40 C.F.R. § 49.122(b)(3).

6. West Suburban Recycling and Energy Center Does Not Hold the Significance placed on it by Peabody

Finally, Peabody seeks to primarily rely upon a single Board ruling to support its argument that NNEPA may not apply tribal laws at the same time that it implements a delegated program. In discussing the decision in *In re West Suburban Recycling and Energy Center ("WSREC"), L.P.* 6 E.A.D. 692 (EAB 1996), 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 permit." Petition at 18. Peabody further concludes from *WSREC* that "it is not appropriate for [the tribal requirements] to be cited in the permit." *Id.* However, nothing in this Order supports the latter claim.

WRSEC involved a non-federal agency, the Illinois Environmental Protection Agency ("IEPA"), using state laws and procedures to deny a PSD permit under a delegation. The Board correctly found this inappropriate, as IEPA was considering factors outside the scope of PSD in processing, and ultimately denying, the application for a federal permit. *WSREC*, 6 E.A.D. at 706-708. However, nothing in the opinion stands for the proposition that non-federal delegate agencies cannot use their own permitting procedures in parallel with federal procedures that apply when they administer federal programs through delegated authority, assuming the stated procedures are not inconsistent with the federal requirements.

In fact, the Board explicitly recognized that IEPA was simultaneously using its own laws to administer the PSD program and found nothing intrinsically wrong with this. The Board found that IEPA was implementing the federal program through a "dual system" that "allow[ed] IEPA to review PSD permit applications in conjunction with state construction permit

applications." *Id.* at 707-708. While the Board recognized the "importance of carrying out the PSD review obligations imposed by the Delegation Agreement in a manner that is timely and consistent with the federal PSD regulations", it also recognized that the" PSD review obligations [do not] mesh perfectly with the state permit review process." *Id.* In short, the Board did not find problems with the state authority being used by IEPA but rather the ultimate outcome of denying a federal PSD permit based upon non-PSD considerations.

Tellingly, Board and judicial cases citing the *WSREC* ruling identify it as establishing the principle that "where a permit proceeding involves requirements under both state and federal law, the scope of the Board's review is limited to issues relating to the federal PSD program and the Board will not assume jurisdiction over permit issues unrelated to the federal PSD program." *See In re Russell City Energy Center, LLC*, 15 E.A.D. ___ 2010 WL 5573720, *47 (EAB 2010); *see also City of Morgan v. BAAQMD*, 118 Cal.App.4th 861, 13 Cal.Rptr.3d 420, 428 (2004). If anything, *WRSEC* stands for the proposition that it is acceptable for local agencies to use their own authorities at the same time they implement delegated programs, but nothing in that implementation can interfere with the administration of the federal program. It also stands for the proposition that the Board does not have jurisdiction to review the non-federal portions of a challenged federal permit. Therefore, since Peabody has not claimed that NNEPA's use of the NNOPR interfered with the administration of the Part 71 Program, *WRSEC* is inapplicable.

III. Conclusion

The Board may only review a permit decision if there is a "clearly erroneous finding of fact or conclusion of law" or it "involves an important policy consideration which the Board, in its discretion, should review." 40 C.F.R. § 71.11(l)(1). Moreover, the burden is upon Peabody

to show that review is warranted. 40 C.F.R. § 71.11(l)(1); *see Rohm & Hass,* 9 E.A.D. at 504. As described in this *amicus* brief, these present high hurdles that Peabody has failed to meet.

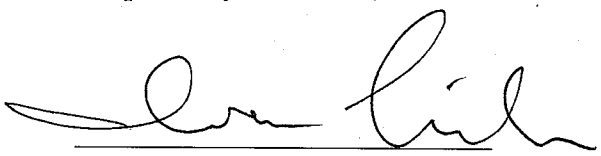
First, Peabody fails to identify any specific Part 71 requirement, either substantive or procedural, that was not followed by NNEPA when it issued the Permit. Rather, all of the allegations pertain to tribal-only requirements. Since these challenges are outside of the scope of the Part 71 Program, Peabody has failed to meet its burden of demonstrating a "clearly erroneous finding of fact or conclusion of law" in connection with the permit decision.

Additionally, Peabody has identified no specific harm or prejudice that it has suffered as a result of NNEPA's action on the Permit. Indeed, every challenged provision of the NNOPR has a parallel Part 71 requirement, and Peabody does not raise concerns about those Part 71 requirements. Rather, Peabody laments that "NNEPA does not appreciate Peabody's increased legal liability that attaches with permit conditions that are now based on NNOPR requirements." Petition at 29. However, Peabody is wrong in this claim because the simple citation to NNOPR requirements in its Permit in no way "increases" Peabody's liability to them, as that liability exists independent from operation of the Permit. Because there has been no harm to Peabody and Peabody's claims pertain to tribal-only laws independent of operation of the Part 71 Program, Peabody has failed to raise any valid claim rising to the level of an "important policy consideration" that should be reviewed by the Board.

For the reasons stated herein, review of Peabody's Petition should be denied in its entirety. Peabody's Petition appears to be a weak attempt to limit the application of Navajo law to it in a forum that is not appropriate or legally empowered to adjudicate the merits of the argument. Moreover, upon closer examination, Peabody's substantive arguments that NNEPA

cannot or should not use its own laws, in the manner complained about by Peabody, have little legitimacy or legal support.

Respectfully submitted,



Ivan Lieben, Assistant Regional Counsel
Region IX, Office of Regional Counsel
United States Environmental Protection Agency
75 Hawthorne St. (ORC-2)
San Francisco, CA 94105
(415) 972-3914
(415) 947-3570 (fax)

CERTIFICATE OF SERVICE

I hereby certify that this *Amicus Curiae* Brief of the United States Environmental Protection, Region IX was electronically filed with the Environmental Appeals Board through its CDX Electronic Submission Page on September 15, 2011.

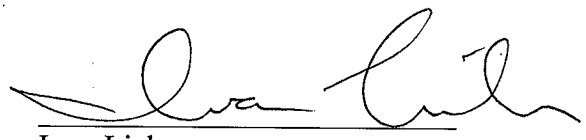
I also certify that copies of the same were sent via first class mail on September 16, 2011 to the following:

Jill E. Grant
Nordhaus Law Firm, LLP
1401 K. Street, NW, Suite 801
Washington, D.C. 20005

John R. Cline
John R. Cline, PLLC
P.O. Box 15476
Richmond, VA 23227

Peter S. Glaser
Troutman Sanders LLP
401 9th Street, NW, Suite 1000
Washington DC 20004-2134

Anthony Aguirre
Asst. Attorney General
Navajo Nation Department of Justice
P.O. Box 2010
Window Rock, AZ 86515



Ivan Lieben
Region IX, Office of Regional Counsel
United States Environmental Protection Agency