JOHN R. CLINE, PLLC
ATTORNEY AT LAW

8261 Ellerson Green Close
Mechanicsville, Virginia 23116

John R. Cline
Virginia Bar #41346

john@johnclinelaw.com

Office : 804-746-4501
Cell: 804-347-4017

September 29, 2012

Via Federal Express

U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board
Ronald Reagan Building, EPA Mail Room
1300 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Re: Petition for Review
Peabody Western Coal Company
Title V Permit No. NN-OP 08-010

Dear Ms. Durr:

On behalf of Peabody Western Coal Company (Peabody or Company), enclosed is a Petition for Review of a recent revision to the above-referenced part 71 federal operating permit issued by the Navajo Nation Environmental Protection Agency (NNEPA) while acting under a delegation of authority from EPA Region IX. An original and five copies of the Petition have been included herein along with three sets of the accompanying Exhibits. Also enclosed is one extra copy of the Petition. Upon its receipt, please date-stamp that copy and return it to me in the enclosed, self-addressed envelope.

Peabody strongly believes that the appropriate Respondent to this Petition must be EPA rather than NNEPA. When an appeal of a federal permit under the Clean Air Act (CAA) has been submitted to the Board in the past and that permit had been issued under an EPA delegation of authority to administer the federal permit program in question, the Company is aware that the Clerk's historical practice has been to request a response to the subject appeal from the agency that issued the federal permit on behalf of EPA. Although Peabody offers no opinion of the appropriateness of that prior practice, we do believe that its implementation with this instant appeal would be completely inappropriate for at least two reasons.

First, while the enclosed Petition challenges the legality of a particular permitting action by NNEPA while acting as EPA's delegate, Peabody asserts therein that NNEPA's action was unlawful because EPA had no statutory authority to delegate its authority to administer the federal operating permit program to NNEPA. In effect, NNEPA's permitting action in question

was void *ab initio* due to EPA's prior unlawful delegation that purportedly authorized NNEPA's action.

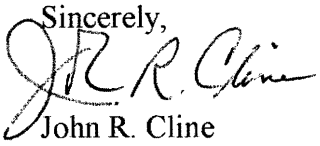
The Company believes the legal deficiency in NNEPA's permitting authority raises an issue of first impression before the Board, i.e., whether EPA's delegation of its authority to administer the CAA title V federal operating permit program is contrary to law. Because, as a delegate agency under 40 C.F.R. part 71, NNEPA "stands in the shoes" of EPA and issues a federal operating permit on behalf of EPA, and because Peabody's appeal herein effectively constitutes a challenge to EPA's asserted authority under the CAA, EPA should be the agency which defends NNEPA's permitting action by responding to Peabody's claim in the enclosure.

Second, when EPA delegated its authority to NNEPA to administer the federal operating permit program, EPA gave notice that, "[b]ecause EPA is retaining its authority to act upon petitions submitted pursuant to 40 CFR 71.10(h) and 71.11(n), any such petitions must be submitted to Region IX[.]" 69 Fed. Reg. 67,578, 67,579 (Nov. 18, 2004). Those particular regulations provide the public with an opportunity to petition EPA to reopen a federal operating permit for cause. It is inconsistent and illogical for EPA, on the one hand, to insist on responding to a public petition to reopen a federal operating permit issued by NNEPA under its delegated authority, but yet on the other hand, to allow NNEPA as a delegate agency to respond to a petition for the Board's review of the same NNEPA-issued federal permit.

In sum, Peabody's Petition herein raises an issue of national significance -- one for which it is appropriate and necessary for EPA to address directly as the Respondent in this proceeding.

Please call or email me if you have any questions about this submittal.

Sincerely,



John R. Cline
Attorney for Petitioner

Enclosures

cc: Linda Crist – Peabody Energy
Jared Blumenfeld – EPA Region IX
Deborah Jordan – EPA Region IX
Stephen B. Etsitty -- NNEPA
Charlene Nelson – NNEPA

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

John R. Cline
John R. Cline, PLLC
8261 Ellerson Green Close
Mechanicsville, VA 23116
(804) 746-4501
john@johnclinelaw.com

Counsel for Peabody Western Coal Company

I. INTRODUCTION

The United States Environmental Protection Agency ("EPA" or "Agency") 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 recently issued an administrative amendment to the part 71 federal operating permit for Peabody Western Coal Company's ("Peabody's" or "Company's") Kayenta Complex. The administrative amendment in question consists of NNEPA's revision of the subject federal permit's issuance and expiration dates. A copy of the amended permit's cover page, which reflects the revised "Issue Date" and the revised "Expiration Date" of that permit, is attached as Exhibit A.

Pursuant to 40 C.F.R. §§ 71.11(*l*)(1), Peabody petitions the Environmental Appeals Board ("Board" or "EAB") to review NNEPA's permit decision, i.e., the administrative amendment in question. In particular, Peabody asks the Board to determine that administrative amendment is based on a conclusion of law which is clearly erroneous. In particular, NNEPA has erroneously concluded that EPA was authorized under the Clean Air Act to delegate to NNEPA the authority to issue and now to amend Peabody's permit. Moreover, as we hope the Board will see, this petition also presents a difficult, but highly important, policy decision that the Board should, in its discretion, review.

II. BACKGROUND

The Kayenta 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 constitutes a "major source" under title V of the Act, CAA § 501(2), it must be operated in compliance with a permit issued under title V. CAA § 502(a).

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). An Indian tribe, *see* CAA § 302(r), is not similarly ***required*** by the Act to develop an operating permit program.

However, CAA § 301(d)(2) authorizes EPA to promulgate regulations which specify those provisions of the Act for which it is appropriate to treat eligible Indian tribes as states. In keeping with that statutory provision, EPA has promulgated the Tribal Air Rule which allows, but does not require, eligible tribes to develop, administer and enforce an EPA-approved tribal operating permit program as well as certain other CAA provisions. 40 C.F.R. §§ 49.1 - 49.11.

The Act requires EPA to "promulgate, administer and enforce" a title V federal operating permit program in any state which does not have an EPA-approved state operating permit program under title V. CAA § 502(d)(3). In keeping with that statutory command, EPA has promulgated its federal operating permit regulations at 40 C.F.R. part 71 ('part 71").

Section 301(d)(4) authorizes EPA to directly administer provisions of the CAA so as to achieve the appropriate purpose in cases where tribal implementation of those provisions is inappropriate or administratively infeasible. To that end, EPA's part 71 federal regulations provide that the Agency will administer and enforce its title V federal operating permit program in Indian country when a title V tribal operating permit program has not been approved in Indian country. 40 C.F.R. § 71.4(b). EPA's part 71 federal operating permit program became effective in Indian country, including the Navajo Nation, on March 22, 1999. 40 C.F.R. § 71.4(b)(2).

EPA's part 71 federal operating permit program at 40 C.F.R. § 71.4(j) provides that EPA may delegate part of its responsibility for administering the part 71 program to a state or tribe in accordance with the provisions of 40 C.F.R. § 71.10. Accordingly, on October 15, 2004, EPA granted NNEPA's request for full delegation of EPA's authority to administer the part 71 federal operating permit program for certain part 71 sources on Navajo Nation lands, including Peabody's Kayenta Complex. 60 Fed. Reg. 67,578 (Nov. 18, 2004).

Acting under that ostensibly delegated administrative authority from EPA, NNEPA has recently administratively amended the existing part 71 federal operating permit for Kayenta Complex by revising that permit's issuance and expiration dates. *See* letter from Stephen B. Etsitty, NNEPA, to G. Bradley Brown, Peabody, of Aug. 31, 2012 (Exhibit B).

III. ISSUE PRESENTED

Peabody respectfully requests the EAB to determine that the subject NNEPA-issued administrative amendment for Kayenta Complex is based on a conclusion of law which is clearly erroneous because EPA's delegation of its authority to NNEPA to administer the part 71 federal permit program was not lawful under the CAA, and consequently the administrative amendment in question has no force of law.

IV. THRESHOLD PROCEDURAL REQUIREMENTS

The part 71 regulations for appeal of permits provide that an administrative amendment is a permit decision for which the Board's review may be requested. 40 C.F.R. § 71.11(l)(1). As explained below, Peabody, as the part 71 permittee, has standing to request the Board's review of the administrative amendment in question, and this petition seeking such review is timely.

A. Persons That May Appeal

Section 71.11(l)(1) also provides the following standing requirements for appeal of a part 71 permit decision.

> Any person who filed comments on the draft permit or participated in the public hearing may petition the [EAB] to review any condition of the permit decision. Any person who failed to file comments or failed to participate in the public hearing on the draft permit may petition for administrative review only to the extent of the changes from the draft to the final permit decision or other new grounds that were not reasonably foreseeable during the public comment period.

However, the part 71 procedures for making an administrative amendment do not require issuance of a draft permit. Consequently, because there were no provisions of a draft administrative amendment for Peabody to review and comment on, the phrase "changes from the draft permit to the final permit decision" should consist in this proceeding of all provisions within the NNEPA-issued final administrative amendment. Moreover, NNEPA made these changes unilaterally and without prior notice to Peabody. Given the changes to its part 71 federal permit which Peabody first saw when presented with the final administratively amended permit, Peabody, especially as the permit holder, is entitled to seek the Board's review of those changes and is not barred from doing so by failure to comment on a permit action of which it had no prior notice.

Moreover, the part 71 procedures for making an administrative amendment do not provide for a public hearing on the draft permit because a draft permit is not part of that permit revision process. Consequently, the phrase "new grounds that were not reasonably foreseeable during the public comment period" should consist in this proceeding of all provisions within the NNEPA-issued administrative amendment. Inasmuch as Peabody had no knowledge that NNEPA intended to administratively amend the Company's part 71 federal permit until Peabody

was presented with those final changes, those changes were not reasonably foreseeable, and constitute grounds for Peabody to seek the Board's review of those changes.

In short, as applied to the administrative permit amendment procedures at 40 C.F.R. § 71.7(d)(3), a reasonable construction of the part 71 standing requirements for appeal of a permit decision would clearly allow Peabody to challenge any condition of NNEPA's administrative amendment in question. Otherwise, unilateral administrative amendments could never be the subject of a petition for review by this Board, which would be contrary to the express provisions for such review in Section 71.11(l)(1).

B. Timing of Appeal

A petition for the Board's review under part 71 typically must be filed within 30 days after a final permit decision is issued, beginning with service of notice of the permitting authority's action. 40 C.F.R. § 71.11(l)(1). When Board review of an administrative amendment is requested, however, the 30-day period for submitting that petition "begins upon the effective date of such action to revise the permit." *Id.*

Peabody was not aware of NNEPA's action to issue the administrative amendment in question until NNEPA emailed a copy of the subject administrative amendment to the Company on August 31, 2012. Exhibit C. That date must be deemed the "effective date of such action" by NNEPA to administratively amend Kayenta's permit.[1] This means that Peabody's petition for review of that permit decision must be submitted to the EAB by no later than, Sunday,

[1] In developing its part 71 federal permit program, EPA generally contemplated that "[a]dministrative permits can be handled by direct correspondence from the permitting authority to the facility after the appropriate information related to the changes has been supplied by the facility." 61 Fed. Reg. 34,202, 34,222 (July 1, 1996). In the case of the unilateral NNEPA-issued administrative amendment in question, Peabody did not provide NNEPA with any "appropriate information related to the changes" because Peabody was unaware that NNEPA was preparing to administratively change the issuance and expiration dates of Kayenta's part 71 federal permit. Thus, in order to afford Peabody the prescribed 30-day period within which to file its petition for review of the administrative permit amendment in question, the term "effective date of such action to revise the permit" should be interpreted to mean that date on which Peabody was first aware of NNEPA's action to revise Kayenta's permit.

September 30, 2012. However, because September 30, 2012 falls on a weekend, the deadline for Peabody's filing is no later than Monday, October 1, 2012. *See* 40 C.F.R. § 71.11(m)(3).

V. ARGUMENT

EPA has delegated its authority to NNEPA to administer the part 71 federal operating permit program in accordance with 40 C.F.R. § 71.4(j) which provides the following:

> (j) *Delegation of part 71 program.* The Administrator may promulgate a part 71 program in a State or Indian country and delegate part of the responsibility for administering the part 71 program to the State or eligible Tribe in accordance with the provisions of § 71.10;

As noted above, acting under a purportedly effective delegation of EPA's part 71 federal authority, NNEPA has recently issued an administrative amendment that revises the issuance and expiration dates of the part 71 federal permit for Peabody's Kayenta Complex.

As demonstrated herein, the CAA does not authorize EPA to delegate to NNEPA its authority to administer the part 71 federal permit program. Consequently, NNEPA's recent action to administratively amend Peabody's part 71 federal permit was *ultra vires*, meaning that the administrative amendment in question has no force of law.

A. Title V of the CAA Does Not Authorize EPA's Delegation of Its Authority to Administer the Part 71 Federal Permit Program.

According to the Administrative Procedure Act, 5 U.S.C. § 558(b), a substantive rule may not be issued "except within jurisdiction delegated to the agency and as authorized by law." The U. S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") observed that

> EPA is a federal agency – a creature of statute. It has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress. "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*,

> 488 U.S. 204, 208 (1988). Thus, if there is no statute conferring authority, a federal agency has none.

Michigan v. EPA, 268 F.3d 1075, 1081 (D.C. Cir. 2001). In that *Michigan* case, the Court determined that EPA's only authority to administer a federal operating permit program is found in 42 U.S.C. §§ 7601(d) and 7661a [CAA §§ 301(d) and 502]. *Id.* at 1084. At issue in this proceeding is whether that statutorily conferred authority includes the Agency's power to delegate its authority to administer a federal operating permit program.

1. *Statutory Construction and Specific CAA Delegations of EPA Authority*

To determine whether an agency's action is contrary to law, courts look first to determine whether Congress has delegated to the agency the legal authority to take the action that is under dispute. *Id.* at 1081 (citing *U.S, v. Mead Corp.*, 121 S. Ct. 2164, 2171 (2000)). Because such an assessment in this proceeding involves an administrative agency's construction of a statute that it administers, that analysis is governed by *Chevron U.S.A. v. Natural Resources Defense Council ("NRDC")*, 467 U.S. 837 (1984). Under *Chevron*,

> [f]irst, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent if Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43 (footnotes omitted).

Applying that *Chevron* standard of review, the *Michigan* Court

> conclude[d] that the plain meaning of [CAA §§ 301(d) and 502] grants EPA the authority to "promulgate, administer and enforce a [federal operating permit] program" for a state or tribe if, and only if, (1) the state or tribe fails to submit an operating program or (2) the operating program is disapproved by EPA or (3) EPA determines the state or tribe is not adequately administering and enforcing a program.

Michigan v. EPA, 268 F.3d at 1082. That is, the *Michigan* Court determined that the CAA defined an explicit scope of EPA authority to "promulgate, administer and enforce" a federal operating permit program. Consequently, and very importantly, the *Michigan* Court did not defer to EPA's interpretation of the Act as giving it broader power under the federal operating permit program *"[s]ince Congress has not delegated authority to the agency to act beyond these statutory parameters*[.]" *Id.* (citing *Mead*) (emphasis added). In particular, *Mead* holds that *Chevron* deference or "*Chevron* step 2" is not applicable "where statutory circumstances indicate no intent to delegate general authority to make rules with force of law". 121 S. Ct. at 2177.

Chevron deference in statutory interpretation is warranted "only as a consequence of statutory ambiguity, and then *only if the reviewing court finds an implicit delegation of authority*." *Sea Land Servs. v. Dep't of Transp.*, 137 F.3d 640, 645 (D.C. Cir. 1998) (emphasis added). Importantly, in that regard, Agency authority may not be lightly presumed. *Michigan* at 1082. The courts "will not presume a delegation of power based solely on the fact that there is not an express withholding of such power." *American Petroleum Inst. ("API") v. EPA*, 52 F.3d 1113, 1120 (D.C. Cir. 1995). Indeed, the D.C. Circuit has previously reminded EPA that to suggest "that Chevron step two is implicated any time a statute does not expressly negate the existence of a claimed administrative power . . . , is both flatly unfaithful to the principles of administrative law . . . and refuted by precedent." *Michigan v. EPA* at 1085 (citing *Ethyl Corp. v. EPA,* 512 F.3d 1053, 1060 (D.C. Cir. 1995); *API v. EPA*, 52 F.2d at 1120).

Applying *Chevron's* step one, the *Michigan* Court found no ambiguity in Congress' meaning of the extent of EPA's authority under the federal operating permit program. *Michigan v. EPA* at 1082. In particular, the Court determined that EPA's statutory authority under the federal operating permit program did *not* include an implied power to exercise that authority in

areas where EPA believed the Indian country status was in question. *Id.* For that same reason, i.e., a lack of statutory ambiguity, a *Chevron* step 1 analysis of EPA's statutory power under the federal operating permit program will find that power does not include an implied power to delegate the Agency's authority to administer that federal program. Thus, consistent with the Court's holding in *Michigan v. EPA*, this Board must similarly conclude that Congress did not provide EPA with the power to delegate its statutory authority to NNEPA to administer the federal operating permit program.

On the other hand, Congress has expressly authorized EPA to delegate its statutory authority to states in a number of other CAA programs. For example, under EPA's federal program for new source performance standards (NSPS), Congress provided that

> [e]ach State may develop and submit to the Administrator a procedure for implementing and enforcing standards of performance for new sources located in such State. If the Administrator finds the State procedure is adequate, *he shall delegate to such State* any authority he has under this chapter to implement and enforce such standards.

CAA § 111(c) (emphasis added). Likewise, the former EPA federal program for national emission standards for hazardous air pollutants (NESHAP) contained identical language expressly authorizing the Administrator to "delegate to such State any authority he has under this chapter to implement and enforce such standards." CAA § 112(d) (revoked and replaced by a new section 112 program for hazardous air pollutant emission standards in 1990).

The plain language of other provisions within the Clean Air Act also authorizes EPA to delegate its authority to states to implement a federal program. Section 114(a) of the Act authorizes the Administrator to perform certain enforcement actions (entry, inspection and monitoring) under several statutory programs and to require certain records, reports and other documentation. Congress then added in no uncertain terms that

> [e]ach State may develop and submit to the Administrator a procedure for carrying out this section in such State. If the Administrator finds the State procedure is adequate, *he may delegate to such State* any authority he has to carry out this section.

CAA § 114(b) (emphasis added).

In 1990 (when Congress authorized EPA to "promulgate, administer and enforce" a federal operating permit program in specific situations), Congress also enacted a federal program for the nationwide control of certain sources of volatile organic compounds. CAA § 183(e). In doing so, Congress used the following language to authorize EPA to delegate its authority to States to implement and enforce those national regulations:

> Each State may develop and submit to the Administrator a procedure under State law for implementing and enforcing regulations promulgated under this subsection. If the Administrator finds the State procedure is adequate, the Administrator shall approve such procedure.

CAA § 183(e)(7).

The preceding examples demonstrate that Congress has employed explicit language when it intended to allow EPA to delegate its authority under the Clean Air Act. However, CAA title V contains no suggestion, much less express language, that EPA is authorized to delegate its authority to administer a federal operating permit program. In the face of those various explicit statutory authorizations for EPA to delegate its federal authority to states, it would be completely unreasonable to suggest that EPA nevertheless has some sort of implied delegation of power from Congress to delegate the Agency's authority to administer a federal operating permit program.

2. *Controlling Case Law*

The courts have previously rejected statutory interpretations of the CAA purporting to find EPA authority for a certain action in the absence of statutory language authorizing such

action. Thus, for example, in the absence of "a textual commitment of authority to the EPA to consider costs in setting NAAQS [national ambient air quality standards] under § 109(b)(1)," the Supreme Court found no such statutory authority for EPA, especially since other provisions within the CAA "explicitly permitted or required economic costs to be taken into account in implementing the air quality standards." *American Trucking Ass'ns v. Whitman*, 121 S. Ct. 903, 909 (2001). The Court refused to find an implicit authorization in the CAA "that has elsewhere, and so often, been expressly granted." *Id.*

Similarly, in the absence of any express congressional delegation of authority, the D.C. Circuit rejected EPA's argument that the Agency was implicitly authorized to change the statutory increments for total suspended particulate matter under the prevention of significant deterioration program. *NRDC v. EPA*, 902 F.2d 962, 978 (D.C. Cir. 1990) ("If Congress had intended to delegate the power [to EPA] to alter the Sec. 163(b) increments, it could have done so explicitly – as it did for other pollutants in Sec. 166."). Also, in the absence of "clear congressional delegation," the D.C. Circuit found in another case that EPA had no implied authority to create a new source review (NSR) exemption for certain pollution control projects, particularly since the NSR statutory program expressly identified other exemptions. *New York v. EPA*, 413 F.3d 3, 41 (2005).

3. *Prior EPA Analysis of Its Delegation Authority*

Thirty years ago EPA internally addressed the same basic issue that is now before the Board. In that earlier instance the Agency was confronted with the question of whether EPA could delegate its authority under the Clean Water Act ("CWA") to issue waste water discharge permits. For essentially the same reasons as previously discussed, EPA's conclusion about its power to delegate its CWA authority was an unequivocal "no." Memorandum from Robert M.

Perry, Associate Administrator for Legal and Enforcement Counsel and General Counsel, to The Administrator, of June 2, 1982 ("Delegation of EPA's Permitting Authority Under the Clean Water Act to Permitting Authorities Under the Surface Mining Control and Reclamation Act of 1977") (Exhibit D).

In particular, EPA acknowledged that CWA § 402(a) provides for the Agency's issuance of federal discharge permits (much like CAA § 502(d)(3) provides for the Agency's issuance of federal operating permits). And, EPA further acknowledged that CWA § 402(b) provides for EPA approval of a state discharge permit program (much like CAA § 502(d)(1) provides for EPA approval of a state operating permit program). Since no other authorities for issuing discharge permits were addressed by the CWA, EPA concluded that the plain text of CWA § 402(a) vested authority to issue discharge permits in EPA, and that "no other agency may exercise that authority unless it is delegated *pursuant to statute*." *See id.* at 2 (emphasis added).

In short, EPA concluded that the CWA provided a specific mechanism for a state to obtain authority to administer an EPA-approved state discharge permit program, but that the CWA did not provide a specific mechanism for EPA to delegate its authority to a state to administer the federal discharge permit program. That same result obtains under the CAA title V program. That is, the CAA § 501(d)(1) provides for a state to obtain authority to administer an EPA-approved state operating permit program, but the CAA does not provide a specific statutory mechanism for EPA to delegate its authority to a state to administer the federal operating permit program.

In conclusion, based on traditional rules of statutory construction, several examples of express CAA delegations of EPA authority to states, controlling case law, and a prior EPA analysis of its authority to delegate administration of a federal permit program, the Board must

conclude in this proceeding that title V of the CAA does not authorize EPA to delegate its authority to administer a federal operating permit program and that any exercise by a tribe of such unlawfully delegated authority is therefore *ultra vires*.

B. EPA's "General Authority" under the CAA Cannot Authorize EPA's Delegation of Its Authority to Administer the Part 71 Federal Permit Program.

Section 301(a) of the CAA provides that "[t]he Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter." EPA actually relied upon this general rulemaking power to promulgate 40 C.F.R. §§ 71.4(j) and 71.10 -- the regulatory provisions which purportedly authorize EPA to delegate its authority to administer the federal operating permit program and the process for making that delegation, respectively. 60 Fed. Reg. 20,804, 20,822 (Apr. 27, 1995).

EPA has stated that "[s]ection 301(a) of the Act delegates to EPA broad authority to issue such regulations as are necessary to carry out the functions of the Act. . . . *It follows* that Congress intended that EPA would similarly have broad legal authority in instances where Tribes choose not to develop program, fail to adopt an adequate program, or fail to adequately implement an air program authorized under section 301(d)." 62 Fed. Reg. 13,748, 13,750 (Mar. 21, 1997) (emphasis added). However, that EPA conclusion about what "follows" is flatly incorrect, and it stands in stark contrast to the Court's explanation that the scope of EPA's power under CAA §§ 301(d) and 502 is limited solely to

> the authority to "promulgate, administer and enforce a [federal operating permit] program" for a state or tribe if, and only if, (1) the state or tribe fails to submit an operating program or (2) the operating program is disapproved by EPA or (3) EPA determines the state or tribe is not adequately administering and enforcing a program.

Michigan v. EPA at 1082.

That court further concluded that CAA § 502 "does not speak of underlying, residual, or even default EPA jurisdiction, authority, or power. It only speaks of the EPA running an implementation plan program for a state that fails to develop an approved program. . . . Nothing in CAA section 301(d), 42 U.S.C. 7601(d), adds to EPA's jurisdiction to implement a federal program in place of the states." *Id.* at 1083. In other words, the D.C. Circuit has already found the scope of EPA's title V authority to administer a federal operating permit program to be unambiguous and therefore beyond the reach any EPA "gap-filling" regulations under CAA § 301(a).

The limit on applicability of § 301(a) has been made unmistakably clear. "*EPA cannot rely on its general authority to make rules necessary to carry out its functions when a specific statutory directive defines the relevant functions of EPA in a particular area.*" *Michigan v. EPA*, 268 F.3d at 1084 (quoting *API v. EPA*, 52 F.3d at 1119) (emphasis added). In this proceeding, the statutory scope of EPA's authority to administer a federal operating permit program is well-defined. That is, EPA's role for administration of a federal operating permit program is limited to the conditions set out in CAA §§ 301(d) and 502(d). *Michigan* at 1083.

In short, Congress plainly did not intend for EPA to delegate its authority to administer its federal operating permit program. Because the CAA is not ambiguous on that issue, EPA cannot rely on its general gap-filling authority under CAA § 301(a) to authorize delegation of the Agency's authority to administer a federal operating permit program.

The D.C. Circuit on several occasions has found it necessary to reject EPA rulemaking under CAA § 301(a) that has conflicted with a clear statutory command. For example, finding that EPA's general grant of rulemaking power cannot trump specific provisions of the Act, the

D.C. Circuit has concluded that § 301(a) could not authorize EPA to stay particular regulations in the face of a statutory provision that prohibited such a stay. *NRDC v. EPA*, 976 F.2d 36, 40-41 (D.C. Cir. 1992). Similarly, the Court has found that § 301(a) could not authorize EPA to give credit for stack height necessary to avoid plume impaction when the Act contained a list of such factors for which stack height credit was allowed and plume impaction was not on that statutory list. *Sierra Club v. EPA,* 719 F.2d 436, 453 (D.C. Cir. 1983). In another case the D.C. Circuit concluded that EPA's general authority to make "regulations as are necessary to carry out [its] functions," i.e., CAA § 301(a), did not empower the Agency to extend PSD permit requirements beyond the limits established by Congress in the Act. *Alabama Power Co. v. EPA,* 636 F.2d 323, 403 (D.C. Cir. 1979).

In sum, contrary to EPA's seemingly all-too-frequent reliance on CAA § 301(a) to promulgate regulations which the Agency believes are necessary to further what the Agency believes are purposes of the Clean Air Act, the D.C. Circuit has repeatedly declined to read such open-ended power into § 301(a). The CAA establishes a well-defined authority for EPA under title V that does not include the power to delegate the Agency's authority to administer its federal operating permit program. EPA therefore cannot use § 301(a) to provide the Agency with that delegation authority.

C. CAA Goals and EPA Policy Cannot Authorize EPA's Delegation of Its Authority to Administer the Part 71 Federal Permit Program.

In the highly relevant *Michigan v. EPA* case where the scope of EPA's authority under the federal operating permit program was also at issue, the Navajo Nation sought to support EPA's unlawful expansion of that authority with statements such as (1) "the Act intended to create an overarching federal role in air pollution control policy," (2) the Act is "national in

scope" and intended to "protect and enhance the quality of the Nation's air resources," and (3) that EPA has the authority to issue regulations necessary to implement the Act. *Michigan*, 268 F.3d at 1083-84 (quotations in original). In similarly arguing in support of its attempt to expand its authority under the federal operating permit program, EPA claimed (1) that its interpretation of the CAA which allows EPA to delegate its authority to administer its federal permit program "is correct because it favors Indian interests," *id.* at 1085, and (2) that its "authority under the CAA is based in part on the general purpose of the CAA." *Id.* at 1084 (quotations in original). But, as the Court responded, "none of these [statements] implies that EPA has some default authority to operate an implementation plan except as specified in sections 301(d) and 502 of the Clean Air Act." *Id.*

Furthermore, EPA has often trumpeted the benefits that tribes can realize through the Agency's "exercise [of] our discretion"[2] to delegate its authority to tribes to administer federal programs under the Act. "By assisting us with administration of the Federal program through delegation, Tribes may remain appropriately involved in implementation of an important air quality program and may develop their own capacity to manage such programs in the future should they choose to do." 76 Fed. Reg. 37,748, 38,779 (July 1, 2011). This Agency statement also shows how EPA sometimes attempts to justify its rulemaking with policy statements in lieu of statutory authority.

As Peabody also recognizes and supports, the Navajo Nation will likely realize significant benefits by administering an operating permit program under the Act. And, through CAA §§ 301(d)(1) and 502(d)(1), Congress has provided the legal pathway for the Navajo Nation to obtain the necessary authority to administer a title V permit program. But, EPA cannot

[2] Recall that EPA had earlier found that "discretion" to delegate its authority to administer its part 71 federal operating permit program by unlawfully relying on CAA § 302(a). 60 Fed. Reg. 20,804, 20,822 (Apr. 27, 1995).

circumvent those statutory requirements that the Navajo Nation must satisfy by instead delegating the Agency's authority to administer the federal title V program when Congress never intended for EPA to delegate that authority. Thus, regardless of the many "laudable goals" to be realized by such a delegation of federal authority to the Navajo Nation, and regardless of EPA's policy reasons for making such a delegation, goals and policy alone are not sufficient to make EPA's delegation of its federal title V permitting authority lawful.

D. The Issue in This Petition Presents an Exceptional Case of National Significance.

Peabody acknowledges that the part 71 federal operating permit for the Company's Kayenta Complex is no stranger to the Board. After NNEPA issued a renewed part 71 federal permit for the Complex while acting under EPA's delegated authority to administer the part 71 federal permit program, Peabody sought the EAB's review of NNEPA's actions (1) that processed and issued that federal permit in accordance with permitting procedures under tribal law and (2) that included conditions based on tribal law within that federal permit. The Board subsequently denied Peabody's requested review of those two narrow issues. *In re Peabody Western Coal Co.*, CAA Appeal No. 11-01 (EAB Mar. 13, 2012) (Order Denying Petition for Review).

Thereafter, NNEPA took final agency action on that permit by issuing a final permit decision on May 12, 2012. Notice of that final agency action was published in the Federal Register on August 22, 2012. 77 Fed. Reg. 50,686. Thus, Agency review procedures relevant to the NNEPA-issued renewed federal operating permit for Kayenta Complex have been exhausted.

However, on August 31, 2012, while again acting under EPA's delegated authority to administer the federal operating permit program, NNEPA issued the administrative amendment

in question to Kayenta's federal operating permit. That new action by NNEPA is different from the NNEPA actions that were challenged before the Board in the above-referenced CAA Appeal No. 11-01. In short, Peabody now asks the Board to find the recent administrative amendment in question to be unlawful because NNEPA had no authority under the Clean Air Act to issue that administrative amendment.

We emphasize that Peabody has absolutely no intent to attempt to prevent the Navajo Nation's implementation of Clean Air Act programs to protect the Nation's air resources. In 1990, Congress specifically amended the CAA by authorizing the treatment of eligible Indian tribes as states, so that tribes could, among other actions, take first-hand responsibility for regulating sources of air emissions located on tribal lands. CAA § 301(d). That congressional amendment was informed by fundamental principles for recognizing Indian sovereignty and protecting all tribal interests thereunder related to the Act, and Peabody fully supports such lawful steps to assist tribal implementation of CAA programs.

The problem, however, is that EPA's current approach to assisting tribes under title V of the Act, which delegates the Agency's authority to administer the federal operating permit program to tribes, is plainly contrary to the law. Thus, the issue presented by this petition implicates far more concern than just a disagreement about a permit revision.

In remarks before the 40th Anniversary Symposium of the Environmental Law Institute, Judge Tatel of the Court of Appeals for the D.C. Circuit observed that the doctrines of administrative law "exist for a compelling Constitutional reason; they keep agencies tethered to Congress and to our representative system of government." The Honorable David S. Tatel, "The Administrative Process and the Rule of Environmental Law," 9 (Oct. 6, 2009) (Exhibit E).

With that in mind, Judge Tatel opined that "given the quasi-constitutional nature of administrative law, interested parties have not just a practical incentive to help agencies do their jobs well, but also *a responsibility as citizens not to encourage agencies to act beyond their authority*." *Id.* at 10 (emphasis added). In that spirit, this petition calls upon the Board to make the most fundamental inquiry of administrative law, i.e., to determine whether an agency's action falls within the scope of its authorizing legislation. In particular, this Board is asked to determine whether EPA's delegation of its statutory authority to NNEPA to administer the federal operating permit program was in accordance with the law.

Although Congress has specified that judicial review of a national regulation under the Clean Air Act must be sought within 60 days of the regulation's promulgation, CAA § 307(b), the statute does not preclude administrative review of a regulation after that time. Nevertheless, Peabody recognizes that "the Board *generally* does not entertain challenges to final Agency regulations in the context of permit appeals" and "that there is 'a strong presumption' against entertaining a challenge to the validity of a regulation subject to a preclusive judicial review provision." *USGen New England, Inc. Brayton Point Station*, 11 E.A.D. 525, 555-57 (EAB 2004) (citations omitted) (emphasis added) (Order Denying Motion for Evidentiary Hearing).

However, the Board does acknowledge that it has the discretionary authority to review a regulation in the context of a permit appeal when "there may be 'an exceptional case' where an 'extremely compelling argument' is made." *Id.* at 557 (citations omitted). "A compelling circumstance justif[ies] a deviation from the general rule against reviewing the validity of regulations" in administrative appeals of permits. *In re B.J. Carney Industries, Inc.*, 7 E.A.D.

171, 194 (EAB 1997) (Remand Order).[3] Just such a case with a highly compelling circumstance is present here.

Peabody is not asking the Board merely to determine whether the Agency's promulgation of 40 C.F.R. § 71.4(j) was a rational exercise of the Agency's lawful authority. Rather, as explained above, that regulation is clearly unlawful under the Clean Air Act. Consequently, the Agency acts unlawfully every time it purports to delegate its Part 71 authority to a tribe, and a violation of the Clean Air Act occurs every time a tribe acts under its supposed federal authority, as NNEPA did in issuing the subject permit amendment.

The Agency is now sending a mixed message to those tribes which seek to build their title V tribal permitting capacities under the Clean Air Act by administering EPA's delegated federal permit program. On the one hand, in keeping with the intent of the Agency's aproach, those tribes will undoubtedly gain experience in the administration of a permit program under the Act. But, on the other hand, they will be doing so with regulations provided by EPA for which they have no legal authority to administer! In essence, EPA's inappropriate delegation of its part 71 administrative authority has cast those tribes in the role of assisting EPA in an unlawful manner. EPA's initiation and perpetuation of unlawful tribal permitting actions imposes a grave injustice upon those unwitting tribes that unfortunately believe they are advancing their tribal interests.

These current permitting circumstances are compelling, and they promise only to get worse as more tribes seek delegation of federal permitting authority under part 71 rather than develop their own tribal permitting authority under 40 C.F.R. part 71. This Agency promotion of unlawful acts is undoubtedly an "exceptional case" in which the damages from unlawful tribal

[3] Although the reviewability issue in *Carney* arose in the context of a penalty appeal, the Board's views with respect to untimely challenges to the validity of final CAA regulations in that setting are also akin to those in permit appeals as well as enforcement actions. *See USGen New England, Inc. Brayton Point Station*, 11 E.A.D. at 557, n.52.

permitting authority will continue to spread with time unless this Board takes action to correct it. The Board can and should exercise its authority to effectuate Congress' clear intention not to authorize EPA to delegate its authority to NNEPA or any other tribe to administer the part 71 federal operating permit program.

Peabody fully understands that its challenge to the part 71 delegation provisions is not a matter of right. And we also understand that "the Agency is entitled to close the book on the rule insofar as its validity is concerned." *USGen New England, Inc. Brayton Point Station*, 11 E.A.D. at 557 (quoting *In re Echevarria,* 5 E.A.D. 626, 634-35 (EAB 1994) (citations and footnotes omitted)). However, the Board is now on notice that the existing CAA title V permitting process for Indian tribes which relies on administering the federal operating permit program is badly broken and needs to be fixed as soon as possible.

This continuing violation is a clear error of law that also implicates an important question of national policy, i.e., whether EPA should persist in unlawful delegation of its authority to tribes, thereby knowingly allowing those tribes to issue federal permits with no force of law. As such, this compelling circumstance is proper for review by the Board under 40 C.F.R. § 71.11(l)(1). Judge Tatel once remarked that "[f]rom my D.C. Circuit advantage, I sometimes wonder whether administrative agencies . . . really care about the fundamentals in the way that courts do." Ex. E at 2. This petition is an opportunity for the Board to demonstrate on behalf of EPA that it does care.

VI. CONCLUSION

The Subject NNEPA-issued Administrative Amendment to Peabody's Part 71 Federal Permit Is Based on a Conclusion of Law Which Is Clearly Erroneous.

There is good reason why this petition has cited so many of the fundamental principles of administrative law addressed in the *Michigan v. EPA* decision. Like the issue presented by this petition, the Court in *Michigan* was confronted with the question of whether EPA had the legal authority to take a particular action under its statutory authority "to promulgate, administer and enforce" a federal operating permit program under the Clean Air Act.

Consistent with the Court's findings in the *Michigan* case, this petition has demonstrated:

(1) That the scope of EPA's statutory authority under CAA section 502(d)(3) is limited solely to the plain statutory text, i.e., "'promulgat[ing], administer[ing] and enforc[ing] a [federal operating permit] program' for a state or tribe if, and only if, (1) the state or tribe fails to submit an operating program or (2) the operating program is disapproved by EPA or (3) EPA determines the state or tribe is not adequately administering and enforcing a program." *Michigan* at 1082.

(2) That nothing in CAA section 502 "speak[s] of underlying, residual, or even default EPA jurisdiction, authority or power" to delegate its authority to administer its federal operating permit program. *Id.* at 1083.

(3) That "[n]othing in CAA section 301(d) . . . adds to EPA's jurisdiction to implement a federal program in place of the states." *Id.* at 1083.

(4) That the scope of EPA's statutory authority under the federal operating permit program is unambiguous, and thus "EPA cannot rely on its general authority [under CAA § 302(a)] to make rules," *id.* at 1084, that authorize delegation of its authority to administer that program.

Therefore, this petition requests the Board to find that EPA had no statutory authority to promulgate:

(1) the provisions of 40 C.F.R. §§ 71.4(j) and 71.10 which allow EPA to delegate its authority to administer the part 71 federal operating permit program;

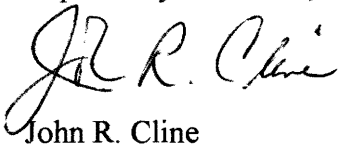
(2) the provisions within § 71.10 which prescribe how such a delegation of EPA administrative authority shall be implemented; and

(3) any and all other provisions of 40 C.F.R. part 71 which authorize a "delegate agency," 40 C.F.R. § 71.(2), to act in the capacity of a "permitting authority," *id.*

"If EPA lacks authority under the Clean Air Act, then its action is plainly contrary to law and cannot stand." *Michigan v. EPA* at 1081 (citing *API*, 52 F.3d at 1119-20; *Ethyl Corp.*, 51 F.3d at 1060). Consequently EPA's delegation of its authority to NNEPA to administer the part 71 federal operating permit program was unlawful and has no force of law.

Therefore, Peabody respectfully requests the Board to determine that the subject NNEPA-issued administrative amendment to Kayenta's part 71 federal operating permit is based on a conclusion of law which is clearly erroneous, and therefore to ORDER that the subject administrative amendment be vacated, that the delegation provisions of part 71 be vacated, and that Kayenta's part 71 federal operating permit be remanded to the sole jurisdiction of EPA.

Respectfully submitted,



John R. Cline
John R. Cline, PLLC
8261 Ellerson Green Close
Mechanicsville, VA 23116
(804) 746-4501
john@johnclinelaw.com

Counsel for Peabody Western Coal Company

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Petition for Review was mailed, via U.S. mail, first class and postage prepaid, on the 1st day of October, 2012, to each of the following:

Jared Blumenfeld, Administrator
Deborah Jordan, Air Division Director
EPA Region IX
75 Hawthorne Street
San Francisco, CA 94104

Stephen B. Etsitty, Executive Director
Charlene Nelson, Air Quality Control Program
Navajo Nation Environmental Protection Agency
P. O. Box 339
Window Rock, AZ 86515

Attorney

Date: October 1, 2012

EXHIBITS

Exhibit	Description
A	Cover Page of Administratively Amended Permit Containing Revised Permit Issuance and Expiration Dates
B	NNEPA Letter Transmitting Administrative Amendment
C	NNEPA Electronic Mail Transmitting Administrative Amendment
D	EPA, "Delegation of EPA's Permitting Authority Under the Clean Water Act to Permitting Authorities Under the Surface Mining Control and Reclamation Act of 1977"
E	Tatel, "The Administrative Process and the Rule of Environmental Law"