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

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

PEABODY WESTERN COAL COMPANY'S RESPONSE TO EPA REGION IX'S AMICUS CURIAE BRIEF

Petitioner in the above-captioned matter, Peabody Western Coal Company ("Peabody" or "Company"), respectfully files this response to an amicus curiae brief filed in this proceeding by U.S. Environmental Protection Agency ("EPA"), Region IX ("Region") on September 15, 2011. Amicus Curiae Brief of EPA Region IX ("Reg. IX Br."). On September 19, 2011, the Company moved for leave to file this response. Peabody Motion for Leave to File a Response. The Environmental Appeals Board ("Board") granted Peabody's motion on September 21, 2011. Order Granting Peabody Motion for Leave to File a Response to EPA Region 9's Amicus Curiae Brief.

I. INTRODUCTION

This case raises a narrow question of law under the Clean Air Act ("CAA") involving a non-federal agency's issuance of a federal permit while acting under EPA's delegation of federal administrative authority. The chronology of permitting and related actions in this case, leading

to Peabody's filing of its petition for review with the Board on May 16, 2011, is detailed in the Company's petition. Pet. at 4-7.

In brief, Navajo Nation Environmental Protection Agency ("NNEPA") has issued a renewed federal operating permit under 40 C.F.R. Part 71 ("Part 71") to Peabody's surface coal mining operations located on lands of the Navajo Nation near Kayenta, Arizona. However, acting solely as EPA's administrative delegate, NNEPA nevertheless issued the Company's part 71 federal permit using procedures based on its own Navajo Nation Operating Permit Regulations ("NNOPR"). In addition, acting solely as EPA's administrative delegate, NNEPA nevertheless issued the Company's part 71 federal permit with ten separate permit conditions based not only on part 71 but also on NNOPR requirements. Peabody now asks EPA's Environmental Appeals Board ("Board") to find NNEPA's reliance on tribal regulations while acting as a delegate agency for EPA to be unlawful under the CAA.

Peabody emphasizes that its petition is not an all-out assault on the Navajo Nation's authority to manage air resources throughout its tribal lands. Peabody fully supports NNEPA's intended transition from its current role in assisting EPA's administration of a federal program under part 71 to NNEPA's full implementation of a tribal program consisting of tribal regulations, once they are approved by EPA under 40 C.F.R. Part 70 ("Part 70"). In this case Peabody has only asked the Board to confirm the boundary between federal and tribal authorities under the CAA when a tribal agency acts with delegated federal administrative authority under the part 71 federal permit program.

The disappointing arguments in the Region's brief cry out for correction and clarification. Peabody's part 71 federal permit is not, as the Region suggests, the product of a consolidated permitting action, where NNEPA administered elements of its tribal permit program separately

from and in addition to its permitting actions as EPA's delegate. Consequently, EPA's argument that Peabody's petition is not reviewable by the Board fails completely.

In the alternative, Region IX attempts to build a case for its belief that NNEPA should be allowed to use its own tribal regulations under a part 71 delegation. Tellingly, however, the Region avoids any substantive discussion of the fundamental principles associated with its delegation of administrative authority. Because EPA's delegation of administrative authority does not involve new rulemaking under the CAA, NNEPA's only choice in issuing Peabody's part 71 federal permit as a delegate agency is to rely on the particular part 71 federal regulations which the delegation has authorized it to use. Consequently, the Region's ideas on how such a delegation should work or could work fall far short of satisfying a basic legal limitation imposed by the CAA.

II. BACKGROUND

Aside from the part 71 federal regulations, two other regulations play a vital role in resolving the issue now before the Board. First, the particular language and structure of the tribal regulations which NNEPA has used while acting as EPA's delegate to administer portions of the part 71 federal program must be examined. For that reason, those key regulations, NNOPR §§ 701-705, are provided herein for ease of reference when this response demonstrates how their use by NNEPA as a delegate agency not only is reviewable under the Board's authority but also is unlawful under the CAA.

In addition, EPA has recently promulgated federal new source review ("NSR") regulations for Indian country. 40 C.F.R. §§ 49.151 - 49.161; 40 C.F.R. §§ 49.166 – 49.173. Particular passages from those regulations as well as from the accompanying preamble provide relevant facts about what is involved when EPA delegates its federal administrative authority to a

tribal agency. Those details are especially informative when evaluating Region IX's argument for why NNEPA should be allowed to use its own tribal regulations when acting as a federal administrative delegate under part 71. For that reason, key provisions of those new federal NSR regulations and EPA's accompanying explanations are quoted below for ease of reference when this response demonstrates why NNEPA's challenged permitting actions using tribal regulations are unlawful under the CAA.

A. NNEPA's Tribal Regulations

NNEPA's challenged actions in this proceeding cannot be clearly understood without knowledge of the tribal regulations that NNEPA actually relied on to issue Peabody's part 71 federal permit. The relevant tribal regulations, contained in the NNOPR as "Subpart VII – Part 71 Program Delegation," are included in Attachment A.

First, NNOPR § 701 states the following:

> Upon delegation of a Part 71 program by USEPA Region IX to the Navajo Nation EPA, the Navajo Nation EPA shall have the authority to issue, amend, revoke, reissue, modify, enforce and renew Part 71 permits to Part H sources pursuant to the procedures set forth both in these regulations and 40 C.F.R. part 71.

Attachment A further shows that NNOPR § 704(A) incorporates 40 C.F.R. Part 71 by reference into NNOPR "for purposes of administering the delegated Part 71 program." Thereafter, NNOPR § 704(B) provides that, "[n]otwithstanding subsection A of this section, the Navajo Nation procedures set forth in the sections listed under § 705 shall apply to part 71 permits in addition to the part 71 procedures." Finally, as Attachment A indicates, NNOPR § 705 includes, among other tribal-only requirements, the tribal procedures of NNOPR Permit Processing at §§ 401-406 with which "Part 71 permits shall be administered and enforced."

Thus, key facts about NNEPA's Part 71 Program Delegation are that:

- NNOPR authorizes NNEPA, as a delegate agency under part 71, "to issue, amend, revoke, reissue, modify, enforce and renew Part 71 permits" . . . pursuant to procedures in 40 C.F.R. Part 71; and

- NNOPR also authorizes NNEPA, as a delegate agency under part 71, "to issue, amend, revoke, reissue, modify, enforce and renew Part 71 permits" . . . pursuant to procedures in "these regulations." "[T]hese regulations" include not only the part 71 regulations which NNOPR incorporates by reference but also specific NNOPR requirements.

B. Facts about Administrative Delegation

EPA's newly adopted federal regulations for new source review, like the part 71 regulations in this case, provide for the delegation of administrative authority. 40 C.F.R. § 49.161; 40 C.F.R. § 49.173. The following are passages from those new regulations and EPA's accompanying preamble:

> • [T]he Administrator may delegate the authority to assist EPA with *administration of portions of this Federal minor NSR program implemented under Federal authority* to a Tribal agency[.] 40 C.F.R. § 49.161(a)(2) (emphasis added).
>
> • [T]he Tribal agency must submit a request to the Administrator that:
> * * *
> (iii) includes a statement by the applicant's legal counsel (or equivalent official) that includes the following information:
> * * *
> (C) A description of the laws of the Tribe that provide *adequate authority to administer the Federal rules and provisions* for which delegation is requested and . . . 40 C.F.R. § 49.161(b)(1) (emphasis added).
>
> • [U]nder a delegated Federal program, the delegated Indian Tribe would be assisting EPA with the *administration of Federal requirements* on EPA's behalf and *under these Federal regulations.* 76 Fed. Reg. 38,767 (emphasis added).

> • . . . for delegating our Federal authority to states and/or tribes *for administering Federal rules* under the Act. *Id.* at 38,779 (emphasis added).
>
> • This administrative delegation is to be distinguished from the TAS [Treatment As a State] process under the TAR [Tribal Air Rule] whereby Tribes seek approval to run programs under Tribal law. Tribes would not need to seek TAS under the TAR in order to request delegation of administration of aspects of these Federal NSR programs. *Id.* at 38,780.
>
> • [T]he administrative delegation approach finalized in these rules provides for [EPA] to *delegate administration of the Federal program operating under Federal law* to interested Tribes[.] *Id.* (emphasis added).
>
> • 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. *Id.* (emphasis added).
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> • Once the delegation becomes effective, the Tribal agency will have the authority under the Act, to the extent specified in the Agreement, to administer the rules in effect for the particular area of Indian country and to act on behalf of the Administrator. The *Federal requirements administered by the delegate Tribal agency* will be subject to enforcement by EPA under Federal law. *Id.*
>
> • [D]elegation of the authority to assist EPA with administration of elements of the Federal NSR programs is a process that is distinct from approval of Tribal eligibility and Tribal programs under CAA section 301(d) and the TAR. *To the extent the commenters are concerned that administrative delegation acts as an approval of Tribal authority, EPA reiterates that irrespective of any such delegation, the minor NSR and nonattainment major NSR programs established here will continue to operate under Federal authority*[.] *Id.* at 38,781 (emphasis added).
>
> • [A]ny *permits* issued under the Federal NSR programs (even where *issued by a Tribe acting on EPA's behalf pursuant to a delegation agreement) remain Federal in character* and continue to be enforceable (whether civilly or criminally) in Federal court. *Id.* at 38,782 (emphasis added).

In sum, EPA has recently explained several important facts associated with the process for delegating its administrative authority for federal permit programs. Those facts have a

critical bearing on why Peabody has challenged specific permitting actions by NNEPA as a delegate agency under part 71.

III. DISCUSSION

A. The Delegation Agreement Was Never Subject to CAA § 307(b).

According to Region IX, CAA § 307(b) required any challenges to the Delegation Agreement to be filed within 60 days after notice of its execution by EPA and NNEPA was published in the Federal Register on November 18, 2004. Reg. IX Br. at 10-11 (citing 69 Fed. Reg. 67,578). Region IX therefore argues that Peabody's right to appeal the Delegation Agreement has expired, i.e., that Peabody cannot at this time challenge provisions of the Delegation Agreement. However, the Region is badly mistaken because the Delegation Agreement was never subject to CAA § 307.

During development of the part 71 federal program, EPA confirmed that a delegation agreement under part 71 is not a type of agency action that is subject to the judicial review provisions of § 307(b). As EPA explained,

> EPA does not believe that EPA delegation of part 71 administration to States or eligible tribes provides an adequate forum for evaluating alternative thresholds [for de minimis emissions] developed by States or eligible tribes, *since there will be no formal approval action in those delegations and the public will not have the opportunity to comment on them before they are effective*.

60 Fed. Reg. 20,818 (Apr. 27, 1995) (emphasis added).

EPA further explained why there was no need to publish part 71 delegation agreements in the Federal Register.

> EPA will not publish [in the Federal Register] its delegation agreement with a delegate agency. Therefore, section 71.4(j) provides that the roles of the delegate agency and EPA in administering the part 71 program will be defined in a delegation agreement, not in a Federal Register notice. The EPA will follow the procedures for delegation

> agreements established with the PSD program under which EPA does not publish its delegation agreements. *Delegation agreements reflect the understanding of EPA and the delegate agency as to their respective responsibilities and are not subject to any notice requirement.* This approach allows EPA and the delegate agency to modify their agreement as circumstances change, without the burden of publishing a Federal Register notice.

61 Fed. Reg. 34,214 (July 1, 1996) (emphasis added).

The Federal Register notice referenced by Region IX, Reg. IX Br. at 11, was for the sole purpose of informing the public in keeping with 40 C.F.R. § 71.10(b) that EPA had delegated its administrative authority under part 71 to NNEPA. In particular, that Federal Register notice did not constitute notice with the opportunity for public comment. Thus, Peabody was under no obligation in 2004 to seek judicial review of the Delegation Agreement.

Given EPA's clear position on this issue established 15 years ago, Peabody is puzzled why Region IX would contradict that position at this time. Indeed, Peabody's Petition at 22-23 provides another EPA succinct explanation in 1998 why public comment on a delegation agreement under part 71 was not necessary. As EPA stated at that time,

> EPA disagrees that notice and comment is required prior to delegation. . . . [W]hen EPA delegates part 71 program implementation duties, EPA is merely passing implementation responsibility of an already promulgated program to an eligible delegate entity. The program that is delegated under part 71 has already been subject to notice-and-comment rulemaking and would not be changed as a result of the delegation. The delegation itself is not a rulemaking procedure.

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

In sum, the Delegation Agreement was not the type of EPA action that could have been challenged under CAA § 307(b). Consequently, Peabody has never had a right or an obligation to appeal the Delegation Agreement under that statutory provision. CAA § 307(b) in no way

influences Peabody's standing at this time to challenge specific contents of the Delegation Agreement.

B. The Board Has Authority to Review Peabody's Claims.

Region IX further asserts that the challenged NNEPA-permitting actions based on tribal law do not bear sufficient nexus to the part 71 federal program. Reg. IX Br. at 7 (internal citations omitted). Consequently, according to the Region, the Board lacks authority to review Peabody's claims because they fall outside the scope of the Board's review authority. *Id.* at 2. For the reasons explained herein, the Region is badly mistaken.

1. Issuance of Peabody's Part 71 Federal Permit Did Not Involve Consolidated Permitting Actions.

Region IX's argument is based on a line of cases where the Board has declined to review a "state-only" or "local-only" provision in a permit because that provision did not have a sufficient nexus to the federal permit program that was reviewable. Reg. IX Br. at 7-8 (internal citations omitted); *id.* at 11-14 (internal citations omitted). In each case, the permitting agency had taken some form of consolidated permitting actions which included not only issuing permit requirements under a federal program but also issuing permit requirements at the same time under a state or local program that had no underlying legal relationship to the federal program. Therefore, Region IX's argument based on the aforementioned Board decisions fails because issuance of Peabody's part 71 federal permit did not involve consolidated permitting actions under both federal and tribal law.

When NNEPA issued Peabody's part 71 federal permit, NNEPA did not also issue a tribal permit under NNOPR.[1] Nor did the NNEPA-issued federal permit include NNOPR

[1] Peabody's Facility is not required to have a tribal permit based only on NNOPR because the Facility is currently permitted under part 71. *See* NNEPA Resp. Ex. B, § 201(A).

requirements based *solely* on tribal authority, except for an uncontested tribal provision requiring Peabody's fee payment[2]. In other words, NNEPA's challenged permitting actions under tribal law were taken as NNEPA acted solely as a delegate agency under part 71. That direct link between the challenged actions under tribal law and the part 71 program constitutes the nexus required to bring those challenged actions under the Board's review.

2. Tribal Regulations Confirm the Nexus Required for Board Review.

The specific NNOPR regulations presented in the preceding Background discussion of this document demonstrate the direct link between NNEPA's challenged actions under tribal law and the part 71 program. NNOPR §§701-705 collectively establish an "expanded" part 71 program under tribal law that includes not only part 71 requirements but also specific NNOPR requirements. In issuing Peabody's part 71 federal permit as a delegate agency, NNEPA has issued that permit in accordance with some of those NNOPR requirements, and NNEPA has included some of those NNOPR requirements in the Company's part 71 federal permit.

NNEPA's combining of NNOPR requirements with part 71 requirements to create NNEPA's "Part 71 Program Delegation" for administering part 71 as a delegate agency establishes the requisite nexus that authorizes the Board to review NNEPA's challenged permitting actions.

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[2] NNEPA has elected to collect sufficient fees under tribal law to fund NNEPA's duties as a delegate agency under part 71. 69 Fed. Reg. 67,579 (Nov. 18, 2004). While NNEPA's collection of a fee from Peabody is not required under the part 71 federal program, Peabody has agreed to inclusion of that one tribal-only requirement in the Company's part 71 federal permit. Pet. Ex. A, Condition IV.A. Notably, NNEPA does *not* claim its delegated administrative authority under part 71 as the authority for placing that particular tribal requirement in Peabody's part 71 federal permit. *See In re Colmac Energy, Inc.*, PSD Appeal No. 88-9, slip op. at 2 (Adm'r, Dec. 12, 1988) (Region IX's PSD permit determination "factored in all necessary requirements of federal law and EPA does not have the authority to impose state or local requirements in the permit in the absence of the permit applicant's consent.").

3. The Delegation Agreement Confirms the Nexus Required for Board Review.

The process of EPA delegating its administrative authority under part 71 to NNEPA actually involved three interrelated documents, i.e., the "EPA-NNEPA Delegation Agreement," Pet. Ex. B, the "Eligibility Determination," Pet. Ex. C, and the "Transition Plan," Pet. Ex. D. They are collectively referred to herein as the "Delegation Agreement." Each of those documents contains provisions that evidence EPA's approval of NNEPA's reliance on NNOPR requirements while acting as a delegate agency under part 71. See, e.g., Pet. Ex. C at 3 (Navajo Nation Air Pollution Prevention and Control Act and NNOPR "contain all relevant authorities and procedures for administration of the federal program"); Pet. Ex. B, § IX.2 (". . . NNEPA agrees to continue to revise, reopen, terminate or revoke and reissue Part 71 permits, as necessary and appropriate, using the procedures of Subpart IV of the [NNOPR]."); Pet. Ex. D, § V.C (NNEPA will process permit applications "pursuant to the procedures described in 40 C.F.R. § 71.5, subpart IV of the NNOPR and the Delegation Agreement."); Pet. Ex. D, § V.D (NNEPA will prepare a technical review memorandum and statement of legal and factual basis for each Part 71 permit "in accordance with 40 C.F.R. § 71.11(b) and [NNOPR] § 401(B)."); *id.* (NNEPA will provide public notice and comment regarding permit actions and conduct permit proceedings "pursuant to 40 C.F.R. § 71.11 and Subpart IV of the NNOPR."); Pet. Ex. D, § V.E (All new permits will be issued in the manner "described in 40 C.F.R. Part [sic] § 71.1 and in subpart IV of the [NNOPR] and section 212 of the Navajo Uniform Rules."); Pet. Ex. D, § V.G ("All terms and conditions in a permit . . . are enforceable by the Administrator pursuant to the CAA and by the Director pursuant to Subpart V of the [NNOPR], Subpart 3 of the Navajo Uniform Rule, and Subchapter 3 of the Navajo Clean Air Act, . . . as well as by persons pursuant to 4 N.N.C. § 1156 and 304 of the CAA.").

Those numerous provisions in the Delegation Agreement provide further evidence of a direct link between the federal part 71 program and NNEPA's challenged actions under tribal law. Given that strong nexus, there should be little doubt that the Board has authority to review those challenged actions.

4. The Region's Other Reasons Are Incorrect, Misleading or Irrelevant.

The preceding discussion of NNEPA's use of tribal regulations while acting as EPA's delegate under part 71 demonstrates the obvious nexus between NNEPA's challenged actions and the part 71 federal program. NNOPR §§ 701-705 creates that nexus, and provisions of the Delegation Agreement confirm it. Nevertheless, woven within NNEPA's argument to the contrary are several assertions that are simply incorrect, misleading or irrelevant. Peabody feels compelled to briefly rebut each of those questionable assertions.

Region IX asserts that Peabody has not "argue[d] that the challenged conditions are inconsistent with Part 71," and that Peabody has not argued that "NNEPA failed to act consistently with Part 71 in issuing the Permit." Reg. IX Br. at 8. "Inconsistency" with part 71 is not the determinant of whether NNEPA's challenged permitting actions are reviewable by the Board. Peabody must demonstrate the presence of a sufficient nexus between those permitting actions that relied on tribal law and the part 71 federal program. Peabody has done so.

Region IX asserts that Peabody has not challenged "any particular *permit condition* governed by Part 71[.]" *Id.* (emphasis in original). The scope of Part 71 permit appeals is broader than simply "permit conditions governed by Part 71." The Board may be petitioned to review "any condition of the permit *decision*." 40 C.F.R. § 71.11(*l*)(1) (emphasis added). Processing and issuing Peabody's federal permit using tribal procedures is clearly a "condition of the permit decision," as is adding tribal requirements as conditions in that part 71 federal permit.

Region IX asserts that the particular permit conditions based on NNOPR, which Peabody has challenged, have been clearly identified "as 'tribal enforceable only,' 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." *Id.* at 9. Those NNOPR-based permit conditions cannot legitimately be labeled as "tribal enforceable only" when, according to NNEPA, the sole basis for their inclusion was NNEPA's delegated administrative authority under part 71. Moreover, the scope of the Board's review authority is broader than whether a particular permit condition provides "support for any federally enforceable Part 71 permit conditions."

Region IX asserts in a footnote that a Peabody statement "indicat[es] that [Peabody] is not disputing the applicability of these requirements under tribal law." *Id.*, n.7. Region IX's assertion is misleading. The applicability of "NNOPR requirements under tribal law," just like the applicability of any other requirements under tribal, state and local laws, is clearly limited under the CAA. In this case "NNOPR requirements under tribal law" are not applicable for permitting actions by NNEPA when it acts under the delegated administrative authority of the part 71 federal permit program.

Region IX asserts that the "legal applicability" of the NNOPR requirements challenged by Peabody "is completely independent from operation or authority of the Part 71 Program or issuance of any particular Part 71 permits," *id.*, and "their applicability is based purely upon tribal law," *id.* at 10. Peabody agrees with that assertion in principle, but those conditions described by the Region do not exist in this case. Rather, in this case NNEPA claims that its delegated administrative authority under part 71 allows it not only to use tribal procedures to process and issue Peabody's part 71 federal permit but also to include NNOPR requirements in that federal permit. NNEPA Resp. at 6 ("[T]ribes must have their own [tribal] authorities to

administer the Part 71 program[.]"); *id.* at 9 (Like Part 70, tribes must comply with the federal requirements listed in Part 71 but must have their own authorities and procedures for implementing those federal requirements.). That is, NNEPA itself claims (wrongly) that but for its delegated administrative authority under part 71, NNEPA would have no authority to use its tribal regulations to administer the part 71 federal program. NNEPA and EPA have agreed to an interrelationship between the part 71 federal program and NNOPR requirements that is unlawful under the CAA.

Region IX implies incorrectly that Peabody's facility, as a "Part H source"[3] under NNOPR, is required to obtain a permit under NNOPR. Reg. IX Br. at 9-10 (citing NNOPR § 301(A) ("For each Part H source, the owner or operator shall submit a timely and complete written permit application . . .".)). Peabody's Facility is not required to have a tribal permit under NNOPR because the Facility is currently permitted under part 71. *See* NNOPR § 201(A). As explained previously and contrary to Region IX's implication, NNEPA's issuance of Peabody's part 71 federal permit did *not* involve any consolidated (federal *and* tribal) permitting actions. Region IX's challenged actions were not based on its tribal authority to issue a tribal permit with NNOPR.

Region IX offers the remarkable assertion that "references to [NNOPR requirements] in the Delegation Agreement, the Permit, or elsewhere is [sic] *merely for informational purposes*." Reg. IX Br. at 10 (emphasis added). Peabody's previous discussions demonstrate otherwise. Acting as a delegate agency under the part 71 federal program, NNEPA has deliberately added NNOPR requirements as enforceable conditions within Peabody's part 71 federal permit. Moreover, the Delegation Agreement provides evidence of EPA's approval of NNEPA's

[3] "Part H" refers to the section of Navajo Nation Regulations that contains the provisions of NNOPR, i.e., the "Permits" section cited as 4 NNR § 11-2H – xxx.

pending unlawful actions as a delegate agency. Thus, references in either document to NNOPR requirements are more than just "information only"; inclusion of NNOPR requirements in those documents has legal consequences under the CAA.

Region IX asserts that the NNOPR requirements in Peabody's part 71 federal permit cannot be reviewed by the Board unless those requirements somehow "impair the effectiveness of the permit or hinder [the] permitting authority's ability to implement or enforce the permit." *Id.* at 13 (quoting *In re Harquahala Generating Station Project,* Permit No. V99-015, Order Denying Petition to Object to Permit, WL 25972933, at *3 (E.P.A. July 2, 2003)). The Region thus suggests that the scope of the Board's review authority is narrower than the test addressed above, i.e., whether the non-federal requirement in a part 71 permit has sufficient nexus with the part 71 federal program. First of all, the scope of the Board's review authority is not as narrow as Region IX's quotation from one decision of the Board may suggest. Moreover, the challenged NNOPR requirements in Peabody's part 71 federal permit do hinder EPA's ability to implement and enforce the permit. Although Peabody's permit was issued by NNEPA under its delegated federal administrative authority, that permit remains a federal permit, i.e., fully under EPA authority. 45 Fed. Reg. 33,413 (May 19, 1980) (A permit issued by a delegate agency is still an "EPA-issued permit."); *see, e.g., In re SEI Birchwood, Inc.,* 5 E.A.D. 25, 26 (EAB 1994). As Peabody's federal permit now stands, however, it contains certain conditions based on tribal regulations which EPA has no authority either to implement or to enforce. Thus, even by the Administrator's test under the *Harquahala Generating Station Project* decision, the NNOPR requirements in Peabody's part 71 federal permit are found to be reviewable by the Board.

Finally, in the Region's effort to convince the Board that it has no authority to review NNEPA's reliance on NNOPR requirements while acting as EPA's administrative delegate for

the part 71 program, Region IX points to express statements in the Delegation Agreement that NNOPR requirements are "not a part of the Delegation Agreement and not part of the administration of the federal Part 71 program." Reg. IX Br. at 15 (quoting NNEPA Delegation Agreement §§ IV.1, IV.2, V.4). Region IX, however, conveniently fails to provide the remaining portion of that quotation, i.e., that acting solely under its alleged authority as EPA's administrative delegate, "NNEPA intends to supplement the requirements in § 71.11(b) with the requirements in the [NNOPR] § 401(B)." Pet. Ex. B, EPA-NNEPA Delegation Agreement §§ IV.1, IV.2, V.4.

The Board must recognize that the Delegation Agreement is a collection of conflicting provisions. For example, one provision states that "NNEPA will administer the existing federal operating permit program *pursuant to 40 C.F.R. Part 71*[.]" *Id.* at 2 (emphasis added). Nevertheless, another provision states that "[u]ntil such time as all Part 71 permits are replaced with Part 70 permits, NNEPA agrees to continue to revise, reopen, terminate or revoke and reissue Part 71 permits, as necessary and appropriate, *using the procedures of Subpart IV of the [NNOPR].*" *Id.* § IX.2 (emphasis added); *see also* numerous provisions of the Delegation Agreement cited in § B.3 above confirming NNEPA's reliance on NNOPR requirements. As Peabody demonstrated above, the complete Delegation Agreement, and not an isolated statement, clearly shows how NNEPA's reliance on NNOPR requirements to issue Peabody's part 71 federal permit is inextricably linked to the part 71 federal program.

C. NNEPA's Reliance on Its Tribal Regulations to Administer Portions of the Part 71 Federal Permit Program as a Delegate Agency Is Unlawful under the Clean Air Act.

Region IX first challenged Peabody's petition for the Board's review on the basis that the legal issue raised by the Company is beyond the scope of the Board's authority. In the alternative, Region IX argues that NNEPA's use of its own tribal regulations to issue Peabody's

federal permit and NNEPA's inclusion of conditions based on NNOPR requirements in that federal permit constitute "an acceptable approach to implementing a delegated program." Reg. IX Br. at 2.

After reviewing the Region's alternative argument, Peabody is convinced more than ever that EPA's approach to delegation of its federal administrative authority to NNEPA, as well as to other non-federal agencies over the years, suffers from a fundamental, systemic flaw. Perhaps, the Agency's expansive explanation of that delegation process during its recent promulgation of federal NSR rules for Indian country, *see* § II.B of the above "Background" discussion, signals EPA's intention to finally correct that problem, at least for future administrative delegations. But, because EPA has relied on and now defends its "old way" for administrative delegation to NNEPA, Peabody must ask the Board for relief.

Before responding to Region IX's individual claims why NNEPA's challenged permitting actions as a delegate agency should be deemed acceptable, Peabody first turns to applicable law to rebut Region IX's alternative argument.

1. Acting as a Delegate Agency under Part 71, NNEPA Is Required to Issue Part 71 Federal Permits Only in Accordance with Part 71 Federal Regulations.

Section II.B of the "Background" discussion of this document provides a collection of EPA's recent quotations that highlight the Agency's emphasis on a tribal agency's need to use the federal regulations of a federal program when acting under its delegated administrative authority for that program. In EPA's prior discussions of its administrative delegation process, that fundamental principle of law has generally been suggested, implied, hinted, intimated, etc. but never before stated so expressly. Peabody can only speculate why Region IX has not embraced that fundamental principle in its brief. In any case, the Region's argument in its brief

stands in stark contrast to the Agency's other recent explanation of the characteristics of its administrative delegation.

Under the "program delegation" authority of 40 C.F.R. part 70, a tribe may use its own tribal permitting regulations based on tribal law – once EPA approves those tribal regulations as satisfying all the requirements of title V of the Act and part 70. *See* Pet. at 11-13. EPA's approval must follow its standard rulemaking process including notice to the public with an opportunity to comment. 40 C.F.R. § 70.4(e).

Similarly, under 40 C.F.R. part 71, "customized" part 71 federal regulations for a particular area in Indian country may be developed from portions of a tribal permit program for that area in combination with provisions from part 71. 40 C.F.R. § 71.4(f). EPA must approve those "customized" federal regulations as satisfying all the requirements of title V of the Act and part 71. EPA's approval must follow its standard rulemaking process including notice to the public with an opportunity to comment. *Id.*

In contrast, under 40 C.F.R. part 71 a tribe may be authorized to administer part 71 federal regulations by EPA's delegation of federal administrative authority. EPA's approval of that administrative delegation must be contained in a delegation agreement between EPA and the delegate tribal agency. 40 C.F.R. §71.10(a). However, because that administrative delegation is not a rulemaking process, EPA's approval of such a delegation of authority is not issued in accordance with its standard rulemaking process including notice to the public with an opportunity to comment. No regulations other than the existing, previously promulgated federal regulations are involved.

In short, when EPA delegates its administrative authority under part 71, the relevant regulations to be applied in administering part 71 have already been promulgated by EPA. As

noted earlier, EPA confirmed this fundamental principle of its administrative delegation process during the Agency's part 71 rulemaking as follows:

> [W]hen EPA delegates part 71 program implementation duties, EPA is merely passing implementation responsibility of an already promulgated program to an eligible delegate entity. The program that is delegated under part 71 has already been subject to notice-and-comment rulemaking and would not be changed as a result of the delegation. The delegation itself is not a rulemaking procedure.

EPA, *Technical Support Document for Federal Operating Permits Program*, "Part 71 Response to Comments Document," 32 (Dec. 21, 1998).[4]

Completely counter to those fundamental principles of administrative delegation, Region IX asserts that a delegation of federal administrative authority under the part 71 federal program "allows the entity seeking delegation to structure the program as best suites [sic] its particular circumstances so long as it provides the necessary authority." Reg. IX Br. at 4. Region IX believes that "a delegated permitting authority could . . . also follow procedures grounded in state or tribal law as long as it ensures that its actions satisfy the Part 71 requirements." *Id.* at 16. Region IX believes that "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." *Id.* at 17. Region IX simply has no legal basis under federal law for those statements.

2. Region IX Mischaracterizes Peabody's Argument.

The Region states that "Peabody argues that NNEPA is not allowed to have its own tribal authorities beyond two very basic provisions in tribal law." Reg. IX Br. at 16. That is not what Peabody said. When interpreted properly, Peabody's statement, Pet. at 16, simply means that

[4] Ironically but not surprisingly, in that discussion of its administrative delegation process for part 71, EPA's statement contains an incorrect reference to "[t]he *program* that is delegated." That quoted phrase is a prime example of EPA's historical, highly confusing and all-too-frequent practice of incorrectly using "program delegation" terminology when actually discussing "administrative delegation."

NNEPA only needs enabling authority under tribal law (not extensive legislation and detailed regulations) to run portions of the part 71 federal permit program.

Region IX's brief does correctly point out, however, that Peabody's discussion of this matter in its petition references the wrong NNOPR provision that enables NNEPA to act as a delegate agency. Reg. IX Br. at 17, n.11. NNEPA's tribal regulatory authority to administer the part 71 federal regulations as a delegate agency is not provided by the incorporation of part 71 by reference at NNOPR § 704(A). Rather, the enabling tribal regulatory authority for NNEPA's actions as a federal delegate is provided by NNOPR § 701 ("[T]he Navajo Nation EPA shall have the authority to issue, amend, revoke, reissue, modify, enforce and renew Part 71 permits to Part H sources pursuant to the procedures set forth . . . in . . . 40 C.F.R. part 71.").

In sum, Peabody's statement in question meant only to explain that the enabling tribal authority required by NNEPA to use its delegated administrative authority under part 71 is minimal, and that NNOPR § 701 provides that enabling authority.

3. The CAA Precludes Delegate Agencies from Using State or Tribal Regulations to Administer Delegated Programs.

Consistent with its "old way" for treating administrative delegations, Region IX's brief at page 18 asserts:

> 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.

As an initial matter, citation to the legal basis for the Region's preceding statement could provide it with some credibility.

Peabody, of course, strongly disagrees with Region IX's opinion in the above statement. The "requisite 'adequate authority' utilized by a delegate agency to administer the Part 71 program" must be, and can only be, that federal administrative authority under part 71 which the agency has been delegated. In this case, there has been no EPA rulemaking to approve NNEPA's use of NNOPR provisions when NNEPA acts under its delegated federal administrative authority. Nothing in the Act accommodates the Region's "quasi-program delegation" theory.

4. Past Delegations Under the PSD Program Are Not a Reliable Indicator of "Permissible" Authorities in the Delegation Context.

Referring to its "old way" for administrative delegation, Region IX acknowledges that EPA has entered into numerous PSD delegation agreements "that identify state or local regulations that may also be applied by the delegate agency when implementing the federal PSD program requirements." Reg. IX Br. at 19. As Peabody has already demonstrated, EPA rulemaking is not involved with the execution of delegation agreements where the Agency is "merely passing implementation responsibility of an already promulgated program to an eligible delegate entity." Consequently, those numerous PSD delegation agreements mentioned by Region IX that allow state or local regulations to replace or supplement delegated federal regulations cannot be lawful under the CAA. Peabody considers it particularly telling that Region IX's brief does not cite to a single case decision where either the Board or a federal court has upheld EPA's practice of allowing a delegate agency to implement the federal PSD program using state or local regulations.

5. The Region's Defense of the TAS Process for Part 71 Administrative Delegations Avoids the Real Issue.

Unlike administrative delegation under part 71, administrative delegation under the recently promulgated federal NSR regulations does not require a determination of the tribe's eligibility for treatment as a state ("TAS"). Reg. IX Br. at 20. Region IX simply offers the conclusory statement that "what happens in the Part 71 context is distinguishable from the Tribal NSR Rule context." *Id.* Peabody believes there is no such distinction.

The real issue here is that Peabody asserts there is no basis under the CAA for requiring a tribe to be eligible for treatment as a state in order for that tribe to be delegated federal administrative authority for a federal program. The sequence of EPA's rulemaking suggests that EPA concluded that TAS treatment was not required by the Act *after* the part 71 regulations had been promulgated. Tellingly, Region IX has not disagreed with Peabody's assertion that the TAS eligibility requirement in the part 71 regulations has no force of law under the CAA. Pet. at 22-23.

Rather, Region IX first proclaims without any support that the lack of a TAS eligibility requirement in the Tribal NSR Rule "is distinguishable" from the presence of that requirement in the part 71 regulations. Reg. IX Br. at 20. The Region then immediately transitions into an unfounded conclusion that "it is perfectly reasonable that a tribe could and would develop its own rules to administer a delegated federal program, such as Part 71[.]" *Id.* In light of applicable federal law on that matter as explained by Peabody, the Company finds nothing "perfectly reasonable" about such a tribal action that would be unlawful under the CAA.

6. Region IX Misrepresents the Contents of the Delegation Agreement.

Even within Region IX's alternative argument, the Region persists with its initial argument that the Delegation Agreement is beyond the reach of the Board because "the NNEPA

Delegation Agreement creates no new law." Reg IX. Br. at 21. Although Peabody concurs with that statement in the context of the CAA, the Company is troubled by the inappropriate implication of Region IX's subsequent statement that "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." *Id.* (emphasis in original).

The inappropriate implication in Region IX's statement above turns on the Agency's use of the word "create." Peabody has already demonstrated that NNEPA's tribal regulations at NNOPR §§ 701-705 have unlawfully *created* new requirements for the part 71 program when NNEPA administers that program as a delegate agency. Those new requirements consist of specific NNOPR provisions listed at NNOPR § 705 that, of course, would not apply if EPA were still administering the part 71 program. Thus, while the Delegation Agreement itself does not *create* any new requirements under part 71, the Agreement clearly *confirms* the new applicability of many NNOPR provisions when NNEPA administers the part 71 program as a delegate agency.

Region IX's assertion that "references to the NNOPR provisions in the NNEPA Delegation Agreement are for *informational purposes only*" is equally disingenious. *Id.* (emphasis in original). NNEPA heavily relies on those references to the NNOPR provisions in the Delegation Agreement as EPA's approval that NNEPA will be using its tribal regulations when acting as a delegate agency under part 71. NNEPA Resp. at 7 ("The Eligibility Determination therefore confirms that NNEPA will be using its own authorities to administer the Part 71 program."); *id.* ("The Delegation Agreement specifically contemplates NNEPA's use of the NNOPR for [part 71 federal] permit processing.") (citing Deleg. Agr., Pet. Ex. B, at §

IV(1)-(2), § V(4) and § IX.2); *id.* at 8 ("The Transition Plan specifically requires NNEPA to follow the NNOPR.") (citing Trans. Plan, Pet. Ex. D, at § V.C, § V.E and § V.G).

In sum, the Delegation Agreement is a compact solely between EPA and NNEPA and consequently does not have any force of law with respect to Peabody. The Delegation Agreement nevertheless confirms EPA's agreement that NNEPA will be relying on its tribal regulations when acting as a delegate agency under part 71. There can be no question that the Delegation Agreement acknowledges the direct link between NNEPA's challenged permitting actions under tribal law and the part 71 federal program. The Board therefore has ample authority to review the inappropriate provisions in the Delegation Agreement. Indeed, because references to the NNOPR provisions throughout the Agreement are evidence of Region IX's approval of NNEPA's intended unlawful actions as a delegate agency under part 71, the Agreement should be amended accordingly.

7. Region IX Misrepresents the Board's Holding in *West Suburban Recycling and Energy Center.*

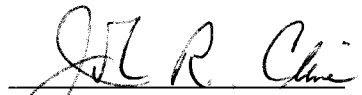
Peabody believes that the Board's holding in *In re West Suburban Recycling and Energy Center, L.P. ("WSREC")*, 6 E.A.D. 692 (EAB 1996), when applied to the facts of this case, means that "delegation of EPA's authority to NNEPA to administer a part 71 federal permit program does not authorize NNEPA to apply tribal procedural and substantive requirements to process and issue Peabody's revised part 71 federal permit." Pet. at 18. Region IX counters that "nothing in the [*WSREC*] 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." Reg. IX Br. at 23.

The Region's position, of course, defends EPA's "old way" of delegating its federal administrative authority by allowing some state and local agencies to run elements of the federal PSD program using their state and local regulations. On the other hand, EPA's "new way" of delegating its federal administrative authority requires the delegate agency to use only federal rules when administering a federal program. *See, e.g.,* § II.B of the "Background" section of this response. Peabody believes that latter approach to administrative delegations is fully consistent with the Board's decision in *WSREC.*

IV. CONCLUSION

While acting solely under EPA's delegated administrative authority for the part 71 federal program, NNEPA has relied on NNOPR procedures to process and issue Peabody's part 71 federal permit and has included NNOPR requirements in ten different conditions of that federal permit. The Board clearly has authority to review those NNEPA permitting actions which NNEPA, and now Region IX, claim are acceptable under the Clean Air Act. For all the reasons explained herein, Peabody respectfully asks the Board to find those actions by NNEPA to be unlawful under the Act and to order NNEPA, in concert with Region IX, to revise Peabody's part 71 federal permit accordingly such that it is based only on part 71 federal regulations.

Respectfully submitted,



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ATTACHMENT A

NNOPR Subpart VII – "Part 71 Program Delegation"

NNOPR §§ 701-705

(*See* NNEPA Response, Exhibit B.)

shall be due on the date specified in the source's part 71 permit. If a part 71 permit has not been issued to a source, the fee shall be due on the anniversary date of the source's original part 71 application to USEPA Region IX.

b. For sources that begin operation after the effective date of these regulations, and for sources that become subject to a permit requirement pursuant to title V of the Clean Air Act through promulgation of the Administrator after the effective date of these regulations, the first annual fee shall be based on the applicable minimum fee. The fee shall be due on the 60th day after that source commences operation.

c. If no emissions inventory is available, the first annual fee shall be based on estimated emissions using approved estimation methods.

2. All annual emission fees other than the first shall be due each year on the anniversary date of the initial fee payment by the source to the Navajo Nation EPA.

3. Notwithstanding any other provision of this section, no annual emission fee shall be required to be paid based on emissions from any acid rain unit before January 1, 2000.

B. Payment Form, Processing, and Use.

1. Fee payments due under this section shall be remitted in the form of a certified check or money order made payable to the Navajo Nation Environmental Protection Agency and submitted to the Air Quality Control Program.

2. Upon receipt of fee payments due under this section, such payments shall be deposited in the Permit Fund established pursuant to 4 N.N.C. § 1139.

3. Fee payments collected under this section shall not be utilized for any purpose not authorized under the Navajo Nation Clean Air Act or the Clean Air Act.

C. Nonpayment. Failure to remit the full fee required by the due dates specified in this section constitutes a violation of these regulations and may subject the owner or operator to enforcement under Subchapter 3 of the Navajo Nation Clean Air Act, including but not limited to, civil penalties for each day of noncompliance pursuant to 4 N.N.C. § 1155.

Subpart VII–Part 71 Program Delegation

§ 701. Authority to Implement Part 71 Program [40 C.F.R. § 71.10]

Upon delegation of a Part 71 program by USEPA Region IX to the Navajo Nation EPA, the Navajo Nation EPA shall have the authority to issue, amend, revoke, reissue, modify, enforce and renew Part 71 permits to Part H sources pursuant to the procedures set forth both in these regulations and 40 C.F.R. part 71.

§ 702. Fees Pursuant to a Delegated Part 71 Program [40 C.F.R. § 71.9]

Upon delegation of a part 71 program by USEPA Region IX to the Navajo Nation EPA, each part H source holding a part 71 permit shall pay initial and annual fees to the Navajo Nation EPA Air Quality Control Program in accordance with Subpart VI of these regulations.

§ 703. Transition from Delegated Part 71 Program to Part 70 Program

Upon approval of the Navajo Nation's primacy application for a part 70 operating permit program, each part H source holding a part 71 permit (including any source with a part 71 permit issued by the Navajo Nation EPA) shall submit an application to the Navajo Nation EPA for a part 70 permit by the date specified in § 301 of these regulations.

§ 704. Part 71 Incorporation by Reference

A. 40 C.F.R. part 71 is incorporated by reference into this regulation for purposes of administering the delegated Part 71 program, except for the following parts:

(1) 40 C.F.R. § 71.4(a)-(k) and (m);
(2) 40 C.F.R. § 71.9;
(3) 40 C.F.R. § 71.10(b), (d)(2), (g), (h) and (j).

B. Notwithstanding subsection A of this section, the Navajo Nation procedures set forth in the sections listed under § 705 shall apply to part 71 permits in addition to the part 71 procedures.

§ 705. Applicable Sections for Part 71 Permits

Part 71 permits shall be administered and enforced in compliance with the following sections:

- Confidentiality §104
- Violation §201
- Emergency Situations §305
- Subpart IV - Permit Processing §§ 401-406
- Subpart V–Enforcement §§501-505
- Subpart VI– Permit Fees §§601-603

CERTIFICATE OF SERVICE

I certify that the original and five copies of PEABODY WESTERN COAL COMPANY'S RESPONSE TO EPA REGION IX'S AMICUS CURIAE BRIEF were mailed to the Board via Federal Express, overnight delivery, on this 5th day of October, 2011.

I also certify that copies of PEABODY WESTERN COAL COMPANY'S RESPONSE TO EPA REGION IX'S AMICUS CURIAE BRIEF were served via U.S. first class mail, postage prepaid, on this 5th day of October, 2011 upon:

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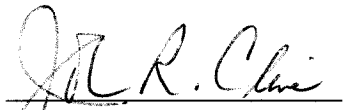

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Date: October 5, 2011