IN RE PEABODY WESTERN COAL COMPANY

CAA Appeal No. 11-01

ORDER DENYING PETITION FOR REVIEW

Decided March 13, 2012

Syllabus

The Navajo Nation Environmental Protection Agency ("NNEPA"), acting with authority from the U.S. Environmental Protection Agency ("EPA") delegated pursuant to 40 C.F.R. part 71, issued a federal Clean Air Act Title V operating permit to Peabody Western Coal Company ("Peabody") governing air emissions from Peabody's mining operation at the Kayenta Mine, Black Mesa Complex in Arizona. Peabody petitioned the Environmental Appeals Board ("Board") for a ruling that NNEPA exceeded its authority by (1) including in the part 71 permit citations to tribal regulations, the Navajo Nation Air Quality Control Program Operating Permit Regulations ("NNOPR"), and (2) using NNOPR procedures to process the permit.

The NNOPR establishes permitting requirements under the Navajo Nation Air Pollution Prevention and Control Act. NNEPA also applies these regulations to permits that contain federal program requirements implemented by NNEPA, including the part 71 permits that NNEPA administers with delegated authority from EPA. The part 71 permit at issue in this case contains parallel citations to requirements of both part 71 and the NNOPR.

Peabody argues that an air pollution control agency acting with delegated federal authority under part 71 is limited to using *solely* the part 71 requirements and procedures to administer the federal permit program, and that it is a clear error of law for NNEPA to cite in the part 71 permit the parallel tribal requirements and procedures of the NNOPR. In addition, Peabody argues that NNEPA was not required to have its own tribal regulations (the NNOPR) in order to obtain part 71 delegation authority from EPA, and that NNEPA therefore has no authority to apply the NNOPR to Peabody's part 71 permit.

Held: The Board denies the petition for review. Peabody has failed to demonstrate that NNEPA made a clear error of law by including citations to the tribal regulations in the part 71 permit or using tribal procedures to issue and administer the permit.

- The Board has previously recognized, without objection, that state agencies acting with delegated federal permitting authority for the Clean Air Act Prevention of Significant Deterioration ("PSD") program often include conditions based on state law in federal permits. *See*, *e.g.*, *In re Knauf Fiber Glass, GmbH,* 8 E.A.D. 121 (EAB 1999). This common practice of including federal and state requirements in a single permit is no more inherently objectionable under a Title V permitting program than under the PSD permitting program in *Knauf*.

- The Board has recognized some limitations on this practice when conflicts arise between federal and state requirements. *See*, *e.g.*, *W. Suburban Recycling & Energy Ctr, L.P.*, 6 E.A.D. 692, 694, 711 (EAB 1996) (holding that a state could not deny a federal PSD permit solely because the applicant had not satisfied unrelated state law requirements); *In re Amerada Hess Corp.*, 12 E.A.D. 1, 14 (EAB 2005) (holding that there was no legitimate reason to include unrelated state law conditions in a federal PSD permit where there was a separate state permit that could appropriately include those conditions, and the administrative record did not include an adequate explanation for including those conditions in the federal permit as well).

- NNEPA's approach to using the NNOPR in conjunction with its administration of the delegated part 71 program is consistent with EPA's expressed intent in establishing the part 71 delegation program. In the preamble to the part 71 regulations, EPA explained that it would not demand that each delegate agency administer a part 71 program in precisely the same way because each agency also must comply with its own procedures, administrative codes, regulations, and laws, as well as the requirements of part 71.

- Delegate agencies are not free to ignore the requirements of part 71 or to implement the program in a manner that conflicts with or is inconsistent with part 71. But Peabody has not identified any such conflict or inconsistency in this case.

- Peabody's argument that NNEPA is not required to have its own tribal regulations in order to obtain part 71 delegation authority is immaterial to the resolution of the issues presented in this case.

Before Environmental Appeals Judges Catherine R. McCabe, Kathie A. Stein, and Anna L. Wolgast.

Opinion of the Board by Judge McCabe:

I. *STATEMENT OF THE CASE*

The Navajo Nation Environmental Protection Agency ("NNEPA"), acting with authority from the U.S. Environmental Protection Agency ("EPA") delegated pursuant to 40 C.F.R. part 71, issued a federal Clean Air Act ("Act" or "CAA") Title V operating permit to Peabody Western Coal Company ("Peabody") governing air emissions from Peabody's mining operation at the Kayenta Mine, Black Mesa Complex in Arizona. Peabody petitions the Environmental Appeals Board ("Board") for a ruling that NNEPA exceeded its authority by including citations to tribal law in the part 71 permit and using tribal procedures to process the permit.

II. *ISSUE ON APPEAL*

The Petition raises the following issue for the Board to resolve:

> Has Peabody demonstrated that it was clear error for NNEPA, as an air pollution control agency acting under delegated authority from EPA to administer a federal operating permit program under 40 C.F.R. part 71, to include citations to tribal requirements for administering the part 71 program in Peabody's part 71 permit and to use tribal law procedures to process permit revisions?

III. *STATUTORY AND REGULATORY FRAMEWORK*

Title V of the Clean Air Act requires that certain sources of air pollution, including major stationary sources, obtain comprehensive operating permits to assure compliance with the requirements of the Act. CAA §§ 502(a), 504(a), 42 U.S.C. §§ 7661a(a), 7661c(a). The Act contemplates that these operating programs will be administered primarily by state and local air pollution control agencies. CAA § 502(b), 42 U.S.C. § 7661a(b). Each state is required to develop and submit for EPA's approval a Title V program under state or local law or under an interstate compact. CAA § 502(d), 42 U.S.C. § 7661a(d). EPA's minimum requirements for these programs are set forth at 40 C.F.R. part 70. Upon approval of the program by EPA, the state or local air pollution control agency is "authorized" to implement its approved part 70 permit program under its own state or local laws.

If a state or local government does not obtain EPA approval of an authorized Title V program within a time deadline specified in the statute, EPA is required to administer a federal Title V program in that jurisdiction. CAA § 502(d)(3), 42 U.S.C. § 7661a(d)(3). EPA's regulations governing federal Title V programs are set forth at 40 C.F.R. part 71. The part 71 regulations authorize EPA to delegate, in whole or in part, its authority to administer the federal Title V program to a state, eligible tribe, local or other agency. 40 C.F.R. § 71.10. To obtain this delegated authority, the state, tribe, local or other agency must demonstrate to EPA that its laws provide adequate authority to carry out all aspects of the delegated program and enter into a "Delegation of Authority Agreement" with EPA that sets forth the terms and the conditions of the delegation. *Id.* § 71.10(a). Under part 71, the state, the tribe, or other air pollution control agency administers the federal program with "delegated" authority from EPA.

Eligible tribes have the same rights as states under the Act to obtain either EPA "authorization" to operate their own Title V programs in compliance with part 70 or an EPA "delegation" of federal authority to administer a Title V pro-

gram on EPA's behalf under part 71. CAA § 301(d)(1), 42 U.S.C. § 7601(d)(1) (authorizing EPA to "treat Indian Tribes as States"); 40 C.F.R. pt. 49 (EPA implementing regulations).

NNEPA obtained delegated authority from EPA to administer the federal Title V part 71 operating permits program within the Navajo Nation boundaries in 2004. *See* Delegation of Authority to Administer a Part 71 Operating Permits Program, Delegation Agreement between U.S. EPA Region IX and NNEPA at 2 (Oct. 15, 2004) ("Delegation Agreement"). EPA based its decision to grant this delegation in part on a legal opinion from the Navajo Nation Attorney General, as required by 40 C.F.R. § 71.10(a), that tribal laws provide "adequate authority to carry out all aspects of the delegated program." Amicus Curiae Brief of U.S. EPA, Region IX, at 5 ("Amicus Curiae Br."). In making that determination, the Navajo Nation Attorney General specifically referenced, *inter alia*, the Navajo Nation Operating Permit Regulations ("NNOPR"), which establish permitting requirements under the Navajo Nation Air Pollution Prevention and Control Act. *Id.*

IV. *PROCEDURAL AND FACTUAL HISTORY OF PERMIT PROCEEDINGS*

After obtaining delegated authority to administer the federal part 71 operating permits program in 2004, NNEPA assumed responsibility for the continued administration of the Title V operating permit for the Black Mesa Complex. When Peabody applied to renew that part 71 permit, NNEPA proposed the renewed permit, sought public comment, and issued the permit on December 7, 2009. Peabody filed a petition before this Board to challenge that permit, objecting primarily to NNEPA's inclusion of citations to the NNOPR in the permit. NNEPA moved for a voluntary remand to "reopen and revise the permit," and the Board granted NNEPA's motion and dismissed the petition for review without prejudice. *In re Peabody W. Coal Co.*, 14 E.A.D. 712, 713, 722 (EAB 2010).

On November 9, 2010, NNEPA proposed and sought public comment on a revised draft permit for the Black Mesa Complex. NNEPA, Response to Comments on Proposed Revisions to Draft Part 71 Operating Permit & Draft Statement of Basis for Black Mesa Complex Permit # NN-0P-08-0101 ("RTC") at 1 (Feb. 28, 2011) (Administrative Record ("A.R.") 39). NNEPA stated that it had revised certain permit provisions to "clarify the legal authorities for those provisions." Draft Statement of Basis at 3 (A.R. 35). Specifically, NNEPA explained the context and basis for the permit's citation to tribal, as well as federal, law:

> When federal and tribal provisions are cited in parallel, the tribal provisions are identical to the federal provisions and NNEPA has determined that compliance with the federal provisions will constitute compliance with the tribal

> counter parts. These parallel tribal citations do not create any new requirements, nor do they impact the federal enforceability of the cited Part 71 requirements.

Id.; *see also* Revised Statement of Basis at 3 (A.R. 41).

Peabody submitted comments on the draft revised permit in December 2010. *See* Peabody Comments on Revised Draft Part 71 Operating Permit & Revised Draft Statement of Basis for Black Mesa Complex Permit # NN-OP 08-010 (Dec. 2010) (A.R. 38). NNEPA prepared a response to comments document dated February 28, 2011, and on April 14, 2011, NNEPA issued a final revised operating permit and a revised Statement of Basis. *See generally* NNEPA, Title V Permit to Operate, Permit # NN-OP 08-010, Peabody Western Coal Company – Kayenta Complex (Apr. 2011) ("Permit") (A.R. 40); RTC at 1; Revised Statement of Basis.[1] The final Permit includes citations to tribal law (the NNOPR), as well as citations to applicable provisions of federal law (part 71), in several conditions. *See*, *e.g.*, Permit II.B at 13 (citing 40 C.F.R. § 71.6(a)(3)(iii) and NNOPR § 302(G)).

On May 16, 2011, Peabody petitioned the Board for review of the final permit, again objecting to NNEPA's inclusion of citations to the NNOPR. Petition at 5 ("NNEPA's delegated federal authority to administer a part 71 permit program did not authorize NNEPA's inclusion of conditions in Peabody's part 71 federal permit that were based on specific tribal provisions of NNOPR."). NNEPA filed a response on July 5, 2011. Peabody and NNEPA sought permission to file a Reply and a Surreply, respectively, on July 21, 2011, and August 1, 2011.[2] On September 5, 2011, U.S. EPA Region 9 ("Region") filed a brief as amicus curiae, generally supporting NNEPA's position.[3]

V. *STANDARD OF REVIEW*

The Board will grant a petition for review of a permit issued under CAA Title V if the petitioner has demonstrated that the permitting authority's decision

---

[1] During the course of remand proceedings and after preparation of the draft revised permit, Peabody requested and obtained a name change for the source from Black Mesa Complex to "the Kayenta Complex." RTC at 1.

[2] The Board now grants those motions and accepts for filing Peabody's Reply and NNEPA's Surreply.

[3] In granting the Region's motion for leave to file a brief as amicus curiae, the Board specifically directed the Region to consult with EPA's Office of General Counsel and Office of Air and Radiation in preparing the brief. *See* Order Granting U.S. EPA, Region 9's Motion for Leave to File Brief as Amicus Curiae (Aug. 10, 2011).

was based on a clearly erroneous finding of fact or conclusion of law, or that the decision involves an exercise of discretion or important policy consideration that warrants review. 40 C.F.R. § 71.11(l)(1); *see also In re Peabody W. Coal Co.*, 12 E.A.D. 22, 33 (EAB 2005). The Board exercises such review "only sparingly," and "most permit conditions should be finally determined at the Regional level." Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *see also Peabody W.*, 12 E.A.D. at 32-33 & n.26 (discussing and applying part 124 standard of review to part 71 proceeding).

VI. *ANALYSIS OF ISSUE PRESENTED*

The issue presented by this Petition is whether Peabody has demonstrated that NNEPA, as an air pollution control agency acting under delegated authority from EPA to administer a federal Title V operating permit program under 40 C.F.R. part 71, made a clear error of law by (a) including citations to tribal law requirements (NNOPR) in the ten challenged Permit conditions and (b) using tribal law procedures to process the Permit.

A. *It Was Not a Clear Error of Law for NNEPA to Include Citations to the NNOPR in the Ten Challenged Permit Conditions*

Peabody argues that NNEPA, acting as a delegated air pollution control agency, has no legal authority to cite NNOPR requirements in a part 71 permit. Petition at 9. Peabody specifically objects to ten conditions of the Permit because they contain citations to underlying requirements of the NNOPR as well as part 71.[4]

Peabody does not argue that the Permit or the cited provisions of the NNOPR are inconsistent with the requirements of part 71 or that they require Peabody to take any additional or different actions than are required by part 71. Indeed, Peabody itself points out that the Permit issued by NNEPA is "essentially identical" to the prior part 71 permit issued by EPA. *Id.* at 5 ("The draft part 71 federal permit contained permit conditions that were based on part 71 federal requirements and that were essentially identical to their counterparts in the original part 71 federal permit.").[5] Peabody simply objects to the Permit's parallel citations

---

[4] Specifically, Peabody challenges Conditions III.B (reporting requirement); IV.C (compliance certifications); IV.D (duty to provide and supplement information); IV.E (submissions); IV.G (permit actions); IV.H (administrative permit amendments); IV.I (minor permit modifications); IV.K (significant permit modifications); IV.L (reopening for cause); and IV.Q (off permit changes). Petition at 8-9.

[5] NNEPA also asserts, and Peabody does not dispute, that where there are parallel citations to NNOPR and part 71 in the ten challenged Permit conditions, the underlying provisions of the NNOPR
Continued

to the NNOPR.[6]

The Region, as amicus curiae, responds that NNEPA's citation to tribal law and use of tribal procedures in processing Peabody's Permit is "an acceptable approach to implementing a delegated federal program." Amicus Curiae Br. at 2. The Region notes that the agency routinely permits non-federal agencies to use their own laws in parallel when implementing federal CAA Prevention of Significant Deterioration ("PSD") regulations. *Id.* at 19 (citing several examples of this practice). The Region argues that the same practice is appropriate for the Title V program in light of the "parallel nature" of the two programs. *Id.*

The Region's argument is consistent with EPA's explanation in the preamble to the proposed part 71 rules of its intended approach to delegated part 71 programs:

> The EPA would adopt a flexible approach in evaluating delegation requests. The EPA would not demand that each delegate agency administer a part 71 program in precisely the same way because each delegate agency would have to comply with its own procedures, administrative codes, regulations, and laws as well as the requirements of this part.
>
> * * * The request would have to include a legal opinion that certifies that the State or local agency or eligible Tribe has the requisite legal authority to implement and administer the program. The request would also have to identify the officers or agencies responsible for carrying out the State, local, or Tribal procedures, regulations, and laws.

Federal Operating Permits Program, 60 Fed. Reg. 20,804, 20,823 (proposed Apr. 27, 1995). This language suggests that EPA expected that delegated agencies would continue implementing their own procedures and regulations, in tandem

---

(continued)
and part 71 are identical. NNEPA Response at 5 (citing Revised Statement of Basis at 3); *see generally* Peabody's Reply to NNEPA's Response.

[6] *See*, *e.g.*, Petition at 5 ("[S]ome of those conditions in that NNEPA-issued draft part 71 federal permit were *also* based on tribal provisions of NNOPR."); *id.* at 7 ("The NNEPA-issued revised part 71 federal operating permit contains certain permit conditions based on *both* provisions of part 71 and provisions of NNOPR,"); *id.* at 29 ("Peabody objects to its NNEPA-issued revised part 71 federal permit containing ten different permit conditions for which *both* a part 71 requirement and a NNOPR requirement have been cited as the underlying authorities for each condition.") (emphases added).

with the requirements of part 71.[7]

This approach is consistent with EPA's stated goal of using part 71 delegation to assist states to continue developing their own operating permit programs, with an eventual goal of meeting the requirements for full program authorization (under part 70) as directed by Congress. At the time it issued the part 71 regulations, EPA expected that federal part 71 permitting programs would be a temporary, "transitional" phase for states until they achieved the goal of full program authorization.[8] Consistent with this expectation, the Region and NNEPA explained in their delegation agreement for the part 71 program that NNEPA is continuing to work towards the goal of part 70 program authorization. Delegation Agreement at 2. NNEPA plans to use the NNOPR provisions and procedures, which mirror and cite federal requirements of part 70, for this purpose. *E.g.*, *id.* ¶ IV.1 at 5 (citing NNOPR § 401(b)); *id.* ¶ IV.2 at 5; *id.* ¶ V.4 at 7. Allowing NNEPA to use the NNOPR in conjunction with the federal part 71 requirements supports EPA's regulatory goal of fostering an eventual smooth transition to an approved part 70 program operated by NNEPA.

As the parties recognize, the part 71 regulations provide a "national template" for federal Title V operating permit programs. *See*, *e.g.*, 40 C.F.R. §§ 71.5-.7 (requirements for permit applications, content, and processing); 61 Fed. Reg. at 34,213 (describing "national template" approach).[9] The parties' dispute centers on the question of whether the rules and procedures provided in

---

[7] Peabody argues that this preamble statement is irrelevant because EPA abandoned this approach when it adopted a "national template" approach in the final part 71 regulations. Peabody's Reply to NNEPA's Response at 22-23. Peabody is mistaken. The "national template" approach was included in both the proposed and final regulations. *See* 40 C.F.R. § 71.4; Federal Operating Permits Program, 61 Fed. Reg. 34,202, 34,213 (July 1, 1996); 60 Fed. Reg. at 20,805. Thus, the Board sees no basis to infer that EPA abandoned the above-quoted preamble statement in the final rule.

[8] *See* 61 Fed. Reg. at 34,203 ("EPA has repeatedly stated its belief that federally-implemented part 71 programs would be of short duration, lasting only until the few remaining States that have not developed approvable part 70 programs are able to submit title V programs that meet the requirements of the Act. * * * To this end, EPA has attempted to structure the rule so that States in which part 71 programs are established will be able to use the program as an aid to adopting and implementing their own part 70 programs * * * ."); *id.* at 34,213 ("EPA has designed part 71 to provide significant flexibility to accommodate the localized air quality issues. For example, EPA will use State application forms whenever possible * * * ."); *id.* at 34,215 ("This approach to providing part 71 forms will lead to less disruption and a smoother transition for sources preparing initial part 71 applications because, in many cases, sources will be familiar with the State form on which the part 71 form is based.").

[9] The part 71 regulations reserve EPA's authority to modify the "national template" for the federal program in a particular state, local or tribal jurisdiction through a rulemaking, provided that any customized program is consistent with the requirements of Title V. 40 C.F.R. § 71.4(f). However, EPA emphasized in its response to comments on the final part 71 rule that it would be "needlessly burdensome on the Agency" to develop a customized part 71 program for every jurisdiction that required a federal program. *See* 61 Fed. Reg. at 34,213.

this national template are all that can be allowed (as Peabody argues) or whether they are simply minimum requirements for a federal part 71 program, which states and tribes can supplement with their own rules and procedures (as NNEPA and the Region argue).

Peabody contends that "[t]his type of delegation [under part 71] means that EPA and the delegate state or tribal agency must administer their respective portions of the federal permit program *solely* in accordance with federal procedures applicable to that program." Petition at 10 (emphasis added). However, Peabody cites no provision in part 71 or other applicable law that prohibits a delegated agency from *also* using its own regulations and procedures to parallel or supplement the part 71 requirements. Clearly, delegated agencies are not free to ignore the requirements of part 71 or to implement the federal program in a manner that conflicts with or is inconsistent with part 71. But Peabody has not identified any such conflict or inconsistency in this case.

Peabody relies most heavily on the argument that NNEPA is not *required* to have its own procedures in order to obtain part 71 delegated authority, *id.* at 11-16, and concludes that "[w]ithout any requirement for NNEPA, as a delegate agency under part 71, to have and use those NNOPR-based provisions, clearly it is *not* 'appropriate for them to be cited in the permit,'" *id.* at 18-19 (quoting RTC at 4). This conclusion does not follow. The issue of whether NNEPA is *required* to have its own procedures is quite separate from whether that practice is *permissible*. The Board does not need to reach the former issue in order to resolve the latter, and the Board declines to do so.

Peabody also cites the Board's prior decision in *West Suburban Recycling & Energy Center, L.P.*, 6 E.A.D. 692 (EAB 1996), to support its position. *Id.* at 17-19. That reliance is misplaced. In *West Suburban*, the Board held that a state could not deny a federal PSD permit solely because the applicant had not satisfied unrelated state law requirements. 6 E.A.D. at 708. That is not the situation here. Neither *West Suburban* nor any other case cited by the parties has held that a federal permit may not include conditions based on state or tribal law.

In fact, the Board has previously recognized, without objection, that state agencies acting with delegated federal permitting authority often include conditions based on state law in federal permits. In *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121 (EAB 1999), the Board explained:

> Often, permitting authorities that issue PSD permit decisions pursuant to a delegation agreement with EPA include requirements in a permit under both federal and state law. * * * Including such provisions in a PSD permit is legitimate, it consolidates all relevant requirements

> in one document and obviates the need for separate federal, state, and local permits.

8 E.A.D. at 162; *see also In re Harquahala Generating Project*, PSD Appeal No. 01-04, at 3 (EAB May 14, 2001) (Order Denying Petition for Review) ("As frequently occurs in the context of PSD permits crafted by state permit authorities, the permit issued by [the delegated permitting authority] consolidated conditions based upon federal PSD requirements, as well as the approved [state implementation plan] and local law.").[10] The Board sees no reason why this common practice of including federal and state conditions in the same permit would be any more inherently objectionable under the Title V permitting program than under the PSD permitting program.[11]

The Board recognizes that there may be some situations in which the practice of combining state and federal requirements in one permit can cause conflict or other concerns. As discussed above, one such concern arose in *West Suburban*, where the state denied a federal PSD permit application solely because the permit applicant had not satisfied unrelated state requirements. 6 E.A.D. at 708; *see also In re Amerada Hess Corp.*, 12 E.A.D. 1, 14 & n.27 (EAB 2005) (holding that there was no legitimate reason to include unrelated state law conditions in a federal PSD permit when there was a separate state permit that could appropriately include those conditions).[12] However, no such concerns are presented in the in-

---

[10] The Region contends that *Harquahala* and other previous decisions by the Board demonstrate that the claims raised by the Petition here are outside the scope of the Board's review authority. Amicus Curiae Br. at 11-15. The Board disagrees. In the cases cited by the Region, the Board declined to review permit requirements based solely on unrelated state or local law, *e.g.*, where federal and state permits were combined. Here, Peabody is seeking review of a federal-only part 71 permit and does not seek the Board's review of the substance of any tribal law requirements.

[11] Indeed, the main purpose of adding Title V to the Clean Air Act was to consolidate Clean Air Act operating requirements in one permit, in order to provide greater clarity and streamlining for regulated sources. *See generally* S. Rep. No. 101-228, at 347-49 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3729-31 (summarizing goals of Title V permit system); Operating Permit Program, 57 Fed. Reg. 32,250, 32,251 (July 21, 1992) (same). Including related state or tribal law requirements in the consolidated Title V permit also can foster that goal.

[12] The Board stated in *Amerada Hess* that it was not expressing general disapproval of the practice of including federal and state conditions in one permit:

> To be clear * * * we are not saying that a single permit may not appropriately contain both PSD and non-PSD conditions. We conclude only that in a case such as this, where a state issues separate PSD (federal) and non-PSD (state) permits, and where the PSD Permit is, on its face, *exclusively* a PSD Permit, it is error for the state to incorporate into the federal PSD permit, without adequate explanation in the administrative record, permit conditions taken directly from the state non-PSD permit that bear no relationship to the federal PSD program.

Continued

stant situation. The Title V federal permit has not been denied, and NNEPA has not attempted to incorporate tribal law requirements unrelated to the Title V program.

Finally, Peabody alleges that EPA's Delegation Agreement with NNEPA contains inconsistent statements and other errors that have confused NNEPA, particularly with respect to whether NNEPA is *required* to have its own procedures. Peabody requests the Board to order revisions to the Delegation Agreement and related documents. *See* Petition at 38-39. As explained above, the question of whether NNEPA is *required* to have its own procedures is immaterial to the resolution of the legal issue presented by this Petition. In addition, the Board reminds Peabody that its authority under 40 C.F.R. § 124.19 is limited to reviewing the Permit decision. The Board's decision provides sufficient guidance to address Peabody's objections to the Permit, and the Board declines to extend its review to statements in the Delegation Agreement.

B. *It Was Not a Clear Error of Law for NNEPA to Use Tribal Procedures of the NNOPR to Process Revisions to Peabody's Permit*

Peabody objects to NNEPA's use of tribal procedures to process revisions to Peabody's Permit for the same reason that it objects to the citations to NNOPR in the Permit – NNEPA's alleged lack of legal authority. Peabody specifically objects to NNEPA's use of its own procedures for reopening the Permit (which has not occurred) and for processing a name change requested by Peabody (which has occurred). Petition at 34-37.

Peabody has not identified any way in which the cited NNOPR procedures differ from, conflict with, or are inconsistent with part 71. Peabody argues that NNEPA may not use "solely" tribal procedures to reopen the Permit under Condition IV.L, Petition at 34, but NNEPA has not attempted to do so. Moreover, Condition IV.L cites *both* part 71 and the NNOPR, not "solely" the NNOPR. Peabody has not identified any way in which the cited requirements of part 71 and NNOPR differ. Instead, Peabody focuses its argument on statements in NNEPA's Response to Comments concerning the reopener condition, arguing that NNEPA overstated its legal authority to act under part 71 to reopen the Permit. Since Peabody cites no language in the Permit reopener condition that conflicts with or is inconsistent with part 71, and NNEPA has made no attempt to exercise any authority to reopen the Permit at this time, the Board finds no error of law in the Permit or in NNEPA's use of its procedures with respect to the reopener condition.

(continued)
12 E.A.D. at 14 n.27.

Similarly, Peabody has failed to demonstrate any error in NNEPA's procedures used for processing the facility name change and other administrative amendments requested by Peabody. *See id.* at 36-37. NNEPA processed the requested changes, and Peabody identifies no inconsistency between NNEPA's procedures and part 71. Again, Peabody focuses its objection on NNEPA's statement in the Response to Comments that it lacked authority to make this name change under part 71. The Board need not reach the issue of whether NNEPA's statement was legally correct, since Peabody has not identified any procedure used by NNEPA that is inconsistent with part 71.

VII. *CONCLUSION OF LAW*

Peabody has failed to meet its burden of demonstrating that NNEPA made a clear error of law by including references to the NNOPR in the ten challenged conditions of the Permit or by using tribal procedures, as well as part 71 procedures, to process the Permit.

VIII. *ORDER*

Peabody's Petition for Review is denied.

So ordered.