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
MOTION FOR RECONSIDERATION OF ORDER DENYING REVIEW

INTRODUCTION

On March 13, 2012, the Environmental Appeals Board ("Board") issued an Order Denying Petition for Review ("Order") in the above-captioned matter which concerns a Clean Air Act Title V federal operating permit governed by provisions of 40 C.F.R. part 71. Pursuant to 40 C.F.R. § 71.11(l)(6) and for the reasons explained herein, Peabody Western Coal Company ("Peabody"), Petitioner in this proceeding, hereby moves for reconsideration of the Order.

BACKGROUND

The part 71 federal operating permit in question ("Permit") is for Peabody's surface coal mining operations ("Kayenta Complex") located near Kayenta, Arizona and within the boundaries of the Navajo Nation. Pet. at 2. That federal permit was issued by the Navajo Nation Environmental Protection Agency ("NNEPA") acting under a delegation of authority from the

U.S. Environmental Protection Agency ("EPA") to administer EPA's part 71 federal operating permit program. *Id.*

Peabody's Petition challenged NNEPA's actions, solely as a delegate agency under the Clean Air Act, to issue that part 71 federal permit by (1) including ten specific conditions based on the Navajo Nation Operating Permit Regulations ("NNOPR") within the federal permit and (2) processing the federal permit in accordance with tribal procedures under tribal law. Pet. at 8-9. In its Order, the Board concluded that "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." Order at 15.

STANDARD OF REVIEW

The part 71 regulations provide that motions to reconsider "must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors." 40 C.F.R. § 71.11(l)(6). However, the part 71 regulations do not provide further procedural details for such motions. Nor does the Board's Practice Manual address motions practice during part 71 permit appeals. The Environmental Appeals Board Practice Manual ("EAB Practice Manual") at V.C.1.

EPA's regulations at 40 C.F.R. part 124 also lack detailed procedures regarding motions in the context of permit appeals under the Clean Air Act's federal permitting program for prevention of significant deterioration ("PSD"). Nevertheless, the Board "has exercised broad discretion to manage its permit appeal docket by ruling on motions presented to it for various purposes[.]" *In re Peabody W. Coal Co.,* CAA Appeal No. 10-01, slip op. at 7 (EAB Aug. 13, 2010). Moreover, the Board has concluded that "the broad case management discretion found in

part 124 cases naturally extends to part 71 cases, which unfold in accordance with procedures very closely parallel to those of part 124." *Id.* at 8.

The part 124 regulations, like those of part 71, also provide that motions for reconsideration "must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors." 40 C.F.R. § 124.19(g). The Board has explained that "[r]econsideration [under part 124] is generally reserved for cases in which the Board is shown to have made a demonstrable error, such as a mistake of law or fact." *In re Russell City Energy Ctr.*, PSD Appeal Nos. 10-01 to -05, at 2 (EAB Dec. 17, 2010) (Order Denying Motion and Supplemental Motion for Reconsideration and/or Clarification and Stay) (internal citations omitted). The Board has further explained that the reconsideration process under part 124 should not be used "as an opportunity to reargue the case in a more convincing fashion." *In re Knauf Fiber Glass, GmbH*, PSD Appeal Nos. 98-3 to -20, at 2-3 (EAB Feb. 4, 1999) (Order on Motions for Reconsideration) (internal citation omitted). Based on the Board's view of the similarities in its broad case management discretion under parts 71 and 124, it is reasonable to conclude that the Board's approach to reconsiderations of its orders under part 124 applies in the same manner to reconsiderations of its orders under part 71.

Counsel for NNEPA has advised the undersigned counsel for Peabody that NNEPA objects to the granting of Peabody's motion for reconsideration. Counsel for EPA Region IX has likewise advised Peabody's counsel that Region IX objects on behalf of EPA to the Board's granting of Peabody's motion for reconsideration.

ARGUMENT

Peabody's original part 71 federal permit was issued by EPA Region IX and contained the standard permit conditions based on applicable part 71 requirements. Pet. at 4, 29. Acting

under EPA's delegation of authority to administer a part 71 federal program, NNEPA subsequently issued a renewed part 71 federal permit to Peabody that again contained the standard permit conditions based on applicable part 71 requirements. Pet. at 7, 29-30. In addition, however, requirements under NNOPR were also cited as underlying authorities for ten of those permit conditions in the renewed part 71 federal permit. *Id.*

The mere fact that Peabody initially had a federal permit, applied to renew that federal permit, and received a new federal permit that for the first time contained ten conditions based on tribal law should signal that something unusual has happened to the federal permitting process. NNEPA, however, has responded that the part 71 federal permit which it issued to Peabody "do[es] not create any new requirements." Pet. at 29 (quoting Pet. Ex. J at 3, 5); *see also* Order at 6 (quoting Draft Statement of Basis at 3 (A.R. 35)). The Board in turn commented that Peabody has not shown that the ten conditions based on NNOPR requirements contained in Peabody's part 71 federal permit "require Peabody to take any additional or different actions than are required by part 71." Order at 8.

Peabody respectfully begs to differ. As Peabody previously demonstrated, Peabody now has a part 71 federal permit containing ten specific permit conditions that are enforceable under tribal law.[1] Pet. at 29 ("NNEPA does not appreciate Peabody's increased legal liability that attaches with permit conditions that are now based on NNOPR requirements."). Peabody strongly believes that receiving a renewed federal permit containing conditions based for the first time on a tribal government's laws in addition to part 71 constitutes "new" and "additional"

[1] This is why the fact that the federal-based conditions and the tribal-based conditions are substantively the same does not excuse NNEPA's challenged permitting actions. Order at 8, n.5. Renewed permit conditions based for the first time on another government's laws are additional requirements for the permit. In addition, contrary to the Board's statement, Peabody did not "point[ ] out that the Permit issued by NNEPA is 'essentially identical' to the prior part 71 permit issued by EPA." Order at 8. The parenthetical explanation following this Board statement correctly acknowledges that Peabody said the draft permit's conditions that were based on part 71 were essentially identical to their counterparts (permit conditions based on part 71) in the original part 71 federal permit. *Id.*

permit requirements, especially when EPA's delegation of administrative authority to NNEPA requires no federal rulemaking. Pet. at 23 (quoting EPA, *Technical Support Document for Federal Operating Permits Program,* "Part 71 Response to Comments Document," 32 (Dec. 21, 1998)) ("The delegation itself is not a rulemaking procedure."); Peabody's Response at 8 (quoting 61 Fed. Reg. 34,202, 34,214 (July 1, 1996)) ("Delegation agreements . . . are not subject to any notice requirements."); Peabody's Response at 7 (quoting 60 Fed. Reg. 20,804, 20,818 (April 27, 1995)) ("[T]here will be no formal approval action in those delegations" of part 71 administration to States or eligible tribes.).

In its Order the Board erroneously concluded that Peabody did not demonstrate that NNEPA's challenged permitting actions constituted clear errors of law. Order at 15. On that mistaken basis, the Board denied review of Peabody's petition. *Id.* This motion for reconsideration of the Order on the grounds that it is based on demonstrable errors, as explained herein, meets the standards for reconsideration of a Board order. In particular, Peabody has documented those demonstrable errors by the Board with repeated and numerous references herein to Peabody's demonstrations that it previously made during the course of this proceeding. Peabody's motion herein has not been used "as an opportunity to reargue the case in a more convincing fashion," *Knauf,* at 2-3 (internal citations omitted), nor has Peabody filed this motion for the purpose of correcting any "failure to present its strongest case in the first instance." *See, e.g., In re Hawaii Electric Light Co., Inc.,* PSD Appeal Nos. 97-15 to -23, at 6 (EAB Mar. 3, 1999) (Order Denying Motion for Reconsideration and Lifting Stay).

Moreover, Peabody's Petition raises an important issue of national significance which could affect every Clean Air Act federal permit issued in the future by an Indian tribe acting under a similar delegation of administrative authority from EPA. If NNEPA's challenged

permitting actions are not corrected, future federal permits issued solely under EPA's delegation of authority will be allowed to contain permit conditions based on, and enforceable under, tribal laws. Peabody's motion for reconsideration should be granted so the Board can review the nationally significant issue presented by this proceeding.

1. NNEPA's Inclusion of Citations to the NNOPR in Ten Challenged Conditions of the Part 71 Federal Permit and NNEPA's Use of Tribal Procedures to Process the Permit Were Clear Errors of Law.

Peabody claimed that NNEPA had no legal authority as an agency with delegated administrative authority from EPA either to issue Peabody's part 71 federal permit with ten specific permit conditions based on tribal provisions in NNOPR or to process the Permit using tribal procedures in NNOPR. Pet. at 2. The Board concluded that Peabody failed to demonstrate that NNEPA's challenged actions were clear errors of law. Order at 15. As shown herein, that conclusion by the Board is erroneous because Peabody's prior filings in this proceeding did make the requisite demonstration to justify the Board's review.

The Board's incorrect conclusion of law is based in large part on the Board's misapprehension of two key facts, leading the Board to commit demonstrable error. First, the Board failed to recognize that the regulations which NNEPA has established in order to administer federal authority as a delegate agency, and which NNEPA applied to this permit, comprise not only the part 71 federal regulations but also specific non-duplicative and additional tribal permitting procedures within NNOPR. *See* Peabody Western Coal Company's Response to EPA Region IX's Amicus Curiae Brief ("Peabody's Response")[2] at 10 ("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."). *Id.* at 23.

[2] The summary of the procedural history of this proceeding before the Board, Order at 5-7, fails to acknowledge that the Board granted Peabody's motion for leave to file this Response. *See* Order Granting Peabody Western Coal Company's Motion for Leave to File a Response to U.S. EPA Region 9's Amicus Curiae Brief (Sept. 21, 2011).

As Peabody demonstrated, NNOPR incorporates by reference the part 71 federal regulations "for purposes of administering the delegated Part 71 program." Peabody's Response at 4-5 (quoting NNOPR § 704(A)). Thereafter, as Peabody demonstrated, NNOPR also adds various tribal permitting procedures to NNEPA's "Part 71 Program Delegation," i.e., tribal permitting procedures that "shall apply to part 71 permits in addition to the part 71 procedures." Peabody's Response at 4-5 (quoting NNOPR § 704(B) (emphasis added)). In short, the Board failed to establish the fact that NNEPA, as a delegate agency under part 71, administers a regulatory program consisting of part 71 regulations combined with specific procedural provisions of NNEPA's tribal regulations.[3]

Second, because the Board did not appreciate the "federal + tribal" scope of the permitting regulations being administered by NNEPA *solely* as EPA's delegate, the Board wrongly found NNEPA's challenged action to be analogous to the longstanding, "common practice" of state agencies "acting with delegated federal [PSD] permitting authority often includ[ing] conditions based on state law in federal permits." Order at 12 (quoting *In re Knauf Fiber Glass GmbH*, 8 E.A.D. 121 (EAB 1999)). The crucial distinction in this case is that, in issuing Peabody's part 71 federal permit, NNEPA did not act in such a dual permitting capacity.[4] Pet. at 19, 30 and 32; *see also* Peabody Western Coal Company's Reply to Navajo Nation EPA's Response ("Peabody's Reply") at 13, n.5; Peabody's Response at 2, 9, 10 and 14. Peabody

[3] The specific procedural provisions of NNEPA's tribal regulations that have been added to the part 71 procedures are "Permit Processing," NNOPR Subpart IV, §§ 401-406; "Enforcement," NNOPR Subpart V, §§ 501-505; and "Permit Fees," NNOPR Subpart VI, §§ 601-603. *See* NNOPR § 707; *see also* n.4 and n.5 for further clarification. The ten Permit conditions challenged by Peabody are based on tribal permitting provisions from NNOPR Subpart IV.

[4] The one exception to this statement is Permit Condition IV.A for "Fee Payment." Part 71 provides no fee collection provision for delegated circumstances such as NNEPA's. Instead, the delegate agency is expected to "collect [ ] fees from part 71 sources under State [or tribal] law which are sufficient to fund the delegated part 71 program[.]" 40 C.F.R. § 71.9(c)(2)(i).

previously demonstrated that, aside from NNEPA acting under its delegated federal authority to administer the part 71 federal permit program, "*NNEPA has not acted in any other permitting capacity in this proceeding*[,]" Pet. at 30 (emphasis in original), with the single exception of a requirement for fee payment that must be based on tribal law. *See* n.4. Peabody's Facility is not required to have a separate tribal operating permit based on tribal law because the Facility has a part 71 federal operating permit. Peabody's Response at 9, n.1 (citing NNOPR § 201(A)); *id.* at 14.

The Board's suggestion that an exclusively federal permit may include conditions based on state or tribal law is troubling and unprecedented. Order at 12. A federal permit that contains conditions based on state or tribal law is no longer solely a federal permit. As EPA explained, "[p]ermits issued under the Federal . . . programs (*even when issued by a Tribe acting on EPA's behalf pursuant to a delegation agreement*) remain Federal in character[.]" Peabody's Response at 9 (quoting 76 Fed. Reg. 38,748, 38,782 (Juky 1, 2012) (emphasis added)). Peabody understands the rationale incases where a delegated agency administers a consolidated permitting action for including permit conditions based on federal law and separate permit conditions based on state law. Order at 12 (citing *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121 (EAB 1999); *In re W. Suburban Recycling & Energy Ctr., L.P.*, 6 E.A.D. 692 (EAB 1996)). By contrast, with the exception of the single requirement for fee payment based solely on tribal law, Pet. at 32-34, (citing Permit Condition IV.A), this proceeding is not concerned with any consolidated permitting action by NNEPA.[5]

[5] Peabody could accept inclusion of that one NNOPR-based requirement within the four corners of its part 71 federal permit as long as all parties understand the NNOPR-based requirement is not part of Peabody's part 71 federal permit. In that case the permit should be identified as a consolidated permit that includes a part 71 federal permit and one non-federal requirement. As EPA has explained, "part 71 permits will not include any non-federally enforceable applicable requirements." *In re Peabody Western Coal Company*, CAA Appeal No. 10-01, (Peabody Western Coal Company's Response to the Navajo Nation EPA's Motion for Voluntary Remand and Memorandum in Support of Motion) (EAB filed on June 11, 2010) , at 21 (quoting 61 Fed. Reg. 34,219).

In short, contrary to the Board's perception, the permitting action in this proceeding is not like a situation where a source has submitted a single permit application addressing both state and federal requirements. "In this instance, Peabody has submitted a permit application only for a federal part 71 permit," Pet. at 30, and NNEPA has responded by only issuing what it alleges to be a part 71 federal permit. (Cover letter for Permit from Stephen B. Etsitty, Executive Director of NNEPA, to Kemal Williamson, President of Peabody Western Coal Company – Black Mesa Complex, of Dec. 7, 2009 ("Re: Issuance of Title V Operating Permit to Peabody Western Coal Company – Black Mesa Complex"; "Action/Status: Part 71 Operating Permit").

It is axiomatic that under the Clean Air Act a tribal agency which has been delegated authority to administer a federal permit program cannot unilaterally amend that federal program. Pet. at 13 (citing CAA § 502(d)(3) that requires EPA to promulgate the part 71 federal permit program).[6] Peabody has repeatedly demonstrated that NNEPA as a delegate agency is not authorized to administer regulations that differ from those of part 71.

> [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.

Pet. at 22-23 (emphases added) (quoting EPA, *Technical Support Document for Federal Operating Permits Program,* "Part 71 Response to Comments Document," 32 (Dec. 21, 1998));

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[6] Yet the Board mistakenly finds that "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." Order at 11 (emphasis added). The Board relied on this fundamental legal principle in a previous proceeding, *In re W. Suburban Recycling & Energy Ctr., L.P.*, 6 E.A.D. 692 (EAB 1996), wherein the Board confirmed that a state agency with delegated authority to administer the federal PSD program was not authorized to apply state procedural and substantive requirements to process and issue the federal PSD permit. Pet. at 17-19 (citing *West Suburban* at 704, 707; *see also id.* at 695, n.4.). Given that legal basis for which Peabody relied on *West Suburban*, the Board was incorrect in characterizing Peabody's reliance on *West Suburban* as "misplaced." Order at 12.

see also Peabody's Reply at 11; Peabody's Response at 8; Pet. at 28 ("EPA is merely passing implementation of an already promulgated program to an eligible delegate entity.") (internal EPA citation omitted).

In summary, a review of Peabody's previous filings in this proceeding confirms that those prior filings clearly and repeatedly demonstrated:

- that NNEPA's inclusion of ten challenged NNOPR-based conditions in Peabody's part 71 federal permit was not an example of the "common practice" of a delegate agency's joint permitting exercise where federal conditions and state or tribal conditions are included in a single permit issued under both federal and state or tribal law;
- that, instead, NNEPA has promulgated a scope of regulations to be administered under its delegation of part 71 authority that includes not only part 71 federal regulations but also specific permitting procedures at NNOPR §§ 401-406;[7] and
- that inclusion of tribal regulations within NNEPA's delegated part 71 permit program is unlawful.

Peabody therefore has demonstrated that (1) NNEPA's inclusion of ten particular conditions based on NNOPR within Peabody's part 71 federal permit and (2) NNEPA's use of tribal permitting procedures from NNOPR to process that part 71 federal permit are each a clear error of law under the Clean Air Act.

Given those prior demonstrations by Peabody, the Board has clearly erred in its Order when it concluded that "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

[7] And also includes tribal enforcement provisions at NNOPR §§ 501-505 and tribal permit fee provisions at NNOPR §§ 601-603.

or by using tribal procedures, as well as part 71 procedures, to process the Permit." Order at 15. Peabody's motion herein meets the standards for reconsideration of a Board order.

2. The Board's Arguments Fail to Defeat Peabody's Demonstration.

In explaining its decision to deny review of Peabody's petition, the Board's Order provided various explanations or rationales to support its conclusion that Peabody did not demonstrate that NNEPA's challenged actions were clear errors of law. In several respects, the Board's analysis is incorrect.

First, the Board rejected Peabody's demonstration that NNEPA's challenged actions are unlawful, relying on EPA Region IX's statement 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.'" Order at 9 (quoting EPA Region IX Amicus Curiae Brief at 2). Neither Region IX's statement nor the Board's adoption of that position is accompanied by any legal analysis to support the Region's opinion. As a matter of law, the Board has erred in its decision to deny review of Peabody's petition by relying on the Region's unsupported, conclusory statement. *See* Peabody's Response at 17-19 ("Region IX simply has no legal basis under federal law for those statements.").

In addition, the Board rejected Peabody's demonstration that NNEPA's challenged actions are unlawful in light of Region IX's "we've-always-done-it-that-way" explanation. "The Region notes that the agency [EPA] routinely permits non-federal agencies to use their own laws in parallel when implementing federal CAA [PSD] regulations." Order at 9 (citing Amicus Brief at 19). A statement confirming EPA's prior permitting practice, without more, is hardly a compelling legal justification. Peabody's Response at 21 (". . . 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.").[8] As a matter of law, the Board has demonstrably erred in its decision to deny review of Peabody's petition by assuming, without any appropriate legal justification, that a prior EPA permitting practice involving administrative delegations to non-federal agencies was a lawful action.

The Board also rejected Peabody's demonstration that NNEPA's challenged actions are unlawful because Peabody allegedly misconstrued a passage from the preamble to the *proposed* part 71 rules. However, it is the Board that has erred because it failed to understand the context of the preamble language in question.

The part 70 regulations were promulgated in 1992, 57 Fed. Reg. 32,250 (July 21, 1992), and required each state to submit its proposed part 70 program to EPA no later than November 15, 1993. 40 C.F.R. § 70.4. By the time EPA proposed the part 71 federal program in April 1995, some states may have had approved part 70 regulations, some states likely had what EPA called "interim approval" of their part 70 regulations, and other states were struggling to finalize their part 70 regulations.

Title V requires EPA to promulgate a federal part 71 program for states that fail to receive approval of their state part 70 regulations. Pet. at 3-4 (citing CAA § 502(d)(3)); see also 60 Fed. Reg. at 20,822. Rather than exclude state permitting authorities from Title V permitting if their part 70 regulations were not approved, EPA decided that it could exercise its discretion to delegate authority to those states to administer some portion or all of a part 71 program. 60 Fed. Reg. at 20,823. EPA also decided that it could delegate authority to tribes to administer some portion or all of a part 71 program, *id.*, although tribes would be less likely to have unapproved

[8] Indeed, Peabody has previously suggested to the Board that something is intuitively, fundamentally wrong with a delegated state agency using state regulations to administer a federal PSD permitting program. Peabody's Response at 21.

part 70 regulations because the CAA does not require tribes to have their own part 70 regulations. Pet. at 3.

As EPA explained,

> 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.

60 Fed. Reg. at 20,823. The Board correctly interpreted the above language to mean "that EPA expected that delegated agencies would continue implementing their own procedures and regulations, in tandem with the requirements of part 71." Order at 9. However, as explained below, the Board failed to understand that the proposed part 71 implementation option to which the quoted language applied was not the part 71 implementation option adopted in the final part 71 program.

When the part 71 rules were being developed, EPA considered two very different options for implementing that program. Option #1 contemplated EPA promulgating individualized or customized part 71 regulations case-by-case for each state or area that did not have an approved part 70 program. Under that option, EPA-promulgated individualized part 71 regulations for a given agency would "tak[e] into account the specific characteristics of the State's existing air program, and bas[e] the State's part 71 program as much as possible on the State's part 70 program that it ha[d] developed to date and that EPA had not found to be inadequate." 61 Fed. Reg. at 34,204.

EPA explained that Option #1 was based on the belief that

> [t]he best way to facilitate transition from Federal to State implementation of Title V is to make sure the Federal and State programs are virtually identical in each relevant State, even if that means the Federal programs would differ from State to State. It would follow that *EPA should approve whatever adequate elements a State*

> *had adopted for its title V program, and then only fill the remaining gaps with Federal provisions as necessary.*

Id. (emphasis added). In short, under Option #1, the "individualized" or "customized," agency-specific implementation approach contemplated in the preamble to the *proposed* part 71 rules, EPA expected that states or tribes without fully approved part 70 regulations "would continue implementing their own [approved part 70] procedures and regulations, in tandem with the requirements of part 71" that would fill any specific gaps in that agency's part 70 program. Order at 9.

However, EPA had several concerns about adopting Option #1. In some situations, it would be impossible for EPA to base the part 71 federal program for an agency on that agency's part 70 program. 61 Fed.Reg. at 34,204. EPA also believed that "the resource burden of establishing and implementing different case-by-case [part 71] programs for States would overwhelm EPA Regional offices[.]" *Id.*

On the other hand, EPA's Option #2 for implementing part 71 contemplated a "national template" approach where a single, "one-size-fits-all" part 71 program would be used for each state or tribe without a fully approved part 70 regulation. The EPA chose a national template approach because the Agency believed that approach "is flexible enough to be an effective program in nearly all areas." 61 Fed.Reg. at 34,213. "Since the national template approach will serve the needs of most areas, it is more efficient to promulgate the program once[.]" *Id.* EPA understood that establishing a generic template for part 71 is a far more efficient use of Agency resources to get the Federal program up and running." 61 Fed. Reg. at 34,204.

"The Agency has consequently concluded that a nationally uniform [part 71] regulation is necessary for carrying out the Agency's functions under title V." That is, in its final part 71 program, EPA did not select "Option #1 -- the approach that would have developed

individualized, agency-specific part 71 regulations where "each delegate agency would have to comply with its own procedures, administrative codes, regulations and laws as well as the requirements of [part 71]." 60 Fed. Reg. at 20,823. [9]

Contrary to the Board's finding, Peabody "is not "mistaken," Order at 10, n.7. Instead, the Board demonstrably erred by concluding that the particular language in the preamble to the proposed part 71 program was applicable to the final part 71 regulations. That language, however, was only applicable to Option #1, i.e., EPA promulgation of individualized agency-specific part 71 regulations, and that agency-specific approach was rejected by the final part 71 regulations in favor of the single promulgation of a "national template," i.e., Option #2.
failing to find that Option #2 (the national template) *was adopted* with the final part 71 regulation. Consequently, the Board the language from the preamble to the proposed part 71 program that applied to Option #1 relied on by the Board that applied to Option #1

As another reason for rejecting Peabody's demonstration that NNEPA's challenged actions are unlawful, the Board argues that NNEPA's challenged actions are "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." Order at 10. As a preliminary matter, the quoted Board language is erroneous as a matter of fact because this proceeding does not

[9] The final part 71 rules further provide that "[w]hen EPA determines that the national template rule is not appropriate for a State, EPA may adopt, through a separate rulemaking, appropriate portions of a State or Tribal program in combination with provisions of part 71 in order to craft a suitable part 71 program, as provided in section 71.4(f)." 61 Fed. Reg. at 34,213. Importantly, as discussed previously, Peabody demonstrated, but the Board failed to recognize, that NNEPA unilaterally took that agency-specific approach by combining portions of NNOPR with the part 71 federal regulations to establish, in essence, a tribal version of part 71 for NNEPA to administer as a delegate agency. Notably, there has been no rulemaking by EPA under 40 C.F.R. § 71.4(f) that would make NNEPA's "tribal version" of part 71 lawful under the Clean Air Act.

involve "part 71 delegation to assist states." Additionally, as a preliminary matter, the quoted Board language is erroneous as a matter of fact because NNEPA, as a tribal agency, is not subject to any "requirement[ ] for full program authorization (under part 70) as directed by Congress."

Aside from those errors in the Board's rationale for rejecting Peabody's demonstration that NNEPA's challenged actions are clear errors of law, the Board's core discussion about "support[ing] EPA's regulatory goal of fostering an eventual smooth transition to an approved part 70 program operated by NNEPA," Order at 10, says nothing about the lawfulness of NNEPA's challenged actions as a delegate agency under the part 71 federal permit program. The Board also noted that "EPA has attempted to structure the [part 71] rule so that States in which part 71 programs are established will be able to use the [part 71] program as an aid to adopting and implementing their own part 70 programs * * *." Order at 10, n.8 (quoting 61 Fed. Reg. at 34,213). Once again, that goal says nothing about authorizing those States with part 71 programs to administer the part 71 federal program using State regulations.

EPA may very well have "designed part 71 to provide significant flexibility to accommodate the localized air quality issues." *Id.* (quoting 61 Fed. Reg. at 34,215. However, that latter statement should not be construed to mean something more than its original meaning. That is, when EPA adopted the final part 71 program, the Agency stated that it "believes the national template is flexible enough to be an effective program in nearly all areas, and individual rulemakings for each area that has a part 71 program would be needlessly burdensome on the Agency."[10] 61 Fed.Reg. at 34,213 (emphasis added). Thus, the flexibility provided to a state

[10] The Board acknowledges this statement that EPA made during the part 71 rulemaking, Order at 11, n.9 (citing 61 Fed Reg. at 34,213), but nevertheless inexplicably believes that each delegate agency is authorized to administer an individualized or customized part 71 federal program that includes the delegate agency administering its own procedures and regulations. Order at 9.

agency to use its own state application form for part 71, Order at 10, n.8, stops far short of authorizing a delegate state agency to use its own state regulations to administer the part 71 federal program.[11]

The Board stated that "[s]ince 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." Order at 14-15. The Board's position on this matter is a specific example of how the Board's mistake of fact leads to its subsequent erroneous conclusion of law.

As a preliminary matter, however, Peabody questions the relevance of the Board's focus on the fact that NNEPA has not actually attempted to use its own tribal procedures to reopen Peabody's part 71 federal permit. Order at 14. Peabody does not believe the relevant issue before the Board is a question of ripeness. Rather, the relevant issue is Peabody's challenge to NNEPA's authority to reopen Peabody's part 71 federal permit based solely on NNEPA's tribal authority under NNOPR § 406.

NNEPA has stated that "Part 71 requires NNEPA to use its own permit processing procedures" to reopen the part 71 federal permit." Pet. at 34 (quoting Pet. Ex. J at 6). NNEPA claims that part 71 contemplates one set of permit reopening procedures being administered "by a tribal or state agency under that agency's own authorities." Peabody's Reply at 20 (quoting NNEPA Resp. at 11.). Clearly, NNEPA's views are inconsistent with part 71 requirements. Contrary to the Order's assertion that Peabody failed to identify that inconsistency, Peabody commented that NNEPA's view of part 71 permit reopening being authorized under tribal law

[11] The Board's reliance on various regulatory goals is, in any event, erroneous as a matter of law because a regulatory goal carries no force of law.

"is both inexplicable and worrisome to Peabody, for it means that NNEPA, acting solely on its own under its tribal authority, allegedly could reopen Peabody's part 71 federal permit and amend it as NNEPA deems necessary and appropriate." Peabody's Reply at 20-21. Therefore, the relevant question before the Board is whether NNEPA is legally correct, i.e., whether NNEPA can reopen Peabody's part 71 federal permit while acting only under its tribal authority and not under its delegated authority to administer part 71.

As explained earlier, the Board failed to recognize the federal-tribal mix of regulations being administered by NNEPA, even though ostensibly standing in EPA's shoes as a delegate agency. *See* Peabody's Response at 10 ("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 particular, the Board failed to identify NNEPA's unlawful addition of NNOPR § 406 ("Permit Reopenings") to the part 71 program administered by NNEPA.

The Board erroneously concluded that "Peabody has not identified any way in which the cited NNOPR procedures differ from, conflict with, or are inconsistent with part 71." Order at 14. Yet, Peabody had previously explained why the tribal permit reopening provision under NNOPR § 406 was completely irrelevant, i.e., because "the CAA prohibits the processing of a part 71 federal permit using a tribal procedure enforceable only under tribal law." Pet. at 34.

Regardless of whether NNEPA has made any attempt to reopen Peabody's part 71 federal permit using NNOPR § 406, the Board has erred as a matter of law by not concluding that such a reopening by NNEPA would be unlawful. Should NNEPA be involved in reopening Peabody's part 71 federal permit, NNEPA's actions must be governed solely by the provisions within part 71 for a "permitting authority" to reopen a part 71 federal permit. *See* 40 C.F.R. § 71.7(f); *see*

also id. at § 71.10(j)(2) ("The Administrator's authority to act upon petitions submitted pursuant to paragraph (h) of this section [addressing a delegated part 71 program having public petitions to reopen a permit for cause] cannot be delegated to an agency not within EPA.").

In summary, the Order cites a number of reasons why the Board believes Peabody has not demonstrated that NNEPA's challenged actions are unlawful. Numerous, previous filings by Peabody in this proceeding, however, tell a different story - one that compels a finding counter to the Board's. The Board's decision overlooks the fundamental legal principle that a tribe's or a state's unilateral amendment of a federal permit program is unlawful under the Clean Air Act. In this case, the NNEPA permitting actions challenged by Peabody are unlawful because those actions are based on an unlawful tribal version of part 71. Nothing which the Board argues in its Order overcomes the conclusion that the challenged NNEPA actions are clear errors of law.

3. A Legal Issue of National Significance Presented in This Proceeding Warrants the Board's Review.

When Peabody first challenged NNEPA's permitting actions as a delegate agency, NNEPA defended its actions by asserting that 40 C.F.R. § 71.10(a) "requires delegate agencies to use their own authorities to process [part 71 federal] permits." NNEPA Response at 3. As NNEPA claimed, "tribes must have their own [tribal] authorities to administer the Part 71 program, including authorities for permit processing, monitoring, and reporting." Navajo Nation EPA's Response to Peabody Western Coal Company's Petition for Review of Clean Air Act Part 71 Permit ("Navajo's Response") at 6; *see* Pet. at 13-14 (Tribes must comply with the federal requirements listed in Part 71 "but must have their own authorities and procedures for implementing those federal requirements.") (quoting NNEPA Response at 9). "NNEPA simply asserts that it is appropriate for those NNOPR provisions to be cited in the revised part 71 federal

permit for Peabody because those provisions 'were a prerequisite for delegation of the [part 71 federal] program.'" Pet. at 32 (quoting Pet. Ex. J at 4).[12]

As Peabody demonstrated, "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." Pet. at 14. Accordingly, Peabody has asked the Board to decide that question, i.e., whether NNEPA is required to have its own tribal procedures to administer the part 71 federal program when NNEPA acts under EPA's delegation of administrative authority.

However, the Board has opined that:

> 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.

Order at 11 (emphases in original).

If the Board's usage of the word "permissible" above is intended to mean "an acceptable approach to implementing a delegated federal program," Order at 9 (quoting Amicus Br. at 2), then the Board's inquiry is too limited. "Permissible," in that context, essentially means that "the practice is not required to be done, but it's OK if you do it." Peabody has already explained herein how the Board's inquiry with that perspective stops short of evaluating the lawfulness of that practice, instead focusing on EPA having used that practice for years with delegated federal PSD programs, or on regulatory goals for states transitioning from part 71 to part 70, or on a strained, out-of-context interpretation of a single statement in a preamble.

At the end of the day, NNEPA's use of its own tribal procedures while acting under its delegated authority to administer the part 71 federal program must be *lawful* under the Clean Air

[12] Indeed, NNEPA has stated that "[t]he delegate agency may not, however, simply follow the Part 71 procedures[.]" Peabody's Reply at 19 (quoting NNEPA Resp. at 10).

Act. The Board simply cannot find the practice to be *permissible* if the practice is not *lawful*. As summarized herein, Peabody's previous filings in this proceeding have demonstrated that NNEPA's unlawful actions flow from its unilateral amendment of the part 71 federal program which itself is unlawful under the Act. The Board should grant this motion for reconsideration and subsequently decide to review this issue once and for all.[13]

Peabody has previously demonstrated that the issue presented in this proceeding, i.e., whether NNEPA's use of its own tribal procedures as a delegate agency is *lawful* under the Act, is one of national significance. Peabody's Reply at 2, 14. The issue presented here -- whether it is lawful for a tribe to have its own tribal permitting procedures to administer a delegated part 71 program -- pertains to all part 71 delegated tribal and state permitting programs and is, therefore, of national significance. *See* Petition at 9-19, setting forth the general and nationally applicable legal requirements for and limitations on state and tribal authority as part 71 delegates of EPA. The Board's resolution of that issue will affect the manner in which each future delegation of authority under 40 C.F.R. § 71.10(a) is administered by identifying, in particular, what limitations will apply to the delegate agency's use of its own tribal (or state) regulations. Peabody believes that Board review of that important issue is both necessary and appropriate at this time "to confirm the boundary between federal and tribal authorities under the CAA when a

[13] Although arguments in this proceeding have focused primarily on NNEPA use of its tribal procedures to administer the part 71 federal program, the Board should recognize that NNEPA also claims that EPA's delegation empowers NNEPA to use its tribal regulations to enforce provisions of Peabody's Part 71 federal permit. Pet. Ex. J at 2. Surprisingly, the Delegation Agreement between EPA Region IX and NNEPA includes a "Transition Plan" which plainly states that "[a]ll terms and conditions in a [part 71] permit are enforceable . . . by the [NNEPA] Director pursuant to Subpart V of the [NNOPR], Subpart 3 of the Navajo Uniform Rule, and Subpart 3 of the Navajo Clean Air Act, 4 N.N.C. §§ 1151-56, as well as by persons pursuant to 4 N.N.C. § 156 . . ." Peabody's Reply at 12 (quoting Pet. Ex. D at § V.G. However, EPA's rulemakings for more recent federal permit programs have confirmed unequivocally that "EPA has consistently withheld enforcement in Federal court from any administratively delegated entity." Peabody's Reply at 11 (quoting 76 Fed. Reg. at 38,782). In any Board review of whether NNEPA's use of its own tribal procedures as a delegated entity is lawful, that inquiry should encompass NNEPA's use of tribal authorities to *enforce*, as well as to *administer*, the part 71 federal permit program.

trial agency acts with delegated federal administrative authority under the part 71 federal permit program." Peabody's Response at 2.

The issue in this proceeding is one of national significance for two reasons. First, a Board decision will establish important precedent for future tribal administration of federal permit programs under the CAA throughout Indian country. *See In re Shell Gulf of Mexico, Inc.*, OCS Appeal No. 10-01 to -04, at 25 (EAB Feb. 10, 2011) (Order on Motions for Reconsideration and/or Clarification) ("[T]hese Permits, when ultimately issued, will be the first ones to make th[e] predicate determination applying the statutory and regulatory [Outer Continental Shelf] source definitions and, thus, will serve as precedent of national significance for all subsequent permits issued for regulated activity on the OCS."); *In re Deseret Power Elec. Coop.*, PSD Appeal No. 07-03, slip op. at 63-64 (EAB Nov. 13, 2008), 14 E.A.D. __ (observing that, "[i]n remanding this Permit to the Region for reconsideration of its conclusions regarding application of BACT to limit CO_2 emissions, we recognize that this is an issue of national scope that has implications far beyond this individual permitting proceeding," and directing the Region to consider whether to address the issue through "an action of nationwide scope").

Aside from the part 71 program, EPA has promulgated other federal permit programs that also provide for delegation of administrative authority. Peabody's Reply at 2 (citing "Federal Minor New Source Review Program in Indian Country," 40 C.F.R. §§ 49-151-49.161; "Federal Major New Source Review Program in Indian Country," 40 C.F.R. §§ 49.166-49.173).[14] EPA Region X has promulgated a federal implementation plan under the CAA that provides for partial delegations of administrative authority for Indian reservations in Idaho, Oregon and Washington. 40 C.F.R. § 49.122.

[14] After completion of all filings in this matter prior to the Order, EPA proposed to amend the federal PSD permit program to provide for delegation of administrative authority. 76 Fed. Reg. 82,234 (Dec. 30, 2011).

Rather than promulgate their own tribal operating permit programs under part 70, *see* Pet. at 3, most tribes likely will begin/continue building tribal capacity under the CAA by seeking administrative delegations for different federal permit programs.[15] Increasing numbers of tribes are projected to seek administrative delegation of one or more federal permitting programs in the future. If a tribe seeking administrative delegation already has some form of non-EPA-approved tribal air program, then the tribe will need appropriate legal guidance under the CAA about how requirements of that tribal program interface with requirements of the delegated federal permit program. Thus, the issue in this proceeding extends far beyond applicability only to NNEPA's administration of the delegated part 71 federal permit program. *See, e.g., In re Shell Gulf of Mexico, Inc.*, at 25; *In re Deseret Power Elec. Coop.*, at 63-64.

The issue in this proceeding is also nationally significant because it calls into question both past and future federal PSD permits issued by states and tribes acting under a delegation of authority to administer the federal PSD program. Based upon Region IX's questionable approval of NNEPA's "acceptable approach to implementing a delegated program," Order at 9 (quoting Amicus Curiae Br. at 2), and based upon Region IX's confirmation of a questionable longstanding, similar practice being implemented by states with delegated authority to administer the federal PSD program, *id.,* Peabody has previously observed that EPA's approach to delegation of its federal administrative authority appears to "suffer[ ] from a fundamental, systemic flaw." Peabody's Response at 17.

In Peabody's Response at 19, Peabody previously questioned the legal basis of several EPA Region IX statements, including the following:

[15] In encouraging tribes to obtain administrative delegation of federal permit programs, EPA points out that, in doing so, tribes can "gain experience by assisting EPA with administration of the Federal rules *without needing to first develop Tribal air programs under Tribal law.*" Peabody's Reply at 4 (quoting 76 Fed. Reg. at 38,783) (emphasis added).

- 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.
- "[A] delegated permitting authority could . . . also follow procedures grounded in sate or tribal law as long as it ensures that is actions satisfy the Part71 requirements." *Id.* at 16.
- "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.

Curiously, throughout this proceeding, Region IX has not cited the Clean Air Act, any other federal law or their implementing regulations as authority for the Region's views on what constitutes "an acceptable approach" by a non-federal agency to administer a federal permit program under an EPA delegation of authority. Peabody's Response at 19. Nor has Region IX, throughout this proceeding, cited to any federal case law to support the Region's views on what constitutes "an acceptable approach" by a non-federal agency to administer a federal permit program under an EPA delegation of authority. *Id.* at 21. If Region IX's views on delegation of administrative authority are embraced by EPA's Office of General Counsel and Office of Air and Radiation, see Order at 7, n.3., then conceivably there are numerous federal PSD permits throughout the United States that have already been unlawfully issued in keeping with state regulations and/or with permit conditions based on state regulations. States currently with delegated administrative authority for a federal permit may unlawfully issue future federal permits in keeping with state regulations and/or with permit conditions based on state regulations.

As evidenced by the numerous references to previous Peabody filings, Peabody emphasizes that its concern about the potential scope of the issue in this proceeding was previously raised, and that Peabody is not trying to restate those concerns "in a more convincing fashion," *Knauf*, at 2-3. *See* Peabody's Response at 21. Peabody respectfully requests the Board not to turn its back on this important matter of national significance not only for the part 71 federal permit program but also for all other federal permit programs under the CAA.

Peabody is aware of the Board's previous explanation that "[r[econsideration is generally reserved for cases in which the Board is shown to have made a demonstrable error, such as a mistake of law or fact." *In re Russell City Energy Ctr.*, PSD Appeal Nos. 10-01 through 10-05, at 2 (EAB Dec. 17, 2010) (Order Denying Motion and Supplemental Motion for Reconsideration and/or Clarification and Stay) (internal citations omitted). But Peabody is also aware that "[i]n the event that the EAB identifies deficiencies in the permit terms or permit-issuance process with the permit on appeal, such as issues of national significance, the EAB may determine that broader participation by interested parties is warranted, and therefore issue a formal grant of review under 40 C.F.R. § 124.19(c)." EAB Practice Manual at IV.D.1.[16]

This proceeding has given rise to serious concerns that EPA's process for delegation of its administrative authority for federal permit programs is broken, has been broken for decades, and needs to be fixed. Realization of the national scope of those concerns is reason alone for the Board to reconsider its Order and then grant review to discern the potential scope of the nationwide problem. The Board's failure to reach the issue of whether NNEPA correctly claims

[16] Peabody has previously noted the Board's conclusion that "the broad case management discretion found in part 124 cases naturally extends to part 71 cases, which unfold in accordance with procedures very closely parallel to those of part 124." *In re Peabody Western Coal Co.*, CAA Appeal No. 10-01, slip op. at 8 (EAB Aug. 13, 2010).

that it is permissible to include tribal permitting provisions in administering EPA's part 71 program is demonstrable error on an issue of national significance, warranting reconsideration.

CONCLUSION

Peabody respectfully submits that the Board's decision to deny review of Peabody's petition reflects clear errors of law. In particular, the Board failed to realize that NNEPA's challenged actions in this proceeding did not involve a consolidated permit that blended permit conditions from a delegated federal program with permit conditions based on state law. Rather, as Peabody has shown, NNEPA's challenged actions were those of an agency acting solely under its delegated authority to administer a part 71 federal permit program. Moreover, the Board failed to realize that NNEPA has unlawfully amended the part 71 federal program to include specific tribal permitting procedures under NNOPR, thereby establishing an unlawful tribal version of part 71 at NNOPR § 704 for NNEPA to administer as a delegate agency. Those mistakes by the Board resulted in the Board's erroneous conclusion that Peabody failed to demonstrate that NNEPA's challenged permitting actions were clear errors of law. Peabody respectfully requests the Board to rectify its errors and reconsider its Order accordingly.

The Board to date also has failed to appreciate the overall importance and national significance of the sole legal issue presented in this proceeding. The magnitude of the impact of the Board's resolution of that issue cannot be overstated; essentially every future EPA delegation of authority to administer a federal permit program would likely be affected by the Board's failure to review that issue. Some federal PSD permits already issued by state agencies that were acting under EPA's delegation of administrative authority may be based on fundamental legal error, which the Board should now address. The Board has erred in finding that the sole legal issue presented by Peabody's petition is "immaterial." Order at 14. Therefore, Peabody

likewise requests the Board to correct that mistake, reconsider its Order, and thereafter decide, in addition or in the alternative, to review that issue as a matter of national significance.

Respectfully submitted,

TGM

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

Counsel for Peabody Western Coal Company

CERTIFICATE OF SERVICE

I certify that a copy of PEABODY WESTERN COAL COMPANY'S MOTION FOR RECONSIDERATION OF ORDER DENYING REVIEW was mailed via first-class U.S. mail, postage prepaid, on this 26th day of March, 2012 to the following:

Jill E. Grant
Counsel to Navajo Nation EPA
Nordhaus Law Firm, LLP
Suite 801
1401 K Street, N.W.
Washington, D.C. 20005

Stephen B. Etsitty
Executive Director
Navajo Nation Environmental Protection Agency
P. O. Box 339
Window Rock, AZ 86515

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

Ivan Lieben
Assistant Regional Counsel
U.S. EPA Region IX
75 Hawthorne Street
San Francisco, CA 94105

TGM

John R. Cline
Attorney for Petitioner

Date: March 26, 2012