EXHIBIT H

Peabody's Comments on NNEPA-issued Draft Revised Part 71 Permit
and Draft Revised Statement of Basis (December 2010)

Peabody Western Coal Company

Comments on

REVISED DRAFT PART 71 OPERATING PERMIT
and
REVISED DRAFT STATEMENT OF BASIS

for

BLACK MESA COMPLEX
PERMIT # NN-OP 08-010

Submitted to

NAVAJO NATION
ENVIRONMENTAL PROTECTION AGENCY

December 2010

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I. BACKGROUND

Acting in accordance with procedures prescribed by the Navajo Nation Operating Permit Regulations (NNOPR), the Navajo Nation Environmental Protection Agency (NNEPA) now proposes to revise the following conditions in the part 71 federal permit for Peabody Western Coal Company's (Peabody's) Black Mesa Complex: Conditions III.B, IV.A, IV.B, IV.C, IV.D, IV.E, IV.G, IV.H, IV.I, IV.K, IV.L and IV.Q. Requirements prescribed by the NNOPR have been proposed as authority for each of those conditions.

For the reasons explained herein, Peabody objects to NNEPA's proposed actions because, under the Clean Air Act (CAA) and the part 71 federal regulations:

(1) NNEPA has no authority to issue Peabody's part 71 federal permit in accordance with tribal procedures in NNOPR;

(2) NNEPA has no authority, with the one exception noted below, to base the aforementioned conditions in Peabody's part 71 federal permit on tribal requirements of NNOPR; and

(3) NNEPA has no authority to include Condition IV.A, based solely on tribal requirements of NNOPR, in Peabody's part 71 federal permit.

In raising these objections, Peabody emphasizes that it is <u>not</u> challenging NNEPA's authority to issue a part 71 federal permit for Black Mesa Complex. Peabody also emphasizes that it is <u>not</u> challenging NNEPA's tribal authority to administer its Navajo Nation Operating Permit Regulations. Peabody supports the Navajo Nation's work to implement applicable requirements of its Clean Air Act as well as the federal Clean Air Act and regards the existing delegation of part 71 authority as a beneficial

step in the Navajo Nation's transition towards administration of its own EPA-approved part 70 tribal permit program.

The concern that gives rise to Peabody's objections herein involves the intersection of federal and tribal laws when a tribe has been delegated authority by EPA to administer a federal permit program under the CAA. Although such EPA delegations of authority have been a common practice with the states for several decades, that particular type of EPA action has not been frequently employed to date with tribes. However, as tribes continue to build greater capacities to manage air quality programs, such delegations of authority are expected to become more commonplace. For that reason, Peabody believes it is necessary and appropriate to address its objections at this time in order that the Clean Air Act's fundamental limitations on a delegate agency's actions may be better understood by all parties involved.

II. NNEPA'S CHALLENGED ACTIONS AS A DELEGATE AGENCY ARE NOT AUTHORIZED UNDER THE CLEAN AIR ACT.

Under the CAA and applicable regulations, a permit program, or portions thereof, may be administered within Indian country in one of three ways. *See, e.g., In re Power Holdings of Illinois, LLC*, PSD Appeal No. 09-04, slip op. at n.18 (EAB Aug. 13, 2010) (citing *In re Milford Power Plant,* 8 E.A.D. 670, 673 (EAB 1999) (addressing administration of the PSD program in a state). First, an eligible tribe can develop its own tribal permit program under tribal law. If those tribal permit regulations meet applicable CAA requirements, EPA can approve the tribal permit program and incorporate the tribal permit regulations as part of the tribe's implementation plan (TIP). Second, EPA may operate a federal permit program under a Federal Implementation Plan (FIP), i.e., in keeping with federal regulations promulgated by EPA. Third, instead of EPA operating a federal permit program, EPA can delegate its authority to operate that federal permit program to a tribe. Under that latter approach, the tribe as a "delegate agency" issues federal permits in accordance with existing federal regulations on behalf of EPA.

In the context of the CAA's title V operating permit program, an EPA-approved tribal operating permit program operated in accordance with tribal law is referred to as a

"part 70 program" because that tribal permit program must satisfy the requirements of 40 C.F.R. part 70. The part 70 program is an example of EPA's delegation of program authority, i.e., where primary responsibility for implementing the title V program under the Clean Air Act is transferred to a tribe.

On the other hand, EPA's federal operating permit program, whether operated by EPA or by a delegate tribal agency, is referred to as a "part 71 program" because that federal permit program must satisfy the requirements of 40 C.F.R. part 71. NNEPA's current authority to administer a part 71 program is an example of EPA's delegation of administrative authority, i.e., where EPA retains the primary responsibility for implementing the title V program, but the tribe is authorized to assist EPA by administering specified functions of the part 71 program.

A. Delegation of Administrative Authority According to EPA Regulations and Guidance

In its preamble to the proposed part 71 regulations, EPA's discussion of the delegation of administrative authority was less than a model of clarity. EPA contemplated at that time that 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. 20,823 (Apr. 27, 1995). However, when EPA finalized the part 71 requirements for delegation of authority to administer that program, EPA concluded that a nationally uniform regulation was necessary for purposes of carrying out EPA's functions under title V, and that individual rulemakings for each area that has a part 71 program would be needlessly burdensome on the Agency. 61 Fed. Reg. 34,204, 34,213 (July 1, 1996).

Those final part 71 regulations also provided an alternative approach in the event that EPA did determine that using the part 71 "national template" would not be appropriate for a particular tribe. In that case the part 71 regulations require EPA to conduct a separate rulemaking to merge appropriate portions of a tribal permit program with provisions of part 71 in order to craft a suitable part 71 federal program applicable only to that particular tribe. *Id.* at 34,213 (codified at 40 C.F.R. § 71.4(f)). Importantly, EPA has not engaged in such a rulemaking to merge any requirements of NNOPR with part 71 provisions. Thus, EPA's delegation of administrative authority to NNEPA

requires that delegate agency to implement the "national template" rule, i.e., the standard regulations of part 71.

Subsequent to promulgation of part 71, other EPA rulemakings have also provided for delegation of authority to administer a federal program. The preamble discussions accompanying those particular rules have more clearly explained the role of the delegate agency. For example, EPA has proposed a FIP to implement both a minor new source review program and a nonattainment major new source review program in Indian country. 71 Fed. Reg. 48,696 (Aug. 21, 2006). In the preamble to that proposed rule, EPA makes clear that a delegate tribal agency would administer the federal requirements under these programs. *Id.* at 48,721. The preamble explains how EPA promulgates its federal rules under a FIP, but a delegate tribal agency could subsequently assist EPA with administration of those federal rules. *Id.* at 48,696. In addition, EPA explains that the delegation approach in the proposed rulemaking provides for EPA to delegate administration of the federal program operating under federal law to interested tribes. *Id.* at 48,722. Under a delegation of administrative authority, delegated program functions would remain part of the FIP administered under federal law, and the delegate tribal agency would simply assist EPA with administration of the program to the extent of the functions delegated. *Id.* at 48,721.

Furthermore, preambles to EPA Region X's rulemaking for Indian reservations in Idaho, Oregon and Washington also clearly explain the role of a delegate tribal agency. EPA explains how the federal rules provide for administrative delegation from EPA to a tribe to implement a specific federal air rule. 70 Fed. Reg. 18,080 (Apr. 8, 2005). The Agency also explains that such a delegation would authorize a tribal government to administer specific functions of the federal rules, with tribal government employees acting as authorized representatives of EPA. *Id.* (emphasis added). Throughout the preambles to that rulemaking, EPA discusses its ability to delegate distinct and severable federal regulations to a tribe for implementation. *See, e.g.,* 67 Fed. Reg. 11,751 (Mar. 15, 2002).

Moreover, EPA has consistently explained in various EPA policy and guidance memoranda cited below that a state or tribe with delegated authority to administer a federal program implements the federal regulations of that program in lieu of EPA. The

delegation means that the state has the responsibility to review proposed construction projects in accordance with the federal permitting regulations; the state acts on behalf of EPA. Letter from Valdas Adamkus, EPA Region V, to Woodrow Myers, M.D., Indiana State Board of Health, of Sept. 11, 1985 (concerning delegation of authority to administer federal PSD program). The delegation results in a delegated state standing in for EPA as a matter of law. Memorandum from Karen Blanchard, EPA OAQPS, to EPA Regional Offices, of Oct. 6, 1994. With a delegation to administer EPA's new source review rules for Indian country, tribes would implement and issue permits under EPA's authority as written. EPA, "Tribal New Source Review Training," Dec. 20-21, 2006. The delegation process grants the state the authority to act in lieu of EPA. Memorandum from Joan Cabreza, EPA Region 10, to Region 10 State and Local Air Pollution Agencies, of Mar. 19, 1996. When 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. EPA, *Technical Support Document for Federal Operating Permits Program,* "Part 71 Response to Comments Document," 32 (Dec. 21, 1998).

In short, NNEPA's characterization of its authority as a delegate agency is simply wrong. Several EPA rulemakings and various EPA policy and guidance documents clearly confirm that EPA's delegation of authority to administer a federal program means that the delegate agency is responsible for administering specific federal regulations of that program. Contrary to NNEPA's assertion, EPA's delegation of authority to administer a federal program does not mean that the delegate agency is authorized either to supplement or replace any federal requirements of that program with counterparts based on tribal law. Stated differently, EPA rulemakings and guidance confirm that the Agency's delegation of authority to administer the part 71 federal program does not make NNEPA an independent permitting agency that is authorized to implement its own tribal requirements.

B. Delegation of Administrative Authority According to the EAB

The fundamental issue underlying Peabody's objections to NNEPA's particular actions in this proceeding was addressed previously by the EAB in the case of *In re West Suburban Recycling and Energy Center, L.P.*, 6 E.A.D. 692 (EAB Dec. 11, 1996) (hereinafter "*WSREC*"). In that case, the State of Illinois did not have an EPA-approved state implementation plan (SIP) for the prevention of significant deterioration (PSD) program. However, EPA had delegated authority to administer the federal PSD program, 40 C.F.R. § 52.21, to the Illinois Environmental Protection Agency (IEPA).

IEPA's preconstruction review was a single, integrated proceeding that combined federal PSD requirements and state permitting requirements based on state law. IEPA had contended that its authority in reviewing any construction permit application, including the PSD portion of that application, was grounded in the substantive and procedural review requirements of Illinois law. *WSREC* at 704. IEPA claimed that "USEPA has essentially instructed IEPA to perform its delegated PSD authority in a manner consistent with the Illinois statutes and rules that implement the SIP." *Id.* at 707 (internal citation omitted).

The EAB flatly rejected IEPA's position, commenting that IEPA's contention that its role in reviewing PSD permit applications was controlled by the substantive and procedural review requirements of Illinois law was "both inexplicable and plainly erroneous." *Id.* at 704. The EAB explained that EPA's delegation of federal PSD authority to IEPA did not alter the fact that the substantive PSD regulations and the federal procedures for processing PSD permit applications apply to the PSD component of any "integrated" construction permit application that IEPA may review. *Id.* at 703.

As the EAB further explained, "the delegation of PSD authority limited IEPA to exercising only the federal PSD authority contained in 40 C.F.R. § 52.21." *Id.* at 704. In other words, under its delegated PSD authority, IEPA was required "to apply the source review provisions of 40 C.F.R. § 52.21, which in turn encompass the permit issuance procedures of 40 C.F.R. Part 124. We have explained that a permit issuer exercising delegated PSD permit authority only 'stands in the shoes' of U.S. EPA." *Id.* at 707.

In sum, when IEPA processed the PSD portion of any "integrated" construction permit application as a delegate agency under the federal PSD permit program, IEPA

had no authority under the CAA to apply any substantive requirements under state law, nor did IEPA have any authority under the Act to process the PSD portion of the integrated permit application and issue the PSD portion of any permit in accordance with state procedures.

The basic legal principles that EAB explained in *WSREC* also apply to EPA's delegation of authority to administer other federal permit programs. Consistent with EAB's holding in *WSREC,* NNEPA must "stand in the shoes" of EPA when NNEPA exercises its delegated authority to administer the part 71 federal permit program. That is, when issuing the renewal part 71 federal permit to Peabody, NNEPA, as a delegate agency, is required under the CAA to apply only substantive part 71 requirements and to process Peabody's part 71 permit application using only federal procedures in part 71. EAB's holding in *WSREC* means that, when NNEPA issues the renewal part 71 federal permit to Peabody, NNEPA is prohibited from processing Peabody's application for that permit in accordance with NNOPR procedures and the federal permit is precluded from containing any condition based on NNOPR.

No Concurrent Permitting Under Tribal Law

In the *WSREC* case, a state agency with delegated authority to administer a CAA federal permit program issued an integrated permit that combined federal permit requirements with other permit conditions required only by state law. Resolution of the issue in this proceeding is even more straightforward because, unlike *WSREC*, this proceeding is not muddled by the additional consideration of a delegate agency also issuing a permit under tribal law.

NNEPA's permitting action in this proceeding consists only of the issuance of a part 71 federal permit. In particular, NNEPA's permitting action in this proceeding does not include issuance of a tribal permit under NNOPR. Indeed, because it is currently permitted under part 71, Black Mesa Complex is not required to have an operating permit issued under tribal law, i.e., under NNOPR. *See* NNOPR § 201(A). Thus, unlike *WSREC* where the state-issued permit had conditions required by federal permitting regulations and also had conditions required by state permitting regulations, the tribal-issued permit in this case should only contain conditions required by federal permitting regulations.

The tribal-issued proposed permit for Black Mesa Complex nevertheless contains conditions required by tribal permitting regulations. NNEPA claims that subjecting Black Mesa Complex to conditions required by tribal permitting regulations is allowed as a result of NNEPA having been delegated authority to administer the part 71 federal permit program.

Nothing under the Clean Air Act supports that NNEPA claim. As demonstrated above, EPA has repeatedly addressed the authority which governs a delegate agency's permit issuance under a federal permit program. Under the Act, substantive and procedural requirements in that federal permit must be based on the federal regulations of that CAA program. Thus, NNEPA's issuance of the part 71 federal permit for Black Mesa Complex in accordance with tribal regulations is unlawful under the Act. Likewise, NNEPA's inclusion of any requirement based on tribal regulations in the part 71 federal permit for Black Mesa Complex is not authorized by that federal law.

C. A Prime Example of What Has Not Been Delegated

NNEPA has continued to maintain that, in order for that tribal agency to administer the part 71 federal permitting requirements, it must exercise some of its own permit-processing procedures under NNOPR. A prime example of what additional authority NNEPA believes comes with its delegated federal authority in this instance is the tribal agency's approach to provisions for reopening a part 71 federal permit that NNEPA issues.

NNEPA has proposed revisions in Condition IV.L of the part 71 federal permit for Black Mesa Complex that would authorize NNEPA solely under tribal law (NNOPR § 406) to reopen and revise that permit for cause. In support of that proposed NNOPR-based action, NNEPA has previously argued that "nowhere do . . . provisions . . . of Part 71 preclude a non-federal permitting authority from reopening a permit under its own provisions." *In re Peabody Western Coal Company*, CAA Appeal No. 10-01, "Navajo Nation EPA's Reply to Peabody Western Coal Company's Response to Motion for Voluntary Remand," 7 (June 24, 2010) (emphasis added) (hereinafter "NNEPA June 2010 Reply"). Clearly, NNEPA does not understand how the Clean Air Act and the part 71 federal regulations constrain its actions under tribal law.

As the above statement by NNEPA illustrates, NNEPA believes that, completely independent of the Clean Air Act and any requirements of the part 71 federal permitting regulations, it is authorized under tribal law to reopen Peabody's part 71 federal permit and to revise provisions within that federal permit. In the words of EAB, Peabody can only characterize NNEPA's belief as "both inexplicable and plainly erroneous." *WSREC* at 704.

It should be clear from the previously discussed EPA rulemakings, guidance and administrative case law that NNEPA has no such independent authority under tribal law to take any action on a part 71 federal permit. Rather, the part 71 federal regulations explicitly provide for NNEPA, as the "permitting authority," to reopen and revise Peabody's part 71 federal permit in accordance with the applicable requirements of part 71. 40 C.F.R. § 71.7(f).

NNEPA has repeatedly failed to acknowledge that the nature and extent of its allowable actions as a delegate agency are addressed by those specific provisions of the part 71 regulations that apply to the "permitting authority." NNEPA's proposed actions that fall outside part 71's prescribed actions for the "permitting authority" are unlawful under the Clean Air Act. Consequently, under the Act, NNEPA is precluded from relying solely on its own tribal authority to reopen and revise Peabody's part 71 federal permit or, for that matter, to take any other action on that permit.

III. NNEPA'S "ADEQUATE AUTHORITY" TO ADMINISTER A DELEGATED PART 71 FEDERAL PROGRAM

40 C.F.R. § 71.10(a) provides: "In order to be delegated authority to administer a part 71 program, . . . the laws of the . . . Indian tribe [must] provide adequate authority to carry out all aspects of the delegated program." NNEPA has construed that language to mean that "there is a federal requirement for tribes to have their own authorities to administer the Part 71 program, including authorities for permit processing, monitoring and reporting, and permit enforcement." NNEPA, Permit No. NN-OP 08-010 (Peabody Western Coal Company – Black Mesa Complex), Responses to Comments, 9 (Dec. 7, 2009) (hereinafter "Responses to Comments"). NNEPA has also stated that "NNEPA is not acting as a deputized agent of EPA in administering the Part 71 program, but rather

is an independent permitting agent required to have its own legal authorities." NNEPA June 2010 Reply at 6.

As Peabody's explanations in the preceding section of these comments demonstrate, NNEPA has misconstrued the meaning of 40 C.F.R. § 71.10(a). In order to administer a delegated part 71 federal program, 40 C.F.R. § 71.10(a) does not require, contrary to NNEPA's assertion, that tribes have their own separate tribal regulations for permit processing, monitoring and reporting, and permit enforcement. Rather, EPA regulations and guidance as well as the EAB's *WSREC* decision confirm that a delegate agency must implement a federal permit program using only the federal substantive and procedural requirements of that program. Thus, 40 C.F.R. § 71.10(a) simply means that NNEPA must be authorized by its own tribal government to implement the part 71 federal regulations.

The discussion which follows in this section first demonstrates that NNEPA does indeed have the requisite "adequate authority to carry out all aspects of the delegated [part 71 federal] program." In addition, the following discussion also addresses several of NNEPA's alleged indicia of its "adequate authority" and explains why NNEPA's claims are incorrect.

A. NNEPA Has the "Adequate Authority"

The Navajo Nation Air Pollution Prevention and Control Act provides that "the Director [of NNEPA] may . . . enter into a delegation agreement with USEPA providing for the Director to implement a CAA Title V operating permit program pursuant to 40 C.F.R. part 71, . . ." 2 N.N.C. § 1134(A)(3). That statutory authority is implemented by NNOPR § 704(A) which provides that "40 C.F.R. part 71 is incorporated by reference into [NNOPR] for purposes of administering the delegated Part 71 program, . . ."

In short, those two, complementary tribal authorities – 2 N.N.C. § 1134(A)(3) and NNOPR § 704(A) – are all that is needed to demonstrate that NNEPA has been authorized under tribal law to administer a part 71 federal program, i.e., that NNEPA has the requisite "adequate authority to carry out all aspects of the delegated program."

B. Specific NNOPR Provisions Do Not Provide "Adequate Authority"

NNOPR § 701 authorizes NNEPA "to issue, amend, revoke, reissue, modify, enforce and renew Part 71 permits . . . pursuant to the procedures set forth both in

[NNOPR] and 40 C.F.R. part 71." NNOPR §§ 704(B) and 705 identify specific Navajo Nation procedures in NNOPR that "shall apply to part 71 permits in addition to the part 71 procedures." *Id.* NNEPA asserts that those particular provisions of NNOPR authorize its permitting actions that are now challenged by Peabody, i.e., issuance of proposed revisions to Peabody's part 71 federal permit in accordance with procedures under NNOPR and inclusion of conditions based on NNOPR requirements in that permit. Responses to Comments at 10.

Peabody has previously demonstrated that EPA regulations, guidance and administrative case law all require a delegate agency administering a federal permit program to issue the federal permit solely in accordance with federal substantive and procedural requirements of that federal program. In contrast, NNEPA regulations at NNOPR §§ 701, 704(B) and 705 also require NNEPA to issue part 71 federal permits in accordance with tribal requirements. As such, those particular NNOPR provisions are unlawful under the Clean Air Act; they simply cannot authorize NNEPA's permitting actions that are now challenged by Peabody. Indeed, NNEPA has no authority whatsoever under the Clean Air Act to amend, supplement or otherwise change the part 71 federal permit program

C. The Delegation Agreement Does Not Provide "Adequate Authority"

NNEPA's misunderstandings about the nature and extent of the "adequate authority" required of a part 71 delegate agency apparently arise in large part due to its erroneous interpretations of certain statements in the EPA-NNEPA Delegation Agreement and related documents. *See Delegation of Authority to Administer a Part 71 Operating Permits Program,* "Delegation Agreement between U.S. Environmental Protection Agency and Navajo Nation Environmental Protection Agency," Oct. 15, 2004 (hereinafter "Delegation Agreement"); EPA Region IX, "Eligibility Determination for the Navajo Nation for Treatment in the Same Manner as a State for Purposes of Delegation of Administration of the Clean Air Act Title V, 40 CFR Part 71 Program," Oct. 13, 2004 (hereinafter "Eligibility Determination"); NNEPA, "Program Description and Transition Plan for a Delegated Part 71 Program," July 16, 2004 (hereinafter "Transition Plan").

1. *The Delegation Agreement Has No Force of Law for Peabody*

Before examining NNEPA's misunderstandings about what the Delegation Agreement and its related documents do, a more fundamental flaw in NNEPA's reliance on those documents must be recognized. In short, the Delegation Agreement and its related documents have no force of law with respect to Peabody.

The basic purpose of a delegation agreement under part 71 is to specify EPA's and the delegate agency's mutual understanding of the extent to which the delegate agency is responsible for administering the part 71 federal program. See, e.g., 40 C.F.R. § 71.10(a). As its name implies, the Delegation Agreement is essentially a contract between the two parties – EPA and NNEPA. Importantly, as explained below, the Delegation Agreement does not constitute an EPA rulemaking that could affect Peabody's rights and obligations under the part 71 federal permit program.

As if to imply that Peabody has already waived any opportunity to challenge the contents of the Delegation Agreement, NNEPA has previously observed that the Company did not challenge the Agreement's contents when it was originally executed in October 2004. NNEPA June 2010 Reply at 7. However, there is good reason for the lack of any Peabody comments on that document at that time. That is, a Delegation Agreement under part 71 does not constitute a rulemaking under the Clean Air Act. Consequently, when notice of the execution of the Delegation Agreement was published in the Federal Register, 69 Fed. Reg. 67,578 (Nov. 18, 2004), the Agreement did not constitute a proposed EPA rulemaking for which public comment was sought.

As EPA explained when it promulgated part 71:

> 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 other words, the delegation

to NNEPA amounts to little more than EPA's transfer of its administrative responsibilities to implement the part 71 federal regulations on the Navajo Nation's Reservation. Because that delegation process did not require EPA to approve any new rules, public comment on that transfer of part 71 administrative responsibilities was unnecessary.

In sum, the EPA-NNEPA Delegation Agreement and related documents have no force of law with respect to third parties, in general, and with respect to Peabody and its part 71 permit, in particular. Consequently, those documents cannot lawfully authorize either NNEPA's use of NNOPR procedures in the issuance of Peabody's part 71 federal permit or NNEPA's imposition of NNOPR requirements as conditions in Peabody's part 71 federal permit.

2. *Delegation Agreement*

Because the EPA-NNEPA Delegation Agreement and its related documents have no force of law under the CAA, that fact by itself is sufficient to reject various NNEPA claims that those documents authorize NNEPA to process Peabody's part 71 federal permit in accordance with procedures under NNOPR and to include NNOPR requirements as conditions in that permit. Nevertheless, Peabody has chosen to comment herein on specific NNEPA allegations regarding those documents, thereby further exposing NNEPA's lack of legitimate authority to take the permitting actions which Peabody now contests.

For example, section IX.2 of the Delegation Agreement states: "Until 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 Navajo Nation Operating Permits Regulation." NNEPA has previously cited that provision of the Delegation Agreement to support its belief that "tribes [must] have their own authorities to administer the Part 71 program, including authorities for permit processing . . ." Responses to Comments at 9.

However, NNEPA has taken § IX.2 of the Delegation Agreement completely out of context. Although that provision of the Agreement does require NNEPA to process part 71 permits in accordance with Subpart IV of NNOPR, that requirement applies only "in the event EPA publishes a notice of approval of the Tribe's operating permits program [NNOPR] under Part 70." Delegation Agreement, § IX.1. In other words, once

EPA approves NNOPR under part 70, NNEPA must then apply its part 70 regulations, including Subpart IV of NNOPR, to process any part 71 permits that have yet to be converted to part 70 permits.

Thus, § IX.2 of the Delegation Agreement does not authorize NNEPA's reliance on Subpart IV of NNOPR to process part 71 permits at any time other than some time in the future after EPA has approved NNOPR under part 70. Contrary to NNEPA's understanding, § IX.2 does not provide NNEPA with "adequate authority" to carry out all aspects of the delegated part 71 federal program.

In another misunderstanding of the Delegation Agreement, NNEPA has incorrectly interpreted sections IV.1, IV.2 and V.4 as authorizing NNEPA's use of NNOPR procedures to administer the part 71 federal program. NNEPA has read more into those provisions than what their words actually mean. Each of those provisions simply acknowledges that NNEPA intends to supplement requirements in part 71 with requirements in NNOPR. NNEPA has incorrectly construed that acknowledgment as authorization to add NNOPR requirements to the part 71 permit, even though each provision plainly states that NNOPR requirements are "not a requirement of the Delegation Agreement and not part of the administration of the federal Part 71 program." Delegation Agreement, §§ IV.1, IV.2 & V.4 (emphasis added).

Peabody believes that those provisions may have been included in the Delegation Agreement under a mistaken belief that NNEPA would also be taking a separate tribal permitting action in this proceeding. That, however, is not the case since in this proceeding NNEPA is only exercising its delegated authority to administer the part 71 program by issuing a part 71 federal permit for Black Mesa Complex. If NNEPA's intended supplements of that part 71 federal permit are "not part of the administration of the federal Part 71 program," then it should be obvious that NNEPA's proposed "supplements" to which Peabody now objects have no lawful place within the four corners of the part 71 federal permit for Black Mesa Complex. Of course, that conclusion is fully consistent with EPA's regulations, guidance and administrative case law, as previously discussed.

3. *Eligibility Determination*

The Tribal Air Rule prescribes four criteria that must be satisfied by a tribe for it to be eligible for treatment as a state under the Clean Air Act. 40 C.F.R. § 49.6. One of those eligibility criteria is simply a confirmation that "[t]he functions to be exercised by the Indian tribe pertain to the management and protection of air resources . . ." *Id.* Clearly, a function consisting of the Navajo Nation's administration of the part 71 federal permit program "pertain[s] to the management and protection of air resources." That particular function is all that EPA needed to identify in order to satisfy the eligibility criterion of concern.

Nevertheless, for some unknown reason EPA found it necessary to respond to that eligibility criterion with more detailed, irrelevant descriptions of the Navajo Nation's authorities and procedures. In particular, in section (c) of the "Eligibility Requirements" of EPA's Eligibility Determination, EPA states the following:

> [T]he Tribe has enacted the Navajo Nation Air Pollution Prevention and Control Act and the Navajo Nation Air Quality Control Operating Permit Regulations; they contain all relevant authorities and procedures for administration of the federal program. In particular, the Tribal statute and regulations establish administrative authorities and procedures for the receipt, processing, and issuance or denial of permit applications, the collection of permitting fees, and the pursuit of various enforcement-related activities including development of compliance plans and schedules of compliance, monitoring, inspections, audits, requests for information, issuance of notices, findings and letters of violation, and development of cases up until filing of a complaint or order.

NNEPA has construed the "authorities and procedures" referenced above to be the tribal-only provisions in NNOPR. That interpretation, however, cannot stand. As previously explained in detail, a delegate agency administering a federal permit program must rely only on the federal authorities and the federal procedures of that program.

One underlying problem with the above statement from the Eligibility Determination is that it addresses more than just the "authorities and procedures to administer the federal program." As previously explained, the tribal statutory authority for NNEPA to administer a delegated part 71 federal program is provided at 2 N.N.C.

§ 1134(A)(3). The tribal regulatory authority and related procedures for NNEPA to administer a delegated part 71 federal program are provided at NNOPR § 704(A), which incorporates the part 71 regulations by reference.

On the other hand, "administrative authorities and procedures for . . . the collection of permitting fees" are not required for NNEPA's administration of the part 71 federal program. As explained in Section V below, under the circumstances of NNEPA's delegated authority, such fees are not collected under the federal program to be administered by NNEPA. Thus, while NNEPA has its own tribal authorities and procedures for collection of permit fees, they should not have been characterized in the Eligibility Determination as "authorities and procedures to administer the federal program."

Moreover, NNEPA's administration of the part 71 federal program does not require "administrative authorities and procedures for . . . the pursuit of various enforcement-related activities including ..." The part 71 federal regulations may address those types of activities, but only in the context of NNEPA's authority to collect fees to cover the costs of such activities involving part 71 sources, 40 C.F.R. § 71.9(b). The part 71 federal program itself simply does not require the conduct of those enforcement-related activities. Thus, as explained further in Section IV below, any tribal authorities and procedures related to NNEPA's conduct of enforcement-related activities cannot constitute "authorities and procedures to administer the [part 71] federal program."

In conclusion, when confirming that the Navajo Nation's application for treatment as a state meets one of the eligibility criteria, the Eligibility Determination contains unnecessary discussion about various tribal "authorities and procedures for administration of the federal program." That discussion includes details about NNEPA's authorities and procedures involving permitting fee collection and enforcement-related activities. Those particular authorities and procedures, however, are not required for NNEPA's administration of the federal program.

The Navajo Nation was the first tribe to be delegated authority to administer the part 71 federal program. Thus, it is understandable that some of the documentation describing the scope and process for that delegation may mischaracterize the true

nature and extent of the tribal authorities and procedures required to administer the part 71 federal program. Nevertheless, incorrect or misleading statements within that documentation cannot negate a fundamental Clean Air Act requirement that a delegate agency must administer a federal permit program only in accordance with federal substantive and procedural requirements of that program. Despite the above-quoted confusing discussion in the Eligibility Determination, EPA elsewhere has confirmed that that "the federal Part 71 Program will continue to be implemented under federal authority throughout the areas described and applied for by the Tribe[.]" Eligibility Determination at 3 (emphasis added).

Finally, the part 71 federal regulations prescribe that a tribe may be delegated authority to administer the part 71 federal program only if that tribe is "eligible," as defined at 40 C.F.R. § 49.2. However, Peabody notes that more recent EPA regulations do not require an initial determination of a tribe's eligibility as a prerequisite to delegation of authority for the tribe's administration of a federal program. *See, e.g.*, 71 Fed. Reg. 48,721 (Aug. 21, 2006) (proposed major and minor new source review in Indian country) ("Tribes would not need to seek [treatment as a state] under the [Tribal Air Rule] in order to request delegation of administration of certain aspects of these Federal NSR programs."); 67 Fed. Reg. 11,752 (Mar. 15, 2002) (FIP for Indian Reservations in Region X) ("When EPA approves a Tribal eligibility application and approves a TIP, the approved Tribe will manage the approved air quality program under Tribal law, and the approved Tribal program is Federally enforceable. In contrast, the delegation approach proposed in these rules provides for EPA to administratively delegate its own Federal authority to a qualified Tribe to implement specific Federal rules.") (emphasis added).

It appears that an "eligibility determination" is now required only when a tribe seeks treatment as a state in order to obtain EPA approval of a tribal program based on tribal authority, e.g., a part 70 tribal operating permit program. Thus, under EPA's more recent regulatory approach to delegation of administrative authority, an eligibility determination would not have been required for delegating authority to administer the part 71 federal program to the Navajo Nation. Peabody believes that EPA's more

recent regulatory approach to delegation of administrative authority provides further rationale for discounting much of the contents of the Eligibility Determination for the Navajo Nation.

4. *Transition Plan*

Sections V.C and V.E of NNEPA's Transition Plan require NNEPA to process part 71 permit applications pursuant to procedures that include Subpart IV of NNOPR. Section V.D of that Transition Plan requires NNEPA to prepare a statement of basis in accordance with provisions that include NNOPR § 401(B). That Transition Plan was developed by NNEPA. That document's reliance on permit-processing procedures of NNOPR to issue part 71 federal permits reflects NNEPA's failure to recognize that a delegate agency is not authorized to use tribal procedures when administering the part 71 federal program.

As demonstrated previously, NNEPA's administration of the part 71 program as a delegate agency must rely only on federal substantive and procedural requirements of part 71. Sections V.C, V.D and V.E of the Transition Plan violate that constraint under the Clean Air Act. Thus, §§ V.C, V.D and V.E of the Transition Plan cannot lawfully provide NNEPA with adequate authority to carry out any aspect of the delegated part 71 program.

D. No "Adequate Authority" by Analogy to Part 70

In this proceeding, Peabody challenges proposed conditions III.B, IV.A, IV.B, IV.C, IV.D, IV.E, IV.G, IV.H, IV.I, IV.K, IV.L and IV.Q in the part 71 federal permit for Black Mesa Complex because each condition contains a requirement based on tribal law. The regulations for a part 70 tribal (or state) permit program provide that "any terms and conditions in the permit that are not required under the Act or under any of its applicable requirements" shall be "specifically designate[d] as not being federally enforceable under the Act." 40 C.F.R. § 70.6(b)(2). Citing § 70.6(b)(2) regarding the inclusion of tribal-only (or state-only) requirements in a part 70 permit, NNEPA has previously asserted that "it is equally appropriate in the Part 71 context to include permit conditions that are state- or tribe-only enforceable." Letter from Jill Grant, counsel to NNEPA, to John Cline, counsel to Peabody, 2 (Mar. 22, 2010). However, NNEPA's

arguments for why such part 71 treatment of tribal-only conditions is "equally appropriate" are not based on the law.

Most importantly, the Clean Air Act does not allow substantive or procedural requirements in a part 71 federal permit that are based on tribal law. Moreover, the challenged conditions are not being proposed in conjunction with a separate permitting action under tribal law. In short, there simply is no federal or tribal legal authority for the NNOPR-based requirements that NNEPA seeks to include as "supplements" in the part 71 federal permit for Black Mesa Complex (with the exception of Condition IV.A tribal authorization of permit fees which is addressed later in these comments).

Nevertheless, NNEPA has claimed that, because having permit processing procedures under NNOPR was a prerequisite for delegation of the part 71 program to NNEPA, inclusion of NNOPR-based conditions as tribal-only elements of Peabody's part 71 federal permit is authorized. *Id.* at 1. NNEPA's premise for that argument is simply wrong; having permit processing procedures under NNOPR was not a prerequisite for delegation of the part 71 administrative authority to NNEPA. As explained earlier, and contrary to NNEPA's understanding, NNEPA was not required to demonstrate that it had adequate, independent authorities such as its own permit processing requirements based on tribal law. *Id.* In fact, NNEPA's use of its own permit processing procedures under NNOPR when issuing a part 71 federal permit as a delegate agency is prohibited under the Clean Air Act.

NNEPA has also argued that, to be eligible for a Part 71 delegation, a state or tribe must demonstrate that its laws provide adequate authority just as a state or tribe must do to be approved to implement a Part 70 program. *Id.* at 2. While that statement is true in the broadest sense, it is also very misleading.

The "adequate authority" required for approval of a part 70 state/tribal permit program is not the same as the "adequate authority" required for delegation of part 71 administrative authority. The adequate authority for part 70 approval is far more extensive than its counterpart for part 71 delegation. For example, a tribe's "adequate authority" for part 70 purposes includes the development and adoption of tribal regulations that fully implement all title V requirements of the CAA. In contrast, a tribe's "adequate authority" for part 71 purposes can be satisfied, as NNEPA has done, by the

mere incorporation of part 71 regulations by reference. Thus, NNEPA's statement that part 70 approval and part 71 delegation each require a demonstration of "adequate authority" constitutes little more than a meaningless "apples-and-oranges" comparison that says nothing to justify inclusion of tribal-only requirements in a part 71 federal permit.

As further support for its claim that tribal-only requirements should be included in part 71 federal permits, NNEPA has previously cited EPA's decision in *In the Matter of Pacific Coast Building Products, Inc.*, Clark County (Nev.) Health District Permit No. A00011 (Adm'r Dec. 10, 1999) (hereinafter "*Pacific Coast*"). According to NNEPA, the *Pacific Coast* decision is precedent for NNEPA's proposed inclusion of tribal-only conditions in Peabody's part 71 federal permit because "EPA found that local-only enforceable and federally enforceable requirements could be streamlined." That NNEPA characterization, however, misrepresents EPA's actual holding in *Pacific Coast*.

The *Pacific Coast* case involved a permitting action by a local air pollution control agency, i.e., the Clark County (Nevada) Health District (CCHD). CCHD implemented an EPA-approved part 70 permit program. In issuing a part 70 permit, CCHD had included a requirement in that permit based on a CCHD requirement that had yet to be approved in Nevada's SIP for Clark County. The CCHD-only requirement in the part 70 permit was more stringent than its counterpart that was currently part of the SIP. The part 70 permit was challenged because it had included a "local-only" requirement instead of the federally enforceable requirement in the SIP.

Under EPA's "White Paper 2" streamlining policy for title V permit conditions, multiple applicable requirements pertaining to the same matter may be streamlined into a single permit condition that will assure compliance with all of those applicable requirements. EPA Office of Air Quality Planning and Standards, "White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program," 7 (Mar. 5, 1996). Based on that streamlining policy, EPA upheld CCHD's part 70 permit that included only the non-SIP requirement in the permit. In doing so, EPA explained that the streamlined, more stringent requirement, which was originally "local-only," not only subsumed its corresponding SIP-approved requirement but the "local-only" requirement also became a federally enforceable condition when included in the part 70 permit.

The facts of this proceeding are much different from the *Pacific Coast* circumstances. Here we do not have a single agency administering its own part 70 program and addressing two of its own requirements. Instead, here we have one tribal agency administering a federal agency's part 71 program and addressing one federal requirement and one tribal-only requirement. Here we do not have a tribal-only requirement being added to a part 71 federal permit and in the process subsuming a corresponding, less stringent federal requirement. Rather, we have a part 71 federal permit to which NNEPA proposes simply to add a tribal-only requirement that would co-exist with its corresponding part 71 requirement that remains in the permit. Finally, here we do not have a tribal-only requirement becoming federally enforceable as a consequence of being added to a part 71 federal. Instead, NNEPA proposes to have the tribal-only requirement remain non-federally enforceable after being added to the part 71 permit.

In sum, and once again contrary to NNEPA's assertion, EPA's *Pacific Coast* decision does not support NNEPA's proposition that a tribal-only requirement can be added to a part 71 federal permit. NNEPA's proposition fails to account for the fact that this particular proceeding involves two separate agencies, each with its own laws and regulations. Under a part 70 tribal program, a tribe is allowed to add a tribal-only requirement to a part 70 tribal permit because tribal law governs all of the requirements in that permit. That is, a single agency has authority to enforce all requirements in the part 70 permit.

In this proceeding, however, a tribe proposes to add tribal-only requirements to a part 71 federal permit. A permit issued by a delegate agency is still an EPA-issued permit. *See, e.g., In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 169 (June 22, 2000). Consequently, although the tribal-issued part 71 permit remains a federal permit, EPA and citizens would lack the authority to enforce certain conditions in that federal permit, namely the tribal-only requirements.

A permitting result where EPA would have no authority to enforce certain conditions in a part 71 federal permit strongly suggests that treatment of tribal-only conditions in a manner analogous to their treatment allowed with part 70 tribal permits is not a good "fit" for the part 71 program. See 61 Fed. Reg. 34,219 (July 1, 1996) (part

71 permits not to include non-federally enforceable requirements); *id.* at 34,207 (all terms and conditions in a part 71 permit enforceable by EPA and citizens under the Act).

IV. THE PROPOSED STATEMENT OF BASIS CONTAINS SEVERAL INCORRECT OR MISLEADING STATEMENTS.

NNEPA's proposed revisions to draft permit conditions has been accompanied by a proposed statement of basis that must "set[ ] forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions)." 40 C.F.R. § 71.7(a)(5). The proposed statement of basis contains a section entitled "Revisions to Portions of the Title V Permit" which was not contained in the initial statement of basis that accompanied NNEPA's issuance of the renewed part 71 federal permit for Black Mesa Complex in December 2009. As that new section explains, NNEPA is proposing revisions to draft permit conditions in Peabody's part 71 federal permit "to clarify the legal authorities for those provisions." In Peabody's opinion, the proposed revisions with their accompanying statement of basis fail to achieve NNEPA's objective. Rather than clarify the applicable legal authorities, NNEPA's explanations only further confound the legal relationship between federal and tribal authorities when a tribe has been delegated authority to administer a federal permit program.

A. A Delegation of Authority to Administer a Part 71 Federal Program Does Not Include a Delegation of Authority to Enforce That Program.

Section 4 ("Revisions to Portions of the Title V Permit") of the proposed statement of basis contains the following statement:

> NNEPA is proposing to revise the permit sections listed in Section (a) of this Statement of Basis to clarify the legal authorities for those provisions. Specifically, in delegating to NNEPA the authority to administer the Part 71 operating permit program, USEPA determined that NNEPA had adequate independent authority to administer the program, as required by 40 C.F.R. § 71.10(a). USEPA found such authority consisted of having adequate permit processing requirements and adequate permit enforcement-related investigatory authorities. Deleg. Agr. §§ IV, V, VI.1, IX.2.

Peabody's preceding comments herein have extensively addressed the "adequate permit processing requirements" that NNEPA incorrectly believes consist of its own permitting procedures under tribal law. Peabody also takes exception to the above-referenced "adequate permit enforcement-related investigatory authorities" which NNEPA believes it must have as a condition of its delegation to administer a part 71 federal program.

Contrary to NNEPA's statement in the new section of the proposed statement of basis, the requisite "adequate authority" to administer the delegated part 71 federal program does not include "adequate permit enforcement-related investigatory authorities." In keeping with 40 C.F.R. § 71.10(a), NNEPA has only been delegated "authority to administer" a part 71 operating permits program. Emphasis added. The part 71 regulations that must be used to administer the part 71 federal program do not contain enforcement-related provisions that could be delegated to NNEPA. Notably, 40 C.F.R. § 71.10(a) does not address delegation of the "authority to administer and enforce" a part 71 operating permits program.

Peabody acknowledges that the Delegation Agreement between EPA and NNEPA contains Section VI entitled "Enforcement," wherein certain enforcement matters are addressed. However, because part 71 regulations do not provide for any enforcement-related actions, the only reasonable conclusion is that the Delegation Agreement relied on some authority other than part 71 to include those enforcement-related provisions.

That reliance on some authority other than part 71, however, begs the question of why enforcement issues have been addressed in the Delegation Agreement. The purpose of a delegation agreement is to specify provisions of the part 71 federal program that the delegate agency shall be authorized to implement. 40 C.F.R. § 71.10(a). However, the Delegation Agreement in this proceeding also specifies provisions that NNEPA ostensibly is authorized to implement that are not provisions of part 71, i.e., enforcement-related matters. Peabody questions whether EPA has exceeded its authority under part 71 by inappropriately attempting to delegate enforcement provisions that are not included in the part 71 federal program.

This enforcement concern has been addressed more fully in subsequent EPA rulemakings that include provisions for the delegation of authority to administer a federal program. EPA has expressly stated in its preambles to those rulemakings that enforcement authority is not part of that delegation. *See, e.g.,* 71 Fed. Reg. 48,722 ("For these administratively delegated programs, Federal program requirements will continue to be subject to enforcement by us [EPA], not the delegate tribal agency, under Federal law."); *see also* 67 Fed. Reg. 11,752 ("With delegated Federal programs, the Federal requirement administered by the delegated Tribe is subject to enforcement by EPA, not the Tribe, under Federal law.").

In conclusion, a new section in the proposed statement of basis for Peabody's renewed part 71 federal permit speaks to NNEPA's exercise of enforcement provisions as being part of NNEPA's delegated authority to administer a part 71 federal program. Peabody questions whether a delegation of authority to administer a part 71 federal program lawfully includes either a delegation of federal enforcement duties or an authorization to implement tribal-only enforcement requirements.

B. Tribal Citations for Conditions in Peabody's Part 71 Federal Permit Do Create New Requirements.

The above-referenced new section in the proposed statement of basis for Peabody's part 71 federal permit states that federal and tribal provisions are cited in parallel, but "[t]hese parallel tribal citations do not create any new requirements." That statement is simply incorrect. A key reason why Peabody has challenged NNEPA's authority as a delegate agency to add those parallel tribal citations in the Company's part 71 federal permit is because they do create new requirements.

Black Mesa Complex has been subject to few, if any, new applicable requirements under the CAA since EPA's issuance of the original part 71 permit for that source. Thus, when Peabody's renewed part 71 federal permit is issued, Peabody has a reasonable expectation to receive a renewed permit that contains few, if any, new requirements.

However, as now proposed, conditions in the renewed part 71 federal permit for Black Mesa Complex would contain various requirements based on Navajo Nation law. Notwithstanding Peabody's challenge to those tribal-based conditions as not being

authorized under the Clean Air Act, the fact remains that Peabody's proposed part 71 federal permit contains conditions based on tribal law that are enforceable only under tribal law. Because those circumstances did not exist with Peabody's original part 71 federal permit, NNEPA lacks any factual basis for stating that "[t]hese parallel tribal citations do not create any new requirements."

The process for renewal of Peabody's part 71 federal permit would result, if NNEPA has its way, in that permit containing requirements that must comply not only with part 71 federal permitting regulations but also now with Navajo Nation permitting regulations. Peabody does not believe that an EPA delegation of authority to administer a federal permit program under the CAA can lawfully authorize a permit issued under that federal program to contain requirements of a non-federal government. There may be non-federal requirements that arise from EPA's delegation of federal authority, e.g., applicability of NNEPA fee collection provisions for part 71 sources, but those non-federal requirements are not part of that delegation of federal authority.

C. NNEPA Proposes to Issue a "Hybrid" Permit

Peabody has applied for renewal of a part 71 federal permit for Black Mesa Complex. That application constitutes a request for NNEPA to exercise its delegated authority to administer the part 71 federal permit program, thereby renewing that part 71 federal permit. Instead, NNEPA has proposed to issue something other than just a part 71 federal permit. As NNEPA explains in the new section of its proposed statement of basis: "The proposed revisions would clarify that the fee provision in § IV.A of the permit is not a term or condition of the Part 71 permit, but rather the tribal component of the permit . . ." In that same section of the statement of basis, NNEPA comments that "[a]ll the terms and conditions of the Part 71 permit are federally enforceable" and also observes that "the tribal component of the permit . . . is not federally enforceable."

The plain language of those statements reveals that NNEPA, acting solely under its delegated federal authority, proposes to issue some form of "hybrid" permit rather than the required part 71 federal permit. That hybrid permit apparently contains not only "the Part 71 permit" but also "the tribal component of the permit."

Such a hybrid permit is simply not compatible with applicable federal and tribal laws. On one hand, the Clean Air Act does not authorize a delegate agency to issue a

part 71 federal permit having requirements based on tribal law. That CAA prohibition applies to NNEPA's regulatory attempt to graft certain tribal-only NNOPR provisions onto the part 71 regulations that NNOPR has incorporated by reference. On the other hand, in this proceeding NNEPA is not acting to issue a separate permit based on tribal law. Consequently, there clearly are no legal grounds for NNEPA to "supplement" Peabody's part 71 federal permit with requirements based on tribal law.

V. NNOPR'S PERMIT FEE REQUIREMENT IS LAWFUL, BUT IS NOT A PART OF PEABODY'S PART 71 PERMIT

In fully delegating authority to NNEPA to administer the part 71 federal permit program, EPA has determined that NNEPA, in accordance with Navajo Nation law, can collect fees from part 71 sources sufficient to fund NNEPA's administration of the part 71 federal program. 69 Fed. Reg. 67,579. In keeping with 40 C.F.R. § 71.9(c)(2)(ii), EPA has therefore suspended its collection of part 71 fees from part 71 sources on the Navajo Reservation. *Id.*

In those circumstances, i.e., where the delegate agency has (1) a full delegation of authority to administer the part 71 federal program and (2) authority to collect sufficient fees under tribal law, there is no provision under 40 C.F.R. part 71 that authorizes the delegate agency to collect fees from part 71 sources. Thus, any fee to be paid to NNEPA by Peabody and other part 71 sources to cover the tribe's cost of administering the part 71 federal program must be collected solely under Navajo Nation law.

The applicable Navajo Nation authority in this instance is NNOPR § 705 (Part 71 permits shall be administered with NNOPR Subpart VI – Permit Fees §§ 601-603). Peabody does not question NNEPA's authority under tribal law to collect a fee from Black Mesa Complex and other part 71 sources. Importantly, however, NNEPA must recognize that such fee collections are not a part of the part 71 federal permit program.

That is, as Peabody has previously explained in detail, NNEPA's delegated authority to administer the part 71 program is constrained under the Clean Air Act to implement only federal substantive and procedural requirements of part 71. NNEPA's fee collection provisions under NNOPR are tribal requirements only; they are not

requirements under part 71. Consequently, NNEPA's fee collection provisions cannot be conditions in the part 71 federal permit for Black Mesa Complex and for other part 71 sources on the Reservation.

Nevertheless, Peabody would consider accepting an attachment to the part 71 federal permit for Black Mesa Complex which establishes the subject fee for Black Mesa Complex under tribal law and NNEPA's method for collecting it in accordance with NNOPR Subpart VI. That attachment would need to specifically designate that the terms and conditions in that attachment are authorized solely by NNOPR Subpart VI, are not federally enforceable and consequently are not a part of Peabody's part 71 permit. At this time, however, Peabody has not evaluated whether NNEPA is authorized under tribal law to develop and issue such an attachment to a part 71 federal permit.

VI. ADMINISTRATIVE PERMIT AMENDMENTS

The part 71 regulations provide a means for making administrative amendments to part 71 permits. 40 C.F.R. § 71.7(d)(1)(i)-(vi) lists different types of permit revisions that qualify for treatment as administrative permit amendments.

A. Request to Change Name of Part 71 Source

Section 1(d) of the proposed statement of basis addresses certain changes to the mining operations at the Kayenta and Black Mesa Mines. In view of those changes, Peabody respectfully requests that the name of the part 71 source that is the subject of this proceeding be changed to "Kayenta Complex" in accordance with the procedures at 40 C.F.R. § 71.7(d)(3).

B. Request to Change Identification of Responsible Official

Peabody has designated a new Responsible Official for the Kayenta Complex. The Company respectfully requests that, in accordance with the procedures at 40 C.F.R. § 71.7(d)(3), the Responsible Official for the Kayenta Complex be identified as follows:

G. Bradley Brown, President
Peabody Western Coal Company
3001 West Shamrell Boulevard
Flagstaff, Arizona 86001
(928) 913-0201

VII. CONCLUSION

For the reasons explained herein, NNEPA must issue revisions to the part 71 federal permit for Black Mesa Complex and to its accompanying statement of basis, ensuring (1) that such revisions are made solely in keeping with part 71 federal procedures and (2) that no permit conditions are based on requirements of the NNOPR.

Moreover, because NNEPA's proposed revisions intend to clarify applicable authorities for NNEPA's issuance of the part 71 federal permit for Black Mesa Complex, and because the administrative authority under the part 71 federal program which EPA has delegated to NNEPA does not include enforcement of part 71 federal requirements, that permit and its accompanying statement of basis must be revised to exclude any requirements for NNEPA's conduct of enforcement-related activities with respect to that source.