BEFORE THE ENVIRONMENTAL APPEALS BOARD
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of	)	
	)	
Peabody Western Coal Company,	)	CAA Appeal No. 12-01
Title V Permit No. NN-OP 08-010	)	
	)	

JOINT MOTION OF U.S. EPA AND NAVAJO NATION EPA FOR SUMMARY DISPOSITION OF PEABODY WESTERN COAL COMPANY'S PETITION FOR REVIEW

I. INTRODUCTION

On October 1, 2012, Peabody Western Coal Company ("Peabody") filed its third petition for review of the same Clean Air Act ("CAA") Title V Operating Permit. *In re Peabody Western Coal Co.*, CAA Appeal No. 12-01, Petition for Review ("petition"). *See also In re Peabody Western Coal Co.*, CAA Appeal No. 10-01, 14 E.A.D. __ (EAB Aug. 13, 2010) ("*Peabody* 10-01"); *In re Peabody Western Coal Co.*, CAA Appeal No. 11-01, 15 E.A.D. __ (EAB March 13, 2012), *motion for reconsideration denied*, April 17, 2012 ("*Peabody* 11-01"). In its latest petition, Peabody is appealing an administrative amendment which corrected two provisions in the permit that is the subject of Peabody's multiple filings: the issuance and expiration dates, which were corrected in light of the Board's decision in *Peabody* 11-01; and the contact information for the U.S. Environmental Protection Agency ("EPA") and Navajo Nation Environmental Protection Agency ("NNEPA") listed in Section 1 of the permit, which was corrected due to a change in personnel at both agencies. Peabody's petition does not actually address these permit corrections, however, but instead challenges the very validity of EPA's federal operating permit program codified in 40 C.F.R. part 71 ("part 71"). *See* Petition at 4

(stating that the issue presented in Peabody's petition for review is whether "EPA's delegation of its authority to NNEPA to administer the part 71 federal permit program was . . . lawful").

Because Peabody's petition addresses neither of the administrative permit corrections nor any other matter that is within this Board's jurisdiction, EPA and NNEPA (collectively, "Respondents") respectfully move the Board to deny the petition for lack of standing and jurisdiction, pursuant to its "broad case management discretion." *Peabody* 10-01, slip op. at 8. *See also* Environmental Appeals Board Practice Manual (June 2012) ("EAB Manual") §§ III.D.1(c) and IV.D.3 (motions). To allow this challenge to proceed and be decided on the merits would greatly enlarge the Board's functions into areas never envisioned by its authorizing regulations, nor ever advocated by the Board, and would provide Peabody a forum to challenge a federally promulgated rule in a manner that is contrary to law.

Respondents' arguments supporting this motion for summary disposition are set forth below. Counsel for EPA and NNEPA informed counsel for Peabody of this motion and were told that counsel for Peabody objects to the motion.

II. PROCEDURAL HISTORY

On December 7, 2009, NNEPA issued a CAA Title V operating permit (Permit No. NN-OP 08-010) to Peabody for the Peabody - Kayenta Complex (formerly called the "Black Mesa Complex"), a surface coal mine located within the Navajo Nation. NNEPA issued the permit pursuant to a delegation of authority from EPA under part 71.[1] On January 7, 2010, Peabody filed a petition for review of the permit before this Board, challenging NNEPA's authority to include permit conditions that cited tribal procedures in parallel with federal procedures. *See*

[1] 40 C.F.R. §§ 71.4(j) and 71.10 provide for EPA to delegate authority to administer a federal part 71 operating permit program to eligible tribes.

Peabody 10-01, slip op. at 4. NNEPA moved for a voluntary remand to revise the permit to clarify its authority for those conditions, and EPA Region 9 filed an *amicus curiae* brief seeking a stay of the proceedings or alternatively supporting NNEPA's motion for voluntary remand. The Board granted NNEPA's motion on August 13, 2010. *Peabody* No. 10-01.[2]

NNEPA issued the revised final permit after remand and notice of that final permit decision on April 14, 2011. On May 16, 2011, Peabody petitioned the Board for review of the final permit on the same grounds as in the earlier proceeding, and also challenged NNEPA's authority to follow tribal procedures in issuing the permit. *See Peabody* 11-01, slip op. at 3. NNEPA responded to Peabody's petition on July 16, 2011, and EPA Region 9 filed an *amicus curiae* brief supporting NNEPA's position on September 15, 2011. On March 13, 2012, the Board denied Peabody's petition for review. *Peabody* No. 11-01. Peabody sought reconsideration of the Board's order by motion dated March 26, 2012. The Board denied Peabody's motion for reconsideration on April 17, 2012. On May 21, 2012, NNEPA provided notice to Peabody of the final permit decision following the Board's denial of Peabody's motion for reconsideration.[3]

At each step in the permitting process, NNEPA provided draft permits, public notices, opportunities for public comment, and responses to comments. In addition, on July 5, 2012, after notice of the Board's denial of Peabody's motion for reconsideration, Peabody's Permit Manager wrote to NNEPA concerning the effective dates of the permit and the permit conditions that had

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[2] The permit did not become a final agency action until the Board ruled on the petition for review, and therefore could be revised. 40 C.F.R. § 71.11(i)(2)(ii), (*l*)(5)(ii) & (iii). *See also Peabody* 10-01, slip op. at 11 (comparing § 124.19(d), which authorizes permit issuers to withdraw a permit at any time prior to Board's grant or denial of review of permit).

[3] A copy of this letter is attached as Exhibit A.

been at issue. NNEPA replied on August 21, 2012, responding to all of Peabody's comments.[4] NNEPA explained that the permit issued on December 7, 2009 was remanded in its entirety by the Board in *Peabody* 10-01, making the effective date of all uncontested conditions of the permit May 14, 2011, 30 days after service of notice of NNEPA's revised permit decision, pursuant to 40 C.F.R. § 71.11(i)(2).[5] The contested conditions became effective no later than June 20, 2012, subsequent to the Board's decision in Peabody 11-01. On August 31, 2012, NNEPA issued the administrative permit amendment that is ostensibly the subject of Peabody's petition for review. The administrative amendment did nothing more than correct the permit issuance and expiration dates and the contact information in the permit.[6]

Peabody has appealed the administrative permit amendment, as discussed above. The Board sent a letter to NNEPA and EPA on October 12, 2012, requesting responses to Peabody's petition by November 27, 2012. On November 13, 2012, Respondents filed a Joint Motion for Extension of Time to address the merits of Peabody's petition, pending the filing and the Board's consideration of this Joint Motion for Summary Disposition. By Order dated November 16, 2012, the Board granted Respondents' request to file a motion for summary disposition before addressing the merits of the petition.

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[4] Copies of the July 5, 2012 Peabody letter and the August 21, 2012 NNEPA letter are attached as Exhibits B and C, respectively.

[5] There is a typographical error in NNEPA's letter, which cites § 71.11(*l*)(2) instead of § 71.11(i)(2).

[6] The administrative permit amendment is attached as Exhibit D. It contains incorrect information as to the effective date of the permit, stating that it was April 14, 2011 rather than the May 14, 2011 date explained in NNEPA's August 21, 2012 letter. NNEPA will file a corrected administrative permit amendment concurrently with the filing of this motion solely to correct the record in this regard. No new issues will be raised by this correction.

Peabody also has appealed the Board's decision in *Peabody* 11-01 to both the Ninth Circuit Court of Appeals, pursuant to 77 Fed. Reg. 50686 (Aug. 22, 2012) (EPA's notice of final action on the permit), and the D.C. Circuit Court of Appeals, which Peabody claims is the appropriate forum because it believes that EPA's action is of "nationwide scope or effect," *see* CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1). *Peabody Western Coal Co. v. EPA*, No. 12-73395 (9th Cir.) (petition for review filed Oct. 22, 2012); *Peabody Western Coal Co. v. EPA*, No. 12-1423 (D.C. Cir.) (petition for review filed Oct. 19, 2012).

III. ARGUMENT

A. The Board's Broad Case-Management Discretion Authorizes the Filing and Consideration of this Motion to Dismiss.

Part 71 and 40 C.F.R. part 124 ("part 124") contain requirements for various types of federal permits and permit decisions. They do not contain procedural requirements for the Board to follow when those permit decisions are appealed to the Board, other than for motions for reconsideration. *See Peabody* 10-01, slip op. at 4-5. The Board has explained, however, that "although the regulations do not specifically provide for motions practice in the context of a permit appeal, the Board regularly considers motions received from parties in a Part 124 proceeding." EAB Manual § IV.D.3 at 44-45 (footnote omitted). Such motions have included motions for summary disposition. *See, e.g.*, *In re Circle T Feedlot, Inc.*, NPDES Appeal Nos. 09-02 & 09-03, slip op. at 9 n.6 (EAB June 7, 2012), 14 E.A.D. __ (referencing order granting motion to dismiss petition for review of draft NPDES permits); *In re Beeland Group LLC*, UIC Permit Appeal No. 08-02, slip op. at 8 n.7 (EAB Oct. 3, 2008), 14 E.A.D. __ (referencing order dismissing petitions for review of UIC permit for lack of standing); EAB Manual § IV.D.7 at 48 n.53 (indicating authority under part 124 to rule on motion for summary disposition concerning a

PSD or other new source review permit). The Board has found 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." *Peabody* 10-01, slip op. at 8; *Peabody* 12-01, Nov. 16, 2012 Order Granting in Part Joint Motion for Extension of Time, at 2 n.1.

B. Peabody Lacks Standing to Bring this Appeal Because It Does Not Concern the Corrections Made by the Administrative Permit Amendment.

In order to obtain review of a permit decision, a petitioner must meet "threshold pleading requirements such as . . . standing."[7] *Circle T Feedlot*, slip op. at 4; *accord Beeland Group*, slip op. at 8 & n.7; *In re Indeck-Elwood LLC*, 13 E.A.D. 126, 143 (EAB 2006) (PSD appeal); *see also id.* at 170 ("we need not resolve the substantive issues raised in the petition, as Petitioners have failed to satisfy threshold procedural requirements necessary for obtaining review.")

40 C.F.R. § 71.11(*l*)(1) requires a person petitioning the Board for review of a permit to have filed comments on the draft permit or to have participated in the public hearing on the draft permit. *See also* 40 C.F.R. § 124.13 (persons challenging a draft permit "must raise all reasonably ascertainable issues and submit all reasonably available arguments . . . by the close of the public comment period."). The Board has found that this requirement "ensure[s] that interested parties have full notice of the basis for final permit decisions and can address any concerns regarding the final permit in an appeal to the Board." *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 431 (EAB 1997). It also "alert[s] the permit issuer to potential problems with a draft permit . . . to ensure that the permit issuer has an opportunity to address the problems before the

[7] In this context "standing" refers to the threshold pleading requirements in part 71.11(*l*)(1) and does not refer to traditional judicial standing.

permit becomes final." *In re City of Phoenix*, 9 E.A.D. 515, 526 (EAB 2000). *Accord Indeck-Elwood*, 13 E.A.D. at 169; *In re Christian County Generation*, 13 E.A.D. 449, 459-60 (EAB 2008); *In re Shell Offshore, Inc.*, 13 E.A.D. 357, 394-96 & n.55 (EAB 2007); EAB Manual § IV.D.2(e), at 44.

There are only two exceptions to the requirement under § 71.11(*l*)(1) to have participated during the comment period: a person who did not participate in the comment period may petition for review "only to the extent of the changes from the draft to the final permit decision or other new grounds that were not reasonably foreseeable during the public comment period." *Id.* These exceptions describe situations when it would not have been possible to comment during the comment period, and so do not alter the general principles discussed above. Indeed, § 71.11(*l*)(1) requires the petitioner to demonstrate "that any issues raised were raised during the comment period . . . unless the petitioner demonstrates that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period." *Id.* An administrative permit amendment under § 71.11(*l*)(1) may come within the category of "new grounds that were not reasonably foreseeable during the public comment period" or that "arose after such period."[8] Under the explicit provisions of § 71.11(*l*)(1), appeals are limited to those new grounds, in this case, the corrections made by the administrative permit amendment.

Further support for the interpretation that the scope of the instant appeal is limited to the corrections made by the administrative permit amendment comes from § 71.7(f), which allows the permitting authority to reopen and revise a permit in certain specified circumstances. It

[8] Peabody appears to agree with this interpretation. *See* Petition at 5 ("the phrase 'new grounds that were not reasonably foreseeable during the public comment period' should consist in this proceeding of all provisions within the NNEPA-issued administrative amendment").

provides that "[p]roceedings to reopen and issue a permit shall follow the same procedures as apply to initial permit issuance *and shall affect only those parts of the permit for which cause to reopen exists*." § 71.7(f)(2) (emphasis added). In other words, comments may be made and, by extension, appeals taken only as to the parts of the permit that are being reopened. Again, the rationale behind this provision is that the portion of the permit that is being reopened and revised constitutes "new grounds" that "arose after [the comment] period," on which the public could not already have commented, and therefore that is the only portion that is available for comment and, by extension, appeal.

This interpretation is also consistent with how EPA has historically viewed petitions regarding part 70 permits issued by a state or local permitting authority.[9] The Administrator has opined that such petitions are limited to the permit conditions affected by the specific permitting action, whether that is a permit issuance, revision, or renewal. *See, e.g., In the Matter of Wisconsin Pub. Serv. Corp.*, Pet. No. V-2006-4, Permit No. 737009020-P02, 2007 EPA CAA Title V LEXIS 14, at *16-23 (Dec. 19, 2007) (limiting the scope of review of a part 70 permit to only those issues directly related to the major permit modification that was the subject of the petition); *see also In the Matter of Tennessee Valley Authority Shawnee Fossil Plant*, Pet. No. IV-2011-1, Permit No. V-09-002 R1, 2012 EPA CAA Title V LEXIS 6 (limiting the scope of review of a part 70 permit to only those issues related to the parts of the permit subject to a reopening). This limited scope of review was also recognized when EPA promulgated the part 70 regulations:

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[9] The part 71 program, which establishes a federal Title V operating permits program, parallels the part 70 program, which establishes the criteria for state, local and tribal Title V operating permit programs.

> Public objections to a draft permit, permit revision, or permit renewal must be germane to the applicable requirements implicated by the permit action in question. For example, *objections addressed to portions of an existing permit that would not in any way be affected by a proposed permit revision would not be germane.*

57 Fed Reg. 32250, 32290 (July 21, 1992) (emphasis added). *Compare with* CAA § 307(d)(7)(B) ("Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment . . . may be raised during judicial review" unless "it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment," in which case EPA "shall convene a proceeding for reconsideration"); *Natural Resources Defense Council v. EPA*, 559 F.3d 561, 563 (D.C. Cir. 2009) (purpose of requirement is "to ensure that the agency and other interested persons have been alerted to the commenter's objection to the proposed rule" so that "[t]he agency then may correct or modify the rule it proposed or explain why it disagrees with the objection" and so "[o]ther parties also may contribute to the agency's deliberations by endorsing or opposing the objection").

Peabody argues that "because there were no provisions of a draft administrative amendment for Peabody to review and comment on," it may petition for review pursuant to 40 C.F.R. § 71.11(*l*)(1) of "all provisions within the NNEPA-issued final administrative amendment." Petition at 5. *See also id.* at 6 ("a reasonable construction of the part 71 standing requirements for appeal of a permit decision would clearly allow Peabody to challenge any condition of NNEPA's administrative amendment in question"). However, the provisions "within the administrative amendment" consist only of the changes made from the final permit – the table of contents (where NNEPA corrected the permit issuance and expiration dates) and

Section 1 (where NNEPA corrected the contact information for NNEPA and EPA), *see* Ex. D – and not all provisions of the permit as a whole, which appears to be Peabody's intent.[10] Peabody is not challenging either of the amended provisions, but instead is challenging the EPA rule underlying NNEPA's issuance and amendment of the permit. Petition at 4. Peabody therefore has not met the threshold requirement of standing.

Peabody makes no claim that it did not have the opportunity to comment on the original permit. To the contrary, Peabody had two opportunities to do so, when NNEPA initially proposed the draft part 71 renewal permit at the end of 2009 and when NNEPA proposed revisions to the draft permit in 2010.[11] Peabody availed itself of both of these opportunities and NNEPA considered and responded to all significant comments on the permit. *See Peabody* 11-01, slip op. at 6 (noting comments and response to comments on draft revised permit); *id.*, Certified Index to the Administrative Record, items 14-15, 19, 21, 38-39. There is therefore no basis for Peabody's argument that it may raise arguments now, in response to an administrative permit amendment, that it could have raised when NNEPA issued the original permit in 2009 or when NNEPA issued the revised permit in 2011, assuming *arguendo* that it would have been appropriate for Peabody to raise these arguments in a permit proceeding at all. Instead, Peabody is now limited to appealing only those permit conditions for which it was "impracticable" to raise concerns earlier, namely, the effective date of the permit and the change in contact

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[10] The administrative amendment specifically explains that "the changes made in the permit will not affect the permit terms and conditions that became effective April 14, 2011." *Id.* (As explained in Part II above, the date specified should have been in May rather than in April.)

[11] In addition, Peabody commented on and received responses to its comments from NNEPA when the parties were in settlement negotiations concerning the permit. *See Peabody* 10-01, slip op. at 3.

information.

An interpretation of part 71 that would allow Peabody or anyone else to mount a general attack on all provisions of its permit through its challenge to an administrative amendment would be untenable. It would set a precedent that would allow a challenger to a permit to continue to raise new arguments whenever a permit is revised in any way, administratively or otherwise, regardless of whether those arguments could have been raised in earlier proceedings. Such an interpretation would create the potential for permit appeals to be never-ending, thus preventing a permit from ever truly becoming final.

C. The Board Lacks Jurisdiction to Review Peabody's Petition, Which is a Challenge to Part 71, Not to the Administrative Permit Amendment at Issue.

1. The Board's Authority Under Part 71 is Limited to Reviewing the Conditions of the Permit.

The Board's jurisdiction to review final Part 71 operating permit decisions under 40 C.F.R. § 71.11(*l*)(l) is limited in scope to reviewing "*any condition* of the permit decision" (emphasis added). *See also* § 124.19(a) (same); § 71.11(*l*)(2) ("The Board may also decide on its initiative to review *any condition* of any permit issued under this part") (emphasis added); § 124.19(b) (same); *Beeland Group*, slip op. at 9 (petition must "contain 'two essential components: (1) clear identification of the conditions of the permit that [are at] issue, and (2) argument that the conditions warrant review.'") (citations omitted), *see also id.* at 24; *USGen New Eng., Inc.*, 11 E.A.D. 525, 555 (EAB 2004); *In re City of Irving, Texas*, 10 E.A.D. 111, 124 (EAB 2001), *pet. for review denied sub nom. City of Abilene v. EPA*, 325 F.3d 657 (5th Cir. 2003); EAB Manual § IV.E.1 at 50 (Board's jurisdiction "is limited to issues related to the

'conditions' of the federal permit that are claimed to be erroneous.").[12]

When a party has raised claims before the Board regarding matters that are not properly considered conditions of the permit decision, *i.e.*, that are outside the scope of the permitting decision being challenged, the Board has consistently found that it lacks authority to hear those claims. *See, e.g., In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 127, 161-62 (EAB 1999) (Board will not review requirements that do not bear sufficient nexus to the federal PSD program); *In re Envtl. Disposal Sys., Inc. ("EDS")*, 12 E.A.D. 254, 266 (EAB 2005) (Board's authority to review Underground Injection Control ("UIC") permits under § 124.19(a) "extends to the boundaries of the UIC permitting program itself"); *In re NE Hub Partners, LP*, 7 E.A.D. 561, 567 (EAB 1998), *review denied sub nom. Penn Fuel Gas, Inc. v. U.S. EPA*, 185 F.3d 862 (3d Cir. 1999) ("protection of interests outside of the UIC program [is] beyond our authority to review in the context of [a UIC] case"). In *EDS*, for example, petitioners appealed the issuance of a UIC permit on the grounds of property rights, Resource Conservation and Recovery Act permitting issues, and other challenges not directly involving UIC permit conditions. *Id.* at 254-56, 296. The Board dismissed all of these claims, finding that § 124.19(a) grants the Board jurisdiction only to decide challenges to UIC permit conditions, that it is "not at liberty to resolve every claim brought before [it] in a permit appeal but must restrict [its] review to conform to [its] regulatory mandate," and therefore that its review is limited to ensuring that EPA's permit

[12] These cases and those cited below arose under part 124, but the grounds for appeal under § 71.11 and § 124.19 are identical, as previously noted. Moreover, the Board has found it appropriate to rely on part 124 for guidance in interpreting part 71, due in large part to the fact that the part 71 appeal provisions are predicated on part 124. *See, e.g., Peabody* 10-01 at 4-6, 11-13. *See also* Federal Operating Permits Program, Proposed Rule, 60 Fed. Reg. 20,804 (Apr. 27, 1995) ("The proposed . . . administrative appeals procedures are set out at § 71.11 and are based closely on selected provisions of part 124, subpart A.").

decisions comport with the applicable requirements of the federal Safe Drinking Water Act and the UIC program. *Id.* at 294-95.[13]

Of particular relevance here, the Board has repeatedly found that an attack on underlying regulations is not, in fact, a challenge to any particular permit condition and so is outside its jurisdiction. *See, e.g.*, *Circle T Feedlot*, slip op. at 35 ("the regulations that govern the Board's review of permits authorize the Board to review *conditions* of the permit decision, not the statutes or regulations that are the predicates for such conditions") (emphasis added). In that case, petitioner attempted to challenge underlying Clean Water Act regulations through a NPDES permit challenge, which the Board did not allow. *Accord USGen*, 11 E.A.D. at 555; *City of Irving*, 10 E.A.D. at 124. The Board's analysis applies equally in the Part 71 context, and specifically to the present situation where a regulation rather than any actual permit condition is being challenged.

In the instant case, the claims raised by Peabody are not challenges to "any condition of the permit decision," as specified by 40 C.F.R. § 71.11(*l*)(1) and 40 C.F.R. § 124.19(a). Nowhere in its petition does Peabody argue that the permit conditions are inconsistent with Part 71, or that NNEPA failed to act consistently with Part 71 in issuing the permit. Rather, Peabody objects to the permit because "EPA's delegation of its authority to NNEPA to administer the part 71 federal permit program was not lawful under the CAA, and consequently the administrative amendment in question has no force of law." Petition at 4. Review of Peabody's petition, which is purely an attack on the validity of part 71, is therefore not within the Board's jurisdiction

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[13] Peabody itself recognized this principle in its May 16, 2011 petition in *Peabody* 11-01 by referring to the Board's ruling in *Knauf* and what it termed the Board's inability to review "non-PSD" issues when considering a challenge to a PSD permit. *Id.* at 30-32.

because it does not focus on any particular permit conditions.

2. The Board Should Not Countenance Peabody's Attempt to Challenge a Rulemaking Through Appeal of an Administrative Permit Amendment.

The Board has consistently held that its review does not extend to challenges to the regulations underlying the disputed permit. *See, e.g., In re Circle T Feedlot*, slip op. at 35. Indeed, any challenge to a rule promulgated under the Clean Air Act must be made pursuant to the judicial review provision in CAA § 307(b), 42 U.S.C. § 7607(b). This is the only avenue for review of a CAA rule, as CAA § 307(e), 42 U.S.C. § 7607(e), makes clear, stating that "[n]othing in this chapter [the CAA] shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section."

CAA § 307(b)(1) contains two central requirements: 1) a petition for review of "any nationally applicable regulations promulgated" by the Administrator must be filed "only in the United States Court of Appeals for the District of Columbia;" and 2) the petition must be filed "within sixty days from the date notice of such promulgation...appears in the Federal Register." There is no exception to the first requirement, and the only exception to the second is "if such petition is based solely on grounds arising after such sixtieth day," a fact that Peabody has not attempted to and indeed cannot show. [14]

This Board clearly is not a U.S. Court of Appeals. Moreover, the time to challenge the delegation provisions of part 71 has long passed, since those provisions were included in the final rule published in the Federal Register on July 1, 1996, 61 Fed. Reg. 34202. Peabody's

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[14] Similarly, a petition for review of any action by the Administrator "which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit." CAA § 307(b)(1). In the instant case, Peabody has appealed the Board's March 13, 2012 denial of its petition to both the D.C. and the Ninth Circuit Courts of Appeal, demonstrating that Peabody is aware of these statutory provisions for judicial review.

petition is therefore both untimely and beyond the scope of the Board's jurisdiction and should be denied.

Moreover, the Board has "repeatedly stated [that] permit appeals are not appropriate fora for challenging Agency regulations." *In re Tondu Energy Co.*, 9 E.A.D. 710, 715-16 and n.10 (EAB 2001) (citations omitted). In *Tondu Energy*, petitioner challenged a PSD permit by claiming that it should have contained a more stringent standard for particulate matter than the existing CAA standard in order to adequately protect human health. The Board found that petitioner was in fact contesting the adequacy of the current CAA standard, which the Board would not review. Similarly here, Peabody states that the issue presented in its petition for review is whether "EPA's delegation of its authority to NNEPA to administer the part 71 federal permit program" is lawful. Petition at 4. In other words, Peabody is challenging the delegation provisions of part 71, not any correction made by the administrative permit amendment nor any condition of the permit itself. *See Circle T Feedlot*, slip op. at 35; *In re City of Port St. Joe and Florida Coast Paper Co.*, 7 E.A.D. 275, 286 (EAB 1997) ("A permit appeal proceeding is not the appropriate forum in which to challenge either the validity of Agency regulations or the policy judgments that underlie them."); *In re Ford Motor Co.,* 3 E.A.D. 677, 682 n.2 (Adm'r 1991) ("Section 124.19, which governs this appeal, authorizes me to review contested permit conditions, but it is not intended to provide a forum for entertaining challenges to the validity of the applicable regulations."). Peabody's appeal presents no reason for the Board to deviate from its principles; on the contrary, Peabody should not be allowed to use the part 71 administrative appeal process to avoid the statutory deadline and other statutory requirements for challenging an EPA CAA rule.

For all these reasons, EPA and NNEPA request that the Board deny Peabody's petition for review for lack of standing and jurisdiction.

Respectfully submitted,

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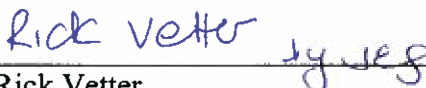

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November 27, 2012

CERTIFICATE OF SERVICE

I hereby certify that copies of this Joint Motion of U.S. EPA and Navajo Nation EPA for Summary Disposition of Peabody Western Coal Company's Petition for Review were served on the following persons in the manner indicated below:

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