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

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

NAVAJO NATION EPA'S MOTION FOR LEAVE TO FILE A SURREPLY

This appeal concerns the delegation by the U.S. Environmental Protection Agency ("EPA") to the Navajo Nation Environmental Protection Agency ("NNEPA") of authority to administer a Part 71 Clean Air Act ("CAA") operating permit program. On May 16, 2011, Peabody Western Coal Company ("PWCC") filed a petition for review of a Part 71 permit issued by NNEPA. PWCC questions NNEPA's authority in issuing the permit. NNEPA filed its response on July 5, 2011, and PWCC subsequently moved the Board for leave to file a reply. NNEPA received PWCC's motion for leave and attached reply on July 21, 2011, and NNEPA now respectfully moves the Board for leave to file the attached surreply.

Although neither the Part 71 regulations nor § V(C)(1) of the EAB Practice Manual (concerning Clean Air Act Title V permit appeals) provide for motions practice or briefing schedules pertaining to Part 71 permit appeals, the Board has found that it has the authority and discretion to provide the necessary procedures. *Peabody Western Coal Co.*, CAA App. No. 10-01, slip op. at 5-8, 14 E.A.D. __ (Aug. 13, 2010). The Board has relied on its procedures for Part 124 permit appeals to fill the gap for Part 71 permit appeals. *Id.*, slip op. at 9. These procedures provide that "If a reply brief has been filed, the EAB may similarly, upon motion, allow the

filing of a surreply brief." EAB Practice Manual § IV(D)(7).

NNEPA is requesting leave to file a surreply because this appeal involves a matter of first impression. The Part 71 delegation at issue is the first that EPA has made to an Indian tribe. There is therefore a heightened need to ensure that the presentation of this matter to the Board contains as thorough and accurate a discussion of the relevant EPA rules, preambles, and other authorities as possible. NNEPA believes that the attached surreply will assist the Board in this regard.

EAB Practice Manual § IV(D)(7) also provides that "Motions for leave to file a reply brief should be filed as soon as possible upon receipt of the permit authority's response." In like manner, NNEPA is filing this motion within ten days of receipt of PWCC's reply brief.

Finally, counsel for NNEPA has conferred with counsel for PWCC, and PWCC does not object to this motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this **NAVAJO NATION EPA'S MOTION FOR LEAVE TO FILE A SURREPLY** and a copy of the attached **NAVAJO NATION EPA'S SURREPLY TO PEABODY WESTERN COAL COMPANY** were served via first class mail, postage prepaid, and by email on this 1st day of August 2011, upon:

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NAVAJO NATION EPA'S SURREPLY TO PEABODY WESTERN COAL COMPANY

INTRODUCTION

This appeal involves the delegation by the U.S. Environmental Protection Agency ("EPA") to the Navajo Nation Environmental Protection Agency ("NNEPA") of authority to administer a Part 71 Clean Air Act ("CAA") operating permit program. The "sole issue in this proceeding" is whether Part 71 requires NNEPA to have its own authorities to administer the Part 71 program. Pet. Reply at 3. Petitioner Peabody Western Coal Company ("PWCC") states that this issue is one of first impression and that the "Board's resolution of the sole legal issue raised in this proceeding will establish important precedent for future implementation of federal Clean Air Act programs throughout Indian country." Pet. Reply at 14; *see also* Pet. Mot. for Leave to File Reply at 3.

Despite the asserted importance of the Board's decision, PWCC does its best to obfuscate the issue that is before the Board. First, PWCC devotes half of its Reply to the wrong rule, namely, EPA's Review of New Sources and Modifications in Indian Country ("NSR rule"), 76 Fed. Reg. 38748 (July 1, 2011) (codified at 40 C.F.R. §§ 49.151-.161, 49.166-.173), rather than the Part 71 rule. PWCC's Reply is also replete with quotations that are taken out of context or which contain significant omissions. This surreply corrects the record and provides the Board with an accurate

presentation of the question at issue.[1]

ARGUMENT

I. THE NSR RULE REQUIRES A TRIBE TO HAVE ITS OWN AUTHORITIES TO ADMINISTER A DELEGATED PROGRAM.

PWCC relies heavily on EPA's NSR rule to argue that the Part 71 permit at issue should not contain references to NNEPA permitting procedures. PWCC assumes that the NSR rule can impliedly supersede or invalidate the delegation process of an entirely different program, an assumption for which it provides no support. In any event, PWCC's reliance on the NSR rule is misplaced. The NSR rule, like Part 71, requires a tribe to show that "the laws of *the Tribe* . . . provide adequate authority to administer the Federal rules and provisions for which delegation is requested" (emphasis added). 40 C.F.R. §§ 49.161(b)(1)(iii)(C); 49.173(b)(1)(iii)(C). *See also* 76 Fed. Reg. at 38780 ("Tribes will only need to show that their laws provide adequate capacity and authority to carry out the delegated activities."); *id.* at note 36 and accompanying text (same).

PWCC quotes a portion of the preamble to the NSR rule, which distinguishes the "program delegation approach" of the Tribal Authority Rule, 63 Fed. Reg. 7254 (Feb. 12, 1998), from the "administrative delegation approach" in the NSR rule, as follows: "In contrast, the administrative delegation approach finalized in these [federal NSR] rules provides for [EPA] to delegate

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[1] PWCC sought to file its Reply because "NNEPA's response raises new matters that Petitioner did not have the opportunity to address. In particular, after the Petition for Review was filed, EPA promulgated [the] 'federal NSR rule.'" PWCC Mot. for Leave to File Reply at 2. In fact, the final NSR rule did not change the delegation provisions in the proposed NSR rule, which PWCC already addressed (the rule was proposed in 2006). Pet. for Review at 27-28. *See* 76 Fed. Reg. at 38779 ("we are finalizing the provisions on administrative delegation to Tribes *as proposed*") (emphasis added). Moreover, the final NSR rule contains the same discussion of the delegation provisions as the proposed NSR rule. *Compare* 76 Fed. Reg. at 38779-80 *with* 71 Fed. Reg. 48696, 48721-22 (Aug. 21, 2006).

administration of the Federal program under Federal law." Pet. Reply at 5 (citing 76 Fed. Reg. at 38780). PWCC claims this statement means that a tribe may not use its own laws to administer the federal program. Pet. Reply at 3-6. Unfortunately, PWCC omits a significant portion of the quoted sentence. The complete quotation is as follows:

> In contrast, the administrative delegation approach finalized in these rules provides for us to delegate administration of the Federal program operating under Federal law to interested Tribes *that provide the information described in final 40 CFR 49.161(b)(1) and 49.173(b)(1).*

76 Fed. Reg. at 38780 (emphasis added). As noted above, the information described in the cited sections of the NSR rule includes a demonstration that "the laws of *the Tribe* . . . provide adequate authority to administer the Federal rules and provisions for which delegation is requested." §§ 49.161(b)(1)(iii)(C); 49.173(b)(1)(iii)(C). *See also* NNEPA Response at 15.

PWCC also emphasizes that a delegated NSR permit is a federal permit. Indeed, there is no question that a delegated NSR permit is a federal permit, just as a delegated Part 71 permit is a federal permit. The key point is that the tribe must have its own laws to process the permit. PWCC confuses the nature of the permit with the nature of the laws required for administering the permit. Under both the delegated Part 71 program and the delegated NSR program, the permit is federal but the tribe is required to have its own authority (*e.g.*, tribal permit processing rules) to administer the federal permit program.[2]

In addition, PWCC claims that because the NSR rule does not require a tribe to obtain "treatment as a state" ("TAS") under CAA § 301(d)(2), 42 U.S.C. § 7601(d)(2), the Part 71 Eligibility Determination and Delegation Agreement are invalid. Pet. Reply at 7-10. There is no

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[2] Similarly, PWCC confuses the development of a tribal air program with the development of tribal laws to *administer* a federal air program. *See* Pet. Reply at 4.

connection between the NSR rule and the Part 71 Eligibility Determination and Delegation Agreement.

Besides, PWCC ignores the fact that, with the exception of a jurisdictional showing, the NSR rule requires the same components as are required for a TAS demonstration. Specifically, the NSR rule requires the tribe to be federally recognized, §§ 49.161(b)(iii)(A), 49.173(b)(iii)(A); to be "carrying out substantial governmental duties and powers over a defined area," §§ 49.161(b)(iii)(B), 49.173(b)(iii)(B); and to have "the technical capability and adequate resources to administer the FIP provisions for which the delegation is requested," §§ 49.161(b)(iv), 49.173(b)(iv). *Compare with* § 49.6(a), (b), and (d) (TAS requirements). These components also are all found in the Part 71 Eligibility Determination and reflected in the Delegation Agreement. EPA found in the Eligibility Determination that the Navajo Nation is federally recognized, Elig. Determ., Pet. Ex. C at 1; has a governing body "carrying out substantial governmental duties and functions," *id.* at 2; and is capable of "carrying out the functions to be exercised in a manner consistent with the terms and purposes of the Clean Air Act and all applicable regulations,"*id.*at 3. *See also* Deleg. Agr., Pet. Ex. B, at 1; 69 Fed. Reg. 67578 (Nov. 18, 2004) (Notice of Delegation); NNEPA Resp. at 7-8. The fact that § 71.10 requires a tribe to be an "eligible" tribe, *i.e.*, to satisfy all the TAS requirements including the jurisdictional requirement, *see* § 71.2 (definition of "eligible tribe"), does not invalidate the Eligibility Determination or the Delegation Agreement; it simply requires an additional showing to be made.

Only the delegated Part 71 program requires a jurisdictional showing; the federally administered program does not. EPA proposed such a requirement originally, in 1995, 60 Fed. Reg. 20804, 20809-10 (April 27, 1995), but revised its position in the 1997 preamble to proposed Part

71. EPA explained that "EPA's implementation of part 71 programs in Indian country is based on EPA's overarching authority to protect air quality within Indian country, not solely on its authority to act in the stead of an Indian Tribe." 62 Fed. Reg. 13748, 13749 (March 21, 1997) (proposed rule). EPA realized that a tribal jurisdictional showing should not be required under the federally administered Part 71 program because that approach "inadvertently created a potential void in coverage, in that it would authorize EPA to administer an operating permits program only where the Tribe had made a jurisdictional showing" instead of over all of Indian country. *Id.* at 13749. "This raised the possibility that neither EPA, the Tribe, nor the State would be implementing an operating permits program in a given geographic area." *Id. Accord* 64 Fed. Reg. 8247, 8249 (Feb. 19, 1999) (final rule). EPA therefore finalized this revised approach. *Id.* at 8249, 8258.[3]

The NSR rule follows the approach of the federally administered Part 71 program. Thus, the NSR rule does not require a tribe to show jurisdiction over the air resources being regulated because to do so might produce gaps in program coverage, not because the requirement would be "unlawful under the Clean Air Act," Pet. Reply at 8. Although the NSR rule does not limit this approach to the federally administered program, unlike Part 71, the distinction is not of importance here: the NSR rule still requires a tribe to show that its laws authorize it to carry out the delegated program, as discussed above, and that is the only question at issue before the Board. Thus the preamble to the NSR rule states:

> Since this program operates throughout Indian country under Federal authority, Tribes will not need to demonstrate either Congressionally-delegated authority over air resources within the exterior boundaries of their reservations or authority of non-reservation areas of Indian country. Instead, Tribal agencies will assist us in

[3] EPA can always fill in with a federally administered program in any areas of Indian country where a tribe cannot demonstrate jurisdiction.

> implementing the Federal program by taking delegation of the administration of particular activities conducted under our authority in Indian country. Under final 40 CFR 49.161(b)(1)(iii)(C) and 49.173(b)(1)(iii)(C),*Tribes will only need to show that their laws provide adequate capacity and authority to carry out the delegated activities*. For example, where a Tribe seeks administrative delegation for permit issuing activities of the Federal program, the Tribe may, among other things, need to show it has in place an appropriate agency *with legal authority to review applications and issue permits on behalf of the delegate Tribal government.*

76 Fed. Reg. at 38780 (emphasis added). *Accord* 71 Fed. Reg. at 48722.

II. THE PART 71 RULE REQUIRES A TRIBE TO HAVE ITS OWN AUTHORITIES TO ADMINISTER A DELEGATED PROGRAM.

PWCC spends the second half of its Reply claiming that NNEPA's Response Brief was "misleading," bandying about the term indiscriminately although providing only one alleged (and incorrect) example, in a footnote.[4] NNEPA explained in its Response how its interpretation of the Part 71 delegation process is supported by Part 71 itself, the Part 71 Federal Register preambles, the Part 71 Delegation Agreement between NNEPA and EPA, and EPA's Part 71 Eligibility Determination. Ironically, PWCC resorts in its Reply to quoting rules and regulation preambles out of context or with significant omissions in an attempt to discredit NNEPA's argument. Some examples of this tactic have already been discussed above, and several more are discussed below, but none alter the basic requirement in § 71.10(a) that "the laws of the . . . Indian Tribe provide adequate authority to carry out all aspects of the delegated program."

For example, PWCC claims that NNEPA relied on a statement in the preamble to proposed

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[4] Pet. Reply at 20, n. 9, complains that NNEPA's reference to § 71.10(h) as the only reopening provision in § 71.10 is misleading because there is also a reopening provision in § 71.7(g). The latter clearly is not within § 71.10. Moreover, far from ignoring § 71.7(g), NNEPA references that provision in the very same paragraph as it references § 71.10(h), and in fact discusses the two in relation to each other. NNEPA Resp. at 11. There is therefore nothing misleading about NNEPA's discussion.

Part 71 that was subsequently overturned in the preamble to the final rule. Pet. Reply at 22-23. PWCC quotes the statement in the proposal, that "each delegate agency would have to comply with its own procedures, administrative codes, regulations, and laws as well as the requirements of this part," 60 Fed. Reg. at 20823, and juxtaposes it with EPA's statement in the final Part 71 preamble that the rule provides a "national template" for a federal operating permit program. PWCC neglects to mention, however, that the proposal preamble also states that Part 71 provides a "national template" for the permit program, so there is no issue of language in the final preamble overturning language in the proposal. 60 Fed. Reg. at 20805; *see also id.* at 20816 (Part 71 is intended to promote national consistency).

The proposal presents both concepts simultaneously because the establishment of a federal operating permit program (one that provides a "national template" based on the Part 70 program) is entirely separate from the administration of that program by a delegate agency (using "its own procedures, administrative codes, regulations, and laws as well as the requirements of this part [71]"). PWCC, however, conflates the two issues, just as it did in the context of the NSR rule. PWCC also neglects to mention that there was no significant change in the delegation provisions between the proposed and final rules, providing further proof that EPA did not change its position on the requirement that a delegate agency have its own authorities to administer the Part 71 program.[5]

PWCC makes several other more tangential arguments that are no more compelling. For

[5] EPA made a minor change to §§ 71.4(j) and 71.10(b) "to reflect the fact that under the final rule, EPA will not publish its delegation agreement." 61 Fed. Reg. at 34214. EPA also made a few other minor revisions to § 71.10, described *id.* at 34225, but none of these revisions concern the issue of whether a tribe uses its own procedures to administer a delegated federal program.

example, PWCC claims that virtually all administrative delegations are just partial delegations, stating that "EPA's administrative delegation of federal authority rarely, if ever, includes *all* provisions of a federal program." Pet. Reply at 18. Part 71, however, specifically provides for delegations "in whole" as well as "in part," § 71.10(a), and EPA's delegation to NNEPA was specifically a delegation "in whole." *See* Notice of Deleg., 69 Fed. Reg. 67578 (Nov. 18, 2004) (EPA is "fully delegating" the Part 71 program to NNEPA); Deleg. Agt., Pet. Ex. B, at § I(1)(a).

The NSR rule is less clear: the regulatory preamble states that tribes have "the option of seeking delegation . . . of the administration of the Federal NSR program or aspects of the program," 76 Fed. Reg. at 38779, implying that delegations in whole are available, but the regulations themselves refer to a "delegation of partial administrative authority agreement," §§ 49.161(b)(2); 49.173(b)(2), rather than a "delegation agreement" as under Part 71. Nevertheless, since the NNEPA program is the only delegated program under Part 71 and it is a delegation in whole, and since there are not yet any delegated programs under the NSR rule, it is difficult to imagine the basis for PWCC's statement.

In addition, PWCC claims that NNEPA argued in its Response that it is "required as a delegate agency to administer only the two federal provisions listed in the Delegation Agreement." Pet. Reply at 18-19 (referring to NNEPA Resp. at 8). On the contrary, NNEPA maintained throughout its Response and continues to maintain that, since it was delegated the Part 71 permit program in full, it is required to administer the entire program. It just must have its own authority to do so.[6]

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[6] PWCC also argues that the Delegation Agreement is not reviewable, Pet. Reply at 10-11, an argument that appears to be self-defeating.

Finally, the discussion in PWCC's Reply at 11-12 regarding permit enforcement is disingenuous. NNEPA is making no attempt to enforce federal law, and the permit at issue specifically states that the tribal laws referenced in the permit are tribally enforceable only. As explained in NNEPA's Resp. at 20, "EPA 'has consistently withheld enforcement in Federal court from any administratively delegated entity,'" (citing 76 Fed. Reg. at 38782), but "a delegated agency still may enforce its own requirements in its own courts." *See also* NNEPA Resp. at 20 n. 20. As PWCC itself acknowledges in Pet. Reply at 12-13, for example, the tribal fee provisions must be enforced under tribal law.

CONCLUSION

For all the foregoing reasons and the reasons set forth in NNEPA's Response, the Board should uphold the Part 71 permit as issued by NNEPA to PWCC.

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