

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY MAY 28 PM 3:11
WASHINGTON, D.C.

ENVIR. APPEALS BOARD

In the Matter of:)	
)	
Peabody Western Coal Company)	Appeal No. CAA 10-01
Permit No. NN-OP 08-010)	
)	
)	
)	

**MOTION OF THE NAVAJO NATION EPA FOR VOLUNTARY REMAND AND
MEMORANDUM IN SUPPORT OF MOTION**

Pursuant to Sections III.D.7(b) and IV.C.1 of the Environmental Appeals Board ("EAB") Practice Manual, Respondent Navajo Nation Environmental Protection Agency ("Navajo Nation EPA" or "NNEPA") respectfully moves for a voluntary remand of the permit at issue in the above-captioned matter. In support of its motion, the Navajo Nation EPA states as follows:

BACKGROUND

The United States Environmental Protection Agency ("USEPA") issued a Clean Air Act Title V permit for the PWCC Black Mesa Complex on September 23, 2003. On October 13, 2004, USEPA delegated to NNEPA the authority to administer the federal operating permit program under 40 C.F.R. Part 71 for the majority of sources on the Navajo Nation, including the Black Mesa Complex. 69 Fed Reg. 67,578 (Nov. 18, 2004). On February 13, 2007, NNEPA issued a First Administrative Amendment to the source, and on December 7, 2009, NNEPA issued a Part 71 renewal permit to PWCC.

On January 7, 2010, PWCC filed a Petition for Review in this case. In the Petition for Review, PWCC challenged provisions in the Part 71 permit that referenced the Navajo Nation

Operating Permit Regulations (“NNOPR”). On January 14, 2010, the EAB mailed a letter to NNEPA directing NNEPA to file a response to PWCC’s petition. However, the parties attempted to resolve the issues raised in PWCC’s petition and twice asked the EAB to extend the time in which the Navajo Nation EPA must file its response in order to discuss possible settlement, which motions were granted. The present date for NNEPA to file its response is July 6, 2010.

The parties have now completed their settlement negotiations and have been unable to resolve all their differences about the permit. Moreover, counsel for PWCC has informed counsel for NNEPA that PWCC will object to this Motion for Voluntary Remand. Nevertheless, as a result of the parties’ negotiations, NNEPA has determined that certain clarifications and corrections should be made to the permit conditions that PWCC contested in its Petition for Review. Instead of filing a response to the Petition to Review, therefore, NNEPA is filing this Motion for a Voluntary Remand so that it may reopen and revise these portions of the permit. NNEPA believes its proposed revisions will address at least some of the issues raised in PWCC’s Petition to Review and thereby narrow the scope of issues to be reviewed by the Board.

ARGUMENT

I. THE EAB HAS AUTHORITY TO REMAND THE PERMIT AND A REMAND WILL PROMOTE THE BOARD’S INTEREST IN EFFICIENCY.

Under NNOPR § 406(A)(1)(c), as well as condition IV.L. of the existing permit, NNEPA may reopen a permit if it “determines that the permit contains a material mistake or that inaccurate statements were made in establishing the emissions standards or other terms or conditions of the permit.” *Cf.* 40 C.F.R. § 71.7(f)(1)(iii). There are no mistakes in the emissions

standards, but NNEPA has determined that some of the permit conditions should be clarified or corrected and therefore is seeking remand of the permit.

There is little case law regarding Part 71 permits, as not many have been issued. Indeed, the Navajo Nation is the first and only tribe to have entered into a delegation agreement with USEPA under Part 71. NNEPA thus did not find any cases addressing voluntary remand of a Part 71 permit, but such case law exists under the PSD program, which may be viewed as analogous in this respect.

Under the PSD program, the Board has the authority and discretion to issue a voluntary remand when the permitting authority determines that a permit must be revised. *In re Indeck-Elwood, L.L.C.*, PSD Appeal No. 03-04, Order at 5-6 (EAB, May 20, 2004) (citing *In re Hub Partners, L.P.*, 7 E.A.D. 561, 563 n.14 (EAB 1998); *In re GMC Delco Remy*, 7 E.A.D. 136, 154, 167 (EAB 1997). As the Board explained, “[a] voluntary remand is generally available where the permitting authority has decided to make a substantive change to one or more permit conditions.” *Indeck-Elwood*, Order at 6. Moreover,

[a]ssuming . . . that changes to the permit could occur, it would be premature for the Board to rule on any element of the current permit that might be affected In effect, we would be exercising our appellate jurisdiction before the permitting authority has finished evaluating the underlying permit decision. This is simply inconsistent with the Board’s role in the [PSD] permit process.

Id. at 7-8. The same considerations apply here, where NNEPA is proposing to make changes to the very same permit conditions that PWCC is challenging in its appeal.

Remanding the permit to NNEPA to make proposed revisions is consistent with principles of judicial efficiency and the Board’s interest in “prompt and informed resolution of permit appeals.” EAB Practice Manual, § III.D.1. NNEPA recognizes that it should revise

portions of the permit conditions that cite the NNOPR, which are the conditions PWCC objects to in its petition for review. A voluntary remand to NNEPA to reopen the permit to clarify these permit conditions may not completely dispose of the issues in PWCC's Petition for Review, but it will certainly advance the appeals process by narrowing the scope of the issues to be reviewed.

II. ALL REOPENED PORTIONS OF THE PERMIT WOULD BE SUBJECT TO THE SAME PROCESS OF PUBLIC NOTICE AND COMMENT AS THE DRAFT RENEWAL PERMIT.

The procedures for reopening a permit are set forth in NNOPR § 406(A)(2), which provides that "proceedings to reopen and revise a permit shall comply with the procedural requirements for initial permit issuance." As required by NNOPR § 403(A), all draft operating permits shall be publicly noticed and made available for public comment. The content, methods, and timing of public notice for permit actions are described in NNOPR § 403(B)-(D). There is a 30-day public comment period for actions pertaining to a draft permit. Thus, the reopened portions of the permit will go through the same process of public notice and comment as the draft renewal permit, and PWCC will have full opportunity to comment on the proposed revisions. Moreover, PWCC will have the right to appeal the revised provisions of the permit to the EAB pursuant to 71.11(I).

CONCLUSION

WHEREFORE, Respondent Navajo Nation EPA respectfully requests that, in the interest of judicial efficiency and prompt and informed resolution of appeals, this Board remand to NNEPA the permit that is the subject of this appeal so that NNEPA may reopen and revise portions of the permit to address issues raised in PWCC's Petition for Review.

Respectfully submitted this 28th day of May 2010.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Motion for Voluntary Remand was served via first class mail, postage prepaid, on this 28th day of May 2010, upon:

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