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July 20, 2011

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EPA ENVIR. APPEALS BOARD

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Via Federal Express

Eurika Durr, Clerk of the Board
Environmental Appeals Board
U. S. Environmental Protection Agency
Colorado Building
1341 G Street, N.W., Suite 600
Washington, D.C. 20005

Re: *In re Peabody Western Coal Company*, Appeal No. CAA 11-01;

Dear Ms. Durr:

On behalf of Peabody Western Coal Company, I have enclosed the original and five copies of each of the following documents for filing in the above-referenced matter:

- Peabody Western Coal Company's Motion for Leave to File a Reply;
- Peabody Western Coal Company's Reply to Navajo Nation EPA's Response; and
- Peabody Western Coal Company's Motion for Order Requesting EPA's Offices of Air and Radiation and General Counsel to File a Brief.

Please do not hesitate to contact me at (804) 746-4501 if you have any questions or concerns about the enclosed.

Sincerely,


John R. Cline

Enclosures

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

ENVIR. APPEALS BOARD

In the Matter of:)

Peabody Western Coal Company)

Title V Permit No. NN-OP 08-010)

Appeal No. CAA 11-01

**PEABODY WESTERN COAL COMPANY'S
MOTION FOR LEAVE TO FILE A REPLY**

Petitioner, Peabody Western Coal Company ("Peabody" or "Company"), respectfully moves this Board for leave to file the attached reply to the Navajo Nation Environmental Protection Agency's ("NNEPA's") response submitted in the above-captioned matter ("NNEPA Resp."). Peabody filed its petition for review on May 16, 2011. NNEPA filed its response on July 5, 2011.

The part 71 regulations governing appeal of permits, 40 C.F.R. § 71.11(I), do not provide for motions practice. The Board's Practice Manual also does not address motions practice during part 71 permit appeals. The Environmental Appeals Board Practice Manual ("EAB Practice Manual") at V.C.1. Despite a similar lack of detailed procedures regarding motions in the context of permit appeals under part 124, the Board "has exercised broad discretion to manage its permit appeal docket by ruling on motions presented to it for various purposes[.]" *In re Peabody Western Coal Co.*, CAA Appeal No. 10-01, slip op. at 7 (EAB Aug. 13, 2010). The

Board has concluded that “the broad case management discretion found in part 124 cases naturally extends to part 71 cases, which unfold in accordance with procedures very closely parallel to those of part 124.” *Id.* at 8.

The Board allows a petitioner in a part 124 proceeding to seek leave to file a reply brief by submitting a motion explaining why a reply brief is necessary. EAB Practice Manual at IV.D.7. Such a motion should be submitted “as soon as possible upon receipt of the permitting authority’s response.” *Id.* Guided by the Board’s motions practice in part 124 proceedings, Petitioner respectfully requests the Board to grant Petitioner’s motion to file the attached reply to the permitting authority’s response in the instant part 71 proceeding.

In support of its motion, Petitioner states that 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 regulations for two new federal permit programs. 76 Fed. Reg. 38,748 (July 1, 2011) (hereinafter “federal NSR rule”). NNEPA’s subsequent response alleges that certain provisions of the new federal NSR rule and its accompanying preamble “support all the arguments NNEPA makes . . . , namely that Part 71 requires delegate agencies to use their own authorities to process [Part 71] permits.” NNEPA Resp. at 15.

Peabody believes that NNEPA has substantially misconstrued the new federal NSR rule and its preamble. That preamble contains a highly informative comparison of EPA’s “administrative delegation approach” and its “program delegation approach,” confirming that NNEPA exceeded its delegated federal authority to administer the part 71 federal permit program when it processed and issued Peabody’s revised part 71 federal permit, Pet. Ex. A. Therefore, based on EPA’s recently promulgated federal NSR rule and accompanying preamble, Peabody seeks to file a reply which demonstrates that NNEPA, as a delegate agency, had no


authority under the Clean Air Act ("CAA") either (1) to use its tribal permitting procedures to process and issue Peabody's revised part 71 federal permit, or (2) to issue that federal permit with conditions based on NNEPA's tribal permit program.

EPA's newly promulgated federal NSR rule is just its latest action to assist the development of tribal capacities under the CAA by allowing tribes to administer federal permit programs as an alternative to tribes developing their own tribal permit programs under tribal law for EPA approval. 76 Fed. Reg. 38,779. Resolution of the sole legal issue raised by the Petition for Review almost certainly will establish far-reaching precedent for federal permits issued by tribes acting under administrative delegations of federal authority.

In support of its motion, Petitioner also states that NNEPA's response contains several claims and related statements that are either misleading or incorrect characterizations of EPA's administrative delegation process. Petitioner therefore seeks to file a reply that will bolster its arguments in the Petition for Review by clarifying or correcting NNEPA's misleading and incorrect characterizations, thereby serving to better inform the Board's review of the parties' respective arguments in this proceeding.

Counsel for Peabody has conferred with counsel for NNEPA, and NNEPA does not object to this motion.

Respectfully submitted,


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Counsel for Peabody Western Coal Company

CERTIFICATE OF SERVICE


I certify that a copy of PEABODY WESTERN COAL COMPANY'S MOTION FOR LEAVE TO FILE REPLY was mailed via Federal Express, overnight delivery, on this 20th day of July, 2011 to:

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

I also certify that copies of PEABODY WESTERN COAL COMPANY'S MOTION FOR LEAVE TO FILE REPLY were mailed via U.S. mail, postage prepaid, on this 20th day of July, 2011 to:

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

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



John R. Cline
Attorney for Petitioner

Date: July 20, 2011

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U.S. EPA.

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

ENVIR. APPEALS BOARD

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

**PEABODY WESTERN COAL COMPANY'S REPLY
TO NAVAJO NATION EPA'S RESPONSE**

I. INTRODUCTION

Petitioner, Peabody Western Coal Company ("Peabody" or "Company"), files this reply in support of the Company's petition for review. *See* Peabody's Petition for Review, Appeal No. CAA 11-01, Dkt No. 1 (filed May 16, 2011) ("Pet."). On July 5, 2011, Navajo Nation EPA ("NNEPA") filed its response to the Company's petition. *See* Navajo Nation EPA's Response to Peabody Western Coal Company's ["PWCC's"] Petition for Review of Clean Air Act Part 71 Permit, Appeal No. CAA 11-01, Dkt No. 4 ("NNEPA Resp.").

This proceeding is concerned with the administrative delegation of EPA's authority to a tribe to administer a federal permit program under the Clean Air Act ("CAA" or "Act"). After Peabody's petition was filed, EPA promulgated the following two new federal permit programs:

- “Federal Minor New Source Review Program in Indian Country,” 76 Fed. Reg. 38,748, 38,788 (July 1, 2011) (codified at 40 C.F.R. §§ 49.151-49.161); and
- “Federal Major New Source Review Program for Nonattainment Areas in Indian Country,” 76 Fed. Reg. 38,748, 38,802 (July 1, 2011) (codified at 40 C.F.R. §§ 49.166-49.173).

Hereinafter, these two new EPA regulations for issuing federal permits in Indian country are referred to collectively as the new “federal NSR rule.”

NNEPA’s response relies on that new EPA rulemaking for the proposition that “the [federal] NSR rule for Indian country directly contradicts PWCC’s position.” NNEPA Resp. at 14. Peabody’s reply herein demonstrates otherwise, i.e., that EPA’s explanation of the administrative delegation provision of the new federal NSR rule confirms that NNEPA has exceeded its authority under the Clean Air Act by using NNEPA permitting procedures developed under tribal law to issue Peabody’s part 71 federal permit.

Furthermore, Peabody’s reply seeks to clarify and/or correct several claims and related statements in NNEPA’s response that are either misleading or simply wrong. The Board’s resolution of the sole legal issue raised by Peabody’s petition almost certainly will establish far-reaching precedent for federal permits issued by tribes under administrative delegations of federal authority. For that reason, Peabody believes that the clarifications and corrections provided herein will benefit the Board’s review of the parties’ respective arguments and its ultimate resolution of the sole issue in this proceeding.

DISCUSSION

II. NEW EPA RULEMAKING CONFIRMS THAT NNEPA'S TRIBAL PERMITTING PROCEDURES ARE NOT REQUIRED WHEN NNEPA ISSUES PART 71 FEDERAL PERMITS UNDER A DELEGATION OF FEDERAL ADMINISTRATIVE AUTHORITY.

EPA's part 71 federal permit program authorizes the Agency to "delegate part of [EPA's] responsibility for administering the part 71 program" to a tribe. 40 C.F.R. § 71.4(j). The sole issue in this proceeding is whether that administrative delegation of federal authority to NNEPA requires NNEPA to process and issue a part 71 federal permit to Peabody using tribal procedures developed under tribal law.

For a tribe to be delegated administrative authority to run specified elements of a part 71 federal program, 40 C.F.R. § 71.10(a) requires the tribe to confirm that "the laws of the . . . Indian Tribe provide adequate authority to carry out all aspects of the delegated program." In its response, NNEPA asserts that provisions of EPA's recently promulgated federal NSR rule "support *all the arguments NNEPA makes* regarding [the Part 71 delegation] process, namely that Part 71 requires delegate agencies to use their own authorities to process permits." NNEPA Resp. at 15 (emphasis added). With the following discussion, Peabody's reply fully rebuts NNEPA's assertion by demonstrating that EPA explanations provided with its new federal NSR rule contradict "all the arguments NNEPA makes."

A. Administrative Delegation of Federal Authority Allows a Tribe to Administer a Federal Permit Program without the Tribe Needing to First Develop a Tribal Permit Program under Tribal Law.

Unlike the preamble to the final part 71 rule, the preamble to the new federal NSR rule contains a substantive discussion of the "administrative delegation approach" that EPA has used to allow NNEPA to issue part 71 federal permits. Importantly, that new preamble discusses differences between EPA's "administrative delegation approach" for issuing federal permits and

EPA's "program delegation approach" for issuing tribal permits. Notably, only with the latter program delegation approach does EPA approve a tribe's use of its own tribal permitting procedures developed under tribal law. *See generally* 76 Fed. Reg. 38,779-81.¹

Significantly, the preamble to the new federal NSR rule states:

EPA expects that the approach to administrative delegation of elements of the Federal NSR program may benefit such Tribes by providing opportunities for Tribes that are building air quality programs to gain experience by assisting EPA with *administration of the Federal rules without needing to first develop Tribal air programs under Tribal law.*

76 Fed. Reg. 38,783 (emphasis added). That statement applies as well to administrative delegation of the part 71 federal permit program. That is, a tribe is allowed to assist EPA with administration of the part 71 federal rules *without needing to first develop tribal air programs under tribal law.*

Thus, NNEPA is not required to have its own tribal permitting procedures under Navajo Nation law in order to be delegated federal authority to administer the part 71 federal program. The fact that NNEPA had its own tribal permitting procedures under tribal law when it was delegated EPA's administrative authority under part 71 is irrelevant. Consistent with administrative delegation under the new federal NSR rule, when NNEPA received EPA's administrative delegation under part 71, NNEPA became obligated "to administer the Federal rules and provisions for which delegation [was] requested." *See* 40 C.F.R. § 49.161(b)(1)(iii)(C).

B. The Preamble to the New Federal NSR Rule Rebutts NNEPA's Assertion That It Must Administer the Part 71 Program Using Tribal Authorities.

¹ EPA Region X provided similar discussions of EPA's "administrative delegation" compared to its "program delegation" in the preambles to the proposed and final adoption of federal regulations under the CAA applicable only to Indian reservations in Idaho, Oregon and Washington. 70 Fed. Reg. 18,074, 18,080-81 (Apr. 8, 2005); 67 Fed. Reg. 11,748, 11,751-52 (Mar. 15, 2002). *See also* EPA Region X, "Response to Comments on the March 15, 2002 Proposal for Federal Implementation Plans under the Clean Air Act for Indian Reservations in Idaho, Oregon and Washington," 26-30 (2005).

In its preamble to the new federal NSR rule, EPA states that the most notable difference between the administrative delegation approach and the program delegation approach concerns the demonstration of required tribal authority. 76 Fed. Reg. 38,781. The sole legal issue in this proceeding, of course, is the scope of tribal authority under tribal law required of NNEPA under the CAA when NNEPA acts under EPA's administrative delegation of federal authority to administer the part 71 federal permit program.

EPA's preamble first acknowledges that its program delegation approach is also called the "TAS [Treatment As a State] process under the TAR [Tribal Air Rule]." 76 Fed. Reg. 38,780. As EPA explains, "the TAR established procedures for our approval of Tribal eligibility applications *to operate the programs of the Act under Tribal law*. Where we approve a tribal eligibility application and approve a Tribal NSR program, the approved Tribe will manage the program under Tribal law[.]" *Id.* (emphasis added).

EPA's preamble then explains: "In contrast, the administrative delegation approach finalized in these [federal NSR] rules provides for [EPA] to delegate administration of the Federal program under Federal law. . . . [T]his program operates throughout Indian country *under Federal authority*." *Id.* (emphasis added). EPA also explains that with its administrative delegation approach, "any *permits issued under the Federal . . . programs* (even when issued by a Tribe acting on EPA's behalf pursuant to a delegation agreement) *remain Federal in character*." *Id.* at 38,782 (emphases added).

In other words, EPA's recent explanation of its "administrative delegation" and "program delegation approaches" makes clear that permits issued under an administrative delegation are issued under federal regulations under federal law, whereas permits issued under a program delegation are issued under tribal regulations under tribal law. EPA's administrative delegation

approach, as relied on by NNEPA to issue Peabody's part 71 federal permit, does not mention, much less require, the use of tribal regulations (such as tribal permitting procedures) under tribal law.

C. Amended Language in the New Federal NSR Rule Clarifies the Meaning of § 71.10(a).

The part 71 regulatory provision at issue in this proceeding requires a tribal agency seeking delegation of federal administrative authority to confirm that "the laws of the . . . Indian Tribe provide adequate authority *to carry out all aspects of the delegated program.*" 40 C.F.R. § 71.10(a) (emphasis added). The new federal NSR rule contains that same requirement for a tribal agency seeking delegation of federal administrative authority.

The wording of that same requirement in EPA's new federal NSR rule, however, is slightly different. In the new rule, a tribal agency seeking delegation of EPA's administrative authority must provide a description of "the laws of the Tribe that provide adequate authority for the tribal agency *to administer the Federal rules and provisions for which delegation is requested*["]." 40 C.F.R. § 49.161(b)(1)(iii)(C) (emphasis added).

Peabody views EPA's change from the older part 71 language to the current part 49 language as a deliberate effort to clarify that a delegate agency does not administer "tribal rules and provisions" when it issues federal permits. EPA is on record as having communicated that exact point in a tribal training session – "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 (emphasis added).

A delegate tribal agency's need to use federal permitting procedures to issue federal permits could not be stated more clearly. Contrary to NNEPA's assertion, EPA's delegation of

federal authority to administer a part 71 federal permit program does not authorize NNEPA to issue part 71 federal permits using tribal procedures based on tribal law.

D. The Preamble to the New Federal NSR Rule Casts Doubt on EPA Region IX's Eligibility Determination for NNEPA To Be Delegated Federal Administrative Authority.

As part of the process for delegating federal administrative authority to NNEPA, EPA Region IX “determined that the Navajo Nation is eligible for TAS for the purpose of entering into a delegation agreement with EPA for the purpose of administering the federal Part 71 Program.” Pet. Ex. C at 5 (“Eligibility Determination”). EPA made that Eligibility Determination because part 71 allows delegation of federal administrative authority to a tribe only if it is an “eligible Tribe.” 40 C.F. R. § 71.4(j). An “eligible Tribe” means “a Tribe that has been determined by EPA to meet the criteria for being treated in the same manner as a State, pursuant to the regulations implementing section 301(d)(2) of the Act.” 40 C.F. R. § 71.2.

1. The Clean Air Act Does Not Require That Eligibility Determination.

Notably, the new federal NSR rule *does not* require a tribe to obtain TAS eligibility under the TAR in order to be delegated federal administrative authority for either new federal permit program. 76 Fed. Reg. 38,780. The federal regulatory program applicable only to certain Indian reservations in EPA Region X also *does not* require a tribe to obtain TAS eligibility under the TAR in order to be delegated federal administrative authority for any of those federal regulations. 40 C.F.R. § 49.122.

Based on that glaring discrepancy between administrative delegation requirements under part 71 and those requirements under other, more recent federal CAA programs, Peabody infers that, at some time after EPA promulgated part 71, the Agency has determined that the Act does not *require* a tribe to be eligible for treatment as a state in order for EPA to delegate its federal

administrative authority to that tribe. Consequently, although the “tribal eligibility” requirement may still be contained in the part 71 regulations, that part 71 requirement is likely not legally enforceable under the Act.²

2. Portions of That Eligibility Determination Are Unlawful and Meaningless under the Clean Air Act.

NNEPA asserts in this proceeding that EPA’s administrative delegation of its federal authority to NNEPA to administer portions of the part 71 federal permit programs requires NNEPA “to have [its] own authorities to administer the Part 71 program, including authorities for permit processing, monitoring and reporting, and permit enforcement.” Pet. Ex. J at 2 (NNEPA’s Responses to Comments). As previously demonstrated, several EPA statements in its preamble to the new federal NSR rule contradict NNEPA’s assertion. Instead, those EPA’s statements confirm that EPA’s administrative delegation process involving a federal permit program in Indian country merely transfers federal (EPA) authority to the delegate tribal agency for that tribal agency to administer the federal rules of the federal permit program.

NNEPA nevertheless points to a number of provisions in the Delegation Agreement, in the Eligibility Determination and in the Transition Plan which “confirm[] that NNEPA will be using its own authorities to administer the Part 71 program.” *See, e.g.*, NNEPA Resp. at 6-8 (citing specific provisions in the three documents). Discussions in the preamble to the new federal NSR rule, however, leave little doubt that any such provisions in the Delegation Agreement and related documents that purport to authorize NNEPA to use its own tribal authorities to administer the part 71 program are unlawful under the Clean Air Act. 76 Fed. Reg. 38,779-81.

Those particular provisions in the Delegation Agreement and related documents simply cannot be squared with fundamental legal principles regarding delegation of federal

² This is another, independent reason why the Eligibility Determination for NNEPA is not separately enforceable under the Act. *See* Pet. at 22-23.

administrative authority. *Id.* The stark reality is that part 71 is always a federal operating permit program consisting solely of federal regulations administered by EPA. When EPA delegates its federal authority to a tribe to administer the part 71 federal program, that tribe is responsible for administering those same federal regulations that EPA would otherwise apply. For a tribe instead to administer its own tribal operating permit regulations under the CAA, it first requires EPA's *program* delegation to do so, i.e., in this case EPA's approval of that tribal permit program under part 70.

Even though NNEPA may have been found eligible for treatment as a state, NNEPA clearly has not received program delegation from EPA for NNEPA's tribal operating permit program. EPA program delegation is the only legitimate mechanism under the Act which can authorize NNEPA to use its own tribal permit regulations. Of course, the resultant NNEPA-issued permit under a program delegation could not, as a matter of law, be a part 71 federal permit.

As shown above, EPA's preamble flatly states that a tribe having been delegated EPA's administrative authority to administer a federal permit program does not need any tribal regulations to administer that program. 76 Fed. Reg. 38,783. "[P]ermits issued under the Federal . . . programs (*even when issued by a Tribe acting on EPA's behalf pursuant to a delegation agreement*) remain Federal in character[.]" *Id.* at 38,782 (emphasis added).

In short, throughout that preamble's explanation of administrative delegation, there is not a single suggestion that any portion of a tribal-issued federal permit might be based on any tribal regulation. In fact, with an administrative delegation, the delegation agreement is required to identify the specific *federal* rules and provisions which the delegate tribe will be authorized to implement on behalf of EPA. 40 C.F.R. § 49.161(b)(2); *see also* 40 C.F.R. § 49.122(c) (Tribe has

the authority under the CAA, *to the extent specified in the delegation agreement*, for administering one or more of the *federal requirements*.) (emphasis added).

In executing such an agreement for administrative delegation of federal authority to a tribe, EPA obviously can only transfer its federal authority under the Act. EPA has no power under that means of delegation to approve the use of any non-federal authority. Thus, to the extent that the subject Delegation Agreement and related documents in this proceeding contain any EPA approval of NNEPA's use of tribal regulations under tribal law in NNEPA's issuance of part 71 federal permits, that EPA approval is unlawful and meaningless under the Clean Air Act.³ Such EPA approval simply has no force of law.

3. NNEPA's Argument That Peabody May Not Challenge the Delegation Agreement Is Legally Flawed.

NNEPA states that “[s]ince the Delegation Agreement supports NNEPA’s position, PWCC resorts to challenging the validity of the Agreement[.]” NNEPA Resp. at 19. Peabody agrees; the Delegation Agreement lies at the heart of the issue which Peabody has raised in this proceeding.

NNEPA attempts to insulate the Delegation Agreement with its related documents from attack by arguing that “[i]f the Delegation Agreement is reviewable at all, it is reviewable as a final agency action under CAA § 307(b)(1).” NNEPA Resp. at 19. Thus, according to NNEPA, any challenge to the Agreement brought by Peabody would have had to have been made in federal court within sixty days of November 18, 2004.” *Id.*

³ Peabody has previously noted that part 71 does not authorize NNEPA to collect part 71 permit fees. Pet. at 33. Rather, in accordance with applicable tribal law, NNEPA must collect fees from part 71 sources in amounts sufficient to fund NNEPA's administration of the delegated portions of part 71. 40 C.F.R. § 71.9(c)(2)(ii). EPA's administrative delegation of federal authority to NNEPA, however, *does not authorize* NNEPA to collect such fees.

As Peabody noted in its petition, Pet. at 22-23, NNEPA's argument ignores the following EPA acknowledgment that a part 71 delegation agreement changes nothing other than the agency responsible for administering specific existing federal rules:

[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). That EPA explanation rebuts NNEPA's suggestion that the EPA-NNEPA delegation agreement is a "final agency action."⁴

In short, Peabody was not a party to the Delegation Agreement. That Agreement was (and still is) nothing more than an agreement between two parties. It did not create any new legal rights or obligations for any third party. The terms and conditions of that two-party agreement were not subject to notice-and-comment rulemaking, i.e., there was no "final agency action" that could have been appealed by Peabody.

III. NEW EPA RULEMAKING CONTRADICTS NNEPA'S ASSERTION OF PERMIT ENFORCEMENT AUTHORITY.

A. No Delegated Federal Enforcement Authority

The preamble to the new federal NSR rule plainly states that "EPA has consistently withheld enforcement in Federal court from any administratively delegated entity." 76 Fed. Reg. 38,782. Thus, while NNEPA has been transferred federal authority to *administer* the part 71

⁴ That EPA statement also confirms the significant legal flaws in the Delegation Agreement and related documents which purport to authorize new requirements based on tribal regulations and tribal law that allegedly flow from the administrative delegation.

federal permit program, NNEPA has not been transferred federal authority to *enforce* the part 71 federal permit program.

Moreover, because the part 71 federal permit program arises under federal law, tribal law cannot authorize NNEPA to enforce part 71 federal permits.

B. No Applicable Tribal Enforcement Authority

The fundamental issue in this proceeding arises from NNEPA's assertion that the language of 40 C.F.R. § 71.10(a) "makes clear that it 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.*" Pet. Ex. J at 2 (NNEPA's Responses to Comments) (emphasis added). Indeed, the Transition Plan which accompanies the part 71 delegation agreement between EPA and NNEPA contains the following highly questionable statement:

All terms and conditions in a [Part 71] permit [issued by NNEPA] *are enforceable* by the Administrator pursuant to the CAA and by the Director pursuant to Subpart V of the Navajo Operating Permit Rule, Subpart 3 of the Navajo Uniform Rule, and Subpart 3 of the Navajo Clean Air Act, 4 N.N.C. §§ 1151-56, as well as by persons pursuant to 4 N.N.C. § 156 and § 304 of the Clean Air Act.

Pet. Ex. D at § V.G. (emphasis added).

However, for the reasons explained above, EPA does not delegate its federal enforcement authority, and Navajo law cannot authorize enforcement of any provisions of federal law. Thus, to the extent that any provision of the Delegation Agreement and its related documents purports to authorize NNEPA to enforce any federal requirement of a part 71 federal permit, that provision has no force of law.

Clearly, NNEPA may enforce its tribal (non-federal) requirement for Peabody to pay a fee that will help NNEPA fund its administration of its delegated federal authority because that fee is

not a federal requirement of the part 71 federal program. Pet. at 32-34. However, if NNEPA had properly exercised its delegated federal authority to administer a part 71 federal permit in this proceeding, no other tribal requirement would apply to Peabody, and consequently NNEPA would have nothing else to enforce under tribal law.⁵

With Peabody's revised part 71 federal permit as currently written, NNEPA attempts to downplay the permit's tribal character by stating "NNEPA has determined that compliance with the federal provisions will constitute compliance with the tribal counterparts. These parallel tribal citations do not create any new requirements." NNEPA Resp. at 5 (quoting NNEPA's statement of basis (Pet. Ex. I at 3.)). Apparently NNEPA fails to appreciate the irony of Peabody applying to renew its federal permit under the CAA and then receiving that federal permit with conditions based on tribal law. Nevertheless, those tribal-based permit conditions are unenforceable under federal and tribal law alike because (1) those conditions are not authorized under the CAA and (2) tribal law cannot modify a federal permit program.

In sum, EPA states in its preamble to the new federal NSR rule that "any permits issued under the Federal NSR programs (even when issued by a Tribe acting on EPA's behalf pursuant to a delegation agreement) remain Federal in character[.]" 76 Fed. Reg. 38,782. By analogy, the tribal character of Peabody's revised part 71 federal permit is unlawful and must be removed.⁶ NNEPA "stands in the shoes" of EPA when NNEPA processes and issues part 71 federal permits as a delegate agency under the CAA. *See, e.g., In re West Suburban Recycling and Energy*

⁵ Peabody only applied to NNEPA for a part 71 federal permit under the CAA. Importantly, in processing and issuing Peabody's part 71 federal permit, NNEPA has not taken any parallel action under NNOPR to process and issue a tribal permit containing tribal requirements that would be enforceable under tribal law. *See* Pet. at 30. Although NNEPA's tribal permitting regulations identify particular provisions of NNOPR that apply when NNEPA issues part 71 permits, *see* NNOPR § 705, NNEPA has no authority under the CAA to modify the scope of the part 71 federal permit program. Moreover, as also discussed herein, NNEPA has no authority under the CAA to enforce part 71 federal permits under tribal law. *Id.*

⁶ The tribal requirement for fee collection is not a legal requirement for the part 71 federal permit, although Peabody would accept its placement with the federal permit in order to promote administrative efficiency.

Center, L.P., 6 E.A.D. 692, 707 (EAB Dec. 11, 1996) (“*WSREC*”). Peabody’s previous part 71 federal permit issued by EPA had no tribal requirements that were enforceable under tribal law, and Peabody’s revised part 71 federal permit issued by NNEPA should be no different.

IV. CERTAIN STATEMENTS IN NNEPA’S RESPONSE ARE MISLEADING OR INCORRECT AND SHOULD BE CLARIFIED OR CORRECTED.

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. More specifically, the Board’s decision likely will articulate the nature and extent of any tribal authority under the Clean Air Act in instances where a tribal agency has been delegated federal authority to administer elements of a federal CAA program.

The issue presented by Peabody’s petition is one of first impression for the Board under Title V of the CAA. To date, Peabody’s petition and NNEPA’s response illustrate the substantial difference in opinions concerning whether EPA’s administrative delegation of federal authority to a tribe to administer a federal permit program serves to authorize and require that tribe to use its own tribal regulations developed under tribal law to administer the delegated aspects of that federal program.

For a tribe seeking administrative delegation of EPA’s authority to administer the part 71 federal permit program, 40 C.F.R. § 71.10(a) requires the tribe to submit a legal opinion “stating that the laws of the . . . Indian Tribe provide adequate authority to carry out all aspects of the delegated program.” NNEPA asserts that particular language “makes clear that it 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.” Pet. Ex. J

at 2 (NNEPA's Responses to Comments). If, in fact, that language of § 71.10(a) was so "clear," the issue raised by Peabody's petition would not be before the Board.

NNEPA's response contains several, more significant misleading or incorrect statements intended to support NNEPA's assertion concerning the extent of its tribal authority as a delegate agency. Those statements therefore directly bear on the single legal issue of this proceeding. Peabody believes that its reply to those misleading or incorrect NNEPA statements will assist the Board's evaluations of the parties' respective arguments and its ultimate resolution of the important issue raised by the Company's petition.

A. NNEPA's Characterization of the Board's Analysis in a Prior Case Involving Delegation of EPA's Authority to Administer the Federal PSD Program Is Incorrect.

Peabody has previously explained, Pet. at 17-19, how the Board's decision in *WSREC* contradicts NNEPA's assertion that NNEPA is required to use its own tribal permitting procedures and other tribal regulations when it has been delegated federal authority to administer the part 71 federal program.⁷ NNEPA has responded that "[t]he Board's [*WSREC*] decision did not . . . find that a delegate agency may not use its own authority in issuing a federal PSD permit[.] NNEPA Resp. at 18. Peabody disputes that NNEPA characterization of the Board's position in *WSREC*.

In *WSREC*, the Board explained that a state agency with delegated federal authority to administer the federal PSD program has a "responsibility to conduct its review and make its decisions *on the basis of the federal PSD program contained in 40 C.F.R. § 52.21.*" *WSREC* at

⁷ NNEPA distinguishes the facts in *WSREC* from those in this proceeding by noting that *WSREC* concerned a state agency's delegated federal authority to administer the federal PSD program, and that the federal PSD regulations do not currently provide for administrative delegation to tribes. NNEPA Resp. at 18. However, those differences are irrelevant to the legal issue at hand, i.e., whether EPA's administrative delegation of its federal authority to administer a federal permit program requires the delegate agency to use its own (state or tribal) permitting procedures and related (state or tribal) authorities when issuing permits under that federal program.

707 (emphasis in original). The Board further explained that the delegate state agency was required “to apply the source review provisions at 40 C.F.R. § 52.21, which in turn encompass the [federal] 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 EPA.” *Id.*

There is no reason why those basic principles of EPA’s administrative delegation of its PSD authority, as explained by the Board, should not apply as well to the instant case involving EPA’s administrative delegation of its part 71 authority. Accordingly, NNEPA, as the delegate agency in this proceeding, has a responsibility to conduct its review of Peabody’s application and make its decision on Peabody’s permit on the basis of the federal operating permit program contained in 40 C.F.R. Part 71. Moreover, because NNEPA, as the delegate agency in this proceeding, “stands in the shoes of EPA,” NNEPA must apply the provisions at 40 C.F.R. Part 71, including the federal permit issuance procedures of part 71.

B. NNEPA’s Characterization of EPA Region X’s Delegation of Administrative Authority Is Incorrect.

Peabody has previously explained, Pet. at 26-27, how EPA Region X’s administrative delegation of its federal authority to administer certain federal regulations for specific Indian reservations in Region X contradicts NNEPA’s assertion that NNEPA is required to use its own tribal permitting procedures when it has been delegated federal authority to administer the part 71 federal regulations. NNEPA claims that comparison of Region X’s administrative delegation process to EPA Region IX’s administrative delegation to NNEPA is inappropriate because Region X’s delegation involves *substantive* requirements of a federal implementation plan (FIP), whereas Region IX’s delegation in this proceeding involves *procedural* requirements under Title V. NNEPA Resp. at 16-17.

NNEPA's claim creates a distinction without a difference. EPA's "administrative delegation approach" applies equally to federal substantive requirements and federal procedural requirements. *See, e.g., WSREC* at 703 (For a state agency delegated authority to administer the federal PSD program, "the federal substantive PSD regulations and the federal procedures for processing PSD applications apply to the PSD components of any 'integrated' application" for both a PSD permit and a construction permit based on state requirements.).

Furthermore, NNEPA suggests that Peabody's comparison of those two instances of administrative delegation of federal authority is not appropriate because Region X's delegation involves a federal implementation plan ("FIP"), but Region IX's delegation to NNEPA does not. NNEPA Resp. at 16. NNEPA's argument this time creates an erroneous distinction that has no bearing on the issue before the Board. NNEPA apparently has overlooked the fact that the part 71 regulations constitute a FIP for tribes as well, i.e., when a tribal implementation plan (TIP) does not contain an operating permit program under 40 C.F.R. Part 70. In short, Region IX's delegation is like Region X's delegation because each conveys EPA's authority to a tribe to administer federal regulations.

Peabody's petition addressed EPA Region X's delegation of federal administrative authority to point out a specific example of EPA's delegation process that says nothing about the delegate tribal agency's use of its own tribal regulations. Pet. at 27. Instead, when Region X delegates its federal authority to a tribe to administer federal regulations, the delegation agreement identifies the specific *federal* rules that the tribal agency will use in exercising that federal authority. *Id.* Nothing in the documentation of EPA's administrative delegation of

federal authority to the Nez Perce Tribe, Pet. at 26-27, suggests that the Tribe must use its own tribal regulations to administer the federal regulations addressed by that delegation.⁸

C. More Examples of NNEPA's Misleading or Incorrect Statements.

Peabody directs the Board's attention to the following additional misleading or incorrect statements in NNEPA's response.

1. Identifying Specific Federal Provisions in the Delegation Agreement

NNEPA identifies two specific provisions from the part 71 federal regulations that it will administer under the Delegation Agreement. NNEPA Resp. at 8 (internal citations omitted). NNEPA then comments that "[i]f NNEPA were administering these Part 71 provisions directly, as PWCC contends, the requirement to include them in the Delegation Agreement would not be necessary." *Id.*

EPA's administrative delegation of federal authority rarely, if ever, includes *all* provisions of a federal program. For example, the new federal NSR rule and Region X's federal rule applicable to certain Indian reservations respectively refer to that process as a "delegation of partial administrative authority," 40 C.F.R. § 49.161(b)(2), or as a "partial delegation of administrative authority," 40 C.F.R. § 49.122. Thus, part 71 requires the delegation agreement to "specify the provisions that the delegate agency shall be authorized to implement," 40 C.F.R. § 71.10(a), in order that EPA and the delegate agency have a mutual understanding of which specific part 71 federal regulations will be administered by each party. NNEPA's belief that it is

⁸ As NNEPA acknowledges, the Region X agreement with the Nez Perce Tribe "provides for the tribe to process and issue open burning permits." NNEPA Resp. at 17. It is not clear why NNEPA then comments that, "[s]ince no federal permit-processing procedures are provided for these activities, presumably the tribe would be using its own authorities." *Id.* Contrary to NNEPA's statement, Region X has promulgated a federal rule for general open burning permits, 40 C.F.R. § 49.132, and Region X also has promulgated a specific federal rule for open burning permits applicable to the Nez Perce Tribe, 40 C.F.R. § 49.10411. Accordingly, as a delegate agency, the Nez Perce Tribe would administer those two particular federal rules to process and issue open burning permits. The Tribe would not be using its own tribal authorities.

required as a delegate agency to administer only the two federal provisions listed in the Delegation Agreement is clearly wrong.

2. Incorrect Comparison of Part 71 with Part 70.

A tribe's promulgation of its own tribal operating permit program under tribal law which EPA then approves as meeting the requirements of 40 C.F.R. Part 70 is an example of EPA's "program delegation approach." NNEPA states that "[u]nder Part 70 states and tribes must comply with the federal requirements listed in Part 70 but must have their own authorities and procedures for implementing those requirements. . . . The same holds true for Part 71. *See* § 71.10(a)." NNEPA Resp. at 9. That NNEPA statement is incorrect; the "same" does not hold true for part 71.

As discussed earlier, the preamble to the new federal NSR rule explains that under "program delegation," a tribe administers its own tribal regulations developed under tribal law, e.g., part 70. 76 Fed. Reg. 38,780. On the other hand, under "administrative delegation" a tribe administers federal regulations developed under federal law. *Id.* NNEPA has been partially delegated federal administrative authority under part 71. Therefore, unlike part 70 program delegation, NNEPA's own authorities and procedures are *not* required for NNEPA to implement those federal provisions of part 71 for which it has been delegated responsibility.

3. Part 71 Procedures Do Not Apply Only to EPA.

NNEPA claims that because § 71.1(a) states literally that part 71 only sets forth the "procedures by which [EPA] will issue operating permits" without also mentioning delegate agencies, "[t]hat lack of detail supports the conclusion that delegate agencies must have their own authorities to implement the Part 71 program. . . . The delegate agency may not, however, simply follow the Part 71 procedures[.]" NNEPA Resp. at 10. Peabody disagrees.

NNEPA's statement demonstrates that it does not understand the fundamental principle of delegation of administrative authority. Under that type of delegation, the only thing that changes is the agency which is responsible for administering certain regulations. There is no new rulemaking; there is no use of different rules. Delegation of federal administrative authority under part 71 merely transfers the responsibility for implementing an existing, "already promulgated," federal regulatory provision from EPA to another agency. EPA, *Technical Support Document for Federal Operating Permit Program*, "Part 71 Response to Comments Document," 32 (Dec. 21, 1998).

Therefore, given the scope of part 71 federal authority which has been transferred to NNEPA:

- Under federal authority of § 71.5(c), and not under tribal authority, NNEPA may develop its own application form. *See* NNEPA Resp. at 10;
- Under federal authority of § 71.6(c)(5)(iii)(D), and not under tribal authority, NNEPA may add requirements for compliance certification *with federal terms and conditions contained in the federal permit*. *See* NNEPA Resp. at 11.
- Under federal authority of § 71.6(c), and not under tribal authority, NNEPA may add "other" federal compliance-related provisions to the permit. *See* NNEPA Resp. at 10.
- Under federal authority of § 71.7(g), and not under its "own reopening procedures," NNEPA must respond if EPA reopens a part 71 permit for cause. *See* NNEPA Resp. at 11.⁹ NNEPA claims that part 71 contemplates one set of permit reopening procedures being administered "by a tribal or state agency under that agency's own authorities." *Id.* That claim is both inexplicable and worrisome to Peabody, for it

⁹ NNEPA's statement that "[t]he only reopening provision in § 71.10 is in subsection (h)," may be factually correct, but it is nevertheless very misleading. The reopening provision in § 71.7(g) provides NNEPA with appropriate part 71 federal procedures.

means that NNEPA, acting solely on its own under only its tribal authority, allegedly could reopen Peabody's part 71 federal permit and amend it as NNEPA deems necessary and appropriate under tribal law.

4. NNEPA Misconstrues 40 C.F.R. § 71.10(f)(2).

Section 71.10(f)(2) requires a tribe receiving delegation of signature authority to certify that

no applicable provision of . . . Tribal law requires that a part 71 permit or renewal be issued after a certain time if the delegate agency has failed to take action on the application.

NNEPA claims the language quoted above "could not be clearer in recognizing that the delegate agency will be using its own procedures and authorities to process Part 71 permits." NNEPA Resp. at 12. NNEPA reads way more into that quoted language than what EPA had intended.

In order to avoid interminable delays in permit issuance, some laws provide for "default issuance," i.e., requiring the permit application to be granted or denied by a date certain after the applicant has submitted a complete application. *See, e.g.,* 42 U.S.C. § 7475(c) (CAA requiring PSD permit decision "not later than one year after the date of filing of such completed application"). In requiring NNEPA to comply with § 71.10(f)(2), EPA only seeks NNEPA's confirmation that it has no such default-issuance provision under Navajo law that would require a part 71 permit decision to be made within a certain period after the permit application is filed. Nothing about § 71.10(f)(2) implies that "the delegate agency will be using its own procedures and authorities to process Part 71 permits."

5. EPA Had No "Choice" in How It Partially Delegated Its Part 71 Administrative Authority to NNEPA.

NNEPA states that “[w]hile EPA could have chosen” to delegate its federal authority to administer a part 71 program to a tribal or state agency, “that is simply not the choice that EPA made when promulgating Part 71.” NNEPA Resp. at 12. Peabody strongly disagrees.

EPA, in fact, has administratively delegated its federal authority to NNEPA to administer the part 71 federal program. *See Delegation Agreement, Pet. Ex. B at 2* (“NNEPA will administer the existing federal operating permit program pursuant to 40 C.F.R. Part 71[.]”). NNEPA has *not* received a part 71 “program delegation” because that type of delegation does not exist for the part 71 federal program. Should NNEPA desire to receive program delegation for an operating permit program under the Act, EPA would have to approve NNEPA’s permitting procedures under Navajo law as meeting part 70 requirements.

In other words, there is only one way that EPA could have delegated its federal authority to NNEPA to administer a part 71 federal permit program; neither EPA nor NNEPA had a choice in how that would be done.

D. NNEPA’s Reliance on a Statement in EPA’s Preamble to the *Proposed Part 71 Regulations* Is Misplaced.

To persuade the Board that NNEPA, as a delegate agency, is required under the CAA to use its own tribal permitting procedures and other tribal authorities, NNEPA references the following EPA statement in its preamble to the *proposed* part 71 federal program:

The EPA would not demand that each delegate agency administer a part 71 program in precisely the same way because each delegate agency would have to comply with its own procedures, administrative codes, regulations, and laws as well as the requirements of this part.

NNEPA Resp. at 6 (quoting 60 Fed. Reg. 20,823 [Apr. 27, 1995]). It is unfortunate that NNEPA has referenced that EPA statement because EPA subsequently abandoned that approach to part 71 implementation. Instead, the *final* part 71 regulations adopted a “national template”

approach for implementation of that federal program because EPA concluded that “individual rulemakings for each area that has a part 71 program [based on that area’s “procedures, administrative codes, regulations, and laws”] would be needlessly burdensome on the Agency.” 61 Fed. Reg. 34,213 (July 1, 1996).

Indeed, a full and objective reading of why EPA developed its “national template” approach for part 71 confirms that EPA promulgated a federal “one-size-fits-all” program of regulations that would be applied throughout the nation either by EPA or by its delegate state or tribal agency. *Id.* In the event that EPA should determine in the future that the uniform national part 71 regulations are not suitable for a particular tribe or state, the final part 71 regulations provide for a separate EPA rulemaking whereby EPA could adopt “appropriate portions of a State or Tribal program in combination with provisions of part 71 in order to craft a suitable part 71 program” for that particular tribe or state.¹⁰ *Id.*; see 40 C.F.R. § 71.4(f).

Thus, NNEPA’s response seeks to support the use of its alleged tribal authority in the issuance of Peabody’s part 71 federal permit by referencing EPA’s *proposed* approach which contemplated a customized part 71 program for each state or tribal area. NNEPA fails to acknowledge, however, that EPA completely abandoned that proposed approach. Instead, in its *final* approach to part 71, EPA established a single, uniform set of federal regulations to be administered alike by EPA and by state and tribal delegate agencies.

V. CONCLUSION

For the foregoing reasons and those stated in its petition, Peabody Western Coal Company requests the Board to remand Peabody’s revised part 71 federal permit to NNEPA with an order (1) to process and issue that revised federal permit only in accordance with EPA-

¹⁰ EPA has *not* conducted any rulemaking to adopt any portion of NNOPR to establish a customized version of the part 71 federal permit program applicable only to the Navajo Nation.

delegated federal administrative procedures, and (2) to cease the designation of any tribal provision under Navajo Nation law as legal authority for any condition in that revised federal permit.¹¹ Moreover, because certain provisions of the Delegation Agreement and its related comments unlawfully authorize various NNEPA actions based on tribal law, Peabody also requests the Board to order the deletion of all such authorizations from the Agreement and its related documents.

Respectfully submitted,



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¹¹ See n.6.

CERTIFICATE OF SERVICE

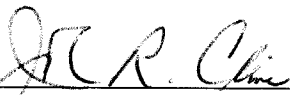
I certify that a copy of PEABODY WESTERN COAL COMPANY'S REPLY TO NAVAJO NATION EPA'S RESPONSE was mailed via Federal Express, overnight delivery, on this 20th day of July, 2011 to:

Jill E. Grant
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John R. Cline
Attorney for Petitioner

Date: July 20, 2011

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY JUL 21 AM
WASHINGTON, D.C.**

AIR APPEALS BOARD

In the Matter of:)
)

Peabody Western Coal Company)

Appeal No. CAA 11-01

Title V Permit No. NN-OP 08-010)
)
)
_____)

**PEABODY WESTERN COAL COMPANY'S MOTION FOR ORDER
REQUESTING EPA'S OFFICES OF AIR AND RADIATION
AND GENERAL COUNSEL TO FILE A BRIEF**

Petitioner, Peabody Western Coal Company ("Peabody" or "Company"), respectfully moves this Board for an Order requesting EPA's Office of Air and Radiation ("OAR") and EPA's Office of General Counsel ("OGC") jointly to file a brief addressing the sole legal issue raised in the above-captioned matter.

The part 71 regulations governing appeal of permits, 40 C.F.R. § 71.11(l), do not provide for motions practice. The Board's Practice Manual also does not address motions practice during part 71 permit appeals. The Environmental Appeals Board Practice Manual ("EAB Practice Manual") at V.C.1. Despite a similar lack of detailed procedures regarding motions in the context of permit appeals under part 124, the Board "has exercised broad discretion to manage its permit appeal docket by ruling on motions presented to it for various purposes[.]" *In re Peabody Western Coal Co.*, CAA Appeal No. 10-01, slip op. at 7 (EAB Aug. 13, 2010). The

Board has concluded that “the broad case management discretion found in part 124 cases naturally extends to part 71 cases, which unfold in accordance with procedures very closely parallel to those of part 124.” *Id.* at 8. Accordingly, Petitioner respectfully requests the Board to exercise its broad case management discretion found in part 71 cases by issuing the order requested by this motion.

This proceeding arises under the administrative review procedures of 40 C.F.R. Part 71 for federal operating permit programs required under title V of the Clean Air Act. 40 C.F.R. § 71.11(l). In keeping with the provisions of 40 C.F.R. § 71.10(a), EPA Region IX has delegated its federal administrative authority to the Navajo Nation Environmental Protection Agency (“NNEPA”) to administer a part 71 federal operating permit program for certain stationary sources located on lands under the jurisdiction of the Navajo Nation. Pet. Ex. B. Peabody’s Kayenta Complex is one of those stationary sources. Notably, although NNEPA has promulgated its own Navajo Nation Operating Permit Regulations (“NNOPR”), a tribal operating permit program developed under tribal law, the NNOPR is not an EPA-approved tribal permit program under 40 C.F.R. part 70. NNEPA Resp. Ex. B.

Acting solely as a delegate agency under part 71, NNEPA has issued a revised part 71 federal permit for the Kayenta Complex, Pet. Ex. A, over Peabody’s objections (1) to NNEPA’s use of its own tribal permit procedures in NNOPR for processing that revised federal permit, and (2) to NNEPA’s inclusion of conditions based on NNOPR in that revised federal permit. Pet. at 8-9. In accordance with 40 C.F.R. § 71.11(l), Peabody has petitioned this Board to review the following single issue: Whether NNEPA, with its delegated federal authority to administer a part 71 federal operating permit program, is authorized and required by 40 C.F.R. § 71.10(a) to

have its own tribal authorities to administer the part 71 federal program, including tribal authorities for permit processing, monitoring and reporting, and permit enforcement? *Id.* at 9.

NNEPA answers that question in the affirmative, stating that “EPA confirmed this interpretation of § 71.10 when EPA processed NNEPA’s request for delegation.” NNEPA Resp. at 6. Moreover, there can be little doubt that provisions within the Delegation Agreement between EPA and NNEPA, Pet. Ex. B, as well as provisions within both EPA’s Eligibility Determination for NNEPA, Pet. Ex. C, and NNEPA’s Transition Plan, Pet. Ex. D, address NNEPA’s reliance on NNOPR requirements and related tribal law to process, issue and enforce part 71 federal permits under NNEPA’s delegated federal administrative authority. *See e.g.*, Pet. Ex. B at § IV(1)-(2), § V(4) and § IX(2); Pet. Ex. C at 3; Pet. Ex. D at § V.C, § V.E and § V.G.

For its part, Peabody claims that NNEPA, as a delegate agency under part 71, is required under the Clean Air Act to issue Peabody’s revised part 71 federal permit only in accordance with the particular requirements of that federal permit program for which it has been delegated responsibility to administer on behalf of EPA. *See, e.g.*, Pet. at 18-19. As a consequence of the Clean Air Act prohibiting NNEPA’s reliance on its own tribal regulations to issue Peabody’s revised part 71 federal permit, Peabody further claims that federal permit may not contain conditions based on NNEPA’s tribal regulations. *Id.*

NNEPA is the only tribal agency to date that has been delegated EPA’s administrative authority to administer a part 71 federal program. Other tribes, however, may seek such delegation as an alternative to the need for developing its own tribal permit program under tribal law and obtaining EPA’s approval of that tribal program under part 70. 76 Fed. Reg. 38,748, 38,779 (July 1, 2011). Moreover, EPA has recently promulgated two federal new source review permit programs for Indian country, *id.* at 38,748 *et seq.*, and each program provides for a similar

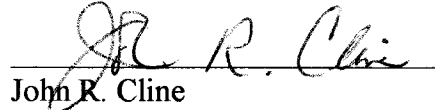
delegation of federal authority to a tribe to administer certain elements of that federal permit program on behalf of EPA. *Id.* at 38,779-81 (codified at 40 C.F.R. §§ 49.161(b) and 49.173(b)). Finally, EPA intends to revise its federal prevention of significant deterioration (PSD) regulations, 40 C.F.R. § 52.21, to provide for delegation of federal authority to a tribe to administer elements of that federal permit program on behalf of EPA. *Id.* at 38,780, n.35. Consequently, the number of tribes seeking administrative delegations of federal authority to administer one or more federal permit programs is expected to increase in the future. The Board's resolution of the issue presented in this proceeding therefore has the potential for establishing far-reaching precedent for those anticipated future administrative delegations.

In this proceeding the Board has requested a response to Peabody's Petition from the "permitting authority," i.e., NNEPA. Letter from Eurika Durr, Clerk of the EAB, to Stephen B. Etsitty, NNEPA, Appeal No. CAA 11-10, Dkt No. 3 (May 20, 2011). However, (1) because EPA originally developed the regulations for the part 71 federal permit program, 61 Fed. Reg. 34,202 (July 1, 1996), including its provisions for administrative delegation of federal authority at § 71.10, (2) because NNEPA's asserted justification for its contested actions is based so heavily on specific language within § 71.10(a), EPA's Eligibility Determination, Pet. Ex. C, and the EPA-NNEPA Delegation Agreement, Pet. Ex. B, and (3) because the Petition raises an issue of first impression under the part 71 federal permit program, OAR's and OGC's views on the underlying issue in this proceeding almost certainly would assist the Board's resolution of this case.

For the foregoing reasons, Peabody respectfully requests the Board to issue an Order requesting OAR and OGC jointly to file a brief addressing the sole legal issue presented by the

Petition for Review. Counsel for Peabody has conferred with counsel for NNEPA, and NNEPA does not object to this motion.

Respectfully submitted,



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CERTIFICATE OF SERVICE

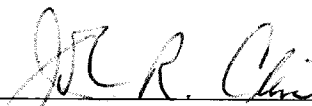
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Date: July 20, 2011