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January 6, 2010

Via Federal Express

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

Re: Petition for Review
Peabody Western Coal Company
Title V Permit No. NN-OP 08-010

To Whom It May Concern:

Enclosed please find a Petition for Review filed on behalf of Peabody Western Coal Company for the above-referenced part 71 Federal operating permit issued by the Navajo Nation Environmental Protection Agency under a delegation of authority from EPA Region IX. An original and five copies of the Petition have been filed along with three sets of the accompanying Exhibits.

Also enclosed is one extra copy of the Petition. Upon its receipt, please date-stamp that copy and return it to me in the enclosed, self-addressed envelope.

Please call me at 804-746-4501 if you have any questions about this submittal.

Sincerely,

John R. Cline
Attorney for Petitioner

Enclosures

cc: Linda Crist – Peabody Energy Corporation

ORIGINAL

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

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

PETITION FOR REVIEW

Pursuant to 40 C.F.R. §§ 71.10(i) and 71.11(l), Peabody Western Coal Company ("Peabody") submits this Petition for Review of the Title V Operating Permit ("Permit") issued by the Navajo Nation Environmental Protection Agency ("NNEPA") under a delegation of authority from EPA Region IX for Peabody's Black Mesa Complex near Kayenta, Arizona. A copy of the Permit is attached as Exhibit A.

This Petition challenges NNEPA's inclusion of requirements from the Navajo Nation Operating Permit Regulations ("NNOPR") as conditions in the Permit. For the reasons explained herein, Peabody respectfully requests the Environmental Appeals Board ("Board") to order the removal of any conditions based on Tribal regulations from the four corners of the Federal Operating Permit for Black Mesa Complex.

I. INTRODUCTION

Title V of the Clean Air Act as amended in 1990 ("Act"), 42 U.S.C. §§ 7661 *et seq.*, requires "major sources" of air pollutant emissions to have an operating permit. When a State or Tribe does not have an EPA-approved operating permit program that meets the requirements of 40 C.F.R. part 70 ("part 70 program"), EPA implements a Federal operating permit program under 40 C.F.R. part 71 ("part 71 program") for the affected area.

The Navajo Nation Environmental Protection Agency ("NNEPA") has developed Tribal operating permit regulations, i.e., the Navajo Nation Operating Permit Regulations ("NNOPR"). The NNOPR have not been approved by EPA under part 70. Although the EPA initially implemented a part 71 program for sources on the Navajo Reservation, the NNEPA has since been delegated authority by EPA to administer a part 71 Federal operating permit program.

Under that delegation, the NNEPA has issued a part 71 Federal operating permit for Peabody's Black Mesa Complex. Certain conditions in that Permit consist of requirements based not only on the part 71 regulations but also on the NNOPR. Other conditions in that Permit consist of requirements based solely on the NNOPR. In defending the Permit's inclusion of requirements based on its Tribal regulations , the NNEPA seems to be saying that delegation of part 71 authority to the Tribe has authorized the creation of federally enforceable conditions that are based on Navajo regulations.

Peabody, however, does not believe that delegation of part 71 authority to NNEPA grants federal approval of the NNOPR. Adding requirements from Tribal regulations as conditions in a Federal operating permit not only creates confusion as to which permit conditions are enforceable under the Clean Air Act but also establishes a dangerous precedent for future Federal operating permits that are issued by delegate Tribal agencies. Because it is unlawful for the

NNEPA to include requirements from its Tribal regulations as conditions in a part 71 Federal operating permit, Peabody requests the Board to require all such permit conditions based on the NNOPR to be removed from the part 71 Federal operating permit for Black Mesa Complex.

It is important to note that Peabody's request does not involve the removal of numerous conditions from the Permit. All of the conditions in question, except one, are independently authorized by part 71 regulations and must remain in the Permit as valid Federal requirements. For those conditions, only the citations of the NNOPR as authority for the conditions must be removed from the part 71 Federal permit. However, as explained further herein, the Permit's condition for collection of permit fees from Peabody is authorized solely by the NNOPR; there is no Federal counterpart for collecting part 71 permit fees in this particular instance. Accordingly, the Permit condition requiring collection of fees is the only NNOPR-based condition that must be removed in its entirety from the four corners of the part 71 permit for Black Mesa Complex.

Peabody also emphasizes that this appeal should not be construed as a challenge to the Navajo Nation's authority to develop, implement and enforce its own operating permit program. Rather, this appeal seeks the Board's assistance in clarifying the interface under the Clean Air Act between Tribal and Federal authorities related to operating permit programs.

II. BACKGROUND

A. The Black Mesa Complex

The Black Mesa Complex (Complex) is a surface coal mine located twenty miles southwest of Kayenta, Arizona and within the exterior boundaries of the Navajo Nation. The Complex includes surface mining operations, coal processing and preparation facilities, an overland conveyor system, several coal storage systems, several open storage piles, and various

storage tanks. Because the Complex is classified as a "major source," 42 U.S.C. § 7661(2), it must have an operating permit issued in accordance with title V. 42 U.S.C. § 7661a(a).

B. Structure of Title V Operating Permit Programs

Title V imposes on each State the duty to develop, administer and enforce an operating permit program that complies with the requirements of title V. Section 502(b) of the Act requires that EPA promulgate regulations containing provisions under which each State must develop an operating permit program and submit it to EPA for approval prior to its implementation. EPA has promulgated 40 C.F.R. part 70 which specifies the minimum elements to be contained in each State operating permit program. 57 Fed. Reg. 32,250 (July 21, 1992).

Sections 502(d)(3) and 502(i)(4) of the Act require EPA to promulgate a Federal operating permit program to apply whenever a State has failed to submit an approvable part 70 program to EPA or has been deficient in the administration or enforcement of its part 70 program. EPA has promulgated 40 C.F.R. part 71 which contains all of the requirements of the Federal operating permit program. 61 Fed. Reg. 34,202 (July 1, 1996). Issued under a Federal program, Part 71 permits contain only federally enforceable requirements. *Id.* at 34,221.

Unlike States, Indian Tribes are not required to develop and run their own part 70 operating permit programs, although EPA encourages them to do so. *See, e.g.*, 64 Fed. Reg. 8,248 (Feb. 19, 1999). EPA has revised its original part 71 Federal operating permit program in order for the Agency to administer and enforce that program within Indian country unless a part 70 Tribal program has been approved by EPA for the area. 40 C.F.R. § 71.4(b). The part 71 Federal operating permit program became effective in Indian country throughout the United States on March 22, 1999. 40 C.F.R. § 71.4(b)(2)

Part 71 provides that EPA may delegate, in whole or in part, responsibility for administering the part 71 program to a State or eligible Tribe. 40 C.F.R. § 71.10(a). The provisions governing delegation of part 71 program authority are prescribed at 40 C.F.R. § 71.10. A Delegation of Authority Agreement is required to set forth the terms and conditions of the delegation and to specify the provisions that the delegate agency is authorized to implement. 40 C.F.R. § 71.10(a). Once delegation becomes effective, the delegate agency is responsible, to the extent specified in the Agreement, for administering the part 71 program. *Id.* Delegation does not constitute approval of a State or Tribal operating permit program under part 70. 40 C.F.R. § 71.4(j); *see also* 61 Fed. Reg. 34,206.

C. The Navajo Nation Operating Permit Regulations

Under authority of the Navajo Nation Air Pollution Prevention and Control Act, 4 N.N.C. §§ 1134-40, NNEPA has developed the Navajo Nation Operating Permit Regulations, 4 NNR §§ 11-2H-101 *et seq.* The NNOPR are patterned after the requirements of 40 C.F.R. part 70. Indeed, the language of many provisions within the NNOPR is identical to the language of their part 70 counterparts because NNEPA intends to seek EPA's part 70 approval of the NNOPR. *See* October 15, 2004 Delegation of Authority Agreement ("Delegation Agreement"), attached as Exhibit B, at 2. However, because EPA has not yet approved the NNOPR as a part 70 Tribal operating permit program, major sources located on the Navajo Reservation are subject to the part 71 Federal operating permit program.

D. NNEPA's Delegated Part 71 Authority

On October 15, 2004 EPA Region IX delegated to the NNEPA authority to administer the part 71 Federal operating permit program for the Black Mesa Complex and certain other part 71 sources on the Navajo Reservation. 69 Fed. Reg. 67,578 (Nov. 18, 2004). The Delegation

Agreement between EPA and NNEPA sets forth terms and conditions of that delegation, consistent with the provisions of part 71. (Ex. B).

E. The Permit at Issue

The original part 71 Federal operating permit for Black Mesa Complex was issued by EPA Region IX and became effective on July 1, 2004. Under its delegated authority to administer a part 71 program, the NNEPA issued a renewal part 71 Federal operating permit for Black Mesa Complex on December 7, 2009. (Ex. A).

During the public comment period for the draft version of that renewal part 71 permit, Peabody objected to inclusion of requirements from the NNOPR as conditions in that part 71 permit. *See* August 2009 Peabody Comments, attached as Exhibit C, at 4-5. Peabody provided further comments on that issue to the NNEPA in November 2009. *See* November 2009 Peabody Comments, attached as Exhibit D, at 1-3. In response, the NNEPA asserted that particular statements within the Delegation Agreement authorized conditions in the NNEPA-issued part 71 permit to be based on NNOPR requirements. *See* NNEPA Responses to Comments, attached as Exhibit E, at 9-10. Peabody now petitions the Environmental Appeals Board to review NNEPA's practice of including specific requirements in the NNOPR as conditions in the renewed part 71 Federal operating permit for Black Mesa Complex.

III. STANDING

During the public comment period for the draft version of the Permit, Peabody timely submitted comments to NNEPA regarding the specific issue it now raises in this Petition for Review. (Ex. C). In accordance with 40 C.F.R. §§ 71.10(i) and 71.11(l)(1), Peabody has standing to appeal the Permit.

IV. DISPUTED PERMIT CONDITIONS

Peabody seeks the Board's review of the NNEPA's inclusion of requirements from the Navajo Nation Operating Permit Regulations in each of the following conditions in the Permit: III.B, IV.A, IV.C, IV.D, IV.E, IV.G, IV.H, IV.I, IV.K, IV.L and IV.Q.

V. STATEMENT OF ISSUE SUPPORTING REVIEW

The above-stated conditions within the NNEPA-issued part 71 Federal operating permit for Black Mesa Complex are based, in whole or in part, on requirements from the Navajo Nation Operating Permit Regulations. For the following reasons, Peabody believes, as a matter of law under the Clean Air Act, that any conditions based on NNOPR requirements have no lawful place in that title V permit.

A. Delegation of part 71 authority does not confer EPA approval of Tribal operating permit regulations.

In order for a Tribal agency to be delegated authority to administer the part 71 Federal operating permit program, EPA must conclude 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). A Tribe has "adequate authority to carry out all aspects of the delegated [part 71] program" when it has *sufficient legal authority and procedures under Tribal law* to administer and enforce a part 71 program. 60 Fed. Reg. 20,823 (Apr. 27, 1995) (emphasis added). As EPA has explained, each delegate agency has to comply with its own procedures, administrative codes, regulations, and laws as well as the requirements of part 71. *Id.*

The Delegation Agreement between the NNEPA and EPA makes clear that EPA "has determined that NNEPA meets all of the criteria for designation as a 'delegate agency' set forth at 40 C.F.R. Part 71." (Ex. B at 1). However, NNEPA appears to construe that EPA finding as conferring Federal approval of its Tribal operating permitting regulations for purposes of title V

permitting. For that reason, NNEPA believes that it is justified in including requirements from the NNOPR in several conditions in the part 71 Federal operating permit for Black Mesa Complex. (Ex. D at 9-10).

NNEPA has misinterpreted the legal effect of EPA's determination that NNEPA has "adequate authority to carry out all aspects of the delegated program." As explained above, EPA only approves Tribal or State operating permit regulations under part 70. In the absence of an EPA-approved part 70 program, EPA issues title V permits under the Federal part 71 program. Title V does not, however, provide for any hybrid permit, i.e., one with some conditions from a part 70 program and other conditions from a part 71 program. Nor does title V provide for the addition of either Tribal or State regulations to a part 71 Federal program.

EPA may delegate, in whole or in part, the authority to administer a part 71 operating permit program to a Tribe. 40 C.F.R. § 71.10(a). However, EPA has made clear that "delegation of a part of a part 71 program will not constitute any type of approval of a State or Tribal operating permits program under part 70." 40 C.F.R. § 71.4(j). Instead, with a partial delegation, the Tribe administers only the delegated portions of part 71, and EPA administers the remaining portions of the part 71 program for sources on that Tribe's lands. *Id.*

In sum, NNEPA's unapproved Tribal regulations do not become elements of the part 71 Federal operating permit program simply because EPA has delegated part 71 authority to the NNEPA. Even after that delegation, the NNOPR remain unenforceable under the Clean Air Act. Therefore, conditions in the part 71 Federal operating permit for Black Mesa Complex that are based on NNOPR requirements have no force of law under the Clean Air Act and must be removed from the title V permit for that source.

B. The Delegation Agreement explicitly recognizes that NNOPR provisions are not part of the subject part 71 Federal operating permit.

The Delegation Agreement plainly recognizes that NNEPA has promulgated its own Navajo Nation Operating Permit Regulations. However, the Delegation Agreement also notes the following: "Although not a requirement of this Delegation Agreement and *not part of the administration of the federal part 71 program*, NNEPA intends to supplement the requirements in Part 71 with the requirements in the Navajo Nation Operating Permit Regulations." (Ex. B, § V.4 (emphasis added)).

In issuing the part 71 Federal permit for Black Mesa Complex, the NNEPA has established the following permit conditions based on NNOPR requirements:

Permit Condition	NNOPR Provision
III.B	§ 302(G)
IV.A	Subpart VI
IV.C	§ 302(I)
IV.D	§ 301(E)
IV.E	§ 702
IV.G	§ 406
IV.H	§ 405(C)
IV.I	§ 405(D)
IV.K	§ 405(E)
IV.L	§ 406
IV.Q	§ 404(B)

Region IX has clearly acknowledged that NNOPR requirements are not title V requirements of the Clean Air Act. The fact that most of the above-stated permit conditions are also based on part 71 requirements is irrelevant. For title V permitting under part 71, those permit conditions must be based only on part 71 requirements that apply. Because provisions within the NNOPR are not required by the Clean Air Act, Peabody respectfully requests any and all requirements from the NNOPR to be removed from the four corners of the NNEPA-issued title V permit for Black Mesa Complex.

C. NNEPA's collection of fees under NNOPR Subpart VI cannot be a requirement of a NNEPA-issued part 71 Federal operating permit.

The fee collection provisions from NNOPR Subpart VI cannot be included in the part 71 Federal permit for an additional reason.

The part 71 regulations contain provisions for determining and collecting part 71 permit fees under the following circumstances: when EPA administers the part 71 program, § 71.9(c)(1); when EPA administers the part 71 program with contractor assistance, § 71.9(c)(3); when part 71 programs are delegated in part, § 71.9(c)(4); and when part 71 programs are fully delegated but EPA has not suspended its part 71 fee collection, § 71.9(c)(2)(i).

However, the Agency found that EPA's collection of part 71 fees through a Federal program could cause problems for delegate agencies that have the independent authority under their State or Tribal laws to collect fees adequate to fund delegated part 71 programs. As a result, EPA concluded that the best approach to collecting revenue for those particular delegate agencies was to allow those agencies to collect sufficient revenues under their State or Tribal law and to suspend EPA collection of part 71 fees for those delegated part 71 programs. 61 Fed. Reg. 34,223-4.

EPA has determined that the NNEPA has adequate authority under Navajo Nation law to fund fully-delegated part 71 activities with fees collected from part 71 sources. (Ex. B at 4). Upon NNEPA's administration of the delegated part 71 authority, EPA agreed to suspend its collection of part 71 fees. *Id.* Under those circumstances, the part 71 regulations contain no provisions for determining and collecting part 71 permit fees. Instead § 71.9(c)(2)(ii) provides:

> Where the delegate State [or Tribe] collects fees from part 71 sources under State [or Tribal] law which are sufficient to fund the delegated part 71 program, the EPA may suspend its collection of part 71 fees. The specific terms and conditions regarding the

> suspension of fee collection will be addressed in the applicable delegation agreement pursuant to § 71.10.

The Delegation Agreement confirms that "NNEPA agrees to collect permit fees from all Part 71 sources in a manner consistent with Subpart VI of the NNOPR." (Ex. B, § II). Importantly, however, NNEPA's commitment to collect revenue from part 71 sources "in a manner consistent with Subpart VI of the NNOPR" does not make that Tribal regulatory requirement part of the part 71 Federal operating permit program. Rather, in circumstances such as NNEPA's, part 71 directs the delegate agency to collect revenue, according to State or Tribal requirements, sufficient to cover the costs of a part 71 program. *See, e.g.,* 61 Fed. Reg. 39,877 (July 31, 1996) (Under part 71 delegations to several States, sources would pay permit fees "according to the State statute.").

In sum, the part 71 Federal permit fee collection procedures that apply to EPA cannot be, and were not, delegated to NNEPA. The Delegation Agreement instead provides for a means of Tribal-authorized collection of permit fee payments consistent with NNOPR Subpart VI. That Agreement, however, does not confer Federal approval of NNOPR Subpart VI as part of the part 71 Federal operating permit program. Thus, although Peabody does not contest NNEPA's authority to determine and collect permit fees outside the four corners of Peabody's federally-enforceable operating permit, the Permit conditions based on NNOPR Subpart VI must be removed from the part 71 Federal permit for Black Mesa Complex.

D. Tribal regulations can be the basis for part 71 permit conditions, but only after EPA rulemaking makes those regulations part 71 federal requirements.

NNEPA has identified several "specific NNOPR provisions that apply to Part 71 permits." (Ex. D at 10). Based on that Tribal authority, i.e., that the language in certain NNOPR

provisions makes them applicable to part 71 permits, the NNEPA has justified citing those NNOPR provisions as authority for conditions in a part 71 Federal operating permit. *Id.*

NNEPA's reliance on Tribal authority to confer Federal approval of a Tribal regulation is misplaced. All title V permit requirements – whether they are Tribal (or State) under part 70 or they are Federal under part 71 – can only be authorized by EPA. Neither a Tribe nor a State can unilaterally confer part 70 or part 71 approval of its operating permit regulations.

EPA designed the part 71 Federal operating permit program using a "national template" approach because the Agency believed that a uniform, standardized approach was still flexible enough to be an effective program in most areas. 61 Fed. Reg. 34,213. Nevertheless, 40 C.F.R. § 71.4(f) provides:

> The Administrator . . . may adopt, through rulemaking, portions of a State or Tribal permit program in combination with provisions of this part [71] to administer a Federal program for the State or in Indian country in substitution of or in addition to the Federal program otherwise required by this part.

EPA has explained that this provision was intended to allow the Agency "the flexibility to meld portions of a . . . Tribal permit program with provisions of part 71 *to create a part 71 program that fits the needs of the area* for which it is being administered, regardless of whether the . . . Tribal program has gained EPA approval." 64 Fed. Reg. 8,259 (emphasis added); *see also* 60 Fed. Reg. 20,811.

In other words, EPA has provided a mechanism whereby provisions within NNOPR *could* serve as the basis for conditions in the part 71 Federal operating permit for Black Mesa Complex. In particular, EPA rulemaking would be required to combine the relevant NNOPR provisions with portions of the standard part 71 program to create a hybrid part 71 Federal operating permit program unique to the Navajo Nation.

Importantly, however, the particular NNOPR provisions adopted through that EPA rulemaking would become, for title V purposes, part 71 Federal requirements specific to the Navajo Nation and *would be cited as such* in any part 71 permit issued by NNEPA under an EPA delegation of part 71 authority. Thus, although it has not been implemented, even the part 71 regulatory procedure for basing conditions in a Federal operating permit on Tribal permitting provisions still would not authorize permit conditions required by Tribal regulations in the part 71 permit. Under the Clean Air Act, Tribal operating permit regulations have no place in a part 71 Federal operating permit.

VI. CONCLUSION

When promulgating requirements for the part 71 program, EPA stated:

> The EPA understands the strong desire expressed by industry commenters to avoid having several regulating entities, e.g., EPA, a State, and a Tribe, seeking to assert regulatory authority over them. The EPA believes that Federal implementation of the title V program throughout Indian country will help provide certainty and clarity to regulated entities.

64 Fed. Reg. 8,253. Yet, the certainty and clarity that EPA expected from administration of its part 71 Federal program in Indian country has not materialized with the part 71 permit recently issued by the NNEPA for the Black Mesa Complex. While the delegation of part 71 authority to a Tribe clearly involves a "marriage" of Federal and Tribal permitting regulations, that marriage stops short of incorporating those Tribal rules into the part 71 Federal program.

Title V conditions in a part 71 Federal operating permit are based on part 71 regulatory requirements. If a Tribal agency has been delegated part 71 program authority, title V conditions in a part 71 Federal operating permit must still be based on part 71 regulatory requirements. Although part 71 provides an EPA-rulemaking mechanism for combining part 71 Federal requirements with requirements from a Tribal operating permit regulation to forge a part 71

Federal program specific to that Tribe, EPA has not performed such rulemaking with the Navajo Nation Operating Permit Regulations.

Because the NNOPR are not part of the part 71 Federal operating permit program, any part 71 Federal permit issued by NNEPA under a delegation of part 71 authority may not contain conditions based on the NNOPR. Nevertheless, the NNEPA-issued part 71 Federal permit for Black Mesa Complex includes several conditions based on requirements from both part 71 and the NNOPR as well as certain fee collection conditions based solely on requirements from the NNOPR. Because Title V permitting under the Clean Air Act does not authorize title V permit conditions based on Tribal regulations, Peabody respectfully requests the Board to order the removal of all conditions based on requirements from the NNOPR from the part 71 Federal operating permit that has been issued for Black Mesa Complex. As previously indicated, that action would necessitate removal of only one NNOPR-based condition in its entirety and the deletion of citations to NNOPR in several other Permit conditions.

The solution in this instance may well be nothing more than segregation of all NNOPR-based permit conditions into a separate "NNOPR-only" attachment to the part 71 Federal permit. But the structure of the part 71 Federal permit for Black Mesa Complex must make clear that conditions in that title V permit are enforceable under the Clean Air Act, but that any related conditions required under Tribal law are not.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER
PEABODY WESTERN COAL COMPANY

CERTIFICATE OF SERVICE

I hereby certify that copies of this Petition for Review were mailed, via U.S. mail, postage prepaid, this 6th day of January, 2010, to:

Stephen B. Etsitty, Executive Director
Charlene Nelson, Air Quality Control Program
Navajo Nation Environmental Protection Agency
P. O. Box 339
Window Rock, AZ 86515

Jared Blumenfeld, Administrator
Deborah Jordan, Air Division Director
EPA Region IX
75 Hawthorne Street
San Francisco, CA 94104

Attorney

EXHIBITS

A. Title V Operating Permit for Black Mesa Mine Issued by NNEPA

B. October 2004 Delegation Agreement between EPA and NNEPA

C. August 2009 Peabody Comments on Draft Permit

D. November 2009 Peabody Comments on Draft Permit

E. December 2009 NNEPA Responses to Comments

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

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

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E. December 2009 NNEPA Responses to Comments

EXHIBIT A

Title V Operating Permit for Black Mesa Mine Issued by NNEPA

NAVAJO NATION ENVIRONMENTAL PROTECTION AGENCY
Office of the Executive Director
Post Office Box 339, Window Rock, AZ 86515
Telephone (928) 871-7692, Fax (928) 871-7996

Dr. Joe Shirley, Jr.
PRESIDENT

Ben Shelly
VICE PRESIDENT

TITLE V PERMIT TO OPERATE

PERMIT #:	FACILITY NAME:	LOCATION:	COUNTY:	STATE:
NN-OP 08-010	PEABODY WESTERN COAL COMPANY – BLACK MESA COMPLEX	KAYENTA	NAVAJO	AZ

ISSUE DATE:	EXPIRATION DATE:	AFS PLANT ID:	PERMITTING AUTHORITY:
12/07/2009	12/07/2014	04-017-NAV01	NNEPA

ACTION/STATUS: PART 71 OPERATING PERMIT

Kemal Williamson, President
Peabody Western Coal Company – Black Mesa Complex
701 Market Street
St. Louis, Missouri 63101-1826

Re: Issuance of Title V Operating Permit to Peabody Western Coal Company – Black Mesa Complex

Dear Mr. Williamson:

This permit is being issued and administered by the Navajo Nation EPA ("NNEPA") pursuant to the Delegation Agreement between the United States Environmental Protection Agency ("USEPA" or "EPA") Region 9 and NNEPA, dated October 15, 2004. In accordance with the provisions of Title V of the Clean Air Act, 40 CFR Part 71, Navajo Nation Operating Permit Regulations, and all other applicable rules and regulations, the permittee, Peabody Western Coal Company – Black Mesa Complex, is authorized to operate air emission units and to conduct other air pollutant emitting activities in accordance with the permit conditions listed in this permit.

Terms and conditions not otherwise defined in this permit have the same meaning as assigned to them in the referenced regulations. All terms and conditions of the permit are enforceable by NNEPA and by EPA, as well as by citizens, under either or both the Navajo Nation Clean Air Act and the federal Clean Air Act, as applicable. If all proposed control measures and/or equipment are not installed and/or properly operated and maintained, the permittee will be considered in violation of the permit.

This permit is valid for a period of five (5) years and shall expire at midnight on the date five (5) years after the date of issuance unless a timely and complete renewal application has been submitted at least six (6) months but not more than eighteen (18) months prior to the date of expiration. The permit number cited above should be referenced in future correspondence regarding this facility.

DEC - 7 2009
Date

Stephen B. Etsitty
Executive Director
Navajo Nation Environmental Protection Agency

Abbreviations and Acronyms

Administrator	Administrator of US EPA
AR	Acid Rain
ARP	Acid Rain Program
CAA	Clean Air Act [42 U.S.C. § 7401 et seq.]
CAM	Compliance Assurance Monitoring
CFR	Code of Federal Regulations
EIP	Economic Incentives Program
gal	gallon
HAP	Hazardous Air Pollutant
hp	horse power
hr	hour
Id. No.	Identification Number
ISO	International Standards Organization
kg	kilogram
lb	pound
MMBtu	million British Thermal Units
mo	month
NESHAP	National Emission Standards for Hazardous Air Pollutants
NNEPA	Navajo Nation Environmental Protection Agency
NNOPR	Navajo Nation Operating Permit Regulations
NNADCR	Navajo Nation Acid Deposition Control Regulations
NO_X	Nitrogen Oxides
NSPS	New Source Performance Standards
NSR	New Source Review
PM	Particulate Matter
PM-10	Particulate matter less than 10 microns in diameter
ppm	parts per million
PSD	Prevention of Significant Deterioration
PTE	Potential to Emit
psia	pounds per square inch absolute
RMP	Risk Management Plan
SNAP	Significant New Alternatives Program
SO_2	Sulfur Dioxide
TPY	tons per year
TSP	Total Suspended Particulate
USEPA	United States Environmental Protection Agency
VOC	Volatile Organic Compounds

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I. Source Identification

- Parent Company Name: Peabody Holding Company, LLC
- Parent Company Mailing Address: 701 Market Street St. Louis, Missouri 63101-1826
- Plant Name: Peabody Western Coal Company – Black Mesa Complex
- Plant Location: 20 miles SSW of Kayenta, Arizona
- County: Navajo, Arizona
- EPA Region: 9
- Reservation: Navajo Nation
- Tribe: Hopi Tribe
- Company Contact: Gary Wendt Phone: (928) 677-5130
- Responsible Official: Kemal Williamson Phone: (314) 342-7586
- EPA Contact: Roger Kohn Phone: (415) 972-3973
- Tribal Contact: Charlene Nelson Phone: (928) 729-4247
- SIC Code: 1221
- AFS Plant Identification Number: 04-017-NAV01
- Description of Process: The facility is a surface coal mining operation.
- Significant Emission Units:

Unit ID	Unit Description	Maximum Capacity	Construction Date	Control Method
J-28 Coal Preparation Area at Kayenta Mine				
J28D	Two (2) bulldozing operations	4,500 hrs/yr	1984-1986	N/A
J28	One (1) truck hopper	2,600 tons/hr*	1984-1986	Sprays and rain birds.
Belt #1-N and Belt #1-S	Two (2) conveyors, from the stockpile K-5 truck hopper to the primary crusher	2,600 tons/hr (each)	1984-1986	Enclosure and sprays.
J28	One (1) high sulfur reclaim hopper	2,600 tons/hr*	1984-1986	Sprays and rain birds.
Belt #8	One (1) conveyor, from the stockpiles K-6 and K-6A truck hopper to the crusher	2,600 tons/hr	1984-1986	Enclosure and sprays.
J28PC	Two (2) primary crushers	2,600 tons/hr* (each)	1984-1986	Enclosure and sprays.
Belt #2	One (1) conveyor, from the primary crusher to the screen	2,600 tons/hr	1984-1986	Enclosure and sprays.
J28S	One (1) double deck screen	2,600 tons/hr*	1984-1986	Enclosure and sprays.
J28SC	One (1) secondary crusher	500 tons/hr	1984-1986	Enclosure.

Unit ID	Unit Description	Maximum Capacity	Construction Date	Control Method
Belt #3 and Belt #4	Two (2) conveyors associated with the sample system crusher.	1.9 tons/hr* (each)	1984-1986	Enclosure and sprays.
J28SSC	One (1) sample system crusher	1.9 tons/hr	1984-1986	Enclosure.
Belt #5 and Belt #6	Two (2) conveyors, from the secondary crusher to the dome stockpile	2,600 tons/hr* (each)	1984-1986	Enclosure and sprays.
K-5, K-6, and K-6A	Three (3) stockpiles	8,900,000 tons/yr (combined)	1984-1986	N/A
	One (1) dome stockpile	8,900,000 tons/yr	1984-1986	Enclosure and sprays.
N-11 Coal Preparation Area at Kayenta Mine				
N11D	One (1) bulldozing operation	1,500 hrs/yr	1991-1992	N/A
N11	One (1) truck hopper	1,800 tons/hr*	1991-1992	Sprays and rain birds.
Belt #34	One (1) conveyor, from the stockpile N-11 truck hopper to the primary crusher.	1,800 tons/hr	1991-1992	Enclosure and sprays.
N11PC	One (1) primary crusher	1,800 tons/hr*	1991-1992	Enclosure and sprays.
Belt #35	One (1) conveyor, from the primary crusher to the screen.	1,800 tons/hr	1991-1992	Enclosure and sprays.
N11S	One (1) single deck screen	1,800 tons/hr*	1991-1992	Enclosure and sprays.
Sample Belt	One (1) conveyor, from the screen to the sample system crusher	1,800 tons/hr	1991-1992	Enclosure and sprays.
N11SSC	One (1) sample system crusher	1.1 tons/hr	1991-1992	Enclosure.
Belt #36	One (1) conveyor from the screen to transfer point	1,800 tons/hr	1991-1992	Enclosure and sprays.
N-11	Stockpile	4,000,000 tons/yr	1991-1992	N/A
N-8 Coal Preparation Area at Kayenta Mine				

Unit ID	Unit Description	Maximum Capacity	Construction Date	Control Method
N8D	Three (3) bulldozing operations	22,285 hrs/yr (combined)	K-1– 1970-1973 K-2 – 1983-1984 K-3 – 1991-1992	N/A
N8	One (1) truck hopper at stockpile K-2 (low sulfur)	2,600 tons/hr*	1970-1973	Sprays, rain birds, and chemical application.
Belt #3A	One (1) conveyor associated with the K-2 low sulfur truck hopper.	2,600 tons/hr	1970-1973	Enclosure.
Belt #11 and Belt #12	Two (2) conveyors to stockpile K-2	1,800 tons/hr (each)	1983-1984	Enclosure and sprays.
N8	One (1) truck hopper at stockpile K-3 (high sulfur)	2,600 tons/hr*	1991-1992	Sprays.
Belt #18	One (1) conveyor associated with the K-3 high sulfur truck hopper	2,600 tons/hr	1991-1992	Enclosure.
Belt #15 and Belt #16	Two (2) conveyors to stockpile K-3	2,600 tons/hr (each)	1991-1992	Enclosure.
Belt #4	One (1) conveyor, from stockpile K-1 to Belts #3 and 14	2,600 tons/hr	1970-1973	Enclosure.
Belt #3 and Belt #14	Two (2) conveyors to the transfer tower	2,600 tons/hr (each)	1970-1973	Enclosure.
Belt #27	One (1) conveyor, from stockpile K-1 to Belt #30	1,800 tons/hr	1970-1973	Enclosure.
Belt #28	One (1) conveyor, from Belts #3 and #14 to Belt #30 transfer point	1,800 tons/hr	1970-1973	Enclosure.
N8SSC	Sample system crusher	1.1 tons/hr	1978-1979	Enclosure, sprays, and chemical application.
Belt #31 and Belt #33	Two (2) conveyors associated with the screens	1,800 tons/hr (each)	1978-1979	Enclosure.
N8S	Two (2) single deck screens	1,800 tons/hr* (combined)	1978-1979	Enclosure and chemical application.
N8SC	Two (2) secondary crushers	600 tons/hr (each)	1978-1979	Enclosure and chemical application.

Unit ID	Unit Description	Maximum Capacity	Construction Date	Control Method
Belt #30 and Belt #32	Two (2) conveyors, from Belts #27 and #28 to the weigh bin	1,800 tons/hr (each)	Belt #30 – 1970-73 Belt #32 – 1991-92	Enclosure.
K-1, K2, and K-3	Stockpiles	8,900,000 tons/yr (combined)	K-1 – 1970-1973 K-2 – 1983-1984 K-3 – 1991-1992	N/A
Overland Conveyor System at Kayenta Mine				
OCTP20 (Belts #20 through #25)	Five (5) conveyors, from process area J-28 to process area N-8	1,800 tons/hr (each)	1983-1984	Enclosure and sprays.
OCTP21 (Belts #21, 21-A, #22, and #23)	Four (4) conveyors, from process area N-8 to the coal storage silos	1,800 tons/hr (each)	1970-1973	Enclosure and sprays.
SILO	Four (4) coal storage silos	1,800 tons/hr* (each)	1970-1973	Baghouse.
Preparation Plant at Black Mesa Mine				
BMD	Two (2) bulldozing operations	4,000 hrs/yr (combined)	1968-1970	N/A
BM	One (1) truck hopper	2,000 tons/hr*	1968-1970	Sprays.
CONV #2	One (1) conveyor, from the truck hopper to the primary crusher	2,000 tons/hr	1968-1970	Enclosure.
BMPC	One (1) primary crusher	2,000 tons/hr*	1968-1970	Enclosure and sprays.
BMS	One (1) screen	2,000 tons/hr	1986	Enclosure and sprays.
BMSC	One (1) secondary crusher	500 tons/hr	1986	Enclosure and sprays.
CONV #4 and CONV #5	Two (2) conveyors, from the primary crusher to live storage	2,000 tons/hr (each)	1968-1970	Enclosure.
CONV #3A and CONV #3B	Two (2) conveyors associated with the screen	2,000 tons/hr (each)	1986	Enclosure and sprays.
BMSSC	One (1) sample system crusher	1.1 tons/hr	1986	Enclosure.

Unit ID	Unit Description	Maximum Capacity	Construction Date	Control Method
BMTPSSC	Two (2) conveyors associated with the sample system crusher	25 tons/hr (each)	1986	Enclosure.
Dead storage	One (1) reclaim hopper	2,000 tons/hr	1968-1970	Sprays.
CONV #11	One (1) conveyor from the reclaim hopper	2,000 tons/hr	1968-1970	Enclosure.
CONV #7	One (1) conveyor from the live storage to the transfer tower	2,000 tons/hr	1968-1970	Enclosure.
CONV #8	One (1) conveyor between the transfer towers	2,000 tons/hr	1968-1970	Enclosure.
BMCTEC	One (1) sample system crusher	1.1 tons/hr	1968-1970	Enclosure.
CONV #9, CONV #9A , and CONV #10	Three (3) conveyors, from the main transfer tower to the pipeline	2,000 tons/hr	1968-1970	Enclosure.
B-1, B-2, B-2A, and B-3	Four (4) stockpiles	6,000,000 tons/yr (combined)	1968-1970	N/A
Storage Tanks				
K01ST	Gasoline storage tank	12,000 gal	1991	N/A
K08ST	Gasoline storage tank	12,000 gal	Approx 1986	N/A

Note: The information describing the process contained in table above is descriptive information and does not constitute enforceable conditions.
* Maximum capacity is limited to the listed value by an up- or downstream process or unit.

II. Requirements for Specific Units

II.A. NSPS General Provisions

The following requirements apply to the operation, maintenance, and testing of the affected facilities in the coal preparation plants in accordance with 40 CFR Part 60, Subparts A and Y ("Standards of Performance for Coal Preparation Plants"):

1. All requests, reports, applications, submittals, and other communications to the Administrator (NNEPA) pursuant to 40 CFR Part 60 shall be submitted in duplicate to the EPA Region 9 office at the following address [40 CFR § 60.4(a)]:

   Director, Air Division (Attn: AIR-1)
   EPA Region 9
   75 Hawthorne Street
   San Francisco, CA 94105

2. Any owner or operator subject to the provisions of this part shall maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility; any malfunction of the air pollution control equipment; or any periods during which a continuous monitoring system or monitoring device is inoperative [40 CFR § 60.7(b)].

3. The availability to the public of information provided to, or otherwise obtained by, the Administrator under this permit shall be governed by 40 CFR Part 2. (Information submitted voluntarily to the Administrator for the purposes of compliance with 40 CFR §§ 60.5 and 60.6 is governed by 40 CFR § 2.201 through § 2.213, and not by 40 CFR § 2.301.) [40 CFR § 60.9].

4. At all times, including periods of startup, shutdown, and malfunction, the permittee shall, to the extent practicable, maintain and operate the affected facilities, including associated air pollution control equipment, in a manner consistent with good air pollution control practice for minimizing emissions. Determination of whether acceptable operating and maintenance procedures are being used will be based on information available to the Administrator which may include, but is not limited to, monitoring results, opacity observations, review of operating and maintenance procedures, and inspection of the source [40 CFR § 60.11(d)].

5. For the purpose of submitting compliance certifications or establishing whether or not a person has violated or is in violation of any standard in 40 CFR Part 60, nothing in 40 CFR Part 60 shall preclude the use, including the exclusive use, of any credible evidence or information, relevant to whether a source would have been in compliance with applicable requirements if the appropriate performance or compliance test or procedure had been performed [40 CFR § 60.11(g)].

6. No owner or operator subject to the provisions of 40 CFR Part 60 shall build, erect, install, or use any article, machine, equipment or process, the use of which conceals an emission which would otherwise constitute a violation of an applicable standard. Such concealment includes, but is not limited to, the use of gaseous diluents to achieve compliance with an opacity standard or with a standard which is based on the concentration of a pollutant in the gases discharged to the atmosphere [40 CFR § 60.12].

7. With respect to compliance with all NSPS in 40 CFR Part 60, the permittee shall comply with the "General notification and reporting requirements" found in 40 CFR § 60.19 [40 CFR § 60.19].

8. The permittee shall provide written notification to NNEPA and USEPA or, if acceptable to NNEPA, USEPA, and the permittee, electronic notification of any reconstruction of an affected facility, or any physical or operational change to an affected facility that may increase the emission rate of any air pollutant to which a standard applies, unless that change is specifically exempted under this permit or in 40 CFR § 60.14(e), in accordance with 40 CFR § 60.7 [40 CFR § 60.7(a)].

II.B. NSPS, Subpart Y Requirements

Table 1— Affected Facilities Subject to New Source Performance Standards, Subpart Y

Affected Facilities	Description
J-28 Coal Preparation Area at Kayenta Mine	
J28PC	Two (2) Primary Crushers
J28S	One (1) Screen (Double Deck)
J28SC	One (1) Secondary Crusher
J28SSC	One (1) Sample System Crusher
Belt #1-N Belt #1-S Belt #8 Belts #2-6	Eight (8) Conveyors
J28TP	Transfer Points (all transfers)
N-11 Coal Preparation Area at Kayenta Mine	
N11PC	One (1) Primary Crusher
N11S	One (1) Screen (Single Deck)
N11SSC	One (1) Sample System Crusher
Belts #34-36	Three (3) Conveyors
N11TP	Transfer Points (all transfers)
N-8 Coal Preparation Area at Kayenta Mine	
N8S	Two (2) Single Deck Screens
N8SC	Two (2) Secondary Crushers
N8SSC	One (1) Sample System Crusher
Belt #32-33	Two(2) Conveyors
N8TP	Transfer Points (K-2 and K-3 stockpile and screen/sample systems)
Preparation Plant at Black Mesa Mine	
BMS	One (1) Screen
BMSC	One (1) Secondary Crusher
BMTPS	Transfer Points (at screen and secondary crusher)
BMSSC	One (1) Sample System Crusher
CONV #3A CONV#3B	Two (2) Conveyors
BMTPSSC	Two (2) Conveyors for the Sample System Crusher

The following requirements apply to each affected facility listed in Table 1 above in accordance with 40 CFR Part 60, Subpart Y:

1. The permittee shall not cause to be discharged into the atmosphere from any coal processing or conveying equipment listed in Table 1 above, gases that exhibit twenty percent (20%) opacity or greater [40 CFR § 60.252(c)].

2. The opacity standard in Condition II.B.1 shall apply at all times except during periods of startup, shutdown, or malfunction [40 CFR § 60.11(c)].

II.C. Monitoring Requirements [40 CFR § 71.6(a)(3)(i)]

1. The permittee shall conduct a weekly visible emission survey of each NSPS, Subpart Y, affected unit listed in Table 1, with the exceptions of the sample system crushers and their associated transfer points, and other underground transfer points including the following: at J-28, the tail end of Belt #8 from the high sulfur reclaim hopper and the tail ends of Belts #1-N and #1-S from the truck hopper; at N-11, the tail end of Belt #34 from the truck hopper. The visible emission survey shall be conducted, while the equipment is operating and during daylight hours, using EPA Method 22 (Visual Determination of Fugitive Emissions from Material Sources and Smoke Emissions from Flares). If one or more NSPS affected facilities are housed within a single structure, the permittee shall conduct the visible emission survey at each opening where particulates vent to the atmosphere. If an instantaneous opacity reading is 10% or greater, the permittee shall conduct a six minute EPA Method 9 opacity observation within 24 hours while the equipment is operating. If any emission unit is not operating at the time the observer arrives, the emission survey is not required for that emission unit on that week.

2. The permittee shall conduct a six-minute EPA Method 9 opacity observation quarterly on each NSPS, Subpart Y, affected unit listed in Table 1 while the equipment is operating, with the exceptions of the sample system crushers and their associated transfer points , and other underground transfer points including: at J-28, the tail end of Belt #8 from the high sulfur reclaim hopper and the tail ends of Belts #1-N and #1-S from the truck hopper; at N-11, the tail end of Belt #34 from the truck hopper. If one or more NSPS affected facilities are housed within a single structure, the permittee shall conduct the EPA Method 9 observation at each opening where gases vent to the atmosphere.

3. The permittee shall conduct a monthly inspection of all water sprays associated with emission points listed in Table 1, with the exceptions of those listed in condition II.C.4, to verify that the spray heads are not clogged and that they are otherwise operating as designed.

4. The permittee shall conduct a monthly inspection of the water meters at the following locations to determine whether any water meter shows a significant change in water pressure or drop in water flow rate: inlet and outlet of emission point N11PC, the truck hopper portion of emission point N11TP, the north and

south outlets of emission point J28PC, the truck hopper and high sulfur reclaim hopper portions of emission point J28TP, and emission point J28S.

5. If any water spray is not operating as designed, the permittee shall take corrective action within 24 hours (or on the next weekday, if a problem is observed during a weekend or holiday) to repair, replace, or modify the spray.

II.D. Recordkeeping Requirements [40 CFR § 71.6(a)(3)(ii)]

1. The permittee shall record and maintain the following records for each visible emission survey (Method 22) and opacity observation (Method 9):

   a. the date and time of the observation and the name of the observer;

   b. the unit ID number;

   c. whether or not the emission unit was operating;

   d. statement of whether visible emissions were detected or the result of Method 9 observations.

2. The permittee shall record and maintain the following record for each water spray and water meter inspection:

   a. the date and time of the observation and the name of the inspector;

   b. the control device ID number;

   c. whether the sprays (if inspected) were operating as designed;

   d. whether the water meters (if inspected) showed a significant change in water pressure or drop in water flow rate; and

   e. a description of any corrective actions taken.

II.E. Operational Flexibility

1. **Clean Air Act § 502(b)(10) Changes** [40 CFR § 71.6(a)(13)(i)]

   a. The permittee is allowed to make a limited class of changes under CAA § 502(b)(10) within this permitted facility without applying for a permit revision, provided the changes do not exceed the emissions allowable under this permit (whether expressed therein as a rate of emissions or in terms of total emissions) and are not Title I modifications. This class of changes does not include:

      i. Changes that would violate applicable requirements; or

ii. Changes that would contravene federally enforceable permit terms and conditions that are monitoring (including test methods), recordkeeping, reporting, or compliance certification requirements.

b. The permittee is required to send a notice to USEPA at least seven (7) days in advance of any change made under this provision. The notice must describe the change, when it will occur, and any change in emissions, and identify any permit terms or conditions made inapplicable as a result of the change. The permittee shall attach each submitted notice to a copy of this permit.

c. Any permit shield provided in this permit does not apply to changes made under this provision.

III. Facility-Wide or Generic Permit Requirements

Conditions in this section of the permit (Section III) apply to all emissions units located at the facility [See 40 CFR § 71.6(a)(1)].

III.A. Recordkeeping Requirements [40 CFR § 71.6(a)(3)(ii)] [40 CFR 71.6(a)(3)(i)(B)]

In addition to the unit-specific recordkeeping requirements derived from the applicable requirements for each individual unit and contained in Section II, the permittee shall comply with the following, generally applicable, recordkeeping requirements:

1. The permittee shall keep records of required monitoring information that include the following:

   a. The date, place, and time of sampling or measurements;

   b. The date(s) analyses were performed;

   c. The company or entity that performed the analyses;

   d. The analytical techniques or methods used;

   e. The results of such analyses; and

   f. The operating conditions as existing at the time of sampling or measurement.

2. The permittee shall retain records of all required monitoring data and supporting information for a period of at least five (5) years from the date of the monitoring sample, measurement, report, or application. Supporting information includes all calibration and maintenance records, all original strip-chart recordings for continuous monitoring instrumentation, and copies of all reports required by this permit.

3. The permittee shall maintain a file of all measurements, including continuous monitoring system, monitoring device, and performance testing measurements; all continuous monitoring system performance evaluations; all continuous

monitoring system or monitoring device calibration checks; all adjustments and maintenance performed on these systems or devices; and all other information required by 40 CFR Part 60, recorded in a permanent form suitable for inspection. The file shall be retained for at least five (5) years following the date of such measurements, maintenance, reports and records [40 CFR §§ 71.6(a)(3)(ii), 60.7(f)].

III.B. Reporting Requirements [40 CFR § 71.6(a)(3)(iii)] [NNOPR § 302(G)]

1. The permittee shall submit to NNEPA and USEPA Region 9 reports of any monitoring required under 40 CFR § 71.6(a)(3)(i)(A), (B), or (C) each six-month reporting period from January 1 to June 30, and from July 1 to December 31. All reports shall be submitted to NNEPA and USEPA Region 9 and shall be postmarked by the 30th day following the end of the reporting period. All instances of deviations from permit requirements must be clearly identified in such reports. All required reports must be certified by a responsible official consistent with Condition IV.E. of this permit.

    a. A monitoring report under this section must include the following:

        i. The company name and address.

        ii. The beginning and ending dates of the reporting period.

        iii. The emissions unit or activity being monitored.

        iv. The emissions limitation or standard, including operational requirements and limitations (such as parameter ranges), specified in the permit for which compliance is being monitored.

        v. All instances of deviations from permit requirements, including those attributable to upset conditions as defined in the permit, and the date on which each deviation occurred.

        vi. If the permit requires continuous monitoring of an emissions limit or parameter range, the report must include the total operating time of the emissions unit during the reporting period, the total duration of excess emissions or parameter exceedances during the reporting period, and the total downtime of the continuous monitoring system during the reporting period.

        vii. If the permit requires periodic monitoring, visual observations, work practice checks, or similar monitoring, the report shall include the total time when such monitoring was not performed during the reporting period and, at the source's discretion, either the total duration of deviations indicated by such monitoring or the actual records of deviations.

viii. All other monitoring results, data, or analyses required to be reported by the applicable requirement.

ix. The name, title, and signature of the responsible official who is certifying to the truth, accuracy, and completeness of the report.

b. Any report required by an applicable requirement that provides the same information described in paragraph III.B.1(a)(i) through (ix) above shall satisfy the requirement under III.B.1(a).

c. "Deviation" refers to any situation in which an emissions unit fails to meet a permit term or condition. A deviation is not always a violation. A deviation may be determined by observation or through review of data obtained from any testing, monitoring, or recordkeeping established in accordance with 40 CFR § 71.6(a)(3)(i), (ii). For a situation lasting more than 24 hours, each 24-hour period (or portion thereof) is considered a separate deviation. Included in the meaning of deviation are any of the following situations:

(i) when emissions exceed an emission limitation or standard;

(ii) when process or emissions control device parameter values indicate that an emission limitation or standard has not been met;

(iii) when observations or data collected demonstrate noncompliance with an emission limitation or standard or any work practice or operating condition required by the permit; or

2. The permittee shall promptly report, to USEPA Region 9 and NNEPA, deviations from permit requirements, including those attributable to upset conditions as defined in this permit; the probable cause of such deviations; and any corrective actions or preventive measures taken. "Promptly" is defined as:

a. any definition of "prompt" or "promptly," or a specific timeframe for reporting deviations as provided in an underlying applicable requirement that is identified in this permit; but

b. where the underlying applicable requirement provides neither a definition nor a timeframe for reporting deviations, reports of deviations shall be submitted on the following schedule:

i. for emissions of any regulated pollutant excluding a hazardous air pollutant or a toxic air pollutant(as identified in the applicable regulation) that continue for more than two hours in excess of permit requirements, the report must be made within 48 hours of the occurrence; and

ii. for all other deviations from permit requirements, the report shall be submitted as part of the semi-annual monitoring report required in paragraph III.B.1 of this permit.

3. If any of the conditions in III.B.2(b)(i) or (ii) of this permit apply, the source must report to USEPA and NNEPA by telephone, facsimile, or electronic mail, within the timeframe given above. A written notice, certified consistent with paragraph III.B.4 of this permit, must be submitted to USEPA and NNEPA within ten (10) working days of the occurrence. All deviations reported under this section must also be identified in the six-month report required under paragraph III.B.1.

4. Any application form, report, or compliance certification required to be submitted by this permit shall contain certification by a responsible official of truth, accuracy, and completeness. All certifications shall state that, based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate, and complete.

III.C. Stratospheric Ozone and Climate Protection [40 CFR Part 82]

1. Pursuant to 40 CFR Part 82, Subpart E, the permittee shall comply with the standards for the labeling of products using ozone-depleting substances.

   a. All containers in which a Class I or Class II substance is stored or transported, all products containing a Class I substance, and all products directly manufactured with a Class I substance must bear the warning statement specified in 40 CFR § 82.106 if it is being introduced into interstate commerce.

   b. The placement of the required warning statement must comply with the requirements of 40 CFR § 82.108.

   c. The form of the label bearing the required warning statement must comply with the requirements of 40 CFR § 82.110.

   e. No person may modify, remove, or interfere with the required warning statement except as described in 40 CFR § 82.112.

2. The permittee shall comply with the standards for recycling and emissions reduction pursuant to 40 CFR Part 82, Subpart F, except as provided for the servicing of motor vehicle air conditioners (MVACs) in Subpart B.

   a. Persons opening appliances for maintenance, service, repair, or disposal must comply with the required practices pursuant to 40 CFR § 82.156.

   b. Equipment used during the maintenance, service, repair, or disposal of appliances must comply with the standards for recycling and recovery equipment pursuant to 40 CFR § 82.158.

c. Persons performing maintenance, service, repair, or disposal of appliances must be certified by an approved technician certification program pursuant to 40 CFR § 82.161.

d. Persons disposing of small appliances, MVACs, and MVAC-like appliances must comply with recordkeeping requirements pursuant to 40 CFR § 82.166. ("MVAC-like appliance" is defined at 40 CFR § 82.152.)

e. Persons owning commercial or industrial process refrigeration equipment must comply with leak repair requirements pursuant to 40 CFR § 82.156.

f. Owners/operators of appliances normally containing fifty (50) or more pounds of refrigerant must keep records of when the refrigerant was purchased and added to such appliances pursuant to 40 CFR § 82.166(k).

3. If the permittee manufactures, transforms, destroys, imports, or exports a Class I or Class II substance, the permittee is subject to all the requirements specified in 40 CFR Part 82, Subpart A.

4. If the permittee performs a service on motor (fleet) vehicles when this service involves an ozone-depleting substance refrigerant (or regulated substitute substance) in the MVAC, the permittee is subject to all applicable requirements as specified in 40 CFR Part 82, Subpart B. The term "motor vehicle," as used in Subpart B, does not include a vehicle for which final assembly has not been completed. The term "MVAC" as used in Subpart B does not include the air-tight sealed refrigeration system used as refrigerated cargo, or the system utilized on passenger buses using HCFC-22 refrigerant.

5. The permittee shall be allowed to switch from any ozone-depleting substance to any alternative that is listed in the Significant New Alternatives Program promulgated pursuant to 40 CFR § 82, Subpart G.

III.D. Asbestos from Demolition and Renovation [40 CFR Part 61, Subpart M]

The permittee shall comply with the requirements of the National Emission Standard for Asbestos, codified in 40 CFR Part 61, Subpart M, for all demolition and renovation projects.

III.E. Compliance Schedule [40 CFR §§ 71.5(c)(8)(iii), 71.6(c)(3)]

1. For applicable requirements with which the source is in compliance, the source shall continue to comply with such requirements.

2. For applicable requirements that will become effective during the permit term, the source shall meet such requirements on a timely basis.

III.F. Chemical Accident Prevention Provisions [CAA § 112(r)(1), (r)(3), (r)(7)] [40 CFR Part 68]

1. The following activities are considered essential and necessary to satisfy the general duty requirements of CAA § 112(r)(1)::

a. identify hazards which may result from accidental releases, using appropriate hazard assessment techniques;

b. design, maintain, and operate a safe facility; and

c. minimize the consequences of accidental releases if they occur.

2. An owner or operator of a stationary source that has more than a threshold quantity of a regulated substance in a process, as determined under 40 CFR § 68.115, shall comply or shall have complied with the requirements of the Chemical Accident Prevention Provisions no later than the latest of the following dates, pursuant to 40 CFR § 68.10:

a. June 21, 1999;

b. Three years after the date on which a regulated substance is first listed under 40 CFR § 68.130; or

c. The date on which a regulated substance is first present above a threshold quantity in a process.

III.G. Permit Shield [40 CFR § 71.6(f)(1)(i)]

1. Compliance with the conditions of the title V permit shall be deemed compliance with the requirements of 40 CFR Part 60, Subpart Y, Standards of Performance for Coal Preparation Plants, as of the date of permit issuance.

IV. Title V Administrative Requirements

IV.A. Fee Payment [NNOPR Subpart VI] [40 CFR §§ 71.6(a)(7), 71.9]

1. The permittee shall pay an annual permit fee in accordance with the procedures outlined below [NNOPR Subpart VI § 603(A). (B)].

a. The permittee shall pay the annual permit fee by October 20 of each year.

b. The fee payment shall be in United States currency and shall be paid by money order, bank draft, certified check, corporate check, or electronic funds transfer payable to the order of the Navajo Nation EPA Air Quality Control Program.

c. The permittee shall send the fee payment and a completed fee filing form to:

Navajo Nation EPA Air Quality Control Program
Operating Permit Program Section
P.O. Box 529
Fort Defiance, AZ 86504

2. The permittee shall submit a fee calculation worksheet form with the annual permit fee by October 20 of each year. Calculations of actual or estimated emissions, and calculation of the fees owed, shall be computed on the fee calculation worksheets provided by the EPA. Fee payment of the full amount must accompany each fee calculation worksheet [40 CFR §§ 71.6(a)(7), 71.9(e)(1)].

3. The fee calculation worksheet shall be certified by a responsible official consistent with 40 CFR § 71.5(d) [40 CFR § 71.9(e)(3)].

4. Basis for calculating annual fee:

   The annual emissions fee shall be calculated by multiplying the total tons of actual emissions of all "fee pollutants" emitted from the source by the applicable emissions fee (in dollars/ton) in effect at the time of calculation. Emissions of any regulated air pollutant that already are included in the fee calculation under a category of regulated pollutant, such as a federally listed hazardous air pollutant that is already accounted for as a VOC or as a PM-10, shall be counted only once in determining the source's actual emissions [NNOPR Subpart VI § 602(A).(B)(1)].

   a. "Actual emissions" means the actual rate of emissions in TPY of any fee pollutant emitted from a part 71 source over the preceding calendar year. Actual emissions shall not include emissions of any one fee pollutant in excess of 4,000 TPY, or any emissions that come from insignificant activities [See NNOPR Subpart VI § 602(B)(1), Subpart I § 102(5)].

   b. Actual emissions shall be computed using methods required by the permit for determining compliance, such as monitoring or source testing data [40 CFR § 71.9(e)(2)].

   c. If actual emissions cannot be determined using the compliance methods in the permit, the permittee shall use other federally recognized procedures [40 CFR 71.9(e)(2)].

   d. The term "fee pollutant" is defined in NNOPR Subpart I § 102(24).

   e. The term "regulated air pollutant" is defined in NNOPR Subpart I § 102(50), except that for purposes of this permit the term does not include any pollutant that is regulated solely pursuant to 4 N.N.C. § 1121 nor does it include any hazardous air pollutant designated by the Director pursuant to 4 N.N.C. § 1126(B).

   f. The permittee should note that the applicable fee is revised each year to account for inflation, and it is available from NNEPA by March 1 of each year.

g. The total annual fee due shall be the greater of the applicable minimum fee and the sum of subtotal annual fees for all fee pollutants emitted from the source [NNOPR Subpart VI § 602(B)(2)].

5. The permittee shall retain, in accordance with the provisions of 40 CFR § 71.6(a)(3)(ii), all fee calculation worksheets and other emissions-related data used to determine fee payment for five (5) years following the submittal of its fee payment. Emission-related data include, for example, emissions-related forms provided by NNEPA and used by the permittee for fee calculation purposes, emissions-related spreadsheets, and records of emissions monitoring data and related support information required to be kept in accordance with 40 CFR § 71.6(a)(3)(ii) [40 CFR § 71.9(i)].

6. Failure of the permittee to pay fees in a timely manner shall subject the permittee to the assessment of penalties and interest in accordance with NNOPR Subpart VI § 603(C).

7. When notified by NNEPA of underpayment of fees, the permittee shall remit full payment within thirty (30) days of receipt of notification [40 CFR § 71.9(j)(2)].

8. A permittee who believes an NNEPA-assessed fee is in error and wishes to challenge such fee, shall provide a written explanation of the alleged error to NNEPA along with full payment of the NNEPA-assessed fee [40 CFR § 71.9(j)(3)].

IV.B. Blanket Compliance Statement [CAA § 113(a), (e)(1)] [40 CFR §§51.212, 52.12,52.33,60.11(g),61.12, 71.6(a)(6)(i), (ii)]

1. The permittee must comply with all conditions of this Part 71 permit. Any permit noncompliance, including, but not limited to, violation of any applicable requirement; any permit term or condition; any fee or filing requirement; any duty to allow or carry out inspection, entry, or monitoring activities; or any regulation or order issued by the permitting authority pursuant to this part constitutes a violation of the Clean Air Act and is grounds for enforcement action; permit termination, revocation and reissuance, or modification; or for denial of a permit renewal application. It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit [40 CFR § 71.6(a)(6)(i), (ii)].

2. Determinations of deviations, continuous or intermittent compliance status, or violations of this permit are not limited to the applicable testing or monitoring methods required by the underlying regulations or this permit; other credible evidence (including any evidence admissible under the Federal Rules of Evidence), if available, must be considered in such determinations [CAA § 113(a), (e)(1); 40 CFR §§ 51.212, 52.12, 52.33, 60.11(g), 61.12].

IV.C. Compliance Certifications [40 CFR § 71.6(c)(5)] [NNOPR § 302(I)]

1. The permittee shall submit to NNEPA and USEPA Region 9 a certification of compliance with permit terms and conditions, including emission limitations, standards, or work practices, postmarked by January 30th of each year and covering the previous calendar year. The compliance certification shall be certified as to truth, accuracy, and completeness by the permit-designated responsible official consistent with Section IV.E. of this permit and 40 CFR § 71.5(d) [40 CFR § 71.6(c)(5)].

2. The permittee shall submit to NNEPA a certification of compliance with permit terms and conditions, including emission limitations, standards, or work practices, postmarked by July 30 and covering the previous six (6) months. The compliance certification shall be certified as to truth, accuracy, and completeness by the permit-designated responsible official consistent with Section IV.E. of this permit. This condition is enforceable by NNEPA only [NNOPR § 302(I)].

3. The certification shall include the following:

   a. Identification of each permit term or condition that is the basis of the certification.

   b. Identification of the method(s) or other means used for determining the compliance status of each term and condition during the certification period.

      If necessary, the owner or operator also shall identify any other material information that must be included in the certification to comply with CAA § 113(c)(2),, which prohibits knowingly making a false certification or omitting material information.

   c. The compliance status of each term and condition of the permit for the period covered by the certification based on the method or means designated above. The certification shall identify each deviation and take it into account in the compliance certification.

   d. A statement whether compliance with each permit term was continuous or intermittent.

IV.D. Duty to Provide and Supplement Information [40 CFR §§ 71.6(a)(6)(v), 71.5(b)] [NNOPR § 301(E)]

The permittee shall furnish to NNEPA and USEPA Region 9, within a reasonable time, any information that NNEPA and USEPA Region 9 may request in writing to determine whether cause exists for modifying, revoking, and reissuing, or terminating the permit, or to determine compliance with the permit. Upon request, the permittee shall also furnish to NNEPA and USEPA Region 9 copies of records that are required to be kept pursuant to the terms of the permit, including information claimed to be confidential. Such information may be provided to USEPA Region 9 only, pursuant to 40 CFR §§ 71.6(a)(6)(v), at the permittee's discretion. Information claimed to be confidential should be accompanied by a claim of confidentiality according to the provisions of 40 CFR Part

2, Subpart B. The permittee, upon becoming aware that any relevant facts were omitted or incorrect information was submitted in the permit renewal application, shall promptly submit such supplementary facts or corrected information. The permittee shall also provide additional information as necessary to address any requirements that become applicable to the facility after this renewal permit is issued.

IV.E. Submissions [40 CFR §§ 71.5(d), 71.6, 71.9] [NNOPR Subpart VII, §702] [40 CFR § 71.5(d), § 71.6, and § 71.9]

Any document required to be submitted with this permit shall be certified by a responsible official as to truth, accuracy, and completeness. Such certifications shall state that, based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate, and complete. All documents required to be submitted, including reports, test data, monitoring data, notifications, compliance certifications, fee calculation worksheets, and applications for renewals and permit modifications, shall be submitted to NNEPA and USEPA Region 9 at the respective addresses below:

Navajo Nation EPA Air Quality Control Program
Operating Permit Program
P.O. Box 529
Fort Defiance, AZ 86504

and

Director, Air Division (Attn: AIR-1)
EPA Region 9
75 Hawthorne Street
San Francisco, CA 94105

IV.F. Severability Clause [40 CFR § 71.6(a)(5)]

The provisions of this permit are severable, and in the event of any challenge to any portion of this permit, or if any portion is held invalid, the remaining permit conditions shall remain valid and in force.

IV.G. Permit Actions [40 CFR § 71.6(a)(6)(iii)] [NNOPR § 406]

This permit may be modified, revoked, reopened, and reissued, or terminated for cause. The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or of a notification of planned changes or anticipated noncompliance does not stay any permit condition.

IV.H. Administrative Permit Amendments [40 CFR § 71.7(d)] [NNOPR § 405(C)]

The permittee may request the use of administrative permit amendment procedures for a permit revision that:

1. corrects typographical errors;

2. identifies a change in the name, address, or phone number of any person identified in the permit, or provides a similar minor administrative change at the source;

3. requires more frequent monitoring or reporting by the permittee;

4. allows for a change in ownership or operational control of a source where the NNEPA determines that no other change in the permit is necessary, provided that a written agreement containing a specific date for transfer of permit responsibility, coverage, and liability between the current and new permittee has been submitted to the NNEPA;

5. incorporates into the Part 71 permit the requirements from preconstruction review permits authorized under an EPA-approved program, provided that such a program meets procedural requirements substantially equivalent to the requirements of 40 CFR §§ 71.7 and 71.8 that would be applicable to the change if it were subject to review as a permit modification, and compliance requirements substantially equivalent to those contained in 40 CFR § 71.6; or

6. incorporates any other type of change which NNEPA has determined to be similar to those listed above in subparagraphs (1) through (5).

IV.I. Minor Permit Modifications [40 CFR § 71.7(e)(1)] [NNOPR § 405(D)]

1. The permittee may request the use of minor permit modification procedures only for those modifications that:

   a. do not violate any applicable requirement.

   b. do not involve significant changes to existing monitoring, reporting, or recordkeeping requirements in the permit.

   c. do not require or change a case-by-case determination of an emissions limitation or other standard, or a source-specific determination for temporary sources of ambient impacts, or a visibility or increment analysis.

   d. do not seek to establish or change a permit term or condition for which there is no corresponding underlying applicable requirement and that the source has assumed to avoid an applicable requirement to which the source would otherwise be subject. Such terms and conditions include:

      i. a federally enforceable emissions cap assumed to avoid classification as a modification under any provision of Title I; and

      ii. an alternative emissions limit approved pursuant to regulations promulgated under CAA § 112(i)(5).

   e. are not modifications under any provision of CAA, Title I.

   f. are not required to be processed as a significant modification.

2. Notwithstanding the list of changes eligible for minor permit modification procedures in paragraph (1) above, minor permit modification procedures may be used for permit modifications involving the use of economic incentives, marketable permits, emissions trading, and other similar approaches, to the extent that such minor permit modification procedures are explicitly provided for in an applicable implementation plan or in applicable requirements promulgated by EPA.

3. An application requesting the use of minor permit modification procedures shall meet the requirements of 40 CFR § 71.5(c), and shall include the following:

   (i) a description of the change, the emissions resulting from the change, and any new applicable requirements that will apply if the change occurs;

   (ii) the source's suggested draft permit;

   (iii) certification by a responsible official, consistent with 40 CFR § 71.5(d), that the proposed modification meets the criteria for the use of minor permit modification procedures and a request that such procedures be used; and

   (iv) completed forms for the permitting authority to notify affected states as required under 40 CFR § 71.8.

4. The permittee may make the change proposed in its minor permit modification application immediately after it files such application. After the permittee makes the change allowed by the preceding sentence, and until the permitting authority takes any of the actions authorized by 40 CFR §71.7(e)(1)(iv)(A) through (C), the permittee must comply with both the applicable requirements governing the change and the proposed permit terms and conditions. During this time period, the permittee need not comply with the existing permit terms and conditions it seeks to modify. If the permittee fails, however, to comply with its proposed permit terms and conditions during this time period, the existing permit terms and conditions it seeks to modify may be enforced against it.

5. The permit shield under 40 CFR § 71.6(f) may not extend to minor permit modifications [See 40 CFR § 71.7(e)(1)(vi)].

IV.J. Group Processing of Minor Permit Modifications [40 CFR § 71.7(e)(2)]

1. Group processing of modifications by EPA may be used only for those permit modifications that:

   a. meet the criteria for minor permit modification procedures under paragraph IV.I.1 of this permit; and

   b. collectively are below the threshold level of ten percent (10%) of the permitted emissions for the emissions unit for which the change is

requested, twenty percent (20%) of the applicable definition of major source in 40 CFR § 71.2, or five (5) tons per year, whichever is least.

2. An application requesting the use of group processing procedures shall be submitted to EPA, shall meet the requirements of 40 CFR § 71.5(c), and shall include the following:

   a. a description of the change, the emissions resulting from the change, and any new applicable requirements that will apply if the change occurs;

   b. the permittee's proposed draft permit;

   c. certification by a responsible official, consistent with 40 CFR § 71.5(d), that the proposed modification meets the criteria for use of group processing procedures,and a request from the responsible official that such procedures be used;

   d. a list of the permittee's other applications awaiting group processing, and a calculation of whether the requested modification, aggregated with these other applications, equals or exceeds the threshold set under Condition IV.J.1(b) above; and

   e. completed forms for the permitting authority to use to notify affected states as required under 40 CFR § 71.8.

3. The permittee may make the change proposed in its minor permit modification application immediately after it files such application. After the permittee makes the change allowed by the preceding sentence, and until the permitting authority takes any of the actions authorized by 40 CFR § 71.7(e)(1)(iv)(A) through (C), the permittee must comply with both the applicable requirements governing the change and the proposed permit terms and conditions. During this time period, the permittee need not comply with the existing permit terms and conditions it seeks to modify. However, if the permittee fails to comply with its proposed permit terms and conditions during this time period, the existing permit terms and conditions it seeks to modify may be enforced against it.

4. The permit shield under 40 CFR § 71.6(f) may not extend to group processing of minor permit modifications [See 40 CFR § 71.7(e)(1)(vi), (e)(2)(vi)].

IV.K. Significant Permit Modifications [40 CFR § 71.7(e)(3)] [NNOPR § 405(E)]

1. The permittee must request the use of significant permit modification procedures for those modifications that:

   a. do not qualify as minor permit modifications or as administrative amendments;

   b. are significant changes in existing monitoring permit terms or conditions; or,

c. re relaxations of reporting or recordkeeping permit terms or conditions.

2. Nothing herein shall be construed to preclude the permittee from making changes consistent with Part 71 that would render existing permit compliance terms and conditions irrelevant.

3. The permittee must meet all requirements of Part 71 when seeking significant permit modifications. For an application to be determined complete, the permittee must supply all information required by 40 CFR § 71.5(c) for permit issuance and renewal, but only that information that is related to the proposed change [See 40 CFR §§ 71.7(e)(3)(ii),; 71.5(a)(2)].

IV.L. Reopening for Cause [40 CFR § 71.7(f)] [NNOPR § 406]

NNEPA shall reopen and revise the permit prior to expiration under any of the following circumstances:

1. Additional requirements under the Clean Air Act become applicable to a major Part 71 source with a remaining permit term of three (3) or more years.

2. NNEPA 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.

3. NNEPA determines that the permit must be revised or revoked to assure compliance with the applicable requirements.

IV.M. Property Rights [40 CFR § 71.6(a)(6)(iv)]

This permit does not convey any property rights of any sort, or any exclusive privilege.

IV.N. Inspection and Entry [40 CFR § 71.6(c)(2)]

Upon the presentation of credentials and other documents as may be required by law, the permittee shall allow authorized representatives from NNEPA and USEPA to:

1. enter upon the permittee's premises where a Part 71 source is located or emissions-related activity is conducted, or where records must be kept under the conditions of the permit;

2. access and copy, at reasonable times, any records that must be kept under the conditions of the permit;

3. inspect, at reasonable times, any facilities, equipment (including monitoring and air pollution control equipment), practices, or operations regulated or required under the permit; and

4. sample or monitor, at reasonable times and as authorized by the Clean Air Act, substances or parameters for the purpose of assuring compliance with the permit or applicable requirements.

IV.O. Emergency Provisions [40 CFR § 71.6(g)]

1. In addition to any emergency or upset provision contained in any applicable requirement, the permittee may seek to establish that noncompliance with a technology-based emission limitation under this permit was due to an emergency. To do so, the permittee shall demonstrate the affirmative defense of emergency through properly signed, contemporaneous operating logs, or other relevant evidence indicating that:

   a. an emergency occurred and that the permittee can identify the cause(s) of the emergency;

   b. the permitted facility was at the time being properly operated;

   c. during the period of the emergency, the permittee took all reasonable steps to minimize the levels of emissions that exceeded the emissions standards or other requirements in this permit; and

   d. the permittee submitted notice of the emergency to EPA within two (2) working days of the exceedance of the emissions limitationsdue to the emergency. This notice must contain a description of the emergency, any steps taken to mitigate the emissions, and any corrective actions taken. This notice fulfills the requirements of Condition III.B.2 of this permit.

   In any enforcement proceeding, the permittee attempting to establish the occurrence of an emergency has the burden of proof.

2. An ""emergency"" means any situation arising from sudden and reasonably unforeseeable events beyond the control of the source, including acts of God, which situation requires immediate corrective action to restore normal operation and that causes the source to exceed a technology-based emissions limitation under the permit. An emergency shall not include noncompliance to the extent caused by improperly designed equipment, lack of preventive maintenance, careless or improper operation, or operator error.

IV.P. Transfer of Ownership or Operation [40 CFR § 71.7(d)(1)(iv)]
A change in ownership or operational control of this facility may be treated as an administrative permit amendment if NNEPA determines no other change in the permit is necessary, Provided, that a written agreement containing a specific date for the transfer of permit responsibility, coverage, and liability from the current permittee to the new permittee has been submitted to NNEPA.

IV.Q. Off Permit Changes [40 CFR § 71.6(a)(12)] [NNOPR § 404(B)]
The permittee is allowed to make certain changes without a permit revision, provided that the following requirements are met:

1. No change is addressed or prohibited by this permit;

2. Each change must comply with all applicable requirements and may not violate any existing permit term or condition;

3. Changes under this provision may not include changes or activities subject to any requirement under Title IV or that are modifications under any provision of the CAA, Title I; and

4. The permittee must provide contemporaneous written notice to NNEPA and USEPA Region 9 of each change, except for changes that qualify as insignificant activities under 40 CFR § 71.5(c)(11). The written notice must describe each change, the date of the change, any change in emissions or pollutants emitted, and any applicable requirements that would apply as a result of the change.

5. The permit shield does not apply to changes made under this provision.

6. The permittee must keep a record describing all changes that result in emissions of any regulated air pollutant subject to any applicable requirement not otherwise regulated under this permit, and the emissions resulting from those changes.

IV.R. Permit Expiration and Renewal [40 CFR §§71.5(a)(1)(iii), 71.6(a)(11), 71.7(b), 71.7(c)(1)(i),71.7(c)(2)(ii), 71.8(d)]

1. This permit shall expire upon the earliest occurrence of one of the following events:

   a. five (5) years elapses from the date of issuance; or

   b. the source is issued a Part 70 permit by an EPA-approved permitting authority.

2. Expiration of this permit terminates the permittee's right to operate unless a timely and complete permit renewal application has been submitted on or before a date six (6) months prior, but not more than eighteen (18) months prior, to the date of expiration of this permit.

3. If the permittee submits a timely and complete application for a renewal permit, consistent with 40 CFR § 71.5(a)(2), but the permitting authority has failed to issue or deny the renewal permit, the permit shall not expire until the renewal permit has been issued or denied. Any permit shield granted pursuant to 40 CFR § 71.6(f) shall extend beyond the original permit term until the permit is renewed or denied.

4. The permittee's failure to have a Part 71 permit is not a violation of this part until NNEPA takes final action on the permit renewal application. This protection shall cease to apply if, subsequent to the completeness determination, the permittee fails to submit, by the deadline specified in writing by NNEPA, any additional information identified as needed to process the application.

5. Renewal of this permit is subject to the same procedural requirements that apply to initial permit issuance, including those for public participation and affected state and tribal review.

6. The application for renewal shall include the current permit number, description of permit revisions and off permit changes that occurred during the current permit term, any applicable requirements that were promulgated and not incorporated into the permit during the current permit term, and any other information required by the application form.

EXHIBIT B

October 2004 Delegation Agreement between EPA and NNEPA

DELEGATION OF AUTHORITY TO ADMINISTER A PART 71 OPERATING PERMITS PROGRAM

DELEGATION AGREEMENT

BETWEEN

US ENVIRONMENTAL PROTECTION AGENCY REGION IX

AND

NAVAJO NATION ENVIRONMENTAL PROTECTION AGENCY

WHEREAS, the U.S. Environmental Protection Agency Region IX ("EPA") administers and enforces a federal operating permits program in the Delegated Program Area (as defined below) pursuant to Title V of the Clean Air Act ("CAA") as amended (1990), and 40 C.F.R. Part 71 ("Part 71 Program").

WHEREAS, pursuant to Section 301(d) of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. § 7601(d), and 40 C.F.R. § 49.7, the Navajo Nation Environmental Protection Agency ("NNEPA"), on behalf of the Navajo Nation, formally requested in a letter dated June 17, 2004, that EPA find that the Navajo Nation meets the eligibility requirements under CAA Section 301(d) and 40 C.F.R. § 49.6 for treatment in the same manner as a State for Part 71 Program delegation purposes ("TAS Request").

WHEREAS, in a separate letter dated July 16, 2003, NNEPA also formally requested that EPA, pursuant to 40 C.F.R. § 71.10, delegate authority to NNEPA, as a delegate agency ("Delegation Request"), to administer and enforce the Part 71 Program in certain areas subject to the TAS Request and identified in "Attachment 1" of this agreement ("Delegated Program Area"). The Delegation Request covers all Title V sources in the Delegated Program Area except for the two facilities specified in the sixth whereas clause below.

WHEREAS, EPA, consistent with 40 C.F.R. § 49.9, notified appropriate governmental entities and the public of NNEPA's TAS Request, and provided 30 days for review and comment on the Navajo Nation's jurisdictional assertions.

WHEREAS, EPA has reviewed NNEPA's TAS Request and has determined that the Navajo Nation meets all of the criteria for such treatment as set forth at 40 C.F.R. § 49.6 to administer a delegated Part 71 Program in the Delegated Program Area.

WHEREAS, NNEPA is not currently seeking to administer the delegated Part 71 Program over the Four Corners Power Plant and the Navajo Generating Station, and the administration of the Part 71 Program for these two sources is not being delegated to NNEPA. Accordingly, the references to Part 71 sources in this Delegation Agreement do not include the Four Corners Power Plant and the Navajo Generating Station.

WHEREAS, EPA has determined that the Navajo Nation has enacted laws and promulgated rules that, by their terms, adequately authorize NNEPA to collect sufficient revenue to carry out all duties necessary to administer a delegated Part 71 Program and to engage in the enforcement investigatory activities described in Section VI.1 of this Delegation Agreement.

WHEREAS, EPA has reviewed NNEPA's request for delegation and the accompanying opinion of the Navajo Nation Attorney General in support of that request and has determined that NNEPA meets all of the criteria for designation as a "delegate agency" set forth at 40 C.F.R. Part 71.

WHEREAS, NNEPA currently intends to submit to EPA on behalf of the Navajo Nation an application for full Part 70 program approval and both agencies agree, as appropriate, to work diligently towards the goal of a fully approved Part 70 program.

WHEREAS, NNEPA and EPA both recognize that the delegation of administration of the Part 71 Program prior to approval of the Part 70 Program application (if a Part 70 Program application is submitted and approved), will help NNEPA develop its Title V program.

WHEREAS, this Agreement may be modified, amended, or revoked in part or in whole by EPA after consultation with NNEPA.

WHEREAS, by entering into this Delegation Agreement, neither NNEPA nor EPA intends to create a document that creates any enforceable rights in third parties who are not signatories to this agreement.

WHEREAS, this Delegation Agreement may be signed by EPA and NNEPA in counterparts.

WHEREAS, NNEPA acknowledges that by operation of the CAA, NNEPA will administer the existing federal operating permit program pursuant to 40 C.F.R. Part 71 effective on October X, 2004 within the Delegated Program Area.

THEREFORE, EPA and NNEPA agree to enter into this Delegation Agreement as follows:

I. GENERAL:

1. Notifications:

   a. The EPA Region IX Regional Administrator shall send a letter to the President of the Navajo Nation to provide notice of the effective date of EPA's full delegation to administer the Part 71 Program to NNEPA.

   b. NNEPA will publish notices in newspapers of local circulation that cover news in the Delegated Program Area notifying the public that NNEPA will receive full delegation to administer the Part 71 Program in that area. NNEPA agrees to make efforts to publicize the Part 71 Program through its website, mailing lists, and other appropriate means. Such notifications shall identify points of contact at NNEPA and EPA.

   c. EPA shall publish a Federal Register notice informing the public that NNEPA will receive full delegation to administer the Part 71 Program in the Delegated Program Area as of the effective date of the delegation. (40 C.F.R. §§ 71.4(g) and 71.10(b))

2. EPA will provide technical support and assistance to NNEPA toward the administration of the Part 71 Program and the activities discussed below in Part VI, including the development of appropriate permit conditions, and determining applicability of the federal regulations.

3. NNEPA agrees to require Part 71 permits of all Part 71 sources as defined by 40 C.F.R. § 71.3(a).

4. NNEPA agrees to process all claims of confidentiality relating to information submitted to the Navajo Nation pursuant to the Part 71 Program and protect information submitted under such a claim unless or until a determination is made that the information is not entitled to confidential treatment. NNEPA agrees to obtain concurrence from EPA before releasing information submitted under a claim of confidentiality.

5. This Agreement may be modified, amended, or revoked in part or in whole by EPA after consultation with NNEPA. Any such modification, amendment, or revocation shall be effective as of the date specified in a notice to the NNEPA.

II. PART 71 FEES:

1. NNEPA agrees to collect permit fees from all Part 71 sources in a manner consistent with Subpart VI of the Navajo Nation Operating Permit Regulations. Pursuant to 40 C.F.R. § 71.9(b), such permit fees will be used solely for the purposes of implementing the Part 71 Program, which includes, but is not limited to, the following activities as they relate to the Part 71 Program:

   a. Reviewing and acting on any application for a permit, permit revision, or permit renewal, including the development of an applicable requirement as part of the processing of a permit, or permit revision or renewal;

   b. Processing permit reopening;

   c. General administration of the permit program, including transition planning, interagency coordination, contract management, training, informational services and outreach activities, assessing and collecting fees, the tracking of permit applications, compliance certifications, and related data entry;

   d. Implementing and enforcing the terms of a Part 71 permit (not including any court costs or other costs associated with an enforcement action), including adequate resources to determine which sources are subject to the program;

   e. Emissions and ambient monitoring, modeling, analyses, demonstrations, preparation of inventories, and tracking emissions, provided these activities are needed in order to issue and implement part 71 permits; and

f. Providing direct and indirect support to small business stationary sources in determining applicable requirements and in receiving permits under Part 71.

2. Upon the effective date of this Delegation Agreement, EPA hereby waives fees from Part 71 sources located in the Delegated Program Area pursuant to 40 C.F.R. §71.9(c)(2)(ii), in light of EPA's determination that the NNEPA has enacted laws and promulgated rules that, by their terms, adequately authorize NNEPA to collect fee revenue and that such fee revenue will be sufficient to administer the delegated Part 71 Program and conduct the activities discussed below in Part VI.

3. EPA retains its right to collect fees from all owners or operators of Part 71 sources if EPA makes a later determination that NNEPA is not collecting fees sufficient to fund an adequate delegated Part 71 Program or if EPA withdraws NNEPA's status as a delegate agency authorized to administer the Part 71 Program.

4. Upon the effective date of this Delegation Agreement, notwithstanding the fee payment provisions of the current Part 71 permits, NNEPA shall begin collecting fees from all Part 71 sources in the Delegated Program Area pursuant to Subpart VI of the Navajo Nation Operating Permit Regulations.

III. PART 71 APPLICATIONS:

1. EPA has provided the NNEPA with a comprehensive list of those sources that have already received a Title V operating permit from EPA Region IX and of those sources that have not yet received a Part 71 permit and will (or may) require a Part 71 permit. NNEPA agrees to provide an updated list annually to EPA Region IX of sources that may require Part 71 permits during the course of NNEPA's administration of the Part 71 Program.

2. EPA agrees to send to NNEPA, by September 1, 2004, copies of all Part 71 applications for sources in the Delegated Program Area for which initial Part 71 permits have not yet been issued.

3. NNEPA agrees to review and make a determination of completeness for each new Part 71 permit application within 60 days of receipt. NNEPA agrees to promptly inform the applicant and EPA of the results of each application completeness review.

4. NNEPA agrees to submit to EPA on a semi-annual basis a list of all permit applications NNEPA intends to process. The initial list will be due to EPA on April 15, 2005 for the period of May 1, 2005 through October 31, 2005. Subsequent lists shall be provided on the 15th day of the month prior to the start of the relevant six-month period.

5. NNEPA agrees to provide adequate notice to the public through appropriate means upon receipt of a new application for a Part 71 permit, revision or renewal.

IV. PERMIT DEVELOPMENT AND REVIEW:

1. NNEPA agrees to draft each Part 71 permit to include all permit elements cited under 40 C.F.R. § 71.6 and all CAM requirements under 40 C.F.R. Part 64. NNEPA agrees to draft the permit, with guidance from EPA where appropriate, to ensure that all Part 71 requirements are incorporated into the permit. NNEPA shall provide EPA an opportunity to review a copy of the draft permit prior to the beginning of the public comment period. NNEPA also agrees to prepare a technical review memorandum and statement of legal and factual basis for each Part 71 permit in accordance with 40 C.F.R. § 71.11(b). Although not a requirement of the Delegation Agreement and not part of the administration of the federal Part 71 program, NNEPA intends to supplement the requirements in § 71.11(b) with the requirements in the Navajo Nation Operating Permit Regulation § 401(B).

2. NNEPA agrees to conduct all administrative permit proceedings in accordance with 40 C.F.R § 71.11, including but not limited to the public notification for permit issuance with a 30-day comment period, availability of permit information, and opportunity for a public hearing. NNEPA agrees to provide EPA with notice of all permit comment periods in advance of the initiation of the 30-day public comment period. Although not a requirement of the Delegation Agreement and not part of the administration of the federal Part 71 program, NNEPA intends to supplement the requirements in § 71.11 concerning administrative permit proceedings with the requirements in the Navajo Nation Operating Permit Regulation.

3. NNEPA agrees to prepare a proposed permit that incorporates all necessary changes, including any changes that result from EPA comments and the public comment period. NNEPA agrees to submit to EPA a copy of the proposed permit along with NNEPA's responses to all comments received on the draft permit and all necessary supporting information (40 C.F.R. § 71.11(j)). EPA shall have 45 days from its receipt of the permit to review and object to the proposed permit in accordance with the procedures set forth at 40 C.F.R. § 71.10(g).

4. EPA will review proposed permits to ensure that they comply with all requirements of the Act, the regulations promulgated thereunder, and any other applicable laws and regulations. EPA intends to use its review authority to ascertain whether each proposed permit contains all information required by 40 C.F.R. § 71.6.

5. NNEPA agrees to follow its transition plan for permit issuance, provided for in Attachment "2" of this agreement.

6. EPA shall object to the issuance of any proposed permit determined not to be in compliance with Part 71, the Act or any other applicable requirement. NNEPA shall not issue a permit if

the Regional Administrator objects in writing within 45 days of receipt of the proposed permit and all necessary supporting information. Any EPA objections shall include a statement of the reasons for objection and a description of the terms and conditions that the permit must include to respond to the objection. EPA shall provide a copy of the objection to the permit applicant. (40 C.F.R. § 71.10(g)(1) and (2)).

7. EPA shall object to a Part 71 permit if NNEPA fails to do any of the following:
   a. submit a copy of each permit application upon EPA request, each proposed permit, and each final permit;
   b. submit any information necessary to adequately review the proposed permit;
   c. process the permit under the procedures required under 40 C.F.R. § 71.7 and 71.11; or
   d. comply with the requirements of 40 C.F.R. § 71.8(a).
   (40 C.F.R. § 71.10(g)).

8. NNEPA agrees, within 90 days after the date of an objection, to revise and submit to EPA a proposed permit in response to the objection. If NNEPA fails to do so, EPA shall issue or deny the permit in accordance with the requirements of Part 71. (40 C.F.R. § 71.10(g)(3)).

9. EPA shall receive and act upon all petitions from any interested person to reopen a permit for cause in accordance with 40 C.F.R. § 71.11(n). (40 C.F.R. §§ 71.10(h) and (j)(2)).

10. EPA may reopen any permit if it finds that cause exists to terminate, modify, or revoke and reissue a permit. EPA intends to follow all procedures found in 40 C.F.R. § 71.7. (40 C.F.R. § 71.7(g)).

11. EPA is not delegating its authority to object to the issuance of a Part 71 permit nor its authority to act upon petitions submitted by the public. (40 C.F.R. § 71.10(j)).

12. NNEPA agrees, upon satisfactory completion of all administrative procedures, to issue all final Part 71 permits under signature authority of the Executive Director of the Navajo Nation Environmental Protection Agency or his/her designee.

V. PART 71 PERMIT REVISIONS AND RENEWALS:

1. NNEPA agrees to continue to administer permits issued under the Part 71 Program and conduct the activities discussed below in Part VI until all Part 71 permits are replaced with Part 70 permits issued pursuant to an approved Part 70 Program. All Part 71 permits that must be renewed while the Part 71 Program is effective will be renewed following the procedures of the Delegation Agreement, Part 71and the Act. (40 C.F.R. § 71.4(k)).

2. NNEPA agrees to revise, reopen, terminate or revoke and reissue Part 71 permits, as necessary and appropriate, using the procedures of the Delegation Agreement, Part 71 and the Act. (40 C.F.R. § 71.4(k)).

3. As soon as practicable, but no later than six months after this delegation becomes effective, using the appropriate procedures for reopenings or revisions contained in Part 71, NNEPA shall revise all EPA-issued Part 71 permits to reflect the change in permitting authority. These changes include, but are not limited to, changes in annual fee submittals and changes to reporting requirements.

4. Although not a requirement of this Delegation Agreement and not part of the administration of the federal Part 71 program, NNEPA intends to supplement the requirements in Part 71 with the requirements in the Navajo Nation Operating Permit Regulations.

VI. ENFORCEMENT:

1. While this Delegation Agreement is in effect, NNEPA agrees to conduct the following activities with respect to Part 71 sources:

   a. development of compliance plans and schedules of compliance;

   b. compliance and monitoring activities, including review of monitoring reports and compliance certifications, inspections, audits, conducting and/or reviewing stack tests, and issuance of requests for information either before or after a violation is identified; and

   c. enforcement-related activities, including issuance of notices, findings, and letters of violation and development of cases up until the filing of a complaint or order.

2. Administrative and judicial enforcement actions by NNEPA are not covered by this Delegation Agreement. This Agreement does not preclude NNEPA from pursuing administrative and judicial enforcement actions under its independent authorities. Where NNEPA pursues such actions, NNEPA shall provide notice to EPA following the procedures specified in Part VI(7).

3. EPA maintains its full federal investigative and enforcement authorities available under the Act, including those specified in 40 C.F.R. §71.12.

4. EPA intends to provide training and guidance to the NNEPA staff in order to develop NNEPA's enforcement program.

5. EPA intends to inspect and conduct comprehensive compliance investigations in conjunction with NNEPA of Part 71 facilities located in the Delegated Program Area; such inspections and investigations shall be performed consistent with EPA's Part 71 Compliance Monitoring Strategy policy.

6. Action taken by NNEPA under this Delegation Agreement shall in no way preclude EPA from enforcing any provision or requirement of Part 71 or the Clean Air Act.

7. NNEPA, upon becoming aware of possible civil violations or criminal activity regarding compliance with the Part 71 Program, shall notify and provide evidentiary documentation to the following EPA offices of such activity as soon as possible, but in all instances no later than 30 days after discovery of the activity. For civil violations, NNEPA shall provide notification and documentation to the Region IX Air Division, Enforcement Branch. For criminal activity, NNEPA shall provide notification and documentation to the EPA Criminal Investigation Division (CID).

VII. SUBMITTAL OF INFORMATION:

1. Permit Issuance:

   a. NNEPA agrees to submit permit information to EPA initially by electronic mail, followed by a signed copy of the original document.
   b. NNEPA shall submit to EPA a list of all permits to be processed semi-annually, as described in section III.4 of this agreement. The first list shall be submitted by April 15, 2005.
   c. The permit application and completeness determination for each permit, permit revision, or permit renewal shall be submitted to EPA once NNEPA has made a completeness determination.
   d. The draft permit for each initial permit, permit revision, or permit renewal will be submitted to EPA before it is made available for public comment. A copy of the technical review memorandum or statement of legal and factual basis and all necessary supporting information will also be submitted. A copy of the public notice shall be submitted to EPA when published.
   e. NNEPA agrees to submit to EPA any public comments that were received on the draft permit, permit revision, or permit renewal and a summary of how the draft initial permit, permit revision, or permit renewal was changed to respond to comments.
   f. The proposed permit, permit revision, or permit renewal resulting from consideration of public comments and the comments of affected States on the draft will be submitted to EPA after the end of the 30-day public comment period. Upon receipt of the proposed permit and all necessary supporting documentation, EPA will start its 45-day review period.
   g. The final permit, permit revision, or permit renewal will be submitted to EPA upon issuance.
   h. NNEPA expects to post on its website a list that identifies each draft and final Part 71 permit. The list will identify the permit, the pubic comment period, and the locations where the public may obtain a copy of the permit.

2. Permit Reporting:

In regards to reporting requirements, all Part 71 permits, including those issued pursuant to Section V.3 of this Delegation Agreement, shall require that all Part 71 sources submit all reports, compliance certifications, and other submittals required by Part 71 and the Part 71 permits to both EPA and NNEPA.

3. Fee Auditing:

   NNEPA agrees to submit a certified annual report that accounts for all Title V fees collected that fiscal year, all Title V expenditures and all Title V funds carried over from the previous fiscal year. The initial report will be due to EPA on September 1, 2005 and will account for the period beginning on the effective date of this agreement through December 31, 2004. Subsequent reports shall be provided on April 1 of each year and will account for the preceding calendar year.

4. Data Management: NNEPA agrees to input into AIRS on at least a monthly basis all data pertaining to each permit including name, AFS plant identification number, permit number assigned, new permit or modification, and final permit issuance date.

5. Retention of Records: NNEPA shall keep each draft, proposed, and final permit and application for permit renewal or modification for at least five years.

VIII. PART 71 IMPLEMENTATION ASSESSMENT:

1. EPA intends to assess NNEPA's administration of the Part 71 Program on an ongoing basis for consistency with the Delegation Agreement, Part 71, and the Act.

   a. EPA intends to consider any written comments from regulated parties, the public or any federal, state, tribal or local agency regarding the implementation of Part 71 in the Delegated Program Area. EPA intends to promptly provide copies of such documents to NNEPA.

   b. EPA intends to assess the Part 71 Program by examining NNEPA files and documents for selected facilities to determine whether permits are processed, issued, reopened, revised, renewed, and enforced in a manner consistent with this Delegation Agreement, Part 71, and the Act.

2. EPA intends to assess NNEPA's Part 71 fee administration to ensure that sufficient fees are being collected to adequately administer the Part 71 Program and conduct activities as described above in Part VI, and to ensure that all Part 71 fees are being expended appropriately.

3. If EPA determines that NNEPA is not adequately administering the program or conducting activities as described above in Part VI, EPA will notify NNEPA of that determination as

soon as possible, along with the reasons for it. EPA and NNEPA will then collaboratively determine the process for correcting the program deficiencies in an expeditious manner. EPA also intends to determine whether the activities to correct the deficiencies warrant assessing additional fees from all Part 71 sources and/or withdrawal of the delegation of the Part 71 Program.

IX. TRANSITION TO AN APPROVED PART 70 PROGRAM:

1. NNEPA agrees to promptly suspend issuance of Part 71 permits in the event EPA publishes a notice of approval of the Tribe's operating permits program under Part 70. NNEPA may continue using the Delegation Agreement and Part 71 for any Part 71 permits for which the administrative or judicial review process is not complete. EPA intends to further address this issue in any notice of Tribal program approval in the event the Tribe applies for approval of a Part 70 Program, and EPA approves the Tribal program. (40 C.F.R. §71.4(l)).

2. NNEPA agrees to continue to administer Part 71 permits, and conduct activities as described above in Part VI, until they are replaced by permits issued under an approved Part 70 Program. Until such time as all Part 71 permits are replaced with Part 70 permits, NNEPA agrees to continue to revise, reopen, terminate or revoke and reissue Part 71 permits, as necessary and appropriate, using the procedures of Subpart IV of the Navajo Nation Operating Permits Regulation.

X. EFFECTIVE DATE

1. This Delegation Agreement between EPA and NNEPA will be effective on the later date this Agreement is signed by the EPA Region IX Regional Administrator, the Executive Director of the NNEPA and the President of the Navajo Nation.

XI. SIGNATURES

Keith Takata — Date: 10-13-04

Wayne Nastri
Regional Administrator
U.S. Environmental Protection Agency - Region IX

XI. SIGNATURES

Date: OCT 15 2004

Stephen B. Etsitty, Executive Director
Navajo Nation Environmental Protection Agency

Date: OCT 15 2004

Joe Shirley, Jr., President
Navajo Nation

Attachment 1
EPA's Approval of NNEPA's TAS Application
to Administer a Delegated Part 71 Program

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

OFFICE OF THE
REGIONAL ADMINISTRATOR

ELIGIBILITY DETERMINATION FOR THE NAVAJO NATION FOR TREATMENT IN THE SAME MANNER AS A STATE FOR PURPOSES OF DELEGATION OF ADMINISTRATION OF THE CLEAN AIR ACT TITLE V, 40 CFR PART 71 PROGRAM

The Office of Regional Counsel ("ORC") and the Air Division have reviewed the Navajo Nation's eligibility for treatment in the same manner as a state ("TAS") under Clean Air Act ("CAA") section 301(d) and 40 C.F.R. Part 49 in order to be delegated administration of the CAA federal Title V operating permit program ("Part 71 Program"), and have recommended a finding of eligibility. Based on this review and recommendation, I have determined that the Navajo Nation has met the requirements of 40 C.F.R. § 49.6 for the purpose of entering into a delegation agreement with EPA to administer the federal Part 71 Program.

Eligibility Requirements

The requirements for the eligibility determination are identified in the Tribal Authority Rule ("TAR") at 40 CFR § 49.6. The TAR allows that, where tribes have previously received authorization for a CAA program or for any other EPA-administered program, they need only identify the prior authorization(s) and provide required information which had not been submitted with the prior application(s) (40 C.F.R. § 49.7(a)(8)). The Navajo Nation has previously applied and received approval for TAS for several EPA programs, including the CAA § 105 grant program, the Public Water Systems ("PWS") Supervision Program, and the Clean Water Act Section 106 grant program. The TAS requirements set forth in the TAR are as follows:

a) The applicant is an Indian tribe recognized by the Secretary of the Interior;

The Navajo Nation fulfilled this requirement by referencing its Clean Water Act Treatment as State application under Section 106, which was approved June 30, 1993. Our review of that application and EPA's approval thereof showed that the required information was submitted and that the Navajo Nation is an Indian tribe recognized by the Secretary of the Interior. See also 67 Fed. Reg. 46328 (July 12, 2002). The Navajo Nation meets the requirement of 40 C.F.R. § 49.6(a).

b) The Indian tribe has a governing body carrying out substantial governmental duties and functions;

The Navajo Nation fulfilled this requirement by referencing its Clean Water Act Treatment as State application, which was approved June 30, 1993. Our review of that application and EPA's approval thereof showed that the required information was submitted and that the Navajo Nation has a governing body carrying out substantial governmental duties and functions. The application describes the Navajo Nation's tripartite government, with executive, legislative and judicial branches, performing many essential governmental functions, including the use of its police powers to protect the health, safety and welfare of the Navajo people. The Navajo Nation government has enacted significant legislation, including the Navajo Nation Air Pollution Prevention and Control Act. The Navajo Nation meets the requirement of 40 C.F.R. § 49.6(b).

c) The functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction; and

The Navajo Nation has met this requirement. The Tribe has provided maps and legal descriptions for the formal Navajo Indian Reservation, established by the Treaty of June 1, 1868, and expanded by subsequent acts of Congress and executive orders that enlarged the Navajo Indian Reservation.[1] The Tribe has also provided maps and legal descriptions for the "satellite" reservations of Alamo, Canoncito and Ramah and for Tribal trust lands located outside of the formal reservations in the Eastern Agency. The Tribe is proposing to administer the program for Part 71 sources located within the formal reservations and the Tribal trust lands located in the Eastern Agency outside of the formal reservations.[2]

Because of ongoing litigation with the Hopi Tribe, the Navajo Nation is not at this time including any air resources within the former Bennett Freeze Area in its request for eligibility determination. Therefore, EPA makes no determination with respect to the Navajo Nation's eligibility to administer the Part 71 Program in the Bennett Freeze Area.

The Tribe is also not currently requesting that EPA make any determination regarding the Tribe's eligibility to administer the Part 71 Program over two coal-fired generating stations located on the Reservation, the Four Corners Power Plant and the Navajo Generating Station. As the Tribe is not proposing to assume administration of the Part 71 permitting program over these

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[1] Copies of the Treaty and the acts of Congress and executive orders were attached as exhibits to the Tribe's CWA Section 106 Application and are relied upon here.

[2] Under the CAA and the TAR, EPA treats tribal trust lands validly set apart for the use of an Indian tribe as reservation land even though that land has not been formally designated as a reservation. For the purposes of this document, EPA refers to the formal reservations and the Tribal trust lands located in the Eastern Agency outside of the formal reservations as the "Reservation."

facilities, EPA makes no determination with respect to the Tribe's eligibility to administer the program over the two power plants.

EPA notes that the federal Part 71 Program will continue to be implemented under federal authority throughout the areas described and applied for by the Tribe until such time as EPA approves a CAA permitting program under 40 C.F.R. Part 70 for such areas. Consistent with this eligibility determination, EPA and the Tribe may enter into a delegation agreement pursuant to which the Tribe would administer the federal program over the areas covered by this eligibility determination on behalf of EPA. The Navajo Nation has enacted laws providing all relevant authorities to enable the Tribe to carry out administration of the federal program. The Tribe has a permitting office within the Navajo Nation Environmental Protection Agency that is duly authorized under Tribal law to issue federal Part 71 permits pursuant to a delegation agreement with EPA. In addition, as described in greater detail below under Section (d), the Tribe has enacted the Navajo Nation Air Pollution Prevention and Control Act and the Navajo Nation Air Quality Control Operating Permit Regulations; they contain all relevant authorities and procedures for administration of the federal program. In particular, the Tribal statute and regulations establish administrative authorities and procedures for the receipt, processing, and issuance or denial of permit applications, the collection of permitting fees, and the pursuit of various enforcement-related activities including development of compliance plans and schedules of compliance, monitoring, inspections, audits, requests for information, issuance of notices, findings and letters of violation, and development of cases up until filing of a complaint or order.

The Navajo Nation has demonstrated that the functions it will exercise in administering the federal Part 71 Program pertain to the management and protection of air resources within the exterior boundaries of the Reservation. The Tribe meets the requirement of 40 C.F.R. § 49.6(c).

d) the Indian tribe is reasonably expected to be capable, in the EPA Regional Administrator's judgment, 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.

The functions to be exercised, in this case, pertain to the administration of the federal Part 71 Program. The Navajo Nation has been working closely with EPA Region 9 to develop its air program capacity since 1987. The Tribe adopted the Navajo Nation Air Pollution Prevention and Control Act, 4 NNC §§ 1101-1162 (amended April 22, 2004 and signed into law May 7, 2004), ("Navajo Nation CAA") in 1995, and has been working on compliance issues with stationary sources on the Reservation for many years. Furthermore, the Navajo Nation has adopted its own air permitting regulations, which the Tribe expects will be the basis for their future application for approval of a Part 70 program. The Air Division has also reviewed the Tribe's staff and administrative capability, and found that the Tribe is reasonably expected to be capable of administering a delegated Part 71 Program. The Navajo Nation EPA has a staff of 67 people working on a variety of environmental programs. The staff includes scientists, inspectors, engineers, and legal counsel. The Navajo Nation has received primacy for the Public Water Systems component of the Safe Drinking Water Act and has applied for primacy for the Underground Injection Control Program as well. Navajo Air Program staff have worked on a

variety of air issues involving the major sources on the Reservation, and they have participated in training and internships with EPA and the Arizona Department of Environmental Quality.

Where EPA is granting a full delegation of administration of the Part 71 program and suspending its collection of federal Part 71 fees, EPA also requires that the Tribe demonstrate it has the ability to collect permit fees and to conduct activities covered by Title V fees, including the enforcement activities referenced in 40 C.F.R. § 71.9(b), which include functions such as inspections, audits and stack tests.[3] The Navajo Nation has developed its permitting laws and regulations to include all relevant requirements to collect fees and conduct the enforcement activities covered by Title V fees, as well as other aspects of the Part 71 program. The Tribe enacted the Navajo Nation CAA as one of its first steps in developing a Navajo Nation Air Quality Program to regulate air quality throughout the Navajo Nation.

Since the passage of the Navajo Nation CAA, the Navajo Air Quality Program has been conducting air quality monitoring and inspections, has completed an air emissions inventory, and has developed operating permit and acid rain permit regulations that the Tribe intends to submit for approval under Parts 70 and 72, respectively, 4 NNR §§ 11-2H-101 through 11-2H-795. It is a violation of the Navajo Nation CAA and the Navajo Nation Air Quality Control Operating Permit Regulations ("Navajo Nation AQCOPR") to violate a federal Part 71 permit. 4 NNC § 1154; 4 NNR § 11-2H-501(A). With respect to permit fees, the Navajo Nation CAA and the Navajo Nation AQCOPR include explicit provisions regarding permit fees and the collection of fees. 4 NNC § 1134(B); 4 NNR §§ 11-2H-601 through 11-2H-603. The Navajo Nation CAA also includes explicit provisions authorizing the Tribe to conduct the enforcement activities covered by Title V fees such as issuing information requests, conducting inspections and audits, and requiring sources to conduct emissions monitoring. See 4 NNC §§ 1103(B) (Administration; Authority of Director), 1151 (Record-keeping, Entry, Monitoring and Inspections), 1152 (Orders to Comply), and 1161(B) (Rulemaking and Other Administrative Procedures; Administrative subpoenas). The Navajo Nation CAA and the Navajo Nation AQCOPR were passed after a public notice and comment period, and there were no adverse comments to these provisions or objections to the Navajo Nation's authority to collect fees. The Navajo Nation has also collected fees from both members and non-members of the Tribe for other environmental programs, including the Navajo Underground Injection Control program. Additionally, all of the facilities subject to the federal Part 71 Program that the Tribe will administer operate pursuant to consensual relationships (leases) with the Tribe.

The Navajo Nation has demonstrated that it is reasonably expected to be capable of carrying out the functions to be exercised in administering the federal Part 71 Program in a manner consistent with the terms and purposes of the CAA and all applicable implementing regulations. The Tribe meets the requirement of 40 C.F.R. § 49.6(d).

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[3]CAA section 502(b)(3)(a)(ii) specifies that the permit fees collected may be used for "implementing and enforcing the terms and conditions of permits (not including any court costs or other costs associated with any enforcement action)."

Notification of "Appropriate Governmental Entities"

40 C.F.R. § 49.9(b) provides that the Regional Administrator shall notify appropriate governmental entities within 30 days of receipt of the Tribe's initial, complete application under the CAA. There are twelve appropriate governmental entities:

- the Hopi Tribe;
- the Jicarilla Apache Tribe;
- the Pueblo of Laguna;
- the Ute Mountain Ute Tribe;
- the Pueblo of Zuni;
- the States of Utah, Arizona, Colorado and New Mexico;
- the U.S. National Park Service;
- the U.S. Forest Service; and
- the U.S. Bureau of Land Management.

Consistent with 40 C.F.R. § 49.9(b), within 30 days of EPA's receipt of the Tribe's complete application, these entities were provided with notice and a 30-day opportunity to comment. In addition, public notice with an opportunity for public comment was provided in the form of an advertisement in the Navajo Times.

Comments were received from the New Mexico Environment Department and the Arizona Department of Environmental Quality, in both cases consisting of letters of support for the Tribe's application.

Determination

Based on the information provided to me by the Navajo Nation, the Air Division, and the Office of Regional Counsel, I have 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.

Date: 10-13-04

Wayne Nastri, Regional Administrator

Attachment 2
NNEPA's Transition Plan for Permit Issuance

NAVAJO NATION ENVIRONMENTAL PROTECTION AGENCY
Navajo Air Quality Program

PROGRAM DESCRIPTION AND TRANSITION PLAN FOR A DELEGATED PART 71 PROGRAM

July 16, 2004

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Program Description for a Navajo Delegated Part 71 Program

I. Introduction

This document describes how the Navajo Nation Environmental Protection Agency ("Navajo Nation EPA" or "NNEPA"), through the Navajo Nation Air Quality Control Program ("NAQCP"), intends to administer and enforce a delegated Clean Air Act ("CAA") Title V Operating Permit Program consistent with the requirements of 40 C.F.R Part 71 and Navajo Nation law. The program description includes an overview of the Navajo delegated Part 71 operating permit program and a discussion of how the program and its implementation will be in accordance with federal requirements.

II. Organization of the NNEPA

In 1995, the Navajo Nation EPA was established as a separate regulatory agency within the executive branch of the Navajo Nation government, in order to ensure independence in the implementation and enforcement of environmental laws within the Navajo Nation for the protection of human health and the environment. The Resources Committee of the Navajo Nation Council provides legislative oversight of NNEPA. An Executive Director, appointed by the President of the Navajo Nation, administers the agency. The Executive Director (referred to as the "Director" in the Navajo Nation environmental laws) has rulemaking, regulatory, and enforcement authority, which he or she may delegate to the various NNEPA departments and programs as appropriate.

The NNEPA is organized into four departments: The Air & Toxics Department, the Waste Regulatory and Compliance Department, the Surface and Ground Water Protection Department and the Enforcement Department. Each department is administered by an Environmental Department Director who oversees departmental functions.

The Air & Toxics Department comprises four programs, the Air Quality Control Program, the Pesticides Program, the Radon Program, and the Asbestos Program. The Air Quality Control Program is headed by an Environmental Program Supervisor and employs additional staff to conduct ambient air monitoring and compliance inspections, assist in enforcement actions, and undertake program development and general office activities.

NNEPA
• Air & Toxics
• Waste Regulatory & Compliance
• Surface & Ground Water Protection
• Enforcement

Air & Toxics Department
• Asbestos Program
• NAQCP
• Pesticides Program
• Radon Program

III. Navajo Nation Laws

The following laws provide the NNEPA in general and the NAQCP in particular with the authority to regulate air quality within Navajo Nation lands:

Table 1. Relevant Navajo Nation Acts and Regulations

Acts / Regulations	Date Passed	Date Amended
Navajo Nation Environmental Policy Act	April 21, 1995	
Navajo Nation Air Pollution Control and Prevention Act	July 20, 1995	April 22, 2004
Navajo Nation Operating Permit Rule	April 13, 2000	July 8, 2004
Plan of Operation	May 22, 2001	
Navajo Nation Uniform Regulations	Sept. 5, 2001	
Navajo Nation Acid Deposition Control Regulations	July 8, 2004	

Copies of those acts and regulations pertaining to the delegated Part 71 program are provided as separate attachments to this application.

IV. Navajo Air Quality Control Program

A. Funding

The Navajo Air Quality Control Program was created in April 1992, beginning its operation under a Section 103 Air Grant awarded from EPA Region 9. The Program then submitted an application and received approval for a Section 105 Grant in 1999. The Program continues to operate under this Grant.

B. Purpose of Program

The Program is organized into four sections: Administration, Regulation Development, Compliance, and Air Monitoring. Though the primary goal of the Program is to obtain EPA approval of and to implement a CAA Title V operating permit program, and this task is currently assigned to the Regulation Development Section, the tasks and responsibilities of the other Program sections will also support the Title V program.

The Administration Section is responsible for administrative, personnel and finance matters related to the operation of the Program, such as taking personnel actions, handling time sheets, assisting in the hiring of personnel, preparing and maintaining budgets, and submitting

reports.

The Regulation Development Section has completed the rulemaking process for the Navajo Nation Acid Rain Rule, the revised Navajo Nation Operating Permit Rule, and the revised Navajo Nation Clean Air Act. In addition, the Section completed the "treatment as a state" application that has already been submitted to EPA as part of the Navajo Nation's application to administer a delegated Part 71 program. The Regulation Development Section also has finalized the delegation application that is currently being submitted to EPA. This Section also will be responsible for completing and submitting the Part 70 application to EPA.

The Compliance Section conducts inspections of all TitleV and non-Title V sources located within the Navajo Nation, such as power plants, coal mines, and oil and gas facilities. In addition, this Section responds to citizen complaints, and is also updating the air emissions inventory for the tribe.

The Air Monitoring Section is responsible for maintaining the operation of and collecting data from four air monitoring stations located within the Navajo Nation. Work on two additional air monitoring sites is nearly completed and these stations are expected to begin operating soon.

C. Staffing

The following briefly describes the functions and responsibilities of the current staff:

1. Administration Section

Chris Lee, Program Supervisor

a. Responsible for all personnel and administrative matters of the Program.
b. Provides support and assistance to Regulation Development Section.
c. Serves in Acting capacity for the Air & Toxics Department Director, as needed.
d. Participates in regional air quality issues, e.g., the WRAP.
e. Completes and submits Program reports.

Marjorie Nelson, Sr. Office Specialist

a. Provides secretarial and clerical support.
b. Assists the Supervisor in personnel and administrative matters of the Program.

2. Regulation Development Section

Wilson Laughter, Sr. Environmental Specialist

a. Works on tasks necessary for NAQCP to assume a delegated Part 71 permit program, approved Part 70 Permit Program, rulemaking activities for existing laws as well as proposed legislation(s).

3. Compliance Section

Iris Begaye, Sr. Environmental Specialist

a. Conduct inspections individually or jointly with other entities of all title V and non-title V sources on Navajo lands, including providing assistance on enforcement cases.
b. Responds to citizen complaints.
c. Maintains and updates Emissions Inventory databases.

4. Air Monitoring Section

Charlene Nelson, Sr. Environmental Specialist

a. Develops and revises QAPP as needed.
b. Works closely with Environmental Technician in the operation of the air monitoring network.
c. Serves in Acting capacity for the Program Supervisor, as needed.

Roderick Yazzie, Environmental Technician

a. Maintains and operates the Navajo air monitoring network.
b. Responsible for requisition of parts and supplies.
c. Constructs new air monitoring sites.

V. Implementation of Operating Permit Program

A. Introduction

The NAQCP proposes to establish and maintain a Title V operating permitting program that will encompasses both new sources and existing sources. The NAQCP plans to achieve this goal in two steps. First, the Program will administer a delegated Part 71 permit program. Second, during the delegation period, the NAQCP will be working toward submitting an application for USEPA approval of a Navajo Part 70 Operating Permit Program within 12 months after receiving delegation to administer a Part 71 permit program. The NAQCP anticipates developing the necessary resources and expertise during the delegation period to allow for a smoother transition to a Navajo Part 70 Operating Permit Program. The necessary laws (as outlined in Table 1) are already in place authorizing the NNEPA Director, through the NAQCP, both to administer a Navajo delegated Part 71 Permit Program and to implement a Navajo Part 70 Operating Permit Program.

The NAQCP proposes to delay developing and implementing a minor source permit program until after the NAQCP has received approval from the USEPA to implement a Part 70 program (the NAQCP may develop this program earlier if it determines it has sufficient personnel and resources). Once the NAQCP has established a minor source permit program, all

affected sources will be required to receive a minor source air permit in accordance with the Navajo Clean Air Act (and Navajo Minor Source Rule that has yet to be developed).

B. Transition From an EPA Part 71 Program to a Navajo Delegated Part 71 Program

USEPA has issued Part 71 permits to 12 of the 14 sources within Navajo Indian country and intends to issue the remaining two permits by September 1, 2004. In the event the two remaining permits are not issued by September 1, 2004, the NNEPA will work in conjunction with Region IX to issue these remaining permits in a timely manner. The NAQCP is seeking to administer a delegated Part 71 program for 12 of these sources, which are listed in Table 2.[1] This program will be a fully delegated program under 40 C.F.R. § 71.10 with respect to those 12 sources.

Within three months of the delegation the NNEPA will administratively amend the permits for these 12 existing Part 71 sources to reflect the change in permitting authority and to revise the appropriate addresses for purposes of reporting and fee payment. USEPA will retain its permit review authority, enforcement authority and other authorities as described further in the Delegation Agreement. The permits will otherwise remain unchanged. The NAQCP will process these permit modifications, as discussed further below.

Listed in Table 2 are the existing sources that will be subject to the delegated Part 71 permit program. This table also includes the amount each source is likely to pay in fees in FY2005 (based on projected emissions) and the annual payment date for each source:

Table 2. Part 71 fees for sources for which NNEPA is seeking Part 71 delegation

Facility Name	**Projected Fee amount for FY05**	**Anniversary Date of Payment**
El Paso Natural Gas– Leupp Station	$97,641	Sept. 1
El Paso Natural Gas– Dilkon Station	$ 4,364	Sept. 1
El Paso Natural Gas– Navajo Station	$18,237	Sept. 1
El Paso Natural Gas– Window Rock Station	$80,941	April 1
El Paso Natural Gas– Gallup Station	$30,082	April 1
El Paso Natural Gas– White Rock Station	$ 8,801	April 1
Peabody Western Coal Company	$87,974.73	Sept. 1

[1] The NAQCP is not including the Four Corners Power Plant or Navajo Generating Station in its delegation application at this time, for the reasons discussed in the Navajo Nation's eligibility application submitted pursuant to 40 C.F.R.§ § 49.6 and 49.7 and in the jurisdictional statement that is a part of that application. The Navajo Nation may supplement its delegation application in the future to include the two power plants, depending upon the status of negotiations with the power plants.

Transwestern Pipeline Co. Leupp Station	$33,281.75	Sept. 1
Transwestern Pipeline Co. Klagatoh Station	$35,930.35	Sept. 1
ConocoPhilips Wingate Fractionating Plant	$ 1,755.26	Sept. 1
Chevron Texaco Aneth Unit	$14,708	April 1
ExxonMobil McElmo Creek Unit	$ 6,123.46	April 1
Total Annual Revenue:	**$419,839.55**	

The following sections discuss how the NAQCP will carry out its specific responsibilities in administering a delegated Part 71 program.

C. Permit Applications

Pursuant to the Delegation Agreement, USEPA will provide NNEPA with a list of all sources that have already received Part 71 permits from the USEPA and of all sources, if any, that have not yet received a Part 71 permit and will require one. USEPA also will provide NNEPA with copies of all applications for sources within the Navajo Nation, if any, that have not yet received a Part 71 permit.

If there are any Part 71 sources that have not received a Part 71 permit, or if there are new Part 71 sources during the period that NNEPA is administering the delegated program, NNEPA will review and make a determination of completeness for each new Part 71 permit application within 60 days of receipt. NNEPA will provide public notice of receipt of a new application for a Part 71 permit, revision or renewal.

The Navajo Air Quality Control Program will process permit applications pursuant to the procedures described in 40 C.F.R. § 71.5, subpart IV of the NNOPR and the Delegation Agreement. NNEPA will submit to the USEPA, beginning on April 15, 2005 (assuming that NNEPA receives delegation by September 1, 2004), a list of all permit applications that NNEPA intends to process on a semiannual basis. If the permit application is complete and accurate and NAQCP staff decides that a permit may be issued under the regulations, a draft permit will be prepared and the public will be notified that the NAQCP is proposing to issue a permit. NNEPA also will promptly inform the applicant and USEPA of the results of each application completeness review.

Pursuant to 40 C.F.R § 71.5, the following information will be required in an application: source identification information and exact location by latitude and longitude (or UTM), a description of the processes and products (by SIC) including any alternate operating scenario, emission rates and supporting information, a description of all equipment including pollution controls, a list of insignificant activities identifying emission unit and how the exemption applies, supporting information, citation and description of all applicable requirements and exemptions, a description of test methods, a compliance plan, a compliance certification, and a certification of truth, accuracy and completeness.

D. Permit Development and Review

Every permit issued will contain the items specified in 40 C.F.R.§ 71.6 and all CAM requirements under 40 C.F.R. Part 64. NNEPA will draft the permit in consultation with USEPA to ensure that all Part 71 requirements are incorporated into the permit. This consultation will include an opportunity for USEPA to review a copy of the draft permit prior to the beginning of the public comment period. NNEPA also will prepare a technical review memorandum and statement of legal and factual basis for each Part 71 permit in accordance with 40 C.F.R. § 71.11(b) and Navajo Nation Operating Permit Regulation § 401(B). NNEPA will provide public notice and comment regarding permit actions and conduct permit proceedings pursuant to 40 C.F.R. § 71.11 and Subpart IV of the NNOPR.

NNEPA will prepare a proposed permit that incorporates all changes, including any changes that result from EPA comments and the public comment period. NNEPA will submit to USEPA a copy of the proposed permit along with NNEPA's responses to all comments received on the draft permit and all necessary supporting information, pursuant to 40 C.F.R. § 71.11(j). USEPA will have 45 days from its receipt of the permit to review and object to the proposed permit in accordance with the procedures set forth at 40 C.F.R. § 71.10(g).

NNEPA will not issue a permit if the Regional Administrator or his/her designee objects in writing within 45 days of receipt of the proposed permit and all necessary supporting information. Pursuant to 40 C.F.R. § 71.10(g)(1) and (2), any USEPA objections will include a statement of the reasons for objections and a description of the terms and conditions that the permit must include responding to the objection. USEPA will provide a copy of the objection to the permit applicant. NNEPA will, within 90 days after the date of an objection, revise and submit to USEPA the proposed permit in response to the objection. If NNEPA fails to do so, USEPA will issue or deny the permit in accordance with the requirements of Part 71, as provided in 40 C.F.R. § 71.10(g)(3).

E. Permit Issuance Process

Within the first three months of the delegation, NNEPA will make administrative amendments to all existing Part 71 permits to reflect the change in permitting authority from USEPA to NNEPA. The administrative amendments also will include but are not limited to changes in annual fee submittals, changes in reporting requirements and a statement that Part 71 permits are enforceable by NNEPA as well as USEPA.

Since NNEPA will not issue new Part 71 permits but instead will revise the existing Part 71 permits, the terms of the existing Part 71 permits will remain unaffected. As each permit comes up for renewal, NNEPA will then issue a renewal permit for a new five-year term. The expiration dates for the existing Part 71 permits are listed in Table 3 below.

Table 3. Part 71 permit expiration dates

Seq.	Facility Name (Location)	Expiration Date	Status

1	Transwestern Pipeline Klagatoh Sta (AZ)	04/24/2005	Current
2	Transwestern Pipeline Leupp Sta (AZ)	04/24/2005	Current
3	El Paso Natural Gas Navajo Sta (AZ)	05/11/2005	Current
4	El Paso Natural Gas Leupp Sta (AZ)	05/11/2005	Current
5	El Paso Natural Gas Dilkon Sta (AZ)	05/11/2005	Current
6	Conoco Wingate Fractionating Plant (NM)	12/21/2005	Current
7	El Paso Natural Gas Window Rock Sta (AZ)	12/25/2005	Current
8	El Paso Natural Gas White Rock Sta (NM)	12/25/2005	Current
9	El Paso Natural Gas Gallup Sta (NM)	12/25/2005	Current
10	Navajo Generating Station (AZ)	06/04/2006	Current
11	Four Corners Power Plant (NM)	06/11/2006	Current
12	Peabody Western Coal (AZ)	09/22/2008	Current
13	ChevronTexaco Aneth Unit (UT)	00/00/2009	Renewal by 09/01/2004
14	ExxonMobil McElmo Creek Unit (UT)	00/00/2009	Renewal by 09/01/2004

All new permits will be issued in the manner described in 40 C.F.R Part § 71.7 and in subpart IV of the Navajo Nation Operating Permit Rule and section 212 of the Navajo Uniform Rules, which are consistent with § 71.7. The Director will issue all new permits for a fixed term of five years, except that solid waste incineration units combusting municipal waste subject to the standards under CAA § 129(e), will be issued a permit for a period not to exceed 12 years.

F. Permit Fees

NNEPA will collect permit fees from all Part 71 sources subject to the delegated program. These fees will be collected pursuant to NNOPR Subpart VI, and are based on the "presumptive minimum" fee under the federal regulations. According to 40 CFR § 70.9(b)(2), the Administrator will presume that the fee structure is sufficient if the program requires the collection and retention of at least the presumptive minimum, or $38.72 /ton per year of actual emissions (adjusted annually based on the Consumer Price Index), which is the amount required by the NNOPR. Moreover, a demonstration that the fees will be sufficient to cover the costs of the delegated program, as required by 40 C.F.R. § 71.9 and NNOPR § 602(C), is attached as Exhibit 1. The demonstration shows that the fees will cover both the direct and indirect costs of the Title V program, which include but are not limited to: regulation and guidance development, permit processing, administrative costs, enforcement, emissions and ambient monitoring, modeling, analyses or demonstrations, emissions inventory and tracking. These fees will be used solely for the Title V program costs. Therefore, since NNEPA has sufficient revenue authority to administer the delegated Part 71 program, USEPA will suspend collection of Part 71 fees, pursuant to 40 C.F.R. § 71.9(c)(2)(ii) and the Delegation Agreement.

Existing Part 71 sources will be required to pay an annual fee on the anniversary date of their Part 71 fee payment while new sources will be required to submit their fees within 60 days of commencing operation as a Part 71 source, pursuant to NNOPR §§ 603, 702. If USEPA delegates the Part 71 program to NNEPA by September 1, 2004, seven of the twelve existing Part 71 sources will be paying their fees to NNEPA on September 1, 2004, with the remainder paying on April 1, 2005 (see Table 2).

G. Enforcement

All terms and conditions in a permit, including but not limited to provisions designed to limit a source's potential to emit, 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 Subchapter 3 of the Navajo Clean Air Act, 4 N.N.C. §§ 1151-56, as well as by persons pursuant to 4 N.N.C. § 1156 and § 304 of the Clean Air Act.

The EPA Administrator retains full federal enforcement authority under the CAA. Violations of any applicable requirement, any permit term or condition, any fee or filing requirement, any duty to allow or carry out inspection, entry, or monitoring activities, or any regulations or order issued by NNEPA pursuant to this Part 71 delegation agreement are violations of the Act pursuant to 40 C.F.R. § 71.12.

Pursuant to the enforcement authority enumerated in Subchapter 3 of the Navajo Nation Clean Air Act, the Director may:

a. restrain or enjoin immediately and effectively any person by order or by suit in court from engaging in any activity in violation of a permit that is presenting an imminent and substantial endangerment to the public health or welfare, or the environment;

b. seek injunctive relief in tribal court to enjoin any violation of any program requirement, including permit conditions, without the necessity of a prior revocation of the permit;

c. assess civil penalties or recover civil damages; and

d. bring a criminal action in tribal court, under certain circumstances and for Indian defendants only.

Initially, however, NNEPA intends to work cooperatively with USEPA on any enforcement actions. By doing so, NNEPA expects to receive training and guidance and to develop expertise to prepare for enforcement under a Part 70 permit program. For example, NNEPA intends to inspect and conduct comprehensive compliance investigations in conjunction with USEPA of Part 71 facilities; such inspections and investigations will be performed in consistent with USEPA's Part 71 Compliance Monitoring Strategy policy. Facility inspections for all Part 71 facilities will be conducted annually and Compliance Monitoring will be done semiannually through facility reporting and certification. Inspections will be conducted by NAQCP Compliance department personnel and/or Monitoring specialists utilizing necessary equipment for testing the emission source and traveling in assigned department vehicles to the inspection sites. Any noncompliance enforcement action will be conducted pursuant to the enforcement authority enumerated in Subchapter 3 of the Navajo Nation Clean Air Act and by the terms identified in the Delegation Agreement utilizing internal Tribal Department of Justice and/or external counsel resources as required in conjunction with US EPA Region IX.

Pursuant to 40 C.F.R. § 49.8, USEPA will continue to exercise primary criminal enforcement responsibility. NNEPA, however, will provide potential investigative leads to USEPA, as agreed to by NNEPA and EPA in a Memorandum of Agreement to be worked out between the parties. The Memorandum of Agreement will outline how NNEPA, upon becoming aware of possible criminal activity regarding compliance with the Part 71 Program, will notify the EPA Criminal Investigation Division of such activity as soon as possible, but in all instances no later than 30 days after discovery of the activity.

H. Current/Future Operating Expenses

The expected cost of administering the Navajo Delegated Part 71 Permit Program during the first year of delegation, in terms of FY 2005 dollars, is$419,839.55. The estimated program costs and funding sources are shown in the table below:

Table 4. Fiscal Budget

Fiscal Year (Oct. 1 - Sept. 30)	**Funding Sources**			**Program Expenses**	
	Sept. 1, Fee	Apr. 1, Fee	Total Permit Fees	Personnel	Operating
	$279,184.09	$140,655.46	$419,839.55	$219,082.00	$200757.55

I. Permit Program Staff and Responsibilities

The following is a list of personnel, including their responsibilities, required to run the Navajo Delegated Part 71 Permit Program:

1. Environmental Department Manager
   a. Assumes the supervisory responsibilities over permit program staff and overall administration of the Navajo Delegated Part 71 Operating Permit Program.
   b. Provides guidance and develops strategies necessary to ensure the successful transition from a USEPA Part 71 Permit Program to a Navajo Delegated Part 71 Permit Program to an approved Navajo Part 70 Operating Permit Program.
   c. Submit reports to USEPA Region 9 to meet the requirements of the Delegation Agreement and NNOPR.
   d. Provides final approval of all draft permits in preparation for signature by the Executive Director.
   e. Hires additional personnel for the permit program as needed.

2. Environmental Program Supervisor
   a. Works closely and in cooperation with the Environmental Department Manager in running the permit program.
   b. Provides assistance for the work on the primacy package.
   c. Works closely with the technical staff on the daily operation of the

permit program.

d. Develops the budget for the permit program.

e. Signs appropriate documents and correspondences pertaining to the regulated community.

3. Environmental Engineer

a. Responsible for the review, processing, drafting, and issuance of applicable permits.

b. Conducts notice and comment activities on draft permits.

c. Works closely with Environmental Program Supervisor and Inspector on issues related to permit conditions and/or provisions.

d. Provides assistance, as needed, on enforcement actions.

4. Environmental Specialist

a. Conducts periodic inspections of all facilities with title V permits subject to the authority of the Delegated Part 71 Permit Program.

b. Assembles, refers, and participates in cases for enforcement actions in cooperation with USEPA.

c. Submits reports (i.e., inspections, violations) of compliance and enforcement activities.

d. Observes source testing at facilities required to meet applicable standards (i.e., RATA, CEMs).

5. Information Technician

a. Assumes all the duties and responsibilities of a network administrator and related work.

b. Performs hardware repair and software program support.

c. Maintains and updates hardware and software equipment.

d. Orders equipment as necessary.

6. Office Specialist

a. Assumes all the secretarial and clerical duties associated with the permit program.

b. Works closely with the Environmental Program Supervisor (and staff) on administrative and personnel matters related to the permit program.

c. Assists the Environmental Engineer on activities related to notice-and-comment period for permits.

VI. Recruitment and Hiring of Permit Program Staff

NNEPA will be advertising and plans to hire additional staff to complete its current and future needs to administer a delegated Part 71 permit program and, ultimately, a Part 70 operating permit program. The following outlines NAQCP's plans for accomplishing this task.

A. Create Staff Positions for Permit Program

1. Establish positions for the permit program

    a. Identify positions and number of personnel needed to administer the permit program.
    b. Work with Navajo Nation Department of Personnel to create new job classifications for the permit program staff.

    This portion of the plan has already been accomplished.

2. Recruitment

    a. Announce positions through local university liaisons: Universities of New Mexico, Arizona, and Utah.
    b. Announce positions through specific professional trade sites, e.g., ITEP, AISES, State Environmental Departments. Announcements will begin in July 2004.
    c. Announce positions with the Navajo Nation Department of Personnel beginning on September 1, 2004.

    This portion of the plan will continue until all the positions are filled.

B. Selection of Staff

1. The selection process will occur as soon as possible following the announcement of positions. Although the exact time will depend on when and the number of applicants referred to NNEPA, the selection of candidates should happen within four to six weeks after the vacancy announcements.
2. NNEPA will consider IPA personnel with USEPA or other governmental organizations when selecting permit program staff.

VII. Orientation and Training

A. New Staff

1. In accordance with the Navajo Nation Personnel Policy and Procedures, all new staff will undergo employee orientation and subject to a 90-day, probationary period.
2. Complete an additional administrative and personnel process.
3. Introduce new staff to NNEPA and receiving briefing on their roles and responsibilities within the permit program.

B. Training

1. Once the 90-day, probationary period has ended, new staff will have the opportunity to receive the training needed to support their respective roles in the permit program.

EXHIBIT C

August 2009 Peabody Comments on Draft Permit

Peabody Western Coal Company

Comments on

DRAFT PART 71 OPERATING PERMIT
and
DRAFT STATEMENT OF BASIS

for

BLACK MESA COMPLEX
PERMIT # NN-OP 08-010

Submitted to

NAVAJO NATION
ENVIRONMENTAL PROTECTION AGENCY

August 2009

COMMENTS OF PEABODY WESTERN COAL COMPANY

I. INTRODUCTION

On July 15, 2009 the Navajo Nation Environmental Protection Agency (NNEPA), a delegate agency for the federal Part 71 program under the Clean Air Act, released a draft Title V operating permit to revise and renew the current Title V permit for Peabody Western Coal Company's (PWCC's) Black Mesa Complex. A draft statement of basis accompanied that draft permit. NNEPA is now seeking comments on those draft documents. Although a public notice by NNEPA identified an August 15, 2009 deadline for public comments on the draft documents, NNEPA subsequently advised PWCC that the subject comment period would not close until August 17, 2009.

As the owner and operator of Black Mesa Complex, PWCC has substantial interest in the contents of those documents. We thank the NNEPA for the opportunity to review and comment on those materials.

The Company's written comments herein are organized into five basic sections. After this brief Section I introduction, PWCC outlines its major concerns with NNEPA's proposed action in Section II. Sections III and IV address the Company's comments on specific conditions within the draft permit and on specific sections within the draft statement of basis, respectively. More details in either one or both of those Sections have been used to supplement the discussions of our major concerns in Section II. Finally, Section V comments are more ministerial in nature, i.e., they seek to revise or correct certain statements in the NNEPA draft documents, including incorrect equipment identifications, incomplete citations, missing words, etc.

II. PWCC MAJOR CONCERNS

A. Scope of NSPS Subpart Y Applicability

Subpart Y regulates coal preparation plants. However, not all pollutant-emitting activities at a coal preparation plant have been designated as "affected facilities" which are subject to Subpart Y. A Subpart Y affected facility is a particular type of coal preparation facility that has been constructed, modified or reconstructed after October 24, 1974. In addition, an "affected facility" at a coal preparation plant is one that meets the definition of one of the particular types of activities that are covered by Subpart Y. Thus, Black Mesa Complex has Subpart Y affected facilities that consist of "coal processing and conveying equipment." However, Black Mesa Complex does not include any facilities that were constructed, modified, or reconstructed after October 24, 1974 ***and*** that are designated as "thermal dryers," pneumatic coal-cleaning equipment (air tables)," "coal storage systems," or "coal transfer and loading systems." 40 C.F.R. § 60.250(a).

Subpart Y "coal processing equipment" is defined as "any machinery used to reduce the size of coal or to separate coal from refuse." 40 C.F.R. § 60.251(g). And, Subpart Y "conveying equipment" is defined as "the equipment used to convey coal to or remove coal and refuse from the [processing] machinery." *Id.* Consequently, a post-1974 conveyor at a coal preparation plant will not be subject to Subpart Y if it does not convey coal to or remove coal and refuse from machinery used to reduce the size of coal or to separate coal from refuse. For example, a conveyor belt conveying coal to a storage pile could not be subject to Subpart Y because it does not meet that NSPS definition of "conveying equipment." *See* 63 Fed. Reg. 53,289 (Oct. 5, 1998) (interpreting the meaning of "processing and conveying equipment"). *See also* letter from George Czerniak, EPA Region V, to Frank Prager, Xcel Energy, of June 30, 2003; letter from Douglas Neeley, EPA Region IV, to Shannon Vogel, North Carolina Dep't of Environment, Health and Natural resources, of Apr. 16, 1998.

Previously, no attempt had been made to distinguish Subpart Y "conveying equipment" at Black Mesa Complex from conveyors at that source which are not subject to Subpart Y. However, in its comments herein to Condition II.B of the draft permit, PWCC has provided those distinctions for individual conveying equipment, documenting how certain conveyors were either not constructed, modified or reconstructed after October 24, 1974 and/or do not satisfy the Subpart Y definition of "conveying equipment." Accordingly, PWCC requests that such conveyors that do not qualify as Subpart Y affected facilities because of their age and/or their function be removed from the permit's list of NSPS affected facilities at Black Mesa Complex.

B. "Grandfathered" Facilities

As discussions in the draft permit and draft statement of basis acknowledge, numerous facilities at the Black Mesa Complex have never been subject to new source review or any other form of permitting under the Clean Air Act. Moreover, those same sources have not been subject to any federally enforceable regulatory provisions of either a tribal implementation plan or a federal implementation plan. Consequently, in the vernacular of Title V, those facilities have no "applicable requirements." While the amounts of their emissions must be included, as appropriate, in a determination of the source's potential to emit or in a calculation of "fee pollutants," there is no other provision of Black Mesa Complex's Title V permit that applies to such facilities.

PWCC requests that the "no applicable requirement" status of those so-called "grandfathered" facilities be prominently recognized within the Title V permit. In particular, in the Condition I listing of significant emission units, an appropriate designation or label must be provided for the "Maximum Capacity" and the "Control Method" entries for each grandfathered facility in order to make clear that information for such facilities is not enforceable but instead has been supplied for informational purposes only.

As further recognition of the grandfathered status of certain facilities at Black Mesa Complex, and in accordance with 40 C.F.R. § 71.6(f), PWCC requests the permit provide a permit shield containing NNEPA's determination that, except for the potential to emit and the fee pollutant calculations, no requirements under the CAA are applicable to those grandfathered facilities. Grandfathered facilities at Black Mesa Complex are those particular significant

emission units that process, convey, store, transfer, load, or otherwise "handle" coal but are not subject to Subpart Y because they were constructed before October 24, 1974.

C. Reliance on Navajo Nation Operating Permit Regulations (NNOPR)

The regulatory action of interest at the present time is the renewal of a Title V permit for the Black Mesa Complex. That permit is subject to the requirements of 40 C.F.R. Part 71. EPA Region 9 has delegated federal authority to the NNEPA to issue that Part 71 renewal permit to include all applicable Part 71 requirements.

The Navajo Nation Operating Permit Regulations have now been effective for several years. With one exception, the Part 71 permit requirements for Black Mesa Complex are completely separate from any permitting requirements of NNOPR that may apply to that source. In particular, the Delegation Agreement between Region 9 and NNEPA obligates NNEPA "to collect permit fees from all Part 71 sources in a manner consistent with Subpart VI of the [NNOPR]." Thus, aside from the NNOPR's Subpart VI procedures to collect Part 71 permit fees, the Part 71 requirements applicable to Black Mesa Complex rely on no other authorities under the NNOPR.

Nevertheless, in the draft Part 71 permit for Black Mesa Complex, NNEPA has cited provisions within Part 71 as well as within the NNOPR as authorities for several permit conditions. Because the NNOPR does not provide authority for any requirement within the Part 71 permit except for the procedure for collection of the Part 71 fee, those other citations to NNOPR authority have no place in the Part 71 permit. Furthermore, as explained below, the cited NNOPR provisions authorize specific requirements to be contained *in permits issued under NNOPR*. Black Mesa Complex is not required to have a NNOPR permit at this time. Thus, with the exception of NNOPR Subpart VI, as explained herein, no other NNOPR provision can currently apply to Black Mesa Complex.

For example, the Reporting Requirements of Condition III.C in the draft permit cite to both 40 CFR § 71.6(a)(3)(iii) and NNOPR §302(G) as authorities for that permit condition. The actual reporting requirement of that permit condition relates to the submission of "reports of any monitoring *required under 40 CFR § 71.6(a)(3)(i)(A), (B), or (C)*[.]" Neither Part 71 nor the Part 71 Delegation Agreement provides authority under NNOPR to require reports of Part 71 monitoring.

And, although NNOPR § 302(G) also addresses the submittal of reports of monitoring required by permit, the "permit" referred to in § 302(G) is not a Part 71 permit but rather a "valid permit issued under [NNOPR] and the Uniform Rules." NNOPR § 201(A). NNEPA simply has no authority to apply a requirement intended for a NNOPR permit to a Part 71 permit instead. .

Even the Compliance Certification provision of Condition IV.C.2, "enforceable by NNEPA only" has no force of law with respect to Black Mesa Complex. The cited authority, NNOPR § 302(I), refers to each operating permit including requirements for compliance certification, etc. But, the "operating permit" addressed by NNOPR § 302(I) is not a Part 71 operating permit. Instead, the "operating permit" addressed by NNOPR is one issued under

authority of NNOPR. Because Black Mesa Complex is not currently required to hold an operating permit issued under NNOPR, § 302(I) has no applicability with respect to that source.

In summary, with the exception of the Part 71 delegation that requires collection of Part 71 fees consistent with NNOPR Subpart VI, the NNEPA have no authority at the present time, either federal or tribal, to apply requirements under the NNOPR to Black Mesa Complex. First, in keeping with the provisions of Part 71, in general, and those of 40 C.F.R. § 71.10 and the EPA-NNEPA Part 71 Delegation Agreement, in particular, NNEPA has no authority under NNOPR to require any condition in the Part 71 permit. Second, because Black Mesa Complex is not currently required to have a permit under NNOPR, NNEPA has no authority to apply any provision under NNOPR to that particular source.

As a result, the NNOPR citations included in the Part 71 permit for Black Mesa Complex are not enforceable, nor do they provide the legal clarity, consistency and certainty that is expected in a Title V permit. With the exception of the citation in Condition IV.a to NNOPR Subpart VI, PWCC respectfully requests that all other citations to NNOPR provisions be deleted from the Title V renewal permit for Black Mesa Complex.

D. "Enforcement Issue"

Section 1.j of the draft statement of basis identifies an "enforcement issue" as a result of PWCC's alleged failure to submit the application to renew Black Mesa Complex's Title V permit in a timely manner. PWCC strongly disputes that assertion and conclusion and has demonstrated, in a letter to NNEPA dated August 7, 2009 that submittal of the subject permit renewal application was timely. That letter is incorporated herein by reference, and PWCC reiterates its request for NNEPA to take the immediate follow-up actions identified in that letter.

III. PWCC COMMENTS ON THE DRAFT PERMIT

Condition No.	Comment
Cover Letter	- As explained in our General Comments above, PWCC believes the subject permit must consist solely of a federal Part 71 permit issued under EPA's authority and the "Delegation of Authority to Administer a Part 71 Operating Permits Program" that was executed between NNEPA and EPA on October 15, 2004. Moreover, because Black Mesa Complex is currently not required to hold an operating permit under NNOPR § 201(A), there is no permit for that source to which the cited provisions of NNOPR apply. Accordingly, the following phrases should be deleted: • 1st ¶: ". . . Navajo Nation Operating Permits Regulations, and all other applicable rules and regulations . . ."; • 2nd ¶: ". . . either or both the Navajo Nation Clean Air Act and . . .": and • 2nd ¶: ". . , as applicable".

- Because a Title V permit's effective date often comes after its issuance date, if that permit is to run for a full five years, then it should expire, without appropriate action to renew it, on a date five years from its *effective* date and not from its issuance date.

I

- The asterisk affixed to the "Maximum Capacity" of several units needs its corresponding explanation at the end of the table of Significant Emission Units.

- As explained in our General Comments above, the list of Significant Emission Units includes a number of "grandfathered" facilities that are not subject to any "applicable requirements." Nevertheless, they must be shown in the Title permit. Therefore, for each "grandfathered" unit listed in the table of Significant Emission Units, PWCC requests the entries for "Maximum Capacity" and "Control Method" be marked with an identifying symbol (**) to denote that particular information for that specific unit is provided for informational purposes only.

- PWCC objects to identifying several of the areas as "coal processing." Under NSPS Subpart Y, the term "processing equipment" means "any machinery used to reduce the size of coal or to separate coal from refuse." 40 CFR §60.251(g). Because the areas in questions have pollutant-emitting activities other than "processing," PWCC requests that they be identified as "coal *preparation* areas."

- In the N-8 area of the table of Significant Emission Units, the "Construction Date" for Belt #3A should be 1970-1973 instead of 1983-1984.

II.A.8

- NNEPA has been delegated federal authority to administer the Part 71 program with respect to the Black Mesa Complex. PWCC does not believe, however, the scope of that delegation includes authority to act under Part 60, NSPS. Therefore, we question whether this condition can require PWCC to provide written notification to NNEPA and whether the use of electronic notification in lieu of written notification must be acceptable to NNEPA.

II.B

- The title of the table and the first column in the table itself refer to "Emission Points/Units." Because the subject matter of this condition is pollutant-emitting activities subject to NSPS Subpart Y, PWCC requests that those activities be identified consistently with the conventional terminology, i.e., as "Affected Facilities."

- As explained above, PWCC requests the subject areas identified in the table be designated as "coal preparation areas" and not as "coal processing areas."

- For the J-28 area, the second belt should be labeled "Belt #1-S".

- For the N-11 area, "Belts #34-26" should be "Belts #34-36".

- For the N-8 area, the following conveyors belts were constructed prior to October 24, 1974 and therefore are not subject to Subpart Y: Belts #3A, #14, #27, #28, #30 and #32. Therefore, please remove those conveyors from this list of Affected Facilities.

- For the N-8 area, several conveyors do not meet the Subpart Y definition of "conveying equipment," i.e., "equipment used to convey coal to or remove coal and refuse from the [processing] machinery." Therefore, please remove the following conveyors from the list of Affected Facilities": Belts #11, #12, #15, #16, and #18. Change the corresponding Description to "Two (2) Conveyors".

- For the Overland Conveyor System, the conveying equipment collectively identified as OCTP21 was constructed prior to October 24, 1974 and must be removed from the list of "Affected Facilities." Also, the individual conveyor belts and their transfer points that collectively make-up OCTP20 are not used to convey coal to or remove coal and refuse from machinery used to reduce the size of coal or to separate coal from refuse. Since the activities of OCTP20 do not meet the definition of "conveying equipment," please delete OCTP20 from the list of Affected Facilities. A separate reason for removing those facilities from the list of Subpart Y affected facilities at Black Mesa Complex is because they are not part of any preparation plant, but rather are coal transport devices for the mines that are used as an alternative to haul trucks.

- For the Black Mesa Preparation Plant, a number of those pollutant-emitting activities were constructed prior to October 24, 1974. Therefore, please remove the following activities from the list of Affected Facilities: BMPC, CONV#2, CONV#4, CONV#5, CONV#11, CONV#7, CONV#8, BMCTEC, CONV#9, CONV#9A AND CONV#10.

- In the first line of the sentence following Table 1, replace the words "the emission units" with "each affected facility". (Also, after the word "above," add the word "in".)

II.C.1	- Because Belt #18 is not subject to Subpart Y (see above), "the tail end of Belt 18 from high sulfur stockpile K-3" must be deleted from this condition.
II.C.2	- Because Belt #18 is not subject to Subpart Y (see above), "the tail end of Belt 18 from high sulfur stockpile K-3" must be deleted from this condition. - At the end of the last sentence, add the words "in lieu of a Method 9 observation on each such affected facility."
III.A	- Testing is not required for any pollutant-emitting activity at Black Mesa Complex. Therefore, this condition is irrelevant and should be deleted from the Title V permit.
III.B	- All of the monitoring requirements of the permit (§ II.C) and all of the recordkeeping requirements of the permit (§ II.D) are unit-specific. Therefore, this generic condition is irrelevant and should be deleted from the Title V permit.
III.C title	- As explained previously, delete reference to "NNOPR § 302(G)".
III.C.1	- The date "December 31, 2008" must be revised to be consistent with the eventual effective date of the renewed permit.
III.C.1.a.v:	- Because the CAM requirements do not apply to any emission units at Black Mesa Complex, the phrase "and including exceedances as defined under 40 CFR § [sic] 64" should be deleted.
III.C.1.a.vii	- PWCC seeks clarification of the meaning of the words "the total time when such monitoring was not performed." Is that time of non-performance measured against the total time that monitoring *should have occurred* to satisfy the periodic monitoring requirement?
III.C.1.b	- There are no other reports required of Black Mesa Complex that satisfy the criteria of this section, so this provision should be deleted in its entirety.
III.C.1.c.iv	- Because the CAM requirements of Part 64 do not apply to Black Mesa Complex, this provision should be deleted in its entirety.
III.C.2.b.i	- Because there are no permit terms for emissions of hazardous air pollutants from Black Mesa Complex, this provision should be deleted in its entirety.

III.H

- In addition to this permit retaining the permit shield with respect to NSPS Subpart Y and Subpart Kb, PWCC requests that this permit condition expand the shield for Subpart Y requirements by stating that, at the time of issuance of this permit, the use of any particulate control technology on a Subpart Y affected facility constitutes a federally enforceable requirement of this permit to ensure compliance with the existing NSPS visible emissions limit.

- PWCC also requests that the permit contain certain negative declarations by NNEPA with respect to several requirements that do not apply. In keeping with 40 C.F.R. § 71.6(f)(1)(ii), NNEPA is requested to include the following determinations in this section of the permit:

(1) The quantity of emissions from each "grandfathered" facility identified herein must be used in determining the source's potential to emit and its annual permit fee. At the time of issuance of this permit, there were no other requirements applicable to any of those grandfathered facilities.

(2) At the time of issuance of this permit, no facility at the source was subject to any promulgated revisions to NSPS Subpart Y.

(3) At the time of issuance of this permit, no facility at the source was subject to any requirement arising from section 112 of the Clean Air Act.

(4) At the time of issuance of this permit, neither EPA nor NNEPA had determined whether the source constituted a "major stationary source" for PSD applicability purposes.

IV.B.2

- In some situations the only available credible evidence may be that provided by "applicable testing or monitoring methods required by the underlying regulations or this permit." Therefore, this condition's requirement that "other credible evidence . . . *must* be considered" should be modified by the words, "if available."

IV.C title

- As explained previously, delete reference to "NNOPR § 302(I)".

IV.C.1

- The dates in this condition will need to be revised to be consistent with the eventual effective date of the renewed permit.

IV.C.2

- As explained previously, this condition must be deleted in its entirety because there is no permit issued under NNOPR to which this requirement applies.

IV.D title

- As explained previously, delete reference to "NNOPR § 301(E)" because there is no permit issued under NNOPR to which that cited regulation applies.

IV.D	- 40 C.F.R. § 71.6(a)(6)(v) provides: "[I]n the case of a program delegated pursuant to § 71.10, for information claimed to be confidential, the permittee may furnish such records directly to the Administrator along with a claim of confidentiality." Although Condition I.4 of the Delegation Agreement speaks to NNEPA's processing of information provided under a claim of confidentiality, PWCC believes the discretion provided to the permittee by § 71.6(a)(6)(v) allows that information to be submitted only to EPA. - "40 CFR § 2" should be "40 CFR Part 2".
IV.E title	- As explained previously, citation to "NNOPR Subpart VI" is allowed because the Delegation Agreement requires NNEPA to collect fees consistent with that NNEPA regulation. NNOPR Subpart VI, however, does not apply to activities other than fee collection. - As explained previously, citation to NNOPR "Section 702" must be deleted because, aside from NNOPR Subpart VI, no other NNOPR provisions are applicable to the Part 71 permit. - NNOPR "Section 703" deals with NNEPA's transition from delegated Part 71 program to Part 70 program. As such, that "Section 703" has no applicability to the instant Part 71 permit and must be deleted.
IV.G, IV.H, IV.I, IV.K, IV.L, IV.Q titles	- In each Condition, the cited NNOPR provision cannot authorize the type of Part 71 permit action addressed by that provision. The cited NNOPR provisions are applicable to a permit issued under NNOPR – a permit which Black Mesa Complex is not required to have, and does not have, at this time. Please delete, respectively, "NNOPR § 406", "NNOPR §405(C)", "NNOPR § 405(D)", "NNOPR § 405(E)", "NNOPR § 406" and "NNOPR § 404(B)".
IV.R.1.a	- Because this provision is not applicable to Black Mesa Complex, PWCC requests that it be deleted in its entirety.
IV.R.1.b	As our comments on the Cover Letter indicate, PWCC believes the 5-year duration of a Title V permit must be measured relative to its effective date and not to its issuance date.
IV.R.3	In the last line of this Condition, please change the word "may" to "shall." Should NNEPA believe there could be cause for the permit shield not continuing to apply under these circumstances, then that possible event should be addressed in this Condition as an exception rather than allowing

the continuing existence of the permit shield to be discretionary in all cases.

IV. PWCC COMMENTS ON THE DRAFT STATEMENT OF BASIS

Section No.	Comment
1.d	- On August 7, 2009 PWCC wrote to NNEPA, taking exception with an allegation at section I.j of the draft statement of basis that PWCC's application to renew the initial Title V permit for Black Mesa Complex was not timely. *See* letter from Gary Wendt, PWCC, to Charlene Nelson, Navajo Nation Operating Permit Program, of Aug. 7, 2009. PWCC incorporates that letter into these comments by reference. In keeping with that communication from PWCC, the discussion in the last paragraph of this Section I.d must be revised to reflect re-issuance of the initial Title V permit on June 1, 2004. The timeline for EPA Region 9's processing of the initial Title V permit for this source was rather atypical. The following lists key dates in that timeline and Region 9's associated actions: • Sept. 23, 2003 -- Initial Title V permit issued; • Oct. 23, 2003 -- Initial Title V permit intended to be reopened before it became effective; and -- Initial Title V permit's effective date extended to Feb. 23, 2004; • Feb. 18, 2004 -- Initial Title V permit's effective date extended to May 28, 2004; • June 1, 2004 -- Initial Title V permit re-issued; and -- Initial Title V permit's effective date extended to July 1, 2004. The key consideration in this particular processing sequence is the fact that Region 9 reopened the initial permit *before it ever became effective*. Moreover, Region 9 extended the effective date of that initial Title V permit on two separate occasions until the Region had completed its reopening process. Finally, when it re-issued the initial Title V permit, EPA Region 9 set the effective date as July 1, 2004. Typically when a Title V permit is reopened, the permit has already been in effect for some period, and the subject source has operated under that permit's conditions. That is not, however, the case with Region 9's reopening of Black Mesa Complex's initial Title V permit before it ever became effective. Thus, while June 1, 2004 was the date the "reopened" Title V permit was issued for Black Mesa Complex, under the peculiar

circumstances of that permit, June 1, 2004 was also the date the initial Title V permit was re-issued. That second issuance date is highly significant because Region 9's action on that date "started the clock running" for the 5-year duration of that permit. (See further comments to Sections (e) "Existing Approvals" and (j) "Enforcement Issue.")

1.e

- As explained in the discussion above, the source never operated under a Part 71 permit that was issued on September 23, 2003. Rather, Black Mesa Complex did not begin operating under its initial Title V permit until it became effective on July 1, 2004. As stated in the draft statement of basis, that operation continued under approval of the first administrative amendment issued by NNEPA.

- Reference to the initial Title V permit issued on June 1, 2004 as the "reopened Title V permit issued on June 1, 2004" is very misleading and inappropriate in this instance because that characterization implies that the source had been operating under its Title V permit prior to the reopening process. For that reason, PWCC objects to describing EPA's action on June 1, 2004 as issuance of a "reopened" permit. "Re-issuance of the initial Title V permit" is a more appropriate description of that permit's status.

- At the bottom of page 3, the discussion of "Monitoring and Testing Requirements" needs to be revised to better reflect the actual scope of Subpart Y applicability at Black Mesa Complex. Subpart Y designates "processing and conveying equipment" as individual affected facilities, and Black Mesa Complex includes some of those types of affected facilities. Subpart Y also designates both "coal storage systems" and "transfer and loading systems" as types of affected facilities. However, Black Mesa Complex does not include any coal storage system or transfer and loading system that is covered by that NSPS.

1.f

- As discussed with respect to Condition I of the draft permit, the Title V permit is "hollow" for grandfathered facilities that have no applicable requirements. Therefore, for each "grandfathered" unit listed in the table of Significant Emission Units, PWCC requests the entries for "Maximum Capacity" and "Control Method" be marked with an identifying symbol (**) to denote that particular information for that specific unit is provided for informational purposes only.

- Peabody also believes that the title of this table, i.e., "Permitted Emission Units and Control Equipment" is inappropriate inasmuch as some of the emission units have never gone through a permitting process other than Title V and consequently have no permit requirements. PWCC requests the title of this table be conformed to that title in the draft permit, i.e., "Significant Emission Units."

1.j - This matter has been addressed by PWCC in a letter dated August 7, 2009 to Ms. Charlene Nelson at NNEPA. PWCC incorporates that letter in these comments by reference. PWCC strongly believes that there is no "enforcement issue" arising from the date on which the Company's application to renew its Title V permit was submitted to NNEPA.

1.l - The standard definition of "potential to emit" (PTE) should be included in this Section. Contrary to the draft statement of basis explanation, the scope of PTE is not constrained only to criteria pollutants and hazardous air pollutants. Furthermore, the statement that "[a]ctual emissions are typically lower than PTE" is not only unnecessary, but is also incorrect for the surface coal mining category of sources.

- PWCC objects to inclusion of values for potential to emit PM in the table for "Potential to Emit." The Part 71 Permit Program applies solely to Title V requirements, and EPA has concluded that PM is not a "regulated air pollutant" for purposes of Title V. *See* memorandum from Lydia Wegman, EPA OAQPS, to EPA Regional Air Directors of Oct. 16, 1995 ("Definition of Regulated Pollutant for Particulate Matter for Purposes of Title V"). The table's inclusion of the PTE values for PM adds nothing to a determination of the scope of Title V applicability to this source and adds nothing relevant to any Part 71 applicable requirement.

- The discussion in the second footnote to the table is confusing and suggests a deficiency in PWCC's application. PWCC's application did include an estimate of fugitive emissions from wind erosion.

Nevertheless, PWCC believes the discussion should be revised to state: "Because coal preparation is a source category that is 'listed' under section 302(j) of the Clean Air Act, but surface coal mining is not such a 'listed' category, Black Mesa Complex's potential to emit is based upon all stack and fugitive emissions from coal preparation activities plus any stack emissions from surface mining activities."

1.m - As explained above, PM is not a regulated pollutant for purposes of Title V. Consequently, there was no reason to report actual emissions of PM. PWCC requests that the table of actual emissions delete any reference to PM.

- The parenthetical note about "PTE data not provided by the source ..." is confusing. It is also irrelevant with respect to this section that addresses actual emissions. Please delete the statement in parenthesis.

3 - Because the Part 71 Permit Program applies solely to Title V requirements, PWCC objects to inclusion of this section on PSD

Applicability. Either with or without the context of Title V permitting, NNEPA simply has no need to perform a PSD threshold applicability determination for Black Mesa Complex at this time which could prejudice some later PSD threshold calculation when it is required.

Moreover, the discussion regarding the inclusion of fugitive emissions in the threshold calculation is very misleading. Finally, the history of the source and its lack of prior preconstruction permitting have already been addressed in Section 1.d of the draft statement of basis.

4.a

- Black Mesa Complex does not have any coal storage system or coal transfer and loading system that is subject to Subpart Y. The discussion should be re-written to indicate that Subpart Y applicability at Black Mesa Complex is confined to coal processing and conveying equipment.

- For purposes of consistency and clarity, PWCC requests that any pollutant-emitting activity subject to NSPS be referred to only as an "affected facility" and not as an "affected unit" or an "affected emission unit."

- The table listing individual affected facilities at the source that are subject to Subpart Y needs to conform to the listing provided in Condition II.B of the permit, as explained therein. Please **delete** the following facilities from the table:

- For N-8 area: Belts #3A, #11, #12, #14, #15, #16, #18, #27, #28, #30 and #32; the corresponding Description should be changed to "Two (2) Conveyors".
- For Overland Conveyor System: OCTP20 and OCTP21.
- For Black Mesa Prep Plant: BMPC, CONV#2, CONV#4, CONV#5, CONV#11, CONV#7, CONV#8, BMCTEC, CONV#9, CONV#9a and CONV#10. For the group of conveyors designated as CONV#4, CONV#5, CONV#3A and CONV#3B, change the Description to "Two (2) Conveyors".

7

- Certain conditions of the Part 71 Permit Program may not be delegated. *See, e.g.*, 40 C.F.R. § 71.10(j). Thus, Part 71 authority may not be delegated "in whole." This section needs to be revised to make clear that authority to administer the Part 71 Permit Program applicable to the Black Mesa Complex was delegated to NNEPA by EPA Region 9 on October 15, 2004.

V. OTHER COMMENTS

A. Draft Permit

Condition No.	Comment
Table of Contents	The titles of the subsections, e.g., NSPS Requirements" need to match their titles in the permit itself, e.g., "NSPS Subpart Y Requirements". (Subsections II.B, II.C, III, III.G, IV.J and IV.K)
II.A. 1st sentence	After the words ". . . maintenance, and testing", add the word "of".
II.A.3	"40 CFR § 2" should be "40 CFR Part 2".
II.A.5, 6 and 7	"40 CFR § 60" should be "40 CFR Part 60".
II.C	- Title should be only "Monitoring Requirements" since there are no "Testing Requirements". - Citation only to 40 CFR § 71.6(a)(3)(i) is sufficient.
III.B.3	"40 CFR § 60" should be "40 CFR Part 60".
III.D title	"40 CFR § 82" should be "40 CFR Part 82".
III.D.1, 2, 3, 4 & 5	"40 CFR § 82" should be "40 CFR Part 82".
III.E title & last sentence	"40 CFR §61" should be "40 CFR Part 61."
III.G title	"40 CFR § 68" should be "40 CFR Part 68".
IV.A.2	In the first sentence, the date should be changed from April 1 to October 20, i.e., "The permittee shall submit a fee calculation worksheet form with the annual permit fee by October 20 of each year."

B. Draft Statement of Basis

Section No.	Comment
1.d	In this section and elsewhere, replace the words "Peabody Energy" with "Peabody Western Coal Company."
1.e	In the table of "Monitoring Requirements" on page 4, several of the Condition Numbers are incorrectly identified for the respective Requirements to which they correspond. In particular, II.C.4 should be

II.C.3; II.C.5 should be II.C.4; and II.C.6 should be II.C.5. Also, Condition II.C.5 in the fourth box of Monitoring Requirements should be II.C.4.

1.e In the last paragraph on page 4, PWCC believes the words ", opacity observations" should be inserted after the words "VE surveys" and before the words "and water spray inspections."

1.e In the next to last "bullet" on page 4, PWCC requests the current language be replaced with the following: "Weekly VE survey using EPA Method 22".

1.f On page 6, the "Unit Description" for Belt #36 should be "One (1) conveyor from the screen to transfer point."

1.f On page 8 for Unit ID "BMCTEC," please delete "CT&E" from the Unit Description. We believe "CT&E" is an abbreviation for the name of the company that originally operated the lab and did the coal testing.

1.i Please change the values of "Maximum Capacity" for the following tanks to the correct values shown below:

Unit ID	Maximum Capacity (gal)
K06ST	5,000
K09ST	10,000
K22ST	500 (each of 2 compartments)

In addition, the installation date for Tank J7ST should be 1987.

1.j In the second paragraph, correct the spelling for "application".

4.a In the table's entries of affected facilities for area J-28, "Belt #1-8" should be "Belt #1-S".

4.a In the table's entries of affected facilities for area N-11, "Belts #34-26" should be "Belts #34-36".

EXHIBIT D

November 2009 Peabody Comments on Draft Permit

PEABODY WESTERN

Peabody Western Coal Company

Charlene Nelsen
Program Supervisor
Navajo Air Quality Program
P.O. Box 529
Fort Defiance, AZ 86504

November 3, 2009

Re: Title V Operating Permit #NN-OP-07; Renewal Application

Dear Ms Nelsen:

Peabody Western Coal Company (PWCC) thanks the Navajo Nation Environmental Protection Agency (NNEPA) for the opportunity to review the draft document entitled "Responses to Comments on the Draft Part 71 Permit Renewal to Operate Peabody Western Coal Company – Black Mesa Complex" (hereinafter "Draft RTC"). We sincerely appreciate NNEPA's diligent efforts in processing that draft permit renewal, for thoroughly reviewing our various comments on that draft permit, and for thoughtfully explaining your comments in the subject document. PWCC continues, however, to have substantive concerns about three issues raised in our earlier comments, and we respectfully request NNEPA to further consider our position with respect to each. PWCC also has a few editorial comments on the current draft of the permit, as explained herein.

UNAUTHORIZED INCLUSION OF NNOPR REQUIREMENTS

"On October 15, 2004, EPA granted NNEPA's request for full delegation of authority to administer the Part 71 federal operating permits program for [PWCC's Black Mesa Complex and] certain [other] Part 71 sources." 69 Fed. Reg. 67,578 (Nov. 18, 2004) (emphasis added). NNEPA has now noticed a draft Part 71 federal operating permit for PWCC's Black Mesa Complex. The Part 71 regulations require that draft permit to contain "the permit conditions required under [40 C.F.R.] § 71.6." 40 C.F.R. § 71.11(a)(4). On the other hand, the Part 71 regulations *neither authorize nor require* that draft permit to contain any permit conditions required under the Navajo Nation Operating Permit Regulations (NNOPR). In short, there is something fundamentally inappropriate at this time with a draft Part 71 federal operating permit that contains permit conditions required under the NNOPR.

1. The Delegation Agreement Repeatedly Recognizes that Requirements under NNOPR Are Not Part of PWCC's Part 71 Federal Operating Permit.

EPA has "fully delegate[ed] the authority to administer the federal operating permits program as set forth under 40 CFR Part 71 and in the [Delegation] Agreement." 69 Fed. Reg. 67,578. That Agreement makes clear that requirements of the NNOPR are not part of a Part 71 federal operating permit. For example, in discussing NNEPA's obligation to incorporate all Part 71 requirements into each Part 71 permit, the Delegation Agreement states:

> Although not a requirement of the Delegation Agreement and not part of the administration of the federal Part 71 program, NNEPA intends to supplement the requirements in § 71.11(b) with the requirements in the Navajo Nation Operating Permit Regulation § 401(B).

Delegation Agreement between U.S. Environmental Protection Agency Region IX and Navajo Nation Environmental Protection Agency, "Delegation of Authority to Administer a Part 71 Operating Permits Program," 5 (Oct. 15, 2004) (emphases added) (hereinafter "Delegation Agreement"). EPA's statement could not be more clear, i.e., requirements in NNOPR § 401(B) are not part of the federal Part 71 program and permits issued thereunder.

Furthermore, in discussing NNEPA's obligation to conduct all administrative proceedings in accordance with 40 C.F.R. § 71.11, the Delegation Agreement states:

> Although not a requirement of the Delegation Agreement and not part of the administration of the federal Part 71 program, NNEPA intends to supplement the requirements in § 71.11 concerning administrative permit proceedings with the requirements in the Navajo Nation Operating Permit Regulation.

Id. (emphases added). Again, EPA's position is unequivocal, i.e., NNOPR requirements concerning administrative permit proceedings are not part of the federal Part 71 program and permits issued thereunder.

Finally, in discussing NNEPA's obligations involving revisions and renewal of Part 71 federal operating permits, the Delegation Agreement states:

> Although not a requirement of this Delegation Agreement and not part of the administration of the federal Part 71 program, NNEPA intends to supplement the requirements in Part 71 with the requirements in the Navajo Nation Operating Permit Regulation.

Id. at 7 (emphases added). Thus, the Delegation Agreement repeatedly emphasizes the legal status of the NNOPR program with respect to the Part 71 federal program, i.e., the NNOPR program and its requirements are not part of the Part 71 federal program and permits issued thereunder.

2. EPA Rulemaking Is Necessary Before Current NNOPR Requirements May Be Added to a Part 71 Federal Operating Permit.

Indeed, EPA rulemaking is necessary to authorize NNEPA's addition of NNOPR requirements to the Part 71 federal operating permit for Black Mesa Complex. In particular, 40 C.F.R. § 71.4(f) provides:

> The Administrator ... may adopt, through rulemaking, portions of a ... Tribal permit program in combination with provisions of this part to administer a Federal program ... in Indian country in substitution of or addition to the Federal program otherwise required by this part.

In this instance, the Delegation Agreement and the Federal Register notice thereof do not constitute that requisite rulemaking. In sum, not only the Delegation Agreement but also the Part 71 rules themselves make clear that NNEPA has no authority to add any requirements of the NNOPR to PWCC's Part 71 federal operating permit.

3. The Scopes of NNEPA's Alleged Federal and Tribal Authorities Are Constrained by Law.

In its draft Response to Comments, NNEPA explains why it believes that it has both federal authority and tribal authority to apply NNOPR requirements to the Part 71 permit for Black Mesa Complex. Draft RTC at 10-12. PWCC respectfully submits that NNEPA has misconstrued the scopes of those authorities with respect to its delegated administration of the Part 71 federal operating permit program.

a. Federal Authority

PWCC does not dispute NNEPA's assertion that "there is a federal requirement for tribes to have their own authorities to administer the Part 71 program." Draft RTC at 10 (citing 40 C.F.R. § 71.10(a)). Nor does PWCC dispute EPA's finding that NNEPA "has adequate authority ... to administer the Part 71 federal permitting program." 69 Fed Reg. 67,578. The problem, however, is that NNEPA is attempting to exercise authority far beyond what is appropriate and necessary to administer the Part 71 federal operating permit program.

In particular, Part 71 does not require a delegate agency to have in place its (the delegate agency's) own operating permit regulations. Indeed, the basic concept of delegation of a federal program is that the delegate agency is authorized to administer the federal regulations of that program. In effect, as a delegate agency for the Part 71 federal operating permit program, NNEPA is authorized by EPA at this time to administer the regulations within Part 71 ... period.

EPA Region IX could not delegate to NNEPA more authority under Title V than the Part 71 regulations allow EPA to delegate. As explained above, the Part 71 federal operating permit program to be administered by NNEPA cannot contain portions of the NNOPR unless EPA has authorized, through rulemaking, the addition of those NNOPR regulations as part of the Part 71 federal program for sources on the Navajo Reservation. *See* 40 C.F.R. § 71.4(f). Simply put, the requisite federal rulemaking to authorize addition of NNOPR requirements to Part 71 federal operating permits for sources on the Navajo Reservation has not occurred.

The prevailing legal status of the NNOPR with respect to the Part 71 federal operating permit program is why the Delegation Agreement repeatedly refers to NNEPA's intent "to supplement the requirements in Part 71 with the requirements in the Navajo Nation Operating Permit Regulations." That is, as "supplements" rather than "substitutions" or "additions," any NNOPR requirements contained in the Part 71 federal operating permit for Black Mesa Complex are something other than Part 71 federal program requirements.

b. Tribal Authority

EPA has acknowledged "a legal opinion from [the Navajo Nation attorney general] that the Navajo Nation Air Pollution Prevention and Control Act and the Navajo Nation Air Quality Control Program Operating Permit regulations provide [NNEPA] adequate authority to carry out all aspects of the delegated program." 69 Fed. Reg. 67,578 (emphasis added). Authority "to carry out all aspects" of the Part 71 federal operating permit program falls short of the authority that NNEPA is attempting to exercise, i.e., the authority to add NNOPR requirements to requirements of the Part 71 federal operating permit program.

PWCC does not dispute NNEPA's tribal authority, i.e., that the NNOPR authorize NNEPA to take a variety of actions with respect to Part 71 federal operating permits and to require certain NNOPR provisions in Part 71 federal operating permits. RTC at 11-12. But, the existence of tribal authority with respect to Part 71 permits does not negate the need for EPA's approval of the exercise of such tribal authority with respect to Part 71 federal operating permits. Unless and until EPA specifically approves, through rulemaking, the NNEPA-proposed additions of NNOPR provisions to a Title V permit, those NNOPR requirements (1) are applicable only under tribal law, (2) are not federally enforceable under the Clean Air Act, and thus (3) have no place within a Part 71 federal operating permit.

4. PWCC Objects to Issuance of a "Hybrid" Permit

The existing draft permit for PWCC that NNEPA has noticed for public comment consists of a "hybrid" permit. That is, it consists not only of (1) a Part 71 federal operating permit incorporating all applicable Part 71 requirements, but also of (2) portions of a tribal operating permit incorporating certain NNOPR requirements. That Part 71 federal operating permit is enforceable under the federal Clean Air Act; the NNOPR requirements are not.

As a general matter, PWCC is neither challenging any specific NNOPR requirements at this time, nor does PWCC challenge NNEPA's tribal authority to issue so-called "Part H" permits at this time. We simply object to NNEPA's unauthorized and ill-advised incorporation of NNOPR requirements within the Part 71 federal operating permit for Black Mesa Complex.

Our objection to NNEPA's proposed action is based solely on legal and administrative considerations. With a single operating permit containing requirements from two separate operating permit regulations, questions about the applicability of a particular requirement and its federal and tribal enforceability are inevitable. With two different sets of administrative procedures applying to a single operating permit, sorting out the appropriate procedure for a particular issue could be a daunting task each time such an issue arises. In short, NNEPA's merger of two operating permit regulations under different authorities for the purpose of issuing a single operating permit establishes a "slippery slope" -- with decisions about which substantive and procedural requirements apply to a particular permit requirement becoming progressively more difficult with the passage of time.

Because the instant proceeding only involves renewal of a CAA Title V permit for Black Mesa Complex, PWCC has a reasonable expectation of being issued a Part 71 federal operating permit, and nothing more. For that reason, PWCC respectfully declines the incorporation of any NNOPR requirements within the pending renewal of the Part 71 federal operating permit for Black Mesa Complex.

PSD APPLICABILITY AND POTENTIAL TO EMIT

NNEPA states that it prefers to keep the PTE of PM information in the Statement of Basis (SoB) because SoBs are used in part to document the applicability or nonapplicability of a variety of CAA requirements, including NSPS, NESHAP, PSD, etc. The SoB is a description of the source that provides the basis for making applicability determinations for other CAA requirements, including PSD. PM is a "regulated NSR pollutant" as that term is defined in EPA's PSD regulations at 40 CFR 52.21. Therefore, NNEPA believes that the SoB should provide an estimate of what the emissions are, to ensure all applicability determinations are correct. Draft RTC at 26-27.

PWCC can find no statutory or regulatory basis that supports NNEPA's "belief" regarding the need to include estimates of emissions in a Title V statement of basis, especially "to ensure all applicability determinations are correct." Indeed, EPA's "White Paper for Streamlined Development of Part 70 Permit Applications," July 10, 1995, takes a far different view of the role that emission estimates play in Title V permitting. In particular, EPA states that emission estimates may be needed for determining Title V applicability, but, in general, Part 70 requires the application to "describe" emissions of all regulated air pollutants for each emissions unit." 40 C.F.R. § 70.5(c). Part 71 likewise requires the application only to "describe" the emissions. 40 C.F.R. § 71.5(c). As EPA explained, "part 70 does not require detailed emissions inventory building." There is no reason why Part 71 would be any different.

PWCC also notes that EPA Region IX, in commenting on another NNEPA draft statement of basis for a Part 71 federal operating permit, recommended deletion of language regarding the treatment of fugitive emissions for PSD applicability purposes and regarding the impression that NNEPA was making a PSD applicability determination for a past modification at the facility. Region IX explained that since the facility was not making a physical change or change in method of operation at the time of the Part 71 permitting, there was no need to address the issue of PSD applicability in that statement of basis for a Title V permit. "EPA Region 9 Comments: Proposed Part 71 Permit Renewal, Four Corners Steam Electric Station," ¶¶ 5-6 (date unknown).

In short, counter to NNEPA's assertion, the Statement of Basis for a Title V permit has no need to include potential to emit values for PM or for any other regulated air pollutant. That purpose of a Title V Statement of Basis is most definitely not "to ensure all applicability determinations are correct." PWCC therefore respectfully requests that presentation of PTE for Black Mesa Complex be deleted from the subject Statement of Basis.

INCLUSION OF FUGITIVE EMISSIONS IN THE PTE

Another reason that independently supports deletion of the PTE presentation in the Statement of Basis is because the PTE calculation does not correctly "count" fugitive particulate matter emissions. NNEPA explains that it "has added a note under the PTE table in Section 1.1 of the SoB stating that fugitive emissions are considered in determining whether this source is a Part 71 major stationary source because this source is subject to NSPS, Subpart Y, which was in effect prior to August 7, 1980." Draft RTC at 27.

Threshold applicability determinations for major stationary sources must include fugitive emissions only if the source category at issue has been "listed" by EPA in accordance with section 302(j) of the Clean Air Act. 40 C.F.R. § 71.2 (definition of "major source"). The stationary source in question, the Black Mesa Complex, is a surface coal mine, a category of sources that has not been "listed" under § 302(j). However, "nested" within the surface mine at Black Mesa Complex are several coal preparation plants. By virtue of the NSPS for coal preparation plants having been promulgated prior to August 7, 1980, that particular source category – coal preparation plants – is listed under § 302(j).

Therefore, in the case of a surface coal mine, the PTE for that source category is calculated as the sum of the stack (non-fugitive) emissions from the mining activities and the stack and fugitive emissions from the coal preparation activities. *See ,e.g.,* attachment to letter from Cheryl Newton, EPA Region V, to Janet McCabe, Indiana Dep't of Environmental Management, of Mar. 6, 2003.

Calculation of the PTE for Black Mesa Complex in the NNEPA's Statement of Basis did not follow that protocol for when fugitive emissions are included in Title V applicability determination. In particular, that NNEPA calculation of PTE includes estimated PM10 fugitive emissions from the Overland Conveyor System, Bulldozing and Unpaved Roads. Those particular "emissions units" do not belong to the source category of coal preparation but rather to the source category of surface mining, for which fugitive emissions are not included in any Title V applicability determination.

In summary, PWCC has demonstrated that a source's PTE is not required to be included in its Title V Statement of Basis, and indeed the PTE provided by NNEPA for Black Mesa Complex is very much in error. For those reasons, we respectfully request deletion of the PTE table and associated erroneous discussion from the Statement of Basis for Black Mesa Complex.

COMMENTS ON FINAL DRAFT OF PERMIT

PWCC also has two minor editorial comments on the current permit draft. First, on Page 3 Section II.C, the title should be "Monitoring Requirements." Second, on Page 11, Section II.C.1, PWCC requests NNEPA add the following sentence at the end of the paragraph: "If any emission unit is not operating at the time the observer arrives, the emission survey is not required for that emission unit during that week." A similar statement was included in the previous 5-year permit. The reason it was included is because of PWCC's operating situation at the Black Mesa Complex. Due to varying coal quality and blending requirements, all emission units are rarely operating at the same time. They operate when needed to satisfy coal quality demands.

PWCC appreciates this opportunity to provide comments on the current draft of the permit and associated documents. We look forward to finalizing this process, and are committed to working with NNEPA to accomplish this. If you have any questions, please contact me at (928) 677-5130 or gwendt@peabodyenergy.com.

Sincerely,

Brian A. Dunfee for

Gary W. Wendt
Manager Environmental

cc:

Director, Air Division (Attn: AIR-1)
EPA Region IX
75 Hawthorne Street
San Francisco, CA 94105

EXHIBIT E

December 2009 NNEPA Responses to Comments

NAVAJO NATION ENVIRONMENTAL PROTECTION AGENCY
Navajo Nation Operating Permit Program
Rt. 112 North, Building F004-051
P.O. Box 529, Fort Defiance, AZ 86504

Detailed Information

Permitting Authority: NNEPA

County: Navajo **State:** Arizona **AFS Plant ID:** 04-017-NAV01

Facility: PEABODY WESTERN COAL COMPANY - BLACK MESA COMPLEX
Document Type: RESPONSES TO COMMENTS

RESPONSES TO COMMENTS

on the Part 71 Permit Renewal to Operate Peabody Western Coal Company – Black Mesa Complex

Permit No. NN-OP 08-010

On July 15, 2009, the Navajo Nation Environmental Protection Agency (NNEPA) had notices published in the Navajo Times, Gallup Independent, and Arizona Daily Sun, Arizona stating that Peabody Western Coal Company – Black Mesa Complex, located at 20 miles SSW of Kayenta, Arizona, had applied for a Part 71 Operating Permit renewal to operate a surface coal mining operation. The notice also stated that NNEPA proposed to issue a permit for this operation and provided information on how the public could review the proposed permit and other documentation. Finally, the notice informed interested parties that they would have thirty (30) days to provide comments on whether or not the permit should be issued as proposed.

On August 14, 2009, Mr. Norman Benally, a local resident of Kayenta, Arizona submitted a comment on the proposed Part 71 Operating Permit. Mr. Benally's comment is listed as Comment 1. On August 27, 2009, USEPA submitted comments on the proposed Part 71 Operating Permit. Their comments are listed as Comments 2 through 9. On August 13, 2009, Peabody Western Coal Company – Black Mesa Complex (referred to as "PWCC") submitted comments on the proposed Part 71 Operating Permit. Their comments are listed as Comments 10 through 50. This Response to Comment document provides responses to all of these comments. When permit language is included in the response, bolded language indicates additions to the permit and language with a line through it has been deleted from the permit.

Comments from Mr. Benally (Comment 1)

Comment 1:

Mr. Benally requested an informal hearing concerning the permit review for PWCC's air permit renewal. Mr. Benally has concerns on the coal fires in the open pit strip mines and at the open storage piles at PWCC. Mr. Benally mentioned that the air quality this summer has been very poor due to coal burning in the open pit strip mines. Mr. Benally also stated that the stench of "sulfur" from the burning coal in the mines and the haze that covers much of Black Mesa reduces visibility and is a serious public health concern.

Response to Comment 1:

PWCC has submitted a coal fire mitigation plan to NNEPA. In this plan, PWCC states that it is in PWCC's best interest to control fires and prevent loss of the coal resource at this site. According to the coal fire mitigation plan submitted, PWCC shall commence efforts to extinguish any coal related fire that could affect the amount of recoverable coal within 48 hours of its discovery. PWCC also operates an air-quality monitoring network throughout the Black Mesa Complex to ensure compliance with air-quality requirements. If the public has a question regarding coal fires, they may contact the following person at PWCC directly:

Mr. Gary Wendt, PWCC Manager Environmental
Black Mesa Complex
TEL: (928) 677-5130
E-mail: gwendt@peabodyenergy.com

or

Mr. Dennis Winterringer, Office of Surface Mining Leader
Black Mesa Complex Team
TEL: (303) 293-5048
E-mail: dwinterringer@osmre.gov

In addition, NNEPA has sent a letter to Mr. Benally to response his comments directly on October 27, 2009.

Comments from USEPA (Comments 2 through 9)

Comment 2:

USEPA agrees with the requirement to conduct weekly visible emission surveys in condition II.C.1. However this condition, unlike the corresponding condition in the initial permit issued by USEPA Region 9, does not contain any language that would trigger a Method 9 observation under certain conditions. The initial Title V permit required PWCC to conduct an opacity test using EPA Method 9 within 24 hours if an

instantaneous opacity reading of 10% or greater was detected. This approach was used to reduce the frequency of required Method 9 observations while still providing a useful gatekeeper to determine whether additional monitoring is warranted. USEPA requests to revise Condition II.C.1 to require a Method 9 observation if an instantaneous opacity reading of 10% or greater is detected.

Response to Comment 2:

NNEPA has revised Condition II.C.1 as follows to require a Method 9 observation if an instantaneous opacity reading of 10% or greater is detected. In addition, NNEPA has added a sentence to this condition to specify that emission survey is not required for the emission unit which is not operating at the time the observer arrives. The corresponding discussions in Sections e. and 4.a in the Statement of Basis (SoB) have been revised also.

II.C. Monitoring and Testing Requirements [40 CFR § 71.6(a)(3)(i)(A)]

1. The permittee shall conduct a weekly visible emission survey of each NSPS, Subpart Y, affected unit listed in Table 1, with the exceptions of the sample system crushers and their associated transfer points, and other underground transfer points including the following: at J-28, the tail end of Belt #8 from the high sulfur reclaim hopper and the tail ends of Belts #1-N and #1-S from the truck hopper; at N-11, the tail end of Belt #34 from the truck hopper; at N-8, the tail end of Belt #18 from the high sulfur stockpile K-3. The visible emission survey shall be conducted, while the equipment is operating and during daylight hours, using EPA Method 22 (Visual Determination of Fugitive Emissions from Material Sources and Smoke Emissions from Flares). If one or more NSPS affected facilities are housed within a single structure, the permittee shall conduct the visible emission survey at each opening where particulates vent to the atmosphere. **If an instantaneous opacity reading is 10% or greater, the permittee shall conduct a six minute EPA Method 9 opacity observation within 24 hours while the equipment is operating. If any emission unit is not operating at the time the observer arrives, the emission survey is not required for that emission unit on that week.**

. . .

Comment 3:

USEPA disagrees with the PM-10 and PM potential to emit ("PTE") that presents on page 12 of the SoB. USEPA stated that controlled emission factors from AP-42 were used to calculate PWCC's PTE of these pollutants. However, since the permit does not contain any enforceable requirements for PWCC to maintain and operate its particulate control devices, NNEPA cannot rely on controlled emission factors for the purpose of calculating PM-10 and PM PTE. Therefore, USEPA notes that the PM-10 and PM PTE presented in the statement of basis are only estimates of the facility's worst case actual emissions, assuming use of the particulate control devices, but does not imply that PWCC

has an enforceable PTE limit. Absent stringent monitoring and testing conditions for the crushers, screens, conveyors, and other processing equipment, as well as conditions requiring the maintenance and operation of the sprayers, the PTE calculation is not enforceable as a practical matter. USEPA states that NNEPA should either recalculate the PTE based on uncontrolled emissions, or use another term instead of PTE, e.g., "emissions estimate."

Response to Comment 3:

NNEPA has recalculated the PTE of PM and PM-10 of this source using the uncontrolled emission factors in AP-42. The revised emission calculation spreadsheet is attached to the revised SoB. The PTE numbers listed in the table in Section I. of the SoB have been revised according to the revised PTE calculations.

Comment 4:

USEPA states that Condition III.A.1 should be deleted. This condition requires the submittal of a source test plan 30 days prior to every source test. At this time the only emission limit PWCC is subject to is a 20% opacity limit. USEPA does not expect PWCC to submit source test plans for Method 9 opacity testing.

Response to Comment 4:

NNEPA agrees that the general testing requirements is not applicable to this source and Condition III.A has been deleted from the permit entirely. The conditions under Condition III have been renumbered accordingly. However, the permittee is still responsible for complying with the monitoring and the associate recordkeeping requirements to ensure compliance with the permit limits as stated in 40 CFR 71.6(a)(3)(i)(B). The reference to 40 CFR 71.6(a)(3)(i)(B) has been added to the heading of Condition III.A - Recordkeeping Requirements.

Comment 5:

USEPA states that the semi-annual monitoring reporting condition (now Condition III.B.1) has an obsolete reference to a due date that has passed. USEPA requests to delete the provision that states "except that the first reporting period shall cover the period from the effective date of this Part 71 permit through December 31, 2008."

Response to Comment 5:

Condition III.B.1 has been corrected as follows as requested:

III.B. Reporting Requirements [40 CFR § 71.6(a)(3)(iii)] [NNOPR § 302(G)]

1. The permittee shall submit to NNEPA and USEPA Region 9 reports of any monitoring required under 40 CFR § 71.6(a)(3)(i)(A), (B), or (C) each six-month

reporting period from January 1 to June 30, and from July 1 to December 31~~, except that the first reporting period shall cover the period from the effective date of this Part 71 permit through December 31, 2008~~. All reports shall be submitted to NNEPA and USEPA Region 9 and shall be postmarked by the 30th day following the end of the reporting period. All instances of deviations from permit requirements must be clearly identified in such reports. All required reports must be certified by a responsible official consistent with Condition IV.E. of this permit.

. . .

Comment 6:

USEPA requested Condition III.H.2 (now Condition III.G.2.) be removed. This condition grants a permit shield for 40 CFR 60, Subpart Kb (the New Source Performance Standard for Volatile Organic Liquid Storage Vessels). The language in this condition is from initial Title V permit issued to this source, and is appropriate permit shield language when a source is subject to an applicable requirement, and that requirement has been incorporated into the permit. However, since PWCC is no longer subject to any Subpart Kb requirements, as explained in the SoB, Condition III.H.2 (now Condition III.G.2) is no longer unnecessary.

Response to Comment 6:

Since the permittee is no longer subject to NSPS, Subpart Kb, NNEPA has removed the requirements in Condition III.H.2 from the revised permit.

Comment 7:

USEPA states that NNEPA should not refer to the coal preparation plant as a "support facility" in the SoB. USEPA states that a "support facility" is normally an industrial source that is adjacent or contiguous to a primary stationary source; has a different SIC code than the primary source; and conveys, stores, or otherwise assists in the production of the principal product. As the mine and the coal preparation facility have the same owner and same two digits SIC code, they are considered one stationary source; therefore, the support facility issue never arises.

Response to Comment 7:

For clarification purposes, Section 1.c. of the SoB has been revised as follows to avoid future confusions:

c. <u>Description of Operations, Products</u>

The Black Mesa Complex (the "Complex") consists of two contiguous surface coal mines, the Black Mesa Mine and the Kayenta Mine; coal preparation and sampling facilities at the Black Mesa Mine; coal processing and overland conveyor systems

at the Kayenta Mine; and various petroleum and other storage tanks. NNEPA views the Complex as a single source under the Clean Air Act. ~~Surface coal mining is the primary activity of the source, and the coal preparation plant serves as a support facility for the two mines.~~

Comment 8:

USEPA stated that the discussion of the 2004 permit reopening in the SoB incorrectly states that "The source also requested that USEPA include conditions in the permit to limit the potential to emit (PTE) of PM-10." This issue was raised by PWCC prior to issuance of the final initial permit, and subsequently in the petition PWCC filed with the Environmental Appeals Board. However, PWCC did not pursue the inclusion of PTE limits as part of the reopening, or subsequently apply for a permit revision to address this issue. Therefore, NNEPA should delete this sentence.

Response to Comment 8:

As the result of this comment, the last paragraph in Section 1.d. of the SoB has been revised as follows:

d. <u>History</u>

...

The initial Title V permit for this source was issued by USEPA on September 23, 2003. The Title V permit was reopened under 40 CFR 71.7(f) on October 23, 2003, when the source claimed that it could not comply with all the terms and conditions in the final permit. These conditions included the ability to comply with Method 9 observations, visible emission notations, and water spray inspections at various emission units. ~~The source also requested that USEPA include conditions in the permit to limit the potential to emit (PTE) of PM-10.~~ EPA reopened the permit to evaluate Peabody Western Coal Company's claims, and the permit was finalized on June 1, 2004. This Title V, Part 71, renewal permit application was submitted on October 29, 2008.

Comment 9:

USEPA stated that the periodic monitoring discussion on pages 3-5 of the SoB (now page 4) is helpful, but could be improved by a more detailed evaluation of PWCC's proposal. For example, USEPA agreed with the proposals to change the water spray and water meter inspection frequencies from weekly to monthly. USEPA also agreed that the frequency of visible emissions surveys could be decreased based on an analysis PWCC's compliance data during the initial permit term. However, while PWCC proposed to delete the survey requirement from the permit entirely, USEPA believes that this monitoring requirement should be retained, albeit with a frequency of weekly instead of the daily surveys currently required. Finally, PWCC's proposal to conduct Method 9

testing once per permit term would not assure compliance with the opacity limit or provide data for annual compliance certifications. USEPA would agree that Method 9 testing frequency can be decreased from monthly to quarterly.

Response to Comment 9:

The discussion on page 3 of the SoB has been revised to include the detailed evaluation of PWCC's proposal as stated in Comment 9.

Comments from PWCC (Comments 10 through 50)

Comment 10:

PWCC has comments on the scope of NSPS Subpart Y Applicability. PWCC stated that Subpart Y regulates coal preparation plants. However, not all pollutant-emitting activities at a coal preparation plant have been designated as "affected facilities" which are subject to Subpart Y. A Subpart Y affected facility is a particular type of coal preparation facility that has been constructed, modified or reconstructed after October 24, 1974. In addition, an "affected facility" at a coal preparation plant is one that meets the definition of one of the particular types of activities that are covered by Subpart Y. Thus, PWCC has Subpart Y affected facilities that consist of "coal processing and conveying equipment." However, PWCC does not include any facilities that were constructed, modified, or reconstructed after October 24, 1974 and that are designated as "thermal dryers," pneumatic coal-cleaning equipment (air tables)," "coal storage systems," or "coal transfer and loading systems" as defined in 40 CFR 60.250(a).

In NSPS, Subpart Y, "coal processing equipment" is defined in 40 CFR 60.251(g) as "any machinery used to reduce the size of coal or to separate coal from refuse." In addition, "conveying equipment" is defined as "the equipment used to convey coal to or remove coal and refuse from the [processing] machinery." *Id.* Consequently, a post-1974 conveyor at a coal preparation plant will not be subject to Subpart Y if it does not convey coal to or remove coal and refuse from machinery used to reduce the size of coal or to separate coal from refuse. For example, a conveyor belt conveying coal to a storage pile could not be subject to Subpart Y because it does not meet that NSPS definition of "conveying equipment." See 63 Fed. Reg. 53,289 (Oct. 5, 1998) (interpreting the meaning of "processing and conveying equipment"). See also letter from George Czerniak, EPA Region V, to Frank Prager, Xcel Energy, of June 30, 2003; letter from Douglas Neeley, EPA Region IV, to Shannon Vogel, North Carolina Dep't of Environment, Health and Natural resources, of Apr. 16, 1998.

PWCC has provided those distinctions for individual conveying equipment, documenting how certain conveyors were either not constructed, modified or reconstructed after October 24, 1974 and/or do not satisfy the Subpart Y definition of "conveying equipment." Accordingly, PWCC requests that such conveyors that do not qualify as Subpart Y affected facilities because of their age and/or their function be removed from the permit's list of NSPS affected facilities at PWCC.

Response to Comment 10:

NNEPA has revised the table for the affected facilities subject to NSPS, Subpart Y in Condition II.B and in Section 4.a of the SoB to remove the units which were constructed prior to October 24, 1974 or do not meet the definition of "conveying equipment" in 40 CFR 60.251(g) as the result of this comment.

Comment 11:

PWCC stated that numerous facilities at this source have never been subject to new source review or any other form of permitting under the Clean Air Act. Moreover, those same facilities have not been subject to any federally enforceable regulatory provisions of either a tribal implementation plan or a federal implementation plan. Consequently, in the vernacular of Title V, those facilities have no "applicable requirements." While the amounts of their emissions must be included, as appropriate, in a determination of the source's potential to emit or in a calculation of "fee pollutants," there is no other provision of PWCC's initial Title V permit that applies to such facilities.

PWCC requests that the "no applicable requirement" status of those so-called "grandfathered" facilities be prominently recognized within the Title V permit. In particular, in the Condition I listing of significant emission units, an appropriate designation or label must be provided for the "Maximum Capacity" and the "Control Method" entries for each grandfathered facility in order to make clear that information for such facilities is not enforceable but instead has been supplied for informational purposes only.

As further recognition of the grandfathered status of certain facilities at this source, and in accordance with 40 CFR 71.6(f), PWCC requests the permit provide a permit shield containing NNEPA's determination that, except for the potential to emit and the fee pollutant calculations, no requirements under the CAA are applicable to those grandfathered facilities. Grandfathered facilities at this source are those particular significant emission units that process, convey, store, transfer, load, or otherwise "handle" coal but are not subject to Subpart Y because they were constructed before October 24, 1974.

Response to Comment 11:

NNEPA acknowledges that some of the existing facilities at PWCC were constructed prior to October 24, 1974 and currently have no applicable requirements. These units might be modified or replaced in the future and therefore, subject to the applicable requirements under CAA then. All the NSPS, Subpart Y affected facilities are identified in Table 1 under Condition II and the reasons why other coal handling facilities are not subject to NSPS, Subpart Y are documented in Section 4.a of the SoB. NNEPA does not believe it is necessary to identify the units constructed prior to October 24, 1974 specifically in the emission unit description table under Condition I or to list these units

in the permit shield condition (now Condition III.G). In addition, a permit shield cannot be granted without public notice. Therefore, no change has been made as a result of this comment.

Comment 12:

PWCC requests that all references to provisions in the Navajo Nation Operating Permit Regulations (NNOPR), other than NNOPR Subpart VI, be deleted from the Part 71 renewal permit for the Black Mesa Complex. PWCC claims that there is neither federal authority nor tribal authority to apply the NNOPR requirements to the Part 71 permit.

Response to Comment 12:

NNEPA finds that both of this comment is incorrect and so is declining to revise the permit documents to delete references to the NNOPR, with limited exceptions, as explained below.

1. Federal Authority

PWCC comments that, "aside from the NNOPR's Subpart VI procedures to collect Part 71 permit fees, the Part 71 requirements applicable to Black Mesa complex rely on no other authorities under the NNOPR." In fact, 40 C.F.R. § 71.10(a) requires that "In order to be delegated authority to administer a part 71 program, . . . the laws of the . . . Indian tribe [must] provide adequate authority to carry out all aspects of the delegated program." Thus, there is not only federal authority but there is a federal requirement for tribes to have their own authorities to administer the Part 71 program, including authorities for permit processing, monitoring and reporting, and permit enforcement. In the case of the Navajo Nation, these authorities are found generally in the Navajo Nation Clean Air Act and specifically in the NNOPR. Moreover, EPA's Eligibility Determination approving the Part 71 delegation recognizes that:

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

Eligibility Determination at 16 (dated October 13, 2004) (attached to Delegation Agreement).

In addition, the Delegation Agreement provides specifically in § IX(2) that "NNEPA agrees to continue to revise, reopen, terminate or revoke and reissue Part 71 permits [that is, to perform all permit processing activities], as necessary and appropriate, using the procedures of Subpart IV of the Navajo Nation Operating Permits Regulation [the Navajo permit processing regulations]." See also Delegation Agreement §§ I(4) (NNEPA agrees to process confidentiality claims); IV(1) (citing NNOPR § 401(B)); IV(2) (citing NNOPR generally); V(4) (same). The Delegation Agreement also states in § VI(1) that NNEPA agrees to conduct "a. development of compliance plans and schedules of compliance; b. compliance and monitoring activities, . . . c. enforcement-related activities," and states in § VI(2) that "[t]his Agreement does not preclude NNEPA from pursuing administrative and judicial enforcement actions under its independent authorities." Moreover, the Delegation Agreement § VII(2) requires all Part 71 sources to submit "all reports, compliance certifications, and other submittals required by Part 71 and the Part 71 permits to both EPA and NNEPA."

The Delegation Agreement also incorporates by reference NNEPA's transition plan for administering the Part 71 program, stating in § IV(5) that "NNEPA agrees to follow its transition plan for permit issuance, provided for in Attachment '2' of this agreement." The transition plan specifically states that NNEPA "will process permit applications pursuant to . . . subpart IV of the NNOPR." Att. 2 at 6, § V.C. See also Att. 2 at 8, § V.E (same); id. at V.G. (enforcement will take place pursuant to NNOPR Subpart V).

2. Tribal Authority

PWCC also states that "the NNOPR does not provide authority for any requirement within the Part 71 permit except for the procedure for collection of the Part 71 fee." On the contrary, NNOPR Subpart VII specifically addresses "Part 71 Program Delegation" and provides the authority not only for NNEPA to collect fees (§ 702) but also more generally in § 701 for NNEPA "to issue, amend, revoke, reissue, modify, enforce and renew Part 71 permits to Part H sources pursuant to the procedures set forth both in these regulations and 40 C.F.R. part 71." NNOPR § 705 lists specific NNOPR provisions that apply to Part 71 permits. See also NNOPR § 704(B) ("the Navajo Nation procedures set forth in the sections listed under § 705 shall apply to part 71 permits in addition to the part 71 procedures.").

For these reasons, NNEPA has referred to various provisions of the NNOPR in all the Part 71 permits it has processed, not just in the permit for PWCC. Therefore, no change has been made as the result of this comment.

Comment 13:

Section 1.j of the draft SoB identifies an "enforcement issue" as a result of PWCC's alleged failure to submit the application to renew Black Mesa Complex's Title V permit in a timely manner. PWCC strongly disputes that assertion and conclusion and has demonstrated, in a letter to NNEPA dated August 7, 2009 that submittal of the subject

permit renewal application was timely. That letter is incorporated herein by reference, and PWCC reiterates its request for NNEPA to take the immediate follow-up actions identified in that letter.

Response to Comment 13:

NNEPA disagrees that the submittal was timely, but acknowledges that there was sufficient confusion about the issue such that it has no plans to take any enforcement or other action regarding it.

Section 1.j of the SoB states: "The Title V permit renewal applicat[i]on was not received within six (6) to eighteen (18) months before the expiration date of the first Title V permit. NNEPA is reviewing this matter and is taking appropriate action." EPA issued the initial Title V permit for the Black Mesa Complex on September 23, 2003. 40 CFR 71.6(a)(11)(ii) requires a Part 71 permit to expire five years from "the date of issuance." Consequently, the permit expired on September 22, 2008. PWCC's arguments regarding the permit expiration date calculate the term from the effective date of the permit rather than from its issuance date, which is contrary to the regulations.

Moreover, 40 CFR 71.7(f)(2) provides that proceedings to reopen a permit for cause "shall affect only those parts of the permit for which cause to reopen exists." When USEPA reopened the permit, it did so only to revise Section II.C of the permit, which pertains to opacity monitoring and testing requirements and water sprays. See, e.g., Letter from Gerardo Rios, EPA, to Brian Dunfee, PWCC, dated April 13, 2004. USEPA stated at the time that Section II.C "is the only section of the permit affected by this reopening." Id. Therefore, this reopening did not affect the issuance date or even the overall effective date of the permit.

NNEPA acknowledges, however, that there was understandable confusion regarding the expiration date of the initial Title V permit, due to the permit reopening and other factors discussed by PWCC, including the February 13, 2007 letter that NNEPA sent to PWCC, which was unclear as to the expiration date of the permit. Indeed, EPA's Environmental Appeals Board itself seemed unclear on the subject, stating in its February 18, 2005 decision on the permit that the permit was issued on September 23, 2003 (Decision at 5), and then stating two sentences later that the "final" permit was issued on May 21, 2004 (*id.*). NNEPA therefore is not taking any action regarding the timeliness of PWCC's submittal of the permit renewal application, and is deleting from the statement of basis any reference to the timeliness of filing. Notice to the public is provided by this response to comments and by the revision to the statement of basis.

Comment 14:

Cover Letter of the Draft Permit - PWCC stated that PWCC believes the subject permit must consist solely of a federal Part 71 permit issued under EPA's authority and the "Delegation of Authority to Administer a Part 71 Operating Permits Program" that was executed between NNEPA and EPA on October 15, 2004. Moreover, because Black

Mesa Complex is currently not required to hold an operating permit under NNOPR § 201(A), there is no permit for that source to which the cited provisions of NNOPR apply.

Accordingly, PWCC requested the following phrases be deleted:

- 1st ¶: ". . . Navajo Nation Operating Permits Regulations, and all other applicable rules and regulations . . .";
- 2nd ¶: ". . . either or both the Navajo Nation Clean Air Act and . . ."; and
- 2nd ¶: ". . , as applicable".

In addition, a Title V permit's effective date often comes after its issuance date. If that permit is to run for a full five years, then it should expire, without appropriate action to renew it, on a date five years from its *effective* date and not from its issuance date.

Response to Comment 14:

No change has been made as the result of this comment. See the response to Comments 12 and 13.

Comment 15:

Condition I - PWCC has the following comments for Condition I:

(a) The asterisk affixed to the "Maximum Capacity" of several units needs its corresponding explanation at the end of the table of Significant Emission Units.

(b) As explained in our General Comments above, the list of Significant Emission Units includes a number of "grandfathered" facilities that are not subject to any "applicable requirements." Nevertheless, they must be shown in the Title permit. Therefore, for each "grandfathered" unit listed in the table of Significant Emission Units, PWCC requests the entries for "Maximum Capacity" and "Control Method" be marked with an identifying symbol (**) to denote that particular information for that specific unit is provided for informational purposes only.

(c) PWCC objects to identifying several of the areas as "coal processing." Under NSPS Subpart Y, the term "processing equipment" means "any machinery used to reduce the size of coal or to separate coal from refuse." 40 CFR 60.251(g). Because the areas in questions have pollutant-emitting activities other than "processing," PWCC requests that they be identified as "coal preparation areas."

(d) In the N-8 area of the table of Significant Emission Units, the "Construction Date" for Belt #3A should be 1970-1973 instead of 1983-1984.

Response to Comment 15:

The explanation of the asterisk mark in the table under Condition I was included in the end of the table on page 8 of the permit. The asterisk mark means that the maximum capacity of certain unit is limited to the listed value by an up- or downstream process or unit. NNEPA agreed to replace the description of "coal processing areas" with "coal preparation areas and has corrected the construction date for Belt #3A.

However, NNEPA does not believe it is necessary to specifically identify the grandfathered units which were constructed before October 24, 1974 (see the response to Comment 11). NNEPA has added a note to the end of the unit description table in Condition I to state that all the information listed in this table is descriptive information and is not enforceable.

Comment 16:

Condition II.A.8 - NNEPA has been delegated federal authority to administer the Part 71 program with respect to the Black Mesa Complex. PWCC does not believe, however, the scope of that delegation includes authority to act under Part 60, NSPS. Therefore, PWCC questions whether this condition can require PWCC to provide written notification to NNEPA and whether the use of electronic notification in lieu of written notification must be acceptable to NNEPA.

Response to Comment 16:

The purpose of the Clean Air Act Title V operating permit program is to provide for a single permit for a source that contains all the CAA requirements applicable to that source, and to make those requirements enforceable through the permit. Therefore, although NNEPA does not have its own NSPS program, NSPS requirements are incorporated into the Title V permit that NNEPA has the delegated authority and responsibility to administer, and NNEPA requires the notification provided for in Permit Condition II.A.8 to be able to fulfill its responsibility under the Delegation Agreement. In addition, the use of electronic notification is not acceptable for NNEPA. Therefore, no change has been made as the result of this comment.

Comment 17:

Condition II.B - PWCC has the following comments for the NSPS, Subpart Y affected units listed in Table 1:

(a) The title of the table in this condition and the first column in the table itself refer to "Emission Points/Units." Because the subject matter of this condition is pollutant-emitting activities subject to NSPS Subpart Y, PWCC requested that those activities be identified consistently with the conventional terminology, i.e., as "Affected Facilities."

(b) As explained in Comment 15(c), PWCC requested the subject areas identified in the table be designated as "coal preparation areas" and not as "coal processing areas."

(c) For the J-28 area, the second belt should be labeled "Belt #1-S".

(d) For the N-11 area, "Belts #34-26" should be "Belts #34-36".

(e) For the N-8 area, the following conveyors belts were constructed prior to October 24, 1974 and therefore are not subject to Subpart Y: Belts #3A, #14, #27, #28, and #30. Therefore, please remove those conveyors from this list of Affected Facilities.

(f) For the N-8 area, several conveyors do not meet the Subpart Y definition of "conveying equipment," i.e., "equipment used to convey coal to or remove coal and refuse from the [processing] machinery." Therefore, PWCC requests to remove the following conveyors from the list of Affected Facilities": Belts #11, #12, #15, #16, and #18. PWCC also requests to change the corresponding Description to "Two (2) Conveyors".

(g) For the Overland Conveyor System, the conveying equipment collectively identified as OCTP21 was constructed prior to October 24, 1974 and must be removed from the list of "Affected Facilities." Also, the individual conveyor belts and their transfer points that collectively make-up OCTP20 are not used to convey coal to or remove coal and refuse from machinery used to reduce the size of coal or to separate coal from refuse. Since the activities of OCTP20 do not meet the definition of "conveying equipment," PWCC requested to delete OCTP20 from the list of Affected Facilities as well. A separate reason for removing those facilities from the list of Subpart Y affected facilities at Black Mesa Complex is because they are not part of any preparation plant, but rather are coal transport devices for the mines that are used as an alternative to haul trucks.

(h) For the Black Mesa Preparation Plant, a number of those pollutant-emitting activities were constructed prior to October 24, 1974. PWCC requests to remove the following activities from the list of Affected Facilities: BMPC, CONV#2, CONV#4, CONV#5, CONV#11, CONV#7, CONV#8, BMCTEC, CONV#9, CONV#9A AND CONV#10.

(i) In the first line of the sentence following Table 1, PWCC requests to replace the words "the emission units" with "each affected facility". PWCC also requests to add the word "in" after the word "above".

Response to Comment 17:

NNEPA has revised the information listed in Table 1 as requested in Comment 17. The first sentence following Table 1 in Condition II.B has also been revised as requested.

Comment 18:

Conditions II.C.1 and II.C.2 - PWCC stated that Belt #18 is not subject to Subpart Y (see Comment 17(f)) and requests to delete the phrase of "the tail end of Belt 18 from high sulfur stockpile K-3" in these conditions.

Response to Comment 18:

The phrase of "at N-8, the tail end of Belt 18 from high sulfur stockpile K-3" in Conditions II.C.1 and II.C.2 has been removed as requested.

Comment 19:

Condition III.A - PWCC stated that testing is not required for any pollutant-emitting activity at Black Mesa Complex. PWCC stated that this condition is irrelevant and should be deleted from the Title V permit.

Response to Comment 19:

Condition III.A has been deleted from the final permit. See the response to Comment 4.

Comment 20:

Condition III.B (now Condition III.A) - PWCC stated that all of the monitoring requirements of the permit (II.C) and all of the recordkeeping requirements of the permit (II.D) are unit-specific. PWCC stated that Condition III.B (now Condition III.A) is a generic condition that is irrelevant and should be deleted from the Title V permit.

Response to Comment 20:

The recordkeeping language in this condition is taken directly from Part 71, and is a standard permit content requirement for all Part 71 permits issued by EPA or NNEPA. Therefore, no change has been made as a result of this comment.

Comment 21:

Condition III.C (now Condition III.B) - PWCC requests to delete the reference to "NNOPR § 302(G)" in the title of this condition.

Response to Comment 21:

No change has been made as the result of this comment. See the response to Comment 12.

Comment 22:

Condition III.C.1 (now Condition III.B.1) - PWCC stated that the date "December 31, 2008" must be revised to be consistent with the eventual effective date of the renewed permit.

Response to Comment 22:

The reference date in this condition has been revised. See the response to Comment 5.

Comment 23:

Condition III.C.1.a.v (now Condition III.B.1.a.v) - PWCC stated that the CAM requirements do not apply to any emission units at Black Mesa Complex. Therefore, the phrase "and including exceedances as defined under 40 CFR § 64.1" should be deleted.

Response to Comment 23:

This condition has been revised as requested.

Comment 24:

Condition III.C.1.a.vii (now Condition III.B.1.a.vii) - PWCC seeks clarification of the meaning of the words "the total time when such monitoring was not performed." PWCC asked if this is means that time of non-performance measured against the total time that monitoring should have occurred to satisfy the periodic monitoring requirement?

Response to Comment 24:

NNEPA agrees with the interpretation that the permittee made on the requirements of this condition.

Comment 25:

Condition III.C.1.b (now Condition III.B.1.b) - PWCC stated that there are no other reports required of Black Mesa Complex that satisfy the criteria of this section. PWCC stated that this provision should be deleted entirety.

Response to Comment 25:

The reporting requirement is also a standard permit content requirement for all Part 71 permits issued by EPA or NNEPA. Although the language itself does not come directly from the regulation, EPA developed this language in order to clarify the semiannual monitoring report requirements for title V sources. No change has been made as a result of this comment.

Comment 26:

Condition III.C.1.c.iv (now Condition III.B.1.c.iv) - PWCC states that the CAM requirements of Part 64 do not apply to Black Mesa Complex. PWCC states that this provision should be deleted entirety.

Response to Comment 26:

This condition has been removed as requested.

Comment 27:

Condition III.C.2.b.i (now Condition III.B.2.b.i) - PWCC states that this provision should be deleted entirety because there are no permit terms for emissions of hazardous air pollutants from this source.

Response to Comment 27:

NNEPA agrees to remove the requirements in Condition III.C.2.b.i since there are no HAP limits included in this permit. The requirements in Condition III.B.2.b have been renumbered accordingly.

Comment 28:

Condition III.H. - In addition to this permit retaining the permit shield with respect to NSPS Subpart Y and Subpart Kb, PWCC requests that this permit condition expand the shield for Subpart Y requirements by stating that, at the time of issuance of this permit, the use of any particulate control technology on a Subpart Y affected facility constitutes a federally enforceable requirement of this permit to ensure compliance with the existing NSPS visible emissions limit.

PWCC also requests that the permit contain certain negative declarations by NNEPA with respect to several requirements that do not apply. In keeping with 40 C.F.R. § 71.6(f)(1)(ii), NNEPA is requested to include the following determinations in this section of the permit:

(1) The quantity of emissions from each "grandfathered" facility identified herein must be used in determining the source's potential to emit and its annual permit fee. At the time of issuance of this permit, there were no other requirements applicable to any of those grandfathered facilities.

(2) At the time of issuance of this permit, no facility at the source was subject to any promulgated revisions to NSPS Subpart Y.

(3) At the time of issuance of this permit, no facility at the source was subject to any requirement arising from section 112 of the Clean Air Act.

(4) At the time of issuance of this permit, neither EPA nor NNEPA had determined whether the source constituted a "major stationary source" for PSD applicability purposes.

Response to Comment 28:

No permit shield shall be granted without public notice. NNEPA cannot add any content to the permit shield condition after the public notice period. In addition, the rule applicability for each unit at PWCC was discussed in the SoB and is not necessary to include the proposed statements in the permit shield condition.

Comment 29:

Condition IV.B.2 - PWCC stated that in some situations the only available credible evidence may be that provided by "applicable testing or monitoring methods required by the underlying regulations or this permit." PWCC stated that this condition's requirement that "other credible evidence . . . *must* be considered" should be modified by adding the words, "if available."

Response to Comment 29:

Condition IV.B.2 has been revised as requested.

Comment 30:

Condition IV.C - PWCC requests to delete reference to "NNOPR § 302(I)" in the title of this condition.

Response to Comment 30:

No change has been made as the result of this comment. See the response to Comment 12.

Comment 31:

Condition IV.C.1 - PWCC stated that the dates in this condition should be revised to be consistent with the eventual effective date of the renewed permit.

Response to Comment 31:

PWCC is already required to submit annual compliance certification under the current Title V permit. The renewal permit does not include additional requirements. Therefore, there is no need to specify the effective date of the renewed permit in Condition IV.C.1. No change has been made as the result of this comment.

Comment 32:

Condition IV.C.2 - PWCC stated that this condition must be deleted because there is no permit issued under NNOPR to which this requirement applies.

Response to Comment 32:

No change has been made as the result of this comment. See the response to Comment 12.

Comment 33:

Condition IV.D - PWCC requests to delete the reference to "NNOPR § 301(E)" in the title of Condition IV.D because there is no permit issued under NNOPR to which that cited regulation applies.

Response to Comment 33:

No change has been made as the result of this comment. See the response to Comment 12.

Comment 34:

Condition IV.D - 40 C.F.R. § 71.6(a)(6)(v) provides: "[I]n the case of a program delegated pursuant to § 71.10, for information claimed to be confidential, the permittee may furnish such records directly to the Administrator along with a claim of confidentiality. Although Condition I.4 of the Delegation Agreement speaks to NNEPA's processing of information provided under a claim of confidentiality, PWCC believes the discretion provided to the permittee by § 71.6(a)(6)(v) allows that information to be submitted only to USEPA.

Response to Comment 34:

NNEPA agrees with PWCC's comment regarding the submittal of information that is claimed to be confidential, and has revised Condition IV.D as follows:

IV.D. Duty to Provide and Supplement Information [40 CFR §§ 71.6(a)(6)(v), 71.5(b)] [NNOPR § 301(E)]

The permittee shall furnish to NNEPA and USEPA Region 9, within a reasonable time, any information that NNEPA and USEPA Region 9 may request in writing to determine whether cause exists for modifying, revoking, and reissuing, or terminating the permit, or to determine compliance with the permit. Upon request, the permittee shall also furnish to NNEPA and USEPA Region 9 copies of records that are required to be kept pursuant to the terms of the permit, including information claimed to be confidential. **Such information may be provided to USEPA Region 9 only, pursuant to 40 CFR §§**

71.6(a)(6)(v), at the permittee's discretion. Information claimed to be confidential should be accompanied by a claim of confidentiality according to the provisions of 40 CFR Part 2, Subpart B. The permittee, upon becoming aware that any relevant facts were omitted or incorrect information was submitted in the permit renewal application, shall promptly submit such supplementary facts or corrected information. The permittee shall also provide additional information as necessary to address any requirements that become applicable to the facility after this renewal permit is issued.

Comment 35:

Condition IV.E - PWCC has the following comments on the title of this condition:

(a) As explained previously, citation to "NNOPR Subpart VI" is allowed because the Delegation Agreement requires NNEPA to collect fees consistent with that NNEPA regulation. NNOPR Subpart VI, however, does not apply to activities other than fee collection.

(b) Citation to NNOPR "Section 702" must be deleted because, aside from NNOPR Subpart VI, no other NNOPR provisions are applicable to the Part 71 permit.

(c) NNOPR "Section 703" deals with NNEPA's transition from delegated Part 71 program to Part 70 program. As such, that "Section 703" has no applicability to the instant Part 71 permit and must be deleted.

Response to Comment 35:

NNEPA does not agree to remove the citations of "NNOPR Subpart VI" and NNOPR "Section 702" in the title of Condition IV.E. See the response to Comment 12 for details. NNEPA agrees to delete the reference to NNOPR § 703 in the Title for Condition IV.E in the revised permit.

Comment 36:

Conditions IV.G, IV.H, IV.I, IV.K, IV.L, and IV.Q - PWCC stated that the cited NNOPR provision cannot authorize the type of Part 71 permit action addressed by that provision. The cited NNOPR provisions are applicable to a permit issued under NNOPR – a permit which the permittee is not required to have, and does not have, at this time. PWCC requests to delete the following citations respectively: "NNOPR § 406", "NNOPR §405(C)", "NNOPR § 405(D)", "NNOPR § 405(E)", "NNOPR § 406" and "NNOPR § 404(B)" from these conditions.

Response to Comment 36:

No change has been made as the result of this comment. See the response to Comment 12.

Comment 37:

Condition IV.R.1.a - PWCC requests to delete this condition because this provision is not applicable to Black Mesa Complex.

Response to Comment 37:

NNEPA agrees that the language in Condition IV.R.1.a is confusing and should be corrected as follows:

IV.R. Permit Expiration and Renewal [40 CFR §§ 71.5(a)(1)(iii), 71.6(a)(11), 71.7(b), 71.7(c)(1)(i) and (ii), and 71.8(d)]

1. This permit shall expire upon the earlier occurrence of the following events:

   a. ~~for sources other than those identified in subparagraph IV.R(1)(a) above,~~ five (5) years elapses from the date of issuance; or

. . .

Comment 38:

Condition IV.R.1.b - PWCC states the 5-year duration of a Title V permit must be measured relative to its effective date and not to its issuance date.

Response to Comment 38:

40 CFR 71.6(a)(11)(ii) requires a Part 71 permit to expire five years from "the date of issuance." Therefore, no change has been made as result of this comment.

Comment 39:

Condition IV.R.3 - PWCC requests to change the word "may" to "shall" in the last line of this condition. Should NNEPA believe there could be cause for the permit shield not continuing to apply under these circumstances, then that possible event should be addressed in this condition as an exception rather than allowing the continuing existence of the permit shield to be discretionary in all cases.

Response to Comment 39:

Condition IV.R.3 has been revised as requested.

Comment 40:

Section 1.d of the SoB - On August 7, 2009 PWCC wrote to NNEPA, taking exception with an allegation at section 1.j of the draft statement of basis that PWCC's application to

renew the initial Title V permit for Black Mesa Complex was not timely. PWCC incorporates that letter into these comments by reference.

PWCC requested to revise the discussion in the last paragraph of Section I.d of the SoB to reflect re-issuance of the initial Title V permit on June 1, 2004. The timeline for EPA Region 9's processing of the initial Title V permit for this source was rather atypical. The following lists key dates in that timeline and Region 9's associated actions:

- Sept. 23, 2003 -- Initial Title V permit issued;
- Oct. 23, 2003 -- Initial Title V permit intended to be reopened before it became effective; and
  -- Initial Title V permit's effective date extended to Feb. 23, 2004;
- Feb. 18, 2004 -- Initial Title V permit's effective date extended to May 28, 2004;
- June 1, 2004 -- Initial Title V permit re-issued; and
  -- Initial Title V permit's effective date extended to July 1, 2004.

The key consideration in this particular processing sequence is the fact that Region 9 reopened the initial permit before it ever became effective. Moreover, Region 9 extended the effective date of that initial Title V permit on two separate occasions until the Region had completed its reopening process. Finally, when it re-issued the initial Title V permit, EPA Region 9 set the effective date as July 1, 2004.

Typically when a Title V permit is reopened, the permit has already been in effect for some period, and the subject source has operated under that permit's conditions. That is not, however, the case with Region 9's reopening of Black Mesa Complex's initial Title V permit before it ever became effective. Thus, while June 1, 2004 was the date the "reopened" Title V permit was issued for Black Mesa Complex, under the peculiar circumstances of that permit, June 1, 2004 was also the date the initial Title V permit was re-issued. That second issuance date is highly significant because Region 9's action on that date "started the clock running" for the 5-year duration of that permit. (also see comments 41 and 43)

Response to Comment 40:

No change has been made as the result of this comment. See the response to Comment 13 for details.

Comment 41:

Section 1.e of the SoB - PWCC has the following comments on Section 1.e of the SoB:

(a) As explained in the discussion in Comment 40, the source never operated under a Part 71 permit that was issued on September 23, 2003. Rather, Black Mesa

Complex did not begin operating under its initial Title V permit until it became effective on July 1, 2004. As stated in the draft statement of basis, that operation continued under approval of the first administrative amendment issued by NNEPA.

(b) Reference to the initial Title V permit issued on June 1, 2004 as the "reopened Title V permit issued on June 1, 2004" is very misleading and inappropriate in this instance because that characterization implies that the source had been operating under its Title V permit prior to the reopening process. For that reason, PWCC objects to describing EPA's action on June 1, 2004 as issuance of a "reopened" permit. "Re-issuance of the initial Title V permit" is a more appropriate description of that permit's status.

(c) At the bottom of page 3 of the SoB, PWCC requests to revise the discussion of "Monitoring and Testing Requirements" to better reflect the actual scope of Subpart Y applicability at Black Mesa Complex. Subpart Y designates "processing and conveying equipment" as individual affected facilities, and Black Mesa Complex includes some of those types of affected facilities. Subpart Y also designates both "coal storage systems" and "transfer and loading systems" as types of affected facilities. However, Black Mesa Complex does not include any coal storage system or transfer and loading system that is covered by that NSPS.

Response to Comment 41:

NNEPA declines to make requested revisions in Comments 41(a) and (b). See the response to Comment 13 for details. The coal storage systems and transfer and loading systems were constructed prior to the applicability date of NSPS, Subpart Y. Therefore, NNEPA has made the requested changes in Comment 41(c) in the SoB.

Comment 42:

Section 1.f of the SoB - For each "grandfathered" unit listed in the table of Significant Emission Units, PWCC requests the entries for "Maximum Capacity" and "Control Method" be marked with an identifying symbol (**) to denote that particular information for that specific unit is provided for informational purposes only.

In addition, PWCC believes that the title of this table, i.e., "Permitted Emission Units and Control Equipment" is inappropriate inasmuch as some of the emission units have never gone through a permitting process other than Title V and consequently have no permit requirements. PWCC requests the title of this table be conformed to that title in the draft permit, i.e., "Significant Emission Units."

Response to Comment 42:

NNEPA has added a note to the unit description table to state that all the information listed in the table of Section 1.f is descriptive information and is not enforceable. NNEPA

does not believe it is necessary to specifically identify the units which are considered grandfather units under NSPS, Subpart Y in this table. In addition, the information listed in the unit description table has been revised due to the changes made in the response to Comment 15.

NNEPA has revised the title of Section 1.f of the SoB to be "Significant Emission Units", in order to be consistent with the information listed in Condition I of the permit.

Comment 43:

Section 1.j of the SoB - PWCC strongly believes that there is no "enforcement issue" arising from the date on which the Company's application to renew its Title V permit was submitted to NNEPA. PWCC incorporates the letter dated August 7, 2009 to Ms. Charlene Nelson at NNEPA in these comments by reference.

Response to Comment 43:

Section 1.j of the SoB has been revised in the response to Comment 13. See the response to Comment 13 for details.

Comment 44:

Section 1.l of the SoB - PWCC has the following comments on this section of the SoB:

(a) PWCC states that the standard definition of "potential to emit" (PTE) should be included in this Section. Contrary to the draft statement of basis explanation, the scope of PTE is not constrained only to criteria pollutants and hazardous air pollutants. Furthermore, the statement that "[a]ctual emissions are typically lower than PTE" is not only unnecessary, but is also incorrect for the surface coal mining category of sources.

(b) PWCC objects to inclusion of values for potential to emit PM in the table for "Potential to Emit." The Part 71 Permit Program applies solely to Title V requirements, and EPA has concluded that PM is not a "regulated air pollutant" for purposes of Title V. See memorandum from Lydia Wegman, EPA OAQPS, to EPA Regional Air Directors of Oct. 16, 1995 ("Definition of Regulated Pollutant for Particulate Matter for Purposes of Title V"). The table's inclusion of the PTE values for PM adds nothing to a determination of the scope of Title V applicability to this source and adds nothing relevant to any Part 71 applicable requirement.

(c) The discussion in the second footnote to the table is confusing and suggests a deficiency in PWCC's application. PWCC's application did include an estimate of fugitive emissions from wind erosion.

(d) Nevertheless, PWCC believes the discussion should be revised to state: "Because coal preparation is a source category that is 'listed' under section 302(j) of the Clean Air Act, but surface coal mining is not such a 'listed' category, Black Mesa Complex's potential to emit is based upon all stack and fugitive emissions from coal preparation activities plus any stack emissions from surface mining activities."

Response to Comment 44:

NNEPA has revised the PTE definition in Section l. of the SoB to match the PTE definition listed in 40 CFR 70.2. NNEPA agreed to remove the statement of "actual emissions are typically lower than PTE".

NNEPA prefers to keep the PTE of PM information in the SoB. SoBs are used in part to document the applicability or nonapplicability of a variety of CAA requirements, including NSPS, NESHAP, PSD, etc. The SoB is a description of the source that provides the basis for making applicability determinations for other CAA requirements, including PSD. PM is a "regulated NSR pollutant" as that term is defined in EPA's PSD regulations at 40 CFR 52.21. Therefore, NNEPA believes that the SoB should provide an estimate of what the PM emissions are, to ensure all applicability determinations are correct. In addition, at the last row of the PTE table, it is clear that the PTE of PM is not used to determine the major source status under Part 71 program.

NNEPA has added a note under the PTE table in Section 1.l. of the SoB to clarify that the total PTE of this source is based upon all stack and fugitive emissions from coal preparation activities plus any stack emissions from surface mining activities as suggested in Comment 44(d). Fugitive emissions from the storage piles and dozing operations have been removed from the PTE summary table. The footnote related to fugitive emissions from the wind erosion has been deleted from the SoB.

Comment 45:

Section 1.m of the SoB - PWCC has the following comments on this section of the SoB:

(a) PWCC stated that PM is not a regulated pollutant for purposes of Title V and there was no reason to report actual emissions of PM. PWCC requests that the table of actual emissions delete any reference to PM.

(b) The parenthetical note about "PTE data not provided by the source ..." is confusing. It is also irrelevant with respect to this section that addresses actual emissions. Please delete the statement in parenthesis.

Response to Comment 45:

NNEPA agreed to remove the reference to the actual PM emission information from the table listed under Section 1.m of the SoB. In addition, the parenthetical note under the table has been removed as requested.

Comment 46:

Section 3 of the SoB - Since the Part 71 Permit Program applies solely to Title V requirements, PWCC objects to inclusion of this section on PSD Applicability. Either with or without the context of Title V permitting, PWCC states that NNEPA simply has no need to perform a PSD threshold applicability determination for Black Mesa Complex at this time which could prejudice some later PSD threshold calculation when it is required.

Moreover, PWCC stated that the discussion regarding the inclusion of fugitive emissions in the threshold calculation is very misleading. Finally, the history of the source and its lack of prior preconstruction permitting have already been addressed in Section 1.d of the SoB.

Response to Comment 46:

A Part 71 permit shall include all the applicable requirements under CAA. PSD is one of the programs under CAA. NNEPA believes that it is necessary to include PSD applicability discussions in the SoB. NNEPA has revised the discussions in Section 3 of the SoB to streamline the history discussion and to clarify the statements relating to the fugitive emissions.

Comment 47:

Section 4.a of the SoB - PWCC has the following comments on Section 4.a of the SoB:

(a) Black Mesa Complex does not have any coal storage system or coal transfer and loading system that is subject to Subpart Y. The discussion should be re-written to indicate that Subpart Y applicability at Black Mesa Complex is confined to coal processing and conveying equipment.

(b) For purposes of consistency and clarity, PWCC requests that any pollutant-emitting activity subject to NSPS be referred to only as an "affected facility" and not as an "affected unit" or an "affected emission unit."

(c) The table listing individual affected facilities at the source that are subject to Subpart Y needs to conform to the listing provided in Condition II.B of the permit, as explained therein. Please delete the following facilities from the table:

- For N-8 area: Belts #3A, #11, #12, #14, #15, #16, #18, #27, #28, #30 and #32; the corresponding Description should be changed to "Two (2) Conveyors".

- For Overland Conveyor System: OCTP20 and OCTP21.
- For Black Mesa Prep Plant: BMPC, CONV#2, CONV#4, CONV#5, CONV#11, CONV#7, CONV#8, BMCTEC, CONV#9, CONV#9a and CONV#10. For the group of conveyors designated as CONV#4, CONV#5, CONV#3A and CONV#3B, change the Description to "Two (2) Conveyors".

Response to Comment 47:

NNEPA has revised the discussion under Section 4.a in the SoB to clarify that the existing coal storage system or coal transfer and loading system at this are not subject to NSPS, Subpart Y since these units were either constructed prior to the applicability date of this NSPS or do not meet the Subpart Y definition of "conveying equipment" (see response to Comment 17). NNEPA has revised the table and discussion in Section 4.a of the SoB to use the term of "affected facilities", instead of "affected units". The table for the affected facilities also been revised as requested (refer to response to Comment 17).

Comment 48:

PWCC stated that certain conditions of the Part 71 Permit Program may not be delegated. *See, e.g.*, 40 C.F.R. § 71.10(j). Thus, Part 71 authority may not be delegated "in whole." This section needs to be revised to make clear that authority to administer the Part 71 Permit Program applicable to the Black Mesa Complex was delegated to NNEPA by EPA Region 9 on October 15, 2004.

Response to Comment 48:

A Part 71 permit program is considered delegated in "whole," in contrast to "in part," when it covers all sources within a particular jurisdiction and consists of the entire delegable program, even though certain authorities may not be delegated pursuant to 40 C.F.R. § 71.10(j). *See, e.g.*, 40 C.F.R. § 71.10(a) ("The Administrator may delegate, *in whole* or in part") (emphasis added); *see also* § 71.9(c)(2) ("For part 71 programs that are fully delegated"). Thus, NNEPA will not revise this aspect of § 7, but has corrected the date and clarified its applicability to PWCC, so that the section will read as follows: "Authority to administer the Part 71 Permit Program was delegated to the Navajo Nation EPA by USEPA Region 9 in part (including for the Black Mesa Complex) on October 15, 2004, and in whole on March 21, 2006."

Comment 49:

PWCC requested the following corrections to the permit:

(a) Table of Contents - The titles of the subsections, e.g., NSPS Requirements" need to match their titles in the permit itself, e.g., "NSPS Subpart Y Requirements". (Subsections II.B, II.C, III, III.G, IV.J and IV.K)

(b) Condition II.A. 1st sentence - After the words ". . . maintenance, and testing", add the word "of".

(c) Condition II.A.3 - "40 CFR § 2" should be "40 CFR Part 2".

(d) Conditions II.A.5, 6 and 7 - "40 CFR § 60" should be "40 CFR Part 60".

(e) Condition II.C - Title should be only "Monitoring Requirements" since there are no "Testing Requirements". Citation only to 40 CFR § 71.6(a)(3)(i) is sufficient.

(f) Condition III.B.3 (now Condition III.A.3) - "40 CFR § 60" should be "40 CFR Part 60".

(g) Condition III.D title (now Condition III.C)- "40 CFR § 82" should be "40 CFR Part 82".

(h) Conditions III.D.1, 2, 3, 4 & 5 (now Condition III.C) - "40 CFR § 82" should be "40 CFR Part 82".

(i) Condition III.E title & last sentence (now Condition III.D) - "40 CFR §61" should be "40 CFR Part 61."

(j) Condition III.G title (now Condition III.F) - "40 CFR § 68" should be "40 CFR Part 68".

(k) Condition IV.A.2 - In the first sentence, the date should be changed from April 1 to October 20, i.e., "The permittee shall submit a fee calculation worksheet form with the annual permit fee by October 20 of each year."

Response to Comment 49:

NNEPA has made all the changes requested in Comment 49 to the permit.

Comment 50:

PWCC requested the following corrections to the SoB:

(a) Section 1.d - In this section and elsewhere, replace the words "Peabody Energy" with "Peabody Western Coal Company."

(b) Section 1.e - In the table of "Monitoring Requirements" on page 4, several of the Condition Numbers are incorrectly identified for the respective Requirements to which they correspond. In particular, II.C.4 should be II.C.3; II.C.5 should be II.C.4; and II.C.6 should be II.C.5. Also, Condition II.C.5 in the fourth box of Monitoring Requirements should be II.C.4.

(c) Section 1.e - In the last paragraph on page 4, PWCC believes the words ", opacity observations" should be inserted after the words "VE surveys" and before the words "and water spray inspections."

(d) Section 1.e - In the next to last "bullet" on page 4, PWCC requests the current language be replaced with the following: "Weekly VE survey using EPA Method 22".

(e) Section 1.f - On page 6, the "Unit Description" for Belt #36 should be "One (1) conveyor from the screen to transfer point."

(f) Section 1.f - On page 8 for Unit ID "BMCTEC," please delete "CT&E" from the Unit Description. We believe "CT&E" is an abbreviation for the name of the company that originally operated the lab and did the coal testing.

(g) Section 1.i - Please change the values of "Maximum Capacity" for the following tanks to the correct values shown below:

Unit ID	Maximum Capacity (gal)
K06ST	5,000
K09ST	10,000
K22ST	500 (each of 2 compartments)

In addition, the installation date for Tank J7ST should be 1987.

(h) Section 1.j - In the second paragraph, correct the spelling for "application".

(i) Section 4.a - In the table's entries of affected facilities for area J-28, "Belt #1-8" should be "Belt #1-S".

(j) Section 4.a - In the table's entries of affected facilities for area N-11, "Belts #34-26" should be "Belts #34-36".

Response to Comment 50:

NNEPA has agreed to make all the changes requested in Comment 50 to the SoB, except for the changes requested in Comment 50(c). NNEPA believes "opacity observations" are equivalent to "VE surveys." It is redundant to make the changes as requested in Comment 50(c). In addition, the discussions in the last paragraph on page 4 have also been revised as the result of Comment 2.