

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

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

**MOTION OF NAVAJO NATION EPA FOR LEAVE TO FILE A REPLY TO PEABODY
WESTERN COAL COMPANY’S RESPONSE TO MOTION FOR VOLUNTARY
REMAND**

On May 28, 2010, Respondent Navajo Nation Environmental Protection Agency (“Navajo Nation EPA” or “NNEPA”) filed a Motion for Voluntary Remand and Memorandum in Support of Motion (“Motion for Remand”) in this proceeding so that it could propose revisions to the Part 71 permit conditions that are the subject of this proceeding. PWCC filed a Response objecting to NNEPA’s Motion for Remand (“PWCC Response”) on June 10, 2010. On June 16, 2010, NNEPA notified the Clerk of the Board of its intent to file a motion for leave to file a reply to the PWCC Response by June 25, 2010. Letter from Jill E. Grant, Nordhaus Law Firm, to Eurika Durr, Clerk of the Board (June 16, 2010).

The EAB Practice Manual does not contain specific requirements for appeals of Clean Air Act Title V permits. *See* EAB Practice Manual § IV.C.1. However, § III of the Manual, which contains the procedures for permit appeals under 40 C.F.R. Part 124, provides that a petitioner who believes that a reply is necessary may ask for leave to file a reply. EAB Practice Manual § III.D.5. The Manual also provides that “[a]s a matter of practice . . . , the EAB expects all motions to be in

writing, state the grounds therefor with particularity, state the relief sought, and be accompanied by any documents on which the motion relies.” *Id.* at § III.D.7 (b). NNEPA is filing this Motion for Leave, together with the attached proposed Reply Brief, consistent with those directions, and in support thereof states as follows:

1. On January 7, 2010 PWCC filed a Petition for Review challenging conditions in its Part 71 permit, issued by the Navajo Nation EPA, that reference Navajo Nation Operating Permit Regulations (“NNOPR”). PWCC, NNEPA, and the United States Environmental Protection Agency Region IX (“EPA”) attempted to resolve the dispute through negotiations. These negotiations failed to resolve the matter, but as a result of the negotiations NNEPA determined that it should reopen and revise some of the permit conditions at issue. *See Mot. for Remand at 2-4.*

2. In its Motion for Remand, NNEPA explained that it had determined that revisions should be made to the specific permit conditions that PWCC contested in its Petition for Review. NNEPA requested that the EAB remand the permit back to NNEPA so that it may reopen and revise the permit accordingly. *Id.*

3. In its Response, PWCC argued that: 1) NNEPA’s Motion for Remand does not meet EAB standards; and 2) NNEPA may not use NNOPR permit procedures to reopen and revise the delegated Part 71 permit at issue. NNEPA’s Motion for Remand addresses PWCC’s first argument, explaining that the proposed revisions to the permit may address PWCC’s claims or change the analysis of those claims, such that consideration by the Board of these permit conditions would be premature. PWCC’s second argument, however, raises issues that PWCC did not raise in its Petition for Review. PWCC’s second argument raises issues regarding NNEPA’s use of the NNOPR to process the permit, rather than issues regarding the inclusion of NNOPR provisions in the permit;

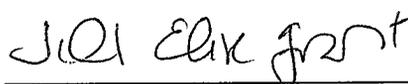
PWCC raised only the latter in its Petition for Review. *See* PWCC Resp. at 9 (stating that the Petition for Review raises a single issue, namely, whether the permit may include conditions based on the NNOPR). Those issues also were not raised in PWCC's comments on the permit made during the public comment period.

4. NNEPA requests the opportunity to submit a Reply to address PWCC's arguments regarding NNEPA's use of NNOPR permit procedures. As stated above, PWCC did not raise these issues previously. Moreover, NNEPA submits that PWCC's failure to do so precludes PWCC from raising these issues now. NNEPA therefore believes its Reply will assist the Board in its resolution of the Motion for Remand pending before it.

5. In addition, EPA has filed a Motion for Leave to File an Amicus Brief Moving for a Stay of the Proceedings. NNEPA wishes to state its concurrence with EPA's Motion for a Stay.

THEREFORE, the Navajo Nation EPA respectfully requests that the Board grant NNEPA's Motion for Leave to File a Reply to the PWCC Response and accept the attached Reply for filing.

Respectfully submitted,



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**NAVAJO NATION EPA’S REPLY TO PEABODY WESTERN COAL COMPANY’S
RESPONSE TO MOTION FOR VOLUNTARY REMAND**

BACKGROUND

On January 7, 2010, Peabody Western Coal Company (“PWCC”) filed a Petition for Review in this case challenging the provisions in its Navajo Nation-issued Part 71 permit that referenced the Navajo Nation Operating Permit Regulations (“NNOPR”). PWCC and the Navajo Nation Environmental Protection Agency (“Navajo Nation EPA” or “NNEPA”), together with the U.S. Environmental Protection Agency (“EPA”), Region 9, attempted to resolve the dispute. Although they were unable to do so, as a result of the parties’ negotiations NNEPA determined that revisions should be made to the specific permit conditions that PWCC contested in its Petition for Review. NNEPA filed a Motion for Voluntary Remand in order to reopen and revise those portions of the permit. *See* Motion of the Navajo Nation EPA for Voluntary Remand and Memorandum in Support of Motion (“Motion for Remand”) (filed May 28, 2010), at 2-4.

On June 10, 2010, PWCC filed a Response objecting to NNEPA’s Motion for Remand (“PWCC Response”), even though NNEPA explained that a remand would address at least some of

PWCC's concerns and narrow the issues before the Board. In its Response, PWCC claimed for the first time that NNEPA did not have the authority to use the NNOPR permit procedures to process the permit.

On June 24, 2010, EPA filed an *amicus* brief explaining that, among other issues, the Board could simply stay this permit appeal until NNEPA "has had an opportunity to re-evaluate and, as appropriate, revise the contested Permit conditions." EPA Region IX's *Amicus Curiae* Brief Moving for a Stay of the Proceedings, or in the Alternative, Seeking that the Board Grant NNEPA's Motion for Voluntary Remand ("EPA Amicus Brief") at 4; *In re Los Mestenos Compressor Station*, CAA Appeal No. 09-01 (EAB 2009) (stay granted Dec. 11, 2009). EPA also argued that NNEPA may revise the permit without reopening it, since the permit is not yet final. *Id.* at 4-5; *In re Indeck-Elwood, LLC*, PSD Appeal No. 03-04, Order at 5-6 (EAB 2004); *In re Desert Rock Energy Co.*, PSD Appeal Nos. 08-03 through 08-06, 2009 WL 3126170 (EAB 2009).

NNEPA agrees with EPA that the Board may simply issue a stay of this proceeding while NNEPA revises the permit at issue. Once the permit is revised, the Board may consider PWCC's Petition for Review in light of the revised permit. Indeed, this procedure would reduce the burdens on PWCC, as PWCC would not need to file a new Petition for Review with the Board. Alternatively, the Board may choose to remand the permit to NNEPA, as NNEPA originally requested, so that NNEPA may revise the permit.

In either case, NNEPA agrees with EPA that it may revise the permit without reopening it, since the permit is not yet final. As EPA noted, 40 C.F.R. § 71.11(i)(2)(ii) provides that the permit is not yet effective with respect to the conditions that are the subject of this review, nor has there been a final permit decision, regardless of whether the permit appeal is stayed or the permit is

remanded, *see* § 71.11 (D)(5)(ii), (iii). If NNEPA does not need to reopen the permit, PWCC's arguments regarding reopening procedures would be moot, as EPA points out. If the Board finds that NNEPA must reopen the permit, however, the Board still should not consider the issues that PWCC raises in its Response regarding NNEPA's use of the NNOPR reopening and other permit processing procedures because those issues were not raised in PWCC's Petition for Review.

ARGUMENT

PWCC makes two main arguments in its Response: first, that NNEPA's Motion for Remand does not meet EAB standards; and second, that NNEPA may not use NNOPR permit procedures to reopen and revise the Part 71 permit.

With regard to the first argument, PWCC claims that NNEPA's Motion for Remand is not sufficiently detailed and will not address what PWCC now claims is the single issue raised in its Petition for Review, which it says is whether the Part 71 permit may include conditions based on the NNOPR. *See* PWCC Resp. at 9. The Motion for Remand makes clear, however, that NNEPA intends to revise the same permit provisions that PWCC has contested, and that it would therefore be premature for the Board to consider these permit conditions now. As EPA notes in its Amicus Brief, these revisions may address PWCC's claims or change the analysis of those claims. EPA Amicus Br. at 9. No further detail should be necessary, and indeed to provide further detail would defeat the purpose of the remand, namely, to avoid a premature consideration of the issues by the Board. For this very reason it is unclear why PWCC is contesting the remand, especially since these permit conditions are automatically stayed pending resolution of this appeal, *see* 40 C.F.R. § 71.11(i)(2)(ii). Moreover, although PWCC now says that it raised a single issue in its Petition for Review, in fact PWCC raised at least three separate issues (relating to the federal enforceability of

the permit, the inclusion of references to the NNOPR in the permit, and the inclusion of a fee provision in the permit), and NNEPA's intended revisions would address all of them, at least in part.

NNEPA explains below why PWCC's other argument, regarding NNEPA's use of the NNOPR permit processing procedures, is not properly before the Board.

I. PWCC DID NOT CHALLENGE NNEPA'S USE OF THE NNOPR TO ISSUE THE PERMIT EITHER IN ITS COMMENTS ON THE DRAFT PERMIT OR IN ITS PETITION FOR REVIEW, AND SO MAY NOT RAISE THIS ISSUE NOW.

PWCC did not challenge NNEPA's use of NNOPR procedures to issue the permit in either the Petition for Review or in its comments on the draft permit, even though the permit documents made clear that NNEPA issued the permit pursuant to those procedures.¹ On the contrary, PWCC states that its Petition for Review raises a single issue, namely, whether the permit may include conditions based on the NNOPR, PWCC Resp. at 9, and not whether NNEPA may use the NNOPR to process the permit. In fact, PWCC acknowledged in its Petition for Review that a "delegate agency has to comply with its own procedures, administrative codes, regulations, and laws as well as the requirements of Part 71." Pet. for Review at 7 (citing 60 Fed. Reg. 20804, 20823 (Apr. 27, 1995)). PWCC now attempts to raise this argument here, where NNEPA intends to reopen and revise the permit pursuant to the same NNOPR permit procedures as it used in issuing the permit. However, 40 C.F.R. § 71.11(g) requires "all persons, including applicants, who believe any condition of a draft permit is inappropriate" to raise "all reasonably ascertainable issues" during the public comment period. NNEPA's use of the NNOPR permit procedures for processing the permit clearly was ascertainable. In addition, § 71.11(d)(1) requires a person petitioning the EAB for review of a

¹ PWCC's comments on the draft permit are attached as Exhibits C and D to the Petition for Review. The permit itself is attached as Ex. A.

permit to demonstrate that the issues raised before the EAB also were raised during the public comment period. *See also* EAB Practice Manual § III.D.2(e) and cases cited therein (referring to equivalent provisions in Part 124).

There is nothing different about NNEPA using the NNOPR permit procedures for reopening and revising the permit compared to issuing the permit, and so there is nothing that would allow PWCC to raise for the first time here the propriety of using the NNOPR permit procedures. All of these permit processing activities concern the administration of the permit, which must take place according to tribal procedures, as acknowledged by PWCC in its Petition for Review and as explained further below. Moreover, Part 71 requires that “proceedings to reopen and issue a permit shall follow the same procedures as apply to initial permit issuance.” § 71.7(f)(2). Since NNEPA followed the NNOPR procedures in issuing the permit (which procedures were not contested), NNEPA also must follow the NNOPR procedures in reopening the permit.

II. THE DELEGATION AGREEMENT CONTEMPLATES THAT NNEPA WILL FOLLOW THE NNOPR PERMIT PROCEDURES, AND PWCC DID NOT CHALLENGE THE DELEGATION AGREEMENT NOR COULD ANY SUCH CHALLENGE BE BROUGHT BEFORE THE BOARD.

Section 71.10(a) requires that, for a tribe to receive delegation to administer a Part 71 program, the tribe must submit a legal opinion demonstrating that “the laws of the . . . Indian Tribe provide adequate authority to carry out all aspects of the delegated program,” which of necessity includes permitting authority. If the tribe satisfies this requirement, among others, EPA may enter into a Delegation of Authority Agreement with the tribe pursuant to which the tribe “will be responsible, to the extent specified in the Agreement, for administering the part 71 program.” *Id.* As PWCC itself noted, Pet. for Review at 7, in proposing the Part 71 regulations EPA stated that

“each delegate agency would have to comply with its own procedures, administrative codes, regulations, and laws as well as the requirements of [Part 71].” 60 Fed. Reg. at 20,823. Thus, NNEPA is not acting as a deputized agent of EPA in administering the Part 71 program, but rather is an independent permitting agency required by EPA to have its own legal authorities.

The relevant Navajo laws include the Navajo Nation Clean Air Act and the NNOPR. In the Delegation Agreement entered into by EPA and the Navajo Nation, EPA found that the tribal laws satisfied all the criteria for delegation. *See* Deleg. Agr. at 1 (attached as Ex. B to Pet. for Review). The Delegation Agreement specifically cites the NNOPR permit fee provision and provides that NNEPA will collect Part 71 permit fees pursuant to that provision. Deleg. Agr. § II(1). The Delegation Agreement also contemplates NNEPA’s use of the NNOPR for permit processing. Deleg. Agr. § IV(1)-(2) (permit development and review); § V(4) (permit revisions and renewals); § IX(2) (revising, reopening, terminating, or revoking and reissuing permits).

Similarly, the Eligibility Determination on which the Delegation Agreement was based states as follows:

The Navajo Nation has enacted laws providing all relevant authorities to enable the Tribe to carry out administration of the [Part 71] program. . . . [T]he 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.

Deleg. Agr. Att. 1, at 3.²

² 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 (continued...) ”

The Delegation Agreement was entered into and became effective on October 15, 2004, *see* § 71.10(a) (Delegation Agreement becomes effective on date of signature), with notice published in the Federal Register pursuant to § 71.10(b), 69 Fed. Reg. 67,578 (Nov. 18, 2004). PWCC did not challenge the Agreement. Moreover, any appeal of the Agreement would not be before this Board, whose jurisdiction over Clean Air Act matters is limited to Clean Air Act permits and enforcement matters, *see* EAB Manual at 2-3, 14-15, 19, 26-27, 39, 43-44, unless otherwise directed by the Administrator, 40 C.F.R. § 1.25(e)(2).

III. EVEN IF THE ISSUE WERE BEFORE THE BOARD, PART 71 DOES NOT PRECLUDE NNEPA FROM USING ITS OWN REOPENING PROCEDURES.

As explained above, NNEPA maintains that the question whether NNEPA may use the NNOPR permitting procedures to reopen and revise the PWCC permit is not before the Board. If the EAB nevertheless decides to consider this issue, NNEPA maintains that Part 71 requires NNEPA to use its own permit processing procedures, and that EPA has confirmed this interpretation.

PWCC bases its argument to the contrary on § 71.7(f)(iii) and (iv), claiming that the words “*or* EPA” (emphasis added) mean that “*only* EPA” may reopen a delegated Part 71 permit. There are many flaws in this argument. First, the regulation at issue says “or,” not “only.” Second, this interpretation fails to take into account the independent authority required under § 71.10(a) to administer a delegated program, discussed above. Third, although EPA may reopen a permit on its own initiative pursuant to § 71.7(g), or in response to a public petition pursuant to § 71.10(h), nowhere do these provisions or any other provision of Part 71 preclude a non-federal permitting authority from reopening a permit under its own provisions. Indeed, § 71.11(n) provides that public

²(...continued)
NNOPR.” Deleg. Agr., Att. 2 at 6, § V.C. *See also* Deleg. Agr., Att. 2 at 8, § V.E (same).

petitions for reopening may be made to the “permitting authority” (defined in § 71.2 as including states and tribes), not just to EPA. EPA therefore must have contemplated that delegated state and tribal agencies would have reopening authority, since the only situation in which a state or tribal agency would be reopening a Part 71 permit under § 71.11(n) is in a delegated program. *See* § 71.4(a)-(f) (providing various scenarios for implementation of a Part 71 program, all of which “the Administrator will administer” unless the Part 71 program is delegated to a non-federal authority under § 71.10). Moreover, § 71.10(g) requires the non-federal permitting authority to conduct a reopening if EPA determines one is required, and the permitting authority must have its own reopening procedures to do so. PWCC’s argument, that only EPA can reopen a delegated Part 71 permit, does not take any of these considerations into account.³

PWCC also argues that the only way state or tribal permit processing procedures may be followed is through § 71.4(f), which provides for an EPA rulemaking to adopt portions of a state or tribal permit program in combination with portions of Part 71. PWCC Response at 19-20. Once again, there is nothing in § 71.4(f) or elsewhere in Part 71 stating that this provision provides the exclusive means for NNEPA to follow its own permit processing procedures when administering a delegated Part 71 program. On the contrary, § 71.4(f) does not address a delegated Part 71 program, but rather a program that the Administrator would administer. *Id.*

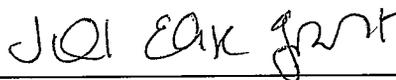
³ NNEPA does not maintain that EPA has federalized the NNOPR, *see* PWCC Resp. at 16, but rather that EPA examined the NNOPR in detail and determined that it contained all the authorities necessary to implement Part 71. Indeed, this is one of the issues NNEPA seeks to clarify by revising the PWCC permit. NNEPA agrees that its permitting procedures must be consistent with the Part 71 requirements and, in fact, they are virtually identical, as PWCC acknowledges. PWCC Resp. at 14; *see also* Pet. for Review at 3.

PWCC's other arguments concerning federal enforceability of the permit conditions and references in the permit to the NNOPR concern the merits of this proceeding, which are not currently at issue with regard to the Motion for Remand or EPA's motion for stay.

CONCLUSION

Respondent Navajo Nation EPA therefore respectfully requests that the Board either stay this proceeding or grant NNEPA's Motion for Remand so that NNEPA may revise portions of the permit to address issues raised in PWCC's Petition for Review and thus narrow the issues before the Board.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this **MOTION OF NAVAJO NATION EPA FOR LEAVE TO FILE A REPLY TO PEABODY WESTERN COAL COMPANY'S RESPONSE TO MOTION FOR VOLUNTARY REMAND** was served via first class mail, postage prepaid, on this 24th day of June 2010, upon:

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