IN RE PEABODY WESTERN COAL COMPANY

CAA Appeal No. 10-01

ORDER GRANTING MOTION FOR VOLUNTARY REMAND

Decided August 13, 2010

Syllabus

On May 28, 2010, the Navajo Nation Environmental Protection Agency ("NNEPA") filed a motion for voluntary remand of a Clean Air Act Title V operating permit it had issued to Peabody Western Coal Company ("Peabody") on December 7, 2009, under a delegation of authority from Region 9 of the U.S. Environmental Protection Agency. The permit governs air emissions from Peabody's Black Mesa Complex, an existing surface coal mine on Navajo Nation land near Kayenta, Arizona. NNEPA's motion comes on the heels of several months of settlement negotiations, in which NNEPA, Peabody, and Region 9 attempted, but failed, to resolve their disputes over the Title V permit's contents.

NNEPA seeks a remand so that it can revise the permit to address matters Peabody raised in this petition for review of the operating permit, filed January 7, 2010. Peabody opposes the remand, and Region 9 filed an *amicus curiae* brief arguing for a stay of proceedings or, in the alternative, seeking a grant of NNEPA's motion.

Held: The Environmental Appeals Board ("Board") grants the motion for voluntary remand. Although the permitting regulations applicable in this case, 40 C.F.R. part 71, do not expressly provide for motions for voluntary remand, the Board holds that it has inherent discretionary authority to rule on such motions in this context. The Board holds further that a grant of remand is appropriate here because NNEPA asserts that, in light of Peabody's arguments, it will revise the permit terms at issue in this case. Under these facts, granting a motion for voluntary remand is warranted.

Before Environmental Appeals Judges Edward E. Reich, Kathie A. Stein, and Anna L. Wolgast.

Opinion of the Board by Judge Wolgast:

I. *Introduction*

On May 28, 2010, the Navajo Nation Environmental Protection Agency ("NNEPA") filed a motion for voluntary remand of a Clean Air Act Title V operating permit it had issued to Peabody Western Coal Company ("Peabody") on December 7, 2009, under a delegation of authority from Region 9 of the

U.S. Environmental Protection Agency. The permit governs air emissions from Peabody's Black Mesa Complex, an existing surface coal mine located twenty miles southwest of Kayenta, Arizona, on Navajo Nation land. The Black Mesa mine is classified as a "major source" of air pollution under the Clean Air Act, and thus it is required to operate in accordance with a Title V permit. *See* CAA §§ 501(2), 502(a), 42 U.S.C. §§ 7661(2), 7661a(a) (Title V requirements).

II. *Issues on Appeal*

To rule on NNEPA's motion, the Environmental Appeals Board ("Board") must decide two primary issues: First, does the Board have authority to grant a motion for voluntary remand under 40 C.F.R. part 71, the regulations that govern these Title V permitting proceedings? Second, if the Board has such authority, is a voluntary remand appropriate in this particular case?

III. *Summary of Decision*

For the reasons stated below, the Board concludes that it has broad discretionary authority to manage its part 71 docket by granting and denying motions, including motions for voluntary remand. The Board concludes further that a grant of voluntary remand is appropriate in this instance.

IV. *Procedural History*

On January 7, 2010, Peabody filed a petition for review of its Title V permit, pursuant to 40 C.F.R. §§ 71.10(i) and 71.11(*l*). In its petition, Peabody objected to the inclusion in the permit of conditions based in whole or in part on the Navajo Nation Operating Permit Regulations, rather than on the part 71 operating permit regulations only.[1] Following the filing of the petition, Peabody and NNEPA, joined by EPA Region 9, engaged in several months of negotiations in which they attempted, but ultimately failed, to settle their disagreements about the permit's contents.

NNEPA now seeks a remand so that it can reopen and revise the permit, explaining that "certain clarifications and corrections should be made to the per-

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[1] Peabody contends that the Navajo requirements are not federally enforceable and may not be included in the permit. Peabody asks the Board to order NNEPA to remove a permit fee collection provision that, in its view, is authorized solely by the Navajo regulations. Pet'n at 7-11, 14. Peabody also seeks an order of removal of citations to Navajo regulations as co-authority, along with the part 71 rules, for other requirements in the permit. *Id.* at 11-14.

mit conditions that [Peabody] contested in its Petition for Review." Mot. for Vol. Remand at 2. NNEPA expects that its revisions will resolve "at least some" of the issues the petition raises and as such will narrow the scope of issues for Board review, thus conserving administrative resources. *Id.* at 2, 4.

Peabody strongly opposes the voluntary remand and has submitted a series of pleadings urging the Board to press forward with a decision on the petition.[2] Peabody rejects any claim that NNEPA's revisions on remand might resolve part or all of the present dispute, arguing to the contrary that "the administrative efficiency of this instant proceeding will be substantially hampered and compromised by a voluntary remand." Resp. to Mot. for Vol. Remand at 9-11. Peabody asserts that a single legal issue underlies each challenge in its petition and should be decided now by the Board; namely, "whether the Clean Air Act allows a part 71 federal operating permit, issued by an eligible Tribe under an EPA delegation of part 71 authority, to include permit conditions based on that Tribe's regulations which have not been approved by EPA." *Id.* at 9.

By leave of this Board, EPA Region 9 filed an *amicus curiae* brief arguing for a stay of proceedings or, in the alternative, seeking a grant of NNEPA's motion for voluntary remand. The Region expresses a procedural preference for a stay but contends that either a stay or a remand will avoid present litigation of substantive issues that may become moot or changed through NNEPA's revision of the permit, thereby conserving limited administrative resources. *Amicus Curiae* Brief at 8. The Region explains that, as the delegating agency for the part 71 program, it possesses a strong interest in ensuring consistency with federal permitting requirements and consequently intends to confer with NNEPA, informally, on how best to revise the permit in light of Peabody's concerns. *Id.*

V. *Analysis*

A. *The Board Has Inherent Authority to Rule on Part 71 Motions*

The permitting regulations applicable in this case, 40 C.F.R. part 71, do not explicitly provide for motions for voluntary remand at the post-petition, pre-response stage of proceedings, where the case presently stands. Indeed, the

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[2] The Board hereby grants Peabody's Motion for Leave to File Surreply to NNEPA's Reply to Peabody's Response Opposing NNEPA's Motion for Voluntary Remand, filed July 9, 2010, and accepts for filing the Surreply brief accompanying the motion. The Board also hereby grants Peabody's Motion for Leave to File Response to Region 9's *Amicus Curiae* Brief Moving for a Stay of Proceedings or, in the Alternative, Seeking a Grant of NNEPA's Motion for Voluntary Remand, which Peabody also filed July 9, 2010, and accepts for filing the accompanying response brief. Finally, the Board denies as unnecessary Peabody's Motion for Order Requesting EPA's Offices of Air and Radiation and General Counsel and EPA's Region IX to File a Brief, filed June 4, 2010.

regulations do not explicitly provide for motions for voluntary remand at *any* stage of the permit appeal proceedings. The only motions specifically addressed in the regulations are motions for reconsideration, which may be filed after the Board's issuance of a final order. *See* 40 C.F.R. § 71.11(*l*)(6). No interlocutory motions are explicitly provided for. *See generally* 40 C.F.R. pt. 71.

This state of affairs is not wholly unfamiliar to the Board. The part 124 permitting rules, which govern the majority of other permit appeals to this Board, and upon which the part 71 administrative review rules are closely predicated, similarly contain no explicit provision for motions for voluntary remand or other interlocutory matters.[3] *See* 40 C.F.R. pt. 124. In the absence of specific regulatory authority providing for motions for voluntary remand, a question arises as to whether the Board has discretionary authority or any other legitimate basis for ruling on such motions.

Neither the part 124 nor part 71 regulations address the issues of potential "gaps" in their procedural rules, or whether the Board has authority to fill any such gaps. The regulatory materials creating the Board and assigning it specific functions and duties similarly do not address these issues. *See* Changes to Regulations to Reflect the Role of the New Environmental Appeals Board in Agency Adjudications, 57 Fed. Reg. 5320, 5323, 5335-38 (Feb. 13, 1992) (directing Board only to "decide each matter before it in accordance with applicable statutes and regulations") (codified as amended in 40 C.F.R. § 1.25(e)).

By contrast, the Consolidated Rules of Practice ("CROP") at 40 C.F.R. part 22 – which govern enforcement appeals – assign to the Board explicit discretionary authority to rule on interlocutory motions and to otherwise actively manage those cases. *See* 40 C.F.R. §§ 22.1(c) (granting to the Board discretionary authority to resolve any questions not addressed in the CROP that arise at any stage of the enforcement proceedings before it), 22.4(a)(2) ("[i]n exercising its duties and responsibilities" under the CROP, the Board "may do all acts and take all measures as are necessary for the efficient, fair and impartial adjudication of issues arising in a proceeding"), 22.16(b) (the Board may issue orders concerning the disposition of motions as it deems appropriate); *see also In re Zaclon, Inc.*, 7 E.A.D. 482, 490 n.7 (EAB 1998) (in the part 22 context, "[t]he Board has authority to independently resolve procedural questions that are not addressed in our rules of practice"); *In re Neman*, 5 E.A.D. 450, 455 n.2 (EAB 1994) (Board is explicitly granted, in part 22 rules, discretion to resolve procedural gaps). The

[3] Notably, EPA amended the part 124 rules in May 2000, adding section 124.19(d), which authorizes a permit issuer to withdraw a permit as a matter of right at any time before the Board grants or denies review of the permit. This provision rendered requests for remand during the pre-review period unnecessary. *See* Amendments to Streamline the National Pollutant Discharge Elimination System Program Regulations: Round Two, 65 Fed. Reg. 30,886, 30,911 (May 15, 2000) (codified in 40 C.F.R. § 124.19(d)); *see also infra* Part V.B.3 (discussing § 124.19(d)).

closest the part 124 regulations come to addressing interlocutory motions on appeal is in the definition of "Environmental Appeals Board," which provides, without further elaboration, that the Board may exercise its "discretion" to refer a "motion" to the Administrator. 40 C.F.R. § 124.2; *see* 57 Fed. Reg. at 5321-22, 5335. These references suggest that the Agency contemplated some form of motions practice, as well as Board discretion in considering such motions, in the part 124 context.

The differing approaches to permit versus enforcement appeal procedures may be explained by the fact that administrative adjudications under part 22 are formal trial-like processes with many detailed procedural rules, whereas administrative adjudications under parts 124 and 71 are informal processes. *See*, *e.g.*, Amendments to Streamline the National Pollutant Discharge Elimination System Program Regulations: Round Two, 65 Fed. Reg. 30,886, 30,896-900 (May 15, 2000) (describing part 124 permit appeal proceedings as informal adjudications). However, simply because certain forms of administrative decisionmaking are informal does not mean that they are without need for sensible and prudent management by the agency decisionmaker.

The general principles of administrative law that apply in such circumstances are well established. In *American Farm Lines v. Black Ball Freight Service*, the Supreme Court of the United States stated that it is "always within the discretion of * * * an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it." 397 U.S. 532, 539 (1970). The action of the agency in such a case is not reviewable by the federal courts "except upon a showing of substantial prejudice to the complaining party." *Id.* Similarly, in *Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council*, the Supreme Court held, "Absent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." 435 U.S. 519, 543-44 (1978) (internal quotation omitted). The Board has relied in the past on these principles of administrative law to guide its decisions. *E.g.*, *In re Marine Shale Processors, Inc.*, 5 E.A.D. 751, 763 n.11 (EAB 1995) (reaching merits of petition for review despite some uncertainty as to whether all issues were properly preserved for review); *In re Genesee Power Station*, 4 E.A.D. 832, 837 n.6 (EAB 1993) (treating as timely a petition for review misfiled with the Region).

In the part 124 context, despite the lack of detailed procedures in the regulations, the Board has exercised broad discretion to manage its permit appeal docket by ruling on motions presented to it for various purposes, including motions for voluntary remand. *E.g.*, *In re Desert Rock Energy Co.*, 14 E.A.D. 484, 493 (EAB

2009) (granting voluntary remand after prior grant of review of air permit);[4] *In re GMC Delco Remy*, 7 E.A.D. 136, 169-70 (EAB 1997) (granting voluntary remand for corrective action study revisions); *In re Indeck-Elwood, LLC*, PSD Appeal No. 03-04, at 5-6 (EAB May 20, 2004) (Order Denying Respondent's Motion for Voluntary Partial Remand and Petitioners' Cross Motion for Complete Remand, and Staying Decision on Petition for Review) [hereinafter *Indeck-Elwood* Order] (denying motions for remand and imposing stay of proceedings as more suitable remedy); *In re NE Hub Partners, LP*, UIC Appeal Nos. 97-1 & 97-2, at 3 (EAB May 30, 1997) (Remand Order) (granting motion for remand to reconsider issues raised in public comments on draft permits).[5] The Board has also exercised discretion to relax or fill gaps in the appellate procedures for part 124 permits. *See*, *e.g.*, *In re Prairie State Generating Co.*, 13 E.A.D. 1, 49 & n.51 (EAB 2006) (applying standard for reopening public comment period in situation analogous, but not identical, to that contemplated by part 124 rules); *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 111 n.8 (EAB 1997) (denying motions for supplemental briefing as not aiding Board's deliberation); *In re Peabody W. Coal Co. Black Mesa Complex*, NPDES Appeal No. 09-10, at 1 (EAB Sept. 29, 2009) (exercising discretion to treat late petition as timely filed). The part 124 rules provide a system by which the "orderly transaction of business" – namely permit litigation – takes place before the Board.

In the Board's judgment, the broad case management discretion found in part 124 cases naturally extends to part 71 cases, which unfold in accordance with procedures very closely parallel to those of part 124. *See* Federal Operating Permits Program, 61 Fed. Reg. 34,202, 34,225 (July 1, 1996) (administrative review procedures in 40 C.F.R. § 71.11 are "based closely on the provisions of 40 CFR part 124"). Moreover, none of the participants in the present case object to the idea that the Board has discretion to rule on the pending motion.

Considering the foregoing points, the Board concludes that it has broad discretionary authority in this informal adjudicatory context to manage its part 71 docket by granting and denying motions, including motions for voluntary remand.

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[4] This *Desert Rock* decision is particularly analogous to the present case, in that while § 124.19(d) provides a permit issuer with authority to withdraw a permit prior to the Board's decision granting or denying review of that permit, the part 124 regulations are silent as to a motion for voluntary remand after a grant of review is made. Like the present case, the Board found that it had discretion to consider and act on such a motion.

[5] The Board decided *NE Hub Partners* and *GMC Delco Remy* prior to the May 2000 addition of section 124.19(d) to the administrative review regulations.

B. *Voluntary Remand Is Warranted in This Case*

1. *General Criteria*

In their various filings with this Board, NNEPA, Peabody, and the Region have all accepted the voluntary remand criteria established in the Board's part 124 case law as relevant and applicable in this part 71 matter. *See* Mot. for Vol. Remand at 3; Resp. to Mot. for Vol. Remand at 5-10; *Amicus Curiae* Br. at 10-11. Given the close similarities between the part 71 and 124 permit appeals processes, and considering all the arguments filed to date, the Board will treat these part 124 criteria as applicable, by analogy, to part 71.

In the part 124 context, the Board will typically grant a motion for voluntary remand in a case where the permit issuer "shows good cause for its request and/or granting the motion makes sense from an administrative or judicial efficiency standpoint." *Desert Rock*, 14 E.A.D. at 497. More specifically, the Board will grant a remand when the permit issuer "has decided to make a substantive change to one or more permit conditions, or otherwise wishes to reconsider some element of the permit decision before reissuing the permit." *Indeck-Elwood* Order at 6; *see Desert Rock*, 14 E.A.D. at 498. The elements of these tests are construed liberally so as to give meaningful effect to EPA's policy favoring permit decision-making by permit issuers, in the first instance, rather than by the Board. *See Desert Rock*, 14 E.A.D. at 495-500. Liberal construction, of course, does not equate to an absence of limitations; the Board may choose to deny motions for voluntary remand if they are made frivolously or in bad faith. *See id*. at 20, 14 E.A.D. at 498 (finding "ample room" in Board's part 124 voluntary remand criteria for motion denial on such grounds). The Board may also deny remand in cases where other processes, such as stays of proceedings, are deemed more suitable under the circumstances. *Indeck-Elwood* Order at 5-9 (staying consideration of petition for review of air permit until conclusion of interagency consultation under section 7 of the Endangered Species Act).

2. *NNEPA's Motion Meets the Threshold Requirements for Remand*

Peabody argues that NNEPA's motion lacks sufficient specificity to demonstrate good cause for a voluntary remand. *See* Resp. to Mot. for Vol. Remand at 6-8 (citing Board cases where, in Peabody's view, permit issuers provided very specific justifications for voluntary remand). The Board disagrees, in light of NNEPA's statements that it intends to "clarify and correct" the permit conditions Peabody contested in the petition for review. Those conditions are identified plainly in this record. *See* Pet'n at 7, 9 (listing "Disputed Permit Conditions" as conditions III.B, IV.A, IV.C-.E, IV.G-.I, IV.K-.L, IV.Q); Mot. for Vol. Remand at 3 ("NNEPA is proposing to make changes to the very same permit conditions that [Peabody] is challenging in its appeal"). By indicating the specific permit elements it plans to reconsider and the general grounds upon which it wishes to

reconsider them (i.e., to specify the regulatory basis or bases therefor), NNEPA adequately describes the course it will follow on remand.

Peabody also claims to be certain that NNEPA will continue on remand to include permit conditions based on the Navajo Nation Operating Permit Regulations, therefore predicting that a remand will waste adjudicatory resources while merely delaying the Board's need to address the merits of Peabody's petition. Resp. to Mot. for Vol. Remand at 8-11. The Board, however, is not persuaded that the motion should be denied based on Peabody's speculation about what might appear in a new permit. As noted, NNEPA wishes to reconsider and correct the permit elements that Peabody addresses in its appeal, and the Region has voiced intent to consult with NNEPA, in its Title V oversight capacity, in light of Peabody's concerns. The Board can only speculate, at this point, about what exactly a revised permit might contain. Accordingly, for the Board to press forward now in the face of a motion for voluntary remand would be, in essence, to "exercis[e] our appellate jurisdiction before the permitting authority has finished evaluating the underlying permit decision." *Indeck-Elwood* Order at 7-8. Such action would be premature.

In addition, Peabody has not alleged, let alone substantiated, frivolousness or bad faith as barriers to NNEPA's motion. Further, Peabody has not claimed substantial prejudice to its own interests, *see Am. Farm Lines*, 397 U.S. at 539, or asserted that a grant of the motion would violate the United States Constitution in some way, *see Vt. Yankee*, 435 U.S. at 543-44. Moreover, the Board is not aware of any "extremely compelling circumstances," *see* 435 U.S. at 543-44, that would caution against a voluntary remand here. Instead, the part 71 permitting rules stay the effectiveness of any permit terms or conditions challenged via a petition for review, so Peabody has no present obligation to comply with the permit provisions it disputes, thereby mitigating any harm it might otherwise bear. 40 C.F.R. § 71.11(i)(2)(ii). Accordingly, the Board finds no reason to proceed further with this matter now, when the permitting authorities expect to make changes that may wholly or partially resolve the disputes presently pending before this tribunal.

3. *The Principles Behind Section 124.19(d) Also Support a Voluntary Remand Here*

Another factor in favor of a voluntary remand in this case is 40 C.F.R. § 124.19(d), which EPA added to the part 124 rules in May 2000. *See* Amendments to Streamline the National Pollutant Discharge Elimination System Program Regulations: Round Two, 65 Fed. Reg. 30,886, 30,911 (May 15, 2000). As noted above, this provision gives permit issuers an unqualified, unilateral right to withdraw part or all of a permit, upon notification of the Board and any interested parties, at any time prior to Board action granting or denying review of the permit. The permit issuer then prepares a new draft permit that proceeds through the same process of public comment and opportunity for a public hearing as would apply to

any other draft permit subject to those regulations. *Id.* (codified at 40 C.F.R. § 124.19(d)). This unqualified right allows permit issuers to take back permits recognized as deficient in some way during the early stages of litigation, before substantial Board and litigant resources are expended on adjudicating such cases, thereby conserving scarce resources.

The part 71 regulations do not include a comparable provision to section 124.19(d), and Peabody argues that this omission was a deliberate choice by EPA in promulgating the Title V regulations. Resp. to *Amicus Curiae* Br. at 7-8. The Board thinks otherwise. In proposing the part 71 rules, the Agency explained the following:

> The EPA considered two alternative methods of establishing * * * administrative review procedural requirements. The first alternative would be to amend the existing procedures in 40 CFR part 124, which establish[] specific decision making procedures for [certain waste, well injection, air, and water] permits, so that the procedures would be compatible with the part 71 program. * * * The second alternative was to establish * * * administrative appeal procedures as a separate section of this rule. This alternative has the advantage of allowing these procedures to focus specifically on the needs of the part 71 program as well as appear in close proximity to the permit program requirements in the Code of Federal Regulations.
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> Today's proposal follows the second alternative. The proposed * * * administrative appeals procedures are set out at § 71.11 and are based closely on selected provisions of part 124, subpart A. The EPA does not believe the choice of one format over the other will have a substantial impact on the implementation of this rule.

Federal Operating Permits Program, 60 Fed. Reg. 20,804, 20,824 (proposed Apr. 27, 1995); *see also* Federal Operating Permits Program, 61 Fed. Reg. 34,202, 34,225-26 (July 1, 1996) (conforming part 71 rule more closely to part 124 (specifically § 124.15) and explaining Agency interest in separating Title V appeals procedures from procedures in part 124); Federal Operating Permits Program, 64 Fed. Reg. 8247, 8259 (Feb. 19, 1999) (conforming part 71 rule to part 124 rule requiring EPA to publish notice of final Clean Air Act Prevention of Significant Deterioration permits).

Taken as a whole, the regulatory history provides no support for Peabody's position that in promulgating the part 71 rules, "EPA saw no need for part 71 permits to be withdrawn from the Board's consideration." Resp. to *Amicus Curiae*

Br. at 8. Rather, the history indicates only that the Agency hoped to simplify Title V permitting by centralizing it as much as possible and by separating it from multi-statute procedural requirements that might confuse litigants. Moreover, the later history shows that the Agency has augmented the original appeal procedures twice so far to make them more consistent with part 124 procedures.

The part 124 regulatory history, on the other hand, establishes that a permit issuer's right of permit withdrawal has been exercised, and is considered useful, in all other statutory contexts the Board oversees. *See* Amendments to Streamline the NPDES Program Regulations: Round Two, 61 Fed. Reg. 65,268, 65,281 (proposed Dec. 11, 1996) (proposing addition of § 124.19(d) to part 124 rules, explaining that "[i]n practice, EPA has withdrawn and reissued permits *under all statutes* prior to decisions of the [Board]") (emphasis added). The instant case suggests that similar procedural authority could be helpful in the part 71 context as well. *Cf. id.* (proposing that section 124.19(d) "will serve the public interest by shortening the time for appeals that may be brought by interested citizens, allowing for the more timely resolution of these appeals, with a shorter stay of conditions"). The Board finds section 124.19(d) instructive and supportive in principle of a grant of voluntary remand in the present case.

4. *The "Reopening the Permit" Arguments Are Inapplicable*

NNEPA originally sought a remand so that it could "reopen" and revise the operating permit. Mot. for Vol. Remand at 2, 4. The part 71 regulations contain provisions that allow issued, currently in-effect Title V operating permits to be reopened "for cause" prior to their expiration dates. 40 C.F.R. § 71.7(f)-(g). The part 124 (and associated statute-specific) regulations contain similar provisions, allowing issued, in-effect permits of specific kinds to be modified, revoked and reissued, or terminated "for cause" prior to their expiration dates. *See id.* § 124.5(a) (water, underground injection well, and hazardous waste permits), 122.63-.64 (water permits), 144.39-.40 (well permits), 270.41, .43 (waste permits).

Peabody originally objected to NNEPA's request, claiming that under the plain language of the part 71 rules, only EPA, and not any delegated agency such as NNEPA, has authority to reopen permits.[6] Resp. to Mot. for Vol. Remand at 11-13 (citing 40 C.F.R. § 71.7(f)(iii)-(iv)). EPA Region 9 disputed Peabody's interpretation of section 71.7(f)(iii)-(iv) and argued that those provisions do not, in fact, strip delegated agencies of authority to reopen a permit. *Amicus Curiae* Br. at 9-10 & n.7. Region 9 also pointed out that, in any event, NNEPA's request

[6] In subsequent filings, Peabody concedes, rightly in our view, that a "plausible interpretation" of section 71.7(f)(iii)-(iv) could find that either EPA or a delegated agency could reopen a part 71 permit. Surreply at 8; Resp. to *Amicus Curiae* Br. at 6.

was not appropriately characterized as "reopening" the permit, because the permit conditions in question are not yet final and effective. *Id.* at 4-5. Instead, the Region laid out the proper course for NNEPA to follow to accomplish its desired objective, which simply would be to reconsider and revise the challenged portions of the permit, issue the revised draft portions of the permit for public comment, consider and respond to public comments, and then issue the final revised permit, all in accordance with the same procedures and authorities it used for initial permit issuance. *See id.* at 5. The Board agrees with the Region's interpretation of 40 C.F.R. § 71.7(f)-(g) that the Title V provisions for reopening issued, currently in-effect permits are not relevant or applicable to the instant dispute.

VI. *Order*

In conclusion, the Board hereby **GRANTS** NNEPA's motion for voluntary remand of CAA Permit No. NN-OP 08-010, **REMANDS** the permit in its entirety to NNEPA, and **DISMISSES WITHOUT PREJUDICE** Peabody's petition for review, denoted CAA Appeal No. 10-01. Peabody retains a legal right to file a new petition for review with the Board pursuant to 40 C.F.R. § 71.11(*l*)(1) following NNEPA's issuance of a revised final permit decision on remand.

In any petition for review filed after NNEPA's issuance of a revised final permit decision, Peabody may reassert objections made in CAA Appeal No. 10-01 and may also assert new objections based on any changes made to the permit decision on remand. 40 C.F.R. § 71.11(*l*)(1). Any other interested person (other than Peabody) who participates in the remand process and is not satisfied with NNEPA's decision on remand may petition the Board for review only to the extent of any changes made on remand. *Id.*

An appeal of NNEPA's decision on remand is required to exhaust administrative remedies. *Id.* § 71.11(*l*)(5)(iii).

So ordered.