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June 10, 2010

Via Federal Express

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

Re: In re Peabody Western Coal Company
CAA Permit No. NN-OP-08-010
CAA Appeal No. 10-01

Dear Ms. Durr:

Enclosed please find an original and five copies of Peabody Western Coal Company's Response to the Navajo Nation EPA's Motion for Voluntary Remand and Memorandum in Support of Motion in the above-referenced matter. Exhibit A has also been enclosed for the original of that Response and for each copy of same.

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

Sincerely,

John R. Cline

Enclosures

ORIGINAL

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

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

PEABODY WESTERN COAL COMPANY'S RESPONSE TO THE NAVAJO NATION EPA'S MOTION FOR VOLUNTARY REMAND AND MEMORANDUM IN SUPPORT OF MOTION

On January 7, 2010, Peabody Western Coal Company ("Peabody" or the "Company") petitioned EPA's Environmental Appeals Board ("EAB" or the "Board") to review a part 71 federal operating permit that had been issued for the Company's Black Mesa Complex by the Navajo Nation Environmental Protection Agency (the "NNEPA") under a delegation of authority from EPA Region IX. Five months later, the NNEPA has yet to provide the Board with any substantive response. Instead, on May 28, 2010, the NNEPA has now requested the Board to voluntarily remand the subject permit in order for the NNEPA to make "certain clarifications and corrections" to some of the permit's conditions.

Peabody strongly opposes the NNEPA's Motion for Voluntary Remand ("Remand Motion") for several reasons. First, the NNEPA's Motion for Voluntary Remand fails to satisfy the Board's threshold standard for granting such requests. The NNEPA's Remand Motion does not identify a single, substantive change that the NNEPA plans to make to the subject permit, nor does the Remand Motion identify any significant issue that the NNEPA intends to reconsider

upon remand. Contrary to the NNEPA's claim in its Remand Motion, voluntary remand of the subject permit will not be administratively or judicially efficient in this matter because there is but a single legal issue underlying the Company's Petition and that issue is certain to remain following the requested remand and any intended permit revisions made by the NNEPA.

In addition to the NNEPA's failure to demonstrate good cause for the Board to remand the subject permit, the NNEPA's proposed actions on that permit, if remanded, are not authorized under the Clean Air Act ("CAA" or the "Act"). When the NNEPA reopens and revises that federal permit, the NNEPA will *not* do so in accordance with applicable federal procedural requirements. Instead, the NNEPA's Remand Motion states that the permit will be reopened and revised in keeping with specific procedures of the Navajo Nation Operating Permit Regulations ("NNOPR"), i.e., Tribal regulations that have never been approved by EPA and consequently are not federally enforceable.

Consistent with the Company's position on the single legal issue raised by its Petition, this Response explains (1) that applicable federal regulations prohibit the NNEPA from determining that cause exists to reopen the subject permit, and (2) that the NNOPR, i.e., the non-EPA-approved Tribal regulations, cannot authorize the NNEPA to reopen the subject federal operating permit. Also consistent with the Company's position on the single legal issue raised by the Company's Petition, this Response explains why the NNEPA cannot rely on its Tribal regulations as the authority to revise the subject federal operating permit.

The single legal issue raised by the Company's Petition will remain unresolved until the Board issues a decision on that question. The issue is one of national significance because it addresses the scope of a delegate Tribal agency's authority at a time when EPA expects to increasingly delegate its authority to administer several CAA programs to a number of tribes.

Therefore, for the reasons explained herein, Peabody respectfully urges the Board to DENY the NNEPA's Remand Motion and to affirm its current order for the NNEPA to respond to the Company's Petition.

BACKGROUND

Under title V of the Clean Air Act, 42 U.S.C. §§ 7661 *et seq.*, certain stationary sources are required to have operating permits. *Id.* at § 7661a(a). The purpose of a title V operating permit is to contain all of the Clean Air Act requirements that apply to the source in question. *See, e.g.*, 57 Fed. Reg. 32,251 (July 21, 1992).

There are two similar, but different, types of title V operating permit programs. Permit programs established under 40 C.F.R. part 70 consist of EPA-approved programs in which State or Tribal operating permits are issued. Each State is required to implement an EPA-approved part 70 State operating permit program. 42 U.S.C. § 7661a(d). Each eligible Tribe is allowed, but is not required, to implement an EPA-approved part 70 Tribal operating permit program. *See, e.g.*, 64 Fed. Reg. 8,248 (Feb. 19, 1999).

The Navajo Nation has begun the process of establishing its own operating permit program under the Clean Air Act by adopting the Navajo Nation Operating Permit Regulations. 4 N.N.R. §§ 11-2H-101 *et seq.* Importantly, however, the NNOPR have never been approved by EPA, and thus the Navajo Nation does not have a part 70 Tribal operating permit program. As a consequence of EPA not having approved the NNOPR, it follows that any requirement of those Tribal regulations is not federally enforceable.

When a Tribe does not have an EPA-approved part 70 program, EPA implements title V for applicable stationary sources within that Tribe's jurisdiction through EPA's own federal operating permit program at 40 C.F.R. part 71. 40 C.F.R. § 71.4(b). By their very nature,

operating permits issued by EPA under part 71 are neither State nor Tribal permits; rather, they are federal permits. Furthermore, when a Tribe does not have an EPA-approved part 70 program, instead of EPA implementing its part 71 program for the applicable sources within the Tribe's jurisdiction, EPA may delegate its authority to administer the part 71 program for such sources to that Tribe. 40 C.F.R. § 71.10(a).

The original title V permit for Peabody's Black Mesa Complex, located on the Navajo Nation Reservation, was issued by EPA Region IX under the part 71 federal operating permit program because the Navajo Nation did not have an EPA-approved part 70 Tribal operating permit program. 71 Fed. Reg. 26,497 (May 5, 2006) (permit effective July 1, 2004). EPA Region IX thereafter delegated its authority to administer and enforce the part 71 federal program for Black Mesa Complex and certain other sources to the NNEPA. 69 Fed. Reg. 67,578 (Nov. 18, 2004). In December 2009, acting under its delegated part 71 authority, NNEPA reissued the part 71 federal operating permit for Black Mesa Complex. Petition, Ex. A.

On January 7, 2010, Peabody petitioned the Environmental Appeals Board to review that NNEPA-issued part 71 federal operating permit. In particular, Peabody challenges that federal operating permit's inclusion of certain conditions based on the NNOPR. Because the Tribe's own operating permit program (NNOPR) remains unapproved by EPA, requirements based on those Tribal regulations are not federally enforceable. Peabody argues that such Tribal-enforceable-only requirements have no legitimate place within the four corners of a federal operating permit required by title V.

NNEPA has now moved the Board to remand the NNEPA-issued part 71 federal operating permit to the NNEPA so that agency may "reopen and revise" "the very same permit conditions that PWCC is challenging in its appeal" to the Board. Remand Motion at 2-3.

According to NNEPA, "certain clarifications and corrections should be made" to those permit conditions. *Id.* at 2.

ARGUMENT

The EAB is charged with hearing appeals of different kinds of EPA-issued permits under a variety of federal environmental statutes. EAB Practice Manual, Section III.B and IV.C (June 2004). "A permit issued by a delegate is still an 'EPA-issued' permit . . . ." *In re West Suburban Recycling and Energy Center, L.P.* [hereinafter "*In re WSREC*"], 6 E.A.D. 692, 695 n.4 (1996) (quoting 45 Fed. Reg. 33,413 (May 19, 1980)). Although there are no regulatory requirements for motions filed under 40 C.F.R. part 71, the Board nevertheless generally has broad discretion to grant a voluntary remand. *In re Desert Rock Energy Company, LLC*, PSD Appeal Nos. 08-03, 08-04, 08-05 & 08-06, *slip op.* at 13, 14 E.A.D. ___ (EAB Sept. 24, 2009).

"[T]he Board typically grants a motion where the movant shows good cause for its request and/or granting the motion makes sense from an administrative or judicial efficiency standpoint." *Id.* at 19. In particular, the Board generally grants a motion for voluntary remand when the requesting permitting authority "has decided to make a substantive change to one or more permit conditions, or otherwise wishes to reconsider some element of the permit decision." *In re Indeck-Elwood, LLC*, PSD Appeal No. 03-04, at 6 (EAB May 20, 2004) (Order Denying Respondent's Motion for Voluntary Partial Remand and Petitioner's Cross Motion for Complete Remand, and Staying the Board's Decision on the Petition for Review).

I. THE RATIONALE FOR NNEPA'S MOTION DOES NOT MEET THE BOARD'S THRESHOLD CRITERIA FOR GRANTING VOLUNTARY REMAND.

A. NNEPA's Proposed Permit Revisions or Reconsiderations Lack Sufficient Specificity to Demonstrate Good Cause.

To obtain the Board's voluntary remand of the NNEPA-issued permit for Black Mesa Complex, NNEPA must demonstrate that it plans "to make a *substantive* change" to one or more conditions in that permit or that it plans to "reconsider some element of the permit decision." *Id.* (emphasis added). The NNEPA's Remand Motion, however, contains no descriptions of its proposed permit changes that are sufficiently detailed to show that such changes would, in fact, be substantive. Moreover, the Remand Motion fails to identify and discuss any particular element of the NNEPA-issued permit that NNEPA would reconsider.

In the Board's earlier proceeding involving an EPA-issued permit for the Desert Rock Energy Facility, Region IX's motion for voluntary remand identified and discussed several specific issues that it sought to reconsider on remand. For example, the Region's remand motion discussed at length a need to consider coordinated completion of the prevention of significant deterioration ("PSD") permit review, consultation under the Endangered Species Act ("ESA"), and the Maximum Achievable Control Technology ("MACT") determination under CAA section 112(g). *In re Desert Rock Energy Company, LLC*, PSD Appeal Nos. 08-03, 08-04, 08-05 & 08-06, at 9-17, (EAB Apr. 27, 2009) (EPA Region 9's Motion for Voluntary Remand). The Region IX remand motion in that proceeding also explained in detail why, on remand, it would reconsider its decision not to evaluate IGCC (Integrated Gasification Combined Cycle) technology as a BACT (Best Available Control Technology) option. *Id.* at 18-23. Furthermore, that same Region IX remand motion explained that it wanted to reconsider not only its use of PM_{10} as a surrogate to satisfy PSD requirements for $PM_{2.5}$, *id.* at 9, but also its questionable

heavy reliance on a 1980 screening document used in the Region's PSD-required additional impacts analysis, *id.* at 23-25.

Furthermore, in the Board's previous proceeding involving two Underground Injection Control permits issued by Region III, one reason for the Region seeking voluntary remand of those permits was the acknowledged incomplete nature of the Region's response-to-comments documentation. *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 563 n.14 (EAB 1998). In another case before the Board that involved a permit issued under the Resource Conservation and Recovery Act of 1976 ("RCRA") by Region V, the permit was voluntarily remanded to the Agency because it intended to change the permit requirement for a Corrective Measures Study Plan to make it due "only after the final RFI [RCRA Facility Investigation] has been approved . . . ." *In re GMC Delco Remy*, 7 E.A.D. 136, 169 (EAB 1997).

In short, the Board granted requests for voluntary remands of permits in the above-mentioned proceedings because each permitting authority had identified and explained specific revisions to be made to particular permit conditions and/or had discussed specific reasons for reconsidering particular issues affecting the permit decision. By comparison, the NNEPA's Remand Motion contains no meaningful specificity regarding planned permit changes or particular issues to be reconsidered. Indeed, NNEPA's Motion does nothing beyond averring that "certain clarifications and corrections should be made to the permit conditions that PWCC contested in its Petition for Review." Remand Motion at 2.

A motion for the Board's remand of a permit must demonstrate a threshold level of good cause. The NNEPA's Motion for Remand in this instance, however, falls far short of that mark. NNEPA's Motion does not identify any substantive change to be made to any permit condition. Nor does NNEPA's Motion identify any particular element of the permit decision that it wishes

to reconsider. NNEPA's Motion simply fails to provide sufficient information for the Board to make an informed decision that the NNEPA has demonstrated good cause for its request.

B. Granting the NNEPA's Motion Will Not Promote Administrative or Judicial Efficiency.

To obtain the Board's voluntary remand of the NNEPA-issued permit for Black Mesa Complex, alternatively the NNEPA Motion for Remand must "make[ ] sense from an administrative or judicial efficiency standpoint." *In re Desert Rock Energy Company* at 19. As explained above, however, the NNEPA's Remand Motion is devoid of any details about any specific action that NNEPA would take upon remand of the part 71 federal operating permit for Black Mesa Complex.

In its Remand Motion, NNEPA states that the requested remand "to make proposed revisions is consistent with principles of judicial efficiency and the Board's interest in 'prompt and informed resolution of permit appeals.'" Remand Motion at 3 (citation omitted). In addition, the Remand Motion opines that the requested remand "to clarify these permit conditions may not completely dispose of the issues in PWCC's Petition for Review, but it will certainly advance the appeals process by narrowing the scope of the issues to be reviewed." *Id.* at 4. The NNEPA simply has no factual basis for making those statements.

Without the Remand Motion providing specific details of the NNEPA's "proposed revisions," the Board has no means for evaluating whether those changes are consistent "with principles of judicial efficiency and the Board's interest in 'prompt and informed resolution of permit appeals.'" Moreover, without the Remand Motion providing any particulars about the "clarifications and corrections" that the NNEPA intends for unidentified permit conditions, the Board lacks an objective, informed basis for determining whether such abstract "clarifications and corrections" will dispose of some issues in the Company's Petition, thus narrowing the scope

of issues remaining to be reviewed. In short, the Remand Motion's offer of proof is nothing more than generalized conclusory statements with no underlying factual support.

The Board must understand that the administrative efficiency of this instant proceeding will be substantially hampered and compromised by a voluntary remand of the NNEPA-issued part 71 federal operating permit for Black Mesa Complex. The NNEPA's Remand Motion mischaracterizes the effect that remand would have on the scope of issues before the Board in this proceeding. The NNEPA claims that the number of such issues will be reduced after the NNEPA's completion of unidentified actions upon remand to resolve some of those issues. However, while Peabody's Petition challenges several different conditions in the NNEPA-issued part 71 federal operating permit, there is only a single legal issue underlying all of those contested permit conditions.

More specifically, at issue in this proceeding is 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. Peabody's Petition raises that sole issue for each permit condition that cites the NNOPR as authority for that condition.

Although the Remand Motion does not provide a descriptive explanation of any planned permit change that the NNEPA would make upon the Board's remand of that permit, the NNEPA's counsel has verbally advised Peabody's counsel that the NNEPA intends to make those permit revisions that the NNEPA had earlier proposed during settlement negotiations between the parties. Personal communication from Jill E. Grant, counsel to Navajo Nation EPA, to John R. Cline, counsel to Peabody Western Coal Company (May 26, 2010). That particular action by the NNEPA means, without question, that upon remand by the Board and subsequent

"clarifications and corrections" of certain permit conditions by the NNEPA, the NNEPA-revised permit for Black Mesa Complex would continue to include permit conditions based on that Tribe's regulations which have not been approved by EPA. In short, the NNEPA's Remand Motion before the Board does not constitute one of those situations where remand is appropriate because an agency wishes "to reconsider its previous position" or "because it believes that its original decision is incorrect on the merits and wishes to change the result." *In re Desert Rock Energy Company* at 20 (citations omitted).

The Remand Motion's assurance that "PWCC will have the right to appeal the revised provisions of the permit to the EAB[,]" Motion at 4, provides no solace to Peabody and, indeed, should give the Board pause. With the NNEPA-revised permit continuing to contain requirements based on EPA-unapproved Tribal regulations, Peabody would seek relief from the Board by filing a new petition for review that would present the same legal issue underlying the Company's current Petition. Thereafter, the NNEPA presumably might request a remand of the revised permit from the Board in order to make further "clarifications and corrections" to the revised permit. So long as any revised part 71 federal operating permit for Black Mesa Complex includes requirements based on the EPA-unapproved NNOPR, this circular administrative procedure of permit revision-appeal-remand could in theory go on *ad infinitum*.

Thus, contrary to assertions in the Remand Motion, the Board's grant of the requested remand of the NNEPA-issued part 71 federal operating permit for Black Mesa Complex would do little more than, in effect, maintain the status quo of the Company's Petition for Review. In this proceeding the Company's Petition raises one key legal issue for which the Board's resolution is sought. After the NNEPA makes "certain clarifications and corrections" to a remanded permit, that one key legal issue for the Board's resolution will still remain.

In the interim, however, significant NNEPA resources would have been expended while making currently unspecified permit changes; while seeking and reviewing comments on those proposed permit revisions from EPA, from contiguous States and Tribes, from Peabody and from the general public; while responding to those comments; and while finalizing and issuing the revised permit decision with its associated statement of basis and a new set of responses to comments. At a minimum, Peabody would again have to challenge inclusion of NNOPR-based requirements in the draft NNEPA-revised part 71 federal operating permit, culminating in the need to file a new petition for review of the revised permit with the Board.

Because the NNEPA's planned actions upon a remanded part 71 federal permit for Black Mesa Complex offer no possibility of resolving the one key issue that Peabody's current Petition presents, that remand would result not only in a significant waste of the parties' administrative resources but also in a considerable delay in the Board's ultimate need to address the merits of the Company's Petition. Therefore, one reason for the Board to deny the Remand Motion is simply to avoid the substantially diminished administrative efficiency that would result from granting that Motion.

II. THE NNEPA HAS NO AUTHORITY UNDER PART 71 TO REOPEN THE SUBJECT PERMIT FOR THE APPLICABLE CAUSES.

Should the Environmental Appeals Board grant the NNEPA's request and remand the part 71 federal operating permit for Black Mesa Complex to the NNEPA, that Tribal agency would then "reopen and revise . . . portions of the permit." Remand Motion at 2. However, the plain language of applicable regulations under 40 C.F.R. part 71 confirms that the NNEPA has no such authority under the CAA to reopen that federal operating permit for the applicable causes.

The authority to administer a part 71 federal operating permit program has been fully delegated to the NNEPA by EPA Region IX. 69 Fed. Reg. 67,578 (Nov. 18, 2004). Such a delegation, however, does not mean that EPA is completely without part 71 authority in those circumstances. Rather, a "fully" delegated program means only that EPA has delegated all of its authority which the Clean Air Act allows the Agency to delegate for that particular program.

With respect to reopening a part 71 permit for cause, 40 C.F.R. § 71.1(f) prescribes particular causes which must exist before the permit "will be reopened prior to the expiration of the permit." More specifically, the part 71 regulations specify that a part 71 permit must be reopened when either of the following causes is found to exist:

> (iii) The permitting authority (*or EPA, in the case of a program delegated pursuant to § 71.10*) 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.
> (iv) The permitting authority (*or EPA, in the case of a program delegated pursuant to § 71.10*) determines that that the permit must be revised or revoked to assure compliance with the applicable requirements.

40 C.F.R. §§ 71.7(f)(iii) and 71.7(f)(iv) (emphases added). Any reopening of the part 71 federal operating permit for Black Mesa Complex to allow the NNEPA's planned "clarifications and corrections" to that permit would need to rely upon either one or both of the above-specified causes for permit reopening.

The NNEPA's authority to issue the part 71 federal operating permit for Black Mesa Complex has been delegated pursuant to 40 C.F.R. § 71.10. 69 Fed. Reg. 67,578. "[I]n the case of a program delegated pursuant to 40 C.F.R. § 71.10," *id.*, the language of the above regulations plainly identifies EPA, and only EPA, as the authority for determining whether those particular causes for permit reopening exist. Therefore, for a reopening of that permit under either one of

the particular causes at 40 C.F.R. §§ 71.7(f)(iii) and 71.7(f)(iv), those regulatory provisions clearly prescribe that only EPA is authorized to determine whether those causes for reopening exist.

Indeed, 40 C.F.R. § 71.7(g) ("Reopenings for cause by EPA for delegated programs") describes specific responsibilities of a part 71 delegate agency, e.g., the NNEPA, when revising a part 71 permit. However, that regulatory provision also makes clear that the delegate agency's responsibilities in a permit revision begin only after, "*the Administrator finds that cause exists* to terminate, modify, or revoke and reissue a permit pursuant to paragraph (f) of this section." 40 C.F.R. § 71.7(g) (emphasis added). In other words, while the NNEPA, as a part 71 delegate agency, has a responsibility to revise a part 71 permit once it has been reopened, only EPA has the authority to determine in the first instance whether cause exists to reopen that permit.

Peabody's Petition for Review seeks relief from the Board due to the NNEPA unlawfully acting outside its delegated authority in issuing the part 71 federal operating permit for Black Mesa Complex. The NNEPA's reopening of that permit, if it is remanded by the Board, would constitute further unlawful action beyond the NNEPA's part 71 delegated authority. Thus, NNEPA's planned, unauthorized reopening of the permit constitutes added justification for the Board's denial of the NNEPA's remand request.

III. THE CLEAN AIR ACT DOES NOT AUTHORIZE RELIANCE ON NNEPA REGULATIONS TO REVISE THE SUBJECT PART 71 FEDERAL OPERATING PERMIT.

Assuming *arguendo* that the Board did grant the NNEPA Motion for Remand, and further assuming *arguendo* that the NNEPA had authority under the Act to reopen the part 71 federal operating permit for Black Mesa Complex and, upon remand, did reopen that permit, then the NNEPA's stated reliance on specific provisions within NNOPR to make "certain

clarifications and corrections" to that permit's conditions would nevertheless be unlawful under the CAA.

The NNEPA states that it would reopen the subject part 71 permit in accordance with NNOPR § 406(A)(2). Remand Motion at 4. Then, according to the NNEPA, after drafting proposed revisions to certain permit conditions, the draft revised permit would be subject to public comment in keeping with NNOPR §§ 403(A)-(D). *Id.* The NNEPA's planned future actions with respect to the subject permit are no different from the NNEPA's past actions during the initial issuance of that permit which Peabody has asked the Environmental Appeals Board to review. That is, Peabody believes that a condition in a part 71 federal operating permit, even when issued by a Tribal agency under a delegation of part 71 authority, cannot be based on EPA-unapproved Tribal regulations whose requirements are not federally enforceable.

A. The Part 71 Delegation of Authority to the NNEPA Does Not Authorize Issuance of a Part 71 Federal Permit in Accordance with Tribal Substantive or Procedural Requirements.

Many of the requirements within the NNOPR parallel the requirements within 40 C.F.R. part 70 because the NNEPA intends ultimately to gain EPA approval of the NNOPR as a part 70 Tribal operating permit program. Petition, Ex. B (October 15, 2004 Delegation of Authority Agreement) at 2. However, to date, such EPA approval has not been granted, and, therefore, no requirement within the NNOPR is federally enforceable.

In addition to the typical part 70 requirements, however, the NNOPR also contains Subpart VII specific to "Part 71 Program Delegation," attached as Exhibit A. Section 701 of those Tribal regulations provides NNEPA with the Tribal authority to administer a part 71 program "*pursuant to the procedures set forth* both *in these regulations* and 40 C.F.R. part 71." 4 N.N.R. § 11-2H-701 (emphasis added). Section 704 of those Tribal regulations incorporates

40 C.F.R. part 71 by reference into the NNOPR with the exception of a few non-applicable provisions within part 71. 4 N.N.R. § 11-2H-704(A). However, Section 704 also provides that "[n]otwithstanding subsection [704(A)], *the Navajo Nation procedures* set forth in the section listed under § 705 *shall apply to part 71 permits* in addition to the part 71 procedures." 4 N.N.R. § 11-2H-704(B) (emphasis added). Section 705 in turn lists the following *NNOPR procedures with which "[p]art 71 permits shall be administered and enforced*": Sections 104, 201, 305, 401-406 (permit processing), 501-505 (enforcement) and 601-603 (permit fees). 4 N.N.R. § 11-2H-705 (emphasis added). In short, by relying on its Tribal authority, the NNEPA have supplemented the federal procedural requirements of 40 C.F.R. part 71 by adding specific NNOPR procedural requirements.

1. The NNEPA's reliance on Tribal procedural requirements to revise the part 71 federal permit is not authorized by the Clean Air Act.

Title V of the Clean Air Act requires EPA to "promulgate, administer, and enforce" a federal operating permit program in areas for which a permit program under 40 C.F.R. part 70 has not been approved by EPA. 42 U.S.C. § 7661a(d)(3). Conversely, neither that statutory provision nor any other provision of the Act mandates or allows a Tribal agency to promulgate, administer and enforce a federal operating permit program when the Tribe lacks an EPA-approved part 70 program.

Put simply, there is nothing within the Clean Air Act that would authorize the addition of non-EPA-approved Tribal regulations to the part 71 federal operating permit program. Therefore, the NNEPA's stated intent to rely upon procedural requirements within the NNOPR to revise the part 71 federal permit for Black Mesa Complex would clearly constitute action not in accordance with the law.

2. Delegation of federal permitting authority under the Act requires the delegate agency to apply federal procedural requirements when issuing the federal permit.

For purposes of part 71, a delegate Tribe stands in the shoes of the Regional Administrator and must follow the procedural requirements of part 71. *In re WSREC* at 695 n.4 ("For purposes of part 124, a delegate State stands in the shoes of the Regional Administrator [and must] follow the procedural requirements of part 124.") (quoting 45 Fed. Reg. 33,413 (May 19, 1980)). Thus, any actions taken by NNEPA with respect to the part 71 federal permit for Black Mesa Complex must be performed in accordance with the applicable procedural requirements of part 71 and not with the procedural requirements of the NNOPR.

Yet, because the delegation of part 71 federal authority to the NNEPA was contingent upon the NNEPA having adequate authority *under Tribal law* to execute all aspects of the delegated program, 40 C.F.R. § 71.10(a), the NNEPA seems to believe that its delegated part 71 authority has somehow "federalized" those requisite Tribal authorities, in general, and the NNEPA's permit processing procedures, in particular. Given that erroneous belief, the NNEPA-issued part 71 federal operating permit for Black Mesa Complex contains several permit conditions based not only on part 71 but also on the NNOPR. Should the Board remand that permit as the NNEPA now requests, then the NNEPA would further rely on that erroneous belief and continue to base some some conditions in a revised permit either on both part 71 and the NNOPR or solely on the NNOPR.[1]

[1] As previously explained, the NNEPA's Motion for Remand is very skeletal and non-specific; it does not identify the particular nature of the permit revisions that the NNEPA plans to make. Nevertheless, counsel to the NNEPA has advised counsel to Peabody that the NNEPA intends to make the particular revisions which the Tribal agency has earlier proposed during settlement discussions between the parties. Personal communication from Jill E. Grant, counsel to Navajo Nation EPA, to John R. Cline, counsel to Peabody Western Coal Company (May 26, 2010). Those NNEPA-revisions would continue to include permit conditions based on requirements of both part 71 and the NNOPR or based solely on the NNOPR.

In a prior PSD permit proceeding before the Board, a permit was issued by a State agency that had been delegated authority to administer the federal PSD program. That permit had been issued under an integrated permitting system that combined federal PSD permit conditions with other permit conditions required by the State construction permit program. In essence, the State agency claimed that permit deficiencies arising under State law were sufficient to justify that agency's denial of a federal PSD permit. The Board, however, held differently. *See In re WSREC.*

In that instance involving delegated PSD authority, the Board explained that

> [the State agency's] authority to review PSD permit applications stems solely from its Delegation Agreement with Region V. The State . . . does not have an approved SIP for the PSD program, and therefore [the State agency] acts only to implement *federal* PSD requirements.
>
> * * *
>
> [N]othing in the Delegation Agreement alters the fact that the federal substantive PSD regulations and the federal procedures for processing PSD permit applications apply to the PSD component of any "integrated" application that [the State agency] may review.

Id. at 703 (emphasis in original).

That same fundamental principle of delegated authority applies equally in the instant case involving the NNEPA-issued part 71 federal permit, except here the issue is even more straightforward because the NNEPA-issued federal permit is not a product of an integrated federal-Tribal permitting system. Rather, the subject permit for Black Mesa Complex is solely a part 71 federal permit. NNEPA's concurrent issuance of a permit under the NNOPR was never contemplated. Instead, NNEPA has essentially grafted certain procedural requirements from its Tribal regulations onto the part 71 federal permit and now intends to continue that unlawful practice if the Board grants the NNEPA Motion for Remand.

Peabody urges the Board to adopt the same rationale in this matter that it previously applied with its *In re WSREC* opinion. In that latter case, the Board held that:

> [The State agency's] contention that "[a]s set forth in the [Delegation Agreement], [the State agency's] role in reviewing PSD preconstruction permit applications is controlled by the substantive and procedural review requirements of [State] law . . . is both inexplicable and plainly erroneous. We find nothing in the Delegation Agreement that would so expand [the State agency's] federal PSD permit review authority; indeed, as explained above, the Delegation Agreement plainly limits [the State agency] to exercising only the federal PSD authority contained in 40 C.F.R. § 52.21. To read the Delegation Agreement as [the State agency] suggests would be to equate [the State agency's] delegated PSD authority with a state PSD program that has been duly authorized by EPA as part of a state SIP. This we cannot do.

In re WSREC at 704.

In conclusion, the NNEPA's past issuance of the part 71 federal permit for Black Mesa Complex inappropriately based several of that federal permit's conditions on the Tribe's regulations. NNEPA-issued revisions to that permit, if remand is granted, promise to continue that unlawful practice of including permit conditions based on non-EPA-approved Tribal requirements within a part 71 federal permit. Neither the Clean Air Act nor the part 71 federal regulations authorize non-EPA-approved Tribal requirements to be included in a part 71 federal permit.

The Board has previously held that a CAA permit issued under an EPA delegation of authority must have been processed in accordance with federal substantive and federal procedural requirements. Because the NNEPA-intended revisions to the part 71 federal permit for Black Mesa Complex would require future processing of that revised permit in accordance with Tribal procedural requirements, the Board has no option but to deny the NNEPA's Motion

for Remand in order to prevent the unlawful permit revisions which the NNEPA would otherwise make.

B. The Part 71 Provision for Incorporating Tribal Regulations Into a Tribe-specific Part 71 Federal Permit Program Has Not Been Followed.

Peabody has appealed the NNEPA-issued part 71 federal permit for Black Mesa Complex because that permit includes certain conditions based on requirements from the NNOPR which are not federally enforceable. Based on prior settlement discussions between the parties, Peabody has every reason to believe that the permit revisions that NNEPA now seeks to make will continue to base certain permit conditions on its non-EPA-approved Tribal requirements.

40 C.F.R. § 71.4(f) does provide a regulatory process for combining provisions from part 71 with provisions from Tribal operating permit regulations in order to establish and administer a federal operating permit program "in Indian country in substitution of or in addition to" the usual part 71 federal program. Such a unique, Tribe-specific federal operating permit program must be adopted by EPA through notice-and-comment rulemaking and would apply only within the jurisdiction of the affected Tribe. In the instant proceeding, any such EPA rulemaking under section 71.4(f) to merge part 71 and NNOPR requirements would result in those incorporated Tribal requirements becoming federally enforceable.

However, EPA has taken no such rulemaking action to incorporate any portion of the NNOPR within the part 71 federal operating permit program for the Navajo Nation. Rather, consistent with its actions in originally re-issuing the part 71 federal permit for Black Mesa Complex, the NNEPA now plans to revise that permit while acting under its Tribal authority to continue including requirements from the NNOPR within that federal permit. Clearly the NNEPA's planned means for combining NNOPR requirements with part 71 federal requirements

in a federal operating permit for Black Mesa Complex would not conform to the CAA rulemaking process under 40 C.F.R. § 71.4(f) for doing so.

C. A "Tribal-only" Designation for NNOPR-based Requirements Will Not Suffice.

During the course of settlement discussions between the parties, the NNEPA did concede that conditions in the permit for Black Mesa Complex that were based on requirements of Tribal regulations were not federally enforceable. As a result, Peabody now has strong reason to believe that the NNEPA's planned revisions to that permit would include designating each NNOPR-based permit condition as "Tribal-only" enforceable in order to show that such permit conditions were not enforceable under the CAA. As explained below, however, Peabody does not believe that EPA ever contemplated a federal operating permit that would contain permit conditions other than those based on the Clean Air Act.

Peabody acknowledges that an EPA-approved State/Tribal operating permit program under 40 C.F.R. part 70 may allow requirements that are not federally enforceable to be included in a part 70 permit. A provision in the part 70 regulations initially requires all terms and conditions in a part 70 permit to be federally enforceable. 40 C.F.R. §70.6(b)(1). However, those part 70 regulations then provide that "[n]otwithstanding [§ 70.6(b)(1)], the permitting authority shall specifically designate as not being federally enforceable under the Act any terms and conditions included in the permit that are not required under the Act or under any of its applicable requirements." 40 C.F.R. § 70.6(b)(2).

During EPA's development of regulations for its part 71 federal permit program, commenters had requested inclusion of a provision in those federal permit regulations analogous to the provision in the State/Tribal permit regulations at 40 C.F.R. § 70.6(b)(2). That is, a part 71 federal regulatory provision was requested that would allow non-federally-enforceable

requirements to be included in a part 71 federal permit so long as such non-CAA requirements were specifically designated as such in the federal permit. Notably, EPA flatly rejected a part 71 provision that would allow non-CAA requirements in a part 71 federal operating permit, stating:

> The EPA disagrees with this request because *part 71 permits will not include any non-federally enforceable applicable requirements*; therefore a requirement for the Agency to identify such terms as non-federally enforceable would be moot, and a part 71 analogue to section 70.6(b)(2) is not needed. *Part 71 differs from part 70 in this respect.*

61 Fed. Reg. 34,219 (July 1, 1996) (emphases added).

EPA's position on this issue makes sense. A part 70 permit is issued under an EPA-approved program, but the permit nevertheless is a State or Tribal operating permit. Should a Tribe desire to add its non-federally-enforceable requirements to federally enforceable requirements in a part 70 Tribal permit, the resulting permit would still constitute only a *Tribal permit*. Every condition in that permit would be enforceable by the Tribe, and the permit would have been issued by a single agency.

On the other hand, a part 71 permit, issued by either EPA or a delegated authority, is a federal operating permit that constitutes an "EPA-issued" permit. Should a Tribe desire to add non-federally enforceable Tribal requirements to federally enforceable requirements in a part 71 federal permit, the resulting permit would no longer be just a part 71 federal permit enforceable under the Act. Instead, the addition of Tribal-only requirements to federally enforceable requirements in a part 71 permit would create a new "hybrid" permit, *where only some of that permit's requirements would be federally enforceable, and where portions of the permit would have been issued by two separate agencies.* It seems inconceivable that EPA ever contemplated a federal, "EPA-issued" permit having such hybrid characteristics.

During settlement negotiations between the parties, the NNEPA responded to this fundamental issue initially presented in the Company's Petition by asserting that inclusion of non-federally enforceable requirements in a part 71 federal permit is acceptable because the Clean Air Act does not prohibit that practice. As demonstrated by the preceding arguments, however, Peabody believes that the Act and the part 71 regulations clearly preclude the creation of such a hybrid permit.

CONCLUSION

As this Response to the NNEPA Remand Motion demonstrates, a voluntary remand of the NNEPA-issued part 71 federal operating permit for Peabody's Black Mesa Complex would be entirely unwarranted and unproductive and would actually facilitate future unlawful actions on that permit by the NNEPA. The NNEPA has not demonstrated good cause for the subject permit to be voluntarily remanded by the Board. Any such remand would adversely affect the administrative efficiency of this proceeding.

Even if the current federal permit for Black Mesa Complex was remanded and the NNEPA then executed its planned, but nevertheless unlawful, actions, to reopen and revise that permit, the single legal issue raised by the Company's Petition for Review would still remain. Therefore, for the reasons explained above, Peabody respectfully urges the Board to DENY the instant Motion for Remand and to continue its process for resolving the legal issue underlying this proceeding.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER
PEABODY WESTERN COAL COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Peabody Western Coal Company's Response to the Navajo Nation EPA's Motion for Voluntary Remand and Memorandum in Support of Motion in the matter of *In re Peabody Western Coal Company*, CAA Appeal No. 10-01, was served by United States First Class Mail, postage prepaid, on each of the following persons this 10th day of June, 2010:

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Date: June 10, 2010

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

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

PEABODY WESTERN COAL COMPANY'S RESPONSE TO THE NAVAJO NATION EPA'S MOTION FOR VOLUNTARY REMAND AND MEMORANDUM IN SUPPORT OF MOTION

EXHIBIT

A. Navajo Nation Operating Permit Regulations, Subpart VII ("Part 71 Program Delegation")

NAVAJO NATION
AIR QUALITY CONTROL PROGRAM
OPERATING PERMIT REGULATIONS

Navajo Nation
Environmental Protection Agency

July 8, 2004

Navajo Nation Air Quality Control Program
P.O. Box 529
Fort Defiance, Arizona 86504
(928) 729-4246

shall be due on the date specified in the source's part 71 permit. If a part 71 permit has not been issued to a source, the fee shall be due on the anniversary date of the source's original part 71 application to USEPA Region IX.

b. For sources that begin operation after the effective date of these regulations, and for sources that become subject to a permit requirement pursuant to title V of the Clean Air Act through promulgation of the Administrator after the effective date of these regulations, the first annual fee shall be based on the applicable minimum fee. The fee shall be due on the 60th day after that source commences operation.

c. If no emissions inventory is available, the first annual fee shall be based on estimated emissions using approved estimation methods.

2. All annual emission fees other than the first shall be due each year on the anniversary date of the initial fee payment by the source to the Navajo Nation EPA.

3. Notwithstanding any other provision of this section, no annual emission fee shall be required to be paid based on emissions from any acid rain unit before January 1, 2000.

B. Payment Form, Processing, and Use.

1. Fee payments due under this section shall be remitted in the form of a certified check or money order made payable to the Navajo Nation Environmental Protection Agency and submitted to the Air Quality Control Program.

2. Upon receipt of fee payments due under this section, such payments shall be deposited in the Permit Fund established pursuant to 4 N.N.C. § 1139.

3. Fee payments collected under this section shall not be utilized for any purpose not authorized under the Navajo Nation Clean Air Act or the Clean Air Act.

C. Nonpayment. Failure to remit the full fee required by the due dates specified in this section constitutes a violation of these regulations and may subject the owner or operator to enforcement under Subchapter 3 of the Navajo Nation Clean Air Act, including, but not limited to, civil penalties for each day of noncompliance pursuant to 4 N.N.C. § 1155.

Subpart VII–Part 71 Program Delegation

§ 701. Authority to Implement Part 71 Program [40 C.F.R. § 71.10]

Upon delegation of a Part 71 program by USEPA Region IX to the Navajo Nation EPA, the Navajo Nation EPA shall have the authority 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.

§ 702. Fees Pursuant to a Delegated Part 71 Program [40 C.F.R. § 71.9]

Upon delegation of a part 71 program by USEPA Region IX to the Navajo Nation EPA, each part H source holding a part 71 permit shall pay initial and annual fees to the Navajo Nation EPA Air Quality Control Program in accordance with Subpart VI of these regulations.

§ 703. Transition from Delegated Part 71 Program to Part 70 Program

Upon approval of the Navajo Nation's primacy application for a part 70 operating permit program, each part H source holding a part 71 permit (including any source with a part 71 permit issued by the Navajo Nation EPA) shall submit an application to the Navajo Nation EPA for a part 70 permit by the date specified in § 301 of these regulations.

§ 704. Part 71 Incorporation by Reference

A. 40 C.F.R. part 71 is incorporated by reference into this regulation for purposes of administering the delegated Part 71 program, except for the following parts:

(1) 40 C.F.R. § 71.4(a)-(k) and (m);
(2) 40 C.F.R. § 71.9;
(3) 40 C.F.R. § 71.10(b), (d)(2), (g), (h) and (j).

B. Notwithstanding subsection A of this section, 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.

§ 705. Applicable Sections for Part 71 Permits

Part 71 permits shall be administered and enforced in compliance with the following sections:

- Confidentiality §104
- Violation §201
- Emergency Situations §305
- Subpart IV - Permit Processing §§ 401-406
- Subpart V–Enforcement §§501-505
- Subpart VI– Permit Fees §§601-603