EXHIBIT J

NNEPA-issued Responses to Comments on Draft Revised Part 71 Permit and Draft Revised Statement of Basis (February 28, 2011; received by Peabody in April 2011)

THE NAVAJO NATION

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NAVAJO NATION ENVIRONMENTAL PROTECTION AGENCY

Response to Comments on Proposed Revisions to Draft Part 71 Operating Permit and Draft Statement of Basis for Black Mesa Complex Permit # NN-OP-08-010

February 28, 2011

In accordance with the decision of the Environmental Appeals Board ("EAB") in *In re: Peabody Western Coal Company*, CAA Permit No. NN-OP-08-010, 14 E.A.D. __ (Aug. 13, 2010), the Navajo Nation Environmental Protection Agency ("NNEPA"), Navajo Air Quality Control Program ("NAQCP"), Operating Permit Program ("OPP") proposed revisions to portions of the draft Part 71 permit for the Peabody Western Coal Company ("PWCC")-Black Mesa Complex. NNEPA notified PWCC of the proposed revisions by letter dated November 9, 2010, and notice also was published on November 18, 2010 in the Navajo Nation Times. The public was given until December 20, 2010 to provide written comments on the draft permit provisions that were proposed to be revised. No public hearings were held because only one entity, PWCC, submitted comments, and PWCC did not request a hearing.

This document provides responses to all significant comments received on the proposed revisions to the draft Part 71 permit.

COMMENT 1:

PWCC asserts that "NNEPA has no authority to issue Peabody's part 71 federal permit in accordance with tribal procedures in NNOPR [the Navajo Nation Operating Permit Regulations]." PWCC Comments on Revised Draft Part 71 Operating Permit and Revised Draft Statement of Basis for Black Mesa Complex Permit # NN-OP 08-010 (Dec. 15, 2010) ("PWCC Comments") at 3; *see also id.* at 11-13. In support of this statement, PWCC asserts that NNEPA simply stands in the shoes of United States Environmental Protection Agency ("EPA") and is authorized under the Clean Air Act only to administer the federal Part 71 permit program as EPA would be required to administer it. *Id.* at 7, 9. PWCC states that, accordingly, NNEPA is not authorized to "supplement or replace any federal requirements of that program with counterparts based on tribal law." *Id.* at 7.

RESPONSE TO COMMENT 1:

As NNEPA has pointed out in previous proceedings and in its response to comments on the original draft permit, 40 C.F.R. § 71.10(a) requires that "In order to be delegated authority to administer a part 71 program, . . . the laws of the . . . Indian tribe [must] provide adequate authority to carry out all aspects of the delegated program." This language makes clear that it is a federal requirement for tribes to have their own authorities to administer the Part 71 program, including authorities for permit processing, monitoring and reporting, and permit enforcement. In the case of the Navajo Nation, these authorities are found generally in the Navajo Nation Air Pollution Prevention and Control Act ("Navajo Nation Clean Air Act") and specifically in the NNOPR. NNEPA is not EPA's deputized agent in administering the Part 71 program, rather it is an independent permitting agency that is required by EPA to have its own legal authorities to administer the federal program. The distinction between a Part 70 and a Part 71 program is not with the procedures used by the tribal or state agency at issue – under both programs the agency must use its own procedures – but rather with the substantive requirements of the permit, which under Part 70 are tribal or state requirements whereas under Part 71 they are federal requirements only (with the exception of the permit fee provisions discussed below in Response to Comment 4).

Both EPA's Eligibility Determination (dated October 13, 2004) approving the Part 71 delegation and the Delegation Agreement between EPA and NNEPA are consistent with the requirements of § 71.10(a). EPA's Eligibility Determination recognizes that:

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

Elig. Determ. (attachment 1 to Delegation Agreement) at 16.

Similarly, the Delegation Agreement provides specifically in § IX(2) that "NNEPA agrees to continue to revise, reopen, terminate or revoke and reissue Part 71 permits [that is, to perform all permit processing activities], as necessary and appropriate, using the procedures of Subpart IV of the Navajo Nation Operating Permits Regulation." *See also* Deleg. Agr. §§ I(4) (NNEPA agrees to process confidentiality claims); IV(1) (citing NNOPR § 401(B)); IV(2) (citing NNOPR generally); V(4) (same). The Delegation Agreement also states in § VI(1) that NNEPA agrees to conduct "a. development of compliance plans and schedules of compliance; b. compliance and monitoring activities, . . . c. enforcement-related activities," and states in § VI(2) that "[t]his Agreement does not preclude NNEPA from pursuing administrative and judicial

enforcement actions under its independent authorities." Moreover, the Delegation Agreement § VII(2) requires all Part 71 sources to submit "all reports, compliance certifications, and other submittals required by Part 71 and the Part 71 permits to both EPA and NNEPA."

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

As clearly stated in the revised Draft Statement of Basis, Section 4, the draft permit includes references to both federal and tribal provisions, but the provisions of Navajo law referenced in the permit are tribally enforceable only, under the NNOPR and the Navajo Nation Clean Air Act, 4 N.N.C. §§ 1101-1162. Further, when federal and tribal provisions are cited in parallel, the tribal provisions are identical to the federal provisions, and accordingly, NNEPA has provided that compliance with the federal provisions will constitute compliance with the tribal counterparts. These parallel tribal citations do not create any new requirements, nor do they impact the federal enforceability of the cited Part 71 requirements.

In its Order remanding the draft permit to NNEPA, the EAB agreed with EPA that the proper course for NNEPA to revise the permit was to follow the same procedures and authorities it used for the initial permit issuance. *In re: Peabody Western Coal Company*, slip op. at 14 (citing Motion of EPA, Region IX, for Leave to File a Brief as Amicus Curiae Moving for a Stay of the Proceedings, or in the Alternative, Seeking That the Board Grant Navajo Nation Environmental Protection Agency's Motion for Voluntary Remand, at 5). These procedures are contained in the NNOPR.

PWCC itself acknowledged in its Petition for Review of the original draft permit ("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)). Further, PWCC stated, "[t]he Delegation Agreement between EPA and NNEPA sets forth terms and conditions of that delegation consistent with the provisions of part 71." Pet. for Review at 5-6.

COMMENT 2:

PWCC asserts that "NNEPA has no authority, with one exception [Fee Payment], to base [Permit Conditions III.B, IV.A, IV.B, IV.C, IV.D, IV.E, IV.G, IV.H, IV.I, IV.K, IV.L and IV.Q] in Peabody's part 71 federal permit on tribal requirements of NNOPR." PWCC Comments at 3, *see also id.* at 20-23. Specifically, PWCC asserts that "the Clean Air Act does not allow substantive or procedural requirements in a part 71 federal permit that are based on tribal law." *Id.* at 20-21. PWCC also asserts that "NNEPA's use of its own permit processing procedures

under NNOPR when issuing a part 71 federal permit as a delegate agency is prohibited under the Clean Air Act." *Id.* at 21.

RESPONSE TO COMMENT 2:

Part 71 requires NNEPA to use its own permit processing procedures, and EPA has confirmed this interpretation. See Response to Comment 1. PWCC's comments fail to take into account the independent authority required under § 71.10(a) to administer a delegated program, discussed above. Before delegating to NNEPA the authority to administer the Part 71 operating permit program, EPA was required to and did determine that NNEPA had adequate and independent authority to administer the permit program. 40 C.F.R. § 71.10(a); Deleg. Agr. at 1. EPA found such authority consisted of having adequate permit processing requirements and adequate permit enforcement-related investigatory authorities. Deleg. Agr. §§ IV, V, VI.1, IX.2. The permit conditions that PWCC cites fall into those exact categories. Since those provisions were a prerequisite for delegation of the program, it is appropriate for them to be cited in the permit. Nothing in the Clean Air Act or Part 71 prohibits the inclusion of these provisions.

COMMENT 3:

PWCC comments that "the 'adequate authority' required for a Part 70 state/tribal permit program is not the same as the 'adequate authority' required for delegation of part 71 administrative authority." *Id.* at 21-22.

a. As part of this statement, PWCC comments that NNEPA misrepresents the holding of *In the Matter of Pacific Coast Building Products, Inc.*, Clark County (Nev.) Health District Permit No. A00011 (Adm'r Dec. 10, 1999) and that the case does not support tribal-only requirements in a Part 71 permit.

b. PWCC states that "a permitting result where EPA would have no authority to enforce certain conditions in a part 71 federal permit strongly suggests that treatment of tribal-only conditions in a manner analogous to their treatment allowed with part 70 tribal permits is not a good 'fit' for the part 71 program." PWCC Comments at 23.

RESPONSE TO COMMENT 3:

As explained in the Responses to Comments 1 and 2, nothing in the Clean Air Act or Part 71 prohibits NNEPA from citing to the NNOPR in the permit. On the contrary, as explained in Responses to Comments 1 and 2, Part 71 and the Delegation Agreement require NNEPA to have adequate independent authority to carry out all aspects of the delegated program.

Part 70 and Part 71 programs are parallel permitting programs implementing the same Clean Air Act Title V requirements. Before a state or tribe may be approved to implement a Part 70 program it must demonstrate that its laws provide adequate authority just as states and tribes

must do to be eligible for a Part 71 delegation. Part 70 provides that state or tribal requirements may be included in a permit as long as they are designated as not being federally enforceable. 40 C.F.R. § 70.6(b)(2). The same requirement of identifying tribal requirements as being tribally enforceable only is appropriate for a Part 71 permit (bearing in mind that NNEPA is not claiming that tribal substantive requirements may be included in a Part 71 permit, other than permit fee provisions).

In response to Comment 3(a), NNEPA maintains that *Pacific Coast Bldg. Products, Inc.* lends support to NNEPA's argument that tribal-only enforceable requirements can be included in a part 71 permit. The *Pacific Coast Bldg. Products, Inc.* case arose in a Part 70 context, but at least some of the reasoning behind the policy of streamlining in Part 70 permits is equally appropriate in a Part 71 context.

In response to Comment 3(b), NNEPA has revised the draft Statement of Basis to explain that compliance with a federal requirement will constitute compliance with its tribe-only counterpart, and also included notations in the permit conditions that all referenced NNOPR provisions are enforceable only by NNEPA. As explained in Response to Comment 1, the parallel tribal citations do not create any new requirements, nor do they impact the federal enforceability of the cited Part 71 requirements.

COMMENT 4:

PWCC asserts that "NNEPA has no authority to include Condition IV.A [Fee Payment], based solely on tribal requirements of NNOPR, in Peabody's part 71 federal permit." PWCC Comments at 3. PWCC agrees that NNEPA has authority under Navajo law to collect a fee from the Black Mesa Complex, but objects to the inclusion of the fee collection provision in the Part 71 permit. *Id.* at 28-29. PWCC states that it "would consider accepting an attachment to the part 71 federal permit for Black Mesa Complex which establishes the subject fee for Black Mesa Complex under tribal law and NNEPA's method for collecting it in accordance with NNOPR Subpart VI." *Id.*

RESPONSE TO COMMENT 4:

The fee provisions in Permit Condition IV.A are an essential part of the Part 71 permit, and must be "sufficient to cover the permit program costs." 40 C.F.R. § 71.9(a). Thus, EPA determined that NNEPA could collect sufficient revenue under its own authorities to fund a delegated Part 71 Program. Deleg. Agr. at 1 and § II.2. It therefore makes sense for the NNOPR fee requirement to be included in the permit rather than attached as a separate document, and it makes sense from the standpoint of administrative efficiency as well. PWCC's suggestion to segregate the fee provision in an attachment to the permit also is contrary to EPA's policy of streamlining permit requirements, discussed in Response to Comment 3. Finally, Permit Condition IV.A has been revised to clearly state that the fee provision is not a term or condition of the Part 71 permit, but rather is a tribal component of the permit and is not federally

enforceable, so there is no cause for confusion on this point even though the permit fee requirements are included as a permit condition.

COMMENT 5:

PWCC comments that Condition IV.L of the permit is not authorized under the Part 71 regulations and the Clean Air Act because that condition would allow NNEPA, solely under tribal law, to reopen and revise the permit for cause. PWCC Comments at 10-11.

RESPONSE TO COMMENT 5:

As explained in Responses to Comments 1 and 2, Part 71 requires NNEPA to use its own permit processing procedures, and EPA has confirmed that interpretation. PWCC's comment is inconsistent with the requirement in Part 71 that NNEPA have independent authority to administer a delegated program. There also is nothing in Part 71 that provides that only EPA may reopen a delegated Part 71 permit. Further, 40 C.F.R. § 71.11(n) provides that public petitions for reopening may be made to the "permitting authority" (defined in § 71.2 as including states and tribes), not just to EPA. Thus, EPA must have anticipated 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.

COMMENT 6:

PWCC asserts that the Delegation Agreement has no force of law for PWCC. PWCC Comments at 14-15. PWCC states that the Delegation Agreement cannot authorize NNEPA's use of NNOPR procedures in issuing the Part 71 federal permit, nor can the Delegation Agreement authorize NNOPR requirements as conditions in the permit. *Id.*

RESPONSE TO COMMENT 6:

PWCC's comments regarding the Delegation Agreement are not comments on the permit. NNEPA's Public Notice of Proposed Revisions to Clean Air Act Part 71 Permit, issued on November 18, 2010, specifically states that "NNEPA will consider comments only on the provisions of the permit that are proposed to be revised, as these are the only portions of the permit affected by this proposed action." *See also In re: Peabody Western Coal Co.*, slip op. at 11 (citing 40 C.F.R. § 71.11(i)(2)(ii)). PWCC's concerns regarding the Delegation Agreement therefore are not properly part of this permit comment process. Moreover, if PWCC is challenging the validity of the Delegation Agreement, such challenge is untimely. The Delegation Agreement became effective on October 15, 2004, and notice of the delegation was

published in the Federal Register on November 18, 2004. *See* 69 Fed. Reg. 67,578 (Nov. 19, 2004). PWCC did not challenge the Delegation Agreement or any portion of it. In fact, as recently as in its Petition for Review, PWCC conceded that "[t]he Delegation Agreement between EPA and NNEPA sets forth terms and conditions of that delegation consistent with the provisions of part 71." Pet. for Review at 5-6. Finally, NNEPA does not in any case have authority to unilaterally revise the Delegation Agreement.

Even if the Delegation Agreement could be challenged in this proceeding, there is nothing defective about the agreement. The agreement is consistent with the requirements of Part 71. As explained in Response to Comment 1, 40 C.F.R. § 71.10(a) requires that, for a tribe to receive delegation to administer a Part 71 program, the tribe must have its own adequate independent authority to administer the Part 71 program. EPA examined the NNOPR in detail and determined that it contained all the authorities necessary to implement Part 71, including permit reopening procedures.

COMMENT 7:

PWCC contests NNEPA's interpretation of several provisions in the Delegation Agreement (§§ IX.2, IV.1, IV.2, and V.4), claiming that they do not authorize NNEPA's use of Navajo permitting procedures to process delegated Part 71 permits. PWCC Comments at 15-16.

RESPONSE TO COMMENT 7:

PWCC's comments regarding the Delegation Agreement are not comments on the permit, and are not properly part of this comment process, as explained above in Response to Comment 6. In any event, PWCC's comments lack validity. Section IX.2 of the Delegation Agreement is included under the title "Transition to an Approved Part 70 Program," but it clearly states that NNEPA will "***continue*** to revise, reopen, terminate or revoke and reissue part 71 permits, as necessary and appropriate, using the procedures of Subpart IV of the Navajo Nation Operating Permits Regulation." Deleg. Agr. § IX.2 (emphasis added). This language contemplates that NNEPA is to use the NNOPR to process Part 71 permits because NNEPA is agreeing to continue such use. Sections IV.1, IV.2, and V.4 of the Delegation Agreement similarly support NNEPA's use of the NNOPR for permit processing. Nothing in the Clean Air Act, Part 71, or the Delegation Agreement prohibits the use of the NNOPR provisions in the way those provisions have been included in the permit. The NNOPR provisions are clearly identified as tribal provisions and as being tribally enforceable only.

COMMENT 8:

PWCC asserts that EPA went beyond the scope of Part 71 in its Eligibility Determination for NNEPA, and incorrectly included language that NNEPA has mischaracterized and misinterpreted in issuing the Part 71 permit. PWCC Comments at 17-19. Specifically, PWCC states that the eligibility determination included "unnecessary discussion" regarding NNEPA's authorities and procedures involving permitting fee collection and enforcement related

activities," and that NNEPA should not have been required to meet the eligibility requirement of 40 C.F.R. § 49.6. *Id.* PWCC asserts that NNEPA cannot rely on the erroneous language in the eligibility determination to authorize NNEPA's inclusion of tribal substantive and procedural requirements in the Part 71 permit. *Id.* at 18-19.

RESPONSE TO COMMENT 8:

PWCC's comments on the Eligibility Determination are not comments on the permit. As explained above in Responses to Comments 6 and 7, they therefore are not properly part of this permit comment process. Further, PWCC's challenges to the Eligibility Determination are not timely and so are impermissible on this ground as well. Nothing in PWCC's comments change EPA's finding that the Navajo Nation enacted laws providing the relevant authorities to enable the Tribe to administer the Part 71 program and that the Navajo Nation Clean Air Act and the NNOPR "contain all relevant authorities and procedures for administration of the federal program." Elig. Determ. at 3.

COMMENT 9:

PWCC asserts that NNEPA cannot rely on NNEPA's Transition Plan to authorize it "to carry out any aspect of the delegated part 71 program." PWCC Comments at 20. PWCC states that NNEPA's administration of the Part 71 permit program must rely only on federal substantive and procedural requirements of Part 71, and that portions of the Transition Plan violate that requirement. *Id.*

RESPONSE TO COMMENT 9:

PWCC's comments on the Transition Plan are not comments on the permit and are not properly part of this comment process, as explained above in Responses to Comments 6, 7, and 8. None of PWCC's comments regarding the Transition Plan alter EPA's incorporation of the Transition Plan into the Delegation Agreement at § IV.5. In any event, the Transition Plan is consistent with the Part 71 requirements and specifically states that NNEPA "will process permit applications pursuant to . . . subpart IV of the NNOPR. Trans. Plan (Deleg. Agr. Att. 2) at 6, § V.C. *See also* Trans. Plan at 8, § V.E.

COMMENT 10:

PWCC asserts that the revised draft Statement of Basis § 4, entitled "Revisions to Portions of the Title V Permit," incorrectly includes a statement that NNEPA has "adequate permit enforcement-related investigatory authorities." PWCC Comments at 24-26. PWCC asserts that 40 C.F.R. § 71.10(a) does not provide for tribal enforcement activities related to delegated Part 71 permits. *Id.*

RESPONSE TO COMMENT 10:

The requirement in 40 C.F.R. § 71.10(a) that NNEPA have "adequate authority to carry out all aspects of the delegated program" includes the requirement to conduct various enforcement-related activities. See Response to Comments 1-3. Moreover, to the extent that PWCC's comment is also a challenge to the Delegation Agreement, on which the Statement of Basis in part relies, *see* Statement of Basis at 3, it is not properly part of this comment process. See Response to Comments 6-8.

COMMENT 11:

PWCC asserts that the Statement of Basis is incorrect in stating that the "parallel tribal citations [in the draft permit] do not create any new requirements." PWCC Comments at 26-27.

RESPONSE TO COMMENT 11:

See Responses to Comments 1-3. In addition, it is up to NNEPA, the agency that promulgated the NNOPR, to interpret those regulations and determine the scope of their requirements.

COMMENT 12:

PWCC comments that NNEPA proposes to issue a "hybrid permit" with both federal and tribal components and that such a permit is not authorized by the Part 71 program. PWCC Comments at 27-28.

RESPONSE TO COMMENT 12:

NNEPA maintains that the revised permit is consistent with the Clean Air Act, Part 71 regulations, and the Delegation Agreement between EPA and NNEPA. NNEPA's Responses to Comments 1 through 11 include all of the authority and explanation necessary to respond to this comment.

COMMENT 13:

PWCC requests that the "name of the part 71 source that is the subject of this proceeding be changed to 'Kayenta Complex' in accordance with the procedures at 40 C.F.R. § 71.7(d)(3)." PWCC Comments at 29.

RESPONSE TO COMMENT 13:

NNEPA agrees to this administrative permit amendment, but will make the proposed revision pursuant to NNOPR § 405(C), as it does not have authority to do so under 40 C.F.R. § 71.7(d)(3).

COMMENT 14:

PWCC comments that it has "designated a new Responsible Official for the Kayenta Complex [Kayenta and Black Mesa Mines]" and requests that the responsible official be identified, pursuant to the procedures at 40 C.F.R. § 71.7(d)(3), as:

G. Bradley Brown, President
Peabody Western Coal Company
3001 West Shamrell Boulevard
Flagstaff, Arizona 86001
(928) 913-9201

RESPONSE TO COMMENT 14:

NNEPA agrees to this administrative permit amendment, but will make the proposed revision pursuant to NNOPR § 405(C), as it does not have authority to do so under 40 C.F.R. § 71.7(d)(3).