LAW OFFICE OF
JOHN M. BARTH

P.O. BOX 409 HYGIENE, COLORADO 80533 (303) 774-8868 BARTHLAWOFFICE@GMAIL.COM

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By email: airquality@navajo-nsn.gov
Tennille Begay
NAQCP/OPP
P.O. Box 529
Fort Defiance, AZ 86504

By email: R9airpermits@epa.gov
Lisa Beckham (AIR-3)
U.S. EPA Region 9
75 Hawthorne Street
San Francisco, CA 94105-3901

Re: Comments of San Juan Citizens Alliance and Dine' Citizens Against Ruining Our Environment regarding the draft Part 71 Title V permit and draft Acid Rain permit for the Four Corners Power Plant

Dear Ms. Begay and Ms. Beckham:

On behalf of San Juan Citizens Alliance ("SJCA") and Dine' Citizens Against Ruining Our Environment (Dine' C.A.R.E.")(collectively the "Conservation Organizations") I submit the following comment letter on the draft Part 71 Title V permit and Acid Rain permit for the Four Corners Power Plant ("FCPP") near Farmington, New Mexico.

The Conservation Organizations have several concerns, including the Tribe's waiver of regulatory jurisdiction under the FCPP site lease agreement. Specifically, the Conservation Organizations are highly concerned that the Navajo Nation has contracted away its right to regulate the FCPP and therefore has no authority to issue, let alone enforce, the Title V permit. Further, and even assuming *arguendo* the Tribe has somehow retained regulatory jurisdiction (which it has not), the proposed permits must comply with certain requirements before it may be issued and/or approved by the United States Environmental Protection Agency ("USEPA"). As discussed herein, the proposed permits are legally and technically deficient.

For the foregoing reasons, the Navajo Nation Environmental Protection Agency ("NNEPA") must not renew the draft Title V permit for the FCPP. Rather, Title V permitting necessarily falls to USEPA. Moreover, to comply with regulatory requirements, the draft permits must be amended to address the deficiencies identified herein.

1. The Navajo Nation Contracted Away its Right to Regulate the FCPP and Therefore Does Not Have the Authority to Issue a Title V Permit.

a. Waiver of ability to regulate under the Lease.

Decades ago, the Navajo Nation contracted away its right to regulate FCPP when it leased the facility to the various FCPP owners and operators. Specifically, in leasing FCPP, the Navajo Nation contracted that the Tribe covenants that it will not directly or indirectly regulate or attempt to regulate the Company or the construction, maintenance or operation of the power plant and transmission system by the Company. The renewed lease agreement does not change this waiver of regulatory jurisdiction. As a result, the Navajo Nation does not have the authority to issue a Title V permit for FCPP because to do so would constitute the direct or indirect regulation of operations of the power plant, and as described further below.

The Ninth Circuit has previously held that the language in the lease for the FCPP indicated an "unmistakable waiver" by the Navajo Nation of its right to regulate that facility. *Arizona Pub. Serv. Co. v. Aspaas*, 77 F.3d 1128, 1130-35 (9th Cir. 1995). The court recognized that "non-regulation covenant" for the FCPP states, "The Tribe covenants that . . . it will not directly or indirectly regulate or attempt to regulate the Company or the construction, maintenance or operation of the power plant and transmission system by the Company . . ." *Id.* Furthermore, the Salt River Project was recently allowed to proceed in its lawsuit for injunctive relief vis-à-vis Navajo Generating Station regulation, which contains a similar non-regulation covenant. *Salt River Project Agric. Improvement & Power Dist.*, 672 F.3d at 1177. There, the court remanded the case back to the district court, which ordered that the Navajo Nation "may not regulate . . . the operation of NGS." *See Salt River Project Agric. Improvement & Power Dist. v. Lee*, No. CV-08-08028-PCT-JAT, 2013 WL 321884, at *26 (D. Ariz. Jan. 28, 2013).

Moreover, and even if the Tribe were to issue a Title V permit, the Navajo Nation's waiver by contract of regulatory jurisdiction over FCPP largely removes the Tribe's power to enforce the permit, if it were violated.

For the above reasons, USEPA, not the Navajo Nation, is the proper entity to regulate FCPP and issue the Title V permit to FCPP under 40 C.F.R Part 71.

b. The May 2005 Voluntary Compliance Agreement

The Draft Title V permit indicates that the permit is being issued pursuant to a May 2005 Voluntary Compliance Agreement ("VCA") between the owners of the FCPP and the Navajo Nation. Draft Title V Permit, pp. 56-57, provision IV.S. *See also,* Exhibit 1 hereto ("VCA").1 The VCA and Draft Permit specifically limit the Navajo Nation's ability to enforce the permit, prevent the Navajo Nation from including any provisions that are more stringent than the minimum

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[1] The VCA can also be found at the following link: http://www2.epa.gov/sites/production/files/2015-11/documents/voluntary-compliance-agreement.pdf

federal requirements, and otherwise results in a less stringent and less enforceable Title V permit.[2] As such, the EPA must assume responsibility for issuing the FCPP Title V permit.

There are numerous provisions in the Draft Title V Permit and VCA that result is a less stringent and less enforceable Title V permit than would be issued by EPA. For example:

- The VCA "overrides any principle of deference to the interpretation or administration adopted by government agencies or officers, any principle of interpretation in favor of Indians or Indian tribes, and any other contrary principle of interpretation." Exhibit 1, VCA, page 44, provision 13.13. This provision would not be included in an EPA-issued Title V permit and significantly weakens both the permit itself and the enforcement of the permit by eliminating the deference normally given to EPA and/or the Navajo Nation in interpreting or enforcing provisions of the permit.
- The VCA allows the operator to reject a permit issued by the Navajo Nation. EPA-issued permits do not offer a permit applicant the right to reject a permit if it is unhappy with its terms and conditions.
- In addition, the following provisions of the VCA are less stringent that the Navajo Nation laws and the Clean Air Act and thus are illegal. Section 5.12 (Administration of Permits), 5.5.2 (Applications For Renewal), and Article 8 (Dispute Resolution) that are not contained in the Navajo Nation laws, and provisions in Article 6 (Permit Content), and Sections 5.11.2 (New or Amended Laws or Regulations), 9.3 (Administrative Penalties), 9.4 (Shutdown Orders), and 9.6 (Citizen Suits).

As a result of the VCA, the draft permit does not meet the federal minimum requirements for Title V permits. Therefore, EPA may not approve the permit and instead must issue a compliant Title V permit itself.

2. The Permit is Being Issued to an Improper Permittee

The Draft Permit is not being issued to a proper Permittee. The Cover Page for the Draft Permit indicates that the "Permittee" is the "Four Corners Steam Electric Station." The Four Corners Steam Electric Station is not a person, corporate entity, owner, or operator of the plant. As such, the Navajo Nation may not issue a permit to the Four Corners Steam Electric Station. Instead, the Title V permit should be each and every owner/operator of the Four Corners Steam Electric Station and each should be jointly and severally responsible for compliance with all provisions of a Title V permit. 40 C.F.R. §71.5(a)(Title V permit applications must be submitted by "owners or operator" and thus must be issued to the same).

A review of EPA Region 9's Draft Acid Rain permit highlights this deficiency with the Draft Title V Permit. EPA's Draft Acid Rain Permit specifically identifies Arizona Public Service (APS), the operator the FCPP, as the Permittee, not the power plant itself. Thus, if EPA's Acid Rain Permit is violated, an enforcement action can proceed against the corporate

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[2] *See,* Draft Permit at p. 57, Provision IV.T. and the VCA.

operator. In contrast, the Title V permit is unenforceable as currently written because the power plant itself is not an individual or corporate entity that is subject to suit. Thus, it is unenforceable in a court of law. As written, the Draft Title V permit not only impairs the ability of EPA and/or the Navajo Nation to enforce the permit, but also impairs the ability of citizen enforcement. As such, the Draft Title V Permit must be amended to clearly identify as the "Permittee" an individual(s) and/or corporate owner/operator as the FCPP that is subject to suit and enforcement.

3. The Draft FCPP Permit Fails to Ensure Compliance with Applicable Requirements.

A. The Startup, Shutdown, and Malfunction Exemptions Are Not Legal nor Technically Justified and Are Contrary to Applicable Requirements.

The draft Title V permit contains exemptions from compliance during periods of startup, shutdown, and malfunction. *See* condition II.A.1.of the draft permit. These exemptions are illegal and/or overbroad and must be removed from the permit or significantly limited.

The draft Title V permit contains exemptions from opacity and particulate limits during periods of "start up" and "shut down." *See* condition II.A.6.b of the draft permit. The definition of "shutdown" allows an exemption from emission limits when any unit "drops below 300 MW net load with the intent to remove the unit from service." Condition II.A.1.k. The definition of "start up" allows and exemption from emission limits from the moment of initial start up until "the unit reaches 400 MW net load." Condition II.A.1.l.

The draft Title V permit also contains an exemption from opacity compliance during "saturated stack conditions." Condition II.A.3. The term "saturated stack conditions is largely undefined except a parenthetical vaguely defining it as "condensed water vapor". *Id.* Under this provision, FCPP is exempt from complying with opacity limits provided the "baghouse is not fully closed." *Id.* This broad opacity exemption would allow unlimited opacity emission as long as a single section of the baghouse remains open, while all other sections are closed. This exemption is arbitrary and capricious because it is vaguely defined and inconsistent with minimum federal requirements. In addition, since Units 4 & 5 utilize wet scrubbers for SO2 control, the operator could claim that "condensed water vapor" exists any time the wet scrubbers are operated, thus allowing an broad exemption from opacity limits. Further, this exemption is inconsistent with the federal regulations. The federal regulations only exclude "uncombined water droplets" from the definition of opacity. Condition II.A.2.c. The "saturated stack condition" exemption in the draft permit is much broader because it is not limited to "uncombined" water vapor and thus even excludes water droplets that are combined with particulate matter. This provision must be removed from the permit because it interferes with the right of the public to ensure continuous compliance with opacity emission limits. Alternatively, the provision should be limited to "uncombined" water droplets in which case the language should be amended to place the burden on the operator to prove that uncombined water droplets are the source of any interference with the COMs each time the operator asserts this defense to compliance with opacity limits.

The draft Title V permit also contains an affirmative defense from exceedances of all emission limits due to any "malfunction." *See* condition II.A.6.c of the draft permit. As written,

FCPP would be entitled to the "malfunction" exemption by operation of law if the plant is able to produce certain paperwork ("it shall be an affirmative defense in an enforcement action seeking penalties if the permittee has met with all of the following conditions...").

Inclusion of these blanket "startup," "shutdown," and "malfunction" ("SSM") exemptions in the draft Title V permit is inappropriate. Blanket SSM provisions are illegal and should be removed from Title V permits. *See Sierra Club v. EPA,* 551 F.3d 1019 (D.C. Cir. 2008)(in the context of Clean Air Act Section 112).

As noted above, we are requesting that additional terms and conditions be added to, and deleted from, the Title V permit related to SSM provisions. NNEPA may not add or delete the terms and conditions requested herein because to do so would constitute a breach of the leasing provision stating that the Navajo Nation may not directly or indirectly regulate or attempt to regulate the operation of the Four Corners Power Plant and may not include more stringent requirements. As such, USEPA must issue this FCPP Title V permit, not NNEPA.

B. *The Draft Title V Permit Fails to Require Sufficient Periodic Monitoring*.

Permitting authorities must ensure that a Title V permit contain monitoring that assures compliance with the terms and conditions of the permit. *See* 42 U.S.C. § § 7661c(c) and 70.6(c)(1). Although as a basic matter, Title V permits must require sufficient periodic monitoring when the underlying applicable requirements do not require monitoring (*see* 40 CFR § 70.6(a)(3)(i)(B)), the D.C. Circuit Court of Appeals has firmly held that even when the underlying applicable requirements require monitoring, permitting authorities must supplement this monitoring if it is inadequate to ensure compliance with the terms and conditions of the permit. As the D.C. Circuit recently explained, 40 CFR § 70.6(c)(1) serves as a gap-filler. In other words, § 70.6(c)(1) ensures that all Title V permits include monitoring requirements "sufficient to assure compliance with the terms and conditions of the permit," even when § 70.6(a)(3)(i)(A) and § 70.6(a)(3)(i)(B) are not applicable. This reading requires a permitting authority to supplement an inadequate monitoring requirement so that the requirement will "assure compliance with the permit terms and conditions." *See Sierra Club v. EPA*, 536 F.3d 673, 680 (D.C. Cir. 2008). In other words, "a monitoring requirement insufficient 'to assure compliance' with emission limits has no place in a permit[.]" *Id.* at 677.

For the reasons described above, the draft Title V permit fails to contain emission limits or monitoring requirements that ensure compliance with underlying opacity, particulate matter and other emission limits due to the deficiencies with the startup, shutdown, and malfunction exemptions.

Especially in light of the troubling exemptions for opacity (which is a surrogate for particulate matter), the draft permit must also include enforceable language mandating installation and operation of continuous monitoring of PM to ensure continuous compliance with these emission limits. PM CEMs are also important to ensure compliance with the Mercury and Air Toxics requirements that use PM emission monitoring as a surrogate for some air toxics.

As noted above, we are requesting that addition terms and conditions be added to, and

deleted from, the Title V permit. NNEPA may not add or delete the terms and conditions requested herein because to do so would constitute a breach of the leasing provision stating that the Navajo Nation may not directly or indirectly regulate or attempt to regulate the operation of the FCPP and because the Nation may not add more stringent requirements. As such, EPA must issue this FCPP Title V permit, not NNEPA.

C. The CAM plan in the Draft Permit is insufficient and Instead the Draft Permit Must Contain Enforceable Requirements for Installing and Operating PM CEMs to Ensure Continuous Compliance.

The Title V permit fails to contain enforceable provisions for installation and operation of PM CEMs to establish continuous compliance with both the PM emission limit and the Mercury and Air Toxics Standards ("MATS") requirements.

The draft Title V permit allows the operator to demonstrate continuous compliance with particulate limits by using a compliance assurance monitoring plan. Condition II.D. We object to the CAM plan provisions of the Title V permit. First, there is little technical support for the findings of the CAM plan. The draft permit's CAM plan does not meet the requirements of the Title V program because it does not provide sufficiently reliable information for determining compliance. 42 U.S.C. § 7661c(b). For example, the CAM plan largely relies on opacity readings as a surrogate for PM emissions. However, as noted above, there are broad illegal exemptions from opacity exceedences and monitoring, especially during saturated stack conditions. The CAM plan also requires a baghouse bag leak detection system. However, this CAM requirement is negated by the saturated stack condition exemption that allows all but one baghouse section to be closed, thus negating the effectiveness of such a system. Finally, the CAM plan is overly vague and does not prove that implementation of the CAM plan will assure continuous with PM and MATs emission limits.

Given the significant deficiencies identified above with the proposed CAM plan, FCPP must instead install a particulate matter continuous emission monitoring system (PM CEMs) to continuously measure and report particulate matter regulated in the FCPP Title V permit. The Clean Air Act Title V program requires stationary sources, such as FCPP, to prove continuous compliance with its emission limits, such as particulate matter. *See,* 42 U.S.C. § 7661c; 40 C.F.R. 70 et seq.; and, 40 C.F.R. Part 64 et seq. FCPP must comply with this requirement by installing, operating, and reporting the results particulate emissions through the use of PM CEMs. EPA has recognized that PM CEMs have been installed and operated at numerous coal plants in the United States. Exhibit 2, p.3 (Wygen Plant) and Exhibit 3, hereto (Burns and MacDonald Report). Another example of a coal with PM CEMs is the Sibley power plant. *See* Exhibit 4 hereto. In addition, the Navajo Generating Station, also located on the Navajo Nation, is being required to install and operate PM CEMs. We request that FCPP also be required to install and operate use PM CEMs.

As noted above, we are requesting that addition terms and conditions be added to, and deleted from, the Title V permit. NNEPA may not add or delete the terms and conditions requested herein because to do so would constitute a breach of the leasing provision stating that the Navajo Nation may not directly or indirectly regulate or attempt to regulate the operation of the FCPP and

would require imposition of more stringent conditions. As such, USEPA must issue this FCPP Title V permit, not NNEPA.

D. The finding of "no jeopardy" to threatened and endangered species is arbitrary and capricious.

Paragraph 6 of the Draft Statement of Basis for the Draft Title V Permit correctly states that under Section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536, and its implementing regulations at 50 CFR Part 402, USEPA is required to ensure that any action authorized, funded, or carried out by USEPA is not likely to jeopardize the continued existence of any Federally-listed endangered species or threatened species or result in the destruction or adverse modification of such species' designated critical habitat. The Navajo Nation and EPA claim that the Title V permit and Acid Rain Permit will have no effect on listed species or their critical habitat because these permits "do not authorize the construction of new emission units or emission increases from existing units, nor does it otherwise authorize any other physical modifications to the facility or its operations." Draft Statement of Basis, §6. However, the issuance of these permits will allow the FCPP to continue to operate for at least 5 more years or until these permits are again renewed. As will be discussed below and in the attached Exhibit 5 hereto, the continued operation of the FCPP (and related Navajo Mine) are jeopardizing the continued existence of Federally-listed endangered species. Moreover, the Navajo Nation and EPA's ESA Section 7 analysis is arbitrary and capricious because it is limited only to "the construction of new emission units or emission increases from existing units" and failed to assess the impacts allowing the continued operation of the FCPP that will result from the re-issuance of the Title V and Acid Rain permits.

The San Juan River adjacent to the FCPP and Navajo Mine serves as critical habitat for the Colorado pikeminnow (CPM) and razorback sucker (RBS). The primary constituent elements of critical habitat for these species include a quantity of water of sufficient quality (i.e., temperature, dissolved oxygen, lack of contaminants, turbidity, etc.) that is delivered to a specific location in accordance with a hydrologic regime that is required for the particular life stage for the species. The existing populations of these species in the San Juan River exist due to a stocking program, without which the species would likely extirpated from the River.

The US Fish and Wildlife Service ("Service") prepared a 2015 BiOp for the continued operation of the Four Corners Power Plant (FCPP) and Navajo Mine Energy Project (NMEP) for 25 more years, from 2016 to 2041. The Draft Title V and Acid Rain permits would allow the continued operation of the FCPP, without which the plant could not legally operate. The 2015 BiOp addressed the Navajo mine expansion of 5,568 acres into Area IV North and Area IV South of the mine lease area, which would allow it to produce 5.8 million tons of coal for 25 years. In addition, FCPP would continue to operate Units 4 and 5 (following the 2013 closure of Units 1-3), with a capacity of 1500 MW. Units 4 and 5 emit 149 lbs. of mercury (Hg) and 523 lbs. of selenium (Se) annually. The power plant has a right to withdraw 51,600 acre-feet per year

(af/yr) and typically uses about 27,500 af/yr of water from the San Juan River. The water is withdrawn via two 8 by 8.5 foot screened intake bays located just above a gated weir (the "APS weir"). The weir dams water to assure adequate water coverage of the intake bays. Water drawn from the San Juan River is stored in the man-made Morgan Lake adjacent to the power plant. The Service's 2015 BiOp determined that the following aspects of the project would adversely affect CPM and RBS and their critical habitat: water withdrawals from the San Juan River, water pollution discharges from NMEP, entrainment of young fish in the FCPP intake pipes, operation of the APS weir, release of non-native fish from Morgan Lake, Hg deposition and bioaccumulation (but not RBS critical habitat), and Se deposition.

As part of the project, the action agencies and project proponents developed a suite of "conservation measures" intended to reduce impacts to CPM and RBS. The conservation measures required the action agencies to consult with the Service on discretionary actions that may result in Hg deposition and required project proponents to develop a plan to reduce entrainment from cooling water intakes, develop a plan to reduce the risk of non-native species escaping from Morgan Lake, partially fund fish passage at the APS weir, and provide additional funding for various studies, monitoring, and additional fish stocking. The BiOp subsequently adopted these conservation measures as binding reasonable and prudent measures (RPMs) with associated terms and conditions (T&Cs).

Ultimately, the 2015 BiOp determined that 25 more years of operations at FCPP and NMEP, along with cumulative effects and the environmental baseline, would not jeopardize CPM or RBS or adversely modify their critical habitat. The Service made clear that its conclusion was premised largely on the belief that the stocking efforts and the conservation measures would "offset the adverse effects which would otherwise occur as a result of the proposed action when considered in relation to the environmental baseline, and cumulative effects."

Various Conservation organizations submitted comment letters on the Service's ESA analysis. Exhibit 5 hereto is one such ESA comment letter, which is incorporated herein by reference. In addition, to the extent that the Navajo Nation and EPA intend to incorporate by reference (or tier) to the 2015 BiOp, we note the following deficiencies with the Service's analysis. First, the BiOp does not adequately consider recovery needs of the species in its no jeopardy and no adverse modification analyses. Second, there is no analysis in the BiOp discussing how the conservation measures will offset the project's adverse impacts. Third, the no jeopardy determination hinged on the determination that the restocking program is offsetting the mercury effects and, in combination with the Conservation Measures, will continue to do so. The problem with this analysis is that the stocking programs for CPM and RBS are not intended to be permanent and are not currently planned to continue through the life of the proposed project, or even the next 5-7 years (which is the normal lifetime of the proposed Title V permit). The CPM augmentation plan is only projected to continue through 2020. The RBS augmentation plan is currently only continuing through 2016. Fourth, the Service misapplied its regulations by finding that its regulations (USFWS 1986) only allows cumulative assessment analyses until the end of the project, which is 2041. Therefore, the Service arbitrarily ignored cumulative effects after 2041. Fifth, the 2015 BiOp illegally excluded the dramatic projected impacts of climate change from its jeopardy and critical habitat analyses. Sixth, the Service's environmental

baseline analysis was faulty because it fails to adequately consider the affects of additional selenium loading in the San Juan River caused by the Navajo Indian Irrigation Project ("NIIP"). Seventh, there is little or no discussion of impingement impacts in the BiOp's discussion of the effects of the project and there is no discussion of impingement impacts in the BiOp's jeopardy or critical habitat analyses. For these reasons, as well as those described in Exhibit 5 hereto, the 2015 BiOp is technically and legally deficient and cannot be used to justify the Navajo Nation/EPA's "no jeopardy"/ "no adverse modification" finding for these permits.

Conclusion

Because the Navajo Nation does not have regulatory authority, the NNEPA may not issue a Title V permit to FCPP. For the reasons stated herein, the 2005 VCA does not remedy this jurisdictional impediment. USEPA should invalidate the Navajo Nation's authority to issue Title V permits and assume the responsibility. Furthermore, the draft Title V permit fails to ensure continuous compliance with applicable requirements as required by the Clean Air Act. EPA/NNEPA should not approve the draft Title V permit until it resolves the issues identified herein. Finally, for the reasons stated herein, the finding of "no jeopardy/no adverse modification" to threatened and endangered species and their habitat by the re-issuance of the Title V permit and continued operation of the FCPP is arbitrary and capricious.

If you have any questions concerning these comments, please contact John Barth at (303) 774-8868.

Sincerely,

s/ John Barth

John Barth
Attorney at Law
P.O. Box 409
Hygiene, CO 80533
(303) 774-8868
barthlawoffice@gmail.com

cc: Mike Eisenfeld, San Juan Citizens Alliance
Carol Davis, Dine' C.A.R.E.