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cc: beckham.lisa@epa.gov
Lisa Beckham (AIR-3)
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75 Hawthorne Street
San Francisco, CA 94105-3901

Re: Proposed Renewal of Part 71 Operating Permit, Permit No. NN-OP-15-06 for the Navajo Generating Station

Dear Ms. Begay:

To' Nizhoni Ani, Black Mesa Water Coalition, and Diné Citizens Against Ruining our Environment, (collectively, the tribal conservation organizations) appreciate this opportunity to comment on the draft renewal Title V Permit No. NN-OP-15-06 for the Navajo Generating Station ("NGS"). The tribal conservation organizations have several concerns, including the Tribe's waiver of regulatory jurisdiction under the NGS site lease agreement. Specifically, the organizations are highly concerned that the Navajo Nation has contracted away its right to regulate NGS 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 Title V permit must comply with certain requirements before it may be issued and/or approved by the United States Environmental Protection Agency ("USEPA").

For the foregoing reasons, the Navajo Nation Environmental Protection Agency ("NNEPA") must not renew the draft Title V permit for NGS. Rather, Title V permitting necessarily falls to USEPA. Moreover, to comply with regulatory requirements, the draft Title V permit must be amended with the language suggested below. Our clients' concerns with the draft Title V permit are as follows:

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

The Navajo Nation contracted away its right to regulate NGS in 1969, almost 50 years ago, when it leased the facility to the various NGS owners and operators. *Salt River Project Agric. Improvement & Power Dist. v. Lee*, 672 F.3d 1176, 1178 n.1 (9th Cir. 2012). Specifically, in leasing NGS, the Navajo Nation contracted that "it will not directly or indirectly regulate or attempt to regulate the Lessees in the . . . operation of the Navajo Generation [sic] Station." *Id.* The original lease agreement is attached as Exhibit 1. The renewed lease agreement issued in 2012 (attached as Exhibit 2) does not change this waiver of regulatory jurisdiction. *See* Exhibit 2, Section 4 (provisions of the original lease not related to charges remain unchanged). As a result, the Navajo Nation does not have the authority to issue a Title V permit for NGS because to do so would constitute the direct or indirect regulation of operations of the power plant.

The Ninth Circuit has previously held that *identical language* in the lease for the Four Corners Power Plant 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 "non-regulation covenant" for the Four Corners Power Plant 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, one of the owners/operators of NGS, was recently allowed to proceed in its lawsuit for injunctive relief vis-à-vis NGS regulation. *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 NGS removes the Tribe's power to enforce the permit, if it were violated.

Finally, Section 1(E) of the amendment to the renewal of the lease agreement for NGS (attached as Exhibit 3) provides the Navajo Nation the option to purchase shares of NGS that will be abandoned by the Department of Water and Power of the City of Los Angeles. Due to its future ownership option, the Navajo Nation has no genuine incentive to vigorously regulate the air emissions from NGS. This presents a conflict of interest, and further precludes the Navajo Nation from serving as regulator and issuing a Title V permit. Put another way, USEPA may not allow a potential owner of NGS to regulate itself.

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

2. The Draft NGS Permit Fails to Ensure Compliance with Applicable Requirements.

To date, NGS has not been reporting its opacity exceedances as required by 40 C.F.R. Parts 60 and 75, and the Federal Implementation Plan ("FIP") for NGS. As discussed in greater detail below, NNEPA should ensure that NGS complies with opacity monitoring requirements before granting a renewed Title V permit. In addition, the Title V permit must contain enforceable language mandating the NGS immediately begin operating its Continuous Opacity Monitors ("COMs") to monitor opacity emissions from each stack and submit quarterly reports containing all such COMs data to EPA.

A. The NGS Draft Permit Fails to Account for Opacity Exceedances, as Required by the Federal Implementation Plan.

In its quarterly excess emission reports, NGS simply assumes it is exempt from the opacity reporting required by the FIP and by Parts 60 and 75 of the Clean Air Act.

For example, NGS's cover letter to USEPA conveying its third quarter 2011 excess emission reports states, "with respect to the opacity data presented in the report, please note that 6-minute opacity readings are not individually listed during scrubber operations because the saturated stack conditions impedes the accuracy of the readings. The report identifies the block time periods for each unit that the scrubbers were operational and the stacks were saturated, in lieu of reporting the individual 6-minute wet stack readings." Thus, NGS has not been demonstrating continuous compliance with the following opacity emission limits in the FIP, which require:

> [n]o owner or operator shall discharge or cause the discharge of emissions from the stacks of Units 1, 2, or 3 into the atmosphere exhibiting greater than 20% opacity, excluding condensed uncombined water droplets, averaged over any six (6) minute period [...] [n]o owner or operator shall discharge or cause the discharge of emissions from the stacks of Units 1, 2, or 3 into the atmosphere exhibiting greater than... 40% opacity, averaged over six (6) minutes, during absorber upset transition periods.

Furthermore, NGS has also failed to report the *magnitude* of any excess opacity emissions. This is in addition to failing to present any evidence that opacity exceedances are due to "condensed uncombined water droplets," which is what NGS alleges. Finally, the FIP directs NGS to exclude condensed uncombined water droplets from its COMs opacity reading, yet NGS refuses to do so. Instead, NGS

simply claims that its wet scrubbers "impede" the accuracy of the readings, but fails to state the magnitude of the alleged interference. The final permit must contain enforceable language requiring NGS to: 1) operate its COMs; 2) submit quarterly COMs reports to EPA; 3) if NGS claims impedance of its COMs, state the magnitude of the interference and exclude that interference from its COMs readings. If NGS claims that the current configuration of air pollution control equipment prevents operation of the COMs, then the final permit should contain enforceable requirements to remedy its inability to operate COMs, such as installation of equipment to dry the flue gas, install a dry slip stream of flue gas in which to operate the COMs, or switch to dry scrubbing to eliminate any water droplet interference.

The permit contains language "excluding condensed uncombined water droplets" from the opacity calculation. *See* condition II.A.2.d of the draft permit. For the reasons stated below, the EPA should remove this phrase from the permit. The permit also contains the following sentence: "Excess opacity due to condensed water vapor in the stack does not constitute a reportable exceedance; however, the length of time during which water vapor interfered with Continuous Opacity Monitoring System ("COM") readings should be summarized in the 40 CFR 60.7 (c) report." *See* condition II.A.4.d of the draft permit. For the reasons stated below, NNEPA should also remove this sentence from the permit.

First, we are aware of no documentation for this draft Title V permit proving that "excess opacity" at NGS is "due to" condensed uncombined water vapor. Before including such a broad exemption from reporting, NGS must first conclusively demonstrate that condensed uncombined water vapor or droplets are causing excess opacity and must conclusively quantify the extent to which such condensed uncombined water droplets are causing such an exceedance of the opacity limits. To our knowledge, no such demonstration has been made and thus the provisions of the permit providing an exclusion of uncombined water vapor should be removed from the permit. Without such conclusive proof, inclusion of the objectionable language in the NGS Title V permit makes that portion of the permit invalid.

Second, during the public comment period on the 2010 FIP, NGS requested that it be exempt from opacity reporting pursuant to 40 C.F.R. 75.14(b). In response, USEPA did not find that an "exemption allowed in part 75 [was] appropriate in this rule." 75 Fed. Reg. 10177. Thus, any language exempting uncombined water vapor from opacity reporting or exceedance calculations should be removed from the permit.

Third, the permit language excluding uncombined water vapor from opacity reporting is in conflict with other federally applicable requirements found in 40 C.F.R. § 60.7, 40 C.F.R. § 72.2 (definition of "continuous opacity monitoring system"), 40 C.F.R. § 74.60, 40 C.F.R. § 75.10, and 40 C.F.R. §75.57(f). Since USEPA has determined that the exemption in 40 C.F.R. 75.14(b) is not appropriate, each of these provisions is an applicable requirement for purposes of the Title V permit. These federally applicable provisions do not contain the language "excluding

condensed uncombined water droplets" from opacity calculation or reporting. Moreover, these federally applicable provisions also do not contain the following language:

"Excess opacity due to condensed water vapor in the stack does not constitute a reportable exceedance; however, the length of time during which water vapor interfered with COMs readings should be summarized in the 40 CFR 60.7 (c) report."

Further, uncombined water can be the "only reason for the failure of an air pollution source to meet the 20% opacity limit." 40 C.F.R. §49.124(d)(2). Each boiler at NGS is currently equipped with electrostatic precipitators ("ESP"). ESPs are generally unable to continuously meet 20% opacity limits at coal plants burning western coal, such as NGS. Thus, almost every coal plant in the western United States has switched to baghouses for controlling particulate emissions and limiting opacity. NGS should be required to prove that its antiquated ESPs can continuously meet the 20% opacity limit absent any interference from uncombined condensed water vapor. This should be articulated in the Title V permit.

In addition, other coal plants using wet scrubbers are able to accurately monitor for opacity continuously from their stacks. *See* Exhibit 4 (Declaration of Dr. Ranajit Sahu, Ph. D.) Dr. Sahu indicated that he is aware of at least three other coal-fired units, which use COMs to measure opacity and which have wet scrubbers, but is reasonably certain that list is not exhaustive. This demonstrates that COMs can be properly designed, located, and used even in units with wet scrubbers. These units include Unit 2 at the Trimble plant located in Trimble County, Kentucky as well as Units 1 and 2 of the Craig station located in Moffat County, Colorado. Additionally, there are technical means of accurately monitoring opacity on a wet stack, including using a stack by-pass, stack dryer, or switching to dry scrubbing.

As such, the permit language identified must be removed from the permit because it is in conflict with other federally applicable requirements, is a mistake, and/or is inaccurate.

In the event NNEPA/USEPA refuses to remove the objectionable language, condition II.A.4.d should be amended to add the word "uncombined" after the word "condensed." *See also* condition II.A.2.d of the draft permit. As currently written, condition II.A.2.d and condition II.A.4.d are inconsistent. The federal regulations only speak to condensed "uncombined" water vapor, not simply "condensed water vapor. 40 C.F.R. §49.124(d)(2). This distinction is important because "combined" water vapor, or water vapor that is combined with particulate matter, should not be exempt from opacity limitations, which are designed to limit emission of particulate matter. For the reasons discussed herein, the draft Title V permit fails to ensure continuous compliance with the opacity limits and must be amended as requested.

NNEPA/USEPA should either remove the language, as requested, or

alternatively, should require that the following language be included in the final permit:

"The owner or operator shall comply with all opacity and COMs provisions found in 40 C.F.R. Part 60 and 40 C.F.R. Part 75, including, but not limited to, 40 C.F.R. § 60.7, 40 C.F.R. § 72.2 (definition of "continuous opacity monitoring system"), 40 C.F.R. § 74.60, 40 C.F.R. § 75.10, and 40 C.F.R. §75.57(f)."

Adding the language specified above to the permit will ensure compliance with all applicable requirements.

As noted above, we are requesting that additional terms and conditions be added to the Title V permit. NNEPA may not add the additional 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 Lessees in the . . . operation of the Navajo Generation [sic] Station…" As such, USEPA must issue this NGS Title V permit, not NNEPA.

B. The Startup, Shutdown, Malfunction, and SO2 Absorber Module Exemptions Are Not Legally nor Technically Justified and Are Contrary to Applicable Requirements.

The draft Title V permit contains an exemption from compliance with opacity limitations "during absorber upset transition periods." *See* condition II.A.2.d of the draft permit. There are several issues with this exemption from compliance.

There is no documentation for this draft permit proving that an exemption from opacity limitations "during absorber upset transition periods" is legally or technically justified at NGS. Before including such a broad exemption from compliance with the opacity limits, NGS must prove the nature of these "absorber upset transition periods" and why an exemption from opacity limits is legally and technically justified. Without such conclusive proof and justification, inclusion of this exemption in the NGS Title V permit is arbitrary and capricious. Since no such demonstration has been made, the "absorber upset transition period" exemption should be removed from the permit.

The draft Title V permit also contains exemptions from opacity, particulate limits, NOx and SO2 during periods of "start up" and "shut down." *See* condition II.A.7.b and II.J.4 of the draft permit. The draft Title V permit also contains an affirmative defense from exceedances of all emission limits due to any "malfunction." *See* condition II.A.7.c of the draft permit. As written, NGS would be entitled to the "malfunction" exemption by operation of law if NGS were able to produce certain paperwork ("it shall be an affirmative defense in an enforcement action seeking penalties if the owner or operator 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 Lessees in the . . . operation of the Navajo Generation [sic] Station..." As such, USEPA must issue this NGS Title V permit, not NNEPA.

C. *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 provides precisely what we have concluded the Act requires: a permitting authority may 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.

In this case, the draft Title V permit fails to contain emission limits or monitoring requirements that ensure compliance with underlying opacity and particulate matter limits for the three coal-fired boilers.

The Title V permit should establish pound per hour PM emission limits, ton per year PM emission limits, and pound per million btu PM emission limits. The draft permit must also include enforceable language mandating continuous monitoring of opacity and PM to ensure continuous compliance with these emission limits.

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

added to, and deleted from, the Title V permit related to opacity and PM emissions monitoring. 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 Lessees in the . . . operation of the Navajo Generation [sic] Station…" As such, EPA must issue this NGS Title V permit, not NNEPA.

D. 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"). The draft permit indicates that NGS has installed PM CEMs, but that they are not working properly. The draft permit fails to contain an enforceable deadline for installation and operation of CEMs and reporting of all emissions data to EPA. The draft permit must be revised to include an enforceable deadline for operation of PM CEMs and reporting of all data to EPA.

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 Lessees in the . . . operation of the Navajo Generation [sic] Station…" As such, USEPA must issue this NGS Title V permit, not NNEPA.

3. Installation of Baghouses is Necessary to Comply With Regional Haze and Clean Air Toxics Rules.

Proper COMs reporting is necessary to ensure continuous compliance with opacity and related particulate emission standards. Proper COMs reporting may reveal that NGS is unable to comply with its opacity limits. If NGS is unable to comply with opacity limits, it may have to change its particulate control system from less effective electrostatic precipitators to more efficient baghouses. However, for the reasons stated below, NGS will likely need to convert to baghouses to comply with its regional haze requirements and Clean Air Toxic requirements.

USEPA has issued a site-specific regional haze FIP for NGS. Under the regional haze program, NGS must install Best Available Retrofit Technology ("BART") for particulate matter, SO2, and NOx. It is common knowledge that baghouses constitute BART for particulate matter. Thus, baghouses should have been required as BART to control NGS's particulate matter emissions.[1]

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[1] EPA's failure to require baghouses at BART for particulate matter has been appealed and is pending with the Ninth Circuit. *TNA v. U.S. EPA*, No. 14-73101.

In addition, USEPA recently promulgated its Mercury and Air Toxics Standards Rule ("MATS"), which sets emission limits for mercury and other toxic air pollutants at NGS. It is generally recognized that baghouses are necessary to comply with the new air toxic standards.

As such, baghouses should have been required under several regulatory programs. The Title V permit should impose a compliance schedule for the installation and operation of baghouses at all 3 NGS units,

As noted above, we are requesting that addition terms and conditions be added to, and deleted from, the Title V permit requiring installation and operation of baghouses. 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 Lessees in the . . . operation of the Navajo Generation [sic] Station..." As such, USEPA must issue this NGS Title V permit, not NNEPA.

Conclusion

Because the Navajo Nation does not have regulatory authority and is burdened by a conflict of interest based on a future purchase option, the NNEPA may not issue a Title V permit to NGS. USEPA should invalidate the Navajo Nation's authority to issue permits and assume the responsibility. Furthermore, the draft Title V permit fails to ensure continuous compliance with applicable opacity monitoring requirements as required by the Clean Air Act and the new National Ambient Air Quality Standards. NNEPA should not approve the draft Title V permit until it removes the objectionable language listed above and requires NGS to switch to baghouses and continuously monitor opacity and particulate matter. All of these requirements should be reflected in the Title V permit and the permit should not be approved until it reflects these requirements.

If you have any questions concerning these comments, please contact Brad Bartlett at (303) 871-7870 or John Barth at (303) 774-8868.

Sincerely,

s/ John Barth

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