

CIVIL COVER SHEET

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12-1423
RMC

JS-44
(Rev. 2/11 DC)

I (a) PLAINTIFFS DINE Care and National Parks Conservation Association (b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF (EXCEPT IN U.S. PLAINTIFF CASES) 958888 Navajo, Arizona	DEFENDANTS U.S. Environmental Protection Agency and Lisa Jackson, EPA Administrator COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT (IN U.S. PLAINTIFF CASES ONLY) Washington, D.C. NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED
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(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER) William L. Miller (D.C. Bar No. 443191) The William Miller Group, PLLC 1666 Connecticut Ave., N.W., Suite 200 Washington, D.C. 20009 202-256-2306	Case: 1:12-cv-00423 Assigned To : Collyer, Rosemary M. Assign. Date : 3/19/2012 Description: Admin. Agency Review
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II. BASIS OF JURISDICTION (PLACE AN x IN ONE BOX ONLY)	III CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN x IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT) FOR DIVERSITY CASES ONLY!																								
<input type="radio"/> 1 U.S. Government Plaintiff <input checked="" type="radio"/> 2 U.S. Government Defendant <input type="radio"/> 3 Federal Question (U.S. Government Not a Party) <input type="radio"/> 4 Diversity (Indicate Citizenship of Parties in item III)	<table style="width:100%; border-collapse: collapse;"> <thead> <tr> <th></th> <th>PTF</th> <th>DFT</th> <th></th> <th>PTF</th> <th>DFT</th> </tr> </thead> <tbody> <tr> <td>Citizen of this State</td> <td align="center"><input type="radio"/> 1</td> <td align="center"><input type="radio"/> 1</td> <td>Incorporated or Principal Place of Business in This State</td> <td align="center"><input type="radio"/> 4</td> <td align="center"><input type="radio"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td align="center"><input type="radio"/> 2</td> <td align="center"><input type="radio"/> 2</td> <td>Incorporated and Principal Place of Business in Another State</td> <td align="center"><input type="radio"/> 5</td> <td align="center"><input type="radio"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td align="center"><input type="radio"/> 3</td> <td align="center"><input type="radio"/> 3</td> <td>Foreign Nation</td> <td align="center"><input type="radio"/> 6</td> <td align="center"><input type="radio"/> 6</td> </tr> </tbody> </table>		PTF	DFT		PTF	DFT	Citizen of this State	<input type="radio"/> 1	<input type="radio"/> 1	Incorporated or Principal Place of Business in This State	<input type="radio"/> 4	<input type="radio"/> 4	Citizen of Another State	<input type="radio"/> 2	<input type="radio"/> 2	Incorporated and Principal Place of Business in Another State	<input type="radio"/> 5	<input type="radio"/> 5	Citizen or Subject of a Foreign Country	<input type="radio"/> 3	<input type="radio"/> 3	Foreign Nation	<input type="radio"/> 6	<input type="radio"/> 6
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IV. CASE ASSIGNMENT AND NATURE OF SUIT

(Place a X in one category, A-N, that best represents your cause of action and one in a corresponding Nature of Suit)

<input type="radio"/> A. Antitrust <input type="checkbox"/> 410 Antitrust	<input type="radio"/> B. Personal Injury/ Malpractice <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Medical Malpractice <input type="checkbox"/> 365 Product Liability <input type="checkbox"/> 368 Asbestos Product Liability	<input checked="" type="radio"/> C. Administrative Agency Review <input type="checkbox"/> 151 Medicare Act Social Security: <input type="checkbox"/> 861 HIA ((1395ff)) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) Other Statutes <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input checked="" type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 890 Other Statutory Actions (if Administrative Agency is Involved)	<input type="radio"/> D. Temporary Restraining Order/Preliminary Injunction Any nature of suit from any category may be selected for this category of case assignment. *(If Antitrust, then A governs)*
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<input type="radio"/> E. General Civil (Other)		OR	<input type="radio"/> F. Pro Se General Civil	
Real Property <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent, Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property Personal Property <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	Bankruptcy <input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 Prisoner Petitions <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition Property Rights <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark Federal Tax Suits <input type="checkbox"/> 870 Taxes (US plaintiff or defendant) <input type="checkbox"/> 871 IRS-Third Party 26 USC 7609	Forfeiture/Penalty <input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 RR & Truck <input type="checkbox"/> 650 Airline Regs <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other Other Statutes <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 430 Banks & Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation	<input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions <input type="checkbox"/> 470 Racketeer Influenced & Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Satellite TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 900 Appeal of fee determination under equal access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes <input type="checkbox"/> 890 Other Statutory Actions (if not administrative agency review or Privacy Act)	

WT EPA

<input type="radio"/> G. Habeas Corpus/ 2255 <input type="checkbox"/> 530 Habeas Corpus-General <input type="checkbox"/> 510 Motion/Vacate Sentence <input type="checkbox"/> 403 Habeas Corpus - Alien Detainee	<input type="radio"/> H. Employment Discrimination <input type="checkbox"/> 442 Civil Rights-Employment (criteria: race, gender/sex, national origin, discrimination, disability age, religion, retaliation) *(If pro se, select this deck)*	<input type="radio"/> I. FOIA/PRIVACY ACT <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 890 Other Statutory Actions (if Privacy Act) *(If pro se, select this deck)*	<input type="radio"/> J. Student Loan <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (excluding veterans)
<input type="radio"/> K. Labor/ERISA (non-employment) <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Labor Railway Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="radio"/> L. Other Civil Rights (non-employment) <input type="checkbox"/> 441 Voting (if not Voting Rights Act) <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 445 American w/Disabilities-Employment <input type="checkbox"/> 446 Americans w/Disabilities-Other	<input type="radio"/> M. Contract <input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholder's Suits <input type="checkbox"/> 190 Other Contracts <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<input type="radio"/> N. Three-Judge Court <input type="checkbox"/> 441 Civil Rights-Voting (if Voting Rights Act)

V. ORIGIN

1 Original Proceeding
 2 Removed from State Court
 3 Remanded from Appellate Court
 4 Reinstated or Reopened
 5 Transferred from another district (specify)
 6 Multi district Litigation
 7 Appeal to District Judge from Mag. Judge

VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)
 Clean Air Act citizen suit, 42 U.S.C. §7604(a), seeks order compelling EPA to perform nondiscretionary duties.

VII. REQUESTED IN COMPLAINT CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 **DEMAND \$** Check YES only if demanded in complaint

JURY DEMAND: YES NO

VIII. RELATED CASE(S) IF ANY (See instruction) YES NO If yes, please complete related case form.

DATE MARCH 16, 2012 SIGNATURE OF ATTORNEY OF RECORD

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INSTRUCTIONS FOR COMPLETING CIVIL COVER SHEET JS-44
 Authority for Civil Cover Sheet

The JS-44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. Listed below are tips for completing the civil cover sheet. These tips coincide with the Roman Numerals on the Cover Sheet.

- I. COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF/DEFENDANT (b) County of residence: Use 11001 to indicate plaintiff is resident of Washington, D.C.; 88888 if plaintiff is resident of the United States but not of Washington, D.C., and 99999 if plaintiff is outside the United States.
- III. CITIZENSHIP OF PRINCIPAL PARTIES: This section is completed only if diversity of citizenship was selected as the Basis of Jurisdiction under Section II.
- IV. CASE ASSIGNMENT AND NATURE OF SUIT: The assignment of a judge to your case will depend on the category you select that best represents the primary cause of action found in your complaint. You may select only one category. You must also select one corresponding nature of suit found under the category of case.
- VI. CAUSE OF ACTION: Cite the US Civil Statute under which you are filing and write a brief statement of the primary cause.
- VIII. RELATED CASES, IF ANY: If you indicated that there is a related case, you must complete a related case form, which may be obtained from the Clerk's Office.

Because of the need for accurate and complete information, you should ensure the accuracy of the information provided prior to signing the form.

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pro hac vice application pending

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Diné CARE)
HC-63, PMB 6113)
Winslow AZ 86047)
)
NATIONAL PARKS CONSERVATION ASSOCIATION)
1300 19th Street NW, Suite 300)
Washington, DC 20036)
)

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY and)
LISA P. JACKSON, in her official capacity as EPA Administrator,)
Ariel Rios Building)
1200 Pennsylvania Avenue, NW)
Washington, DC 20460)
)

Defendants.)

Case: 1:12-cv-00423
Assigned To : Collyer, Rosemary M.
Assign. Date : 3/19/2012
Description: Admin. Agency Review

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. The federal Clean Air Act requires the Administrator of the United States Environmental Protection Agency (“Administrator” or “EPA”) to promulgate modern pollution control limits at the massive Navajo Generating Station (“NGS”) and Four Corners Power Plant (“Four Corners”), located on Navajo tribal lands in Arizona and New Mexico, to remedy unhealthful, scenery-impairing air pollution in protected national parks and wilderness areas in the American Southwest. Because EPA has failed to promulgate such pollution control limits without unreasonable delay, Plaintiffs bring this action to secure an order from the court that directs EPA to issue haze-reducing pollution control limits at NGS and Four Corners forthwith.

2. In particular, this Clean Air Act Section 304(a) citizen suit, 42 U.S.C. §7604(a), seeks an order compelling EPA to perform its nondiscretionary duties by date or dates certain to promulgate federal implementation plans (“FIPs”) establishing Best Available Retrofit Technology (“BART”) for NGS and Four Corners. EPA’s failure to perform these duties within a reasonable time has deprived Plaintiffs’ members of health, welfare, and procedural protections provided by the Clean Air Act.

JURISDICTION AND VENUE

3. The instant action arises under the Clean Air Act (“CAA” or “the Act”), 42 U.S.C. §7401 *et seq.* This Court has jurisdiction over this action pursuant to 42 U.S.C. §7604 and 28 U.S.C. §§1331 and 1361. The relief requested herein is authorized pursuant to 42 U.S.C. §7604 and 28 U.S.C. §§2201, 2202, and 1361.

4. In accordance with 42 U.S.C. §7604(a) and 40 C.F.R. Part 54, Plaintiffs notified the Administrator of EPA of the violations alleged herein and Plaintiffs’ intent to

initiate the present action. This notice was provided via certified mail, posted July 15, 2011, and addressed to the EPA Administrator. Copies of Plaintiffs' notice were served on the EPA Regional Administrator in San Francisco, the Navajo Nation, the states of Arizona and New Mexico, and on the operators of NGS and Four Corners. More than 180 days have passed since Plaintiffs' notice was served pursuant to 42 U.S.C. §7604(a). EPA never contacted Plaintiffs regarding their July 15, 2011 notice letter, and EPA never issued any final BART determinations for NGS or Four Corners.

5. Venue is proper in this Court pursuant to 28 U.S.C. §1391(e) because Defendant Lisa P. Jackson is an officer of the United States sued for acts and omissions in her official capacity, and her official residence is in the District of Columbia.

PARTIES

6. Plaintiff Diné CARE (Citizens Against Ruining our Environment) is a non-profit, all-Navajo environmental organization, based within the Navajo homeland. Diné CARE strives to educate and advocate for traditional Navajo teachings as it protects and provides a voice for all life in the Four Sacred Mountains. Diné CARE promotes alternative uses of natural resources that are consistent with the Diné philosophy of Beauty Way. Diné CARE works to protect and preserve the Diné way of life, including clean air on which all life depends.

7. Plaintiff National Parks Conservation Association ("NPCA") is a national not-for-profit corporation headquartered in Washington, D.C., with over 325,000 members nationwide. NPCA's mission is to protect and enhance America's national parks for the use and enjoyment of present and future generations. Since NPCA was established in 1919, it has advocated for protection of the natural environment (including air quality) in and around

the national parks, educated decision makers and the public about the importance of preserving the parks, worked to convince officials in the Executive Branch and members of Congress to uphold the laws that protect the public's use and enjoyment of the parks and to support new legislation to address threats to the parks, litigated to uphold these laws, and assessed the health of the parks and adequacy of park management to better inform the public and advocate for parks.

8. Defendant Lisa P. Jackson is the Administrator of the United States Environmental Protection Agency and is charged with the task of taking various actions to implement and enforce the Clean Air Act, including those actions sought herein. Defendant Jackson is sued in her official capacity, and she officially resides in Washington, D.C.

9. Defendant United States Environmental Protection Agency is the federal agency charged with implementation of the Clean Air Act.

FACTUAL BACKGROUND

Visibility Impacts from NGS and Four Corners Power Plants

10. Pollution from NGS has plagued the Grand Canyon since coal was first fed to its boilers over thirty years ago. NGS is a 2,250 megawatt coal-fired power plant located approximately 12 miles from the eastern edge of Grand Canyon National Park. NGS is the largest coal-fired power plant on the Colorado Plateau, and the eighth largest in the country. Although located on Navajo tribal land, NGS is owned and operated exclusively by non-tribal utilities including Salt River Project, Arizona Public Service Company, Tucson Electric Power, Bureau of Reclamation, Los Angeles Department of Water and Power and Nevada Energy.

11. On an annual basis, NGS discharges into the air of the Southwest over 34,000 tons of nitrogen oxides (NO_x), 1,900 tons of particulate matter (PM), 3,690 tons of sulfur dioxide (SO₂), and 20 million tons of carbon dioxide (CO₂).

12. Four Corners is a 2,060 megawatt coal-fired power plant located in the northwest corner of New Mexico, approximately 25 miles west of Farmington, New Mexico and approximately 35 miles south of Mesa Verde National Park in Colorado. Although Four Corners is located on Navajo tribal land, it is owned and operated exclusively by non-tribal utilities including Arizona Public Service Company, Southern California Edison, Public Service Company of New Mexico, Salt River Project, El Paso Electric Company, and Tucson Electric Power.

13. Four Corners has five separate generating units that were constructed between 1962 and 1970. Every year Four Corners' five generating units burn over ten million tons of coal, and, in that same span of time, discharge into the air of the Colorado Plateau approximately 42,000 tons of NO_x, 12,000 tons of SO₂, 1,300 tons of PM, and 15 million tons of CO₂. Four Corners is the largest single source of air pollution in the state of New Mexico.

14. In 1977, Congress amended the Clean Air Act to provide "Class I" status – the greatest protection from air pollution -- to national parks and wilderness areas. "Class I" status means, among other things, that existing visibility impairment in mandatory Class I national parks and wilderness areas must be eliminated.

15. Visibility impairment is measured in deciviews. A 1.0 deciview reduction in visibility is perceptible to the human eye. According to EPA's 1999 regional haze regulations, "A single source that is responsible for a 1.0 deciview change or more should

be considered to “cause” visibility impairment.” 40 C.F.R. Part 51, Subpart P, Appendix Y— Guidelines for BART Determinations Under the Regional Haze Rule, Section III A. 1.

16. The National Park Service has determined through air dispersion modeling that air pollution from NGS alone impairs visibility by over **39 deciviews** in at least eleven Class I national parks and wilderness areas in the Southwest, 39 times greater than EPA’s threshold used to determine if a single source of pollution causes visibility impairment. Class I areas impacted by emissions from NGS include Grand Canyon National Park (AZ), Capitol Reef National Park (UT), Bryce Canyon National Park (UT), Arches National Park (UT), Canyonlands National Park (UT), Mesa Verde National Park (CO), Petrified Forest National Park (AZ), Sycamore Canyon Wilderness (AZ), Pine Mountain Wilderness (AZ), Mazatzal Wilderness (AZ) and Zion National Park (UT).

17. The National Park Service additionally has determined through air modeling that Four Corners impairs visibility in 16 Class I areas by more than **46 deciviews** – 46 times greater than EPA’s threshold used to determine if a single source of air pollution causes visibility impairment. Class I areas impacted by emissions from Four Corners include Arches National Park (UT), Bandelier Wilderness (NM), Black Canyon of the Gunnison Wilderness (CO), Canyonlands National Park (UT), Capitol Reef National Park (UT), Grand Canyon National Park (AZ), Great Sand Dunes National Monument (CO), La Garita Wilderness (CO), Maroon Bells Snowmass Wilderness (CO), Mesa Verde National Park (CO), Pecos Wilderness (NM), Petrified Forest National Park (AZ), San Pedro Parks Wilderness (NM), West Elk Wilderness (CO), Weminuche Wilderness (CO) and Wheeler Peak Wilderness (NM).

18. To remedy the visibility impairment caused by NGS and Four Corners, the Act requires EPA to mandate the installation and operation of Best Available Retrofit Technology ("BART"). 42 U.S.C. §7491(b)(2)(A).

19. The installation and operation of BART at NGS and Four Corners would remedy, at least in part, existing visibility impairment in those downwind national parks, wilderness areas, wildlife refuges, and other areas designated by the Act and EPA rules as mandatory "Class I" Federal areas.

20. Plaintiffs' members use and enjoy these Class I areas for recreation, spiritual, cultural and aesthetic enjoyment, including enjoyment of the scenic vistas. Plaintiffs' members' use and enjoyment of these areas is adversely affected by the visibility impairment caused by NGS and Four Corners.

21. The acts and omissions of EPA complained of herein cause injury to Plaintiffs and their members by delaying the adoption, submission, review, approval or promulgation, and implementation of federal implementation plans required by the Act to remedy and protect against visibility impairment adversely affecting use and enjoyment of Class I areas by Plaintiffs' members. These delays cause injury to Plaintiffs' members by prolonging existing, and allowing future, visibility impairment that significantly interferes with Plaintiffs' members' use and enjoyment of Class I areas, and by nullifying or delaying measures mandated by the Act to remedy and prevent such visibility impairment. The recreational, aesthetic, health and environmental interests of Plaintiffs' members have been and continue to be adversely affected by the acts and omissions of EPA alleged herein.

22. The acts and omissions of EPA alleged herein further deprive Plaintiffs and their members of procedural rights and protections to which they would otherwise be

entitled, including, but not limited to, the right to comment on and judicially challenge the adequacy of federal implementation plans for the NGS and Four Corners power plants.

23. For all the foregoing reasons, the failures complained of herein cause Plaintiffs and their members' injuries for which they have no adequate remedy at law. Granting the requested relief would redress these injuries.

EPA's Tribal FIP Obligations

24. The citizen suit provision of the Clean Air Act, Section 304(b)(2), 42 U.S.C. §7604(b)(2), provides that citizens may commence a civil action against the Administrator of EPA "where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." Furthermore, "the district courts of the United States shall have jurisdiction to compel (consistent with paragraph (2) of this subsection) agency action unreasonably delayed . . . In any such action for unreasonable delay, notice to the entities referred to in subsection (b)(1)(A) of this section shall be provided 180 days before commencing such action."

25. Pursuant to the tribal authority provision of the Clean Air Act, Section 301(d)(4), 42 U.S.C. §7601(d)(4),

In any case in which the Administrator determines that the treatment of Indian tribes as identical to States is inappropriate or administratively infeasible, the Administrator may provide, by regulation, other means by which the Administrator will directly administer such provisions so as to achieve the appropriate purpose.

26. In 1998, EPA issued its Clean Air Act tribal authority rule pursuant to 42 U.S.C. §7601(d)(4). 63 Fed.Reg. 7271 (February 12, 1998). According to the tribal authority rule at 40 C.F.R. §49.11, the EPA Administrator,

(a) Shall promulgate without unreasonable delay such Federal implementation plan provisions as are necessary or appropriate to protect

air quality, consistent with the provisions of sections 304(a) and 301(d)(4), if a tribe does not submit a tribal implementation plan [TIP] meeting the completeness criteria of 40 CFR part 51, appendix V, or does not receive EPA approval of a submitted tribal implementation plan.

27. The Navajo Nation has not submitted a regional haze TIP to EPA, and the Navajo Nation is under no obligation or deadline to do so.

28. The tribal authority rule states at 40 C.F.R. §49.4,

Tribes will not be treated as States with respect to the following provisions of the Clean Air Act and any implementing regulations thereunder:

(e) Specific visibility implementation plan submittal deadlines established under section 169A of the Act.

29. According to EPA's 1999 regional haze regulations at 40 C.F.R. §51.308(e),

(1) To address the requirements for BART [best available retrofit technology], the State [or EPA pursuant to 40 C.F.R. §49.11] must submit an implementation plan containing the following plan elements and include documentation for all required analyses:

... (ii) A determination of BART for each BART-eligible source in the State that emits any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in any mandatory Class I Federal area. All such sources are subject to BART.

30. EPA has determined that both the Navajo Generating Station and the Four Corners Power Plant are BART-eligible sources.

31. On July 22, 2007, EPA provided written notification to the operators of NGS and Four Corners that regional haze BART analyses were required because each facility was BART-eligible and was also subject to BART for specific pollutants.

32. In November, 2007, the operator of NGS, Salt River Project Agricultural Improvement and Power District, provided its regional haze BART analysis to EPA. In its BART analysis, SRP confirmed that NGS was both BART-eligible and subject to BART due to its impacts to nearby Class I areas.

33. In January, 2008, the operator of Four Corners, Arizona Public Service Company, provided its regional haze BART analysis to EPA. In its BART analysis, Arizona Public Service Company confirmed that Four Corners was both BART-eligible and subject to BART due to its impacts to nearby Class I areas.

34. Approximately two years later, on August 28, 2009, EPA issued an "Advance Notice of Rulemaking" that discussed the "anticipated visibility improvements and the cost effectiveness for different levels of air pollution controls as [BART]" for NGS and Four Corners. 74 Fed.Reg. 44313 (August 28, 2009). In its notice, EPA confirmed its earlier determinations that the two power plants "are the only BART eligible sources located on the Navajo Nation." 74 Fed.Reg. at 44315. EPA did not propose BART for either power plant.

35. Over a year later, on October 19, 2010, EPA issued a proposed BART determination for Four Corners. 75 Fed.Reg. 64221 (October 19, 2010). EPA indicated that it was "proposing to find" that a BART determination for Four Corners was "necessary and appropriate" pursuant to its tribal authority rule at 40 C.F.R. §49.11(a). 75 Fed.Reg. at 64223. On February 25, 2011 the EPA published a supplemental proposed BART determination for Four Corners. 76 Fed. Reg. 10530.

36. As of the date of this complaint, EPA has not issued a final BART determination for Four Corners.

37. As of the date of this complaint, EPA has not issued a proposed or final BART determination for NGS.

FIRST CLAIM FOR RELIEF
Failure to Promulgate final BART determinations

38. Plaintiffs hereby incorporate all previous paragraphs by reference.

39. The visibility protection provision of the Clean Air Act at 42 U.S.C. §7491(b)(2)(A) requires EPA to issue regulations that include a requirement for major sources of air pollution that cause or contribute to visibility impairment in any mandatory Class I national park or wilderness area, such as NGS and Four Corners, to “procure, install, and operate, as expeditiously as practicable (and maintain thereafter) the best available retrofit technology, as determined by the State (or the Administrator in the case of a plan promulgated under section 7410 (c) of this title) for controlling emissions from such source for the purpose of eliminating or reducing any such impairment.”

40. As a result of this Congressional mandate, EPA promulgated regional haze regulations which, at 40 C.F.R. §51.30(e)(1)(ii), set forth a mandatory duty that BART be established for each “BART eligible” source:

The State [or EPA] . . . *must submit* . . . a determination of BART for each BART eligible source. Emphasis added.

41. According to the regional haze regulations at 40 C.F.R. §51.30(e)(1)(ii), all BART eligible sources are “subject to BART” with respect to “any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in any mandatory Class I Federal area.”

42. NGS and Four Corners are located on tribal lands. As a result, EPA’s visibility protection obligations with respect to these facilities are set forth in Clean Air Action Section 301, 42 U.S.C. §7601, and in EPA’s tribal authority rule.

43. Pursuant to the tribal authority provision of the Clean Air Act, Section 301(d)(4), 42 U.S.C. §7601(d)(4),

In any case in which the Administrator determines that the treatment of Indian tribes as identical to States is inappropriate or administratively infeasible, the Administrator may provide, by regulation, other means by

which the Administrator will directly administer such provisions so as to achieve the appropriate purpose.

44. In 1998, EPA issued its Clean Air Act tribal authority rule pursuant to 42 U.S.C. §7601(d)(4). 63 Fed.Reg. 7271 (February 12, 1998). According to the tribal authority rule at 40 C.F.R. §49.11, the EPA Administrator,

(a) Shall promulgate without unreasonable delay such Federal implementation plan provisions as are *necessary or appropriate* to protect air quality, consistent with the provisions of sections 304(a) and 301(d)(4), if a tribe does not submit a tribal implementation plan [TIP] meeting the completeness criteria of 40 CFR part 51, appendix V, or does not receive EPA approval of a submitted tribal implementation plan. Emphasis added.

45. The Navajo Nation has not submitted a regional haze TIP to EPA, and the Navajo Nation is under no deadline to do so.

46. On July 22, 2007, EPA provided written notification to the operators of NGS and Four Corners that regional haze BART analyses were required because each facility was BART-eligible and was also subject to BART for specific pollutants.

47. EPA's 2007 BART eligibility and subject-to-BART determinations for NGS and Four Corners were tantamount to a finding by the agency *at that time* that it was both necessary and appropriate to promulgate BART determinations without unreasonable delay pursuant to 40 C.F.R. §49.11.

48. In other words, EPA's BART-eligibility and subject to BART determinations were equivalent to, and unavoidably resulted in, a finding that BART determinations were necessary and appropriate. This is because EPA's BART-eligibility and subject to BART determinations triggered a mandatory legal duty on the part of EPA to make BART determinations for NGS and Four Corners pursuant to the regional haze regulations at 40 C.F.R. §51.30(e)(1)(ii).

49. Because EPA has failed to promulgate a federal regional haze BART determination for either NGS or Four Corners for more than four years, it has failed to meet its mandatory duty to establish BART for all “BART-eligible” and “subject to BART” sources on Navajo Nation land without unreasonable delay.

50. EPA’s failure to promulgate final BART determinations for NGS and Four Corners constitutes a failure to perform acts or duties that are not discretionary with the Administrator within the meaning of 42 U.S.C. §7604(a)(2). Such failure is ongoing and, on information and belief, will continue absent the relief sought herein.

51. Accordingly, Plaintiffs are entitled to an order from this Court directing EPA to promulgate final and complete BART determinations for NGS and Four Corners forthwith.

RELIEF REQUESTED

52. WHEREFORE, Plaintiffs pray that this Court:

(1) Declare that EPA’s failures to promulgate final BART determinations for NGS and Four Corners as complained of herein constitute failures to perform nondiscretionary duties without unreasonable delay within the meaning of Clean Air Act Section 304(b)(2), 42 U.S.C. §7604(b)(2), and the tribal authority rule at 40 C.F.R. §49.11;

(2) Preliminarily and permanently enjoin the Administrator from continuing to violate the above-described nondiscretionary duties;

(3) Order the Administrator to issue final BART determinations for NGS and Four Corners forthwith;

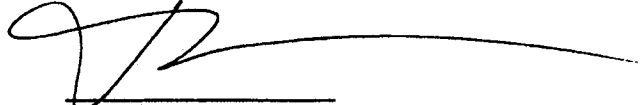
(4) Award Plaintiffs their reasonable costs of litigation, including attorneys’ fees, pursuant to 42 U.S.C. §7604(d);

(5) Retain jurisdiction over this action to ensure compliance with the Court's orders;
and

(6) Grant such other relief as the Court deems just and proper.

DATED: this 16th day of March, 2012.

FOR PLAINTIFFS,



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