

Statement of Stephen B. Etsitty
Executive Director
Navajo Nation EPA

Committee on Energy and Commerce
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Hearing Titled: “EPA Enforcement Priorities and Practices”

The Navajo Nation appreciates the opportunity to present its views on the United States Environmental Protection Agency’s Enforcement Priorities and Practices. My Testimony this morning will focus on Regional Haze, the Best Alternative Retrofit Technology (“BART”) determination processes, and our experiences working with Region VI, Region IX, and Environmental Protection Agency (“EPA”) Headquarters.

The Navajo Nation (“Nation”) is a primarily coal-based resource tribe that is the landlord for two large coal-fired plants and associated mines located directly on its tribal lands and close neighbor to one large coal fired power plant and associated mine located near the Nation. The Regional Haze Rule, 40 C.F.R. Part 51, 64 Fed. Reg. 35714 (July 1, 1999), directly affects the Nation’s existing natural resource economy and its government revenue sources. Moreover, because of the Nation’s substantial coal reserves and potential jobs in the energy sector, the Regional Haze Rule and other EPA rules will have long reaching impacts on the Nation’s sovereignty, including the Nation’s ability to independently develop its natural resource economy and provide economic security for its tribal members.

I. Introduction

The San Juan Generating Station (“SJGS”), a coal-fired electric power plant adjacent to the Navajo Nation, is of critical economic importance to the Navajo Nation and the Navajo people. The SJGS provides jobs to a significant number of Navajo people, both at the power plant and at the coal mine associated with the plant, as discussed further below. A recent rulemaking under the Regional Haze Rule by the EPA imposes excessively stringent and expensive BART on the SJGS and jeopardizes the continued viability of the power plant.

Accordingly, the Navajo Nation filed an Amicus Curiae brief in *Wild Earth Guardians, et al., v. United States Environmental Protection Agency*, Tenth Circuit Case Nos. 11-9552, 11-9557, and 11-9567, in support of the Public Service Company of New Mexico (“PNM”) and of New Mexico Governor Martinez and the New Mexico Environment Department (collectively “New Mexico”), in their petitions for review of the BART rulemaking for the SJGS (entitled “Approval and Promulgation of Implementation Plans; New Mexico; Federal Implementation Plan for Interstate Transport of Pollution Affecting Visibility and Best Available Retrofit Technology Determination,” 76 Fed. Reg. 52,388 (Aug. 22, 2011) (“FIP”).

The Navajo Nation (“Nation”) is the largest sovereign Indian Nation both in terms of population and land area in the United States. The Nation is the homeland of approximately 300,000 Navajo people, covers more than 27,000 square miles, and shares territory with the

states of Arizona, New Mexico, and Utah. Much of the Nation is in close proximity to areas covered by the Regional Haze Rule (known as “Class I” areas under Clean Air Act, see 42 U.S.C. § 7472(a)).

As economic census data continues to illustrate the Nation has remained extremely economically depressed for many generations. In economic terms, it is one of the two poorest areas in the United States, with an unemployment rate that has increased from 42.16% in 2001 to 50.52% in 2007. Since the current national recession hit in late 2008, the Nation has suffered even more unemployment, particularly for younger Navajo people, who are often forced to move elsewhere. The average annual Navajo family income is about \$20,000.

The SJGS is a four-unit coal-fired electric generating facility located in Waterflow, New Mexico, and has a generating capacity of 1800 megawatts. The SJGS is located approximately 17 miles east of Shiprock, New Mexico, a town of approximately 10,000 residents and the largest population center on the Navajo Nation. Coal for the SJGS is mined at the San Juan Mine, located about 18 miles east of Shiprock.

While both the SJGS and the San Juan Mine are located outside the jurisdiction of the Navajo Nation, the plant and the mine have a significant positive economic impact on the Nation and on the regional economy.

The SJGS is a major employer in the northeastern portion of the Navajo Nation. Approximately 88 of the 400 employees (22%) at the plant are Native American, most being Navajo. About 230 of the San Juan Mine 500-person workforce (approximately 46%) are Native American, with most also being Navajo. In addition, many of the temporary workers hired during times of scheduled maintenance at the SJGS and the major contractors to the SJGS are comprised of mostly Navajo employees.

II. EPA’s Obligation to Engage in *Meaningful Tribal Consultation*

As recognized in E.O. 13175, “the United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions.” Accordingly, every federal agency “shall have an accountable process to ensure *meaningful and timely* input by tribal officials in the development of regulatory policies that have tribal implications.” (emphasis added). As the EPA recognizes in its EPA Tribal Consultation Policy, Section IV, EPA shares the federal government’s trust responsibility derived from the historical relationship between the federal government and Indian tribes.

For purposes of the required tribal consultation, the standard for determining whether a regulation has tribal implications is not whether it “impose[s] substantial direct compliance costs on tribal governments,” but rather whether a proposed regulation has “substantial direct effects on one or more Indian tribes.” As discussed above, the FIP for SJGS will have substantial direct effects on the Navajo Nation, the SJGS, San Juan Mine, subcontractors, and seasonal workers. This represents about 318 households of the Navajo Nation and includes highly paid jobs that are about 2.75 times the average Navajo Nation Household Income of about \$20,000. Regionally,

coalmine jobs pay an average annual income of more than \$55,000, and loss of comparable paying jobs at the SJGS would be devastating, both directly and indirectly, to many Navajo people.

Closure of the SJGS and San Juan Mine would also affect the Navajo Nation's tax base. Approximately 318 workers from the SJGS, San Juan Mine, and related activities reside on the Navajo Nation. These individuals purchase goods and services produced, processed or extracted from the Navajo Nation, and 4% sales tax is assessed on all sales of goods and services within the Navajo Nation. In the event that the SJGS and San Juan Mine are closed and workers are laid off, these individuals will have less money to spend. This would reduce the sales tax revenue collected by the Navajo Nation and place additional social safety net obligations on the Navajo Nation.

EPA has a trust responsibility to the Navajo Nation in this circumstance. Nonetheless, despite the unique impact that this FIP and other impending BART rulemaking in Navajo Indian Country will have on the Navajo Nation, the EPA failed to conduct requisite "outreach" to the Nation and consultation prior to publishing the proposed FIP for SJGS.

Because of this lack of outreach and consultation, Navajo Nation President Ben Shelly sent a letter on May 3, 2011 to Dr. Armendariz, Regional Administrator, EPA Region VI, requesting formal government-to-government consultation with EPA on the FIP for SJGS. It was especially disappointing to again have to remind EPA of its consultation obligations to the Nation at a time when other air-quality rulemakings for the Nation's power plants were pending: (BART for Navajo Generating Station ("NGS")) and the Four Corners Power Plant ("FCPP"), and the MATS Rule. The Nation has had to request consultation on those aforementioned rulemakings even though EPA had just finalized its Tribal Consultation Policy purportedly to better implement E.O. 13175 and its 1984 Indian Policy.

As a result of the President's request, EPA staff met with President Shelly and other Navajo Nation officials and counsel on May 20, 2011, in Albuquerque, New Mexico. At that meeting, the parties discussed the Nation's comments and concerns about the proposed FIP for SJGS. The Nation appreciates the opportunity provided by EPA. However, the approximately two-hour consultation, only provided at the eleventh hour of the FIP rulemaking, was neither meaningful nor adequate tribal consultation. In fact, contrary to its Tribal Consultation Policy, EPA never provided feedback to the Nation regarding its comments at the May 20, 2011 meeting, and the Nation is therefore unaware how its concerns were weighed or considered by the agency, if at all. The EPA can and must do better to engage with the Nation in meaningful government-to-government consultation in this and other rulemakings, which have the potential to so catastrophically impact the Nation through EPA regulation. Indeed, EPA made only one change in the final FIP for SJGS that was positive for the Nation compared with the proposed rule.

The Nation nonetheless remains hopeful that EPA will improve its consultation practices, in accordance with its stated policies, and looks forward to beginning to work with the EPA in a true government-to-government relationship as the Regional Haze Rule is implemented in the southwest and across the Navajo Nation and as other rule-makings are undertaken.

III. EPA's Failure to Analyze Impacts to the Nation from the SJGS FIP

In its April 4, 2011 comments on the draft FIP for SJGS, and in its Amicus Brief in *Wild Earth Guardians, et al., v. United States Environmental Protection Agency*, the Nation pointed out EPA's failure to comply with its own regulations and fully analyze all five BART factors for all available retrofit control technologies that are technically feasible, and how EPA also failed to consider critical economic impacts to the Nation and Region as required as part of the BART analysis, and pursuant to its trust responsibility and government-to-government relationship with the Nation. Specifically, EPA failed to consider potential regional economic impacts and impacts on local Indian tribes, including the Navajo Nation, and the inevitable impacts if SJGS and its mine were forced to close as a result of imposition of costly SCR technology.

As the Nation stated in its comments on the proposed FIP for SJGS, EPA provides the facile conclusion that it does not have direct "tribal implications," as defined in E.O. 13175, because the FIP does not impose federally enforceable emissions limitations on any source located on tribal lands, and neither imposes substantial direct compliance costs on tribal governments, nor preempts tribal law.

This is not an accurate analysis of the potential social costs to the Navajo people. On the contrary, should the final FIP for SJGS result in closure of SJGS, hundreds of jobs will be lost, not only in the coal and power industry on the Nation, but in the service support industry and public sector as well. If the SJGS closes as a result of EPA's BART FIP, a conservative estimate is that 318 Navajo jobs would be lost, representing an annual loss of about \$17.7 million. This would reduce spending by about \$25 million per year after adjusting for an income multiplier and a loss of nearly \$1 million annually in sales tax receipts for the Navajo Nation, which is a significant loss for the Navajo Nation's General Fund. An increase in the number of unemployed on the Navajo Nation caused by the closure of the SJGS or San Juan Mine would result in increased demands for social services provided by the Navajo Nation. At a time when other EPA rulemakings are threatening to diminish the Nation's coffers, such as BART determinations at the FCPP and the NGS, these increased demands for services would necessitate the Navajo Nation diverting an increased percentage of its already stressed budget to provide for the social needs of the unemployed. This would divert funding that could be spent on economic development and thereby stunt future economic growth on the Navajo Nation.

IV. Other EPA Rulemakings Affecting the Navajo Nation

On February 25, 2011, EPA, Region IX, proposed an Alternative Emission Control Strategy ("AECS"), a better-than-BART determination which supplemented its previous October 19, 2010 proposal for FCPP. The AECS takes into account the FCPP proposal to shutdown Electrical Generating Units ("EGUs") 1, 2 and 3 (of 5 total EGUs). The loss of this total net capacity of 560 MW by 2014 would result in 100% control of NO_x, SO₂, PM, Hg and other hazardous pollutants from these EGUs, which would significantly reduce emissions from FCPP.

Currently, EPA, Region IX, has delayed proposing BART for NGS pending crucial consultations with stakeholder tribes. After publication of the Advance Notice of Proposed

Rulemaking (“ANPR”) for BART for NGS and FCPP, the Navajo Nation recommended a phased approach to emissions controls for those plants, and suggested that the EPA consider the multiple interests at stake, including the significant economic interests of the Navajo Nation. The Navajo Nation previously commented that EPA should have explicitly analyzed the impact of the MATS rule in conjunction with these other rulemakings and provide flexibility for compliance scheduling so that FCPP and NGS, upon which the Navajo Nation economy is almost entirely reliant, can continue their operations. The Nation also commented that the EPA should also analyze the impact of future rulemakings, such as GHG regulation, which have the potential to insert yet another layer of compliance costs and compliance scheduling for coal-fired power plants to meet, and constitute severe challenges to the Navajo Nation economy.

We acknowledge that EPA has begun to implement its Tribal Consultation Policy with affected Indian tribes and is working closely with other federal agencies, including the Department of the Interior, on these issues. While the Nation appreciates that EPA is apparently sensitive to the plight of FCPP and NGS under its current rulemakings, equally critical to the Nation’s and the regional economy is the future of SJGS. EPA must use the flexibility it has under the CAA to develop a rational scheme integrating its multiple rulemakings and timelines, especially given the goal under the Regional Haze Rule to gradually phase in visibility reductions in Class I Areas up until 2064. To the extent the EPA is unable to be flexible because of statutory requirements under the CAA, the Nation urges Congress to consider amendments to the CAA that will allow for such flexibility.

Specifically in making BART determination, EPA also must not be allowed to invert the intent of Congress that local governments, including tribes, have exclusive authority to make discretionary policy decisions consistent with the needs of their constituents and regional economies, so long as they meet the requirements of the CAA and further the national goal of pristine conditions at Class I areas under the Regional Haze Rule.

V. Conclusion

The Nation supports the substantive goals of the CAA, and the goal of the Regional Haze Rule to improve visibility at Class I areas. However, for the Nation as a tribal nation and a small government landlord of affected EGUs and associated mines, implementation by EPA of the Regional Haze Rule and BART must be done with due analysis and accommodation of the critical economic interests of the Navajo Nation and the Navajo people in the continued operation of power plants in and near Navajo Indian Country. EPA has an obligation to meaningfully consult with the Nation for rulemakings directly affecting the Nation before promulgating a draft rule. That was not done for the proposed FIP for SJGS, or for the ANPR for the FCPP and NGS, and EPA therefore violated its consultation obligations and trust responsibility to the Nation.

EPA’s “one size fits all” approach to rulemaking fails to acknowledge or address the specific concerns and impacts to the Navajo Nation, as well as regional impacts. Making matters worse, EPA’s uncoordinated approach to rulemakings impacting the same industries creates regulatory uncertainty, increases compliance costs, and puts at substantial risk the national and regional economies, critical jobs of Navajo people, and the very viability of the Navajo

government. Congress should therefore strongly consider amending the CAA to mandate an integrated scheme for EPA rulemaking, and to allow industry to implement the Regional Haze rule and other EPA rulemakings in a rational fashion and within a reasonable time frame, while still protecting the health and welfare of the public and meeting the substantive goals of the CAA.

Respectfully,

THE NAVAJO NATION

Stephen B. Etsitty
Executive Director
Navajo Nation Environmental Protection Agency