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JOHN M. BARTH

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May 16, 2014

CERTIFIED MAIL/RETURN RECEIPT REQUESTED

Gina McCarthy  
Administrator  
U.S. Environmental Protection Agency  
Washington, D.C. 20460

Jared Blumenfeld  
Regional Administrator  
U.S. Environmental Protection Agency, Region 9  
75 Hawthorne Street  
San Francisco, CA 94105

Eric H. Holder, Jr.  
Attorney General of the United States  
950 Pennsylvania Avenue NW  
Washington, DC 20530-0001

Tucson Electric Power  
88 E. Broadway Blvd.  
Tucson, AZ 85701

Arizona Public Service  
P.O. Box 53933 Sta. 3200  
Phoenix, AZ 85072-3933

Public Service Company of New Mexico  
Main Offices  
Albuquerque, NM 87158

Salt River Project  
1521 N. Project Drive  
Tempe, Arizona 85281-1298

El Paso Electric Company  
P.O. Box 982  
El Paso, TX 79960

To whom it may concern:

On behalf of San Juan Citizens Alliance (“SJCA”), 1309 E. 3rd Ave. Suite B-3 Durango, Colorado 81302 970-259-3583 and Center for Biological Diversity (“the Center”), 351 California Street, Suite 600, San Francisco, California 94104 (415) 436-9682, I am providing notice, under Section 1365 and 1369(b) of the Clean Water, 33 U.S.C. §§1365,1369(b) and 40 C.F.R. Part 135, of intent to sue either the U.S. Environmental Protection Agency (“EPA”) and/or Arizona Public Service (“APS”), Tucson Electric Power, Public Service Company of New Mexico, Salt River Project, and El Paso Electric Company for the legal violations identified herein.

Background

This notice letter pertains to the Four Corners Power Plant (“FCPP”) located on the Navajo Nation. Arizona Public Service Company is the operator, and partial owner of, the FCPP. The other partial owners of the FCPP are: Public Service Company of New Mexico

(PNM), Salt River Project (“SRP”), Tucson Electric Power (“TEP”) and El Paso Electric Company. EPA Region 9 is the Clean Water Act permitting authority for the FCPP because it is located on Indian lands. On April 3, 2001 EPA Region 9 issued the most recent NPDES permit for the FCPP, which is NPDES Permit No. NM0000019.<sup>1</sup> The permit became effective on April 7, 2001 and expired on April 6, 2006. To date, EPA has not issued a renewal NPDES permit for the FCPP.

The original application for a renewal permit was submitted in late 2005, followed subsequent updates to the application. Exhibit 1 hereto. On October 30, 2012, EPA Region 9 acknowledged that “much time has elapsed since [APS] submitted the original application for renewal” and EPA requested an updated application. *Id.* EPA indicated at that time that it “plans to draft and issue a renewed NPDES permit for the APS Four Corners Power Plant in 2013.” *Id.* APS submitted a revised permit application on February 15, 2013. Exhibit 2 hereto. On February 19, 2013, EPA stated that it would “draft a proposed renewed NPDES permit within 6 months” after receiving the revised application. Exhibit 3 hereto. It has been over 14 months since EPA received APS’s revised NPDES permit application and EPA has not issued a proposed renewal permit for public comment.

### Claims against EPA

SJCA and the Center claim that EPA has unreasonably delayed issuing a National Pollutant Elimination System Permit. Alternatively, SJCA and the Center claim that EPA’s attempt to administratively extend Permit NM0000019 beyond the statutorily-limited 5 year term is illegal and renders the permit void by operation of law.

EPA’s failure to timely issue a renewal NPDES permit for the FCPP constitutes an unreasonable delay for rendering its decision under the Administrative Procedures Act, 5 U.S.C. § 558(c). It has been over 8 years since NPDES Permit No. NM0000019 has expired and 13 years since an NPDES permit for the FCPP has been issued by EPA. This delay by EPA is arbitrary, capricious, and/or unreasonable under the law.

Alternatively, Congress has determined that NPDES permits may only be issued “for fixed terms not exceeding five years.” 33 U.S.C. § 1342(b)(1)(B). EPA’s permit program “shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder” including the maximum 5-year term. 33 U.S.C. § 1342(a)(3). It follows that EPA does not have the statutory authority to administratively extend an NPDES permit beyond the statutory 5-year time period. *ONRC Action v. Columbia Plywood, Inc.*, 286 F.3d 1137, 1146 (9<sup>th</sup> Cir. 2002, dissent by Reinhardt). Likewise, a continuing shield under 40 C.F.R. §122.6 may in no event last more than five years, the term of a properly issued renewal permit under 33 U.S.C. §1342(b)(1)(B) and 40 C.F.R. 122.6. Permit #NM0000019 expired on April 6, 2006 and thus may only be administratively extended by EPA through April 6, 2011.

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<sup>1</sup> A copy of the permit can be found at: <http://www.epa.gov/region9/water/npdes/pdf/navajo/AZ-PublicServiceC0-permit.pdf>.

EPA's attempt to administratively extend Permit NM000019 and the continuing shield beyond 5 years is illegal. EPA has refused to act for almost ten years, and by its inaction, attempted to allow APS and the other owners of the FCPP to receive not only the equivalent of one additional NPDES permits (until 2011), but the equivalent of two additional permits. In doing so, EPA has illegally ignored the plain language of Congress limiting the term of NPDES permits to 5 years. Permit NM000019 became void by operation of law on April 7, 2011.

Claims against APS and the other owners of the FCPP

For the reasons stated above, SJCA and the Center claim that APS and the other owners of the FCPP are illegally discharging pollutants from the FCPP without a valid NPDES permit. As noted above, NPDES Permit No. NM000019 expired on April 6, 2006. EPA does not have the legal authority to extend a NPDES permit for longer than 5 years. Therefore, APS and the other owners of the FCPP have been illegally discharging pollutants (including but not limited to Total Dissolved solids, selenium, temperature, Total Suspended Solids) from the FCPP (and its pipes, point sources and appurtenances) into navigable waters (including but not limited to No Name Wash, Chaco Wash, the San Juan River, and/or Morgan Lake) without a permit from April 7, 2011 to date. APS and the other owners of the FCPP are jointly and severally liable for civil penalties on each and every day it has discharged pollutants without a permit from April 7, 2011 to date. As noted above, APS and the other owners may not rely on a continuing shield defense because EPA is without authority to administratively extend NPDES Permit No. NM000019 beyond five years.

Please contact me if you have any questions about this notice letter or if you would like to discuss resolution of this matter without protracted litigation.

Sincerely,

s/ John M. Barth

John M. Barth

cc: Mike Eisenfeld, SJCA  
Michael Saul, The Center for Biological Diversity