

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

In Re: U.S. EPA, REGION 9)
)
 DINE’ CITIZENS AGAINST RUINING)
 THE ENVIRONMENT)
)
 SAN JUAN CITIZENS ALLIANCE)
)
 CENTER FOR BIOLOGICAL DIVERSITY))
)
 AMIGOS BRAVOS)
)
 SIERRA CLUB)
)
 Petitioners.)
)
 v.)
)
 U.S. ENVIRONMENTAL PROTECTION)
 AGENCY, REGION 9)
)
 ALEXIS STRAUSS,)
 ACTING REGIONAL ADMINISTRATOR)
 US EPA REGION 9)
)
 TOMAS TORRES, DIRECTOR,)
 WATER DIVISION, US EPA REGION 9)
)
 Respondents.)

**PETITION FOR WRIT OF
MANDAMUS PURSUANT
TO 28 U.S.C. § 1651
33 U.S.C. §1369(B)(1)(F)**

Case No. _____

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Dine' Citizens Against Ruining the Environment ("Dine' CARE"), San Juan Citizens Alliance ("SJCA"), Center for Biological Diversity ("CBD"), Amigos Bravos, and Sierra Club, collectively referred to herein as "Petitioners", respectfully submit this disclosure statement. Dine' CARE is a non-profit organization based on the Navajo Nation and is composed of Navajo members. Dine' CARE has no parent corporation nor is there any publicly held corporation that owns stock or other interests in the organization. SJCA is a non-profit environmental organization incorporated in the State of Colorado. San Juan Citizens Alliance has no parent corporation nor is there any publicly held corporation that owns stock or other interests in the organization. CBD is a non-profit membership corporation incorporated in the State of Arizona. The Center for Biological Diversity has no parent corporation nor is there any publicly held corporation that owns stock or other interests in the organization. Amigos Bravos is a non-profit membership corporation incorporated in the State of Arizona. Amigos Bravos has no parent corporation nor is there any publicly held corporation that owns stock or other interests in the organization. Sierra Club is a non-profit membership corporation incorporated in the State of California. The Sierra Club has no parent corporation

nor is there any publicly held corporation that owns stock or other interests in the organization.

I. INTRODUCTION

Petitioners request that this Court issue a writ of mandamus compelling the Environmental Protection Agency (“EPA”) Region 9 to take long overdue action on a National Pollution Discharge Elimination System (“NPDES”) permit application, which has been pending since 2006, related to the coal fired Four Corners Power Plant (“FCPP” or “power plant”), as required by the federal Clean Water Act (“CWA” or “Act”), 33 U.S.C. § 1342(b)(1)(B). This action is necessary to ensure the facility is operating in compliance with the current mandates of the Act and its implementing regulations, and to protect the people, livestock, wildlife, and waters of the Navajo Nation Reservation and areas downstream from unnecessary harm and preventable degradation.

The current FCPP NPDES permit was issued by EPA in 2001 and expired over 12 years ago. Since that time EPA has failed to take final action on a NPDES renewal permit application pending since 2006. EPA is in patent violation of the mandates and procedures of the CWA and EPA’s own regulations governing the processing of the NPDES permit application for the FCPP.

II. PARTIES, JURISDICTION, AND VENUE

Plaintiff Diné CARE is an all-Navajo membership organization comprised of a federation of grassroots community activists in the Four Corners region of Arizona, New Mexico, Colorado, and Utah, and the Tribal lands within the borders of those states. Diné CARE's goal is to protect all life in their ancestral homeland by empowering local and traditional people to organize, speak out, and assure conservation and stewardship of the environment through civic involvement, engagement, and oversight in decision-making processes relating to tribal development, and oversight of government agencies' compliance with all applicable environmental laws. Diné CARE members live, use, and enjoy the waters and areas that are affected by the FCPP, including areas in Arizona. Diné CARE members include customers of the Arizona utilities who own the FCPP. Diné CARE brings this action on its own behalf and on behalf of its adversely affected members. Its primary office is located in Dilkon, Arizona. The declaration of Dailan Long, a member of Dine' CARE is attached as Exhibit 1 and describes how EPA's failure to render final action of the pending NPDES permit application adversely impacts his interests and those of Dine' CARE. Mr. Long is a member of Dine' CARE. Exhibit 1, p. 1, ¶1. Mr. Long lives on the Navajo Nation and his homestead is located on the east and west side of the Chaco River. *Id* at p. 2, ¶3. Mr. Long raises sheep on Navajo lands near the Chaco River. *Id* at p. 1, ¶1.

The FCPP is visible from Mr. Long's home. *Id* at p. 3, ¶8. Mr. Long also recreates along the Chaco River. *Id* at p. 2, ¶4. Mr. Long is forced to haul water from a well 15 miles away from his homestead because tribal members downstream of the FCPP experience livestock mortality when consuming water from the Chaco River. *Id* at p. 3, ¶7. Mr. Long is adversely impacted by EPA's failure to make a final determination on the pending NPDES permit application because EPA's inaction exacerbates public health concerns associated with pollution discharges from the plant, denies Mr. Long data and information on coal ash water pollution discharges that would be regulated under a new permit, and impacts water quality in the Chaco River thus creating a risk to his personal health, his property, his livestock, and the agricultural use of his property. *Id* at p. 3, ¶10. Issuance of a final decision by EPA would remedy some of the harms of inaction by providing more information about water pollution discharges and its impact on the Chaco River and endangered species. *Id* at p. 4, ¶12. Issuance of a final decision by EPA would also provide a procedural right to appeal any deficiencies with the permit, which is currently being thwarted by EPA's inaction. *Id* at p. 4, ¶11.

Petitioner SJCA is a non-profit membership organization with over 500 members in the Four Corners region. The declaration of Mike Eisenfeld, a member of SJCA, Amigos Bravos, and Sierra Club is attached as Exhibit 2 and describes how EPA's failure to render final action of the pending NPDES permit application

adversely impacts his interests and those of the conservation organizations of which he is a member. More specifically, Mr. Eisenfeld lives in Farmington, New Mexico about 15 miles from the FCPP. Exhibit 2 at p. 1, ¶¶ 2& 3 and p. 3 ¶7. Mr. Eisenfeld is an avid river runner and has boated on the San Juan River on numerous occasions. *Id* at p. 2, ¶4. Mr. Eisenfeld also frequently visits Morgan Lake, into which the FCPP directly discharges pollutants. *Id* at p. 3, ¶6. Mr. Eisenfeld has physical contact with the San Juan River and Morgan Lake when he recreates in those waterbodies and is concerned about health impacts to himself and his family from exposure to pollution. *Id* at pp. 8-9, ¶17. Mr. Eisenfeld is concerned with impacts of the FCPP on endangered species living in the San Juan River, namely the Colorado pikeminnow and razorback sucker. *Id.* EPA's failure to take final action on the permit application harms Mr. Eisenfeld because it results in unregulated pollution discharges into the Chaco River watershed, fails to address impacts to endangered fish species, and interferes with his recreational interests in Morgan Lake and the San Juan River. *Id.* at p. 9, ¶19. Mr. Eisenfeld's concerns would be eased if EPA would take final action on the permit because he would have more information about water pollution discharges, impacts to endangered fish species, and would diminish his concerns about health risks to himself and his family. *Id.* at pp. 9-10, ¶20.

Petitioner CBD is a non-profit membership corporation with offices in Arizona. CBD is actively involved in species and habitat protection issues worldwide, including throughout the western United States. The Center, its members, and staff members use the lands and waters near the FCPP—in particular the San Juan River—for recreational, scientific, and aesthetic purposes. The Center brings this action on its own behalf and on behalf of its adversely affected members. The declaration of Taylor McKinnon, a member of CBD is attached as Exhibit 3 and describes how EPA’s failure to render final action on the pending NPDES permit application adversely impacts his interests and those of CBD. Mr. McKinnon is also an avid river runner and used to be a river guide on the San Juan River. Exhibit 3 hereto at pp. 3-4, ¶7. Mr. McKinnon also has a personal and professional interest in protecting the endangered fish species that live in the San Juan River and the critical habitat that supports the fish species. *Id.* Mr. McKinnon has concerns that pollution from the FCPP is adversely impacting these endangered fish species. *Id.* at p. 5, ¶9. Mr. McKinnon is also concerned that the Four Corner Power Plant cooling water intake structure that pulls large volumes of water from the San Juan River may be contributing to adverse impact and mortality to the endangered fish species. *Id.* at p. 6, ¶9. Mr. McKinnon is concerned that the EPA’s refusal to take final action on the permit may contribute to further poisoning, endangerment and rarity of its endangered species, all of

which he cares deeply about. Some of his concerns would be redressed by issuance of a final permit by EPA because it would begin to regulate these problems. *Id.* at p. 6, ¶9. In addition, he would be able to appeal any deficiencies in a final permit. *Id.* EPA's failure to finalize a permit has denied him of this legal opportunity. *Id.*

Amigos Bravos is a non-profit conservation membership organization. Amigos Bravos is dedicated to preserving and restoring the ecological and cultural integrity of New Mexico's water and the communities that depend on it.

Sierra Club is America's oldest and largest grassroots environmental organization with more than 820,000 members and supporters nationwide including more than 30,000 members residing in Arizona, Utah, and New Mexico. The Sierra Club's concerns encompass the protection of the San Juan River and the endangered species found therein. Sierra Club's main office is located in Oakland, California.

As outlined above, Petitioners have standing to bring this case on their own behalf and through their members.

Environmental Protection Agency, Region 9, is a federal government agency with the primary responsibility for taking final action on the long pending FCPP NPDES Permit application and is located in San Francisco, California.

Alexis Strauss is the Acting Regional Administrator for EPA Region 9, whose office is located in San Francisco, California. Ms. Strauss was previously the Director of Region 9's Water Division and personally signed the 2001 NPDES permit. Exhibit 4 hereto, page 1 of the 2001 NPDES Permit.

Tomas Torres is the current Director of the Water Division at US EPA Region 9. The Water Division is responsible for issuing NPDES Permits for water pollution discharges located on the Navajo Nation, such as those from the FCPP.

Water pollution and other impacts from the power plant will occur on the Navajo Nation and in tributary downstream waters in Arizona. The majority owner of the coal plant, Arizona Public Service, is based in Arizona. The Salt River Project and Tucson Electric Company, minority owners of the FCPP, are also based in Arizona. The seat of the Navajo Nation is also in Arizona.

This Court has jurisdiction to issue the writ of mandamus sought by this Petition pursuant to the All Writs Act, 28 U.S.C. § 1651. The CWA grants this Court jurisdiction to review EPA's NPDES permitting actions, 33 U.S.C. § 1369(b)(1)(F), and the All Writs Act empowers this Court to issue a writ to protect its "prospective jurisdiction" by compelling EPA to make substantive decisions that once made will be reviewable by this Court. *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 76 (D.C. Cir 1984) ("*TRAC*"). EPA's years of inaction constitute both unlawfully withheld action and unreasonable delay

pursuant to 5 U.S.C. § 706(1), and warrant a writ of mandamus from this Court ordering EPA to take final action on the pending permit application.

This Court is a proper venue for this action pursuant to 33 U.S.C. § 1369(b)(1)(F) which directs that cases be filed “in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person.”

II. STATUTORY AND REGULATORY BACKGROUND

A. The Clean Water Act

The CWA prohibits the “discharge of any pollutant” from a point source— “any discernible, confined and discrete conveyance”—to navigable waters “except in compliance with law.” 33 U.S.C. §§ 1311, 1362. The CWA authorizes EPA, or states with permit programs approved by EPA, to issue NPDES permits allowing for the discharge of pollutants into waters of the United States. 33 U.S.C. § 1342. EPA Region 9 in San Francisco is responsible for the issuance of NPDES Permits for sources of water pollution on the Navajo Nation.

Every NPDES permit must establish “effluent limitations” for the pollutants being discharged. *Waterkeeper Alliance, Inc. v. U.S. EPA*, 399 F.3d 486, 491 (2nd Cir. 2005 (citing *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102 (2004))). NPDES permits must also contain conditions requiring both

monitoring and reporting of pollutants in any discharge. 33 U.S.C. § 1342(a)(2); 40 C.F.R. § 122.44(i)(1) & (2). EPA’s regulations specify that NPDES permits shall include conditions requiring monitoring “[t]o assure compliance with permit limitations.” 40 C.F.R. § 122.44(i)(1). Specifically, a permit must include “requirements to monitor . . . each pollutant limited in the permit” to ascertain whether the pollutants in the discharge stay within the permitted limits. *Id.* at § 122.44(i)(1)(i). Such conditions are necessary to verify compliance with effluent limitations and to facilitate permit enforcement. *NRDC v. Cnty of Los Angeles*, 725 F.3d 1194, 1208 (9th Cir. 2013).

In addition, section 316(b) of the CWA requires that NPDES permits for facilities with cooling water intake structures ensure that the location, design, construction, and capacity of the structures reflect the best technology available for minimizing adverse environmental impact. 33 U.S.C. § 1326(b); *see also* 40 C.F.R. § 401.14 (same). The chosen technology must reduce the adverse aquatic impact, impingement or entrainment, to the smallest amount, extent or degree reasonably possible. 40 C.F.R. § 125.92(r) (2014). Under the permitting scheme in effect at the time EPA Region 9 issued the last permit for the FCPP, permits were issued on a case-by-case basis, with the permitting agency using its “best professional judgment” to impose conditions necessary to meet Best Technology Available (“BTA”). 40 C.F.R. § 125.90(b).

Section 402(b)(1)(B) of the CWA specifies that NPDES permits are to be issued for fixed terms not to exceed five years. 33 U.S.C. § 1342(b)(1)(B). The five-year limit on a NPDES permit's maximum duration establishes a mandatory expiration date at which the permit must be reviewed and updated to reflect changes in the law, the conditions of discharge and receiving waters, or the requirements applicable to the permittees.

B. EPA's National Pollutant Discharge Elimination System Permitting Regulations

EPA regulations mandate a specific process designed to lead to timely final action expiring NPDES permits before or shortly after they expire that EPA has simply declined to follow with respect to the FCPP. An applicant initiates the NPDES process when it files a permit application providing information regarding the facility and its proposed discharges. *See* 40 C.F.R. § 124.3. Once the application is complete, EPA then prepares and issues a draft permit and explanatory fact sheet. *See* 40 C.F.R. §§ 124.6, 124.8, and 124.56. EPA provides public notice of these documents, and holds a thirty-day public comment period. *See id.* § 124.10(a)(1)(ii) and (b)(1). After the close of the public comment period, the Regional Administrator determines whether a final permit should be issued, based on the administrative record compiled during the public comment period. *See id.* §§ 124.15, 124.18.

After EPA issues a final permit decision, an interested party may request an evidentiary hearing to contest the resolution of any questions raised during the public comment period. *Id.* § 124.74(a). The Regional Administrator then grants or denies the request for a hearing. *See id.* § 124.75(a)(1). If a Regional Administrator denies a request for an evidentiary hearing, the denial becomes final agency action within thirty days unless an appeal is made to the Environmental Appeals Board (“EAB”). *Id.* §§ 124.60(c)(5) and 124.91. An EAB order denying review renders the Regional Administrator's previous decision final. *Id.* § 124.91(f)(1). Finally, once an EPA permit decision has become final, any interested person may obtain judicial review of the decision by petitioning for review in the Circuit Court of Appeals. 33 U.S.C. § 1369(b)(1).

III. FACTUAL BACKGROUND

A. The Coal Plant

The Four Corners Power Plant is located on the Navajo Nation, near Farmington, New Mexico. The power plant began operations in 1963 and is scheduled to continue operating until at least 2041.

The power plant is owned and operated by Arizona Public Service Company on behalf of itself as well as the Salt River Project Agricultural Improvement and Power District, El Paso Electric Company, Public Service Company of New Mexico, and Tucson Electric Power Company.

The FCPP provides electrical power to utilities in Arizona, Texas, and New Mexico. Units 1-3 of the coal plant were built in 1963 and operated for over half a century through 2013. In 2013 the owners of the coal plant opted to retire Units 1-3 rather than retrofit them to meet federally mandated air pollution limits. The much larger Units 4-5 of the coal plant, totaling 1540 MW of capacity, have been operating since 1970. Arizona Public Service intends to operate Units 4-5 through 2041, at which time the coal plant will be 71 years old.

Units 4-5 burn approximately 19,000 tons of coal per day. The coal boils water to create steam, which turns a turbine to generate electricity. The coal plant diverts up to 48 million gallons of water per day from the San Juan River. On average the coal plant pumps approximately 27,500 af/yr from the river. The water is withdrawn via two 8 by 8.5-foot screened intake bays located just above a gated weir. The weir dams water to assure the intake bays are adequately submerged. Water drawn from the San Juan River is stored in Morgan Lake, a man-made reservoir adjacent to the coal plant.

Coal combustion waste results from burning coal at the coal plant. This waste—fly ash, bottom ash, and boiler slag—is collected in the plant's boilers and pollution control equipment and then disposed of in lined and unlined liquid surface impoundments at the site. Over the past 50 years, Arizona Public Service has disposed of approximately 33.5 million tons of coal combustion waste.

Coal ash contains numerous toxic constituents including heavy metals such as antimony, arsenic, barium, beryllium, cadmium, chromium, lead, mercury, nickel, selenium, and thallium. Pollutants from coal combustion waste have leached through the bottom of existing coal combustion waste impoundments at the site and entered the groundwater migrating toward the Chaco River. Arizona Public Service has constructed various intercept trenches and pump-back wells beginning in 1977 and continuing through the present attempting to minimize the migration of this pollution to the adjacent Chaco River.

B. The San Juan River, Morgan Lake, and the Chaco River

The second largest of the three sub-basins of the Colorado River, the San Juan River is one of the most important waterways in the Southwest. Morgan Lake and the Chaco River, both located on the power plant property, are tributary to the San Juan River. The Chaco River flows into the San Juan River near Shiprock, New Mexico.

Morgan Lake is a 1,200 acre cooling pond for the power plant that is also operated as a public recreation area.¹ Primary contact recreation is allowed on the lake, including windsurfing, boating, fishing, and other activities which can result in ingestion, inhalation, and direct contact with the waters of Morgan Lake.

C. Endangered Colorado Pikeminnow and Razorback Sucker

¹ <https://farmingtonnm.org/listings/morgan-lake/> (last visited November 30, 2017).

The Colorado pikeminnow was federally listed as endangered in 1973. Critical habitat for the Colorado pikeminnow, designated in 1994, includes the 100-year floodplain of the species' historic range in San Juan County, New Mexico, and San Juan County, Utah. This critical habitat includes the stretch of the San Juan River adjacent to the FCPP and Navajo mine. Remnant populations exist in the segment of the San Juan River.

The razorback sucker was federally listed as endangered in 1991. The Service designated the segment of the San Juan River from the Hogback Diversion to Lake Powell as critical habitat for the razorback sucker in 1994. This critical habitat includes the stretch of the San Juan River adjacent to the FCPP.

In 2015, as required by section 7 of the ESA, the Fish and Wildlife Service issued a Biological Opinion analyzing the effects of continued operation of the power plant and related coal mine on endangered species as part of the lease extension allowing operation of the plant from 2016- 2041. Exhibit 5. The Biological Opinion acknowledged the already dire state of the Colorado pikeminnow and razorback sucker populations in the San Juan River and cataloged substantial adverse impacts to these populations and their critical habitat from the continued operation of the FCPP and Navajo Mine, including impacts from water pollution and the FCPP cooling water intakes. Exhibit 5 at pp. 105-119.

The Biological Opinion found that entrainment in the coal plant's water intake system, as well as other impacts, would decrease the population viability of Colorado pikeminnow and razorback sucker in the San Juan River basin. Exhibit 5 at p. 134.

D. The NPDES Permit

On April 3, 2001 Alexis Strauss, then Director of EPA Region 9's Water Division, issued the most recent effective NPDES permit for the FCPP, NPDES Permit No. NM0000019. Exhibit 4, p. 1. The permit became effective on April 7, 2001, and expired on April 6, 2006. *Id.*

Under the terms of the permit and EPA regulation, the permittee was required to submit a renewal application at least 180 days prior to the expiration of the permit. APS submitted an application for a new NPDES permit on October 5, 2005. After sitting dormant at EPA for over 7 years, on October 30, 2012 EPA acknowledged that "much time has elapsed since [APS] submitted the original application for renewal" and requested an updated application. Exhibit 6, p. 1. EPA indicated at that time that it "plan[ned] 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. On February 19, 2013, EPA stated that it would "draft a proposed renewed NPDES permit within 6 months" after receiving the revised application. Exhibit 7, p. 1.

EPA failed to issue a draft permit by its stated deadline of August 15, 2013. On May 16, 2014, Petitioners issued a 60-day notice of intent to sue letter to EPA alleging, *inter alia*, that EPA had illegally delayed in issuing a final NPDES permit for the FCPP. Exhibit 8.

On November 13, 2014, EPA released a draft permit and opened a public comment period. Exhibit 9. On February 18, 2015 Petitioners and other conservation organizations submitted timely written comments on EPA's draft permit. Exhibit 10. The public comment period closed on February 18, 2015.

Over three years after the close of the public comment period EPA still has not taken final action on the pending permit application. On February 28, 2018, EPA stated that it "will issue the permit for the Four Corners Power Plant in the immediate future." Exhibit 11, Response to Comments, p. 1, Response 1. On March 8, 2018, Petitioners asked EPA Region 9 for a more precise schedule for its issuance of the FCPP Permit. Exhibit 12. On that same day, EPA's permit engineer responded that it would issue the permit in April 2018. *Id.* But again, EPA Region 9 failed to render a final decision on the permit application in April 2018. EPA has again delayed its timeline for acting on the permit application, this time until June 2018. Exhibit 13. As of the date of this Petition, EPA has not taken final action on the permit application.

E. The Discharges and Cooling Water Intake

F CPP discharges a suite of pollutants including copper, iron, chlorine, heated water, suspended solids, among others to Morgan Lake, the Chaco River, and ultimately the San Juan River.

1. The discharge into Morgan Lake, No Name Wash, Chaco River, and the San Juan River.

a. Outfall 001

The F CPP discharges pollutants from Morgan Lake to No Name Wash, which flows to the Chaco River and then the San Juan River. Exhibit 9, Fact Sheet, pp. 2-3. The flow rate of this discharge is approximately 4.2 million gallons/day. *Id* at p.2. This discharge is used to regulate total dissolved solids (TDS) build up in the lake, which must be controlled because the lake water is also used for cooling the generation units. *Id*. The current and proposed draft permit sets a flow limit of 14.7 million gallons per day from this Outfall and allows a maximum daily temperature discharge of up to 95 degrees Fahrenheit (35 degrees Celsius), and regulates pH. *Id*. The permits also require monitoring for TDS from Outfall 001. *Id*.

b. The “Internal” Outfalls

The draft permit also regulates discharges from the following so-called “internal outfalls”:

i. Internal Outfall 01A: F CPP also discharges condensor cooling water into an effluent channel which flows to Morgan Lake. This discharge is referred to as

“Internal Outfall 01A.” FCPP chlorinates the cooling water to act as a biocide to prevent fouling of the generating units. This permit allows a discharge of 954 pounds per day of Total Residual Chlorine into Morgan Lake, and also regulates pH, oil and grease, and requires flow and toxicity monitoring. *Id.*

ii. Internal Outfall 01B: This internal outfall was used for disposing of chemical cleaning wastewater to an ash pond. APS claims that Internal Outfall 01B is not in use but wishes to retain the possibility of discharging through the outfall in the future. *Id.*

iii. Internal Outfall 01E: This outfall discharges water pollution from the combined waste treatment pond that receives 8-13 million gallons per day of waste streams from various pollution sources at the power plant. *Id.* The wastewater from this pond is channeled into a culvert which is regulated prior to mixing with the condenser cooling water discharged from Internal Outfall 01A. The combined discharges from Internal Outfall 01E and Internal Outfall 01A are then discharged into Morgan Lake. A large component of Internal Outfall 01E is bottom ash transport water. This discharge is regulated for total suspended solids (TSS), pH, and oil and grease.

2. **The leaking coal ash impoundments**

Since at least 1977, the coal ash impoundments at the FCPP have leaked contaminated seepage into the Chaco River Basin. Exhibit 14 at p. 4.5-61 (FEIS,

Section 4.5 Water Resources-Hydrology). The Final Environmental Impact Statement documents the history of coal ash seepage into the Chaco River Basin by stating:

Previous studies found two primary areas of groundwater seepage beneath the ash disposal areas, the “north seep” and “south seepage area” (APS 2013). In 1977, APS constructed an open ditch system to collect seepage water from the ash disposal facilities as part of the NPDES permits for the FCPP. In 1993 and 2011, extraction wells were installed. These systems are designed to prevent contamination of the Chaco wash. In October 2011, APS constructed a north intercept trench excavated to the Lewis shale formation. A review of groundwater level data and water quality data in three wells located downgradient of the trench show declines in all constituents and groundwater level. APS installed a second south intercept trench to collect groundwater in early 2014. The finished project entailed the construction of two French drains adjoining each other in a north to south direction. Both French drains are 2 miles long and the trenches for the drains were excavated to the Lewis shale formation. The bottom of the trench was filled with a granular media and slotted pipe, to allow the collection of water at two points approximately mid-length in location. Water that is collected at these points is pumped to FCPP’s Lined Decant Water Pond. With the operation of the intercept trenches, continued operation of wet ash ponds and expansion of the DFADAs would have less potential to contaminate local groundwater and water quality in Chaco Wash.

Id. EPA was a cooperating agency with regard to the 2015 FEIS. Exhibit 15, p. 2. (EPA ESA memo 11/10/2014).

The coal ash seepage is believed to contain mercury, selenium, boron, nickel, uranium, zinc, and total dissolved solids. The coal ash seepage is also expected to exceed pollution concentrations standards enacted to protect human health, livestock, and aquatic life. However, EPA’s 2001 NPDES permit does not

require monitoring, reporting, or pollution effluent limits for the coal ash discharges into the Chaco River Basin.

EPA's 2014 Draft Renewal Permit for the FCPP would require the following:

“A Seepage Monitoring and Management Plan shall be established and implemented to determine the source of and pollutants in seepages below all ash ponds that receive or received coal combustion residue either currently or in the past. The Plan shall be established and submitted to EPA within 120 days of the issuance of this permit. The Plan shall at a minimum do the following:

1. Identify all seeps within 100 meters down gradient of such impoundments;
2. Conduct sampling (or provide summary of current data if sufficient and valid) of seepages for boron, mercury, nickel, selenium, uranium, zinc and total dissolved solids.
3. Provide information about number of flows observed and range of flows observed
4. Provide information about exceedances of any human health, livestock, or chronic or acute aquatic life standards as established in the 2007 NNWQS in the samples collected for analysis.

Exhibit 9 at p. 15 (Draft Permit).

3. The cooling water intake structure

As noted above, cooling water intake structures are regulated by EPA upon issuance of an NPDES permit. The 2001 NPDES permit does not regulate the intake structure or require publicly available reporting on the impacts the intake structure is having on endangered fish species. In contrast, EPA's 2014 draft permit states:

“The Permittee shall submit all the material required under 40 CFR 122.21

(r) (1)-(8) upon submittal of their next renewal application.”

Exhibit 9 at p. 11 (Draft Permit). This regulatory requirement requires the operator of existing cooling water intake structures to identify threatened and endangered species in the affected watershed and biological data on mortality and impacts to such species. The Service has found that Colorado pikeminnow and Razorback sucker exist in the area of the San Juan River impacted by the FCPP. Exhibit 16 p. 6 of pdf (USFS 9/2/2014 Memo). The Service also found that the project area contains critical habitat for these endangered fish species. *Id.* at p. 8 of pdf. The cooling water intake system at the FCPP can cause injury or death to these critically endangered native species due to impingement on the intake structure screens and entrainment in the cooling water system itself. EPA has acknowledged that adverse effects to endangered fish species can also result from “entrainment at the APS Weir on the San Juan River.” Exhibit 15, p. 2 (Region 9 11/10/14 ESA memo). To date, a thorough assessment of the impacts to Colorado pikeminnow and razorback sucker from impingement and entrainment in the cooling water intake system has never been submitted for public review and comment.

IV. ARGUMENT

A. This Court has Jurisdiction to Issue a Mandamus Order

This Court has jurisdiction to issue the writ of mandamus sought by Petitioners pursuant to the All Writs Act, 28 U.S.C. § 1651. Section 509(b)(1)(F)

of the Clean Water Act, 33 U.S.C § 1369(b)(1)(F), grants jurisdiction to the Courts of Appeals to review EPA’s NPDES permitting actions and the All Writs Act empowers this Court to issue a writ to protect its “prospective jurisdiction” by compelling EPA to make substantive decisions that once made will be reviewable by this Court. *TRAC*, 750 F.2d at 76; *Air Line Pilots Association, International (“ALPA”) v. CAB*, 750 F.2d 81, 84 (D.C. Cir. 1984). Section 509 effectively assigns exclusive jurisdiction to the Court of Appeals for claims concerning *delay* in agency action on NPDES permits because the agency action Petitioners seek—action on the delayed permit reissuance applications—will be reviewable by this Court under section 509(b)(1)(F) once it happens. *See FTC v. Dean Foods Co.*, 384 U.S. 597, 604 (1966); *Pub. Util. Comm’r v. Bonneville Power Admin.*, 767 F.2d 622, 626, 630 (9th Cir. 1985); *TRAC*, 750 F.2d at 79; *see also Clark v. Busey*, 959 F.2d 808, 811 (9th Cir. 1992) (reasoning that because the Court of Appeals’ jurisdiction to review the final FAA order is exclusive, jurisdiction to review any procedural irregularities preceding the final order is also exclusive) (citations omitted).²

² There appears to be no controlling authority specifically addressing the type of inaction alleged by Petitioners in this case, *i.e.*, unreasonable delay in acting on NPDES permit reissuance application. However, the Supreme Court and other Circuit Courts of Appeals have found jurisdiction in the Courts of Appeals over various claims attendant to or related to the issuance of CWA section 402 permits. 33. U.S.C. § 1342. In *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193, 196 (1980), the Supreme Court found that EPA’s denial of a variance and disapproval

B. A Writ Should Issue Because EPA has Unreasonably Delayed Issuing the Final Permit

EPA is in violation of the CWA and its own implementing regulations for failing to take final action on the FCPP application. When a permit is required by federal law and a valid application is pending, the APA states that the permitting agency must act “within a reasonable time” and “with due regard for the rights of interested parties and those adversely affected.” 5 U.S.C. § 558(c). Here, EPA’s over-decade long failure to take final action, and its over three year-long failure to act since it closed the comment period on the draft permit are both unreasonable.

The D.C. Circuit in *TRAC* first laid out the test for determining whether an agency’s delay is “so egregious as to warrant mandamus.” 750 F.2d at 80. The *TRAC* test, which has been adopted in this Circuit, requires courts to consider the following factors: (1) the time agencies take to make decisions must be governed by a “rule of reason”[;] (2) where Congress has provided a timetable or other

of effluent restrictions contained in a State-issued 402 permit was a denial of an NPDES permit within the CWA’s grant of jurisdiction under section 509(b)(1)(F) and remanded the case to the Ninth Circuit. Similarly, this Court has found that CWA section 509(b)(1)(F) grants jurisdiction to the Courts of Appeals to hear challenges involving agency extensions of NPDES permits and the issuance of NPDES regulations. *See Pacific Legal Found. v. Costle*, 586 F.2d 650, 654-55 (9th Cir. 1978) (finding the extension of an NPDES permit was tantamount to a permit issuance and thus within grant of jurisdiction under CWA section 509(b)(1)(F)), *rev’d* on other grounds by 445 U.S. 198 (1980); *Natural Res. Def. Council, Inc. v. EPA*, 966 F.2d 1292, 1296-97 (9th Cir. 1992) (finding that CWA section 509 grants circuit court jurisdiction to review “rules that regulate the underlying permit procedures”).

indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason[;] (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake[;] (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority[;] (5) the court should also take into account the nature and extent of the interests prejudiced by the delay[;] and (6) the court need not “find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.” *Id.* (citations omitted); *See Independence Mining Co. v. Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997) (adopting *T.R.A.C.* factors); *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177 n. 11 (9th Cir. 2002) (noting *T.R.A.C.* factors apply “in the absence of a firm deadline”)

EPA’s inaction over the FCPP NPDES application presents one of the circumstances where mandamus relief is appropriate. In this Circuit, the Court has granted a writ requiring a final decision when, as here, the agency’s delay is harming human health or the environment and the agency lacks a “concrete timeline” for its decision. *See, In re A Cmty. Voice*, 878 F.3d 779, 787 (9th Cir. 2017) (granting a writ mandating EPA take action on lead-based paints were EPA had delayed for more than eight years, offered only “speculative dates” and failed to offer a “concrete timetable” for final action, and “there is a clear threat to human

welfare”); *In re Pesticide Action Network*, 798 F.3d 809, 813 (9th Cir. 2015) (granting a writ where EPA failed to take final action as promised, had delayed for more than eight years, lacked a “concrete timeline” for final action, and the action involved a pesticide harmful to human health).

EPA’s ongoing delay frustrates this Court’s role in providing a forum for review of the final permits, and as discussed below, the above factors support a finding that EPA has unreasonably delayed action and mandamus is the appropriate remedy. *TRAC*, 750 F.2d 70.

1. The Clean Water Act’s Statutory Framework and the Rule of Reason Supports a Finding that EPA’s Delay is Unreasonable.

Congress mandated that NPDES permits be for fixed terms, no greater than five years. 33 U.S.C. § 1342(b)(1)(B). The five-year limit for NPDES permits establishes a mandatory expiration date at which point the permit must be reviewed and updated to reflect changes in the law, the conditions of receiving waters, or the requirements applicable to the permittees. Congress could not have intended that permits be for fixed five year terms and yet allow EPA to leave an expired NPDES Permit in place to serve as the *de facto* permit for more than three additional five year permit cycles, as is the case here, without EPA review and update.

As one court has stated, although “there is no per se rule as to how long is too long to wait for agency action . . . a reasonable time for agency action is

typically counted in weeks or months, not years.” *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004) citing *Midwest Gas Users Asso. v. FERC*, 833 F.2d 341, 359 (D.C. Cir. 1987) (“This court has stated generally that a reasonable time for an agency decision could encompass ‘months, occasionally a year or two, but not several years or a decade.’” (quoting *MCI Telecommunications Corp. v. FCC*, 627 F.2d 322, 340 (D.C. Cir. 1980))).

Numerous courts have issued mandamus orders for regulatory delays that were far shorter in length than the current over twelve year delay in issuing the FCPP NPDES permit. *See, Potomac Elec. Power Co. v. ICC*, 702 F.2d 1026, 1035 (D.C. Cir. 1983) (eight year delay unreasonable); *Public Citizen Health Research Group v. Aughter*, 702 F.2d 1150, 1157- 1159 (D.C. Cir. 1983) (three year delay unreasonable); *MCI*, 627 F.2d at 324-25 (four year delay unreasonable); *Nader v. FCC*, 520 F.2d 182, 206 (D.C. Cir. 1975) (ten year delay unreasonable). In sum, the CWA’s mandate for five year permit terms and prevailing case law finding delays of several years to be unreasonable underscore EPA’s ongoing over twelve year delay in acting on the FCPP permit application is unreasonable.

EPA’s own regulations impose a duty on the agency to act after it issues a draft NPDES permit. More specifically, EPA’s regulations state, “[a]fter the close of the public comment period under §124.10 on a draft permit, the Regional

Administrator *shall issue a final permit decision...*” 40 C.F.R.

§124.15(a)(emphasis added).

2. Public Health and Welfare Interests are Negatively Prejudiced by EPA’s Delay.

EPA’s ongoing inaction harms Petitioners because EPA has delayed the issuance of permits with potentially stricter requirements that would result in cleaner water and protection of endangered fish species. As envisioned by Congress, Petitioners and the general public have a legally cognizable interest in clean water. *C.f. Ecological Rights Foundation v. Pacific Lumber Company*, 230 F.3d 1141, 1151 (9th Cir. 2000) (citing *Friends of the Earth v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 155-61 (4th Cir. 2000) (*en banc*) (the increased risk of harm based on CWA permit violations is an injury in- fact.)).

Congress intended NPDES permits to be for fixed terms, so that every five years the permitting agency would update the permit and where applicable, include any more stringent effluent limitations that are warranted. In other words, Congress intended that EPA would review NPDES permits every five years to determine whether improvements in available technology warranted more stringent technology-based effluent limitations or deterioration in water quality warranted more stringent water quality based effluent limits. In the twelve years that EPA has delayed taking final action on the expired NPDES Permit, there have been both advances in the available and economically achievable water pollution reduction

technology for coal-fired power plants and a deterioration in the water quality of the applicable water bodies into which the facility discharges. EPA's delay has postponed an assessment of compliance with current effluent limitation guidelines, CWA, 33 U.S.C. §§ 1311(b), 1314(b) and assessment of best available technology economically achievable ("BAT"), which EPA can set based upon "best professional judgment" ("BPJ") on a case-by-case basis in individual NPDES permits. 33 U.S.C. § 1342(a)(1); 40 C.F.R. § 122.41(a)(1).

EPA's inaction has also delayed the regulation of coal ash discharges into the Chaco River watershed resulting from seepage from the FCPP coal ash disposal facilities. Finally, EPA's inaction has also delayed collection and public dissemination of the impacts to endangered fish species in the San Juan River. These delays can be remedied by an order from this Court directing EPA to take final action on the long pending NPDES application by a reasonable date certain.

3. EPA's inaction is inexcusable

EPA may claim that it has other priorities, but "[h]owever many priorities the agency may have, and however modest its personnel and budgetary resources may be, there is a limit to how long it may use these justifications to excuse inaction in the face of the congressional command to act." *In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545, 554 (D.C. Cir. 1999). EPA's failure to

issue a final permit and allow the 2001 permit to remain in effect for over 3 five-year permit cycles is inexcusable.

4. The Public Has Been Precluded From Participating in Environmental Decision-Making Processes For the Coal Plants.

EPA's failure to take final action has denied Petitioners the opportunity to appeal a final NPDES permit. EPA's failure to take final action has delayed regulation of unpermitted discharges of coal ash seepage into the Chaco River watershed thus posing a risk to public health and the endangered aquatic species living downstream. EPA's inaction has also resulted in inexcusable delay in the collection and public dissemination of information regarding the impacts to endangered fish species resulting from operation of the cooling water intake structure on the San Juan River.

V. CONCLUSION

Petitioners respectfully request that the Court issue a writ of mandamus compelling EPA Region 9 to take final action on the long pending NPDES permit application for the FCPP by a reasonable date certain within 3 months of its decision. In addition, the Petitioners request that the Court awards fees and costs to Petitioners under CWA section 509(b)(3), 33 U.S.C. § 1369(b)(3), in an amount to be determined following subsequent motion practice and briefing.

VI. STATEMENT OF RELATED CASES

Petitioners are not aware of any related cases pending in this Court.

Respectfully submitted,

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Certification of Compliance

I certify pursuant to Circuit Court Rule 21-2(c) that this Petition complies with the type-volume limitation of 30 pages, excluding items allowed by rules or local rules.

s/ John Barth

Certification of Service

I certify that this Petition for Writ of Mandamus and was served by U.S. Priority Mail upon the following this 23rd day of May 2018.

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