CASE NO. 07-9546, *ET AL.*

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ARIZONA PUBLIC SERVICE COMPANY,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition For Review Of A Final Rule Of The
United States Environmental Protection Agency

OPENING BRIEF OF PETITIONER ARIZONA PUBLIC SERVICE COMPANY

FINAL WITH
REFERENCES
TO THE JOINT
APPENDIX

January 22, 2008

Thomas Sayre Llewellyn
LAW OFFICE OF
THOMAS SAYRE LLEWELLYN
5125 MacArthur Boulevard, NW
Suite 32-A
Washington, DC 20016
(202) 237-7291
t.llewellyn@att.net

Oral argument is not requested.

CASE NO. 07-9546, *ET AL.*

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ARIZONA PUBLIC SERVICE COMPANY,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

CORPORATE DISCLOSURE STATEMENT

Pinnacle West Capital Corporation ("Pinnacle West") is the parent of Petitioner Arizona Public Service Company ("APS") and owns one-hundred (100) percent of APS' stock. No publicly held corporation owns ten (10) percent or more of Pinnacle West's stock.

DATED: October 1, 2007
FINAL: January 22, 2008

Respectfully submitted,

/s/Thomas Sayre Llewellyn

Thomas Sayre Llewellyn
LAW OFFICE OF
THOMAS SAYRE LLEWELLYN
5125 MacArthur Boulevard, NW
Suite 32-A
Washington, DC 20016

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Administrative Procedure Act

Clean Air Act

Legislative History

Regulations

Federal Register

Treatises

Prior Or Related Appeals

None, excepting the case consolidated herewith, No. 07-9647.

JURISDICTIONAL STATEMENT

This petition challenges a final rule that the United States Environmental Protection Agency ("EPA") promulgated under sections 301(a) and 301(d)(4) of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. §§ 7601(a), 7601(d)(4) (2000). EPA published the rule on May 7, 2007, at 72 Fed. Reg. 25698. Petitioner Arizona Public Service Company ("APS") timely filed this petition on July 3, 2007, under CAA section 307(b)(1), 42 U.S.C. § 7607(b)(1) (2000).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether EPA's imposition of the 20 percent opacity limit on fugitive dust was arbitrary or capricious.

2. Whether EPA's imposition of the 20 percent opacity limit on Unit 4 and 5 stack emissions was arbitrary or capricious.

STATEMENT OF THE CASE

This is a petition for review of a rule promulgated through informal rulemaking -- based on an administrative record -- under the CAA. The rule, known as a "federal implementation plan" or "FIP," imposes federal air emission limitations and other requirements upon the Four Corners Power Plant ("the Plant"). The FIP is referred to as "source-specific," because it applies to only one plant or "source" of air emissions. 72 Fed. Reg. 25698 (May 7, 2007) [Joint Appendix ("JA") 19].

EPA began work on a FIP for the Plant in the early 1990's, in consultation with APS and other interested parties, including the Navajo Nation of Indians. EPA first published a proposed FIP and solicited public comment in 1999. 64 Fed. Reg. 48731 (Sept. 8, 1999) [JA 1]. EPA again published the proposed FIP and solicited public comment in 2006, 71 Fed. Reg. 53631 (Sept. 12, 2006) [JA 10], and then promulgated the final FIP on May 7, 2007, 72 Fed. Reg. 25698 [JA 19].

APS, the operating agent for (and part owner of) the Plant, has cooperated with EPA in the development of the FIP since the early 1990's, first through negotiation of appropriate provisions and later through submission of extensive comments during the rulemaking. APS' early cooperation and decision to support the lion's share of the FIP have enabled EPA to impose extensive requirements as a matter of administrative convenience -- without any substantial demonstration of the actual necessity of the requirements to the protection of air quality, and without explanation of why the selected requirements are preferable to less stringent requirements that would also protect air quality.

However, APS is compelled to challenge two discrete aspects of the FIP, each of which is a textbook example of arbitrary agency action. As will be shown herein, as to the first of those aspects, EPA provided no supporting rationale, either upon publishing the proposed FIP or upon publishing the final FIP. As to the other aspect, EPA failed to provide a reasoned basis, imposed a limit despite

uncontroverted evidence in the record that the Plant cannot meet that limit, and rejected – without reasoned explanation -- APS' proposed solution to the problem.

STATEMENT OF FACTS

The Four Corners Power Plant

The Plant is located in Fruitland, New Mexico, within the Navajo Indian Reservation. Comments of Arizona Public Service Company (Nov. 22, 2006) ("APS 2006 Comments") at 1 [JA 288]. The Plant comprises five coal-fired, electric utility steam generating units. *Id.* APS owns Units 1, 2 and 3, and is the operator and operating agent for the entire Plant. *Id.* Units 4 and 5 are owned by several "participants," including APS. *Id.*

The relationship between the Plant and the Navajo Nation is governed by various federal leases and grants of rights-of-way, made in 1960, 1966, and 1985. *Id.* The leases and the grants contain language renouncing any authority of the Navajo Nation to regulate the Plant, and the Ninth Circuit has upheld the validity of that language, *Arizona Public Service Co. v. Aspaas*, 77 F.3d 1128 (9th Cir. 1995). *Id.*

Over the years (long before EPA even proposed the FIP) APS and the other participants invested heavily in air pollution control equipment for the Plant. On Units 1, 2 and 3, the technology employed includes venturi scrubbers for control of emissions of particulate matter ("PM") and sulfur dioxide ("SO_2"), and special

burners for control of emissions of nitrogen oxides ("NO_X"). *Id.* The technology employed on Units 4 and 5 includes baghouses for control of PM, lime spray towers for control of SO_2, and special burners for control of NO_X. *Id.*

The baghouse technology is of particular importance to this case. A baghouse traps PM by filtering gas streams through large fabric filters. Proper functioning of a baghouse depends upon the integrity of the bags, maintenance of proper differential pressure, and other factors. Baghouses are equipped with protective mechanisms that result in automatic bypass or shutdown of the baghouse to protect it in the event of an equipment failure (*e.g.*, a fan malfunction). Emissions from Units 4 and 5 are each routed to a series of four parallel baghouses. Letter from M. Wood (APS) to S. Pogorzelski (EPA) (April 14, 1998) at 7 [JA 129]; Letter from M. Wood (APS) to L. Guinan (EPA) (August 1, 1996) at 2-3 [JA 115-16].

The Plant has voluntarily complied with certain emission limitations that the State of New Mexico adopted under the CAA. APS 2006 Comments at 1 [JA 288]. The Plant has done so, even though many years ago EPA adopted the position that New Mexico lacks regulatory jurisdiction over the Plant because of the Plant's location on the Navajo reservation. *Id.*

There are six air pollution monitors within 100 kilometers of the Plant, three in Colorado, and three in New Mexico. EPA, Response To Public Comments

(April 30, 2007) ("Response To Comments") at 11 [JA 40]. Data produced by those monitors establish that air quality in the area of the Plant is superior to federal ambient air quality standards for all pollutants. *Id.* In the vernacular of the CAA, the area is in "attainment" with federal air quality standards.[1]

EPA's published air quality data for San Juan County, New Mexico (where the Plant is located) during 2005 demonstrate that ambient concentrations of NO_X, SO_2, and PM would have to increase several fold to violate air quality standards. APS 2006 Comments at 2 & Attachment A [JA 289, 306-11]. For SO_2, ambient concentrations would have to increase by an order of magnitude to violate the applicable air quality standard. *Id.* at 2 [JA 289].

The Statutory And Regulatory Background

National Ambient Air Quality Standards

The CAA establishes a number of regulatory programs designed to protect air quality. Prominent among these is a program for attainment and maintenance of federal air quality standards known as the National Ambient Air Quality Standards or "NAAQS."

Section 109 directs EPA to adopt the NAAQS, including primary and secondary standards. 42 U.S.C. § 7409 (2000). Primary NAAQS are those that EPA determines are "requisite to protect the public health," 42 U.S.C. § 7409(b)(1)

[1] The derivation of these standards, known as National Ambient Air Quality Standards, is discussed in the next section.

(2000). Secondary NAAQS are those that EPA determines are "requisite to protect the public welfare," 42 U.S.C. § 7409(b)(2) (2000). *See* Response To Comments at 9-10 [JA 38-39]. EPA has adopted primary and secondary NAAQS for SO_2, PM, ozone, nitrogen dioxide, and lead, and a primary NAAQS for carbon monoxide. *See* 40 C.F.R. Part 50 (2006).

State Implementation Of The NAAQS

Section 110 of the Act then exhorts states to develop regulatory programs designed to attain and maintain compliance with the NAAQS. 42 U.S.C. § 7410 (2000). Those programs are known as State Implementation Plans or "SIPs." SIPs are to include "enforceable emission limitations and other control measures, means, or techniques . . . as may be necessary or appropriate to meet the applicable requirements of this Act." 42 U.S.C. § 7410(a)(2)(A) (2000). Once EPA approves a SIP, its requirements become federally enforceable. 42 U.S.C. § 7413 (2000).

States that fail to adopt adequate SIPs are subject to certain federal sanctions. 42 U.S.C. § 7410(m) (2000). Also, under section 110(c)(1), EPA is required to promulgate a FIP for the state, within two years after EPA finds a state has failed to submit an adequate SIP. 42 U.S.C. § 7410(c)(1) (2000).

Before enactment of the 1990 amendments to the CAA, the State of New Mexico adopted and obtained EPA's approval of a SIP that contained emission limitations purportedly applicable to the Plant. APS 2006 Comments at 1 [JA288].

In the early 1990's, EPA informed APS of its position that the New Mexico SIP does not apply to the Plant. *Id.* Nonetheless, the Plant voluntarily continued to comply with the emission limitations in the New Mexico SIP with which the Plant had complied historically. *Id.* *See* 72 Fed. Reg. 25698 (May 7, 2007) [JA 19].

Tribal Implementation Of The NAAQS

In the 1990 amendments to the CAA, Congress established a significant new role for Indian tribes. New section 301(d) authorized EPA to treat Indian tribes as though they were states. 42 U.S.C. § 7601(d)(1)(A) (2000). It directed EPA to promulgate regulations specifying those provisions of the Act for which it is appropriate to treat tribes as states, and authorized EPA to promulgate regulations providing other means by which EPA will directly administer the Act in the case of those provisions of the Act for which it is not appropriate to treat tribes as states. 42 U.S.C. §§ 7601(d)(2), 7601(d)(4) (2000).

In 1998, EPA adopted a rule to implement the Act's new provisions for Indian tribes. 63 Fed. Reg. 7254 (Feb. 12, 1998) (codified at 40 C.F.R. Part 49). That rule is commonly known as the Tribal Authority Rule or "TAR."

In the TAR, EPA determined that it is appropriate to treat tribes as states for most provisions of the CAA, including most of the implementation plan provisions of section 110, 42 U.S.C. § 7410. 40 C.F.R. §§ 49.3, 49.4 (2006). Thus, tribes may adopt Tribal Implementation Plans or "TIPs" for their reservations.

However, EPA found that it is not appropriate to treat tribes as states under section 110(c)(1), *i.e.*, the provision that directs EPA to promulgate a FIP when a state fails to submit an adequate SIP. 40 C.F.R § 49.4(d) (2006); 63 Fed. Reg. 7264-65 (Feb. 12, 1998). As a substitute for section 110(c)(1), EPA provided in the TAR that under EPA's general authority under section 301(a), 42 U.S.C. § 7601(a) (2000), and EPA's authority to implement the Act for tribes under section 301(d)(4), 42 U.S.C. § 7601(d)(4) (2000):

> [EPA shall] promulgate without unreasonable delay such federal implementation plan provisions as are necessary or appropriate to protect air quality . . . if a tribe does not submit a tribal implementation plan . . . .

40 C.F.R. § 49.11(a) (2006).

The Navajo Nation has not submitted a TIP.[2] Because of this, and because it is EPA's position that the New Mexico SIP does not apply to the Plant, EPA developed the FIP challenged herein. 72 Fed. Reg. 25698-99 (May 7, 2007) [JA 19-20].

[2] APS maintains that under the federal leases and grants of rights-of-way for the Plant, discussed *supra* at 3, the Navajo Nation lacks authority to regulate the Plant through a TIP or otherwise. Comments Of Arizona Public Service Company (Nov. 8, 1999) ("APS 1999 Comments") at 8-11 [JA 178-81]. However, the question of the Navajo Nation's authority was not resolved in the FIP and is therefore not presented here.

Development Of The FIP

The Negotiated FIP

In the early 1990's, EPA began to develop a FIP, in consultation with APS, the State of New Mexico, and the Navajo Nation. *See* Draft Memorandum of Understanding (April 15, 1993) ("Draft MOU") [JA 79-83]; Letter from K. Bigos (EPA) to S. Hoskie (Navajo EPA) (Aug. 4, 1993) [JA 84]. In general, the parties intended the FIP to federalize the provisions of the New Mexico SIP with which the Plant had complied historically. Draft MOU at 3 [JA 81]; Letter from M. Wood (APS) to L. Guinan (EPA) (Aug. 1, 1996), at Attachment, p. 1 [JA 114].

The New Mexico SIP addressed emissions of SO_2, NO_X, and PM from the stacks of the Plant's generating units. Technical Support Document For Proposed Rule (April 30, 1999) ("1999 Technical Support Document") at 2-3 [JA 151-52]. The SIP did not address the so-called "opacity," *i.e.*, the opaqueness, of emissions from the stacks of the Plant's generating units.[3] Nor did the New Mexico SIP address the opacity of dust produced by coal and ash handling operations, sometimes referred to as "fugitive dust."

During the course of the negotiation of the FIP, EPA proposed to add a provision limiting the stack emissions from Units 4 and 5 as measured by a

[3] A common definition of "opacity" is: "the degree to which emissions reduce the transmission of light and obscure the view of an object in the background." 40 C.F.R. § 60.2 (2007).

continuous opacity monitoring system ("COMS") to an opacity of 20 percent averaged over any six minute period (except for one six minute period per hour of not more than 27 percent). Letter from M. Wood (APS) to L. Guinan (EPA) (Nov. 17, 1994) at Attachment, pp. 3-4 [JA 88-89]. There is no NAAQS for opacity. Also, it is extremely difficult to quantify the relationship between opacity and emissions of PM, for which there is a NAAQS. *Id.* at Attachment, p.15 [JA 100].

However, EPA often imposes an opacity limit to ensure that control equipment for PM emissions – in the case of the Plant, baghouses – is being properly operated and maintained. *See* 72 Fed. Reg. 25701 (May 7, 2007) [JA 22]. And proper operation and maintenance of the baghouses tends to ensure that the emission limit for PM is being met. *See id.*

Occasional spikes in opacity measurements do not necessarily mean the baghouses are being improperly operated or maintained, however. APS 2006 Comments at 5 [JA 292]. Unavoidable conditions during periods of unit startup, shut down, or equipment malfunction are common causes of high opacity. Letter from M. Wood to L. Guinan (Aug. 1, 1996) at Attachment, pp. 3-5 [JA 116-18]. During periods of saturated stack conditions, water vapor sometimes creates false, high opacity readings. *Id.* And some events of high opacity are simply not fully explainable. *Id.*

During the FIP negotiations, APS initially opposed the Unit 4/5 opacity limit. Letter from M. Wood to L. Guinan (Nov. 17, 1994) at Attachment, p. 15 [JA 100]. APS cited the NAAQS attainment status of the Four Corners region and argued that "since there is no quantifiable relationship between opacity and [PM] emissions or ambient concentrations of [PM], an opacity requirement is not necessary for NAAQS attainment purposes." *Id.* APS also stated that only new units that are designed to meet a 20 percent opacity limit can consistently meet such a limit as measured with a COMS. *Id.* at 15-16 [JA 100-01].

APS ultimately agreed to the proposed opacity limit. It did so, based on the understanding that the opacity limit would not apply during periods of unit startup or shutdown, during periods of saturated stack conditions[4], or during periods of equipment malfunction. Letter from M. Wood (APS) to L. Guinan (EPA) (May 31, 1995) at 3 [JA 110]; Letter from M. Wood to L. Guinan (Aug. 1, 1996) at Attachment, p. 4-5 [JA 117-18].

EPA offered language to exempt excess opacity during startup, shutdown and malfunction:

> Emissions in excess of the level of the applicable emission limit during periods of start-up, shutdown, and malfunction shall not be considered a violation of the applicable emission limit.

[4] Because COMS cannot distinguish between PM and water, condensed water in the stack creates high opacity readings that are unrelated to PM or performance of the baghouses.

Memorandum from S. Pogorzelski (EPA) to M. Wood (APS) (June 23, 1998) [JA 132]. Following further discussion, this language was later revised to read:

> Emissions in excess of the level of the applicable emission limit or requirement during periods of start-up and shutdown for opacity and particulate matter, and during periods of malfunction for all air contaminants, shall not be considered a violation of the applicable emission limit.

Letter from M. Wood (APS) to S. Pogorzelski (EPA) (Feb. 9, 1999) at Attachment, p. 15 [JA 149]. Language was also developed to exempt high opacity readings occurring during saturated stack conditions. Draft Federal Implementation Plan for Four Corners Power Plant (July 15, 1998) at 4, 5 [JA 136, 137].

The 1999 Proposed FIP

On September 8, 1999, EPA published a proposed FIP in the Federal Register, and solicited public comment. 64 Fed. Reg. 48731 (Sept. 8, 1999) [JA 1]. For the most part, the proposed FIP was true to the FIP the various parties had negotiated over the preceding six years. In the preamble, EPA stated that it was proposing to "federalize standards from the New Mexico [SIP]" and that in some instances EPA proposed to modify the New Mexico SIP requirements "to ensure comprehensive emission control and federal consistency." *Id.* at 48732 [JA 2].

EPA said that "[g]iven the magnitude of the emissions from the plant, EPA believes that the proposed FIP provisions are both necessary and appropriate to protect air quality on the Reservation." *Id.* at 48733 [JA 3]. EPA did not articulate

why the particular control provisions selected were necessary or appropriate to protect the NAAQS, or why less stringent provisions would not also adequately protect the NAAQS.

EPA said that it was proposing the 20 percent opacity standard from the negotiated FIP for Units 4 and 5 to ensure that the baghouses were being properly operated and maintained. 1999 Technical Support Document at 4 [JA 153]. EPA said that because Units 4 and 5 employ baghouses they "are able to meet this limit." *Id.* EPA did not address the degree of any relationship between the specific opacity limit proposed and protection of the NAAQS.

Unlike the negotiated FIP, however, the proposed FIP did not contain an exemption for opacity or PM during periods of equipment malfunction, other than the relief that might be provided by exclusion of the one six-minute period per hour of not more than 27 percent opacity. It provided first, that

> Emissions in excess of the level of the applicable emission limit or requirement that occur due to a malfunction shall constitute a violation of the applicable emission limit.

64 Fed. Reg. 48739 (Sept. 8, 1999) (proposed 40 C.F.R. § 49.21(h)(3)) [JA 9]. The term "malfunction" was defined as:

> [A]ny sudden and unavoidable failure of air pollution control equipment or process equipment or of a process to operate in a normal or usual manner. Failures that are caused entirely or in part by poor maintenance, careless operation, or any other preventable upset condition or preventable equipment breakdown shall not be considered malfunctions.

Id. at 48736 (proposed 40 C.F.R. § 49.21(c)(8)) [JA 6]. Thus, emissions exceeding the opacity limit (or any other "excess emissions") would violate the FIP and the Clean Air Act even where the sole cause was a "sudden and unavoidable failure" of equipment.

The proposed FIP then provided a limited affirmative defense to enforcement for excess emissions caused by malfunctions. *Id.* at 48739 (proposed 40 C.F.R. § 49.21(h)(3)) [JA 9]. The defense was limited in two respects. First, it only served to avoid monetary penalties, not to prevent declaratory, injunctive or other relief. *See id.* Hence, even if the affirmative defense were established, the Plant would still be held in violation of the FIP and the Act. Second, to establish the defense, *i.e.*, to overcome the presumption of liability for monetary penalties, it was necessary not only to prove that the excess emissions were caused by a malfunction, but also to make a number of other highly prescriptive showings. *Id.*

With respect to false high opacity readings due to condensed water vapor, the proposed FIP created a presumption that high opacity readings that occur when the baghouse is operating "within its normal operating parameters" were caused by saturated stack conditions and therefore "shall not be considered an excess emission." *Id.* at 48736 (proposed 40 C.F.R. § 49.21(e)) [JA 6].

APS submitted comments on the 1999 proposal. APS 1999 Comments [JA 170-84]. APS supported the FIP to extent it was consistent with the FIP negotiated among the various parties. *Id.* at 1-2 [JA 171-72].

However, APS reserved the right to challenge any final FIP to the extent it departed from the negotiated FIP. *Id.* at 2 [JA 172]. Among other things, APS argued that the emission limits had been selected as a matter of administrative convenience, and that EPA had not articulated the standards that would justify selection of those limits in the absence of APS' consent. *Id.* at 14 [JA 184]. APS stated that "while these provisions will protect the NAAQS, less stringent provisions might also protect the NAAQS." *Id.*

APS objected to the elimination of the exemption from the Units 4 and 5 opacity limitation during periods of malfunction, and the substitution of the limited affirmative defense. *Id.* at 4-6 [JA 174-76]. APS argued, *inter alia*, that

> [I]t would be both unfair and irrational to presume a violation where excess emissions are caused by "malfunction," when the very definition of malfunction establishes that malfunctions are events essentially beyond the operator's reasonable control.

Id. at 5 [JA 175]. APS pointed out that "[t]he physical reality is that no numerical emission limitation can be met 100 percent of the time, and enforceable standards must be drafted to account for this reality." *Id.* at 6 [JA 176]. Although the FIP is to be based on protection of the NAAQS, APS observed that EPA had not

presented any sort of air quality analysis to justify rejecting the exemption for malfunctions that had been agreed to in the negotiated FIP. *Id.*

The docket for the 1999 proposal contained certain EPA memoranda that stated a general EPA policy against exemptions in SIPs for excess emissions caused by malfunctions. Policy On Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions (Sept. 28, 1982) [JA 64-68]; Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions (Feb. 15, 1983) [JA 69-73]. In its comments, APS argued that the policy memoranda were not regulations and that EPA would need to justify any application of its policy to the proposed FIP. APS 1999 Comments at 4-5 [JA 174-75].

The 2006 Proposed FIP

Over six years passed before EPA took further formal action on the FIP. In the meantime, APS had agreed voluntarily to achieve significant additional Plant-wide reductions in SO_2 emissions. 71 Fed. Reg. 53632, 53633 (Sept. 12, 2006) [JA 11, 12].

On September 12, 2006, EPA again proposed the FIP and solicited public comment. 71 Fed. Reg. 53631 (Sept. 12, 2006) [JA 10]. The 2006 version was much the same as the 1999 version. It continued to presume conclusively that excess emissions caused by malfunctions are violations of the FIP and the CAA, and to allow a limited affirmative defense to assessment of monetary penalties for

excess emissions caused by malfunctions. *Id.* at 53639 (proposed 40 C.F.R. § 49.21(h)(3)) [JA 18]. EPA offered no data to demonstrate the achievability of the Unit 4 and 5 opacity limit or to address the relationship between the limit and protection of the NAAQS.

With respect to high opacity readings that occur when the baghouse is operating "within its normal operating parameters," EPA revised the presumption of saturated stack conditions to state that such emissions would not be considered "violations" and exempted periods "due to saturated stack conditions" from excess emissions reporting. *Id.* at 53636, 53638 (proposed 40 C.F.R. §§ 49.21(e), 49.21(f)(4)) [JA 15, 17].

The 2006 version added the more stringent SO_2 reduction requirement that APS had agreed to. *Id.* at 53636 (proposed 40 C.F.R. § 49.21(d)(1)) [JA 15]. It also added -- without explanation -- a 20 percent limitation on the opacity of fugitive dust from certain coal and ash handling operations, that had never been discussed with APS:

> Each owner or operator shall not emit dust with an opacity greater than 20% from any crusher, grinding mill, screening operation, belt conveyor, or truck loading or unloading operation.

Id. at 53636 (proposed 40 C.F.R. § 49.21(d)(3) [JA 15].

In its comments on the 2006 proposal, APS again generally supported the FIP, although it continued to reserve the right to challenge the adequacy of the

basis for the emission limits, in the event EPA reacted unfavorably to APS' handful of specific objections. APS 2006 Comments at 3-4, 13-17 [JA 290-91, 300-04]. APS informed the agency that based on data generated by the Plant's COMS over the past several years, exceedances of the proposed 20 percent opacity limit for Units 4 and 5 will inevitably occur, even under conditions of best operating practices and proper equipment operation, and taking into account exclusion from the standard of the one six-minute period per hour of not more than 27 percent opacity. *Id.* at 5 [JA 292]. Because of this and particularly because of the severely limited nature of the affirmative defense for excess emissions caused by malfunctions, APS argued that an allowance for periodic exceedances must be factored into the continuous opacity limit itself. *Id.*[5]

APS explained that it had performed a statistical analysis known as a "Monte Carlo simulation" on COMS data to determine the probability of exceedances of the Unit 4 and 5 opacity limit. *Id.* It said that it projected that the Plant could meet the limit 99.8 percent of the time for each six-month reporting

[5] Note that the while the general concept of malfunction seems fairly straightforward, EPA's definition of "malfunction" is not necessarily easy to apply. For example, if an event does not occur daily or even weekly, but can be expected to occur with some frequency, does that mean that the event is not "normal or usual"? *See* 71 Fed. Reg. 53636 (Sept. 12, 2006) (proposed 40 C.F.R. § 49.21(c)(6)) [JA 15].

period, and proposed that the final FIP contain an allowance for exceedances up to 0.2 percent of the six-minute periods per reporting period.[6] *Id.*

APS noted that the opacity exceedance problem is quite common in the industry. *Id.* at 5 n.7 [JA 292]. It pointed to precedent for its proposed solution in EPA's approval of a revision to the North Carolina SIP. *Id.* at 5 [JA 292]. In the North Carolina case, EPA approved opacity exceptions of up to 0.8 percent of the total operating hours per calendar quarter. *Id.*

APS also objected to the newly proposed opacity limit for fugitive dust. *Id.* at 9 [JA 296]. APS argued that the proposed requirement was not a part of the New Mexico SIP upon which the FIP was modeled; that it was not necessary to protect any air quality standard; and that EPA had not provided any reason for the requirement. *Id.*

EPA's Final Action On The FIP

On May 7, 2007, EPA promulgated the final FIP. 72 Fed. Reg. 25698 (May 7, 2007) [JA 19]. The final FIP was much the same as the FIP proposed in 2006.

EPA explained the basis for the final FIP as follows:

> Today's action will make federally enforceable the emission limitations which [the Plant] has historically followed as well as ensuring that [the Plant] continues to significantly reduce its emissions of SO2. This action will help to advance the goals of ensuring continued maintenance of the national ambient air quality

[6] This percentage included a margin of safety so that if adopted, APS could be reasonably certain of full compliance.

> standards and protecting visibility. Given the importance of these goals and the magnitude of emissions from the plant, EPA believe that making these limits federally enforceable is appropriate to protect air quality on the Reservation and is accordingly exercising its discretionary authority under sections 301(a) and 301(d)(4) of the CAA and 40 CFR 49.11(a) to promulgate a FIP containing provisions to achieve these ends.

Id. at 25698-99 [JA 19-20]. EPA also said that the FIP would "help to maintain consistent standards on the Navajo Indian Reservation and its neighboring States." *Id.* at 25699 [JA 20].

The final FIP included the opacity limit on fugitive dust and allowed the Plant 548 days to come into compliance with that limit. *Id.* at 25705 (to be codified at 40 C.F.R. § 49.23(d)(3)) [JA 26]. EPA did not respond to APS' fundamental objections to the fugitive dust limit, and did not explain the specific basis or necessity for the limit.

EPA rejected – without explanation -- APS' proposal for an allowance for exceedances of the Unit 4 and 5 opacity limit up to 0.2 percent of the six-minute periods per reporting period. EPA defended its refusal to provide an exemption for excess emissions during malfunctions, stating, *inter alia*, that this was consistent with "EPA's longstanding position, as reflected in numerous policy documents and rulemakings," *id.* at 25702 [JA 23].

EPA inserted a new requirement that the Plant report "excess emissions" caused by condensed water vapor in periodic reports submitted under 40 C.F.R. §

60.7 (2007). *See* 72 Fed. Reg. 25707-08 (May 7, 2007) (to be codified at 40 C.F.R. § 49.23(f)(1) and (4)) [JA 28-29]. In response to public comments, EPA stated that the facility would be required to report high opacity readings during periods of saturated stack conditions as "apparent excess emissions" and that "[i]f anything inappropriate shows up in the reports, EPA can follow up to get better clarification of the issue." *Id.* at 25701 [JA 22].

SUMMARY OF THE ARGUMENT

EPA imposed the twenty percent opacity limit on fugitive dust from certain coal and ash handling operations without explaining why the limit is necessary or appropriate to protect air quality or otherwise providing a rational basis for the limit. APS objected to the limit and the lack of any rationale in its comments on the proposed rule, but EPA ignored APS' objection. Because the limit lacks a reasoned basis in the record, it is arbitrary and capricious and should be vacated and remanded.

EPA also imposed the 20 percent opacity limit on stack emissions from Units 4 and 5 without providing a reasoned basis for that limit. Although EPA said the purpose of the limit was to ensure proper operation of the baghouses (which control emissions of PM), EPA did not explain why the particular limit it chose – *i.e.*, 20 percent opacity averaged on a six-minute basis with only a limited one per

hour exclusion of not more than 27 percent opacity -- is necessary to achieve that purpose.

The opacity limit on Units 4 and 5 does not account for the fact that the Plant cannot meet that limit as currently defined with its existing pollution control equipment, and EPA has identified no exigency based on protection of air quality that would justify such a limit. APS proposed a solution to the problem in its rulemaking comments, but EPA rejected that solution without reasoned explanation, and despite the fact that EPA had recently approved a similar solution in a state implementation plan.

The severely limited affirmative defense for excess emissions caused by unavoidable equipment malfunction does not solve the problem because the opportunity to obtain a waiver cannot cure an arbitrary rule. Moreover, the affirmative defense only avoids liability for civil penalties. *Unavoidable* excess emissions remain violations of the FIP and the CAA, subject to suits for declaratory and injunctive relief.

Moreover, the policy upon which EPA relies for taking this approach does not make sense in the specific context of this case, in particular because of the excellent state of air quality in the region. EPA's approach to excess emissions caused by malfunctions is inconsistent with EPA's approach to unavoidable excess emissions during unit startup and shutdown, and the one per hour exclusion. Also,

EPA's approach ignores the design of the statute that existing units be subject to less stringent standards than new units, except where identified air quality problems compel a different result.

For all of the above reasons, the 20 percent opacity limit on Unit 4 and 5 stack emissions is arbitrary and capricious. The Court should vacate and remand that limit.

ARGUMENT

The Standard Of Review

Under section 307(d)(9) of the CAA, the Court may reverse an EPA action found to be arbitrary or capricious. 42 U.S.C. § 7607(d)(9) (2000). This standard is essentially the same as that of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706 (2000). *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1064 (D.C. Cir. 1995).

The arbitrary and capricious standard is deferential. However, the Agency is owed deference only where it is evident from the record that the Agency has engaged in reasoned decisionmaking:

> To meet this standard, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 . . . .

Qwest Corp. v. FCC, 258 F.3d 1191, 1198 (10th Cir. 2001).

The Agency's explanation must include an identification of the specific standards that guide the Agency's choices. Exercises of standardless discretion are arbitrary and capricious. *Qwest Corp.*, 258 F.3d at 1201-02; *Dithiocarbamate Task Force v. EPA*, 98 F.3d 1394, 1402 (D.C. Cir. 1996).

The Court may also reverse agency action taken without observance of applicable procedural requirements, including the requirement to respond to significant comments and criticisms on the proposed rule. 42 U.S.C. §§ 7607(d)(6)(B), 7607(d)(9)(D) (2000). Reversible procedural errors must be arbitrary or capricious, and they are subject to a rule of prejudicial error. *Id.*

Again, this standard is essentially the same as that of the APA. 5 U.S.C. §§ 553(c), 706(2)(D) (2000). *See International Fabricare Inst. v. EPA*, 972 F.2d 384, 389 (D.C. Cir. 1992) ("We will therefore overturn a rulemaking as arbitrary and capricious where the EPA has failed to respond to specific challenges that are sufficiently central to its decision.").

Record References

APS objected to the proposed opacity limit on fugitive dust in its comments. APS 2006 Comments at 9-10, 16-17 [JA 296-97, 303-04]. EPA adopted that limit at 72 Fed. Reg. 25705 (May 7, 2007) (to be codified at 40 C.F.R. § 49.23(d)(3)) [JA 26].

APS also objected to the proposed 20 percent opacity limit for Units 4 and 5 (and the proposed rule on excess emissions from malfunctions) in its comments. APS 2006 Comments at 4-6, 10-13, 16-17 [JA 291-93, 297-300, 303-04]. EPA adopted that limit (and the rule on excess emissions from malfunctions) at 72 Fed. Reg. 25705, 25706, 25708 (May 7, 2007) (to be codified at 40 C.F.R. §§ 49.23(d)(4), (e), (h)(3)) [JA 26, 27, 29].

I. EPA'S IMPOSITION OF THE OPACITY LIMIT ON FUGITIVE DUST WITHOUT ARTICULATING A RATIONALE THEREFOR WAS ARBITRARY AND CAPRICIOUS.

EPA did not provide a rationale for its imposition of the opacity limitation on fugitive dust from coal and ash handling operations, either upon proposing the requirement or upon promulgating the final FIP. Nor is any rationale otherwise reasonably traceable from the record.

"A rule without a stated reason is necessarily arbitrary and capricious." *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 551 (D.C. Cir. 1983). Accordingly, the fugitive dust limitation is arbitrary and capricious and should be vacated and remanded to the Agency.

The general rationales that EPA provided for promulgating the FIP do nothing to explain the specific basis for the fugitive dust limit. EPA stated that the FIP would contribute to maintenance of the NAAQS and that the FIP is

"appropriate to protect air quality." 72 Fed. Reg. 25698 (May 7, 2007) [JA 19]. But the same presumably could be said of any emission limit.

EPA has not identified any "limiting standard" that it is using to determine *which* emission limitations or other requirements are "necessary or appropriate to protect air quality," 49 C.F.R. § 49.11(a) (2006). In the absence of such a limiting standard, it is impossible for the Court to determine whether EPA's selection of the fugitive dust limitation is rational. *Qwest Corp.*, 258 F.3d at 1201-02. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 388 (1999). As this Court confirmed nearly thirty years ago, "Courts 'are no longer content with bare administrative *ipse dixits* based on supposed administrative expertise.'" *Kennecott Copper Corp. v. EPA*, 612 F.2d 1232, 1236 (10th Cir. 1979) (quoting *Appalachian Power Co. v. EPA*, 477 F.2d 495, 507 (4th Cir. 1973)).

The Agency itself has recognized elsewhere that not every requirement that reduces or controls emissions is "necessary or appropriate to protect air quality," within the meaning of the TAR. In 2006, EPA proposed a rule to govern review and permitting of new air pollution sources ("new source review" or "NSR") in Indian country. 71 Fed. Reg. 48696 (Aug. 21, 2006). Even though EPA found that subjecting all existing minor sources to NSR requirements "would result in significant emissions reductions," EPA concluded that "subjecting all minor sources to the program is not necessary to achieve the NAAQS." *Id.* at 48714.

Nor does EPA's vague reference to the "magnitude" of emissions from the Plant supply any rationale. *See* 72 Fed. Reg. 25698, 25699 (May 7, 2007) [JA 19, 20]. That the Plant has a particular magnitude of emissions does not answer the question of which specific controls are necessary or appropriate to protect air quality. This is particularly the case given how superior to the NAAQS the air in the Four Corners area is. *See supra* at 4-5.

Nor does the fugitive dust limitation enjoy any support from EPA's unexplained reference to maintaining "consistent standards on the Navajo Indian Reservation and its neighboring States," 72 Fed. Reg. 25699 (May 7, 2007) [JA 20]. In the first place, neither the CAA nor the TAR identify such consistency as a relevant factor. In the second place, the New Mexico SIP does not include the fugitive dust limitation, so its imposition in the FIP cannot be said to maintain consistency with the standards of that state.

There is a federal New Source Performance Standard ("NSPS") promulgated under CAA section 111, 42 U.S.C. § 7411 (2000), that contains a 20 percent opacity limit for coal handling operations where the facility is constructed after October 24, 1974. 40 C.F.R. Part 60, Subpart Y (2007). But that NSPS cannot be the basis for the opacity limit in the FIP, because the Plant is an "existing" source built long before 1974 and not subject to Subpart Y (or any other NSPS).

In fact, Congress intended that, in general, existing sources such as the Plant would be subject to less stringent standards than "new" sources built after the applicability dates of the various NSPS. *California v. Department of the Navy*, 431 F. Supp. 1271, 1291 (N.D. Cal. 1977), *aff'd*, 624 F.2d 885 (9th Cir. 1980). *See* S. Rep. No. 1196, 91st Cong., 2d Sess. 15-16 (1970); Arbuckle, *et al.*, Environmental Law Handbook (Twelfth ed. 1993) at 127. Because EPA has identified no air quality-related or other justification for the fugitive dust opacity limit, the imposition of that limit constitutes an unlawful application of the Subpart Y NSPS to an existing source.

During the rulemaking, APS protested the lack of any rationale for the fugitive dust limit. APS 2006 Comments at 9-10 [JA 296-97]. APS pointed out that the limitation was not part of the New Mexico SIP and that the limit was not necessary to protect any air quality standard. *Id.* at 9 [JA 296]. APS also requested notice of, and the opportunity to comment on, any rationale for the limit that EPA might ultimately develop. *Id.* at 17 [JA 304].

Although EPA responded to many comments on the proposed FIP -- *see* 72 Fed. Reg. 25699-702 (May 7, 2007) [JA 20-23], Response To Comments [JA 30-63] – EPA did not respond to APS' objection to the fugitive dust limitation. This failure to respond to a significant comment on the proposed rule violated the procedural requirements of section 307 of the Act, 42 U.S.C. § 7607(d)(6)(B)

(2000), and was arbitrary and capricious. *See Appalachian Power Co. v. EPA*, 135 F.3d 791, 821-22 (D.C. Cir. 1998).[7] Accordingly, the Court should vacate the fugitive dust limitation at 40 C.F.R. § 49.23(d)(3) and remand it to the Agency.

II. EPA'S IMPOSITION OF THE TWENTY PERCENT OPACITY LIMIT ON UNIT 4 AND 5 STACK EMISSIONS WAS ARBITRARY AND CAPRICIOUS.

A. EPA Did Not Provide A Reasoned Basis For The Limit.

In its 1999 Technical Support Document, EPA said that

> The standard for opacity has been added in order to confirm Units 4 and 5 are in continuous compliance and are properly operated and maintained. These Units operate with baghouses for particulate control and therefore are able to meet this limit.

1999 Technical Support Document at 4 [JA 153]. In the preamble to the final FIP, EPA said that "[o]pacity limits are generally applied to ensure a source is meeting its [particulate matter] emissions limit" and "[t]he opacity limit for this facility is set to assure proper operation of the baghouse." 72 Fed. Reg. 25701 (May 7, 2007) [JA 22].

There is significant uncertainty about the relationship between opacity and PM emissions. APS stated during the FIP negotiations that "there is no quantifiable relationship between opacity and particulate matter emissions or ambient concentrations of particulate matter," Letter from M. Wood to L. Guinan

[7] Alternatively, this failure to respond to a significant comment violated the APA. *American Mining Congress v. EPA*, 907 F.2d 1179, 1191 (D.C. Cir. 1990).

(Nov. 17, 1994) at Attachment, p. 15 [JA 100]. Moreover, in the preamble to another proposed CAA rule issued shortly before EPA promulgated the FIP, EPA itself admitted that

> [A] reliable and direct correlation between opacity and PM emissions cannot be established without significant site-specific simultaneous testing of both PM emissions and opacity, particularly for short term periods (e.g., 24 hours or less).

72 Fed. Reg. 18428, 18429 (April 12, 2007).

Yet given that measurement of opacity could be useful in assuring that PM control equipment, *e.g.*, the baghouses on Units 4 and 5, is being properly operated, EPA did not establish why the particular limit it chose – 20 percent on a six-minute average basis (excluding one six-minute period per hour of not more than 27 percent) – is the right limit for this purpose. As APS pointed out in its comments, there can be exceedances of such a limit, even when the equipment is being properly operated and maintained. APS 2006 Comments at 5 [JA 292].

In fact, in the preamble to a recent proposed revision to a SIP, EPA acknowledged that exceedances of an opacity standard measured on such a short-term – *i.e.*, six-minute – basis may be more indicative of normal variability than poor operation. EPA explained that

> With use of [COMS] it is possible to have a continuous stream of opacity data. This results in the collection of many individual, short-term opacity measurements that reflect the full range of control device operating variability and, depending upon the amount of variability, may or may not be indicative of poor operation of control

> equipment and excess PM emissions. . . . [U]nder the proposed revised rule, an emissions unit is allowed . . . up to 100 percent opacity for up to two percent of the operating time on a quarterly basis [less certain otherwise exempted periods] for no more than ten percent of the time on a daily basis . . . .

72 Fed. Reg. 18428, 18429 (April 12, 2007).

For that matter, EPA never provided a reasoned explanation for why it selected the underlying PM emissions limit that it chose, other than the fact that it was administratively convenient to cut and paste from the New Mexico SIP. Again, while EPA may declare that the specific PM limit is "necessary and appropriate" to protect air quality, 72 Fed. Reg. 25698 (May 7, 2007) [JA 19], it is impossible to tell whether this is a rational conclusion without any "limiting standard" against which to review this conclusion.[8] *Qwest Corp.*, 258 F.3d at 1201-02. *See American Lung Ass'n v. EPA*, 134 F.3d 388, 392-93 (D.C. Cir. 1998), *cert. denied*, 528 U.S. 818 (1999).

Lacking a reasoned basis, the opacity limit on Units 4 and 5 is arbitrary and capricious. Thus, even without considering the evidence that the Plant cannot meet the opacity limit and EPA's unexplained rejection of APS' proposed solution to the

[8] APS does not challenge the PM limit *per se*, but does challenge EPA's use of that limit as a basis to justify the opacity limit. Note that in its comments, APS requested notice of, and the opportunity to comment on, any rationale that EPA might ultimately develop for the various emission limits. APS 2006 Comments at 17 [JA 304].

problem (discussed below), there is ample reason to set the limit aside and remand it to the Agency.

B. EPA Imposed The Limit Despite Uncontroverted Evidence That The Plant Cannot Meet The Limit, And Rejected APS' Proposed Solution Without Reasoned Explanation.

The 20 percent opacity limit on Units 4 and 5 is achievable using the existing baghouses most of the time. APS 2006 Comments at 5 [JA 292]. However, APS pointed out in its comments that based on COMS data, exceedances will inevitably occur, even under conditions of best operating practices and proper equipment operation. *Id.* Because of this, and particularly because of the severely limited nature of the proposed affirmative defense for malfunctions, APS argued that the limit is not achievable, in the absence of some allowance for periodic exceedances. *Id.*

Based on a statistical analysis of historical COMS data, APS said it believed it could achieve the limit 99.8 percent of the time for each six-month reporting period. *Id.* Thus, APS proposed that EPA incorporate in the limit itself an allowance for exceedances of the limit 0.2 percent of the time. *Id.* APS noted that EPA had very recently approved a similar approach in the North Carolina SIP, indicating that EPA saw nothing in the CAA to preclude this solution. *Id.* (citing 70 Fed. Reg. 61556 (Oct. 25, 2005). APS also pointed out that the opacity exceedance problem is quite common. *Id.* at 5 n.7.

In the final FIP, EPA rejected APS' proposed approach. Although, as discussed below, the FIP provides a limited affirmative defense to civil penalties where APS proves (*inter alia*) that an exceedance is caused by malfunction, the FIP presumes *conclusively and irrefutably* that any exceedance of the limit caused by equipment malfunction is a violation of the FIP and the CAA.

The FIP expressly states that excess emissions caused by a malfunction are violations. 40 C.F.R. § 49.23(h)(3) (published at 72 Fed. Reg. 25708 (May 7, 2007)) [JA 29]. A malfunction is defined as "any sudden and *unavoidable* failure of air pollution control equipment . . . to operate in a normal or usual manner." 40 C.F.R. § 49.23(c)(7) (published at 72 Fed. Reg. 25705 (May 7, 2007)) [JA 26] (emphasis added). Thus, APS is to be held liable for violations of the FIP and the Act for events that are by definition beyond APS' control. Moreover, some events of excess emissions cannot be fully explained as being caused by malfunctions, yet APS would be liable for those events as well, even in the absence of any evidence of operator fault.

The Agency's adoption of the opacity limit was contrary to the evidence provided by APS that the limit cannot be met without an allowance for occasional exceedances. Nor did EPA question or refute that evidence. *Cf. International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 (D.C. Cir. 1978) ("We are beset with contentions of petitioners that bear indicia of substantiality. Yet we have no

EPA comment on the specific questions raised . . . ."). An agency decision that is contrary to the evidence before the agency is arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

Of course, achievability is not necessarily the appropriate basis for the limit. But in the absence of any specific showing by the agency that its draconian approach is necessary to protect air quality, *see supra*, it is unreasonable to demand something of the Plant that is unachievable using its existing pollution control equipment.

The Agency also failed to respond to APS' proposed solution to the problem. In particular, the Agency said nothing to explain why APS' proposed solution was unacceptable, when the Agency had recently approved an analogous approach in the North Carolina SIP. An agency is duty bound to demonstrate that it has considered reasonable alternatives to its chosen course, and to articulate its reasons for rejecting those alternatives. *International Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795 (D.C. Cir. 1983), *cert. denied*, 469 U.S. 820 (1984). Where the agency fails to explain its choices, neither the reviewing court nor the public can be assured that the agency has engaged in reasoned decisionmaking.

Moreover, the consequences of EPA's arbitrary action are no small matter. A six month period has on the order of 43,200 six-minute periods (240 per day

times 180 days). If Unit 4 and Unit 5 exceeded the limit during 0.2 percent of the six-minute periods, each would accrue some 86 violations of the Act every six months (0.002 times 43,200). Over a five-year period, then, each unit might be deemed to have violated the Act some 860 times (for a combined 1720 times for the Plant).[9]

This information, which will be publicly available in compliance certifications signed by corporate officials under the Plant's CAA Title V operating permit, could then easily be used in the press and other venues by opponents of coal-fired power plants to paint APS as a serious and callous violator of the law. The public relations and investor relations problems are obvious. But there is more. Private citizens could bring suit under section 304 of the Act seeking declaratory and injunctive relief, and the award of costs of litigation (including attorneys' fees). *See* 42 U.S.C. § 7604 (2000).

Moreover, the enforcing court presumably could consider ordering APS to take necessary action to prevent any future violations. This would represent the perverse result that opponents of the Plant could obtain through "enforcement" of the limit that which the Agency could not rationally justify in setting the limit in the first place.

---

[9] This example is for purposes of illustration. Actual numbers of exceedances may well be lower because, *inter alia*, APS' 0.2 percent proposal included a reasonable margin of safety (*see supra* at 19 n.6) and there are times when the units are not operating.

A recent case in Alabama shows that APS' concerns are well-founded. *Sierra Club v. TVA*, 2007 U.S. Dist. LEXIS 63749 (N.D. Ala. Aug. 27, 2007). There, the units met the opacity limit 99.0 and 99.5 percent of the time. *Id.* at *53. The court found that "[d]uring the claimed violation period, the [plant] was properly operating its pollution control equipment." *Id.* at *17.

Yet because the Eleventh Circuit had ruled earlier that Alabama's 2.0 percent "*de minimis* rule" had not been properly incorporated into the Alabama SIP, *Sierra Club v. TVA*, 430 F.3d 1337, 1340 (11th Cir. 2005), the court saw no alternative but to hold the defendant in violation of the CAA. *Sierra Club v. TVA*, 2007 U.S. Dist. LEXIS 63749, *53-55. The court then ordered the defendant to submit a remediation plan to bring its plant into continuous compliance with the 20 percent opacity limit in the Alabama SIP. *Id.* at *56.

It is very important to understand that in seeking an allowance for periodic exceedances in this instance, APS is not seeking the relaxation of any existing CAA standard. No opacity standard has ever applied to APS, either in the New Mexico SIP or otherwise. What APS seeks is nothing more than the rational adoption of a standard in the first instance.

Yet as shown above, EPA's adoption of the opacity limit for Units 4 and 5 was not rational. Accordingly, that limit should be vacated and remanded to the Agency.

C. EPA's Limited Affirmative Defense Does Not Cure The Error And Is Itself Arbitrary And Capricious.

As discussed above, the FIP provides a limited affirmative defense to civil penalties for emissions in excess of the opacity limit caused by malfunctions. 40 C.F.R. § 49.23(h)(3) (published at 72 Fed. Reg. 25708 (May 7, 2007)) [JA 29]. By definition, a "malfunction" is "unavoidable." 40 C.F.R. § 49.23(c)(7) (published at 72 Fed. Reg. 25705 (May 7, 2007)) [JA 26]. To establish the defense, APS must prove the cause of excess emissions was a malfunction, and also make a number of other highly prescriptive showings, which amount to proving absolutes.

The affirmative defense does not cure EPA's error in promulgating an arbitrary limit in the first instance. An irrational rule cannot be saved "by tacking on a waiver procedure," *Alltel Corp. v. FCC*, 838 F.2d 551, 561 (D.C. Cir. 1988). Even if it could, the affirmative defense here only avoids the imposition of civil penalties – it does not avoid a finding of violation or the granting of injunctive relief. *See* 72 Fed. Reg. 25702 (May 7, 2007) [JA 23]. Additionally, the defense does nothing to address those situations where the cause of the excess emissions is not fully explainable.

Moreover, under the CAA Title V operating permit program, companies must periodically certify their facilities' compliance status, including "whether compliance during the period was continuous or intermittent." *See* 40 C.F.R. § 71.6(c)(5)(iii)(C) (2007). Although companies are free to explain the basis for

their certifications, 68 Fed. Reg. 38518, 38520 (June 27, 2003), an affirmative defense to civil penalties does not relieve a company from certifying intermittent compliance. And certification of intermittent compliance can have very substantial, adverse regulatory consequences. *See*, *e.g.*, 40 C.F.R. § 71.5(c)(8) (2007) (requiring development of a schedule of remedial measures upon Title V permit renewal if a source is not in compliance at the time of permit issuance).

In support of its approach here, EPA relied upon its "longstanding position, as reflected in numerous policy documents and rulemakings" that excess emissions caused by malfunctions "are violations of the underlying requirement but that the regulatory agency may provide that the violator may assert an affirmative defense to a claim for penalties." *Id.* However, EPA has never adopted this position into a duly promulgated, generally applicable rule. And because, as shown below, EPA's position makes no sense in the present case, EPA's reliance thereon was arbitrary and capricious.[10]

The essence of EPA's position on malfunctions appears to be contained in a 1983 policy memorandum that EPA placed in the docket for the FIP rulemaking. Policy On Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions (Feb. 15, 1983) [JA 69-73]. There, EPA stated that:

---

[10] *Cf. Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977) ("a 'regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.'") (citation omitted).

> If a SIP contains a malfunction provision, it cannot be the type that provides for automatic exemption where a malfunction is alleged by a source. Automatic exemptions might aggravate air quality so as not to provide for attainment of the ambient air quality standards.

Id. at Attachment, p. 1 [JA 71].

As APS argued in its comments, this reasoning makes no sense to the extent it seeks to prohibit any and all automatic exemptions for malfunctions. APS 2006 Comments at 11 [JA 298]. Any allowed level of air emissions theoretically "might aggravate air quality," yet EPA does not outlaw all air emissions when it establishes emission standards or limitations. Rather, EPA (or the state) makes reasonable judgments about what levels of emission control are necessary to protect the NAAQS, based upon engineering calculations and air quality analysis. EPA has made no effort here to establish that prohibiting all excess opacity readings at Units 4 and 5 caused by malfunction is in fact necessary to protect the NAAQS.

Given that the Plant has operated for decades and has not caused any violation of air quality standards, EPA would seem to have little basis for concern about exempting excess emissions caused by malfunctions in this case. Yet even if there were legitimate basis for concern going forward, APS offered a proposed solution that would limit the number of allowable exceedances per reporting period. On the basis of that proposal, EPA could calculate a reasonable worst case

to see if APS' proposed solution would in fact pose a threat to maintenance of the NAAQS. But as discussed above, EPA rejected APS' proposal out of hand.

Moreover, EPA could easily condition an exemption for malfunctions as North Carolina (with EPA's approval) conditioned the allowance for periodic exceedances of its opacity limit: "provided that no excess emissions during these periods cause or contribute to a violation of . . . any ambient air quality standard." 70 Fed. Reg. 61556 (Oct. 25, 2005). In fact, the definition of "malfunction" in the FIP provides that there will be no affirmative defense to civil penalties "if during the period of excess emissions, there was an exceedance of the relevant ambient air quality standard that could be attributed to the emitting source." 40 C.F.R. § 49.23(c)(7) (published at 72 Fed. Reg. 25705 (May 7, 2007)) [JA 26].

If the concern is to avoid threats to the NAAQS, then any exemption for excess emissions caused by malfunction could be similarly conditioned. This would achieve EPA's purpose, without making the unsupported assumption that all excess emissions caused by malfunction threaten the NAAQS (as EPA has done here).

EPA asserts that it is not "unfair to allow for claims for injunctive relief where a malfunction has occurred." 72 Fed. Reg. 25702 (May 7, 2007) [JA 23]. To the contrary, it is both unfair and nonsensical to enjoin conduct beyond the

reasonable control of the operator, except where there is a serious, demonstrated threat to air quality.[11]

Moreover, EPA's position here is inconsistent with its position on excess emissions during other periods. EPA has excluded periods of startup and shutdown from the applicability of the PM and opacity limits, subject to a duty to operate so as to minimize emissions during such periods to the extent practicable, 40 C.F.R. § 49.23(h)(2) (published at 72 Fed. Reg. 25708 (May 7, 2007)) [JA 29]. EPA has also excluded one six-minute period per hour of not more than 27 percent opacity from the 20 percent opacity limit. 40 C.F.R. § 49.23(d)(4) (published at 72 Fed. Reg. 25705 (May 7, 2007) [JA 26].

EPA reasonably explained that it could provide the startup and shutdown exemption based on the technical infeasibility of meeting the emissions limit during a defined period of time. 72 Fed. Reg. 25702 (May 7, 2007) [JA 23]. *See* Letter from M. Wood (APS) to S. Pogorzelski (EPA) (April 14, 1998) at 7 [JA 129]. Yet the same reasoning would apply to malfunctions (which are by definition "unavoidable," *i.e.*, technically infeasible to avoid), and even more so if there were a defined limit on the number of allowable exceedances per reporting period (as APS had proposed).

---

[11] Note that EPA always has the authority to issue an emergency administrative order or to seek a judicial restraining order where a pollution source is presenting an imminent and substantial endangerment to public health or welfare, whether or not the source is violating an applicable emission limit. 42 U.S.C. § 7603 (2000).

In an effort to reconcile its treatment of startup and shutdown with its treatment of malfunctions, EPA asserted that the exclusions for periods of startup and shutdown "are not exemptions." *Id.* But they are exemptions to the same extent that excluding excess emissions during periods of malfunction would be. And there is nothing inherently evil about "exemptions." Exemptions in the present context merely constitute a rational accommodation of the technical limits to what the existing control equipment can achieve, recognizing that there is no air quality-related need here to demand more than what the existing control equipment can achieve.[12]

The federal New Source Performance Standard ("NSPS") for power plants on which construction was commenced after August 17, 1971, exempts excess emissions during periods of start-up, shutdown, and malfunction. 40 C.F.R. § 60.8(c) and Part 60, Subpart D (2007). *See* APS 2006 Comments at 13 [JA 300]. As discussed *supra* at 28, Congress intended that the new sources subject to NSPS would be subject to more stringent requirements than older, "existing" sources. The Plant's units are all "existing" sources, not subject to any NSPS, yet by failing to excuse excess emissions caused by malfunction, the FIP would impose more stringent requirements on Units 4 and 5 than the NSPS would on new units.

[12] Presumably, the same is true of the one per hour exemption, although EPA never did explain how it chose that exemption.

It is true that controls more stringent than those in the NSPS may be imposed in SIPs (or FIPs) where necessary to protect the NAAQS. But again, EPA has not demonstrated such a need in this case. Accordingly, EPA has failed to consider the relevant factors under the Act and its action is arbitrary and capricious. *State Farm*, 463 U.S. at 43.

Even assuming it would be rational to limit an exclusion for excess emissions caused by malfunction to relief from liability for civil penalties (which as shown above, it is not), there is no justification in the record for shifting the burden of proof to APS, as EPA has done in its "affirmative defense" approach. EPA's approach presumes that excess emissions are the fault of APS and not caused by malfunction, and requires APS to prove otherwise. It is arbitrary to create such a presumption, without an underlying factual basis. Perhaps such a presumption could be justified if there were evidence that operator error or negligence is in fact much more common than equipment malfunction, but the record contains no such evidence.

In sum, the limited affirmative defense approach does not cure the otherwise arbitrary opacity limit for Units 4 and 5, and is itself arbitrary and capricious. In adopting that approach EPA did not make a rational connection between the facts found and the choice made and EPA failed to consider the relevant factors under

the Act. Accordingly the Court should vacate the opacity limit on Units 4 and 5 and remand that limit to the Agency.

CONCLUSION

EPA's imposition of the opacity limit on fugitive dust (40 C.F.R. § 49.23(d)(3)) and EPA's imposition of the opacity limit on stack emissions from Units 4 and 5 (40 C.F.R. §§ 49.23(d)(4) and (e)) were arbitrary and capricious. The Court should vacate and remand those limits, and grant such other relief as the Court deems just and proper.

Dated: October 1, 2007
Final: January 22, 2008

Respectfully submitted,

/s/Thomas Sayre Llewellyn

Thomas Sayre Llewellyn
LAW OFFICE OF
THOMAS SAYRE LLEWELLYN
5125 MacArthur Blvd., NW
Suite 32-A
Washington, DC 20016
(202) 237-7291
t.llewellyn@att.net

ATTACHMENT

The Agency Action Under Review: 72 Fed. Reg. 25698 (May 7, 2007)

(b) [Reserved]

Dated: April 26, 2007.

Peter J. Probasco,

Acting Chair, Federal Subsistence Board.

Dated: April 26, 2007.

Steve Kessler,

Subsistence Program Leader, USDA—Forest Service.

[FR Doc. 07–2205 Filed 5–4–07; 8:45 am]

BILLING CODE 3410–11–P; 4310–55–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 49

[EPA–R09–OAR–2006–0184; FRL–8308–6]

RIN 2009–AA01

Source-Specific Federal Implementation Plan for Four Corners Power Plant; Navajo Nation

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is promulgating a source-specific Federal Implementation Plan (FIP) to regulate emissions from the Four Corners Power Plant (FCPP), a coal-fired power plant located on the Navajo Indian Reservation near Farmington, New Mexico.

EFFECTIVE DATE: This rule is effective on June 6, 2007.

FOR FURTHER INFORMATION CONTACT: Rebecca Rosen, EPA Region IX, (415) 947–4152, *rosen.rebecca@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has established a docket for this action under Docket ID No. R09-OAR–2006–0184. All documents in the docket are listed in the Federal eRulemaking portal index at *http://www.regulations.gov* and are available either electronically at www.regulations.gov or in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California, 94105. To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section. A reasonable fee may be charged for copies.

Throughout this document, ''we,'' ''us'' and ''our'' refer to EPA.

Table of Contents

I. Background of the Final Rule

FCPP is a privately owned and operated coal-fired power plant located on the Navajo Indian Reservation near Farmington, New Mexico. Based on lease agreements signed in 1960, FCPP was constructed and has been operating on real property held in trust by the federal government for the Navajo Nation. The facility consists of five coal-fired electric utility steam generating units with a total capacity in excess of 2000 megawatts (MW).

In 1999, EPA initially proposed to promulgate a FIP to regulate emissions from FCPP. At that time, FCPP had historically achieved certain emissions limits which had been approved by EPA into the New Mexico SIP. See 40 CFR 52.1640. However, because the New Mexico SIP is not approved to apply on the Navajo Indian Reservation, and because the Navajo Nation did not have a federally applicable tribal implementation plan (TIP), EPA proposed to promulgate a FIP to remedy the existing regulatory gap. 64 FR 48731 (September 8, 1999) (1999 proposed FIP). The proposed FIP would have, in essence, federalized the requirements contained in the New Mexico SIP which FCPP had historically followed. In explaining the basis for its proposed action, EPA stated that given the magnitude of emissions from the plant, the Agency believed the proposed FIP provisions were necessary and appropriate to ensure the protection of air quality on the Reservation. 64 FR at 48733.

Before EPA took final action on the 1999 proposed FIP, a stakeholders group of environmental organizations (Environmental Defense, Western Resource Advocates, and New Mexico Citizens for Clean Air and Water), the National Park Service (NPS), and Arizona Public Service (APS), the operating agent for FCPP, convened to discuss the facility. The stakeholders group negotiated substantial additional sulfur dioxide (SO_2) emissions reductions which FCPP believed it could achieve by enhancing the efficiency of its existing SO_2 scrubbers. After testing the program, the Navajo Nation and the stakeholders group requested that EPA include these negotiated, additional SO_2 emissions reductions in the FIP. FCPP agreed to increase the amount of SO_2 emissions it was eliminating from its exhaust stream from 72% to 88%, thereby reducing its annual emissions of SO_2 to the atmosphere by about 25,000 tons per year.

EPA did not finalize the proposed 1999 FIP after the stakeholders group began negotiations. Instead, after the stakeholders group had finished its work, EPA proposed a new FIP in September, 2006. 71 FR 53631 (September 12, 2006) (2006 proposed FIP).

In the 2006 proposed FIP, EPA again explained that to remedy the regulatory gap that exists with regard to FCPP, the Agency was proposing to issue a source-specific FIP. EPA proposed to establish federally enforceable emission limits for SO_2, NO_X, PM, and opacity, and control measures for dust. For SO_2, the 2006 proposed FIP included a requirement for FCPP to comply with a significantly lower emission limit than the one set forth in the 1999 proposed FIP. For NO_X and PM emissions, EPA again proposed to federalize the emissions limits which FCPP has historically followed. In other words, the primary difference between EPA's 1999 proposed FIP and our 2006 proposed FIP is our inclusion of requirements for FCPP to comply with the more stringent SO_2 emissions limitation.

EPA's objective at this time in promulgating a FIP for FCPP is to remedy the existing regulatory gap described above. Today's action will make federally enforceable the emission limitations which FCPP has historically followed as well as ensuring that FCPP continues to significantly reduce its emissions of SO_2. This action will help to advance the goals of ensuring continued maintenance of the national ambient air quality standards and protecting visibility. Given the importance of these goals and the magnitude of emissions from the plant, EPA believes that making these limits federally enforceable is appropriate to protect air quality on the Reservation and is accordingly exercising its discretionary authority under sections 301(a) and 301(d)(4) of the CAA and 40

CFR 49.11(a) to promulgate a FIP containing provisions to achieve these ends.

II. Analysis of Major Issues Raised by Commenters

EPA received 43 comment letters on the proposal. The Navajo Nation EPA and one environmental organization provided comments in support of the proposed FIP. Other commenters raised concerns which focused on EPA's jurisdiction over FCPP and our exercise of FIP authority, general concerns about air quality and health in the Four Corners area, more specific comments about the emission limits and control requirements in the proposed FIP, and questions as to whether FCPP's SO_2 emissions reductions were close to or equivalent to that achievable through best available retrofit technology (BART).

EPA held a public informational workshop and public hearing on the proposed FIP in Farmington, New Mexico, on October 5, 2006. EPA received approximately 36 written and e-mail comments and 7 oral comments. Many of those commenting at the public hearing also submitted their comments in writing.

Our complete Response to Comments is contained in a separate document in the docket for this rulemaking. A summary of the significant comments and responses is provided below.

A. Jurisdictional and Authority Issues

Comment: Several commenters raised issues regarding EPA's authority to promulgate a FIP for FCPP. Some commenters stated that EPA does not have the authority to promulgate the proposed FIP because FCPP's ongoing compliance with the emissions limits in the New Mexico SIP means that there is no regulatory gap for EPA to fill.

Response: EPA's authority to promulgate a source-specific FIP is based on Clean Air Act (CAA) sections 301(a) and (d)(4) and the regulations implementing these provisions known as the Tribal Authority Rule (TAR) at 40 CFR Part 49. CAA section 301(d)(4) provides EPA with broad discretion to promulgate regulations directly for sources located in Indian country,[1] including on Indian reservations if we determine such Federal regulations are ''necessary or appropriate'' and the Tribe has not promulgated a TIP. Specifically, in 40 CFR 49.11, EPA interpreted CAA section 301(d)(4) to authorize EPA to promulgate ''such Federal implementation plan provisions as are necessary or appropriate to protect air quality.''

As explained in the 1999 and 2006 proposed FIPs, a regulatory gap exists with regard to FCPP. 64 FR at 43,955; 71 FR at 53,632. Although FCPP has historically followed the rules in the New Mexico SIP, EPA has not found that New Mexico had regulatory authority under the CAA on the Navajo Indian Reservation and has not approved the State's implementation plan for any area on the Reservation. It is EPA's position that, absent an explicit finding of jurisdiction and approval in Indian country, State and local governments lack authority under the CAA over air pollution sources, and the owners or operators of air pollution sources, throughout Indian country. See 63 FR 7254, 7259 (February 12, 1998) (responding to comment that EPA should '' 'grandfather' existing facility subject to state authority so that states continue to regulate those facilities until the affected parties all agree cooperatively to a transition from state to tribal jurisdiction''). Therefore, the New Mexico SIP does not apply to FCPP and there is a regulatory gap.

EPA is exercising its discretion to promulgate emission limitations for FCPP to close this regulatory gap in light of the magnitude of the emissions of NO_X, SO_2, and PM from FCPP. This FIP will help to ensure maintenance of the NAAQS and progress towards meeting the national visibility goal and help to maintain consistent standards on the Navajo Indian Reservation and its neighboring States.

The source-specific FIP published today is based on the same CAA authority that EPA has used elsewhere in rulemakings and that has been affirmed by the courts. EPA's interpretation of its authority in the TAR was affirmed by the U.S. Court of Appeals for the District of Columbia Circuit in *Arizona Public Service Co.* v. *EPA,* 211 F.3d 1280 (D.C. Cir. 2000), *cert. denied,* 121 S. Ct. 1600 (2001). That court also upheld EPA's authority to issue operating permits to major stationary sources located in Indian country under Title V of the CAA, pursuant to regulations at 40 CFR Part 71. *State of Michigan* v. *EPA,* 268 F.3d 1075 (D.C. Cir. 2001). In addition, in an unpublished opinion in December 2006, the Ninth Circuit Court of Appeals found that EPA's promulgation of a FIP establishing agricultural burning rules that applied to some, but not all reservations in the Northwestern United States was not arbitrary and capricious. *Safe Air for Everyone* v. *EPA,* No. 05–73383 (9th Cir., Dec. 8, 2005). A copy of the unpublished opinion is in our docket.

EPA has used its authority in CAA sections 301(a) and (d), as implemented through 40 CFR Part 49, to issue a number of FIPs to address air pollution concerns at specific facilities located in Indian country. *See, e.g.*, Federal Implementation Plan for Tri-Cities Landfill, Salt River Pima-Maricopa Indian Community, 40 CFR 49.22 (64 FR 65663 (November 23, 1999)); Federal Implementation Plan for the Astaris-Idaho LLC Facility (formerly owned by FMC Corporation) in the Fort Hall PM_{10} Nonattainment Area, 40 CFR 49.10711 (65 FR 51412 (August 23, 2000).

Therefore, we disagree with those comments challenging EPA's authority to promulgate a FIP for FCPP.

B. Concerns About the Scope of the FIP

Comment: The overwhelming majority of commenters indicated that in issuing a FIP for FCPP, EPA should go beyond merely federalizing the emission limits which FCPP has historically followed. Most commenters raised concerns about poor air quality, deteriorating visibility and high rates of cancer, asthma, and other respiratory problems in the Four Corners area, and a number requested that EPA prohibit any emissions from the facility rather than merely federalizing the limits the facility has historically followed. Other commenters urged EPA to take regulatory action to regulate or to further reduce emissions of SO_2, NO_X, PM, mercury, and ''toxic emissions.'' Commenters raised a variety of general concerns regarding health impacts associated with FCPP, including the public health and/or environmental impacts of fugitive dust from coal mining, mercury (Hg) and carbon dioxide (CO_2, greenhouse gases). Another commenter argued that in issuing a FIP for FCPP, EPA must comply not only with the requirements of section 301 of the CAA but also ensure through the FIP process that FCPP is in compliance with all applicable federal and state ambient standards by complying with the requirements of section 110 of the CAA addressing State implementation plans.

[1] ''Indian country'' is defined under 18 U.S.C. 1151 as: (1) All land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (2) all dependent Indian communities within the borders of the United States, whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State, and (3) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. Under this definition, EPA treats as reservations trust lands validly set aside for the use of a Tribe even if the trust lands have not been formally designated as a reservation.

Response: EPA is taking action to close the regulatory gap that exists with respect to FCPP. As explained above, at present there is not currently an approved implementation plan covering FCPP. EPA's exercise of authority in issuing this FIP is based on the Agency's conclusion that it is appropriate to protect air quality on the Reservation by remedying the lack of federally enforceable limits applicable to this facility. As such, our action is limited to making enforceable those emissions limits which FCPP has historically followed, or in the case of SO_2, an emission limit FCPP has achieved following a successful test program to determine if the existing scrubbers at FCPP could be improved.

Today's action is an important step in protecting air quality on the Reservation. As noted in the proposal, this action will contribute towards ensuring continued maintenance of the NAAQS and towards protecting visibility. EPA acknowledges that additional regulatory actions by EPA may be necessary or appropriate in the future to further protect air quality on the Navajo Reservation, depending on, among other things, conditions on the Reservation and the decisions of the Navajo Nation to exercise its discretionary authority under the CAA.

C. Comments on Emissions Limits

1. Comments on Emissions Limits for Pollutants Other Than SO_2

Comment: Several commenters urged EPA to take regulatory action in addition to the proposed FIP to require reductions of NO_X and PM emissions from FCPP. In particular, several commenters urged EPA to undertake a BART determination for FCPP's NO_X emissions.

Response: EPA agrees that it may be necessary or appropriate in a future rulemaking to require FCPP to reduce its NO_X or PM emissions below those levels which were historically contained in the New Mexico SIP or which are necessary to comply with the Acid Rain program. Today's rule, however, does not address the requirements of EPA's nationally applicable Regional Haze rule, codified at 40 CFR 51.308, which contains specific implementation plan requirements regarding BART determinations.[2]

EPA intends to apply any requirements for FCPP to achieve a reduction in its NO_X or PM emissions in a separate rulemaking. EPA will begin gathering information from FCPP to determine what measures, if any, are appropriate for the facility to implement to reduce its NO_X and PM emissions to comply with the Regional Haze Rule's requirements for BART.

2. Comments on Emission Limit for SO_2

Comment: A number of commenters requested EPA to promulgate a FIP that would require FCPP to reduce its SO_2 emissions to greater than 88% SO_2 removal from the exhaust gas. Some comments questioned the method which EPA specified FCPP should use to determine how much SO_2 was being removed or that removal efficiency should be determined by SO_2 CEMs located before and after the scrubber. The commenters noted that FCPP should not be able to count as ''removed'' sulfur that is retained in bottom and flyash.

Response: The removal efficiency that FCPP historically met (72%) and the increased efficiency required in this FIP (88%) are based on comparison of the percentage of sulfur in the coal that FCPP is combusting and the outlet concentration of sulfur expressed as SO_2. The commenters are correct that some of the sulfur is retained in bottom and flyash. However, comparing coal sampling for sulfur content to the SO_2 emitted at the stacks remains the most technically appropriate method of demonstrating compliance. FCPP uses a coal sampling tower that meets American Society of Testing and Materials (ASTM) specifications for obtaining a representative sample of the coal for sulfur analysis prior to combustion.

EPA agrees with one commenter that the regulatory language establishing the 88% removal efficiency should be clarified in the final FIP. Instead of stating the limit as ''12 percent of that which is produced by the coal burning equipment * * * '', EPA will change the FIP to reflect that the SO_2 limit is based on limiting emissions to 12% of the sulfur in the coal.

3. Comments on Whether FCPP's 88% Reduction of SO_2 Emissions Is Close to or Equivalent to BART

Comment: EPA received several comments regarding our statement in the preamble to the 2006 proposed FIP that ''EPA believes that the SO_2 controls proposed today for FCPP are close to or the equivalent of a regional haze BART determination for SO_2. This takes into consideration the early reductions that this action will achieve and the modifications to the existing SO_2 scrubbers.'' One commenter called upon EPA to conduct a full SO_2 BART analysis before taking final action. Another commenter disagreed with our statement that 88% control of SO_2 for FCPP is ''close to or the equivalent of'' BART and called upon EPA to require FCPP to meet what it characterized as the applicable presumptive BART requirement. In contrast, other comments supported EPA's statement or echoed the importance of achieving SO_2 emissions reductions from FCPP now rather than on the schedule anticipated for BART determinations.

Response: EPA is not making a BART determination for FCPP today. As noted in the preamble to the proposed FIP, the level of control in the FIP for FCPP is ''close to or the equivalent'' of BART for this source. EPA agrees that if the Agency were to undertake a case-by-case BART analysis, BART could potentially be determined to be a greater level of control than 88% SO_2 removal.[3] However, any case-by-case BART analysis would be subject to the timeframes needed to implement such controls. As explained above, under the TAR, EPA has the discretion to promulgate FIPs, as necessary or appropriate, within reasonable timeframes to protect air quality in Indian country. Id. In today's rulemaking EPA is exercising its discretion under 40 CFR 49.11 to find that it is neither necessary or appropriate at this time to undertake a BART determination for SO_2 for FCPP given the timing of the substantial SO_2 reductions resulting from this FIP. Moreover, as explained in the preamble to the 2006 proposed FIP, there are only two major sources of SO_2 on the Navajo Reservation that are potentially subject to the BART requirements—Navajo Generating Station and FCPP. 71 FR at 53632. EPA determined previously that the SO_2 emission limits in the 1991 FIP for the Navajo Generating Station provide for greater reasonable progress toward the national visibility goal than would BART. 71 FR at 53633. As explained above, given that the SO_2

[2] Such implementation plans are not required from the States until December 17, $2007_{[0]}$. Tribes are not subject to any mandatory deadlines to submit regional have implementation plans. See 40 CFR 49.7(c); 64 FR at 35758 (''For example, unlike States, tribes are not required by the TAR to adopt and implement CAA plans or programs, thus tribes are not subject to mandatory deadlines for submittal of implementation plans.''

[3] EPA disagrees with the comment that the BART Guidelines, 70 FR 39104, 39171 (July 6, 2005) established a presumption that BART at FCPP is 95% control for SO_2. Although the BART Guidelines did establish a presumption of either 95% control for SO_2 or 0.15 lbs/MMBtu for large power plants, this presumption applies only to power plants that are currently uncontrolled or achieving less than 50% control of SO_2. *Id.* As indicated in the preamble to the proposed FIP, this presumption thus does not apply to power plants, such as FCPP, with existing SO_2 controls achieving at least 50% removal efficiency. 71 FR at 53633; *see also* 70 FR at 39171.

controls for FCPP immediately achieve significant reductions in SO_2 comparable to what could ultimately be achieved through a formal BART determination, EPA believes that it will not be necessary or appropriate to develop a regional haze plan to address SO_2 for the Navajo Nation in the near term.

The Navajo Nation EPA has specifically requested EPA to take this action, and in doing so stated: ''Given the results of the APS study, the Navajo Nation agrees that an 88% SO_2 removal rate for SO_2 at Four Corners Power Plant appears to be equivalent to BART, especially taking into account the early reductions that will be achieved.'' Letter from Stephen Etsitty, to Deborah Jordan, dated December 6, 2005. EPA generally agrees with the Navajo Nation's assessment and has, therefore, taken this step in regulating emissions on the Navajo Nation reservation.

4. Comments on Opacity Emission Limits

Comment: One commenter objected to the lack of a 20% opacity standard for Units 1, 2, and 3. Other comments objected to the FIP's exemption of water vapor from the 20% opacity standard on Units 4 and 5 and also criticized exempting the Units from compliance with the opacity limit during startup and shutdown when the units dropped below 300 MW. In contrast, another commenter stated that the opacity requirements on these units are overly restrictive, especially as they pertain to periods of malfunction.

Response: Opacity limits are generally applied to ensure a source is meeting its PM emissions limit. For Units 1, 2, and 3, however, an opacity limit (coupled with a continuous opacity monitors (COMS)) would not be an appropriate method for ensuring compliance with the PM emissions limits for these units. This is because Units 1, 2, and 3 use venturi scrubbers to reduce PM emissions; due to interference from steam in the exhaust, COMS can not be used to monitor opacity on these stacks. Given this, EPA finds that the use of opacity limits to ensure that FCPP is meeting its PM emissions limits is not appropriate for these units. EPA continues to find, and is finalizing in today's action, that parametric monitoring of each venturi scrubber is the best method of assuring proper operation to minimize the emissions of PM.

Units 4 and 5 have always operated with an exemption from opacity limits during shutdown. The commenter has not provided any information demonstrating that exempting these units during shutdown harms the environment or public health.

With regards to comments requesting an exemption from the opacity limit during malfunctions, EPA has explained below its reasons for providing an affirmative defense for these periods. With regards to the comment on the phrasing for exempting water vapor, EPA agrees that this should be changed to uncombined water droplets. With respect to the commenter requesting a demonstration that the opacity was caused by uncombined water droplets, EPA believes this is not necessary. The opacity limit for this facility is set to assure proper operation of the baghouse. The rule will require that the facility assure that there has been no bypass through the bypass damper during these periods of assumed water droplet interference. The facility will be required to report these as apparent excess emissions in their quarterly excess emissions report. If anything inappropriate shows up in the reports, EPA can follow up to get better clarification of the issue.

D. Comments on Control Requirements

Comment: One commenter was concerned that the heat input for the FCPP Plant may have increased over a number of years as indicated from the ''EPA Acid Rain Scorecard'' and wanted to know if this increase constituted a major modification triggering permitting.

Response: EPA is undertaking this rulemaking pursuant to our rulemaking authority established in CAA sections 301(a) and 301(d) to promulgate source-specific FIPs in Indian Country. EPA is not addressing in today's action the status of this source with respect to any need for major source permitting or whether or not a modification had occurred at the plant.

We do note that changes in the heat input reflected by the ''EPA Acid Rain Scorecard'' do not necessarily indicate that an electric generating unit (EGU) has made a major modification. For example, the methodology for determining heat input to EGUs used in the Scorecard changed with the 1995 data. For the years before this, the Scorecard relied on coal consumption data provided to the EIA, while from 1995 on it was determined by flow measurements in the stack and calculated based on 40 CFR Part 60, Appendix A, Method 19.

Comment: One commenter questions whether or not the current method of flyash disposal is safe.

Response: The only regulatory action in this rule regarding flyash addresses the generation of dust while handling the flyash on site. The rule is imposing a 20% opacity limit on transfer points for flyash. This will cover the ash that is being sold for use as an additive to cement and the process for mixing of flyash and scrubber sludge for disposal at the mines. This regulation does not evaluate or control the method of disposal at the mine.

Comment: One commenter questions whether or not the facility was ever exempted from opacity monitoring as required and then eligible for exemption under 40 CFR 75.10(a) and 40 CFR 75.14(b), respectively.

Response: EPA is not aware that there was any specific exemption requested or granted to this facility. However, EPA has had extensive experience inspecting and negotiating with this plant since the early 1990's. EPA has been aware that even to the extent FCPP has followed the New Mexico rules, the three venturi scrubbed units (1, 2, and 3) have had no opacity limit and no opacity monitoring in the stacks. These units have venturi scrubbers that cannot be bypassed while the unit is in operation and the stacks have an exhaust gas stream that is always saturated. If a specific exemption was required, EPA would grant it for these three units upon request by the facility.

Comment: APS has commented that parametric monitoring should not be required by this rule, but that EPA should wait until Compliance Assurance Monitoring (CAM) is required by the facility's Title V permit. The commenter goes on to say if parametric monitoring is required that there should be a six month schedule for installation and shakedown of the equipment.

Response: EPA disagrees with the comment that EPA should wait to require the parametric monitoring under CAM. EPA believes that newly created applicable requirements, such as the emissions limitations in the FCPP FIP, should establish adequate monitoring, recordkeeping, and reporting that will assure compliance. It would not be appropriate to establish new applicable requirements (in the form of FCPP FIP requirements) that lack compliance-assuring monitoring, recordkeeping, and reporting requirements. Therefore, FCPP should establish parametric monitoring, and recordkeeping and reporting requirements, in conjunction with this source-specific FIP rule.

CAM is designed as a gap filling mechanism where the parametric monitoring required for an applicable requirement is insufficient to ensure compliance. All rules, such as the FCPP FIP, should have sufficient monitoring to assure compliance rather than rely on

the gap filling anticipated by CAM. EPA believes that the parametric monitoring is the most appropriate method to assure continuous compliance with the PM limits in this rule for Units 1, 2, and 3. EPA concurs that FCPP should be allowed a six month period to comply with this requirement and the final regulatory language reflects this.

Comment: FCPP commented that its emissions during startup, shutdown and malfunction events should be exempt from the emissions limits, and therefore not considered violations, rather than subject to an affirmative defense for penalties.

Response: EPA acknowledges the New Mexico SIP contained an exemption for these emissions. However, in our 1999 proposed FIP, EPA recognized that the New Mexico SIP's exemption of startup, shutdown and malfunction emissions from FCPP was in error. The 1999 proposed FIP contained a provision similar to the affirmative defense provision in the 2006 proposed FIP for malfunction events and alternate emissions limits for startup.

EPA has set forth its position on numerous occasions stating that emissions during startup, shutdown and malfunction events are considered violations of the underlying emissions limitations. For startup and shutdown events, EPA may set alternate limits where it is technically infeasible for the equipment to meet the emissions limit for a defined period of time. Such alternate startup and shutdown limits are not exemptions. For excess emissions resulting from malfunctions, EPA's longstanding position, as reflected in numerous policy documents and rulemakings, is that those emissions are violations of the underlying requirement but that the regulatory agency may provide that the violator may assert an affirmative defense to a claim for penalties based on the affirmative defense language such as we proposed.

FCPP's arguments on the issue, which are legal rather than technical, boil down to: (1) The CAA should only require excess malfunction emissions to be violations if those emissions would cause a violation of the NAAQS, (2) it is unfair to find a violation where the emissions are sudden and unavoidable, (3) the requirement to take all steps and to do everything possible renders the affirmative defense provision a ''nullity,'' and (4) the provision improperly usurps the judicial function of establishing the burden of proof. In response to the first point, the CAA contains numerous requirements that cannot be directly correlated with an exceedance of the NAAQS. (See, *e.g.* 40 U.S.C. 7410(a)(2) (requirements for SIPs).) Furthermore, NAAQS violations are rarely based on emissions from just one source, but rather from emissions from several or many sources. As to FCPP's second point, EPA agrees that penalties may not be appropriate where a malfunction was beyond the source's control and the source has taken all necessary actions to minimize emissions during the malfunction and to quickly remedy the problem. However, EPA does not agree that it is unfair to allow for claims for injunctive relief where a malfunction has occurred. The criteria ensure that these conditions are met before a source may be relieved from paying penalties while also allowing for claims for injunctive relief to proceed. On the third point, we disagree. The criteria represent reasonable mechanisms that sources should have in place to minimize and mitigate any adverse effects from malfunctions. For the fourth point, we are unclear what the commenter means by saying the defense ''usurps the judicial function of establishing burden of proof.'' However, we think that each party bears the appropriate burden in any enforcement case. The party seeking to enforce a claim bears that burden of proving that excess emissions occurred to establish a violation. FCPP may raise as a defense to penalties that the violation was unavoidable and FCPP took appropriate preventive and corrective action. The court retains its function of determining whether each party has met its burden. Therefore, EPA is finalizing the language proposed in the FIP allowing an affirmative defense for excess emissions resulting from malfunctions.

Comment: FCPP also commented that the FIP should not become effective until 18 months following promulgation because EPA's 2006 proposed FIP contained a new 20% opacity requirement for certain dust-generating activities.

Response: EPA agrees that FCPP may have 18 months to develop the necessary controls to ensure it does not exceed 20% opacity from its dust generating activities. EPA also agrees that FCPP may have the requested additional time to develop a parametric monitoring plan and to install CEMS and collect adequate data to demonstrate compliance with the SO2 emission limit.

Comment: FCPP commented that it did not agree with EPA's option in the proposed preamble to impose a 40% opacity limit for Units 1, 2, and 3.

Response: EPA agrees for the reasons discussed above concerning why EPA will not impose a 20% opacity limit on Units 1, 2, and 3.

III. Administrative Requirements

A. Executive Order 12866

Regulatory Planning and Review

Under Executive Order (E.O.) 12866, 58 FR 51735 (October 4, 1993), all ''regulatory actions'' that are ''significant'' are subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. A ''regulatory action'' is defined as ''any substantive action by an agency (normally published in the **Federal Register**) that promulgates or is expected to result in the promulgation of a final rule or regulation, including * * * notices of proposed rulemaking.'' A ''regulation or rule'' is defined as ''an agency statement of general applicability and future effect,* * *''

The FIP is a ''significant regulatory action'' because it raises novel legal or policy issues. Nevertheless, after reviewing information regarding this action, the Office of Management and Budget waived review of this action.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Under the Paperwork Reduction Act, a ''collection of information'' is defined as a requirement for ''answers to * * * identical reporting or recordkeeping requirements imposed on ten or more persons * * *'' 44 U.S.C. 3502(3)(A). Because the FIP applies to a single facility, FCPP, the Paperwork Reduction Act does not apply. *See* 5 CFR 1320(c).

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control

numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this final action on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. The FIP for FCPP being finalized today does not impose any new requirements on small entities. *See Mid-Tex Electric Cooperative, Inc.* v. *FERC,* 773 F.2d 327 (D.C. Cir. 1985)

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. 04–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under UMRA section 202, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed rules and for final rules for which EPA published a notice of proposed rulemaking, if those rules contain ''federal mandates'' that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. If UMRA section 202 requires a written statement, UMRA section 205 generally requires EPA to identify and consider a reasonable number of regulatory alternatives. Under UMRA section 205, EPA must adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule, unless the Regional Administrator publishes with the final rule an explanation why EPA did not adopt that alternative. The provisions of UMRA section 205 do not apply when they are inconsistent with applicable law. UMRA section 204 requires EPA to develop a process to allow elected officers of State, local, and Tribal governments (or their designated, authorized employees), to provide meaningful and timely input in the development of EPA regulatory proposals containing significant Federal intergovernmental mandates.

EPA has determined that the final FIP contains no Federal mandates on State, local or Tribal governments, because it will not impose any additional enforceable duties on any of these entities. EPA further has determined that the final FIP is not likely to result in the expenditure of $100 million or more by the private sector in any one year. Although the final FIP imposes enforceable duties on an entity in the private sector, the costs are expected to be minimal. Consequently, UMRA sections 202, 204, and 205 do not apply to the final FIP.

Before EPA establishes any regulatory requirements that might significantly or uniquely affect small governments, it must have developed under UMRA section 203 a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that the final FIP will not significantly or uniquely affect small governments, because it imposes no requirements on small governments. Therefore, the requirements of UMRA section 203 do not apply to the final FIP. Nonetheless, EPA worked closely with representatives of the Tribe in the development of today's action.

E. Executive Order 13132: Federalism

Federalism (64 FR 43255, August 10, 1999) revokes and replaces Executive Orders 12612 (Federalism) and 12875 (Enhancing the Intergovernmental Partnership). Executive Order 13132 requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications is defined in the Executive Order to include regulations that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it merely approves a State rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, Nov. 9, 2000), requires EPA to develop ''an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' Under Executive Order 13175, to the extent practicable and permitted by law, EPA may not issue a regulation that has tribal implications, that imposes substantial direct compliance costs on Indian tribal governments, and that is not required by statute, unless the Federal government provides the funds necessary to pay direct compliance costs incurred by tribal governments, or EPA consults with tribal officials early in the process of developing the proposed regulation and develops a tribal summary impact statement. In addition, to the extent practicable and permitted by law, EPA may not issue a regulation that has tribal

implications and pre-empts tribal law unless EPA consults with tribal officials early in the process of developing the proposed regulation and prepares a tribal summary impact statement.

EPA has concluded that this final rule may have tribal implications because it will impose federally enforceable emissions limitation on a major stationary source located and operating on the Navajo reservation. However, this final rule will neither impose substantial direct compliance costs on tribal governments nor pre-empt Tribal law because the final FIP imposes obligations only on the owner or operator of FCPP.

EPA has also consulted extensively with officials of the Navajo Nation in the process of developing this regulation. EPA had discussions with Tribal representatives during proposal of the FIP in 1999. By letter dated December 5, 2005, the Navajo Nation EPA supported the action taken in this FIP. Tribal officials attended the public information workshop and public hearing on the proposed FIP. Therefore, EPA has allowed Navajo Nation to provide meaningful and timely input into development of this FIP.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This rule also is not subject to Executive Order 13045, ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it approves a state rule implementing a Federal standard.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Pub L. 104–113, 12 (10) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards (VCS) in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. VCS are technical standards (*e.g.*, materials specifications, test methods, sampling procedures and business practices) that are developed or adopted by the VCS bodies. The NTTAA directs EPA to provide Congress, through annual reports to OMB, with explanations when the Agency decides not to use available and applicable VCS.

Consistent with the NTTAA, the Agency conducted a search to identify potentially applicable VCS. For the measurement of the sulfur in the coal for calculating the efficiency of the SO_2 scrubbers for FCCP, EPA proposes to require use of ASTM standards. FCCP would have the ability to choose an applicable ASTM standard for both the coal sample collection and the sulfur in coal analysis.

In regard to the remaining measurement needs as listed below, there are a number of VCS that appear to have possible use in lieu of the EPA test methods and performance specifications (40 CFR Part 60, Appendices A and B) noted next to the measurement requirements. It would not be practical to specify these standards in the current rulemaking due to a lack of sufficient data on equivalency and validation and because some are still under development. However, EPA's Office of Air Quality Planning and Standards is in the process of reviewing all available VCS for incorporation by reference into the test methods and performance specifications of 40 CFR Part 60, Appendices A and B. Any VCS so incorporated in a specified test method or performance specification would then be available for use in determining the emissions from this facility. This will be an ongoing process designed to incorporate suitable VCS as they become available.

Particulate Matter Emissions—EPA Methods 1 though 5

Opacity—EPA Method 9 and Performance Specification Test 1 for Opacity Monitoring

SO_2—EPA Method 6C and Performance Specification 2 for Continuous SO_2 Monitoring

NO_X—EPA Method 7E and Performance Specification 2 for Continuous NO_X Monitoring.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994), establishes Federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it strengthens the level of protection provided to human health or the environment. This final rule requires emissions reductions and makes emissions limitations federally enforceable for a major stationary source.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. section 804(2). This rule will be effective June 6, 2007.

L. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by July 6, 2007. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition

for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See CAA section 307(b) (2)).

List of Subjects in 40 CFR Part 49

Environmental protection, Administrative practice and procedure, Air pollution control, Indians, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: April 30, 2007.

Stephen Johnson,

Administrator.

■ Title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 49—[AMENDED]

■ 1. The authority citation for part 49 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

■ 2. Section 49.23 is added to read as follows:

§ 49.23 Federal Implementation Plan Provisions for Four Corners Power Plant, Navajo Nation.

(a) *Applicability.* The provisions of this section shall apply to each owner or operator of the coal burning equipment designated as Units 1, 2, 3, 4, and 5 at the Four Corners Power Plant (the Plant) on the Navajo Nation Indian Reservation located in the Four Corners Interstate Air Quality Control Region (see 40 CFR 81.121).

(b) *Compliance Dates.* Compliance with the requirements of this section is required upon the effective date of this rule unless otherwise indicated by compliance dates contained in specific provisions.

(c) *Definitions.* For the purposes of this section:

(1) *Affirmative defense* means, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding.

(2) *Air pollution control equipment* includes baghouses, particulate or gaseous scrubbers, and any other apparatus utilized to control emissions of regulated air contaminants which would be emitted to the atmosphere.

(3) *Business Day.* Business day means a normal working day, excluding weekends and Federal Holidays.

(4) *Daily average* means the arithmetic average of the hourly values measured in a 24-hour period.

(5) *Excess emissions* means the emissions of air contaminants in excess of an applicable emissions limitation or requirement.

(6) *Heat input* means heat derived from combustion of fuel in a Unit and does not include the heat input from preheated combustion air, recirculated flue gases, or exhaust gases from other sources. Heat input shall be in accordance with 40 CFR Part 75.

(7) *Malfunction* means any sudden and unavoidable failure of air pollution control equipment or process equipment or of a process to operate in a normal or usual manner. Failures that are caused entirely or in part by poor maintenance, careless operation, or any other preventable upset condition or preventable equipment breakdown shall not be considered malfunctions. This rule provides an affirmative defense to actions for penalties brought for excess emissions that arise during certain malfunction episodes. An affirmative defense is not available if during the period of excess emissions, there was an exceedance of the relevant ambient air quality standard that could be attributed to the emitting source.

(8) *Owner or Operator* means any person who owns, leases, operates, controls, or supervises the Plant or any of the coal burning equipment designated as Units 1, 2, 3, 4, or 5 at the Plant.

(9) *Oxides of nitrogen (NO_X)* means the sum of nitric oxide *(NO)* and nitrogen dioxide (NO_2) in the flue gas, expressed as nitrogen dioxide.

(10) *Plant-wide basis* means total stack emissions of any particular pollutant from all coal burning equipment at the Plant.

(11) *Regional Administrator* means the Regional Administrator of the Environmental Protection Agency (EPA) Region 9 or his/her authorized representative.

(12) *Shutdown* means the cessation of operation of any air pollution control equipment, process equipment, or process for any purpose. Specifically, for Units 1, 2, or 3, shutdown begins when the unit drops below 40 MW net load with the intent to remove the unit from service. For Units 4 or 5, shutdown begins when the unit drops below 300 MW net load with the intent to remove the unit from service.

(13) *Startup* means the setting into operation of any air pollution control equipment, process equipment, or process for any purpose. Specifically, for Units 1, 2, or 3, startup ends when the unit reaches 40 MW net load. For Units 4 or 5, startup ends when the unit reaches 400 MW net load.

(14) *24-hour period* means the period of time between 12:01 a.m. and 12 midnight.

(d) *Emissions Standards and Control Measures*—(1) *Sulfur Dioxide.* No owner or operator shall discharge or cause the discharge of sulfur dioxide (SO_2) into the atmosphere in excess of:

(i) 12.0 percent of the potential combustion concentration assuming all of the sulfur in the coal is converted to SO_2. This percent emitted is determined by a daily calculation of the plantwide heatinput weighted annual average.

(ii) 17,900 pounds of total SO_2 emissions per hour averaged over any consecutive three (3) hour period, determined on a plant-wide basis.

(2) *Particulate Matter.* No owner or operator shall discharge or cause the discharge of particulate matter from any coal burning equipment into the atmosphere in excess of 0.050 pounds per million British thermal unit (lb/MMBtu) of heat input (higher heating value), as averaged from three sampling runs, each at 60 minutes in duration, each collecting a minimum sample of 30 dry standard cubic feet.

(3) *Dust.* Each owner or operator shall operate and maintain the existing dust suppression methods for controlling dust from the coal handling and storage facilities. Within ninety (90) days after promulgation of this section, the owner or operator shall submit to the Regional Administrator a description of the dust suppression methods for controlling dust from the coal handling and storage facilities, flyash handling and storage, and road sweeping activities. Within 548 days of promulgation of this section each owner or operator shall not emit dust with an opacity greater than 20 percent from any crusher, grinding mill, screening operation, belt conveyor, or truck loading or unloading operation.

(4) *Opacity.* No owner or operator shall discharge or cause the discharge of emissions from the stacks of Units 4 and 5 into the atmosphere exhibiting greater than 20% opacity, excluding uncombined water droplets, averaged over any six (6) minute period, except for one six (6) minute period per hour of not more than 27% opacity.

(5) *Oxides of nitrogen.* No owner or operator shall discharge or cause the discharge of NO_X into the atmosphere.

(i) From either Unit 1 or 2 in excess of 0.85 lb/MMBtu of heat input per unit, and from either Units 3, 4, or 5 in excess of 0.65 lb/MMBtu of heat input per unit averaged over any successive thirty (30) boiler operating day period;

(ii) In excess of 335,000 lb per 24-hour period when coal burning equipment is operating, on a plant-wide basis; for each hour when coal burning equipment

is not operating, this limitation shall be reduced. If the unit which is not operating is Unit 1, 2, or 3, the limitation shall be reduced by 1,542 lb per hour for each unit which is not operating. If the unit which is not operating is Unit 4 or 5, the limitation shall be reduced by 4,667 lb per hour for each unit which is not operating.

(e) *Testing and Monitoring.* Upon completion of the installation of continuous emissions monitoring systems (CEMS) software as required in this section, compliance with the emissions limits set for SO2 and NO_X shall be determined by using data from a CEMS unless otherwise specified in paragraphs (e)(2) and (e)(4) of this section. Compliance with the emissions limit set for particulate matter shall be tested annually, or at such other time as requested by the Regional Administrator, based on data from testing conducted in accordance with 40 CFR part 60, appendix A, Methods 1 through 5, or any other method receiving prior approval from the Regional Administrator. Compliance with the emissions limits set for opacity shall be determined by using data from a Continuous Opacity Monitoring System (COMS) except during saturated stack conditions (uncombined water droplets). If the baghouse is operating within its normal operating parameters, the baghouse is not fully closed, and a high opacity reading occurs, it will be presumed that the occurrence was caused by saturated stack conditions and shall not be considered a violation.

(1) The owner or operator shall maintain and operate CEMS for SO2, NO or NO_X, a diluent and, for Units 4 and 5 only, COMS, in accordance with 40 CFR 60.8 and 60.13, and appendix B of 40 CFR part 60. Within six (6) months of promulgation of this section, the owner or operator shall install CEMS and COMS software which complies with the requirements of this section. The owner or operator of the Plant may petition the Regional Administrator for extension of the six (6) month period for good cause shown. Completion of 40 CFR part 75 monitor certification requirements shall be deemed to satisfy the requirements under 40 CFR 60.8 and 60.13 and appendix B of part 60. The owner or operator shall comply with the quality assurance procedures for CEMS found in 40 CFR part 75, and all reports required thereunder shall be submitted to the Regional Administrator. The owner or operator shall provide the Regional Administrator notice in accordance with 40 CFR 75.61.

(2) *Sulfur Dioxide.* For the purpose of determining compliance with this section, the sulfur dioxide inlet concentration (in lb/MMBtu) shall be calculated using the daily average percent sulfur and Btu content of the coal combusted. The inlet sulfur concentration and Btu content shall be determined in accordance with American Society for Testing and Materials (ASTM) methods or any other method receiving prior approval from the Regional Administrator. A daily fuel sample shall be collected using the coal sampling tower conforming to the ASTM specifications. The analyses shall be done on the daily sample using ASTM methods or any other method receiving prior approval from the Regional Administrator.

(i) The inlet sulfur dioxide concentration shall be calculated using the following formula:

$I_s = 2(\%S_f)/GCV \times 10^4$ English units

Where:

I_s = sulfur dioxide inlet concentrations in pounds per million Btu;
$\%S_f$ = weight
percent sulfur content of the fuel; and
GCV = Gross calorific value for the fuel in Btu per pound.

(ii) The total pounds of SO_2 generated by burning the coal shall be calculated by multiplying the SO_2 inlet concentration by the daily total heat input determined by the 40 CFR Part 75 acid rain monitoring. This will determine the pounds of SO_2 produced per day. The SO_2 emitted from the stacks shall be determined by adding the daily SO_2 emissions from each stack as determined by the 40 CFR Part 75 acid rain monitors. Compliance with the emission limit shall be determined for each day by adding that day's SO_2 emissions and that day's SO_2 produced to the previous 364 days and then dividing the 365 days of emissions by the 365 days of SO_2 produced. Compliance is demonstrated if this fraction, converted to a percent, is equal to or less than 12.0 percent. The data from the 40 CFR Part 75 monitors shall not be bias adjusted. If a valid SO_2 pounds per hour or heat input is not available for any hour for a unit, that heat input and SO_2 pounds per hour shall not be used in the calculation of the annual plant-wide average.

(3) *Particulate Matter.* Particulate matter emissions shall be determined by averaging the results of three test runs. Each test run shall be sixty (60) minutes in duration and shall collect a minimum volume of thirty (30) dry standard cubic feet. Within six (6) months of promulgation of this section, particulate matter testing shall be conducted annually and at least six (6) months apart, with the equipment within 90 percent of maximum operation in accordance with 40 CFR 60.8 and Appendix A to 40 CFR Part 60. The owner or operator shall submit written notice of the date of testing no later than 21 days prior to testing. Testing may be performed on a date other than that already provided in a notice as long as notice of the new date is provided either in writing or by telephone or other means acceptable to the Region 9 Enforcement Office, and the notice is provided as soon as practicable after the new testing date is known, but no later than 7 days (or a shorter period as approved by the Region 9 Enforcement Office) in advance of the new date of testing.

(4) *Oxides of nitrogen.* The total daily plant-wide oxides of nitrogen emissions in pounds of NO_2 per day shall be calculated using the following formula:

$$TE = \sum_{i=1}^{n} \sum_{j=1}^{m} \left(E_{ij} \times H_{ij} \right)$$

Where:

TE = total plant-wide nitrogen dioxide emissions (lb NO_2/day);
E_{ij} = hourly average emissions rate of each unit (lb NO_2/MMBtu);
H_{ij} = hourly total heat input for each unit (MMBtu);
n = the number of units of coal burning equipment operating during the hour;
m = the number of operating hours in a day, from midnight to midnight.

(5) Continuous emissions monitoring shall apply during all periods of operation of the coal burning equipment, including periods of startup, shutdown, and malfunction, except for CEMS breakdowns, repairs, calibration checks, and zero and span adjustments. Continuous monitoring systems for measuring SO_2, NO_X, and diluent gas shall complete a minimum of one cycle of operation (sampling, analyzing, and data recording) for each successive 15-minute period. Hourly averages shall be computed using at least one data point in each fifteen minute quadrant of an hour. Notwithstanding this requirement, an hourly average may be computed from at least two data points separated by a minimum of 15 minutes (where the unit operates for more than one quadrant in an hour) if data are unavailable as a result of performance of calibration, quality assurance, preventive maintenance activities, or backups of data from data acquisition and handling system, and recertification events. When valid SO_2 pounds per hour, NO_2 pounds per hour, or NO_2 pounds per million Btu emission data are not obtained because of continuous monitoring system breakdowns, repairs, calibration checks, or zero and span adjustments, emission data must be

obtained by using other monitoring systems approved by the EPA to provide emission data for a minimum of 18 hours in at least 22 out of 30 successive boiler operating days. If a parameter essential for determining either the SO_2 pound per hour or the heat input is not valid or unavailable, that hour for that unit shall not be used in calculating the percent emissions of SO_2 for the plant-wide limit. The necessary software for determining compliance with the SO_2 plantwide annual average shall be installed and operating within 180 days of the effective date of this rule. The first day for determining compliance with the plantwide SO_2 limit shall be 365 days after the successful installation of the software.

(6) The owner or operator shall maintain a set of opacity filters to be used as audit standards.

(7) Nothing herein shall limit EPA's ability to ask for a test at any time under Section 114 of the Clean Air Act, 42 U.S.C. 7414, and enforce against any violation.

(8) In order to provide reasonable assurance that the scrubbers for control of particulate matter from Units 1, 2, and 3 are being maintained and operated in a manner consistent with good air pollution control practice for minimizing emissions, the owner or operator shall comply with the following provisions:

(i) The owner or operator shall develop a plan to monitor, record, and report parameter(s) indicative of the proper operation of the scrubbers to provide a reasonable assurance of compliance with the particulate matter limits in paragraph (d)(2) of this section. The owner or operator shall submit this plan to the Regional Administrator no later than sixty (60) days after the effective date of this FIP. The owner or operator shall implement this plan within 90 days of approval by the Regional Administrator and shall commence reporting the data generated pursuant to the monitoring plan in accordance with the schedule in paragraph (e)(8)(v) of this section. If requested by the Regional Administrator, this plan shall be revised and submitted to the Regional Administrator for approval within sixty (60) days of the request. The revised plan shall be implemented within sixty (60) days of the Regional Administrator's approval.

(ii) In the event that the owner or operator is unable to develop the plan required in paragraph (e)(8)(i) of this section due to technical difficulties, fails to submit the plan within sixty (60) days of the effective date of this FIP, or the Regional Administrator disapproves the plan, the owner or operator shall install and operate devices to measure the pressure drop across each scrubber module and the total flow of scrubbing liquid to the venturi section of each scrubber module. The data from these instruments shall be monitored and recorded electronically. A minimum of one reading every 15 minutes shall be used to calculate an hourly average which shall be recorded and stored for at least a five-year period. The owner or operator shall report in an electronic format either all hourly data, or one-hour averages deviating by more than 30 percent from the levels measured during the last particulate matter stack test that demonstrated compliance with the limit in this section. The owner or operator shall implement this requirement no later than one hundred eighty (180) days after the effective date of this FIP if it failed to submit the plan within sixty (60) days after the effective date of this FIP; or no later than 60 days after the Regional Administrator's disapproval of the plan.

(iii) The monitoring required under paragraphs (e)(8)(i) and (e)(8)(ii) of this section shall apply to each Unit at all times that the Unit is operating, except for monitoring malfunctions, associated repairs, and required quality assurance or control activities (including, as applicable, calibration checks and required zero and span adjustments). A monitoring malfunction is any sudden, infrequent, not reasonably preventable failure of the monitoring to provide valid data. Monitoring failures that are caused in part by poor maintenance or careless operation are not malfunctions.

(iv) The owner or operator may petition the Regional Administrator for an extension of the sixty (60) day deadline. Such extension shall be granted only if the owner or operator demonstrates to the satisfaction of the Regional Administrator that:

(A) The delay is due to technical infeasibility beyond the control of the owner or operator; and

(B) The requested extension, if granted, will allow the owner or operator to successfully complete the plan.

(v) The owner or operator shall submit to the Regional Administrator reports of the monitoring data required by this section semi-annually. The reports shall be postmarked within 30 days of the end of each calendar quarter.

(vi) The owner or operator shall develop and document a quality assurance program for the monitoring and recording instrumentation. This program shall be updated or improved as requested by the Regional Administrator.

(vii) In the event that a program for parameter monitoring on Units 1, 2, and 3 is approved pursuant to the Compliance Assurance Monitoring rule, 40 CFR Part 64, such program will supersede the provisions contained in paragraph (e)(8) of this section.

(f) *Reporting and Recordkeeping Requirements.* Unless otherwise stated all requests, reports, submittals, notifications, and other communications to the Regional Administrator required by this section shall be submitted, unless instructed otherwise, to the Director, Navajo Environmental Protection Agency, P.O. Box 339, Window Rock, Arizona 86515, (928) 871–7692, (928) 871–7996 (facsimile), and to the Director, Air Division, U.S. Environmental Protection Agency, Region IX, to the attention of Mail Code: AIR–5, at 75 Hawthorne Street, San Francisco, California 94105, (415) 972–3990, (415) 947–3579 (facsimile). For each unit subject to the emissions limitation in this section and upon completion of the installation of CEMS and COMS as required in this section, the owner or operator shall comply with the following requirements:

(1) For each emissions limit in this section, comply with the notification and recordkeeping requirements for CEMS compliance monitoring in 40 CFR 60.7(c) and (d). For Units 4 and 5, periods of excess opacity due to water droplets shall be reported in the summary report required by 40 CFR 60.7(d).

(2) For each day, provide the 365 day percent SO_2 emitted, the total SO_2 emitted that day, and the total SO_2 produced that day. For any hours on any unit where data for SO_2 hourly pounds or heat input is missing, identify the unit number and monitoring device that did not produce valid data that caused the missing hour.

(3) Furnish the Regional Administrator with reports describing the results of the annual particulate matter emissions tests postmarked within sixty (60) days of completing the tests. Each report shall include the following information:

(i) The test date;

(ii) The test method;

(iii) Identification of the coal burning equipment tested;

(iv) Values for stack pressure, temperature, moisture, and distribution of velocity heads;

(v) Average heat input;

(vi) Emissions data, identified by sample number, and expressed in pounds per MMBtu;

(vii) Arithmetic average of sample data expressed in pounds per MMBtu; and

(viii) A description of any variances from the test method.

(4) *Excess Emissions Report.* (i) For excess emissions (except in the case of saturated stack conditions), the owner or operator shall notify the Navajo Environmental Protection Agency Director and the U.S. Environmental Protection Agency Regional Administrator by telephone or in writing within one business day (initial notification). A complete written report of the incident shall be submitted to the Navajo Environmental Protection Agency Director and the U.S. Environmental Protection Agency Regional Administrator within ten (10) working days of the initial notification. This notification should be sent to the Director, Navajo Environmental Protection Agency, by mail to: P.O. Box 339, Window Rock, Arizona 86515, or by facsimile to: (928) 871–7996 (facsimile), and to the Regional Administrator, U.S. Environmental Protection Agency, by mail to the attention of Mail Code: AIR–5, at 75 Hawthorne Street, San Francisco, California 94105, by facsimile to: (415) 947–3579 (facsimile), or by e-mail to: *r9.aeo@epa.gov.* The complete written report shall include:

(A) The name and title of the person reporting;

(B) The identity and location of the Plant and Unit(s) involved, and the emissions point(s), including bypass, from which the excess emissions occurred or are occurring;

(C) The time and duration or expected duration of the excess emissions;

(D) The magnitude of the excess emissions expressed in the units of the applicable emissions limitation and the operating data and calculations used in determining the magnitude of the excess emissions;

(E) The nature of the condition causing the excess emissions and the reasons why excess emissions occurred or are occurring;

(F) If the excess emissions were the result of a malfunction, the steps taken to remedy the malfunction and the steps taken or planned to prevent the recurrence of such malfunction;

(G) For an opacity exceedance, the 6-minute average opacity monitoring data greater than 20 percent for the 24 hours prior to and during the exceedance for Units 4 and 5; and

(H) The efforts taken or being taken to minimize the excess emissions and to repair or otherwise bring the Plant into compliance with the applicable emissions limit(s) or other requirements. For this reporting requirement, excess opacity due to saturated stack conditions is exempted.

(ii) If the period of excess emissions extends beyond the submittal of the written report, the owner or operator shall also notify the Regional Administrator in writing of the exact time and date when the excess emissions stopped. Compliance with the excess emissions notification provisions of this section shall not excuse or otherwise constitute a defense to any violations of this section or of any law or regulation which such excess emissions or malfunction may cause.

(g) *Equipment Operations.* At all times, including periods of startup, shutdown, and malfunction, the owner or operator shall, to the extent practicable, maintain and operate the Plant including associated air pollution control equipment in a manner consistent with good air pollution control practices for minimizing emissions. Determination of whether acceptable operating and maintenance procedures are being used will be based on information available to the Regional Administrator which may include, but is not limited to, monitoring results, opacity observations, review of operating and maintenance procedures, and inspection of the Plant. With regard to the operation of the baghouses on Units 4 and 5, placing the baghouses in service before coal fires are initiated will constitute compliance with this paragraph. (If the baghouse inlet temperature cannot achieve 185 degrees Fahrenheit using only gas fires, the owner or operator will not be expected to place baghouses in service before coal fires are initiated; however, the owner or operator will remain subject to the requirements of this paragraph.)

(h) *Enforcement.* (1) Notwithstanding any other provision in this implementation plan, any credible evidence or information relevant to whether the Plant would have been in compliance with applicable requirements if the appropriate performance or compliance test had been performed, can be used to establish whether or not the owner or operator has violated or is in violation of any standard in the plan.

(2) During periods of startup and shutdown the otherwise applicable emission limits or requirements for opacity and particulate matter shall not apply provided that:

(i) At all times the facility is operated in a manner consistent with good practice for minimizing emissions, and the owner or operator uses best efforts regarding planning, design, and operating procedures to meet the otherwise applicable emission limit;

(ii) The frequency and duration of operation in start-up or shutdown mode are minimized to the maximum extent practicable; and

(iii) The owner or operator's actions during start-up and shutdown periods are documented by properly signed, contemporaneous operating logs, or other relevant evidence.

(3) Emissions in excess of the level of the applicable emission limit or requirement that occur due to a malfunction shall constitute a violation of the applicable emission limit. However, it shall be an affirmative defense in an enforcement action seeking penalties if the owner or operator has met with all of the following conditions:

(i) The malfunction was the result of a sudden and unavoidable failure of process or air pollution control equipment or of a process to operate in a normal or usual manner;

(ii) The malfunction did not result from operator error or neglect, or from improper operation or maintenance procedures;

(iii) The excess emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance;

(iv) Steps were taken in an expeditious fashion to correct conditions leading to the malfunction, and the amount and duration of the excess emissions caused by the malfunction were minimized to the maximum extent practicable;

(v) All possible steps were taken to minimize the impact of the excess emissions on ambient air quality;

(vi) All emissions monitoring systems were kept in operation if at all possible; and

(vii) The owner or operator's actions in response to the excess emissions were documented by properly signed, contemporaneous operating logs, or other relevant evidence.

[FR Doc. E7–8530 Filed 5–4–07; 8:45 am]

BILLING CODE 6560–50–P

CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), and in reliance upon the word count feature of the word processing software used to prepare the brief (Microsoft Word 2002), I hereby certify that this brief contains 10,457 words.

/s/Thomas Sayre Llewellyn

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that all required privacy redactions have been made (*i.e.*, none) and that the foregoing Opening Brief Of Petitioner Arizona Public Service Company as submitted in Digital Form is an exact copy of the written document filed with the Clerk. I further certify that the digital submission has been scanned for viruses with the anti-virus feature of Verizon Internet Security Suite (Version No. 6.0.1.21395), with a virus definition file date of January 20, 2008, and according to the program, is free of viruses.

/s/Thomas Sayre Llewellyn

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2008, one copy of the foregoing Opening Brief Of Petitioner Arizona Public Service Company was furnished by commercial carrier for delivery within three calendar days, to each of the following:

Matthew G. Kenna, Esquire
Western Environmental Law Center
Rocky Mountain Office
679 E. 2nd Avenue
Suite 11B
Durango, CO 81301

David A. Carson, Esquire
United States Department of Justice
Environment and Natural Resources Division
1961 Stout Street – 8th Floor
Denver, CO 80294

_____

/s/Thomas Sayre Llewellyn

_____