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9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO DIVISION

12 DINÉ CARE and NATIONAL PARKS
13 CONSERVATION ASSOCIATION,

14 Plaintiffs,

15 v.

16 UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY and LISA P. JACKSON,
17 in her official capacity as EPA Administrator,

18 Defendants,

19
20 SALT RIVER PROJECT AGRICULTURAL
IMPROVEMENT & POWER DISTRICT,

21 Intervenor-Defendant.
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Case No. C 12-03987 JSW

**PLAINTIFFS' NOTICE OF MOTION
AND MOTION FOR SUMMARY
JUDGMENT, INCLUDING
MEMORANDUM OF POINTS
AND AUTHORITIES**

Date: June 21, 2013
Time: 9:00 a.m.
Judge: Hon. Jeffrey S. White

1 **NOTICE OF MOTION AND MOTION**

2 TO DEFENDANTS, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
3 and LISA P. JACKSON, and INTERVENOR-DEFENDANT SALT RIVER PROJECT
4 AGRICULTURAL IMPROVEMENT & POWER DISTRICT AND THEIR ATTORNEYS OF
5 RECORD:

6 NOTICE IS HEREBY GIVEN that on June 21, 2013 at 9:00 a.m. or as soon thereafter
7 as counsel may be heard by the above-entitled court, located at the Phillip Burton Federal
8 Building & United States Courthouse, Courtroom 11 - 19th Floor, 450 Golden Gate Avenue, San
9 Francisco, CA 94102, in the courtroom of The Honorable Jeffrey S. White, United States District
10 Court Judge, plaintiffs will and hereby do move the Court for summary judgment on the ground
11 that there is no genuine issue as to any material fact and that the plaintiffs are entitled to
12 judgment as a matter of law.

13 This motion is based on this Notice of Motion and Motion, the Memorandum of Points
14 and Authorities filed herewith, the declarations in support of this Motion from David
15 Howekamp, Exhibit 6, George E. Hays, Exhibit 2, and Diane Albert, Exhibit 3, the pleadings and
16 papers filed herein, and upon such other matters as may be presented to the Court at the time of
17 the hearing.

18
19 Counsel for Plaintiffs
20 DINÉ CARE and NATIONAL PARKS
21 CONSERVATION ASSOCIATION

22 By /s George E. Hays
23 George E. Hays
24 Reed Zars

25 DATED: March 8, 2013
26
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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Statement of the Issues to be Decided

1. Is EPA's failure of over five and a half years to issue a final rule establishing Best Available Retrofit Technology ("BART") for the Navajo Generating Station unreasonable?
2. Should EPA be ordered to issue a final rule within one year that establishes Best Available Retrofit Technology for the Navajo Generating Station?

Statement of Undisputed Material Facts

1. Navajo Generating Station ("Navajo") is a 2,250 megawatt coal-fired power plant located in northern Arizona approximately 12 miles from the eastern edge of Grand Canyon National Park. Answer, ¶¶ 10, 12.
2. Although located on Navajo tribal land, the Navajo Generating Station is owned and operated exclusively by non-tribal utilities including Salt River Project, Arizona Public Service Company, Tucson Electric Power, Bureau of Reclamation, Los Angeles Department of Water and Power and Nevada Energy. "Advance Notice of Proposed Rulemaking," 74 Fed. Reg. 44,313 (Aug. 28, 2009) ("ANPR").
3. On an annual basis, Navajo discharges into the air of the Southwest over 34,000 tons of nitrogen oxides (NO_x), 1,900 tons of particulate matter (PM) and 3,690 tons of sulfur dioxide (SO₂). EPA's Air Markets Program, <http://ampd.epa.gov/ampd/>.
4. Visibility impairment is measured in deciviews. Answer, ¶ 15.
5. A 1.0 deciview reduction in visibility is perceptible to the human eye. 40 C.F.R. Part 51, Subpart P, Appendix Y— Guidelines for BART Determinations Under the Regional Haze Rule, Section III A. 1.
6. According to EPA, "[a] BART-eligible source with a predicted visibility impact of 0.5 deciviews (dv) or more in a Class I area 'contributes' to visibility impairment and is subject to BART." See 70 Fed. Reg. at 39161 (July 6, 2005). Navajo contributes to visibility impairment at 11 surrounding Class I areas in excess of this threshold, and is thus subject to BART." 78 Fed. Reg. 8277/1 (April 23, 2012).

1 7. Visitors to Grand Canyon National Park, including NPCA member Diane Albert, are
2 adversely affected by the plume of pollution coming from the Navajo Generating Station that
3 mars their views of this natural wonder. Declaration of Diane Albert, Exhibit 3.

4 8. The Navajo Nation has not submitted a regional haze Tribal Implementation Plan to
5 EPA, and the Navajo Nation is under no obligation or deadline to do so. Answer, ¶ 27.

6 9. EPA has considered Navajo Generating Station to be BART-eligible and subject to
7 BART since at least July 22, 2007. Exhibit 4, Email from Stephanie Talbert to Reed Zars,
8 January 15, 2013.

9 10. In November 2007, the operator of the Navajo, Salt River Project Agricultural
10 Improvement and Power District (“Salt River Project”), provided its regional haze BART
11 analysis to EPA. Therein, Salt River Project confirmed that Navajo was both BART-eligible and
12 subject to BART due to its impacts to nearby Class I areas. Exhibit 5, ENSR Corp., BART
13 Analysis for the Navajo Generating Station Units 1 – 3 (Nov. 2007).

14 11. In the ANPR, issued in August 2009, EPA stated that it intended to publish its BART
15 determination for Navajo approximately 60 days after receiving information requested by the
16 notice. The ANPR required comments within 30 days. ANPR, 74 Fed. Reg. at 44314. This was
17 informally extended for all affected tribes to December 28, 2009. Exhibit 6, Howekamp Decl., ¶
18 9.

19 12. EPA did not issue a proposed BART determination for Navajo until February 5,
20 2013, more than 1,100 days (three years and two months) after the comment deadline in the
21 ANPR. 73 Fed. Reg. 8274.

22 13. On July 15, 2011, Plaintiffs notified the Administrator of EPA of the violations
23 alleged herein and Plaintiffs’ intent to initiate the present action. Answer, ¶ 4.

24 14. More than 180 days passed between service of the notice letter and the filing of the
25 complaint in this case. Answer, ¶ 4.

Argument

I. To Achieve a Congressionally Mandated National Goal, EPA Has a Mandatory Duty to Require Best Available Retrofit Technology for Polluting Sources Impairing Visibility in National Parks.

In 1977, Congress ordered EPA to restore the many scenic vistas impaired by pollution in our National Parks. Thirty-six years later, citizens who frequent Grand Canyon and other national treasures in the southwest still wait for the air to clear.

In amending the Clean Air Act in 1977, one explicitly stated purpose of Congress was to “to preserve, protect, and enhance the air quality in national parks.” 42 U.S.C. § 7470(2). To this end, Congress designated each National Park greater than 6,000 acres in size in existence as of August 1977 as a “mandatory class I Federal area[]”, 42 U.S.C. § 7472(a) and 7491(g), and declared “as a national goal . . . the remedying of any existing, impairment of visibility” in those areas resulting “from manmade air pollution.” 42 U.S.C. § 7491(a)(1). To help achieve this visibility goal, Congress ordered EPA to mandate the installation and operation of Best Available Retrofit Technology (“BART”) on polluting sources less than fifteen years old that were causing or contributing to visibility impairment in Class I areas. 42 U.S.C. § 7491(b)(2)(A). Navajo Generating Station is one these pollution sources.

As a result of this Congressional mandate, EPA promulgated regional haze regulations which, at 40 C.F.R. § 51.308(e)(1)(ii), recognizing its own mandatory duty to establish BART for each eligible source.

II. EPA Determined that Navajo is Subject to BART Over Five and a Half Years Ago, and Still EPA Has Not Issued a Final Determination for this Highly Polluting Plant.

On July 22, 2007, EPA provided written notification to the operator of Navajo that it must provide a BART analysis for the plant. Fact 9. In November of that year, Salt River Project provided this analysis to EPA, confirming that Navajo is subject to BART requirements due to its impacts to nearby Class I areas. Fact 10. Nevertheless, over five and a half years have passed since EPA’s notification, and still EPA has not issued a final BART determination for Navajo.

According to the tribal authority rule at 40 C.F.R. § 49.11, the EPA Administrator,

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

5 EPA's 2007 finding that Navajo and the nearby Four Corners Power Plant ("Four
 6 Corners") were eligible for and subject to BART requirements was tantamount to a finding by
 7 the agency *at that time* that it was both necessary and appropriate to promulgate BART
 8 determinations without unreasonable delay pursuant to 40 C.F.R. § 49.11. In other words, EPA's
 9 eligibility and "subject to" determinations were equivalent to, and unavoidably resulted in, a
 10 finding that it was necessary and appropriate to make BART determinations for these facilities.
 11 This is because EPA's BART eligibility and "subject to" determinations triggered a mandatory
 12 legal duty on the part of EPA pursuant to the regional haze regulations at 40 C.F.R. §
 13 51.308(e)(1)(ii) that state: "The State [or EPA] . . . *must submit* . . . a determination of BART for
 14 each BART eligible source." (Emphasis added.) Because EPA has failed to promulgate a
 15 BART determination for Navajo for more than five and a half years, it has failed to meet its
 16 mandatory duty to establish BART for Navajo without unreasonable delay.

17 EPA's delay in issuing a BART determination for Navajo is difficult to understand,
 18 particularly since EPA indicated in August 2009 that it planned to issue proposed BART
 19 determinations for Navajo and Four Corners by March 2010.¹ EPA was painfully slow in
 20 issuing its determination for Four Corners, taking 14 months to issue a proposal, and another
 21 eighteen months to issue a final determination. *See* 75 Fed. Reg. 64221 (Oct. 19, 2010) and 77
 22 Fed. Reg. 51620 (Aug. 24, 2012). However, even that effort could be deemed speedy compared
 23 to EPA's phlegmatic progress in issuing a BART determination for Navajo, where EPA did not

24 ¹ EPA issued a federal register notice on August 28, 2009 inviting public comment on issuing
 25 BART determinations for both Navajo and nearby Four Corners. ANPR, 74 Fed. Reg. 44,313
 26 (Aug. 28, 2009). In that notice, EPA set a public comment deadline for the end of September
 27 2009 and said that EPA anticipated issuing BART determinations for both Navajo and Four
 28 Corners within 60 days after EPA received those comments. *Id.* at 44314/1. EPA informally
 extended that comment period for the affected tribes to December 28, 2009. Fact 10. Sixty days
 after that would have been approximately March 1, 2010.

1 issue even its proposed BART determination until February 5, 2013. *See* 78 Fed. Reg. 8274.

2 III. The Clean Air Act Requires EPA to Fulfill its Mandatory Duties Without
 3 Unreasonable Delay.

4 The citizen suit provision of the Clean Air Act, Section 304(b)(2), 42 U.S.C.
 5 § 7604(b)(2), provides that citizens may commence a civil action against the Administrator of
 6 EPA “where there is alleged a failure of the Administrator to perform any act or duty under this
 7 chapter which is not discretionary with the Administrator.” Furthermore, “the district courts of
 8 the United States shall have jurisdiction to compel (consistent with paragraph (2) of this
 9 subsection) agency action unreasonably delayed . . .” *Id.*

10 Plaintiffs have been unable to find a case in which a court has established a legal test for
 11 what constitutes unreasonable delay in carrying out a mandatory Clean Air Act duty. However,
 12 interpreting the Administrative Procedures Act, the Ninth Circuit has adopted a six-part test to
 13 examine the issue of unreasonable delay.

14 (1) the time agencies take to make decisions must be governed by a rule of reason; (2)
 15 where Congress has provided a timetable or other indication of the speed with which it
 16 expects the agency to proceed in the enabling statute, that statutory scheme may supply
 17 content for this rule of reason; (3) delays that might be reasonable in the sphere of
 18 economic regulation are less tolerable when human health and welfare are at stake; (4)
 19 the court should consider the effect of expediting delayed action on agency activities of a
 higher or competing priority; (5) the court should also take into account the nature and
 extent of the interests prejudiced by delay; and (6) the court need not find any
 impropriety lurking behind agency lassitude in order to hold that agency action is
 unreasonably delayed.

20 *Brower v. Evans*, 257 F.3d 1058, 1068 (9th Cir.2001) (*quoting Telecomms. Research & Action v.*
 21 *FCC* (“*TRAC*”), 750 F.2d 70, 80 (D.C. Cir. 1984).

22 In *Brower*, the Ninth Circuit upheld a district court finding that in an environmental case
 23 that the National Marine Fisheries Service had unreasonably delayed congressionally mandated
 24 studies on the impact of tuna fishing on dolphin populations near California. Applying the “rule
 25 of reason,” many times other federal courts have also found that the executive branch has
 26 unreasonably delayed carrying out a mandatory duty. In *In re American Rivers*, 372 F.3d 413,
 27 419 (D.C. Cir. 2004), the court found the Federal Energy Regulatory Commission’s six-year
 28 delay in responding to a petition for consultation under the Endangered Species Act was

“nothing less than egregious.” *Id.* The Court further noted that it previously had found delays of three, four and five years “unreasonable.” *Id.* at 419 n.12 (citing *Airline Pilots Ass’n v. Civil Aeronautics Bd.*, 750 F.2d 81, 86 (D.C. Cir. 1984) (five year delay in responding to application for adjudication was unreasonable); *Public Citizen Health Research Group, v. Auchter*, 702 F.2d 1150, 1157 (D.C. Cir. 1983) (three-year delay in responding to petition for ethylene oxide standards was unreasonable); and *MCI Telecommunications Corp. v. FCC*, 627 F.2d 322, 324-25 (D.C.Cir.1980) (four-year delay in responding to petition for reasonability determination was unreasonable). As the *American Rivers* court stated, “[t]here is no per se rule as to how long is too long to wait for agency action,” but “a reasonable time for agency action is typically counted in weeks or months, not years.” 372 F.3d at 419.

As is shown above, the delay in this case has not been weeks or months, but five and a half years.

IV. EPA’s Delay in Completing the BART Determination for Navajo Has Been Unreasonable.

In its proposed BART determination issued last month, EPA recognized a decades-old problem created by the Navajo Generating Station and proposed significant action to do something about it.

Currently, air quality and visibility are impaired in the Class I areas surrounding [Navajo Generating Station]. The National Park Service noted in 2008 that “[v]isibility is impaired to some degree at all units where it is being measured and remains considerably higher than the target natural conditions in many places, particularly on the haziest days.” Of the 11 mandatory Class I federal areas located within 300 [kilometers] of [Navajo Generating Station], eight national parks, including Grand Canyon, Canyonlands, and Capitol Reef, are among the areas monitored by the National Park Service. [Navajo Generating Station] is one of many contributors to regional haze in these areas and Congress recognized that all sources that emit air pollutants that may reasonably be anticipated to cause or contribute to visibility impairment would need to do their part to address the problem.

78 Fed. Reg. at 8279 (citations omitted). EPA’s BART proposal for Navajo calls for the installation of controls so that the facility can “achieve a nearly 80 percent reduction of its current overall NO_x emission rate.” *Id.* at 8274. If EPA adopts its control technology proposal, EPA expects the benefits to exceed one deciview at all eleven Class I areas within 300 kilometers, two deciviews at most of these areas, and 5.4 deciviews at two of these areas. *Id.* at

1 8287. A 1.0 deciview reduction in visibility is perceptible to the human eye. Fact 5.

2 To address the issue of whether EPA has unreasonably delayed in making the Navajo
3 BART determination, Plaintiffs retained David Howekamp, former director of the EPA regional
4 office that is currently tasked with completing the BART determination. Mr. Howekamp is now
5 an environmental consultant specializing in air quality management, providing expert advice to
6 companies, governmental agencies, nongovernmental organizations and citizen groups. Exhibit
7 6, Howekamp Decl., ¶ 1.

8 Mr. Howekamp has also provided expert advice in numerous cases regarding appropriate
9 rulemaking schedules for Clean Air Act requirement, and his recommended schedules have been
10 adopted by judges in this district. *See, e.g., Our Children's Earth Foundation v. USEPA*, Case
11 No. 03-0770CW (N.D. Cal.) and *Communities for a Better Environment, et al v. USEPA*, Case
12 No. 07-03678 (N.D. Cal.). Exhibit 6, Howekamp Decl., ¶ 1.

13 As described below, Mr. Howekamp has reviewed the Navajo situation and has
14 concluded that a maximum reasonable time for EPA to issue a final BART determination is one
15 year. Exhibit 6, Howekamp Decl., ¶ 13.

16 V. This Court Should Order EPA to Issue a Final BART Determination for Navajo
17 Within a Year.

18 The remedy necessary to correct EPA's unreasonable delay in issuing a final BART
19 determination for Navajo is for the court to issue a deadline for EPA to take such final action.
20 Mr. Howekamp has analyzed the situation and determined that allowing EPA one year to
21 complete this BART determination is "both expeditious and reasonable." Exhibit 6, Howekamp
22 Decl. ¶ 13. As Mr. Howekamp points out, EPA has made over 50 BART determinations, and the
23 average time between the proposed and final rules has been 5.4 months. *Id.*

24 In proposing a year rather than 5.4 months to allow EPA to complete the Navajo BART
25 determination, Mr. Howekamp took a number of factors into account, some of which cut in favor
26 of a determination sooner while others do not. As to those factors that favor giving EPA more
27 time, Mr. Howekamp notes that Executive Order 13175 requires EPA to consult and coordinate
28 with Tribal Governments regarding the rule.

On the other hand, Mr. Howekamp notes that in finalizing a BART determination for Navajo, EPA will not be plowing new ground. EPA has made BART determinations for multiple power plants and other industrial facilities in a number of states. A number of these determinations are for large coal-fired power plants, including two in close proximity to Navajo, the Four Corners and San Juan power plants in northwestern New Mexico. Although each determination does have plant-specific technical and policy issues, the techniques for evaluating control technology options, visibility modeling, and cost calculations are basically the same. Exhibit 6, Howekamp Decl., ¶ 13. Furthermore, the three facilities share the same general airshed of the Colorado Plateau so the visibility modeling considerations will be based on comparable conditions. Also, the significant tribal consultation that EPA implemented during the Four Corners and San Juan rulemaking processes provided a foundation for tribal consultation regarding Navajo. Although completion of the Four Corners rulemaking took 18 months from proposal to final, the San Juan time gap was a little over seven months.

In summary, Mr. Howekamp's view that EPA can complete its BART determination within a year has ample support.

VI. The Plaintiffs Have Standing to Bring This Action.

As shown by Exhibit 3, the declaration of Diane Albert accompanying this motion, plaintiffs have standing to bring this action.

Conclusion

For the reasons set forth above, Plaintiffs' motion for summary judgment should be granted, and EPA should be ordered to complete its final BART determination for the Navajo Generating Station within one year.

DATED: March 8, 2013

Respectfully Submitted,

By /s George E. Hays

George E. Hays
Reed Zars

Counsel for Plaintiffs
DINÉ CARE and NATIONAL PARKS
CONSERVATION ASSOCIATION