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IN UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

DINÉ CARE and NATIONAL PARKS CONSERVATION ASSOCIATION,

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and ROBERT PERCIASEPE, in his official capacity as Acting EPA Administrator,*

Defendants,

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,

Intervenor-Defendant.

Case No. 12-cv-03987-JSW

INTERVENOR-DEFENDANT'S NOTICE OF CROSS-MOTION AND CROSS-MOTION FOR SUMMARY JUDGMENT, AND RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, INCLUDING MEMORANDUM OF POINTS AND AUTHORITIES

Date: June 21, 2013
Time: 9:00 A.M.
Courtroom 11, 19th Floor
Judge: The Hon. Jeffrey S. White

* Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Robert Perciasepe, Acting Administrator of the United States Environmental Protection Agency ("EPA"), should be substituted as successor to Defendant Lisa P. Jackson, the former Administrator of EPA.

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

TO PLAINTIFFS, DINÉ CARE and NATIONAL PARKS CONSERVATION ASSOCIATION, and DEFENDANTS, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and ROBERT PERCIASEPE, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 21, 2013, at 9:00 A.M., or as soon thereafter as counsel may be heard by the above-entitled Court, located in Courtroom 11 at the Phillip Burton Federal Building & United States Courthouse, 450 Golden Gate Avenue, 19th Floor, San Francisco, California, Intervenor-Defendant Salt River Project Agricultural Improvement and Power District will and hereby does move for summary judgment of the claims in this action on the grounds that there is no genuine issue as to any material fact and that the Defendants and Intervenor-Defendant are entitled to judgment as a matter of law, and for dismissal of this suit for lack of subject matter jurisdiction pursuant to Rules 12(b)(1) and 12(h)(3) of the Federal Rules of Civil Procedure.

This motion is based on Rule 56 of the Federal Rules of Civil Procedure, Civil Local Rule 56, this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, and all pleadings and papers on file in this action, and upon such matters as may be presented to the Court at the time of the hearing.

Dated: April 19, 2013

Counsel for Intervenor-Defendant

SALT RIVER PROJECT
AGRICULTURAL IMPROVEMENT AND
POWER DISTRICT

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SUMMARY OF ARGUMENT

Because Plaintiffs do not and cannot identify any nondiscretionary duty that the U.S. Environmental Protection Agency ("EPA") failed to perform under the Clean Air Act ("CAA"), this Court lacks subject matter jurisdiction under CAA § 304(a)(2), 42 U.S.C. § 7604(a)(2) (2006). CAA § 110(c)(1), 42 U.S.C. § 7410(c)(1) (2006), which directs EPA to adopt federal implementation plans to remedy states' failure to submit implementation plans, does not apply to tribes. EPA's authority to regulate sources on tribal lands, including the Navajo Generating Station ("NGS") at issue here, begins and ends with EPA's Tribal Authority Rule, which permits EPA to promulgate such CAA regulatory provisions as it finds are "necessary or appropriate to protect air quality." 40 C.F.R. § 49.11 (2012). This rule cannot support jurisdiction under CAA § 304(a)(2) because it creates only a regulatory—not a statutory—duty and because it is discretionary on its face. *Ariz. Pub. Serv. Co. v. EPA*, 562 F.3d 1116, 1125 (10th Cir. 2009).

Moreover, NGS is already the subject of ongoing EPA rulemaking for potential emission controls. Adjudicating this matter would require this Court to decide core issues pending before EPA in that rulemaking, including whether any regulation is necessary or appropriate for NGS and, if so, whether such regulation should establish "best available retrofit technology" emission controls or alternative measures. Judicial determination of these matters would impermissibly intrude on EPA's executive branch functions. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *see also SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943).

EPA in any event has not unreasonably delayed promulgating a final rule when the rulemaking has just begun. EPA has exercised its authority diligently by consulting with affected tribes and agencies, performing studies, and soliciting public comments on a range of regulatory approaches in EPA's proposed rule published only weeks ago, in February 2013.

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TABLE OF ABBREVIATIONS

ANPR	Advance Notice of Proposed Rulemaking
BART	Best Available Retrofit Technology
CAA	Clean Air Act
DOE	United States Department of Energy
EPA	United States Environmental Protection Agency
FIP	Federal Implementation Plan
NGS	Navajo Generating Station
NOx	Nitrogen Oxide or Nitrogen Oxides
SIP	State Implementation Plan
SRP	Salt River Project Agricultural Improvement and Power District
TAR	Tribal Authority Rule
TIP	Tribal Implementation Plan

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF INTERVENOR-DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Statement of the Issues To Be Decided

1. Whether the Clean Air Act imposes on the U.S. Environmental Protection Agency ("EPA") a nondiscretionary statutory duty to promulgate a federal implementation plan for Navajo tribal lands addressing emission controls for regional haze with respect to the Navajo Generating Station ("NGS").
2. Whether the Court should order EPA to promulgate a final rule requiring installation of "best available retrofit technology" ("BART") at NGS rather than allow EPA to exercise its discretion to identify, and to consider whether to adopt, potential alternative emission control measures designed to achieve greater emission reductions than BART would.
3. Whether EPA has unreasonably delayed promulgation of a final rule for the Navajo Generating Station, when EPA published a proposed rule for that facility only two-and-a-half months ago, following consultations with affected Indian tribes, federal agencies, and other stakeholders to help EPA address the facility's unique regulatory circumstances.

Introduction

Plaintiffs' suit seeks to have this Court preempt the outcome of a notice-and-comment rulemaking under the Clean Air Act ("CAA" or "Act"), 42 U.S.C. §§ 7401, *et seq*., initiated only two-and-a-half months ago by the United States Environmental Protection Agency ("EPA" or the "Agency"). In that rulemaking, EPA has solicited comments on whether to promulgate a federal implementation plan ("FIP") imposing "best available retrofit technology" ("BART") emission limits under the CAA's visibility protection program. The limits being considered by EPA in this FIP rulemaking would control nitrogen oxide ("NOx") emissions from the Navajo Generating Station ("NGS"), a facility that is operated and partly owned by intervenor-defendant Salt River Project Agricultural Improvement and Power District ("SRP") and that is located on

Navajo Nation tribal lands in Arizona and, thus, is not subject to a state's regulatory jurisdiction under the CAA.

Plaintiffs' complaint is grounded in the theory that EPA has a nondiscretionary duty under the CAA to promulgate a FIP imposing BART limits on NGS and that EPA has "unreasonably delayed" promulgation of that FIP. For this Court to have jurisdiction to entertain this claim, Plaintiffs would have to establish that the EPA Administrator has failed to perform a nondiscretionary *statutory* "act or duty" under CAA § 304(a)(2), 42 U.S.C. § 7604(a)(2) (2006). If EPA has breached such a statutory duty, the Court may then consider whether to compel EPA to take action if performance of the duty has been "unreasonably delayed."

For the reasons discussed in more detail below, this Court lacks subject matter jurisdiction under CAA § 304(a)(2) to entertain Plaintiffs' claim. The only statutory nondiscretionary duty imposed on the Administrator to promulgate a FIP is found in CAA § 110(c)(1), 42 U.S.C. § 7410(c)(1) (2006). That CAA provision requires EPA to promulgate a FIP when it finds that "a *State*"—*not* an "Indian tribe"—either "has failed to make a required submission" to revise a state implementation plan ("SIP") or else has submitted an incomplete or unapprovable SIP revision. This statutory provision has no application to tribes and therefore imposes no duty on EPA to promulgate a FIP that would apply to NGS.

Furthermore, EPA's authority to establish FIPs for tribal lands is derived from CAA § 301(d), 42 U.S.C. § 7601(d) (2006), not from CAA § 110(c). Section 301(d) directs EPA to adopt regulations that would "treat Indian tribes as States" under the CAA. These regulations (known as the Tribal Authority Rule ("TAR")) establish requirements for EPA approval of tribal implementation plans ("TIPs"). Where the Administrator determines that "treatment of Indian tribes as identical to States is inappropriate," the TAR provides that EPA is to "directly administer" the CAA provisions "to achieve the appropriate purpose." CAA § 301(d)(4), 42 U.S.C. § 7601(d)(4) (2006). As relevant here, the TAR provides that tribes are *not* to be treated identically to States in two critical respects. Under the TAR, tribes are not required to submit

TIPs implementing the CAA visibility program by any deadline, and tribes are not to be treated as States for purposes of promulgation of FIPs under CAA § 110(c)(1). 40 C.F.R. § 49.4(d), (e) (2012). As a result, only the TAR provides authority for EPA to adopt a FIP for facilities on tribal lands, and then only if EPA finds, after notice-and-comment rulemaking, that the FIP is "necessary or appropriate." *Id.* § 49.11(a).

Finally, even if this Court had jurisdiction over Plaintiffs' claims, Plaintiffs do not, and could not, establish that EPA has unreasonably delayed promulgation of a visibility FIP for NGS. EPA is in the midst of a complex rulemaking that was initiated only two-and-a-half months ago. No court has ever suggested that failure to promulgate a complex rule within two-and-a-half months constitutes "unreasonable delay." For these reasons, the Court should grant summary judgment for SRP and deny it to Plaintiffs.

Statutory and Regulatory Background

With one exception, CAA implementation plans represent an exercise in federalism in which regulatory responsibilities are divided between the States and the federal government. This case involves that sole exception, which addresses the division of authority between the federal government and lands under the jurisdiction of Indian tribes. The authority and responsibility of EPA and tribes to establish CAA programs for sources on tribal lands are derived from regulations adopted by EPA under CAA § 301(d) of the Clean Air Act and not from EPA's more generally applicable obligations under CAA § 110(c)(1).

I. The Basic State-Federal CAA § 110 Regulatory Scheme

Under various parts of Title I of the CAA, 42 U.S.C. §§ 7401-7515 (2006), EPA is responsible for promulgating regulations that define the general requirements for pollution control programs that become part of SIPs. Once EPA has defined the elements of a particular CAA program through legislative rules, States are then to develop detailed regulatory requirements implementing those EPA rules, including appropriate limits on emissions from specific stationary sources located within the State. CAA § 110(a)(1), (2), 42 U.S.C.

§ 7410(a)(1), (2) (2006). By specific deadlines, States are to submit these "implementation plans" to EPA for approval (or disapproval). CAA § 110(a)(1), (k), 42 U.S.C. § 7410(a)(1), (k) (2006). Once approved by EPA, they become a part of a federally enforceable SIP. CAA § 113, 42 U.S.C. § 7413 (2006). If a State fails to submit a particular SIP (or a required SIP revision) by the applicable deadline, or submits an inadequate SIP or SIP revision, EPA has a nondiscretionary duty under CAA § 110(c)(1) to promulgate a FIP within two years. CAA § 110(c)(1), 42 U.S.C. § 7410(c)(1) (2006).

II. The CAA Visibility Protection Program

The CAA program that is the focus of this case is a program to protect and improve visibility in designated national parks and other specially protected federal lands. CAA §§ 169A, 169B, 42 U.S.C. §§ 7491, 7492 (2006). Under that program, EPA must adopt regulations that require States to adopt, as part of their SIPs, emission limits and other measures that will result in "reasonable progress toward meeting" a national visibility goal. CAA §§ 169A(a)(1), (b)(2), 42 U.S.C. §§ 7491(a)(1), (b)(2) (2006). EPA's regulations required States to submit these "reasonable progress" visibility SIPs, including SIP provisions to address widespread visibility impairment known as "regional haze," by December 17, 2007. 40 C.F.R. § 51.308(b) (2012) ("[E]ach State . . . must submit . . . an implementation plan for regional haze . . . no later than December 17, 2007"). These "reasonable progress" SIP measures may include BART emission limits. EPA's visibility rules establish criteria for determining which sources are "BART-eligible"[1] and "subject to BART."[2] *Id.* § 51.308(e)(1). The SIP-submittal deadline in 40 C.F.R.

[1] "BART-eligible" sources are facilities that emit sizeable amounts of visibility-impairing pollutants, including NOx; are within certain statutorily specified source categories (including fossil fuel-fired power plants of a certain size); and were in existence on August 7, 1977, but had not been in operation for more than 15 years as of that date. CAA § 169A(b)(2)(A), 42 U.S.C. § 7491(b)(2)(A) (2006); 40 C.F.R. § 51.301 (2012) (definition of "existing stationary facility"); *see generally* 70 Fed. Reg. 39,104 (July 6, 2005) (promulgating BART rules); *Am. Corn Growers Ass'n v. EPA*, 291 F.3d 1 (D.C. Cir. 2002) (addressing EPA regional haze rules and, in particular, those rules' BART requirements); *Util. Air Regulatory Group v. EPA*, 471 F.3d 1333 (D.C. Cir. 2006) (denying petitions for review of EPA's 2005 BART rules).

§ 51.308(b) carries out statutory provisions designed to establish a due date for States to submit regional haze SIPs to EPA pursuant to CAA §§ 169A and 169B. *See* CAA § 169B(e)(1), (2), 42 U.S.C. § 7492(e)(1), (2) (2006); Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, Title VI, § 6102(c)(2), 112 Stat. 107, 464 (1998) (amending submittal deadline for regional haze SIPs under CAA §§ 169A and 169B that was originally set in CAA § 169B(e)(2)). Failure by a State to submit an adequate visibility SIP by the deadline triggers EPA's statutory obligation to adopt a FIP under CAA § 110(c)(1).

III. Clean Air Act Programs on Tribal Lands

The SIP programs adopted by States do not apply to designated tribal lands within a State. *Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1285 (D.C. Cir. 2000) (noting that "Congress delegated to tribes the authority to regulate air quality in areas within the exterior boundaries of a reservation"). For those lands, CAA § 301(d) authorizes EPA to establish regulatory provisions under which tribes may develop their own CAA programs, which, when approved by EPA, become TIPs. CAA § 301(d)(1)-(3), 42 U.S.C. § 7607(d)(1)-(3) (2006); *see id.* § 301(d)(3) ("The Administrator may promulgate regulations which establish the elements of tribal implementation plans and procedures for approval or disapproval of tribal implementation plans and portions thereof."). EPA has adopted detailed rules under CAA § 301(d) governing these tribal programs. 40 C.F.R. §§ 49.1-49.3 (2012); *id.* § 49.5-49.11. The CAA authorizes EPA, in adopting those rules, to identify "case[s] in which . . . the treatment of Indian tribes as identical to States is inappropriate or administratively infeasible," and, in such cases, to "provide, by

[2] A BART-eligible source is "subject to BART" if, based on an analysis of visibility impacts, it "may reasonably be anticipated to cause or contribute to any impairment of visibility in any mandatory Class I Federal area." 40 C.F.R. § 51.308(e)(1)(ii) (2012). Such a source may then become subject to BART requirements with respect to its emissions of visibility-impairing pollutants pursuant to a source-specific analysis that accounts for five statutorily listed factors, including the compliance costs of and visibility improvements projected to result from the BART emission controls. CAA § 169A(b)(2)(A), (g)(2), 42 U.S.C. § 7491(b)(2)(A), (g)(2) (2006); 40 C.F.R. § 51.308(e)(1)(ii)(A), (B) (2012). The regional haze program also explicitly allows for adoption of alternative methods of compliance with BART, in lieu of source-specific BART emission limits, if the alternative provides "greater reasonable progress" toward visibility improvement than would source-specific BART. 40 C.F.R. § 51.308(e)(2), (3) (2012).

regulation, other means by which the Administrator will directly administer such provisions so as to achieve the appropriate purpose." CAA § 301(d)(4) (2006).

EPA's TAR implements CAA § 301(d). As relevant here, EPA determined in the TAR that the requirement in 40 C.F.R. § 51.308(b) that States submit regional haze visibility SIPs under CAA §§ 169A and 169B by a deadline constitutes a provision for which treating tribes as identical to States is inappropriate. 40 C.F.R. § 49.4(e) (2012) ("Tribes will not be treated as States with respect to the following provisions of the Clean Air Act and any implementing regulations thereunder: . . . (e) Specific visibility implementation plan submittal deadlines established under section 169A of the Act"). Because tribes are not to be treated as States that are subject to visibility SIP submittal deadlines, any failure to submit a visibility TIP could not give rise to an obligation by EPA to adopt a FIP under CAA § 110(c)(1). Consistent with that result, the TAR also expressly provides that CAA § 110(c)(1) is a provision of the Act that does not apply to tribes. *Id.* § 49.4(d). The TAR itself establishes authority for EPA to adopt FIPs for tribal lands and identifies specific criteria governing promulgation of those FIPs. 40 C.F.R. § 49.11 (2012). Under the TAR, EPA may adopt one or more FIP provisions only upon a discretionary finding that such FIP provisions are "necessary or appropriate to protect air quality." *Id.* § 49.11(a). Once EPA initiates a rulemaking to establish "necessary or appropriate" FIP provisions, the Agency is to promulgate such FIP provisions "without unreasonable delay," assuming that EPA makes a *final* "necessary or appropriate" finding as to such provisions as well as (in the case of visibility provisions) any other required findings (*e.g.*, a final finding that a source is BART-eligible and subject to BART).

Statement of Facts

NGS is a 2,250 megawatt coal-fired power plant that is located on land within the boundaries of the Navajo Nation reservation in Arizona.[3] SRP Answer ¶ 10. NGS is owned by

[3] Plaintiffs' motion for summary judgment lists what the motion terms "undisputed material facts." Pl. Motion 3. Certain purported factual statements presented by plaintiffs are inaccurate—but not material to resolution of the motions for summary judgment. For example,

multiple entities, including SRP, which operates the facility, and the U.S. Bureau of Reclamation. *Id.*; 78 Fed. Reg. at 8,275. Among other things, pursuant to the Colorado River Basin Act of 1968, NGS powers the Central Arizona Project, a water distribution system that delivers large amounts of water to agricultural users and cities in Arizona as well as to Indian tribes pursuant to water rights settlement agreements approved by Acts of Congress. *Id.* The coal used by NGS is supplied by a mine located on the reservation lands of both the Navajo Nation and the Hopi Tribe, which receive substantial tax revenues and royalties from NGS and the mine. These payments are important parts of those Tribal Governments' revenues. *Id.*

The Navajo Nation has not submitted a TIP governing NGS. In an email to SRP on July 22, 2007, an EPA staff person requested that SRP conduct a BART analysis for NGS. Pl. Mot. Ex. 4. SRP provided a BART analysis of NGS in 2008. 78 Fed. Reg. at 8,279. On August 28, 2009, EPA published its ANPR indicating its intent to develop a BART determination for NGS. 74 Fed. Reg. 44,313. The ANPR solicited public comments on certain aspects of a BART

Plaintiffs' motion states that "[o]n an annual basis," NGS emits "over 34,000 tons of nitrogen oxides (NOx)," and cites for this assertion "EPA's Air Markets Program, http://ampd.epa.gov/ampd/." But that EPA database states that NGS during 2012 emitted 16,468.3 tons of NOx—less than half the amount Plaintiffs assert. *See also* EPA, Approval of Air Quality Implementation Plans; Navajo Nation; Regional Haze Requirements for Navajo Generating Station, 78 Fed. Reg. 8,274, 8,277 (Feb. 5, 2013) ("EPA Proposed Rule") (stating that at NGS, "[o]ver the 2009-2011 timeframe, the owners of NGS voluntarily installed new LNB/SOFA [*i.e.*, low NOx burners/separated overfire air]"). LNB/SOFA are combustion controls, which is the type of NOx emission controls that EPA's BART Guidelines establish, as the product of notice-and-comment rulemaking, as the "presumptive" NOx emission control technology that is "extremely likely to be appropriate" as BART for NOx emissions from electric generating units of the type present at NGS. 70 Fed. Reg. 39,104, 39,131-32, 39,134-36, 39,171-72 (July 6, 2005). Plaintiffs' factual error is, however, immaterial to the issues presented for decision in the present case.

Plaintiffs also incorrectly assert that EPA, in an August 2009 Federal Register notice, "stated that it intended to publish its BART determination for Navajo approximately 60 days after receiving information requested by the notice." Pl. Mot. 4 (citing EPA's Advance Notice of Proposed Rulemaking, 74 Fed. Reg. 44,313, 44,314 (Aug. 28, 2009) ("ANPR")). In fact, the cited passage from the EPA notice stated only that at that time—*before* EPA received the voluminous amounts of information and comments that were generated by the notice's publication and submitted by interested parties, including SRP—EPA "intend[ed] to . . . *propos[e]*" a BART determination for NGS for public review and comment. 74 Fed. Reg. at 44,314 (emphasis added). As discussed herein, EPA has issued proposed regulatory action concerning BART determinations for NGS for public review and comment pursuant to proper rulemaking procedures.

analysis for NGS and another electric generating facility located on tribal lands, as well as "any additional information that any person believes the agency should consider." *Id.* EPA later extended the 30-day public comment deadline on the ANPR for all commenters to October 28, 2009, 74 Fed. Reg. 50,154 (Sept. 30, 2009), and then extended the comment period further for affected tribes, *see* Pl. Mot. 4. EPA received over 6,000 comments on the ANPR and undertook consultation with the affected tribes, SRP and the other owners of NGS, and other federal agencies. 78 Fed. Reg. at 8,277.

On February 5, 2013, EPA published for public comment its proposed rule regarding potential BART or other regional haze requirements for NGS. 78 Fed. Reg. 8,274. In the proposed rule, EPA proposed to determine that, under the terms of the TAR, it is "necessary or appropriate" to determine BART for NOx emissions from NGS. *Id.* at 8,279 ("EPA *is proposing to find* that a BART determination for NOx emissions from NGS is 'necessary or appropriate' under the TAR. See 40 CFR 49.11.") (emphasis added). EPA also proposed to find that an alternative to BART, which would achieve greater reasonable progress with a longer compliance timeframe, is necessary or appropriate for NGS under the TAR. *Id.* at 8,288-90. In addition, the EPA Proposed Rule solicited public comment on other BART alternatives, *id.* at 8,290-91, and indicated that the Agency may issue supplemental notices of proposed rulemaking if it determined such potential alternatives were capable of achieving greater reasonable progress than BART, *id.* The proposed rule announced that the deadline for submission of public comments was May 6, 2013. *Id.* at 8,274.

On March 19, 2013, EPA published a notice extending the public comment period on its February 5, 2013 proposed rule to August 5, 2013, in response to requests by the Navajo Nation, the Central Arizona Water Conservation District (the agency that manages the Central Arizona Project), and SRP. 78 Fed. Reg. 16,825, 16,826 (Mar. 19, 2013). EPA noted that "[t]he Navajo Nation and other stakeholders" requested the extension "to allow time for interested parties to explore alternatives to BART that provide additional flexibility and also ensure greater

reasonable progress [toward visibility improvement] than would be achieved under BART." *Id.* at 16,825. EPA noted that it was encouraging, through the rulemaking, "a robust public discussion of our proposed BART determination and alternative" as well as two other potential alternatives outlined in the proposed rule, "or other approaches developed by other parties," and "recognized the potential need for a supplemental proposal." *Id.* at 16,826. EPA added:

> EPA recognizes that the stakeholder process, to develop viable alternatives to BART that provide additional flexibility to the owners of NGS while achieving more emission reductions to achieve greater reasonable progress than BART, will require a significant amount of time. EPA also recognizes the critical importance of active participation by the Navajo Nation, the Hopi Tribe, and other affected tribes located in Arizona in the development of alternatives to BART.

Id. EPA noted that it would hold public hearings on its proposed rule at least 30 days before the comment period closed. *Id.*

Argument

I. Plaintiffs Do Not and Cannot Identify Any Nondiscretionary Act or Duty that EPA Has Failed To Perform, and This Court Therefore Lacks Subject Matter Jurisdiction.

Congress has granted the federal district courts jurisdiction to hear citizen suits against the EPA Administrator under the CAA "where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator." CAA § 304(a)(2), 42 U.S.C. § 7604(a)(2) (2006); *See* Complaint ¶ 3. Because Plaintiffs do not and cannot identify any failure by the Administrator to perform a nondiscretionary act or duty imposed on EPA by Congress, this Court has no jurisdiction to entertain Plaintiffs' claim or to award the relief they request.

There being here no statutory nondiscretionary "act or duty" that EPA has failed to perform, Plaintiffs seek to conjure one from thin air. According to Plaintiffs, once a member of EPA staff allegedly determined that NGS was BART-eligible and subject to BART, the Agency "triggered a mandatory legal duty on the part of EPA pursuant to the regional haze regulations at 40 C.F.R. § 51.308(e)(1)(ii)." Pl. Mot. 6. Those 40 C.F.R. Part 51 regulations—as Plaintiffs

purport to quote from them—"state: 'The State [or EPA] . . . *must submit* . . . a determination of BART for each BART eligible source.' (Emphasis added.)." *Id.* "Because," in Plaintiffs' words, "EPA has failed to promulgate a BART determination for Navajo for more than five and a half years," Plaintiffs would have this Court hold that EPA "has failed to meet its mandatory duty to establish BART for Navajo without unreasonable delay." *Id.*

Plaintiffs' argument is flawed in at least two separate and fundamental respects. First and foremost, jurisdiction arises under CAA § 304(a)(2) only where EPA is alleged to have failed to perform a *statutory* duty under some section of the CAA. *See*, *e.g.*, *Envtl. Def. Fund v. Thomas*, 870 F.2d 892, 896 (2d Cir. 1989) ("Section 304 grants jurisdiction to district courts to compel the Administrator to perform non-discretionary *statutory* duties") (emphasis added). The "nondiscretionary" duty that Plaintiffs allege EPA violated here is, by Plaintiffs' own reckoning, grounded exclusively in an EPA *regulatory* provision (40 C.F.R. § 51.308). This is insufficient to provide this Court with subject matter jurisdiction over Plaintiffs' action. *See*, *e.g.*, *Maine v. Thomas*, 874 F.2d 883, 888 n.7 (1st Cir. 1989) (Although certain "*regulatory* duties are perhaps nondiscretionary, . . . they are not *statutory* nondiscretionary duties; hence, they are not proper grist for the [CAA § 304] mill.") (first emphasis added).

Second, the regulatory provision on which Plaintiffs rely to impose this alleged nondiscretionary duty on EPA does not, by its express terms, impose any duty (nondiscretionary or otherwise) on the Agency at all. Although Plaintiffs blithely insert, in brackets, the words "[or EPA]" when they quote the language of 40 C.F.R. § 51.308(e)(1)(ii), no basis exists for this revision to the rule. The provisions of EPA's visibility regulations at 40 C.F.R. Part 51, Subpart P, §§ 51.300-.309 (2012), impose obligations on *States*, not on EPA. *See*, *e.g.*, *id.* § 51.300(a) ("The primary purposes of this subpart are to require *States* to develop programs to assure reasonable progress toward meeting the national goal of preventing any future, and remedying any existing, impairment of visibility in mandatory Class I Federal areas . . . .") (emphasis added); *id.* § 51.308(e) ("The *State* must submit an implementation plan containing emission

limitations representing BART . . . .") (emphasis added); *id.* § 51.308(e)(1)(ii) ("To address the requirements for BART, the *State* must submit an implementation plan containing . . . [a] determination of BART for each BART-eligible source in the State . . . .") (emphasis added).

How do Plaintiffs attempt to justify engrafting the words "or EPA" onto this regulatory text (which by its plain terms references only "State[s]"), so as to create the impression that there is a "nondiscretionary" duty on EPA's part? They invoke language from a *different* regulatory regime, the TAR, that provides that EPA "[s]hall 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 . . . ." Pl. Mot. 6 (quoting 40 C.F.R. § 49.11(a)) (emphasis omitted). According to Plaintiffs, the alleged finding in 2007 by a member of EPA's staff that NGS was "eligible for and subject to BART requirements was tantamount to a finding by the [A]gency *at that time* that it was both necessary and appropriate" to promulgate a BART determination for NGS "without unreasonable delay pursuant to 40 C.F.R. § 49.11." *Id.* (emphasis in original). Because jurisdiction under CAA § 304(a)(2) cannot be predicated on an alleged failure on EPA's part to perform a "nondiscretionary" act or duty that arises (if it arises at all) only under a *regulation*, Plaintiffs' resort to the language of 40 C.F.R. § 49.11 is unavailing.

As it is, the only provision of the CAA itself that imposes on EPA a nondiscretionary duty to promulgate a FIP is CAA § 110(c)(1). Under CAA § 110(c)(1), EPA "shall promulgate a Federal implementation plan at any time within 2 years after the Administrator . . . (A) finds that a State has failed to make a required submission . . . or (B) disapproves a State implementation plan submission in whole or in part." But Plaintiffs do not rely on CAA § 110(c)(1), and for good reason. The language of section 110(c)(1) arguably might have imposed on EPA a nondiscretionary duty to promulgate a regional haze FIP for tribal lands if EPA's TAR had treated tribes as "identical to States," CAA § 301(d)(4), with respect to visibility SIP-submittal deadlines and CAA § 110(c)(1). In that hypothetical circumstance, if a tribe failed to submit a

TIP by the submittal deadline, the requirement for a CAA § 110(c)(1) FIP might be triggered. But, as noted above, EPA in the TAR specifically identified visibility SIP-submittal deadlines and CAA § 110(c)(1) as provisions of the CAA for which "[t]ribes *will not be treated as States*." 40 C.F.R. § 49.4(d), (e) (2012) (emphasis added). In other words, while failure of a *State* to submit a visibility SIP may give rise to a nondiscretionary duty on EPA's part under CAA § 110(c)(1), an *Indian tribe's* non-submittal of a visibility TIP does *not* impose any obligation on EPA under CAA § 110(c)(1). And while the *regulatory* provisions of 40 C.F.R. § 49.11(a) that EPA has promulgated may direct that the Agency "promulgate without unreasonable delay such Federal implementation plan provisions" as EPA determines—*in its discretion*—may be "necessary or appropriate to protect air quality," that regulatory instruction cannot be the basis for subject matter jurisdiction under CAA § 304(a)(2).

II. Adjudication of Plaintiffs' Claim Would Impermissibly Interfere with EPA's Administrative Discretion in an Ongoing Rulemaking.

In addition to failing to satisfy the jurisdictional requirements for suits under CAA § 304(a)(2), Plaintiffs' claim improperly calls on this Court to step into an ongoing administrative rulemaking proceeding regarding potential emission controls at NGS. Doing so would improperly interfere with EPA's exercise of its administrative discretion in violation of fundamental separation of powers principles.

As a threshold matter, EPA would be warranted in adopting a FIP only after the Agency had found, through notice-and-comment rulemaking, that NGS is BART-eligible and subject to BART and that a BART determination for NGS was "necessary or appropriate" under 40 C.F.R. § 49.11. *See Ariz. Pub. Serv. Co. v. EPA*, 562 F.3d 1116, 1125 (10th Cir. 2009) ("*APS*") (TAR "provides the EPA discretion to determine what rulemaking is necessary or appropriate to protect air quality," and only then "requires the EPA to promulgate such rulemaking"). EPA has *proposed* to make such findings for NGS in a pending rulemaking but awaits public comments on these issues, which the Agency must consider and address in reaching a final rulemaking

decision. *See, e.g.*, 78 Fed. Reg. at 8,279 ("EPA is proposing to find that a BART determination for NOx emissions from NGS is 'necessary or appropriate' under the TAR").

Plaintiffs claim that a July 2007 communication from EPA staff to SRP indicating that, in EPA's view, NGS is BART-eligible and subject to BART was "tantamount to a finding by the agency *at that time* that it was both necessary and appropriate to promulgate BART determinations without unreasonable delay." Pl. Mot. 6 (emphasis in original). Plaintiffs offer neither legal authority nor any grounding in logic for this "tantamount to a finding" argument, which fails for two reasons.

First, the July 2007 communication from a person on EPA's staff was insufficient to bind the EPA Administrator to take *any* future action: Agency findings that can compel EPA to take direct and substantial regulatory action must be rules that are promulgated through notice-and-comment legislative rulemaking procedures. *See, e.g.*, *Thomas v. New York*, 802 F.2d 1443, 1447 (D.C. Cir. 1986) (Scalia, J.) (letter from EPA Administrator expressing belief that U.S. pollution endangered public welfare in Canada did not trigger any EPA duty under section 115 of the CAA, 42 U.S.C. § 7415, to require States to revise implementation plans). Thus, even if someone at EPA believed in 2007 and still believes now that NGS is BART-eligible and subject to BART, the July 2007 EPA staff communication on which Plaintiffs rely did not create a binding, legally enforceable rule compelling the EPA Administrator to establish BART emission limits for NGS.

Second, EPA's "necessary or appropriate" analysis under the TAR is distinct from questions concerning whether a source is BART-eligible and subject to BART. Those latter questions are largely factual and focus on certain characteristics of the source in question, including its size, age, pollutants emitted, and projected visibility impacts. *Cf.* 70 Fed. Reg. at 39,158-63 (promulgating provisions of EPA's BART Guidelines that establish criteria and procedures for States to address BART-eligibility and "subject to BART"). In contrast, the TAR's "necessary or appropriate" analysis entails broad policy choices regarding what control

measures, if any, should be implemented to "protect air quality." 40 C.F.R. § 49.11(a) (2012). That a source on tribal lands may be BART-eligible and subject to BART is only a starting point for EPA's determination of whether any FIP provisions are necessary or appropriate, an inquiry that may well involve, *inter alia*, working with tribes to assess air quality problems and to develop tribal and federal strategies to address them. *See APS*, 562 F.3d at 1126. Equating the two analyses would undermine the TAR by requiring full FIPs for all sources that are subject to BART and located on tribal lands, robbing EPA of the discretion "explicitly granted" by Congress, 40 C.F.R. § 49.11, to develop tailored air quality solutions addressing the unique issues implicated where Tribes have sovereign jurisdiction.

As discussed above, EPA is carrying out a rulemaking proceeding in which it is considering whether to promulgate FIP provisions containing regional haze requirements—potentially, *but not necessarily*, including BART for NGS. In the course of this rulemaking, after evaluating the factual record and considering and responding to public comments, EPA will exercise its discretion to decide several central issues, including whether a FIP for NGS is "necessary" or "appropriate" at this time, and whether and in what form any such FIP should establish NOx BART for NGS or instead BART-alternative requirements for NGS.

In this action, Plaintiffs ask this Court to decide the same issues that are before EPA now and will be before the Agency as it takes final action to resolve those issues after it receives, evaluates, and responds to public comments. In the event the Court were to agree with Plaintiffs that EPA has a mandatory duty to promulgate a BART FIP for NGS, the relief Plaintiffs request—an order requiring EPA to issue a final BART determination for NGS within one year—would improperly abrogate EPA's statutory discretion.

It is an axiom of federal administrative law, reflecting separation of powers principles, that a court *sitting in review* of agency action "is not empowered to substitute its judgment for that of the agency." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *see also, e.g.*, *Ranchers Cattlemen Action Legal Fund United Stockgrowers v. U.S. Dep't of Agric.*,

415 F.3d 1078, 1093 (9th Cir. 2005). As a court *reviewing* agency action cannot substitute its judgment for that of an agency, it follows with even greater force that a court cannot *make* a judgment entrusted to that agency's discretion, by exercising authority delegated to the agency by Congress. Where there is involved "a determination of policy or judgment which the agency alone is authorized to make *and which it has not made*, a judicial judgment cannot be made to do service for an administrative judgment." *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) (emphasis added). That is, a court "cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency." *Id.* Here, EPA has, pursuant to rulemaking authority delegated by Congress in CAA § 301(d)(4), adopted a rule under which EPA will promulgate BART (or an alternative to BART that achieves greater reasonable progress toward visibility improvement) only if, following notice-and-comment rulemaking, the Agency determines in its discretion that such a FIP provision is "appropriate" or "necessary." A federal court is not authorized to intervene in an ongoing Agency rulemaking and exercise that discretion *for* EPA.

Section 169A of the CAA requires only that applicable implementation plans "contain such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting the national goal." CAA § 169A(b)(2), 42 U.S.C. § 7491(b)(2) (2006). While the Act provides for controls reflecting BART under this provision, the BART-determining authority has broad discretion to allow sources to comply with alternative measures that make reasonable progress. *See Util. Air Regulatory Group v. EPA*, 471 F.3d 1333 (D.C. Cir. 2006); *Ctr. for Energy & Econ. Dev. v. EPA*, 398 F.3d 653 (D.C. Cir. 2005). To that end, EPA's regional haze rules provide that an implementation plan "may opt to implement . . . other alternative measure[s] rather than to require sources subject to BART to install, operate, and maintain BART," if such alternative measures "achieve greater reasonable progress than would be achieved through the installation and operation of BART." 40 C.F.R. § 51.308(e)(2) (2012).

EPA has proposed to find that such an alternative measure is necessary or appropriate for NGS. 78 Fed. Reg. at 8,288 (proposing alternative measure with longer compliance time than BART that achieves greater overall NOx reductions). In addition, EPA solicited comments on other potential BART alternatives, which EPA may address in a supplemental notice of proposed rulemaking. *See id.* at 8,291. As stated in their complaint (at ¶ 52) and motion (at 3), Plaintiffs' requested relief would constrain EPA from exercising its discretion to adopt such BART alternatives, forcing on EPA a judicial determination that BART—and not a BART alternative—must be adopted for NGS. The CAA provides no authority for a court to second-guess EPA's judgment on such a discretionary matter.

Further, in exercising its discretion to determine which measures may be "appropriate" or "necessary" to promulgate, EPA must exercise discretion in determining the timeline for its proceedings. Agencies generally are free to structure their rulemaking proceedings as they see fit to carry out their duties. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 543 (1978) ("[a]bsent constitutional constraints or extremely compelling circumstances administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties") (internal quotes and citations omitted). EPA must have adequate time to solicit the information it needs through comments and consultation, evaluate that information, prepare responses to comments, and satisfy the other procedural requirements for administrative rulemaking.

EPA is actively engaged in rulemaking on the BART and BART-alternative options for NGS. EPA's February 2013 proposed rule solicited public comments on EPA's proposed BART determination and alternative. EPA indicated it is open to consideration of other potential BART alternatives and would issue supplemental proposals addressing such alternatives if commenters describe "technically and economically feasible technologies or mechanisms" that would allow greater reasonable progress toward visibility improvement than BART would. 78 Fed. Reg. at

8,291. EPA recently extended the public comment period in response to requests from affected parties, including the Navajo Nation, which sought additional time to consult with other stakeholders regarding the feasibility of additional alternatives. 78 Fed. Reg. at 16,826. Granting relief to Plaintiffs would improperly interfere with EPA's ability to exercise its discretion to determine what final action is necessary or appropriate.

Accordingly, even if this Court had jurisdiction—and it does not, as discussed above—it should not grant Plaintiffs' requested relief because doing so would improperly interfere with EPA's exercise of its rulemaking discretion on critical procedural and substantive matters.

III. The Time EPA Has Devoted to Rulemaking on Possible BART Requirements for NGS Does Not Constitute Unreasonable Delay.

Finally, even if were possible to find that a nondiscretionary duty exists here—and, as shown above, it is not possible to do so based on "proposed" findings—Plaintiffs' claim must fail. To begin with, any evaluation of whether EPA has "unreasonably delayed" promulgation of a final rule for NGS must begin with the February 5, 2013 date when EPA initiated the NGS rulemaking by proposing a rule,[4] not with July 2007 as Plaintiffs claim. *See, e.g., Sierra Club v. Thomas*, 828 F.2d 783, 785-86, 798 (D.C. Cir. 1987) (in CAA rulemaking case, EPA had not unreasonably delayed conclusion of rulemaking where a period of "less than three years" had passed since EPA published its proposed rule, even though Agency had been "actively gathering information" for its rulemaking for at least three-and-a-half years before it issued the proposed

[4] Because EPA has published a proposed rule that is currently subject to public review and comment, this case differs significantly from cases Plaintiffs cite, *see* Pl. Mot. 7-8, involving claims of unreasonable agency delay in responding to petitions seeking initiation of rulemaking or other agency action. *See Brower v. Evans*, 257 F.3d 1058 (9th Cir. 2001) (agency unreasonably delayed studies needed to inform mandatory agency determination before statutory deadline); *In re American Rivers & Idaho Rivers United*, 372 F.3d 413 (D.C. Cir. 2004) (Commission gave no response to petition for interagency consultation); *Air Line Pilots Ass'n v. Civil Aeronautics Bd.*, 750 F.2d 81 (D.C. Cir. 1984) (Civil Aeronautics Board took no action on individual applications for eligibility determinations); *Pub. Citizen Health Research Group v. Auchter*, 702 F.2d 1150 (D.C. Cir. 1983) (no proposed rule at time of court's decision); *MCI Telecomms. Corp. v. FCC*, 627 F.2d 322 (D.C. Cir. 1980) (remanding to FCC to define schedule for determination of whether submitted rates were just and reasonable).

rule) (internal quotations omitted). Plaintiffs do not even attempt to show that promulgation of a final rule has been "unreasonably delayed" when the proposed rule had been published by the Agency barely a month before Plaintiffs moved for summary judgment. In any event, even if a legal basis and precedent for such a conclusion existed (which they do not), the U.S. Court of Appeals for the Ninth Circuit—and not this Court—would have exclusive jurisdiction under the All Writs Act, 28 U.S.C. § 1651, to resolve the "unreasonable delay" question. *See Pub. Util. Comm'r of Or. v. Bonneville Power Admin.*, 767 F.2d 622, 626 (9th Cir. 1985) (Kennedy, J.) (adopting *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70 (D.C. Cir. 1984)).

Even if Plaintiffs' claims of delay beginning in 2007 were legally relevant, they are without merit. Promulgating FIP provisions for sources on tribal lands necessitates a more wide-ranging analysis than typically is required with respect to sources subject to state jurisdiction. Under the TAR, EPA must determine which provisions are "necessary or appropriate to protect air quality" for sources on tribal lands, an inquiry that entails analysis of a broader spectrum of environmental and policy factors than would often be considered for sources elsewhere. 40 C.F.R. § 49.11(a) (2012). For NGS, these policy factors include the vital economic importance of NGS to the economies of the Navajo Nation and the Hopi Tribe; NGS's crucial role in providing power to pump essential water to users in the region, including to tribes under water rights settlement agreements approved through Acts of Congress; the interests of numerous federal agencies with oversight over NGS; the federal government's partial ownership of NGS; and NGS's voluntary installation of emission control technology to reduce visibility-impairing pollutants. *See* 78 Fed. Reg. at 8,289. Given these factors affecting EPA's analysis, it is reasonable that the Agency would require additional time to determine what regulations may be "necessary or appropriate" in such unique circumstances.

Contrary to Plaintiffs' suggestion, EPA has not been sitting idly by or making only token efforts. On the contrary, EPA has actively pursued comprehensive rulemaking involving consultations with affected Tribes, federal agencies, NGS owners, and others, and has solicited

comments and possible alternative approaches from the public. After assessing information submitted by SRP, EPA issued its ANPR as "the beginning of an ongoing process of consultation with tribes and discussions with other key stakeholders" to develop any necessary or appropriate regulations for NGS. 78 Fed. Reg. at 8,277. In response to the ANPR, which requested comment on specific issues and solicited "any additional information that any person believes the agency should consider," EPA received over 6,000 comments. *Id.*; 74 Fed. Reg. at 44,314. EPA met with Tribes on several occasions, and conducted site visits to NGS and affected communities, to discuss the vital importance to tribal economies and water interests of NGS's continued operation.[5] 78 Fed. Reg. at 8,278. EPA also took input from the owners and operator of NGS on factors influencing the feasibility of and timeline for the plant's adoption of potential emission controls, including the "unusual requirement" that the Department of Interior review NGS's upcoming lease and rights-of-way agreement renewals under the National Environmental Policy Act due to the plant's location on tribal land. *Id.* And EPA considered the input and interests of several federal agencies that oversee or are affected by NGS, including the Bureau of Reclamation (which is an owner of NGS), the National Park Service, the Bureau of Indian Affairs, the Office of Surface Mining, the U.S. Fish and Wildlife Service, the U.S. Forest Service, and the U.S. Department of Energy ("DOE"). *Id.* at 8,279. In 2011, EPA coordinated with DOE to commission a study of the potential effects on power and water rates resulting from various emission control options for (including potential closure of) NGS, a study that was completed in 2012. *Id.*

In sum, considering the extensive array of stakeholders and unique considerations involved in this rulemaking, along with EPA's manifold other administrative responsibilities, the amount of time EPA devoted to determining whether, and what, regulations to propose as

[5] Nine tribes or tribal organizations commented on the importance of the continued operation of NGS: the Navajo Nation, Hopi Tribe, Gila River Indian Community, Ak-Chin Indian Community, Tohono O'odham Nation, Pascua Yaqui Tribe, Fort McDowell Yavapai Nation, Yavapai-Apache Nation, and the Inter Tribal Council of Arizona. 78 Fed. Reg. at 8,277.

"necessary or appropriate" for NGS was reasonable,[6] and EPA cannot be said to have unreasonably delayed final action in a rulemaking that was begun only two-and-a-half months ago.

Conclusion

For the foregoing reasons, this Court should grant EPA and SRP's cross-motions for summary judgment, deny Plaintiffs' motion for summary judgment, and dismiss Plaintiffs' complaint with prejudice.

Respectfully submitted,

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[6] Plaintiffs cite EPA's remark in the ANPR that it intended at that time to propose a BART determination about 60 days after receiving comments. *See* Pl. Mot. 6 n.1. But that remark neither established a binding commitment nor provides any evidence of delay. At the time EPA published the ANPR, 60 days may have seemed to EPA an adequate period in which to develop a proposed rule concerning BART based on information then available to EPA. Given that, as noted above, EPA thereafter received an enormous volume of comments and additional information from the public bearing on its BART-related regulatory and policy analyses with respect to NGS, EPA plainly required additional time to exercise its discretionary authority properly.