BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF Public Service Company of New Mexico, San Juan Generating Station Permit Number: P062R2 Issued by the New Mexico Environment Department, Air Quality Bureau	)	PETITION TO OBJECT TO ISSUANCE OF A STATE TITLE V OPERATING PERMIT Petition Number: VI-2010-

PETITION FOR OBJECTION

Pursuant to Section 505(b)(2) of the Clean Air Act and 40 C.F.R. § 70.8(d), WildEarth Guardians, the San Juan Citizens Alliance, and Carson Forest Watch (hereafter "Petitioners") hereby petition the Administrator of the U.S. Environmental Protection Agency ("EPA") to object to the New Mexico Environment Department, Air Quality Bureau's (hereafter "NMED") proposed issuance of the Title V operating permit (hereafter "Title V Permit") for Public Service Company of New Mexico (hereafter "PNM") to operate the San Juan Generating Station in San Juan County, New Mexico. *See* Exhibit 1, PNM, San Juan Generating Station Proposed Title V Permit, Permit Number P062R2 (Sept. 21, 2010).

INTRODUCTION

The San Juan Generating Station is a 1,848 megawatt coal-fired power plant located in San Juan County, New Mexico. According to the most recent proposed Statement of Basis for the proposed Title V Permit, the San Juan Generating Station is a:

> coal-fired electric generating station located approximately 3 miles north-northeast of Waterflow, New Mexico. The facility consists of four coal-fired boilers (Units 1-4) which burn coal received by conveyors from the adjacent San Juan Mine to generate high-pressure steam that powers a steam turbine coupled with an electric generator. Electric power thus produced by the units is supplied to the electric power grid for sale. This is a pulverized coal fired power plant with 4 boilers.

See Exhibit 2, PNM, San Juan Generating Station, Proposed Statement of Basis, Proposed Title V Operating Permit Renewal (Oct. 25, 2010).

San Juan Generating Station with Homes in the Foreground
(image from Flickr, jonnypeace—use of image does not imply endorsement).

The coal-fired power plant has the potential to emit massive amounts of a number of toxic air pollutants every year, including:

- 24,710.1 tons of nitrogen oxides, as much as is released by 1.29 million passenger vehicles (according to the EPA, a passenger vehicle releases on average 38.2 pounds of NO_x annually, http://www.epa.gov/otaq/consumer/f00013.htm (last visited Nov. 19, 2010);
- 39,427.0 tons of carbon monoxide;
- 249 tons of volatile organic compounds ("VOCs");
- 16,042 tons of sulfur dioxide ("SO_2");
- 1,550 tons of particulate matter less than 10 microns in diameter ("PM_{10}"); and
- 74.6 tons of hazardous air pollutants ("HAPs"), including 48.1 tons of hydrofluoric acid, 15.8 tons of hydrochloric acid, and 49 pounds of mercury, a known neurotoxin.

See Exhibit 1 at 4; Mercury emissions data from EPA's Toxic Release Inventory, http://www.epa.gov/cgi-bin/broker?view=COFA&trilib=TRIQ0&sort=_VIEW_&sort_fmt=1&state=35&county=35045&chemical=_ALL_&industry=2211&year=2009&tab_rpt=1&fld=RELLBY&fld=TSFDSP&_se

rvice=oiaa&_program=xp_tri.sasmacr.tristart.macro&OTHDISPD=Y (last visited Nov. 19, 2010).

According to NMED, the proposed Title V Permit was submitted to EPA for review on August 4, 2010 and the EPA's 45-day review period ended on September 20, 2010. *See* Exhibit 3, E-mail from Joseph Kimbrell, Air Permit Specialist, NMED Air Quality Bureau (Sept. 22, 2010). Based on Petitioner's conversations with Region 6 EPA staff and NMED, the EPA did not object to the issuance of the Title V Permit. This petition is thus timely filed within 60 days following the conclusion of EPA's review period and failure to raise objections.

Although it appears as if NMED is preparing revisions to the proposed Title V Permit, and indeed the latest version of the Title V Permit appears to contain numerous additions and revisions, indicating that the Title V Permit is far from final, Petitioners have been informed that their 60 day window to file a petition is tolling.

This petition is based on objections to the permit raised with reasonable specificity during the public comment period. To the extent the EPA may somehow believe this petition is not based on comments raised with reasonable specificity during the public comment period, Petitioner requests the Administrator also consider this a petition to reopen the Title V Permit in accordance with 40 C.F.R. § 70.7(f).[1] A permit reopening and revision is mandated in this case because of one or both of the following reasons:

1. Material mistakes or inaccurate statements were made in establishing the terms and conditions in the permit. *See* 40 C.F.R. § 70.7(f)(1)(iii). As will be discussed in more detail, the Title V Permit suffers from material mistakes in violation of applicable requirements, etc.; and

2. The permit fails to assure compliance with the applicable requirements. *See*, 40 C.F.R. § 70.7(f)(1)(iv). As will be discussed in more detail, the Title V Permit fails to assure compliance with several applicable requirements.

PETITIONERS

WildEarth Guardians is a Santa Fe, New Mexico-based nonprofit membership group dedicating to protecting and restoring the American West. WildEarth Guardians has an office in Santa Fe and more than 1,200 members throughout New Mexico. Through its Climate and Energy Program, WildEarth Guardians advocates for cleaner energy, cleaner air, and more responsible use and development of fossil fuels.

[1] To the extent the Administrator may not believe citizens can petition for reopening for cause under 40 C.F.R. § 70.7(f), Petitioner also hereby petitions to reopen for cause in accordance with 40 C.F.R. § 70.7(f) pursuant to the Administrative Procedure Act, 5 U.S.C. § 553(e) (stating that any person has the "right to petition for the issuance…of a rule") and 5 U.S.C. § 555(b) ("an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function").

San Juan Citizens Alliance is a nonprofit organization based in Durango, Colorado with offices in Farmington, New Mexico, that has over 500 members in the Four Corners region. San Juan Citizens Alliance is actively involved in energy development oversight, advocating for cleaner air and better stewardship of natural systems. San Juan Citizens Alliance promotes reduced energy consumption, energy efficiency, and clean, renewable energy to improve community health and prosperity.

Carson Forest Watch is a volunteer citizen group based in Peñasco, New Mexico that monitors forest resources on the national forests of northern New Mexico and southern Colorado, which are often impacted by air pollution from the San Juan Generating Station and other facilities in the region.

On May 7, 2010, WildEarth Guardians, the San Juan Citizens Alliance, and Carson Forest Watch submitted detailed comments regarding NMED's proposal to renew the Title V Permit for the San Juan Generating Station. *See* Exhibit 4, WildEarth Guardians, San Juan Citizens Alliance, Carson Forest Watch Comments on Draft Title V Permit (May 7, 2010). The objections raised in this petition were raised with reasonable specificity in comments on the draft Title V Permit.

Petitioners request the EPA object to the issuance of Permit Number P062R2 and/or find reopening for cause for the reasons set forth below.

GROUNDS FOR OBJECTION/REOPENING

I. THE TITLE V PERMIT FAILS TO ENSURE COMPLIANCE WITH PSD REQUIREMENTS

A Title V Permit is required to include emission limitations and standards that assure compliance with all applicable requirements, including requirements under the Clean Air Act's Prevention of Significant Deterioration ("PSD") program, at the time of permit issuance. *See* 42 U.S.C. § 7661c(a); 40 C.F.R. § 70.6(c)(1). In this case, evidence indicate that PSD requirements are, in fact, applicable to the San Juan Generating Station and that the facility is currently in violation of PSD requirements. Despite this, the Title V Permit fails to both assure compliance with PSD and to bring the San Juan Generating Station into compliance with PSD through a compliance plan.

Pursuant to Part C of the Clean Air Act, a source cannot construct or operate a major source or major modification of a major source without first obtaining a permit. *See* 42 U.S.C. § 7475(a). This requirement is echoed in federal regulations and in the New Mexico State Implementation Plan ("SIP"). *See* 40 C.F.R. § 51.166(a)(7)(iii) and the New Mexico SIP, 20.2.74.200.C New Mexico Administrative Code ("NMAC"). Among other requirements, federal requirements and the New Mexico SIP further prohibit the operation of a major stationary source after a major modification unless the source has applied Best Available Control Technology ("BACT") to control emissions of harmful air pollutants. *See* 40 C.F.R. § 51.166(j), 40 C.F.R. § 52.21(j), and the New Mexico SIP, 20.2.74.302 NMAC.

The San Juan Generating Station is a major stationary source within an area classified as attainment for all criteria pollutants. However, according to information brought to light by the EPA and both expressly and impliedly confirmed by NMED, the San Juan Generating Stations never obtained PSD permits both for the initial construction of at least units 1, 3 and 4, and likely unit 2, and for the recent addition of low-NO_x burners on all four units.

Accordingly, NMED was both required to prepare a Title V Permit that includes PSD requirements, including BACT requirements, and to include a compliance plan to bring the facility into compliance in accordance with 42 U.S.C. §§ 7661b(b) and 7661c(a) and 40 C.F.R. § 70.6(b)(3). Unfortunately, NNED failed to do so. The Administrator must therefore object to the issuance of the Title V Permit for the San Juan Generating Station. Evidence of noncompliance with PSD requirements and the failure of the Title V Permit to ensure compliance with applicable requirements are as follows:

A. The San Juan Generating Station was Required to Obtain PSD Permits Prior to Construction—It has yet to Obtain Such Permits

PNM never obtained PSD permits for the initial construction of units 1-4, yet it appears that the permitting and construction of at least units 1, 3 and 4 occurred subsequent to the effective date of the EPA's PSD program on June 1, 1975. Therefore, it appears that PNM was required to obtain PSD permits for at least units 1, 3, and 4 in accordance with 40 C.F.R. § 52.21 (1975).

NMED did not address this issue in proposing to issue the Title V Permit. In the Statement of Basis for the proposed Title V Permit, NMED discloses that permits were issued for the construction of units 1, 3, and 4 in 1975, 1982, and on September 15, 1975, respectively. *See* Exh. 2 at 6. However, these permits were not PSD permits and there is no evidence that, at least with regards to units 1, 3, and 4, the units have been subjected to PSD requirements since their initial construction, in violation of the Clean Air Act.

EPA itself has flagged this as a major issue of concern. In comments sent to NMED on September 20, 2010, EPA stated:

> At this time, I continue to have serious concerns that this source may be PSD applicable, despite your replies to my earlier questions on 1) PSD analysis, claiming summary judgement on 2 of the 4 boilers (#3 and #4) at this site in Federal Court on Consent Decree that they are not (no mention is made of the other 2 boilers, i.e., Units #1 and #2); in addition to 2) a more recent response on no collateral increase in CO emissions from the Consent Decree required Low NOx burner installations on each of the boilers.
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> NMED provided Court documents on the first subject, but there does not appear to be enough information in them on the "EPA" finding of non-PSD applicability to make a determination on this subject. I cannot locate any supporting records at R6 for this finding, and in a telephone communiqué with Ned Jerabek and you on 9/20/10, Ned indicated there may not be any records of the phone conversation at your Agency either. There are two phases of PSD applicability that occurred during construction phases of

> this source, and the material presented so far on "commencement of construction" from this action, our records including previous applications from this source, the Court records provided, and your clarifications indicate numerous discrepancies on construction dates for at least the #1, #3 and #4 boilers at this plant. With the question remaining unanswered on PSD applicability analysis, and to verify past PSD applicability, we request a copy of all records in the NMED permit file for this source. Please forward as soon as possible.

Exhibit 5, Comments from Catherine Penland, Air Permits Section, EPA Region 6 to Joseph Kimbrell, Title V Permits Engineer, New Mexico Environment Department, Air Quality Bureau (Sept. 20, 2010) at 1. As is evident, there are serious questions over whether the San Juan Generating Station is operating in compliance with PSD. NMED was at least obligated to investigate whether the San Juan Generating Station was in compliance with PSD to ensure compliance with applicable requirements in accordance with Title V.

NMED may claim that EPA has already determined that PSD does not apply, at least with regards to units 3 and 4, citing the U.S. District Court for the District of New Mexico's ruling in *Grand Canyon Trust v. Public Service Co.*, 283 F. Supp. 2d 1249 (D.N.M. 2003). In this ruling on a Clean Air Act citizen suit, the Court held that a phone call from EPA to NMED's predecessor, the New Mexico Environmental Improvement Agency, constituted final agency action sufficient to uphold a finding that PSD was not applicable to units 3 and 4. The court dismissed the suit for lack of jurisdiction, at least with regards to the PSD claims.

This ruling, however, missed the point. EPA never made a formal finding that PSD did not apply to units 3 and 4. As EPA noted in its comment to NMED, no "supporting records" exist to demonstrate that EPA undertook final agency action to conclude that PSD did not apply to units 3 and 4. Furthermore, to the extent it could be argued that EPA undertook final agency action through a phone call for which no records exist, this action was simply wrong. Any EPA finding that PSD was not applicable to units 3 and 4 defies the fact that permits were issued and construction began units subsequent to the effective date of EPA's 1975 PSD regulations at 40 C.F.R. § 52.21 (1975). ***EPA itself seems to recognize that any prior determination was in error.***

It is important to note that in *Grand Canyon Trust* the Court did not uphold EPA's supposed determination that PSD was not applicable to units 3 and 4. Rather, the Court simply ruled that it lacked jurisdiction to review the claim as to whether PSD applied in light of EPA's supposed final action on the matter. This ruling does not absolve NMED from assuring, above all, that units 3 and 4 are operating in compliance with all applicable requirements and to take appropriate action pursuant to Title V if they are not in compliance. EPA reaffirms this position, stating in comments to NMED:

> Whitepaper 1 has discussed the process for handling possible PSD/NSR violations prior to issuance of a Title V permit. Even though White Paper 1 states that companies "are not federally required to reconsider previous applicability determinations as part of their inquiry in preparing part 70 permit applications." White Paper I further states, "However, EPA expects companies to rectify past noncompliance as it is discovered.

> Companies remain subject to enforcement actions for any noncompliance with requirements to obtain a permit or meet air pollution control obligations. In addition, the part 70 permit shield is not available for noncompliance with applicable requirements that occurred prior to or continues after submission of the application." White Paper I, part II, section H] it continues, "EPA expects companies to rectify past noncompliance as it is discovered. Companies remain subject to enforcement actions for any noncompliance with requirements to obtain a permit or meet air pollution control obligations. In addition, the Part 70 permit shield is not available for noncompliance with applicable requirements that occurred prior to or continues after submission of the application." White Paper 1, part II, section H.
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> Since the Title V permits must have all applicable requirements, NMED must first determine if there is a violation of the SIP/PSD rules. The record should clearly address why NMED did not consider or re-evaluate the PSD applicability of Boilers 1, 3 and 4 for this action, since the emissions are far above the major source determinations, and construction appears to have commenced (by some conflicting dates, as previously noted) after the Federal PSD applicability dates.

Exh. 5 at 2 (footnote removed).[2]

NMED may also claim that it was not required to assess PSD applicability in the context of the Title V Permit. Indeed, NMED states in the Statement of Basis that, "Title V action does not determine PSD applicability[.]" Exh. 2 at 3. "However, to ensure compliance with applicable requirements, NMED necessarily must assess whether the facility is in compliance with PSD requirements. If the facility is not in compliance, it must remedy this noncompliance by writing a permit that both assures compliance and contains a compliance plan.

To this end, NMED may also claim that PSD does not apply with regards to the initial construction because, "…the facility was constructed prior to the applicability of 20.2.74 NMAC[.]" Exh. 2 at 3. However, in assessing whether the Title V Permit assures compliance with applicable requirements, NMED is not limited solely to assessing whether the facility is in compliance with the New Mexico SIP. Applicable requirements include, among other things, "Any standard…promulgated by EPA through rulemaking under title I of the Act that implements the relevant requirements of the Act[.]" 40 C.F.R. § 70.2 (definition of "applicable requirement"). In this case, NMED was obligated to assess whether PNM was in violation of 40 C.F.R. § 52.21—a standard promulgated by EPA implementing the PSD preconstruction requirements under Title I of the Clean Air Act—due to its failure to obtain PSD permits for the construction of units 1, 3, and 4. If a finding of noncompliance was found, NMED was further obligated to address this in any Title V Permit.

The Administrator therefore has a nondiscretionary duty to object to the issuance of the Title V Permit for the San Juan Generating Station on the basis that it fails to ensure compliance with PSD requirements under the Clean Air Act.

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[2] "White Paper 1" refers to Memo from Lydia N. Wegman, Deputy Director, Office of Air Quality Planning and Standards, to Air Directors, Regions I-X, *White Paper for Streamlined Development of Part 70 Permit Applications* (July 10, 1995).

Although the Administrator may argue that Petitioners failed to comment with reasonable specificity on this issue, the grounds for Petitioners' concerns over this issue arose after the public comment period on the draft Title V Permit. These concerns came to light only after Petitioners received EPA's comments on the proposed Title V Permit. After attempting to obtain a copy of these comments from NMED on September 22, 2010, Petitioners received these comments only after contacting EPA on October 15, 2010. *See* Exhibit 6, E-mail from Catherine Penland, EPA Region 6 (Oct. 15, 2010). During the public comment period and based on the information provided by NMED to the public, Petitioners had no reason to believe that the issue of PSD applicability as it relates to the construction of units 1, 3, and 4, remained relevant.

However, to the extent that the Administrator disagrees with Petitioners' contention that the grounds for this issue arose subsequent to the public comment period, such a disagreement does not absolve her from addressing whether reopening of the Title V Permit is warranted in accordance with 40 C.F.R. § 70.7(f).

B. The Title V Permit Fails to Bring the Facility into Compliance with PSD with Regards to Significant Increases in Carbon Monoxide Emissions

The Title V Permit also fails to assure compliance with PSD because it fails to address significant increases in carbon monoxide emissions that occurred as a result of the installation of low-NO_x burners on all four units at the San Juan Generating Station in 2006.

This issue was also raised by the EPA in their September 20, 2010 comments. *See* Exh. 5 at 1-2. In response, NMED conceded that, in fact, it had failed to address increases in carbon monoxide emissions and that, upon further investigation, the Title V Permit failed to assure compliance with PSD with regards to recent significant increases in carbon monoxide emissions. NMED responded:

> As discussed in the telephone call on 9/20/2010 with Cathy Penland, Ned Jerabek, and Joe Kimbrell, NMED did re-evaluate the CO emission increase/decrease associated with the project to install low NOx burners that were authorized by NSR permit 0063M3 and required by the Consent Decree. PNM did not request any increase in allowable CO emission limits to accommodate the installation of the low NOx burners. Quarterly CO emissions test using EPA Method 10 demonstrate that the emission limits that were established prior to the installation of the low NOx burners have not been violated.
>
> In the NSR Permit 0063M2 issued January 22, 1997, the CO emissions for the four boilers were calculated using AP-42 emissions factors correlating to the type operation at SJGS. That emission was and still is 0.5 lbs of CO per ton of coal combusted. Since the rate of combustion was different for the units, the corresponding CO emission limits were: Unit 1 (E301) 92.9 lbs/hr; Unit 2 (E302) 95.4 lbs/hr, Unit 3 (E304) 144.2 lbs/hr, and Unit 4 (E304) 141.5 lbs/hr. These CO limits were required in the Title V permit P062-R1 issued February 4, 2005. Under Title V requirements PNM was required to perform initial compliance testing of CO using EPA Method 10 within six months

following the issuance of Permit P062R1. This testing was to verify for the first time that the CO emission limits were adequately set to represent this facility.

PNM conducted the first CO test in May 2005, resulting in CO emission rates far exceeding permit limits. PNM, using the CO test results submitted an application to modify the permit to account for the existing, "before now" unknown emission rates to better reflect the actual facility conditions. Additional CO testing in July 2005, redistributed the requested CO increases to the levels permitted today: Unit 1 (E301) 3,000 lbs/hr; Unit 2 (E302), Unit 3 (E304), and Unit 4 (E304) 2,000 lbs/hr.

The CO emission limits currently permitted were first established by NSR Permit 0063M3 dated September 20, 2005. These CO emission increases were not due to any modification of the facility and did not trigger a PSD analysis.

Permit 0063M4 dated September 18, 2006 which authorized the installation of the low NOx burners did not alter or change the CO emission limits for the facility. The facility is currently in compliance with the CO emission limits.

The question was asked, "Why is there such a large discrepancy between the CO emission rates based on AP-42 emission factors and those from the emission tests if these increased emissions were not due to facility modifications?" AP-42 emission factors were established to represent emissions for the average population of facility surveyed by EPA. Facilities as large as SJGS are custom built and only through actual emission testing can anyone know what the true emissions are.

On October 4, 2010, we re-evaluated the PSD applicability of the Installation of the Low NOx Burner via NSR Permit 0063M4, issued 9/18/2006.

- PNM didn't request an increase in the allowable CO limits to accomplish the installation of the Low NOx Burners.
- However, PSD regulations require the comparison of past actuals to future projected actuals when determining if a project is significant or not. PNM in effect stated in the 0063M4 permitting process that the future potential actuals from the Low NOx Burner Installation was not going to be different from past actuals.
- Now that all of the Low NOx Burners have been installed (last unit became operational on 3/31/2009), we are now able to compare CO emission past actuals with future actuals for the Low NOx Burner Project. A comparison of the Quarterly CO Test results from May, 2006 which is prior to the installation of the Low NOx Burners to the Quarterly Test results from 2010 which is after the last Unit was retrofitted with the Low NOx Burners is shown here.

	Past Actuals Pre-Low Nox Burner installation May 15-17, 2006			
3-run avg	Unit 1	Unit 2	Unit 3	Unit 4
CO (lb/MMBtu)	0.757	0.098	0.033	0.137

CO (lb/hr)	2164.4	331.2	152.1	629.7
CO (tpy)	9480.1	1450.7	666.1	2758.1

Future Projected Actuals
Post-Low Nox Burner installation

3-run avg	6/15/2010 Unit 1	4/21/2010 Unit 2	8/24/2010 Unit 3	5/27/2010 Unit 4
CO (lb/MMBtu)	0.634	0.523	0.2	0.326
CO (lb/hr)	2215	1760	1201.9	1804.8
CO (tpy)	9701.7	7708.8	5264.3	7905.0

Increase in Actuals due to Lox Nox Burner Installation

	Unit 1	Unit 2	Unit 3	Unit 4
CO (lb/MMBtu)	-0.123	0.425	0.167	0.189
CO (lb/hr)	50.6	1428.8	1049.8	1175.1
CO (tpy)	221.6	6258.1	4598.222	5146.924

- ***This comparison clearly shows that all four units individually and combined exceed the 100 tons/year increase threshold for CO PSD significance. Therefore, it is our conclusion that NSR Permit 0063M4 should have been a PSD Permit or processed as a PSD permit.***
- ***It is our intent to add a Compliance Plan in the current Title V Permit P062R2 for PNM to submit a PSD application to address the significant increase in CO from the construction of the low NOx Burners.***

Exhibit 7, NMED Response to EPA Comments (Oct. 29, 2010) at 2-3 (emphasis added).

Clearly NMED's comments indicate the Title V Permit is required to bring the San Juan Generating Station into compliance with PSD with regards to the significant increases in carbon monoxide resulting from the installation of low-NO_x burners. Unfortunately, the Title V Permit, as proposed, does not bring the facility into compliance with PSD. Although NMED intends "to add a Compliance Plan in the current Title V Permit," this does not remedy the fact that the proposed Title V Permit fails to assure compliance with applicable requirements. The Administrator must therefore object.

Although the Administrator may argue that Petitioners failed to comment with reasonable specificity on this issue, the grounds for Petitioners' concerns over this issue arose after the public comment period on the draft Title V Permit. These concerns came to light only after Petitioners received EPA's comments on the proposed Title V Permit. After attempting to obtain a copy of these comments from NMED on September 22, 2010, Petitioners received these comments only after contacting EPA on October 15, 2010. *See* Exhibit 6, E-mail from Catherine Penland, EPA Region 6 (Oct. 15, 2010). During the public comment period and based on the information provided by NMED to the public, Petitioners had no reason to believe that the issue of PSD applicability as it related to units 1-4 was an issue with regards to carbon monoxide emissions. Indeed, NMED only completed an actual analysis of the carbon monoxide increases on October 10, 2010. Thus, Petitioner could not have possibly commented on the adequacy of the Title V Permit in this regard.

However, to the extent that the Administrator disagrees with Petitioners' contention that the grounds for this issue arose subsequent to the public comment period, such a disagreement does not absolve her from addressing whether reopening of the Title V Permit is warranted in accordance with 40 C.F.R. § 70.7(f).

II. THE TITLE V PERMIT FAILS TO ENSURE COMPLIANCE WITH SOURCE IMPACT ANALYSIS REQUIREMENTS IN THE NEW MEXICO STATE IMPLEMENTATION PLAN

NMED failed to ensure that the applicable NO_x and particulate matter emission limits set forth in the Title V Permit were based on an actual analysis of ambient air quality impacts, as required by the New Mexico SIP at 20.2.72.208.D. NMAC.

This SIP provision states that NMED shall deny any permit for construction, modification, or revision if it would "cause or contribute to air contaminant levels in excess of any National Ambient Air Quality Standard or New Mexico Air Quality Standard unless the ambient air impacts is offset by meeting the requirements of either 20.2.29 NMAC or 20.2.72.216 NMAC[.]" 20.2.72.208.D. NMAC. In this case, it is not apparent that NMED assessed the NO_x and particulate matter emission limits specifically to ensure that the San Juan Generating Station would not cause or contribute to exceedances of the ozone, nitrogen dioxide ("NO_2"), and particulate matter less than 2.5 microns in diameter ("$PM_{2.5}$") National Ambient Air Quality Standards ("NAAQS"). This is of serious concern in light of the fact that several new permit modifications have recently been undertaken and new permits have been issued—including, but not limited to permits 0063M3, 0063M4, 0063-M6, and 0063M6R1—meaning NMED had an affirmative duty to ensure that the permit limits would protect the NAAQS in accordance with its SIP.

Our concerns over this issue are bolstered by the fact that the San Juan Generating Station has never obtained a PSD permit. As discussed above, PNM never obtained PSD permits for the construction of units 1, 3, and 4, and never obtained a PSD permit for recent significant increases in carbon monoxide emissions resulting from the installation of low-NO_x burners. An analysis of impacts to ambient air quality is a fundamental requirement of the PSD permitting requirement. *See* 42 U.S.C. § 7475(a)(3) (stating, among other things, that a demonstration is required showing that a source "will not cause, or contribute to, air pollution in excess of any…national ambient air quality standard[.]"); *see also*, New Mexico SIP, 20.2.74.302.D.4 NMAC.

NMED attempts to argue that source impact analysis requirements in the New Mexico SIP only apply to New Source Review ("NSR") permits, and therefore implies that they are irrelevant in the context of the San Juan Generating Station Title V Permit. This argument misses the point entirely. A Title V Permit must ensure compliance with applicable requirements, including the need to ensure that all underlying NSR permits issued to the San Juan Generating Station were supported by source impact analyses. If an underlying NSR permit was issued without the completion of a source impact analysis in accordance with the SIP, then

the Title V Permit must contain provisions that bring the facility into compliance with this requirement.

In this case, there is simply no indication that any analysis of ozone, NO_2, $PM_{2.5}$ impacts has ever been completed for any NSR permit issued for any pollutant emitting activity at the San Juan Generating Station. Indeed, NMED only asserts that "air dispersion modeling [was] conducted for [NSR permit 0063M6R1] or previous permitting action(s) [and] demonstrated compliance with the NAAQS." Exhibit 8, NMED Response to WildEarth Guardians' Comments on Draft Title V Permit P062R2 at 2. However, this is simply erroneous. There is no information or analysis presented, cited, or otherwise referenced by NMED indicating that any analysis of the impacts of the San Juan Generating Station to ambient concentrations of ozone, NO_2, and $PM_{2.5}$ has ever been completed, particularly in conjunction with the initial construction of units 1, 3, and 4 and the recent major modification that occurred as a result of the installation of low-NO_x burners and concurrent significant increase in carbon monoxide emissions. At the least, NMED has never prepared an analysis of impacts to ambient concentrations of ozone, NO_2, and $PM_{2.5}$ based on the requirements specified in 40 C.F.R. § 51, Appendix W, as required by 40 C.F.R. § 52.21(l). The Administrator must therefore object.

III. THE TITLE V PERMIT FAILS TO REQUIRE PROMPT REPORTING OF DEVIATIONS

Condition B110.C of the Title V Permit requires reporting of permit deviations only once every six months. This does not constitute prompt reporting of permit deviations, as required by the Clean Air Act, 42 U.S.C. 7661b(b)(2), and Title V regulations, 40 C.F.R. § 70.6(a)(3)(iii)(B).

Prompt reporting is typically defined "in relation to the degree and type of deviation likely to occur and the applicable requirements." 40 C.F.R. § 70.6(a)(3)(iii)(B). In explaining the meaning of "prompt," the House Report for the CAA Amendments of 1990 stated that "the permittee would presumably be required to report that violation without delay." H.F. Rep. No. 101-490, pt. 1, at 348 (1990). In commenting on other proposed state operating permit programs, the EPA has explained:

> In general, the EPA believes that 'prompt' should be defined as requiring reporting within two to ten days for deviations that may result in emissions increases. Two to ten day is sufficient time in most cases to protect public health and safety as well as to provide a forewarning of potential problems.

Clean Air Act Proposed Interim Approval of Operating Permits Program: State of New York, 61 Fed. Reg. 39617-39602 (July 30,1996). Most recently, the second circuit court of appeals held that "prompt" for purposes of prompt reporting of permit deviations must at least be less than every six months depending upon the source's compliance history and public health risk. *NYPIRG v. Johnson*, 427 F.3d 172 (2nd Cir. 2005). Clearly, reporting permit deviations only once every six months, as the Title V Permit requires, does not constitute prompt reporting.

Currently, Condition B110.C only requires semiannual reporting of deviations—or once every six months, regardless of the nature of the deviation. Clearly this does not constitute prompt reporting in accordance with 42 U.S.C. 7661b(b)(2) and 40 C.F.R. § 70.6(a)(3)(iii)(B).

In response to comments, NMED asserts that Condition B110.D requires reporting of excess emissions in accordance with 20.2.7.110 NMAC. *See* Exh. 8 at 4. It is true that B110.D sets requirements for the reporting of excess emissions, which could be a type of deviation. However, NMED does not explain why it believes the requirements of B110.D, which references 20.2.7.110 NMAC, constitute "prompt" in the context of requiring prompt reporting. The requirement simply states that an initial report of an excess emission must be reported "no later than the end of the next regular business day after the time of discovery." 20.2.7.110.A(1) NMAC. However, this would mean that if an excess emission occurred on a Friday, the source would not be required to report until the end of the following Monday, the next regular business day—conceivably up to four days. Prompt reporting is typically defined "in relation to the degree and type of deviation likely to occur and the applicable requirements" (40 C.F.R. § 70.6(a)(3)(iii)(B)), so it is unclear how this requirement represents a reporting requirement that reflects consideration of "the degree and type of deviation likely to occur." It is notable that EPA Title V regulations require reporting of deviations from hazardous or toxic air pollutant emission limits "with[in] 24 hours of the occurrence." 40 C.F.R. § 71.(a)(3)(iii)(B)(1).

Furthermore, the 2005 Consent Decree over violations at the San Juan Generating Station specifically requires that excess opacity emissions occurring during startups, shutdowns, malfunctions, or emergencies, or occurring when both the boiler and all fans that move flue gas in the unit are off, requires that such deviations be reported "by facsimile no later than twenty-four (24) hours after the start of the next business day and…in writing no later than ten (10) calendar days after the start of the first business day following the reading[.]" Exhibit 9, Consent Decree Entered in *Grand Canyon Trust, et al. v. Public Service Co. of New Mexico*, CV 02-552 BB/ACT (ACE) (D.N.M. 2005) at (9)(a)(vi). Clearly, underlying applicable requirements demand more frequent reporting of deviations than the Title V Permit currently provides for.

The Administrator must object to the issuance of the Title V Permit on the basis that it fails to ensure prompt reporting of all permit deviations—including excess emissions—in accordance with 42 U.S.C. 7661b(b)(2), and 40 C.F.R. § 70.6(a)(3)(iii)(B).

IV. THE TITLE V PERMIT FAILS TO REQUIRE SUFFICIENT PERIODIC MONITORING

Permitting authorities must ensure that a Title V Permit contain monitoring that assures compliance with the terms and conditions of the permit. *See* 42 U.S.C. § 7661c(c) and 40 C.F.R. § 70.6(c)(1). Although as a basic matter, Title V Permits must require sufficient periodic monitoring when the underlying applicable requirements do not require monitoring (*see* 40 C.F.R. § 70.6(a)(3)(i)(B)), the D.C. Circuit Court of Appeals has firmly held that even when the underlying applicable requirements require monitoring, permitting authorities must supplement this monitoring if it is inadequate to ensure compliance with the terms and conditions of the permit. As the D.C. Circuit recently explained:

> [40 CFR § 70.6(c)(1)] serves as a gap-filler….In other words, § 70.6(c)(1) ensures that all Title V permits include monitoring requirements "sufficient to assure compliance with the terms and conditions of the permit," even when § 70.6(a)(3)(i)(A) and § 70.6(a)(3)(i)(B) are not applicable. This reading provides precisely what we have concluded the Act requires: a permitting authority may supplement an inadequate monitoring requirement so that the requirement will "assure compliance with the permit terms and conditions."

See Sierra Club v. EPA, 536 F.3d 673, 680 (D.C. Cir. 2008). In other words, "a monitoring requirement insufficient 'to assure compliance' with emission limits has no place in a permit[.]" *Id*. at 677.

In this case, the Title V Permit fails to contain monitoring requirements that ensure compliance with underlying particulate matter limits for the four coal-fired boilers. The Title V Permit establishes particulate limits for the coal-fired boilers at Condition A106.A, setting forth pound per hour emission limits, ton per year emission limits, and pound per million btu ("lb/mmbtu") emission limits. Unfortunately, the prescribed monitoring fails to ensure compliance with these emission limits.

Of particular concern is that the Title V Permit exempts monitoring altogether for particulate matter. Condition B108.D states that monitoring may be foregone altogether for two monitoring periods if individually, units 1, 2, 3, or 4 have operated for less than 25% of a monitoring period, and may even be foregone for a longer period of time if units 1, 2, 3, or 4 operate for less than 10% of any monitoring period. This Condition is problematic. As a practical matter, it allows the San Juan Generating Station to forego particulate matter monitoring altogether if units 1, 2, 3, or 4 operate less than 25% of a monitoring period. This can hardly serve to ensure compliance with the applicable particulate matter emission limits.

Although NMED asserts that, "The intent of this exemption is to reduce the possibility that equipment that is not monitoring must be started up for the sole purpose of monitoring" (Exh. 8 at 6), the practical result of this exemption is PNM would be allowed to operate units 1, 2, 3, or 4 for upwards of 90 days annually without being required to conduct any particulate matter monitoring. Indeed, 25% of a quarterly monitoring period would amount to around 22 days. With four quarters annually, this amounts to nearly 90 days that PNM could be allowed to avoid monitoring altogether. It is unclear how this would ensure continuous compliance with hourly or lb/mmbtu emission limits. The fact that PNM could be allowed to avoid monitoring altogether if it only operates units 1, 2, 3, or 4 for 10% or less than any monitoring period—9 days a quarter or 36 days a year—underscores the inappropriateness of including Condition B108.D in the Title V Permit due to its failure to ensure sufficient periodic monitoring that assures compliance with applicable particulate matter limits. The Administrator must therefore object.

The Title V Permit fails to require any monitoring of emissions related to duct leaks from units 1-4. The Title V Permit expressly limits emissions of NO_x, SO_2, carbon monoxide, and particulate matter from duct leaks at Condition A106.D. However, the Title V Permit actually sets forth no explicit monitoring of such emissions to ensure compliance, and therefore fails to

ensure sufficient monitoring. Although the Title V Permit requires that PNM conduct a duct leak management program in accordance with Condition A402.C, it is unclear exactly what this program entails and how it will ensure compliance with the emission limits for duct leaks. Indeed, it does not even appear as if the duct leak management program has been prepared, or that NMED has assured its effectiveness in appropriately limiting emissions of NO_x, SO_2, carbon monoxide, and particulate matter from duct leaks. Condition A402.C states that compliance with the duct leak management program will be determined "using data generated by the monitoring and by Department inspections of the units," but it is unclear exactly what monitoring data will be generated and what NMED will inspect to ensure compliance. Not only is the duct leak management program vague, it does not appear as if any specific standards exist to ensure that any duct leak management program is implemented to ensure compliance with applicable emission limits. We are particularly troubled at the fact that there are no limits on the number of leaking ducts, or leaking points along any ducts. Fundamentally, the Title V Permit simply does not require sufficient monitoring to assure compliance with the duct leak emission limits for NO_x, SO_2, carbon monoxide, and particulate matter. The Administrator must therefore object.

V. CONDITION B112.E IS CONTRARY TO APPLICABLE REQUIREMENTS

Condition B112.E states that "For sources that have submitted air dispersion modeling that demonstrates compliance with federal ambient air quality standards, compliance with the terms and conditions of this permit regarding source emissions and operation shall be deemed to be compliance with federal ambient air quality standards specified at 40 CFR 50 NAAQS." This Condition implies that compliance with the Title V Permit automatically means that the NAAQS will be protected.

This Condition is contrary to the Clean Air Act. NMED cannot automatically conclude that compliance with a Title V Permit assures compliance with the NAAQS. The agency must first prepare an analysis and assessment of emissions to make such a finding, and even then must do so on a source-by-source basis, both individually and cumulatively. *See e.g.*, 40 C.F.R. § 51.160. Furthermore, because the NAAQS are revised every five years (*see* 42 U.S.C. § 7409(d)(1)), it is further inappropriate given that permit terms and conditions rarely are revised, and at least are not required to be revised as the NAAQS are revised.

This Condition is particularly problematic in light of the fact that the construction permits issued for the San Juan Generating Station were issued prior to the promulgation of several NAAQS. For example, the Statement of Basis indicates that permits were issued in 2006, 2005, 1997, 1987, 1982, 1975, and 1973, all predating many of the current NAAQS, including the 2006 annual and 24-hour $PM_{2.5}$ NAAQS (*see* 40 C.F.R. § 50.13), the 2008 8-hour ozone NAAQS (*see* 40 C.F.R. § 50.15), the 2010 annual and hourly NO_2 NAAQS (*see* 75 Fed. Reg. 6474-6537 (Feb. 9, 2010), and the 2010 hourly SO_2 NAAQS (*see* 75 Fed. Reg. 35520-35603 (June 22, 2010). This Condition is further problematic because, as explained, the San Juan Generating Station is currently operating in violation of PSD requirements and therefore, NMED has failed to prepare the necessary analyses to demonstrate that operation of the San Juan Generating Station will not cause or contribute to violations of the NAAQS.

The Title V Permit cannot include a provision that automatically concludes operation of the San Juan Generating Station will protect any and all NAAQS specified at 40 C.F.R. § 50. The Administrator must therefore object to the issuance of the Title V Permit.

CONCLUSION

For the reasons stated above, Petitioners request the Administrator object to and/or reopen the Title V Permit issued by the NMED for PNM to operate the San Juan Generating Station. The Administrator has a nondiscretionary duty to issue an objection to the Title V Permit within 60 days in accordance with Section 505(b)(2) of the Clean Air Act.

Respectfully submitted this 19th day of November 2010

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TABLE OF EXHIBITS

1. PNM, San Juan Generating Station Proposed Title V Permit, Permit Number P062R2 (Sept. 21, 2010).
2. PNM, San Juan Generating Station, Proposed Statement of Basis, Proposed Title V Operating Permit Renewal (Oct. 25, 2010).
3. E-mail from Joseph Kimbrell, Air Permit Specialist, NMED Air Quality Bureau (Sept. 22, 2010).
4. WildEarth Guardians, San Juan Citizens Alliance, Carson Forest Watch Comments on Draft Title V Permit (May 7, 2010).
5. Comments from Catherine Penland, Air Permits Section, EPA Region 6 to Joseph Kimbrell, Title V Permits Engineer, New Mexico Environment Department, Air Quality Bureau (Sept. 20, 2010).
6. E-mail from Catherine Penland, EPA Region 6 (Oct. 15, 2010).
7. NMED Response to EPA Comments (Oct. 29, 2010).
8. NMED Response to WildEarth Guardians' Comments on Draft Title V Permit P062R2.
9. Consent Decree Entered in *Grand Canyon Trust, et al. v. Public Service Co. of New Mexico*, CV 02-552 BB/ACT (ACE) (D.N.M. 2005).