May 7, 2010

New Mexico Environment Department
Air Quality Bureau
Operating Permit Unit
1301 Siler Rd., Bldg. B
Santa Fe, NM 87507

Re: Comments on Draft Title V Permit for Public Service Company of New Mexico's ("PNM's") San Juan Generating Station, San Juan County, NM, Permit No. P062R2

To Whom It May Concern:

WildEarth Guardians, San Juan Citizens Alliance, and Carson Forest Watch submit the following comments in response to the New Mexico Environment Department's ("NMED's") proposal to renew a Clean Air Act Title V operating permit allowing Public Service Company of New Mexico ("PNM") to continue operating the San Juan Generating Station (Operating Permit No. P062R2), located in San Juan County, New Mexico.

The San Juan Generating Station is a massive coal-fired power plant. The facility consists of four coal-fired boilers, The facility releases over 80,000 tons of toxic air pollution, including more than 24,000 tons of smog-forming nitrogen oxide ("NO_x") gases, 1,700 tons of particulate matter less than 10 microns in diameter ("PM_{10}"), and more than 74 tons of hazardous air pollutants such as hydrochloric acid, mercury, hydrofluoric acid, and benzene. *See* Draft Title V Permit at 4 and 11-12. According to data submitted with the U.S. Environmental Protection Agency's ("EPA's") Clean Air Markets Division, the facility also releases 11,881,245.5 tons of carbon dioxide annually.

For the foregoing reasons, NMED must deny PNM's application for a renewed Title V Permits due to its failure to ensure compliance with applicable requirements under the Clean Air Act.

1. **The Title V Permit Fails to Address Greenhouse Gas Emissions to Assure Compliance with PSD**

In proposing to issue the Title V Permit, it appears that the NMED has not assessed whether carbon dioxide ("CO_2"), key greenhouse gas, is subject to regulation in accordance with

PSD requirements and therefore failed to ensure compliance with PSD under the Clean Air Act, PSD regulations, and the New Mexico SIP. This is of concern given that the San Juan Generation Station is the largest source of greenhouse gases regulated by NMED, annually releasing nearly 12 million tons of carbon dioxide.

As New Mexico itself has noted, greenhouse gases, such as carbon dioxide and methane, are subject to regulation under PSD regulations. In accordance with those regulations, any source that emits more than 250 tons per year "of any air pollutant subject to regulation under the Federal Act" is subject to PSD permitting requirements, including the requirement that Best Available Control Technology ("BACT") be utilized to keep air emissions in check. *See* 40 CFR § 51.166(j)(2). Similarly, these regulations require that any major source that undergoes a modification leading to a significant emissions increase is also required to utilize BACT. The Clean Air Act makes clear that the BACT requirements extend to "each pollutant subject to regulation" under the Act. 42 USC § 7479(3) and 40 CFR § 52.21(b)(12). In this case, it appears the NMED failed to determine whether the Title V Permit ensures compliance with PSD requirements under the Clean Air Act and PSD regulations in relation to CO_2 emissions from the San Juan Generating Station.

NMED has taken the position that PSD requirements apply to any source that emits more than 250 tons/year of CO_2 and, by extension, any source that emits more than 250 tons/year of methane. In briefs submitted in appeal of the Desert Rock power plant, New Mexico explained:

> The [Clean Air] Act requires EPA to conduct a BACT analysis and set an emission limit for "any regulated pollutant" before issuing the PSD permit. CO_2 is a regulated pollutant under the Act. Failure to conduct modeling and a BACT analysis for CO_2 violates the requirements of the Act and constitutes a clear legal error.

See State of New Mexico's Petition for Review and Supplemental Brief in Re: Desert Rock Energy Company, LLC at 30.[1] To this end, NMED must assess greenhouse gas emissions from the San Juan Generating Station to ensure that the facility is in compliance with PSD and Title V permitting requirements.

The need to assess greenhouse gas emissions in order to ensure the Title V Permit assures compliance with applicable requirements is especially critical in the case of the San Juan Generating Station. The Statement of Basis indicates that a number of permitting actions allowing construction and modifications of the coal-fired boilers have been undertaken since 1973, likely leading to significant increases in CO_2 emissions. There is no indication that NMED assessed greenhouse gas emissions as part of those permitting actions, meaning NMED has no basis to conclude that the San Juan Generating Station is in compliance with applicable requirements, or that the Title V Permit ensures compliance with applicable requirements.

2. Certain Emission Limits Appear Unsupported by any Ambient Air Quality Impacts Analysis as Required by the SIP

[1] This brief is attached to these comments as Exhibit 1.

We are concerned that it appears the applicable NO_x and particulate matter emission limits have not been established based on an analysis of ambient air quality impacts, as required by the New Mexico SIP at NMAC 20.2.72.208.D. This 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[.]" 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 and $PM_{2.5}$ National Ambient Air Quality Standards ("NAAQS"). This is particularly of concern in light of the fact that several permit modification have recently been undertaken, meaning NMED had an affirmative duty to ensure the permit limits would protect the NAAQS in accordance with its SIP.

Finally, are concerned that the Title V Permit does not include emission limits for $PM_{2.5}$, or any condensable particulate matter for that matter. The Title V Permit and Statement of Basis indicates that such limits will be established at a later date, yet if applicable requirements currently require the San Juan Generating Station to comply with $PM_{2.5}$ and condensable particulate matter limits, such limits must be included in the Title V Permit. As a threshold matter, NMED cannot ensure that the San Juan Generating Station will protect the $PM_{2.5}$ NAAQS without incorporating limits on $PM_{2.5}$ emissions and condensable particulate matter.

3. Startup, Shutdown, and Malfunction Exemptions for Opacity Limits are Contrary to Applicable Requirements

The draft Title V Permit at Condition A106.C indicates that opacity limits can be exceeded during startup, shutdown, and malfunction for coal-fired Units 1, 2, 3, and 4. Such an blanket exemption to emission limits is wholly inappropriate and contrary to applicable requirements. Although we understand that such an exemption may be allowed under the San Juan Generating Station Consent Decree, such an exemption is contrary to applicable requirements and therefore cannot be incorporated into this Title V Permit. Furthermore, because the Title V Permit indicates that opacity limits are being used as indicators of particulate emissions in accordance with the compliance assurance monitoring plan, it is further inappropriate to allow exemptions during startup, shutdown, and malfunction. As a practical matter, this means that the Title V Permit likely fails to ensure compliance with applicable particulate matter emission limits.

At a minimum, the Title V Permit fails to incorporate reporting requirements set forth in the Consent Decree to ensure that any startup, shutdown, and malfunction exemption set forth for opacity is not abused. These reporting requirements are set forth under Section V(9)(a)(vi) and require, among other things, that PNM shall notify NMED of any excess opacity reading caused by startup, shutdown, and malfunction by facsimile no later than 24-hours after the start of the next business day and in writing no later than 10 calendar days after the start of the first business

day following the reading. The Title V Permit must include these excess emission monitoring requirements from the Consent Decree.

4. The Title V Permit Fails to Require Prompt Reporting of Deviations

Condition 5.1.2 of the draft 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 Title V regulations.

Prompt reporting is typically defined "in relation to the degree and type of deviation likely to occur and the applicable requirements." 40 CFR § 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 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. It would make sense for NMED to require written reporting of permit deviations related to emission limits at least within two to ten days so that public health and safety can be protected and the applicable requirements can be met. NMED must also ensure that any other deviations are reported promptly in accordance with applicable requirements. We request NMED assess both the compliance history and the public health risks associated with the San Juan Generating Station when determining what constitutes prompt in the context of this Title V Permit.

5. The Draft 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 USC § 7661c(c) and 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 CFR § 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 draft 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, including 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 emission limits. Unfortunately, the prescribed monitoring fails to ensure compliance with these emission limits.

Specifically, the draft Title V Permit provides for monitoring that is too infrequent to ensure continuous compliance with the annual, hourly, pound per million btu emission rates. The Title V Permit only requires once/quarter testing for particulate matter emissions, which can hardly to serve to ensure compliance with the hourly and pound per million btu emission limits. Furthermore, monitoring only once per quarter can hardly serve to provide reliable data representative of the source's compliance status with regards to the annual emission limits.

Furthermore, to the extent the Title V Permit relies on compliance assurance monitoring ("CAM") requirements to meet particulate matter emission limits, it is unclear how meeting CAM will ensure compliance with applicable particulate matter limits. Of particular concern is that there is no support for the proposed opacity trigger points for corrective action and excursions set forth at Table 402.C at Condition A402.C. There is no indication that meeting these trigger points will ensure compliance with the applicable particulate matter limits. We are also concerned that the Title V Permit allows the opacity trigger points to be changed through administrative permit amendment.[2] Administrative permit amendments are only allowed in narrow circumstances, such as where typographical errors are being corrected, where addresses are changed, or where monitoring is to become more frequent. It does not appear that an administrative permit amendment is the proper procedure for altering the opacity trigger points under the CAM requirements in the Title V Permit.

[2] Condition A406.C specifically states that the permittee may use the administrative amendment procedures of 20.2.70.404.A(1)(e) NMAC to change the CAM trigger points in Table 3.3.12. Although there is no Table 3.3.12 in the draft Title V Permit, we assume that this refers to Table 402.C.

Finally, the draft Title V Permit appears to exempt monitoring altogether for particulate matter. Condition B108.D states that monitoring may be foregone altogether for two monitoring periods if 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.

We are also concerned that 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, no the Title V Permit actually sets forth no explicit monitoring of such emissions to ensure compliance. Although the Title V Permit requires a duct leak management program, it is unclear exactly what this program entails and how it will ensure compliance with the emission limits for duct leaks. The Title V Permit 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.

6. Condition B112.E Must be Removed or Revised

Condition B112.E states that "For sources that have submitted air dispersion modeling that demonstrated compliance with federal ambient air quality standards, compliance with the terms and conditions of this permit regarding source emissions and operation shall be deemed in compliance with federal ambient air quality standards (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 inappropriate. 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. Furthermore, because the NAAQS are revised every five years (*see* 42 USC 7409(d)(1)), it is further inappropriate given that permit terms and conditions rarely are revised. Finally, the Title V Permit cites "40 CFR 50 NAAQS" as authority for this Condition. Regulations at 40 CFR § 50 provide no authority for this Condition, meaning it must be removed.

7. The Title V Permit Fails to Ensure Compliance with Section 112(j) of the Clean Air Act

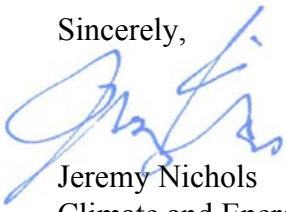
The draft Title V Permit fails to assure compliance with section 112(j), 42 USC § 7412(j), of the Clean Air Act. In particular, the Title V Permit fails to assure compliance with case-by-case maximum achievable control technology ("MACT") requirements for the electric utility steam generating unit ("EGU") in operation at the Cherokee coal-fired power plant.

Indeed, the Title V Permit fails to assure compliance with Section 112(j) in the context of mercury and other HAP emissions from the EGU in operation at the San Juan Generating Station. The facility is a major source of HAPs. On February 8, 2008, the D.C. Circuit Court of Appeals held that the EPA had inappropriately delisted EGUs from the list of sources whose emissions are regulated under Section 112 of the Clean Air Act. In light of this ruling, as well as the EPA's failure to promulgate a MACT standard for EGUs, NMED was required to develop a case-by-case MACT for the EGU in operation at the San Juan Generating Station and to include such case-by-case MACT in the Title V Permit. Such a case-by-case MACT was required to include mercury emission limits, as well as limits for other HAPs regulated under Section 112 of the Clean Air Act, such as hydrofluoric acid, hydrochloric acid, and benzene.

Although it may be argued that Section 112(j) simply does not apply to EGUs on the basis that they may not be subject to the schedule for MACT promulgation set forth under Section 112(e)(1) or (3) due to the fact that they were added as a source category under Section 112 subsequent to the Clean Air Act Amendments of 1990, this argument makes little sense. For one thing, Section 112(e)(1) and (3) specifically reference Section 112(c)(1), which explicitly provides that the list of source categories promulgated under Section 112 may be periodically revised. Section 112(c)(5) of the Clean Air Act sets forth the standards for listing new source categories, as provided for under Section 112(c)(1), and sets forth deadlines for MACT promulgation for new sources. Taken together, Section 112(j)'s reference to Section 112(e)(1) and (3), which in turn references Section 112(c)(1), appears to strongly indicate that Section 112(j) requirements were meant to apply to new source categories listed under Section 112(c)(1) in accordance with Section 112(c)(5). To that end, it would make little sense in light of the purpose of Section 112(j), which is to ensure that all major sources of toxic pollutants meet strict regulatory standards, even when issuance of national MACT standards are delayed, to allow newly added source categories to somehow escape the application of Section 112(j).

Thank you for the opportunity to comment.

Sincerely,



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