

LAW OFFICE OF  
JOHN M. BARTH

AC-14-002-9924

5/22 139 47 AAT

P.O. BOX 409 HYGIENE, COLORADO 80533 (303) 774-8868 BARTHLAWOFFICE@GMAIL.COM

May 16, 2014

CERTIFIED MAIL/RETURN RECEIPT REQUESTED

Gina McCarthy  
Administrator  
U.S. Environmental Protection Agency  
Washington, D.C. 20460

Jared Blumenfeld  
Regional Administrator  
U.S. Environmental Protection Agency, Region 9  
75 Hawthorne Street  
San Francisco, CA 94105

Eric H. Holder, Jr.  
Attorney General of the United States  
950 Pennsylvania Avenue NW  
Washington, DC 20530-0001

Tucson Electric Power  
88 E. Broadway Blvd.  
Tucson, AZ 85701

Arizona Public Service  
P.O. Box 53933 Sta. 3200  
Phoenix, AZ 85072-3933

Public Service Company of New Mexico  
Main Offices  
Albuquerque, NM 87158

Salt River Project  
1521 N. Project Drive  
Tempe, Arizona 85281-1298

El Paso Electric Company  
P.O. Box 982  
El Paso, TX 79960

OFFICE OF THE  
EXECUTIVE SECRETARIAT

2014 MAY 22 PM 1:29

REC

To whom it may concern:

On behalf of San Juan Citizens Alliance ("SJCA"), 1309 E. 3rd Ave. Suite B-3 Durango, Colorado 81302 970-259-3583 and Center for Biological Diversity ("the Center"), 351 California Street, Suite 600, San Francisco, California 94104 (415) 436-9682, I am providing notice, under Section 1365 and 1369(b) of the Clean Water, 33 U.S.C. §§1365,1369(b) and 40 C.F.R. Part 135, of intent to sue either the U.S. Environmental Protection Agency ("EPA") and/or Arizona Public Service ("APS"), Tucson Electric Power, Public Service Company of New Mexico, Salt River Project, and El Paso Electric Company for the legal violations identified herein.

Background

This notice letter pertains to the Four Corners Power Plant ("FCPP") located on the Navajo Nation. Arizona Public Service Company is the operator, and partial owner of, the FCPP. The other partial owners of the FCPP are: Public Service Company of New Mexico

(PNM), Salt River Project (“SRP”), Tucson Electric Power (“TEP”) and El Paso Electric Company. EPA Region 9 is the Clean Water Act permitting authority for the FCPP because it is located on Indian lands. On April 3, 2001 EPA Region 9 issued the most recent NPDES permit for the FCPP, which is NPDES Permit No. NM0000019.<sup>1</sup> The permit became effective on April 7, 2001 and expired on April 6, 2006. To date, EPA has not issued a renewal NPDES permit for the FCPP.

The original application for a renewal permit was submitted in late 2005, followed subsequent updates to the application. Exhibit 1 hereto. On October 30, 2012, EPA Region 9 acknowledged that “much time has elapsed since [APS] submitted the original application for renewal” and EPA requested an updated application. *Id.* EPA indicated at that time that it “plans to draft and issue a renewed NPDES permit for the APS Four Corners Power Plant in 2013.” *Id.* APS submitted a revised permit application on February 15, 2013. Exhibit 2 hereto. On February 19, 2013, EPA stated that it would “draft a proposed renewed NPDES permit within 6 months” after receiving the revised application. Exhibit 3 hereto. It has been over 14 months since EPA received APS’s revised NPDES permit application and EPA has not issued a proposed renewal permit for public comment.

#### Claims against EPA

SJCA and the Center claim that EPA has unreasonably delayed issuing a National Pollutant Elimination System Permit. Alternatively, SJCA and the Center claim that EPA’s attempt to administratively extend Permit NM0000019 beyond the statutorily-limited 5 year term is illegal and renders the permit void by operation of law.

EPA’s failure to timely issue a renewal NPDES permit for the FCPP constitutes an unreasonable delay for rendering its decision under the Administrative Procedures Act, 5 U.S.C. § 558(c). It has been over 8 years since NPDES Permit No. NM0000019 has expired and 13 years since an NPDES permit for the FCPP has been issued by EPA. This delay by EPA is arbitrary, capricious, and/or unreasonable under the law.

Alternatively, Congress has determined that NPDES permits may only be issued “for fixed terms not exceeding five years.” 33 U.S.C. § 1342(b)(1)(B). EPA’s permit program “shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder” including the maximum 5-year term. 33 U.S.C. § 1342(a)(3). It follows that EPA does not have the statutory authority to administratively extend an NPDES permit beyond the statutory 5-year time period. *ONRC Action v. Columbia Plywood, Inc.*, 286 F.3d 1137, 1146 (9<sup>th</sup> Cir. 2002, dissent by Reinhardt). Likewise, a continuing shield under 40 C.F.R. §122.6 may in no event last more than five years, the term of a properly issued renewal permit under 33 U.S.C. §1342(b)(1)(B) and 40 C.F.R. 122.6. Permit #NM0000019 expired on April 6, 2006 and thus may only be administratively extended by EPA through April 6, 2011.

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<sup>1</sup> A copy of the permit can be found at: <http://www.epa.gov/region9/water/npdes/pdf/navajo/AZ-PublicServiceC0-permit.pdf>.

EPA's attempt to administratively extend Permit NM000019 and the continuing shield beyond 5 years is illegal. EPA has refused to act for almost ten years, and by its inaction, attempted to allow APS and the other owners of the FCPP to receive not only the equivalent of one additional NPDES permits (until 2011), but the equivalent of two additional permits. In doing so, EPA has illegally ignored the plain language of Congress limiting the term of NPDES permits to 5 years. Permit NM0000019 became void by operation of law on April 7, 2011.

Claims against APS and the other owners of the FCPP

For the reasons stated above, SJCA and the Center claim that APS and the other owners of the FCPP are illegally discharging pollutants from the FCPP without a valid NPDES permit. As noted above, NPDES Permit No. NM0000019 expired on April 6, 2006. EPA does not have the legal authority to extend a NPDES permit for longer than 5 years. Therefore, APS and the other owners of the FCPP have been illegally discharging pollutants (including but not limited to Total Dissolved solids, selenium, temperature, Total Suspended Solids) from the FCPP (and its pipes, point sources and appurtenances) into navigable waters (including but not limited to No Name Wash, Chaco Wash, the San Juan River, and/or Morgan Lake) without a permit from April 7, 2011 to date. APS and the other owners of the FCPP are jointly and severally liable for civil penalties on each and every day it has discharged pollutants without a permit from April 7, 2011 to date. As noted above, APS and the other owners may not rely on a continuing shield defense because EPA is without authority to administratively extend NPDES Permit No. NM0000019 beyond five years.

Please contact me if you have any questions about this notice letter or if you would like to discuss resolution of this matter without protracted litigation.

Sincerely,

s/ John M. Barth

John M. Barth



cc: Mike Eisenfeld, SJCA  
Michael Saul, The Center for Biological Diversity



EXHIBIT 1



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION IX  
75 Hawthorne Street  
San Francisco, CA 94105

October 30, 2012

Certified Mail No. 7008 3230 0000 3863 1437  
Return Receipt Requested

David Bloomfield, Plant Manager  
Four Corners Power Plant  
P. O. Box 355, MS 4913  
Fruitland, NM 87416

**RE: APS Four Corners Power Plant NPDES Application for Permit Renewal  
(Permit No. NN0000019)**

Dear Mr. Bloomfield

This office timely received the original application for renewal of the above referenced NPDES permit in late 2005 as well as subsequent updates to it, allowing the facility to operate under an administrative extension of the currently expired permit.

Since much time has elapsed since you submitted the original application for renewal, and there have been, or likely will be, significant changes in operations including removal of several units from service and changes in wastewater disposal methods and locations, etc., USEPA recommends that you to submit a fully revised application that reflects current operations, as well as future plans for the next permit cycle, i.e. for the next five years, for the facility.

This office will review the application, as well as other relevant information, and plans to draft and issue a renewed NPDES permit for the APS Four Corners Power Plant in 2013. If you have any questions, please contact Gary Sheth of this office at (415) 972-3516 or at [sheth.gary@epa.gov](mailto:sheth.gary@epa.gov).

Sincerely,

A handwritten signature in black ink that reads "David Smith".

David Smith, Manager  
NPDES Permits Office, WTR-5

cc: Carl Woolfolk, Environmental Section Leader, APS Four Corners Power Plant.  
Patrick Antonio, NNEPA, Water Quality/NPDES Program.





EXHIBIT 2

**Four Corners  
Power Plant**  
P.O. Box 355  
Fruitland, NM 87416

February 15, 2013

**CERTIFIED MAIL**

Mr. David Smith, Manager  
NPDES Permits Office, WTR-5  
USEPA, Region IX  
75 Hawthorne Street  
San Francisco, CA 94105-3901

**RE: NPDES Permit Renewal Application NN0000019; By EPA's Request**

Dear Mr. Smith:

Arizona Public Service Company (APS), Four Corners Steam Electric Station is providing a second renewal application at the request of the Environmental Protection Agency (EPA), because of the time elapsed for the first application renewal. EPA requested a full application to be provided per 40 CFR Part 122 and a discussion of the impacts for the closure of Units 1, 2, and 3. This submittal provides the permit renewal application and information requested by EPA.

The current NPDES permit for the Four Corners Power Plant became effective on April 7, 2001, and has been administratively extended from the expiration date of April 6, 2006. APS is applying for authorization to continue discharging from the following Outfalls until permit renewal is granted:

001-A Cooling Pond Discharge commonly known as Morgan lake Blow Down to unnamed wash tributary to Chaco Wash

Internal Outfalls:

01A-A Condenser Cooling Water Discharge  
01E-A Combined Waste Treatment Pond Discharge  
01B-A Chemical Metal Cleaning Wastewater Discharge

APS has enclosed a copy of the present Four Corners Power Plant Permit, to assure your files are complete. APS has also included as part of the renewal application a discussion of the Impacts when they occur in the future for the closure of Units 1, 2, and 3.





EXHIBIT 3



John Barth <barthlawoffice@gmail.com>

**Re: FOIA Response for EPA-R9-2013-002707; Four Corners Pwr Plant 2 of 8**  
4 messages

Tinger.John@epamail.epa.gov <Tinger.John@epamail.epa.gov>

Tue, Feb 19, 2013 at 12:54 PM

To: John Barth <barthlawoffice@gmail.com>

Cc: Sheth.gary@epa.gov

Hi John , For the four corners npdes permit, we are currently seeking and will, when received, review the revised permit renewal application from APS in order to draft a proposed renewed NPDES permit within 6 months after that. The proposed permit will incorporate information from the permittee about all the relevant process and operational changes that have occurred as well as those likely to occur over the next permit cycle.

- John

John Tinger  
U.S. EPA Region IX  
NPDES Permits Branch  
(415) 972-3518

-----John Barth <barthlawoffice@gmail.com> wrote: -----

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To: John Tinger/R9/USEPA/US@EPA  
From: John Barth <barthlawoffice@gmail.com>  
Date: 02/13/2013 10:03PM  
Cc: meisenfeld@frontier.net  
Subject: Re: FOIA Response for EPA-R9-2013-002707; Four Corners Pwr Plant 2 of 8

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Mr. Tinger

Thank you again for sending me the response to our Four Corners Power Plant FOIA request. Could you please also tell me the status of the renewal of the NPDES permit for the facility. The current permit was issued in 2001 and expired in 2006. Thus, it have been almost 12 years since EPA renewed an NPDES permit for the facility. Please let me know your timeline for issuing a draft renewal permit. Thank you.

John Barth  
Attorney at Law  
P.O. Box 409  
Hygiene, CO 80533  
(303) 774-8868

