



TOHONO O'ODHAM NATION

OFFICE OF THE CHAIRMAN AND VICE CHAIRMAN

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ALL OF US TOGETHER

NED NORRIS JR.
CHAIRMAN

ISIDRO LOPEZ
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March 1, 2010

Jared Blumenfeld, Regional Administrator
U.S. Environmental Protection Agency, Region 9
75 Hawthorne Street
San Francisco, CA 94105-3901

Re: Tohono O'odham Nation Comments on the Advanced Notice of Proposed Rulemaking:
Assessment of Anticipated Visibility Improvements at Surrounding Class I Areas and
Cost Effectiveness of Best Available Retrofit Technology for Four Corners Power Plant
and Navajo Generating Station, 74 Federal Register 44313, August 28, 2009

EPA Docket Number EPA-R09-OAR-2009-0598

Dear Mr. Blumenfeld:

The Tohono O'odham Nation (the "Nation"), a federally recognized Indian tribe, submits these comments on the above named Advanced Notice of Proposed Rulemaking regarding the Navajo Generating Station ("NGS"). Thank you for extending the comment deadline for Arizona Indian tribes to March 1, 2010 in response to the Nation's request in Tohono O'odham Legislative Council Resolution No. 09-644. The Nation has used the additional time to consult with the Environmental Protection Agency ("USEPA") and the Bureau of Reclamation regarding how the technology options proposed for NGS may affect the Nation. The Nation intends to continue those federal agency consultations, and may submit additional comments in response to future actions which the USEPA may take on this matter. The Nation has also met with representatives of the Salt River Project, the Central Arizona Project ("CAP"), the Arizona Department of Water Resources, the Arizona Department of Environmental Quality, Governor Jan Brewer, the Hopi Tribe and the Navajo Nation in its effort to understand the implications of the proposed rulemaking.

The proposed pollution controls at NGS seek to improve the visibility of the air in the Four Corners region. The Nation supports this objective. As an Indian tribe which feels a spiritual connection with the Earth, we value and support efforts to protect the land, air, water, and the Earth's ecological systems for present and future generations. However, after extensive

Jared Blumenfeld, EPA Regional Administrator

March 1, 2010

Page 2

review and discussions with other affected tribes and interested parties, the Nation does not support Selective Catalytic Reduction as the Best Available Retrofit Technology for NGS.

I. The marginal improvements in visibility which Selective Catalytic Reduction offers do not support its selection as the best available retrofit technology for NGS.

The USEPA is considering various combinations of Low NO_x Burners, Separated Overfire Air, and Selective Catalytic Reduction technologies to retrofit the three units at NGS to achieve regional visibility improvements. Use of these retrofit technologies at NGS will come with widely different costs. The CAP has estimated that the Low NO_x Burners and Separated Overfire Air technology will cost \$43 million, and the Selective Catalytic Reduction technology will cost \$700 million in addition to the cost of Low NO_x Burners and Separated Overfire Air.¹ It is this high cost of the Selective Catalytic Reduction which concerns us. The Nation favors pollution control technologies which will provide measurable visibility improvement at a reasonable cost. The CAP has estimated that the use of Selective Catalytic Reduction instead of Low NO_x Burners will improve visibility from 0.47 deciview to 0.70 deciview, a visibility improvement that will not be perceptible to the human eye.²

Because of its high cost and low marginal improvement in visibility, the Selective Catalytic Reduction technology is not an appropriate option as the best available retrofit technology for NGS. In addition, the air quality compliance deadline under the Regional Haze Rule is the year 2064,³ a full 54 years in the future. The Nation believes that the lower cost technologies should be required now, leaving decisions about higher cost technologies until the future when technologies such as Low NO_x Burners have been given a chance to make an impact.

The Nation also supports the positions taken by the Navajo Nation and the Hopi Tribe. Both tribes have taken positions against imposition of Selective Catalytic Reduction retrofit technology because of the impact such a decision would have on tribal revenues and tribal employment. These two tribes are the closest both to the NGS power plant itself and to the Class I scenic areas which the Regional Haze Rule is designed to protect. The Nation believes that great weight should be given to the comments of the two tribes most closely connected to the issue to be addressed by the proposed rulemaking.

II. Impacts on the Nation

In 2004 the Nation achieved a water rights settlement for a portion of its lands. This water rights settlement was developed through thirty years of litigation, negotiation and Congressional legislation. It was a monumental effort. That water settlement allocates 66,000 acre-feet of CAP water per year to the Nation. A key element of the negotiated bargain that the

¹ Central Arizona Project letter to USEPA, December 18, 2009.

² Central Arizona Project powerpoint presentation, November 25, 2009.

³ 40 CFR §51.308

Jared Blumenfeld, EPA Regional Administrator

March 1, 2010

Page 3

Nation made in that water settlement was the promise by the United States to pay for delivery of that CAP water to the Nation through special funding mechanisms. The funding to pay for that delivery of water is now jeopardized by the decisions to be made about retrofit technology at NGS.

Many comments submitted to date point out that the impacts of the retrofit technology selected for NGS will result in impacts within Arizona in areas far removed from the power plant and the coal mines on the Navajo and Hopi reservations. These wide-ranging impacts will occur because NGS was authorized to be and is the power source to pump water through the Central Arizona Project from the Colorado River to central and southern Arizona.⁴

The Arizona Water Settlements Act ("AWSA"), P.L.108-451, created a final settlement of litigation involving the water rights and claims of the Nation and allottees within the Nation that had been pending since 1975. This litigation asserted prior rights of the Nation and allottees to the surface and groundwater resources of the upper Santa Cruz basin in Southern Arizona and sought to enjoin literally hundreds of defendants, including the City of Tucson and other major water users, from using any of these water resources to the detriment of the prior rights of the Nation and the allottees.

Title III of the AWSA, the Southern Arizona Water Rights Settlement Amendments Act of 2004 ("SAWRSA Amendments"), amended an earlier settlement known as the Southern Arizona Water Rights Settlement Act of 1982, P.L.97-293 ("SAWRSA"). The SAWRSA Amendments resulted in the Nation and the allottees releasing their superior rights to local surface water and groundwater in exchange for an entitlement of 66,000 acre-feet per year of CAP water. Unlike the local surface water and groundwater, CAP water must be pumped 2,000 vertical feet through a series of 14 pumping plants along a canal extending 336 miles. Lifting 66,000 acre-feet of water 2,000 vertical feet takes a tremendous amount of electric power, essentially all of which is provided by NGS.

SAWRSA recognized that delivering CAP water to the Nation and allottees would entail significant operation, maintenance and replacement ("OM&R") expenses. Accordingly, Section 313 of SAWRSA, 96 Stat. 1284, established a "Cooperative Fund" to pay these OM&R costs and other expenses. The Cooperative Fund was created through federal and state appropriations and cash payments by major water users in the upper Santa Cruz basin.

Section 310 of the SAWRSA Amendments, 118 Stat.3559, reauthorized the Cooperative Fund. In conjunction with that reauthorization, Section 107 of the AWSA amended provisions of the Lower Colorado River Basin Development Fund ("Development Fund") which was initially authorized in the Colorado River Basin Project Act. While the Development Fund was initially created to effect repayment to the United States by Arizona water users of certain CAP construction costs, Section 107 of the AWSA redirected revenues accruing to the Development

⁴ Colorado River Basin Project Act, P.L.90-537, 43 USC § 1523.

Jared Blumenfeld, EPA Regional Administrator

March 1, 2010

Page 4

Fund to implement final Indian water rights settlements, including the SAWRSA Amendments. As now structured, the first priority for revenues into the Development Fund is the payment of the annual fixed OM&R charges associated with CAP deliveries to Indian Tribes, including the Nation. During calendar year 2010, this fixed OM&R charge is \$69 per acre-foot.

The fixed OM&R is only a portion of the CAP delivery charge. The other component is the variable O&M. This charge consists of the cost of electric power to pump the CAP water from the Colorado River. In 2010, the variable O&M rate is \$49 an acre-foot.

The AWSA directs that the fixed OM&R charges for deliveries to the Nation are payable from the Development Fund. On the other hand, variable O&M is payable from the Nation's Cooperative Fund. Accordingly, any increase in the cost of power generated at NGS will directly impact the Nation's Cooperative Fund and accelerate its depletion. Similarly, abandonment of the NGS due to costs associated with the selected retrofit technology could increase fixed OM&R due to relocation of transmission facilities and similar costs that have yet to be quantified. Any increases in fixed OM&R will prematurely exhaust the Development Fund.

Federal payment for all OM&R costs for 66,000 acre-feet per year was part of the deal that the Nation struck when it approved the water settlement. As stated by Chairwoman Vivian Juan-Saunders in testimony before the House Water and Power Subcommittee of the Committee on Natural Resources on October 2, 2003, "The United States is required to annually deliver 37,800 acre-feet [now 66,000 acre-feet, after the 2004 amendments] of CAP water without the Nation having to pay any OM&R or capital charges" (emphasis added).⁵

The premature exhaustion of either the Cooperative Fund or the Development Fund will result in the Nation and the allottees losing their ability to utilize their CAP entitlements. Once these dedicated funds have been spent, the Nation and allottees are solely responsible for paying these delivery charges, a financial burden neither the Nation nor the allottees can bear.

More importantly, the exhaustion of either Fund will change the deal the Nation and the allottees made with the United States and other parties in agreeing to the SAWRSA Amendments. This result would breach the solemn trust obligation the United States owes the Nation and the allottees to ensure they receive the full value of their CAP entitlements which they accepted in good faith in lieu of their local surface water and groundwater supplies. Such an outcome would be yet another example of the United States and its agencies and departments breaking solemn promises made to Indian Tribes over the decades.

The solemn trust obligation of the United States for Indian water settlements is set forth in the "Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims" developed by the Department of the Interior and adopted to establish the basis for negotiation and settlement of claims concerning Indian

⁵ Statement of Vivian Juan-Saunders, Chairwoman of the Tohono O'odham Nation, House of Representatives, Water and Power Subcommittee, Committee on Natural Resources, October 2, 2003.

Jared Blumenfeld, EPA Regional Administrator
March 1, 2010
Page 5

water resources, effective March 12, 1990. The Preamble states: "Indian water rights are vested property rights for which the United States has a trust responsibility . . ." These criteria and procedures acknowledge that the United States' framework for negotiating water settlements is designed, in part, to ensure that "Indians obtain the ability as part of each settlement to realize value from the confirmed water rights resulting from settlement."⁶

The SAWRSA Amendments give the Nation broad authority to use its CAP entitlement within the three county area covered by the Central Arizona Water Conservation District for a wide range of purposes. This authority was specifically negotiated to assure that the Nation had plenary power over how, when and where to use its full CAP entitlement.

The canons of construction applicable to legislation impacting Indian Tribes are well settled.⁷ These canons require the United States to interpret federal statutes liberally in favor of Indians. Consistent with that long-existing standard, the AWSA must be liberally interpreted to assure that the Nation and the allottees receive the full value associated with their negotiated CAP entitlements. The selection of a retrofit technology for the NGS which will, over time, deprive the Nation and allottees of the bargain they made is completely contrary to any reasonable interpretation of the AWSA and would represent a clear breach by the United States of the solemn trust obligation it owes to the Nation and its members.

III. Environmental Justice

Since 1994 the United States government has sought to consciously evaluate federal actions, policies and programs for any disproportionate impact on minority and low-income populations.⁸ The USEPA is charged with coordinating this "environmental justice" analysis among federal agencies. In the current administration, USEPA Administrator Lisa Jackson has identified maintaining environmental justice as one of her top priorities, as stated below:

With regard to environmental justice, early consideration of the potential effect of a regulation or policy on minority and/or low-income communities is essential to gaining a full understanding of this effect during the regulatory process, determining how to address any effect that may be found, and reaching out to the affected communities in a meaningful way...⁹

⁶ Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims, 55 Federal Register 9223, March 12, 1990.

⁷ County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 269 (1992).

⁸ Executive Order 12898, 59 Federal Register 7629 (February 11, 1994). "To the greatest extent practicable and permitted by law, and consistent with the principles set forth in the report on the National Performance Review, each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States and its territories and possessions, the District of Columbia, the Commonwealth of Puerto Rico, and the Commonwealth of the Mariana Islands."

⁹ Jackson moves to Integrate Key Priorities Into EPA Policy Development, Daily News from InsideEPA.com, November 30, 2009.

Jared Blumenfeld, EPA Regional Administrator

March 1, 2010

Page 6

The Nation, as an Indian tribe with a high rate of poverty and unemployment, is both a minority population and a low-income population. If the USEPA requires NGS to install Selective Catalytic Reduction retrofit technology, thus driving up the cost of electricity produced at NGS, the OM&R cost of delivering CAP water to the Nation will increase significantly. If the high cost of retrofit technology causes NGS to shut down, the surplus power sales revenues to the Development Fund will potentially disappear, causing the Fund to be depleted much earlier than expected. These effects on the Cooperative Fund and the Development Fund will result in the Nation taking on a disproportionate share of the NGS retrofit burden. The environmental justice policy of the United States requires that the retrofit technology decision be made with full knowledge of the disproportionate effect it may have on Indian tribes in general, and on the Nation in particular. The Nation believes that selection of the Selective Catalytic Reduction retrofit technology would be inconsistent with the USEPA's commitment to environmental justice.

IV. Consultation with USEPA and the Bureau of Reclamation

Under Executive Order 13175¹⁰ all federal agencies have a responsibility to consult with Indian Tribes when federal actions or policy development or regulation development will have substantial direct effects on one or more Indian Tribes. President Obama's Memorandum on Tribal Consultation of November 5, 2009, has breathed new life into the consultation policy, requiring "regular and meaningful consultation and collaboration with tribal officials in policy decisions that have tribal implications."¹¹ The Nation appreciates the consultation that the USEPA and the Bureau of Reclamation have provided on this issue thus far. The Nation anticipates that additional consultation will be required, and urges the USEPA to closely coordinate with the Department of the Interior and its Bureau of Indian Affairs and Bureau of Reclamation, and other federal agencies, to fully inform tribes of all potential impacts before developing a proposed rule on retrofit technology for NGS.

V. Conclusion

The Nation supports protection of the air quality at the Class I scenic areas in Arizona, Utah, Colorado and New Mexico. However, imposing expensive retrofit technology on NGS is likely to impact the Nation by depleting the Cooperative Fund and the Development Fund which pay for delivery of the Nation's CAP water. Early depletion of these two Funds will deny the Nation of the benefit of the bargain which it made with the United States and other parties when it agreed to the Southern Arizona Water Rights Settlement Act of 1982 and its 2004 Amendments. Such a breach of an agreement would not be taken lightly by the Nation.

¹⁰ Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, 65 Federal Register 67249, November 6, 2000.

¹¹ Tribal Consultation Memorandum for the Heads of Executive Departments and Agencies, 74 Federal Register 57881, November 5, 2009.

Dr. Ned Norris, Jr.
Chairman

Jared Blumenfeld, EPA Regional Administrator

March 1, 2010

Page 7

The Nation supports lower cost retrofit technologies at NGS, and opposes required retrofit using Selective Catalytic Reduction technology.

Sincerely,



Dr. Ned Norris, Jr.
Chairman

cc: Colleen McKaughan, Associate Director Air Division, Environmental Protection Agency