

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA,)	
)	Case No. 15-cv-537
)	
Plaintiff,)	
)	
v.)	
)	
ARIZONA PUBLIC SERVICE COMPANY,)	COMPLAINT
SOUTHERN CALIFORNIA EDISON COMPANY,)	
EL PASO ELECTRIC COMPANY, PUBLIC)	
SERVICE COMPANY OF NEW MEXICO, SALT)	
RIVER PROJECT AGRICULTURAL)	
IMPROVEMENT AND POWER DISTRICT, and)	
TUCSON ELECTRIC POWER COMPANY,)	
)	
Defendants.)	

The United States of America (“United States”), by authority of the Attorney General of the United States and through the undersigned attorneys, acting at the request of the Administrator of the United States Environmental Protection Agency (“EPA”) alleges the following:

NATURE OF THE ACTION

1. This is a civil action brought by the United States against Arizona Public Service Company, El Paso Electric Company, Public Service Company of New Mexico, Salt River Project Agricultural Improvement and Power District, Tucson Electric Power Company, and Southern California Edison Company (collectively the “Defendants”), pursuant to sections 113(b) and 167 of Clean Air Act (“CAA”), 42 U.S.C. §§ 7413(b) and 7477, seeking injunctive relief and the assessment of civil penalties for violations of the Prevention of Significant

Deterioration (“PSD”) provisions of the Act, 42 U.S.C. §§ 7470-7492, and the regulations promulgated thereunder.

2. Defendants modified, and thereafter operated, certain coal-fired electric generating units at the Four Corners Power Plant located near Shiprock, New Mexico, without first obtaining appropriate permits authorizing the modifications and subsequent operation of the units, and without installing and employing the best available control technology (“BACT”) to control emissions of sulfur dioxide (“SO₂”) and/or nitrogen oxides (“NO_x”), as required by the Act and applicable regulations.

3. The Four Corners Power Plant is located within the boundaries of the Navajo Nation.

4. As a result of the operation of the unlawfully modified coal-fired electricity generating units following these unpermitted modifications, unlawful amounts of SO₂, NO_x, and/or particulate matter (“PM”) pollution each year have been, and still are being, released into the atmosphere.

JURISDICTION AND VENUE

5. This Court has jurisdiction over the subject matter of this action pursuant to Sections 113(b) and 167 of the CAA, 42 U.S.C. §§ 7413(b) and 7477, and pursuant to 28 U.S.C. §§ 1331, 1345, and 1355.

6. Venue is proper in this District pursuant to Section 113(b) of the CAA, 42 U.S.C. § 7413(b), and 28 U.S.C. §§ 1391(b) and 1395(a), because the violations that are the subject of this Complaint occurred and are occurring in the part of the Navajo Nation that is within this District.

NOTICE

7. Notice of the commencement of this action has been given to the State of New Mexico as required under Section 113(b) of the CAA, 42 U.S.C. § 7413(b).

AUTHORITY

8. Authority to bring this action is vested in the Attorney General of the United States by CAA Section 305, 42 U.S.C. § 7605, and pursuant to 28 U.S.C. §§ 516 and 519.

THE DEFENDANTS

9. Defendant Arizona Public Service Company is headquartered in Arizona, and is the operator and a co-owner of the Four Corners Power Plant, located on the Navajo Nation near Shiprock, New Mexico.

10. Defendant El Paso Electric Company is headquartered in Texas, and is a co-owner of the Four Corners Power Plant.

11. Defendant Public Service Company of New Mexico is headquartered in New Mexico, and is a co-owner of the Four Corners Power Plant.

12. Defendant Salt River Project Agricultural Improvement and Power District is a political subdivision of the State of Arizona, and is a co-owner of the Four Corners Power Plant.

13. Defendant Southern California Edison Company is headquartered in California, and was until December 30, 2013, a co-owner of the Four Corners Power Plant.

14. Defendant Tucson Electric Power Company is headquartered in Arizona, and is a co-owner of the Four Corners Power Plant.

15. Each Defendant is a “person” within the meaning of Section 302(e), 42 U.S.C. § 7602(e) of the CAA.

STATUTORY AND REGULATORY BACKGROUND

16. The CAA is designed to protect and enhance the quality of the nation's air and to promote the public health and welfare and the productive capacity of its population. Section 101(b)(1) of the CAA, 42 U.S.C. § 7401(b)(1).

National Ambient Air Quality Standards

17. Section 109 of the CAA, 42 U.S.C. § 7409, requires the Administrator of EPA to promulgate regulations establishing primary and secondary national ambient air quality standards ("NAAQS") for those air pollutants ("criteria pollutants") for which air quality criteria have been issued pursuant to Section 108 of the CAA, 42 U.S.C. § 7408. The primary NAAQS are set to be adequate to protect the public health with an adequate margin of safety, and the secondary NAAQS are set to be adequate to protect the public welfare from any known or anticipated adverse effects associated with the presence of the air pollutant in the ambient air.

18. An area that meets the NAAQS for a particular pollutant is termed an "attainment" area. An area that does not meet the NAAQS is a "nonattainment" area. An area that cannot be classified due to insufficient data is "unclassifiable." At all times relevant to the violations alleged in this action, the Four Corners Power Plant has been located in an area that has been designated as being in attainment with the NAAQS for NO_x and SO₂.

Prevention of Significant Deterioration Requirements

19. Part C of Title I of the CAA, 42 U.S.C. §§ 7470-7492, contains requirements for the prevention of significant deterioration of air quality in those areas designated as either in attainment or unclassifiable for purposes of meeting the NAAQS. These requirements are designed to protect public health and welfare, to assure that economic growth will occur in a manner consistent with the preservation of existing clean air resources, and to assure that any

decision to permit increased air pollution is made only after careful evaluation of all the consequences of such a decision and after adequate opportunities for public participation in the decision making process. These provisions are referred to collectively as the “PSD” program, which is part of the overall New Source Review (“NSR”) program. The NSR program also includes requirements for areas designated as being in nonattainment with the NAAQS standards, known as the Nonattainment NSR program, which is set forth at Part D of the Title I of the Act, 42 U.S.C. §§ 7501-7515.

20. As part of the PSD program, Section 165(a) of the Act, 42 U.S.C. § 7475(a), among other things, prohibits the construction and operation of a “major emitting facility” in an area designated as attainment or unclassifiable unless a permit has been issued that comports with the requirements of Section 165 and the facility is subject to BACT¹ for each pollutant subject to regulation under the Act that is emitted from the facility. Section 169(1) of the CAA, 42 U.S.C. § 7479(1), designates fossil fuel fired steam electric plants of more than two hundred and fifty million British thermal units (“BTUs”) per hour heat input and that emit or have the potential to emit one hundred tons per year or more of any regulated pollutant to be “major emitting facilities.”

21. Section 169(2)(c) of the CAA, 42 U.S.C. § 7479(2)(C), defines “construction” as including “modification” (as defined in Section 111(a) of the CAA). “Modification” is defined in

¹ Section 169(3) of the Act, 42 U.S.C. § 7479(3) defines BACT, in pertinent part, as “an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines if it is achievable for such facility”

Section 111(a) of the CAA, 42 U.S.C. § 7411(a)(4), to be “any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.”

22. Pursuant to Section 110 of the CAA, 42 U.S.C. § 7410, each State must adopt and submit to EPA for approval a State Implementation Plan (“SIP”) that includes, among other things, regulations to prevent the significant deterioration of air quality under Sections 161-165 of the CAA, 42 U.S.C. §§ 7471-7475.

23. If a state does not have a PSD program that has been approved by EPA and incorporated into the SIP, the federal PSD regulations set forth at 40 C.F.R. § 52.21 are incorporated by reference into the SIP. 40 C.F.R. § 52.21(a).

24. The federal PSD regulations apply to Indian lands in the State of New Mexico. *See* 40 C.F.R. § 52.21(a); 45 Fed. Reg. 52,676, 52,741 (Aug. 7, 1980) (first incorporating the provisions of 40 C.F.R. § 52.21 into various SIPs, including New Mexico’s SIP). In addition, the EPA regulations governing the State of New Mexico’s PSD SIP provide that the “requirements of section 160 through 165 of the Clean Air Act are not met for federally designated Indian lands” such as the Navajo Nation, where the Four Corners Power Plant is located. 40 C.F.R. § 52.1634(b). Accordingly, the federal PSD regulations set forth at 40 C.F.R. § 52.21 apply to major emitting facilities in the Navajo Nation such as the Four Corners Power Plant. *See id.*

25. The applicable federal PSD regulations have at all relevant times prohibited construction of a “major modification” without, among other things, obtaining a PSD permit, undergoing a BACT determination, and applying BACT pursuant to such determination for each

relevant pollutant. The definitions contained in the PSD regulations have at all relevant times defined “major modification” to include “any physical change in or change in the method of operation” of a major stationary source that would result in a significant net emissions increase of a regulated pollutant. 40 C.F.R. § 52.21(b)(2)(i). “Significant” means a rate of emissions that would equal or exceed any of the following rates for the following pollutants: NO_x, 40 tons per year; SO₂, 40 tons per year. 40 C.F.R. § 52.21(b)(23)(i). Effective July 15, 2008, a “significant” increase in SO₂ is also regulated as a precursor to fine particulate matter (“PM_{2.5}”). *See* 73 Fed. Reg. 28,321, 28,327, 333-34 (May 16, 2008).

ENFORCEMENT PROVISIONS

26. Section 113(a) of the CAA, 42 U.S.C. § 7413(a), provides that the Administrator of the EPA may bring a civil action in accordance with Section 113(b) of the CAA whenever, on the basis of any information available, the Administrator finds that any person has violated or is in violation of any other requirement or prohibition of, *inter alia*, the PSD requirements of the CAA, or any rule or permit issued thereunder.

27. Section 113(b) of the CAA, 42 U.S.C. § 7413(b), authorizes the Administrator of the EPA to initiate a judicial enforcement action for a permanent or temporary injunction, and/or for a civil penalty of up to \$25,000 per day for each violation occurring before January 31, 1997; \$27,500 per day for each violation occurring on or after January 31, 1997; \$32,500 per day for each violation occurring after March 15, 2004; and \$37,500 per day for each violation occurring after January 12, 2009, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701, against any person whenever such person has violated, or is in violation of, among other things, the requirements or prohibitions described in the preceding paragraph.

28. Section 167 of the CAA, 42 U.S.C. § 7477, authorizes the Administrator of the EPA to initiate an action for injunctive relief as necessary to prevent the construction, modification, or operation of a major emitting facility which does not conform to the PSD requirements in Part C of Title I of the CAA.

29. 40 C.F.R. § 52.23 provides, *inter alia*, that any failure by a person to comply with any provision of 40 C.F.R. Part 52 shall subject such person to an enforcement action pursuant to CAA Section 113, 42 U.S.C. § 7413.

GENERAL ALLEGATIONS

30. At all times pertinent to this civil action, Defendant Arizona Public Service Company has been an owner and operator of the Four Corners Power Plant.

31. At all times pertinent to this civil action, Defendant El Paso Electric Company has been a co-owner of the Four Corners Power Plant.

32. At all times pertinent to this civil action, Defendant Public Service Company of New Mexico has been a co-owner of the Four Corners Power Plant.

33. At all times pertinent to this civil action, Defendant Salt River Project Agricultural Improvement and Power District has been a co-owner of the Four Corners Power Plant.

34. At all times pertinent to this civil action, until December 30, 2013, Defendant Southern California Edison Company was a co-owner of the Four Corners Power Plant.

35. At all times pertinent to this civil action, Defendant Tucson Electric Power Company has been a co-owner of the Four Corners Power Plant.

36. At all times pertinent to this civil action, the Four Corners Power Plant has been a “major emitting facility” and “major stationary source” within the meaning of the CAA and the PSD regulations for SO₂ and NO_x.

FIRST CLAIM FOR RELIEF

(PSD Violations)

37. Paragraphs 1 – 36 are realleged and incorporated herein by reference.

38. Defendants commenced construction of one or more major modifications, as defined in the CAA and implementing regulations, at the Four Corners Power Plant. Such major modifications included one or more physical changes or changes in the method of operation, including, but not necessarily limited to (1) the replacement of the pendant reheater and related upgrades at Unit 4 of the Four Corners Power Plant in 2007, and (2) the replacement of the pendant reheater and related upgrades at Unit 5 of the Four Corners Power Plant in 2008. Such modifications resulted in significant net emissions increases, as defined by the relevant PSD regulations, of NO_x and/or SO₂.

39. Defendants did not comply with the PSD requirements in the CAA and the applicable PSD regulations with respect to the units they modified. Among other things, Defendants failed to obtain PSD permits for the construction and operation of the modified units. Defendants did not undergo a BACT determination, and failed to install and operate BACT for the control of NO_x and SO₂ pursuant to such determination, as required by the CAA and the applicable PSD regulations.

40. Defendants have violated and continue to violate Section 165(a) of the CAA, 42 U.S.C. § 7475(a) and the applicable PSD regulations. Unless restrained by an order of this Court, these and similar violations of the Act will continue.

41. As provided in Section 113(b) of the CAA, 42 U.S.C. § 7413(b), the violations set forth above subject Defendants to injunctive relief and civil penalties of up to \$32,500 for each day of violation occurring on or after March 15, 2004; and \$37,500 for each day of violation occurring on or after January 12, 2009, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701.

PRAYER FOR RELIEF

WHEREFORE, based upon all the allegations set forth above, the United States requests that this Court:

1. Permanently enjoin Defendants from operating the Four Corners Power Plant, except in accordance with the CAA and any applicable regulatory requirements;
2. Order Defendants to apply for NSR permits that conform with the permitting requirements in effect at the time of the permitting action, for each pollutant in violation of the NSR requirements of the CAA;
3. Order Defendants to remedy their past violations by, among other things, requiring Defendants to install and operate BACT at the units subject to this action, for each pollutant in violation of the PSD requirements of the CAA;
4. Order Defendants to achieve, maintain, and demonstrate compliance with the CAA and applicable requirements established thereunder, including the PSD provisions described above;

5. Order Defendants to conduct audits of their operations to determine if any additional modifications have occurred that would require them to meet NSR requirements, and report the results of these audits to the United States;

6. Order Defendants to take other appropriate actions to remedy, mitigate, and offset the harm to the public health and the environment caused by the violations of the CAA alleged above;

7. Assess a civil penalty against Defendants of up to \$32,500 per day for each violation of the Clean Air Act and applicable regulations occurring after March 15, 2004; and \$37,500 per day for each such violation occurring on or after January 12, 2009;

8. Award Plaintiff its costs of this action; and,

9. Grant other such relief as the Court deems just and proper.

Dated: June 24, 2015

Respectfully submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA:

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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

(b) County of Residence of First Listed Plaintiff (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

DEFENDANTS

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, PTF DEF, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Table with 5 columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Contains various legal categories and checkboxes.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District, 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): Brief description of cause:

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
 United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an "X" in one of the six boxes.
 Original Proceedings. (1) Cases which originate in the United States district courts.
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.
- Date and Attorney Signature.** Date and sign the civil cover sheet.