

Opening Statement of Harrison Tsosie
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Committee on Energy and Commerce
Subcommittee on Energy and Power
February 8, 2012

Hearing Titled “The American Energy Initiative: What EPA’s Utility MACT Rule will Cost U.S.
Consumers

The Navajo Nation appreciates the opportunity to present its views on the U.S. EPA Utility MACT rule (also referred to as the Mercury and Air Toxics Standards or MATS rule). The Navajo Nation (“Nation”) is a primarily coal-based resource tribe that is the landlord for two large coal-fired plants and associated mines located directly on its tribal lands. The final MACT Rule directly affects the Nation’s existing natural resource economy and its government revenue sources. Moreover, because of the Nation’s substantial coal reserves, the MACT Rule will have long reaching impacts on the Nation’s sovereignty, including the Nation’s ability to independently develop its natural resource economy and provide economic security for its tribal members.

I. INTRODUCTION

EPA recently issued a final MACT rule on December 21, 2011, that establishes national emission limits and monitoring, reporting, recordkeeping and testing requirements for mercury (“Hg”), non-Hg-metals such as arsenic (As), nickel (Ni), cadmium (Cd), chromium (Cr), lead (Pb) and selenium (Se), and acid gases such as hydrogen chloride (HCl), hydrogen fluoride (HF) and hydrogen cyanide (HCN), at new or existing coal- and oil-fired electric utility generating units (“EGUs”). The compliance deadline is three years from the effective date of the final rule. The final rule impacts three coal-fired power plants, comprised of 12 EGUs, currently located on or near the Navajo Nation, as well as future coal-fired power plants to be located on the Nation. The Navajo Generating Station (“NGS”)¹ and Four Corners Power Plant (“FCPP”)² are both located on Navajo Nation trust land pursuant to lease agreements with the Navajo Nation and burn Navajo coal, as well as employ Navajo tribal members and sustain local economies. San Juan Generating Station (“SJGS”) is located adjacent to the Navajo Nation and is a significant employer of Navajo tribal members and is a major contributor to the local economy.

The Navajo Reservation, or Diné’tah, is the permanent homelands of the Navajo people as reserved in the Treaty of 1868 between the United States and the Navajo Nation. The health and well being of the natural environment and the Navajo people are of utmost importance to the Navajo government. As a tribal nation and a small government landlord of affected EGUs and associated mines, appropriate analysis and consideration in the MACT Rulemaking should have been given to the critical economic interests of the Navajo Nation and the Navajo people in the continued operation of NGS and FCPP, as well as additional potential adverse impacts to the regional economy and Navajo tribal

¹ NGS is comprised of three EGUs with a total generating capacity of 2,250 megawatts.

² FCPP is comprised of five EGUs with a total generating capacity of 2,060 megawatts.

employment for compliance by SJGS with the MACT Rule. So far, EPA has completely failed to meet its consultation obligations to the Navajo Nation and to appropriately analyze the economic impacts to the Nation in promulgating the MACT Rule. The MACT Rule was not tailored so that costs of compliance for plants on the Navajo Nation are achievable within a reasonable timeframe, taking into consideration the simultaneous challenges each of the plants faces under the Regional Haze Rule (“RHR”) in meeting Best Available Retrofit Technology (“BART”), as well as compliance requirements under other Clean Air Act (“CAA”) programs.

In accordance with Section 112(d)(1) of the CAA, the MACT rule did not take into account differences among classes, types, and sizes of sources as well as differences in types/classes of fuels in determining emissions standards for existing sources, and which differ substantially on a regional and site specific basis. Based on the Treaty derived government-to-government relationship of the Navajo Nation and the United States government, and consistent with the right of sovereignty and self-determination of the Navajo Nation, it was appropriate for EPA to consider classifying EGUs on tribal lands in a different subcategory from those on non-Indian lands. Instead, EPA has promulgated a “one size fits all” rule that fails to acknowledge the efficacy of certain technologies based on boiler type and coal qualities or the impracticability of coal blending for many plants.³

II. EPA MUST CONSULT WITH THE NAVAJO NATION AND MUST AMEND ITS REGULATORY IMPACT ANALYSIS (RIA) TO CONSIDER THE ECONOMIC IMPACTS TO THE NAVAJO NATION AND NAVAJO PEOPLE FROM THE FINAL MACT RULEMAKING.

A. There are Substantial Economic Interests of the Navajo Nation and Navajo People at Stake.

The 2009-2010 Comprehensive Economic Development Strategy of the Navajo Nation (“CEDS”) summarizes Navajo Nation economic data including budget figures, primary sources of revenue, major employers, and poverty, employment and unemployment figures.⁴ According to the CEDS, in 2007 the unemployment rate for the Navajo Nation was five times higher than the unemployment rate of the highest ranked U.S. State (Rhode Island at 10%), increasing from 42.16% in 2001 to 50.52% in 2007.⁵

The percentage of Navajo people on the Navajo Nation living below the federal poverty level in 2007 was 36.76%.⁶

Based on the CEDS, the Power Plants are listed among the largest employers within the Nation. During the period covered by the CEDS, FCPP employed 586 people, 72% of whom were members of the Nation, with an annual payroll of \$41 million.⁷ Additionally, the plants are linked inextricably with the coal mines that supply fuel to them and the additional economic benefits to the Navajo Nation

³ For example, SJGS, NGS and FCPP are captive to their associated mines, and cannot blend. *See* EPA Base Case v.4.10, Ch. 9, Tables 9-1 and 9-2, and Sections 9.1.2 and 9.2.9.

⁴ 2009-2010 Comprehensive Economic Development Strategy of the Navajo Nation (“CEDS”), *available at* http://www.navajobusiness.com/pdf/CEDS/CED_NN_Final_09_10.pdf.

⁵ CEDS at 20.

⁶ *Id.* at 23.

⁷ *Id.* at 35.

attributable to the plants include mine employment, payroll and royalty revenue for the Nation. For example, FCPP burns approximately 10 million tons of coal annually from the BHP Navajo Mine.⁸ Revenues to the Nation in the form of royalties and taxes paid by the Navajo Mine into the Navajo Nation's general revenue were \$69 million in 2007 alone.⁹ The Navajo Mine is also a major employer on the Navajo Nation, with 427 employees, 87% of whom are Navajo tribal members. Salary and benefits paid by the Navajo Mine exceeded \$46 million in 2007.¹⁰

A February 2012 Economic Impact Study prepared by the Arizona State University W.P. Carey School of Business concerning the Navajo Generating Station and Kayenta Mine finds the following in this grave economic environment; NGS provides 538 permanent jobs, with 83% of those filled by Navajos. Numerous seasonal employees are also hired by the plant of which large percentages are Native American. The plant's annual payroll is more than \$50.0 million.¹¹ The Peabody Kayenta Mine delivers approximately 8.3 million tons of coal to NGS and employs 320 union represented and 110 non-represented company workers a large percentage of whom are Native American.¹² The general revenues attributable to the Navajo Nation government from FCPP, NGS, and the mines that supply them, make up a third of the general operating budget of the Navajo Nation. In part utilizing its general operating budget, the Navajo Nation itself employs 7,316 individuals, 98% of which are Navajo.¹³

The CEDS provides the following commentary on the impacts of the closure of the Mohave Generating Station on the Navajo Nation:

Because of EPA regulations, the Mohave Generating Station near Laughlin, Nevada, closed its operations. As this power plant was the sole buyer of coal from Black Mesa Mine, it had to close its operation on January 1, 2006. Closure of this mine has had very adverse economic impact not only on the 160 or so people laid-off from the mine, but also on the Navajo Nation coffers.¹⁴

The Nation has already suffered the ripple effects of one EPA rulemaking that, through the imposition of financially untenable emissions controls, resulted in the closure of the Mohave Generating Station, and as a consequence, the closure of the Black Mesa Mine, which until then had supplied 30% of the Nation's general revenues.¹⁵ If FCPP or NGS were to close as the result of the imposition of cost-prohibitive emission controls, the mine supplying coal to that plant would also close. Revenue and job losses of that magnitude would be cataclysmic for the Navajo Nation and its People, and would certainly impugn the very solvency of the Navajo Nation government.

B. EPA Has So Far Failed to Consult with the Navajo Nation As Required by Law.

⁸ *Id.*

⁹ *Id.* at 37.

¹⁰ *Id.*

¹¹ *Id.* at 36.

¹³ *Id.* at 140.

¹⁴ *Id.* at 37.

¹⁵ *Id.*

As recognized in E.O. 13175, “the United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions.”¹⁶ Accordingly, every federal agency “shall have an accountable process to ensure *meaningful and timely* input by tribal officials in the development of regulatory policies that have tribal implications.”¹⁷ As the EPA recognizes, EPA shares “the federal government’s trust responsibility, which derives from the historical relationship between the federal government and Indian tribes”¹⁸ It is therefore extremely surprising that in a February 28, 2011 Memorandum regarding consultation with Indian tribes on the proposed MACT Rule, EPA states the following:

The EPA has concluded that this action may have tribal implications. However, it will neither impose substantial direct compliance costs on tribal governments, nor preempt tribal law. This proposed rule would impose requirements on owners and operators of EGUs. EPA is aware of three coal-fired EGUs located in Indian country. EPA is not aware of any EGUs owned or operated by tribal entities.¹⁹

For purposes of the required tribal consultation, the standard for determining whether a regulation has tribal implications is not whether it “impose[s] substantial *direct compliance costs* on tribal governments,” but rather whether a proposed regulation has “substantial *direct effects* on one or more Indian tribes.”²⁰ As discussed above, the final MACT Rule will have substantial direct effects on the Navajo Nation, which relies on two of the three coal-fired plants identified in the Tribal Outreach Memo, and their supporting mines, for one third of its general operating fund, in addition to the significant Navajo jobs provided by all three plants and their associated mines. Where the Nation’s tribal trust assets are so implicated, EPA has a unique trust responsibility to the Navajo Nation in this circumstance.

Nonetheless, despite recognizing the unique impact of the MACT Rulemaking in Navajo Indian Country,²¹ EPA’s sole “outreach” to the Nation was apparently a generic letter to the Navajo Nation President that was also sent out to 583 other tribes, none of which has coal-fired plants on their lands.²² The EPA can and must do better to engage with the Navajo Nation in meaningful government-to-government consultation in this and other rulemakings, which have the potential to so catastrophically impact the Navajo Nation through EPA regulation.²³

¹⁶E.O. 13175, 65 Fed. Reg. at 67249.

¹⁷ *Id.* at 67250 (emphasis added).

¹⁸ USEPA Tribal Consultation Policy, Section IV.

¹⁹ February 28, 2011 Memorandum, *Summary of Outreach and Consultation with Tribal Governments*, from Laura McKelvey, EPA Community & Tribal Programs Group, to NESHAP (hereinafter “Tribal Outreach Memo”).

²⁰ E.O. 13175 §§ 1(a) and 5(a), 65 Fed. Reg. at 67249-50 (emphasis added). Where there are direct compliance costs placed on tribes by agency regulation, a further process beyond meaningful consultation is generally required. *See id.* at § 5(b).

²¹ Surely EPA knew where the three coal fired power plants in Indian country were located.

²² Tribal Outreach Memo.

²³ It is especially troubling to have to remind USEPA of its consultation obligations to the Nation where three other air-quality rulemakings for the Nation’s power plants are current or pending, where the Nation has had to request consultation on those rulemakings, and where USEPA has just finalized its Tribal Consultation Policy purportedly to better implement E.O. 13175 and its 1984 Indian Policy.

C. EPA Failed to Analyze Impacts to the Navajo Nation as Part of Its Regulatory Impact Analysis.

Moreover, in addition to its failure to meaningfully consult with the Nation, the EPA failed entirely to analyze the potentially catastrophic economic effects of the MACT Rulemaking on the Navajo Nation in its March 2011 Regulatory Impact Analysis of the Proposed Toxics Rule (“RIA”),²⁴ or to consult with the Navajo Nation as a government that would be “uniquely” affected by the proposed rule.²⁵ Although the Navajo Nation is not the “owner” or “operator” of the FCPP or NGS, it is the landlord for those plants, and owns the coal that supplies both plants, and consequently is directly impacted by the MACT Rule’s compliance costs. As a coal fired power plant landlord and coal owner, EPA should have analyzed the effects of compliance on the future solvency of the Navajo Nation government.

Additionally, in the proposed MACT Rule, EPA provides the facile conclusion that “more jobs will be created in the air pollution control technology production field than may be lost as the result of compliance with these proposed rules.”²⁶ This is not an accurate analysis of the potential social costs to the Navajo people, where unemployment runs at over 50%, and where no skilled labor force, or industry, exists in the pollution control technology field. On the contrary, should the final MACT Rule result in closure of NGS, as apparently predicted by the EPA,²⁷ thousands of jobs will be lost, not only in the coal and power industry on the Nation, but in the service support industry and public sector as well. Such devastation to the local Navajo economy would likely force migration of many Navajo workers from their native homeland in search of jobs, a “social cost” never analyzed or considered by EPA in its RIA.²⁸

III. THE MACT RULE FAILS TO PROVIDE AN APPROPRIATE LEVEL OF FLEXIBILITY REDUCE IMPLEMENTATION COSTS

A. The MACT Rule Compliance Timeline Is Overly Stringent and Will Increase the Cost of Compliance and Uncertainty in Continued Operation of EGUs.

Given site specific constraints and the likely inability of the control technology industry to meet industry demands for compliance technology within the statutorily mandated maximum three year period for compliance established pursuant to CAA § 112(i)(3)(A), EPA can reduce the impact of the MACT Rule compliance timeline by seeking the available 2-year Presidential extension.²⁹ Alternatively, EPA could still seek a legislative fix that would allow compliance timelines for the MACT Rule to be incorporated into other rulemakings affecting sources.³⁰

²⁴ See, generally, RIA, Chapters 8-10.

²⁵ See 2 U.S.C. § 1534, E.O. 12866, 58 Fed. Reg. 51735 (Oct. 4, 1993).

²⁶ 76 Fed. Reg. at 24979.

²⁷ RIA, Figure 8-8.

²⁸ Other shortcomings in the RIA are discussed in further detail, *infra*.

²⁹ See CAA § 112(i)(4).

³⁰ See discussion, *infra*.

Pursuant to CAA §112, existing sources are required to comply with the final MACT Rule within 3 years.³¹ However, as EPA itself acknowledges, coming into compliance within the three year statutory period will depend on the control technology industry being able to ramp up quickly.³² Additionally, EPA should consider that existing sources would have to design and procure appropriate control technology to meet the new standards, obtain necessary permits, and schedule outages to install the required technology. Timelines should also take into consideration site-specific constraints, which may include materials and labor costs, pending lease approvals,³³ future CAA rulemaking, changes in business structure, etc. Moreover, this rule is effective nationally. Indeed, EPA estimates that there are approximately 1,400 EGUs located at 550 facilities covered by this proposed MACT Rule.³⁴ Without appropriate extensions, site-specific constraints and demand on the control technology industry have the potential to lead to premature shutdown of the some sources.

B. EPA Must Incorporate All Other Current and Pending Rulemakings into its MACT Rulemaking and Provide Flexibility for Industry to Comply.

EPA acknowledges that EGUs are subject to several rulemaking efforts such as NESHAP standards under § 112, New Source Performance Standards (“NSPS”) under §111, interstate transport of emissions contributing to ozone and PM air quality problems under § 110(a)(2)(D) and greenhouse gases (“GHG”) standards.³⁵ However, all current and pending EPA rulemakings for EGUs should have been considered in establishing a compliance schedule for meeting Hg and other HAP emission limits under this current rulemaking. In the case of FCPP and NGS on the Navajo Nation, costs for compliance and scheduling to meet the MACT Rule requirements will be in addition to the exorbitant costs and other uncertainties faced by FCPP, NGS, and SJGS as they strive to meet BART under the CAA.

NGS and the FCPP are subject to proposed BART determinations under the RHR of the CAA, with the goal of restoration of visibility in mandatory Class I federal areas (“Class I Areas”) (42 USC § 7491(a); 40 CFR §51.308). Upon a final determination for BART, the power plants will have five years to comply with installation of the determined emissions control technology. Compliance costs and compliance scheduling in meeting BART already have the potential to significantly impact the Navajo Nation economy. Including another level of costs for compliance and compliance scheduling to meet the MACT Rule would be in addition to the exorbitant costs faced by the power plants on Navajo Nation to meet BART, and the stringent timeframes for MACT emissions controls. The Navajo Nation economy will be confronted with the recurring threat of severe reductions in the revenue received from the power plants and their supplying mines.

On February 25, 2011, EPA, Region IX, proposed an Alternative Emission Control Strategy (“AECS”), a better-than-BART determination to its previous October 19, 2010 proposal for FCPP. The AECS takes into account the FCPP proposal to shutdown Units 1, 2 and 3. The loss of this total net

³¹ CAA § 112(i)(3)(A).

³² *Id.* at 25055.

³³ Land use approvals on Indian trust lands require significantly longer time periods, as many as several years, and hence add to regulatory uncertainty in the context of ongoing, and multiple, rulemakings.

³⁴ *Id.* at 25088.

³⁵ 76 Fed. Reg. at 25057.

capacity of 560 MW by 2014 would result in 100% control of NO_x, SO₂, PM, Hg and other hazardous pollutants from these EGUs, which would significantly reduce emissions from FCPP.

Currently, EPA, Region IX, has delayed proposing BART for NGS pending crucial consultations with stakeholder tribes. After publication of the Advance Notice of Proposed Rulemaking (“ANPRM”), the Navajo Nation recommended a phased approach to emissions controls for FCPP and NGS, and suggested that the EPA consider the multiple interests at stake, including the significant economic interests of the Navajo Nation. EPA should have explicitly analyzed the impact of the MACT rule in conjunction with these other rulemakings and provide flexibility for compliance scheduling so that FCPP and NGS, upon which the Navajo Nation economy is almost entirely reliant, can continue their operations. The EPA should also analyze the impact of future rulemakings, such as greenhouse gas regulation, which have the potential to insert another layer of compliance costs and compliance scheduling for coal-fired power plants to meet, and may add another layer of severe challenges to the Navajo Nation economy.

IV. THE RIA’S MODELING AND ANALYSIS IS FLAWED AND INCOMPLETE.

The RIA presents the health and welfare benefits, costs, and other impacts of the MACT Rule by 2016.

A. Projected Retirements Are Troubling.

EPA used the Integrated Planning Model (IPM), developed by ICF Consulting, to conduct its analysis. IPM is a dynamic linear programming model that can be used to examine air pollution control policies for SO₂, NO_x, Hg, HCl, and other air pollutants throughout the United States for the entire power system.³⁶ Relative to the base case, the RIA states that 9.9 GW of coal-fired capacity is projected to be uneconomical to maintain by 2015. The RIA further defines uneconomic EGUs as “older, smaller, and less frequently used generating units that are dispersed throughout the country.”³⁷ In fact, the RIA projects that NGS will have to retire by 2015 as a result of the proposed MACT Rule.³⁸ The Navajo Nation is particularly concerned how EPA in its RIA categorizes NGS as “uneconomic”. In the policy case, EPA assumes that most coal fired EGUs will require a fabric filter (baghouse) to meet the total PM standard.³⁹ However, EPA acknowledges that for non-Hg controls, a number of the units that were in the MACT floor for non-Hg HAP metals in fact had electrostatic precipitator (“ESP”) installed.⁴⁰ NGS should not have to install baghouses to comply with the MACT Rule.

In addition to failing to consider the direct economic impacts on the Navajo Nation, the RIA fails to account for the fact that NGS is owned in part by the United States acting through the Bureau of Reclamation (“BOR”). Energy generated by NGS and attributed to BOR’s ownership share is used in multiple ways to subsidize the Central Arizona Project (“CAP”), which delivers Colorado River water for domestic, municipal, industrial and agricultural uses throughout central and southern Arizona. Pursuant to the Arizona Water Settlements Act of 2004, P.L. 108-451, revenues generated by the sale of power

³⁶ RIA at 8-1.

³⁷ RIA at 8-17.

³⁸ RIA at Figure 8-8.

³⁹ RIA at 8-5.

⁴⁰ 76 Fed. Reg. at 25055.

exceeding that needed to deliver CAP water may be used to fund the costs of Indian water rights settlements in Arizona. The Nation is currently engaged in negotiations to settle its water rights claims in the Lower Colorado River Basin, and will look to these funds should it reach a settlement of these water rights claims in the state. Further, any settlement of the Nation's water rights claims in Arizona would likely also involve delivery of CAP water, and the Nation has an interest in keeping energy rates for delivery of CAP water at an economical level. None of these tribal interests, or federal and state interests, were analyzed or even considered in the RIA.

The RIA projection of NGS as uneconomic and retiring based on the MACT Rule is alarming. EPA needs to explain how it predicted the closure of NGS, and if that prediction is correct, EPA must consider the impacts to the Navajo Nation and consult with the Navajo Nation. EPA must also evaluate closure of larger EGUs such as NGS on a regional economic basis rather than on a Nation-wide basis considering only electric reliability and costs to ratepayers.

V. CONCLUSION

The Nation generally supports the goal of the final MACT to reduce HAP emissions from stationary sources. However, as a tribal nation and a small government landlord of affected EGUs and associated mines, appropriate analysis and consideration in the MACT Rule should have been given to the critical economic interests of the Navajo Nation and the Navajo people in the continued operation of power plants in Navajo Indian Country. So far, EPA has failed to meet its consultation obligations to the Navajo Nation and explicitly analyze the economic impacts to the Nation in promulgating the MACT Rule. The MACT Rule must be tailored so that costs of compliance for plants on the Navajo Nation are achievable within a reasonable timeframe, taking into consideration the unique challenges each of the plants faces in meeting BART, other compliance requirements under CAA, as well as compliance costs for future rulemakings.

Based on the government-to-government relationship of the Navajo Nation and the United States government, and consistent with the right of sovereignty and self-determination of the Navajo Nation, EPA should also consider classifying EGUs on tribal lands in a different subcategory from those on non-Indian lands. In any case, EPA should not promulgate a "one size fits all" rule that fails to acknowledge the efficacy of certain technologies based on boiler type and coal qualities or the impracticability of coal blending for many plants. Additionally, given the likelihood that the control technology industry will be unable to meet industry demands for compliance with the MACT Rule within the statutorily mandated three year period, and site specific realities, the EPA should seek to utilize all extension measures available under the CAA. EPA should also consider seeking amendments to the CAA which would allow for extension of the compliance period for the MACT Rule where necessary to coordinate compliance timelines for plants involved in other rulemakings.

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