

CENTER FOR BIOLOGICAL DIVERSITY
DINE CITIZENS AGAINST RUINING OUR ENVIRONMENT
SAN JUAN CITIZENS ALLIANCE

VIA ELECTRONIC and CERTIFIED MAIL: RETURN RECEIPT REQUESTED

October 11, 2010

Ken Salazar, Secretary
U.S. Department of the Interior
1849 C Street NW
Washington, DC 20240

Rowan W. Gould, Director
U.S. Fish and Wildlife Service
1849 C Street NW, Room 3012
Washington DC 20240

Joseph Pizarchik, Director
Office of Surface Mining Reclamation and Enforcement
1951 Constitution Avenue, NW
Washington, DC 20240

RE: SIXTY-DAY NOTICE OF INTENT TO SUE FOR VIOLATIONS OF SECTION 7 AND SECTION 9 OF THE ENDANGERED SPECIES ACT IN CONNECTION WITH THE OFFICE OF SURFACE MINING, RECLAMATION AND ENFORCEMENT'S AUTHORIZATION OF FEDERAL PERMIT NUMBER NM-0003F FOR COAL MINING AT BHP NAVAJO COAL COMPANY'S NAVAJO MINE

Dear Secretary Salazar and Directors Gould and Pizarchik:

By this letter, the undersigned attorneys respectfully notify you that the Center for Biological Diversity ("Center"), Diné Citizens Against Ruining Our Environment ("CARE") and San Juan Citizens Alliance ("Alliance") intend to file a lawsuit in Federal district court for your ongoing violations of sections 7 and 9 of the Endangered Species Act ("ESA" or "Act"), 16 U.S.C. §§ 1536, 1538. The violations alleged herein stem from the Western Region Office of Surface Mining, Reclamation and Enforcement's ("OSM's") failure to insure no jeopardy to threatened and endangered species or destruction or adverse modification of designated critical habitat, through completion of consultation with the U.S. Fish and Wildlife Service ("FWS"), pursuant to section 7(a)(2) of the ESA and its implementing regulations, 16 U.S.C. § 1536(a)(2), 50 C.F.R. Part 400. In particular, OSM has failed to consult with FWS regarding the effects of federally-authorized coal mining activities at BHP Navajo Coal Company's ("BNCC") Navajo Mine (Federal Permit No. NM-003F) located entirely on Navajo Nation lands in Northwestern, New Mexico.

Species and critical habitats that may be affected directly, indirectly, and/or cumulatively

by these actions include: the endangered Colorado pikeminnow (*Ptychocheilus lucius*) and its designated critical habitat; the endangered razorback sucker (*Xyrauchen texanus*) and its designated critical habitat; the endangered southwestern willow flycatcher (*Empidonax traillii extimus*) (flycatcher) and its designated critical habitat; the threatened Mesa Verde cactus (*Sclerocactus mesae-verdae*); the endangered Mancos milkvetch (*Astragalus humillimus*); the endangered Rio Grande silvery minnow (*Hybognathus amarus*) and its designated critical habitat; and, the endangered California condor (*Gymnogyps californianus*)(collectively referred to herein as “Listed Species and Critical Habitats”).

This letter is provided pursuant to the sixty-day notice requirement of the citizen suit provision of the ESA, to the extent such notice is deemed necessary by a court. 16 U.S.C. § 1540(g).

I. INTRODUCTION

The BHP Navajo Mine is located in Fruitland, New Mexico, San Juan County, within the northeastern portion of the Navajo Nation near the San Juan River. The Navajo Mine lease area is divided into five areas (I-V). BHP is currently conducting surface coal mining operations. The mine excavates coal from subbituminous coal beds found within the Fruitland formation formed in Upper Cretaceous sediments. The coal produced at the Navajo Mine is supplied to the adjacent Four Corners Power Plant operated by Arizona Public Service where it is burned to generate electricity. Beginning in 1971, BHP has accepted approximately 1.9 million cubic yard (“mcyd”) of Coal Combustion Waste (“CCW”) from the Four Corners Power Plant annually for us as minefill. CCW consists of fly ash, scrubber sludge and bottom ash.¹ As of 2000, BHP has permanently disposed 50-55 million tons of CCW in the mine.

¹ A 2008 Toxic Release Inventory (“TRI”) Chemical Data Form from BHP Navajo Coal Company and posted on the U.S. Environmental Protection Agency’s website demonstrates that CCW from the power plant contains significant levels of arsenic, mercury, lead and selenium, among others. CCW is permanently dumped into the mine annually for use as “landfill.” See, http://www.epa.gov/cgi-bin/broker?TRI=87416BHPNV16MIL&YEAR=2008&VIEW=TRFA&TRILIB=TRIQ0&sort=_VIEW_&sort_fmt=1&FLD=RELLBY&FLD=TSFDSP&FLD=RE_TOLBY&TAB_RPT=1&SERVICE=oiaa&_PROGRAM=xp_tri.sasmacr.tristart.macro

On or about September 7, 2010, OSM authorized the renewal of Federal Permit No NM-0003F for coal mining operations at the Navajo Mine. The life of the permit renewal is five years. See U.S. Dep't of the Interior, Office of Surface Mining, Reclamation and Enforcement, *Approval of Permit Renewal for BHP Navajo Coal Company's Navajo Mine* (Sept. 7 2010) ("Renewal Authorization")(Ex. A). Prior to authorization of the permit renewal, OSM did not initiate or complete consultation with FWS pursuant to section 7(a)(2) of the ESA, to consider the effects of mining operations at the Navajo Mine on species listed as threatened or endangered pursuant to the Act.

Renewed mining of coal at the Navajo Mine -- and the resulting transport and combustion of coal and disposal of coal combustion wastes as minefill-- will directly, indirectly, and/or cumulatively affect the Listed Species and Critical Habitats. Accordingly, unless and until formal consultation is initiated and completed satisfactorily in accordance with section 7(a)(2) and its implementing regulations, any renewed mining activities are an unlawful taking of threatened and endangered species and are prohibited by sections 7 and 9 of the ESA. 16 U.S.C. §§ 1536(a)(2), 1538(a)(1)(B). These violations are further discussed below.

II. THE ESA REQUIRES OSM TO ENSURE THAT ITS ISSUANCE OF THE PERMIT WILL NOT JEOPARDIZE THE CONTINUED EXISTENCE OF THREATENED AND ENDANGERED SPECIES OR ADVERSELY MODIFY THEIR CRITICAL HABITAT.

Congress enacted the ESA in 1973 to provide for the conservation of endangered and threatened fish, wildlife, and plants and their natural habitats. 16 U.S.C. § 1531, 1532. To accomplish this purpose, the ESA requires the Secretaries of the Interior and Commerce to determine which species should be added to the list of endangered and threatened species, and to designate "critical habitat" for listed species. *Id.* (citing 16 U.S.C. § 1533(a)). The two secretaries generally share responsibilities under the ESA; thus, the Secretary of the Interior acts through the FWS to implement ESA requirements with respect to terrestrial species, and the Secretary of Commerce, through the National Oceanic and Atmospheric Administration's Fisheries Service ("NOAA Fisheries"),² handles responsibilities for marine species. *Id.* at n.32 (citing 16 U.S.C. 1532(15) (definition of "Secretary"); 50 C.F.R. § 402.01(b); ESA Consultation Regulations, 51 Fed. Reg. 19926, 19926 (June 3, 1986)).

² NOAA Fisheries was previously called the National Marine Fisheries Service ("NMFS").

The ESA imposes substantive and procedural obligations on all federal agencies, including OSM, with regard to threatened and endangered species and their critical habitat. *Id.* at 35 (citing 16 U.S.C. §§ 1536(a)(1), (a)(2), 1538(a)(1), (a)(2); 50 C.F.R. § 402.06(a)). Relevant here is section 7(a)(2), which requires that:

Each federal agency shall, in consultation with and with assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species

16 U.S.C. § 1536(a)(2). The definition of agency “action” is “broad and includes ‘the granting of licenses, contracts, leases, easements, rights-of-way, [or] *permits*.’” 50 C.F.R. § 402.02 (emphasis added). Thus, “section 7(a)(2) imposes a substantive duty on federal agencies to ensure that none of their actions is likely to jeopardize listed species or destroy or adversely modify the critical habitat of such species.” *Id.* (citing 51 Fed. Reg. at 19926).

The ESA’s implementing regulations set forth a specific process, fulfillment of which is the only means by which an action agency ensures that its affirmative duties under section 7(a)(2) of the ESA are satisfied. 50 C.F.R. § 402.14(a); *Sierra Club v. Babbitt*, 65 F.3d 1502, 1504-05 (9th Cir. 1995). By this process, each federal agency must review its “actions” at “the earliest possible time” to determine whether any action “may affect” listed species or critical habitat in the “action area.” 50 C.F.R. § 402.14. The “action area” is defined to mean all areas that would be “affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.” 50 C.F.R. § 402.02. The term “may affect” is broadly construed by FWS to include “[a]ny possible effect, whether beneficial, benign, adverse, or of an undetermined character,” and is thus easily triggered. 51 Fed. Reg. at 19926. If a “may affect” determination is made, “consultation” is required.

Consultation is a process between the federal agency proposing to take an action (the “action agency”)—here, OSM—and, for activities affecting terrestrial species, FWS. “Formal consultation” commences with the action agency’s written request for consultation and concludes with FWS’s issuance of a “biological opinion” (“BiOp”). 50 C.F.R. § 402.02. The BiOp issued at the conclusion of formal consultation “states the opinion” of FWS as to whether the federal action is “likely to jeopardize the continued existence of listed species” or “result in the destruction or adverse modification of critical habitat.” 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(c).

Prior to commencing formal consultation, the action agency may prepare a “biological assessment” (“BA”) to “evaluate the potential effects of the action on listed and proposed species and designated and proposed critical habitat” and “determine whether any such species or habitat are likely to be adversely affected by the action.” 50 C.F.R. § 402.12(a). While the action agency is required to use a BA in determining whether to initiate formal consultation, FWS may use the results of a BA in determining whether to request the action agency to initiate formal consultation or in formulating a BiOp. 50 C.F.R. §§ 402.12(k)(1), (2). If a BA concludes that the action is “not likely to adversely affect” a listed species, and FWS concurs in writing that is the end of the “informal consultation” process. 50 C.F.R. § 402.13.

III. OSM HAS FAILED TO SATISFY ITS DUTIES PURSUANT TO SECTION 7(A)(2) OF THE ESA.

A. **Threatened and Endangered Species Will Be Impacted**

Threatened and endangered species are known to occur within the “action area” of the Navajo Mine and “may” be affected directly, indirectly, and/or cumulatively by the activities authorized by OSM’s Navajo Mine permit renewal and its resulting coal mining, transportation and combustion at Four Corners Power Plant and permanent disposal as CCW minefill. At a minimum, such species include the Listed Species and Critical Habitat set forth above. *See, e.g.,* U.S. Dep’t of the Interior, U.S. Fish and Wildlife Service, *Draft Biological Opinion for the Desert Rock Energy Project, U.S. Bureau of Indian Affairs, Gallup, New Mexico* (Oct. 2009) (“Desert Rock BO”)(Ex. B); *see also* 50 C.F.R. § 402.02 (defining “indirect effects” as “those that are caused by the proposed action and are later in time, but still are reasonably certain to occur”).

For example, mercury pollution from the disposal of CCW at the Navajo Mine and combustion of coal from the Navajo Mine at Four Corners Power Plant will indirectly and cumulatively impact endangered Colorado pikeminnow, the razorback sucker and their critical habitat. Both fish would be exposed to mercury emissions from the power plant(s) through surface and groundwater contamination and ambient air exposure, deposition, and runoff into aquatic habitats, and subsequent bioaccumulation through the food chain. *See e.g.* Desert Rock BO at 120. Upon entering the San Juan River ecosystem, microorganisms convert mercury to methylmercury, a highly toxic form of mercury. *Id.* Because methylmercury is stable and

accumulates through the food chain, the highest mercury concentrations are found in top predators, such as the Colorado pikeminnow, causing reproductive impairment, behavioral changes, and brain damage. *Id.* Using a threshold for adverse effects of 0.2 mg/kg WW, 64 percent of Colorado pikeminnow experience reproductive impairment due to mercury presently. *Id.* By 2020, the Desert Rock BO finds that mercury deposition in the San Juan River basin is expected to increase by 35.4 percent without or 35.5 percent with the construction of the proposed Desert Rock Energy Project. *Id.*³ For this reason, FWS’s draft biological opinion predicts that 72 percent of Colorado pikeminnow in the San Juan River basin will experience mercury-induced reproductive impairment by 2020—which “is likely to jeopardize the continued existence of the Colorado pikeminnow.” *Id.* at 120 (emphasis added).

The Desert Rock BO and jeopardy opinion is based on a conservative estimate of environmental release and exposure to mercury. Among other things, the Desert Rock BO does not evaluate or consider the significant contribution of mercury from forty-years of CCW disposal at the Navajo Mine. According to EPA’s TRI, which provides BHP reported data from 2000-2007, thousands of pounds of mercury have been disposed of in the Navajo Mine annually as “minefill.”⁴ None of the CCW is treated prior to disposal and BHP does not use a liner system or any other control mechanism to prevent saturation and migration of the mercury or other constituents into surface or ground waters which flow directly into the San Juan River. OSM’s permitting decision does not evaluate the hydrological impacts of BHP’s nearly half-century of permanent disposal of over a half-billion tons of CCW at the mine and contribution to mercury cycling in the San Juan environment.

In sum, the effects of OSM’s issuance of the Navajo Mine permit which include, but are not limited to, mercury migration and deposition in the San Juan River, “may affect” the survival and recovery of the endangered southwestern Colorado pikeminnow and other threatened and endangered species.

³ By continuing to combust coal from the Navajo Mine, the Four Corners Power Plant emits, and will continue to emit, 600 pounds of mercury annually and its annual deposition of mercury into the San Juan River basin is predicted to remain unchanged through 2020. Desert Rock BO at Appendix A - Figure 1 (Ex. C).

⁴ http://www.epa.gov/cgi-bin/broker?view=YearlyChartFromTrends&tab_rpt=1&TRI=87416BHPNV16MIL&fld=E5&grf_fld=E5&trilib=TRIQ0&Data=TRI&BYear=2000&EYear=2007&state=ALL%20STATES&county=ALL%20COUNTIES&industry=&chemical=N458&_service=oiaa&_program=xp_tri.sasmacr.tristart.macro

B. OSM Failed to Consult With FWS

By its own admission OSM failed to undertake Section 7 consultation for its authorization of the Navajo Mine permit renewal. The agency states:

As required in the regulations at 30 CFR 773.6(3) notice was sent to local government agencies and to all Federal and State agencies with an interest in the proposed action. The Fish and Wildlife Service was notified of the renewal and did not respond to our request for comments. See Tab 7. A Section 7 consultation is not required for the permit renewal because one was done as part of the approval of the 2005 significant revision—Proposal to Mine Area IV North.

Response to San Juan Citizens Alliance Comments, Navajo Mine Permit Renewal, OSM ID No. 9/08/19-03 (Aug. 11, 2009) at 5 (Ex. C). In addition, although Tab 7 includes copies of public notices of BHP's application for Navajo Mine permit renewal published in two regional newspapers, it includes no written request from OSM, in this case the action agency, to FWS to commence "Formal consultation" as is required by 50 C.F.R. § 402.02. See Tab 7: Notifications, Navajo Mine Permit Renewal Decision Document (Ex. D).

OSM's determination that Section 7 consultation was not required for its authorization of the Navajo Mine permit renewal is unlawful. As set forth above, the ESA requires all federal agencies to ensure that their actions—including the issuance of permits—do not jeopardize listed species or destroy or adversely modify critical habitat. Further, OSM was a cooperating agency on the Draft Environmental Impact Statement ("DEIS") for the proposed Desert Rock Energy Project and therefore, upon information and belief, was either aware of, discussed or directly reviewed the Desert Rock BO prior to issuance of OSM's Renewal Authorization. DEIS at 6-9; *accord* Desert Rock BO at 10 (including Navajo Mine in action area).

OSM's determination that no consultation was required is further undermined by the fact that OSM failed disclose (or provide to the public or any agency) any existing, draft or final permit for the Navajo Mine. See Comment Response Document at 12 (Ex. E). The limited availability and absence of circulation of any permitting at the draft permit stage (including information necessary for ESA consultation) prevented FWS from being able to meaningfully understand and participate in the consultation process.

In sum, the indirect and cumulative effects of coal mining at the Navajo Mine pursuant to Federal Permit Number NM-0003F may affect numerous threatened and endangered species and their critical habitat located in the action area. When OSM authorized the renewal of Federal

Permit Number NM-0003F, it failed to commence or complete consultation with FWS pursuant to Section 7 of the ESA, 16 U.S.C. § 1536(a)(2) to ensure that coal mining at Navajo Mine would not jeopardize the continued existence of threatened and endangered species or result in the adverse modification of their critical habitats. OSM therefore violated and remains in violation of Section 7 of the ESA, 16 U.S.C. § 1536(a)(2).

V. VIOLATIONS OF 16 U.S.C. § 1538

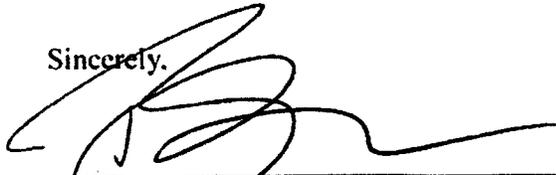
The ESA prohibits any “person” from “taking” threatened and endangered species. 16 U.S.C. § 1538; 50 C.F.R. § 17.31. “Take” is defined to mean to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such conduct.” *Id.* § 1532(19). FWS has defined “harm” to include “significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding or sheltering.” 50 C.F.R. § 222.102. The ESA’s prohibition of the take of listed species is subject only to certain limited exemptions, including through FWS’s development of an “incidental take statement” in a biological opinion and/or issuance of an “incidental take permit” pursuant to Section 10 of the ESA. 16 U.S.C. § 1539(a)(1)(A).

Here, because OSM failed to complete consultation as required by the Section 7 of the ESA in its authorization of the Navajo Mine permit, and because coal mining, transportation and combustion resulting from OSM’s authorization of the Navajo Mine permit renewal will take threatened and endangered species—including, but not limited to, by significant modification or degradation of species habitat and by injury of listed species’ reproductive capacity—OSM’s Renewal Authorization constitutes an ongoing unlawful “take” under section 9 of the ESA.

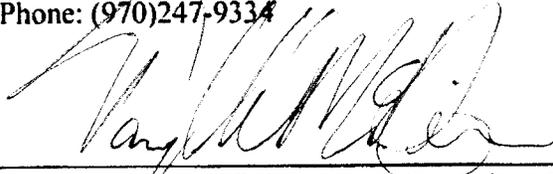
V. CONCLUSION

If you do not act within 60 days to correct these violations of the ESA, the Center, Diné CAR and the Alliance will pursue litigation in federal court against the agencies and officials named in this letter. We will seek injunctive and declaratory relief, and legal fees and costs regarding these violations. If you have any questions, wish to meet to discuss this matter, or feel this notice is in error, please contact us.

Sincerely,



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EXHIBIT LIST

- Ex. A U.S. Dep't of the Interior, Office of Surface Mining, Reclamation and Enforcement, *Approval of Permit Renewal for BHP Navajo Coal Company's Navajo Mine* (Sept. 7 2010)("Renewal Authorization")
- Ex. B U.S. Dep't of the Interior, U.S. Fish and Wildlife Service, *Draft Biological Opinion for the Desert Rock Energy Project, U.S. Bureau of Indian Affairs, Gallup, New Mexico* (Oct. 2009)("Desert Rock BO")
- Ex. C Desert Rock BO at Appendix A - Figure 1
- Ex. D Response to San Juan Citizens Alliance Comments, Navajo Mine Permit Renewal, OSM ID No. 9/08/19-03 (Aug. 11, 2009)
- Ex. E Notifications, Navajo Mine Permit Renewal Decision Document
- Ex. F Comment Response Document