WILDEARTH GUARDIANS
A FORCE FOR NATURE

September 10, 2009

BY CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Robert G. Schemahorn, Jr.
Chairman, Lamar Utilities Board
and
Rick Rigel
Superintendent, Lamar Utilities Board
Lamar Light and Power
200 North Second Street
Lamar, CO 81052

William Leung
General Manager
Arkansas River Power Authority
PO Box 70
Lamar, CO 81052

Dear Messrs. Schemahorn, Rigel, and Leung:

WildEarth Guardians hereby provides notice that construction of the Lamar Light and Power coal-fired electric generating unit (hereafter "Lamar Plant"), located at 100 North Second Street, Lamar, CO 81052, constitutes an ongoing violation of the Clean Air Act. Construction of the Lamar Plant is proceeding in violation of section 112(g) of the Clean Air Act, 42 U.S.C. § 7412(g). In 60 days, or shortly thereafter, we intend to file suit against the Lamar Utilities Board and Lamar Light and Power and the Arkansas River Power Authority, and seek appropriate injunctive relief to remedy this ongoing violation pursuant to the Clean Air Act, 42 U.S.C. § 7604(b)(1). Pursuant to 40 C.F.R. § 54.2(c), this notice is being served via certified mail to the owner or managing agent of the Lamar Plant.

The Lamar Utilities Board and Lamar Light and Power have commenced construction of the Lamar Plant without first securing the required regulatory determination that the unit will operate at Maximum Achievable Control Technology ("MACT") levels for the hazardous air pollutants ("HAPs") it will emit. The HAPs that the Lamar Plant will emit include mercury, a potent neurotoxin, selenium compounds, cyanide compounds, formaldehyde, hydrochloric acid, hydrogen fluoride, sulfuric acid, benzene, and thallium compounds . The Lamar Plant is an electric utility steam generating unit ("EGU") and a major source of HAPs pursuant to section

112 of the Clean Air Act. Not only does the facility release more than 10 tons/year of hydrochloric acid, a listed HAP, the facility is a fossil fuel fired combustion unit of more than 25 megawatts that produces electricity for sale.

Section 112(g)(2)(B) of the Clean Air Act states:

> After the effective date of a permit program under subchapter V of this chapter in any State, no person may construct or reconstruct any major source of hazardous air pollutants, unless the Administrator (or the State) determines that the maximum achievable control technology emission limitation under this section for new sources will be met. Such determination shall be made on a case-by-case basis where no applicable emission limitations have been established by the Administrator.

42 U.S.C. § 7412(g)(2)(B). These case-by-case MACT requirements are implemented through Clean Air Act regulations, which provide that:

> After the effective date of section 112(g)(2)(B) (as defined in § 63.41) in a State or local jurisdiction and the effective date of the title V permit program applicable to that State or local jurisdiction, no person may begin actual construction or reconstruction of a major source of HAP in such State or local jurisdiction unless…[t]he permitting authority has made a final and effective case-by-case determination pursuant to the provisions of § 63.43 such that emissions from the constructed or reconstructed major source will be controlled to a level no less stringent than the maximum achievable control technology emission limitation for new sources.

40 C.F.R. § 63.42(c)(2). The date upon which Colorado's title V permit program was approved was August 16, 2000 (*see* 65 Fed. Reg. 49,919), meaning that major sources of HAPs subsequently constructed in Colorado are subject to the case-by-case MACT requirements.

In 2000, the U.S. Environmental Protection Agency ("EPA") added coal-fired electric generating units ("EGUs") among the sources listed under section 112(c) of the Clean Air Act and subject to MACT emission standards under section 112. *See* Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units, 65 Fed. Reg. 79,825 (Dec. 20, 2000). The EPA explained:

> It is appropriate to regulate HAP emissions from coal- and oil-fired electric utility steam generating units under section 112 of the CAA [Clean Air Act] because…electric utility steam generating units are the largest domestic source of mercury emissions, and mercury in the environment presents significant hazards to public health and the environment….. It is necessary to regulate HAP emissions from coal- and oil-fired electric utility steam generating units under section 112 of the CAA because the implementation of other requirements under the CAA will not adequately address the serious public health and environmental hazards arising from such emissions…and which section 112 is intended to address. Therefore, the EPA is adding coal- and oil-fired electric utility steam generating units to the list of source categories under section 112(c) of the CAA.

In addition to mercury, other HAPs listed under section 112 of the Clean Air Act that may be released by coal-fired electric generating units include hydrochloric acid, hydrogen fluoride, antimony, arsenic, beryllium, cadmium, chromium, cobalt, cyanide, dioxin, lead, manganese, mercury, nickel, selenium, sulfuric acid, benzene, and polycyclic organic matter.

Despite its December 2000 finding, EPA changed course and instead attempted to remove EGUs, or delist, them from the list of HAP sources under 112(c)(1) and instead regulate only some HAP emissions under the Clean Air Mercury Rule.

This attempted delisting of EGUs by EPA occurred through a process not authorized by Congress and was subsequently challenged. On February 8, 2008, the U.S. Court of Appeals for the District of Columbia, in *State of New Jersey v. U.S. Environmental Protection Agency*, D.C. Cir. Case No. 05-1162, declared EPA's attempted delisting unlawful and void. The D.C. Circuit's decision to vacate the U.S. EPA's action made clear that EGUs, such as the Lamar Plant, remain listed as a source category under section 112(c) of the Clean Air Act and therefore subject to MACT standards. Controlling case law provides that vacatur of unlawful agency action renders that action a nullity. In other words, the agency action lacks any legal significance and is treated as if it never happened. *See*, e.g. *Environmental Defense v. Leavitt*, 329 F. Supp. 2d 55, 64 (D.D.C. 2004) ("When a court vacates an agency's rules, the vacatur restores the status quo before the invalid rule took effect."); *Environmental Defense v. EPA*, 489 F.3d, 1320, 1325 (D.C. Cir. 2007) (while remanded regulations remain in effect, vacated regulations do not); *Campanale & Sons, Inc. v. Evans*, 311 F. 3d 109, 127 (1st Cir. 2002) (option of vacating a regulation described as "overturning it in its entirety").

With respect to regulating HAP emissions from coal-fired power plants, the D.C. Circuit's vacatur of EPA's Delisting Rule means that EPA never lawfully removed power plants from the HAP source category list under section 112(c). As the D.C. Circuit made clear, "EGUs remain listed under section 112" because "EPA's purported removal of EGUs from section 112(c)(1) list... violated the CAA's plain text and must be rejected." *New Jersey*, slip op. at 17 and 14. As a result, the statutory requirements at 112(c) apply and have applied continuously since December 2000 to coal-fired EGUs, including the Lamar Plant.

Furthermore, because EPA has not promulgated MACT standards for EGUs pursuant to section 112 of the Clean Air Act, the case-by-case MACT requirements of section 112(g) now apply to EGUs for which construction commenced subsequent to December 2000. In the case of the Lamar Plant, construction commenced subsequent to December 2000 and therefore, the Lamar Utilities Board and Lamar Light and Power and Arkansas River Power Authority were required to comply with case-by-case MACT requirements under section 112(g) of the Clean Air Act and 40 CFR § 63.42(c). Indeed, in a letter dated July 6, 2009 to Mr. William Leung, the EPA stated:

> This letter is to notify you that coal- and oil-fired EGUs that began actual construction or reconstruction after December 15, 2000, including those that began actual construction between the March 29, 2005 publication of the Section 112(n) Revision Rule and the March 14, 2008 issuance of the mandate vacating that rule, and relied Section 112(g). You must contact the appropriate permitting authority as expeditiously as possible to

obtain a new source maximum achievable control technology (MACT) determination and a schedule for coming into compliance with the requirements of Section 112(g).

See, Exhibit 1 to this notice, U.S. EPA letter to William Leung, Arkansas River Power Authority in re: "Maximum Achievable Control Technology Requirements for Arkansas River Power Authority Project/Lamar Light and Power" (July 6, 2009).

Pursuant to the Clean Air Act, 42 U.S.C. § 7604(a)(1)(2000), citizens are entitled to bring suit to enjoin violations of an "emission standard or limitation", and to seek civil penalties for such violations. An "emission standard or limitation" is defined as: (1) "a schedule or timetable of compliance, emission limitation, standard of performance or emissions standard[.]" 42 U.S.C. §§ 7604(f)(1). Section 112(g) constitutes a "a schedule or timetable of compliance, emission limitation, standard of performance or emissions standard." Accordingly, WildEarth Guardians will bring suit to enjoin your ongoing violation of section 112(g) of the Clean Air Act and associated regulations, seek civil penalties for this violation, and recover attorneys' fees and costs, and any other appropriate relief.

WildEarth Guardians' contact information is listed below. If you have questions regarding the allegations, believe that any of the above information is in error, or would like to discuss a settlement of this matter prior to the initiation of litigation, please contact me at (303) 573-4898 x 1303.

Sincerely,

Jeremy Nichols
Climate and Energy Program Director
WildEarth Guardians
1536 Wynkoop, Suite 301
Denver, CO 80202
(303) 573-4898 x 1303
jnichols@wildearthguardians.org

cc:

Lisa Jackson
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennyslvania Ave.
Washington, D.C. 20460

Carol Rushin
Acting Regional Administrator
U.S. Environmental Protection Agency
EPA Region 8
1595 Wynkoop St
Denver, CO 80202-1129

Bill Ritter
Governor State of Colorado

James B. Martin
Director

136 State Capitol
Denver, CO 80203-1792

Colorado Department of Public Health
and Environment
4300 Cherry Creek Drive South
Denver, CO 80246-1530