IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 09-CV-01576-WDM-KLM

WILDEARTH GUARDIANS,

Plaintiff,

v.

PUBLIC SERVICE COMPANY OF COLORADO, d/b/a XCEL ENERGY,

Defendant.

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

WildEarth Guardians respectfully moves this Court to enjoin Public Service Company of Colorado d/b/a Xcel Energy ("Xcel") from constructing, modifying, or operating Comanche Unit 3 in violation of Section 112(g) of the Clean Air Act. 42 U.S.C. § 7412(g). Section 112(g) imposes stringent limits on the amount of Hazardous Air Pollutants ("HAPs") that coal-fired power plants, such as Comanche Unit 3, can emit. Id. Without a Maximum Achievable Control Technology ("MACT") determination, there is no assurance that Xcel is employing the best control technologies to reduce Comanche Unit 3's emission of HAPs to the extent required by the Clean Air Act. Despite failing to obtain a final MACT determination, Xcel plans to imminently begin operations at Comanche Unit 3. This failure will result in excessive emission of HAPs, which pose serious and irreparable harm to human health and the environment.

This preliminary injunction should be granted for the following three reasons. First, Xcel is in clear violation of 112(g) by failing to obtain a valid MACT determination for Comanche Unit 3 prior to construction. Both EPA and Colorado have directly notified Xcel of their obligation to comply with Section 112(g). Despite numerous notifications, and ample opportunity, Xcel still lacks a valid MACT determination, will complete construction this month, and begin operation in November.

Second, operation of Comanche Unit 3 without a final MACT determination poses a serious threat to public health and the environment. Comanche Unit 3, as currently permitted, will annually emit 131 pounds of mercury, a potent neurotoxin. Mercury contamination already negatively impacts the people of Colorado: 20% of the state's waters are so contaminated with mercury that fish caught in these bodies of water are unsafe for human consumption. In addition to harming the public health, operation of Comanche Unit 3 without a MACT determination will deprive WildEarth Guardians of its right to comment on the sufficiency of the MACT determination during the administrative review process.

Third, the harm to public health and the environment outweighs any burden that Xcel may experience as the result of an injunction. WildEarth Guardians acknowledges that Xcel will incur some economic burden as a result of this injunction. However, the burden on Xcel should be viewed in light of the ample notice and opportunity afforded Xcel to obtain a MACT determination. This burden should also be considered in light of Congressional intent and EPA expertise in enacting stringent emissions limitations for sources of HAPs.

FACTUAL AND LEGAL BACKGROUND

A. Mercury emissions from coal-fired EGUs pose a serious threat to public health and the environment.

Coal-fired electric generating units ("EGUs") are the largest source of anthropogenic mercury emissions in the United States, emitting over 48 tons of mercury each year.[1] (Nichols Decl. ¶ 8.) The EPA has linked mercury exposure to a multitude of adverse health effects. While the nervous system and the kidney are most susceptible to mercury poisoning, it also affects the respiratory, cardiovascular, gastrointestinal, hematologic, immune, and reproductive systems. U.S. EPA, Mercury Study Report to Congress (1997), ES-3, available at http://www.epa.gov/ttn/oarpg/t3/reports/volume5.pdf. An EPA study concluded that, "[n]eurotoxicity is the health effect of greatest concern with methylmercury exposure . . . Dietary methylmercury is almost completely absorbed into the blood and distributed to all tissues including the brain…" Regulatory Finding on the Emissions of Hazardous Air Pollutants From Electric Utility Steam Generating Units, 65 Fed. Reg. 79,825, 79,829 (Dec. 20, 2000).

Developing fetuses and very young children are especially sensitive to the effects of methylmercury and are particularly at risk for mercury poisoning. (Nichols Decl. ¶ 15.) Methylmercury "readily passes through the placenta to the fetus and the fetal brain." 65 Fed. Reg. 79,829. Fetuses, breast-fed infants, and children exposed to methylmercury when they or

[1] Other HAPs emitted by power plants include arsenic, dioxins, acid gases, selenium, lead, and other heavy metals, each of which have been shown to cause serious adverse health effects. (Nichols Decl. ¶ 13.)

their mothers are exposed to methylmercury are at particular risk for developing permanent neurological disorders including mental retardation, vision loss, hearing loss, delayed developmental milestones, attention deficits, memory problems, auditory processing problems, language difficulties, ataxia, and, in extreme cases, seizures. Id.

Mercury seriously threatens public health through its interaction with the environment. Once emitted from EGUs, mercury deposits onto bodies of water (such as oceans, lakes, reservoirs, rivers and streams) and enters the ecosystem. (Nichols Decl. ¶ 15.) Mercury does not degrade, meaning that the environmental and public health effects of emissions from EGUs is long-lasting and persistent. (Id.) Once mercury is deposited in waters, the highly toxic methylmercury is formed. (Id.) Methylmercury accumulates in the tissues of organisms in the affected ecosystem, concentrating in the tissues of more complex animals. (Id.)

Humans are primarily exposed to mercury by eating fish with elevated mercury concentrations. (Id.) Mercury emissions from coal-fired power plants contribute directly to high levels of mercury in fish. 65 Fed. Reg. at 79,829. "Most of the mercury currently entering U.S. water bodies and contaminating fish is the result of air emissions which, following atmospheric transport, deposit onto watersheds or directly to water bodies." Id. at 79,827.

Consumption of fish contaminated with mercury is a growing and serious problem. A recent comprehensive study of rivers and lakes by the U.S. Geological Survey revealed that every fish sampled contained some level of mercury in their tissues. (Nichols Decl. ¶ 16.) Over a quarter of the fish sampled had mercury concentrations that exceeded EPA human health criteria. (Id.) Of Colorado's water bodies, 20% contain fish contaminated with so much mercury that the fish are not safe to eat. (Id. at ¶ 17.) Colorado has issued a fish consumption advisory for the Teller Reservoir near Pueblo. (Id.)

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B. EGUs are regulated under Section 112 of the Clean Air Act as a major source of HAPs.

Section 112 of the Clean Air Act controls the emission of mercury and other HAPs by regulating sources that emit these HAPs. 42 U.S.C. § 7412. Section 112(b) lists over 188 distinct air pollutants including mercury compounds, hydrofluoric acid and hydrochloric acid. § 7412(b). Any construction, reconstruction, or modification of a regulated source category of HAPs is strictly prohibited until an approved state agency determines that such source meets the MACT emission limitation. § 7412(g). In cases where the Administrator has failed to establish an emission standard for a particular source category, Section 112(g)(2) mandates that an owner/operator obtain a case-by-case determination from the Administrator or State in order to construct or modify a major source of HAPs. See § 7412(g)(2); 40 C.F.R. § 63.43(b). Such dehtermination "shall not be less stringent than the emission control which is achieved in practice by the best controlled similar sources . . . ." 40 C.F.R. § 63.43(d)(1).

In 2000, EPA placed coal-fired EGUs on the list of sources subject to regulation under Section 112. 65 Fed. Reg. at 79,829. EPA determined that regulation of EGUs, the largest anthropogenic source of mercury in the United States, was "appropriate and necessary" because "mercury emissions from [EGUs] are considered to be a threat to public health and the environment." Id. at 79,827.

In 2005, despite acknowledging mercury as a HAP of great concern to public health, EPA, now under a new administration, purported to delist EGUs from regulation under Section 112. 70 Fed. Reg. 15,994 (March 29, 2005). However, EPA's delisting rule failed to follow the proper procedures for delisting sources provided for in Section 112(c), which led a coalition of states and various environmental organizations to immediately challenge EPA's action. See New Jersey v. EPA, 517 F.3d 574 (D.C. Cir. 2008). In February 2008, the D.C. Circuit court appropriately vacated the delisting rule. Id. The court found that EPA had deployed the "logic of the Queen of Hearts" by substituting its own desires for the plain text of Section 112(c). Id. at 582. In addition to vacating the delisting rule, the court held that EGUs remained listed under

Section 112 as a source of HAPs. Id. at 583. Therefore, owners/operators of EGUs were always prohibited from constructing or modifying a major source of HAPs without first obtaining a final MACT determination from the appropriate permitting authority.

An important question arose in the wake of New Jersey: whether EGUs that began construction after the delisting rule in 2005, but prior to the vacatur in 2008, were subject to the MACT requirements of Section 112(g). EPA carefully considered this question, and then in a memo issued in January 2009, EPA answered this question. (See Defendant's Motion to Take Judicial Notice of Administrative and Judicial Records (Docket No. 9) [hereinafter Def.'s Mot. for Jud. Notice], Ex. L.) In that memo, EPA specifically determined that Section 112(g) applies to those EGUs that began construction in the three-year period during which EPA purported to delist EGUs. Id. EPA also urged the appropriate permitting authorities to begin case-by-case MACT determinations "without delay" for those EGUs. (Id.) The State of Colorado has also notified Xcel of its obligation to obtain a MACT determination. (Def.'s Mot. for Jud. Notice, Ex. M). In July 2009, EPA warned Xcel of a possible enforcement action if Xcel failed to obtain a final MACT determination for Comanche Unit 3. (Def.'s Mot. for Jud. Notice, Ex. N.)

C. Xcel has not obtained a final MACT determination for Comanche Unit 3, the largest coal-fired power plant in Colorado.

When construction is completed, Comanche Unit 3 will be the largest coal-fired power plant in Colorado. (Nichols Decl. ¶ 7.) Comanche Unit 3 will emit over 25 tons of a combination of HAPs (Id. at ¶ 13.), including 131 pounds of mercury each year. (Id. at ¶ 20.) In addition to Comanche Unit 3, Pueblo is home to a number of other mercury-emitting industries, including coal-fired power plants, cement plants and a steel mill. (Rickman Decl. ¶ 20.) The steel mill is the largest source of anthropogenic mercury in the state. (Id.)

A recent study of mercury control technologies demonstrates that cost-effective measures can drastically reduce mercury emissions from uncontrolled levels, up to 95%. (Nichols Decl. ¶ 24.) These control technologies were implemented at EGUs that were already operational. (Id.)

Despite the availability of cost-effective control technologies that may substantially reduce Comanche Unit 3's emission of mercury from 131 pounds annually, Xcel has not received a final MACT determination for Comanche Unit 3 that assures that the facility is using control technology not less stringent than the best controlled similar EGUs. (Def. Mem. Br. 2.)

According to an October 8, 2009 letter issued by Colorado's Air Pollution Control Division ("APCD"), Xcel has submitted a MACT application to APCD, and the agency is currently in the process of reviewing that application. (Def.'s Reply Brief, Ex. S.) APCD acknowledges it will not issue a final MACT determination until February 2010 at the earliest.[2] (See id.) However, it could take much longer. As James Martin, the Director of the Colorado Department of Public Health and the Environment ("CDPHE"), acknowledged, "we didn't know a lot about mercury capture four years ago, when Comanche 3's permit was written…we know a lot more now, and have to go back and review the permit, and maybe bump up the requirements." (Nichols Decl. ¶ 24.) Yet, Xcel plans to imminently begin startup procedures for Comanche Unit 3 in November 2009, and become commercially operational in January 2010. (Coleman Decl. ¶ 3.) Under this timeline, Comanche Unit 3 will be operational before the public can fully participate in the MACT administrative review process, and before a final determination is issued. (Nichols Decl. ¶ 23.)

PRELIMINARY INJUNCTION STANDARD

The Tenth Circuit analyzes four factors when determining whether to issue a preliminary injunction. In order for a court to issue a preliminary injunction, the moving party must demonstrate:

> (1) a likelihood of success on the merits; (2) a likelihood that the movant will suffer irreparable harm in the event that injunctive relief is not granted; (3) that the balance of equities tips in the movant's favor; and (4) that the injunction is in the public interest.

[2] Assuming an initial determination issued within 60 days from the date of the letter, the public comment period lasts only 30 days, and a final determination is issued immediately after the public comment period.

Attorney General of Oklahoma v. Tyson Foods, Inc., 565 F.3d 769, 776 (10th Cir. 2009). The power to grant injunctive relief "rests in the sound discretion of the court." Forest Guardians v. Babbitt, 174 F.3d 1178, 1187 (10th Cir. 1998).

ARGUMENT

A. WildEarth Guardians has a strong likelihood of success on the merits.

This suit is brought pursuant to the citizen suit provision of the Clean Air Act. 42 U.S.C § 7604(a). That provision allows citizens to act as private attorney generals and bring suit against any person "alleged to have violated or to be in violation of an emissions standard or limitation…." Id. An "emissions limitation" includes the MACT requirements of Section 112(g). See id. Therefore, the requirement that WildEarth Guardians demonstrate a likelihood of success on the merits is satisfied by a showing that Xcel is in violation of Section 112(g) of the Clean Air Act.

1. *The plain language of Section 112(g) requires Xcel to obtain a final MACT determination for Comanche Unit 3.*

In December 2000, EPA added EGUs to the Section 112(c) list of source categories subject to Section 112 requirements, including the Section 112(g) prohibition on construction or modification without a MACT determination. 65 Fed. Reg. at 79,830-31. Although EPA purported to remove EGUs from the Section 112(c) list in 2005, it never lawfully did so. In New Jersey, the D.C. Circuit court rejected EPA's attempted delisting and "vacate[d] the Delisting Rule" based on "the plain text and structure of section 112." New Jersey, 517 F.3d at 583. The D.C. Circuit expressly held that "EGUs remain listed under section 112." Id.

Therefore, since December 2000 when EPA first listed them, EGUs have been subject to the requirements of Section 112. Nat'l Fuel Gas Supply Co. v. Fed. Energy Reg. Comm'n, 59 F.3d 1281, 1287 (D.C. Cir. 1995); see Harper v. Va. Dep't of Taxation, 509 U.S. 86, 97 (1993) (holding that Supreme Court rulings "must be given full

retroactive effect . . . as to all events, regardless of whether such events predate or postdate our announcement of the rule"). Xcel cites to Harper for the narrow proposition that judicial decisions can only apply to court cases "still open on direct review." (Def. Reply Br. 10.) When read in whole, Harper states:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review *and as to all events, regardless of whether such events predate or postdate our announcement of the rule*.

Id.(emphasis added) Given this language, Harper envisions more broad retroactive application of court decisions. In this case, however, it does not matter how Harper ultimately read, because no law is being applied retroactively. EGUs were listed under Section 112 in 2000, and New Jersey simply affirmed that they remain so.[3]

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[3] Moreover, as developed more expansively in Plaintiff's Response to Xcel's Motion to Dismiss, Xcel is not being unfairly subjected to a retroactive law in any case. Requiring Xcel to comply with Section 112(g) does not contravene the core principles of due process because Xcel had fair notice, Xcel unreasonably relied upon an unlawful agency regulation, and Xcel's burden in comply with section 112(g) is secondary to ensuring public health.

First, fair notice is given when a "person of reasonable intelligence [has] a reasonable opportunity to know what is prohibited so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Xcel has been notified several times of its obligation to obtain a valid MACT determination: 1) when EGUs were initially delisted, 2) when New Jersey vacated EPA's improper delisting of EGUs, 3) when Xcel was directly notified by the EPA, and 4) when Xcel was directly notified by APCD.

Second, Xcel relied on an unlawful agency regulation that was subsequently vacated. Other jurisdictions have tackled the reliance argument, and found it unpersuasive. S. Alliance for Clean Energy v. Duke Energy Carolinas, LLC, No. 1:08CV318, 2008 WL 5110894, at *10 (W.D.N.C. Dec. 2 2008). The court in the S. Alliance case concluded that, "§ 112(g)(2)(B) and 40 C.F.R. § 63.40(b) were in effect at the time Duke began its construction of Cliffside Unit 6 and the completion of a MACT process was required before construction began." Id.

Finally, any burden created due to Xcel's reliance on the delisting rule is secondary to protecting public health. EPA recognizes that EGUs may have relied in good faith on the delisting rule, but nonetheless interpreted Section 112(g) as applicable to EGUs that began construction between March 2005 and March 2008. That conclusion arose after a balance of the "challenges" EGUs would face against the harm to public health of non-compliance.

Xcel interprets this language to apply only in a preconstruction permitting process. This interpretation would lead to the absurd result whereby an owner would be rewarded for initially violating Section 112(g). "No person may construct" flatly prohibits any and all construction unless the owner has secured a valid MACT determination.[4] While it is true that EPA regulations state that no person may "begin actual construction or reconstruction of a major source" absent "a final and effective [MACT] determination," such language should be seen as general program requirements, not as an attempt by EPA to weaken any language Congress has used in the Act. 40 C.F.R. § 63.42(c). The plain language of Section 112(g) prohibits all construction or modification of a major source of air pollutants until an owner has obtained a final MACT determination. Xcel has failed to obtain such a final notice, and thus violated Section 112(g) by constructing Comanche Unit 3.

Xcel's ongoing violation of Section 112(g) cannot excuse it from the clear statutory mandate to obtain a MACT determination for Comanche Unit 3. Section 112(g) prohibits constructing without a MACT determination, but Xcel, in the absence of a preliminary injunction, will not only complete construction, but will actually begin operation of the largest EGU in the state without a final MACT determination. Xcel should not be allowed to operate in clear violation of Section 112(g) because it has only now belatedly engaged in the MACT administrative process.

2. *EPA, APCD and other jurisdictions have concluded that Section 112(g) applies to EGUs such as Comanche Unit 3.*

Despite numerous and clear indications that owner/operators of EGU are legally obligated to obtain final MACT determinations, Xcel has failed to do so. (Def. Br. 9.) In its January 2009 memo, EPA responded to "questions [that] ha[d] been raised [in the wake of New Jersey] about the applicability of Section 112(g) to coal- and oil-fired

[4] As demonstrated elsewhere in the Clean Air Act, Congress knows how to define the regulatory status of a source based upon the commencement of construction. See 42 U.S.C. § 7411(a)(2) (defining a "new source" under the new source performance standards program).

EGUs that are major sources and that began actual construction or reconstruction between March 29, 2005 and March 14, 2008." (Def. Mot. for Jud. Notice, Ex. L.) In the memo, EPA acknowledges that the effect of the Court's vacatur in New Jersey is that "coal- and oil-fired EGUs, which were a listed source category under Section 112 beginning December 20, 2000, remain on the Section 112(c) list and therefore are subject to Section 112(g)." (Id.) Specifically, the Principal Deputy Assistant Administrator "urge[d] permitting authorities to undertake Section 112(g) reviews without delay . . . ." (Id.)

Shortly after the EPA memo, APCD sent a letter to Xcel detailing the effect of the New Jersey decision on Comanche Unit 3. (Def.'s Mot. for Jud. Notice, Ex. M.) APCD reiterated EPA's interpretation that Section 112(g) to applies to EGUs constructed during the 2005-2008 period. (Id.) The express purpose of this March 2009 letter was to request that Xcel submit an updated MACT application to APCD for Comanche Unit 3. (Id.)

As recently as July 2009, Xcel received a letter from the EPA Office of Enforcement and Compliance Assurance stating that "the fact that an EGU may have commenced construction before the [delisting rule was] vacated does not permit the source to avoid obtaining a MACT determination and MACT emission limits for the source's hazardous air pollutants, pursuant to Clean Air Act section 112(g)." (See Def.'s Mot. for Jud. Notice, Ex. N.) Moreover, the letter warned Xcel that "[f]ailure to obtain a MACT determination [for construction of Comanche Unit 3] may subject you to enforcement under Section 113 of the Clean Air Act." (Id.) Despite the unique situation created by the delisting rule, it is well understood that Xcel is under a current legal obligation to obtain a valid MACT determination in order to comply with Section 112(g).

This Court need not give Chevron deference to EPA's interpretation of the applicability of Section 112(g) to EGUs such as Comanche Unit 3 in order to find EPA's reasoning persuasive. WildEarth Guardians does not reference EPA's interpretation, detailed in its January 2009 memo, assuming the Court will give it Chevron deference. (Def. Reply Br. at 14.) Rather,

under Skidmore, EPA's application of Section 112 to EGUs "consitute[s] a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Skidmore v. Swift & Co., 323 U.S. 134 (1944). "Under Skidmore the degree of deference given to informal agency interpretations will 'vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position.'" S. Utah Wilderness Alliance v. Bureau of Land Mgm't, 425 F.3d 735, 759 (10th Cir. 2006) (citing United States v. Mead Corp., 533 U.S. 218, 228 (2001)). Thus, if EPA has carefully considered its position, is consistent in its position, displays expertise on the subject, and the position is persuasive, then Skidmore deference applies. In this case, EPA has done just that.

First, EPA has carefully considered the issue of EGUs that began construction between March 29, 2005 and March 14, 2008. EPA's January memo acknowledges the care that EPA took in considering the challenges faced by owners/operators of EGUs that began construction in that time period: "EPA recognizes that the application of MACT standards to a project that has already begun construction may present challenges." (Def.'s Mot. for Jud. Notice, Ex. L.) However, after carefully considering the challenges of requiring EGUs to obtain MACT determinations, EPA stated its position that EGUs have always been subject to Section 112(g). (Id.)

Second, EPA has been consistent in its interpretation of 112(g) and applied this interpretation through orders. EPA's announced its interpretation in memo of January 2009, echoed it in the letter from EPA's Office of Enforcement to Xcel, and most recently re-iterated and applied that interpretation in an order issued by EPA Administrator Lisa Jackson. Order Granting Issue 3 of April 28, 2008 Clean Air Act Title V Petition, Petition No. IV-2008-04 (Sept. 21, 2009) (final order), available at http://www.epa.gov/region07/programs/artd/air/title5/petitiondb/petitions/spurlock_response2008.pdf (hereinafter "Jackson Order"). That order reiterated EPA's position that, "coal- and oil-

fired EGUs remain on the Section 112(c) list, and therefore, are subject to Section 112(g)." Jackson Order at 6. The order also demonstrates EPA's expertise necessary for Skidmore deference. Skidmore, 323 U.S. at 134. In this order, arising from a Sierra Club petition and a formalized hearing, Administrator Jackson detailed the history of Section 112(g) requirements for EGUs, and the applicability of Section 112(g) to EGUs constructed during the 2005-2008 period. Jackson Order at 5-7. In considering the application of 112(g) to the construction and operation of a Kentucky power plant, EPA demonstrated its specialized agency expertise.

Third, EPA's interpretation has been shown to be persuasive in both Colorado and other jurisdictions. Colorado has adopted EPA's interpretation of Section 112(g). The March 2009 letter from APCD to Xcel states, "EPA has requested that State permitting authorities commence a process under Section 112(g) to make a new-source MACT determination….the Division is initiating the 112(g) process for Comanche Unit 3…" (Def.'s Mot. for Jud. Notice, Ex. M.) The fact that Colorado, shortly after the EPA interpretation was announced, contacted Xcel regarding its obligation to obtain a MACT determination, demonstrates the persuasiveness of the agency's interpretation.

Prior to EPA's January memo, other jurisdictions arrived at the same interpretation of Section 112(g) as EPA: EGUs remain subject to Section 112(g). A court that recently considered litigation substantially similar to the present action held that an EGU that began construction during the period when EGUs were purportedly delisted was subject to the MACT requirements of Section 112(g). S. Alliance for Clean Energy v. Duke Energy Carolinas, LLC, No. 1:08CV318, 2008 WL 5110894 at *10 (W.D. N.C. Dec. 2, 2008). In S. Alliance for Clean Energy, the court ordered the defendant electric utility provider to obtain a final MACT determination within a limited time.[5] Id. at *5. A preliminary injunction would be appropriate,

[5] Other EGUs voluntarily complied with Section 112(g) after the EPA memo. See, e.g., Longleaf Energy Assoc., LLC's Application for a Notice of MACT Approval for the Longleaf Energy Station (Oct. 6 2008), available at www.georgiaair.org/airpermit/downloads/permits/psd/dockets/longleaf/112docs/mactapp.pdf; Notice of MACT Approval, SIP Permit Application No. 18499 (June 2009), available at

the court noted, if the defendant failed to obtain a MACT determination within a limited time per court order. Id. at *10. The court was careful to note that a preliminary injunction is "justified by Defendant's refusal to comply with the plain requirements of current law." Id. EPA's interpretation employs the same reasoning as employed by the court in S. Alliance, proving that the agency's interpretation provides persuasive authority, and is entitled to Skidmore deference.

Although Xcel is now belatedly participating in the MACT administrative review process, without conceding that it is obligated to do so (Def.'s Reply Br. at 4.), Xcel's delay in submitting the MACT application will result in operation of Comanche Unit 3 without a final MACT determination in violation of Section 112(g). The plain language of Section 112, and the interpretation of EPA, Colorado, and other federal courts indicate that Comanche Unit 3 is in violation of the requirements of Section 112(g).

B. WildEarth Guardians will suffer irreparable harm in the absence of a preliminary injunction.

A movant's burden to demonstrate irreparable harm is satisfied if the movant can demonstrate a significant, rather than speculative, risk of irreparable harm. RoDa Drilling Co. v. Siegal, 552 F.3d 1203, 1210 (10th Cir. 2009). The Tenth Circuit considers the irreparable harm requirement satisfied when the movant demonstrates that money damages cannot compensate for the harm to be suffered. Id.

The purpose of the Clean Air Act is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare…." 42 U.S.C. § 7401(b). To achieve this goal, Congress directed EPA to regulate 188 HAPs under Section 112. § 7412(b). Congress mandated stringent emissions limitations for these HAPs by requiring an owner/operator of a major source of HAPs to obtain a determination from the appropriate permitting authority that the control technologies employed are at least as stringent as the best controlled similar sources. § 7412(g); 40 C.F.R. § 63.43(d)

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www.georgiaair.org/airpermit/downloads/permits/psd/dockets/longleaf/112docs/0990030mactapproval.pdf.

The Supreme Court has noted the unique nature of harm to the environment, and concluded that in the environmental context, there is a presumption that irreparable injury exists. Amoco Production Co. v. Gamble, 480 U.S. 531, 545 (1987). "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable." Id. The Court continued by noting that the existence of environmental harm weighs in favor of issuing a preliminary injunction. Id. "If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." Id.

1. Excessive emissions of mercury and other HAPs from Comanche Unit 3 causes irreparable harm to the public health and the environment.

a. Mercury causes a variety of adverse effects on public health and the environment.

As detailed in the statement of facts, supra, mercury deposited into the environment causes a variety of adverse health effects. These effects include impairment of the nervous, respiratory, cardiovascular, gastrointestinal, hemotologic, immune and reproductive systems. U.S. EPA, Mercury Study Report to Congress (1997), ES-3, available at http://www.epa.gov/ttn/oarpg/t3/reports/volume5.pdf. These detrimental effects are even more pronounced in developing fetuses and breast-fed children. Id. Children exposed when their mothers consume contaminated fish "have exhibited a variety of developmental neurological abnormalities, including the following: delayed onset of walking, delayed onset of talking, cerebal palsy, altered muscle tone and deep tendon reflexes, and reduced neurological test scores…." Id. at ES-4.

b. EGUs are the largest anthropogenic source of mercury in the U.S.

"The 491 U.S. coal-fired power plants are the largest unregulated industrial source of mercury emissions nationwide, annually emitting about 48 tons of mercury." (Nichols Decl. ¶ 8.) In 2000, when EPA found that it was "appropriate and necessary" to regulate mercury emissions from EGUs, EGUs contributed 30% of the anthropogenic mercury in the United

States. 65 Fed. Reg. at 79,825-27. In considering EGU emissions, EPA found that mercury is the "HAP of greatest concern." Id. at 79,827.

When EGUs were first listed for regulation under Section 112(g), EPA provided a detailed analysis of the link between EGU emissions of mercury and the affect on human health and the environment. Id. at 79,827. Once emitted by EGUs, mercury enters the ecosystem and deposits onto bodies of water. Id. From there, mercury enters the tissues of aquatic organisms in the affected ecosystem. Id. Moving up the food chain, the concentration of mercury in fish tissue increases. Id. By the time fish reach the table for human consumption, the concentration of mercury is high enough to cause adverse health effects. Id. A recent comprehensive survey of streams showed that all fish sampled had some levels of mercury in their tissue. (Nichols Decl. ¶ 16.)

Mercury emissions by EGUs do not merely result in a localized affect on communities such as Pueblo. Rather, the impacts of mercury stretch across the state of Colorado and the nation. Nearly 20% of Colorado's waters contain fish with tissues so contaminated with mercury that the fish are not safe to eat. (Nichols Decl. ¶ 17.) EPA recommends that pregnant women and women who may become pregnant, check fish consumption advisories in their state before eating locally caught fish. *What you need to know about mercury in fish and shellfish*, http://www.epa.gov/waterscience/fish/advice/index.html. This warning indicates that the impact of mercury—primarily deposited into the ecosystem from EGUs—is nationwide public health problem.

In response to more stringent state and federal regulations, coal-fired power plants are beginning to implement cost-effective control technologies, which can drastically reduce the amount of mercury emitted throughout the country. A recent study of mercury control technologies, released by the U.S. Government Accountability Office, shows that new capture technologies allowed coal-fired power plants to achieve well over 90% reduction in mercury emissions compared to uncontrolled emissions. GAO Clean Air Report at 7-8.

c. Operation of Comanche Unit 3 without a valid MACT determination will lead to excessive emissions of mercury.

Operation of Comanche Unit 3 without a final MACT determination allows for excessive emissions of HAPs such as mercury, which, contrary to the policies of the Clean Air Act, poses serious threats to public health and welfare. Comanche Unit 3 will be the largest coal-fired power plant in the entire state of Colorado, and will deposit 131 pounds of mercury each year. (Nichols Decl. ¶ 7, 19.) The 131 pounds of mercury emitted by Comanche Unit 3 will be in addition to mercury emitted other Xcel-owned power plants at the Comanche station and mercury emitting facilities located in Pueblo, CO. The situation has deteriorated to the point where Colorado has issued a fish consumption advisory for the Teller Reservoir outside of Pueblo. (Id. at ¶ 17.)

Despite the overwhelming information detailing the severe public health problems associated with mercury emissions, as well as the availability of new control technologies, Xcel is prepared to operate Comanche Unit 3 without a final MACT determination. Drastic reductions in mercury emissions due to the implementation of new control technologies can be achieved at EGUs that are already fully operational, demonstrating that operation of Comanche Unit 3 without a MACT determination may emit far more mercury than with a MACT determination. (Nichols Decl. ¶¶ 20, 24.) Even James Martin, Director of the Colorado Department of Public Health and Environment ("CDPHE"), has publically stated "we didn't know a lot about mercury capture four years ago when Comanche 3's permit was written…[t]his is an emerging area and we've got a lot to evaluate." (Nichols Decl. ¶ 25.)

In this instance, the injury to the environment and public health is irreparable, and cannot be compensated for by monetary damages. (Rickman Decl. ¶ 22.) In addition to harm related to public health, Comanche Unit 3 will impair WildEarth Guardians' mission and the interests of its members. For example, a WildEarth Guardians member has a lifelong interest in studying indigenous carnivores. (Id. at ¶ 19.) He is concerned that mercury will not only impact humans, but also wildlife that consume contaminated fish. (Id.) Another WildEarth Guardians member

plans to visit the Comanche National Grasslands near Pueblo next month, but is concerned about the amount of mercury. (Nichols Decl. ¶ 29.) Specifically, he does not plan to recreate near waters contaminated with mercury in the area. (Id. at ¶ 30.) Xcel is attempting to circumvent the very regulations that protect the public from the adverse effects of mercury. Absent an injunction restraining the operation of Comanche Unit 3, the Pueblo community will suffer a truly irreparable injury from excessive mercury emissions.

2. *WildEarth Guardians and its members will suffer an irreparable procedural injury from the operation of Comanche Unit 3 prior to any public participation in the current administrative review process.*

The operation of Comanche Unit 3, beginning in January 2010, prior to any opportunity for public notice and comment in the current MACT administrative review process, constitutes an irreparable procedural injury to WildEarth Guardians and its members. This jurisdiction has recognized procedural injury, as related to environmental harm, in the context of a preliminary injunction. San Luis Valley Ecosystem Council v. U.S. Fish and Wildlife Service, No. 07-cv-00945 at *6, 2009 WL 2868818 (D. Colo. Sept. 3, 2009).

EPA regulations require that the permitting agency provide, at a minimum, a 30-day public comment period where members of the public may comment on the MACT application prior to the issuance of a final MACT determination. 40 C.F.R. § 63.43(h). Public notice and comment are essential components of the MACT determination process. The opportunity for notice and comment promotes public participation in the administrative review process and informed decision-making by the permitting authority. This process allows citizens and organizations with technical expertise related to the Clean Air Act and emissions control technologies, such as WildEarth Guardians (See Nichols Decl. ¶¶ 27, 28), to provide critical feedback on the efficacy of the emissions limitations and the sufficiency of control technologies employed by coal-fired power plants. The process is also essential for citizens to comment on how the addition of HAPs will affect their health and their community.

Public notice and comment, as part of the MACT administrative review process, is intended to take place before construction or modification of a major source of HAPs. See 40 C.F.R. § 63.43(h). In the present case, however, notice and comment related to the current MACT determination will not take place until after construction on Comanche Unit 3 is completed and commercial operations have begun. The earliest possible date that APCD can issue a final MACT determination for Comanche Unit 3 is February 2010, a full month after Comanche becomes operational (assuming that an initial determination is issued within 60 days from the date of the APCD letter, the public comment period lasts only 30 days, and a final determination is issued immediately following the comment period). But if the Director of CDPHE is correct that there is "a lot to evaluate" the process may take considerably longer to complete. (Nichols Decl. ¶¶ 25, 26.)

Xcel is a sophisticated electric-generating utility, has ample experience with Colorado's permitting processes and requirements related to EGUs, and has had ample notice of its obligation to obtain a final MACT determination for Comanche Unit 3. Xcel could have reasonably anticipated how long it would take to obtain a MACT determination, but nonetheless delayed its submission of the MACT application, thereby pushing back the timeline for the entire administrative review process. Because of Xcel's delay in submitting its MACT application, commercial operations are scheduled to begin in January 2010 (Coleman Decl. ¶ 3.), before the public will have an opportunity to fully participate in the notice and comment period.

Given the contentious nature of Xcel's actions leading to the current administrative review process and the emergence of new control technologies, it is reasonably foreseeable that the final MACT determination may be issued much later than February 2010. (Nichols Decl. ¶ 26.) When the permitting agency receives adverse comments during the public comment period, the agency has an additional 30 days to consider the comments and revise its analysis before issuing a final MACT determination. 40 C.F.R § 63.63(h).

In the mean time, as currently permitted, Comanche Unit 3 will emit 131 pounds of mercury each year, at a rate of 65% reduction in emissions compared to uncontrolled mercury emissions. (Nichols Decl. ¶¶ 19, 22.) This works out to 0.35 pounds of mercury emitted every day. (Id. at ¶ 19.) Comanche Unit 3 will continue to emit mercury at that level until it receives a final MACT determination from APCD. It is foreseeable that during the review process APCD could impose much more stringent emissions limitations based on new control technologies.

WildEarth Guardians, its members, and the public are legally entitled to comment on the sufficiency of the MACT determination. WildEarth Guardians regularly supports its mission by providing APCD with comments related to coal-fired power plants during the administrative review process. (Nichols Decl. ¶ 26.) In 2006, WildEarth Guardians submitted a comment to APCD regarding Xcel's operating permit for its Hayden Station. (Id.) WildEarth Guardians has a history of effective commenting. (Id.) When WildEarth Guardians is provided the opportunity to comment it often succeeds in shaping the ultimate regulatory outcome. (Id.)

Given the importance of ensuring that Colorado's largest ever coal-fired power plant meets applicable requirements for one of its most hazardous pollutants, WildEarth Guardians and the public deserve the right to participate in the MACT determination process before excess harmful emissions are released.

C. The balance of equities tips in favor of WildEarth Guardians.

Several factors tip the balance of equities in favor of WildEarth Guardians: (1) courts have repeatedly held that harm to public health outweighs financial burden; (2) Xcel has had ample notice of its legal obligation to obtain a MACT determination and ample opportunity to discharge this obligation; and (3) Congressional intent and EPA expertise demonstrates that Section 112 is meant to require stringent emissions limitations despite hardships to the owner/operator of EGUs.

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1. *The harm to public health and the environment outweighs a financial injury to Xcel.*

On one side of the scale rests the health of a local Colorado community, as well as the health of Colorado's water systems. The local Pueblo community is already burdened with numerous mercury emitting facilities. However, impacts are not merely localized: 20% of Colorado's waters are so contaminated with mercury that fish caught in these waters are unsafe for human consumption. (Nichols Decl. ¶ 17.) Operation of Comanche Unit 3 without a valid MACT determination permits Xcel to emit excessive HAPs, which can cause public health problems. (Id. at ¶ 18.) On the other side of the scale stands Xcel's economic burden.

In preliminary injunction cases where courts balanced the equities of harm to public health against economic harm to power companies, courts have held that the burden on public health outweighed an economic burden. Union Electric v. EPA, 427 U.S. 246 (1976); Sierra Club v. Franklin County Power Co., 546 F.3d 918 (7th Cir. 2008); United States v. West Penn Power Co., 460 F. Supp. 1305 (W.D. Pa. 1978). In Union Electric, the Supreme Court held that the public health problems associated with air pollution outweighed a power company's economic and technological burden of coming into compliance with the Clean Air Act. The Court rejected Union Electric's argument that compliance imposed a "technological infeasible" burden by noting that "[a]s we have previously recognized, the 1970 Amendments to the Clean Air Act were a drastic remedy to what was perceived as a serious and otherwise uncheckable problem of air pollution." Id. at 256. Further, the Court relied upon Congressional intent to dismiss the power company's claims of economic and technological burdens. Id. at 258. "The Senate's stiff requirement was intended to foreclose the claims of emission sources that it would be economically or technologically infeasible for them to achieve emission limitations sufficient to protect the public health within the specified time." Id. Thus, the Court has previously recognized that public health should override claims of economic and technological burdens.

Applying the reasoning set forth in Union Electric, the court in West Penn rejected a power company's argument of a technologically infeasible burden. West Penn, 460 F. Supp.

1305 (W.D. Pa. 1978). The court granted a preliminary injunction against an operational power plant that failed to comply with the strictures of the Clean Air Act. Id. at 1319. The power plant failed to reduce their emissions of sulfur dioxide to levels mandated by the State Implementation Plan ("SIP"). Id. at 1305-06. West Penn Power Co. asserted that the injunction should not be granted because they were interacting with the relevant state agency in an attempt to obtain a valid variance permit, and that the technology required to comply with the emissions standards of the SIP was "infeasible." Id. at 1314. The court dismissed the "agency interaction" claims by noting that "[d]efendant now has further proceedings pending before the Pennsylvania Agency and we will not interfere with them, but this is no reason for this court withholding action in this case…." Id. at 1314.

In Sierra Club, the court granted a preliminary injunction prohibiting further construction of a power plant. Sierra Club, 546 F.3d at 918. The court found that the 600 megawatt power plant would emit HAPs such as mercury. The standing declarant stated that she would no longer visit or recreate in the area of the power plant because of the detrimental effects of the HAPs on the local environment. The court determined that the balance of equities tipped in favor of the movant and issued the injunction because it prevented an irreparable injury and the burden on the power company was minimal—all the power company was required to do was to stop construction until it obtained a valid PSD permit. Id. at 936.

Consistent with the preceding opinions, the balance of equities tips in favor of protecting the Pueblo community, and the waterways of Colorado, from the dangerous effects of HAPs over the economic and technological burden imposed on Xcel. WildEarth Guardians does not contend that Xcel lacks any control technology. Rather, similar to Franklin Power in Sierra Club who commenced construction without a valid permit, Xcel has continued to construct or modify Comanche Unit 3 without a final MACT determination. There is currently no assurance that Comanche Unit 3's control technology rises to the level required by Section 112(g). The allowance of even a small amount of excessive HAPs can lead to detrimental, dangerous, and

irreparable harm to the local community and environment. (Nichols Decl. ¶ 9.) The Supreme Court made clear, by stressing the harm to public health, that this balance favors issuance of a preliminary injunction in order to protect the public health.

2. *Xcel has had ample notice and opportunity to discharge its legal duty to obtain a MACT determination*.

Xcel, and indeed the entire electric utility industry, have been aware that they are legally obligated to obtain final a MACT determination for the construction or modification of EGUs. Responsible EGUs, such as Longleaf Power Station, immediately reacted to the New Jersey decision and took steps to ensure compliance with Section 112(g) before further construction and eventual operation. See, e.g., Longleaf Energy Assoc., LLC's Application for a Notice of MACT Approval for the Longleaf Energy Station (Oct. 6 2008), available at www.georgiaair.org/airpermit/downloads/permits/psd/dockets/longleaf/112docs/mactapp.pdf; Notice of MACT Approval, SIP Permit Application No. 18499 (June 2009), available at www.georgiaair.org/airpermit/downloads/permits/psd/dockets/longleaf/112docs/0990030mactapproval.pdf. Letters from EPA and APCD to Xcel echoed that such proactive measures were needed to come into compliance. EPA went so far as to remind Xcel that failure to comply may result in enforcement proceedings. (Def.'s Mot. for Jud. Notice, Ex. L.)

Despite clear and convincing indicators that Section 112(g) applies to EGUs such as Comanche Unit 3, Xcel has continued to construct or modify Comanche Unit 3 without a final MACT determination. Xcel is prepared to begin start-up procedures imminently. (See S. Alliance for Clean Energy; Def.'s Mot. for Jud. Notice Ex. L, Ex. M; Coleman Decl. ¶ 3.) Any hardship borne by Xcel due to the issuance of a preliminary injunction should be considered in light the fact that Xcel has had a year and a half to come into compliance with Section 112 (g) of the Clean Air Act.

Xcel did not submit the MACT application until late July 2009, a mere three months before it planned to begin startup procedures. (Def.'s Mem. Br. 11.) Xcel is no stranger to the

permitting process with APCD and can reasonably anticipate how long the process leading to a MACT determination will take. (Nichols Decl. ¶ 21.) Again, any hardship borne by Xcel should be considered in light of the fact that Xcel could have discharged its legal obligation to obtain a MACT determination by initiating its participation in the MACT administrative review process earlier.

3. *A financial burden does not excuse Xcel's failure to comply with Section 112(g).*

The Clean Air Act's MACT requirement should be not subverted because Xcel will experience an economic burden as the result of a preliminary injunction. Section 112(g) imposes stringent emissions limitations on EGUs in order to deal with the nation's serious air pollution problem. When it issued its determination that EGUs that commenced construction during the 2005-2008 period where subject to Section 112, EPA considered the burden on electric utility providers of coming into compliance with section 112(g). EPA noted that "application of MACT standards to a project that has already begun construction may present challenges." (Def. Mot. for Jud. Notice, Ex. L.) However, EPA ultimately weighed the balance between the burden on public health and the burden on EGUs, and concluded that those challenges do not outweigh the necessity of EGUs to obtain a final MACT determination. (Id.)

The serious burden on the environment and public health outweigh Xcel's economic burden. Xcel's hardship is especially diminished because the financial hardships imposed by a preliminary injunction could have been avoided had Xcel made a timely submission of the MACT application, thereby leaving enough time for a final MACT determination to be issued before operations commenced on Comanche Unit 3. Xcel's financial hardship should not now be used as an excuse for non-compliance with Section 112(g) and undermining the policies of the Clean Air Act.

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D. A preliminary injunction is in the public interest.

The public interest is best served by granting a preliminary injunction. Similar to the balance of equities analysis, determining whether the public interest is best served by a preliminary injunction requires balancing the public interest in health against the public interest in keeping utility rates low. Again, this balance weighs the environmental, public health, and procedural injuries against a financial burden. In Sierra Club, the public interest supported an injunction because "requiring the Company to obtain a valid PSD permit would likely result in decreased emission and improved public heath, which would further a stated goal of the CAA." Sierra Club, 546 F.3d at 936.

Similarly, in West Penn, the court specifically acknowledged the tension between public interest in health and public interest in keeping energy rates low. "When the polluter is a power company … the issue becomes more confused because the same public with interest in a clean environment is also interested as consumers in keeping utility rates down…." West Penn, 460 F. Supp. at 1312. However, the court was careful to defer to congressional contemplation of this balance by noting: "[t]he determination of this clash of interests, however, as illustrated in this case is basically a problem for the legislature, not the courts." Id. After all, it is the legislature that prioritizes the interests of the public.

Here, as in Sierra Club and West Penn, public interest tips in favor of health over costs to Xcel. The West Penn court wisely deferred to purposes underlying the Clean Air Act as articulated by Congress. Those purposes aim to protect public health, as well as prevent and control air pollution. 42 U.S.C. § 7401(b). The plain language of Section 112, requiring control technologies to maximize reductions of HAP emissions, demonstrates that Congress intended for the Clean Air Act to be an effective tool for protecting public health and preventing air pollution. Id. at § 7412(d); S. Alliance for Clean Energy, at *16. Further, the presence of a citizen suit demonstrates Congress intent to allow private citizens to bring suit against violators who endanger the public health and diminish air quality.

The health impacts of Comanche Unit 3 are amplified by the concentration of coal-fired power plants and other mercury emitting industries in and around Pueblo, CO. (Rickman Decl. ¶ 20.) Comanche Unit 3 will be the largest coal-fired power plant in Colorado, and it is in addition to the current complex of power plants owned by Xcel in Pueblo. (Nichols Decl. ¶¶ 6, 7.) When such a concentration exists, it is in the public's best interest to enjoin facilities that fail to comply with the stringent emissions limitations set forth in the Clean Air Act.

E. This Court should waive the surety bond or require only a nominal bond.

A surety bond, in the context of a preliminary injunction, is used to pay the "costs and damages" affecting an enjoined party when it is determined upon appeal that they have been wrongfully restrained. FED. R. CIV. P. 65(c). Rule 65(c) states, in relevant part, that "[t]he court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper." Id. However, Rule 65(c) does not mandate that a surety bond always be posted by the moving party. RoDa Drilling Co. v. Siegal, 552 F.3d 1203, 1215 (10th Cir. 2009). Rather, trial courts have "wide discretion under Rule 65(c) in determining whether to require security." Winnebago Tribe v. Stovall, 341 F.3d 1202, 1206 (10th Cir. 2003).

This Court should exercise its discretion to waive a security bond or impose a nominal bond because: (1) security bonds are generally not required, or required only in nominal amounts, in the context of public interest environmental litigation; (2) WildEarth Guardians is not in a position to profit from restraining Xcel; and (3) requiring a substantial security bond would effectively eliminate WildEarth Guardians' ability to bring a preliminary injunction and would foreclose judicial review of the matter. (Nichols Decl. ¶¶ 31, 32.) Additionally, WildEarth Guardians has a high likelihood of success on the merits, and it is therefore unlikely that Xcel will be wrongfully enjoined.

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CONCLUSION

For the foregoing reasons, this Court should grant WildEarth Guardians' Motion for Preliminary Injunction because WildEarth Guardians will suffer an irreparable injury if the injunction is not granted, has a high likelihood of success on the merits, the balance of equities tips in WildEarth Guardians' favor, and the injunction is supported by the public interest in health and the environment.

DATED this 28th day of October, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 28th day of October, 2009, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following counsel of record:

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