IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:11-cv-00742-MSK–MJW

WILDEARTH GUARDIANS,

Plaintiff,

v.

LAMAR UTILITIES BOARD d/b/a LAMAR LIGHT AND POWER, and ARKANSAS RIVER POWER AUTHORITY,

Defendants.

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON DEFENDANTS' LIABILITY AND PLAINTIFF'S STANDING

Pursuant to Fed. R. Civ. P. 56, Plaintiff WildEarth Guardians ("Guardians") moves for Partial Summary Judgment against Defendants Lamar Utilities Board, d/b/a Lamar Light and Power, and Arkansas River Power Authority ("Lamar Utilities" or "Defendants") on its First, Second, Fourth, and Fifth Causes of Action in the Supplemental Complaint (Dkt. # 47, ¶¶ 140, 150, 167, and 174).[1] Guardians hereby requests a declaratory judgment that Defendants are liable for 2,454 violations of the Clean Air Act. Further, Guardians moves for Partial Summary Judgment that it has standing to bring this citizen suit on behalf of its members.

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[1] In the interest of judicial economy and reducing the scope of evidence presented at trial, Guardians moves for partial summary judgment on these causes of action. There are no genuine issues of material fact regarding these claims, which can be resolved promptly, thereby also reducing the length of any necessary trial. Guardians reserves its right to pursue the remaining causes of action in the Supplemental Complaint. However, because the claims on which Guardians presently moves for summary judgment set forth Defendants' most egregious violations of the Clean Air Act, should the Court grant partial summary judgment on its First, Second, Fourth, and Fifth Causes of Action, Guardians will not pursue additional claims.

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GLOSSARY OF TERMS

Air Division	Air Pollution Control Division of the Colorado Department of Public Health and Environment
ARPA	Arkansas River Power Authority
BACT	Best Available Control Technology. An emission limitation based on the maximum degree of pollutant reduction which the state permitting authority determines is achievable for a facility, taking into account energy, environmental, and economic impacts and other costs.
CAA	Clean Air Act of 1963, 42 U.S.C. §§ 7401 et seq.
CAQCC	Colorado's Air Quality Control Commission. Created by the Colorado Legislature to develop air pollution control policy and regulate pollution sources.
CDPHE	Colorado Department of Public Health and Environment
CEMS	Continuous emission monitoring systems. Equipment used to measure and record emissions of pollutants and to demonstrate compliance with applicable emission standards.
CO	Carbon monoxide, a pollutant
CWA	Clean Water Act
EPA	Environmental Protection Agency
kWh	Kilowatt-hours
lb/mmBtu	Pound per million metric British thermal units. A rate used to measure pollutant emissions.
lb/MWh	Pounds per megawatt-hour. A rate used to measure pollutant emissions.
LRP	Lamar Repowering Project, also known as Lamar Light & Power Plant
LUB	Lamar Utilities Board d/b/a Lamar Light & Power
NAAQS	National Ambient Air Quality Standards. Standards, the attainment and maintenance of which are requisite to protect public health and welfare. EPA has established NAAQS for six major air pollutants, which are codified at 40 C.F.R. Part 50.
NO_X	Nitrogen oxides. A group of gasses (pollutants) also known as oxides of nitrogen.

NO_2	Nitrogen dioxide, a pollutant. One of the gasses known as NO_X.
NSPS	New Source Performance Standards. Technology-based pollution control standards issued by EPA which apply to certain categories of new and modified stationary sources.
Permit	Permit Number 05PR0027, issued for the construction and operation of the LRP.
PSD	Prevention of Significant Deterioration. Applies to new major sources or major modifications at existing sources for pollutants where the area the source is located is in attainment or unclassifiable with the NAAQS; requires installation of BACT.
SAR	Semi-Annual Report. Monitoring report that include excess emission reports.
SIP	State Implementation Plan. A document created by each state to attain NAAQS and implement other CAA requirements.
SO_2	Sulfur dioxide, a pollutant.
tpm	tons per month

I. INTRODUCTION

This is a citizen suit brought by Guardians, pursuant to the Clean Air Act ("CAA" or "Act"), 42 U.S.C. §§ 7601 et seq., against the Defendants for repeatedly violating their air pollution emissions standards, limitations, and permit conditions at the Lamar coal-fired electric generating unit, also known as the Lamar Repowering Project or Lamar Light & Power Plant ("LRP" or "Lamar Plant"). Since coming on-line in May of 2009, the LRP has repeatedly exceeded its permitted limits for several dangerous air pollutants, including nitrogen oxides, sulfur dioxide, and carbon monoxide. Defendants' emission violations are disturbing in light of the adverse health effects associated with these pollutants, the LRP's location within Lamar's city limits, and the continuing nature of these violations. Guardians seeks declaratory and injunctive relief against Defendants, as well as applicable civil penalties, including beneficial mitigation projects. See Plaintiff's Supplemental Complaint, Dkt. # 47 at p. 42-43.

Defendants can offer no defense as to their *liability* for these violations, because the CAA imposes strict liability, making the permittee liable for *any* exceedance of permit limitations, regardless of fault. Defendants have been "modifying," "tuning," and "testing" their facility intermittently for years. However, during all this time, they have continued to violate their emission limits and the conditions of their permit. The CAA does not permit Defendants to tinker with their facility over the course of almost four years, while continuing to illegally emit harmful pollution into the atmosphere during the process. This illegal pollution is very real to Guardians' members, including those in Lamar, Colorado, who are concerned about the impacts to their health, and to the health of their children, grandchildren, and neighbors, whenever the plant is running.

Summary judgment on liability is appropriate and warranted in this case. There is no dispute regarding whether the Defendants violated the emission limitations in their permit, and thereby the CAA. Because this is a strict liability statute, the Court need not, and in fact may not, consider any arguments regarding fault, excuses related to testing the facility, or efforts to modify the LRP, until the penalty phase of this litigation. See 42 U.S.C. § 7413(e)(1).[1] If this Court grants partial summary judgment to Guardians as to the violations set forth herein, the issues remaining to be decided with respect to the First, Second, Fourth, and Fifth causes of action in the Supplemental Complaint would be the nature and timing of injunctive relief and the assessment of a civil penalty payable to the government (or through beneficial mitigation projects). See id. § 7604(a), (g).

II. BACKGROUND

A. The Clean Air Act and Colorado State Implementation Plan

Congress enacted the CAA "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)(1). Under Title I of the CAA, the Environmental Protection Agency ("EPA") promulgates National Ambient Air Quality Standards ("NAAQS"), which define the level of air quality necessary to protect the public health and welfare for certain "criteria pollutants," specifically sulfur dioxide,

[1] In determining the appropriate penalty under the CAA, the Court considers: "(in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence . . . , payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation." 42 U.S.C. § 7413(e)(1).

nitrogen oxides, particulate matter, carbon monoxide, lead, and ozone. Id. § 7409(a)-(b); 40 C.F.R. pt. 50.

In addition to the NAAQS, the CAA requires EPA to develop nationwide uniform technology-based standards, referred to as New Source Performance Standards ("NSPS"). See 42 U.S.C. § 7411. These standards apply to specific categories of stationary sources, such as electric generating units, that EPA finds "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." Id. § 7411(b)(1)(A). New sources of pollution, including existing sources that undergo modifications resulting in a new source or increases in pollution, are prohibited from operating in violation of the NSPS. Id. § 7411(e).

The CAA also includes a control scheme for the Prevention of Significant Deterioration ("PSD"). See 42 U.S.C. § 7475. The Act's PSD provisions seek to prevent air quality from backsliding to the bare-minimum NAAQS. See id.; New York v. EPA, 413 F.3d 3, 12 (D.C. Cir. 2005). The core of the PSD program is that "[n]o major emitting facility . . . may be constructed in any area to which [PSD] applies unless" various requirements are met, including obtaining a PSD permit. 42 U.S.C. § 7475(a). "Construction" also includes certain major modifications. See id. § 7479(2)(C). Other PSD requirements include that new or modified major sources utilize the best available control technology ("BACT") for each regulated pollutant. See id. § 7475(a)(4). The Act defines BACT as "an emission limitation based on the maximum degree of [pollutant] reduction . . . which the [state] permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for [the] facility." See id. § 7479(3).

The CAA allows states to implement these federal clean air requirements through EPA–approved plans, known as State Implementation Plans ("SIPs"). 42 U.S.C. § 7410(a). SIPs must include permitting programs and specific emission standards and limitations, which provide for the implementation, maintenance, and enforcement of the NAAQS in each state. Id. All SIP provisions approved by EPA become federal law and are enforceable by any person in federal court, through the CAA's citizen suit provision. See id. § 7604(a), (f)(4); Romoland Sch. Dist. v. Inland Empire Energy Ctr., 548 F.3d 738, 741 (9th Cir. 2008) (provisions of an EPA-approved SIP are federally enforceable in district court through the Act's citizen suit provision).

The State of Colorado's Air Quality Control Commission ("CAQCC") promulgated a SIP for Colorado pursuant to the Colorado Air Pollution Prevention and Control Act ("Colorado Act"), COLO. REV. STAT. § 25-7-2, for the implementation of the CAA and the attainment and maintenance of NAAQS. See COLO. REV. STAT. § 25-7-101. Colorado's SIP incorporates by reference EPA's New Source Performance Standards codified at 40 C.F.R. pt. 60. See CAQCC Regulation No. 6, 5 COLO. CODE REGS. § 1001-8. Colorado also has an EPA-approved PSD program, set forth in CAQCC Reg. No. 3, 5 COLO. CODE REGS. § 1001-5.[2] EPA has approved the Colorado SIP as set forth in 40 C.F.R. § 52.320, and it is incorporated by reference into the Code of Federal Regulations at 40 C.F.R., Subpart G, § 52.230, et seq.

The CAA authorizes citizens to bring enforcement suits against persons "who [are] alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of . . . an emission standard or limitation." 42 U.S.C. § 7604(a)(1)(A). An

[2] The Colorado Act requires that the State's PSD program be in accordance with the PSD provisions of the CAA, including emission limitations and BACT requirements. See COLO. REV. STAT. § 25-7-203.

"emission standard or limitation" includes emission standards or limitations set forth in an EPA-approved SIP, any requirement under 42 U.S.C. § 7411 (NSPS requirements), and any permit term or condition. Id. §7604(f)(1), (3), (4). Citizens may sue for injunctive relief, for civil penalties payable to the U.S. Treasury, and for up to $100,000 in beneficial mitigation projects. See id. § 7604(g).[3] The CAA's citizen suit provision allows citizens to enforce legal standards to protect their own health and welfare and to encourage government agencies to enforce the Act more vigorously. See id.; Natural Res. Def. Council v. Train, 510 F.2d 692, 723 (D.C. Cir. 1975). This provision "reflect[s] a deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that the Act would be implemented and enforced." Train, 510 F.2d at 700.

B. The Pollutants: Nitrogen Oxides, Sulfur Dioxide, and Carbon Monoxide

Nitrogen oxides ("NO_X") can adversely affect respiratory health, lead to the formation of fine particle pollution that can cause premature death, aggravate heart disease, and lead to a host of other adverse respiratory health effects. EPA explains:

> Nitrogen dioxide (NO_2) is one of a group of highly reactive gasses known as "oxides of nitrogen," or [NO_X] . . . While EPA's National Ambient Air Quality Standard covers this entire group of NO_X, NO_2 is the component of greatest interest . . . In addition to contributing to the formation of ground-level ozone, and fine particle pollution, NO_2 is linked with a number of adverse effects on the respiratory system.

[3] 42 U.S.C. § 7413(b), amended in part by the Debt Collection Improvement Act of 1996, authorizes injunctive relief and civil penalties of up to $37,500 per day for each violation occurring after January 12, 2009. See also 42 U.S.C. § 7413(e)(1); 28 U.S.C. § 2461(a); 40 C.F.R. § 19.4; 74 Fed. Reg. 626 (Jan. 7, 2009).

See EPA, "Nitrogen Dioxide," Attachment 1 to Wilmes Dec., Ex. A.[4] EPA also describes the health effects from NO_X:

> Current scientific evidence links short-term NO_2 exposures, ranging from 30 minutes to 24 hours, with adverse respiratory effects including airway inflammation in healthy people and increased respiratory symptoms in people with asthma. Also, studies show a connection between breathing elevated short-term NO_2 concentrations, and increased visits to emergency departments and hospital admissions for respiratory issues, especially asthma . . .
>
> NO_X react with ammonia, moisture, and other compounds to form small particles. These small particles penetrate deeply into sensitive parts of the lungs and can cause or worsen respiratory disease, such as emphysema and bronchitis, and can aggravate existing heart disease, leading to increased hospital admissions and premature death.

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[4] This document is publicly available at http://www.epa.gov/air/nitrogenoxides/index.html. See Declaration of Ashley Wilmes ("Wilmes Dec") ¶ 2, attached hereto as Exhibit A. A printout of this informational EPA webpage is attached to Wilmes Dec. as Attachment 1. This report and the other EPA reports cited in this section are authenticated under Fed. R. Evid. 901(a) (the requirement of authentication is "satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims") and Fed. R. Evid. 901(b)(7)(B) (as "a purported public record or statement [that] is from the office where items of this kind are kept"). In addition, these EPA documents are self-authenticated as an official publication under Fed. R. Evid. 902(5). See Kuba v. Sea World, Inc., 428 Fed. App'x 728, 732 (9th Cir. 2011) (excerpt from City of San Diego website authenticated under Rule 902(5)); Castaic Lake Water Agency v. Whittaker Corp., 272 F. Supp. 2d 1053, 1061, n.6 (C.D. Cal. 2003) (EPA reports are self-authenticating); and Williams v. Long, 585 F. Supp. 2d 679, 686–88 (D. Md. 2008) (collecting cases indicating that postings on government websites are inherently authentic or self-authenticating). These documents are admissible under the "public records" exception to hearsay rule as it is "a record or statement of a public office [that] sets out the office's activities" and "neither the source of information nor other circumstances indicate a lack of trustworthiness." Fed. R. Evid. 803(8)(A)(i), (B). See, e.g., PennEnvironment v. GenOn Ne. Mgmt. Co., No. 07-475, 2011 WL 1085885, at *10 (W.D. Pa. Mar. 21, 2011) (and cases cited therein) (EPA reports, including one entitled "The toxicity of aluminum to aquatic species in the US" were admissible in CWA citizen suit summary judgment motion under Fed. R. Evid. 803(8) as "public records and reports generated by public agencies setting forth their activities and/or factual findings as the result of an investigation made pursuant to their authority granted by law"). Finally, a court may take judicial notice of matters of public record, including an agency's public website. See Parker v. Robinson, No. 07-cv-01731-MSK-KLM, 2008 WL 1924376, at *2 (D. Colo. May 1, 2008); Coleman v. Dretke, 409 F.3d 665, 667 (5th Cir. 2005).

See EPA, "Nitrogen Dioxide: Health," Attachment 2 to Wilmes Dec., Ex. A.[5]

Sulfur dioxide ("SO_2") is also a respiratory irritant, with studies showing that short-term exposure can lead to increased visits to emergency rooms for respiratory illness:

> Current scientific evidence links short-term exposures to SO_2, ranging from 5 minutes to 24 hours, with an array of adverse respiratory effects including bronchoconstriction and increased asthma symptoms. These effects are particularly important for asthmatics at elevated ventilation rates (e.g., while exercising or playing.)
>
> Studies also show a connection between short-term exposure and increased visits to emergency departments and hospital admissions for respiratory illnesses, particularly in at-risk populations including children, the elderly, and asthmatics.
>
> EPA's National Ambient Air Quality Standard for SO_2 is designed to protect against exposure to the entire group of sulfur oxides (SO_X) . . . SO_X can react with other compounds in the atmosphere to form small particles. These particles penetrate deeply into sensitive parts of the lungs and can cause or worsen respiratory disease, such as emphysema and bronchitis, and can aggravate existing heart disease, leading to increased hospital admissions and premature death.

See EPA, "Sulfur Dioxide: Health," Attachment 3 to Wilmes Dec., Ex. A.[6]

Carbon monoxide ("CO") "is a colorless, odorless gas emitted from combustion processes." See EPA, "Carbon Monoxide: Health," Attachment 4 to Wilmes Dec., Ex. A.[7]

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[5] This document is publicly available at http://www.epa.gov/air/nitrogenoxides/health.html. See Wilmes Dec ¶ 3. For the reasons discussed in note 5, supra, this document is authenticated and admissible.

[6] This document is publicly available at: http://www.epa.gov/air/sulfurdioxide/health.html. See Wilmes Dec ¶ 4. For the reasons discussed in note 5, supra, this document is authenticated and admissible.

[7] This document is publicly available at: http://www.epa.gov/airquality/carbonmonoxide/. See Wilmes Dec ¶ 5. For the reasons discussed in note 5, supra, this document is authenticated and admissible.

EPA explains that "CO can cause harmful health effects by reducing oxygen delivery to the body's organs (like the heart and brain) and tissues." Id.

III. STATEMENT OF UNDISPUTED FACTS

A. Lamar Repowering Project and its Operating Permit

In November 2004, the Lamar Utilities Board ("LUB") and the Arkansas River Power Authority ("ARPA") entered into a Joint Operating Agreement for the development of the "Lamar Repowering Project" – "repowering" the LUB's gas-fired electric generation station as a coal-fired facility – and for its continued operation and maintenance.[8] See Defendants' Answer to Plaintiff's Supplemental Complaint, ("Ans."), Dkt. # 49 ¶ 49; Affidavit of Richard Rigel in Support of Defendants' Motion to Dismiss ("Rigel Aff.") ¶ 3, Dkt. # 12-2. The LRP is owned by ARPA and operated by the LUB, doing business under the name Lamar Light and Power. Rigel Aff. at ¶ 2, 3. The LRP, with its new coal-fired boiler, began operation sometime on or about May 18, 2009. Ans. ¶ 50. Defendants submitted an official notice of start-up for this boiler to the Air Pollution Control Division ("Air Division")[9] of the Colorado Department of Public Health and Environment ("CDPHE") on June 1, 2009. Id.

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[8] Although not a material fact, it is worth noting that Defendants converted their utility from natural gas to coal at a time when other utilities were switching from coal to natural gas. In fact, a 2010 white paper by Babcock & Wilcox (the LRP's boiler manufacturer) explained the rationale for switching from coal to natural gas, stating: "Recent changes in the price of natural gas have made that fuel economically attractive, with the added benefit of reduced emissions of [SO2], [NOx], and [carbon dioxide]. For those utilities with existing coal-fired units, conversion from coal firing to natural gas firing might be an option worth considering." See Natural Gas Conversions of Existing Coal-fired Boilers, attached hereto as Att. 5 to Wilmes Dec. This document is available at: http://www.babcock.com/library/pdf/ms-14.pdf. See Wilmes Dec. ¶ 6.

[9] The Air Division administers the air permit program for stationary sources in Colorado.

On February 3, 2006, the Air Division issued Permit Number 05PR0027 ("Permit") to LUB for the construction and operation of the LRP.[10] Ans. ¶ 52. Defendants' Permit was modified on August 21, 2007 and October 13, 2009. Id. Defendants admit that the "construction permit and subsequent modifications issued by [the Air Division] include emissions limitations for certain air pollutants with which the LRP must comply." Rigel Aff. ¶ 4, Dkt. # 12-2. The permit provisions relevant to Guardians' First, Second, Fourth, and Fifth Causes of Action do not differ in the 2007 and 2009 Permits, which were in effect during the violations at issue in this lawsuit. See 2007 Permit, attached hereto as Exhibit B; 2009 Permit, attached as Exhibit C.[11]

The LRP's construction and operating Permit includes limits for emissions of NO_X, SO_2, and CO from the circulating fluidized bed boiler, also known as the coal-fired boiler or AIRS Point ID 004. Condition 7 of the Permit limits the NO_X emission rate from the coal-fired boiler to no more than 1.0 pounds per megawatt-hour ("lb/MWh") on a rolling 30-day average basis. See Permit, Ex. C at ARPA_NOx15265. Condition 7 limits the SO_2 emission rate from the coal-fired boiler to no more than 1.4 lb/MWh on a 30-day rolling average basis. See id. Condition 4 of the Permit limits emissions of SO_2 from the coal-fired boiler to a daily average of not more than 0.103 pound per million metric British thermal units ("lb/mmBtu") heat input, in order to

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[10] The Air Division issued the permits for the construction and operation of the LRP directly to LUB, as operator of the Lamar Plant. Accordingly, LUB submits semi-annual reports to the Air Division and is directly responsible for state and federal regulatory requirements. However, both operators *and* owners – including ARPA – are liable for violations of the CAA. See Pound v. Airosol Company, Inc., 498 F.3d at 1097.

[11] Ex. B (2007 Permit) and Ex. C (2009 Permit) were produced by Defendants in discovery and are public records on file with the Air Division. See Wilmes Dec. ¶ 9. These documents are therefore authenticated pursuant to Fed. R. Evid. 901(a). See also Fed. R. Evid. 901(b)(4), (7). These permits are admissible under Fed. R. Evid. 803(6), as records of a regularly conducted activity, and Fed. R. Evid. 803(8) as public records.

achieve the SO_2 BACT requirement. Id. at ARPA_NOx15264[12] ("Emissions of Sulfur Dioxide shall not exceed a daily average of 0.103 [lb/mmBtu] heat input."). Condition 4 limits emissions of CO from the coal-fired boiler to not more than 76.5 pounds per hour based on a rolling 3-hour average, in order to achieve the CO BACT requirement. See id. ("Emissions of Carbon Monoxide shall not exceed 76.5 pound per hour based on a rolling 3-hour average.").

The LRP's coal-fired boiler is equipped with continuous emission monitoring systems ("CEMS") that monitor emissions of certain pollutants, including NO_X, SO_2, and CO. Condition 7 of Lamar's Permit requires LUB to install, calibrate, maintain, and operate a CEMS, and record the output of the system, for measuring SO_2 emissions from the coal-fired boiler at the Lamar Plant. See Permit, Ex. C at ARPA_NOx15265; 40 C.F.R. § 60.49Da(b). Condition 7 of the Permit also requires LUB to install, calibrate, maintain, and operate a CEMS, and record the output of the system, for measuring NO_X emissions from the coal-fired boiler at the LRP. See id. at ARPA_NOx15265; 40 C.F.R. § 60.49Da(c)(1). Condition 12 requires the boiler to be equipped with a CEMS for CO. See Ex. C at ARPA_NOx15269.

B. Defendants' Excess Emission Reports

Pursuant to Permit Condition 7 and 40 C.F.R. § 60.7, LUB must submit excess emissions and monitoring systems performance reports to EPA and the Air Division on a semi-annual basis, which document certain excess emissions. See Permit, p. 7, ARPA_NOx15267. According to these "Semi-Annual Reports," submitted to the Air Division by LUB on or about January 29, 2010, July 29, 2010, January 28, 2011, and January 30, 2012, since beginning

[12] As the provisions relevant to this Motion for Summary Judgment are identical in the 2007 and 2009 permits, throughout this brief, Guardians will cite to only Permit Modification No. 2, issued on October 13, 2009. See ARPA_NOx15261.

operation on May 18, 2009, the Lamar Plant has regularly exceeded its emission limits for NO_X, SO_2, and CO.[13]

On January 29, 2010, LUB submitted its Semi-Annual Report to the Air Division for the period beginning April 14, 2009 and extending through December 31, 2009 ("SAR 2009"). See SAR 2009 Excerpts, attached hereto as Exhibit D.[14] On July 29, 2010, LUB submitted its Semi-Annual Report to the Air Division for the period beginning January 1, 2010 and extending through June 30, 2010 ("SAR 2010-1"). See SAR 2010-1 Excerpts, attached hereto as Exhibit E. On January 28, 2011, LUB submitted its Semi-Annual Report to the Air Division for the period beginning July 1, 2010 and extending through December 31, 2010 ("SAR 2010-2"). See SAR 2010-2 Excerpts, attached hereto as Exhibit F. On January 30, 2012, LUB submitted its Semi-Annual Report to the Air Division for the period beginning July 1, 2011 and extending through December 31, 2011 ("SAR 2011-2"). See SAR 2011-2 Excerpts, attached hereto as Exhibit G. Each Semi-Annual Report contains "Quarterly EPA Summary Reports," which document excess emissions for NO_X, SO_2, and CO. The LUB Superintendent signed each Quarterly EPA

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[13] LUB also submitted Semi-Annual Reports on or about July 30, 2011 (for the first half of 2011) and July 3, 2012 (for the first half of 2012), although the boiler was not in operation during those reporting periods, so these reports are not relevant.

[14] Exhibits D through H (the Semi-Annual Reports and Excess Emissions Report) were produced by Defendants in discovery and are public records on file with the Air Division at CDPHE. See Wilmes Dec. ¶ 10. These documents are therefore authenticated pursuant to Fed. R. Evid. 901(a). See also Fed. R. Evid. 901(b)(4), (7). Each EPA Summary Reports was attested by LUB as "true, accurate, and complete." Furthermore, LUB submitted these documents to the Air Division on Lamar Light and Power letterhead. "[D]ocuments produced during discovery that are on the letterhead of the opposing, producing party are authentic per se for purposes of Federal Rule of Evidence 901." Law Co. v. Mohawk Constr. & Supply Co., Inc., 577 F.3d 1164, 1170 (10th Cir. 2009) (citations omitted). These permits are admissible under Fed. R. Evid. 803(6), as records of a regularly conducted activity, under Fed. R. Evid. 803(8) as public records, and under Fed. R. Evid. 801(d)(2) as party admissions.

Summary Report contained therein, certifying "the information contained in this report is true, accurate, and complete." See, e.g., Ex. D at ARPA_NOx019864.

On October 12, 2010, LUB submitted a "Revised Emissions Report" as an addendum to its July 29, 2010 Semi-Annual Report to the Air Division. See Revised Emissions Report, attached hereto as Exhibit H, ARPA_NOx025774. This report revised incorrect data resulting from CEMS programming errors and deficiencies. Id. The addendum report shows 30-day rolling average emissions for the Lamar Plant for the applicable pollutants that have 30-day rolling average limitations, including the NSPS NO_X and NSPS SO_2 limitations at issue here. Id. The report includes a spreadsheet, wherein LUB identifies all days in which its CEMS data showed exceedances of 30-day rolling average limitations, from May 18, 2009 through June 30, 2010. Id. at ARPA_NOx025775.

C. The LRP's History of Non-Compliance

1. The LRP's Repeated Emission Exceedances

The LRP began generating electricity in May 2009. Rigel Aff. ¶ 5, Dkt. # 12-2. From the beginning, the plant has been plagued with problems. See, e.g., Ex. D (SAR 2010-1) at ARPA_NOx019858. On October 28, 2009, following corrections to certain calculations in the CEMS programming, Defendants discovered significant exceedances for NO_X and SO_2 emissions. Id. at ARPA_NOx019859. Subsequently, Defendants' boiler contractor, Babcock & Wilcox ("B&W"), installed a selective non-catalyst reduction ("SNCR") NO_X emission control system for the LRP. Id.

However, the LRP's emission issues continued and, by at least late February 2010, Defendants were aware that the SNCR system was not achieving the required level of emission

control. Rigel Aff. ¶ 7, Dkt. # 12-2. A number of design and engineering issues were believed to have caused these exceedances, including failure of the multi-clone dust collectors, improper design of the primary and secondary air fan systems, and an incorrectly-designed combustion air management system. Id. On February 23, 2010, Rick Rigel, Superintendant of the LUB, communicated in an email to Tom Garabedian, a representative of B&W, that: "[w]e cannot continue to operate knowingly exceeding the NO_X requirements as we are now. We must either reduce NO_X very quickly or we will be forced to come off-line." See February 23, 2010 Email, attached hereto as Exhibit I.[15] However, after February 23, 2010, Defendants continued to operate while knowingly exceeding their NO_X emission limitations. From February 24, 2010 though December 30, 2010 (when the plant went offline), the LRP exceeded its 1.0 lb/MWh emission limit for NO_X on 242 days, almost every single day that the plant operated. See Ex. F at ARPA_NOx000196-000205; Ex. H at ARPA_NOx025778-025780.[16]

On December 30, 2010, a tube failure and/or other operations problems caused the LRP to go offline. According to the Defendants, "The plant was tripped offline at approximately 10:30 o'clock on December 30, 2010 after a steam tube ruptured. It is believed the rupture was a result of the use of steam for the injection of ammonia into the system, which caused excessive

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[15] This email was produced by Defendants in discovery. See Wilmes Dec. ¶ 11. This document is from Rick Rigel's email account and contains his signature line. This document is therefore authenticated pursuant to Fed. R. Evid. 901(a). This document is admissible under Fed. R. Evid. 801(d)(2) as a party admission.

[16] Defendants' records do not show a NO_X violation from August 11 through August 16 (see Ex. F at ARPA_NOx000196), when the plant was operating (see id. at ARPA_NOx000175). However, there was significant CEMS "downtime" (where the monitor was not operational) from August 12 through August 16, so unrecorded violations may have occurred during this time. See id. at ARPA_NOx000198-000200.

corrosion to the exterior of the tube." See Defs' Response to Pl.'s First Set of Interrogatories, attached hereto as Exhibit J, at p. 11 (Interrog. No. 5). Emission violations at the LRP were ongoing when the plant went off-line. See SAR 2010-2, Ex. F at ARPA_NOx000179. The LRP remained offline during the first half of 2011.

The LRP was brought back online from July 15, 2011 through early November 2011 for what Defendants describe as the "limited purpose of performing short-term diagnostic testing and boiler tuning." See Supplement Affidavit of Rick Rigel, Dkt. # 28-1 ¶ 2. Although "testing" of the facility occurred during this time, by August 2011, LRP was again producing electricity for sale and its operation looked exactly like that in Fall of 2010. See Lamar's Operating Summary for September 2011, attached hereto as Exhibit K.[17] For example, during the month of September 2011, the LRP produced 20,777,118 kilowatt-hours ("kWh") of energy. Id. at 4. In August 2011, the LRP produced 13,776,599 kWh. Id. In contrast, the LRP produced 12,956,514 kWh in September 2010 and 18,149,880 kWh in November 2010. Id. Therefore, "testing" of the LRP produced more electricity in August and September of 2011 than the "operation" of the LRP did in September and November of the previous year. Lamar sold energy from the generation of the LRP during this time to the Municipal Energy Association of Nebraska ("MEAN"). See id. at 1. ARPA's member municipalities also used energy generated by the LRP in 2011. Id.

[17] This document was produced by Defendants in discovery and is part of an ARPA board meeting packet. See Wilmes Dec. ¶ 12. It is authenticated pursuant to Fed. R. Evid. 901(a), as there is no reason to question this document's authenticity. This document is admissible under Fed. R. Evid. 803(6), as records of a regularly conducted activity, under Fed. R. Evid. 803(8) as public records, and under Fed. R. Evid. 801(d)(2) as party admissions.

During the second half of 2011, despite Defendants' assurances to the Air Division, Defendants continued to violate emission limits for NO_X, SO_2, and CO. See SAR 2011-2, Ex. G at ARPA_NOx025406-25447. The LRP exceeded its daily emission limit for NO_X (30 day rolling average) for 919.55 hours during the third quarter of 2011 (95% of its operating time) and for 603.73 hours during the fourth quarter of 2011 (96.5% of its operating time). Id. at ARPA_NOx025438, ARPA_NOx025446. In fact, Defendants failed to operate the LRP in compliance with emission limits in the Permit on even a single day that the LRP operated in 2011. Id. at ARPA_NOx025420-25425. NO_X violations at the LRP were ongoing through November 12, 2011, the last day that the LRP's emission reports show Boiler Unit 8 as "on." Id. at ARPA_NOx025424, ARPA_NOx025447.

According to Defendants, they are currently "working with their boiler manufacturer, Babcock & Wilcox, on several additional modifications to the [LRP]." See Defs.' Responses to Pl.'s First Set of Interrogatories (on Merits), attached hereto as Exhibit L, at p. 14 (Interrog. No. 8). "Defendants expect to have these modifications completed by the second quarter of 2013." Id. Defendants then plan to resume operations at the LRP for more "testing" of the LRP by summer 2013.[18] See ARPA's General Manager's Board Report for November 2012, attached as Exhibit M (providing an update on the status of equipment for modifications to the LRP and noted that, although the equipment delivery schedule pushed back the "testing/tuning schedule a

[18] This comports with an article in the Prowers Journal (a community newspaper for Prowers County) on February 27, 2013, reporting that according to a written update provided by ARPA to its board members, complete testing and tuning of the LRP "should start by late summer and take between 90 to 120 days to complete." See "Repowering Project Upgrades May Run through 2013," Attachment 6 to Wilmes Dec., Ex. A, and available at http://theprowersjournal.com/2013/02/27/repowering-project-upgrades-may-run-through-2013/.

bit," "[w]e should still be ready by late spring-early summer.").[19] ARPA has also budgeted for 120 days of testing in 2013. See ARPA's Preliminary 2013 Budget Update for the September 27, 2012 Board Meeting, attached hereto as Exhibit N (stating: "We increased operating costs for the [LRP] by approximately $137,000 [in the latest draft of the 2013 budget] due to adding an additional load of coal and corresponding limestone. In discussions with LUB, if it takes the full 120 days of testing as we budgeted it will most likely require five loads of coal . . .").[20]

2. Defendants' Out-of-Court Agreements with the Air Division

On September 24, 2010, LUB entered into a settlement agreement in the form of a Compliance Order on Consent ("2010 Consent Order") with the Division concerning violations at the LRP through the first half of 2010. See 2010 Consent Order, Dkt. 12-3.[21] Based upon the LRP's semi-annual monitoring reports and other information provided by the Defendants, the Division made certain determinations regarding violations at the LRP, including:

> Lamar failed to limit its October 2009 monthly emission of SO_2 to 19.6 tons per month ("tpm"), violating Permit 05PR0027 Condition 10.
>
> Lamar failed to limit its August 2009, September 2009, October 2009 and November 2009 monthly emissions of NO_X to 17.4 tpm, violating Permit 05PR0027 Condition 10.

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[19] This document, Ex. M, was produced by Defendants in discovery and is part of an ARPA board meeting packet. See Wilmes Dec. ¶ 13. This document is authentic and admissible for the reasons set forth in n. 18, supra.

[20] This document, Ex. N, was produced by Defendants in discovery and is part of an ARPA board meeting packet. See Wilmes Dec. ¶ 14. This document is authentic and admissible for the reasons set forth in n. 18, supra.

[21] The 2010 and 2011 Consent Orders were attached to Defendants' Motion to Dismiss, Dkt. # 12, and authenticated by Richard Rigel as "true and correct copies" in an accompanying affidavit. See Rigel Aff. ¶¶ 9, 12, Dkt. #12-2.

> Lamar failed to limit SO_2 emissions to a daily average of 0.103 lbs/mmBTU on multiple days from January 2010 through June 2010, violating Permit 05PR0027 Condition 4.
>
> Lamar failed to limit CO emissions to the three-hour rolling average of 76.5 lbs/hr during multiple intervals over the three month period from April 2010 to June 2010, violating Permit 05PR0027 Condition 4.

Id. at p. 2. Defendants have admitted that these determinations by the Air Division are correct. See Defs.' Response to Pl.'s Req. for Admission, Ex. L at p. 7 (Request No. 1). As part of the 2010 Consent Order, LUB agreed to immediate compliance with the Colorado SIP. See Dkt. #12-3 at 5-6. Notwithstanding this Consent Order, the LRP's emissions continued to exceed its permitted limits for NO_X, SO_2, and CO. See SAR 2010-2, Ex. F.

On April 29, 2011, LUB entered into a second Compliance Order on Consent ("2011 Consent Order") with the Division. See 2011 Consent Order, Dkt. # 12-4. The 2011 Consent Order details certain modifications and tune-ups made to the LRP in 2010, directed at achieving compliance, including installation of the aforementioned SNCR system, boiler tuning, and air flow testing. Id. at p. 2. However, despite these equipment modifications and tune-ups, the LRP continued to exceed its permitted emission limits. Based upon Defendants' semi-annual monitoring reports, records related to the LRP, and other information provided by the Defendants, the Division made certain determinations regarding violations at the LRP, including:

> On 400 occasions between June 4, 2009 and December 31, 2010 (including 260 occasions between the second quarter of 2009 and the second quarter of 2010, 78 days in the third quarter of 2010 and 62 days in the fourth quarter of 2010), Lamar exceeded the 30 day rolling average NO_X limit of 1.0 lb/MWH, violating Permit Condition Number 7.
>
> On 221 occasions between June 4, 2009 and December 31, 2010 (including 50 occasions between the second quarter of 2009 and the second quarter of 2010, 46 days in the third quarter of 2010, and 25 days in the fourth quarter of 2010),

> Lamar exceeded the SO_2 30-day rolling average limit of 1.4 lb/MWH, violating Permit Condition Number 7.
>
> On 41 occasions (including 36 days in the third quarter of 2010 and 5 days in the fourth quarter of 2010), Lamar exceeded the SO_2 daily average limit of 0.103lbs/mmBTU, violating Permit Condition Number 4.
>
> On 81 occasions (including 45 days in the third quarter of 2010 and 36 days in the fourth quarter of 2010), Lamar exceeded the CO three-hour rolling average limit of 76.5 lbs/hour, violating Permit Condition Number 4.

Id. at p. 3-4. Defendants have admitted that these determinations by the Air Division are correct. See Defs.' Responses to Pl.'s Req. for Admissions, attached hereto as Exhibit O, at p. 2 (Request No. 4).

In the 2011 Consent Order, LUB agreed that it may "operate the [LRP] for the limited purpose of performing short-term diagnostic testing and boiler tuning" – referred to as "Preliminary Testing" – but that it would not "renew operations" at the LPR until it "reasonably conclude[d] that its modifications, adjustments, and/or re-design of the [LRP] result[ed] in a Facility that [would] operate in compliance with the Act, the Regulations, and the Permit." Dkt. # 12-4 at p. 5 ¶¶ 12, 13. The agreement also provided that: "[e]ffective immediately and without limitation, Lamar shall comply" with the Colorado SIP and the Permit. Id. at p. 5 ¶ 11.

Subsequently, Defendants reported that the total operating time for the LRP during this "short-term diagnostic testing" period in the second half of 2011 was 1593.35 hours. See SAR 2011-2, Ex. G at ARPA_NOx025438 and ARPA_NOx025446. During this period, and notwithstanding the 2011 Consent Order, the LRP's emissions continued to exceed its permitted limits for NO_X, SO_2, and CO. See id. at ARPA_NOx025438, ARPA_NOx025446, ARPA_NOx025415, and ARPA_NOx025419.

On December 6, 2012, Defendant LUB entered into a ***third*** Compliance Order on Consent ("2012 Consent Order") with the Air Division regarding violations at the LRP. See 2013 Consent Order, attached hereto as Exhibit P.[22] This Consent Order sets forth violations of the LRP's permitted limits for NO_X, SO_2, and CO during 2011 when the Defendants were "testing" modifications to the facility. Id. at ARPA_NOx028066-028064.

Again, LUB agrees that it "may operate the [LRP] for the limited purpose of performing short-term diagnostic testing and boiler tuning," but that it will not "renew operations" at the LRP until it "reasonably concludes that its modifications, adjustments, and/or re-design of the [LRP] result in a Facility that will operate in compliance with the Act, the Regulations, and the Permit." Id. at ARPA_Nox028066-028067, ¶¶ 10, 11. Despite the length of the testing during 2011 and the violations that occurred during this period, this is the only limitation placed on "testing" of the LRP in the 2012 Consent Order.

IV. STANDARD OF REVIEW

A court shall render summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A factual dispute is 'genuine' for purposes of Rule 56 when the evidence presented in support and opposition to the motion is so contradictory that, if presented at trial, a reasonable jury could return a verdict for either party." *In re* Ribozyme Pharm., Inc. Sec. Litig., 209 F. Supp. 2d 1106, 1110 (D. Colo. 2002) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)). The relevant inquiry is "whether the evidence presents a sufficient disagreement to

[22] The 2012 Consent Order was produced by Defendants in discovery. See Wilmes Dec. ¶ 15. It is signed by the Defendants and stamped and dated by the Air Division. This document is therefore authenticated pursuant to Fed. R. Evid. 901(a).

require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 251-52. "An issue of fact is 'material' if under the substantive law it is essential to the proper disposition of the claim." Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 670 (10th Cir. 1998). Although summary judgment motions are not appropriate in every case, they are "an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1).

Courts find summary judgment on liability for violations of the CAA particularly appropriate where, as here, a trial is not necessary because the defendant's own air pollution monitoring results demonstrate liability. See, e.g., Sierra Club v. Pub. Serv. Co. of Colo., 894 F. Supp. 1455 (D. Colo. 1995); St. Bernard Citizens for Envtl. Quality v. Chalmette Ref., L.L.C., 354 F. Supp. 2d 697, 706-07 (E.D. La. 2005); Friends of the Earth v. Potomac Elec. Power Co., 419 F. Supp. 528 (D.D.C. 1976).

V. GUARDIANS HAS STANDING TO BRING THIS CITIZEN SUIT

In addition to seeking summary judgment as to Defendants' liability, Guardians seeks summary judgment that it has standing to bring this suit on behalf of its members. Defendants' violations injure Guardians and its members, and it is within this Court's power under the CAA to redress these injuries. Organizations such as Guardians have standing to bring a suit on behalf of their members when:

> (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members.

Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977). As these requirements are met in this case, Guardians has standing.

A. Guardians' Members Have Standing To Sue in Their Own Right

Because Guardians' members Shirley Warren, Charles Warren, Angela Warren, and Jeremy Nichols have standing to sue in their own right, the organization satisfies the first element of the Supreme Court's Hunt test.[23] See Declaration of Shirley Warren ("Shirley Dec."), attached hereto as Exhibit Q; Declaration of Charles Warren ("Charles Dec."), attached hereto as Exhibit R; Declaration of Angela Warren ("Angela Dec."), attached hereto as Exhibit S; and Declaration of Jeremy Nichols ("Nichols Dec."), attached hereto as Exhibit T. To satisfy Article III's standing requirements, a plaintiff must show:

> (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

S. Utah Wilderness Alliance v. Palma, No. 11-4094, 2013 WL 71780, at *7 (10th Cir. Jan. 8, 2013) (citing Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc. ("Laidlaw"), 528 U.S. 167, 180-81 (2000)).

1. Guardians' Members Have Suffered "Injury in Fact"

"[B]reathing even slightly polluted air entails a health risk" that is an injury in fact. Communities for a Better Env't v. Cenco Ref. Co., 180 F. Supp. 2d 1062, 1075 (C.D. Cal. 2001). See also LaFleur v. Whitman, 300 F.3d 256, 271 (2d Cir. 2002) (plaintiff's "likely exposure to additional SO_2 in the air where she works is certainly an 'injury-in-fact' sufficient to confer

[23] If even one member of an organization has standing to sue in his or her own right, that is sufficient for the organization to have standing. See Utah Ass'n of Counties v. Bush, 455 F.3d 1094, 1099 (10th Cir. 2006).

standing"); Natural Res. Def. Council v. EPA, 507 F.2d 905, 910 (9th Cir. 1974) (finding "no doubt" that plaintiff "will suffer injury if compelled to breathe air less pure than that mandated by the [CAA]."). Furthermore, a plaintiff's members' "reasonable concerns" of harm caused by pollution from the defendant's facility directly affecting those members' recreational, aesthetic, and economic interests establishes injury in fact. Laidlaw, 528 U.S. at 183-84. See also Concerned Citizens Around Murphy v. Murphy Oil USA, Inc., 686 F. Supp. 2d 663, 671 (E.D. La. 2010) ("[B]eing reasonably concerned about the health effects of air pollution" establishes an injury in fact for standing purposes).

"The injury-in-fact necessary for standing need not be large, an identifiable trifle will suffice." LaFleur, 300 F.3d at 270 (internal quotations and citations omitted); see also Sierra Club v. El Paso Gold Mines, No. Civ.A.01 PC 2163 OES, 2002 WL 33932715, at *3 (D. Colo. Nov. 15, 2002) (following "identifiable trifle" standard); Natural Res. Def. Council v. Vilsack, No. 08-cv-02371-CMA, 2011 WL 3471011, at *4 (D. Colo. Aug. 5, 2011) (same, finding that "the level of harm necessary to establish standing is less than that needed to show a violation of governing environmental standards."). In LaFleur, the Court held that "[a]ctual exposure to increased levels of SO_2 at one's workplace is certainly something more than an 'identifiable trifle,' even if the ambient level of air pollution does not exceed the NAAQS." 300 F.3d at 271. The threat of future injury is also sufficient. See El Paso Gold Mines, 2002 WL 33932715, at *3.

The declarations of Guardians' members establish injury in fact far beyond a mere "identifiable trifle." Shirley and Charles Warren are members of Guardians who live less than one mile from the LRP. See Shirley Dec. at ¶ 5, Ex. Q; Charles Dec. at ¶ 5, Ex. R. They see the plant whenever they go outside their house. Id. They breathe emissions from the LRP. Id.

Since the LRP began operation in 2009, they have witnessed smoke and other emissions coming from the LRP, and one time found Charles' vehicle covered in particulate matter. Shirley Dec. at ¶ 6; Charles Dec. at ¶ 6. The sight of air pollution coming from the LRP diminishes the Warrens' recreational and aesthetic enjoyment of taking walks and being outside in their neighborhood. Shirley Dec. at ¶ 7; Charles Dec. at ¶ 7.

The Warrens are concerned that the LRP's unlawful emissions will cause respiratory and other health problems. Shirley Dec. at ¶ 10, 14; Charles Dec. at ¶ 10, 13. Given the nature of the pollutants as described in pp. 6-8, supra, and their proximity to the plant, their concerns are reasonable. In the past few years, Charles has experienced shortness of breath. Charles Dec. at ¶ 13. He worries that the pollution from the LRP has impacted his respiratory health in the past, and will continue to impact his health when it resumes operations this summer. Id. Charles also worries about the health effects that pollution from the LRP will have on his granddaughter, who lives in Lamar and has asthma, and on the other young children who live near the LRP and who wait for the school bus near the plant. Id. at 12.

When the weather is good, the Warrens enjoy going to Sonic, sitting outside, and drinking a milkshake. Shirley Dec. at ¶ 18; Charles Dec. at ¶ 17. However, they rarely do this when the LRP is running, because of their health concerns regarding the LRP's emissions. Id. The Warrens have read and heard that the LRP will start back up again by summer, and that "testing" of plant may run throughout the summer, possibly through the end of 2013. Shirley Dec. at ¶ 15; Charles Dec. at ¶ 14. They are concerned about being exposed to illegal pollution again this summer, when they would otherwise enjoy spending time outdoors. Shirley Dec. at ¶ 16; Charles Dec. at ¶ 16.

Angela Warren and her children live less than ten blocks from the LRP. Angela Dec. at ¶ 4, Ex. S. She has seen emissions coming from the LPR and it diminishes her enjoyment of being outside in her neighborhood. More importantly, she is very concerned about the health impacts of the LRP's pollution for herself and her children. Id. at ¶ 8, 12. Angela's daughter has asthma, and sometimes struggles to breathe. Id. at ¶ 10, 11. Angela understands that the health concerns from NO_X and SO_2 include effects on breathing and the respiratory system, and that exposure to these pollutants is especially concerning for children with asthma. Id. at ¶ 9. She worries about when the LRP fires back up this summer, when she would otherwise enjoy spending time outside with her children. Id. at ¶ 13.

Shirley Warren, Charles Warren, and Angela Warren, who live in close proximity to the LRP and breath the unlawful emissions from it, have therefore suffered injury in fact sufficient for standing in this case.[24] See, e.g., Cenco Ref. Co., 180 F. Supp. 2d at 1075 (living and working in immediate vicinity of refinery and breathing polluted air is an injury); Murphy Oil, 686 F. Supp. 2d at 671 (persons who "use and enjoy their yards and neighborhood less because of odors emanating from" a refinery suffer an injury); Laidlaw, 528 U.S. at 181-82 (in Clean Water Act ("CWA") case, standing found where individual lived a half-mile from defendant's facility, "occasionally drove over the" river that defendant discharged into, which "looked and smelled polluted," and used the river less because of his pollution concern).[25]

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[24] As set forth in his Declaration, Jeremy Nichols also has standing. See Ex. T. Mr. Nichols regularly visits Lamar and the nearby Comanche National Grassland. See Nichols Dec. at ¶ 8, 13. The pollution from the LRP affects his recreational and aesthetical interests. Id. at ¶ 10, 11. He is worried about being exposed to unlawful emissions from the LRP when he returns to Lamar and the Comanche National Grassland this summer. Id. at ¶ 8, 13, 14.

[25] As noted by this Court, because the CAA and CWA "are similar in their mechanism of

2. The Injuries are "Fairly Traceable" to the Defendants

"The element of traceability requires the plaintiff to show that the defendant is responsible for the injury, rather than some other party not before the court." S. Utah Wilderness Alliance v. Office of Surface Mining Reclamation & Enforcement ("SUWA"), 620 F.3d 1227, 1233 (10th Cir. 2010). See also Lujan v. Defenders of Wildlife, 504 U.S. 55, 560-61 (1992) (to satisfy the traceability requirement, the injury must not result from the independent action of some third party not before the court). "Where a plaintiff has pointed to a polluting source as the seed of his injury, and the owner of the polluting source has supplied no alternative culprit, the 'fairly traceable' requirement can be said to be fairly met." Friends of the Earth v. Gaston Copper Recycling Corp., 204 F.3d 149, 162 (4th Cir. 2000); Sierra Club v. Franklin Cnty. Power of Ill., 546 F.3d 918, 926-27 (7th Cir. 2008) (same); Sierra Club v. Tenn. Valley Auth., 430 F.3d 1337, 1345 (11th Cir. 2005) (where plaintiffs attested that their experiences in the natural areas around the power plant were negatively affected by the plant's unlawful emissions, their injuries were traceable to those violations). Even circumstantial evidence has been deemed to satisfy the traceability requirement. See Texans United for a Safe Econ. Educ. Fund v. Crown Cent. Petroleum Corp., 207 F.3d 789, 793 (5th Cir. 2000) (plaintiffs satisfied this requirement by presenting only circumstantial evidence that their injuries were connected to the defendants' CAA violations).

The traceability requirement is easily satisfied in this case, as the injuries Guardians' members complain of are fairly traceable to the Defendants' excess emissions from the LRP,

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operation, courts routinely turn to cases decided under one when interpreting the other." Opinion and Order Denying Motion to Dismiss, Dkt. # 36 at p. 5 n.1 (citing Roosevelt Campobello Intern. Park Commn. v. EPA, 711 F.2d 431, 437 (1st Cir. 1983)).

"rather than some other party not before the court." SUWA, 620 F.3d at 1233. As discussed in the attached declarations of Guardians' members, they have seen pollution coming from the LRP. See, e.g., Shirley Dec. at ¶ 6. They also know that the LRP is emitting illegal pollution that they cannot see, and they are concerned regarding the health effects from this pollution. See, e.g., Shirley Dec. at ¶¶ 10-12. The Warrens' enjoyment of outdoor activities is diminished by the LRP's unlawful emissions. See, e.g., Shirley Dec. at ¶¶ 7, 17, 18. As documented by Defendants' excess emission reports, the LRP frequently exceeds its emission limits for a variety of pollutants known to cause adverse health effects, including respiratory problems. See Exhibits D through H. Finally, there is no evidence of unlawful emissions from another plant in Lamar. This evidence satisfies the traceability requirements. See, e.g., Chalmette Ref., 354 F. Supp. 2d at 703 (finding this type of evidence establishes traceability).

3. Guardians' Members' Injuries can be Redressed by an Order from this Court.

"[T]he requirement of redressability ensures that the injury can likely be ameliorated by a favorable decision." SUWA, 620 F.3d at 1233. Here, "it is likely, as opposed to merely speculative," that Guardians' members' injuries will be addressed by a favorable decision granting the requested relief. Laidlaw, 528 U.S. at 181. The CAA grants this Court authority to redress these members' injuries through injunctive relief and civil penalties against the Defendants. See 42 U.S.C. § 7604(a). In addition, the Court may order the Defendants to undertake beneficial mitigation projects in lieu of some part of a civil penalties award. See id. § 7604(g)(2). Violations at the LRP continued after the Complaint was filed and after Defendants entered into Consent Orders with the Air Division, demonstrating the need for injunctive relief and civil penalties.

An injunction requiring Defendants to cease violating the CAA will redress Plaintiffs' members' injuries by ensuring that that they will not be exposed to Defendants' illegal emissions in the future. Defendants plan to resume operations in summer of 2013.[26] This Court has already determined, based upon Defendants' compliance history, that "there is a 'realistic prospect' that violations will continue." Opinion and Order Denying Motion to Dismiss, Dkt. # 36, p. 8. The imposition of injunctive relief satisfies the redressability element required for standing. See, e.g., Pub. Interest Research Grp. Of N.J. v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 73 (3rd Cir. 1990) (finding that plaintiff's members' injuries would be redressed by an injunction which, if complied with, would decrease the pollution causing the injuries); Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546, 556 (5th Cir. 1996); Lead Envtl. Awareness Dev. V. Exide Corp., No. CIV. 96-3030, 1999 WL 124473, at *19 (E.D. Pa. Feb. 19, 1999) (finding that Defendants' violations are redressable by injunctive relief, because "[e]ven if such violations are episodic, they have continued and there is no guarantee that they will cease."); Chalmette Ref., 354 F. Supp. 2d at 705 ("An injunctive remedy is an appropriate form of redress if it will effectively abate or deter illegal conduct that is ongoing at the time of suit.").

The imposition of civil penalties will also redress Guardians' members' injuries.[27] Penalties (including payments to beneficial mitigation projects) will deter future violations, both

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[26] Defendants plan to renew operations at the LRP for more "testing" by this summer. See, e.g., Ex. M at ARPA_NOx025293; Ex. N at ARPA_NOx025192.

[27] In addition, the Court is also empowered to order Defendants to take remedial measures to redress the effects of its past violations. See Pub. Interest Research Grp. v. Atl. Salmon of Me., L.L.C., 339 F.3d 23 (1st Cir. 2003) (construing CWA); United States v. Cinergy Corp., 582 F. Supp. 1055 (S.D. Ind. 2008) (construing CAA); see also 42 U.S.C. § 7604(g)(2) (authorizing partial use of CAA penalty for "beneficial mitigation projects").

by punishing Defendants' illegal conduct and by helping to remove Defendants' economic incentive to violate the law. In Laidlaw, the Supreme Court held that civil "penalties may serve . . . to deter future violations and thereby redress the injuries that prompted a citizen suitor to commence litigation." 528 U.S. at 174. The Court explained:

> It can scarcely be doubted that, for a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress. Civil penalties can fit that description. To the extent that they encourage defendants to discontinue current violations and deter them from committing future ones, they afford redress to citizen plaintiffs who are injured or threatened with injury as a consequence of ongoing unlawful conduct.

Id. at 185-186; see also Covington v. Jefferson Cnty., 358 F.3d 626, 654 (9th Cir. 2004) ("Though a citizen's suit cannot recapture the [pollutants] that have been released, the civil penalties authorized under the [CAA] are more than sufficient to meet the redressability standard because they will deter future violations."); Sierra Club v. TVA, 430 F.3d at 1345 (civil penalties payable to U.S. Treasury were deterrent and satisfied redressability standard); Crown Cent. Petroleum, 207 F.3d at 793 (same).

B. This Suit's Purpose Is Germane To Guardians' Purposes.

WildEarth Guardians is a nonprofit environmental organization, whose purpose includes protecting public health and the environment from air pollution. See Nichols Dec. ¶ 4, Ex. T. This lawsuit is germane to that purpose. See, e.g., Sierra Club v. TVA, 430 F.3d at 1345 (CAA citizen suit is germane to purpose of environmental organizations).

C. The Participation Of Individual Members Is Not Required.

None of the claims Guardians asserts requires its members to participate as individuals in this litigation. Courts routinely hold that participation of individual members is not required in

an environmental citizen suit. See, e.g. Chalmette Ref., 354 F. Supp. 2d at 701 (individual members' participation in CAA citizen suit "not required because citizen suit does not seek monetary damages or particularized relief to a single person or group"). Because Guardians satisfies the Hunt requirements for associational standing, it has standing to bring this action on behalf of its members.

VI. GUARDIANS IS ENTITLED TO SUMMARY JUDGMENT AS TO LIABILITY ON ITS FIRST, SECOND, FOURTH, AND FIFTH CAUSES OF ACTION

Pursuant to the citizen suit provision of the CAA, "any person may commence a civil action on his own behalf [] against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of [] an emission standard or limitation under [the Act]." 42 U.S.C. § 7604(a)(1)(A). The CAA grants jurisdiction to the district courts "to enforce such an emission standard or limitation" under this citizen suit provision and "to apply any appropriate civil penalties." Id. § 7604(a).

According to excess emission reports submitted by Defendants to the Air Division, since beginning operation on May 18, 2009, the Defendants have regularly violated the "emission standards and limitations" established in Permit No. 05PR0027 issued by the Air Division pursuant to the Colorado SIP for the construction and operation of the LRP. Summary judgment on Defendant's liability is therefore appropriate for 2,454 violations (as set forth in detail below), because there is no genuine issue of material fact regarding these violations, and Guardians is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(a).

The CAA "imposes ***strict liability*** upon owners and operators who violate the Act." Pound v. Airosol Company, Inc., 498 F.3d 1089, 1097 (10th Cir. 2007) (emphasis added); see also United Steelworkers of Am. v. Or. Steel Mills, Inc., 322 F.3d 1222, 1229, n.4 (10th Cir. 2003. "Strict enforcement of applicable permits is in accordance with the legislative history of the Clean Air Act, which 'plainly reflects congressional intent that claims of technological and economic infeasibility not constitute a defense to an adjudication of violations of applicable' Clean Air Act requirements." Chalmette Ref., 399 F. Supp. 2d at 736 (quoting Potomac Elec. Power Co., 419 F. Supp. at 535); Potomac Elec., 419 F. Supp. at 535 (citing the Supreme Court in Union Elec. v. EPA, 427 U.S. 246, 256-57 (1976), and explaining: the CAA "is meant to be 'technology-forcing' and 'public health [is] given absolute priority over continued operations of a noncomplying polluters").

A. The CAA Authorizes Guardians to Bring this Citizen Enforcement Action Against the Defendants

1. Guardians Properly Invoked the CAA's Citizen Suit Provision

The CAA authorizes "any person" to bring a citizen suit. 42 U.S.C. § 7604(a). The CAA defines "person" to include corporations, partnerships and associations. Id. § 7602(e). "It is clear that nonprofit corporations may invoke the [CAA]'s citizen suit provision." Concerned Citizens Around Murphy, 686 F. Supp. 2d at 668 (citing Crown Cent. Petroleum, 207 F.3d at 792). Moreover, because Guardians has standing to bring this action, as set forth above, it also has statutory standing under the CAA. See Concerned Citizens Around Murphy, 686 F. Supp. 2d at 668; Chalmette Ref., 354 F. Supp. 2d at 700 ("statutory standing to sue under the [CAA] extends to the outer boundaries set by the 'case or controversy' requirement of Article III of the

Constitution").[28]

Pursuant the CAA's citizen suit provision, Guardians provided Defendants with at least 60 days notice of its intent to sue, before filing its Complaint and Supplemental Complaint. See 42 U.S.C. § 7604(b)(1)(A) (providing that 60 days notice must be given to the alleged violator, EPA, and the State before a citizen suit may be commenced). On October 27, 2010 and January 10, 2011, Guardians provided notice to the Defendants, the EPA Administrator, and the State of Colorado, of its intent to sue over the CAA violations on which this suit is based. See Supp. Complaint Ex. A-1, Dkt. 48-1 (October 27, 2010 notice letter) and Ex. A-2, Dkt. 48-2 (January 10, 2011 notice letter).

2. Defendants are "Persons" Subject to the CAA's Citizen Suit Provision

The CAA authorizes citizen suits against any "person," which is defined broadly to include "an individual, corporation, partnership, association, State, municipality, [or] political subdivision of a State . . ." 42 U.S.C. §§ 7604(a), 7602(e). "Municipality" is defined as "a city, town, borough, county, parish, district, or other public body created by or pursuant to State law." Id. § 7602(f).

Defendant LUB d/b/a Lamar Light and Power is a municipal utility, and operator of the LRP. Ans. ¶ 22. The LUB was established under Article VII of the Home Rule Charter of the City of Lamar, and it is a governmental entity authorized to conduct business in the State of Colorado. See Ex. P at ARPA_NOx028061. Therefore, the LUB is a "person" within the meaning of the CAA, 42 U.S.C. § 7602(e).

[28] See also Ecological Rights Found. v. Pac. Lumber Co., 230 F.3d 1141, 1147 (9th Cir. 2000) (CWA); Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 16 (1981) (CWA).

Defendant ARPA owns the LRP. ARPA is a political subdivision of the State of Colorado established pursuant to the Power Authority Act, COLO. REV. STAT. § 29-1-204, et seq. Ans. ¶ 23. Therefore, ARPA is a "person" within the meaning of the CAA, 42 U.S.C. § 7602(e).

3. Defendants are "In Violation" of the CAA

The plain language of the CAA's citizen suit provision "permits citizen suits for continuing violations and wholly past violations, so long as the past violations were repeated." Paper, Allied-Indus., Chem. and Energy Workers Int'l Union, No. CIV-04-438-F, 2005 WL 1389431, at *15 (W.D. Okla. June 10, 2005).[29] A citizen-plaintiff may prove that violations are ongoing either "(1) by proving violations that continue on or after the date the complaint is filed, or (2) by adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations." Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, 844 F.2d 170, 171-72 (4th Cir. 1988); Natural Res. Def. Council v. Sw. Marine, Inc., 236 F.3d 985, 998 (9th Cir. 2000) (same).[30]

Defendants' own records show the violations alleged in Guardians' First, Second, Fourth, and Fifth Causes of Action continued after Guardians' initial Complaint was filed, thus establishing that Defendants are "in violation" of the various emission limits. Defendants plan to renew operations at the LRP for more "testing" by this summer. See, e.g., Ex. M at

[29] See also United States v. LTV Steel Co., 187 F.R.D. 522, 526 (E.D. Pa. 1998) (finding that the CAA "permits citizen suits for both continuing violations and wholly past violations, so long as the past violation occurred more than once.").

[30] The Supreme Court, construing identical "in violation" language in the CWA's citizen suit provision, ruled: "[t]he most natural reading of 'to be in violation' is a requirement that citizen plaintiffs allege a state of either continuous or intermittent violation – that is, a reasonable likelihood that a past polluter will continue to pollute in the future." Gwaltney of Smithfield v. Chesapeake Bay Found., 484 U.S. 49, 57 (1987).

ARPA_NOx025293; Ex. N at ARPA_NOx025192. Based upon Defendants' compliance history, a reasonable trier of fact could find that violations are likely to recur. In fact, in denying Defendants' motion to dismiss this case is moot, this Court found:

> [U]pon this record, if the Plant is reactivated, without evidence of appropriate corrections /modifications, it is likely to operate in violation of the permit conditions in the same way that it did from June - November 2011. Thus, there is a "realistic prospect" that violations will continue.

Opinion and Order Denying Motion to Dismiss, Dkt. # 36, p. 8. Therefore, Defendants are "in violation" of the CAA and subject to liability for the violations set forth below.

4. The Defendants are Subject to Liability under the CAA's Citizen Suit Provision for Violations of the "Emission Standards and Limitations" in their Permit

Lamar's Permit includes limits for emissions of NO_X, SO_2, and CO from the circulating fluidized bed boiler, also known as the coal-fired boiler or AIRS Point ID 004. Condition 7 limits the NO_X emission rate from the coal-fired boiler to no more than 1.0 lb/MWh on a rolling 30-day average basis. See ARPA_NOx15265 (Permit, p. 5). Condition 7 of the Permit also limits the SO_2 emission rate from the coal-fired boiler to no more than 1.4 lb/MWh on a 30-day rolling average basis. See id. Condition 4 of the Permit limits emissions of SO_2 from the coal-fired boiler to a daily average of not more than 0.103 lb/mmBtu heat input. See ARPA_NOx15264 (Permit, p. 4). Condition 4 limits emissions of CO from the coal-fired boiler to not more than 76.5 lb/hour based on a rolling 3-hour average. See id.

Each of these emission limits is an "emission standard or limitation" subject to enforcement under the CAA's citizen suit provision, 42 U.S.C. § 7604(a)(1)(A). The CAA expressly defines "emission standard or limitation" to include "any permit term or condition"

issued under a federally-approved SIP. See id. § 7604(f)(4).[31] Lamar's Permit was issued by the Air Division pursuant to CAQCC Reg. No. 3, 5 COLO. CODE REGS. § 1001-5, a federally approved provision of the Colorado SIP, 40 C.F.R. § 52.320, et seq. Therefore, the emission limits for NOx, SO_2, and CO enumerated above, as set forth in Conditions 4 and 7 of the Permit, are "permit terms and conditions" that are federally enforceable by citizens through the citizen suit provision of the Clean Air Act, 42 U.S.C. § 7604(a).[32]

B. Defendants' Own Excess Emission Reports Prove 2,454 CAA Violations

Defendant's own Semi-Annual Reports, submitted to the Air Division on or about January 29, 2010, July 29, 2010, January 28, 2011, and January 30, 2012, is conclusive evidence establishing these 2,454 CAA violations.[33] See Ex. D through G. In Pub. Serv. Co. of Colo.,

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[31] The emission limits for CO and SO_2 set forth in Condition 4 of Lamar's Permit are also "emission limitations" in effect under Colorado's SIP. See 42 U.S.C. § 7604(f)(1). The emission limits for SO_2 and NOx set forth in Condition 7 of Lamar's Permit are also requirements "under section 7411" of the CAA, 42 U.S.C. § 7411 (New Source Performance Standards). See 42 U.S.C. § 7604(f)(3); 40 C.F.R. § 60.49Da(i)(1)(a) (setting forth NSPS limit of 1.4 lb/MWh for SO_2 on a 30-day rolling average basis); 40 C.F.R. § 60.44Da(e)(1) (setting forth NSPS limit of 1.0 lb/MWh for NO_X on a 30-day rolling average basis).

[32] Furthermore, pursuant to the Colorado Code of Regulations, COLO. CODE REGS. § 1001-2 § I.G (Common Provisions Regulation), "federally enforceable" is defined to mean "all limitations and conditions which are enforceable by the [EPA], including, but not limited to: (1) those requirements developed pursuant to Code of Federal Regulations Title 40, Parts 60, 61, 63, and 72; (2) requirements within any U.S. EPA-approved [SIP]; (3) requirements in operating permits issued under an U.S. EPA-approved program; and (4) any requirements in permits for new or modified sources which are issued pursuant to the Code of Federal Regulations Title 40, Section 52.21 or under regulations approved by the U.S. EPA pursuant to the Code of Federal Regulations Title 40, Part 51, Subpart I; except those permit requirements specifically identified as state-only enforceable requirements, or specifically incorporating Colorado regulatory requirements (other than the incorporation of federal requirements) not in the [SIP]. . . "

[33] Here, Defendants' own excess emission reports provide sufficient proof of the violations alleged in this case. The statements and information in these records and reports are party admissions, and are admissible under Fed. R. Evid. 801(d)(2). See Fischer v. Forestwood Co.,

this Court held that the Defendant's own emission monitoring data and reports constituted competent evidence of emissions violations in a CAA citizen suit, and entered summary judgment as to the Defendant's liability for those emission violations. 894 F. Supp. at 1459. The Court explained:

> Under the Colorado SIP, owners or operators of fossil fuel generators are required to install, calibrate, maintain, and operate CEMs. . . . Pursuant to [the CAA], this information must be made available to the public.
>
> The CEM maintenance and reporting requirements alone impart a high degree of probative reliability to the CEM data and reports. Moreover, since the Clean Air Act establishes a regime of strict liability, [] CEM data and reports may provide conclusive evidence of emissions compliance. It follows that if such records are probative of compliance with the Act they are probative of the Act's violation.

Id. (internal citations omitted).

The CEMS data in Defendants' Excess Emission Report, submitted to the Air Division on October 12, 2010 as an addendum to its July 29, 2010 Semi-Annual Report, is also conclusive evidence of Defendants' CAA violations.[34] See Ex. H. This Revised Emissions Report – which Defendants submitted to the Air Division to revise incorrect data resulting from CEMS programming errors – includes a summary report, wherein the Defendants identify all days in which its CEMS data showed exceedances of the 30-day rolling average limitations for NO_X and SO_2 (NSPS), from May 18, 2009 through June 30, 2010. Id. For the same reasons set forth above, Defendants' CEMS data and summary report in this Revised Emissions Report are undisputed evidence of Defendants' violations. See also 62 Fed. Reg. 8314 (February 27, 1997)

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525 F.3d 972, 984 (10th Cir. 2008) (admission of party opponent not hearsay).

[34] The statements and information in the Excess Emissions Report are party admissions, and are admissible under Fed. R. Evid. 801(d)(2).

(wherein EPA promulgated the "Credible Evidence Rule" to clarify that "any credible evidence" can be used for compliance and enforcement purposes).

In both CAA and CWA cases, courts regularly grant declaratory and summary judgment on liability based upon a defendant's own monitoring records and emission/discharge reports to the government. See, e.g., Murphy Oil, 686 F. Supp. 2d at 680 (summary judgment granted where company's "unauthorized discharge reports" demonstrated violations of emission limits in permit); Potomac Elec. Power, 419 F. Supp. at 533 (finding no issue of fact as to the existence of 24 emissions violations where defendant's own records showed violations); United States v. Aluminum Co. of Am., 824 F. Supp. 640, 648-49 (E.D. Tex. 1993) (granting summary judgment for federal government in CWA case because monitoring reports submitted to EPA were "conclusive evidence" of violations). Furthermore, Courts regularly grant summary judgment for plaintiffs in environmental citizen suits involving large numbers of violations. See, e.g., Pub. Serv. Co. of Colo., 894 F. Supp. 1455 (finding liability for over 19,000 violations of CAA permit); PennEnvironment, 2011 WL 1085885, at *12 (finding liability for 8,684 violations of CWA permit); Chalmette Ref., 399 F. Supp. 2d 726 (E.D. La. 2005) (finding liability for 2,629 CAA violations involving "upset" emissions).

C. Defendants' 2,454 Violations of the Clean Air Act

Defendants' own excess emission reports prove 2,454 violations of the CAA, as set forth below. Guardians' counsel have prepared summary tables of these emission exceedances for the Court's reference. See Summary Table for NO_X violations (1.0 lb/MWh limitation, 30 day rolling average) and SO_2 violations (1.4 lb/MWh limitation, 30 day rolling average), attached hereto as Exhibit U; Summary Table for SO_2 violations (0.103 lbs/mmBTU limitation, daily

average), attached hereto as Exhibit V; Summary Table for CO violations (76.5 lbs/hr, rolling 3-hour average), attached hereto as Exhibit W.[35] Each emission exceedance identified in these tables is established in Defendants' "excess emission" reports to the Air Division. Defendants do not claim that any of these exceedances were the result of "startup and shutdown," "malfunctions," "upset conditions," or other circumstances under which performance is or was excused, or for which any defense applies.[36] See Defs.' Resp. to Pl.'s Second Set of Interrogatories (on the Merits), attached hereto as Exhibit X, at p. 2 (Interrog. No. 11).

1. First Cause of Action: Guardians is Entitled to Summary Judgment as to Defendants' Liability for 478 Violations of NSPS NO_X Limitation

Guardians is entitled to summary judgment on its First Cause of Action in the Supplemental Complaint, wherein it alleges that "Lamar Utilities has violated and continues to violate the [CAA] by failing to limit NO_X emissions at the Lamar Plant to no more than 1.0

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[35] These summaries are admissible pursuant to Fed. R. Evid. 1006, as they summarize and the content of voluminous entries in Defendants' excess emission reports. Those reports are admissible and attached as exhibits to this Motion. See Ex. D through H. "Fed. R. Evid. 1006 clearly permits the use of a summary of business records provided all of the records from which it is drawn are otherwise admissible. The admission of summaries under Rule 1006 is within the sound discretion of the trial court." Harris Market Research v. Marshall Mktg. and Comm., Inc., 948 F.2d 1518, 1525 (10th Cir. 1991) (internal quotation and citations omitted). See also PennEnvironment, 2011 WL 1085885, at *12, n.10 (court used charts summarizing defendant's self-monitoring reports in finding summary judgment on liability in CWA citizen suit). These summaries can also be used as pedagogical devices, pursuant to Fed. R. Evid. 611.

[36] Although the Colorado SIP (CAQCC Reg. No. 5) contains an affirmative defense provision for excess emissions during malfunctions, see 5 COLO. CODE REGS. § 1001-2 II.E, and an affirmative defense provision for excess emissions during periods of startup and shutdown, see 5 COLO. CODE REGS. § 1001-2 II.J, these defenses are limited in their applicability to certain emission limitations, and owners and operators of facilities must meet specific notification requirements to establish these defenses. Moreover, the burden is on the Defendants to prove that one of these affirmative defense provisions applies. See id., and e.g., Anderson v. Farmland Indus., Inc., 70 F. Supp. 2d 1218 (D. Kan. 1999) (holding that Defendant refinery had burden of proving that malfunction exception applied as defense to excess emission violations in CAA citizens' suit).

lb/MWh on a rolling 30-day average basis, as required by Lamar's Permit and the applicable NSPS regulations for NO_X, 40 C.F.R. § 60.44Da(e)(1)." Dkt. # 47 at ¶ 141. According to their own monitoring data and reports to the Air Division, Defendants failed to limit NO_X emissions at the LRP to no more than 1.0 lb/MWh, on a rolling 30-day average basis, on at least 478 days from May 18, 2009 through November 12, 2011, violating Permit 05PR0027 Condition 7.

These violations include: 270[37] days of violation for the second quarter of 2009 through the second quarter of 2010 (June 4, 2009 through June 30, 2010) (see Revised Emissions Report, Ex. H at ARPA_NOx025774 – 025780); 78 days of violation in the third quarter of 2010 (from July 1, 2010 through September 30, 2010) (see SAR 2010-2, Ex. F at ARPA_ NOx000196 – 000197; 2011 Consent Order, [38] Dkt. # 12-4 at p.3); 58[39] days of violation during the fourth quarter of 2010 (from October 1, 2010 through December 31, 2010) (see SAR 2010-2, Ex. F at ARPA_ NOx000205); 43 days of violation in the third quarter of 2011 (from July 1, 2011

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[37] The Air Division determined that there were 260 NO_X violations for this period. Dkt. # 12-4 at p.3. Defendants admit that the Air Division's determination regarding these 260 NO_X violations in the 2011 Consent Order was correct. See Defs.' Responses to Pl.'s Req. for Admissions, Ex. O, at p. 2 (Request No. 4). However, Defendants' Revised Emissions Report demonstrates 270 days of violation from June 4, 2009 through June 30, 2009 (from the second quarter of 2009 through the second quarter of 2010). Guardians is requesting summary judgment on all 270 violations.

[38] Defendants admit that Air Division's determination regarding these 78 NO_X violations in the 2011 Consent Order was correct. See Defs.' Responses to Pl.'s Req. for Admissions, Ex. O, at p. 2 (Request No. 4).

[39] Defendants' excess emissions report demonstrates 58 days of violation during the fourth quarter of 2010, which is reflected in Guardians' Summary, Ex. U. The Air Division determined that there were 62 NO_X violations for this period. Dkt. # 12-4 at p.3. Defendants admit that the Air Division's determination regarding these 62 NO_X violations in the 2011 Consent Order was correct. See Defs.' Responses to Pl.'s Req. for Admissions, Ex. O, at p. 2 (Request No. 4). However, Guardians is requesting summary judgment on only the 58 violations set forth in its Summary, as there can be no genuine issue of material fact as to these violations.

through September 30, 2011) (see SAR 2011-2, Ex. G at ARPA_ NOx025439); and 29 days of violation during the fourth quarter of 2011 (from October 1, 2011 through December 31, 2011) (see SAR 2011-2, Ex. G at ARPA_NOx025447).[40] See Summary, Ex. U (listing all 478 days where NO_X emissions at the LRP exceeded 1.0 lb/MWh on a rolling 30-day average basis).

Defendants therefore violated an "emission standard or limitation" under the CAA, 42 U.S.C. § 7604(f)(4).[41] As there is no genuine issue as to any material fact relating to this cause of action, Guardians is entitled to summary judgment on liability for the 468 violations of the CAA set forth above and a declaration that Defendants violated the CAA 468 times by exceeding their NO_X (NSPS) emission limit.

2. Second Cause of Action: Guardians is Entitled to Summary Judgment as to Defendants' Liability for 245 Violations of NSPS SO_2 Limitation

Guardians is entitled to summary judgment on its Second Cause of Action in the Supplemental Complaint, wherein it alleges that "Lamar Utilities has violated and continues to violate the [CAA] by failing to limit SO_2 emissions at the Lamar Plant to no more than 1.4

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[40] Defendants' excess emissions reports demonstrate 72 NO_X violations during the third and fourth quarters of 2011, which is reflected in Guardians' Summary, Ex. U. In the 2012 Consent Order, the Air Division determined that there were 74 NO_X violations for this period. Ex. P at ARPA_NOx28064. Guardians is requesting summary judgment on only 72 violations (43 days of violation in the third quarter of 2011 and 29 violations during the fourth quarter of 2011), as there can be no genuine issue of material fact as to these violations.

[41] These violations of the NSPS for NO_X are also violations of Section 111 of the Clean Air Act, 42 U.S.C. § 7411(e). See id. (it is unlawful for any owner or operator of any "new source" to operate such source in violation of an applicable NSPS); 40 C.F.R. § 60.44Da(e)(1) (sources subject to the NSPS that commenced construction, reconstruction, or modification after February 28, 2005 shall not discharge any gases into the atmosphere that contain NO_X in excess of 1.0 lb/MWh on a rolling 30-day average basis).

lb/MWh, on a rolling 30-day average basis, as required by Lamar's Permit and the applicable NSPS regulations for SO_2, 40 C.F.R. § 60.44Da(i)(1)." Dkt. # 47 at ¶ 151. According to their own monitoring data and reports submitted to the Air Division, Defendants failed to limit SO_2 emissions to no more than 1.4 lb/MWh, on a rolling 30-day average basis, on at least 245 days from May 18, 2009 through November 2, 2011, violating Permit 05PR0027 Condition 7.

These violations include: 160[42] days of violation for the second quarter of 2009 through the second quarter of 2010 (June 4, 2009 through June 30, 2010) (see Revised Emissions Report, Ex. H at ARPA_NOx025774 – 025780); 48[43] days of violation in the third quarter of 2010 (from July 1, 2010 through September 30, 2010) (see SAR 2010-2, Ex. F at ARPA_NOx000160); 25 days of violation during the fourth quarter of 2010 (from October 1, 2010 through December 31, 2010) (see SAR 2010-2, Ex. F at ARPA_NOx000172; 2011 Consent Order,[44] Dkt. # 12-4 at p.4); and 12 days of violation during the fourth quarter of 2011 (from October 1, 2011 through

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[42] The Air Division determined that there were 150 SO_2 violations for this period. Dkt. # 12-4 at p.4. Defendants admit that the Air Division's determination regarding these 150 SO_2 violations in the 2011 Consent Order was correct. See Defs.' Responses to Pl.'s Req. for Admissions, Ex. O, at p. 2 (Request No. 4). However, Defendants' Revised Emissions Report demonstrates 160 days of violation from June 4, 2009 through June 30, 2009 (from the second quarter of 2009 through the second quarter of 2010), which is reflected in Guardians' Summary, Ex. U. Guardians is therefore requesting summary judgment on 160 violations.

[43] The Air Division determined that there were 46 days of violations for this period. Dkt. # 12-4 at p.3. Defendants admit that the Air Division's determination regarding these 46 SO_2 violations in the 2011 Consent Order was correct. See Defs.' Responses to Pl.'s Req. for Admissions, Ex. O, at p. 2 (Request No. 4). However, Defendants' excess emissions report for this period demonstrates 48 days of violation during the third quarter of 2010, which is reflected in Guardians' Summary, Ex. U. Guardians is therefore requesting summary judgment on 48 violations.

[44] Defendants admit that the Air Division's determination regarding these 25 SO_2 violations was correct. See Defs.' Responses to Pl.'s Req. for Admissions, Ex. O, at p. 2 (Request No. 4).

December 31, 2011) (see SAR 2011-2, Ex. G at ARPA_NOx025416; 2010 Consent Order, Ex. P at ARPA_NOx28064). See Summary, Ex. U (listing all 245 days where SO_2 emissions at the LRP exceeded 1.4 lb/MWh on a rolling 30-day average basis).

Defendants therefore violated an "emission standard or limitation" under the CAA, 42 U.S.C. § 7604(f)(4).[45] As there is no genuine issue as to any material fact relating to this cause of action, Guardians is entitled to summary judgment on liability for the 245 violations of the CAA set forth above and a declaration that Defendants violated the CAA 245 times by exceeding their SO_2 (NSPS) emission limit.

3. Fourth Cause of Action: Guardians is Entitled to Summary Judgment as to Defendants' Liability for 79 Violations of SO_2 BACT Limitation

Guardians is entitled to summary judgment on its Fourth Cause of Action in the Supplemental Complaint, wherein it alleges that "Lamar Utilities has violated and continues to violate the [CAA] by failing to limit SO_2 emissions at the Lamar Plant to a daily average of 0.103 lb/mmBtu, as required by Lamar's Permit." Dkt. # 47 at ¶ 168. According to Defendants' own monitoring data and reports submitted to the Air Division, Defendants failed to limit SO_2 emissions at the LRP to a daily average of 0.103 lb/mmBtu on at least 79 days from May 18, 2009 through November 12, 2011, violating Permit 05PR0027 Condition 4.

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[45] These violations of the NSPS for SO_2 are also violations of Section 111 of the Clean Air Act, 42 U.S.C. § 7411(e). See id. (it is unlawful for any owner or operator of any "new source" to operate such source in violation of an applicable NSPS); 40 C.F.R. § 60.43Da(i)(1)(i) (sources subject to the NSPS that commenced construction, reconstruction, or modification after February 28, 2005 shall not discharge any gases into the atmosphere that contain SO_2 in excess of 1.4 lb/MWh on a 30-day rolling average basis).

These violations include: 14 days of violation during the first and second quarters of 2010 (January 1, 2010 through June 30, 2010) (see SAR 2010-1, Ex. E at ARPA_NOx028124 – 028129); 41 days of violation during the third and fourth quarters of 2010 (from July 1, 2010 through December 31, 2010) (see SAR 2010-2, Ex. F at ARPA_NOx000174 – 000180; 2011 Consent Order, Dkt. # 12-4 at p. 4); and 24 days of violation during the third and fourth quarters of 2011 (from July 1, 2011 through December 31, 2011) (see SAR 2011-2, Ex. G at ARPA_NOx025419 – 025425; 2012 Consent Order, Ex. P at ARPA_NOx28063). See Summary, Ex. V (listing all 79 days where SO_2 emissions at the LRP exceeded a daily average of 0.103 lb/mmBtu).

Defendants therefore violated an "emission standard or limitation" under the CAA, 42 U.S.C. § 7604(f)(4). As there is no genuine issue as to any material fact relating to this cause of action, Guardians is entitled to summary judgment on liability for the 79 violations of the CAA set forth above and a declaration that Defendants violated the CAA 79 times by exceeding their SO_2 (BACT) emission limit.

4. Fifth Cause of Action: Guardians is Entitled to Summary Judgment as to Defendants' Liability for 1,652 Violations of CO BACT Limitation

Guardians is entitled to summary judgment on its Fifth Cause of Action in the Supplemental Complaint, wherein it alleges that "Lamar Utilities has violated and continues to violate the Clean Air Act by failing to limit CO emissions at the Lamar Plant to the rolling three hour average of 76.5 lb/hour, as required by Lamar's Permit." Dkt. # 47 at ¶ 175. According to their own monitoring data and reports, Defendants failed to limit CO emissions at the LRP to the rolling three hour average of 76.5 lb/hour, with at least 1,652 violations occurring on 139 days

from May 18, 2009 through November 8, 2011, thereby violating Permit 05PR0027 Condition 4.

For 3-hour rolling averages, periods of excess emissions can overlap. See EPA, Computation of Rolling Averages, Attachment 7 to Wilmes Dec., Ex. A.[46] Even though the rolling average represents a three hour period, data is recorded in one hour periods (the average for that three hour period). Id. The maximum number of 3-hour exceedances that can be recorded in one day is 24. Id. Therefore, there can be 24 violations of the LRP's 3-hour rolling average for CO in one day.

Under the CAA, multiple violations occurring on the same day are considered multiple days of violation. See 42 U.S.C. § 7413(b) (setting a maximum fine "per day for each violation" of the Act); Atl. States Legal Found. v. Tyson Foods, Inc., 897 F.2d 1128, 1137, 1138 (11th Cir. 1990) (in construing similar language in CWA, court noted that the statutory penalty provision was "not a model of clarity," but nonetheless found that it was "capable of only a single reasonable interpretation: the daily maximum penalty applies separately to each violation of an express limitation."); United States v. Smithfield Foods, Inc., 191 F.3d 516, 528 (4th Cir. 1999) (treating each of Defendants' permit violations "as a separate and distinct infraction for purposes of penalty calculation" under the CWA). As the Court explained in Borden Ranch Partnership v. U.S. Army Corps of Engineers, construing "per day for each violation" language in CWA:

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[46] This document is available on EPA's Applicability Determination Index database Web site, which collects letters and memoranda issued by EPA on CAA applicability or monitoring issues under the New Source Performance Standards and the National Emission Standards for Hazardous Air Pollutants programs. See Wilmes Dec ¶ 8. For the same reasons discussed in note 5, supra, this document is authenticated and admissible. Although this EPA Letter addresses the method of computation of rolling averages with regards to CEMS data as set forth in 40 C.F.R. Part 60 subparts D and H, it is helpful guidance in understanding 3-hour rolling averages in general.

> The [CWA] imposes a maximum penalty "per day for each violation." 33 U.S.C. § 1319(d). It does not say "per each day in which violations occur" or "per day in which a party pollutes." The focus is clearly on each violation, and courts have consistently rejected attempts to limit civil penalties to the number of days in which violations occur. A contrary rule would encourage individuals to stack all their violations into one "Pollution Day," in which innumerable offenses could occur, subject only to the $25,000 maximum.

261 F.3d 810, 817 (9th Cir. 2001).

The LRP had multiple violations of its rolling 3-hour average limit for CO on many days. Pursuant to 42 U.S.C. § 7413(b), they are subject to a penalty for each violation. These violations include: 270 violations during 26 days in the second quarter of 2010 (April 1, 2010 through June 30, 2010) (see SAR 2010-1, Ex. E at ARPA_NOx028146); 747 violations during 45 days in the third quarter of 2010 (from July 1, 2010 through September 30, 2010) (see SAR 2010-2, Ex. F at ARPA_NOx000182 – 183; 2011 Consent Order, Dkt. # 12-4 at p.4); 335 violations during 36 days of the fourth quarter of 2010 (from October 1, 2010 through December 31, 2010) (see SAR 2010-2, Ex. F at ARPA_NOx000187; 2011 Consent Order, Dkt. # 12-4 at p.4); 236 violations during 18 days in the third quarter of 2011 (from July 1, 2011 through September 30, 2011) (see SAR 2011-2, Ex. G at ARPA_NOx025428); and 64 violations during 10 days in the fourth quarter of 2011 (from October 1, 2011 through December 31, 2011) (see SAR 2011-2, Ex. G at ARPA_NOx025432). See Summary, Ex. W (listing all periods where CO emissions at the LRP exceeded a rolling 3-hour average of 76.5 lb/hour).

Defendants therefore violated an "emission standard or limitation" under the CAA, 42 U.S.C. § 7604(f)(4). As there is no genuine issue as to any material fact relating to this cause of action, Guardians is entitled to summary judgment on liability for the 1,652 violations of the

CAA set forth above and a declaration that Defendants violated the CAA 1,652 times by exceeding their CO (BACT) emission limit.

D. Both Defendants LUB and APRA Are Liable for These Violations

Both owners and operators of a polluting facility are liable for violations of the CAA at that facility. In United Steelworkers of America, the Tenth Circuit explained:

> The EPA has defined the term "owner or operator" as "any person who owns, leases, operates, controls, or supervises a stationary source." 40 C.F.R. § 61.02. While the citizen suit provision does not use the words "owner or operator," the CAA has been interpreted to impose "strict liability upon owners and operators" of polluting facilities that violate the Act.

322 F.3d at 1228 n. 4 (citing United States v. Dell'Aquilla, 150 F.3d 329, 332 (3d Cir. 1998); United States v. B & W Inv. Properties, 38 F.3d 362, 367 (7th Cir. 1994). Thus, both LUB and ARPA are liable for the violations at the LRP set forth herein.

VII. DEFENDANTS' CONSENT ORDERS WITH THE AIR DIVISION DO NOT PRECLUDE SUMMARY JUDGMENT AS TO LIABILITY ON GUARDIANS' FIRST, SECOND, FOURTH, AND FIFTH CAUSES OF ACTION

A. Defendants Cannot Meet Their Burden of Demonstrating Mootness

On May 5, 2011, Defendants filed a Motion to Dismiss this case as moot. Dkt. # 12. In their motion, Defendants argued that this case was moot as a result of two informal enforcement actions by the Air Division, which resulted in settlement agreements between the Defendants and the Air Division in the form of "Compliance Orders on Consent" in September 2010 and April 2011. After allowing an opportunity for jurisdictional discovery, during which time the LRP resumed operations for "preliminary testing," this Court denied Defendants' Motion to Dismiss, finding that "there is a 'realistic prospect' that violations will continue." Opinion and Order Denying Motion to Dismiss (March 29, 2012), Dkt. # 36, p. 8. The Court explained: "Even if the

burden is on the Plaintiff to demonstrate that the enforcement proceedings have not rendered the case moot, they have done so." Id.

1. The Burden is on the Defendants to Demonstrate Mootness

Since this Court's Order denying Defendants' Motion to Dismiss, the Tenth Circuit confirmed that the burden is on the Defendants to demonstrate mootness. See WildEarth Guardians v. Pub. Serv. Co. of Colo., 690 F.3d 1174, 1183 (10th Cir. 2012) ("[A]lthough the plaintiff bears the burden of demonstrating standing, the defendant bears the burden of proving mootness.") (citing Adarand Constructors, Inc. v. Slater, 528 U.S. 216, 221 (2000)).

2. Defendants' December 6, 2012 Consent Order with the Air Division Does Not Render this Case Moot

The Defendants' third Compliance Order on Consent with the Air Division is another informal administrative enforcement action, not a judicially-enforceable consent decree. See 2012 Consent Order, Ex. P. In the 2012 Consent Order, as it did in the 2011 Consent Order, LUB agreed that it "may operate the [LRP] for the limited purpose of performing short-term diagnostic testing and boiler tuning," but that it will not "renew operations" at the LRP until it "reasonably concludes that its modifications, adjustments, and/or re-design of the [LRP] result in a Facility that will operate in compliance with the Act, the Regulations, and the Permit." Id. at ARPA_NOx028066-028067, ¶¶ 10, 11. As we now know from reviewing the Defendants' records of their "testing" in 2011, "short-term diagnostic testing" can mean months of unchecked polluting, which harms Guardians' members.[47]

[47] In fact, the Air Division determined that a number of violations occurred during "testing" of the LRP in 2012, including: "NOx rolling 30-day emissions exceedances of the 1.0 lb/MWh limit on 74 days from July 1, 2011 [through] December 31, 2011, violating Permit 05PR0027 Condition 7 and 40 CFR §60.44 NSPS Subpart Da(e)(l)." Ex. P at ARPA_NOx028064.

Defendants plan to renew operations at the LRP for more "testing" this summer. See, e.g., Ex. M at ARPA_NOx025293; Ex. N at ARPA_NOx025192. In light of the LRP's compliance history, Defendants' disregard for the 2010 and 2011 consent agreements with the Air Division, and Defendants repeatedly demonstrating their inability to operate the LRP without violating the law, Defendants cannot meet their burden of showing that the 2012 Consent Order moots this case. The 2010 and 2011 Consent Orders were ineffective in deterring further violations of the CAA and this Court held that those agreements did not moot this case. Dkt. # 36. The 2012 Consent Order should not be treated any differently by this Court.

B. Citizen Suits Under the CAA are Not Precluded by Administrative Enforcement Actions

Under the CAA, a citizen suit is only precluded by a lawsuit filed in court, and not by any other administrative action. See 42 U.S.C. § 7604(b)(1)(B) (stating that a citizen suit may not be commenced "if the Administrator or State has commenced and is diligently prosecuting a civil action ***in a court of the United States or a State*** to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right.") (emphasis added). See also Crown Cent. Petroleum, 207 F.3d at 793 (holding that, under the plain language of the CAA, a citizen suit is precluded only by a lawsuit filed in court, and not by any other administrative action).

Guardians' CAA citizen suit is not precluded by these out-of-court settlement agreements between the Air Division and LUB. In fact, Guardians brought this suit because the State of Colorado is not "diligently prosecuting" a case against Defendants. Instead, the Air Division is entering into one ineffective administrative settlement agreement after another with LUB. The 2012 Consent Order surprisingly places no new restrictions on "Preliminary Testing" at the LRP,

nor does it ensure any oversight by the Air Division during this testing. Given the violations that occurred during the last round of testing in 2011, it is nearly certain that Guardians' members will be exposed to more illegal pollution this summer.

VIII. CONCLUSION

For the foregoing reasons, Guardians respectfully requests that this Court grant its Motion for Partial Summary Judgment and declare that: (1) Guardians has standing to bring this citizen suit on behalf of its members; (2) Defendants violated, and are in violation of, the LRP's Permit and the Clean Air Act, as described in Guardians' First, Second, Fourth, and Fifth Causes of Action in the Supplemental Complaint (Dkt. # 47, ¶¶ 140, 150, 167, and 174); and (3) that Defendants have committed the following number of violations of the Clean Air Act with respect to each count: First Count, 478 violations; Second Count, 245 violations; Fourth Count, 78 violations; Fifth Count, 1,652 violations.

Dated: March 12, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of March 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following e-mail addresses of counsel of record:

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Counsel for Defendants

/s/ Ashley D. Wilmes
Ashley D. Wilmes

ATTACHMENTS

1. Exhibit A – Declaration of Ashley Wilmes; Attachment 1: EPA, "Nitrogen Dioxide"; Attachment 2: EPA, "Nitrogen Dioxide: Health"; Attachment 3: EPA, "Sulfur Dioxide: Health"; Attachment 4: EPA, "Carbon Monoxide: Health"; Attachment 5: Natural Gas Conversions of Existing Coal-fired Boilers; Attachment 6: "Repowering Project Upgrades May Run through 2013"; Attachment 7: EPA, Computation of Rolling Averages

2. Exhibit B – 2007 Permit (No. 05PR0027)

3. Exhibit C – 2009 Permit (No. 05PR0027)

4. Exhibit D – Excerpts of Semi-Annual Report dated January 29, 2010 (SAR 2009)

5. Exhibit E – Excerpts of Semi-Annual Report dated July 29, 2010 (SAR 2010-1)

6. Exhibit F – Excerpts of Semi-Annual Report dated January 28, 2011 (SAR 2010-2)

7. Exhibit G – Excerpts of Semi-Annual Report dated January 30, 2012 (SAR 2011-2)

8. Exhibit H – Revised Emissions Report dated October 12, 2010

9. Exhibit I – February 23, 2010 Email from Rick Rigel

10. Exhibit J – Defendants Response to Plaintiff's First Set of Interrogatories

11. Exhibit K – Lamar's Operating Summary for September 2011

12. Exhibit L – Defendants' Responses to Plaintiff's First Set of Interrogatories, Request for Production of Documents, and Request for Admissions (on The Merits)

13. Exhibit M – ARPA's General Manager's Board Report for November 2012

14. Exhibit N – ARPA's Preliminary 2013 Budget Update for the September 27, 2012 ARPA Board Meeting

15. Exhibit O – Defendants' Responses to Plaintiff's Request for Admissions

16. Exhibit P – 2012 Compliance Order on Consent

17. Exhibit Q – Declaration of Shirley Warren

18. Exhibit R – Declaration of Charles Warren

19. Exhibit S – Declaration of Angela Warren

20. Exhibit T – Declaration of Jeremy Nichols

21. Exhibit U – Summary Table for NO_X violations (1.0 lb/MWh limitation, 30 day rolling average) and SO_2 violations (1.4 lb/MWh limitation, 30 day rolling average)

22. Exhibit V – Summary Table for SO_2 violations (0.103 lbs/mmBTU limitation, daily average)

23. Exhibit W – Summary Table for CO violations (76.5 lbs/hr, rolling 3-hour average)

24. Exhibit X – Defendants' Responses to Plaintiff's Second Set of Interrogatories (on the Merits)