

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. \_\_\_\_\_

WILDEARTH GUARDIANS, a New Mexico non-profit corporation,

Petitioner,

v.

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

Respondents.

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**COMPLAINT**

1. Plaintiff WildEarth Guardians brings this suit pursuant to the citizen suit provision of the federal Clean Air Act, 42 U.S.C. § 7604, against Public Service Company of Colorado d/b/a Xcel Energy (“Xcel”), for constructing Comanche Unit 3, a new, 750-megawatt, coal-fired power plant, at its Comanche Station in Pueblo, Colorado, in violation of the emissions standards or limitation contained in Section 112(g) of the Clean Air Act, 42 U.S.C. § 7412(g). Under this section, Xcel is prohibited from construction of Unit 3 or modification of the Comanche Station by adding Unit 3, a major source of hazardous air pollutants, in the absence of a final determination that the facility will achieve a level of hazardous air pollutant emissions control that satisfies the Maximum Achievable Control Technology (“MACT”) requirements of the Clean Air Act. Plaintiff seeks declaratory and injunctive relief against Xcel, as well as applicable civil penalties.

2. Xcel's violations of the Clean Air Act's MACT requirements pose a serious threat to the health of Colorado's people and surrounding environment. The U.S. Environmental Protection Agency ("EPA") has found that coal-fired power plants such as Xcel's Comanche Unit 3 emit 67 of the 188 individual hazardous air pollutants Congress listed for regulation under the 1990 Clean Air Act Amendments, including mercury, selenium, dioxins, arsenic, acid gases, and other heavy metals.

3. Mercury and its interaction with the environment provides one example of the way hazardous pollutants emitted by coal-fired power plants pose serious health threats to the people of Colorado. Once mercury is deposited in Colorado's waters, the formation of highly toxic methylmercury occurs. Methylmercury then accumulates in fish tissue and threatens human health if consumed. Nearly 20% of the state's fish species have high mercury concentrations, and many Coloradoans routinely consume locally caught fish. *See*, Mark Jaffe, *Mercury Mystery in State Waters*, DENVER POST, April 9, 2009, [available at http://www.denverpost.com/news/ci\\_12074611](http://www.denverpost.com/news/ci_12074611).

4. An EPA study reveals that, "Neurotoxicity is the health effect of greatest concern with methylmercury exposure . . . Dietary methylmercury is almost completely absorbed into the blood and distributed to all tissues including the brain; it also readily passes through the placenta to the fetus and fetal brain. The developing fetus is considered most sensitive to the effects from methylmercury . . ." 65 Fed. Reg. 79,825, 79,829 (2000). Fetuses, breast-fed infants, and children exposed to methylmercury when they or their mothers consume contaminated fish are at particular risk for developing permanent neurological disorders including mental retardation, vision loss, hearing loss, delayed developmental milestones, attention deficits, memory problems, auditory processing problems, language difficulties, ataxia, and, in extreme cases,

seizures.

5. Other hazardous air pollutants emitted by power plants include arsenic, dioxins, acid gases, selenium, lead, and other heavy metals, which have been shown to cause serious adverse health effects, including cancer, heart disease, stroke, and neurological impairment. One of those pollutants, dioxin, is among the most potent carcinogens on the planet.

6. Plaintiff, a citizen group whose members are harmed by Xcel's violations of the Clean Air Act, asks the Court, pursuant to the Clean Air Act's citizen suit provision, 42 U.S.C. § 7604(a), to: (1) declare that Xcel's construction of Comanche Unit 3 without an approved MACT determination is illegal under section 112 of the Clean Air Act, 42 U.S.C. § 7412; (2) alternatively, declare that Xcel's modification of the Comanche Station by adding Unit 3 without an approved MACT determination is illegal under section 112 of the Clean Air Act, 42 U.S.C. § 7412; (3) enjoin Xcel from construction or operation of Comanche Unit 3 until and unless it complies with the Clean Air Act and any applicable regulatory requirements; (4) assess civil penalties against Xcel for its violations of the Clean Air Act; and (5) award Plaintiff its cost of litigation.

### **JURISDICTION AND VENUE**

7. This court has subject matter jurisdiction over this Clean Air Act citizen suit pursuant to 42 U.S.C. § 7604(a) and 28 U.S.C. § 1331.

8. Pursuant to 42 U.S.C. § 7604(c), venue is proper because Comanche Unit 3 is located in this District and violations have occurred and continue to occur in this District.

9. On April 23, 2009, Plaintiff WildEarth Guardians provided Xcel with notice of the violation alleged in this Complaint. Plaintiff also provided notice to the EPA Administrator, and to the State of Colorado via the Governor, pursuant to 42 U.S.C. § 7604(b). At least 60 days

have elapsed since Plaintiff provided notice of the violations alleged in this Complaint. Neither the EPA nor the State of Colorado has commenced or diligently prosecuted a civil action to require compliance with the violations alleged in this Complaint.

### **THE PARTIES**

10. Plaintiff WILDEARTH GUARDIANS is a non-profit corporation with approximately 4,000 members throughout the United States, including in Colorado. WildEarth Guardians' mission is to bring people, science, and the law together in defense of the American West's rivers, forests, deserts, grasslands, and the delicate web of life to which we are inextricably linked.

11. Members of WildEarth Guardians live, work, garden, and engage in outdoor recreation in areas that would be affected by the excessive amount of mercury and other hazardous air pollutants that Comanche Unit 3 will emit if it is allowed to operate without a proper MACT determination. Thus, WildEarth Guardians, its staff, and its members have a substantial interest in this matter and are adversely affected and aggrieved by Xcel's failure to comply with the Clean Air Act. WildEarth Guardians brings this action on behalf of itself and its adversely affected members. A decision requiring Xcel to cease construction of Comanche Unit 3 until it obtains a lawful MACT determination would redress these harms to Plaintiff and its members.

12. Defendant PUBLIC SERVICE COMPANY OF COLORADO d/b/a XCEL ENERGY owns and operates the Comanche Station where the violations that gave rise to this action occurred and where construction continues on Comanche Unit 3. Xcel is constructing Comanche Unit 3 and/or modifying the Comanche Station by adding Comanche Unit 3. Defendant is a "person" within the meaning of 42 U.S.C. 7602(e).

## LEGAL BACKGROUND

13. Section 112(g)(2)(B) of the Clean Air Act prohibits any person from “construct[ing] . . . any major source of hazardous air pollutants unless the Administrator (or the State) determines that the maximum achievable control technology emissions limitation under this section for new sources will be met.” 42 U.S.C. § 7412(g)(2)(B). This section further requires that the MACT determination “shall be made on a case-by-case basis where no applicable emission limitations have been established . . . .” Id.

14. Section 112(g)(2)(A) of the Clean Air Act prohibits any person from “modify[ing] . . . a major source of hazardous air pollutants unless the Administrator (or the State) determines that the maximum achievable control technology emissions limitation under this section for existing sources will be met.” 42 U.S.C. § 7412(g)(2)(A). This section also requires that the MACT determination “shall be made on a case-by-case basis where no applicable emissions limitations have been established . . . .” Id.

15. Pursuant to federal regulations implementing section 112(g) of the Clean Air Act, a MACT determination must identify and require a level of control that “shall not be less stringent than the level of emission control which is achieved in practice by the best controlled similar source.” 40 C.F.R. § 63.43(d)(1).

16. EPA regulations governing the process for conducting a case-by-case MACT determination provide the public the right to comment on a Notice of Proposed MACT Approval and a right to appeal the final MACT determination. See 40 C.F.R. § 63.43(h).

17. In 2000, the EPA placed “electric utility steam generating units” (“EGUs”) on the list of categories of sources of hazardous air pollutants established by Clean Air Act § 112(c), making them subject to regulation under section 112 of the Clean Air Act. 65 Fed. Reg. at

79,830. An EGU is defined in the Clean Air Act as “any fossil fuel fired combustion unit of more than 25 megawatts that serves a generator that produces electricity for sale.” 42 U.S.C. § 7412(a)(8). Thus, a coal-fired power plant capable of producing at least 25 megawatts is a type of EGU.

18. After a source category is placed on the section 112(c) list, all new and modified facilities in that category must obtain a case-by-case MACT determination. The EPA must also set maximum achievable hazardous air pollutant emissions standards for that category, at which point all new and modified plants must meet those standards and no longer have to obtain a case-by-case determination. See 42 U.S.C. §§ 7412(d), 7412(g)(2)(B). The EPA has not promulgated maximum achievable hazardous air pollutant emissions standards for EGUs.

19. In 2005, the EPA purported to remove EGUs from the list of sources subject to Clean Air Act § 112. The EPA regulations provide that once a source is listed, the source may only be deleted from the source category list pursuant to section 112(c)(9) of the federal Clean Air Act. However, the EPA did not purport to delist EGUs pursuant to section 112(c)(9) of the Clean Air Act.

20. The EPA’s decision was challenged in the D.C. Circuit Court of Appeals by numerous states, tribes, and environmental organizations.

21. On February 8, 2008, the D.C. Circuit Court of Appeals vacated as unlawful the EPA’s attempt to remove coal-fired power plants from the list of sources regulated under section 112 of the Clean Air Act. *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008). The D.C. Circuit held that power plants “remain listed under section 112.” *Id.* at 583. Accordingly, EGUs are sources subject to the Clean Air Act’s requirements for hazardous air.

22. Pursuant to the citizen suit provision of the Clean Air Act, any person may

commence a civil action for violation of a Clean Air Act emission standard or limitation, including the requirements of section 112(g). 42 U.S.C. § 7604(a), (f). The Clean Air Act's citizen suit provision permits citizens to seek injunctive relief and civil penalties payable to the U.S. Treasury of up to thirty-seven thousand five hundred dollars (\$37,500.00) per day for each separate violation of the Clean Air Act. *See* 42 U.S.C. §§ 7413(b), 7604(a); 40 C.F.R. § 19.4; 74 Fed. Reg. 626 (January 7, 2009).

### **FACTUAL BACKGROUND**

23. Comanche Unit 3 is a 750-megawatt, coal-fired boiler type power plant. Therefore, Comanche Unit 3 meets the definition of an electric utility steam generating unit under 42 U.S.C. § 7412(a)(8).

24. Comanche Unit 3 is a "major source" of hazardous air pollutants under Clean Air Act Section 112(a)(1), because it has the potential to emit over 10 tons per year of hazardous air pollutants hydrochloric acid ("HCl") and hydrofluoric acid ("HFC"), and has the potential to emit over 25 tons per year of a combination of numerous hazardous air pollutants.

25. On July 5, 2005, the Colorado Department of Public Health and Environment issued a Title V permit to Xcel. This permit lacked a determination that the facility will achieve a level of hazardous air pollutant emissions control that satisfies MACT.

26. Comanche Unit 3's existing permit allows for the discharge of 131 pounds of mercury annually.

27. Construction of Comanche Unit 3 began on December 21, 2006.

28. As of December 21, 2006, Xcel had still not obtained a determination from the EPA or the Colorado Department of Public Health and Environment that Comanche Unit 3 will meet MACT emission limits for hazardous air pollutants. Additionally, as of February 8, 2008,

the date of the D.C. Circuit Court's decision vacating the EPA's attempt to remove EGUs from the list of "major sources" of hazardous air pollutants, Xcel had still not attempted to properly obtain a MACT determination and continued constructing Comanche Unit 3.

29. As of the date of the filing of this Complaint, Xcel has not obtained a MACT determination from the EPA or the Colorado Department of Public Health and Environment.

30. Comanche Unit 3's operations are scheduled to commence in the fall of 2009.

## **CLAIMS FOR RELIEF**

### **FIRST CAUSE OF ACTION**

#### ***Violation of Clean Air Act § 112(g)(2)(B) Construction Without a MACT Determination***

31. Plaintiffs repeat and incorporate the allegations in the preceding paragraphs as if set forth in full.

32. Xcel owns and operates the Comanche Station and is constructing Comanche Unit 3 within the meaning of 42 U.S.C. § 7412(g). Comanche Unit 3 is a coal-fired EGU, which is a listed source category of hazardous air pollutants under Clean Air Act § 112(c). Comanche Unit 3 is a major source of hazardous air pollutants within the meaning of Clean Air Act § 112(a)(1), and is subject to Clean Air Act § 112(g)(2)(B)'s prohibition on constructing a major source of hazardous air pollutants without a MACT determination.

33. Xcel has commenced and currently is continuing construction of Comanche Unit 3 in violation of Clean Air Act § 112(g), as well as federal and state implementing regulations. Xcel has not obtained a case-by-case MACT determination for any of the hazardous air pollutants that would be emitted by Comanche Unit 3. Pursuant to case-by-case MACT requirements, Xcel must demonstrate and obtain a final and effective determination from the EPA or the State of Colorado that Comanche Unit 3 will achieve reductions in hazardous air



pollutant emissions that appropriately reflect MACT for each hazardous air pollutant emitted, which must be at least as stringent as the emissions performance achieved in practice by the best performing similar source. 42 U.S.C. § 7412(g).

34. Xcel is unlawfully constructing a major source of hazardous air pollutants without a MACT determination and without an Air Quality Permit containing MACT-based emission limits, in violation of Clean Air Act § 112(g)(2)(B), and Xcel continues to violate the Clean Air Act until it ceases construction and obtains a valid and effective case-by-case MACT determination for each hazardous air pollutant that Comanche Unit 3 would emit. 42 U.S.C. § 7412(g)(2)(B).

**SECOND CAUSE OF ACTION**  
***Violation of Clean Air Act § 112(g)(2)(A)***  
***Modification Without a MACT Determination***

35. Plaintiffs repeat and incorporate the allegations in the preceding paragraphs as if set forth in full.

36. In the alternative, the existing Comanche Station is a “major source” under Clean Air Act § 112(a)(1), and Comanche Unit 3 is therefore subject to Clean Air Act § 112(g)(2)(A)’s prohibition on modifying a major source without a MACT determination.

37. Xcel is unlawfully modifying a major source of hazardous air pollutants without a MACT determination and without an Air Quality Permit containing MACT-based emission limits in violation of Clean Air Act § 112(g)(2)(A), and Xcel continues to violate the Clean Air Act until it ceases modification and obtains a valid and effective case-by-case MACT determination for each hazardous air pollutant that Comanche Unit 3 would emit. 42 U.S.C. § 7412(g)(2)(A).

## PRAYER FOR RELIEF

WHEREFORE, based upon the allegations contained in the foregoing paragraphs, the Plaintiff requests that this Court:

1. Issue a declaratory judgment that Xcel's construction of Comanche Unit 3 without an approved MACT determination is illegal under Section 112 of the Clean Air Act, 42, U.S.C. § 7412;
2. In the alternative, issue a declaratory judgment that Xcel's modification of the Comanche Station by adding Unit 3 without an approved MACT determination is illegal under Section 112 of the Clean Air Act, 42, U.S.C. § 7412;
3. Permanently enjoin Xcel from construction or operation of Comanche Unit 3 except in accordance with a MACT determination pursuant to Clean Air Act Section 112(g) and applicable regulatory requirements;
4. Assess a civil penalty against Xcel of up to \$37,500.00 per day for each violation of the Clean Air Act and applicable regulations;
5. Award Plaintiff its cost and reasonable attorneys' fees incurred in initiating and prosecuting this action; and
6. Grant such other relief as the Court deems just and proper.

Respectfully submitted,

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