April 20, 2009

Sent Via Certified Mail

Richard C. Kelly
Chairman, President, and CEO Xcel Energy
Xcel Energy
414 Nicollet Mall
Minneapolis, MN 55401-1993

Michael J. Price
General Manager, Power Generation, Colorado
Public Service Company of Colorado
PO Box 840
Denver, CO 80201

Re: Comanche 3 Clean Air Act Violation, Failure to Obtain Permit to Limit Hazardous Air Pollutants, Including Mercury

Dear Messrs. Kelly:

WildEarth Guardians hereby provides notice that construction of the Comanche 3 coal-fired electric generating unit (hereafter "Comanche 3"), located at the Comanche Station, 2005 Lime Road, Pueblo, CO 81006, constitutes an ongoing violation of the Clean Air Act. Construction of the Comanche 3 coal-fired boiler is proceeding in violation of Section 112 of the Clean Air Act, 42 U.S.C. § 7412. In 60 days, or shortly thereafter, we intend to file suit against Xcel Energy and seek appropriate injunctive relief to remedy this ongoing violation pursuant to the Clean Air Act, 42 U.S.C. § 7604(b)(1).[1]

Specifically, Xcel Energy has commenced construction of Comanche 3 without first securing the required regulatory determination that the unit will operate at Maximum Achievable Control Technology ("MACT") levels for the hazardous air pollutants ("HAPs") it will emit, including mercury, a potent neurotoxin. Section 112(g)(2)(B) of the Clean Air Act provides:

> After the effective date of a permit program under subchapter V of this chapter in any State, no person may construct or reconstruct any major source of hazardous air pollutants, unless the Administrator (or the State) determines that the maximum achievable control technology emission limitation under this section for new sources will be met. Such

[1] For the purposes of this notice, Xcel Energy refer to both Xcel Energy and Public Service Company of Colorado doing business as Xcel Energy.

determination shall be made on a case-by-case basis where no applicable emission limitations have been established by the Administrator.

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

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

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

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

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

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

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

some HAP emissions under the Clean Air Mercury Rule (CAMR).

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

With respect to regulating HAP emissions from coal-fired power plants, the D.C. Circuit's vacatur of EPA's Delisting Rule means that EPA never lawfully removed power plants from the HAP source category list under section 112(c). As the D.C. Circuit made clear, "EGUs remain listed under section 112" because "EPA's purported removal of EGUs from section 112(c)(1) list... violated the CAA's plain text and must be rejected." *New Jersey*, slip op. at 17 and 14 (emphasis added). As a result, the statutory requirements that attach to an industry listed at 112(c) apply and have applied continuously since December 2000 to the coal- and oil fired EGUs, including the Comanche 3 EGU.

Furthermore, because EPA has not promulgated MACT standards for EGUs pursuant to section 112 of the Clean Air Act, the case-by-case MACT requirements of section 112(g) now apply to EGUs for which construction commenced subsequent to December 2000. In the case of Comanche 3, construction commenced subsequent to December 2000 and therefore, Xcel Energy was required to comply with case-by-case MACT requirements under section 112(g) of the Clean Air Act and 40 C.F.R. § 63.42(c). Indeed, in a letter dated March 13, 2009, the Colorado Department of Public Health and Environment, Air Pollution Control Division explicitly informed Xcel Energy that Comanche 3 is subject to section 112(g) and requested the company provide information to comply with section 112(g). *See*, Exhibit 1 to this notice, Colorado Department of Public Health and Environment, Air Pollution Control Division letter to Gary Magno, Xcel Energy in re: "Case-by-Case 112(g) MACT Application" (March 13, 2009).

The need for Xcel Energy to comply with section 112(g) of the Clean Air Act is particularly important in light of the projected mercury emissions from Comanche 3. Comanche 3 will be permitted to release 131 pounds of mercury annually. These emissions will come as reports indicate 20% of Colorado's lakes and reservoirs contain mercury tainted fish that are unhealthy to consume. *See*, Exhibit 2 to this notice, Jaffe, M., "Mercury Mystery in State Waters," *Denver Post* (April 5, 2009).

Pursuant to the Clean Air Act, 42 U.S.C. § 7604(a)(1), citizens are entitled to bring suit to enjoin violations of an "emission standard or limitation," and to seek civil penalties for such violations. An "emission standard or limitation" is defined to include, among other things, "any requirement under section 111 or 112 (without regard to whether such requirements is expressed as an emission standard or otherwise[.]" 42 U.S.C. § 7604(f)(3). Accordingly, WildEarth Guardians will bring suit to enjoin Xcel Energy's ongoing violation of section 112(g) of the Clean Air Act and regulations implementing section 112, seek civil penalties for this violation, and recover attorneys' fees and costs, and any other appropriate relief.

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

Sincerely,

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