EXHIBIT 8

DINE′ CITIZENS AGAINST RUINING OUR ENVIRONMENT*
SAN JUAN CITIZENS ALLIANCE*
NATURAL RESOURCES DEFENSE COUNCIL*
SIERRA CLUB* WILDEARTH GUARDIANS* CLEAN AIR TASK FORCE*
GRAND CANYON TRUST* ENVIRONMENT NEW MEXICO*
WESTERN RESOURCE ADVOCATES

March 4, 2008

Joseph Lapka
U.S. Environmental Protection Agency
Region 9
Air Permits Office (AIR-3)
EPA Region IX
75 Hawthorne Street
San Francisco, CA 94105

RE: EPA MUST ESTABLISH CASE-BY-CASE MACT LIMITS FOR HAZARDOUS AIR POLLUTANTS FROM THE PROPOSED DESERT ROCK COAL PLANT

Dear Mr. Lapka:

The above captioned groups respectfully submit these comments on behalf of their thousands of members that will be adversely impacted by the construction and operation of the proposed Desert Rock Power Plant. We incorporate, as part of our comments for the administrative record for this proposed project, all of the documents referenced and cited to herein. These comments are based on recent developments and information of central relevance to EPA's approval of the Desert Rock Power Plant.

Introduction

On July 19, 2006, EPA issued a draft Clean Air Act preconstruction permit for the 1500 Megawatt (MW) coal-fired power plant proposed by Sithe Global. EPA issued the draft permit pursuant to its Prevention of Significant Deterioration (PSD) regulations (40 C.F.R. § 52.21). The permit included emission limitations and other requirements associated with certain PSD pollutants that the proposed facility would emit.[1] The draft

[1] Numerous stakeholders, including Dine´ Citizens Against Ruining Our Environment, San Juan Citizens Alliance, Environmental Defense, Western Resource Advocates, Natural Resources Defense Council, Sierra Club, Forest Guardians, Environment Colorado, Clean Air Task Force, and Grand Canyon Trust filed comments specifically with respect to EPA's draft PSD permit. In addition, these conservation organizations filed supplemental comments on the draft PSD permit on October 4, 2007. Other conservation groups also filed comments.

PSD permit did not purport to include an evaluation of maximum achievable control technology (MACT) for the control of hazardous air pollutants (HAPs), including mercury, and did not in fact incorporate emission standards or other requirements intended to limit emissions of HAP.

However, before Sithe may begin construction of the Desert Rock facility, in addition to issuing a final PSD permit that fully complies with the requirements of the Clean Air Act (CAA), EPA must perform a comprehensive, case-by-case new source MACT analysis for the proposed coal plant, and establish emission limitations that "require the maximum degree of reduction in emissions" achievable for each HAP that the facility will emit, and it must do so in accordance with the requirements of CAA §§ 112(d) and 112(g). Moreover, EPA must provide an opportunity for notice and comment on its MACT analysis before it issues final MACT requirements for the Desert Rock coal plant.

Because EPA has failed, thus far, to conduct a MACT analysis for this facility and issue HAP emission limitations for the Desert Rock plant, the CAA approval process is fatally incomplete, and EPA may not issue final regulatory approval for construction of Sithe's proposed coal plant.

Discussion

1. Background

The CAA requires that EPA list "all categories of and subcategories of major sources" of HAP, CAA § 112(c)(1),[2] and promulgate regulations that establish "emissions standards . . . applicable to new and existing sources of hazardous air pollutants [that] require the maximum degree of reduction in emission" that the Administrator determines is achievable, CAA § 112(d)(2). These "maximum achievable control technology" standards for new sources must be no less stringent than "the emission control that is achieved in practice by the best controlled similar source." CAA § 112(d)(3). The Act requires that EPA meet certain deadlines for promulgating standards under section 112(d). *See, e.g.*, CAA § 112(c)(5), (c)(6), (c)(8), (e)(1), (e)(3). However, even when EPA has failed to promulgate emission standard under section 112(d), new sources (and modifications to existing sources) must have MACT emission limitations before they can be built. *See* CAA § 112(g)(2).

In particular, Section 112(g)(2)(B) 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

[2] A major source is, without limitation, "*any* stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year of any hazardous air pollutant or 25 ton per year or more of any combination of hazardous air pollutants." CAA § 112(a)(1) (emphasis added).

> maximum achievable control technology emission limitation under this section for new sources will be met. Such determination shall be made on a case-by-case basis where no applicable emission limitations have been established by the Administrator.

It is undeniable that EPA has failed to meet its obligation to promulgate MACT standards for new and existing electric generating units (EGUs). This failure is made clear by a recent decision by the United States Court of Appeals for the D.C. Circuit. New Jersey v. EPA, D.C. Cir. Case No. 05-1097 (decided Feb. 8, 2008). In vacating EPA's "clean air mercury rule," the Court acknowledged that the Agency had illegally attempted to remove EGUs from the list of source categories established pursuant to CAA § 112(c).[3] Accordingly, EPA's purported "delisting" was ineffectual, and the December 2000 source category listing of EGUs remains in effect.

Specifically, in vacating EPA's delisting decision and the associated Clean Air Mercury Rule (CAMR), the Court concluded:

> [I]n view of the plain text and structure of section 112, we grant the petitions and vacate the Delisting Rule. *See Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993). This requires vacation of CAMR's regulations for both new and existing EGUs. EPA promulgated the CAMR regulations for existing EGUs under section 111(d), but under EPA's own interpretation of the section, it cannot be used to regulate sources listed under section 112; EPA thus concedes that if EGUs *remain listed under section 112, as we hold*, then the CAMR regulations for existing sources must fall. Resp't Br. at 99, 101-02; see also Delisting Rule, 70 Fed. Reg. at 16,031.

(emphasis added) (A copy of the decision is attached as Exhibit 1).

2. EPA Must Establish § 112(g) Standards for Desert Rock

Because EGUs are a listed category of major source under CAA § 112(c), because EPA's attempt to delist this source category was illegal and ineffectual, and because the triggering criteria for applicability of CAA § 112(g) has been satisfied (i.e., the "effective date of a permit program under subchapter V"), it is clear that the proposed Desert Rock coal plant may not move forward unless and until EPA performs a comprehensive MACT analysis, and establishes case-by-case emission limitations for each HAP that the facility

[3] As the Court explained:

> On December 20, 2000, the Administrator announced — in light of the study mandated by section 112(n)(1)(A), as well as subsequent information and consideration of alternative feasible control strategies — that it was "appropriate and necessary" to regulate coal- and oil-fired EGUs under section 112 because, as relevant, mercury emissions from EGUs, which are the largest domestic source of mercury emissions, present significant hazards to public health and the environment. Regulatory Finding on the Emissions of Hazardous Air Pollutants From Electric Utility Steam Generating Units, 65 Fed. Reg. 79,825, 79,827 (Dec. 20, 2000) ("2000 Determination"). "As a result the source category for Coal- and Oil-Fired [EGUs] was added to the list of source categories under section 112(c)" on December 20, 2000.

would emit. Consistent with the express requirements of section 112(d), these standards must reduce emissions of HAPs to the greatest degree achievable, and may be no less stringent than "the emission control that is *achieved in practice* by the best controlled similar source."[4]

Neither the proposed air permit for the Desert Rock coal plant (that EPA issued on July 19, 2006), nor any of EPA's supporting materials, include a MACT analysis or purport to address EPA's MACT-related obligations. Nor does the permit incorporate any MACT emission limitations or other requirements applicable to mercury and any other HAP.[5] We note that the EPA Regulatory Finding upon which EPA's listing decision was based states that "Coal- and oil-fired electric utility steam generating units … emit a *significant number of the 188 HAP on the section 112(b) list*." 65 Fed. Reg. 79825, 79827-79828 (Dec. 20, 2000) (emphasis added). EPA has developed a "selected" listing of approximately 67 hazardous air pollutants emitted by coal-fired power plants that includes, in addition to mercury, toxics like arsenic, beryllium, cadmium, chromium, dioxins, lead, and manganese. 65 Fed. Reg. 79825, 79828 (Dec. 29, 2000); see also U.S. Environmental Protection Agency, *Study of Hazardous Air Pollutant Emissions from Electric Utility Steam Generating Units—Final Report to Congress* ("Utility Study"), ES 1-2 (Feb. 1998). The D.C. Circuit Court of Appeals has specifically recognized EPA's "clear statutory obligation to set emissions standards for *each* . . . HAP [listed in CAA §112(b)]." National Lime Ass'n v. EPA, 233 F.3d 625, 634 (D.C. Cir. 2000). Thus, the MACT determination for the Desert Rock facility must *specifically address* all of the 67 (or more) hazardous air pollutants Desert Rock plant will emit.

Because EPA has yet to address HAP emissions from the proposed facility, whether or not EPA finalizes the PSD portions of the CAA approval for the plant *construction may not begin* until the Agency has performed a robust MACT analysis, provided an opportunity for public notice an comment, and adopted final HAP emission limitations that fully comply with the requirements of section 112(d) and 112(g).[6] Moreover, were Sithe to begin construction of the Desert Rock facility without first obtaining a valid MACT determination for all HAP that the facility will emit, such

[4] The D.C. Cir. has issued numerous opinions that directly address the Agency's obligations when adopting standards under section 112(d). *See National Min. Ass'n v. E.P.A.*, 59 F.3d 1351 (D.C. Cir. 1995); *National Lime Ass'n v. E.P.A.*, 233 F.3d 625 (D.C. Cir. 2000); *Cement Kiln Recycling Coalition v. E.P.A.*, 255 F.3d 855 (D.C. Cir. 2001); *Sierra Club v. E.P.A.*, 353 F.3d 976 (D.C. Cir. 2004); *Mossville Environmental Action Now v. E.P.A.*, 370 F.3d 1232 (D.C. Cir. 2004); *Sierra Club v. Environmental Protection Agency*, 479 F.3d 875 (D.C. Cir. 2007); *Natural Resources Defense Council v. E.P.A.*, 489 F.3d 1364 (D.C. Cir. 2007). EPA's identification of MACT limitations for the Desert Rock facility must be consistent with the D.C. Circuit's guidance regarding the establishment of MACT standards under section 112(d) as expressed in these cases.

[5] While the Desert Rock permit application dedicated one page of discussion to MACT (and another single paragraph to HAPs) it failed utterly to perform a meaningful MACT analysis that would ensure compliance with section 112(d) by identifying and adopting emission limitation, for each HAP, based on the single best performing similar source. *See* Application For Prevention of Significant Deterioration Permit For the Desert Rock Energy Facility (May 2004) at 4-25 - 4-26, 5-3.

[6] EPA has adopted regulations that address case-by-case MACT determination under section 112(g). *See* 40 C.F.R. by §§ 63.40—63.44.

activity would constitute a clear violation of the Act, and would subject Sithe to a possible CAA enforcement action.

3. EPA Must Reopen the PSD Permit Analysis for Desert Rock

Finally, a robust MACT analysis and strict MACT limitations for mercury and other HAP are likely to require changes to facility design and/or operational parameters. As a result, the detailed analysis of emissions performance and other environmental implication of the project required under the PSD program may no longer be fully accurate. Among other things, use of activated carbon injection to remove mercury from the flue gas would result in elevated levels of mercury and other toxins in the solid waste produced by the proposed plant. These solid wastes will need to be properly disposed of, and may pose a serious threat to groundwater resources if managed improperly. As a result, in connection with identifying BACT for the Desert Rock plant, EPA should expressly consider the toxicity of the facility's coal combustion waste (CCW) as a factor in evaluating the facility's collateral environmental impacts and as an additional justification for conducting a robust evaluation of alternatives to the project (both under BACT and under CAA § 165(a)(2)).[7]

In order to ensure that the PSD permit requirements continue to reflect the greatest degree of emission reduction achievable, pursuant to the criteria of CAA § 165 and 169, and to ensure that all other environmental impacts are appropriately considered, EPA must reexamine the PSD permit limits and other permit conditions in light of the MACT analysis required by section 112(g). Additionally, EPA must provide the public with an opportunity to comment on EPA's conclusions regarding the affect that compliance with section 112(g) will have on the appropriateness of the project and on the level of stringency of the emission limits under section 165.

Conclusion

As described above, EPA's failure to perform a detailed MACT analysis for the proposed Desert Rock plant, and to adopt MACT emission limitation consistent with CAA § 112(d) for all HAPs that the proposed facility would emit, preclude EPA from

[7] In its 2000 Regulatory Determination on Wastes from the Combustion of Fossil Fuels, EPA anticipated that an increase in the toxicity of CCW could result from the more stringent regulation of power plant hazardous air emissions under the Clean Air Act. EPA pledged: "We will reevaluate risk posed by managing coal combustion solid wastes if levels of mercury or other hazardous constituents change due to any future Clean Air Act air pollution control requirements for coal burning utilities." 65 Fed. Reg. 32,221. In a subsequent 2006 Study, EPA demonstrated such heightened risk, especially from arsenic and selenium, from CCW generated by coal-fired power plants with activated carbon injection. US EPA. *Characterization of Mercury-Enriched Coal Combustion Residues from Electric Utilities Using Enhanced Sorbents for Mercury Control*, EPA/600/R-06/008 (January 2006) (finding that arsenic may leach at levels 100 times its maximum contaminant level (MCL) and selenium at levels up to 200 times its MCL). In a report to be released later this year, EPA will address CCW generated by coal-fired power plants employing wet scrubbers – preliminary data indicate that toxic metals in CCW from these plants are also cause for concern. U.S. EPA, Office of Research and Development. "Evaluating the Fate of Metals from Management of Coal Combustion Residues from Implementation of Multi-Pollutant Controls at Coal-Fired Electric Utilities," Presentation for 32nd Annual EPA-A&WMA Information Exchange, December 4, 2007.

issuing final regulatory approval for construction of the proposed coal plant. To remedy this deficiency, EPA must perform a MACT analysis (consistent with the requirements of section 112(d)), provide an opportunity for public notice and comment, and issue a final determination in accordance with Section 112(g)(2)(B). Moreover, EPA must reopen the PSD permit, and address any impact that the MACT emission control requirements will have on the analysis of the appropriateness of the project and on the stringency of the PSD permit limitations and/or other permit conditions.

Sincerely,

San Juan Citizens Alliance
Mike Eisenfeld
New Mexico Energy Coordinator
108 North Behrend, Suite I
Farmington, New Mexico 87401
phone: 505 325-6724
meisenfeld@frontier.net

Grand Canyon Trust
Roger Clark
Air & Energy Director
2601 N. Fort Valley Road
Flagstaff, Arizona 86001
phone: 928-774-7488, ext. 214
rclark@grandcanyontrust.org

WildEarth Guardians
Robert Ukeiley
Climate and Energy Program Director
312 Montezuma
Santa Fe, New Mexico 87501
phone: 720-563-9306
rukeiley@wildearthguardians.org

Robb Thomson
Energy - Cap and Trade, 4Corners Chair
Rio Grande Chapter
1807 2nd Street, Suite 45
Santa Fe, New Mexico 87505
robbm@toast.net

Environment New Mexico
Lauren N. Ketcham
Advocate
P.O. Box 40173
Albuquerque, New Mexico 87196
phone: 505-254-4819
lauren@environmentnewmexico.org

Dine CARE
Dailan J. Long
Community Organizer
HC -63 Box 263
Winslow, Arizona 86047
phone: 505-801-0713
dailan.jake@gmail.com

Sierra Club
Clean Air Task Force
Jeff Stant
Director, PPW Project - Safe Disposal Campaign
217 South Audubon Road
Indianapolis, IN 46219
phone: 317-359-1306
jeffreystant@sbcglobal.net

Natural Resources Defense Council
Patrice Simms
Senior Project Attorney at Law
1200 New York Ave. NW, Suite 400
Washington D.C. 20005
(202) 289-2437
psimms@nrdc.org

Western Resource Advocates
John Nielsen
Energy Program Director
2260 Baseline Rd., Suite 200
Boulder, CO 80302
(303) 444-1188
jnielsen@westernresources.org