



May 6, 2008

Via Certified U.S. Mail

Mr. Stephen L. Johnson, Administrator
United States Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

John V. Corra, Director
Department of Environmental Quality
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Cheyenne, WY 82002

Ronald R. Harper, CEO
Basin Electric Power Cooperative
1717 East Interstate Avenue
Bismarck, ND 58503-0564

RE: Notice of Violation at Basin Electric Dry Fork Generating Station

To Whom It May Concern:

We hereby provide notice, pursuant to the citizen suit provision of the Clean Air Act, 42 U.S.C. § 7604(b), that Basin Electric Power Cooperative's (Basin Electric) construction of the Dry Fork Generating Station constitutes a violation of Clean Air Act Section 112, 42 U.S.C. § 7412, 40 C.F.R. §§ 63.43 & 63.44, and Wyoming Air Quality Standards and Regulations (WAQSR) Chapter 6, § 6(g), because Basin Electric has not obtained "maximum achievable control technology" (MACT) emission limits for its hazardous air pollutant emissions. The Act prohibits any person from "construct[ing] . . . any major source of hazardous air pollutants unless the Administrator (or the State) determines that the [MACT] emissions limitation . . . will be met." 42 U.S.C. § 7412(g)(2)(B).

The Clean Air Act (CAA) contains a list of "hazardous air pollutants" (HAPs) including, but not limited to, hydrochloric acid, hydrogen fluoride, antimony, arsenic, beryllium, cadmium, chromium, cobalt, lead, manganese, mercury, nickel, selenium, sulfuric acid, benzene, and polycyclic organic matter. 42 U.S.C. § 7412(b). If a listed source of air pollution emits more than 25 tons per year of HAPs, that source is required to obtain HAP emission limits

representative of MACT prior to commencement of construction. 40 C.F.R. §63.42; 42 U.S.C. § 7412(d); WAQSR Chapter 6, §6(g)(ii); 40 C.F.R. §63.43(d) and (e).

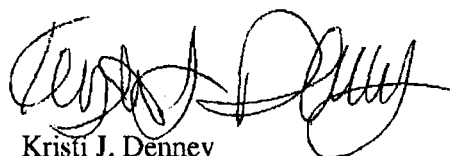
The United States Environmental Protection Agency (EPA) has listed coal-fired electric generating units (EGUs) among the sources subject to Section 112's emissions standards. *Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units*, 65 Fed. Reg. 79,825, 79,827 (Dec. 20, 2000). On March 29, 2005, EPA purported to remove EGU's as sources subject to Section 112. 70 Fed. Reg. 15,994. The EPA's purported "de-listing" of coal-fired power plants was recently held to have been unlawful, and therefore void *ab initio*, by the Court of Appeals for the District of Columbia. *See attached State of New Jersey v. U.S. Environmental Protection Agency*, D.C. Cir. Case No. 05-1162 (D.C. Cir. February 8, 2008) (vacating rules removing coal-fired plants from list of sources that must meet Section 112 requirements).

The D.C. Circuit issued an expedited mandate on March 14, 2008, vacating the Delisting Rule and the Clean Air Mercury Rule (CAMR). *See attached*. Controlling case law provides that vacatur of an unlawful agency action renders that action a nullity—i.e., 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"). By vacating EPA's Delisting Rule, the Court of Appeals has, accordingly, deprived the Rule of any legal effect; EPA never lawfully removed power plants from the hazardous air pollution source list, despite purporting to do so. Basin Electric cannot, therefore, rely on the Rule to avoid the requirements of Section 112(g); EGUs "*remain listed* under section 112," *New Jersey*, slip op. at 17 (emphasis added), because "EPA's purported removal of EGUs from the section 112(c)(1) list . . . violated the CAA's plain text and must be rejected." *Id.* at 14.

According to Wyoming Department of Environmental Quality's (WDEQ's) February 7, 2007, permit analysis, Dry Fork's main boiler has the potential to emit 34.8 tons per year of HAPs. Therefore, under the Clean Air Act's implementing regulations and the WAQSR, Basin Electric was required to obtain for the Dry Fork facility "a final and effective case-by-case determination . . . such that [its hazardous air pollutant emissions] . . . will be controlled to a level no less stringent than the maximum achievable control technology ["MACT"] emission limitation for new sources," **before commencing** "actual construction." 40 C.F.R. § 63.42(c); WAQSR Chapter 6, § 6(g). The Dry Fork permit that was issued by WDEQ on October 15, 2007, established no emission limits for HAPs that are based on a case-by-case, maximum achievable control technology analysis. Basin Electric began construction on the Dry Fork Station in November 2007 without a "final and effective" MACT determination for its hazardous air pollutant emissions. Basin Electric has unlawfully proceeded with on-site construction of the Dry Fork facility, even after the D.C. Circuit's vacatur. This construction constitutes a violation of Section 112 and WAQSR Chapter 6, § 6(g).

Do not hesitate to contact me if you have any questions or concerns, at (303) 449-5595, ext. 100 or kristi.denney@sierraclub.org.

Sincerely



Kristi J. Denney
On behalf of the Sierra Club

Cc: Regional Administrator
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