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VIA UPS

Ms. Kristi J. Denney
Sierra Club
85 Second Street, Second Floor
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Re: Response to Citizen Suit Notice Letter

Dear Ms. Denney:

This letter responds to your notice of May 6, 2008, provided pursuant to the citizen suit provision of the Clean Air Act, 42 U.S.C. § 7604. In that letter, you allege that Basin Electric Power Cooperative's ("Basin Electric") construction of the Dry Fork Generating Station constitutes a violation of the Clean Air Act ("CAA") Section 112, 42 U.S.C. § 7412, because Basin Electric has not obtained maximum achievable control technology ("MACT") emission limits for its hazardous air pollutants emissions.

On October 15, 2007, the State of Wyoming issued Basin Electric a valid permit to begin construction on the Dry Fork Station, and Basin Electric has proceeded with construction in reliance on that permit. At the time the permit was issued and, indeed, throughout the permit review process, the only hazardous air pollutant (HAP) requirements applicable to the Dry Fork Station were the mercury New Source Performance Standards (NSPS) requirements set forth in 40 C.F.R. Part 60, Subpart HHHH, and Wyoming's requirement that all pollutants (including HAPs) be subject to a BACT emission limit. Basin Electric's permit contained a requirement specifying that mercury emission rates would not exceed the applicable NSPS, and included a mercury BACT requirement targeting control of mercury emissions to achieve the EPA-proposed mercury MACT standard of 20×10^{-6} lb/MW-hr. Additionally, Basin Electric's permit required installation of mercury pollution control equipment within ninety days of initial startup. All legal requirements applicable to Basin Electric at the time the permit was issued were met. In reliance on its validly issued permit, Basin Electric began construction in October 2007. The construction design included plans for mercury control, as required by the permit.

Nearly five months later, on March 14, 2008, the D.C. Circuit Court of Appeals vacated the EPA rule delisting coal-fired power plants from Section 112 of the Clean

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Air Act and the EPA rule setting mercury NSPS for coal-fired power plants. *New Jersey v. EPA*, Case No. 05-1097 (D.C. Cir. Feb. 8, 2008). It is this decision that Basin Electric understands forms the basis for Sierra Club's assertion that Basin Electric's construction of the Dry Fork station in compliance with its validly issued permit constitutes a violation of Section 112(g)(2)(B) of the CAA. This allegation arises out of a fundamental misunderstanding of the CAA requirements for mercury, as applicable to the Dry Fork Station. As discussed further below, Basin Electric believes that the Sierra Club does not have the legal authority to bring a citizen suit where (1) Basin has, at all times, complied with the CAA and its permit; and (2) Basin began actual construction on the Dry Fork Station when Section 112(g) requirements were not applicable to the plant. Further, as detailed below, mercury is the only HAP for which a Section 112(g) analysis would be required and, this, only at not yet permitted electric generating units.

I. The Citizen Suit Provision of the CAA Does Not Allow For Attacks on Valid State Permits

Section 304 of the CAA authorizes citizen suits only to claim a violation of an emission standard or limitation or to allege a failure to obtain a permit required prior to construction. 42 U.S.C. § 7604(a). As such, the Sierra Club cannot bring the citizen suit it proposes, nor would a United States District Court have jurisdiction to hear such a case. Basin Electric obtained a valid permit, effective October 15, 2007, to begin construction, and it has operated within the bounds of that permit since its issuance.

Sierra Club is not asserting that Basin Electric violated any terms of its construction permit; rather, it is attacking the legality of the permit issued by the Wyoming Department of Environmental Quality. As such, Sierra Club's noticed suit would, in effect, collaterally attack a facially valid permit issued by the Wyoming agency – an attack disallowed by courts under the CAA's citizen suit provisions. *See Nat'l Parks Conservation Ass'n, Inc. v. Tenn. Valley Auth.*, 175 F. Supp. 2d 1071, 1078 (E.D. Tenn. 2001);*United States v. Solar Turbines,* 732 F. Supp. 535, 539-40 (M.D.Pa.1989) (prohibiting enforcement action against "an owner/operator who has committed no violation that can be attributed to it other than to act in accordance with a permit it received from an authorized permit-issuing authority"). Because citizen suits may not be used to collaterally attack facially valid state permits, *Nat'l Parks Conservation,* 175 F. Supp. 2d at 1079, Sierra Club's notice, which threatens a suit against Basin for operating in accordance with the permit validly issued by the Wyoming Department of Environmental Quality, lacks proper legal basis.

The requested relief is not available to Sierra Club where, as here, a valid permit was issued and construction has now been proceeding for over 7 months. Even EPA would be precluded from bringing an action to stop construction of the Dry Fork Station at this late stage. As the U.S. Supreme Court recognized in *ADEC v. EPA*, 124 S. Ct.

983 (2004), EPA has authority to stop construction when it had already issued preconstruction orders alerting the source and the state permitting authority to its concerns, but would not necessarily be able to issue "post construction federal Agency directives" and must act timely "recognizing that Courts are less likely to require new sources to accept more stringent permit conditions the farther planning and construction have progressed." *Id.* at 1005; *see also United States v. AM General Corp.*, 34 F.3d 472, 475 (affirming District Court's dismissal of an EPA-initiated enforcement action where EPA did not act until well after the facility received a PSD permit and began construction.). Because a citizen suit allows a private party the ability to act as a private attorney general, "effectively stand[ing] in the shoes of the EPA," *Grand Canyon Trust v. Tucson Elec. Power Co.*, 391 F.3d 979, 987 (9th Cir. 2004); *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1521-22 (9th Cir. 1987)("citizen enforcement suits are analogous to EPA enforcement suits"), such citizens cannot have greater rights to stop construction of a plant already under construction pursuant to a valid permit than does EPA.

II. Section 112(g) Does Not Apply to Facilities With Valid Air Permits, Much Less to Facilities That Have Begun Actual Construction

Section 112(g) does not apply to the Dry Fork Station in the wake of the D.C. Circuit Court's vacatur of the EPA's Delisting Rule and the Clean Air Mercury Rule ("CAMR") in *New Jersey v. EPA*, Case. No. 05-1162 (D.C. Cir. Feb. 8, 2008). Section 112(g)(2)(B) provides, in pertinent part, as follows:

> *no person may construct* or reconstruct any major source of hazardous air pollutants ... *unless* the Administrator (or the State) determines that the MACT 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 emissions limitations have been established by the Administrator.

(Emphasis added.) EPA's section 112(g) regulations further emphasize that "no person may ***begin actual construction*** or reconstruction of a major source of HAP" unless a case by case determination has been made. 40 CFR § 63.42(c)(emphasis added). Accordingly, a MACT limitation must be set and incorporated into a permit by the time a plant undertakes "construction," which had already occurred at the Dry Fork Station when the D.C. Circuit Court issued its decision and subsequent mandate in *New Jersey v. EPA*. At the time Basin Electric began construction on the Dry Fork Station, Section 112(g) was not applicable, and Basin was issued a valid permit that fully complied with the then-existing mercury regulations.

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That the D.C. Circuit vacated CAMR does not invalidate state-approved permits issued in accordance with that rule when it was still in effect. The court's action is, essentially, analogous to the adoption of a new Sec. 112(g) rule for coal-fired electric generating units. In that vein, EPA's Section 112(g) regulations provide guidance for how to treat existing projects subsequent to the CAMR court decision. Those regulations provide that Section 112(g)(2)(B) does not apply to sources that have "received all necessary air quality permits for such construction or reconstruction project before the effective date of Section 112(g)(2)(B)." 40 C.F.R. § 63.40(b). In its final rule adopting the Section 112(g) regulations, EPA discussed the possibility of limiting the final rule applicability to sources that had applied for a permit but not yet received a permit, as well as limiting the rule's applicability to sources that had not yet begun actual construction even though they had received a final permit. In the end, EPA opted for the middle ground and limited applicability to those sources that had not yet obtained a permit, explaining its decision as follows:

> The EPA believes the chosen approach reflects the best option for ensuring adequate controls on sources seeking to add new equipment while grandfathering sources which have already made significant investments in equipment. This approach ensures that if prior to the permit issuance, new approaches to control HAP emissions are considered appropriate, the source will apply the latest control technology. This approach is also most consistent with current Federal policy in the prevention of significant deterioration (PSD), in which sources with an approved permit are grandfathered when the attainment status of the region changes in the new source review (NSR) program as well, while sources with a complete application which might otherwise be considered major modifications are grandfathered, these modifications do not escape review; they are treated as minor modifications instead.

61 Fed. Reg. 68384, 68387 (December 27, 1996). EPA's reasoning and rationale are equally applicable here, where Basin Electric not only has been issued a valid permit, but it has already begun actual construction in reliance on that permit.

Limiting Section 112(g)'s applicability to those projects not yet permitted evidences a recognition that to do otherwise would unfairly result in applying new changes in governing rules to facilities that had already been designed and engineered in reliance on the current permitting regime, often with great financial commitments. *See Grand Canyon Trust v. Tucson Elec. Power Co.*, 391 F.3d 979, 983 (9th Cir. 2004) (apparent purpose of BACT regulations "was to preserve settled expectations with

respect to already-issued permits"). Likewise, fundamental principles of fairness dictate that "[t]o accuse a source of a violation necessitates its ability to have avoided the violation or to have a means of complying with an administrative order so that it may correct the violation." *Solar Turbines*, 732 F. Supp. at 539. It is patently unreasonable to expect Basin Electric to have foreseen and obtained a permit in compliance with the D.C. Circuit's vacatur of CAMR in *New Jersey v. EPA*, issued 5 months after Basin Electric began actual construction on the plant. The law does not demand the permitting process be effected with a crystal ball.

III. Coal-Fired Electric Generating Units Are Not Regulated For HAPs Other Than Mercury

Non-mercury hazardous air pollutant emissions from utility boilers are not currently regulated under the CAA and, as such, Basin Electric's construction permit is not subject to challenge regarding HAPs emission limits. The D.C. Circuit Court's vacatur of CAMR has no effect on the continuing validity of that permit.

Section 112 of the CAA directs regulation of HAPs emissions controls; specifically, Section 112(d) sets MACT limits applicable to most source categories. Congress, however, chose to regulate utility steam generating units separately and enacted Section 112(n), which sets forth a different and independent legislative scheme for such sources. In choosing to address HAP emissions from utility steam generating units separately from HAPs from other sources, Congress instructed EPA in Section 112(n) to regulate HAP emissions from power plants only to the extent that they pose a health risk. Indeed, Section 112(n)(1)(A) makes clear that the factual predicate for regulating HAP emissions from power plants is an EPA finding that a hazard to public health is "reasonably anticipated to occur as a result of" those emissions.

In 2000, EPA issued a regulatory finding under Section 112(n)(1)(A) that regulation of mercury emissions from coal-fired electric utility stream generating units under Section 112 is appropriate and necessary. 65 Fed. Reg. 79825 (Dec. 20, 2000). In this rulemaking, the EPA noted that a handful of other HAPs might pose potential concerns as regards public health, but, significantly, it based its finding exclusively on the potential hazards of mercury emissions from coal-fired units. EPA made no regulatory finding with respect to other HAPs, but it noted that emissions of other substances "may be evaluated further during the regulatory process." Since then, EPA has never publicly evaluated other HAPs under Section 112(n)(1)(A).

Given the plain language of Section 112(n)(1)(A) and the EPA's December 2000 findings, it is clear that Congress intended the EPA to regulate only those emissions that have been demonstrated to cause a significant threat of serious adverse effects on the public health and, currently, EPA has only made that finding with respect to mercury. Sierra Club's allegations to the contrary misunderstand the factual predicates

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required to regulate HAPs from electric utility steam generating units, and therefore they do not support a well-founded cause of action in this instance.

In light of these and other strong legal and equitable arguments against the noticed citizen suit regarding the Dry Fork Station air permit, Basin Electric encourages Sierra Club to reconsider its decision to invoke the citizen suit provisions of the Clean Air Act.

Sincerely,

Denise W. Kennedy, P.C.
of Holland & Hart LLP

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