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May 15, 2008

Via Certified Mail No. 7003 1010 0000 4906 3837

Rick R. Roper, Manager
Cliffside Steam Station
Duke Energy Carolinas, LLC
573 Duke Power Road
 Mooresboro, NC 28814

Via Certified Mail No. 7003 1010 0000 4906 3851

CT Corporation System (as Registered Agent for
Duke Energy Carolinas, LLC)
225 Hillsborough Street
Raleigh, NC 27603

Via Certified Mail No. 7003 1010 0000 4906 3868

Stephen L. Johnson, Administrator
U.S. EPA Headquarters
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Via Certified Mail No. 7003 1010 0000 4906 3844

William G. Ross, Jr., Secretary
North Carolina Department of Environment
& Natural Resources
1601 Mail Service Center
Raleigh, NC 27699-1601

Re: Supplemental Notice of Violation of 42 U.S.C. § 7412(g)(2) by Duke Energy Carolinas, LLC at Cliffside Steam Station

Dear Mr. Roper, Administrator Johnson, and Secretary Ross:

By this letter, Environmental Defense Fund ("EDF") provides notice pursuant to 42 U.S.C. § 7604(b) and 40 C.F.R. pt. 54 that Duke Energy Carolinas, LLC's ("Duke") construction of Cliffside Unit 6 at the company's existing Cliffside Steam Station in Rutherford County, North Carolina, is in violation of 42 U.S.C. § 7412(g)(2). This Notice of Violation is a supplement to the May 6, 2008 Notice of Violation sent to you by National Parks Conservation

Exhibit B to Complaint - SACE et al. v. Duke Energy

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Association (“NPCA”), Natural Resources Defense Council (“NRDC”), Sierra Club and Southern Alliance for Clean Energy (“SACE”).

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). The section further requires that the determination of maximum achievable control technology (“MACT”) “*shall be made on a case-by-case basis* where no applicable emission limitations have been established . . .” (emphasis added). *Id.*

Additionally, 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 new sources will be met.” 42 U.S.C. § 7412(g)(2)(A). The section also requires that the determination of maximum achievable control technology (“MACT”) “*shall be made on a case-by-case basis* where no applicable emission limitations have been established . . .” (emphasis added). *Id.*

Clean Air Act § 304(a) authorizes citizen suits to enforce the Act’s provisions, and further authorizes the Court to issue injunctions and to apply appropriate civil penalties. 42 U.S.C. § 7604(a). Duke is liable for up to thirty two thousand five hundred dollars (\$32,500) for *each day* that *each violation* continues. *See* 40 C.F.R. § 19.4 (adjustment of civil monetary penalties for inflation).

On January 29, 2008, the North Carolina Department of Environment and Natural Resources, Division of Air Quality issued Air Quality Permit No. 04044T28 to Duke Energy Carolinas, LLC for construction and operation of Cliffside Unit 6 and associated facilities. Cliffside Unit 6 is a “major source” under Clean Air Act § 112(a)(1) is therefore subject to § 112(g)(2)(B)’s prohibition on *constructing* a major source without a MACT determination. In the alternative, the existing Cliffside Steam Station is a “major source” under Clean Air Act § 112(a)(1) and Unit 6 is therefore subject to § 112(g)(2)(A)’s prohibition on *modifying* a major source without a MACT determination. However, Air Quality Permit No. 04044T28 did not contain, and Duke has not otherwise obtained, a determination from EPA or the State of North Carolina that MACT emission limits will be met for all hazardous air pollutants that Cliffside Unit 6 will emit. On information and belief, Duke began constructing Cliffside Unit 6 on or about January 30, 2008. Duke has publicly acknowledged, through press releases and official documents filed with the North Carolina Utilities Commission in Docket No. E-7, sub 790, that it has commenced construction and currently is constructing Cliffside Unit 6. These construction activities include, but are not limited to, site-grading, excavation, and concrete-pouring.

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Clean Air Act § 112 forbids construction of Cliffside Unit 6 unless and until Duke obtains an EPA or North Carolina MACT determination for *every hazardous air pollutant* that Cliffside Unit 6 will emit. See *Nat'l Lime Ass'n v. EPA*, 233 F.3d 625, 634 (D.C. Cir. 2000) (noting the “clear statutory obligation to set emission standards for each listed HAP”). EPA has noted that coal-fired power plants “emit a significant number of the 188 HAP [hazardous air pollutants] on the section 112(b) list” 65 Fed. Reg. 79825, 79827-28 (Dec. 20, 2000). EPA has identified “a total of 67 of the 188 HAPs ... as potentially being emitted by utilities.” EPA, *Study of Hazardous Air Pollutant Emissions from Electric Utility Steam Generating Units-Final Report to Congress*, Executive Summary at ES-4 (Feb. 25, 1998) (<http://www.epa.gov/ttnlcaaa/t3/reports/utilexec.pdf>). These hazardous air pollutants include “arsenic, beryllium, cadmium, chromium, manganese, nickel, hydrogen chloride [HCl], hydrogen fluoride [HF], acrolein, dioxins, formaldehyde, and radionuclides” as well as “mercury and lead.” *Id.* at ES-6.

We recognize that EPA “purported to remove” coal-fired power plants from the list of sources subject to Clean Air Act § 112. *New Jersey v. EPA*, 517 F.3d 574, 578 and 582 (D.C. Cir. 2008). The D.C. Circuit, however, vacated EPA’s attempt to remove coal-fired power plants from the list of sources regulated under § 112 because “EPA had no authority to delist [coal-fired power plants] without taking the steps required under section 112(c)(9).” *Id.* at 581. As a result, EPA’s unlawful attempt to remove coal-fired power plants from the list of sources subject to the Clean Air Act’s stringent requirements for hazardous air pollutants has no legal effect. See *Envtl. Defense v. Leavitt*, 329 F. Supp. 2d 55, 64 (D.D.C. 2004) (holding that “[w]hen a court vacates an agency’s rules, the vacatur restores the status quo before the invalid rule took effect.”); see also *Envtl. Defense v. EPA*, 489 F.3d 1320, 1325 (D.C. Cir. 2007) (while remanded regulations remain in effect, vacated regulations do not); and *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”). Power plants, therefore, “remain listed under section 112.” *New Jersey v. EPA*, 517 F.3d at 583. The D.C. Circuit ordered expedited issuance of the mandate in *New Jersey v. EPA* on March 14, 2008. Accordingly, the D.C. Circuit’s February 8, 2008 decision in the *New Jersey v. EPA* case is now legally effective and fully enforceable. Therefore, Duke is in violation of Clean Air Act § 112(g)(2) until it abates construction and obtains a valid and effective case-by-case MACT determination. The violations are located at the Cliffside Steam Station, Unit 6, 573 Duke Power Road, Mooresboro, in Rutherford County, North Carolina.

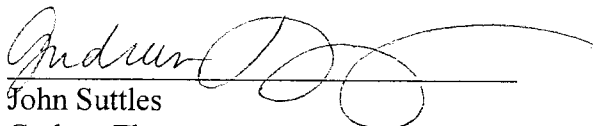
The name and address of the party giving this Notice are:

Michael Regan
Environmental Defense Fund
4000 Westchase Blvd, Suite 510
Raleigh, NC 27607

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If you believe that any portion of this Notice is in error or if you wish to discuss any aspect of this Notice, please contact John Suttles or Gudrun Thompson at the address and phone number listed below. We would be pleased to discuss alternatives for a cooperative resolution of the violations listed in this Notice.

Sincerely,



John Suttles
Gudrun Thompson
SOUTHERN ENVIRONMENTAL LAW CENTER
200 West Franklin Street, Suite 330
Chapel Hill, NC 27516
Telephone (919) 967-1450
*Counsel for EDF, NPCA, NRDC, Sierra Club and
SACE*

Cc:

Robin Smith
Mary Penny Thompson
B. Keith Overcash
1601 Mail Service Center
Raleigh, NC 27699-1601

Governor Michael F. Easley
Office of the Governor
20301 Mail Service Center
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J. I. Palmer, Jr., Regional Administrator
U.S. Environmental Protection Agency
Region 4
Sam Nunn Atlanta Federal Center
61 Forsyth Street, SW
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