

# SOUTHERN ENVIRONMENTAL LAW CENTER

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May 6, 2008

*Via Certified Mail No. 7003 1010 0000 4906 3776*

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 3783*

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 3790*

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 3806*

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

*Re: 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, National Parks Conservation Association, Natural Resources Defense Council, Sierra Club and Southern Alliance for Clean Energy (collectively, "Citizen Groups") provide 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).

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

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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.

Citizen Groups 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 names and addresses of the parties giving this Notice are:

Stephanie Kodish  
National Parks Conservation Association  
706 Walnut Street, Suite 200  
Knoxville, TN 37902

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Patrice L. Simms  
Natural Resources Defense Council  
1200 New York Ave. NW, Suite 400  
Washington, DC 20005

Molly Diggins  
North Carolina Sierra Club  
112 S. Blount Street  
Raleigh, NC 27601

Ulla Reeves  
Southern Alliance for Clean Energy  
29 N. Market Street, Suite 409  
Asheville, NC 28801

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. Citizen Groups would be pleased to discuss alternatives for a cooperative resolution of the violations listed in this Notice.

Sincerely,



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John Suttles

Gudrun Thompson

SOUTHERN ENVIRONMENTAL LAW CENTER  
200 West Franklin Street, Suite 330  
Chapel Hill, NC 27516  
Telephone (919) 967-1450  
*Counsel for Citizen Groups*

Cc:  
Robin Smith  
Mary Penny Thompson  
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1601 Mail Service Center  
Raleigh, NC 27699-1601

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Governor Michael F. Easley  
Office of the Governor  
20301 Mail Service Center  
Raleigh, NC 27699-0301

J. I. Palmer, Jr., Regional Administrator  
U.S. Environmental Protection Agency  
Region 4  
Sam Nunn Atlanta Federal Center  
61 Forsyth Street, SW  
Atlanta, GA 30303-8960