



State of New Mexico

BILL RICHARDSON
Governor

GARY K. KING
Attorney General

June 19, 2008

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

Mr. Wayne Nastri, Regional Administrator
Region 9
United States Environmental Protection Agency
75 Hawthorne Street
San Francisco, CA 94105

RE: MACT Determination for Proposed Desert Rock Energy Facility

Messrs. Johnson and Nastri:

As the chief protectors of New Mexicans' health and environment, we have grave concerns about the proposed Desert Rock Energy Facility ("Desert Rock") currently before the U.S. Environmental Protection Agency ("EPA"). The EPA's recent proposal to fast track the permitting decision for this potential new source of Hazardous Air Pollutants ("HAPs") without conducting required environmental analyses could have severe negative impacts on the air New Mexicans breathe. Pollutants emitted by coal-fired power plants like Desert Rock including mercury, lead and arsenic have well-documented detrimental impacts on human health, especially on children. The EPA must do a complete and thorough analysis before reaching any conclusions on this air permit.

In particular, we write to ensure that the U.S. Environmental Protection Agency conducts a proper maximum achievable control technology ("MACT") determination for the emission of hazardous air pollutants prior to the construction of Desert Rock. The Clean Air Act prohibits the construction of Desert Rock unless and until EPA makes a proper MACT determination. 42 U.S.C. §7412(g)(2)(B). To date, EPA has neither made a MACT determination, nor has it announced when that determination will be made or the procedures that will be followed.

EPA's obligation to make a pre-construction MACT determination for Desert Rock is beyond dispute. Pursuant to Section 112(c) of the Act, EPA listed coal-fired power plants as a major source category for HAPs in 2000. 65 Fed. Reg. 79825 (Dec. 20, 2000). For each major source category, the Act requires the EPA to "promulgate regulations establishing emission standards." 42 U.S.C. §7412(d)(1).

These standards must reflect the “maximum degree of reduction in emissions that is deemed achievable.” 42 U.S.C. §7412(d)(3).

Despite this unambiguous requirement, EPA has not promulgated HAPs emission standards for coal-fired power plants. Instead, EPA issued a rule that purported to remove coal-fired power plants from the list of major sources. 70 Fed. Reg. 15994 (Mar. 29, 2005). Earlier this year, the D.C. Circuit Court of Appeals invalidated EPA’s delisting rule, *New Jersey v. EPA*, D.C. Cir. Case No. 05-1097 (decided Feb. 8, 2008), and subsequently issued an expedited vacatur of that rule. More recently, the D.C. Circuit rejected EPA’s request for a rehearing on the matter.

In the wake of the *New Jersey* vacatur, and in the absence of a MACT standard for coal-fired power plants, the EPA must conduct a site-specific MACT determination for Desert Rock. The Act plainly requires that “where no applicable emission limitations have been established by the Administrator”, the permitting authority—the EPA, in the case of Desert Rock—must make a “case-by-case” determination whether a proposed major source would meet the “maximum achievable control technology emission limitation” for hazardous air pollutants. 42 U.S.C. § 7412(g)(2)(B). The case-by-case MACT determination must be completed before the major source may begin construction. *Id.*¹

In addition, the EPA must make the MACT determination for all listed HAPs to be emitted by Desert Rock. *National Lime Assoc. v. EPA*, 233 F.3d 625, 633-34 (D.C. Cir. 2000). Desert Rock will emit approximately 166 tons per year of hydrogen chloride and 13.3 tons per year of hydrogen fluoride. *Application for Prevention of Significant Deterioration Permit*, May 7, 2004, at p. 5-3. Desert Rock is also expected to emit substantial amounts of mercury, arsenic, lead, dioxins, and other HAPs.

The EPA must acknowledge its obligation to make the MACT determination for Desert Rock and identify the procedure that it will follow.² The regulations provide EPA with two alternative procedures for making a MACT determination for Desert Rock. 40 CFR §63.43(c). Specifically, the EPA can make the determination in response to an application for a “Notice of MACT Approval,” or through “any other administrative procedures for preconstruction review.” 40 CFR §63.43(c)(2)(i)-(ii). The best option is for EPA to make the MACT determination as part of the PSD permitting process—the only existing “administrative procedure for preconstruction review.” Regardless of the approach EPA selects, however, the MACT determination should be made before the issuance of the PSD permit, and incorporated into that permit. Doing so provides for enforceability of the MACT requirements while ensuring the compatibility of those requirements with the design parameters specified in the PSD permit. Further, no matter which route it takes, the EPA must provide adequate notice and an opportunity for public review and comment on the MACT determination. See 40 CFR § 63.43(c)(2)(ii) and 40 CFR §63.43(f)-(h).

¹ Sithe Global, the project proponent, acknowledges its obligation to obtain the MACT determination before commencing construction of Desert Rock. See *Application for Prevention of Significant Deterioration Permit*, May 7, 2004, at p. 3-12 (“If a MACT standard has not yet been promulgated for the source category, the applicant must secure case-by-case MACT approval.”)

² EPA is solely responsible for making the MACT determination. The EPA suggested in a presentation in September of 2006 that the Navajo Nation would conduct the MACT determination when it issued the Title V permit, but the Navajo Nation will not require Sithe Global to submit a permit application until twelve (12) months after it commences construction of Desert Rock. 40 C.F.R. §71.5(a)(ii). Moreover, EPA has never delegated to the Navajo Nation the authority pursuant to Section 112(l) of the Act to conduct a case-by-case MACT determination.

We have serious concerns about the environmental impacts of constructing Desert Rock in a region already impaired by other large coal-fired power plants. Mercury contamination from Desert Rock poses a particular concern. Nearly every reservoir in New Mexico and stretches of the San Juan River already suffer from high levels of mercury contamination, and the addition of another significant source of mercury will set back our efforts to correct this situation.

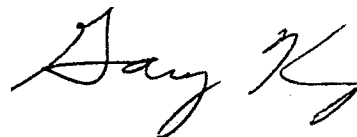
In view of these concerns, and to address the issues raised herein, we request that the EPA provide the following information:

- Confirmation that the EPA will not authorize the construction of Desert Rock unless and until a site-specific MACT determination for each applicable HAP has been made;
- Confirmation that the EPA is responsible for making this MACT determination;
- Identification of the specific procedure, including the requirements for public notice and comment, that the EPA will follow to make the MACT determination. We strongly believe that, in addition to conducting the MACT determination before the issuance of the PSD permit, the EPA should incorporate the MACT determination into the PSD permit. If, however, the EPA does not complete the MACT determination before the issuance of the PSD permit, the EPA must confirm that it will reopen the PSD permit to incorporate the modifications necessitated by the MACT determination.

We appreciate your timely response to this request. Please contact Seth T. Cohen, Assistant Attorney General (505.827.6000), or New Mexico Environment Department Secretary Ron Curry at (505.827.2855), if you have questions or would like additional information.

Sincerely,


BILL RICHARDSON
Governor


GARY K. KING
Attorney General

cc: The Honorable Joe Shirley, President, Navajo Nation
The Honorable Bill Ritter, Governor, State of Colorado
The Honorable Ron Curry, Secretary, New Mexico Environment Department