

North Carolina Department of Environment and Natural Resources
Division of Air Quality

Michael F. Easley, Governor

William G. Ross, Jr., Secretary
B. Keith Overcash, P.E., Director

June 2, 2008

Mr. Rick R. Roper
Manager, Cliffside Steam Station
Duke Energy Carolinas LLC
573 Duke Power Road
Mooresboro, North Carolina 28114

Dear Mr. Roper:

As you know, the District of Columbia Circuit Court of Appeals, in *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008), recently overturned EPA's Clean Air Mercury Rule ("CAMR"). As a result, there is an ongoing national debate over the impact of the decision. In particular, opinions differ about whether the ruling affects a previously issued permit under which construction has begun but is not completed. Whatever the outcome of that debate, the Division of Air Quality (DAQ) must be assured that the recently permitted Cliffside Unit 6 incorporates emission limitations for mercury and other hazardous air pollutants ("HAPs") that are the most stringent achievable for such a source. Therefore, DAQ has concluded that a formal public process consistent with Clean Air Act ("CAA") §112 should now be initiated to ensure that the permit contains the most stringent limits that are in fact achievable.

On December 20, 2000, the EPA concluded that it was appropriate and necessary to regulate mercury emissions from coal- and oil-fired electric generating units ("EGUs") under CAA §112, 42 U.S.C. §7412, and listed those EGUs as sources of HAPs under §112(c). 65 Fed. Reg. 79,825. In March 2005, EPA removed EGUs from the §112(c) list, 70 Fed. Reg. 15,994, 16,002-08, 16,032 ("Delisting Rule"), and in May 2005, EPA promulgated CAMR, regulating mercury emissions from coal-fired EGUs under §111 instead of §112, 70 Fed. Reg. at 28,610, 28,624-32.

Both 2005 actions were challenged in the Circuit Court of Appeals for the District of Columbia. At the time DAQ approved the permit for construction of Cliffside Unit 6, the appeal was still pending and CAMR remained in effect. However, on February 8, 2008, shortly after DAQ issued the permit for the construction of the unit, the Court held that the EPA violated the Clean Air Act by not complying with the requirements of CAA §112(c)(9) in removing EGUs from the list of sources regulated under §112. "This require [d] vacation of CAMR's regulations for both new and existing EGUs." *New Jersey*, 517 F.3d at 583. The Court thus vacated the new source performance standards and remanded them to the EPA for reconsideration. On March 14, 2008, the Court granted a motion to expedite the mandate, thus making the ruling effective as of that date.

Since the Delisting Rule has been vacated, it is clear that EGUs are now on the §112(c) list. If DAQ were *now* to issue a construction permit for a covered new EGU, that new unit would be subject to CAA §112(g) case-by-case emission limitations for hazardous air pollutants. However, there is a debate whether a major source *whose construction was permitted and begun prior to the D.C. Circuit's decision*

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and mandate, but whose construction will be completed for the most part after the date of mandate, is subject to the requirements of §112(g). This is exactly the situation of Cliffside Unit 6.

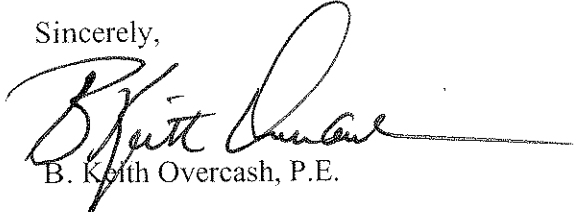
As you know, the foregoing issue is the subject of current litigation in the Office of Administrative Hearings and of threatened litigation in the federal courts. Years of litigation over this legal issue will serve no one's interest. Instead, we believe the public interest is best served by assuring that Unit 6, which the Utilities Commission determined met the standards for public convenience and necessity for reliable electricity supply and which has a current valid permit from DAQ, has the maximum degree of reduction in emissions achievable. DAQ notes that the initiation of operation of Unit 6 and the contemporaneous permanent retirement of four uncontrolled units at Cliffside are part of Duke's plan for compliance with emission caps under the Clean Smokestacks Act. It is also clear that all EGUs will be required to control HAP emissions once EPA has adopted a standard under §112 for utility boilers. There is no reason to wait for EPA action where, as here, the unit is not yet operational and construction has only so recently begun.

Therefore, regardless of whether §112(g) applies to Unit 6 by its own terms, DAQ believes that the best course of action is to initiate a public process now, consistent with the standards in §112, to determine the maximum degree of reduction in emissions of HAPs that is achievable for the category of source in which Unit 6 falls, consistent with the analyses that would apply under §112. If that process results in limits more stringent than those in the existing permit, then DAQ would modify the permit to incorporate those limitations.

In order to expedite this process, DAQ suggests that Duke agree at the outset to the public process described above and affirm that DAQ is entitled to modify the existing permit to include the limits ultimately determined by the process, provided they are more stringent than limits currently in the permit. In order to ensure the integrity of the process, DAQ will also require express commitments from Duke that Duke will make no contention that any ongoing construction must or should be considered when determining appropriate limits and that construction which does take place prior to any determination and subsequent permit modification will have no effect on the ultimate determination.

Please advise us of your intentions on or before June 13, 2008.

Sincerely,



B. Keith Overcash, P.E.

Cc: James Gulick
Marc Bernstein
Charles Case
Garry Rice
Bill Ross