

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

SIERRA CLUB,)
)
Plaintiff,)
)
v.) Civil Action No. _____
)
UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Defendant.)

COMPLAINT

I. STATEMENT OF THE CASE

1. This is a civil action for declaratory and injunctive relief brought pursuant to the Clean Air Act (“CAA”), 42 U.S.C. §§ 7401, *et seq.*, and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 706(1) and 555(b). This action seeks an order requiring defendant U.S. Environmental Protection Agency (“EPA”) to perform its non-discretionary duty to issue a final federal implementation plan (“FIP”) that contains air pollution emission limits for the Four Corners Power Plant in northwest New Mexico, and to act on plaintiff’s July 7, 2005 petition that seeks the same relief.

2. EPA’s own CAA regulation at 40 C.F.R. § 49.11(a) (1998) states the agency “[s]hall promulgate without unreasonable delay” federal emission limits if a tribe does not submit a tribal implementation plan (“TIP”). Because the Navajo Tribe has not submitted a

proposed TIP, on September 8, 1999, EPA formally determined that it was “both necessary and appropriate” to issue a FIP to regulate emissions from the Four Corners Power Plant “to protect air quality on the [Navajo] Reservation.” 64 Fed. Reg. 48731, 48733 (September 8, 1999).

According to EPA, a FIP for the Four Corners Power Plant is necessary to cure a “regulatory gap” because states such as New Mexico “are generally precluded from enforcing their civil regulatory programs on Tribal lands, absent an explicit Congressional authorization or State-Tribal agreement.” *Id.* at 48732.

3. As a consequence, EPA in 1999 issued the *proposed* FIP for the Four Corners Power Plant. *Id.* Nevertheless, EPA has failed to perform its non-discretionary duty to *finalize* any FIP for the Four Corners Power Plant for the last seven years.

II. JURISDICTION AND VENUE

4. This court has subject matter jurisdiction over the claims set forth in this complaint pursuant to the Clean Air Act, 42 U.S.C. § 7604(a)(2) (citizen suit provision), 28 U.S.C. § 1331 (federal question statute), 5 U.S.C. § 706(1) (Administrative Procedure Act), and 28 U.S.C. § 2201 (declaratory judgment statute). The relief requested is authorized by 42 U.S.C. § 7604(a), 5 U.S.C. § 706(1), and 28 U.S.C. §§ 2201 and 2202.

5. Venue is proper in the District of New Mexico pursuant to 42 U.S.C. §§ 7604(a) and 7607(b) because any FIP issued by EPA for the Four Corners Power Plant would be reviewable in the Tenth Circuit Court of Appeals and the District Court of New Mexico is within the Tenth Circuit Court of Appeals. Venue is also proper pursuant to 28 U.S.C. § 1391(e)(2) because the Four Corners Power Plant is located in New Mexico.

6. Pursuant to the Clean Air Act at 42 U.S.C. § 7604(a), and 40 C.F.R. § 54.2, on November 30, 2005, Sierra Club notified EPA by certified mail of its intent to sue the agency for unreasonably delaying the finalization of the FIP for the Four Corners Power Plant. Over 180 days have passed since Sierra Club notified EPA of its intent to sue. EPA has not issued a final FIP for the Four Corners Power Plant since Sierra Club's November 30, 2005 notice letter.

III. PARTIES

7. Sierra Club, a national conservation organization with approximately 600,000 members, is dedicated to protecting natural resources, including clean air and water. On behalf of its members, Sierra Club works to protect and enhance the quality of air throughout the country. The Sierra Club brings this action on behalf of its adversely affected members.

8. Members of Sierra Club live, work, and recreate in northwest New Mexico in the vicinity of the Four Corners Power Plant. Members of Sierra Club therefore breathe, use, and enjoy the ambient air in and surrounding the Four Corners area. Elevated levels of air pollution in the Four Corners area degrade the air and scenery used by plaintiff's members.

9. The health, aesthetic, and recreational interests of plaintiff's members are being and will continue to be adversely affected by EPA's failure to issue a final FIP for the Four Corners Power Plant and to act on plaintiff's petition that seeks such relief. EPA's unreasonable delay in issuing a FIP is allowing the Four Corners Power Plant to discharge pollutants without any meaningful emission limits or methods to monitor such limits. EPA's failure to act harms and will continue to harm plaintiff and its members.

10. EPA is the federal agency charged by the Clean Air Act with carrying out the

statutory provisions at issue in this case. EPA has a non-discretionary duty to issue a FIP for the Four Corners Power Plant without unreasonable delay, and to act on plaintiff's petition in a reasonable amount of time.

IV. FACTS

11. The Four Corners Power Plant is a five unit coal-fired electricity generating facility in northwest New Mexico, well known for fouling the desert air and scenic vistas of the area. The Four Corners Power Plant is one of the largest power plants in the country, with a combined electric generating capacity of 2,040 megawatts (MW) and emissions of sulfur dioxide, nitrogen oxides, particulate matter and carbon dioxide of over 15 million tons per year.

12. Emissions of nitrogen oxide (NO_x) from the Four Corners Power Plant, ranked the highest among all coal-fired power plants in the country, are 40,742 tons per year. That is equivalent to the NO_x emissions of approximately two million vehicles driven an average of 15,000 miles per year.

13. Every year the Four Corners Power Plant also dumps into the air 590 pounds of mercury, an established neuro-toxin.

14. Built between 1960 and 1971, Units 1 and 2 are rated at 170 megawatts (MW) each, Unit 3 at 220 MW, and Units 4 and 5 at 740 MW each. Units 1-3 are owned by Arizona Public Service Company. Units 4 and 5 are owned by the following entities in the following percentages: Southern California Edison (48%); Arizona Public Service (15%), Public Service Company of New Mexico (13%), Salt River Project (10%), Tucson Electric Power (7%), and El Paso Electric (7%).

15. On September 8, 1999, EPA formally determined that it was “both necessary and appropriate” to issue a FIP to regulate emissions from the Four Corners Power Plant “to protect air quality on the [Navajo] Reservation.” 64 Fed. Reg. 48731, 48733 (September 8, 1999).

16. According to EPA, a FIP for the Four Corners Power Plant is necessary to cure a “regulatory gap” because states such as New Mexico “are generally precluded from enforcing their civil regulatory programs on Tribal lands, absent an explicit Congressional authorization or State-Tribal agreement.” *Id.* at 48732.

17. As a consequence, EPA issued the *proposed* FIP for the Four Corners Power Plant. *Id.* Nevertheless, EPA has failed to *finalize* any FIP for the Four Corners Power Plant since its finding that a FIP was necessary in 1999.

18. On June 12, 2001, EPA issued an incomplete Title V operating permit for the Four Corners Power Plant, acknowledging that the permit did not impose emissions limits for particulate matter, sulfur dioxide or nitrogen oxides, or any compliance monitoring requirements for those pollutants. According to EPA’s June 12, 2001 Statement of Basis for the Four Corners Power Plant permit this is because EPA has failed to issue a FIP that is applicable to the Four Corners Power Plant:

EPA has proposed a Federal Implementation Plan (FIP) which would impose limits on the emissions of total particulate matter, SO₂, and NO_x from this facility. The FIP would also require the use of continuous emissions monitoring systems for SO₂ and NO_x. Once EPA takes final action on this FIP, this facility will also be subject to the requirements of EPA’s Compliance Assurance Monitoring (CAM) regulation (40 C.F.R. Part 64). This facility is not currently subject to CAM, since the only current limits on emissions of criteria pollutants from this facility derive from the Acid Rain regulations, and CAM monitoring is not required for these limits (see 40 C.F.R. 64.2(b)(1)(iii)).

19. On November 18, 2004, EPA delegated to the Navajo Nation the authority to issue Title V operating permits, but retained authority over the Four Corners Power Plant. 69 Fed. Reg. 67578 (November 18, 2004). According to EPA, “The Agreement applies to all new and existing sources within the Delegated Program Area except the Four Corners Power Plant and the Navajo Generating Station, for which Region IX retains sole authority to regulate under Title V.” *Id.*

20. On July 7, 2005, Sierra Club formally petitioned EPA to issue a final FIP for the Four Corners Power Plant. Sierra Club’s petition was submitted pursuant to the Administrative Procedure Act.

21. EPA has never acted on Sierra Club’s petition. EPA has unreasonably delayed acting on Sierra Club’s petition.

22. On November 30, 2005, Sierra Club notified EPA by certified mail of its intent to sue the agency for unreasonably delaying its non-discretionary duty under the Clean Air Act to finalize the FIP for the Four Corners Power Plant. Over 180 days have passed since Sierra Club notified EPA of Sierra Club’s intent to sue. EPA has not issued a final FIP for the Four Corners Power Plant since Sierra Club’s November 30, 2005 notice letter.

23. On March 21, 2006, EPA delegated to the Navajo Nation the authority to issue a Title V operating permit for the Four Corners Power Plant. For that permit to be meaningful, however, it needs to have meaningful and enforceable emission limits and monitoring requirements. Until EPA issues a FIP there will be no meaningful or enforceable emissions limits to include in the permit.

24. EPA has failed to meet its nondiscretionary duty to protect the air quality in the Four Corners area by failing to issue a FIP for the Four Corners Power Plant.

25. The central aim of the Clean Air Act is to protect our nation's air from unnecessary and unhealthful air pollution. EPA is frustrating the interests and objectives of the Clean Air Act by unreasonably delaying the issuance of a final FIP applicable to the Four Corners Power Plant.

26. Plaintiff incorporates by reference and realleges the allegations contained in paragraphs 1 through 25 for each of the causes of action below.

V. CAUSES OF ACTION

A. FAILURE TO ISSUE FIP WITHOUT UNREASONABLE DELAY

27. In the 1990 amendments to the Clean Air Act, Congress granted authority to EPA to "treat Indian tribes as States under this Chapter." 42 U.S.C. § 7601(d)(1)(A). Under that authority, EPA proposed its "Tribal Authority Rule" ("tribal rule") in 1994, 59 Fed. Reg. 43956 (Aug. 25, 1994), and issued the final tribal rule in 1998, 63 Fed. Reg. 7254 (February 12, 1998).

28. The tribal rule allowed Indian tribes to regulate sources of air pollution within their boundaries as long as the tribal program was consistent with the Clean Air Act.

29. According to EPA's tribal rule at 40 C.F.R. § 49.11(a), the EPA Administrator

(a) Shall promulgate without unreasonable delay such federal implementation plan provisions as are necessary or appropriate to protect air quality, consistent with the provisions of sections 301(a) and 301(d)(4), if a tribe does not submit a tribal implementation plan meeting the completeness criteria of 40 CFR part 51, Appendix V, or does not receive EPA approval of a submitted tribal implementation plan.

30. Because the Navajo Nation had not submitted a tribal implementation plan, on September 8, 1999, EPA made the formal, discretionary determination that it was “both necessary and appropriate” to issue a FIP to regulate emissions from the Four Corners Power Plant “to protect air quality on the [Navajo] Reservation.” 64 Fed. Reg. 48731, 48733 (September 8, 1999). According to EPA, a FIP for the Four Corners Power Plant is necessary to cure a “regulatory gap” because states such as New Mexico “are generally precluded from enforcing their civil regulatory programs on Tribal lands, absent an explicit Congressional authorization or State-Tribal agreement.” *Id.* at 48732.

31. EPA’s formal, discretionary determination in 1999 that it was “necessary and appropriate” to issue a FIP to regulate emissions from the Four Corners Power Plant triggered EPA’s non-discretionary duty to issue that FIP “without unreasonable delay.” 40 C.F.R. § 49.11(a); 42 U.S.C. § 7601(a) and (d).

32. EPA issued the proposed FIP for the Four Corners Power Plant on September 8, 1999. *Id.* Nevertheless, EPA has failed to finalize any FIP for the Four Corners Power Plant for the last seven years.

33. EPA has failed to perform its non-discretionary duty, and has failed to act without unreasonable delay, by not issuing a final FIP for the Four Corners Power Plant for the last seven years. EPA is therefore in violation of (1) Clean Air Act Section 110(c), 42 U.S.C. § 7410(c), by failing to issue a FIP after finding the absence of approvable SIP, (2) Clean Air Act Section 301(a) and (d), 42 U.S.C. § 7601(a) and (d), by failing directly to administer the Act in cases where tribes will not be treated identically to states; and (3) the tribal rule at 40 C.F.R. § 49.11(a)

by failing to promulgate a FIP “without unreasonable delay” if a tribe does not submit a tribal implementation plan.

B. FAILURE TO ACT ON PLAINTIFF’S PETITION

34. Pursuant to the Administrative Procedure Act (“APA”), “Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.” 5 U.S.C. § 553(e).

35. The APA provides that “within a reasonable time, each agency shall proceed to conclude a matter presented to it.” 5 U.S.C. § 555(b). Pursuant to the APA, “agency action” includes an agency’s “failure to act.” 5 U.S.C. § 551(13).

36. The APA requires that “To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall – (1) compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706.

37. Plaintiff petitioned EPA on July 7, 2005 to issue a final FIP for the Four Corners Power Plant.

38. EPA has never acted on plaintiff’s petition. EPA’s failure to act for the last year represents an unreasonable delay, particularly in light of EPA’s failure to issue a final FIP for almost seven years.

VI. RELIEF REQUESTED

WHEREFORE, plaintiff respectfully requests this court to grant the following relief to correct defendant's failure to act:

DECLARE that defendant has failed to issue a final FIP applicable to the Four Corners Power Plant without unreasonable delay;

DECLARE that defendant has failed to act on plaintiff's petition in a reasonable period of time.

ORDER defendant to issue a final FIP for the Four Corners Power Plant with all expedition, but in no event later than 60 days.

ORDER defendant to pay plaintiff its costs of litigation, including but not limited to reasonable attorney fees, as authorized in the Clean Air Act at 42 U.S.C. § 7604(d) and the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504; and

GRANT such other relief as the Court deems necessary and proper.

Dated this 26th day of July, 2006

FOR PLAINTIFF SIERRA CLUB,

/s/ Electronically filed

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