

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

WILDEARTH GUARDIANS,)	
)	
Plaintiff,)	No. _____
)	
v.)	
)	
LISA JACKSON, in her official capacity as)	COMPLAINT FOR
Administrator, United States)	DECLARATORY AND
Environmental Protection Agency)	INJUNCTIVE RELIEF
)	
Defendant.)	
_____)	

INTRODUCTION

1. This is a straightforward, Clean Air Act deadline suit. 42 U.S.C. §§ 7401-7671q. Plaintiff, WildEarth Guardians (“Guardians”) filed a petition (the “Petition”) with Defendant, Lisa Jackson, the Administrator of the U.S. Environmental Protection Agency (“EPA”) over four months ago. See 42 U.S.C. § 7661d(b)(2) (authorizing such petitions). Guardians’ Petition asks the Administrator to object to an air pollution permit (the “Permit”) issued by the New Mexico Environment Department, Air Quality Bureau (“NMED”), to Public Service Company of New Mexico (“PNM”) to operate the San Juan Generating Station, a coal-fired power plant located in San Juan County, New Mexico. The Clean Air Act expressly requires that the Administrator “shall grant or deny such petition within 60 days.” 42 U.S.C. § 7661d(b)(2). Although more than 60 days have passed, the Administrator has not acted on Guardians’ Petition and is in violation of her mandatory and nondiscretionary duty under the Clean Air Act. Guardians seeks an order compelling the Administrator to obey the Clean Air Act and grant or deny its Petition. Guardians also seeks a declaration that the Administrator is in violation of the Act.

JURISDICTION, VENUE, AND NOTICE

2. This Court has subject matter jurisdiction over the claim in this Complaint pursuant to the citizen suit provision of the Clean Air Act, because the Administrator has failed to perform a non-discretionary act or duty under the Clean Air Act. 42 U.S.C. § 7604(a)(2) (citizen suit provision of the Clean Air Act). This Court has federal question jurisdiction, because Guardians claims a violation of the Clean Air Act, a federal statute. 28 U.S.C. § 1331 (federal question jurisdiction). The requested relief is authorized by statute. 28 U.S.C. § 2201 (declaratory judgment); 28 U.S.C. § 2202 (injunctive relief); and 42 U.S.C. § 7604(d) (costs and attorney fees).

3. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(e) because a substantial part of the events and omissions giving rise to Guardians' claim occurred in the District of New Mexico. Guardians' Petition concerns a Permit issued by an administrative agency of the State of New Mexico regulating air pollution from the San Juan Generating Station in San Juan County, New Mexico. Additionally, Guardians' main office is located in Santa Fe, New Mexico.

4. Guardians properly gave the Administrator more than 60-days written notice of the violation alleged in this Complaint and of Guardians' intent to bring suit to remedy that violation. See 42 U.S.C. § 7604(b)(2) and 40 C.F.R. §§ 54.2 and 54.3. The Administrator received Guardians' Petition on November 19, 2010. When the Administrator failed to respond within 60 days, on February 23, 2011, Guardians provided the Administrator with written notice of the claim alleged in this Complaint and of its intent to sue. More than 60 days have passed since the Administrator received Guardians' notice letter. The Administrator has not remedied

the violations alleged in Guardians' notice letter and this Complaint by granting or denying Guardians' Petition.

PARTIES

5. Plaintiff WILDEARTH GUARDIANS is a non-profit conservation organization with its main office in Santa Fe, New Mexico. Guardians is dedicated to protecting and restoring wildlife, wild rivers, and wild places in the American West, and to safeguarding the Earth's climate and air quality. Guardians and its members work to reduce harmful air pollution in order to safeguard public health, welfare, and the environment. Guardians has approximately 4,500 members, many of whom live, work, and/or recreate in areas affected by pollution from the San Juan Generating Station.

6. Guardians is a "person" within the meaning of 42 U.S.C. § 7602(e). As such, Guardians may commence a civil action under 42 U.S.C. § 7604(a).

7. Guardians' members live, raise their families, work, recreate, and conduct educational, research, advocacy, and other activities in areas that will be affected by pollution from the San Juan Generating Station. Guardians regularly participates in the public permitting process for facilities that emit air pollution. Guardians spends money and time on these processes with the aim of ensuring that permits, such as that issued to the San Juan Generating Station, protect and improve air quality, as well as comply with relevant laws and regulations. Guardians and its members have a substantial interest in ensuring that the EPA complies with federal law, including the requirements of the Clean Air Act. During the permitting process for the San Juan Generating Station, Guardians provided comments critical of the Permit's terms and limits and subsequently petitioned the Administrator to object to the issuance of the Permit. The Administrator's unlawful withholding of a decision on Guardians' Petition harms Guardians

and its members. The Clean Air Act gives Guardians a procedural right to a timely decision on its Petition. This interest, as well as Guardians' organizational interest in participating in and influencing the permitting process are injured by the Administrator's failure to respond to Guardians' Petition. Guardians' and its members' interests have been, are being, and will continue to be, irreparably harmed by EPA's failure to act on Guardians' Petition for an objection to the San Juan Generating Station Permit.

8. Because the Administrator has not responded to Guardians' Petition, the organization's members and volunteers cannot be certain that the San Juan Generating Station Permit conforms to the requirements of the Clean Air Act. The Administrator's failure to respond thus prevents Guardians' members and volunteers from being certain that the San Juan Generating Station Permit protects them from exposure to pollutants emitted by that facility to the extent required by law. The Administrator's unlawful withholding of a decision on Guardians' Petition harms Guardians and its members by allowing the San Juan Generating Station to release more pollution. The Permit allows the San Juan Generating Station to release pollutants that degrade the air, environment, economy, and scenery used by Guardians' members. These pollutants harm the economic, health, aesthetic, recreational, procedural, and organizational interests of Guardians and its members.

9. The Administrator's unlawful withholding of action on Guardians' Petition prevents Guardians from challenging an unfavorable EPA decision or from benefiting from a favorable decision on the Petition. EPA's decision on the Petition, if favorable, is likely to result in changes to the Permit that would reduce pollution from the facility. An unfavorable decision on the Petition would allow Guardians to bring a challenge to EPA's decision. A favorable decision on the Petition or a successful challenge to an adverse decision would likely result in a

reduction in the level of pollution the facility's Permit would allow and a consequent reduction in the harm to Guardians and its members. The Clean Air Act violations alleged in this Complaint have injured and continue to injure the interests of Guardians and its members. Granting the relief requested in this lawsuit would redress these injuries by compelling EPA action that Congress determined to be an integral part of the regulatory scheme for protecting human health from the effects of unregulated air pollution.

10. Defendant LISA JACKSON is the Administrator of the EPA. The Administrator is responsible for implementing the Clean Air Act, including the requirement to grant or deny Guardians' Petition within 60 days. Ms. Jackson is sued in her official capacity.

REQUIREMENTS OF THE CLEAN AIR ACT

11. The Clean Air Act aims "to protect and enhance the quality of the Nation's air resources." 42 U.S.C. § 7401(b)(1). To help meet this goal, the 1990 amendments to the Clean Air Act created the Title V permit program—an operating permit program that applies to all major sources of air pollution. See 42 U.S.C. §§ 7661-7661f.

12. A primary purpose of the Title V permitting program is to reduce violations of the Clean Air Act and improve enforcement by recording in a single document all of the air pollution control requirements that apply to a major source of air pollution. See New York Public Interest Research Group v. Whitman, 321 F.3d 316, 320 (2nd Cir. 2003). Major sources of air pollution cannot legally discharge pollutants into the air unless they have a valid Title V operating permit. See 42 U.S.C. § 7661a(a).

13. The Clean Air Act provides that the EPA Administrator may approve state programs to administer the Title V permitting program with respect to sources within their borders. See 42 U.S.C. § 7661a(d). The Administrator has approved New Mexico's

administration of its Title V permit program. See 69 Fed. Reg. 54,244-47 (Sept. 8, 2004). The New Mexico Environment Department, Air Quality Bureau (“NMED”) is responsible for issuing Title V permits in New Mexico.

14. Before a state with an approved Title V permit program can issue a Title V permit, the State must forward the proposed Title V permit to EPA. See 42 U.S.C. § 7661d(a)(1)(B). EPA then has 45 days to review the proposed permit. EPA must object to the issuance of the permit if EPA finds that the permit does not comply with all applicable provisions of the Clean Air Act. See 42 U.S.C. § 7661d(b)(1).

15. After EPA’s 45-day review period expires, “any person may petition the Administrator within 60 days” to object to the proposed permit. 42 U.S.C. § 7661d(b)(2).

16. Once EPA receives such a petition, the Clean Air Act requires that “[t]he Administrator shall grant or deny such petition within 60 days after the petition is filed.” 42 U.S.C. § 7661d(b)(2).

FACTUAL ALLEGATIONS

17. The San Juan Generating Station is a major stationary source of air pollution located in San Juan County, New Mexico. The facility is a 1,848 megawatt power plant that consists of four coal-fired boilers. The facility burns coal to generate steam to power turbines coupled with an electric generator.

18. According to the Statement of Basis for the Title V permit, the San Juan Generating Station has the potential to emit 24,710.1 tons of nitrogen oxides (“NO_x”), 39,427 tons of carbon monoxide, 249 tons of volatile organic compounds (“VOCs”), 16,042 tons of sulfur dioxide (“SO₂”), 1,550 tons of particulate matter, and 74.6 tons of hazardous air

pollutants. These hazardous air pollutants include 48.1 tons of hydrofluoric acid, 15.8 tons of hydrochloric acid, and 49 pounds of mercury.

19. Guardians submitted detailed comments on May 7, 2010, during NMED's public comment period for the Title V Permit. Guardians raised a number of objections to the Title V Permit, including, among other things, that NMED failed to ensure compliance with the Clean Air Act's Prevention of Significant Deterioration ("PSD") permitting program. See 42 U.S.C. § 7470, et seq.

20. NMED submitted the proposed Title V permit for the San Juan Generating Station to EPA on August 4, 2010. The EPA's 45-day review period for the permit ended on September 20, 2010. EPA did not raise any objections to the permit.

21. On November 19, 2010, Guardians filed a petition requesting that the Administrator object to the issuance of the Title V permit for the San Juan Generating Station on the basis that the Title V permit 1) failed to assure compliance with PSD requirements, 2) failed to assure compliance with New Mexico's State Implementation Plan, 3) failed to require prompt reporting of permit deviations, 4) failed to require sufficient periodic monitoring, and 5) inappropriately deemed that compliance with the terms of the Permit automatically protected the National Ambient Air Quality Standards.

22. Guardians' Petition was timely filed within 60 days following the conclusion of EPA's review period and failure to raise objections in accordance with section 505(b)(2) of the Clean Air Act.

23. Guardians' Petition was based on objections that were either raised with reasonable specificity during the public comment period for the draft permit or arose subsequent to the public comment period, in accordance with section 505(b)(2) of the Clean Air Act.

CLAIM FOR RELIEF

Failure to Grant or Deny Guardians' Petition

24. Every allegation set forth in this Complaint is incorporated herein by reference.

25. The Administrator has a mandatory duty to grant or deny Guardians' Petition within 60 days after it is filed. See 42 U.S.C. § 7661d(b)(2).

26. It has been more than 60 days since the Administrator received Guardians' Petition requesting that EPA object to the Title V Permit for the San Juan Generating Station.

27. As of the date of the filing of this Complaint, EPA has not granted or denied Guardians' Petition.

28. Accordingly, EPA has violated and continues to violate the Clean Air Act, 42 U.S.C. § 7661d(b)(2).

29. This Clean Air Act violation constitutes a "failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator" within the meaning of the Clean Air Act's citizen suit provision. 42 U.S.C. § 7604(a)(2). EPA's violation is ongoing, and will continue unless remedied by this Court.

REQUEST FOR RELIEF

WHEREFORE, the Plaintiff WildEarth Guardians requests that this Court enter judgment providing the following relief:

A. A declaration that EPA has violated the Clean Air Act by failing to grant or deny Guardians' Petition requesting that EPA object to the Title V permit for the San Juan Generating Station;

B. An order compelling EPA to grant or deny Guardians' Petition for an objection to the Title V permit for the San Juan Generating Station in accordance with an expeditious

schedule prescribed by the Court and to publish in the Federal Register a notice granting or denying Guardians' Petition within ten working days of EPA's decision;

C. An order retaining jurisdiction over this matter until such time as EPA has complied with its non-discretionary duties under the Clean Air Act;

D. An order awarding Guardians its costs of litigation, including reasonable attorney's fees; and

E. Such other and further relief as the Court deems just and proper.

Respectfully submitted this 31st day of May 2011.

/s/ Samantha Ruscavage-Barz
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