United States District Court

EASTERN DISTRICT OF WISCONSIN

Sierra Club

V.

City of Menasha, et al.

SUMMONS IN A CIVIL CASE

CASE NUMBER: 09-C-122

TO: (Name and Address Defendant)

City of Menasha
Mayor Don Merkes
140 Main Street
Menasha, WI 54952

YOU ARE HEREBY SUMMONED and required to serve upon PLAINTIFF'S ATTORNEY (Name and Address)

David C. Bender
Garvey McNeil & McGillivray, SC
634 W. Main Street, Ste 101
Madison, WI 53703

an answer to the complaint which is served on you with this summons, within 20 days after service of this summons on you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. Any answer that you serve on the parties to this action must filed with the Clerk of this Court within a reasonable period of time after service.

JON W. SANFILIPPO
CLERK

02-09-09
DATE

Cheryl A Zeatel
(BY) DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
NORTHERN DIVISION

'09 FEB -6

SIERRA CLUB, 85 Second Street, 2nd Floor San Francisco, CA 94105 Plaintiff, vs. CITY OF MENASHA, 140 Main Street, Menasha, WI 54952, and MENASHA UTILITIES 321 Milwaukee Street Menasha, WI 54952-0340 Defendants.	)	Civil Action No. 09-C-122

COMPLAINT

Plaintiff, Sierra Club, by its undersigned attorneys, alleges as follows:

INTRODUCTION

1. This is a civil action for civil penalties, declaratory and injunctive relief, with costs and fees, under the Clean Air Act ("the Act" or "CAA"), 42 U.S.C. §§ 7401, *et seq.*

2. Sierra Club seeks an order requiring the Defendants, the City of Menasha, Wisconsin and the Menasha Utilities, to comply with the requirements of the Act at the power plant located at 198 River Street, Menasha, Wisconsin ("River Street Plant"),

which is owned and operated by the Defendants and to forfeit penalties for violations of the CAA at the plant.

3. The River Street Plant is a coal-fired power plant consisting of two stoker-fed boilers and associated equipment that emits tons of carbon dioxide, nitrogen oxides, sulfur oxides, particulate matter and carbon monoxide. Those pollutants contribute to climate change, respiratory distress, cardiovascular disease, and premature mortality. Nitrogen oxides and sulfur oxides in the air also contribute to acid rain, which sterilizes lakes and damages property. Presence of those pollutants in the atmosphere is also associated with increased hospital admissions and emergency room visits.

4. On one or more occasions, Defendants modified and thereafter operated the boilers and steam distribution system at the River Street Plant without first obtaining appropriate permits authorizing that construction, without meeting emission limits that are "best available control technology," and without installing appropriate technology to control emissions of nitrogen oxides, sulfur dioxides, particulate matter, and other pollutants as required by the Act and its implementing regulations.

5. As a result of the Defendants' operation of the plant following those unlawful modifications, and in the absence of appropriate controls, unlawful amounts of various pollutants have been, and continue to be, released into the atmosphere, aggravating air pollution locally and far downwind from this plant.

6. An order from this Court directing Defendants to obtain the required permits, which necessitate compliance with best available control technology limits,

installation of modern pollution controls and a demonstration to the appropriate regulatory agencies that emissions from the facility will not result in unlawful amounts of air pollution, will improve air quality for thousands of Wisconsin residents, including Sierra Club's members. It will also reduce illness and protect lakes and streams from further degradation due to the fallout from acid rain and mercury deposition.

7. If Defendants comply with the Act, including the Prevention of Significant Deterioration ("PSD") program, 42 U.S.C. §§ 7470-7479, the plant will significantly decrease its annual air pollution emissions.

PARTIES

8. Plaintiff Sierra Club is an incorporated, not-for-profit organization with its headquarters at 85 Second Street, 2nd Floor, San Francisco, California and its Wisconsin Chapter Office at 222 S. Hamilton St., Suite 1, Madison, WI 53703-3201. Its purpose is to preserve, protect, and enhance the natural environment. Its mission includes reducing and eliminating pollution from the mining, combustion, and waste disposal of coal, which negatively affects Sierra Club's members as well as members of the public. Sierra Club has over 1.3 million members and supporters nationwide, including approximately 15,000 members in Wisconsin.

9. Defendant City of Menasha, Wisconsin, is a municipality in the State of Wisconsin that owns the River Street Plant through Menasha Utilities.

10. Defendant Menasha Utilities is a division of the City of Menasha that provides utility services to the Menasha area and operates the River Street Plant.

11. Each of the defendants is a "person" within the meaning of Sections 302(e) and 304(a)(3) of the Act, 42 U.S.C. § 7602(e), 7604(a)(3).

STANDING

12. Sierra Club has members who live, work, and recreate in the City of Menasha, as well as neighboring areas in the Fox River Valley and downwind from the plant. These members are impacted negatively by air pollution emissions from the plant. The health and welfare of Sierra Club's members, as well as their enjoyment of outdoor activities, has been and continues to be harmed by air pollution from the plant.

13. An order of this Court enjoining Defendants from operating the plant and/or requiring Defendants to procure a PSD permit with current best available control technology standards for the major modification(s) that have been made at the plant, will redress the injuries to Sierra Club's members because of the significant decreases in air pollution that will be required under a new permit.

JURISDICTION AND VENUE

14. This Court has subject matter jurisdiction over the claims set forth in this complaint pursuant to 42 U.S.C. § 7604(a), 28 U.S.C. §§ 1331, 1355, and 2201. The relief requested by the Plaintiff is authorized by statute in 28 U.S.C. §§ 2201 and 2202, and 42 U.S.C. § 7604.

15. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) because the Defendants reside in, and all or a substantial part of the events or omissions giving rise to the claims herein occurred in, the Eastern District of Wisconsin. Venue is also proper pursuant to 42 U.S.C. § 7604(c)(1) because this action is for violations at the River Street Plant, which is located within the Eastern District of Wisconsin.

16. No prior notice is required for the claims set forth below. 42 U.S.C. § 7604(a)(3).

GENERAL ALLEGATIONS

17. The Act requires that the United States Environmental Protection Agency (EPA) promulgate National Ambient Air Quality Standards (NAAQS), which are upper limits on air pollution, to protect public health and welfare, 42 U.S.C. § 7409.

18. The Act also requires each state to designate those areas within its boundaries where the air quality meets or exceeds NAAQS for each pollutant. An area that meets the NAAQS for a particular pollutant is termed an "attainment" area, whereas an area that exceeds the NAAQS is a "nonattainment" area. Areas for which there is insufficient information to determine compliance with NAAQS are "unclassifiable," 42 U.S.C. § 7407(d).

19. The River Street Plant is located at 198 River Street, Menasha, Winnebago County, Wisconsin.

20. At the times relevant to this complaint, Winnebago County was classified as either "attainment" or "unclassifiable" for all pollutants.

21. Defendants are government entities that own and are responsible for the operations of the River Street Plant.

22. The River Street Plant consists of two coal-fired boilers and associated equipment that create steam for use either to turn two turbine generators with a combined rating of 21.5 megawatts ("MW") of electricity and/or to distribute to area industrial facilities.

23. The two boilers at the River Street Plant are rated at 113.8 and 201.9 million British Thermal Units (MMBtu) per hour.

24. The River Street Plant does not have the current ability to generate more than 24.99 MW of electricity for distribution to the grid.

25. Coal is the predominant fuel for the boilers at the River Street Plant.

26. The River Street Plant has the potential to emit in excess of 100 tons per year of the following pollutants: carbon dioxide, nitrogen oxides, sulfur dioxide, carbon monoxide, and particulate matter.

27. The River Street Plant is a "major emitting facility" or "major stationary source" as those terms are used in 42 U.S.C. § 7475(a), 40 C.F.R. §§ 52.21(a)(2), (b)(1) and Wis. Admin. Code §§ NR 405.02(22).

28. Any major stationary source in an attainment or unclassifiable area that intends to construct a "major modification" must first obtain a PSD permit, 42 U.S.C. § 7475(a), 40 C.F.R. § 52.21, Wis. Stat. § 285.60 and Wis. Admin. Code § NR 405.01.

FIRST CLAIM FOR RELIEF

(Commencing Construction of a Major Modification Without a PSD Permit)

29. Paragraphs 1 through 28 are realleged and incorporated herein by reference.

30. At various times, Defendants commenced construction of one or more major modifications, affecting the boilers and associated equipment at the River Street Plant. Each such major modification was a physical change or change in method of operation which resulted in significant net emission increases, as defined by 40 C.F.R. § 52.21(b)(3)(i) and Wis. Admin. Code §§ NR 405.02(24), (27) of one or more pollutants.

31. Defendants continue to violate Section 165(a) of the Act, 42 U.S.C. § 7475(a), and the PSD regulations set forth in the Wisconsin State Implementation Plan, Wis. Stat. § 285.60, *et seq.*, and Wis. Admin. Code ch. NR 405, by, *inter alia*, their continuing failure to obtain the required PSD permit for major modifications to the River Street Plant.

32. Based upon the foregoing, Defendants have violated and continue to violate Section 165(a) of the Act, 42 U.S.C. § 7475(a), 40 C.F.R. § 52.21, Wis. Stat. § 285.60 and Wis. Admin. Code ch. NR 405. Unless restrained by an order of this Court, these and similar violations of the PSD provisions of the Act will continue at the River Street Plant.

33. The PSD violations set forth above entitle Plaintiff to injunctive relief and subject Defendants to civil penalties, 42 U.S.C. §§ 7413 and 7604.

SECOND CLAIM FOR RELIEF

(Declaratory Relief)

34. Paragraphs 1 through 33 are realleged and incorporated herein by reference.

35. Pursuant to 28 U.S.C. §§ 2201 and 2202, Sierra Club is entitled to a declaration that Defendants violated the Act by commencing one or more major modifications of the River Street Plant without a PSD permit, that the River Street Plant is a modified source for purposes of the PSD programs, and such further necessary or proper relief as may be granted by the Court.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Sierra Club respectfully prays for this Court to:

A. Declare that the Defendants were required to obtain a PSD permit for the changes to the River Street Plant described above;

B. Declare that the River Street Plant is a modified source for purposes of the PSD program;

C. Enjoin Defendants from operating the River Street Plant unless and until Defendants apply for and obtain a lawfully-issued PSD permit;

D. Order the Defendants to apply for permits that are in conformity with the requirements of the PSD provisions of the Act for each modification that Defendants commenced without first obtaining a PSD permit;

E. Order the Defendants to remedy their past violations by, *inter alia,* requiring the Defendants to install, as appropriate, the necessary pollution controls to meet best available control technology emission limits;

F. Order the Defendants to take appropriate actions to remedy, mitigate, and offset the harm to public health and the environment caused by the violations of the Act alleged above;

G. Order the Defendants to conduct audits of their operations to determine if any additional modifications have occurred that would require them to meet the PSD requirements and to report the results of these audits to Sierra Club and the EPA;

H. Order the Defendants to pay civil penalties in 42 U.S.C. §§ 7413, 7604, as adjusted by 40 CFR 19.4, including a beneficial mitigation project pursuant to 42 U.S.C. § 7604(g)(2) that will decrease air pollution in the immediate vicinity of the River Street Plant where Sierra Club's members live and recreate;

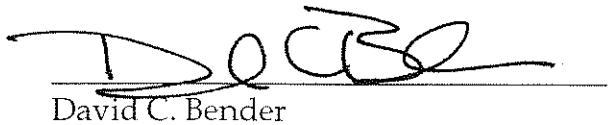
I. Order the Defendants to pay Sierra Club's costs of this action, including reasonable attorney fees, pursuant to CAA § 304(d), 42 U.S.C. § 7604(d);

J. Retain jurisdiction over this action to ensure compliance with the Court's Order; and

K. Any other relief that the Court finds is just and equitable.

Respectfully submitted this 4th day of February, 2009.

GARVEY MCNEIL & MCGILLIVRAY, S.C.



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