

UNITED STATES DISTRICT COURT
for the
MIDDLE DISTRICT OF GEORGIA

PARTNERSHIP FOR POLICY
INTEGRITY, a Public Benefit Non-
Governmental Organization,

Plaintiff,

v.

GINA MCCARTHY, UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY Administrator,

Defendant.

Civ. No. 5:16-CV-38-CAR

CIVIL COMPLAINT FOR INJUNCTION AND DECLARATORY RELIEF

JURISDICTION, NOTICE AND VENUE

1. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 as a federal question, and 42 U.S.C. § 7604(a)(2) as an action arising under the Clean Air Act (“CAA” or “Act”).

2. On August 25, 2015 Plaintiff PARTNERSHIP FOR POLICY INTEGRITY (“PFPI”) provided Defendant GINA MCCARTHY, Administrator at the United States Environmental Protection Agency (“EPA”), with notice of its intent (“NOI”) to file suit for violations of Section 505 of the Act (42 U.C.S. § 7661d). (See Notice Letter, attached as Exhibit 1). The violations complained of are continuing and more than sixty days have elapsed since notice was served, thus fulfilling the requirements of the Act that at least sixty days elapse

between serving notice on the Administrator and the commencement of this action (42 U.S.C. § 7604(b)).

3. Venue lies in the United States District Court for the Middle District of Georgia pursuant to 28 U.S.C. § 1391(e)(1), which permits a civil action against an officer or employee of the United States, or any agency thereof, to be brought in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated. The City of Barnesville, where the facility at issue is situated, is located in Lamar County, which is among those Counties included in the Macon Division of the United States District Court for the Middle District of Georgia.

NATURE OF THE ACTION

4. This is an action brought under the CAA's "Citizens' Suit" provisions to compel Defendant MCCARTHY to take a non-discretionary action. Thus, this court has subject matter jurisdiction over the claim set forth herein pursuant to 42 U.S.C. § 7604(a)(2), and the authority to award attorney's fees pursuant to 42 U.S.C. § 7604(d). This case does not concern federal taxes, is not a proceeding under 11 U.S.C. §§ 505 or 1146, and does not involve the Tariff Act of 1930. Thus, this court has authority to order the declaratory relief requested pursuant to 28 U.S.C. § 2201. If the Court orders declaratory relief, 28 U.S.C. § 2202 authorizes this Court to issue injunctive relief. Plaintiff seeks a declaratory judgment and injunction compelling Administrator MCCARTHY to take final action to grant or deny the petition filed by PFPI on May 26, 2015 ("Petition"). The Petition seeks EPA's final action objecting to Title V operating permit No. 4911-171-0014-02-0 ("Permit") issued by the Georgia Environmental Protection Division of the Clean Air Branch ("EPD"), of the Georgia Department of Health. EPD issued the Permit for a 60.5-megawatt (MW) biomass steam-turbine generator ("Facility") owned and

operated by Piedmont Green Power (“PGP”) in the City of Barnesville, Lamar County, State of Georgia. Defendant has failed to comply with a non-discretionary duty to grant or deny the Petition within 60 days after filing as required by 42 U.S.C. § 7661d(b)(2).

PARTIES

5. PFPI is a non-profit corporation organized under the laws of the State of Massachusetts. PFPI provides scientific, legal and advocacy support so that citizen groups, environmental organizations, and policymakers can better understand energy development impacts on air quality, ecosystems, the climate and communities. PFPI’s Petition creates a procedural right to final action that has been denied by EPA’s inaction and delay. Relief will prompt enhanced control of harmful emissions of air pollution and thereby improve air quality in the area surrounding the Facility.

6. PFPI has members, supporters and directors who live, work, and pursue recreational activities in the immediate vicinity of the Facility.

7. PFPI’s members, supporters and directors have been, are, and will be adversely affected by excessive emissions of air pollution resulting from the Permit’s failure to ensure compliance with the Act, Federal Operating Permit regulations at 40 Code of Federal Regulations Part 70, Georgia’s State Implementation Plan (“SIP”), state permitting, and other applicable requirements which operate to limit and control emissions of air pollution as mandated by law. These adverse effects include health impacts caused by exposure to the Facility’s air pollution, lost economic opportunities, costs of health care, damage to homes and vehicles and increased maintenance expenses, the cost for purchase and maintenance of air purification equipment, and costs of more frequent clothes laundering, window cleaning and the like.

8. PFPI's members, supporters and directors experience increased rates of asthma and other respiratory ailments, and higher morbidity as a result of exposure to air pollutants emitted from the Facility.

9. PFPI's members, supporters and directors, and their children, alter their daily routines in response to the Facility's pollution, including reduced physical exercise and recreation, additional and/or prolonged periods of time indoors, and increased frequency of school and employment absenteeism, all as a direct result of the operation of the Facility in violation of the emissions limits in the Permit, the SIP, and the Clean Air Act.

10. Operation of the Facility in compliance with the Act as a result of PFPI's petition will have lower harmful emissions of air pollution either by actually conforming to the 250 TPY synthetic minor source emissions limits or through the imposition of enhanced air pollution control methods as part of new source review, applicable to major sources of air pollution.

11. Defendant MCCARTHY has failed to take timely final action on the Petition, thus interfering with the Act's requirement that all major sources of criteria pollutants and hazardous air pollutants (HAPs) have permits with specific, justified and enforceable emissions limitation that prevent excessive air pollution and protect the public's health and welfare interests. The Permit conditions fail to ensure compliance with applicable emissions limitations, among other requirements, and endangers, as described above, the community's health and welfare.

12. Defendant's failure to take timely final action on the Petition has allowed PGP to operate without a Permit that ensures compliance with the Act, and results in emissions in excess of those allowed for any facility with Synthetic Minor status.

13. PFPI has been and will continue to be adversely affected and irreparably injured by Defendant's failure to comply with the Act.

14. Defendant MCCARTHY is sued in her official capacity as EPA Administrator, and as the person with ultimate authority over and responsibility to respond to PFPI's Petition.

TITLE V OF THE CLEAN AIR ACT AND GEORGIA'S PERMIT PROGRAM

15. Congress passed the Act in 1970 to abate air pollution, enhance air quality, and to protect the public health and welfare. 42 U.S.C. § 7401(b). Congress directed EPA to improve our Nation's air quality and required EPA to identify those air pollutants that endanger public health and welfare. 42 U.S.C. § 7408(a).

16. Title V of the CAA as amended in 1990 requires that states develop federally approvable permit programs that apply to major sources of air pollution. Georgia promulgated Chapter 391-3-1-.03(2) of the Georgia Air Quality Act (O.C.G.A. Section 12-9-1, et seq.) establishing that an "Operating (SIP) Permit" is required by "[a]ny person operating a facility or performing an activity which is not exempted under 391-3-1-.03(6) from which air contaminants are or may be emitted."

17. A permit issued pursuant to Title V of the Act ("Title V Permit") violates the Act if it fails to ensure compliance with applicable requirements. 42 U.S.C. § 7661c(a), CAA § 504(a). This includes, but is not limited to, any standard or other requirement under Sections 111 and 112 of the Act; any standard or other requirement provided for in the applicable implementation plan; and any standard or other requirement of the regulations promulgated to protect stratospheric ozone under Title VI of the Act. 40 C.F.R. § 702.

18. The Administrator has a non-discretionary duty to object to Title V Permits that fail to meet the minimum requirements of the Act. If the Administrator does not object to the issuance of a Title V Permit, any person may petition the Administrator to take such action. 42 U.S.C. § 7661d(b)(2).

19. PFPI's Petition to the EPA alleged that Permit 4911-171-0014-V-02-0 suffers from the following legal infirmities: i) the "don't ask, don't tell" condition for fuel contamination testing is a gross violation of the spirit of the Act, and is not in compliance with 40 CFR § 63.11222(a)(2); ii) the provisions limiting the Facility's annual mass emissions of any individual HAP to 10 tons, and total HAPs to 25 tons, are unenforceable as a practical matter; iii) data on which the Facility's Synthetic Minor status is based are technically unsubstantiated, and the NOx and CO conditions are not practically enforceable; and iv) the Potential to Emit (PTE) calculations do not include quantified emissions associated with startup, shutdown and malfunction (SSM) as required by law.

20. The Petition requests EPA object to the Permit and order EPD to commence Prevention of Significant Deterioration permitting processes for the Facility as a Major Source.

21. The Administrator is required to grant or deny Title V Petitions within 60 days after the petition is filed. 42 U.S.C. § 7661d(b)(2). More than 60 days has elapsed since PFPI filed its Petition, and the Administrator has not taken action to grant or deny the Petition. Respondent and Defendant Administrator have a clear, present non-discretionary duty to act on PFPI's Petition.

22. Plaintiff has exhausted its administrative remedies and has no plain, speedy or adequate remedy in the ordinary course of law. Issuance of a writ is needed to avoid immediate, severe, and irreparable harm to Plaintiff, as well as residents and visitors to the City of Barnesville.

FIRST CLAIM FOR RELIEF

(Failure To Take Final Action on PFPI's Title V Petition)

23. Paragraphs 1 through 22 are hereby incorporated herein by reference.

24. To date, Defendant MCCARTHY has not granted, denied or otherwise acted in response to PFPI's Petition as required by law. 42 U.S.C. § 7661(d).

25. PFPI's Petition, filed on May 26, 2015, objected to the Title V Permit issued by EPD for PGP's facility in the City of Barnesville.

26. Defendant MCCARTHY has violated and is in violation of Section 505 of the Act by failing to perform this non-discretionary duty. 42 U.S.C. § 7661(d).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

1. Enter a declaratory judgment that Defendant MCCARTHY failed to perform her non-discretionary duty by failing to take timely final action to grant or deny PFPI's Petition objecting to the Permit;

2. Issue a writ of mandamus compelling Defendant MCCARTHY to immediately take action to grant or deny the Petition, and publish this action in the Federal Register within 30 days of the Court's ruling;

3. Direct by injunction, pursuant to section 304(a) of the CAA (42 U.S.C. § 7604(a)), that Defendant MCCARTHY take final action to grant or deny the Petition and publish this action in the Federal Register within 30 days of the Court's ruling;

4. Retain continuing jurisdiction to review Defendant MCCARTHY's compliance with all judgments entered herein;

5. Issue such additional judicial determinations and orders that are necessary to effectuate the foregoing requests for relief;

6. Grant to Plaintiff the costs of litigation, including reasonable attorneys' and expert witness' fees, pursuant to the Act's section 7604(d); and

7. Provide such other relief as the Court shall deem just and proper.

DATE: January 25, 2016

s/ Robert Jackson
Robert Jackson – GA Bar No. 387750
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Atlanta, GA 30303
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Phone: (404) 313-2039

Attorney for Plaintiff
Partnership for Policy Integrity

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Partnership for Policy Integrity, a public benefit corporation

(b) County of Residence of First Listed Plaintiff Hampshire County, MA (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number) Robert Jackson (GA Bar #387750) at GreenLaw at 260 Peachtree Street - Suite 2200, Atlanta, GA 30303; (404) 313-2039

DEFENDANTS

United States Environmental Protection Agency, Gina McCarthy, Administrator

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
3 Federal Question (U.S. Government Not a Party)
2 U.S. Government Defendant
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State
Citizen of Another State
Citizen or Subject of a Foreign Country
PTF DEF
1 1 Incorporated or Principal Place of Business In This State
2 2 Incorporated and Principal Place of Business In Another State
3 3 Foreign Nation
4 4
5 5
6 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Table with 5 columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Includes various legal categories like Insurance, Personal Injury, Real Estate, etc.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding
2 Removed from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from Another District
6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 42 U.S.C. Section 7661d

Brief description of cause: Enforcement of EPA Administrator's non-discretionary duty to grant or deny petition alleging Clean Air Act violation

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER 5:16-CV-38-CAR

DATE 01/25/2016 SIGNATURE OF ATTORNEY OF RECORD s/ Robert Jackson

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
 United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an "X" in one of the six boxes.
 Original Proceedings. (1) Cases which originate in the United States district courts.
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.