CLIENT ALERT

"Big Brown" Citizen Suit Survives Motion to Dismiss

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A federal district court in Texas has allowed the Sierra Club's Clean Air Act citizen suit against the Big Brown Plant in Freestone County, Texas to proceed past a multifaceted motion to dismiss. As part of its Beyond Coal Texas campaign, the Sierra Club seeks to force the largest power providers in Texas to phase out operations at the Big Brown Plant by alleging that the plant routinely exceeds the opacity limit established in Texas's State Implementation Plan (SIP) and the plant's Title V operating permit (even assuming that the plant has utilized its hourly six-minute exemption) as well as the particulate matter (PM) limit set forth in the Texas SIP.

In *Sierra Club v. Energy Future Holdings Corporation*, No. 6:12-CV-108, -- F. Supp. 2d --, 2013 WL 485363 (W.D. Tex. Feb. 6, 2013), the court denied the owner and operator's motion to dismiss, rejecting all of the commonly raised grounds for dismissal in citizen suits under the Clean Air Act.

Case Background

The Sierra Club brought suit against Energy Future Holdings Corporation and Luminant Generation Company under the Clean Air Act's citizen suit provision, 42 U.S.C. § 7604. It alleges that, according to defendants' self-reported data, Big Brown Plant violated the 30% opacity limit in the Texas SIP on 6,520 occasions between July 2007 and December 2010, at times exceeding 90% opacity and even taking into account the six-minute exemption available to the plant every hour for equipment changes and similar factors. The Sierra Club also claims that the plant violated the PM limit in the Texas SIP on at least 370 occasions between January 2008 and July 2011.

The Court's Decision

The defendants moved to dismiss, arguing first that dismissal was warranted under Rule 12(b)(1) because Plaintiff did not identify a single member of its organization that had suffered a redressable injury from Big Brown's emissions. The court ruled that an organization asserting representational standing need not identify a particular member that claims a cognizable injury-in-fact in order to survive a motion to dismiss for lack of standing. Rather, for a case to move forward from the pleading stage, it suffices that the organization alleges that its members have generally suffered and will continue to suffer actual and threatened injury to protectable interests that are caused by defendants' actions, are redressable, and are germane to the organization's purpose.

Because the Sierra Club alleged that its members live, work, and recreate in areas nearby and downwind of the Big Brown Plant, are purportedly suffering from actual and threatened injury to their health and welfare due to emissions allegedly from Big Brown, and because the interests asserted are germane to the Sierra Club's purpose, the court held that the group need not "'name names' in its Complaint."[1] That holding contributes to what appears to be a new trend in standing cases at the motion to

dismiss stage that has taken hold in the Second and Fifth Circuits, as well as federal district courts in the District of Columbia and the Western District of Texas.[2]

Defendants also sought dismissal under Rule 12(b)(1) by arguing that the suit was an impermissible collateral attack on the plant's Title V permit. The court rejected that argument, holding that Section 304 of the Clean Air Act authorizes citizen plaintiffs to bring suit for violations of any emission standards or limitations under *either* a Title V permit *or* a state SIP.

The court also rejected defendants' contention that dismissal was warranted under Rule 12(b)(6) because the pre-suit notice was deficient, finding instead that the information included in that notice was sufficient to allow defendants to identify the date of the alleged violations and to bring the plant into compliance with the Act.

Further, the court was not persuaded by the defendants' argument that the claim for injunctive relief was moot. Although the Big Brown Plant had received a new permit that permitted planned maintenance, startup, and shutdown (MSS) emissions so that their conduct was now lawful, the permit was promulgated under a provision in the Texas Administrative Code that had been rejected by the EPA and therefore had not been incorporated into the state SIP. As a result, the court held that the permit could not shield the defendants from the applicable limits in the Texas SIP. Finally, the court rejected defendants' contention that the case should be dismissed under Rule 12(b)(6) because the plaintiff had misstated the applicable PM limitation, instead allowing it to amend its complaint to correct the typographical error. The Amended Complaint was filed on February 19, 2013.

Looking Forward

Even before the motion to dismiss was decided, the Sierra Club moved for partial summary judgment, asking the court to determine that it satisfies Article III associational standing requirements and that undisputed evidence (Defendants' own Excess Emission Reports) establishes that defendants violated their opacity limit.[3] Briefing of that motion is ongoing, and the decision may provide further insights on the court's view of standing for air emissions suits. Provided the case is not resolved before trial, a bench trial is scheduled for November 4, 2013.

To read a complete copy of this decision, **click here**.

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[1] *Energy Future Holdings Corporation*, 2013 WL 485363, at *4. In so holding, the court followed the Second Circuit's decision in *Building and Construction Trades Council of Buffalo, N.Y. and Vicinity v. Downtown Development, Inc.*, 448 F.3d 138, 145 (2d Cir. 2006).

[2] *See Ass'n of Am. Physicians & Surgeons, Inc. v. Sebelius*, No. 10-0499, -- F. Supp. 2d --, 2012 WL 5353562, at *5 (D.D.C. Oct. 31, 2012) (collecting cases) (holding that "[a]t the pleading stage, the Court presumes that general allegations encompass the specific facts necessary to support the claim, so the plaintiff need not identify an affected member by name" (citation omitted)).

[3] Notably, in that motion, the Sierra Club identifies a member who it claims has standing to sue and attaches her declaration in support of standing.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Kirsten L. Nathanson
Partner – Washington, D.C.
Phone: +1 202.624.2887
Email: knathanson@crowell.com

Sherrie Armstrong Davis
Counsel – Washington, D.C.
Phone: +1 202.624.2846
Email: sarmstrongdavis@crowell.com