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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL PARKS CONSERVATION ASSOCIATION

A non-profit corporation headquartered in Washington, D.C.
777 6th Street NW, Suite 700
Washington D.C. 20001

WILDEARTH GUARDIANS

A non-profit corporation headquartered in Santa Fe, NM
312 Montezuma Avenue
Santa Fe, NM 87501

Case: 1:11-cv-00130
Assigned To : Kessler, Gladys
Assign. Date : 1/20/2011
Description: Admn Agency Review

GRAND CANYON TRUST

A non-profit corporation headquartered in Flagstaff, Arizona
2601 N. Fort Valley Rd
Flagstaff, AZ 86001

NORTHWEST ENVIRONMENTAL DEFENSE CENTER

A non-profit corporation headquartered in Portland, Oregon
10015 SW Terwilliger Blvd.
Portland, OR 97219

SAN JUAN CITIZENS ALLIANCE

A non-profit corporation headquartered in Durango, Colorado
1022 1/2 Main Avenue
Durango, Colorado 81302

CENTER FOR BIOLOGICAL DIVERSITY

A non-profit corporation headquartered in Tucson, Arizona
351 California St., Ste. 600
San Francisco, CA 94104

WASHINGTON WILDLIFE FEDERATION

A non-profit corporation headquartered in Bellevue, Washington
P.O. Box 1656
Bellevue, WA 98009

TO' NIZHONI ANI

A non-profit corporation headquartered in Arizona
Ten miles north of Hard Rock Chapter
Hard Rock, AZ
86039

DOODA DESERT ROCK

P.O. Box 7838
Newcomb, Navajo Nation
New Mexico 87455

SIERRA CLUB

A non-profit corporation headquartered in San Francisco, California
85 Second Street, 2nd Floor
San Francisco, CA 94105

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
THE INTERIOR and UNITED STATES
DEPARTMENT OF AGRICULTURE

Defendants.

COMPLAINT

I. STATEMENT OF THE CASE

1. This is a civil action for declaratory and injunctive relief brought pursuant to the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 706(1) and 555(b). This action seeks an order finding that defendants Departments of Interior and Agriculture (“DOI” and “DOA”) have failed to act without unreasonable delay on three of plaintiffs’ petitions that seek formal certification of visibility impairment in national parks and wilderness areas. By not acting on plaintiffs’ petitions, defendants have failed to fulfill their statutory and regulatory duty under the

federal Clean Air Act to determine the extent to which individual sources of air pollution are impairing the visibility in federal Class I areas. 42 U.S.C. § 7491(b)(2)(A); 40 C.F.R. § 51.302(c). DOI and DOA have failed to act on plaintiffs' petitions from between 11 and 20 months. Plaintiffs respectfully request an order establishing a prompt deadline for DOI and DOA to act on plaintiffs' petitions.

II. JURISDICTION AND VENUE

2. This court has subject matter jurisdiction over the claims set forth in this complaint pursuant to 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 5 U.S.C. § 706(1), and 28 U.S.C. §§ 2201 and 2202.

3. Venue is proper in the District of Columbia pursuant to 28 U.S.C. § 1391(e)(1) because both the Departments of Interior and Agriculture reside in the District of Columbia. Venue is also proper in the District of Columbia pursuant to 28 U.S.C. § 1391(e)(3) because plaintiff National Parks Conservation Association resides in the District of Columbia.

III. PARTIES

4. The National Parks and Conservation Association is America's only private, nonprofit citizen organization dedicated solely to preserving, protecting and enhancing the U.S. National Park System. NPCA was founded in 1919, and today has approximately 320,000 members nationwide. NPCA's mission is to protect and enhance the natural and cultural resources of America's National Park System through research, public education and advocacy. NPCA is headquartered in Washington, D.C.

5. WildEarth Guardians is a non-profit environmental organization, with offices in Colorado, Arizona, and New Mexico. WildEarth Guardians protects and restores wild rivers,

wildlife and wild places in the American West. A critical component of this work is helping to foster an ethic of appreciation by allowing people to enjoy these wildlife, wild rivers and wild places. WildEarth Guardians is headquartered in Sante Fe, New Mexico.

6. The Grand Canyon Trust is a non-profit, regional conservation organization dedicated to conserving the natural and cultural resources of the Colorado Plateau. The Trust advocates an ecologically responsible and sustainable balance between resource use and preservation, along with the protection of areas of beauty and solitude. The Trust recognizes that clear air and vast panoramas are defining characteristics of the Colorado Plateau, and has been involved in air quality issues since its founding in 1985. The Trust is headquartered in Flagstaff, Arizona.

7. Northwest Environmental Defense Center is an independent, non-profit organization working to protect the environment and natural resources of the Pacific Northwest. The Northwest Environmental Defense Center is headquartered in Portland, Oregon.

8. To' Nizhoni Ani ("beautiful water speaks") is a non-profit, Navajo grass-roots organization committed to protecting the health and environment of the Navajo people. To' Nizhoni Ani is located ten miles north of Hard Rock Chapter, Hard Rock, Arizona.

9. Washington Wildlife Federation, an affiliate of the National Wildlife Federation, is a non-profit, membership organization that works to protect the wildlife of Washington State. Washington Wildlife Federation is based in Bellevue, Washington.

10. The Center for Biological Diversity is a non-profit organization that works to secure a future for all species, great and small, hovering on the brink of extinction. The Center for Biological Diversity is based in Tucson, Arizona.

11. The San Juan Citizens Alliance is a grass roots organization dedicated to social, economic and environmental justice in the San Juan Basin. The Alliance helps citizens protect the water

and air, public lands, rural character, and unique quality of life in the San Juan Basin, while embracing the diversity of the region's people, economy and ecology. San Juan Citizens Alliance is headquartered in Durango, Colorado.

12. Dooda ("No") Desert Rock is a grass-roots Navajo organization working to protect the air quality of the Navajo Nation and neighboring national parks including the Grand Canyon National Park. Dooda Desert Rock is located in Newcomb, Navajo Nation, New Mexico.

13. Sierra Club, a national conservation organization with approximately 700,000 members, is dedicated to protecting natural resources, including clean air and water. Sierra Club was founded in 1892. On behalf of its members, Sierra Club works to protect and enhance the quality of air throughout the country. Sierra Club is headquartered in San Francisco, California.

14. Plaintiffs bring this action on behalf of their adversely affected members.

15. Individual members of the plaintiff groups regularly visit and enjoy the national parks and wilderness areas that are the subject of plaintiffs' visibility impairment petitions. Individual members of the plaintiff groups breathe, use, and enjoy the ambient air in and surrounding the national parks and wilderness areas described in the petitions. Pollution from large industrial facilities, including coal-fired power plants, degrade the air and scenery used by plaintiffs' members.

16. The health, aesthetic, and recreational interests of plaintiffs' members are being and will continue to be adversely affected by the failure of DOI and DOA to act without unreasonable delay on plaintiffs' petitions to certify conditions of reasonably attributable visibility impairment. DOI and DOA's unreasonable delay in deciding whether plaintiffs' petitions demonstrate the existence of reasonably attributable visibility impairment is frustrating the visibility protection provisions of the Clean Air Act. If DOI and DOA were to grant plaintiffs' petitions, large

sources of air pollution that are presently causing visibility impairment in many national parks and wilderness areas would more likely be required to reduce their emissions. DOI and DOA's failures to act harms, and will continue to harm, plaintiffs and their members.

IV. FACTS

17. On May 5, 2009, Petitioners National Parks Conservation Association, Sierra Club, Grand Canyon Trust, San Juan Citizens Alliance, To' Nizhoni Ani and Diné CARE formally petitioned DOI to certify that nitrogen oxide and particulate matter emissions from the Navajo Generating Station in Arizona are impairing visibility in the Grand Canyon National Park. Grand Canyon National Park is a mandatory Class I area under the Clean Air Act. 40 C.F.R. Part 81. Petitioners' petition was submitted pursuant to the Administrative Procedure Act, 5 U.S.C. § 553(e).

18. On June 24, 2009, Petitioners National Parks Conservation Association, Washington Wildlife Federation, Sierra Club, and Northwest Environmental Defense Center formally petitioned DOI to certify that nitrogen oxide emissions from the Centralia Power Plant in Washington are impairing visibility in Mount Rainier and Olympic National Parks. Mount Rainier and Olympic National Parks are both mandatory Class I areas under the Clean Air Act. 40 C.F.R. Part 81. Petitioners' petition was submitted pursuant to the Administrative Procedure Act, 5 U.S.C. § 553(e).

19. On February 16, 2010, Petitioners National Parks Conservation Association, Earthjustice, Sierra Club, San Juan Citizens Alliance, Grand Canyon Trust, Center for Biological Diversity, Diné CARE, Dooda Desert Rock and Wild Earth Guardians formally petitioned DOI and DOA to certify that nitrogen oxide, sulfur dioxide and particulate matter emissions from the Four Corners Power Plant in New Mexico are impairing visibility in sixteen national parks and wilderness

areas administered by the National Park Service and the U.S. Forest Service in Arizona, Utah, New Mexico and Colorado. The sixteen national parks and wilderness areas named in the petition are all mandatory Class I areas under the Clean Air Act, 40 C.F.R. Part 81. Petitioners' petition was submitted pursuant to the Administrative Procedure Act, 5 U.S.C. § 553(e).

20. Pursuant to the EPA's regulations, the Federal Land Manager of any mandatory Class I area may certify to a state that it is reasonable to attribute visibility impairment to a single, or small group of air pollution sources. Accordingly, 40 C.F.R. § 51.302(c)(1) provides that "[t]he affected Federal Land Manager may certify to the State, at any time, that there exists reasonably attributable impairment of visibility in any mandatory Class I Federal area." Upon certification, states must "identify and analyze for BART [best available retrofit technology] each existing stationary facility which may reasonably be anticipated to cause or contribute to impairment of visibility" in the Class I area. 40 C.F.R. § 51.302(c)(4).

21. The term "reasonably attributable visibility impairment" is defined as "visibility impairment that is caused by the emission of air pollutants from one, or a small number of sources." 40 C.F.R. § 51.301.

22. The term "visibility impairment" is defined as "any humanly perceptible change in visibility (light extinction, visual range, contrast, coloration) from that which would have existed under natural conditions." *Id.* EPA's regulations state that "[a] single source that is responsible for a 1.0 deciview change or more should be considered to 'cause' visibility impairment" and that "determining whether a source 'contributes' to visibility impairment should not be higher than 0.5 deciviews." 40 C.F.R. § 51 Appendix Y—Guidelines for BART Determinations Under the Regional Haze Rule, Section III A. 1.

23. A deciview is a perceptually correct "haze index such that uniform changes in haziness

correspond to uniform incremental changes in perception across the entire range of conditions, from pristine to highly impaired.” 40 C.F.R. § 51.301.

24. As set forth in Petitioners’ May 5, 2009 petition, the Navajo Generating Station in Arizona annually impairs visibility more than 0.5 deciviews at each of the eleven mandatory Class I areas within 300 kilometers of the facility, including an average of 2.5 deciviews of impairment on at least eight days every year to Grand Canyon National Park alone. The Navajo Generating Station causes more than 19 deciviews of maximum cumulative impact across the eleven mandatory Class I areas within 300 kilometers of the facility.

25. As set forth in Petitioners’ June 24, 2009 petition, the Centralia Power Plant in Washington annually impairs visibility more than 0.5 deciviews at each of the thirteen mandatory Class I areas within 300 kilometers of the facility, including impairment over 0.5 deciviews for 148 days every year at Mt. Rainier National Park, and impairment over 0.5 deciviews for 69 days every year at Olympic National Park. The Centralia Power Plant causes an average impairment of 3.9 deciviews on at least eight days every year at Mt. Rainier National Park and an average impairment of 2.6 deciviews on at least eight days at Olympic National Park. The Centralia Power Plant causes more than 24 deciviews of maximum cumulative impact across the thirteen mandatory Class I areas within 300 kilometers of the facility.

26. As set forth in Petitioners’ February 16, 2010 petition, the Four Corners Power Plant in New Mexico annually impairs visibility more than 0.5 deciviews at each of the sixteen mandatory Class I areas within 300 kilometers of the facility. The Four Corners Power Plant causes an average impairment of 3.1 deciviews on at least eight days every year at Mesa Verde National Park and an average impairment of 2.2 deciviews on at least eight days at Canyonlands National Park. The Four Corners Power Plant causes more than 25 deciviews of maximum

cumulative impact across the sixteen mandatory Class I areas within 300 kilometers of the facility

27. On September 3, 2009, NPCA, Minnesota Center for Environmental Advocacy, Friends of the Boundary Waters Wilderness and Voyageurs National Park Association submitted a petition to DOI asking the agency to certify that impairment of visibility at Voyageurs and Isle Royale National Parks, and Boundary Waters Canoe Area Wilderness was reasonably attributable to pollutant emissions from Xcel Energy's Sherco coal-fired power plant located in Becker, Minnesota.

28. Less than two months later, on October 21, 2009, DOI formally certified that visibility impairment at Voyageurs and Isle Royale National Parks, and Boundary Waters Canoe Area Wilderness, was reasonably attributable to emissions from the Sherco facility.

29. DOI's October 21, 2009 visibility impairment certification states: "According to the EPA's BART guidelines, a single source that is responsible for a 0.5 deciview (dv) or more change in visibility should be considered to "contribute to" visibility impairment. Xcel Energy's regional haze modeling submitted to the MPCA in October 2006, showed that, for the 2002-2004 modeling period, combined impacts from Sherco Units 1 and 2 were above the EPA 0.5 dv threshold on 165 days at Voyageurs and 159 days at Isle Royale, with maximum impacts of 2.34 dv and 1.79 dv respectively."

30. DOI's October 21, 2009 visibility impairment certification concludes: "Based on Xcel Energy's modeling results, a portion of the existing visibility impairment in Voyageurs and Isle Royale is reasonably attributable to pollution emissions from Sherco Units 1 and 2."

31. DOI and DOA have never acted on the remainder of Petitioners' petitions that show far greater deciview impacts than those caused by Sherco. DOI and DOA have unreasonably

delayed acting on Petitioners' remaining petitions.

32. Plaintiffs incorporate by reference and reallege the allegations contained in paragraphs 1 through 31 for the cause of action below.

V. CAUSE OF ACTION

FAILURE TO ACT WITHOUT UNREASONABLE DELAY ON PLAINTIFFS' PETITIONS

33. 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).

34. 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).

35. 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.

36. Plaintiffs petitioned DOI on May 5, 2009 and June 24, 2009, and both DOI and DOA on February 16, 2010. DOI and DOA have not acted on plaintiffs' petitions as of the date of this complaint.

37. DOI and DOA have unreasonably delayed taking action on plaintiffs' petitions. DOI and DOA's failure to act for the last 11-20 months represents an unreasonable delay.

VI. RELIEF REQUESTED

WHEREFORE, plaintiffs respectfully request this court to grant the following relief to correct defendants' failure to act:

DECLARE that defendants have unreasonably delayed taking action on plaintiffs' petitions;

ORDER defendants to act on plaintiffs' petitions with all expedition, but in no event later than 30 days.

ORDER defendants to pay plaintiffs their costs of litigation, including but not limited to reasonable attorney fees, as authorized by the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504; and

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

FOR PLAINTIFFS National Parks Conservation Association, Grand Canyon Trust, San Juan Citizens Alliance, To' Nizhoni Ani, Diné CARE, Washington Wildlife Federation, Northwest Environmental Defense Center, WildEarth Guardians, Center for Biological Diversity, and Sierra Club.

Dated this 20th day of January, 2011.



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