

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

SIERRA CLUB,)	
)	
Petitioner,)	
)	
vs.)	Case No. _____
)	
ROBERT MOSER, M.D., in his official capacity as))	
Secretary of The Kansas Department of Health and))	
Environment, and THE KANSAS DEPARTMENT))	
OF HEALTH AND ENVIRONMENT, an agency))	
of the State of Kansas,)	
)	
Respondents.)	
_____)	

PETITION FOR JUDICIAL REVIEW
Pursuant to Kan. Stat. Ann. Chapters 65 and 77

Petitioner, Sierra Club, by and through its attorney, Robert V. Eye of Kauffman & Eye,¹ hereby present this Petition for Judicial Review and alleges and states as follows:

1. Pursuant to K.S.A. 77-606 *et. seq.*, Sierra Club seeks judicial review of the final Air Emission Source Construction Permit as modified by the final “Addendum” (the “Permit”) issued to Sunflower Electric Power Corporation (“Sunflower”) by the Kansas Department of Health and Environment (“KDHE”) and signed by Robert Moser, Secretary of KDHE, on May 30, 2014. A certified copy of the final Permit and Addendum is attached hereto as Exhibit 1.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this petition for review of final agency action pursuant to K.S.A. 77-601 *et. seq.* and the Kansas Air Quality Act which provides that this Court

¹ Counsel for Petitioner also includes Todd D. True and Amanda W. Goodin of Earthjustice. A motion for leave of Amanda Goodin to appear *pro hac vice* has been filed concurrently with this petition; a motion for leave of Todd D. True to appear *pro hac vice* will be filed soon thereafter.

shall have original jurisdiction to review the Permit at issue here. K.S.A. 65-3008a(b). These same statutes also make venue proper in this Court.

PARTIES

3. Petitioner's addresses are:

Kansas Sierra Club
16 E. 13th Street
Lawrence, KS 66044

Sierra Club
National Headquarters
85 Second Street, 2nd Floor
San Francisco, CA 94105

4. Respondent Kansas Department of Health and Environment is located at 1000 S.W. Jackson, Topeka, Kansas 66612.

5. Respondent Kansas Department of Health and Environment is the agency responsible for protection of human health and the environment in Kansas, including the issuance of air permits pursuant to the requirements of the federal Clean Air Act under authority delegated by the U.S. Environmental Protection Agency ("EPA"). Robert Moser, Secretary of KDHE, signed the Permit at issue here pursuant to K.S.A. 65-3008.

FACTS THAT DEMONSTRATE SIERRA CLUB IS ENTITLED TO JUDICIAL REVIEW

6. The Permit issued by KDHE on May 30, 2014, is final agency action as required under K.S.A. 77-607.

7. The Sierra Club has standing to challenge the Permit pursuant to K.S.A. 65-3008a(b) because it and its members participated in the public comment process and the public hearing on the proposed draft permit and addendum. Sierra Club also has standing pursuant to K.S.A. 77-611(b) as "a person who was a party to the agency proceedings that led to the agency action" and K.S.A. 77-611(d). A copy of Sierra Club's comments on the proposed

draft permit and addendum are attached hereto as Exhibit 2.

8. Sierra Club members live, work, recreate, farm, and engage in other activities that will be adversely impacted by the Holcomb Expansion (defined below). They include senior citizens, children, people with asthma, and other individuals who are especially vulnerable to harm from exposure to ground-level ozone, hazardous air pollutants, other harmful air pollutants that will be emitted by the project's new coal-fired electric generating unit, and from the climate change impacts that are exacerbated by greenhouse gas emissions. The health, aesthetic, conservation, recreational, economic, scientific, informational, and procedural interests of Sierra Club and its members have been, are being, and, unless the relief prayed for herein is granted, will continue to be adversely affected and irreparably injured by KDHE's failure to comply with federal and state law in issuing the Permit as described below. The declarations of Barbara Campbell, Linda McKay, Sarah Hill-Nelson, Harold Starr, Arnold Lee Messenger, and Dr. Jonathan Levy are attached hereto as Exhibits 3 through 8, respectively.

9. The Sierra Club is not required to exhaust administrative remedies before seeking judicial review under the provisions of the Kansas Air Quality Act. K.S.A. 65-3008a(b).

10. This Petition is timely because it is filed within thirty (30) days of the issuance of the Permit. K.S.A. 77-613(d).

BACKGROUND

11. On December 16, 2010, KDHE issued a final Air Emission Source Construction Permit (the "2010 Permit") to Sunflower Electric Power Corporation for construction of one 895-megawatt coal-fired power plant at the site of Sunflower's existing coal-fired power plant in Holcomb, Kansas.

12. On January 14, 2011, Sierra Club filed a petition for review of the 2010 Permit pursuant to K.S.A. 65-3008a(b), and on KDHE's motion the case was transferred to the Kansas

Supreme Court for direct review. Following briefing and oral argument, the Supreme Court held that the 2010 Permit failed to comply with the Clean Air Act and Kansas State Implementation Plan. Accordingly, the Court reversed KDHE's decision to issue the permit and remanded it to the agency. *See Sierra Club v. Moser*, 298 Kan. 22, 310 P.3d 360 (2013).

13. On January 16, 2014, KDHE published notice that it planned to reissue the 2010 Permit with modifications (styled an "Addendum") that purported to address the deficiencies identified by the Supreme Court. KDHE accepted public comment on the permit modification for 30 days and scheduled a public hearing in Garden City, Kansas. Sierra Club and individual Sierra Club members submitted comments on the draft addendum.

14. On May 30, 2014, KDHE issued the final Permit and response to comments.

15. Sierra Club filed a Petition for Reconsideration with the Secretary of KDHE on June 6, 2014. KDHE denied this Petition on June 19, 2014. A copy of the Petition and the Secretary's denial is attached hereto as Exhibit 9.

PETITIONER'S REASONS THAT RELIEF SHOULD BE GRANTED

16. On May 30, 2014, KDHE issued the Permit to Sunflower authorizing construction and operation of one new 895 megawatt coal-fired generating unit and associated equipment (the "Holcomb Expansion") at Holcomb Generating Station in Holcomb, Finney County, Kansas, at the site of an existing generating unit owned by Sunflower ("Holcomb 1").

17. The Holcomb Expansion will emit substantial volumes of numerous pollutants that cause serious harm to human health and the environment. These pollutants include particulate matter, nitrogen oxides, sulfur dioxide, ozone-forming constituents, mercury, acid gases, other hazardous air pollutants, and greenhouse gases. The U.S. Environmental Protection Agency has determined that all of these pollutants pose a significant risk to human health and the environment.

18. KDHE is authorized to issue permits allowing the construction of new major stationary sources of regulated air pollutants that meet the minimum requirements of the Prevention of Significant Deterioration (“PSD”) provisions of the federal Clean Air Act and implementing regulations, pursuant to delegated authority. 40 C.F.R. § 52.870.

19. The Permit is unlawful because it fails to meet the minimum requirements of the federal Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* and implementing regulations; the Kansas Air Quality Act, K.S.A. 65-3001 *et seq.* and implementing regulations; and the Kansas Administrative Procedure Act, K.S.A. 77-501 *et seq.* Additionally, the Permit was issued by an unlawful procedure; the Permit is based on unsupported determinations of fact; and the Permit is otherwise unreasonable, arbitrary or capricious. K.S.A. 77-621. The Permit also fails to address the specific deficiencies identified by the Supreme Court in *Sierra Club v. Moser*, 298 Kan. 22, 310 P.3d 360. Accordingly, the Permit must be set aside.

I. THE PERMIT FAILS TO INCLUDE ADEQUATE EMISSIONS LIMITATIONS FOR NITROGEN DIOXIDE AND SULFUR DIOXIDE.

20. Under the federal Clean Air Act (“CAA”), no person may construct a “major stationary source” of regulated air pollutants unless they demonstrate that the source will not cause or contribute to air pollution in excess of any national ambient air quality standard (“NAAQS”), any maximum allowable increase or maximum allowable concentration for any pollutant, or any other applicable emission standard or standard of performance. 42 U.S.C. § 7475(a)(3). The Holcomb Expansion will constitute a major stationary source of regulated air pollutants within the meaning of the CAA.

21. On January 22, 2010, the EPA announced a new 1-hour nitrogen dioxide (“NO₂”) NAAQS to protect public health. The final rule was published in the Federal Register on February 9, 2010, and the new standard became effective on April 12, 2010.

22. On June 22, 2010, the EPA published in the Federal Register a new 1-hour sulfur dioxide (“SO₂”) NAAQS; that new standard became effective on August 23, 2010.

23. Both the 1-hour NO₂ NAAQS and the 1-hour SO₂ NAAQS were in effect at the time KDHE issued the 2010 Permit for the Holcomb Expansion; however, as the Kansas Supreme Court found, the 2010 Permit failed to demonstrate that the Holcomb Expansion will not cause or contribute to violations of these standards, in violation of federal and Kansas law. *See Sierra Club v. Moser*, 298 Kan. 22, 310 P.3d 360 (2013).

24. The Permit as modified by the “addendum” includes new emission limits for hourly emissions of NO_x and SO₂. These limits, however, are inadequate for numerous reasons.

25. The emission limits in the Permit fail to ensure that the Holcomb Expansion will not cause or contribute to exceedences of the 1-hour NO₂ NAAQS and the 1-hour SO₂ NAAQS and associated increments. The modeling used to support the emission limits demonstrates that the Holcomb Expansion will in fact cause or contribute to violations of the 1-hour standards, in violation of the plain language of the Clean Air Act.

26. KDHE justifies these exceedences by relying on Significant Impact Levels (“SILs”) established in KDHE guidance. The plain language of the Clean Air Act, however, does not authorize a source to cause or contribute to *any* exceedences of the NAAQS, no matter how small the contribution. 42 U.S.C. § 7475(a)(3).

27. Even if it were acceptable to rely on SILs to excuse the NAAQS exceedences that the Holcomb Expansion will cause, KDHE relied on SILs that are larger than the SILs discussed in guidance issued by EPA. By relying on larger SILs than those described by EPA, Sunflower has failed to demonstrate that the Holcomb Expansion will not contribute to exceedences of the NAAQS.

28. Additionally, the emission limits in the Permit fail to ensure that the Holcomb Expansion will not cause or contribute to exceedences of the 1-hour NO₂ NAAQS and the 1-hour SO₂ NAAQS and associated increments because the modeling and analysis used to support the emission limits is flawed and outdated.

29. The modeling attempts to demonstrate that Holcomb Station will not cause or contribute to exceedences of the NAAQS so long as the emissions attributable to Holcomb Station are at or below a certain level. The modeling does this, in part, by incorporating emissions from existing sources, most significantly emissions from Holcomb 1, to demonstrate that the addition of the emissions from the Holcomb Expansion will not cause or contribute to exceedences of the NAAQS. When incorporating existing sources such as Holcomb 1 into such modeling demonstrations, EPA guidance requires that emissions from existing sources be estimated as either the maximum possible emissions from such sources based on their design capacity, or at the level of an enforceable permit limit for the pollutant and averaging period at issue. However, the baseline emissions from Holcomb 1 in the modeling are neither based on an enforceable 1-hour limit nor on Holcomb 1's maximum potential to emit, and emissions from Holcomb 1 may—and likely will be—higher than assumed in the modeling. Accordingly, the modeling fails to demonstrate that the Holcomb Expansion will not cause or contribute to exceedences of the NAAQS.

30. Additionally, the modeling assumes certain background concentrations of NO_x and SO₂, but these assumed background concentrations are not reasonable and not adequately supported.

31. The Clean Air Act requires site-specific air quality monitoring for every PSD permit application. 42 U.S.C. § 7475(e). These ambient air quality data must be collected at and

around the site of the new source, and are used to establish the baseline concentrations of regulated pollutants. This baseline is then used to assess whether the new source will cause a violation of NAAQS or increment.

32. The Permit is not based on adequate ambient air monitoring. No site-specific monitoring was conducted; instead, KDHE relied on air monitoring data from existing monitors. These data are insufficient because the monitoring data are not sufficiently current and because the monitors are too far from Holcomb to be representative of the ambient air quality at Holcomb.

33. Additionally, the monitoring data, as well as the air quality modeling and analysis, are outdated. The new emission limits in the Permit must be based on a current air quality impact analysis and supporting data; instead, KDHE inappropriately relied on analysis and data from the 2010 Permit.

34. Finally, the emission limits must be set aside because they are based on an unlawful procedure. Under the Kansas Judicial Review Act, this Court may set aside an agency decision that follows an unlawful procedure. K.S.A. 77-621(c); *see also id.* § 77-619(a).

35. The Kansas Air Quality Act and implementing regulations require KDHE to provide the public with an opportunity to comment on a draft permit or permit modification, including an opportunity to comment on all relevant supporting materials. K.A.R. 28-19-204; *id.* § 28-19-350(k).

36. In establishing the emission limits in the final addendum, KDHE relied in part on updated air modeling and analysis submitted by Sunflower in 2014. KDHE, however, failed to make this updated analysis public and failed to accept public comment on this critical portion of Sunflower's permit application.

37. Sierra Club requested an opportunity to comment on this analysis in a petition for reconsideration, which KDHE denied. *See* Exhibit 9.

38. KDHE's failure to allow public comment on critical and current information violates federal and Kansas law, and is grounds for this Court to set aside the agency's decision.

II. THE PERMIT FAILS TO INCLUDE ADEQUATE EMISSIONS LIMITATIONS FOR HAZARDOUS AIR POLLUTANTS.

39. The Clean Air Act requires that new sources of hazardous air pollutants be subject to emissions limitations based on the maximum achievable control technology ("MACT") for all hazardous air pollutants. 42 U.S.C. § 7412. The MACT requirement is more stringent than the best available control technology ("BACT") requirement applicable to other regulated pollutants, as the hazardous air pollutants covered under this provision are those that are the most severely toxic to human health and the environment, even in small amounts. Hazardous air pollutants that the Holcomb Expansion will emit include mercury and acid gases such as hydrogen chloride and hydrogen fluoride.

40. KDHE did not include MACT emissions limitations for hazardous air pollutants in the 2010 Permit.

41. After KDHE issued the 2010 Permit, EPA finalized the Mercury and Air Toxics Standards ("MATS"), 40 C.F.R. part 63, Subpart UUUUU, which establishes hazardous air pollutant emission standards for electric generating units.

42. The emission limits in the 2010 Permit are less stringent than the standards in the MATS rule. For example, the MATS rule contains an emission standard for mercury of 0.003 pounds per gigawatt-hour, but the 2010 Permit only includes an emission limit of 0.02 pounds per gigawatt-hour. Similarly, the MATS rule contains an emission standard for filterable particulate matter of 0.09 pounds per megawatt-hour, but the 2010 Permit only requires an

emission rate of 0.1166 pounds per megawatt-hour.

43. The MATS rule applies to the Holcomb Expansion and its requirements must be incorporated into the Permit. *See Sierra Club v. Moser*, 298 Kan. 22, 310 P.3d 360 (2013).

44. The Clean Air Act provides that no person may construct a major source of hazardous air pollutants unless EPA (or the state permitting agency) determines that the source, if properly constructed, will comply with the relevant hazardous air pollutant emission standards. 42 U.S.C. § 112(i)(1); *id.* § 112(g)(2).

45. The Kansas Air Quality Regulations governing hazardous air pollutants provide that no person may construct a major source of hazardous air pollutants without first obtaining a pre-construction permit. K.A.R. 28-19-752a; *see also* K.A.R. 28-19-300.

46. In the Permit “Addendum,” KDHE included an unsupported statement that “the owner or operator shall comply with all applicable provisions of [the MATS rule].” KDHE did not include any MATS-specific emission limits or otherwise modify the relevant limits from the 2010 Permit. KDHE’s unsupported statement in the Addendum does not constitute a determination that the Holcomb Expansion, if constructed as proposed, will comply with the MATS rule, in violation of the Clean Air Act. Nor does this statement constitute compliance with the specific permitting requirements in the Kansas Air Quality Regulations.

47. KDHE’s statement regarding the MATS rule lacks evidentiary support in the record. The record evidence demonstrates that the Holcomb Expansion is designed to meet emission limits that are not as stringent as the standards in the MATS rule, and does not contain adequate evidence to support a finding that the plant as designed can meet the MATS standards. KDHE’s statement that the Holcomb Expansion will comply with the standards in the MATS rule is arbitrary and capricious, unsupported by record evidence, and contrary to law.

48. In order to meet the MATS standards, several significant changes must be

incorporated into the design of the Holcomb Expansion. As explained in Sierra Club's comments on the draft permit modification, these changes will affect the operation of other pollution control technology at the facility. Accordingly, KDHE must revise its BACT determination from the 2010 Permit to evaluate and require any additional steps needed to ensure that the BACT limits will be met despite these changes. Similarly, KDHE must revise its air quality analysis to incorporate changes to the facility resulting from the additional controls needed to ensure compliance with the MATS. KDHE's failure to revise or even revisit the BACT determination and air quality analysis for the Holcomb Expansion violates the Clean Air Act and Kansas law, and is arbitrary and capricious and unsupported by record evidence.

49. To the best of Sierra Club's knowledge, KDHE did not provide any additional analysis in conjunction with the draft permit modification supporting its statement that the Holcomb Expansion will comply with the MATS rule. If Sunflower submitted or KDHE conducted additional analysis that KDHE failed to make public in conjunction with the permit modification process, such failure would be contrary to the public participation requirements of the Clean Air Act and Kansas Air Quality Regulations.

III. THE PERMIT FAILS TO INCLUDE EMISSION LIMITS FOR GREENHOUSE GASES.

50. Under the CAA, no person may construct a major stationary source of regulated air pollutants unless they demonstrate that the source will be subject to BACT for each regulated pollutant. 42 U.S.C. § 7475(a)(4).

51. On January 2, 2011, federal regulations governing greenhouse gas emissions from vehicles became effective. These final rules were published in the Federal Register on June 3, 2010. *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule* ("Tailpipe Rule"), 75 Fed. Reg. 31514 (June 3, 2010).

52. As of January 2, 2011, the date the Tailpipe Rule became effective, greenhouse gases became a “pollutant subject to regulation” under the Clean Air Act, triggering the requirement that stationary sources include BACT for greenhouse gases in pre-construction permits. *Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs*, 75 Fed. Reg. 17,004 (Apr. 2, 2010).

53. On June 3, 2010, EPA finalized federal regulations phasing in the stationary source BACT requirement for greenhouse gases. *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule* (“Tailoring Rule”), 75 Fed. Reg. 31,514 (June 3, 2010). Under the Tailoring Rule, sources exceeding 75,000 or 100,000 tons per year of carbon dioxide became subject to greenhouse gas permitting on January 2, 2011.

54. The Permit for the Holcomb Expansion was signed by Secretary Moser on May 30, 2014.

55. The Holcomb Expansion will emit more than 100,000 tons per year of carbon dioxide, and is a source that triggers Clean Air Act permitting requirements for other pollutants (such as nitrogen oxides and sulfur oxides) independent of its greenhouse gas emissions. The U.S. Supreme Court has affirmed EPA’s authority to require that BACT for greenhouse gases be included in the permits for such sources. *See Util. Air Regulatory Group v. EPA*, No. 12-1146 (S. Ct. June 23, 2014).

56. Separate from and in addition to the BACT requirement, EPA has published proposed new source performance standards for greenhouse gas emissions from electric generating units pursuant to section 111(b) of the CAA, 42 U.S.C. § 7411. *See Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 1430 (Jan. 8, 2014) & 77 Fed. Reg. 22,392 (April 13, 2012).

These standards, once final, will apply to all sources that commence construction after the date the standard was proposed, including the Holcomb Expansion. *See* 42 U.S.C. § 7411(a)(2).

Accordingly, once the standards are finalized, the Permit must be modified to include the new source performance standard for greenhouse gases, in addition to a BACT emission limit for greenhouse gases.

57. The Permit for the Holcomb Expansion does not include emission limits for greenhouse gases. The failure to include emission limits in the Permit is contrary to law, arbitrary and capricious, and lacks support in the record.

IV. THE PERMIT FAILS TO INCLUDE CURRENT BACT LIMITS.

58. Under the CAA, no person may construct a major stationary source of regulated air pollutants unless they demonstrate that the source will be subject to BACT for each regulated pollutant. 42 U.S.C. § 7475(a)(4). The BACT requirement is expressed as an emissions limitation in the Permit for each pollutant based on the lowest level of emissions that can be achieved by application of the best available control technology for each pollutant. 40 C.F.R. § 52.21(b)(12). The BACT requirement is designed to require new sources to incorporate the most current pollution control technology available.

59. KDHE conducted a BACT analysis prior to issuing the 2010 Permit. KDHE did not, however, conduct a BACT analysis prior to re-issuing the Permit on May 30, 2014. Instead, KDHE advised that it would rely on the analysis for the 2010 Permit which was conducted in 2010 and earlier.

60. KDHE was required to update the BACT analysis for the Holcomb Expansion. The BACT analysis supporting the 2010 Permit is no longer current; as Sierra Club's comments on the draft permit modification demonstrate, more stringent emission limits are achievable and are being achieved in practice by comparable facilities.

61. The Permit does not require BACT for each regulated pollutant and is not based on a current and thorough BACT analysis, in violation of the Clean Air Act and Kansas law. KDHE's failure to require BACT for each regulated pollutant is arbitrary and capricious and contrary to law.

WHEREFORE, Petitioner respectfully requests a Declaration that the Permit is unlawful; an Order setting aside the Permit and remanding the matter to the KDHE for further proceedings to redress substantive and procedural failures in the Permit and permitting process; an injunction prohibiting Sunflower from proceeding with construction of the Holcomb Expansion until such time as a valid and lawful permit is issued; an award of the cost of litigation, including reasonable attorney's fees and witness fees; and such further relief as the Court deems just and equitable.

Respectfully submitted this _____ day of June, 2014.

ROBERT V. EYE (#10689)
Robert V. Eye Law Office, L.L.C.
Dibble Building
123 S.E. 6th Avenue, Suite 200
Topeka, KS 66603
(785) 234-4040 | Phone
(785) 234-4260 | Fax
bob@kauffmaneye.com

AMANDA W. GOODIN (WSBA #41312)
TODD D. TRUE (WSBA #12864)
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104
(206) 343-7340 | Phone
(206) 343-1526 | Fax
agoodin@earthjustice.org
ttrue@earthjustice.org

Attorneys for Petitioner Sierra Club