

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

FRIENDS OF THE EARTH,
1717 Massachusetts Avenue, N.W., 600
Washington, DC 20036-2002

Plaintiff,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY and STEPHEN L.
JOHNSON, Administrator,
United States Environmental Protection Agency,
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Defendants.

) Civ. No.
)
)
)
)

Case: 1:07-cv-01572
Assigned To : Collyer, Rosemary M.
Assign. Date : 9/5/2007
Description: Admn. Agency Review

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This action is brought under the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* (“the Act”) and the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* (“APA”). Plaintiff Friends of the Earth (“Friends”) seeks to compel Defendants, the United States Environmental Protection Agency and Stephen L. Johnson, Administrator of the U.S. Environmental Protection Agency (collectively “EPA”), to carry out their nondiscretionary duty to promulgate regulations containing standards applicable to emissions from Category 3 marine diesel engines — those used to propel large ocean-going vessels — as required by section 213(a) of the Act, 42 U.S.C. § 7547(a).

2. As described below, the deadline for promulgation of regulations containing standards applicable to such emissions was November 1992. Some 15 years after that deadline,

however, EPA has still failed to act and these heavy-duty polluters are still not adequately regulated. Domestically-registered ships are only minimally regulated by EPA, and EPA has failed to impose any emissions standards on foreign-flagged vessels operating within U.S. territorial waters.

JURISDICTION

3. This Court has jurisdiction over this action under 28 U.S.C. § 1331 (action arising under the laws of the United States) and section 304(a) of the Act, 42 U.S.C. § 7604(a) (citizen suit provision).

4. Section 304(b)(a) of the Act requires that written notice of intent to bring suit under the Act must be provided to the Administrator of EPA 60 days prior to commencement of such an action. 42 U.S.C. § 7604(b)(2). On June 13, 2007, plaintiff notified the Administrator by certified mail of plaintiff's intent to sue to compel EPA's compliance with section 304(a)(2) of the Act. A copy of this written notice is attached hereto as Exhibit 1. The letter was received by the Administrator on June 18, 2007. Thus the 60-day notice period expired on August 17, 2007.

VENUE

5. Venue lies in this judicial district pursuant to 28 U.S.C. § 1391(e) because Defendant EPA has its principle office here, a substantial part of the events or omissions giving rise to the claim occurred here, and plaintiff Friends of the Earth has its headquarters here.

PARTIES

6. Plaintiff FRIENDS OF THE EARTH:

a. Plaintiff Friends of the Earth is a public interest, not-for-profit advocacy organization with its headquarters in Washington D.C. Friends' mission is to defend the environment and champion a just and healthy world. Friends is the U. S. voice of the world's

largest network of environmental groups with affiliates in 70 countries. The Bluewater Team (formerly Bluewater Network) of Friends of the Earth works to stop environmental damage from vehicles and vessels, and to protect human health and the planet by reducing dependence on fossil fuels.

b. Many members of Friends live and work in coastal areas where emissions from large marine vessels degrade air quality and compromise public health and safety. As such, they have suffered and are suffering injury not only to their own health but also to the health of others in their families and communities. Moreover, many members of Friends enjoy recreational, scientific, cultural, inspirational, educational, and conservation activities in these areas, such as camping, hiking, fishing, boating, swimming, photography, aesthetic enjoyment and nature study. These activities, and these members' overall enjoyment of these coastal areas, are hampered by poor air quality, reduced visibility and damage to ecosystems, caused in part by unregulated emissions from large marine vessels.

c. To protect its members' interests in coastal air quality, plaintiff has been working to reduce air pollution from large marine vessels for nearly 10 years. Plaintiff's involvement in the issue dates back to 1999 when it first petitioned, and later sued, the EPA under the Clean Air Act to regulate emissions from large marine engines. More recently, Friends has engaged in a number of international, national, state and local initiatives to reduce the growing volume of emissions from ships.

d. Since 2005, Friends has lead a delegation to the International Maritime Organization to participate in negotiations on international air pollution standards for ships. Friends also publishes technical papers and generates media coverage of the urgent need to reduce smokestack pollution from large marine vessels. On numerous occasions over the last several years, Friends has authored extensive comments to both the International Maritime

Organization and the EPA, urging the adoption of more stringent international regulations to reduce emissions of oxides of nitrogen and various other pollutants, including sulfur oxides, hydrocarbons, particulate matter, carbon monoxide, airborne toxics and greenhouse gases, from the world shipping fleet.

e. In 2000, Bluewater Network (now the Bluewater Team of Friends of the Earth) published “A Stacked Deck: Air Pollution from Large Ships,” one of the first reports by a non-profit organization to address emissions from large marine vessels. This report revealed that large ocean-going vessels are one of the world’s largest and fastest growing sources of emissions of several air pollutants. In 2001, Bluewater Network co-sponsored a two-day “Conference on Marine Vessels and Air Quality.” Over 200 participants from around the world, representing federal, state and local air quality regulators, environmental groups and the maritime industry, attended this event. The conference provided a unique opportunity for these diverse stakeholders to focus on national and international air quality concerns related to commercial marine transportation.

f. EPA’s failure to promulgate regulations containing standards applicable to emissions from Category 3 marine diesel engines and foreign-flagged vessels has resulted and is resulting in continuing emissions from these engines containing high levels of, among other things, carbon monoxide, nitrogen oxide and particulate matter, all of which contribute to Plaintiff’s members’ asthma and other respiratory health problems, thus causing harm and injury to Plaintiff’s members who reside near ports. In addition, EPA’s failure to promulgate regulations containing standards applicable to emissions from Category 3 marine diesel engines and foreign-flagged vessels has resulted and is resulting in continuing poor air quality, reduced visibility, and damage to ecosystems, all of which harm Plaintiff’s members’ recreational, scientific, cultural, inspirational, educational, and conservation interests in coastal areas.

g. Plaintiff's and its members' interests in clean air and in having the environmental laws of the nation fully implemented have been, are being, and unless the relief prayed for herein is granted, will continue to be adversely affected and irreparably injured by EPA's continuing failure to promulgate regulations containing standards applicable to emissions from Category 3 marine diesel engines.

h. The injuries described above are actual, concrete injuries suffered by Plaintiff and its members. These injuries are caused by the actions and omissions of EPA, as described herein. The injuries of plaintiff and its members would be redressed by the relief sought herein. Plaintiff has no adequate remedy at law.

7. Defendant UNITED STATES ENVIRONMENTAL PROTECTION AGENCY is a federal agency charged by the Act with protecting and enhancing the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population. *See* 42 U.S.C. § 7401(b). EPA is required by section 213(a) of the Act, 42 U.S.C. § 7547(a), to promulgate regulations setting standards applicable to emissions from nonroad vehicles, including Category 3 marine diesel engines.

8. Defendant STEPHEN L. JOHNSON is the Administrator of the U.S. Environmental Protection Agency, and is sued in his official capacity. Mr. Johnson is ultimately responsible for insuring that EPA complies with and fully implements the Act in accord with Congress's intentions.

BACKGROUND

Emissions from Category 3 Marine Diesel Engines

9. Category 3 marine diesel engines — defined by EPA as “those marine diesel engines with a displacement at or above 30 liters per cylinder,” 64 Fed. Reg. 73300, 73305-06 (December 29, 1999) — are used primarily for propulsion power on large ocean-going vessels

such as container ships, tankers, bulk carriers and cruise ships, and are among the largest engines in the world.

10. These engines burn residual fuel oil, a byproduct of refining crude oil into higher-grade products, which has substantially higher ash, sulfur, and nitrogen content than other fuels. The emissions from these engines contribute significantly to national ozone, carbon monoxide (CO), nitrogen oxide (NO_x), and particulate matter (PM) levels, especially near commercial ports such as Seattle, Oakland, Los Angeles and New York.

11. Such high levels of pollution have serious impacts on environmental and public health. NO_x is a precursor to the formation of both ground-level ozone (smog) and fine particulate matter pollution. Smog causes harmful respiratory effects including but not limited to chest pain, coughing, shortness of breath, decreased lung function, inflammation of the lung tissue and aggravation of existing respiratory diseases, and may impair the body's immune system. Children and the elderly are most severely affected by these health effects.

12. Exposure to diesel PM and other pollution from marine diesel engines can also lead to aggravation of respiratory and cardiovascular disease, increased asthma, coughing, wheezing, difficulty breathing, chronic bronchitis, decreased lung function, increased allergenicity and premature death.

13. In addition to public health and welfare concerns, emissions from large marine diesel engines also harm the environment by degrading visibility, contributing to haze, acid rain, and eutrophication of water bodies, and by reducing crop yields and productivity of forest ecosystems. Particulate matter also causes soiling and erosion damage to culturally important objects, promotes and accelerates the corrosion of metals, degrades paints, and deteriorates building materials.

Statutory Context

14. Prior to 1990, the Clean Air Act did not regulate emissions from nonroad engines and vehicles such as locomotives, tractors, and marine vessels. To remedy this, Congress enacted, as part of the 1990 Clean Air Act amendments, section 213 (42 U.S.C. § 7547) (“Nonroad Engines and Vehicles”), which requires EPA to reduce emissions from most types of nonroad engines, including marine engines.

15. In section 213(a)(1), Congress directed the Administrator of EPA to study nonroad engine emissions “to determine if such emissions cause, or significantly contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” 42 U.S.C. § 7547(a)(1). The study was to be completed “within 12 months of November 15, 1990,” *i.e.*, by November 15, 1991. *Id.*

16. Section 213(a)(2) required the Administrator to determine “within 12 months after completion of the study under paragraph (1) [*i.e.*, by no later than November 15, 1992], based upon the results of such study,” whether emissions of carbon monoxide, oxides of nitrogen, and volatile organic compounds from nonroad engines, including marine diesel engines, “are significant contributors to ozone or carbon monoxide concentrations” in areas that do not meet federal air quality standards (“nonattainment areas”). 42 U.S.C. § 7547(a)(2).

17. Finally, section 213(a)(3) required the Administrator, if s/he made an affirmative determination under section 213(a)(2), to “promulgate . . . regulations containing standards applicable to emissions from those classes or categories of new nonroad engines and new nonroad vehicles . . . which in the Administrator’s judgment cause, or contribute to, such air pollution.” 42 U.S.C. § 7547(a)(3). The regulations were to be promulgated “within 12 months after completion of the study under paragraph (1),” *i.e.*, by no later than November 15, 1992. 42 U.S.C. § 7547(a)(3).

History of EPA's Marine Diesel Engine Emissions Rule

18. EPA completed the study required by section 213(a)(1) of the Act in November 1991. U.S. Environmental Protection Agency, *Nonroad Engine and Vehicle Emission Study—Report* (1991).

19. In June 1994, a year and a half past the statutory deadline, EPA made the determination required by section 213(a)(2) of the Act that emissions of carbon monoxide, oxides of nitrogen, and volatile organic compounds from, among other sources, Category 3 marine diesel engines are “significant contributors” to ozone and carbon monoxide concentrations in nonattainment areas. 59 Fed. Reg. 31306, 31307 (June 17, 1994).

20. In December 1999, seven years after the statutory deadline, EPA promulgated regulations setting standards applicable to emissions from smaller marine diesel engines, but explicitly excluded Category 3 engines and all engines on foreign-flagged vessels. 64 Fed. Reg. 73300 (Dec. 29, 1999).

21. In February 2000, Bluewater Network (at that time a Project within Earth Island Institute but now the Bluewater Team of Friends of the Earth), challenged this rule and EPA's failure to promulgate regulations containing standards applicable to emissions of NO_x from Category 3 marine engines. *Bluewater Network v. EPA*, No. 00-1065 (D.C. Cir., petition for review filed February 24, 2000). The case was settled when EPA agreed to publish, by January 31, 2003, a final rule under section 213(a)(3) containing NO_x emission standards for new Category 3 marine diesel engines, and to consider whether Category 3 engines installed on foreign-flagged vessels should also be subject to such emission standards while in U.S. territorial waters.

22. EPA published the new rule on February 28, 2003, more than ten years after the statutory deadline. 68 Fed. Reg. 9746 (Feb. 28, 2003) (the “2003 Rule”). The 2003 Rule

adopted a “two-tier” approach for setting emissions standards for Category 3 marine diesel engines. “Tier 1” standards codified NOx emissions standards set forth by the International Marine Organization in Annex VI to the International Convention on the Prevention of Pollution from Ships, as Modified by the Protocol of 1978 Relating Thereto (MARPOL Annex VI). However, EPA postponed the setting of more stringent and comprehensive “Tier 2” standards for NOx, SOx, diesel PM, and other pollutants to a future rulemaking, which EPA committed to complete no later than April 27, 2007. EPA also committed to consider in that future rulemaking the application of the new Tier 2 standards to Category 3 engines on foreign-flagged vessels in U.S. waters. EPA’s commitment to take action by April 27, 2007 was codified at 40 C.F.R. § 94.8(a)(2)(ii).

23. On April 23, 2003, Bluewater Network petitioned the D.C. Circuit Court of Appeals for review of the 2003 Rule, claiming that EPA had violated sec. 213(a)(3) of the Act and had acted arbitrarily and capriciously in failing to adopt meaningful emission standards for new Category 3 marine diesel engines and in failing to regulate emissions from engines on foreign-flagged vessels. *See Bluewater Network v. EPA*, 372 F.3d 404 (D.C. Cir. 2004). Without reaching the merits of Bluewater Network’s arguments, the court upheld the 2003 Rule, relying in part upon EPA’s commitment to publish a new final rule for Category 3 marine engines by April 27, 2007. *Id.*

24. EPA failed to promulgate a new final rule for Category 3 marine engines on April 27, 2007. Instead, on that date EPA issued a proposed rule purporting to extend the deadline for issuing the required emissions standards until December 17, 2009. 72 Fed. Reg. 20977 (April 27, 2007).

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF Violations of Clean Air Act Section 213(a)(3)

25. Plaintiff re-alleges, as if fully set forth herein, each and every allegation contained in the preceding paragraphs.

26. As alleged above, section 213(a)(3) of the Clean Air Act requires that the Administrator “shall . . . promulgate . . . regulations containing standards applicable to emissions from those classes or categories of new nonroad engines and new nonroad vehicles . . . which in the Administrator’s judgment cause, or contribute to, such air pollution.” 42 U.S.C. § 7547(a)(3). The regulations were to be promulgated by no later than November 15, 1992. EPA’s failure to meet this nondiscretionary deadline violated and continues to violate section 213(a)(3) of the Act, 42 U.S.C. § 7547(a)(3).

27. Alternatively, EPA’s commitment in the 2003 Rule, as codified at 40 C.F.R. § 94.8(a)(2)(ii), created a mandatory deadline of April 27, 2007, by which EPA must promulgate regulations containing standards applicable to emissions from new Category 3 marine diesel engines as required by section 213(a)(3). EPA’s failure to meet this nondiscretionary deadline violated and continues to violate section 213(a)(3) of the Act, 42 U.S.C. § 7547(a)(3), and 40 C.F.R. § 94.8(a)(2)(ii).

SECOND CLAIM FOR RELIEF Violation of Administrative Procedure Act

28. Plaintiff re-alleges, as if fully set forth herein, each and every allegation contained in the preceding paragraphs.

29. Defendant EPA’s failure to promulgate regulations containing standards applicable to emissions from Category 3 marine diesel engines as required by section 213(a) of the Clean Air Act, is a nondiscretionary agency action unlawfully withheld. 5 U.S.C. § 706(1).

Defendant's continuing failure to promulgate such regulations is arbitrary, capricious, an abuse of discretion, and not in accordance with law, contrary to the APA, 5 U.S.C. § 706(2).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests that this Court:

A. Declare that EPA is in violation of its nondiscretionary duty, pursuant to section 213(a)(3) of the Act, 42 U.S.C. § 7547(a)(3), to promulgate regulations containing standards applicable to emissions from new Category 3 marine diesel engines, including engines on foreign-flagged vessels that enter United States ports, by November 15, 1992.

B. Alternatively, declare that EPA is in violation of its nondiscretionary duty, pursuant to section 213(a)(3) of the Act, 42 U.S.C. § 7547(a)(3), and its commitment in the 2003 Rule, as codified at 40 C.F.R. § 94.8(a)(2)(ii), to promulgate regulations containing standards applicable to emissions from new Category 3 marine diesel engines, including engines on foreign-flagged vessels that enter United States ports, by April 27, 2007.

C. Enjoin EPA from further delaying compliance with its nondiscretionary duty to promulgate regulations containing standards applicable to emissions from new Category 3 marine diesel engines, including engines on foreign-flagged vessels that enter United States ports, by extending the regulatory deadline to December 17, 2009 or otherwise.

D. Direct EPA within 30 days after entry of this Court's judgment to promulgate proposed regulations containing standards applicable to emissions from new Category 3 marine diesel engines, including engines on foreign-flagged vessels that enter United States ports, and to publish final regulations no later than 60 days thereafter.

E. Award plaintiff its costs of litigation, including reasonable attorney and expert witness fees, pursuant to 42 U.S.C. § 7604(d).

F. Grant plaintiff such further and additional relief as the Court may deem just and proper.

Respectfully submitted,

DATED: September ____, 2007

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DATED: September ____, 2007

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