
Case No. 07-9546

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ARIZONA PUBLIC SERVICE COMPANY,
Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION
AGENCY,
Respondent, and

SIERRA CLUB, DINÉ CARE, DINÉ FOR
THE C-AQUIFER, and SAN JUAN
CITIZENS ALLIANCE,
Intervenors/Respondents.

An Original Action in the Court of Appeals, challenging
a Federal Rule found at 72 Fed. Reg. 25,698 (May 7, 2007)

**BRIEF OF INTERVENORS
SIERRA CLUB ET AL. (PROOF COPY)**

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CORPORATE DISCLOSURE STATEMENT

The intervenors are non-profit corporations and have no parent companies, subsidiaries or affiliates that have issued shares to the public.

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STATEMENT OF RELATED CASES

This case is related to Sierra Club et al. v. U.S. EPA, Tenth Cir. No. 07-9547, which the Court has already consolidated with this case for procedural purposes in its order of August 10, 2007.

STATEMENT OF ADOPTION BY REFERENCE

Intervenors-respondents Sierra Club et al. (“Conservation Groups”) hereby adopt by reference the portions of the brief of the federal respondent United States Environmental Protection Agency (“EPA”) addressed to the petition and brief of petitioner Arizona Public Service Company (“APS”). See Fed. R. App. P. 28(i). The Conservation Groups supplement EPA’s brief as follows.

ARGUMENT

I. The Quality of the Air Surrounding the Four Corners Power Plant is Not “Excellent,” and Needs Improvement

APS refers throughout its brief to “the excellent state of air quality in the region.” See, e.g., APS Brf. at 22. However, that statement is contradicted by the record, which shows that there are serious health and visibility related air quality problems in the Four Corners region. See Opening Brf. of Conservation Groups in 07-9547 at 3-14 (citations omitted) (discussing record evidence of air quality problems in the region); id. at 17-20 (discussing how the members of the Conservation Groups suffer from local air quality).

In particular, asthma is a grave problem in the region, which is caused by ground-level ozone, which in turn is caused largely by oxides

of nitrogen (NOx) emissions. Id. at 3-8. The Four Corners Power Plant emits the greatest amount of NOx of any power plant in the country. Id. at 4. The public, including members of the Conservation Groups, are greatly impacted by these asthma-causing emissions. Id. at 11-14.

APS assert that “ambient concentrations of NOx . . . would have to increase several fold to violate air quality standards.” APS Brf. at 5, citing [JA __]. However, that cited reference refers to the annual mean concentration of NOx in 2005. E-45 at 23 [JA __]. When the 8-hour concentration for ozone (O₃) is examined, the most relevant standard for assessing the asthma-inducing impacts of NOx emissions, the record shows that the region is barely within the current federal standard, a standard that EPA’s own study group has acknowledged is inadequate to protect human health, and which California has already lowered below the levels found in the Four Corners region, and which EPA has proposed to lower in acknowledgment of this scientific consensus. Id.; Opening Brf. of Conservation Groups in 07-9547 at 4-6.

Mercury pollution is another serious problem in the region, and while its impacts are not as immediately felt as NOx, its long-term toxic effects may be even worse. Id. at 8. Mesa Verde National Park,

forty miles from the Four Corners Power Plant, “recorded the third-highest concentration [of mercury] in the country.” Id. at 8, quoting E-39 at 14 [JA_].

Further, visibility impairment is a major problem in the Four Corners, especially in the region’s National Parks, which is caused in part by particulates and sulphur dioxide emissions from the Four Corners Power Plant. Id. at 9-13.

Accordingly, APS’s statement that the local air quality is “excellent” is contradicted by the record, and can not be accepted.

II. Existing Technology-Based Standards Do Not Prevent More Stringent Air Quality-Based Standards

EPA’s point regarding start-up and shut-down exceedances (EPA Brf. at 52), that the air quality-based requirements of a federal implementation plan (“FIP”) are not limited by the state of technology-based standards, applies with equal force to APS’s argument regarding the 20 percent opacity limit. See APS Brf. at 27-28; Donald T. Hornstein, Lessons from Federal Pesticide Regulation on the Paradigms and Politics of Environmental Law Reform, 10 Yale J. on Reg. 369, 374 n.10 (1993) (discussing differences in technology-based

and air quality-based requirements of the Clean Air Act).

III. A Date Certain Should Be Set for EPA to Act on the Remand of the Fugitive Dust Limitation

EPA has moved to Court to grant it a voluntary remand regarding the FIP's 20 percent opacity limit on fugitive dust emissions. EPA Brf. at 53. While the Conservation Groups do not believe they can defend EPA's explanation for that limitation since the agency itself is not willing to defend it, they do believe that the Court should order the agency to address this issue on remand within a time certain and not simply allow the EPA to do nothing as the requested remand would allow.

“Fugitive dust means a particulate matter emission made airborne by forces of wind, mechanical disturbance of surfaces, or both. Unpaved roads, construction sites, and tilled land are examples of sources of fugitive dust.” 40 C.F.R. § 49.123(a). Fugitive dust emissions are a significant problem for coal-fired power plants, both during storage and transportation of the coal before combustion and in dealing with combustion waste. The EPA's tribal clean air rules “limit[] the amount of fugitive particulate matter that may be emitted from certain

air pollution sources operating within [an] Indian reservation to control ground-level concentrations of particulate matter.” 40 C.F.R. § 49.126(a). Power plants are not among the list of sources exempted from the tribal fugitive dust rule. 40 C.F.R. § 49.126(c).

The typical fugitive dust limitation imposed in an implementation plan is stated in terms of a 20 percent opacity limit. See, e.g., 69 Fed. Reg. 30,006, 30,019 (May 26, 2004) (EPA approval of a State Implementation Plan in California: “The applicable standard in Regulation VIII for visible fugitive dust is 20% opacity.”). Accordingly, a 20 percent opacity limit as contained in the Four Corners Power Plant FIP is normal, and the air quality experts within EPA apparently thought a fugitive dust limitation was required here to protect air quality.

The residents of the Four Corners should not be punished in the long term with dirty air simply because those in the EPA who wrote the rule did not do a good enough job of explaining why the limitation is necessary. Ironically, had the proposed rule not contained a fugitive dust limitation, the Conservation Groups would have likely commented that the rule needed one, which might have produced a better-

explained fugitive dust rule.

Accordingly, EPA should be required to revisit this issue and issue a new decision within a time certain, perhaps six months. See 40 C.F.R. § 49.11(a) (EPA “[s]hall promulgate without reasonable delay such Federal implementation plan provisions as are necessary or appropriate to protect air quality”) (emphasis added). Or, in the event the Court rules in favor of the Conservation Groups’ petition for review in 07-9547, EPA could be ordered to revisit this issue when it issues a proper FIP as requested by the Conservation Groups. But the issue should not be remanded without any required action by EPA.

CONCLUSION AND REQUESTED RELIEF

For the reasons stated above and in EPA’s brief, the Court should uphold EPA’s FIP for the Four Corners Power Plant vis a vis the challenges to it presented by APS in its petition for review, except for the fugitive dust limitation, regarding which the Court should set a deadline for action by EPA on remand.

Respectfully submitted December 17, 2007.

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS,
AND TYPE STYLE REQUIREMENTS**

This brief complies with the type-volume limitation the Court's order of August 10, 2007, because it contains 1,126 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using WordPerfect 10 in 14-point Century Schoolbook font.

/s/Matt Kenna
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CERTIFICATE OF DIGITAL SUBMISSION

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CERTIFICATE OF SERVICE

I certify that on December 17, 2007, I emailed a copy of this proof brief, and mailed two copies of the brief, to the following counsel of record:

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