

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

FILED
U.S. DISTRICT COURT
INDIANAPOLIS DIVISION
08 APR -3 PM 3:07

SOUTHERN DISTRICT
OF INDIANA
LAURA A. BRIGGS
CLERK

SIERRA CLUB,
85 Second Street, 2nd Floor
San Francisco, CA 94105,

Plaintiff,

v.

DUKE ENERGY INDIANA, INC.
1000 E. Main Street
Plainfield, IN 46168

CINERGY CORP.,
139 East Fourth Street
Cincinnati, OH 45202

CINERGY PSI, INC.
1000 E. Main Street
Plainfield, IN 46168

PSI ENERGY, INC.,
1000 E. Main Street
Plainfield, IN 46168

CINERGY POWER GENERATION
SERVICES, LLC
139 East Fourth Street
Cincinnati, OH 45202

1 : 08 -cv- 0437 -SEB -TAB

Case No. _____

Cause: 893 (Environmental)

Defendants.

Plaintiff, Sierra Club, through the undersigned attorneys, alleges as follows:

NATURE OF THE ACTION

1. This is a civil action brought against Duke Energy Indiana, Inc. ("Duke"),
Cinergy Corp. ("Cinergy"), Cinergy PSI, Inc. ("CPSI"), PSI Energy, Inc. ("PSI") and

Cinergy Power Generation Services, LLC ("CPGS") (collectively, the "Defendants") pursuant to Section 304 of the Clean Air Act ("the Act"), 42 U.S.C. § 7604, for declaratory and injunctive relief and the assessment of civil penalties for violations of the Prevention of Significant Deterioration ("PSD") provisions of the Act, 42 U.S.C. §§ 7470-92.

2. On numerous occasions, Defendants modified and thereafter operated their coal-fired and oil-fired electric generating units at the Edwardsport Generating Station in Knox County, Indiana, without first obtaining appropriate permits authorizing this construction, without meeting emission limits that are "best available control technology," and without installing appropriate technology to control emissions of nitrogen oxides, sulfur dioxide, particulate matter, sulfuric acid mist, and other pollutants, as required by the Act and implementing regulations.

3. As a result of the Defendants' operation of the Edwardsport Generating Station following these unlawful modifications, and in the absence of appropriate controls, unlawful amounts of various pollutants have been, and continue to be, released into the atmosphere, aggravating air pollution locally and far downwind from these plants.

4. An order from this Court directing Defendants to obtain the required permits, which necessitate compliance with best available control technology limits, installation of modern pollution controls and a demonstration to the appropriate regulatory agencies and the public that emissions from the facility will not result in

unlawful amounts of air pollution, will improve air quality for millions of Americans, including Sierra Club's member. It will also reduce illness, protect lakes and streams from further degradation due to the fallout from acid rain and mercury deposition.

5. Sulfur dioxide, nitrogen oxides, particulate matter, mercury, sulfuric acid mist, carbon dioxide, and other pollutants, when emitted into the air, have substantial adverse environmental and health impacts.

6. Sulfur dioxide ("SO₂") interacts in the atmosphere to form sulfate aerosols, which can be inhaled, cause sickness and mortality from lung and heart disorders, including asthma, bronchitis, and heart attacks.

7. Nitrogen oxides ("NO_x") have adverse effects on human health, human welfare, and the environment. NO_x forms ground level ozone, or smog, which is harmful to human health and the environment. Ozone can cause temporary and permanent damage to human lungs, decrease lung capacity, and increased hospital visits. These effects impact children and the elderly most significantly. Ozone also causes significant damage to vegetation.

8. SO₂ and NO_x also form acid rain. Acid rain turns lakes and streams acidic, rendering them uninhabitable by aquatic life as well as harming plants, and causing decay of buildings and monuments.

9. Particulate matter ("PM") is the term for solid or liquid particles found in the air. Smaller particulate matter of a diameter of 10 micrometers or less is referred to as PM₁₀. Power plants, including the Edwardsport Generating Station, are major

sources of PM. PM causes premature death, damage to lungs, cancer, and respiratory disease, especially among the elderly, children, and people with chronic lung disease or asthma.

10. If Defendants comply with the Clean Air Act, including the Prevention of Significant Deterioration program, 42 U.S.C. §§ 7470-7479, the Edwardsport Generating Station will decrease its annual air pollution emissions by thousands of tons.

PARTIES

11. Plaintiff Sierra Club is an incorporated, not-for-profit organization that has its headquarters at 85 Second Street, 2nd Floor, San Francisco, California. Sierra Club has over 1.3 million members and supporters, including members who live, work, and recreate in the area that will be immediately impacted by pollution emissions from the Edwardsport Generating Station. Sierra Club's purpose includes practicing and promoting the responsible use of earth's ecosystems and resources, and protecting and restoring the quality of the natural and human environment. Its mission includes reducing and eliminating pollution from the mining, combustion, and waste disposal of coal, which negatively affects Sierra Club's members as well as other members of the public. Sierra Club's Indiana Chapter (Hoosier Chapter) has more than 7,000 members, and its mailing address is 1915 W. 8th Street, Suite D, Indianapolis, Indiana 46202. The health and welfare of Sierra Club's members, as well as their enjoyment of outdoor activities, is harmed by air pollution from the Edwardsport Generating Station.

12. Defendant PSI is an Indiana corporation that owns or operates, or at relevant times hereto owned or operated, the Edwardsport Generating Station. Defendant PSI is a wholly-owned subsidiary of Defendant Cinergy and Defendant Duke Energy Indiana.

13. Defendant Duke Energy Indiana is an Indiana corporation that owns or operates, or at relevant times hereto owned or operated, the Edwardsport Generating Station.

14. Defendant Cinergy was created on October 24, 1994, from the combination of Defendant PSI and the Cincinnati Gas & Electric Company. Cinergy is a Delaware corporation with its principal place of business in Cincinnati, Ohio. Cinergy owns or operates, or at relevant times hereto owned or operated, the Edwardsport Generating Station.

15. Defendant Cinergy Power Generation Services, LLC, at relevant times hereto, was an unregulated subsidiary of Defendant Cinergy, which provided electric production-related construction, operation, and maintenance services regarding the Edwardsport Generating Station and, therefore, was an owner or operator of the Edwardsport Generating Station.

16. Each of the Defendants is a "person" within the meaning of Sections 302(e) and 304(a)(3) of the Act, 42 U.S.C. §§ 7602(e), 7604(a)(3).

JURISDICTION AND VENUE

17. This Court has subject matter jurisdiction over the claims set forth in this complaint pursuant to 42 U.S.C. § 7604(a), 28 U.S.C. § 1331, 1355, 2201 and 2202. The relief requested by the Plaintiff is authorized by statute in 28 U.S.C. §§ 2201 and 2202, and 42 U.S.C. §§ 7413, 7604.

18. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to the claims herein occurred in the Southern District of Indiana and pursuant to 42 U.S.C. § 7604(c)(1) because this action is for violations at the Edwardsport Generating Station, which is located within the Southern District of Indiana.

NOTICE

19. No prior notice is required for the claims set forth herein.

20. Sierra Club is simultaneously providing its notice of intent to sue for additional violations by Defendants of other provisions of the Clean Air Act and Indiana State Implementation Plan and will move to amend this complaint, or file an additional action, as necessary, to raise those claims at the expiration of the notice period set forth in 42 U.S.C. § 7604(b).

BACKGROUND

21. The Clean Air Act is designed to protect and enhance the quality of the Nation's air so as to promote the public health and welfare and the productive capacity of its population. 42 U.S.C. § 7401(b)(1).

22. Section 108(a) of the Act, 42 U.S.C. § 7408(a), requires the Environmental Protection Agency ("EPA") to identify and prepare air quality criteria for each air pollutant which may endanger public health and welfare when emitted, and which results from numerous or diverse mobile or stationary sources. Section 109 of the Act, 42 U.S.C. § 7409, requires the Administrator to promulgate National Ambient Air Quality Standards ("NAAQS"), which are upper limits on air pollution, to protect public health and welfare.

23. Under Section 107(d) of the Act, 42 U.S.C. § 7407(d), each state is required to designate those areas within its boundaries where the air quality meets or exceeds the NAAQS for each pollutant. An area that meets the NAAQS for a particular pollutant is termed an "attainment" area, whereas area that does not meet the NAAQS is a "nonattainment" area. Areas for which there is insufficient information to determine compliance with NAAQS are "unclassifiable."

24. At times relevant to this Complaint, the Edwardsport Generating Station was located in Knox County, Indiana, which was classified as either attainment or unclassifiable for all pollutants.

25. Congress enacted a Prevention of Significant Deterioration program in Part C of Title I of the Act, 42 U.S.C. §§ 7470-7492, which applies in areas designated as attainment or unclassifiable. The PSD program intends to assure that economic growth will occur in a manner consistent with the preservation of existing clean air resources, to limit the degree to which pollution can cause air quality deterioration in areas attaining

NAAQS, and to assure that any decision to permit increased air pollution is made only after careful evaluation of all the consequences of such a decision and after public participation in the decision making process.

26. Pursuant to sections 110(a)(2)(C) and 161 of the Act, 42 U.S.C. §§ 7410(a)(2)(C) and 7471, Indiana is required to adopt a state implementation plan ("SIP") that contains emissions limitations and such other measures as may be necessary to comply with the PSD program. Indiana must promulgate its own PSD regulations, at least as stringent as those set forth at 40 C.F.R. § 51.166. EPA must either approve Indiana's state regulations containing a sufficient PSD program, or incorporate the federal PSD regulations, 40 C.F.R. § 52.21, into the Indiana SIP. 40 C.F.R. § 52.21(a).

27. On August 7, 1980, EPA disapproved Indiana's proposed PSD program, 40 C.F.R. § 52.793, 45 Fed. Reg. 52676, 52741 (August 7, 1980), and then incorporated by reference the PSD regulations of 40 C.F.R. § 52.21(b) through (w) into the Indiana SIP. 46 Fed. Reg. 9580, 9583 (January 19, 1981). At all relevant times, the federal PSD program at 40 C.F.R. § 52.21 applied to the projects at issue in this case.

28. On June 18, 2007, EPA approved a revision to the Indiana State Implementation Plan to incorporate a PSD program contained in the Indiana regulations. 72 Fed. Reg. 33,395 (June 18, 2007). This approval was prospective, and applies to changes to the Edwardsport Generating Station occurring after June 18, 2007.

29. As set forth at 42 U.S.C. § 7475(a) and 40 C.F.R. § 52.21, any major stationary source in an attainment or unclassifiable area that intends to construct a major modification must first obtain a PSD permit.

30. Under the PSD program, a "major stationary source" is defined to include fossil fuel-fired steam electric plants of more than 250 million British thermal units (Btu) per hour heat input which emit or have the potential to emit one hundred tons per year or more of any regulated air pollutant. 40 C.F.R. § 52.21(b)(1)(i)(a).

31. The Edwardsport Generating Station is, and at all relevant times was, a "major stationary source."

32. "Major modification" is defined at 40 C.F.R. § 52.21(b)(2)(i) as "any physical change or change in the method of operation of a major stationary source that would result in a significant net emission increase of any pollutant subject to regulation under the Act."

33. "Net emissions increase" means "the amount by which the sum of the following exceeds zero: (a) [a]ny increase in actual emissions [as defined by 40 C.F.R. § 52.21(b)(21)] from a particular physical change or change in method of operation at a stationary source; and (b) [a]ny other increases and decreases in actual emissions [as defined by 40 C.F.R. § 52.21(b)(21)] at the source that are contemporaneous with the particular change and are otherwise creditable." 40 C.F.R. § 52.21(b)(3)(i).

34. A "significant" net emissions increase means an increase in the rate of emissions that would equal or exceed any of the following rates for the following

pollutants: 40 tons per year of NO_x; 40 tons per year of SO₂; 7 tons per year of sulfuric acid mist, and 25 tons per year of PM. 40 C.F.R. § 52.21(b)(23)(i). For pollutants subject to regulation under the Act that are not set forth in 40 C.F.R. § 52.21(b)(23)(i), any increase is significant.

35. As set forth at 42 U.S.C. § 7475(a) and 40 C.F.R. § 52.21(j), as preconditions for issuing a PSD permit, the source must be subject to best available control technology (“BACT”) emission limits, as defined in 40 C.F.R. § 52.21(b)(12) and 42 U.S.C. § 7479(3), the source must submit an analysis of ambient air quality in the area, 40 C.F.R. § 52.21(m), and the source must demonstrate that the project will not cause or contribute to air pollution that is in violation of any national ambient air quality standard or the maximum allowable increase in emissions of that pollutant. 40 C.F.R. § 52.21(k).

36. In addition, the owner or operator of a proposed source or modification must submit all information necessary to perform any analysis or make any determination required under 40 C.F.R. § 52.21(n).

CITIZEN SUIT ENFORCEMENT PROVISIONS

37. Section 304(a)(3) of the Act, 42 U.S.C. § 7604(a)(3), provides that “any person may commence a civil action on his own behalf... against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under Part C of subchapter I of this [the Clean Air Act] (relating to significant deterioration of air quality)....”

38. Pursuant to Sections 113 and 304, 42 U.S.C. §§ 7413, 7604, the Court may award civil penalties up to \$25,000 per day of violation for violations occurring before January 30, 1997, up to \$27,500 per day for each such violation occurring between January 30, 1997 and March 15, 2004, and up to \$32,500 for each such violation occurring after March 15, 2004, injunctive relief, and Sierra Club's cost of bringing this action, including reasonable attorneys fees.

GENERAL ALLEGATIONS

39. Defendants, individually or together, owned or operated the Edwardsport Generating Station during relevant times hereto.

40. At all relevant times, the Edwardsport Generating Station was a "major stationary source," within the meaning of the Act for PSD.

FIRST CLAIM FOR RELIEF

(Commencing Construction of a Major Modification Without A PSD Permit)

41. Paragraphs 1 through 40 are realleged and incorporated herein by reference.

42. At various times, Defendants commenced construction of one or more major modifications, affecting the boilers and associated equipment at the Edwardsport Generating Station. Each such major modification resulted in significant net emission increase, as defined by 40 C.F.R. §52.21(b)(3)(i), of one or more pollutants.

43. Defendants continue to violate Section 165(a) of the Act, 42 U.S.C. § 7475(a), and the PSD regulations set forth in 40 C.F.R. §52.21, by, *inter alia*, their

continuing failure to obtain the required PSD permit for major modifications to the Edwardsport Generating Station. In addition, Defendants are in continuing violation of requirements to comply with best available control technology, demonstrate that construction or modification will not cause or contribute to air pollution in violation of any national ambient air quality standard or any specified incremental amount, and perform an analysis of the ambient air quality in the area, as required by 40 C.F.R. § 52.21(m).

44. Based upon the foregoing, Defendants have violated and continue to violate Section 165(a) of the Act, 42 U.S.C. §7475(a), and 40 C.F.R. §52.21, as incorporated into the Indiana SIP. Unless restrained by an order of this Court, these and similar violations of the PSD provisions of the Act will continue at the Edwardsport Generating Station.

45. As provided in Sections 113 and 304 of the Act, 42 U.S.C. §§ 7413, 7604, the PSD violations set forth above subject Defendants to injunctive relief and civil penalties.

SECOND CLAIM FOR RELIEF

(Declaratory Relief)

46. Paragraphs 1 through 45 are realleged and incorporated herein by reference.

47. Pursuant to 28 U.S.C. §§ 2201, 2202, Sierra Club is entitled to a declaration that Defendants violated the Clean Air Act by commencing one or more major modifications of the Edwardsport Generating Station without a PSD permit, that the

Edwardsport Generating Station is a modified source for purposes of the Clean Air Act PSD program, and such further necessary or proper relief as may be granted by the Court.

PRAYER FOR RELIEF

WHEREFORE, based upon the foregoing, the Sierra Club requests that this Court:

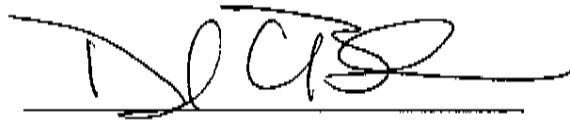
1. Permanently enjoin Defendants from operating the Edwardsport Generating Station, including the construction of future modifications, except in accordance with the Clean Air Act and any applicable regulatory requirements;
2. Order the Defendants to apply for permits that are in conformity with the requirements of the PSD provisions of the Clean Air Act for each modification which Defendants commenced without first obtaining a PSD permit;
3. Order the Defendants to remedy their past violations by, *inter alia*, requiring the Defendants to install, as appropriate, the necessary pollution controls to meet best available control technology emission limits;
4. Order Defendants to take other appropriate actions to remedy, mitigate, and offset the harm to public health and the environment caused by the violations of the Clean Air Act alleged, above;
5. Order Defendants to conduct audits of their operations to determine if any additional modifications have occurred which would require them to meet the

requirements of PSD and to report the results of these audits to Sierra Club and the United States Environmental Protection Agency;

6. Order Defendants to pay civil penalties, including a beneficial mitigation project pursuant to 42 U.S.C. § 7604(g)(2);
7. Order Defendants to pay Sierra Club's costs of this case, including reasonable attorneys fees;
8. Declare that the Defendants were required to obtain a PSD permit for changes to the Edwardsport Generating Station;
9. Declare that that the Edwardsport Generating Station is a modified source for purposes of the Clean Air Act PSD program; and
10. Any other relief that the Court finds just and equitable.

Respectfully submitted

GARVEY, MCNEIL & MCGILLIVRAY, S.C.

A handwritten signature in black ink, appearing to read 'D. C. Bender', written over a horizontal line.

David C. Bender
634 West Main Street, Suite 101
Madison, WI 53703
Tel. 608.256.1003
Fax 608.256.0933
Email: bender@gmmattorneys.com