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FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

SEP 19 2012
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SUE BEITIA, CLERK

Attorney for Plaintiffs
PRESERVE PEPE'EKEO HEALTH
AND ENVIRONMENT

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

PRESERVE PEPE'EKEO HEALTH AND
ENVIRONMENT, a Hawai'i
nonprofit unincorporated
association

Plaintiff,

vs.

LISA P. JACKSON, UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY Administrator,

Defendant.

) COMPLAINT FOR INJUNCTIVE AND
) DECLARATORY RELIEF; EXHIBIT 1

CV12 00520 RLP

JURISDICTION, VENUE AND NOTICE

1. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question) and 42 U.S.C. § 7604(a)(2) (action arising under the Clean Air Act).

2. On November 7, 2011, Plaintiff PRESERVE PEPE'EKEO HEALTH AND ENVIRONMENT ("PPHE") served Defendant LISA P. JACKSON

with notice of their intent to file suit for violations of section 505 of the Clean Air Act ("CAA"), 42 U.S.C. § 7661d, thus providing Defendant with at least sixty (60) days of written notice of the violation alleged herein, as required by the CAA (42 U.S.C. § 7604(b)). (See Notice Letter, Attached as Exhibit 1). More than sixty days have elapsed since notice was served and the violations complained of are continuing.

3. Venue lies in the District of Hawai'i pursuant to 28 U.S.C. § 1391(e) since a substantial part of the events or omissions giving rise to the claim occurred in Hawaii.

NATURE OF ACTION

4. This is an action brought under the "Citizens' Suit" provisions of the CAA to compel Defendant LISA P. JACKSON to take a non-discretionary action mandated by the Act. Thus this court has subject matter jurisdiction over the claim set forth in this complaint pursuant to 42 U.S.C. § 7604(a)(2), and has authority to award attorney's fees pursuant to 42 U.S.C. § 7604(d). This case does not concern federal taxes, is not a proceeding under 11 U.S.C. §§ 505 or 1146, and does not involve the Tariff Act of 1930. Thus this Court has authority to order the declaratory relief requested under 28 U.S.C. § 2201. If the Court orders declaratory relief, 28 U.S.C. § 2202 authorizes this Court to issue injunctive relief. Plaintiff seeks a

declaratory judgment and injunction compelling the Administrator of the Environmental Protection Agency ("EPA") to undertake final action to grant or deny the Petition filed by PPHE on August 26, 2011. The petition seeks EPA's final action objecting to the Title V operating permit ("Title V permit") issued by the Environmental Management Division of the Clean Air Branch ("CAB"), Hawai'i Department of Health ("DOH"), for the Hu Honua Bioenergy Facility proposed in Pepe'ekeo Hawai'i. Defendant has failed to comply with her non-discretionary mandatory duty to grant or deny such petition with 60 days after the petition is filed (CAA, 42 U.S.C. § 7661d (b)(2)).

PARTIES

5. Plaintiff Preserve Pepe'ekeo Health and Environment is a Hawai'i unincorporated association recognized under Hawai'i law (HRS Chapt. 429) with principal offices in Pepe'ekeo, Hawai'i. PPHE is dedicated to protecting and enhancing air quality in Hawai'i. PPHE is working to promote public health and welfare by achieving clean air on the Big Island of Hawai'i. PPHE promotes clean industries and technologies, and efforts to reduce or eliminate polluting methods of energy generation, particularly at the Hu Honua Bioenergy Facility near the hamlet of Pepe'ekeo on the Hamakua Coast of Hawai'i's Big Island.

6. PPHE has members, supporters and directors who live, work, and recreate in the immediate vicinity of the Hu Honua Bioenergy Facility. PPHE's members, supporters and directors will be adversely affected by the excessive emissions of air pollution approved by the operations at the Hu Honua facility to which PPHE objected in its Petition, by having to breathe unhealthful air and suffer associated economic harm to business, as a consequence of inadequate Title V Permit conditions that fail to ensure compliance with the CAA, Federal Operating Permit regulations at 40 Code of Federal Regulations Part 70, the Hawai'i State Implementation Plan ("SIP"), State permitting requirements and other applicable requirements. PPHE's members, supporters and directors, and their children, experience asthma and/or other respiratory ailments whose severity is exacerbated during periods of excessive air pollution. PPHE's members, supporters and directors, and their children alter their daily routines during periods of excessive air pollution, such as reduced physical exercise and recreation, additional and prolonged periods of time indoors, and increased frequency of school absenteeism and missed work days for individuals that are themselves injured or who care for other persons that are injured by the excessive air pollution. Children are generally more susceptible to injury from exposure to air pollution. PPHE's members, supporters and directors live

in Hawai'i to enjoy the quality of outdoor experiences, including clean and healthful air quality.

7. Defendant's failure to take timely final action on PPHE's Petition interferes with the CAA's program requiring all major sources of criteria air pollutants and hazardous air pollutants to have specific, enforceable emissions limitations and to not cause or contribute to excessive air pollution and create unhealthful air quality conditions. Defendant's failure to take timely final action on PPHE's Petition has allowed Hu Honua to commence the necessary steps to construct and bring their facility online even though PPHE raised substantial issues in its Petition to the EPA demonstrating that Hu Honua's Title V Permit conditions fail to ensure compliance with applicable emissions limitations, among other requirements, resulting in harmful air pollution. Therefore, the above-described health and economic interests of PPHE and their respective members and supporters have been and will continue to be adversely affected and irreparably injured by Defendant's failure to comply with the CAA.

8. Defendant LISA P. JACKSON is sued in her official capacity as EPA Administrator and as the person with ultimate authority over and responsibility to respond to PPHE's Petition.

TITLE V OF THE CLEAN AIR ACT AND HAWAI'I'S PERMIT PROGRAM

9. In 1970, Congress enacted the CAA to abate air pollution, enhance air quality, and to protect public health and welfare. 42 U.S.C. § 7401(b). Congress directed EPA to clean up our nation's air quality and required EPA to identify those air pollutants, which endanger public health and welfare. 42 U.S.C. § 7408(a).

10. Title V of the CAA as amended in 1990 requires the states to develop a federally approvable permit program that applies to major sources of air pollution. In response, Hawai'i promulgated Title 11, Chapter 60.1 of the Hawai'i Administrative Rules ("HAR"), establishing that an Air Pollution Control Permit is required prior to construction, reconstructing, modifying or operating a station air pollution source or air pollution control equipment.

11. A permit issued pursuant to Title V of the CAA ("Title V Permit") violates the CAA if it fails to ensure compliance with applicable requirements (42 U.S.C. § 7661c (a), CAA § 504 (a)), including but not limited to: any standard or other requirement under sections 111 and 112 of the Act; any standard or other requirement provided for in the applicable implementation plan; and any standard or other requirement of the regulations promulgated to protect stratospheric ozone under title VI of the Act (40 C.F.R. § 70.2).

12. The Administrator has a nondiscretionary duty to object to permits that fail to meet the minimum requirements of the CAA. If the Administrator does not object to the issuance of a permit, any person may petition the Administrator to take such action. PPHE's Petition to the EPA alleges that Hu Honua Bioenergy's Permit violates the CAA in that it fails to apply and comply with the requirements for a Prevention of Significant Deterioration ("PSD") review contained in HAR Chapter 60.1, that it fails to ensure compliance with best available control technology ("BACT") requirements for CO, that it violates section 112 of the CAA, Hawai'i rules limiting emissions of hazardous air pollutants ("HAPs") as well as the maximum achievable control technology ("MACT") requirements contained in 40 C.F.R. § 63.43. Additionally, the Petition alleges that Hu Honua's permit violates the CAA in failing to provide for monitoring capable of ensuring compliance with emissions limitations for CO and HAPs, and in exempting boiler startup and shutdown emissions from the Permit's boiler emission limits.

13. The Administrator is required to grant or deny Title V Petitions within 60 days after the petition is filed. It has now been nearly a year and the Administrator has yet to act on PPHE's Petition. Respondent and Defendant Administrator has a clear, present non-discretionary duty to act on Plaintiff's Petition.

14. Plaintiff has exhausted its administrative remedies and has no plain, speedy, and adequate remedy in the ordinary course of law. Issuance of a writ is needed to avoid immediate, severe, and irreparable harm to Plaintiff and the residents and visitors to Pepe'ekeo.

FIRST CLAIM FOR RELIEF

(Failure To Take Final Action on PPHE's Title V Petition)

15. Paragraphs 1 through 14 are incorporated herein by reference.

16. To date, Defendant has not granted, denied, or otherwise acted pursuant to section 505 of the CAA (42 U.S.C. § 7661d) on PPHE's Petition filed on August 26, 2011, objecting to the Title V permit issued by the CAB, for the Hu Honua Bioenergy Facility proposed in Pepe'ekeo Hawai'i.

17. Defendant has violated and is in violation of section 505 of the CAA (42 U.S.C. § 7661d) by failing to perform this non-discretionary statutory duty.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

1. Enter a declaratory judgment that Defendant LISA P. JACKSON failed to perform her non-discretionary duty when she failed to take timely final action to approve or disapprove

PPHE's Petition objecting to the Title V permit issued for the Hu Honua Bioenergy Facility in Pepe'ekeo as required by the CAA;

2. Issue a writ of mandamus compelling Defendant to immediately take action to grant or deny the PPHE petition objecting to the Title V permit issued for the Hu Honua Bioenergy Facility in Pepe'ekeo, and publish this action in the Federal Register within 30 days of the Court's ruling;

3. Direct by injunction, pursuant to section 304(a) of the CAA (42 U.S.C. § 7604 (a)), that Defendant take final action to grant or deny PPHE's Petition objecting to the Title V permit issued for the Hu Honua Bioenergy Facility in Pepe'ekeo, and publish this action in the Federal Register within 30 days of the Court's ruling;

4. Retain continuing jurisdiction to review defendant's compliance with all judgments entered herein;

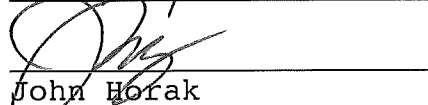
5. Issue such additional judicial determinations and orders that are necessary to effectuate the foregoing requests for relief;

6. Grant to Plaintiffs the costs of litigation, including reasonable attorneys and expert witness' fees pursuant to CAA section 7604 (d); and

7. Provide such other relief as the Court shall deem just and proper.

DATED: Honolulu, Hawaii,

9/17/2012



John Horak
Attorney for Plaintiff
Preserve Pepe'ekeo Health and
Environment