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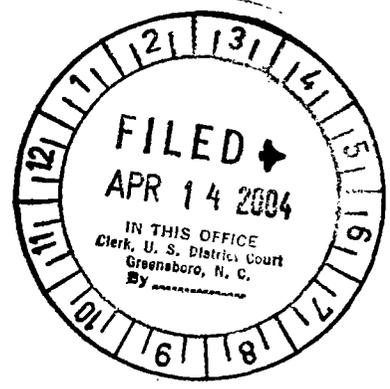
APR 15 2004

BY: KW

THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 and )  
 )  
 ENVIRONMENTAL DEFENSE, ET AL., )  
 )  
 Plaintiff-Intervenors, )  
 )  
 v. )  
 )  
 DUKE ENERGY CORPORATION )  
 )  
 Defendant. )

Civil Action No. 1:00 CV 1262



**ORDER AND FINAL JUDGMENT**

On August 26, 2003, the Court issued a Memorandum Opinion in this action (Docket No. 234) addressing the parties' motions for summary judgment (hereinafter the "Summary Judgment Order"), in which the Court made certain legal determinations to be applied in this case, including the legal standard to be applied in determining whether Defendant Duke Energy Corporation's ("Duke Energy") projects were "routine maintenance, repair, and replacement" and hence not subject to regulation under the Prevention of Significant Deterioration ("PSD") provisions of the Clean Air Act and related regulations, as well as the legal standard for calculating whether Duke Energy's projects caused an increase in annual net emissions triggering PSD. In particular, with regard to the latter issue, the Court determined as a matter of law that, for purposes of determining whether Duke Energy's projects resulted in a "net significant emissions increase" triggering PSD requirements, "post-project emissions must be calculated on an annual basis, measuring emissions in tons per year, and in calculating post-

project emissions levels the hours and conditions of operations must be held constant.

Accordingly, a net emissions increase can result only from an increase in the hourly rate of emissions.” (Docket No. 234 at 48.) The Court deferred ruling on the issue of whether Duke Energy’s projects resulted in an increase in emissions above the baseline rate until trial, but held as a matter of law that “to the extent the projects did not increase the unit’s maximum hourly rate of emissions, however, these projects are not subject to PSD.” (Docket No. 234 at 70.) The Court subsequently considered and denied Plaintiff United States’ Motion for Reconsideration of the Summary Judgment Order. (Docket No. 294.)

Plaintiff United States and Plaintiff-Intervenors Environmental Defense, *et al.* and Duke Energy have submitted a joint stipulation that obviates the need for a trial under the legal standards applicable in this case under the Summary Judgment Order, and that enables the Court to enter an appealable final judgment under those legal standards, thereby saving the parties and the Court the time and expense of a trial. Specifically, the parties have made the following stipulations:

1. Plaintiff and Plaintiff-Intervenors stipulate that their contention that each of the projects at issue in this case resulted in a significant net emissions increase within the meaning of the relevant PSD regulations is based solely on their contention that the projects would have been projected to result in an increased utilization of the units at issue.
2. Plaintiff and Plaintiff-Intervenors stipulate that they do not contend that the projects at issue in this case caused an increase in the maximum hourly rate of emissions at any of Duke Energy’s units.
3. Plaintiff and Plaintiff-Intervenors stipulate to the dismissal, with prejudice, of those Claims for Relief which are not PSD claims (the “Non-PSD Claims”), *i.e.*, the even-numbered Claims for Relief in the Complaint, as incorporated by reference in the Complaint-in- Intervention.

4. Defendant stipulates to the dismissal of its counterclaims in this action, without prejudice to revive such counterclaims in the event of a remand of this case as the result of an appeal. In the event of a remand, Plaintiff and Plaintiff-Intervenors will not oppose Defendant's counterclaims on timeliness or statute of limitations grounds.

5. The Parties stipulate that the Court stay enforcement of Magistrate Judge Eliason's Orders regarding the UARG documents (Docket Nos. 164, 244 and 250) and stay consideration of Duke Energy's Rule 72(a) Objections (Docket No. 252) and UARG's Rule 72(a) Objections (Docket No. 251 and 281) to those orders. Upon entry of such a stay and a final judgment and order pursuant to the Joint Motion for Entry of Final Judgment, Plaintiff shall return the documents that are the subject of those Orders and Objections and any and all copies of these documents to Defendant. Defendant shall retain and preserve these documents.

6. Upon entry of an Order staying enforcement of Magistrate Judge Eliason's Orders regarding the UARG documents (Docket Nos. 164, 244 and 250) and staying consideration of Duke Energy's Rule 72(a) Objections (Docket No. 252) and UARG's Rule 72(a) Objections (Docket No. 251 and 281), Plaintiff and Plaintiff-Intervenors agree to the withdrawal of the documents submitted as Exhibits 166-176 in support of Plaintiff's Motion for Reconsideration (Docket No. 268) and stipulate that these documents and the other documents that are the subject of Duke Energy's Rule 72(a) Objections (Docket No. 252) and UARG's Rule 72(a) Objections (Docket No. 251 and 281) shall not be part of the record in any appeal of the final judgment entered pursuant to the Joint Motion for Entry of Final Judgment. Plaintiff and Plaintiff-Intervenors further stipulate that they shall not refer to these documents and the other documents that are the subject of Duke Energy's Rule 72(a) Objections (Docket No. 252) and UARG's Rule 72(a) Objections (Docket No. 251 and 281) in any of their argument or filings in the course of that appeal.

7. In the event of a remand after appeal of a final judgment entered pursuant to the Joint Motion for Entry of Final Judgment, Plaintiff and Plaintiff-Intervenors reserve the right to seek to lift the stay of enforcement of Magistrate Judge Eliason's Orders regarding the UARG documents (Docket Nos. 164, 244, and 250), and Defendant and UARG reserve the right to seek to lift the stay of consideration of Duke Energy's Rule 72(a) Objections (Docket No. 252) and UARG's Rule 72(a) Objections (Docket No. 251 and 281).

8. With respect to the miscellaneous action pending in the United States District Court for the District of Columbia relating to subpoenas served upon UARG, Plaintiff agrees to withdraw the subpoenas served on UARG in United States v. Duke Energy Corp. (M.D.N.C.). If this case is remanded as the result of an appeal, UARG and Defendant will not oppose the enforcement of new subpoenas as untimely.

9. Defendant stipulates to the withdrawal of Duke Energy's Motion for Sanctions (Docket No. 286) with prejudice, and Duke Energy's Motion to Strike Exhibits 166-176 (Docket No. 282), without prejudice.

10. Plaintiff and Plaintiff-Intervenors reserve the right to appeal the final judgment as to the PSD claims in this action. *i.e.*, the odd-numbered Claims for Relief in the Complaint, as incorporated by reference into the Complaint-in-Intervention. Defendant agrees and stipulates that the final judgment entered in connection with these stipulations is appealable by Plaintiff and Plaintiff-Intervenors as of right pursuant to 28 U.S.C. § 1291 with respect to the PSD claims in this action.

The Stipulations eliminate any need for a trial by this Court to determine any facts relevant to whether Duke Energy's projects triggered PSD. In this case, Plaintiff and Plaintiff-Intervenors (collectively "Plaintiffs") do not contend that any of the projects "increase[d] the unit's maximum hourly rate of emissions." (Docket No. 234 at 70.) Accordingly, under the test set forth by the Court, "these projects are not subject to PSD" as a matter of law (*id.*), and Plaintiffs cannot prevail at trial. Establishing an emissions increase is an essential element of Plaintiffs' PSD claims, and the failure of this element is grounds for granting summary judgment. *McClain v. South Carolina Nat. Bank*, 105 F.3d 898, 901 (4<sup>th</sup> Cir. 1997), *citing Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (if a party cannot prevail on an element of a claim that is essential to that claim, summary judgment on the entire claim is appropriate).

Plaintiffs' stipulation is not equivalent to a voluntary dismissal of the PSD Claims, because Plaintiffs clearly contend that a different legal test is applicable for determining PSD requirements. Specifically, Plaintiffs contend that PSD emissions increases can occur as the result of projects that would increase the projected capacity utilization (hours of operation) of a unit, even if hourly emissions rates are unchanged. The Court has rejected Plaintiffs' interpretation of the PSD emissions test. In light of Plaintiffs' stipulation, there is nothing

currently left for trial, but Plaintiffs have appropriately reserved the right to appeal the resulting dismissal of their PSD Claims.

The even-numbered claims in the Complaint, which are incorporated by reference into the Complaint-in-Intervention, allege that Duke Energy's projects violated the general permitting requirements under the North Carolina or South Carolina State Implementation Plans ("SIPs"). In order to enable the Court to enter an appealable final judgment on all claims in this case, however, Plaintiffs have stipulated to the voluntary dismissal, with prejudice, of these Non-PSD claims.

This leaves the issue of Defendant Duke Energy's counterclaims. Duke Energy's counterclaims are premised on the threatened application of the interpretation of the PSD regulations urged by EPA in this case. The Court has rejected EPA's interpretation of the PSD regulations. Accordingly, Duke Energy has stipulated to the dismissal of these claims, without prejudice to Duke Energy to revive them in the event that they become relevant in a remanded proceeding. Dismissal of these counterclaims as requested by Duke Energy eliminates them as a technical obstacle to finality.

All of the claims in this action have been addressed. This Order constitutes a final judgment entered pursuant to Rule 58(a) of the Federal Rules of Civil Procedure. An appealable final judgment is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978), quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945). In order to be final, a judgment must dispose of all claims as to all parties. *J.D. Pharmaceutical Distribs., Inc. v. Save-On Drugs & Cosmetics Corp.*, 893 F.2d 1201, 1208 (11<sup>th</sup> Cir. 1990).

Plaintiffs have reserved the right to appeal this judgment as to their PSD Claims in this action. While Plaintiffs have dismissed their Non-PSD Claims with prejudice, they have not consented to judgment on their PSD Claims. Rather, they have stipulated to facts that obviate the need for trial under the legal standards for PSD announced by this Court. If Plaintiffs do not appeal, or if this Court's judgment is affirmed, the case will be over. There is clear precedent in this Circuit for this procedural means of achieving finality while preserving the losing party's right to appeal. *Distaff, Inc. v. Springfield Contracting Corp.*, 984 F.2d 108 (4<sup>th</sup> Cir 1993); *ITCO Corp. v. Michelin Tire Corp.*, 722 F.2d 42 (4<sup>th</sup> Cir. 1983). In addition, Duke Energy has stipulated that this final judgment is appealable by Plaintiffs pursuant to 28 U.S.C. § 1291 as of right with respect to the PSD Claims.

There remain four as-yet unresolved motions pending in this matter: Duke Energy's Rule 72(a) Objections (Docket No. 252) relating to documents containing certain UARG communications; UARG's Rule 72(a) Objections (Docket No. 251 and 281) concerning the same documents; Duke Energy's Motion To Strike Exhibits 166-176 (Docket No. 282); and Duke Energy's Motion for Sanctions (Docket No. 286). The Joint Stipulation resolves these matters. The parties and UARG have requested that the Court stay enforcement of the Orders of Magistrate Judge Eliason that were the subject of the Rule 72(a) Objections (Docket Nos. 164, 244 and 250), and stay any further consideration of the Rule 72(a) Objections, without prejudice to seeking enforcement of the Orders or reviving the Objections in the event that the case is remanded after appeal. Plaintiff has agreed to withdraw the documents that are the subject of the Motion To Strike, and has agreed that the disputed UARG documents will not be part of the record on any appeal of this Order. Duke Energy has agreed to withdraw the Motion To Strike,

without prejudice, and Duke Energy has agreed to withdraw the Motion for Sanctions, with prejudice.

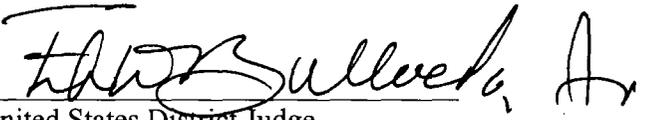
Accordingly, it is hereby ORDERED that:

1. Summary judgment is granted in favor of Defendant Duke Energy on Plaintiff's and Plaintiff-Intervenors' PSD claims in this action. Plaintiffs and Plaintiff-Intervenors have reserved the right to appeal this determination.
2. Plaintiff's and Plaintiff-Intervenors' Non-PSD Claims are hereby voluntarily dismissed, with prejudice. Plaintiff and Plaintiff-Intervenors have not reserved the right to appeal this voluntary dismissal.
3. Defendant Duke Energy's counterclaims are hereby dismissed, without prejudice to their being revived in the event of a remand following an appeal.
4. Enforcement of Magistrate Judge Eliason's Orders regarding certain UARG documents (Docket Nos. 164, 244 and 250) is hereby stayed. Consideration of Duke Energy's Rule 72(a) Objections (Docket No. 252) and UARG's Rule 72(a) Objections (Docket No. 251 and 281) is hereby stayed. In the event of a remand after appeal of this judgment, Plaintiff and Plaintiff-Intervenors may seek to lift the stay of enforcement of Magistrate Judge Eliason's Orders and Defendant and UARG may seek a lift of the stay of consideration of the Objections.
6. Duke Energy's Motion for Sanctions (Docket No. 286) has been withdrawn, with prejudice.
7. Duke Energy's Motion To Strike (Docket No. 282) has been withdrawn without prejudice to re-file the Motion in the event that the case is remanded after appeal and Plaintiffs obtain and seek to resubmit the subject documents.

8. The Parties shall comply with the terms of their stipulations as described above.
9. All claims and counterclaims having been disposed of in this action, Final Judgment is accordingly hereby entered pursuant to Rule 58.

SO ORDERED

April 14, 2004  
date

  
United States District Judge