IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 08-cv- _____

Colorado Citizens Against ToxicWaste, Inc.
a Colorado non-profit corporation,

Rocky Mountain Clean Air Action
a Colorado non-profit corporation,

Plaintiffs,
v.

Stephen L. Johnson, in his official capacity as Administrator, Environmental Protection Agency
a federal agency,

Defendant.

COMPLAINT

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Attorneys for Plaintiffs

1. Plaintiffs, Colorado Citizens Against ToxicWaste, Inc. ("CCAT") and Rocky Mountain Clean Air Action ("RMCAA") file this Complaint in order to resolve a controversy with Stephen L. Johnson, in his official capacity as Administrator of the Environmental Protection Agency (hereinafter referred to as "Defendant" or "EPA") regarding the EPA's failure to timely review and update regulations to adequately limit radon emissions from operating uranium mills in a manner which conforms with the standards set forth in the National Emission Standard for Hazardous Air Pollutants ("NESHAP") provisions of the Clean Air Act ("CAA"). *See*: 42 U.S.C. § 7412.

2. On April 26, 2007, Plaintiffs notified the EPA that it intended to file an action to compel the Secretary to carry out mandatory duties regarding regulation of radon emissions from uranium mills under the CAA's NESHAP provisions pursuant to 40 C.F.R. Part 61 Subpart W (radon emissions from uranium mills). 40 C.F.R. § 61.250 *et seq*.

3. The CAA NESHAP provisions are the means by which Congress has addressed the ongoing hazards posed by the disposal and storage of uranium tailings at active uranium mills in Colorado and the nation generally. While an insignificant amount of uranium milling has taken place since the early 1980s when the last boom/bust cycle resulted in the closure of nearly all uranium mills in the United States, there is currently another resurgence in uranium mining and milling. Numerous restart and new mill proposals have been submitted to local, state, and federal regulators, including the mill at Cañon City, Colorado and a proposed mill in the Paradox Valley of western Colorado.

4. However, EPA has failed to take mandatory action to ensure that the radon emission regulations meet the CAA requirements and continues to conduct its regulatory program based

on outmoded radon emission standards. This suit respectfully requests that the Court compel EPA to conform the Subpart W regulations with the CAA NESHAP provisions and to ensure that the deadly impacts of radon emissions from active uranium mills does not recur during the current uranium boom.

5. The 1990 amendments to the Clean Air Act state that any National Emission Standard for Hazardous Air Pollutants in effect before the date of enactment of the CAA "shall be reviewed and, if appropriate, revised, to comply with the requirements of subsection (d) within 10 years after the date of enactment of the Clean Air Act Amendments of 1990." 42 U.S.C. § 7412(q)(1).

6. The On April 26, 2007, Plaintiffs provided the necessary written notice of the intent to initiate this action pursuant to section 304(a)(2) of the CAA, 42 U.S.C. § 7604(a)(2), by alleging that EPA failed to perform a non-discretionary duty pursuant to CAA section 112(q)(1), 42 U.S.C. § 7412(q)(1), to review and, if appropriate, revise, 40 C.F.R. Part 61, Subpart W, National Emission Standards for Radon Emissions From Operating Mill Tailings ("NESHAP Subpart W") to comply with the requirements of CAA section 112(d), 42 U.S.C. § 7412(d).

7. The NESHAP Subpart W regulations were in effect before the 1990 CAA Amendments were adopted. The NESHAP Subpart W regulations currently fail to meet the requirements of CAA section 112(d), 42 U.S.C. § 7412(d).

8. The Plaintiffs respectfully submit that the relief requested - including a timeline for promulgation of CAA-compliant NESHAP Subpart W regulations - is fair, reasonable, in the public interest, and consistent with the CAA, 42 U.S.C. §§ 7401 *et seq*.

JURISDICTION AND VENUE

9. This action arises under the citizen suit provision of the Clean Air Act ("CAA"), 42 U.S.C. § 7604. In particular, the Court's jurisdiction is established by statute at 42 U.S.C. § 7604(a)(2), 42 U.S.C. § 7412(q)(1), as well as 28 U.S.C. §§ 1331 & 1361. Relief may be granted pursuant to 42 U.S.C. § 7604(a) and 28 U.S.C. §§ 2201 and 2202. Plaintiffs' right to bring this action is established by the CAA at 42 U.S.C. § 7604(a)(2) and the Administrative Procedure Act. 5 U.S.C. §§ 701 *et seq.*

10. On April 26, 2007, Plaintiffs provided the necessary notice of intent to sue that alerted EPA to Plaintiffs' concerns that EPA had violated Section 304 of the CAA, 42 U.S.C. § 7604 by failing to perform a non-discretionary duty set forth in 42 U.S.C. § 7412(q)(1) and that Plaintiffs would seek to address the concerns by the initiation of a lawsuit. Plaintiffs participated, in good faith, to find a resolution of this matter without resorting to litigation. All CAA notice provisions have been satisfied. 42 U.S.C. § 7604 (b).

11. The CAA provides a waiver of sovereign immunity and jurisdiction to award Plaintiffs' attorneys fees. 42 U.S.C. § 7604 (d). No monetary damages are sought by this action.

12. Venue is proper in Colorado Federal District Court. 42 U.S.C. §§ 7604 (a)(3), 7604(c).

PROCEDURAL BACKGROUND

13. On April 26, 2007, a Notice of Intent to Sue ("NOI") was filed on behalf of Rocky Mountain Clean Air Action ("RMCAA") and Colorado Citizens Against ToxicWaste ("CCAT").

14. The NOI provided the necessary written notice of the intent to initiate this action pursuant to section 304(a)(2) of the CAA, 42 U.S.C. § 7604(a)(2), by alleging that EPA failed to

perform a non-discretionary duty pursuant to CAA section 112(q)(1), 42 U.S.C. § 7412(q)(1), to review and, if appropriate, revise, 40 C.F.R. Part 61 (NESHAP Subpart W) to comply with the requirements of CAA section 112(d), 42 U.S.C. § 7412(d).

15. The NOI alerted EPA to the ongoing failure of the regulations to comply with the requirements of CAA section 112(d), 42 U.S.C. § 7412(d). The NOI alerted EPA of Plaintiffs' concerns that EPA had violated Section 304 of the CAA, 42 U.S.C. § 7604 by failing to perform a non-discretionary duty set forth in 42 U.S.C. § 7412(q)(1) and would seek to address the concerns by seeking injunctive relief, declaratory relief, the cost of litigation, and other relief.

16. In accordance with the notice provisions of the CAA, Plaintiffs requested discussions with EPA regarding the terms of a binding agreement between EPA and the Plaintiff organizations that could resolve this matter without resort to lengthy litigation.

17. Undersigned counsel for Plaintiffs and counsel for EPA held numerous discussions between May 2007 and February 2008 which resulted in an agreement designed to resolve the issues raised in the NOI and this Complaint. EPA was represented by Laurel A. Bedig, U.S. Department of Justice Environment & Natural Resources Division, Environmental Defense Section and by Susan Stahle, Air and Radiation Law Office, Office of General Counsel, U.S. Environmental Protection Agency.

18. The agreement received approval of counsel and all parties and was memorialized in a consent decree which was presented to the parties for final signature in May 2008. Plaintiffs promptly provided a signed copy to Defendants. Defendants have not signed the consent decree.

19. Because the parties have reached an impasse, and are presently unable to agree upon resolution of this matter without resort to litigation, Plaintiffs respectfully submits that judicial

review and resolution of this matter is now necessary, fair, reasonable, in the public interest, and consistent with the CAA, 42 U.S.C. §§ 7401 *et seq*.

PARTIES

20. The full name and address of the Plaintiffs are:

Rocky Mountain Clean Air Action, 1536 Wynkoop, Suite 302, Denver, CO 80202,

Colorado Citizens Against ToxicWaste, PO Box 964, Canon City, CO 81215-0964.

21. These Plaintiffs provided the statutorily required notice and meet all statutory and Article III standing requirements to invoke the jurisdiction of this Federal District Court.

22. Both organizations and their members are actively involved and deeply committed to the protection of the air and health of their communities against the deadly pollution that is associated with uranium milling and the disposal of uranium tailings. Both organizations and their members are directly effected by the ongoing operation of the uranium mill and associated mill tailings disposal facilities in, among other places, Cañon City, Colorado. Both organization have members who live in close proximity to a uranium mill and whose health is directly affected by the ongoing operation of a uranium mill. Both organizations have members whose outdoor recreation, including hiking, backpacking, bird watching, gardening, and other activities are conducted in close proximity to operating uranium mills.

23. The named defendant, Stephen L. Johnson is sued in his official capacity as Administrator, Environmental Protection Agency, the federal agency subject to mandatory requirements in implementing the Clean Air Act.

24. Plaintiffs seek judicial relief that compels EPA to take mandatory action to address the serious matter of radon emissions created by the operation of the existing and planned uranium mills, all of which are located in the Western United States.

STATUTORY AND REGULATORY BACKGROUND

25. The mandatory requirements of the CAA are set forth at 40 C.F.R. Part 61 Subpart W, 40 C.F.R. § 61.250 *et seq.,* Section 112(d) of the Clean Air Act, and at Section 112(q)(1) of the CAA. 42 U.S.C. § 7412(q)(1). Section 112(q) of the CAA states that any National Emission Standard for Hazardous Air Pollutants in effect before the date of enactment of the 1990 CAA Amendments "shall be reviewed and, if appropriate, revised, to comply with the requirements of subsection (d) within 10 years after the date of enactment of the Clean Air Act Amendments of 1990." 42 U.S.C. § 7412(q)(1)

26. The current regulations – *Subpart W - National Emission Standards for Radon Emissions from Operating Mill Tailings* - were promulgated December 15, 1989. *See*, 54 Fed. Reg. 51703.

27. The NESHAP Subpart W regulations are required to comply with the purposes and standards articulated in the CAA for regulation of hazardous air pollutants. *See* 42 U.S.C. § 7412. The EPA must ensure that the NESHAP regulatory program remains in compliance with the requirements of the CAA regarding radon emissions from operating mill tailings.

28. The NESHAP Subpart W regulations apply to owners or operators of facilities licensed to manage uranium byproduct materials during and following the processing of uranium ores, commonly referred to as uranium mills and their tailings. 40 C.F.R. § 61.250 *et seq.*

29. The uranium milling industry has been nearly dormant since the early 1980s. The only two conventional uranium mills in the United States which possess a NESHAP Subpart W permit and an Atomic Energy Act license to conduct milling operations are the Denison Uranium Mill near White Mesa, Utah and the Cotter Uranium Mill near Cañon City, Colorado. The EPA continues to directly implement the NESHAP Subpart W regulatory program regarding these two uranium milling operations.

30. The Nuclear Regulatory Commission has recently identified numerous uranium mill proposals which are subject to the NESHAP Subpart W regulations. The EPA is currently conducting its review of one or more new mill proposals under the Subpart W regulations without benefit of the CAA-mandated review and update of the radon-222 emission standards. The EPA is responsible for review and approval of the NESHAP subpart W permit which is required for the Piñon Ridge Uranium Mill, which is currently the subject of ongoing regulatory proceedings at the state and county level in Colorado.

31. The NESHAP Subpart W regulations limit radon-222 emissions from existing uranium mill tailings piles to no more than 20 picocuries per square meter per second and require uranium tailings impoundments built after December 15, 1989, to meet one of two "work practices" standards. 40 C.F.R. § 61.252.

32. Recent reports, however, indicate that the current radon standards set forth in NESHAP Subpart W do not adequately protect human health from radon emissions from radioactive mill tailings. This litigation is necessary to ensure that the EPA take all necessary action to remedy ongoing violations of the CAA.

EFFECTS OF RADON EMISSIONS

33. Radon is a serious health hazard and is carcinogenic. According to the EPA, 21,000 people die annually due to lung cancer caused by radon. http://www.epa.gov/radon/images/402-r-03-003.pdf Adverse health effects, particularly due to emissions from tailings at uranium mills, have been noted at levels below the current numeric standard of 20 picocuries per square meter per second.

34. The EPA itself states that, "There is no safe level of radon—any exposure poses some risk of cancer." http://www.epa.gov/radiation/radionuclides/radon.htm#inbody. The current standard allows radon emissions to exceed background levels at the uranium mill sites, which are estimated at between 0.003 to 2.6 picocuries per square meter, by more than 10 times. *See*: http://www.atsdr.cdc.gov/toxprofiles/phs145.html.

35. Additionally, existing uranium mills have been able to maintain emissions of radon-222 below the current numeric standard of 20 picocuries per square meter per second. A uranium mill operated by Cotter Corporation in Cañon City, Colorado, for example, has reported radon-222 emissions from its facilities that range from 6.2 picocuries per square meter per second to 18.7 picocuries per square meter per second.

36. Records on file with the EPA also indicate that the White Mesa uranium mill in Utah has maintained radon-222 emission levels at 15.5 picocuries per square meter per second.

37. On information and belief, Plaintiffs allege that the EPA rulemaking is likely to result in a numerical standard for all operating uranium mills tailings piles with the numeric standard set far below the current 20 picocuries per square meter per second. On information and belief,

technology exists to further reduce emissions of radon from operating uranium mill tailings to safer levels that are well below current numeric and "work practice" standards.

38. EPA studies such as the January 2006, study on "Technologically Enhanced Naturally Occurring Radioactive Materials From Uranium Mining" continue to confirm the presence of radon-222 as a "principal concern to human health and the environment." *See*, http://www.epa.gov/radiation/tenorm/pubs.htm.

PLAINTIFFS' FIRST CLAIM FOR RELIEF

39. Plaintiffs repeat and incorporate by reference the allegations in the above paragraphs and all paragraphs of this Complaint.

40. The CAA imposes a nondiscretionary duty that National Emission Standards for Hazardous Air Pollutants regulations in effect before enactment of the 1990 CAA amendments must be reviewed by the Administrator for compliance with CAA standards and, if appropriate, revised within ten years. 42 U.S.C. § 7412(q)(1).

41. It has been over ten years since the enactment of the 1990 CAA amendments and the EPA has yet to review or revise the regulations at Subpart W - National Emission Standards for Radon Emissions from Operating Mill Tailings ("NESHAP Subpart W"). 40 C.F.R. 61.250 *et seq.*

42. The current standards in NESHAP Subpart W violate CAA standards by allowing unsafe and unhealthy levels of radon to be released into the air, even though the uranium mills can meet more stringent standards that are more protective of air quality than the current standards. 42 U.S.C. § 7412(d).

43. The EPA has failed to perform a nondiscretionary duty under the CAA as required by the CAA and is engaged in ongoing violations of the CAA which can be remedied by the relief sought in this complaint.

REQUEST FOR RELIEF

Plaintiffs respectfully seek relief in the form of a judicially enforceable order that provides the following:

A. Declare that NESHAP Subpart W allows unsafe and unhealthy levels of radon to be released into the air, even though the uranium mills can meet more stringent standards, and therefore declare that the regulations at 40 C.F.R. Part 61 Subpart W, 40 C.F.R. § 61.250 *et seq*. are invalid.

B. Declare that the EPA has violated the CAA and compel the EPA to take all necessary steps to comply with the CAA by initiating rulemaking to update 40 C.F.R. Part 61 Subpart W, 40 C.F.R. § 61.250 *et seq*.

C. Require EPA to publish draft regulations on or before August 1, 2009.

D. Require EPA to publish final regulations on or before March 1, 2010.

E. Require EPA to file Status Reports with the Court on November 1, 2008, March 1, 2009, and June 1, 2009, that describe the steps EPA has taken toward rulemaking efforts.

F. Enjoin EPA from issuing NESHAP Subpart W permits until such time that the EPA has issued CAA-compliant NESHAP Subpart W regulations.

G. Award Plaintiffs their reasonable fees and costs, as provided by the CAA. 42 U.S.C. § 7604(d).

RESPECTFULLY SUBMITTED on August 21, 2008

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