

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
COVINGTON, KENTUCKY

LAVERNE BRASHEAR

Plaintiff,

v.

CASE NO. 2000-263

HARSCO CORPORATION,

Judge William O. Bertelsman

Defendant.

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AMENDED CITIZEN SUIT COMPLAINT

* * * * *

PARTIES

1. Plaintiffs, LaVerne Brashear is, and all times relevant to this lawsuit was, a resident of Gallatin County, Kentucky. Mrs. Brashear lives on the north side of U.S. Highway 42, across from Harsco Corporation's slag processing operations.
2. Defendant, Harsco Corporation, ("Harsco") does business in Gallatin County, Kentucky as "Heckett MultiServe" on a 12.995 acre tract of land inside of Gallatin Steel's fence line.
3. Defendant, Harsco, operates a slag processing plant at this location that is part of the steel producing process. Harsco is the sole processor of Gallatin's slag. There is no visible line, barrier or fence separating the operations of Gallatin Steel and Harsco at this steel mill.
4. According to Harsco permit, the SIC for its slag operations at Gallatin's mill is 3399.
5. The U.S. Attorney General and US EPA Administrator are served with a copy of this Complaint as required by the citizen suit provisions of the federal environmental laws.

NATURE OF ACTION

6. This suit is a citizen-suit enforcement action seeking redress for violations of federal and federally-enforceable state environmental laws by defendant, Harsco. Plaintiff has standing to file this civil enforcement action under the Clean Air Act Section 304, 42 U.S.C. §7604.

7. This is a civil action for recovery of attorney fees and for such other relief as this Court deems just and proper, including but not limited to civil penalties to be paid to the Treasury of the United States of America.
8. This complaint alleges that defendant, Harsco, violated the CAA, 42 U.S.C. §§7401 et seq., and federally-enforceable provisions of its state air permit by owning and operating unpermitted emissions units. The Complaint also alleges that Harsco violated the PSD provisions of the CAA and Title V of the CAA.
9. The alleged violations of federal and state environmental laws and regulations by defendant, Harsco, is ongoing, continuing, and/or capable of being repeated in the future.

JURISDICTION

10. This U.S. District Court has jurisdiction over the subject matter of this lawsuit and defendant, Harsco, under 28 U.S.C. § 1331 and §1355; 42 U.S.C. §7413.
11. Harsco's alleged violations of the CAA occurred at and about Ghent, Gallatin County, Kentucky, which is in the Eastern District of Kentucky.
12. Accordingly, venue for this civil action properly lies in this district under 28 U.S.C. §1331, 42 U.S.C. §7413.

NOTICE

13. The citizen suit provisions of the CAA require Plaintiff to provide written notice to the defendant, U.S. Environmental Protection Agency (“US EPA”) U.S. Department of Justice (“U.S. DOJ”), and the Commonwealth of Kentucky sixty days prior to filing a civil enforcement action.
14. On October 25, 2000, Plaintiff gave written notice to Harsco, U.S. EPA, U.S. EPA Region IV, U.S. DOJ and the Commonwealth of Kentucky, that she intended to file a citizen’s enforcement suit against Harsco for ongoing and continuing violations of the CAA and federally enforceable provisions of the CAA and the environmental regulations promulgated pursuant thereto.
15. The notice letter provided sufficient information to allow defendant, Harsco, to identify and attempt to correct its violations of federal and state environmental laws and regulations.
16. As of the filing date of both the original Complaint and this Amended Complaint, more than sixty days have passed since the postmark date of the notice letter that Plaintiff sent

by certified mail, return receipt requested, to defendant and other named recipients, and neither the Administrator of U.S. EPA nor the Commonwealth of Kentucky has commenced and is diligently prosecuting a civil action in a court of the United States or a State to redress the violations alleged herein.

17. Defendant, Harsco, has done nothing to stop its continuing and repeated discharge of particulate matter and hazardous substances from its unpermitted emissions unit, commonly known as slag piles and a “slag dumping area.”

-- Injuries can likely be redressed under CAA --

18. Plaintiff has been injured by Harsco's unpermitted and uncontrolled release of pollution into the atmosphere. Plaintiff's injuries include, but are not limited to, pollution of her real and personal property and injury to her right to clean air and a healthy environment.
19. A favorable decision by this Court will force the defendant, Harsco, to cease, desist and abate uncontrolled air pollution.

-- Statutory Background --

20. Pursuant to Section 109 of the CAA, 42 U.S.C. §7409, the Administrator of the US EPA has promulgated national ambient air quality standards for certain listed pollutants, including particulate matter.
21. Particulate matter is a regulated air pollutant under the CAA. 42 U.S.C. §7409.
22. Section 110 of the CAA, 42 U.S.C. §7410, requires each state to submit to the Administrator for approval, a plan for the implementation, maintenance and enforcement of the national ambient air quality standards. Under Section 110(a)(2)(D) of the CAA, 42 U.S.C. §7410(a)(2)(D), such state implementation plan (“SIP”) must include, *inter alia*, a program to provide for the regulation of the modification, construction and operation of any stationary source of air pollution, including a permit program as required by Part C of the CAA, 42 U.S.C. §§7470-7479.
23. EPA approved Kentucky's SIP containing Kentucky's PSD program. 45 Fed. Reg. 6092 (January 25, 1980). Kentucky's SIP has been revised on several occasions since its approval by the Administrator. Violations of Kentucky's SIP are federally enforceable by private citizens under 42 U.S.C. §7604.
24. The Prevention of Significant Deterioration (“PSD”) provisions contain an elaborate review and permitting procedure, as well as general control requirements, for sources

locating in areas that have air quality better than the national ambient air quality standards (“NAAQS”).

25. Pursuant to Part C of the CAA governing PSD, new major sources of air pollution are subject to pre-construction review. 42 U.S.C. §§7470 - 7479.
26. Kentucky’s PSD regulation applies to a major stationary source and controls the type and amount of air pollutants that may be emitted into the atmosphere, which are subject to regulation under the CAA. 410 KAR 51:017, section 8(2-3).
27. The term “stationary source” means a building, structure, affected source, or installation that emits or may emit a regulated air pollutant. 401 KAR 50:035 section 1(36)
28. The term “major stationary source” is defined to include an iron and steel plants, which emits or has the potential to emit 100 tons per year of a pollutant subject to regulation under the CAA, including but not limited to particulate matter. 401 KAR 51:017, Section 1(1)(a)1 and 42 U.S.C. §7479. For iron and steel mills, the potential to emit includes fugitive emissions. 42 U.S.C. §7479.
29. The term “emissions unit” is defined as a part or activity of a stationary source that emits or has the potential to emit a regulated air pollutant. 401 KAR 50:035, section 1(14).
30. Kentucky’s PSD regulation provides that an owner or operator who constructs or operates a source not in accordance with the application who begins actual construction after September 22, 1982, without applying for and receiving approval, shall be subject to appropriate enforcement action 401 KAR 51:017, section 17(1).
31. Title V of the CAA establishes a detailed and extensive permit system. This Title is incorporated into the CAA as §§501 to 507, 42 U.S.C. §§7661 to 7661(f).
32. Under the Title V program, the determination of whether a sources is a “major source” depends on potential emissions, rather than actual emissions. 42 U.S.C. §7602.
33. One of the objectives of Title V is to “create a single document that serves as a comprehensive statement of a source’s obligation for air pollution control.” 57 Fed. Reg. 32,250 (July 24, 1992). Title V permits must include all limits, conditions and schedules needed to assure compliance with all applicable requirements of the CAA.

-- General background allegations --

34. On April 28, 1995, KDAQ issued defendant, Harsco, a state operating air permit (No. S-95-074) for a slag processing plant.

35. Defendant, Harsco's, permit application states that it operates 2,000 actual hours per year.
36. According to its permit application, defendant, Harsco, has the potential to emit 91.53 tons of particulate matter from just its slag processing plant.
37. Air emissions from the slag piles and molten slag dumping area are not identified, or otherwise disclosed, in Harsco's permit application or its state-operating permit.

Slagging operation

38. Slag is a waste product that forms as a "skin" on top of molten steel when Gallatin Steel melts scrap steel in its electric arc furnace. Gallatin Steel cannot produce steel without generating slag.
39. The quantity and composition of slag generated by Gallatin Steel can affect air emissions from Harsco's operations. Thus, Gallatin Steel's management can, and often do, make decisions that materially affect air pollution at Harsco's operations.
40. The Gallatin mill cannot operate with a means of slag processing. Harsco has exclusive contractual rights to process Gallatin's slag.
41. Gallatin Steel is the sole provider of slag to Harsco.
42. The continued existence of the Harsco slag facility at the Gallatin mill is dependent on the operation of the Gallatin Steel.
43. Among other services, defendant, Gallatin, contracted with defendant, Harsco, to remove molten slag from the melt shop so that Gallatin can produce steel.
44. Defendant, Harsco, transports molten slag from Gallatin's melt shop and pours the red-hot, molten slag on the ground at a slag-dumping area.
45. Large clouds of particulate matter are emitted into the atmosphere when the slag is poured out of these huge containers. The particulate matter contains metals from the steel-making process, including iron, zinc and chromium. Winds in the atmosphere distribute this air pollution in various directions and distances from the slag dumping area.
46. There is no "air pollution control equipment" to control fugitive dust when Harsco pours molten slag onto the ground, as that term is defined at 401 KAR 50:010(5).
47. Once the remaining pile of molten slag cools to a solid state, Harsco sprays the pile with water to further cool it and suppress additional dust.
48. Harsco moves the cooled slag into huge storage piles. Harsco creates large clouds of slag

dust when it moves this material in different areas with heavy equipment. Air pollution from the slag piles is not identified in Harsco's permit application or in its state-operating permit, which is expired.

49. On January 17, 1995, Harsco and Gallatin Steel entered into a contract for the provision of certain services by Harsco at the Gallatin mill, including slag dumping and processing. The contract has an effective date of February 7, 1995.
50. Under this contract, Harsco and Gallatin Steel have agreed to share common infrastructure features; more specifically, they share Gallatin's water processing facility, Gallatin's sanitary sewer system, and the "dedicated road" between the two facilities.
51. Gallatin Steel can use Harsco's equipment if, by reasons of a Force Majeure under the slag contract, Harsco is unable to fulfill its contractual obligations.
52. Under the slag contract, Gallatin Steel receives a royalty payment from Harsco for any residual metallics that Harsco sells to a third party.

COUNT I

HARSCO'S VIOLATION OF FEDERAL AND STATE PERMITTING REQUIREMENTS

53. Plaintiff restates, reincorporates and reiterates each and every allegation in averments 1 through 52, above, as if fully set forth herein.
54. Kentucky's SIP provides that all owners and operators of sources subject to this regulation shall submit timely and complete permit applications pursuant to 401 KAR 50:035. The Kentucky SIP is applicable to defendant, Harsco. 401 KAR 50:035.
55. The Kentucky SIP provides that a permit applicant shall provide emission-related information on regulated air pollutants. A permit applicant shall describe all emissions of regulated air pollutants emitted from an emissions unit, unless the units are exempted in section 2 of this regulation. 401 KAR 50:035, Section 3(3)(d).
56. On or about August 11, 1994, Harsco submitted a permit application to KDAQ for a slag processing plant.
57. Defendant, Harsco, did not identify or otherwise disclose the slag piles and "slag dumping area" as "emissions units" in its permit application.
58. On April 28, 1995, KDAQ issued defendant, Harsco, a state-operating permit. Emissions from the slag piles and slag dumping area are not permitted because they are not

identified or otherwise listed in Harsco's permit.

59. Beginning on or about April 28, 1995 and continuing to the present, defendant, Harsco, emitted particulate matter into the atmosphere from the slag piles and slag dumping area without a permit in violation of 401 KAR 50:035, section 3.
60. Beginning on or about April 28, 1995 and continuing to the present, defendant, Harsco, failed to provide KDAQ emissions-related information pertaining to the slag piles and slag dumping area, which are required by 401 KAR 50:035, section 3.

COUNT II

HARSCO CIRCUMVENTION OF PSD PROGRAM

61. Plaintiffs restate and reiterate each and every allegation in averments 1 through 60.
62. Defendant, Harsco, disclosed that its slag processing operation had a potential to emit 91.53 tons of air pollutants per year. However, Harsco failed to disclose the number of tons of particulate matter released at its slag dumping area and slag piles in its permit application.
63. When the amount of potential emissions from the slag dumping area and slag piles are added to the amount of emissions in Harsco's application, Harsco has a potential to emit greater than 100 tons of air pollutants per year.
64. Beginning on or about April 28, 1995 and continuing to the present, defendant, Harsco, was a major source, major stationary source, and/or "major emitting facility" as those terms are defined by Sections 169, 302, 502(1) of the Clean Air Act, its implementing regulations, and Kentucky's comparable regulations. See 41 KAR 51:017, section 1(1)(a).
65. Defendant, Harsco commenced construction after September 22, 1982, emits pollutants regulated by the CAA, including particulate matter, and was constructed in a PM attainment area. Thus, beginning on or about April 28, 1995 and continuing to the present, defendant, Harsco, is subject to federal and state PSD regulations.
66. Beginning on April 28, 1995 and continuing to the present, Harsco is in violation of Section 165 of the CAA, 42 U.S.C. §7475 by constructing a major source, major emitting facility, and/or major stationary source without obtaining the proper construction permit or undergoing a PSD pre-construction review.
67. In the alternative, the facilities of Gallatin Steel and Harsco, constitute a single major

source, major stationary source, or major emitting facility of air emissions under the PSD program. This is because Gallatin Steel and Harsco, belong to the same industrial grouping, are located on continuous or adjacent properties and are under the control of the same person or entity. As such, Harsco has circumvented PSD review by failing to obtain PSD review for its slag operations, including dumping, storage and processing of molten and cooled slag.

COUNT III

HARSCO'S CIRCUMVENTION OF THE CLEAN AIR ACT'S TITLE V PROGRAM

68. Plaintiff restates, reincorporates and realleges each allegation in averments 1-67, above, as if fully set forth herein.
69. On or about August 11, 1994, Harsco submitted a permit application to KDAQ for a slag processing plant that had a potential to emit less than 100 tons per year of emissions.
70. Defendant, Harsco, did not identify or otherwise disclose the "slag dumping area" and slag piles as "emissions units" in its permit application.
71. When the amount of potential emissions from the slag dumping area and slag piles are added to the amount of emissions disclosed in Harsco's application, Harsco has a potential to emit greater than 100 tons of air pollutants per year.
72. Harsco is a major stationary source, for purposes of the Clean Air Act's Title V program. See 42 U.S.C. § 7661(2).
73. As a major stationary source, defendant, Harsco was required to obtain a Title V operating permit or a federally enforceable state operating permit. It obtained neither.
74. Beginning on or about April 28, 1995 and continuing to the present, defendant, Harsco, is in violation of Title V of the CAA, 42 U.S.C. §§7661 to 7661(f) by failing to obtain a Title V permit.
75. In the alternative, the facilities of Gallatin Steel and Harsco constitute a single major stationary source of air emissions under the Title V program. This is because defendants, Gallatin Steel and Harsco, belong to the same industrial grouping, are located on continuous or adjacent properties and are under the control of the same person or entity. As such, Harsco is, and has been since April 12, 1995, in violation of the terms and conditions of its Title V permit, SIP and the CAA by operating unpermitted emissions units that emit a regulated air pollutant.

COUNT IV

HARSCO'S VIOLATION OF 401 KAR 63:010

76. Plaintiff restates, reincorporates and realleges each allegation in averments 1- 75, above, as if fully set forth herein.
77. 401 KAR 63:010 is incorporated into Kentucky's SIP and is, therefore, a federally enforceable regulation
78. Beginning on or about April 28, 1995 and continuing to the present, Harsco violated 401 KAR 63:010, by failing to take reasonable precautions to prevent particulate matter from becoming airborne at the molten slag dumping area and slag piles
79. Harsco dumps molten slag from the steel mill about once every thirty minutes, every day of every week, whenever the steel mill is melting scrap steel. Thus, the air pollution is a repetitive and continuing violation of federal and state law and Harsco is operating more hours than that allowed by its permit.
80. Beginning on or about April 28, 1995, and continuing to the present, Harsco, violated 401 KAR 63:010, by repeatedly allowing a discharge of fugitive dust to travel past its property line.

WHEREFORE, Plaintiff, LaVerne Brashear, demands:

1. Judgment against defendant, Harsco, on all regulatory issues set forth herein.
2. That the Court order defendant, Harsco, to take all measures necessary so that it comes into full and complete compliance with the Clean Air Act and KRS Chapter 224, and the regulations promulgated thereto.
3. That the Court order defendant, Harsco, to pay civil penalties to the United States of America in an amount to be decided by the U.S. District Court for each day of each violation of an environmental law, regulation or permit.
4. That the Court order defendant, Harsco, to cease and desist from dumping molten slag until this emissions unit is properly permitted by KDAQ and US EPA.
5. That the Court order defendant, Harsco, to fully disclose and otherwise provide all needed or necessary information on pollution emitted into the atmosphere from the slag dumping area and slag piles to KDAQ and US EPA.
6. That the Court order defendant, Harsco, to cease dumping molten slag on the ground without taking affirmative steps to prevent and control generation of fugitive emissions

that pollute the environment.

7. That the Court order defendant, Harsco, to cease storing cooled slag in uncovered piles on the ground without taking affirmative steps to prevent and control generation of fugitive emissions that pollute the environment.
8. Payment of attorney fees and costs under the citizen suit provisions of the Clean Air Act.
9. Any other legal, equitable and judicial relief to which the plaintiff appears rightfully entitled under law or equity.

JEFFREY M. SANDERS (82106)
Robert E. Sanders & Associates
Attorney for Plaintiffs
1017 Russell Street
Covington, Kentucky 41011
859-491-3000
859-655-4642 (fax)

Jonathon Conte, Esq.
312 Walnut Street
Suite 3250, Box 5427
Cincinnati, OH 45201-5427

James Hecker, Esq.
Trial Lawyers for Public Justice
1717 Massachusetts Avenue, NW Suite 800
Washington, DC 20036