

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
Northwestern Division**

NATIONAL PARKS CONSERVATION)		
ASSOCIATION, INC. and)		
SIERRA CLUB,)		
)		
Plaintiffs)		
v.)		Civil Action No.-01-403-VEH
)		
TENNESSEE VALLEY AUTHORITY)		
)		
Defendant.)		

**ORDER ON CROSS MOTIONS FOR
PARTIAL SUMMARY JUDGMENT (STANDING)**

Plaintiffs National Parks Conservation Association, Inc. (“NPCA”) and Sierra Club, Inc. (“Sierra Club”) have filed an action under the citizen suit provision of the Clean Air Act (“CAA”), 42 U.S.C. § 7604(a) (2000), asserting Tennessee Valley Authority (“TVA”) violated the CAA by its 1982 work at the Colbert Unit 5 plant (“the work”). NPCA¹ says the work constituted a “modification” under the CAA, triggering the New Performance Standards (“NSPS”), Non-Attainment NSR (“NNSR”)², and Prevention of Significant Deterioration (“PSD”) standards of the

¹ For economy’s sake, “NPCA” shall mean “NPCA and Sierra Club” unless the context clearly indicates otherwise.

² The EPA has designated the counties around the Colbert Plant as meeting the NAAQS, *see* Plaintiffs Memorandum in support of Motion for Partial Summary Judgment (standing), page 13, fn. 3. (Doc. 177.)

CAA. Second Amended Complaint (“SAC”) (Doc. 80.) The SAC asserts TVA violated the Clean Air Act (“CAA”) by its 1982 work at the Colbert Unit 5 plant (“the work”). NPCA³ says the work constituted a “modification” under the CAA, triggering the New Performance Standards (“NSPS”), Non-Attainment NSR (“NNSR”)⁴, and Prevention of Significant Deterioration (“PSD”) standards of the CAA.

TVA has filed a Motion for Partial Summary Judgment on the issue of NPCA’s standing to bring this action. (Doc. 93). The TVA motion was accompanied by a brief, doc. 94, and evidentiary filings. (Doc. 95.). NPCA duly opposed the TVA motion, doc. 110, and filed evidentiary materials. (Docs. 112, 117 - 119, 122 - 124.) TVA replied, doc. 143, and filed additional evidentiary exhibits. (Doc. 144). NPCA filed a supplemental reply. (Doc. 175.) TVA replied yet again. (Doc. 193.)

At the same time, NPCA filed its own Motion for Partial Summary Judgment (Standing). (Doc. 176.) NPCA filed a supporting memorandum, doc. 177, and evidentiary materials. (Docs. 178 - 188.) TVA opposes the NPCA motion. (Doc. 200, with exhibit attached.)

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RULE 56 STANDARD OF REVIEW

Under Fed. R. Civ. P. 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Chapman v. AI Transport, 229 F.3d 1012, 1023 (11th Cir. 2000). The party asking for summary judgment always bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the pleadings or filings which it believes demonstrate the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. Once the moving party has met its burden, Rule 56(e) requires the non-moving party to go beyond the pleadings and, by its own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial. Celotex, 477 U.S. at 324.

The substantive law will identify which facts are material and which are irrelevant. Chapman, 229 F.3d at 1023; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). All reasonable doubts about the facts and all justifiable inferences are resolved in favor of the non-movant. Chapman, 229 F.3d at 1023; Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1115 (11th Cir. 1993). A dispute is genuine "if the

evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson, 477 U.S. at 248; Chapman, 229 F.3d at 1023. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. Anderson, 477 U.S. at 249.

The method used by the party moving for summary judgment to discharge its initial burden depends on whether that party bears the burden of proof on the issue at trial. See Fitzpatrick, 2 F.3d at 1115-17 (citing U.S. v. Four Parcels of Real Property, 941 F.2d 1428 (11th Cir. 1991)(*en banc*)). If the moving party bears the burden of proof at trial, then it can only meet its initial burden on summary judgment by coming forward with positive evidence demonstrating the absence of a genuine issue of material fact; i.e. facts that would entitle it to a directed verdict if not controverted at trial. Fitzpatrick, 2 F.3d at 1115. Once the moving party makes such a showing, the burden shifts to the non-moving party to produce significant, probative evidence demonstrating a genuine issue for trial.

If the moving party does not bear the burden of proof at trial, it can satisfy its initial burden on summary judgment in either of two ways. First, the moving party may produce affirmative evidence negating a material fact, thus demonstrating that the non-moving party will be unable to prove its case at trial. Once the moving party satisfies its burden using this method, the non-moving party must respond with

positive evidence sufficient to resist a motion for directed verdict at trial.

The second method by which the moving party who does not bear the burden of proof at trial can satisfy its initial burden on summary judgment is to affirmatively show the absence of any evidence in the record in support of a judgment for the non-moving party on the issue in question. This method requires more than a simple statement that the non-moving party cannot meet its burden at trial but does not require evidence negating the non-movant's claim; it simply requires the movant to point out to the court that there is an absence of evidence to support the non-moving party's case. Fitzpatrick, 2 F.3d at 1115-16. If the movant meets its initial burden by using this second method, the non-moving party may either point to evidence in the court record, overlooked or ignored by the movant, sufficient to withstand a directed verdict, or the non-moving party may come forward with additional evidence sufficient to withstand a directed verdict motion at trial based on the alleged evidentiary deficiency. However, when responding, the non-movant can no longer rest on mere allegations, but must set forth evidence of specific facts. Lewis v. Casey, 518 U.S. 343 (1996) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992)).

THE REQUIREMENTS OF STANDING

To establish standing, a plaintiff must show that (1) he or she has suffered an injury-in-fact; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Lujan, 504 U.S. at 560-561.

A plaintiff must also establish organizational standing. Friends of the Earth, Inc., v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167 (2000). In Laidlaw, the Court said the injury must be (1) concrete and particularized, actual or imminent, not conjectural or hypothetical; (2) fairly traceable to the challenged action(s) of the defendant; and (3) likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. An association has standing when its members would otherwise have standing to sue in their own rights, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the suit. 528 U.S. at 180 -181.

DISCUSSION

After review of the filings, the court finds NPCA has met its burden of establishing standing to bring this action. At least some of its members have suffered an injury in fact and the injury, if proven, is fairly traceable to TVA's work at Colbert

5. While TVA points out deficiencies in some of the NPCA evidentiary filings, many of these go to weight, not admissibility.

Any issue of standing deficiency as to a particular emission or a particular NPCA member can be handled at trial by having NPCA make a preliminary showing as to any such emission(s) or member(s).

Similarly, as to separate and distinct claims by NPCA members, e.g. health effects on members, or damage to property from alleged particulate matter, the court anticipates no difficulty persuading NPCA that it would be in no one's interest to maintain such a claim if "trial quality" proof is not there. The parties' attention is called to Worldwide Primates, Inc. v. McGreal, 26 F.3d 1089 (11th Cir. 1994) and Worldwide Primates, Inc. v. McGreal, 87 F.3d 1252 (11th Cir. 1996), and the court would expect, after appropriate investigation, the dismissal of claims or parties whose legal theories or purported facts are not supported.

With regard to TVA's economic standing arguments, the court would simply note that NPCA asserts in the Joint Status Report that EPA will not bring this action because it will not sue a "sister" federal agency. TVA is such an agency. 16 U.S.C. §§ 831-331ee (200 & Supp. II 2002) . The costs of maintaining a CAA action, just for experts and discovery depositions, all but ensure that only organizations or wealthy individuals could maintain a CAA action. NPCA has as much an interest in

enforcement of the CAA as any private litigant, and to say it could not bring this action would lead, under the circumstances here (EPA having bowed out), to no action being maintained. While standing has constitutional significance, its application should neither be mechanical nor formalistic; the underlying policies of the standing requirement seem amply satisfied by NPCA.

While it is true that, should NPCA prevail, the court will order TVA to go through applicable permitting process(es), and therefore a third party or agency will be involved in the “relief” sought by NPCA, the court cannot say as a matter of law this makes it speculative that NPCA’s injury will be redressed by a favorable decision. There are other remedies available to NPCA, and it would not be speculative to say that putting Colbert 5 through the permitting process would almost certainly lead to some changes at Colbert 5 that would benefit NPCA and its members.⁵


The court does have concerns about NPCA’s ability to prove causation regarding Colbert Unit 5. TVA brings this up in the standing context; the court thinks it applies more broadly. If NPCA cannot link causation between the 1982 work at

⁵ On one level, this is simply recognition of regulatory reality: faced with a lengthy and expensive regulatory proceeding and its unknown outcome, any reasonable regulated industry would seek compromise, preferring to spend (hopefully less) money doing something the regulators want, and thereby obtain certainty of outcome, if not permanent peace.

Colbert 5 and the claimed injuries, the action fails without regard to standing. Based on the filings, the court says that NPCA has met its Rule 56 burden as to opacity, but saying so does not ensure NPCA will, without more, sustain its burden of proof at trial.

For these reasons, the NPCA's Motion for Partial Summary Judgment (Standing) is **GRANTED** as to visibility impairment/opacity, denied without prejudice as to other emissions, and TVA's Motion for Partial Summary Judgment (Standing) is **DENIED** without prejudice.

Done on September 7, 2005.



VIRGINIA EMERSON HOPKINS
United States District Judge