

A potential therefore exists for contaminants from the solid waste within the Impoundment to move into groundwater and surface waters near the site. The Department, in its continuing efforts to ensure that FirstEnergy address any and all potential harm which may result from the Impoundment, brings this suit pursuant to Sections 7002(a)(1)(B) of the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6972(a)(1)(B), to ensure that FirstEnergy’s disposal of solid waste in the Impoundment will not create an imminent and substantial endangerment to health or the environment.

Jurisdiction

1. This matter is an action brought under Section 7002(a)(1)(B) of RCRA, 42 U.S.C. § 6972(a)(1)(B), which provides that such actions must be brought in the appropriate United States District Court. Because this matter arises from a federal question, this Honorable Court, therefore, has jurisdiction to hear and decide this matter pursuant to 28 U.S.C. § 1331. Pendant jurisdiction is also asserted for the Department’s closely related state claims against FirstEnergy, for operating the Impoundment in violation of provisions of Pennsylvania’s Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. § 6018.101 *et seq.*, (“Solid Waste Management Act”). Venue is in this judicial district pursuant to 28 U.S.C. § 1391(b)(2).

The Parties

2. The Department is an executive agency of the Commonwealth of Pennsylvania, with the duty and authority to administer and to enforce, *inter alia*, the Solid Waste Management Act, 35 P.S. § 6018.101 *et seq.* The Commonwealth of Pennsylvania is a “person” pursuant to Section 7002 of RCRA, 42 U.S.C. § 6972.

3. FirstEnergy is an Ohio corporation, which owns and operates both the Impoundment and the Bruce Mansfield power generating station. FirstEnergy is a “person” pursuant to Section 7002 of RCRA, 42 U.S.C. § 6972.

Bruce Mansfield Power Generating Station and the Little Blue Run Impoundment

4. The Bruce Mansfield power generating station is a 2490 megawatt, coal-fired power station, located in Shippingport, Beaver County, Pennsylvania.

5. The flue-gas scrubbers and other air pollution controls at the Bruce Mansfield power generating station generate significant quantities of flue gas desulfurization (FGD) waste and fly ash material. Some of that waste is converted into synthetic gypsum.

6. The remainder of the waste is thickened into a slurry of approximately 30 per cent solids, including fly ash and hardening agents, and then conveyed (along with other wastes) through a seven-mile, underground pipeline from the Bruce Mansfield power generating station to the Impoundment.

7. The Impoundment is an unlined, residual waste disposal site located primarily in Greene Township, Beaver County. The site, which spans the Pennsylvania-West Virginia border, is approximately 1,700 acres in size.

8. The Department issued the original permit for the site in 1974 to Dravo Corporation; the operations and permit were subsequently modified and transferred to Pennsylvania Power Company and thereafter to FirstEnergy.

9. In 1974, no Pennsylvania or federal regulation existed requiring that a liner be installed on the floor of a residual waste disposal impoundment. Current Pennsylvania regulations prohibit the construction of new, unlined residual waste impoundments.

10. The absence of a liner in the disposal area creates a potential for contaminants from the waste to move into groundwater and surface waters near the Impoundment, as set forth below.

Count 1: Section 7002(a)(1)(B) of RCRA

11. The allegations set forth in Paragraphs 1 through 10, inclusive, are incorporated herein by reference.

12. The Department requires FirstEnergy to monitor both groundwater and surface waters in the vicinity of the Impoundment.

13. The analytical results of samples of groundwater taken during FirstEnergy's monitoring, and of samples taken by the Department, indicate that groundwater degradation, that is, a measurable increase in the concentration of one or more contaminants, is or may be occurring as a result of the solid waste disposed of within the Impoundment.

14. Calcium, sulfates, chlorides, and other groundwater constituents found at certain locations near the Impoundment indicate that contaminants from the solid waste within the Impoundment are entering groundwater at such locations.

15. The analytical results of monitoring by FirstEnergy and the Department at certain locations near the Impoundment indicate the presence of arsenic in the groundwater which may be originating from constituents in the solid waste disposed of in the Impoundment.

16. Groundwater is the source of drinking water for some who live near the Impoundment, and arsenic is a contaminant which has the potential to pose a risk of harm to human health.

17. The groundwater in the vicinity of the Impoundment provides the base flow for the streams adjacent to and nearby the Impoundment. The potential exists for contaminants present in the groundwater to enter the streams and pose a risk of harm to the environment.

18. Constituents contained in the solid waste disposed of in the Impoundment may present a potential that human health and environmental receptors would be exposed to a risk of harm, in the near term and the future, if remedial action is not taken. These conditions “may present an imminent and substantial endangerment to health or the environment,” as that term is used in Section 7002(a)(1)(B) of RCRA, 42 U.S.C. § 6972(a)(1)(B).

19. Section 7002(a)(1)(B) of RCRA, 42 U.S.C. § 6972(a)(1)(B), provides that a state may commence a civil action against any person who has or is contributing to the past or present disposal of any solid waste which may present an imminent and substantial endangerment to health or the environment. Further, the Court shall have the jurisdiction to order such person to take such action as may be necessary.

20. Under this provision, the Department, as a regulatory agency, need not wait until threats to public health or the environment are realized; rather, the Department may act to prevent such threats.

Count 2: Violations of the Pennsylvania Solid Waste Management Act

21. The allegations set forth in Paragraphs 1 through 20, inclusive, are incorporated herein by reference.

22. FirstEnergy’s operation of the Impoundment and disposal of solid waste into the Impoundment are subject to the conditions and requirements set forth in, *inter alia*, the Pennsylvania Solid Waste Management Act, the regulations promulgated pursuant thereto, Solid

Waste Permit No. 300558 issued to FirstEnergy to operate the Impoundment (“Permit”), and consent orders and agreements executed by FirstEnergy and its predecessors.

23. On April 5, 2006, FirstEnergy executed a Consent Order and Agreement with the Department (“2006 Consent Order.”) Pursuant to Paragraph 5(b) of the 2006 Consent Order and Condition 43 of the Permit, FirstEnergy was required to conduct semi-annual site reconnaissance to determine whether seeps or springs had developed in the vicinity of the Impoundment, to sample and characterize the constituents of such flows, and to report such information to the Department. Pursuant to Section 289.266 of the Department’s regulations, 25 Pa. Code § 289.266, FirstEnergy was required to conduct specified groundwater assessment activities upon receipt of information demonstrating groundwater degradation at any monitoring point. Pursuant to Paragraph 5(a) of the 2006 Consent Order and Section 289.267 of the Department’s regulations, 25 Pa. Code § 289.267, FirstEnergy was required to conduct groundwater abatement activities to address any and all such flows contaminated by constituents from the Impoundment, by means specified in the 2006 Consent Order and the Department’s regulations.

24. Between 2005 and the present, FirstEnergy sampled numerous flows, including, but not limited to, five (5) seeps or springs in the vicinity of the Impoundment, designated as S-30, S-31, Bayard Spring, Byers Spring, and Culler No. 3 Spring. The sampling results from these and other flows confirmed that such flows had been contaminated by constituents from the Impoundment. Nevertheless, FirstEnergy has failed to conduct required groundwater assessment and abatement actions regarding such flows, in violation of the Department’s regulations, the 2006 Consent Order, and the Permit.

25. FirstEnergy's operation of the Impoundment in violation of the Permit, the regulations, and an order of the Department, including the 2006 Consent Order, constitutes unlawful conduct pursuant to Section 610 of the Pennsylvania Solid Waste Management Act, 35 P.S. § 6018.610, and subjects FirstEnergy to imposition of civil penalties of up to TWENTY FIVE THOUSAND DOLLARS (\$ 25,000.00) per day for each violation.

Relief Requested

26. The Department and FirstEnergy have negotiated performance obligations to be imposed on FirstEnergy to assess and abate the potential for the Impoundment to pose an imminent and substantial threat to public health or the environment. These performance obligations are reflected in the Consent Decree which the Department is lodging with this Honorable Court at the same time that it is filing this Complaint.

27. The Department will cause notice of this Consent Decree and a request for public comments concerning it to be published, and will accept public comments for at least thirty (30) days following publication. Once public comments, if any, have been received and duly considered by the Department, the Department anticipates filing a Motion for Entry of Consent Decree with this Honorable Court.

CONCLUSION

Wherefore, the Commonwealth of Pennsylvania, Department of Environmental Protection, respectfully requests that this Honorable Court lodge the accompanying Consent Decree, await the filing of the Department's Motion for Entry of Consent Decree, ultimately enter the accompanying Consent Decree as an Order of this Court, and for such other relief that this Court deems just and proper.

Respectfully submitted,

s/ John H. Herman
John H. Herman
Assistant Regional Counsel
PA ID No. 64981
joherman@pa.gov

Bruce M. Herschlag
Acting Regional Counsel
PA ID No. 58304
bherschlag@pa.gov

Office of Chief Counsel
Commonwealth of Pennsylvania
Department of Environmental Protection
400 Waterfront Drive
Pittsburgh, PA 15222-4745
(412) 442-4262

FOR THE COMMONWEALTH OF
PENNSYLVANIA, DEPARTMENT OF
ENVIRONMENTAL PROTECTION

Dated: July 27, 2012