

United States District Court
District of Columbia

PUBLIC EMPLOYEES FOR ENVIRONMENTAL
RESPONSIBILITY (PEER)
2001 S STREET N.W. SUITE 507
WASHINGTON D.C 20009

THE ALLIANCE FOR BASE CLEANUP (ABC)

5 AMVETS AVE.

FALMOUTH, MA 02540

PLAINTIFFS,

**Complaint and
Request for
Preliminary
Injunction**

v.

Case No. _____

November 20, 2003

U.S. DEPARTMENT OF THE AIR FORCE

SECRETARY JAMES G. ROCHE; DEPARTMENT OF
THE AIR FORCE; THE PENTAGON;
WASHINGTON, D.C. 20330-1000

U.S. DEPARTMENT OF THE ARMY

ACTING SECRETARY R.L. "LES" BROWNLEE
DEPARTMENT OF THE ARMY; THE PENTAGON;
WASHINGTON, D.C. 20310

DEFENDANTS.

PLAINTIFFS PEER AND ABC'S COMPLAINT AND REQUEST FOR A PRELIMINARY INJUNCTION

Nature of this Action

Plaintiffs brings this action pursuant to the Administrative Procedure Act of 1949, which allows “a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702 (2003). Plaintiffs were adversely affected by Defendants’ failure to comply with the procedural requirements of the National Environmental Policy Act (NEPA). 42 U.S.C. § 4331.

Specifically and upon our best belief and information, Defendants U.S. Department of the Army and the U.S. Department of the Air Force signed a lease extending the Army National Guard’s occupancy at the Massachusetts Military Reservation (MMR) until 2051 and failed to produce an Environmental Impact Statement (EIS) reviewing the environmental impacts of this major federal action. The Secretary of the Army is named both as the lead executive of the U.S. Department of the Army and as the federal official responsible for the actions of the federal government undertaken by, for, or at the request of the National Guard.

Plaintiffs PEER and ABC requests a preliminary injunction prohibiting any further activity at the MMR by the Defendants or the Army National Guard until the Defendants satisfactorily fulfill their statutory obligations under NEPA by producing an EIS, or, in the alternative, and Environmental Assessment (“EA”) with a finding of no significant impact (FONSI) rooted in data based on the best available science, as is required by the Data Quality Act of 2000.

Jurisdiction

1. The court has jurisdiction over this subject matter pursuant to 28 U.S.C. § 1331. The requisite federal question arises under the Administrative Procedure Act, 5 U.S.C. § 500. Parties and Standing
2. Plaintiff PEER is a national non-profit corporation based in Washington, D.C. with field offices throughout the United States, including New England. PEER members rely on the aquifer below the MMR for drinking water, and any pollution of that aquifer directly impacts their health. The Defendants’ use of rocket fuel containing perchlorate has contaminated the aquifer under the MMR and may jeopardized the safety of the drinking water of several PEER members.
3. PEER members rely on aquifer-dependent natural resources for recreational, aesthetic, and economic benefits. The continued refusal of Defendants to complete the environmental assessment requirements prevents PEER members from acquiring the information necessary to determine the environmental and health risk presented by the Defendants’ activities.

4. Plaintiff Alliance for Base Cleanup (ABC) is a community group which formed in 1990. ABC is a member of the Military Toxics Project based in Lewiston, Maine. The Military Toxics Project is a national, non-profit network of environmental justice groups, community organizations, workers and veterans working toward finding preventative solutions to pollution by the U.S. Department of Defense. ABC is dedicated to the investigation and cleanup of environmental damage caused by the Massachusetts Military Reservation on Cape Cod. The co-directors of ABC live on Cape Cod, and rely on the aquifer below the MMR for drinking water, and any pollution of that aquifer directly impacts their health. The Defendants' use of rocket fuel containing perchlorate has contaminated the aquifer under the MMR, and jeopardized the safety of the drinking water of the co-directors of ABC.

5. Only by requiring the Defendants' to fulfill their Congressionally-mandated legal obligation under NEPA to produce an environmental assessment and, upon the finding of significant impact, an EIS, will the environmental and health safety risk posed by the aquifer's contamination be adequately addressed.

6. PEER and ABC bring this action on behalf of their own corporate selves and their adversely affected members to induce the Defendants' to comply with its legal duties required by NEPA.

7. Defendant U.S. Department of the Army is an agency of the executive branch of the United States Government. Defendant Les Brownlee is Undersecretary, U.S. Department of the Army, and is currently Acting Secretary. As Secretary, Defendant Roche has the ultimate responsibility for the activities of the U.S. Department of the Air Force, including those actions complained of herein.

8. Defendant U.S. Department of the Air Force is an agency of the executive branch of the U.S. Government. Defendant James G. Roche is the Secretary of the U.S. Department of the Air Force. As Secretary, Defendant Roche has the ultimate responsibility for the activities of the Department including those actions complained of herein.

Facts

9. The MMR spans parts of the Towns of Bourne, Sandwich, Falmouth, and Mashpee, Massachusetts.

10. The location of the MMR sits atop the sole-source aquifer that provides water for Cape Cod's estimated 225,000 residents.

11. The Army National Guard routinely fired rockets on the base. The solid fuel that propels these rockets contains the chemical perchlorate.

12. Perchlorate is known to disrupt thyroid function and prompt hormone changes that can cause thyroid tumors; it is particularly dangerous to pregnant women and children.

13. The Environmental Protection Agency has raised health concerns about the levels of

perchlorate found in drinking water in concentrations as low as one part-per-billion. The Massachusetts Department of Environmental Protection echoed this concern by issuing an “advice level” to keep perchlorate in Bourne water below one part-per-billion.

14. Last spring a Bourne home was found to have a perchlorate level of 1.75 parts-per-billion in its drinking water supply. Last year three public Bourne wells were closed after traces of perchlorate were found.

15. The Council on Environmental Quality (CEQ) promulgates regulations allowing agencies to issue Categorical Exclusions (CATEXs). 40 C.F.R 1508.1. CATEXs are established by agencies pursuant to Part 1507.3 of the CEQ regulations. 40 C.F.R 1507.3. A CATEX is defined as a category of actions which do not individually or cumulatively have a significant effect on the human environment and for which, therefore, neither an environmental assessment nor an EIS is required. CEQ regulations require that agencies adopt procedures by which a normally excluded action, that does in fact have a significant environmental effect, will be subject to the procedural requirements of NEPA. CEQ regulations require that the proposed procedures shall be adopted only after an opportunity for public review. *Id.*

16. Defendants or their agents have extended the lease of the MMR through 2051.

17. Defendants have failed to show why the extension of the MMR does not have significant environmental effects.

Cause of Action

I. Failure to Comply with the Procedural Requirements of NEPA

18. The National Environmental Policy Act of 1969 (NEPA) sets forth substantive environmental quality goals for the government and nation. See 42 U.S.C. § 4331. 43 U.S.C. § 4332(2)(C) requires all agencies of the U.S. Government to include an EIS in every “recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.”

19. The lease extension signed by Defendants or their agents qualifies as a major Federal action significantly affecting the quality of the human environment, is the subject of public controversy, and involves uncertain and significant environmental risk affecting the human environment. Such an action requires the production of an environmental assessment and a subsequent EIS to comply with NEPA.

20. Defendants violated section 4332(2)(C) of NEPA by failing to prepare an environmental assessment and subsequent EIS.

21. Although the responsible Agencies have produced documents reviewing the environmental effects of the MMR -- the 1998 Master Plan and the

EIR -- neither are relevant, because neither contemplated the lease extension, the homeland security center, or the deteriorating condition of the aquifer.

22. If Defendants designated the lease extension as a CATEX, it was done so in an unlawful manner.

23. Although lease extensions by Defendants may be covered by a CATEX, the extension of the MMR lease does have a significant environmental effect, and is subject to the requirements of NEPA. 40 C.F.R 1508.4.

24. Defendants Army and Air Force failed to follow proper procedure in promulgation of its CATEX regarding lease renewals, violating 40 C.F.R 1507.3.

25. Even if the CATEX was promulgated in a lawful manner, a change in existing conditions at the MMR requires an environmental assessment of the lease extension. See 32 C.F.R § 989 (App. B) at A2.3.7.

26. If a programmatic agreement with the EPA was in place which allowed the Air Force to avoid producing an environmental assessment or an EIS, then the programmatic agreement was reached in an unlawful manner.

Prayer for Relief

WHEREFORE, plaintiffs request relief as follows:

1. A preliminary injunction prohibiting further activity at the MMR until Defendants satisfactorily fulfill their statutory obligations under NEPA by producing an EIS.

Dated: November 20, 2003

Daniel P. Meyer

Public Employees For Environmental Responsibility
2001 S Street, N.W. Suite 570
Washington, D.C. 20009

Tele: 202-265-7337
dmeyer@peer.org

D.C. Bar No. 455369