UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHARTER TOWNSHIP OF VAN BUREN,

Plaintiff,

vs.

Case No: 97-60076-AA
HON. BARBARA K. HACKETT

EQ, THE ENVIRONMENTAL QUALITY COMPANY, d/b/a MICHIGAN DISPOSAL, INC., a Michigan corporation,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This citizens suit was filed under the Clean Air Act, 42 U.S.C. § 7401 et seq., for alleged violations of air pollution permits. Defendant EQ, the Environmental Quality Company, d/b/a Michigan Disposal, Inc. (EQ) has filed a motion to dismiss Counts 2 and 3 of plaintiff's complaint. For the reasons stated below, defendant's motion shall be granted.

BACKGROUND

Plaintiff Charter Township of Van Buren (Township) brought a citizen suit complaint under the Clean Air Act against EQ for alleged environmental violations. EQ operates a hazardous waste treatment facility within Van Buren Township pursuant to air pollution control permits issued by the Wayne County Department of

Environment, Air Quality Management Division (Wayne County). Wayne County administers permits for environmental emissions for the Michigan Department of Environmental Quality (MDEQ). Before filing this lawsuit, it is not disputed that the Township filed its notice of intent to sue. On March 31, 1997, Van Buren filed a three-count complaint against EQ. Count 1 alleges that EQ improperly altered its operations without a permit to do so. Count 2 alleges that EQ dismissed air contaminants which are injurious to humans in violation of condition 7 of the Michigan disposal permits. Count 3 alleges that EQ dismissed air emissions in violation of condition 7 of the Michigan disposal permits which have unreasonably interfered with the comfortable enjoyment of life and property.

Defendant EQ has moved to dismiss Counts 2 and 3 pursuant to Fed.R.Civ.P. 12(b)(6). EQ argues that the Clean Air Act limits citizen suits for violations of permit conditions to claims to enforce requirements of the Clean Air Act or of a state implementation plan (SIP) which the EPA approves. Defendant EQ argues that Counts 2 and 3 allege only a violation of condition 7, which it maintains is not in effect under the Clean Air Act or a federally approved SIP. Plaintiff does not dispute that condition 7 per se is not part of the Clean Air Act or an SIP. Plaintiff argues that condition 7 incorporates Rule 336.1901 (901) of

Michigan's Air Pollution Control Commission General Rules (Commission Rules) because condition 7 and Rule 901 are virtually identical. Rule 901 provides:

> Notwithstanding the provisions of any other Commission rule, a person shall not cause or permit the emission of an air contaminant or water vapor in quantities that cause, alone or in reaction with other air contaminants, either of the following:
>
> (a) Injurious effects to human health or safety, animal life, plant life of significant economic value, or property.
>
> (b) Unreasonable interference with the comfortable enjoyment of life and property.

Rule 336.1901.

Condition 7 provides:

> 7. Operation of this emission source shall not result in the emission of an air contaminant which causes injurious effects to human health or safety, animal life, plant life of significant value or property, or which causes unreasonable interference with comfortable enjoyment of life and property.

Exhibit A to Plaintiff's Response Brief. Plaintiff maintains that Rule 901 was incorporated as part of Michigan's SIP. Under its theory that condition 7 and Rule 901 are the same, and that the SIP incorporated Rule 901, plaintiff argues that counts 2 and 3 are actionable under the Clean Air Act.

Defendant EQ, on the other hand, contends that even if Rule 901 and condition 7 were construed to be the same, plaintiff is barred from suing for a violation of Rule 901 under the Clean Air Act as its notice of intent to sue did not reference Rule 901. Defendant also disputes that Rule 901 was ever incorporated into Michigan's SIP. Furthermore, defendant contends that even if Rule 901 were part of Michigan's SIP, condition 7 and Rule 901 are not identical. Finally, defendant argues that permit condition 7 is not actionable in a Clean Air Act citizen suit because it does not prescribe objective, quantitative standards but sets forth imprecise subjective standards.

STANDARD OF LAW

Defendant has filed a motion to dismiss counts 2 and 3 for failure to state a claim under Fed.R.Civ.P. 12(b)(6). Federal Rule of Civil Procedure 12(b)(6) authorizes a court to dismiss a claim on an issue of law. In this case, both parties have submitted matters outside the pleadings for the court's consideration. Accordingly, the court shall treat defendant's motion as one for summary judgment pursuant to Fed.R.Civ.P. 56(c).

Federal Rule of Civil Procedure 56(c) empowers the court to render summary judgment "forthwith 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 F.D.I.C. v. Alexander, 78 F.3d 1103, 1106 (6th Cir. 1996). The Supreme Court has affirmed the court's use of summary judgment as an integral part of the fair and efficient administration of justice. The procedure is not a disfavored procedural shortcut. Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986); see also Kutrom Corp. v. City of Center Line, 979 F.2d 1171, 1174 (6th Cir. 1992).

The standard for determining whether summary judgment is appropriate is "'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Wimmingham v. North Am. Resources Corp., 42 F.3d 981, 984 (6th Cir. 1994) (citing Booker v. Brown & Williamson Tobacco Co., 879 F.2d 1304, 1310 (6th Cir. 1989)). The evidence and all inferences therefrom must be construed in the light most favorable to the non-moving party. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Smartech Elec., Inc. v. Mahoning County Commr., 85 F.3d 257, 259 (6th Cir. 1996); Wilson v. Stroh Co., Inc., 952 F.2d 942, 945 (6th Cir. 1992). "[T]he mere existence of some alleged factual dispute between the parties will

not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986); see also Hartleip v. McNeilab, Inc., 83 F.3d 767, 774 (6th Cir. 1996).

If the movant establishes by use of the material specified in Rule 56(c) that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law, the opposing party must come forward with "specific facts showing that there is a genuine issue for trial." First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 270 (1968); see also Adams v. Philip Morris, Inc., 67 F.3d 580, 583 (6th Cir. 1995). Mere allegations or denials in the non-movant's pleadings will not meet this burden. Anderson, 477 U.S. at 248. Further, the non-moving party cannot rest on its pleadings to avoid summary judgment. It must support its claim with some probative evidence. Kraft v. United States, 991 F.2d 292, 296 (6th Cir.), cert. denied, 510 U.S. 976 (1993).

ANALYSIS

1. Condition 7 is Not a Viable Basis for a Citizen Suit

A Clean Air Act citizen suit may be brought against a private party only if the party has (1) violated an "emission standard or limitation under [the Clean Air Act]" or an order regarding such a

standard or limitation, or (2) proposed to construct or constructed a facility without having first obtained a permit required under Parts C or D of Subchapter I of the Clean Air Act, or violated any such permit. 42 U.S.C. § 7604(a)(1) and (3). Counts 2 and 3 allege only that defendant has violated permit condition 7. In order for counts 2 and 3 to state a valid citizen suit claim, condition 7 must be an emission standard or limitation under the Clean Air Act or under an SIP approved by the EPA. 42 U.S.C. § 7604(f)(4). The Clean Air Act establishes minimum air quality levels and states may adopt more stringent protections in their SIPs. Her Majesty the Queen v. City of Detroit, 874 F.2d 332, 336 (6th Cir. 1989).

In this case, plaintiff does not dispute that condition 7 is not in effect under the Clean Air Act or under Michigan's SIP. As pleaded, counts 2 and 3 must be dismissed because condition 7 is not a citizen suit emission standard.

Plaintiff contends that condition 7 is enforceable in this citizen suit because the condition is virtually identical to Michigan Commission Rule 901, which it alleges was accepted by the EPA as part of Michigan's SIP. It is not disputed that the complaint does not allege a violation of Rule 901. Thus, in order for the court to consider plaintiff's argument, it must construe

plaintiff's opposition brief as a motion to amend its complaint to allege a violation of Rule 901. The standard of law for granting leave to amend is that leave should be granted unless doing so would be futile because the amended complaint could not survive a motion to dismiss. Foman v. Davis, 371 U.S. 178, 182 (1962). Because the standard for granting leave to amend is liberal, the court shall consider whether plaintiff's complaint could survive defendant's motion to dismiss if plaintiff were allowed to amend the complaint to allege violations of Rule 901 in counts 2 and 3. For the reasons stated below, the court finds that a citizen suit may not be brought under the Clean Air Act based on an alleged violation of Commission Rule 901.

2. Inadequate Notice

Defendant EQ argues that plaintiff's position that counts 2 and 3 state a viable citizen suit claim for an alleged violation of Rule 901 must be dismissed because plaintiff failed to provide notice that it would allege a violation of Rule 901 prior to filing this action. The Clean Air Act provides that a citizen suit plaintiff, such as the Township, must serve notice on the alleged violator at least 60 days prior to filing suit. 42 U.S.C. § 7604(b). The notice must:

> include sufficient information to permit the recipient to identify the specific standard, limitation, or order which has allegedly been violated, the activity alleged to be in violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name and address of the person giving the notice.

40 C.F.R. § 54.2(b). The Supreme Court has held that a plaintiff must comply with the mandatory notice provision before there is subject matter jurisdiction over the action. Hallstrom v. Tillamook County, 493 U.S. 20, 31 (1989). The purpose of the notice provision is to provide the alleged violator with effective notice so that compliance with federal environmental laws may be achieved short of litigation. See Public Interest Research Group v. Hercules, Inc., 50 F.3d 1239, 1249 (3rd Cir. 1995).

In this case, plaintiff sent defendant notice on September 10, 1996. The relevant portion of plaintiff's notice of intent to bring a citizen suit under the Clean Air Act alleges that defendant violated permit condition 7 as follows:

> The facility's operations have had harmful effects to human health and safety. In the Clean Air Act, Congress has identified various hazardous air pollutants. A review of these hazardous air pollutants and the facility's ambient air monitoring records indicate that levels of some of these substances have exceeded 1 in a 100,000 excess cancer risk levels. Secondary Risk Screening Levels ("SRSLs") established by the MDEQ at the facility's boundaries. This is significant because the facility is located within a populated area, near school buildings, and ball fields at which children play. The

following is a chart for four hazardous air pollutants (trichloroethene, benzene, cadmium, and chromium) which have been detected in levels exceeding SRSLs and the months during which these levels exceeded SRSLs.

In addition, the Permit itself recognizes "the common public right to live free from foul or noxious odors." (Permit Condition 71). Operation of this facility has resulted in numerous complaints about such "foul and noxious odors" and has caused unreasonable interference with the comfortable enjoyment of life and property. Since September 8, 1994, Van Buren has received 233 air quality complaints concerning the facility's operations. In addition, numerous private suits have been filed by neighboring residents complaining about the air emissions and the diminishment of value to the enjoyment and value of neighboring properties. These complaints continue on a regular basis, depending on the activity at the facility.

Complaint, Exhibit A.

EQ alleges that because the notice did not specifically allege a violation of Rule 901 that counts 2 and 3 must be dismissed. The regulations governing notice, however, do not require that the citizen suit plaintiff advise the alleged violator of every statutory code provision under which it will sue, only that the plaintiff provide "sufficient information to permit the recipient to identify" the provision allegedly violated. Section 54.3. The question for the court is not simply whether plaintiff's notice specifically alleged a violation of Rule 901, which clearly it did not, but rather, whether EQ could identify Rule 901 as having allegedly been violated based on the content of the notice given.

Having carefully considered this question, the court finds that the notice was inadequate.

Although the notice need not specifically cite the standard allegedly violated, it must give sufficient information that the recipient can identify the standard. In Fried v. Sungard Recovery Serv., Inc., 900 F. Supp. 758, 765 (E.D. Pa. 1995), the court found that notice was adequate although it did not cite to a specific statutory violation where the letter alleged that defendants' renovations violated the National Emissions Standard for Asbestos (NESA) and only one section of the NESA applied to renovations. Under these circumstances, the court found that plaintiff had provided sufficient information, albeit barely, for the recipient to determine the specific standard allegedly violated. Id.

By contrast, in this case, there was no way for defendants to identify Rule 901 of the Michigan Commission Rules as the specific standard which had allegedly been violated. This is true for several reasons. First, plaintiff's notice specifically alleged a violation of permit condition 7 so there was no reason for defendant to attempt to identify another standard which may have been violated. Second, the notice did not allege any violation of the Michigan Commission Rules of which Rule 901 is a part. Moreover, the information provided in the notice would not lead

defendant to identify Rule 901 as having been violated. The notice identified four hazardous air pollutants (trichloroethene [TCE], benzene, cadmium, and chromium) as allegedly having been emitted in violation of SRSLs levels. None of those four pollutants are identified in Rule 901.

The Clean Air Act requires that plaintiff provide defendant with sufficient information that defendant could identify Rule 901 as allegedly having been violated. 42 U.S.C. § 7604(b). Plaintiff's notice is woefully devoid of any information which would lead EQ to identify Michigan Commission Rule 901 as having been violated. Because plaintiff identified specific provisions of defendant's Wayne County permits which had allegedly been violated, there was simply no way for EQ to perceive that the Township actually meant to sue for the violation of an unidentified Michigan Commission Rule. Accordingly, any attempt by plaintiff to save counts 2 and 3 from dismissal by arguing that they may be brought under Rule 901 must fail. Plaintiff failed to give adequate notice permitting defendant to identify Rule 901 as allegedly having been violated. Thus, this court lacks subject matter jurisdiction over any claim based on a violation of Rule 901, and counts 2 and 3 must be dismissed.

3. Rule 901 is Not Part of Michigan's SIP

In the alternative, even if the court were to find that plaintiff gave adequate notice to allow a suit premised on an alleged violation of Rule 901 to proceed, the court still must grant defendant's motion for partial summary judgment. This is so because a citizen suit may not be brought on the basis of Rule 901.

The parties agree that under the applicable law, in order for an alleged violation of Rule 901 to be actionable under a Clean Air Act citizen suit, Rule 901 must be included in Michigan's SIP. 42 U.S.C. § 7604(f)(4). The parties disagree, however, over whether Rule 901 was ever incorporated into Michigan's SIP. The Township maintains that Michigan's SIP incorporates Rule 901. ZO disputes the Township's claim.

In order for a provision to become a part of a state's implementation plan, the state must (1) formally submit it to the EPA, 42 U.S.C. § 7410(a)(1), and (2) the EPA must formally approve it. 42 U.S.C. § 7410(k). There is no dispute that Rule 901 was submitted to the EPA. The issue is whether the EPA formally approved Rule 901.

The Township argues that Rule 901 was incorporated into the Commission Rules which were accepted by the EPA as part of Michigan's SIP. It alleges that Michigan submitted its SIP to the

EPA on February 3, 1972, and that the EPA approved Michigan's SIP with certain exceptions which are not relevant here. 40 C.F.R. § 52.1172. The Township claims that Michigan submitted certain revisions to its SIP which the EPA accepted, which included the following provision:

> On January 8, 1980, the State submitted a copy of the finally adopted rules of the Commission. These rules became fully effective on January 18, 1980. These finally adopted rules are identical to the rules submitted on April 25, 1979, as part of Michigan's Part D nonattainment area plan except for a modification in the numbering system. Paragraph (c)(16) of this subpart identifies those rules on which USEPA has not taken final action.

40 C.F.R. § 52.1170(c)(18).

Defendant EQ, on the other hand, disputes that Rule 901 was ever incorporated into Michigan's SIP. EQ argues that section 52.1170(c)(18), quoted above, is ambiguous and does not support plaintiff's position that Rule 901 was incorporated into the SIP, because Rule 901 was not published in the Federal Register prior to its alleged inclusion. Defendant is correct that EPA approval requires Federal Register notice and the opportunity to submit comments. See 5 U.S.C. § 553; Buckeye Power, Inc. v. United States EPA, 481 F.2d 162, 171 (6th Cir. 1973). It is not disputed that Rule 901 was submitted to the EPA on April 25, 1979, for approval

as part of Michigan's SIP, but that the EPA never published 901 in the Federal Register for comment.

In support of its motion to dismiss, defendant has attached a document prepared by the Michigan Department of Environmental Quality (MDEQ), Air Quality Division (AQD), entitled "Rule History and Current Status in the SIP." That document shows that Rule 901 was submitted to the EPA on April 25, 1979, and that the EPA has taken no action on the Rule. The chart also indicates that the EPA is "taking no action on rules already approved" and that the EPA previously approved Rule 336.46. Exhibit G at 15. The document also indicates:

> Please Note: the rules were recodified in a submittal made on 1/18/80. In the FR notice on 5/6/80 (45 Fr 29790), EPA acted on this submittal package; however, they did not act on "those rules which have already been approved." The rules which were not acted on, which EPA considered to have been already approved, are not listed in the FR notice.

Exhibit G to Defendant's Reply Brief at 1. Although Exhibit G indicates that the EPA did not act on Rule 336.1901 (901) because of its prior approval of Rule 336.46, plaintiff has not argued that its claims exist under Rule 336.46 nor that Rule 336.1901 incorporated Rule 336.46.

In further support of its motion to dismiss, defendant also has submitted an unofficial chart prepared by the MDEQ-AQD,

comparing Michigan's air rules to the federal EPA rules. Exhibit F to Defendant's Reply Brief. The chart states that Rule 901 is a solely Michigan Rule which is not found in the federal version. Exhibit F to Defendant's Reply Brief at 123. Defendant also has submitted a letter from the EPA dated September 20, 1994, listing the Michigan air pollution regulations which are considered to be federally enforceable. Exhibit B to Defendant's Reply Brief. Although the letter lists numerous state air regulations which are federally enforceable, Rule 901 is not among those listed.

Defendant also has submitted two other pieces of evidence in support of its claim that Rule 901 was never made part of Michigan's SIP such that it could be enforced pursuant to a citizen Clean Air Act suit. Defendant has submitted a copy of a February 23, 1996, letter from MDEQ-AQD Chief Dennis Drake to David Kee, Director, Air and Radiation Division, EPA Region 5. Defendant's Exhibit J to Defendant's Supplemental Brief. In that letter Drake states:

> All of Michigan's former Air Pollution Act, Public Act (PA) 348 of 1965, has been made part of the Natural Resource and Environmental Protection Act, PA 451 of 1994. The former PA 348 is now located in Article II, Chapter 1, Part 55 of PA 451. Also, all of the air pollution control rules which were associated with the former PA 348 should be included as part of the SIP, except for R 336.91-97, R 336.1230-1232, 1310, and the

rules in Part 5. (These are now associated with PA 451, but the rule numbers have not changed.)

Public Act 348 and its rules were included in the 1972 SIP submittal. Since that SIP submittal was approved, it's possible that some of the rules included in the submittal, ones which were never revised or withdrawn from the SIP, are actually still part of the SIP. An example of this would be R 336.46, which was the old version of R 336.1901. It appears that R 336.46 may still be part of the SIP, although EPA has never taken action on R 336.1901.

Exhibit J to Defendant's Supplemental Brief. Exhibit J unequivocally states that the EPA has never taken action on Rule 336.1901 (901). The letter suggests that the reason for this may be that Rule 901's predecessor, Rule 336.46 may be a part of the SIP. The court does not consider whether Rule 336.46 was made part of the SIP, however, as plaintiff has not argued that Rule 336.46 is applicable in this case and plaintiff is not seeking to bring claims under Rule 336.46.

Finally, the court notes that defendant has submitted a letter dated January 25, 1995, from Robert Irvine of MDEQ-AQD's Strategy Development Unit to a Michigan attorney which states that Rule 901 is not part of Michigan's SIP:

At your request I am writing to clarify an issue regarding Rule 901 of the Michigan Air Pollution Control regulations. The issue is whether Rule 901 is or is not

> part of Michigan's State Implementation Plan (SIP). It is currently the position of the Air Quality Division (AQD) that the rule is not part of the SIP. This position is based on three facts. One, we have to date been unable to find any EPA notice of rule making on Rule 901 specifying it as being in the SIP. Two, EPA has been unable to find such documentation and has told us to consider it not part of the SIP. Third, staff of the AQD have publicly stated that Rule 901 is not part of the SIP because the rule covers nuisance odors and injurious effects which EPA traditionally has not been concerned about enforcing and which may not involve emission reductions impacting the SIP.

Exhibit K to Defendant's Supplemental Brief.

EQ submitted Exhibits J and K, discussed above, pursuant to a supplemental brief. Because the court found defendant's supplemental brief helpful to determining the issues raised in defendant's motion, the court granted plaintiff leave to file its own supplemental brief. Despite this opportunity, plaintiff declined to do so. Plaintiff has failed to present any contradictory proofs in support of its argument that Rule 901 is part of Michigan's SIP. The record now before the court consists solely of defendant's uncontradicted proofs showing that the MDEQ and EPA have concluded that Rule 901 is not included in Michigan's

SIP.[1] The opinions of the MDEQ and EPA regarding the scope of Michigan's SIP are entitled to considerable deference on the part of this court. Chevron v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984); Navistar Int'l Transp. Corp. v. United States EPA, 858 F.2d 282, 287 (6th Cir. 1988), cert. denied, 490 U.S. 1039 (1989). Having carefully reviewed all of the evidence submitted, the court concludes that Rule 901 is not part of Michigan's SIP and is not enforceable pursuant to a citizen suit under the Clean Air Act.

In reaching this conclusion, the court is mindful that the Clean Air Act requires that each state adopt and submit to the EPA for approval an SIP, 42 U.S.C. § 7410, in order to ensure that the state comply with the National Ambient Air Quality Standards (NAAQS) promulgated by the EPA pursuant to 42 U.S.C. § 7409. A state's SIP may contain only those requirements which ensure that the state complies with the NAAQS. See 42 U.S.C. § 7410(a)(1).

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[1]In its reply brief, defendant also pointed out that the EPA internet web site listing of Michigan's SIP did not list Rule 901 as having been made part of the SIP. In its later filed supplemental brief, defendant pointed out that on or about August 4, 1997, the EPA changed its internet web site listing of Michigan's SIP to include Rule 901 as an SIP provision. The court agrees with defendant that the inclusion of Rule 901 on the web site is not controlling authority in the court's determination of defendant's motion to dismiss.

The NAAQS apply only to the "criteria pollutants" which are lead, nitrogen dioxide, sulfur dioxide, carbon monoxide, particulates and ozone. 40 C.F.R. Pt. 50. In this case, plaintiff is suing in count 2 for the emissions of non-criteria pollutants including benzene, chromium, cadmium and TCE. Thus, defendant argues that permit condition 7 (or Rule 901) cannot be in effect under Michigan's SIP because they do not serve the objective of attaining compliance with the NAAQS. In support of this argument, defendant has attached a memorandum from the associate general counsel of the EPA dated February 9, 1979, stating that measures to control non-criteria pollutants may not legally be made part of a state's SIP. Exhibit B to Defendant's Brief in Support of Motion to Dismiss. Plaintiff has not contradicted this evidence. Accordingly, this court finds that the EPA memorandum stating that a state SIP may not regulate non-criteria pollutants offers additional support for this court's conclusion that Rule 901 is not part of Michigan's SIP.

Moreover, to the extent that plaintiff relies on condition 7 or Rule 901 to sue for the alleged odor content of defendant's emissions in count 3 of its complaint, the court notes that the EPA has stated that the Clean Air Act does not regulate odors and there are no NAAQS which regulate odors. 58 Fed. Reg. 28,359, 28,360

(1993). Defendant has cited numerous instances where the EPA removed odor provisions from the SIPS of other states. See, e.g. 60 Fed. Reg. 36,715, 36,719-20 (1995) (Montana), 58 Fed. Reg. 11,374, 11,377 (1993) (Virginia), 60 Fed. Reg. 21,703, 21,704 (1995) (Washington), 61 Fed. Reg. 47,058, 47,058 (1996) (Wyoming), 60 Fed. Reg. 27,411, 27,411 (1995) (Minnesota). To the extent that plaintiff argues that condition 7 or Rule 901 forms the basis for it to bring a claim for odor emissions in count 3 of the complaint, the numerous instances where the EPA has rejected approval of SIP provisions regulating odors further buttresses this court's ruling that Rule 901 is not part of an EPA approved SIP.

Having found that (1) plaintiff may not bring a citizen suit under the Clean Air Act based on an alleged violation of permit condition 7; (2) plaintiff gave inadequate notice of its intent to bring a citizen suit under Rule 901; and, (3) Rule 901 is not part of an EPA approved SIP, counts 2 and 3 must be dismissed and the court does not reach the other arguments raised in defendant's motion.

CONCLUSION

For the reasons stated above, defendant's motion to dismiss counts 2 and 3 of the complaint only for failure to state a claim,

which the court construes as a motion for summary judgment, hereby is GRANTED.

SO ORDERED.

BARBARA K. HACKETT
United States District Judge

Dated: January 5, 1998.