

**Law Office of Kathryn M. Amirpashaie, PLC**  
406 Blue Ridge Avenue NE, Leesburg, Virginia 20176

Kathryn M. Amirpashaie

Telephone: 703.771.8394  
E-Mail: [kmalawoffice@gmail.com](mailto:kmalawoffice@gmail.com)

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August 25, 2016

VIA CERTIFIED MAIL

Administrator Gina McCarthy  
U.S. Environmental Protection Agency  
Mail Code: 1101A  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

RE: Notice of Intent to Sue under the Federal Clean Air Act

Dear Administrator McCarthy:

This letter provides notice, pursuant to 42 U.S.C. § 7604(b), that the Sierra Club intends to file a citizen suit against the United States Environmental Protection Agency (“EPA”) and the Administrator of the EPA, based on your failure to perform a nondiscretionary duty set forth under Title V of the Clean Air Act (“CAA” or “Act”). Specifically, Sierra Club intends to file suit over your failure to, within the timeframe required by Section 505(b)(2) of the Act,<sup>1</sup> grant or deny the petition submitted by Sierra Club seeking an objection by EPA to the Title V Operating Permit, Permit No. 11-628-15 (hereafter “Proposed Permit”), proposed by the Western North Carolina Regional Air Quality Agency (“WNCRAQA”) for Duke Energy Progress, Inc.’s Asheville Steam Electric Plant (“Asheville Plant”), located in Buncombe County, North Carolina. Sierra Club’s petition was mailed to EPA on June 17, 2016, via FedEx overnight delivery. As of today, more than 60 days have passed without EPA taking action on said petition, in violation of the Administrator’s nondiscretionary duty under Section 505(b)(2) to grant or deny the petition within 60 days after it was filed.<sup>2</sup>

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<sup>1</sup> See 42 U.S.C. § 7661d(b)(2).

<sup>2</sup> *Id.*

I. The Asheville Plant Is Subject to Title V of the Clean Air Act

Title V of the CAA requires specified sources of air pollution to obtain an operating permit from a permitting authority.<sup>3</sup> EPA delegated to North Carolina the authority to administer the CAA's Title V operating permit program within the state.<sup>4</sup> North Carolina adopted laws and regulations granting WNCRAQA, a local air agency, the authority to implement the program in Buncombe County and the City of Asheville.<sup>5</sup> WNCRAQA subsequently adopted regulations to fulfill this delegation.<sup>6</sup>

The previous Title V permit for the Asheville Plant was issued on January 18, 2011, and expired on May 31, 2015. WNCRAQA received Duke Energy's permit renewal application on August 22, 2014 and, on March 26, 2015, noticed a draft Title V permit renewal for public comment and scheduled a public hearing for April 29, 2015. "Written comments from the public were accepted via email and regular mail from March 26th until May 7, 2015."<sup>7</sup> On April 30, 2015, Sierra Club submitted timely comments on the draft permit, urging WNCRAQA to establish modeling-based, numerical emission limits stringent enough to ensure that the people of Asheville would no longer be exposed to unsafe amounts of sulfur dioxide.<sup>8</sup>

Among other issues raised in those comments, Sierra Club criticized the draft permit as failing to comply with requirements under the Clean Air Act and the WNCRAQA local implementation plan due to the impermissibly lenient proposed numerical limits for sulfur dioxide emissions.<sup>9</sup> More specifically, Sierra Club submitted air dispersion modeling demonstrating that the 24-hour, 2.3 lbs/MMBtu limits for sulfur dioxide emissions included in the draft permit were not stringent enough to ensure that compliance with such limits will ensure compliance with the applicable narrative prohibition that the Plant not cause downwind exceedances of the governing ambient air quality standard for sulfur dioxide.<sup>10</sup> To translate the narrative prohibitions into clear numerical emission limits, WNCRAQA needed to set one-hour

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<sup>3</sup> 42 U.S.C. § 7661a(a).

<sup>4</sup> Clean Air Act Final Full Approval of Operating Permit Programs; North Carolina, Mecklenburg County, and Western North Carolina, 66 Fed. Reg. 45,941 (Aug. 31, 2001).

<sup>5</sup> *See id*; *see also* N.C.G.S. § 143-215.112.

<sup>6</sup> *See generally* WNCRAQA Code §§ 17.0501 *et seq.*

<sup>7</sup> Western North Carolina Regional Air Quality Agency Memorandum, "Public Comments Regarding Proposed Title V Permit Renewal for Duke Energy Progress, Inc. – Asheville Steam Plant Facility," Nov. 16, 2015 (Revised Mar. 22, 2016), at 1, available at <https://www.buncombecounty.org/common/wncAir/Memo%20to%20Board%20with%20Appendices.pdf>.

<sup>8</sup> Sierra Club Comments on Draft Title V Permit Renewal for Duke Energy Progress' Asheville Steam Electric Plant, Permit No. 11-628-15 (Apr. 30, 2015).

<sup>9</sup> *Id.* at 8–10.

<sup>10</sup> *Id.*

limits of approximately 0.029 pounds of sulfur dioxide per MMBtu for the Asheville coal units—an emission rate that the Plant was achieving in 2006.

II. EPA Failed to Grant or Deny Sierra Club’s Petition to Object to the Proposed Permit for the Asheville Plant within the Statutorily Required Timeframe

As per CAA section 505(b)(1), within 45 days of receipt of a proposed Title V permit, the Administrator of the EPA “shall . . . object” to the permit’s issuance if it “contains provisions that are determined by the Administrator as not in compliance with the applicable requirements” of the CAA and “the requirements of an applicable implementation plan.”<sup>11</sup> If EPA does not object during this period, any person may petition the Administrator for issuance of an objection within 60 days after the expiration of the 45-day review period.<sup>12</sup> Accordingly, the timing for EPA to object to the Proposed Permit for Asheville and for the public to petition EPA to object to the Proposed Permit was as follows: WNCRAQA submitted the proposed permit to EPA on April 15, 2016; EPA’s 45-day review period ended on May 30, 2016; and the 60-day public petition period ended on July 29, 2016.

EPA did not object to the Asheville Proposed Permit within the allotted 45-day time frame. Consequently, Sierra Club filed a petition to object to the Proposed Permit on June 17, 2016, within 60 days after the expiration of EPA’s 45-day review period, in accordance with 42 U.S.C. § 7661d(b)(2). The Petition to EPA was properly based on issues raised during the public comment period for the Proposed Permit. Specifically, Sierra Club’s Petition showed that the Proposed Permit lacks the conditions necessary to ensure compliance with applicable requirements that prohibit the exceedance of governing ambient air quality standards—*i.e.*, sufficiently stringent numerical limits on the emission of sulfur dioxide.

According to CAA section 505(b)(2) of the CAA, the Administrator was required to respond to Sierra Club’s June 17, 2016 petition to object within 60 days, either granting or denying the petition.<sup>13</sup> However, as of August 25, 2016, EPA has yet to respond to the petition to object to Asheville’s Title V Permit.

III. Citizens May Sue EPA for Failure to Timely Grant or Deny a Petition to Object

Section 304(a)(2) of the CAA provides that any person may sue the Administrator of the EPA “where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary.”<sup>14</sup> Section 505(b)(2) of the CAA expressly provides that the “Administrator shall grant or deny [a petition to object] within 60 days after the petition is

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<sup>11</sup> 42 U.S.C. § 7661d(b)(1).

<sup>12</sup> 42 U.S.C. § 7661d(b)(2).

<sup>13</sup> *Id.* (“The Administrator shall grant or deny such petition within 60 days after the petition is filed.”).

<sup>14</sup> 42 U.S.C. § 7604(a)(2).

filed.”<sup>15</sup> This provision imposes a mandatory, nondiscretionary duty upon EPA to act within 60 days of the filing of a petition under this section. Accordingly, in the event that the Administrator fails to perform this nondiscretionary duty, citizens may bring suit to compel such action.

IV. Sierra Club Intends to File a Citizen Suit to Compel EPA to Grant or Deny the Petition to Object

Sierra Club filed a timely petition to object to the Proposed Title V Permit for the Asheville Plant on June 17, 2016. The Administrator had 60 days to grant or deny the petition to object to the Proposed Permit.<sup>16</sup> To date, the Administrator has not granted or denied the Petition to Object. Therefore, the Administrator has failed to perform the nondiscretionary duty to grant or deny Sierra Club’s Petition within the statutorily mandated time frame, in violation of 42 U.S.C. § 7661d(b)(2).

The CAA requires citizens to provide the Administrator with 60 days notice prior to bringing an action under CAA section 304(a)(2) where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.<sup>17</sup> Accordingly, Sierra Club hereby notifies EPA and the Administrator of its intent to file suit under CAA section 304(a)(2) for failing to perform the nondiscretionary duty of granting or denying Sierra Club’s June 17, 2016 petition to object to the proposed Title V permit for the Asheville Plant. If the violation remains unresolved at the end of the 60-day notice period, Sierra Club intends to seek the following relief:

1. An order compelling EPA and the Administrator to grant or deny Sierra Club’s Petition within 60 days from the date of the order;
2. Attorneys’ fees and other litigation costs; and
3. Other appropriate relief as allowed.

If you would like to discuss the matters identified in this letter or offer a proposal for resolving this issue, please contact me directly at [kmalawoffice@gmail.com](mailto:kmalawoffice@gmail.com) or (703) 771-8394.

Sincerely,

/s Kathryn Amirpashaie

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<sup>15</sup> 42 U.S.C. § 7661d(b)(2) (emphasis added).

<sup>16</sup> See *id.*

<sup>17</sup> *Id.*; see also 40 C.F.R. § 54.2(a).

Kathryn M. Amirpashaie, Esq.  
Law Office of Kathryn M. Amirpashaie, PLC  
406 Blue Ridge Avenue NE  
Leesburg, VA 20176  
Tel.: 703.771.8394  
E-mail: kmalawoffice@gmail.com

Bridget Lee, Esq.  
The Sierra Club  
50 F Street NW, Eighth Floor  
Washington, DC 20009  
Tel.: 202.675.6275  
E-mail: bridget.lee@sierraclub.org

*Counsel for the Sierra Club*

cc via e-mail only:

Kristi M. Smith (smith.kristi@epa.gov)  
Michael Lee (lee.michaelg@epa.gov)  
Heather McTeer Toney (mcteertoney.heather@epa.gov)  
Heather Ceron (ceron.heather@epa.gov)  
Carol Kemker (kemker.carol@epa.gov)  
Keri Powell (powell.keri@epa.gov)

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