ENVIRONMENTAL INTEGRITY PROJECT

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**Via Certified Mail, Return Receipt Requested**

September 30, 2016

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

**Re: Notice of Intent to Sue for Unreasonable Delay and Failure to Perform a Non-Discretionary Duty to Revise and Re-Issue or Deny Three Title V Permits Issued by the Texas Commission on Environmental Quality**

Dear Administrator McCarthy:

With this letter, Environmental Integrity Project, Sierra Club, Air Alliance Houston, and Environment Texas (collectively, "Plaintiffs") are giving you the required notice of our intent to sue the U.S. Environmental Protection Agency ("EPA") and you, in your official capacity as Administrator of the EPA, for unreasonably delaying performance of a mandatory duty and, in the alternative, for failing to perform a non-discretionary duty. 42 U.S.C. §7604(a); 40 C.F.R. §§ 54.2 and 54.3.

Because the Texas Commission on Environmental Quality ("TCEQ") failed to timely-revise three Title V operating permits—Permit Nos. O1668 (Shell Deer Park Chemical Plant), O1669 (Shell Deer Park Refinery), and O31 (SWEPCO's H.W. Pirkey Power Plant)—to correct deficiencies identified in two objection orders issued by your office, the Clean Air Act and EPA's regulations require you to revise and reissue or deny the permits yourself.[1] 42 U.S.C. § 7661d(c) ("If the permitting authority fails, within 90 days after the date of an objection . . . to submit a permit revised to meet the objection, the Administrator shall issue or deny the permit in accordance with the requirements of this subchapter"); 40 C.F.R. § 70.8(d); *see also Sierra Club v. Johnson*, 500 F.Supp.2d 936 (N.D. Illinois, May 21, 2007) (holding that the Administrator has a non-discretionary duty to issue or deny permit after 90-day period expires); *WildEarth*

[1] EPA's Deer Park Order is available electronically at: https://www.epa.gov/sites/production/files/2015-09/documents/dpr_response2014.pdf EPA's Pirkey Order is available electronically at https://www.epa.gov/sites/production/files/2016-02/documents/pirkey_response2014.pdf

*Guardians v. Jackson*, 885 F.Supp.2d 1112, 1118 (D. New Mexico, August 2, 2012) ("EPA . . . concedes that it is subject to an obligation to . . . [issue or deny a Title V permit] after the 90-day period expires.").

**Table of Relevant Dates**[2]

| Permit No. | Source Name | Application Date | Proposed Permit Sent to EPA | Objection Date | TCEQ Deadline to Revise Permit | Date of Publication of TCEQ Draft Revision[3] |
|---|---|---|---|---|---|---|
| O1668 | Deer Park Chemical Plant | 4/15/2009 | 2/4/2014 | 9/24/2015 | 12/23/2015 | 4/3/2016 |
| O1669 | Deer Park Refinery | 5/20/2009 | 2/4/2014 | 9/24/2015 | 12/23/2015 | 4/3/2016 |
| O31 | H.W. Pirkey Power Plant | 3/27/2013 | 7/22/2014 | 2/3/2016 | 5/3/2016 | 6/17/2016 |

Instead of acknowledging and performing this duty, EPA has decided to allow the TCEQ to continue to review and process the objectionable permits. According to this decision, expressed in correspondence from EPA's Region 6 office to the TCEQ, EPA will take no action on the deficient permits until the TCEQ provides additional information, and once the required information is provided, EPA will review the permits according to the schedule that applies to permits that have not drawn an objection. *See, e.g.,* (Attachment 3) Letter from Jeff Robinson, Section Chief, Air Permitting, EPA Region 6 to Bridget Bohac, Chief Clerk of the TCEQ, Regarding Southwestern Electric Power Company's H.W. Pirkey Power Plant Title V Permit No. O31 (July 15, 2016) ("Upon receipt of the proposed title V permit and all necessary supporting information, including but not limited to TCEQ's response to the public comments along with the final revised statement of basis, we will begin our 45-day review period. *See* 40 C.F.R. § 70.8(c)(1).").[4] This decision is contrary to black letter law and constitutes an unreasonable delay of a mandatory duty or a failure to perform a non-discretionary duty. 42 U.S.C. § 7661d(c); 40 C.F.R. §§ 70.7(g), 70.8(d).[5] The decision to allow Texas to continue to

[2] Additional background information regarding these permitting projects may be found in (Attachment 1) EIP, Sierra Club, and AAH's Comments on the TCEQ's Draft Reopening Permit Nos. O1668 and O669 and (Attachment 2) EIP and Sierra Club's Comments on the TCEQ'S Draft Reopening Permit No. O31.

[3] As explained in Attachments 1 and 2 to this Notice, the TCEQ's late-filed draft revisions do not resolve EPA's objections.

[4] EPA also filed comments on late-filed proposed revisions to the Deer Park permits indicating that the TCEQ should continue to work on the project and provide additional information to the EPA regarding its proposed revisions. (Attachment 4) EPA Comments on the TCEQ's Draft Reopening Permit Nos. O1668 and O1669 (May 3, 2016).

[5] Plaintiffs are aware that federal district courts have reached different conclusions about whether EPA's failure to issue or deny an objectionable permit must be challenged under 42 U.S.C. § 7604(a)'s unreasonable delay provision or 7604(a)(2)'s failure to perform a non-discretionary duty provision. Out of an abundance of caution, Plaintiffs

process and review these permits is also unlikely to lead to a resolution of the issues raised in EPA's objection orders, because the TCEQ has already indicated that it will not make the changes required to correct the objectionable permits. *See, e.g.,* (Attachment 5) Executive Director's Response to EPA's Objection to Permit No. O31 (explaining that EPA should defer to Texas's interpretation of the State Implementation Plan and refusing to make changes to the permit to make SIP limits enforceable during planned maintenance, startup, and shutdown activities).[6]

EPA's proposed course of inaction is not only contrary to the Clean Air Act, it also undermines the effectiveness of Title V's public participation provisions. The purpose of the Title V permitting program is to clarify which requirements apply to each major source of air pollution. Because Title V permits are the central instrument for enforcing and assuring compliance with pollution control requirements that protect those living or working near major sources, the Title V program provides a robust framework for public participation in the permitting process. To ensure that disputes between stakeholders are promptly resolved and that differences of opinion between state and federal permitting agencies do not derail the permitting process, Title V establishes a reasonable schedule and process for such disputes to be resolved. *See,* 42 U.S.C. § 7661a(b)(6) (Title V programs must include "[a]dequate, streamlined and reasonable procedures for expeditiously determining when applications are complete, for processing such applications, for public notice, including offering an opportunity for public comment and a hearing, and for expeditious review of permit actions, including applications, renewals, or revisions, and including an opportunity for judicial review in State court of the final permit action[.]"); *see also, Id.* at § 7661d (laying out process and schedule for EPA's review of Title V permits and public petitions).

Where, as here, a state-permitting authority rejects EPA's interpretation of applicable law or refuses to timely correct deficiencies identified in an EPA objection order, the Clean Air Act requires the Administrator to bring closure to the dispute by taking over the permitting process for that source. *Id.* at § 7661d(c). If the state permitting agency contends that the permit issued by the Administrator improperly characterizes a source's obligations under the Act, the state may challenge EPA's permit in federal court, but EPA and state permitting agencies may not prolong the administrative process by continuing to hash out disagreements informally after a state's obligation to revise the permit has passed. *Id.* ("No objection shall be subject to judicial review until the Administrator takes final action to issue or deny a permit under this subsection.").

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provide notice for both claims and intend to provide EPA the full 180-day notice period for the unreasonable delay claim before filing suit.

[6] While this response was made within the 90-day revision period, the TCEQ did not propose any changes to Pirkey's permit documents until June 17, 2016, after the revision period had passed. These draft changes, if finalized, would formalize the TCEQ's disagreement with EPA's objection order and would not resolve the deficiencies identified by EPA. Because the TCEQ has not yet made any final revisions to the Pirkey permit and because the draft changes fail to resolve the deficiencies that drew EPA's objection, it is the Administrator's duty to revise and reissue or deny the permit herself.

EPA objected to the Shell and SWEPCO Title V permits because the Environmental Integrity Project, Sierra Club, and Air Alliance Houston demonstrated that the permits fail to comply with the Act. *Id.* at 7661d(b)(2) ("The Administrator shall issue an objection . . . if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of this chapter, including the requirements of the applicable implementation plan."). Because Texas refused to revise the objectionable permits to meet EPA's objections within 90 days, it is the Administrator's duty to promptly revise and reissue or deny the objectionable permits to ensure that Plaintiffs and their members are afforded the public health protections guaranteed by the Act.[7] EPA's failure to fulfill this duty and its decision to allow Texas to continue to review and process the Shell and SWEPCO Title V permits, despite the State's failure to meet its deadlines and its refusal to comply with EPA's objection orders, constitutes an unreasonable delay of a mandatory duty or a failure to perform a non-discretionary duty.

Unless EPA furnishes Shell and SWEPCO with the notices required by 40 C.F.R. § 70.8(g)(5) and issues revised permits correcting the deficiencies identified in the Administrator's objection letters within 180 days of receipt of this letter, Plaintiffs intend to file suit in federal district court to compel such actions.

As required by 40 C.F.R. § 54.3, the persons providing this notice are:

Environmental Integrity Project
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Austin, Texas 78701
Attn: Gabriel Clark-Leach
Tel: (512) 637-9478

Sierra Club
2101 Webster Street, Suite 1300
Oakland, California 94612
Attn: Katie Schaefer
Tel: (415)-977-5745

Air Alliance Houston
3914 Leeland
Houston, Texas 77003
Tel: (713) 528-3779
Attn: Adrian Shelley

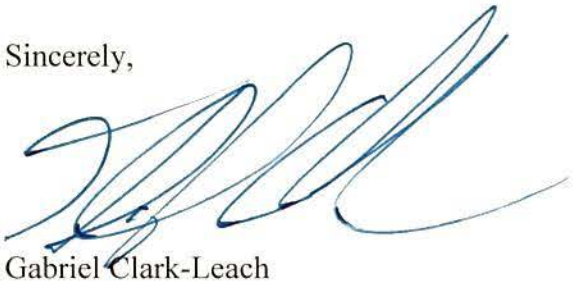
[7] Plaintiffs do not contend that EPA may not seek the TCEQ's input as it reviews and revises Texas's objectionable permits. Indeed, Plaintiffs expect that EPA will consider the TCEQ's input as it revises the objectionable permits. Plaintiffs, however, do contend that EPA must take control of the permitting process for these projects and act to expeditiously correct the deficient permits.

Environment Texas
815 Brazos, Suite 600
Austin, Texas 78701
Tel: (512) 479-0388
Attn: Luke Metzger

While EPA regulations require this information, please direct all correspondence and communications regarding this matter to the undersigned attorney.

Please contact me if you have any questions regarding this notice letter or if you wish to discuss resolution of this matter.

Sincerely,



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**ATTORNEY FOR PLAINTIFFS**
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