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Leavy.Jacqueline@epamail.epa.gov

FW: Notice of Intent to Sue under the Federal Clean Air Act (Sierra Club and EIP Petition to Object to Bull Run Title V Permit, No. 01-0009/567519)

To: CMS.OEX@epamail.epa.gov

From: Kathryn M. Amirpashaie [mailto:kmalawoffice@gmail.com]

Sent: Thursday, December 03, 2015 4:00 PM

To: Mccarthy, Gina <McCarthy.Gina@epa.gov>; Ceron, Heather <Ceron.Heather@epa.gov>; Smith, Kristi <Smith.Kristi@epa.gov>; Land, Eva <Land.Eva@epa.gov>; Lee, Michael <lee.michaelg@epa.gov>

Cc: Zachary Fabish <zachary.fabish@sierraclub.org>; Abel Russ (aruss@environmentalintegrity.org) <aruss@environmentalintegrity.org>

Subject: Notice of Intent to Sue under the Federal Clean Air Act (Sierra Club and EIP Petition to Object to Bull Run Title V Permit, No. 01-0009/567519)

Attached please find a copy of the Sierra Club and Environmental Integrity Project's (EIP) Notice of Intent to file a citizen suit against the United States Environmental Protection Agency (EPA) and the Administrator of the EPA, based on EPA's failure to perform a nondiscretionary duty pursuant to 42 U.S.C. § 7661d(b)(2) of the Clean Air Act, to either grant or deny a petition to object to a proposed Title V Operating Permit for a Tennessee power plant, filed by the Sierra Club and EIP pursuant to CAA section 505(b)(2) of the Act within 60 days after the petition was filed. Specifically, on September 29, 2015, Sierra Club and EIP petitioned EPA to object to Proposed Permit No. 567519 issued by the Tennessee Department of Environment and Conservation for Tennessee Valley Authority's Bull Run Fossil Plant located in Clinton, Tennessee. As of today, more than 60 days have elapsed without EPA taking action on said petition.

The attached Notice of Intent to Sue was mailed to the Administrator today via certified mail, as required by law. If you would like to discuss the matters identified in the attached NOI, please contact me directly at kmalawoffice@gmail.com or (703) 851-9111. Thank you.

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Sincerely,

Kathryn M. Amirpashaie, Esq.

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December 3, 2015

VIA CERTIFIED MAIL

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

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

Dear Administrator Gina McCarthy:

This letter provides notice, pursuant to 42 U.S.C. § 7604(b), that the Sierra Club and Environmental Integrity Project (“EIP”) intend to file a citizen suit against the United States Environmental Protection Agency (“EPA”) and the Administrator of the EPA, based on EPA’s failure to perform a nondiscretionary duty pursuant to 42 U.S.C. § 7661d(b)(2) of the Clean Air Act (“CAA” or “Act”), to either grant or deny a petition to object to a proposed Title V Operating Permit (“Proposed Permit”) for a Tennessee power plant, filed by the Sierra Club and EIP pursuant to CAA section 505(b)(2) of the Act within 60 days after the petition was filed. 42 U.S.C. § 7661d(b)(2). Specifically, Sierra Club and EIP petitioned EPA to object to Proposed Permit No. 567519 issued by the Tennessee Department of Environment and Conservation (“TDEC”) for Tennessee Valley Authority’s (“TVA”) Bull Run Fossil Plant (“Bull Run”) located in Clinton, Tennessee. The petition was delivered via certified mail to EPA on September 29, 2015. As of today, more than 60 days have elapsed without EPA taking action on said petition, in violation of the Administrator’s nondiscretionary duty under CAA section 505(b)(2) to grant or deny the petition within 60 days after it was filed. *See id.*

I. Bull Run 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. 42 U.S.C. § 7661a(a). Tennessee's construction and operating permit programs have been approved by EPA and, accordingly, TDEC is responsible for issuing Title V permits to facilities within the State. See Tennessee Air Pollution Control Regulations Chapter 1200-03-09; see also 40 C.F.R. Part 70, Appendix A, Tennessee (a)(2) ("The State's operating permit program is hereby granted final full approval effective on November 30, 2001.").

Bull Run's prior Title V permit was issued January 6, 2009, and expired on January 6, 2014. In January of 2015, TDEC released a proposed permit (comprised of draft Title V Permit No. 01-0009/567519, draft Title IV Acid Rain Permit No. 01-0009/869161, and draft CAIR Permit No. 01-0009/869022) for Bull Run, based on an application received in July of 2013. On February 12, 2015, the Sierra Club and EIP, along Southern Alliance for Clean Energy and Earthjustice, submitted timely comments on the Proposed Permit. In pertinent part, the comments raised issue with the Proposed Permit's impermissibly lax monitoring requirements for opacity, noting, in particular, that Permit Condition E 3-8 contemplates exceedingly infrequent reporting of opacity, that this extreme infrequency is improper, and that the issue must be rectified in any final permit that TDEC issues.

TDEC subsequently issued a revised Proposed Permit in April of 2015, with a public comment period open through May 21, 2015; in this revised draft, TDEC did not change Condition E 3-8. Accordingly, Sierra Club and EIP, along with Southern Alliance for Clean Energy and Earthjustice, submitted timely public comments on the revised Proposed Permit on May 21, 2015. In these comments, Sierra Club and EIP again raised the issue of impermissibly lax opacity requirements, noting that the proposed biannual visual inspection of opacity in the plume exiting Bull Run was insufficient for ensuring compliance with the short-term opacity standard in the permit.

II. Citizens May Petition EPA to Object to Proposed Title V Permits

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." 42 U.S.C. § 7661d(b)(1). 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. 42 U.S.C. § 7661d(b)(2). Accordingly, the timing for EPA to object to the Proposed Permit for Bull Run and for the public to petition EPA to object to the Proposed

Permit was as follows: EPA's 45-day review period ended on July 31, 2015; the 60-day public petition period ended on September 29, 2015. See Tennessee Proposed Title V Permits, available at <http://www2.epa.gov/caa-permitting/tennessee-proposed-title-v-permits>.

EPA did not object to the Bull Run Proposed Permit within the allotted 45-day time frame. Consequently, Sierra Club and EIP filed a petition to object to the Proposed Permit on September 29, 2015, within 60 days after the expiration of the 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 periods for the Proposed Permit. Specifically, the Petition raised objection with the Proposed Permit's impermissibly lax monitoring requirements for opacity, in particular noting that the permit improperly contemplates opacity compliance as assessed twice a year through visual emissions inspection, despite applicable requirements setting short-term limitations on opacity.

According to CAA section 505(b)(2) of the CAA, the Administrator was required to respond to Sierra Club and EIP's September 29, 2015 petition to object within 60 days, either granting or denying the petition. 42 U.S.C. § 7661d(b)(2) ("The Administrator shall grant or deny such petition within 60 days after the petition is filed."). However, as of December 3, 2015, EPA has yet to respond to the petition to object to the Bull Run 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 can 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." 42 U.S.C. § 7604(a)(2). 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 filed." 42 U.S.C. § 7661d(b)(2) (emphasis added). 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 and EIP Intend to File a Citizen Suit

Sierra Club and EIP filed a timely petition to object to the Proposed Title V Permit for Bull Run on September 29, 2015. The Administrator had 60 days—until November 28, 2015—to grant or deny the petition to object to the Proposed Permit. See 42 U.S.C. § 7661(b)(2). As of December 3, 2015, the Administrator has not yet granted or denied the Petition to Object. Therefore, the Administrator has failed to perform the nondiscretionary duty to grant or deny Sierra Club and EIP'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. 42 U.S.C. § 7604(b)(2); *see also* 40 C.F.R. 54.2(a). Accordingly, through this letter, Sierra Club and EIP hereby notify EPA and the Administrator of their intent to file suit against EPA and the Administrator of the EPA, under CAA section 304(a)(2) for failing to perform the nondiscretionary duty of granting or denying the September 29, 2015 petition to object to the Proposed Title V Permit for Bull Run. If the violation remains unresolved at the end of the 60-day notice period, Sierra Club and EIP intend to seek the following relief:

1. An order compelling EPA and the Administrator to grant or deny Sierra Club and EIP'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 these issues, please contact me directly at kmalawoffice@gmail.com or (703) 851-9111.

Sincerely,

/s/ Kathryn Amirpashaie

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