

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA**

CONSOLIDATED ENVIRONMENTAL
MANAGEMENT, INC. AND NUCOR
STEEL LOUISIANA, LLC

v.

REGINA MCCARTHY, in her Official
Capacity as Administrator, U.S. Environmental
Protection Agency,

Defendant.

Civ. Case No. _____

ORIGINAL COMPLAINT

INTRODUCTION

1. Plaintiffs, Consolidated Environmental Management, Inc., a Delaware corporation and a wholly-owned subsidiary of Nucor Corporation, and Nucor Steel Louisiana, LLC, a Delaware limited liability company and also a wholly-owned subsidiary of Nucor Corporation (collectively referred to herein as “Nucor”), bring this suit against Regina McCarthy, in her official capacity as Administrator of the Environmental Protection Agency (collectively referred to herein as “EPA”) for EPA’s failures to take (after determining to object to Nucor’s state-issued permits) non-discretionary actions required by § 505(b)(3) and (c) of the Clean Air Act (“CAA” or “the Act”), 42 U.S.C. § 7661d(b)(3) and (c). This citizen suit arises out of Administrator McCarthy’s failures to take non-discretionary actions under the Act § 304(a)(2), 42 U.S.C. § 7604(a)(2) and of violations of the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 551-706, all arising from her course of conduct respecting multiple petitions to object, and

seeks an order under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, (a) declaring her purported objections to Nucor's current permits to be void *ab initio* and of no continuing force or effect and (b) clarifying her statutory obligations should she determine to object in response to future petitions on state-issued permits for which Nucor has already applied and which are currently pending before the Louisiana Department of Environmental Quality ("LDEQ").

2. Pursuant to Local Court Rule LR 3.1, Nucor notifies the Court that this civil action involves subject matter that comprises a material part of the subject matter or operative facts in the following previously pending proceedings: *Louisiana Department of Environmental Quality v. United States Environmental Protection Agency*, United States Court of Appeals for the Fifth Circuit, Case No. 12-60482 (filed 06/22/2012; closed 06/10/2014); *Zen-Noh Grain Corporation v. United States Environmental Protection Agency*, United States District Court for the Eastern District of Louisiana, Civil Action No. 2:12-cv-02535-SSV-SS, Section R (filed 10/17/12; closed 05/22/13); *Zen-Noh Grain Corporation v. Consolidated Environmental Management, Inc./Nucor Steel Louisiana*, United States District Court for the Eastern District of Louisiana, Civil Action No. 2:12-cv-01011-SSV-SS, Section R (filed 4/20/12; closed 12/19/12); *Zen-Noh Grain Corporation v. United States Environmental Protection Agency*, United States District Court for the Eastern District of Louisiana, Civil Action No. 2:10-cv-04367-SSV-SS, Section R (filed 11/19/10; closed 04/12/11); *Zen-Noh Grain Corporation v. Leggett, et al*, United States District Court for the Eastern District of Louisiana, Civil Action No. 2:09-cv-00282-SSV-SS, Section R (filed 01/23/09; closed 04/29/09). A list of the related issues presented in those actions is set forth in a separate notice, attached hereto as Exhibit A.

3. Nucor further gives notice that a copy of this Complaint has been served on the Attorney General of the United States and the Administrator of EPA, pursuant to 42 U.S.C. § 7604(c), Fed. R. Civ. P. 4(i), and Fed. R. Civ. P. 5.1.

JURISDICTION AND VENUE

4. This Court has jurisdiction of this action by virtue of the CAA § 304(a)(2), 42 U.S.C. § 7604(a)(2), because EPA has failed to comply with its nondiscretionary duties under the CAA when objecting to Nucor's permits.

5. Further, this Court has jurisdiction over this action by virtue of the APA, 5 U.S.C. §§ 551, 704, because unlawful EPA final agency action is involved for which there is no other adequate remedy in court. This action will also invoke the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, by virtue of the declaratory relief necessitated by EPA's unlawful actions.

6. APA § 706(1), 5 U.S.C. § 706(1), provides that the Court may compel agency action unlawfully withheld or unreasonably delayed. APA § 706(2)(A), 5 U.S.C. § 706(2)(A), provides relief for the action addressed herein in that EPA has issued orders which are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. APA § 706(2)(C), 5 U.S.C. § 706(2)(C), provides relief for the action addressed herein in that EPA has issued orders in excess of its legal authority. APA § 706(2)(D), 5 U.S.C. § 706(2)(D), provides relief for the action addressed herein in that EPA has issued orders without observance of procedures required by law.

7. In addition to the jurisdiction granted by the CAA and APA, judicial review in the district court is favored in this case because EPA has acted beyond its authority. Even where Congress is understood generally to have precluded review, the Supreme Court permits review in the district court under the *Kyne* exception. The exception applies when, as here, an agency has

acted beyond its delegable powers by denying a statutorily created right and, without review by the district court, plaintiffs have no other means to protect and enforce that right, *see Leedom v. Kyne*, 358 U.S. 184, 190-91 (1958); *see also Friends of Crystal River v. EPA*, 794 F. Supp. 674 (W.D. Mich. 1992), *aff'd*, 35 F.3d 1073 (6th Cir. 1994) (holding that EPA's action constituted a clear statutory violation and, therefore, was reviewable by district court, even if Clean Water Act precluded judicial review; without review by district court, plaintiffs would have no other means to directly challenge EPA's alleged, *ultra vires* conduct); *see also Clean Water Action Council of Northeastern Wisconsin, Inc. v. EPA*, 12-3388, 2014 WL 4257843 (7th Cir. Aug. 29, 2014) (the venue and filing provisions of 42 U.S.C. §7607(b) are not jurisdictional and thus do not preclude review on the merits).

8. Further, sovereign immunity does not bar a suit challenging such *ultra vires* acts, because as Nucor alleges below, a federal officer, Administrator McCarthy, acted in excess of her legal authority. *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689-690, 69 S.Ct. 1457, 1461 (1949); *see also Dugan v. Rank*, 372 U.S. 609, 621-22 (1963).

9. Finally, EPA is judicially estopped from challenging this Court's jurisdiction over this matter in light of EPA's earlier representations to the United States Court of Appeals for the Fifth Circuit, in which EPA argued that Nucor's requested relief was available only in the district court, as more fully set forth below.

10. This dispute is not moot because, among other reasons, it "falls within a special category of disputes that are 'capable of repetition' while 'evading review.'" *Turner v. Rogers*, 131 S.Ct. 2507, 2514 (2011) (quoting *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498 (1911)).

11. Venue in the Eastern District of Louisiana is proper under 28 U.S.C. § 1391(e), as that is the district where a substantial part of the actions giving rise to this citizen suit have

occurred.

SUMMARY OF VIOLATIONS

12. EPA issued orders on March 23, 2012 (“2012 Order”) and January 30, 2014 (“2014 Order”) related to Louisiana state-issued permits held by Nucor. These two orders violated the CAA and constituted arbitrary and capricious agency action in the following ways.

13. EPA determined in both the 2012 Order and the 2014 Order to untimely “object” in writing to Nucor’s already-issued state permits, under § 505(b)(2) of the Act, 42 U.S.C. § 7661d(b)(2), yet EPA did not in either order “modify, terminate, or revoke” such state-issued permits, in violation of § 505(b)(3) of the Act, 42 U.S.C. § 7661d(b)(3), which states that:

If the permitting authority has issued a permit prior to the receipt of an objection by the Administrator under paragraph (2) of this subsection, the Administrator shall modify, terminate, or revoke such permit and the permitting authority may thereafter only issue a revised permit in accordance with subsection (c) of this section.

14. By deliberately declining to modify, terminate, or revoke the permits, and declining to issue or deny the permits after LDEQ failed to submit modified permits, final actions explicitly required as a result of EPA’s objections under § 505(b)(3) and (c) of the Act, 42 U.S.C. § 7661d(b)(3), (c), EPA was able to, and did, take other untimely and unauthorized actions in violation of the Act. EPA later avoided judicial review of its unlawful course of conduct by invoking the shield of Section 505(c) of the Act, 42 U.S.C. § 7661d(c), which provides that “No objection shall be subject to judicial review until the Administrator takes final action to issue or deny a permit under this subsection.” By determining to object but failing to take the mandatory, non-discretionary actions to “modify, terminate, or revoke” the permits, and to “issue or deny” them when LDEQ refused to submit revised permits, EPA thus avoided judicial review of its illegal final actions while obstructing Nucor’s permits, all in violation of

Section 505(b) and (c) of the Act, 42 U.S.C. § 7661d, and of congressional intent that objections be quickly resolved.

15. When LDEQ responded to EPA's *ultra vires* request for further justification for LDEQ's permitting decisions, but did not submit a revised permit, EPA illegally declared LDEQ's response to be a "new permit" subject to additional petitions to object rather than taking statutorily required action to issue or deny the permit itself and then undertook to notify the petitioning parties that they should file new petitions to the Nucor "new permit" as decreed by the EPA.

16. EPA's illegal course of conduct unlawfully required the permitting authority to defend the validity of Nucor's permits without EPA's observance of the procedure explicitly required by law, while at the same time EPA denied Nucor and the permitting authority the right to prompt judicial review of EPA's unlawful conduct, all in violation of the CAA and the APA.

17. EPA's deliberate disregard of the requirements of Sections 505(b)(3) and 505(c) of the Act, 42 U.S.C. §§ 7661d(b)(3), 7661d(c), has allowed EPA to take unauthorized final action in the form of irrelevant, untimely and procedurally defective "objections" to Nucor's state-issued permits while at the same time avoiding judicial review of its actions.

18. If EPA contends that the CAA allows it to object in writing to state-issued permits without complying with 42 U.S.C. § 7661d(b)(3)'s requirement to "modify, terminate, or revoke" such permits, and to do so without complying with 42 U.S.C. § 7661d(c)'s requirement to take final action to issue or deny such permits when the permitting authority does not submit a permit revised to meet EPA's objections, then EPA's actions are unconstitutional, as they have deprived Nucor of its validly-issued state permits without even the pretense of due process.

STATEMENT OF FACTS

19. Nucor is the holder of a Louisiana Prevention of Significant Deterioration (“PSD”) permit No. PSD-LA-740(M-1), and a Louisiana Title V permit No. 2560-00281-V1 (“Pig Iron permits”). Nucor is also the holder of a Louisiana PSD permit No. PSD-LA-751(M-2) and a Louisiana Title V permit No. 3086-V3 (“DRI permits”).

20. Nucor was issued PSD permit No. PSD-LA-740 and Title V permit No. 2560-00281-V0 on May 24, 2010. Nucor was issued Title V permit No. 2560-00281-V1, which amended permit No. 2560-00281-V0 on January 27, 2011. Nucor was issued PSD Permit No. PSD-LA-740(M-1), which amended permit No. PSD-LA-740, on July 9, 2013. These state-issued permits are for the construction of a Pig Iron manufacturing facility located near the town of Convent, St. James Parish, Louisiana.

21. Nucor was issued PSD permit No. PSD-LA-751 and Title V permit No. 3086-V0, on January 27, 2011, for the construction and operation of a “direct reduced iron” or DRI manufacturing facility, also located near the town of Convent, St. James Parish, Louisiana.

22. The DRI PSD permit was modified on November 16, 2012 and again on November 26, 2013 and now bears the number PSD-LA-751(M-2). The DRI Title V permit was modified on March 8, 2012, May 29, 2014, and July 1, 2015 and now bears number 3086-V3.

23. The process of obtaining these permits began on May 12, 2008, when Nucor submitted to LDEQ, with required copies to EPA, applications for PSD and Title V permits for the construction and operation of a Pig Iron facility to be located near the town of Convent, St. James Parish, Louisiana.

24. The application process included two public hearings and two public comment periods, during which EPA submitted numerous comments.

25. LDEQ considered all comments and issued the Pig Iron PSD permit and Title V

permit on May 24, 2010.

26. LDEQ provided EPA with a copy of the Pig Iron Title V permit, as required by the CAA. 42 U.S.C. § 7661d(a); 40 C.F.R. § 70.8(a).

27. EPA did not object to the Pig Iron permits.

28. On June 25, 2010, Zen-Noh Grain Corporation (“Zen-Noh”), the owner and operator of a grain elevator located adjacent to Nucor’s property in St. James Parish, submitted a petition to EPA pursuant to 42 U.S.C. § 7661, requesting that EPA object to the Pig Iron PSD and Title V permits issued by LDEQ.

29. The Louisiana Environmental Action Network (“LEAN”) and the Sierra Club also filed separate petitions for EPA to object to the Pig Iron Title V permit on June 25, 2010.

30. Although § 505(b)(2) of the CAA, 42 U.S.C. § 7661d(b)(2), provides that “The Administrator shall grant or deny” petitions to object within 60 days, EPA took no action on these petitions.

31. On November 19, 2010, Zen-Noh filed a citizen suit in the Eastern District of Louisiana to compel EPA action on its petition. *See Zen-Noh Grain Corporation v. Lisa Jackson*, No. 10-4367 (E.D. La.; filed 11/19/10; closed 04/12/11).

32. The start of construction on the Pig Iron facility was delayed by numerous objections and permit appeals. In the intervening time, natural gas market conditions changed substantially and a DRI facility became desirable.

33. On August 20, 2010, Nucor submitted PSD and Title V applications to LDEQ, again with copies to EPA, to construct a DRI facility as part of the Convent facility.

34. The DRI facility would replace roughly half of the permitted Pig Iron facility’s iron making capacity with the DRI process, with corresponding reductions in emissions.

35. After public notice and comment, including comments from EPA, LDEQ issued the PSD and Title V permits for the DRI facility on January 27, 2011.

36. On May 3, 2011, Zen-Noh filed a petition with EPA seeking an objection to the DRI permits.

37. LEAN and Sierra Club also filed separate petitions with EPA on May 3, 2011.

38. EPA did not take action on these petitions within 60 days, as is required by 42 U.S.C. § 7661d(b)(2).

39. On February 1, 2012, the EPA provided public notice of a proposed settlement of action No. 10-4367. 77 Fed. Reg. 5010. The EPA proposed to respond to both of Zen-Noh's petitions (the June 25, 2010 and May 3, 2011 petitions) by March 16, 2012. *Id.* at 5010, 5011.

40. On March 23, 2012, EPA issued an untimely order which addressed only some of the objections contained in the Zen-Noh petitions and which did not address the petitions filed by LEAN and Sierra Club at all. *See* "Order Granting Petitions for Objection to Permits," responding to Petition Number VI-2010-02 & Petition Number VI-2011-03, *In the Matter of: Consolidated Environmental Management, Inc.—Nucor Steel Louisiana, Pig Iron and DRI Manufacturing in St. James Parish, Louisiana* (hereinafter, the "2012 Order").

41. EPA issued the 2012 Order 637 days after Zen-Noh, LEAN, and Sierra Club filed their petitions to object to the Pig Iron permits, and 325 days after they filed their petitions to object to the DRI permits, despite the CAA's mandate that EPA "grant or deny" such petitions within 60 days of receipt. 42 U.S.C. § 7661d(b)(2).

42. In responding to the Zen-Noh and LEAN petitions to object with the 2012 Order, EPA was required to "grant or deny" both petitions, and, if it determined in its discretion to grant either or both petitions, it was explicitly required to "modify, terminate, or revoke" Nucor's

permits.

43. Indeed, those were the only actions authorized by the CAA under the facts of this case; any other action would violate the express mandates of the CAA. *See* 42 U.S.C. § 7661d(b)(3) (“If the permitting authority has issued a permit prior to receipt of an objection by the Administrator under paragraph (2) of this subsection, the Administrator **shall modify, terminate, or revoke such permit** and the permitting authority may thereafter only issue a revised permit in accordance with subsection (c) of this section.”) (Emphasis added).

44. Despite the clear language of 42 U.S.C. § 7661d(b)(3) requiring that it “grant or deny” the Zen-Noh and LEAN petitions, in the 2012 Order EPA deferred action on the majority of issues in the petitions by “grant[ing]” the petitions on two “threshold” issues.

45. In relevant part, the 2012 Order, at pp. 10-11, stated:

LDEQ has not adequately justified its decision to permit the DRI and pig iron processes as two separate projects for purposes of PSD analysis, and (2) LDEQ has not provided permit records from which the full scope of applicable requirements for the pig iron and DRI title V permits can be determined and, in particular, has not adequately explained the basis for its transfer of emissions units between the pig iron and DRI processes via the title V permits, and its incorporation by reference of permit requirements established in a title V permit into a PSD permit.

46. Although EPA purported to grant, in part, one of the pending petitions to object to Nucor’s permits on the above-stated grounds, EPA failed to “modify, terminate, or revoke” the already-issued permits, in violation of 42 U.S.C. § 7661d(b)(3).

47. EPA’s request for more information or a justification from LDEQ by means of an “objection” was clearly *ultra vires* under the circumstances.

48. Given that the petitions to object at issue did not satisfy the petitioners’ burden of proof, the only appropriate response under EPA’s own rules and the burden of proof under the

CAA placed on the petitioners, was for EPA to deny the petitions in full, not to ask LDEQ for further clarification without stating what permit modifications were necessary to resolve its objection. EPA's action not only violated its own rules about the burden of proof resting solely on the petitioner but is also inconsistent with the express language of the CAA placing the burden of demonstration on the petitioner. *See* 42 U.S.C. § 7661d(b)(2).

49. By granting the petitioners a second attempt to satisfy their burden of proof, EPA not only exceeded the authority granted to it by the CAA, *see* 42 U.S.C. § 7661d(b)(2) (“The Administrator shall issue an objection within such period 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.”), but also violated its own rules, further demonstrating that EPA's actions were arbitrary and capricious. *See* EPA's order dated June 19, 2013, “Partial Order Responding To Petitioners' May 3, 2011 & October 3, 2012 Requests that the Administrator Object to the Issuance of Title V Operating Permits,” responding to Petition Numbers VI-2011-06 and VI-2012-07, *In the Matter of: Consolidated Environmental Management, Inc.–Nucor Steel Louisiana, Pig Iron and DRI Manufacturing in St. James Parish, Louisiana* (hereinafter, the “2013 Order”).

50. In the 2013 Order, EPA partially denied the petitions of LEAN and Sierra Club on the basis that:

When petitioners do not provide the relevant analyses and citations to support their claims, the EPA is left to work out the basis for petitioners' objection, contrary to Congress' express allocation of the burden of demonstration to the petitioner in CAA § 505(b)(2). ...Moreover, given that CAA § 505(b)(2) and our implementing regulations at 40 C.F.R. § 70.8(d) provide only 60 days for the EPA to grant or deny a petition, and the additional factors discussed above, the EPA does not interpret the Act to require it to grant petition claims that are not adequately supported.

51. On June 21, 2012, when LDEQ responded to the *ultra vires* inquiries posed to it by EPA in the 2012 Order, LDEQ specifically stated in its response to EPA's "objection" that it disagreed with EPA and was not revising the permits to which EPA had objected.

52. Nevertheless, and apparently in complete disregard of LDEQ's decision not to make any revisions to the Nucor permits, EPA declared that LDEQ's response would itself be considered a "new permit" subject to new petitions to object, and did so despite the explicit instructions of Section 505(c) of the Act, 42 U.S.C. § 7661d(c), that: "If the permitting authority fails, within 90 days after the date of an objection under subsection (b) of this section, 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.*" (Emphasis supplied).

53. The Administrator's failure to follow the requirement of Section 505(c) of the Act, 42 U.S.C. § 7661d(c), to issue or deny the permit after LDEQ declined to submit a permit "revised to meet the objection," and her declaration that any LDEQ response would be a "new permit," were designed to extend the time for challenges to Nucor's permits and to avoid judicial review of EPA's untimely, *ultra vires* actions. As set forth below, EPA's strategy to shield the 2012 Order from judicial review has thus far prevailed, making this suit necessary in order that Nucor's future state-issued permits are not to be disparaged by unlawful agency actions given the inevitability of the issuance of the up-coming permit renewals for both the Title V DRI permit and the Pig Iron permits.

54. After LDEQ responded to its objection, counsel for EPA then specifically called counsel for Zen-Noh, LEAN, and the Sierra Club to "emphasize" its position that LDEQ's response was a "new permit," even though no such new permits were in fact issued by LDEQ.

55. LEAN and Sierra Club responded with a renewed petition to object to the

LDEQ's response on October 3, 2012, as if the LDEQ response were a new Title V permit issued by LDEQ.

56. Because the 2012 Order violated the CAA in the ways described above, LDEQ sought review of the 2012 Order in the Fifth Circuit. *See Louisiana Dep't of Envtl. Quality v. EPA*, No. 12-60482, 730 F.3d 446 (5th Cir. 2013).

57. Nucor intervened to protect its interests in its permits and its partially-built DRI facility.

58. Nucor contended that EPA's 2012 Order was *ultra vires* because EPA had employed a deliberate strategy of bifurcating its response to petitions with multiple partial orders issued far beyond the statutory 60-day deadline, without ever actually denying the petitions, or alternatively, granting them and subsequently modifying, terminating or revoking Nucor's permits as required by 42 U.S.C. § 7661d(b)(3).

59. Nucor contended that EPA's strategy allowed EPA to raise baseless and irrelevant issues to object to state-issued permits without the opportunity for judicial review.

60. In response, EPA urged the Fifth Circuit to dismiss LDEQ's and Nucor's petitions for review, arguing that because EPA had not issued or denied a permit in its 2012 Order, it was entitled to the shield of 42 U.S.C. § 7661d(c), which provides that "No objection shall be subject to judicial review until the Administrator takes final action to issue or deny a permit under this subsection."

61. This was a convenient argument for EPA, given that the shield of 42 U.S.C. § 7661d(c) was only available because EPA deliberately chose not to "modify, terminate, or revoke" Nucor's permits in the 2012 Order, despite its clear legal duty to do so. In other words, by violating the mandate of 42 U.S.C. § 7661d(b)(3) to "modify, terminate, or revoke," and

ignoring the fact that LDEQ did not submit a permit “revised to meet the objection,” or any revised permit at all, EPA deliberately sought to foreclose judicial review of its 2012 Order.

62. Additionally, EPA insisted as a litigating strategy, if nothing else, that the proper forum to present Nucor’s petition was a United States district court. *See* EPA’s brief, pp. 26, 27, available at *Louisiana Dep’t of Env’tl. Quality v. EPA*, No. 12-60482 (5th Cir. 2013), R. Doc. 00512107706; *see also* comments at oral argument by counsel for EPA, “we believe there are district court remedies that could facilitate getting this issue in a form suitable for this Court’s review. ... what they could do, in the district court what you could do, assuming standing is satisfied, you could bring a suit to compel EPA to issue a response to a petition...and **if somebody believed that what EPA had done didn’t count under the statute, it wasn’t legally a response, they could come back to the district court and say ‘no, they haven’t answered the petition.’**” Panel Oral Argument at 21:55 (emphasis added), available at: http://www.ca5.uscourts.gov/OralArgRecordings/12/12-60482_8-5-2013.wma.

63. Ultimately the Fifth Circuit dismissed LDEQ’s and Nucor’s petitions for lack of subject matter jurisdiction, finding that the 2012 Order was an “objection” that did not constitute “final action *to issue or deny a permit* under this subsection.” 730 F.3d at 450 (emphasis added).

64. The Fifth Circuit further noted that “we do not determine whether LDEQ and Nucor may pursue other avenues of judicial review, such as an action in district court under 42 U.S.C. § 7604(a)(2).” *Id.*

65. On January 30, 2014, EPA issued another Order (the “2014 Order”), partially granting the 2010, 2011, and 2012 petitions (and dismissing the remaining issues) filed by Sierra Club and LEAN, nearly four years after LDEQ issued Nucor’s Title V permits (and after completion of the DRI facility).

66. EPA's actions in responding to the petitions were *ultra vires* because the only actions authorized by the CAA were: (1) to deny the petitions; or (2) to grant the petitions; issue an objection; notify LDEQ that cause exists to modify, terminate, or revoke the permits; allow LDEQ the chance to modify, terminate, or revoke the permits; and if LDEQ did not modify, terminate, or revoke the permits to resolve EPA's objection, EPA should have taken final action to "issue or deny" the permits itself. *See* 42 U.S.C. § 7661d(b)(3) and (c); 40 C.F.R. § 70.7(g)(5).

67. The CAA does not allow EPA to grant itself a phased-review process, consisting of a series of data requests or explanations, phrased as "objections," by EPA and responses by the state permitting authority, as EPA did with the 2012 and 2014 Orders.

68. Despite EPA's continuing *ultra vires* actions, on April 30, 2014, LDEQ responded to the 2014 Order.

69. In light of the above extended series of events, on September 12, 2014, Nucor submitted to EPA a letter providing notice of its intent to file a citizen suit for failure to take a mandatory action. *See* Exhibit B. That same day, Nucor also submitted to EPA a letter providing notice of its intent to file a citizen suit for unreasonable delay in taking a mandatory action. *See* Exhibit C. On September 11, 2015, Nucor submitted to EPA a revised letter providing notice of its intent to file a citizen suit for failure to take a mandatory action. *See* Exhibit D.

70. Then, on January 8, 2016, EPA wrote LDEQ that its "administrative process" on the petitions to object to Nucor's state-issued permits was "complete and concluded." *See* Exhibit E. Yet EPA still has not taken what it has contended in the Court of Appeals would be final action on Nucor's permits, either in the form of (1) denying the petitions; or (2) granting the petitions; issuing an objection; notifying LDEQ that cause exists to modify, terminate, or revoke

the permits; allowing LDEQ the chance to modify, terminate, or revoke the permits; and if LDEQ did not modify, terminate, or revoke the permits to resolve EPA's objection, EPA should have taken final action to "issue or deny" the permits itself. *See* 42 U.S.C. § 7661d(b)(3) and (c); 40 C.F.R. § 70.7(g)(5). Because EPA failed to take such final actions so as to deliberately foreclose Nucor's opportunity for judicial review, its actions are therefore void *ab initio* and should be declared to be so by this Court in order that EPA will lawfully "process" Nucor's subsequent state-issued permits.

NUCOR'S INTEREST IN THIS MATTER

71. This action is made necessary by EPA's repeated delays, failures to act, and acting in violation of the CAA in response to objections to a Louisiana Title V permit which were filed under Section 505 of the CAA, 42 U.S.C. § 7661d.

72. EPA's actions have repeatedly violated Nucor's rights respecting the prompt and final resolution of objections to Louisiana Title V permits for Nucor's Louisiana iron manufacturing project.

73. EPA has engaged in a pattern and practice of employing *ultra vires* agency action to collaterally attack Nucor's permits and other permits issued by other states.

74. Evidence of numerous such EPA abuses regarding permits issued by other states is maintained by EPA in a Title V Petition database which is readily accessible to the public.

75. The database contains information showing chronic EPA delays in responding to petitions to object, and numerous objections to already-issued state permits which were issued by EPA without compliance with the requirements of Sections 505(b)(3) and 505(c) of the Act, 42 U.S.C. §§ 7661d(b)(3), (c) to "modify, terminate or revoke such permit[s.]" and "issue or deny" them. See: <http://www.epa.gov/title-v-operating-permits/title-v-petition-database>

76. If not subject to judicial review, EPA's actions will leave in place a system by which it imposes irrelevant requirements on state-issued permits which state permitting authorities contend are in compliance with the Act.

77. Nucor has expended hundreds of millions of dollars and hired hundreds of employees based upon the issuance of the permits.

78. EPA's strategy to avoid taking what it admits would be "final action to issue or deny a permit" has allowed EPA to impose unauthorized requirements on permitting agencies and permittees while deliberately avoiding judicial review in numerous cases found in the aforementioned database.

79. This dispute is clearly not moot because, among other reasons, it "falls within a special category of disputes that are 'capable of repetition' while 'evading review.'" *Turner v. Rogers*, 131 S.Ct. 2507, 2514 (2011) (quoting *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498 (1911)).

80. Nucor is required to regularly renew and/or modify its Title V permits. Nucor applied for renewal of Permit No. 3086-V3 on July 23, 2015, in compliance with the requirement that it do so by July 28, 2015. On December 7, 2015, LDEQ approved Nucor's proposed Permit No. 3086-V4 for public notice. Proposed Permit No. 3086-V4 is a renewal and modification of the Title V permit for Nucor's DRI facility. The deadline for public submission of comments regarding proposed Permit No. 3086-V4 expired on January 11, 2016. Nucor anticipates issuance of the final Permit No. 3086-V4 in early 2016.

81. Nucor applied for renewal of Permit No. 2560-00281-V1 on November 21, 2014, in compliance with the requirement that it do so by November 28, 2014. The application sought renewal and modification of, inter alia, the Title V permit for Nucor's Pig Iron facility. The

application was deemed administratively complete by LDEQ on November 24, 2014, but is still undergoing review by LDEQ and no draft permit has yet been issued and no draft permit has yet been put forth for public comment. Upon information and belief, Nucor submits that a draft of the renewal to Permit No. 2560-00281-V1 will be issued by LDEQ in the near future.

82. In its January 8, 2016 letter, EPA noted that “nothing in this letter precludes the EPA from raising any issue as part of the Title V process related to Nucor’s renewal permits, which are new administrative proceedings. Any EPA review of these renewal permits would accordingly be under the auspices of separate administrative proceedings and could address any aspect of the renewal permits. The EPA at its discretion may review those proposed renewal permits, as appropriate, under section 505 of the CAA.” Exhibit E.

83. Therefore, by its own admission, EPA has reserved the right to inflict upon Nucor the same illegal tactics as it did in the 2012 Order. This jeopardizes Nucor’s forthcoming Permit No. 3086-V4, its renewal of Permit No. 2560-00281-V1, and any other subsequent permit modifications that Nucor will surely receive in the future.

84. For this reason, a live controversy clearly exists in this matter, despite what representations EPA made in the January 8, 2016 letter. *See Nat. Res. Def. Council, Inc. v. U.S. E.P.A.*, 595 F. Supp. 1255, 1263 (S.D.N.Y. 1984) (“[W]hen an administrative agency withdraws an order while still maintaining that the legal position is justified, repetition is likely and the claim should not be considered moot.”).

85. EPA’s actions and delays in acting have violated the clearly expressed intent of Congress that petitions to object to Title V permits be granted or denied promptly.

86. Six hundred and thirty-one days after the Pig Iron PSD and Title V permit issuance and 421 days after the DRI PSD and Title V permit issuance, and well past the

applicable statutory deadlines, the Administrator purported to object to Nucor's Title V permits, jeopardizing Nucor's multi-million dollar investment and acting in derogation of Nucor's PSD permits and LDEQ's permitting authority.

87. The CAA vested EPA with limited authority for responding to petitions to object: if EPA chooses to object, it is required to modify, terminate, or revoke the permits.

88. Instead, here, EPA identified "threshold issues" for LDEQ to respond to, and invited the petitioners to raise their objections again if they were not satisfied with LDEQ's response. One petitioner did so. EPA ignored that "new" petition until the petitioner sued, and then granted the petition in part and denied it in part when, in fact, that petition was grossly untimely and should have been denied as such immediately by EPA.

89. The result of this process was that EPA did not truly "complete its administrative process" on all petitions until, at best, January 30, 2014, 1,441 days after they were first filed.

90. Even now it is not clear that EPA has really "finalized the administrative process." LDEQ responded to EPA's most recent objection within 90 days of its issuance on April 30, 2014, as required by EPA's regulations at 40 CFR 70.7(g)(4). If the Administrator at any time determines that LDEQ's response failed to resolve the objection, EPA still may give Nucor 30 days' notice and terminate, modify, or revoke and reissue Nucor's permit.

91. Absent a judicial declaration that EPA's 2012 and 2014 Orders are *ultra vires* and should be vacated, EPA will be able to continue its practice of ignoring the requirements of the CAA as it engages in its apparently never-ending "administrative" processes on Nucor's state-issued permits.

92. If EPA contends that the CAA allows it to issue "objections" to already-issued permits without complying with 42 U.S.C. § 7661d(b)(3)'s requirement to "modify, terminate, or

revoke” the permits, and without taking final action to issue or deny the permit under 42 U.S.C. 7661(c) if the state permitting authority does not agree with its objections, then EPA’s actions are unconstitutional as they have deprived Nucor of the opportunity for judicial review and due process.

93. The injuries set forth above constitute an injury-in-fact – specifically, an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.

94. This injury is “particularized” because it affects Nucor in a personal and individual way.

95. Further, Nucor asserts that there is a causal connection between the injuries alleged herein and the conduct complained of – in other words, Nucor’s injuries are fairly traceable to the Administrator’s violation of the CAA and are redressable by this Court.

96. Finally, Nucor asserts that it is likely, as opposed to merely speculative, that its injury will be redressed by a favorable decision from the Court.

CLAIMS

COUNT I

97. EPA determined in both the 2012 Order and the 2014 Order to “object” in writing to Nucor’s already-issued permits, under § 505(b)(2) of the Act, 42 U.S.C. § 7661d(b)(2), yet EPA did not in either order “modify, terminate, or revoke” such permits, in violation of § 505(b)(3) of the Act, 42 U.S.C. § 7661d(b)(3).

98. EPA’s failure to “modify, terminate, or revoke” Nucor’s permits, as required by § 505(b)(3) of the Act, 42 U.S.C. § 7661d(b)(3), and its failure to “issue or deny” the permits after

LDEQ failed to submit revised permits 90 days after EPA's objection, constitute failures to take mandatory agency action.

99. By deliberately declining to modify, terminate or revoke the permits, and issue or deny them, actions explicitly required by Section 505(b)(3) and (c) of the Act which give rise to judicial review, EPA intentionally sought, and subsequently did, evade judicial review by wrongfully invoking the shield provided in Section 505(c) of the Act, which provides that "No objection shall be subject to judicial review until the Administrator takes final action *to issue or deny a permit* under this subsection." (Emphasis added).

100. By failing to take the mandatory, non-discretionary actions of "modifying, terminating, or revoking" and "issuing or denying" the permits, EPA thus avoided judicial review of its illegal final actions while obstructing Nucor's permits, all in violation of Section 505(b) and (c) of the Act and of congressional intent that objections be quickly resolved.

101. For this reason, the 2012 Order and 2014 Order are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. APA § 706(2)(A), 5 U.S.C. § 706(2)(A).

102. Further, the 2012 Order and 2014 Order exceed EPA's legal authority. APA § 706(2)(C), 5 U.S.C. § 706(2)(C), APA § 706(2)(D), 5 U.S.C. § 706(2)(D).

103. Finally, the 2012 Order and 2014 Order fail to observe the procedures required by law. APA § 706(2)(D), 5 U.S.C. § 706(2)(D).

COUNT II

104. The 2012 Order extended additional petition rights to petitioners and allowed them to file additional petitions to object even after LDEQ has responded to the 2012 Order, in violation of 42 U.S.C. § 7661d(b)(2).

105. For this reason, the 2012 Order is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. APA § 706(2)(A), 5 U.S.C. § 706(2)(A).

106. Further, the 2012 Order exceeds EPA's legal authority. APA § 706(2)(C), 5 U.S.C. § 706(2)(C), APA § 706(2)(D), 5 U.S.C. § 706(2)(D).

107. Finally, the 2012 Order fails to observe the procedures required by law. APA § 706(2)(D), 5 U.S.C. § 706(2)(D).

COUNT III

108. By issuing the 2012 Order, EPA granted itself a phased-review process, consisting of a series of objections by EPA and responses by the state permitting authority, exceeding the authority granted by the CAA, which allows EPA to issue one objection in response to a petition. 42 U.S.C. § 7661d(b)(2).

109. For this reason, the 2012 Order is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. APA § 706(2)(A), 5 U.S.C. § 706(2)(A).

110. Further, the 2012 Order exceeds EPA's legal authority. APA § 706(2)(C), 5 U.S.C. § 706(2)(C), APA § 706(2)(D), 5 U.S.C. § 706(2)(D).

111. Finally, the 2012 Order fails to observe the procedures required by law. APA § 706(2)(D), 5 U.S.C. § 706(2)(D).

COUNT IV

112. The 2012 and 2014 Orders violate the express congressional command in 42 U.S.C. § 7661d(b)(2) that objections are to be made within 60 days of receipt of a petition to object.

113. For this reason, the 2012 and 2014 Orders are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. APA § 706(2)(A), 5 U.S.C. § 706(2)(A).

114. Further, the 2012 and 2014 Orders exceed EPA's legal authority. APA § 706(2)(C), 5 U.S.C. § 706(2)(C), APA § 706(2)(D), 5 U.S.C. § 706(2)(D).

115. Finally, the 2012 and 2014 Orders fail to observe the procedures required by law. APA § 706(2)(D), 5 U.S.C. § 706(2)(D).

COUNT V

116. The 2012 and 2014 Orders illegally purport to state objections that are based solely on EPA's own policy preferences, and not the express requirements of the CAA, the Part 70 regulations, or the Louisiana SIP, which provide the sole basis for decision in this matter. 42 U.S.C. § 7661d(b); 40 C.F.R. 70.8(c); LAC 33:III.507; LAC 33:III.533.C.

117. For this reason, the 2012 and 2014 Orders are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. APA § 706(2)(A), 5 U.S.C. § 706(2)(A).

118. Further, the 2012 and 2014 Orders exceed EPA's legal authority. APA § 706(2)(C), 5 U.S.C. § 706(2)(C), APA § 706(2)(D), 5 U.S.C. § 706(2)(D).

119. Finally, the 2012 and 2014 Orders fail to observe the procedures required by law. APA § 706(2)(D), 5 U.S.C. § 706(2)(D).

COUNT VI

120. EPA's failure to "modify, terminate, or revoke" Nucor's permits, as required by § 505(b)(3) of the Act, 42 U.S.C. § 7661d(b)(3), constitutes an unreasonable delay in taking mandatory agency action.

PRAYER FOR RELIEF

THEREFORE, Nucor respectfully requests the Court to enter judgment in its favor and against EPA, specifically requesting the following relief:

- A. that the Court enter an order vacating the 2012 Order and the 2014 Order;
- B. that the Court issue declaratory relief by ruling as follows:
 - 1. when a state permitting authority has issued a permit before receipt of any EPA “objection,” the EPA may not issue an “objection” without complying with 42 U.S.C. § 7661d(b)(3)’s requirement to take final action to “modify, terminate, or revoke” the permit in question;
 - 2. the objection process under 42 U.S.C. § 7661d does not allow EPA to grant additional petition rights to other persons/entities, which are not provided for in the Act;
 - 3. the objection process under 42 U.S.C. § 7661d does not allow EPA to grant itself a phased-review process, consisting of a series of objections by EPA and responses by the state permitting authority; rather, EPA may only issue one objection in response to a petition;
 - 4. EPA may not issue an “objection” unless it does so before expiration of the deadlines set forth in 42 U.S.C. § 7661d; specifically, that EPA may only issue an “objection” if it does so (1) within 45 days after receiving a copy of the proposed permit, (2) within 45 days after receiving notification of the proposed permit, or (3) within 60 days of receipt of a petition to object to the permit;
 - 5. EPA may only object to Title V permits under 42 U.S.C. § 7661d for reasons set forth in the Act, its implementing regulations, and the Louisiana SIP;
- C. that the Court enter a declaratory judgment that finds Nucor’s permits (PSD permit No. PSD-LA-740(M-1), Title V permit No. 2560-00281-V1, PSD permit

AND NUCOR STEEL LOUISIANA, LLC

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

(b) County of Residence of First Listed Plaintiff (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

DEFENDANTS

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, PTF DEF, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Table with 5 columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Contains various legal categories and checkboxes.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District, 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): Brief description of cause:

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
 United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an "X" in one of the six boxes.
 Original Proceedings. (1) Cases which originate in the United States district courts.
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.
- Date and Attorney Signature.** Date and sign the civil cover sheet.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

CONSOLIDATED ENVIRONMENTAL
MANAGEMENT, INC. AND NUCOR
STEEL LOUISIANA, LLC

v.

REGINA MCCARTHY, in her Official
Capacity as Administrator, U.S. Environmental
Protection Agency,

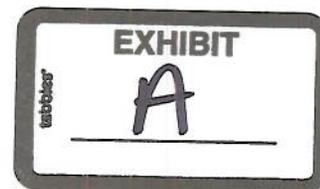
Defendant.

Civ. Case No. _____

LR 3.1 NOTICE OF RELATED CASES

1. Pursuant to Local Court rule LR 3.1, plaintiffs, Consolidated Environmental Management, Inc., a Delaware corporation and a wholly-owned subsidiary of Nucor Corporation, and Nucor Steel Louisiana, LLC, also a wholly-owned subsidiary of Nucor Corporation (collectively referred to herein as "Nucor"), notify the court that the above-captioned civil action involves subject matter that comprises a material part of the subject matter or operative facts in the following previously pending proceedings:

- A. *Zen-Noh Grain Corporation v. Leggett, et al*, United States District Court for the Eastern District of Louisiana, Civil Action No. 2:09-cv-00282-SSV-SS, Section R, (filed 01/23/09; closed 04/29/09).
- B. *Zen-Noh Grain Corporation v. United States Environmental Protection Agency*, United States District Court for the Eastern District of Louisiana, Civil Action No. 2:10-cv-04367-SSV-SS, Section R (filed 11/19/10; closed 04/12/11);



- C. *Zen-Noh Grain Corporation v. United States Environmental Protection Agency*, United States District Court for the Eastern District of Louisiana, Civil Action No. 2:12-cv-02535-SSV-SS, Section R (filed 10/17/12; closed 05/22/13);
- D. *Louisiana Department of Environmental Quality v. United States Environmental Protection Agency*, United States Court of Appeals for the Fifth Circuit, Case No. 12-60482, 730 F.3d 446 (filed 06/22/2012; closed 06/10/2014);
- E. *Zen-Noh Grain Corporation v. Consolidated Environmental Management, Inc./Nucor Steel Louisiana*, United States District Court for the Eastern District of Louisiana, Civil Action No. 2:12-cv-01011-SSV-SS, Section R (filed 4/20/12; closed 12/19/12).

BACKGROUND

2. Nucor is the holder of a Louisiana Prevention of Significant Deterioration (“PSD”) permit No. PSD-LA-740(M-1), and a Louisiana Title V permit 2560-00281-V1 (“Pig Iron permits”). Nucor is also the holder of a Louisiana PSD permit No. PSD-LA-751(M-2) and a Louisiana Title V permit No. 3086-V3 (“DRI permits”).

3. Nucor was issued PSD-LA-740 and Title V permit No. 2560-00281-V0 on May 24, 2010. Nucor was issued Title V permit No. 2560-00281-V1, which amended 2560-00281-V0 on January 27, 2011. Nucor was issued PSD Permit No. PSD-LA-740(M-1), which amended PSD-LA-740, on July 9, 2013. These state-issued permits are for the construction of a Pig Iron manufacturing facility located near the town of Convent, St. James Parish, Louisiana (“the Pig Iron Facility”).

4. Nucor was issued PSD permit No. PSD-LA-751 and Title V permit No. 3086-V0, on January 27, 2011, for the construction and operation of a “direct reduced iron” manufacturing facility, also located near the town of Convent, St. James Parish, Louisiana (the “DRI Facility”).

5. The DRI PSD permit was modified on November 16, 2012 and again on November 26, 2013 and now bears the number PSD-LA-751(M-2). The DRI Title V permit was modified on March 8, 2012, May 29, 2014, and July 1, 2015 and now is numbered 3086-V3.

PREVIOUSLY PENDING ACTIONS

6. In Civil Action No. 09-00282, Zen-Noh Grain Corporation (“Zen-Noh”) sought to enjoin the Louisiana Department of Environmental Quality (“LDEQ”) from issuing Nucor proposed permits No. PSD-LA-740 and No. 2560-00281-V0 for the Pig Iron Facility. Zen-Noh alleged that LDEQ had failed to comply with certain procedural requirements of the Clean Air Act (“CAA”) and the federally enforceable Louisiana State Implementation Plan. LDEQ responded by filing a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. The Court granted LDEQ’s motions and dismissed the case without prejudice, holding that Zen-Noh’s suit was not ripe as the permits in question had not yet been issued and it was unclear if they ever would be issued.

7. In Civil Action No. 10-4367, Zen-Noh sought to compel EPA to respond to a petition to object that Zen-Noh had previously submitted to EPA. In that petition, Zen-Noh had requested that EPA object to Nucor’s Permit No. 2560-00281-V0 for the Pig Iron Facility and remand those permits back to LDEQ. The parties agreed to a settlement, and on April 2, 2012, the Court dismissed the action with prejudice.

8. In the Fifth Circuit matter No. 12-60482, LDEQ sought review of an EPA order

that purported to state an “objection” to permits No. 2560-00281-V0 and No. 3086-V0. Nucor intervened in that matter. The Fifth Circuit dismissed LDEQ’s and Nucor’s petitions for lack of subject matter jurisdiction, finding that the 2012 Order was an “objection” that did not constitute “final action to issue or deny a permit under this subsection;” therefore, EPA was entitled to the shield of 42 U.S.C. § 7661d(c), which provided that “No objection shall be subject to judicial review until the Administrator takes final action to issue or deny a permit under this subsection.”

9. In Civil Action No. 12-02535, Zen-Noh sought to compel EPA to take allegedly mandatory action on permits No. 2560-00281-V0 and No. 3086-V0. Zen-Noh alleged that because EPA had issued an “objection” to the permits, 42 U.S.C. § 7661d imposed a mandatory duty to immediately thereafter “modify, terminate, or revoke” the permits. EPA filed a motion to dismiss for lack of subject matter jurisdiction, which the Court granted. The Court held that although EPA “must modify, terminate, or revoke the permit[s] at some point,” it was entitled to discretion regarding the timeline for taking such action.

10. In Civil Action No. 12-1011, Zen-Noh requested that Nucor be enjoined from constructing or operating its DRI Facility, alleging that permits No. No. PSD-LA-751 and No. 3086-V0, did not authorize construction of the DRI Facility. On July 31, 2013, the Court dismissed the action with prejudice.

11. The present matter involves Nucor’s attempt to defend permits No. PSD-LA-740(M-1), No. 2560-00281-V1, No. PSD-LA-751(M-2), No. 3086-V3, as well as forthcoming permits for the DRI and Pig Iron facilities, from *ultra vires* attacks by EPA.

Respectfully submitted,

BRADLEY MURCHISON KELLY & SHEA LLC

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AND NUCOR STEEL LOUISIANA, LLC**

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September 12, 2014

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED TO ALL

Ms. Gina McCarthy, Administrator
Environmental Protection Agency
1200 Pennsylvania, N.W.
Washington, DC 20460

Honorable Eric Holder,
Attorney General, United States of America
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Peggy Hatch, Secretary
Louisiana Department of Environmental
Quality
P.O. Box 4301
Baton Rouge, LA 70821-4301

Mr. Ron Curry, Regional Administrator
U.S. EPA Region 6
1445 Ross Avenue, Suite 1200
Dallas, TX 75202

Re: First Notice of Intent to File Citizen Suit Against Administrator McCarthy
regarding Nucor permit nos. PSD-LA-740, 2560-00281-V0, and 2560-00281-V1.

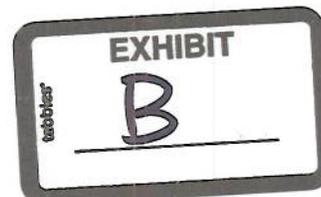
Dear Administrator McCarthy:

Pursuant to the Clean Air Act ("CAA" or "the Act") § 304(b), 42 U.S.C. § 7604(b), this correspondence provides 60 days' notice that Nucor Steel Louisiana LLC and Consolidated Environmental Management, Inc., a fully-owned subsidiary of Nucor Corporation (collectively, "Nucor"), intend to file a citizen suit against Administrator McCarthy and the Environmental Protection Agency (collectively referred to herein as "EPA") for failure to take mandatory action under the CAA § 304(a)(2), 42 U.S.C. § 7604(a)(2), for violations of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-706, and for relief under the Declaratory Judgment Act ("DJA"), 28 U.S.C. §§ 2201-2202. By separate letter Nucor is also providing 180 days' notice of its intent to file a citizen suit for unreasonable delay in taking a mandatory action.

Persons Giving Notice:

Nucor Steel Louisiana LLC
9101 Highway 3125
Convent, LA 70723

Consolidated Environmental Management, Inc.
1915 Rexford Road
Charlotte, North Carolina 28211



BRADLEY MURCHISON KELLY & SHEA LLC

Environmental Protection Agency et al.
September 12, 2014
Page 2

Nucor Corporation
1915 Rexford Road
Charlotte, North Carolina 28211

Nucor's Counsel:

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Summary of Violations:

EPA issued orders on March 23, 2012 ("2012 Order") and January 30, 2014 ("2014 Order") related to permits held by Nucor. These orders violated the CAA and constituted arbitrary and capricious agency action in the following ways:

1. EPA purported to state objections to a Prevention of Significant Deterioration ("PSD") permit in the guise of a title V permit objection, in violation of 42 U.S.C. § 7477 (2011);
2. EPA disregarded the express congressional command in 42 U.S.C. § 7661d(b)(2) that objections are to be made within 60 days of receipt of a petition to object;
3. EPA purported to state objections that are based solely on EPA's own policy preferences, and not the express requirements of the CAA, the Part 70 regulations, or the Louisiana State Implementation Plan ("SIP"), which provide the sole basis for

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decision in this matter. 42 U.S.C. § 7661d(b); 40 C.F.R. 70.8(c); LAC 33:III.507; LAC 33:III.533.C;

4. The 2012 Order extended additional petition rights to petitioners and allowed them to file additional petitions to object even after the state has responded to the Order, in violation of 42 U.S.C. § 7661d(b)(2);
5. EPA has failed to issue, revoke, modify or terminate Nucor's permits after timely receipt of Louisiana Department of Environmental Quality's ("LDEQ") response to EPA's 2014 Order;
6. EPA's strategy to avoid making what they believe to be a "final agency action" has deliberately ensured that Nucor's permits will forever remain in administrative limbo without the opportunity for judicial review; and
7. If EPA contends that the CAA does not mandate an opportunity for judicial review because LDEQ has satisfied its objections, then EPA's actions and its application of the CAA are unconstitutional as they have deprived Nucor of due process.

Jurisdiction and Venue:

The purpose of this letter is to give 60 days' notice of statutory violations committed by EPA so that EPA is afforded a fair opportunity to rectify those deficiencies. Should EPA fail to fully resolve Nucor's permits in the manner set forth below, Nucor will file suit in the Eastern District of Louisiana and seek declaratory and injunctive relief, including attorneys' fees and costs. Jurisdiction in the Eastern District of Louisiana is based on 28 U.S.C. §§ 1331, 42 U.S.C. § 7604(a)(2), 5 U.S.C. §§ 551-706, and 28 U.S.C. §§ 2201-2202.

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The district court has jurisdiction of this action by virtue of the CAA § 304(a)(2), 42 U.S.C. § 7604(a)(2), because EPA has failed to comply with its nondiscretionary duties under the CAA.

Further, the district court has jurisdiction over this action by virtue of the APA, 5 U.S.C. §§ 551 et seq., because unlawful EPA final agency action is involved for which there is no other adequate remedy in court. The district court has jurisdiction of this action pursuant to 28 U.S.C. §§ 2201-2202 (DJA), by virtue of the declaratory relief necessitated by EPA's unlawful actions.

APA § 706(1), 5 U.S.C. § 706(1), provides that the court may compel agency action unlawfully withheld or unreasonably delayed. APA § 706(2)(A), 5 U.S.C. § 706(2)(A), provides relief for the action addressed herein in that EPA has issued orders which are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. APA § 706(2)(C), 5 U.S.C. § 706(2)(C), provides relief for the action addressed herein in that EPA has issued orders in excess of its legal authority. APA § 706(2)(D), 5 U.S.C. § 706(2)(D), provides relief for the action addressed herein in that EPA has issued orders without observance of procedures required by law.

In addition to the jurisdiction granted by the CAA, APA, and DJA, judicial review in district court is favored in this case because EPA has acted beyond its authority. Even where Congress is understood generally to have precluded review, the Supreme Court permits review in the district court under the *Leedom* exception. The exception applies when, as here, an agency has acted beyond its delegable powers by denying a statutorily created right and, without review by the district court, plaintiffs have no other means to protect and enforce that right, *see Leedom*

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v. Kyne, 358 U.S. 184, 190-91 (1958); *see also Friends of Crystal River v. EPA*, 794 F. Supp. 674 (W.D. Mich. 1992), *aff'd*, 35 F.3d 1073 (6th Cir. 1994) (holding that EPA's action constituted a clear statutory violation and, therefore, was reviewable by district court, even if Clean Water Act precluded judicial review; without review by district court, plaintiffs would have no other means to directly challenge EPA's alleged, *ultra vires* conduct); *see also Clean Water Action Council of Northeastern Wisconsin, Inc. v. EPA*, 12-3388, 2014 WL 4257843 (7th Cir. Aug. 29, 2014) (the venue and filing provisions of §7607(b) are not jurisdictional and thus do not preclude review on the merits).

Further, sovereign immunity does not bar a suit challenging such *ultra vires* acts, because as Nucor alleges below, a federal officer, Administrator McCarthy, acted in excess of her legal authority. *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689-690, 69 S.Ct. 1457, 1461 (1949); *see also Dugan v. Rank*, 372 U.S. 609, 621-22 (1963).

Finally, EPA is judicially estopped from challenging the district court's jurisdiction over this matter in light of EPA's earlier representations to the United States Court of Appeals for the Fifth Circuit, in which EPA argued that Nucor's requested relief was available only in the district court, as more fully set forth below.

Venue in the Eastern District of Louisiana is proper under 28 U.S.C. § 1391(e), as that is the district where a substantial part of the actions giving rise to this Notice have occurred.

Statement of Facts

Nucor holds PSD permit No. PSD-LA-740 and title V permit No. 2560-00281-V0, both issued on May 24, 2010, and title V permit No. 2560-00281-V1, which amended 2560-00281-V0

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on January 27, 2011, all for a Pig Iron facility (“Pig Iron permits”). Nucor is also the holder of PSD permit No. PSD-LA-751 and title V permit No. 3086-V0, issued on January 27, 2011, for a “direct reduced iron” or DRI manufacturing facility (“DRI permits”). The DRI PSD permit was modified on November 16, 2012 and again on November 26, 2013 and now bears the number PSD-LA-751(M2). The DRI title V permit was modified on March 8, 2012 and on May 29, 2014 and now is numbered 3086-V2.

The process of obtaining these permits began on May 12, 2008, when Nucor submitted to the Louisiana Department of Environmental Quality (“LDEQ”), with copies to EPA, applications for PSD and title V permits for the construction and operation of a Pig Iron facility to be located near the town of Convent, St. James Parish, Louisiana. The application process included two public hearings and two public comment periods, during which EPA submitted numerous comments. LDEQ considered all comments and issued the Pig Iron PSD permit and title V permit on May 24, 2010. EPA did not object to these permits.

On June 25, 2010, Zen-Noh Grain Corporation (“Zen-Noh”), the owner and operator of a grain elevator located adjacent to Nucor’s property in St. James Parish, petitioned EPA pursuant to the CAA to object to the Pig Iron PSD and title V permits issued by LDEQ. The Louisiana Environmental Action Network (“LEAN”) and the Sierra Club also filed separate petitions for EPA to object to the Pig Iron title V permit on June 25, 2010. EPA took no action on these petitions. On November 19, 2010, Zen-Noh filed a citizen suit in the Eastern District of Louisiana to compel EPA action on its petition. *See Zen-Noh Grain Corporation v. Lisa Jackson,*

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No. 10-4367 (La. E.D. 2010). EPA apparently settled this action with a promise to respond to Zen-Noh's petition by March 16, 2012.

The start of construction on the Pig Iron facility was delayed by numerous objections and permit appeals. In the intervening time, market conditions changed substantially and a DRI facility became desirable. On August 20, 2010, Nucor submitted PSD and title V applications to LDEQ, again with copies to EPA, to construct a DRI facility as part of the Convent facility. The DRI facility would replace roughly half of the permitted Pig Iron facility, with corresponding reductions in emissions. After public notice and comment, including comments from EPA, LDEQ issued the PSD and title V permits for the DRI facility on January 27, 2011.

On May 3, 2011, Zen-Noh filed a petition with EPA seeking an objection to these permits. LEAN and Sierra Club also filed separate petitions with EPA on May 3, 2011. EPA took no action on these petitions.

On March 23, 2012, EPA issued the 2012 Order, which only addressed some of the objections contained in the Zen-Noh petitions and did not address the petitions filed by LEAN and Sierra Club at all. Instead, EPA deferred action on the majority of issues in the petitions by "grant[ing]" the petitions on two "threshold" issues:

(1) LDEQ has not adequately justified its decision to permit the DRI and pig iron processes as two separate projects for purposes of PSD analysis, and (2) LDEQ has not provided permit records from which the full scope of applicable requirements for the pig iron and DRI title V permits can be determined and, in particular, has not adequately explained the basis for its transfer of emissions units between the pig iron and DRI processes via the title V permits, and its incorporation by reference of permit requirements established in a title V permit into a PSD permit.

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2012 Order, at 10-11. Although EPA's 2012 Order did not identify any term or condition of the permits that failed to comply with the CAA, or identify an "applicable requirement" that was improperly excluded from the permits, it nevertheless included a purported "objection" to both the DRI and pig iron title V permits.

On June 21, 2012, LDEQ responded to the inquiries posed to it by EPA in the 2012 Order. EPA declared that LDEQ's explanation would be considered a "new" permit subject to new petitions, despite LDEQ's assertions that it did not consider its response to be a new permit.¹ EPA then specifically called counsel for Zen-Noh, LEAN, and the Sierra Club to "emphasize"² this position. LEAN and Sierra Club responded with a renewed petition to object to the LDEQ response on October 3, 2012.

Because the 2012 Order violated the CAA, LDEQ sought review of the 2012 Order in the Fifth Circuit. *See Louisiana Dep't of Env'tl. Quality v. EPA*, No. 12-60482 (5th Cir. 2013). Nucor intervened to protect its interests in its permits and its partially-built DRI facility. Nucor contended that EPA lacked authority to take action on a title V permit that does not actually constitute an objection, and that constitute actions instead on a PSD permit. Nucor further contended that EPA could not bifurcate its response to petitions with multiple partial orders issued far beyond the statutory 60-day deadline. Nucor argued that EPA's partial-response strategy created a never-ending objection loop, keeping Nucor's permits in administrative limbo without the opportunity for judicial review. In response, EPA urged the Fifth Circuit to dismiss

¹ *Louisiana Dep't of Env'tl. Quality v. EPA*, No. 12-60482 (5th Cir. 2013), R. Doc. 00512322527.

² *Id.*

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Nucor's petition for review and insisted that the proper forum for Nucor's petition was a United States district court (*see* EPA's brief, pp. 26, 27, available at *Louisiana Dep't of Env'tl. Quality v. EPA*, No. 12-60482 (5th Cir. 2013), R. Doc. 00512107706; *see also* comments at oral argument by counsel for EPA, "we believe there are district court remedies that could facilitate getting this issue in a form suitable for this Court's review. ... what they could do, in the district court what you could do, assuming standing is satisfied, you could bring a suit to compel EPA to issue a response to a petition...and if somebody believed that what EPA had done didn't count under the statute, it wasn't legally a response, they could come back to the district court and say 'no, they haven't answered the petition.'" Panel Oral Argument at 21:55, available at http://www.ca5.uscourts.gov/OralArgRecordings/12/12-60482_8-5-2013.wma). Ultimately the Fifth Circuit dismissed LDEQ's and Nucor's petitions for lack of subject matter jurisdiction, but held that "we do not determine whether LDEQ and Nucor may pursue other avenues of judicial review, such as an action in district court under 42 U.S.C. § 7604(a)(2)." *Id.* at 450.

On July 26, 2013, EPA declared by letter that it had concluded the administrative process regarding all issues related to the 2012 Order, and that therefore it would not further respond to Zen-Noh's petitions (the "2013 letter").³ On January 30, 2014, EPA issued another Order (the "2014 Order"), partially granting the 2010, 2011, and 2012 petitions (and dismissing the remaining issues) filed by Sierra Club and LEAN, nearly four years after LDEQ issued Nucor's

³ *See Louisiana Dep't of Env'tl. Quality v. EPA*, No. 12-60482 (5th Cir. 2013), R. Doc. 00512322527, R. Doc. 00512322528. ("EPA has taken action on all issues that pertain to the 2012 Order. None of the remaining petition issues pertain to the 2012 Order. To the extent that the EPA has continuing authority to pursue its 2012 Order, it does not intend to take any further action pursuant to that Order. Accordingly, the administrative process following that Order is now complete and concluded.").

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title V permits (and after completion of the DRI facility). In light of the 2014 Order, and the 2013 letter confirming that EPA would not further respond to Zen-Noh's petitions, EPA has now responded to all petitions related to the Nucor facility. However, based on past practice, EPA likely views LDEQ's response to the 2014 Order as issuing a "new" permit worthy of additional comments. EPA has taken no action to dissuade this and confirm that Nucor's permits are valid and enforceable and that EPA will not take further action on them.

In light of the above extended series of events, Nucor requests that EPA enter an Order declaring Nucor's permits to be valid, enforceable, and free and clear of any continuing EPA objection.⁴ Absent such action by EPA, Nucor will file an action in the Eastern District of Louisiana request various items of relief set forth fully below.

Harm to Nucor

This notice of intent to sue is made necessary by EPA's repeated delays (and repeated failures to act) in response to objections to a Louisiana title V permit which were filed under Section 505 of the CAA, 42 U.S.C. §7661d. EPA's delayed actions and failures to act have repeatedly violated Nucor's rights respecting the prompt resolution of objections to Louisiana title V permits for Nucor's Louisiana iron manufacturing project, and are now calling into question the validity of Nucor's most recent permit. EPA has engaged in a pattern and practice of employing *ultra vires* agency action to collaterally attack Nucor's permits, and it has failed to

⁴ According to EPA's title V petition database, both the 2012 and 2014 Orders are designated as having a "final" status. However, this designation in no way precludes EPA from contesting the sufficiency of LDEQ's response to the 2014 Order, and therefore Nucor is still at risk of a future EPA Order contesting the validity of Nucor's title V permits. EPA's title V petition database is available at: <http://www.epa.gov/region7/air/title5/petitiondb/petitiondb.htm>

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confirm that Nucor's permits are valid and enforceable and that EPA will not take further action on them. At best, EPA's actions will leave a permanent "cloud" on Nucor's permits, and at worst, it leaves open the possibility that EPA will again attack Nucor's permits through further *ultra vires* agency action, in any event putting Nucor's massive capital investment in jeopardy. Nucor has expended hundreds of millions of dollars and hired hundreds of employees based upon the issuance of the permits, and therefore is exposed to significant risk by EPA's tactics which leave open the possibility of future attacks on Nucor's permits. EPA's strategy to avoid making what they believe to be a "final agency action" has deliberately ensured that Nucor's permits will forever remain in administrative limbo without the opportunity for judicial review. This dispute is clearly not moot because it "falls within a special category of disputes that are 'capable of repetition' while 'evading review.'" *Turner v. Rogers*, 131 S.Ct. 2507, 2514 (2011) (quoting *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498 (1911)).

As detailed below, EPA has, to Nucor's prejudice and harm: (1) repeatedly delayed action on petitions to object, and thereby violated the statutory requirement to "grant or deny" such petitions to object to Nucor's title V permits "within 60 days after the petition is filed" [§505(b)(2)]; (2) taken piecemeal actions without fully disposing of petitions to object, thus delaying resolution of the objections and providing unauthorized and unfair ("second bite") procedural opportunities to petitioners; (3) granted one petition to object based on a purported lack of sufficient information in the permit record, and without identifying any respects in which "the permit is not in compliance with [the CAA], including the requirements of the applicable implementation plan;" (4) objected to Nucor's Prevention of Significant Deterioration ("PSD")

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permit without any appropriate jurisdictional basis in the CAA and in violation of Nucor's rights to due process as identified by the Supreme Court; (5) sought to avoid judicial review of its violations of CAA permitting requirements by arguing to the Fifth Circuit Court of Appeals that jurisdiction is in the district court and arguing to the district court that jurisdiction is solely in the courts of appeals; and (6) failed to take any action on Louisiana's response to EPA's objection.

As EPA does not believe a delay beyond statutory deadlines imposes any bar on its actions, Nucor can obtain no certainty as to the validity of its permits absent an EPA declaration that the permits are valid as they currently stand, or, failing that, a court ruling compelling EPA to state whether EPA intends to modify, terminate, or revoke and reissue its title V permit again.

EPA's actions and delays in acting have violated the clearly expressed intent of Congress that petitions to object to title V permits be granted or denied promptly. Six hundred and thirty-one days after the Pig Iron PSD and title V permit issuance and 421 days after the DRI PSD and title V permit issuance, and well past the applicable statutory deadlines, the Administrator purported to object to Nucor's title V permits, jeopardizing Nucor's multi-million dollar investment and acting in derogation of Nucor's PSD permits. EPA did not grant or deny all pending petitions at that time. Rather, EPA identified "threshold issues" for Louisiana to respond to, and invited the petitioners to raise their objections again if they were not satisfied with Louisiana's response. One petitioner did so. EPA ignored that "new" petition until the petitioner sued, and then granted its petition in part and denied it in part. The result of this process was that EPA did not finally act on all petitions until January 30, 2014, 1,441 days after they were first filed.

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Even now it is not clear that EPA has finalized the process. Louisiana responded to EPA's most recent objection within 90 days of its issuance on April 30, 2014, as required by EPA's regulations at 40 CFR 70(g)(4). However, if the Administrator determines that Louisiana's response failed to resolve its objection it still may give Nucor 30 days' notice and terminate, modify, or revoke and reissue Nucor's permit. Absent a judicially imposed requirement to take action or declare the permit valid, EPA will continue to ignore statutory time limits and not act.

Nucor cannot have assurance that its permits are valid until EPA indicates that LDEQ's actions in response to its objection are satisfactory. Nucor contends that, in the circumstances created by the Administrator's repeated violations of the deadlines contained in Section 505 of the CAA, as explained below, the Act must be read to mandate that EPA issue or deny Nucor's permits even after receipt of LDEQ's responses to EPA's 2014 Order in order to afford Nucor due process in the form of an opportunity for judicial review of EPA's objections. If EPA contends that the CAA does not mandate an opportunity for judicial review because LDEQ has satisfied its objections, then EPA's actions are unconstitutional.

Description of Violations:

1. EPA's 2012 and 2014 Orders are *ultra vires* actions. The district court should vacate the Orders, declare that EPA may not collaterally attack Nucor's PSD permits in a title V proceeding, and reaffirm that EPA's review is limited to violations of explicit requirements of the Act and/or the Louisiana SIP. LDEQ is the PSD permitting authority in Louisiana; EPA is not. LDEQ issued two currently valid PSD permits to Nucor for the construction of a Pig Iron

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facility and a DRI facility on a common property. Concurrently, LDEQ issued two title V operating permits to Nucor for the same facilities. LDEQ also issued a modification to the title V permit for the Pig Iron facility. Pursuant to those permits, Nucor commenced construction of a multi-million dollar iron making complex. Six hundred and thirty-one days after the Pig Iron PSD and title V permit issuance and 421 days after the DRI PSD and title V permit issuance, and well past the applicable statutory deadlines, the Administrator purported to object to Nucor's title V permits,⁵ jeopardizing Nucor's multi-million dollar investment and acting in derogation of Nucor's PSD permits. In addition to failing to meet the statutory deadline for an objection, the Administrator's objection to the title V permit due to her disagreement with the terms of a valid PSD permit exceeded her authority under the CAA, and violates the structure of CAA § 167 and the Supreme Court's decision in *Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461 ("ADEC"), where the Court defined the permissible boundaries of EPA's authority to collaterally attack a PSD permit. The Administrator's objection violates each limit established by the Supreme Court on collaterally attacking a valid PSD permit. Her objection reflects nothing more than a mere policy disagreement with LDEQ, which is not a lawful basis for objection under the Act. Finally, the Administrator's power is constrained by statute and she may not ignore the limits on when she may act nor may she grant additional rights to petition against a permit, which is beyond that authorized by the Act.

⁵ In Louisiana, for a project that triggers PSD, both the PSD permit and the title V permit must be issued prior to the source being authorized to begin actual construction. LA. ADMIN. CODE tit. 33, pt. III §§ 501, 507, and 509.

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2. Nucor is entitled to a declaration from the district court that Nucor's permits are valid, enforceable, and free and clear of any continuing EPA objection. EPA has now responded to all petitions related to Nucor's facility. EPA has not terminated or revoked Nucor's permits. Having exhausted all authority available to it for acting on Nucor's permits, EPA cannot take any further action on Nucor's permits, and therefore Nucor's permits should be declared as valid and enforceable.

3. Nucor is entitled to a final response from EPA that denies in full the petitions of Zen-Noh, LEAN, and Sierra Club, and confirms that Nucor's permits are valid, enforceable, and free and clear of any continuing EPA objection, and the district court should compel EPA to issue such a response.

Conclusion

As required by law, Nucor obtained both a PSD and a title V permit from LDEQ for the Pig Iron plant. Well after the time allowed by law for either title V permit, the Administrator issued an objection to both title V permits, alleging that the PSD permits were deficient. Despite clear language requiring that an objection be issued within 60 days and be based on violation of the Act, the Administrator neither resolved the issues nor based her objection on any requirement of the Act, instead basing her action merely on her preferences for how the PSD permits should have been issued. The PSD permits are not even within the jurisdiction of the Administrator, but rather are solely within LDEQ's permitting jurisdiction. EPA has also purported to grant additional rights to petitioners beyond the right to request an objection, and have even stated that LDEQ's re-affirmation of the permits constitutes a "new permit" allowing for additional

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challenges. EPA's and the Administrator's actions in no way conform to the requirements of the law. They ignore the structure of the CAA by undermining the cooperative federalism approach to air quality regulation established by the Act and make it impossible for Nucor or any other business to plan investment. The Administrator's objection to the title V permit due to her disagreement with the terms of a valid PSD permit exceeded her authority under the CAA, and violates the structure of CAA § 167 and the Supreme Court's decision in *Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461, where the Court defined the permissible boundaries of EPA's authority to collaterally attack a PSD permit.

In light of the above, Nucor requests that EPA enter an Order declaring Nucor's permits to be valid, enforceable, and free and clear of any continuing EPA objection. Absent such action by EPA, Nucor will file an action in the Eastern District of Louisiana requesting:

- A. that the court (1) enter an order vacating the 2012 Order and the 2014 Order, and (2) issue a declaratory ruling that (a) EPA may not object to the terms of a valid PSD permit using its title V objection authority, but may merely incorporate the PSD permit terms into the title V permit; (b) EPA may only object to title V permits under 42 U.S.C. § 7661d for reasons set forth in the Act, its implementing regulations, and the Louisiana State Implementation Plan ("SIP"); (c) the objection process under 42 U.S.C. § 7661d does not allow EPA to grant itself a phased-review process, consisting of a series of objections and responses by the state permitting authority (i.e., "multiple bites at the apple"); (d) the objection process under 42 U.S.C. § 7661d does not allow EPA to grant additional petition

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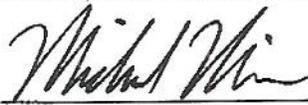
rights to other persons/entities, which are not provided for in the Act; and (e) EPA may only object to title V permits if it does so in compliance with the express congressional command in 42 U.S.C. § 7661d(b)(2) that objections are to be made within 60 days of receipt of a petition to object; and

- B. that the court enter a declaratory judgment that finds Nucor's permits to be valid, enforceable, and free and clear of any continuing EPA objection;
- C. or in the alternative, that the court compel EPA to grant or deny Nucor's title V permits Nos. 2560-00281-V0 and 2560-00281-V1; and
- D. For any and all other equitable relief that the court may deem appropriate.

If you would like to discuss any portion of this Notice or a proposal for the resolution of the issues discussed above, please feel free to contact the undersigned.

Yours very truly,

BRADLEY MURCHISON KELLY & SHEA LLC

By: 

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cc: Mr. Steven J. Rowlan
Mr. Jeffrey D. Braun
Mr. Jerald N. Jones
(All via PDF email)

BRADLEY MURCHISON KELLY & SHEA LLC

SHREVEPORT | NEW ORLEANS | BATON ROUGE

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VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED TO ALL

Ms. Gina McCarthy, Administrator
Environmental Protection Agency
1200 Pennsylvania, N.W.
Washington, DC 20460

Peggy Hatch, Secretary
Louisiana Department of Environmental
Quality
P.O. Box 4301
Baton Rouge, LA 70821-4301

Honorable Eric Holder,
Attorney General, United States of America
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Mr. Ron Curry, Regional Administrator
U.S. EPA Region 6
1445 Ross Avenue, Suite 1200
Dallas, TX 75202

Re: Second Notice of Intent to File Citizen Suit Against Administrator McCarthy regarding Nucor permit nos. PSD-LA-740, 2560-00281-V0, and 2560-00281-V1.

Dear Administrator McCarthy:

Pursuant to the Clean Air Act ("CAA" or "the Act") § 304(a) and (b), 42 U.S.C. § 7604 (a) and (b), this correspondence provides 180 days' notice that Nucor Steel Louisiana LLC and Consolidated Environmental Management, Inc., a fully-owned subsidiary of Nucor Corporation (collectively, "Nucor"), intend to file a citizen suit against Administrator McCarthy and the Environmental Protection Agency (collectively referred to herein as "EPA") for an unreasonable delay in taking mandatory action under the CAA § 304(a)(2), 42 U.S.C. § 7604(a)(2), for violations of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-706, and for relief under the Declaratory Judgment Act ("DJA"), 28 U.S.C. §§ 2201-2202. By separate letter Nucor is also providing 60 days' notice of its intent to file a citizen suit for failure to take a mandatory action.

Persons Giving Notice:

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Convent, LA 70723



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Nucor Corporation
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Nucor's Counsel:

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Phone: (318) 227-1131
Fax: (318) 227-1141

Summary of Violations:

EPA issued orders on March 23, 2012 ("2012 Order") and January 30, 2014 ("2014 Order") related to permits held by Nucor. These orders violated the CAA and constituted arbitrary and capricious agency action in the following ways:

1. EPA purported to state objections to a Prevention of Significant Deterioration ("PSD") permit in the guise of a title V permit objection, in violation of 42 U.S.C. § 7477 (2011);
2. EPA disregarded the express congressional command in 42 U.S.C. § 7661d(b)(2) that objections are to be made within 60 days of receipt of a petition to object;
3. EPA purported to state objections that are based solely on EPA's own policy preferences, and not the express requirements of the CAA, the Part 70 regulations, or

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the Louisiana State Implementation Plan (“SIP”), which provide the sole basis for decision in this matter. 42 U.S.C. § 7661d(b); 40 C.F.R. 70.8(c); LAC 33:III.507; LAC 33:III.533.C;

4. The 2012 Order extended additional petition rights to petitioners and allowed them to file additional petitions to object even after the state has responded to the Order, in violation of 42 U.S.C. § 7661d(b)(2);
5. EPA has unreasonably delayed taking action to declare whether it will or will not revoke, modify or terminate Nucor’s permits after timely receipt of Louisiana Department of Environmental Quality’s (“LDEQ”) response to EPA’s 2014 Order, which action is required by the CAA and EPA regulations;
6. EPA’s strategy to avoid making what they believe to be a “final agency action” has deliberately ensured that Nucor’s permits will forever remain in administrative limbo without the opportunity for judicial review; and
7. If EPA contends that the CAA does not mandate an opportunity for judicial review because LDEQ has satisfied its objections, then EPA’s actions and its application of the CAA are unconstitutional as they have deprived Nucor of due process.

Jurisdiction and Venue:

The purpose of this letter is to give 180 days’ notice of statutory violations created by EPA delays in performing mandatory actions so that EPA is afforded a fair opportunity to rectify those deficiencies. Should EPA fail to fully resolve Nucor’s permits in the manner set forth below, Nucor will file suit in the Eastern District of Louisiana and seek declaratory and

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injunctive relief, including attorneys' fees and costs. Jurisdiction in the Eastern District of Louisiana is based on 28 U.S.C. §§ 1331, 42 U.S.C. § 7604(a)(2), 5 U.S.C. §§ 551-706, and 28 U.S.C. §§ 2201-2202.

The district court has jurisdiction of this action by virtue of the CAA § 304(a)(2), 42 U.S.C. § 7604(a)(2), because EPA has unreasonably delayed performance of its nondiscretionary duties under the CAA respecting Nucor's permits

Further, the district court has jurisdiction over this action by virtue of the APA, 5 U.S.C. §§ 551 et seq., because unlawful EPA final agency action is involved for which there is no other adequate remedy in court. The district court has jurisdiction of this action pursuant to 28 U.S.C. §§ 2201-2202 (DJA), by virtue of the declaratory relief necessitated by EPA's unlawful actions.

APA § 706(1), 5 U.S.C. § 706(1), provides that the court may compel agency action unlawfully withheld or unreasonably delayed. APA § 706(2)(A), 5 U.S.C. § 706(2)(A), provides relief for the action addressed herein in that EPA has issued orders which are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. APA § 706(2)(C), 5 U.S.C. § 706(2)(C), provides relief for the action addressed herein in that EPA has issued orders in excess of its legal authority. APA § 706(2)(D), 5 U.S.C. § 706(2)(D), provides relief for the action addressed herein in that EPA has issued orders without observance of procedures required by law.

Jurisdiction granted by the CAA, APA, and DJA, judicial review in district court is favored in this case because EPA has acted beyond its authority. Even where Congress is understood generally to have precluded review, the Supreme Court permits review in the district

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court under the *Leedom* exception. The exception applies when, as here, an agency has acted beyond its delegable powers by denying a statutorily created right and, without review by the district court, plaintiffs have no other means to protect and enforce that right, *see Leedom v. Kyne*, 358 U.S. 184, 190-91 (1958); *see also Friends of Crystal River v. EPA*, 794 F. Supp. 674 (W.D. Mich. 1992), *aff'd*, 35 F.3d 1073 (6th Cir. 1994) (holding that EPA's action constituted a clear statutory violation and, therefore, was reviewable by district court, even if Clean Water Act precluded judicial review; without review by district court, plaintiffs would have no other means to directly challenge EPA's alleged, *ultra vires* conduct); *see also Clean Water Action Council of Northeastern Wisconsin, Inc. v. EPA*, 12-3388, 2014 WL 4257843 (7th Cir. Aug. 29, 2014) (the venue and filing provisions of §7607(b) are not jurisdictional and thus do not preclude review on the merits).

Further, sovereign immunity does not bar a suit challenging such *ultra vires* acts, because as Nucor alleges below, a federal officer, Administrator McCarthy, acted in excess of her legal authority. *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689-690, 69 S.Ct. 1457, 1461 (1949); *see also Dugan v. Rank*, 372 U.S. 609, 621-22 (1963).

Finally, EPA is judicially estopped from challenging the district court's jurisdiction over this matter in light of EPA's earlier representations to the United States Court of Appeals for the Fifth Circuit, in which EPA argued that Nucor's requested relief was available only in the district court, as more fully set forth below.

Venue in the Eastern District of Louisiana is proper under 28 U.S.C. § 1391(e), as that is the district where a substantial part of the actions giving rise to this Notice have occurred.

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Statement of Facts

Nucor holds PSD permit No. PSD-LA-740 and title V permit No. 2560-00281-V0, both issued on May 24, 2010, and title V permit No. 2560-00281-V1, which amended 2560-00281-V0 on January 27, 2011, all for a Pig Iron facility (“Pig Iron permits”). Nucor is also the holder of PSD permit No. PSD-LA-751 and title V permit No. 3086-V0, issued on January 27, 2011, for a “direct reduced iron” or DRI manufacturing facility (“DRI permits”). The DRI PSD permit was modified on November 16, 2012 and again on November 26, 2013 and now bears the number PSD-LA-751(M2). The DRI title V permit was modified on March 8, 2012 and on May 29, 2014 and now is numbered 3086-V2.

The process of obtaining these permits began on May 12, 2008, when Nucor submitted to the Louisiana Department of Environmental Quality (“LDEQ”), with copies to EPA, applications for PSD and title V permits for the construction and operation of a Pig Iron facility to be located near the town of Convent, St. James Parish, Louisiana. The application process included two public hearings and two public comment periods, during which EPA submitted numerous comments. LDEQ considered all comments and issued the Pig Iron PSD permit and title V permit on May 24, 2010. EPA did not object to these permits.

On June 25, 2010, Zen-Noh Grain Corporation (“Zen-Noh”), the owner and operator of a grain elevator located adjacent to Nucor’s property in St. James Parish, petitioned EPA pursuant to the to object to the Pig Iron PSD and title V permits issued by LDEQ. The Louisiana Environmental Action Network (“LEAN”) and the Sierra Club also filed separate petitions for

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EPA to object to the Pig Iron title V permit on June 25, 2010. EPA took no action on these petitions. On November 19, 2010, Zen-Noh filed a citizen suit in the Eastern District of Louisiana to compel EPA action on its petition. *See Zen-Noh Grain Corporation v. Lisa Jackson*, No. 10-4367 (La. E.D. 2010). EPA apparently settled this action with a promise to respond to Zen-Noh's petition by March 16, 2012.

The start of construction on the Pig Iron facility was delayed by numerous objections and permit appeals. In the intervening time, market conditions changed substantially and a DRI facility became desirable. On August 20, 2010, Nucor submitted PSD and title V applications to LDEQ, again with copies to EPA, to construct a DRI facility as part of the Convent facility. The DRI facility would replace roughly half of the permitted Pig Iron facility, with corresponding reductions in emissions. After public notice and comment, including comments from EPA, LDEQ issued the PSD and title V permits for the DRI facility on January 27, 2011.

On May 3, 2011, Zen-Noh filed a petition with EPA seeking an objection to these permits. LEAN and Sierra Club also filed separate petitions with EPA on May 3, 2011. EPA took no action on these petitions.

On March 23, 2012, EPA issued the 2012 Order, which only addressed some of the objections contained in the Zen-Noh petitions and did not address the petitions filed by LEAN and Sierra Club at all. Instead, EPA deferred action on the majority of issues in the petitions by "grant[ing]" the petitions on two "threshold" issues:

- (1) LDEQ has not adequately justified its decision to permit the DRI and pig iron processes as two separate projects for purposes of PSD analysis, and
- (2) LDEQ has not provided permit records from which the full scope of applicable

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requirements for the pig iron and DRI title V permits can be determined and, in particular, has not adequately explained the basis for its transfer of emissions units between the pig iron and DRI processes via the title V permits, and its incorporation by reference of permit requirements established in a title V permit into a PSD permit.

2012 Order, at 10-11. Although EPA's 2012 Order did not identify any term or condition of the permits that failed to comply with the CAA, or identify an "applicable requirement" that was improperly excluded from the permits, it nevertheless included a purported "objection" to both the DRI and pig iron title V permits.

On June 21, 2012, LDEQ responded to the inquiries posed to it by EPA in the 2012 Order. EPA declared that LDEQ's explanation would be considered a "new" permit subject to new petitions, despite LDEQ's assertions that it did not consider its response to be a new permit.¹ EPA then specifically called counsel for Zen-Noh, LEAN, and the Sierra Club to "emphasize"² this position. LEAN and Sierra Club responded with a renewed petition to object to the LDEQ response on October 3, 2012.

Because the 2012 Order violated the CAA, LDEQ sought review of the 2012 Order in the Fifth Circuit. *See Louisiana Dep't of Env'tl. Quality v. EPA*, No. 12-60482 (5th Cir. 2013). Nucor intervened to protect its interests in its permits and its partially-built DRI facility. Nucor contended that EPA lacked authority to take action on a title V permit that does not actually constitute an objection, and that constitute actions instead on a PSD permit. Nucor further contended that EPA could not bifurcate its response to petitions with multiple partial orders

¹ *Louisiana Dep't of Env'tl. Quality v. EPA*, No. 12-60482 (5th Cir. 2013), R. Doc. 00512322527.

² *Id.*

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issued far beyond the statutory 60-day deadline. Nucor argued that EPA's partial-response strategy created a never-ending objection loop, keeping Nucor's permits in administrative limbo without the opportunity for judicial review. In response, EPA urged the Fifth Circuit to dismiss Nucor's petition for review and insisted that the proper forum for Nucor's petition was a United States district court (*see* EPA's brief, pp. 26, 27, available at *Louisiana Dep't of Env'tl. Quality v. EPA*, No. 12-60482 (5th Cir. 2013), R. Doc. 00512107706; *see also* comments at oral argument by counsel for EPA, "we believe there are district court remedies that could facilitate getting this issue in a form suitable for this Court's review. ... what they could do, in the district court what you could do, assuming standing is satisfied, you could bring a suit to compel EPA to issue a response to a petition...and if somebody believed that what EPA had done didn't count under the statute, it wasn't legally a response, they could come back to the district court and say 'no, they haven't answered the petition.'" Panel Oral Argument at 21:55, available at http://www.ca5.uscourts.gov/OralArgRecordings/12/12-60482_8-5-2013.wma). Ultimately the Fifth Circuit dismissed LDEQ's and Nucor's petitions for lack of subject matter jurisdiction, but held that "we do not determine whether LDEQ and Nucor may pursue other avenues of judicial review, such as an action in district court under 42 U.S.C. § 7604(a)(2)." *Id.* at 450.

On July 26, 2013, EPA declared by letter that it had concluded the administrative process regarding all issues related to the 2012 Order, and that therefore it would not further respond to

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Zen-Noh's petitions (the "2013 letter").³ On January 30, 2014, EPA issued another Order (the "2014 Order"), partially granting the 2010, 2011, and 2012 petitions (and dismissing the remaining issues) filed by Sierra Club and LEAN, nearly four years after LDEQ issued Nucor's title V permits (and after completion of the DRI facility). In light of the 2014 Order, and the 2013 letter confirming that EPA would not further respond to Zen-Noh's petitions, EPA has now responded to all petitions related to the Nucor facility. However, based on past practice, EPA likely views LDEQ's response to the 2014 Order as issuing a "new" permit worthy of additional comments. EPA has taken no action to dissuade this and confirm that Nucor's permits are valid and enforceable and that EPA will not take further action on them.

In light of the above extended series of events, Nucor requests that EPA enter an Order declaring Nucor's permits to be valid, enforceable, and free and clear of any continuing EPA objection.⁴ Absent such action by EPA, Nucor will file an action in the Eastern District of Louisiana request various items of relief set forth fully below.

Harm to Nucor

This notice of intent to sue is made necessary by EPA's repeated delays (and repeated failures to act) in response to objections to a Louisiana title V permit which were filed under

³ See *Louisiana Dep't of Env'tl. Quality v. EPA*, No. 12-60482 (5th Cir. 2013), R. Doc. 00512322527, R. Doc. 00512322528. ("EPA has taken action on all issues that pertain to the 2012 Order. None of the remaining petition issues pertain to the 2012 Order. To the extent that the EPA has continuing authority to pursue its 2012 Order, it does not intend to take any further action pursuant to that Order. Accordingly, the administrative process following that Order is now complete and concluded.").

⁴ According to EPA's title V petition database, both the 2012 and 2014 Orders are designated as having a "final" status. However, this designation in no way precludes EPA from contesting the sufficiency of LDEQ's response to the 2014 Order, and therefore Nucor is still at risk of a future EPA Order contesting the validity of Nucor's title V permits. EPA's title V petition database is available at: <http://www.epa.gov/region7/air/title5/petitiondb/petitiondb.htm>

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Section 505 of the CAA, 42 U.S.C. §7661d. EPA's delayed actions and failures to act have repeatedly violated Nucor's rights respecting the prompt resolution of objections to Louisiana title V permits for Nucor's Louisiana iron manufacturing project, and are now calling into question the validity of Nucor's most recent permit. EPA has engaged in a pattern and practice of employing *ultra vires* agency action to collaterally attack Nucor's permits, and it has failed to confirm that Nucor's permits are valid and enforceable and that EPA will not take further action on them. At best, EPA's actions will leave a permanent "cloud" on Nucor's permits, and at worst, it leaves open the possibility that EPA will again attack Nucor's permits through further *ultra vires* agency action, in any event putting Nucor's massive capital investment in jeopardy. Nucor has expended hundreds of millions of dollars and hired hundreds of employees based upon the issuance of the permits, and therefore is exposed to significant risk by EPA's tactics which leave open the possibility of future attacks on Nucor's permits. EPA's strategy to avoid making what they believe to be a "final agency action" has deliberately ensured that Nucor's permits will forever remain in administrative limbo without the opportunity for judicial review. This dispute is clearly not moot because it "falls within a special category of disputes that are 'capable of repetition' while 'evading review.'" *Turner v. Rogers*, 131 S.Ct. 2507, 2514 (2011) (quoting *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498 (1911)).

As detailed below, EPA has, to Nucor's prejudice and harm: (1) repeatedly delayed action on petitions to object, and thereby violated the statutory requirement to "grant or deny" such petitions to object to Nucor's title V permits "within 60 days after the petition is filed" [§505(b)(2)]; (2) taken piecemeal actions without fully disposing of petitions to object, thus

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delaying resolution of the objections and providing unauthorized and unfair (“second bite”) procedural opportunities to petitioners; (3) granted one petition to object based on a purported lack of sufficient information in the permit record, and without identifying any respects in which “the permit is not in compliance with [the CAA], including the requirements of the applicable implementation plan;” (4) objected to Nucor’s Prevention of Significant Deterioration (“PSD”) permit without any appropriate jurisdictional basis in the CAA and in violation of Nucor’s rights to due process as identified by the Supreme Court; (5) sought to avoid judicial review of its violations of CAA permitting requirements by arguing to the Fifth Circuit Court of Appeals that jurisdiction is in the district court and arguing to the district court that jurisdiction is solely in the courts of appeals; and (6) failed to take any action on Louisiana’s response to EPA’s objection.

As EPA does not believe a delay beyond statutory deadlines imposes any bar on its actions, Nucor can obtain no certainty as to the validity of its permits absent an EPA declaration that the permits are valid as they currently stand, or, failing that, a court ruling compelling EPA to state whether EPA intends to modify, terminate, or revoke and reissue its title V permit again.

EPA’s actions and delays in acting have violated the clearly expressed intent of Congress that petitions to object to title V permits be granted or denied promptly. Six hundred and thirty-one days after the Pig Iron PSD and title V permit issuance and 421 days after the DRI PSD and title V permit issuance, and well past the applicable statutory deadlines, the Administrator purported to object to Nucor’s title V permits, jeopardizing Nucor’s multi-million dollar investment and acting in derogation of Nucor’s PSD permits. EPA did not grant or deny all pending petitions at that time. Rather, EPA identified “threshold issues” for Louisiana to respond

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to, and invited the petitioners to raise their objections again if they were not satisfied with Louisiana's response. One petitioner did so. EPA ignored that "new" petition until the petitioner sued, and then granted its petition in part and denied it in part. The result of this process was that EPA did not finally act on all petitions until January 30, 2014, 1,441 days after they were first filed.

Even now it is not clear that EPA has finalized the process. Louisiana responded to EPA's most recent objection within 90 days of its issuance on April 30, 2014, as required by EPA's regulations at 40 CFR 70(g)(4). However, if the Administrator determines that Louisiana's response failed to resolve its objection it still may give Nucor 30 days' notice and terminate, modify, or revoke and reissue Nucor's permit. Absent a judicially imposed requirement to take action or declare the permit valid, EPA will continue to ignore statutory time limits and not act.

Nucor cannot have assurance that its permits are valid until EPA indicates that LDEQ's actions in response to its objection are satisfactory. Nucor contends that, in the circumstances created by the Administrator's repeated violations of the deadlines contained in Section 505 of the CAA, as explained below, the Act must be read to mandate that EPA issue or deny Nucor's permits even after receipt of LDEQ's responses to EPA's 2014 Order in order to afford Nucor due process in the form of an opportunity for judicial review of EPA's objections. If EPA contends that the CAA does not mandate an opportunity for judicial review because LDEQ has satisfied its objections, then EPA's actions are unconstitutional.

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Description of Violations:

1. EPA's 2012 and 2014 Orders are *ultra vires* actions. The district court should vacate the Orders, declare that EPA may not collaterally attack Nucor's PSD permits in a title V proceeding, and reaffirm that EPA's review is limited to violations of explicit requirements of the Act and/or the Louisiana SIP. LDEQ is the PSD permitting authority in Louisiana; EPA is not. LDEQ issued two currently valid PSD permits to Nucor for the construction of a Pig Iron facility and a DRI facility on a common property. Concurrently, LDEQ issued two title V operating permits to Nucor for the same facilities. LDEQ also issued a modification to the title V permit for the Pig Iron facility. Pursuant to those permits, Nucor commenced construction of a multi-million dollar iron making complex. Six hundred and thirty-one days after the Pig Iron PSD and title V permit issuance and 421 days after the DRI PSD and title V permit issuance, and well past the applicable statutory deadlines, the Administrator purported to object to Nucor's title V permits,⁵ jeopardizing Nucor's multi-million dollar investment and acting in derogation of Nucor's PSD permits. In addition to failing to meet the statutory deadline for an objection, the Administrator's objection to the title V permit due to her disagreement with the terms of a valid PSD permit exceeded her authority under the CAA, and violates the structure of CAA § 167 and the Supreme Court's decision in *Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461 ("ADEC"), where the Court defined the permissible boundaries of EPA's authority to collaterally attack a PSD permit. The Administrator's

⁵ In Louisiana, for a project that triggers PSD, both the PSD permit and the title V permit must be issued prior to the source being authorized to begin actual construction. LA. ADMIN. CODE tit. 33, pt. III §§ 501, 507, and 509.

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objection violates each limit established by the Supreme Court on collaterally attacking a valid PSD permit. Her objection reflects nothing more than a mere policy disagreement with LDEQ, which is not a lawful basis for objection under the Act. Finally, the Administrator's power is constrained by statute and she may not ignore the limits on when she may act nor may she grant additional rights to petition against a permit, which is beyond that authorized by the Act.

2. Nucor is entitled to a declaration from the district court that Nucor's permits are valid, enforceable, and free and clear of any continuing EPA objection. EPA has now responded to all petitions related to Nucor's facility. EPA has not terminated or revoked Nucor's permits. Having exhausted all authority available to it for acting on Nucor's permits, EPA cannot take any further action on Nucor's permits, and therefore Nucor's permits should be declared as valid and enforceable.

3. Nucor is entitled to a final response from EPA that denies in full the petitions of Zen-Noh, LEAN, and Sierra Club, and confirms that Nucor's permits are valid, enforceable, and free and clear of any continuing EPA objection, and the district court should compel EPA to issue such a response.

Conclusion

As required by law, Nucor obtained both a PSD and a title V permit from LDEQ for the Pig Iron plant. Well after the time allowed by law for either title V permit, the Administrator issued an objection to both title V permits, alleging that the PSD permits were deficient. Despite clear language requiring that an objection be issued within 60 days and be based on violation of the Act, the Administrator neither resolved the issues nor based her objection on any requirement

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of the Act, instead basing her action merely on her preferences for how the PSD permits should have been issued. The PSD permits are not even within the jurisdiction of the Administrator, but rather are solely within LDEQ's permitting jurisdiction. EPA has also purported to grant additional rights to petitioners beyond the right to request an objection, and have even stated that LDEQ's re-affirmation of the permits constitutes a "new permit" allowing for additional challenges. EPA's and the Administrator's actions in no way conform to the requirements of the law. They ignore the structure of the CAA by undermining the cooperative federalism approach to air quality regulation established by the Act and make it impossible for Nucor or any other business to plan investment. The Administrator's objection to the title V permit due to her disagreement with the terms of a valid PSD permit exceeded her authority under the CAA, and violates the structure of CAA § 167 and the Supreme Court's decision in *Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461, where the Court defined the permissible boundaries of EPA's authority to collaterally attack a PSD permit.

In light of the above, Nucor requests that EPA enter an Order declaring Nucor's permits to be valid, enforceable, and free and clear of any continuing EPA objection. Absent such action by EPA, Nucor will file an action in the Eastern District of Louisiana requesting:

- A. that the court (1) enter an order vacating the 2012 Order and the 2014 Order, and (2) issue a declaratory ruling that (a) EPA may not object to the terms of a valid PSD permit using its title V objection authority, but may merely incorporate the PSD permit terms into the title V permit; (b) EPA may only object to title V permits under 42 U.S.C. § 7661d for reasons set forth in the Act, its implementing

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regulations, and the Louisiana State Implementation Plan (“SIP”); (c) the objection process under 42 U.S.C. § 7661d does not allow EPA to grant itself a phased-review process, consisting of a series of objections and responses by the state permitting authority (i.e., “multiple bites at the apple”); (d) the objection process under 42 U.S.C. § 7661d does not allow EPA to grant additional petition rights to other persons/entities, which are not provided for in the Act; and (e) EPA may only object to title V permits if it does so in compliance with the express congressional command in 42 U.S.C. § 7661d(b)(2) that objections are to be made within 60 days of receipt of a petition to object; and

- B. that the court enter a declaratory judgment that finds Nucor’s permits to be valid, enforceable, and free and clear of any continuing EPA objection and confirms that with the issuance of Louisiana’s responses to the 2012 and 2014 Orders Nucor’s permits are valid and enforceable;
- C. or in the alternative, that the court compel EPA to grant or deny Nucor’s title V permits Nos. 2560-00281-V0 and 2560-00281-V1; and
- D. For any and all other equitable relief that the court may deem appropriate.

If you would like to discuss any portion of this Notice or a proposal for the resolution of the issues discussed above, please feel free to contact the undersigned.

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Yours very truly,

BRADLEY MURCHISON KELLY & SHEA LLC

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cc: Mr. Steven J. Rowlan
Mr. Jeffrey D. Braun
Mr. Jerald N. Jones
(All via PDF email)

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September 11, 2015

**VIA CERTIFIED MAIL,
RETURN RECEIPT REQUESTED** 7014 1200 0002 0921 6568

Ms. Gina McCarthy, Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Third Notice of Intent to File Citizen Suit Against Administrator McCarthy regarding Nucor permit nos. PSD-LA-740(M-1), Title V permit 2560-00281-V1, PSD-LA-751(M-2) and Title V permit 3086-V3.

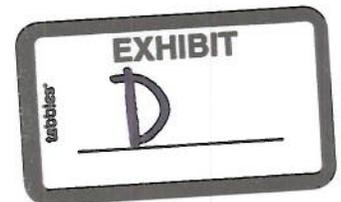
Dear Administrator McCarthy:

Pursuant to the Clean Air Act ("CAA" or the "Act") § 304(b), 42 U.S.C. § 7604(b), this correspondence provides 60 days' notice that Nucor Steel Louisiana LLC and Consolidated Environmental Management, Inc., a fully-owned subsidiary of Nucor Corporation (collectively, "Nucor"), intend to file a citizen suit against Administrator McCarthy and the Environmental Protection Agency (collectively referred to herein as "EPA") for EPA's failure to take, after determining to object to Nucor's state-issued permits, a non-discretionary action required by § 505(b)(3) of the Act, 42 U.S.C. § 7661d(b)(3). This citizen suit arises out of Administrator McCarthy's failure to take non-discretionary action under the CAA § 304(a)(2), 42 U.S.C. § 7604(a)(2), out of violations of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-706, arising from her course of conduct, and seeks an order under the Declaratory Judgment Act ("DJA"), 28 U.S.C. §§ 2201-2202, declaring her purported objections to Nucor's permits to be void *ab initio* and of no continuing force or effect.

Persons Giving Notice:

Nucor Steel Louisiana LLC
9101 Highway 3125
Convent, LA 70723

Consolidated Environmental Management, Inc.
1915 Rexford Road
Charlotte, North Carolina 28211



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Nucor Corporation
1915 Rexford Road
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Nucor's Counsel:

Mr. David R. Taggart
Bradley Murchison Kelly & Shea LLC
401 Edwards Street, Suite 1000
Shreveport, Louisiana 71101
Phone: (318) 227-1131
Fax: (318) 227-1141

Summary of Violations:

EPA issued orders on March 23, 2012 and January 30, 2014 related to Louisiana state-issued permits held by Nucor. These two orders violated the CAA and constituted arbitrary and capricious agency action in the following ways:

1. In both orders, EPA determined to “object” in writing to Nucor’s already-issued permits, under § 505(b)(2) of the Act, 42 U.S.C. § 7661d(b)(2), yet EPA did not in either order “modify, terminate, or revoke” such permits, in violation of § 505(b)(3) of the Act, 42 U.S.C. § 7661d(b)(3), which states that:

If the permitting authority has issued a permit prior to receipt of an objection by the Administrator under paragraph (2) of this subsection, the Administrator shall modify, terminate, or revoke such permit and the permitting authority may thereafter only issue a revised permit in accordance with subsection (c) of this section.

2. By deliberately declining to modify, terminate, or revoke the permits, actions explicitly required as a result of EPA’s objections under § 505(b)(3) of the Act, 42 U.S.C. § 7661d(b)(3), EPA was able to, and did, take other untimely and unauthorized actions in violation of the Act. EPA later avoided judicial review of its unlawful course of conduct by invoking the shield of § 505(c) of the Act, 42 U.S.C. § 7661d(c), which provides that “[n]o objection shall be subject to judicial review until the Administrator takes final action to issue or deny a permit under this subsection.”
3. By deliberately declining to modify, terminate or revoke the permits, actions explicitly required by § 505(b)(3) of the Act, 42 U.S.C. § 7661d(b)(3), which give rise to judicial review, EPA intentionally sought, and subsequently did, evade judicial

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review by wrongfully invoking the shield provided in § 505(c), 42 U.S.C. § 7661d(c), which provides that “[n]o objection shall be subject to judicial review until the Administrator takes final action to issue or deny a permit under this subsection.” By failing to take the mandatory, non-discretionary action of “modifying, terminating, or revoking” the permits, EPA thus avoided judicial review of its illegal conduct while obstructing Nucor’s permits, all in violation of §§ 505(b) and (c) of the Act and of congressional intent that objections be quickly resolved.

4. When the Louisiana Department of Environmental Quality (“LDEQ”) responded to EPA’s request for further justification for LDEQ’s permitting decisions, EPA illegally declared LDEQ’s response to be a “new permit” subject to additional petitions to object.
5. EPA’s illegal course of conduct unlawfully required the permitting authority to defend the validity of Nucor’s permits without EPA’s observance of the procedure explicitly required by law, while at the same time EPA denied Nucor and the permitting authority the right to prompt judicial review of EPA’s objection, all in violation of the CAA and the APA.
6. EPA’s deliberate disregard of the requirements of §§ 505(b)(3) and 505(c), 42 U.S.C. §§ 7661d(b)(3) and 7661d(c), has allowed EPA to assert irrelevant, untimely and procedurally defective objections to Nucor’s state-issued permits while at the same time avoiding judicial review of its actions; and
7. If EPA contends that the CAA allows it to object in writing to state-issued permits without complying with 42 U.S.C. § 7661d(b)(3)’s requirement to “modify, terminate, or revoke” the permits, and without complying with 42 U.S.C. § 7661d(c)’s requirement to take final action to issue or deny such permits when the permitting authority does not submit a permit revised to meet EPA’s objections, then EPA’s actions are unconstitutional, as they have deprived Nucor of its validly-issued state permits without even the pretense of due process.

Jurisdiction and Venue

The district court has jurisdiction of this action by virtue of the CAA § 304(a)(2), 42 U.S.C. § 7604(a)(2), because EPA has failed to comply with its nondiscretionary duties under the CAA when objecting to Nucor’s permits.

Further, the district court has jurisdiction over this action by virtue of the APA, 5 U.S.C. §§ 551 *et seq.*, because unlawful EPA final agency action is involved for which there is no other

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adequate remedy in court. This action will also invoke 28 U.S.C. §§ 2201-2202 (DJA), by virtue of the declaratory relief necessitated by EPA's unlawful actions.

APA § 706(1), 5 U.S.C. § 706(1), provides that the court may compel agency action unlawfully withheld or unreasonably delayed. APA § 706(2)(A), 5 U.S.C. § 706(2)(A), provides relief for the action addressed herein in that EPA has issued orders which are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. APA § 706(2)(C), 5 U.S.C. § 706(2)(C), provides relief for the action addressed herein in that EPA has issued orders in excess of its legal authority. APA § 706(2)(D), 5 U.S.C. § 706(2)(D), provides relief for the action addressed herein in that EPA has issued orders without observance of procedures required by law.

In addition to the jurisdiction granted by the CAA and APA, judicial review in the district court is favored in this case because EPA has acted beyond its authority. Even where Congress is understood generally to have precluded review, the Supreme Court permits review in the district court under the *Leedom* exception. The exception applies when, as here, an agency has acted beyond its delegable powers by denying a statutorily created right and, without review by the district court, plaintiffs have no other means to protect and enforce that right. *See Leedom v. Kyne*, 358 U.S. 184, 190-91 (1958); *see also Friends of Crystal River v. EPA*, 794 F. Supp. 674 (W.D. Mich. 1992), *aff'd*, 35 F.3d 1073 (6th Cir. 1994) (holding that EPA's action constituted a clear statutory violation, and, therefore, was reviewable by district court, even if Clean Water Act precluded judicial review; without review by district court, plaintiffs would have no other means to directly challenge EPA's alleged *ultra vires* conduct); *see also Clean Water Action Council of Ne. Wis., Inc. v. EPA*, No. 12-3388, 2014 WL 4257843 (7th Cir. Aug. 29, 2014) (the venue and filing provisions of § 7607(b) are not jurisdictional and thus do not preclude review on the merits).

Further, sovereign immunity does not bar a suit challenging such *ultra vires* acts, because as Nucor alleges below, a federal officer, Administrator McCarthy, acted in excess of her legal authority. *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689-690 (1949); *see also Dugan v. Rank*, 372 U.S. 609, 621-22 (1963).

Finally, EPA is judicially estopped from challenging the district court's jurisdiction over this matter in light of EPA's earlier representations to the United States Court of Appeals for the Fifth Circuit, in which EPA argued that Nucor's requested relief was available only in the district court, as more fully set forth below.

Venue in the Eastern District of Louisiana is proper under 28 U.S.C. § 1391(e), as that is the district where a substantial part of the actions giving rise to this Notice have occurred.

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Statement of Facts

Nucor is the holder of a Louisiana Prevention of Significant Deterioration (“PSD”) permit No. PSD-LA-740(M-1), and a Louisiana Title V permit 2560-00281-V1 (“Pig Iron permits”). Nucor is also the holder of a Louisiana PSD permit No. PSD-LA-751(M-2) and a Louisiana Title V permit No. 3086-V3 (“DRI permits”).

Nucor was issued PSD-LA-740 and Title V permit No. 2560-00281-V0 on May 24, 2010. Nucor was issued Title V permit No. 2560-00281-V1, which amended 2560-00281-V0, on January 27, 2011. Nucor was issued PSD permit No. PSD-LA-740(M-1), which amended PSD-LA-740, on July 9, 2013. These state-issued permits are for the construction of a Pig Iron manufacturing facility located near the town of Convent, St. James Parish, Louisiana.

Nucor was issued PSD permit No. PSD-LA-751 and Title V permit No. 3086-V0, on January 27, 2011, for the construction and operation of a “direct reduced iron” or DRI manufacturing facility, also located near the town of Convent, St. James Parish, Louisiana. The DRI PSD permit was modified on November 16, 2012, and again on November 26, 2013, and now bears the number PSD-LA-751(M-2). The DRI Title V permit was modified on March 8, 2012, May 29, 2014, and July 1, 2015, and now is numbered 3086-V3.

The process of obtaining these permits began on May 12, 2008, when Nucor submitted to LDEQ, with required copies to EPA, applications for PSD and Title V permits for the construction and operation of a Pig Iron facility to be located near the town of Convent, St. James Parish, Louisiana. The application process included two public hearings and two public comment periods, during which EPA submitted numerous comments. LDEQ considered all comments and issued the Pig Iron PSD permit and Title V permit on May 24, 2010. LDEQ provided EPA with a copy of the Pig Iron Title V permit, as required by the CAA. 42 U.S.C. § 7661d(a); 40 C.F.R. § 70.8(a). EPA did not object to the Pig Iron permits.

On June 25, 2010, Zen-Noh Grain Corporation (“Zen-Noh”), the owner and operator of a grain elevator located adjacent to Nucor’s property in St. James Parish, submitted a petition to EPA pursuant to 42 U.S.C. § 7661, requesting that EPA object to the Pig Iron PSD and Title V permits issued by LDEQ. The Louisiana Environmental Action Network (“LEAN”) and the Sierra Club also filed separate petitions for EPA to object to the Pig Iron Title V permit on June 25, 2010. Although § 505(b)(2) of the CAA, 42 U.S.C. § 7661d(b)(2), provides that “[t]he Administrator shall grant or deny” petitions to object within 60 days, EPA took no action on these petitions. On November 19, 2010, Zen-Noh filed a citizen suit in the Eastern District of Louisiana to compel EPA action on its petition. *See Zen-Noh Grain Corp. v. Lisa Jackson*, No. 10-4367 (E.D. La. 2010). EPA settled this action with a promise to respond to Zen-Noh’s petition by March 16, 2012.

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The start of construction on the Pig Iron facility was delayed by numerous objections and permit appeals. In the intervening time, natural gas market conditions changed substantially and a DRI facility became desirable. On August 20, 2010, Nucor submitted PSD and Title V applications to LDEQ, again with copies to EPA, to construct a DRI facility as part of the Convent facility. The DRI facility would replace roughly half of the permitted Pig Iron facility's iron making capacity with the DRI process, with corresponding reductions in emissions. After public notice and comment, including comments from EPA, LDEQ issued the PSD and Title V permits for the DRI facility on January 27, 2011.

On May 3, 2011, Zen-Noh filed a petition with EPA seeking an objection to the DRI permits. LEAN and Sierra Club also filed separate petitions with EPA on May 3, 2011. EPA did not take action on these petitions within 60 days, as is required by 42 U.S.C. § 7661d(b)(2).

On March 23, 2012, EPA issued an untimely order which addressed only some of the objections contained in the Zen-Noh petitions and which did not address the petitions filed by LEAN and Sierra Club at all. See "Order Granting Petitions for Objection to Permits," responding to Petition Number VI-2010-02 & Petition Number VI-2011-03, *In the Matter of: Consolidated Environmental Management, Inc.-Nucor Steel Louisiana, Pig Iron and DRI Manufacturing in St. James Parish, Louisiana* (the "2012 Order"). EPA issued the 2012 Order 637 days after Zen-Noh, LEAN, and Sierra Club filed their petitions to object to the Pig Iron permits, and 325 days after they filed their petitions to object to the DRI permits, despite the CAA's mandate that EPA "grant or deny" such petitions within 60 days of receipt. 42 U.S.C. § 7661d(b)(2).

In responding to the Zen-Noh and LEAN petitions to object with the 2012 Order, EPA was required to "grant or deny" both petitions, and, if it determined in its discretion to grant either or both petitions, it was explicitly required to "modify, terminate, or revoke" Nucor's permits. Indeed, those were the only actions authorized by the CAA under the facts of this case; any other action would violate the express mandates of the CAA. See 42 U.S.C. § 7661d(b)(3) ("[i]f the permitting authority has issued a permit prior to receipt of an objection by the Administrator under paragraph (2) of this subsection, the Administrator **shall modify, terminate, or revoke such permit** and the permitting authority may thereafter only issue a revised permit in accordance with subsection (c) of this section.") (emphasis added).

Despite the clear language of 42 U.S.C. § 7661d(b)(3) requiring that it "grant or deny" the Zen-Noh and LEAN petitions, in the 2012 Order, EPA deferred action on the majority of issues in the petitions by "grant[ing]" the petitions on two "threshold" issues. In relevant part, the 2012 Order, at pp. 10-11, stated:

LDEQ has not adequately justified its decision to permit the DRI and pig iron processes as two separate projects for purposes of PSD analysis, and (2) LDEQ

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has not provided permit records from which the full scope of applicable requirements for the pig iron and DRI title V permits can be determined and, in particular, has not adequately explained the basis for its transfer of emissions units between the pig iron and DRI processes via the title V permits, and its incorporation by reference of permit requirements established in a title V permit into a PSD permit.

Although EPA purported to grant, in part, one of the pending petitions to object to Nucor's permits, EPA failed to "modify, terminate, or revoke" the already-issued permits, in violation of 42 U.S.C. § 7661d(b)(3).

EPA's request for more information from LDEQ by means of an "objection" was clearly *ultra vires* in the circumstances. Given that the petitions to object at issue did not satisfy the petitioners' burden of proof, the appropriate response was for EPA to deny the petitions in full, not to ask LDEQ for further clarification so as to give the petitioners a second attempt to satisfy their burden of proof. Nevertheless, on June 21, 2012, LDEQ responded to the inquiries posed to it by EPA in the 2012 Order. However, LDEQ specifically stated in its response to EPA's "objection" that it disagreed with EPA and was not revising the permits to which EPA had objected.

EPA declared that LDEQ's response would itself be considered a "new" permit subject to new petitions to object, and did so despite the explicit instructions of § 505(c) of the Act, 42 U.S.C. § 7661d(c), that: "[i]f the permitting authority fails, within 90 days after the date of an objection under subsection (b) of this section, 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." (Emphasis added.)

The Administrator's failure to follow the requirement of § 505(c) to issue or deny the permit after LDEQ declined to submit a permit "revised to meet the objection," and her declaration that any LDEQ response would be a "new" permit, were designed to avoid judicial review of EPA's untimely, *ultra vires* actions. As set forth below, EPA's strategy to shield the 2012 Order from judicial review has thus far prevailed, making this suit necessary.

After LDEQ responded to its objection, EPA then specifically called counsel for Zen-Noh, LEAN, and the Sierra Club to "emphasize" its position that LDEQ's response was a new permit. LEAN and Sierra Club responded with a renewed petition to object to the LDEQ's response on October 3, 2012, as if the LDEQ response were a new Title V permit issued by LDEQ.

Because the 2012 Order violated the CAA in the ways described above, LDEQ sought review of the 2012 Order in the Fifth Circuit. *See Louisiana Dep't of Envtl. Quality v. EPA*, 730

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F.3d 446 (5th Cir. 2013). Nucor intervened to protect its interests in its permits and its partially-built DRI facility. Nucor contended that EPA's 2012 Order was *ultra vires* because EPA had employed a deliberate strategy of bifurcating its response to petitions with multiple partial orders issued far beyond the statutory 60-day deadline, without ever actually denying the petitions, or alternatively, granting them and subsequently modifying, terminating or revoking Nucor's permits as required by 42 U.S.C. § 7661d(b)(3). Nucor contended that EPA's strategy allowed EPA to raise baseless and irrelevant issues to object to state-issued permits without the opportunity for judicial review.

In response, EPA urged the Fifth Circuit to dismiss LDEQ's and Nucor's petitions for review, arguing that because it had not taken final action to issue or deny a permit in its 2012 Order, it was entitled to the shield of 42 U.S.C. § 7661d(c), which provides that "[n]o objection shall be subject to judicial review until the Administrator takes final action to issue or deny a permit under this subsection." This was a convenient argument for EPA, given that the shield of 42 U.S.C. § 7661d(c) was only available because EPA deliberately chose not to take final action to "modify, terminate, or revoke" Nucor's permits in the 2012 Order, despite its clear legal duty to do so. In other words, by violating the mandate of 42 U.S.C. § 7661d(b)(3) to "modify, terminate, or revoke," and ignoring the fact that LDEQ did not submit a permit "revised to meet the objection," or any revised permit at all, EPA deliberately sought to foreclose judicial review of its 2012 Order.

Additionally, EPA insisted as a litigating strategy, if nothing else, that the proper forum for Nucor's petition was a United States district court. *See* EPA's brief, pp. 26, 27, available at *Louisiana Dep't of Env'tl. Quality v. EPA*, No. 12-60482 (5th Cir. 2013), R. Doc. 00512107706; *see also* comments at oral argument by counsel for EPA, "[w]e believe there are district court remedies that could facilitate getting this issue in a form suitable for this Court's review. ... what they could do, in the district court what you could do, assuming standing is satisfied, you could bring a suit to compel EPA to issue a response to a petition ... and **if somebody believed that what EPA had done didn't count under the statute, it wasn't legally a response ... they could come back to the district court and say 'no, they haven't answered the petition.'**" Panel Oral Argument at 21:55 (emphasis added), available at: http://www.ca5.uscourts.gov/OralArgRecordings/12/12-60482_8-5-2013.wma.

Ultimately the Fifth Circuit dismissed LDEQ's and Nucor's petitions for lack of subject matter jurisdiction, finding that the 2012 Order was an "objection" that did not constitute "final action to issue or deny a permit under this subsection." *Louisiana Dep't of Env'tl. Quality*, 730 F.3d at 449. The Fifth Circuit further noted that "we do not determine whether LDEQ and Nucor may pursue other avenues of judicial review, such as an action in district court under 42 U.S.C. § 7604(a)(2)." *Id.* at 450.

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On January 30, 2014, EPA issued another Order (the “2014 Order”), partially granting the 2010, 2011, and 2012 petitions (and dismissing the remaining issues) filed by Sierra Club and LEAN, nearly four years after LDEQ issued Nucor’s Title V permits (and after completion of the DRI facility). The 2014 Order was *ultra vires* because the review process should have ended with EPA’s response to the first round of petitions, given the mandate in 42 U.S.C. § 7661d(b)(3) that EPA either deny the petitions, or instead modify, terminate, or revoke the permits. The CAA does not allow EPA to grant itself a phased-review process, consisting of a series of objections by EPA and responses by the state permitting authority, as EPA did with the 2012 and 2014 Orders. Despite EPA’s continuing *ultra vires* actions, on April 30, 2014, LDEQ responded to the 2014 Order.

EPA still has not taken what it has contended would be final action on Nucor’s permits, either in the form of denying the petitions in full, or granting them and subsequently modifying, terminating or revoking the permits as required by 42 U.S.C. § 7661d(b)(3). Its actions are therefore void *ab initio* and should be declared to be so by the district court.

In light of the above extended series of events, Nucor intends to file an action in the Eastern District of Louisiana requesting the various items of relief set forth fully below.

Harm to Nucor

This notice of intent to sue is made necessary by EPA’s repeated delays, failures to act, and acting in violation of the CAA in response to objections to a Louisiana Title V permit which were filed under § 505 of the CAA, 42 U.S.C. § 7661d. EPA’s actions have repeatedly violated Nucor’s rights respecting the prompt and final resolution of objections to Louisiana Title V permits for Nucor’s Louisiana iron manufacturing project. EPA has engaged in a pattern and practice of employing *ultra vires* agency action to collaterally attack Nucor’s permits and other permits issued by other states. Evidence of numerous such EPA abuses regarding permits issued by other states is maintained by EPA in a Title V Petition database which is readily accessible to the public. The database contains information showing chronic EPA delays in responding to petitions to object, and numerous objections to already-issued state permits which were issued by EPA without compliance with the requirements of §§ 505(b)(3) and 505(c) of the Act, 42 U.S.C. §§ 7661d(b)(3) and (c), to “modify, terminate or revoke such permit[s].” See <http://www.epa.gov/region07/air/title5/petitiondb/petitiondb.htm>.

If not subject to judicial review, EPA’s actions will leave in place a system by which it imposes irrelevant requirements on state-issued permits which state permitting authorities contend are in compliance with the Act. Nucor has expended hundreds of millions of dollars and hired hundreds of employees based upon the issuance of the permits. EPA’s strategy to avoid taking what it admits would be “final action to issue or deny a permit” has allowed EPA to impose unauthorized requirements on permitting agencies and permittees while deliberately

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avoiding judicial review in numerous cases found in the aforementioned database. This dispute is clearly not moot because it “falls within a special category of disputes that are ‘capable of repetition’ while ‘evading review.’” *Turner v. Rogers*, 131 S.Ct. 2507, 2514-2515 (2011) (quoting *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498 (1911)).

EPA’s actions and delays in acting have violated the clearly expressed intent of Congress that petitions to object to Title V permits be granted or denied promptly. Six hundred and sixty-nine days after the Pig Iron PSD and Title V permit issuance and 421 days after the DRI PSD and Title V permit issuance, and well past the applicable statutory deadlines, the Administrator purported to object to Nucor’s Title V permits, jeopardizing Nucor’s multi-million dollar investment and acting in derogation of Nucor’s PSD permits and LDEQ’s permitting authority. The CAA vested EPA with limited authority for responding to petitions to object: if EPA chooses to object, it is required to modify, terminate, or revoke the permits. Instead, here, EPA identified “threshold issues” for LDEQ to respond to, and invited the petitioners to raise their objections again if they were not satisfied with LDEQ’s response. One petitioner did so. EPA ignored that “new” petition until the petitioner sued, and then granted its petition in part and denied it in part. The result of this process was that EPA did not finally act on all petitions until January 30, 2014, 1,441 days after they were first filed.

Even now it is not clear that EPA has finalized the process. LDEQ responded to EPA’s most recent objection within 90 days of its issuance on April 30, 2014, as required by EPA’s regulations at 40 C.F.R. § 70.7(g)(4). If the Administrator at any time determines that LDEQ’s response failed to resolve the objection, EPA still may give Nucor 30 days’ notice and terminate, modify, or revoke and reissue Nucor’s permit.

Absent a judicial declaration that EPA’s 2012 and 2014 Orders are *ultra vires* and should be vacated, EPA will continue its practice of ignoring the requirements of the CAA. If EPA contends that the CAA allows it to issue “objections” to already-issued permits without complying with 42 U.S.C. § 7661d(b)(3)’s requirement to “modify, terminate, or revoke” the permits, and without taking final action to issue or deny the permit under 42 U.S.C. § 7661(c) if the state permitting authority does not agree with its objections, then EPA’s actions are unconstitutional as they have deprived Nucor of the opportunity for judicial review and due process.

Conclusion

In light of the above, Nucor intends to file an action in the Eastern District of Louisiana requesting:

- A. that the court enter an order vacating the 2012 Order and the 2014 Order;

BRADLEY MURCHISON KELLY & SHEA LLC

Ms. Gina McCarthy, Administrator

September 11, 2015

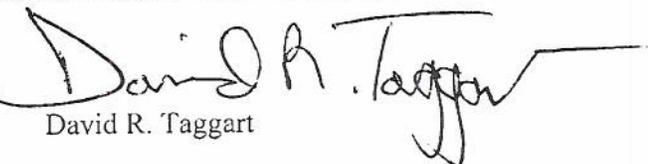
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- B. that the court issue a declaratory ruling that when a state permitting authority has issued a permit before receipt of any EPA "objection," the EPA may not issue an "objection" without complying with 42 U.S.C. § 7661d(b)(3)'s requirement to take final action to "modify, terminate, or revoke" the permit in question;
- C. that the court enter a declaratory judgment that finds Nucor's permits (PSD permit No. PSD-LA-740(M-1), Title V permit 2560-00281-V1, PSD permit No. PSD-LA-751(M2) and Title V permit No. 3086-V3) to be valid, enforceable, and free and clear of any continuing EPA objection;
- D. or, in the alternative, that the court compel EPA to grant or deny Nucor's permits (PSD permit No. PSD-LA-740(M-1), Title V permit 2560-00281-V1, PSD permit No. PSD-LA-751(M2) and Title V permit No. 3086-V3); and
- E. any and all other equitable relief that the court may deem appropriate.

If you would like to discuss any portion of this Notice or a proposal for the resolution of the issues discussed above, please feel free to contact the undersigned.

Yours very truly,

BRADLEY MURCHISON KELLY & SHEA LLC

By: 
David R. Taggart

DRT/nwm

cc: Honorable Loretta Lynch
Attorney General, United States of America
U.S. Department of Justice
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Via Certified Mail, Return Receipt No.: 7014 1200 0002 0921 6582

Peggy Hatch, Secretary
Louisiana Department of Environmental Quality
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Mr. Ron Curry, Regional Administrator

U.S. EPA Region 6

1445 Ross Avenue, Suite 1200

Dallas, TX 75202

Via Certified Mail, Return Receipt No.: 7014 1200 0002 0921 6605

Mr. Steven J. Rowlan (via PDF email)

Mr. Jeffrey D. Braun (via PDF email)

Mr. Jerald N. Jones (via PDF email)



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS TX 75202-2733

JAN 08 2016

Ms. Cheryl Nolan
Acting Administrator
Air Permits Division
Louisiana Department of Environmental Quality
P.O. Box 4313
Baton Rouge, LA 70821-4313

RE: Consolidated Environmental Management - Nucor Steel, Louisiana, Title V Petition Order
Responding to Petitions VI-2010-05, VI-2011-06, and VI-2012-07 (January 30, 2014)

Dear Ms. Nolan:

I understand that the Louisiana Department of Environmental Quality (LDEQ) recently gave public notice of a draft permit renewal and modification for the Part 70 operating permit issued to Nucor Steel Louisiana, LLC, for its direct reduced iron process in St. James Parish and that the LDEQ has also received an application from Nucor to renew its Part 70 operating permit for its pig iron process. I would like to take this opportunity to update you regarding the status of a Clean Air Act (CAA) title V petition Order signed by the EPA Administrator on January 30, 2014. This order granted in part and denied in part the three above-referenced title V petitions filed by the Louisiana Environmental Action Network (LEAN) and the Sierra Club, seeking objections to certain title V permits issued by the LDEQ for Nucor. As is described in more detail below, the EPA's administrative process following the 2014 Order is complete and concluded. Accordingly, the EPA's administrative process related to Petitions VI-2010-05, VI-2011-06, and VI-2012-07, filed by the Sierra Club and LEAN, is complete and concluded.

As background, in 2010 and 2011, the Sierra Club and LEAN filed two petitions seeking objections to certain Nucor title V permits issued by the LDEQ. Zen-Noh Grain Corp. (Zen-Noh) had also filed two petitions, seeking objections to these same Nucor title V permits. In an order signed by the EPA Administrator on March 23, 2012, granting Zen-Noh's two petitions, EPA explained that if the LDEQ responded to that 2012 Order, then Zen-Noh, LEAN or the Sierra Club could file new petitions if they wished to raise continuing concerns with the Nucor title V permits. On June 21, 2012, the LDEQ submitted to the EPA a response to the 2012 title V petition Order.

In 2012, the Sierra Club and LEAN subsequently filed another petition seeking an EPA objection. Part of this petition addressed the response the LDEQ provided to the EPA on June 21, 2012. No other petitions were filed regarding the LDEQ's June 21, 2012, response. On June 19, 2013, the Administrator issued a title V petition Order denying LEAN and the Sierra Club's petitions on the issue of whether the pig iron and direct reduced iron processes should have been aggregated for the purposes of Prevention of Significant Deterioration permitting. As explained in a letter I sent to you dated July 26, 2013, with the issuance of the June 19, 2013, Order, the EPA had taken action on all issues that pertained to the 2012 Order and the EPA's administrative process following that Order was complete and concluded.



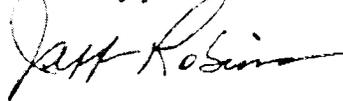
As noted above, the EPA Administrator subsequently signed the January 30, 2014, Order, responding to the remaining issues in the Sierra Club and LEAN petitions, granting in part and denying in part. The LDEQ sent a response to the 2014 title V petition Order dated April 30, 2014. The EPA did not issue an objection under section 505(b)(1) of the CAA and no title V petitions were filed under CAA section 505(b)(2) regarding the LDEQ's April 30, 2014, Response. Thus, the administrative process following the 2014 Order is also complete and concluded. Accordingly, the EPA's administrative process related to Petitions VI-2010-05, VI-2011-06, and VI-2012-07, filed by Sierra Club and LEAN, is complete and concluded, as is the EPA's administrative process related to Petitions VI-2010-02 and VI-2011-03, filed by Zen-Noh.

In addition, notice of these EPA Orders was published in the Federal Register on March 21, 2014 (79 FR 15740) for the 2013 and 2014 title V petition Orders, and April 23, 2012 (77 FR 24200) for the 2012 title V petition Order, and no party sought judicial review of these Orders to the extent such review was available under CAA sections 307 and 505.

Further, I note that nothing in this letter precludes the EPA from raising any issue as part of the title V process related to Nucor's renewal permits, which are new administrative proceedings. Any EPA review of these renewal permits would accordingly be under the auspices of separate administrative proceedings and could address any aspect of the renewal permits. The EPA at its discretion may review those proposed renewal permits, as appropriate, under section 505 of the CAA.

If you have any questions, please contact me at (214) 665-6435.

Sincerely yours,



Jeff Robinson
Chief
Air Permits Section

cc: Tegan Treadaway
Assistant Secretary, Office of Environmental Services
Louisiana Department of Environmental Quality

David R. Taggart
Counsel to Nucor Steel Louisiana, LLC, Consolidated Environmental Management, Inc.,
and Nucor Corporation