

January 17, 2024

By Certified Mail Return Receipt Requested

Administrator, Michael S. Regan
Office of the Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 1101A
Washington, D.C. 20460

RE: Notice of Intent to File Suit Under the Clean Air Act, 42 U.S.C. § 7604(a)(2) for Failure to Take Final Action on Pennsylvania's Case-by-Case Reasonably Available Control Technology State Implementation Plan Revision

Dear Administrator Regan:

Pursuant to Section 304 of the Clean Air Act, Keystone-Conemaugh Projects, LLC's ("KEY-CON") is providing notice of intent to file suit for the "failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator[.]" 42 U.S.C. § 7604(a)(2). Specifically, and as explained in more detail below, the Administrator has violated his nondiscretionary duties under 42 U.S.C. § 7410(k)(2)-(4) by failing to take final action on the case-by-case Reasonably Available Control Technology ("RACT") State Implementation Plan ("SIP") revisions submitted by the Pennsylvania Department of Environmental Protection ("PADEP") for KEY-CON's Keystone and Conemaugh Generating Stations on or about May 26, 2022. The Environmental Protection Agency ("EPA") must remedy the Administrator's violation of his mandatory duties under the Clean Air Act. The Administrator's failure to timely act on these SIP revisions has caused regulatory uncertainty and violated KEY-CON's rights under the Clean Air Act and other applicable law.

The Clean Air Act imposes a nondiscretionary duty on the Administrator to approve or disapprove a complete SIP revision within twelve months. 42 U.S.C. § 7410(k)(2). PADEP submitted the SIP revisions for the Keystone and Conemaugh Generating Stations to EPA on May 26, 2022, and, under § 7410(k)(1), those SIP revisions were considered complete by operation of law on November 26, 2022. Therefore, the Administrator was required to approve or disapprove, in whole or in part, the SIP revisions for the Keystone and Conemaugh Generating Stations by November 26, 2023. The Administrator did not do so.¹

¹ The Administrator's failure to timely act on the SIP revisions for the Keystone and Conemaugh Generating Stations is particularly egregious where EPA counsel, in related litigation over a federal implementation plan issued by EPA to implement RACT for these and other stations, represented to the Third Circuit Court of Appeals that the agency would take action "in due course" and "will take action on the SIP." (Tr. of Oral Arg. 20:9 & 22:16, *Keystone-Conemaugh Projects, LLC v. EPA*, No. 22-3026, ECF No. 91 (3d Cir. Nov. 17, 2023).

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KEY-CON intends to file suit against you in your official capacity as the Administrator of the EPA and against the agency for failure to perform nondiscretionary duties under the Clean Air Act. See 42 U.S.C. § 7604(a)(2), (b). If the Administrator has not cured his breach of his non-discretionary duty to act on the SIP revisions for the Keystone and Conemaugh Generating Stations within 60 days of this Notice of Intent, KEY-CON reserves the right to file suit for relief under 42 U.S.C. § 7604(a)(2). KEY-CON will seek to compel the Administrator and/or the EPA to take the appropriate action and any other equitable relief under 5 U.S.C. § 706(1) and other applicable laws and power of the court.

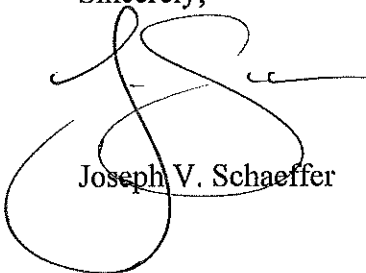
Under 42 U.S.C. § 7604(d), “[t]he court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.” If KEY-CON must file a suit to obtain the Administrator and/or the EPA’s compliance with the Clean Air Act, KEY-CON intends to seek all available costs, including without limitation, reasonable attorney’s fees.

As required by 40 C.F.R. § 54.3(a), the entity providing this notice is:

Keystone-Conemaugh Projects, LLC
175 Cornell Road, Suite 1
Blairsville, PA 15717

I look forward to receiving a response and working with the EPA so that it will not be necessary to take further formal action. Please direct any questions about this Notice to Joseph V. Schaeffer at 412-394-5499 or jschaeffer@babstcalland.com.

Sincerely,



Joseph V. Schaeffer

JVS/kk

cc: Merrick B. Garland, Attorney General of the United States
Todd Sunhwaee Kim, Assistant Attorney General of the United States
Adam Ortiz, EPA Regional Administrator, Region 3
Jessica Shirley, PADEP Interim Acting Secretary
Nick Lazor, PADEP Director, Bureau of Air Quality