



VIA CERTIFIED MAIL

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December 19, 2023

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

**Re: Notice of Intent to Sue Over Failure to Act on Suncor Energy, Inc.'s Plant 2
(East Plant) Clean Air Act Title V Permit, 95OPAD108**

Dear Administrator Regan:

GreenLatinos, the Center for Biological Diversity, and Sierra Club (“Plaintiffs”) intend to sue you and the Environmental Protection Agency (“EPA”) for your failure to act on operating permit No. 95OPAD108 (“Permit”) issued by the Colorado Department of Public Health and Environment for the Suncor Energy (U.S.A.), Inc. (“Suncor”) Commerce City Refinery, Plant 2 (East) (“East Plant”) in Adams County, Colorado.¹ EPA has failed to act on two duties: (1) EPA failed to modify, terminate, or revoke the Permit following EPA’s July 31, 2023 objection to the Permit, *see* 42 U.S.C. § 7661d(b)(3); and (2) EPA has failed to issue a revised permit or deny the Permit after the Division failed to submit a revised proposed permit to EPA by the statutory deadline, *see* 42 U.S.C. § 7661d(c).

Therefore, for the reasons described herein, Plaintiffs intend to bring a suit 60 days or later from the date of this letter, under section 304(a)(2) of the Clean Air Act, 42 U.S.C. § 7604(a)(2), against EPA for its failure to perform a non-discretionary duty outlined in 42 U.S.C. §§ 7661d(b)(3) and (c). Alternatively, Plaintiffs intend to bring a suit 180 days or later from the date of this letter, under section 304(a) of the Clean Air Act, 42 U.S.C. § 7604(a), against EPA for its unreasonable delay of the agency action outlined in 42 U.S.C. §§ 7661d(b)(3) and (c).

PLAINTIFFS

GreenLatinos is a national nonprofit organization that convenes a broad coalition of Latino leaders committed to addressing environmental, natural resources, and conservation issues that significantly affect the health and welfare of the Latino community. GreenLatinos

¹ As Administrator of EPA, Administrator Regan is responsible for EPA’s actions, inactions, and violations of statutory duties. Hereinafter, “EPA” will refer to both the agency and Administrator Regan.

engages in this advocacy at the national, regional, and local levels. It strives to amplify the voices of minority, low-income, and tribal communities and to advance health equity, environmental justice, and community resilience. Environmental justice, clean transportation, clean air, and climate change are among the organization's core priorities.

The Center for Biological Diversity is a national nonprofit environmental advocacy organization and works to defend and protect air quality in Colorado and other states. Its mission is to ensure the preservation, protection, and restoration of biodiversity, native species, ecosystems, public lands and waters, and public health through science, policy, and environmental law. Based on the understanding that the health and vigor of human societies and the integrity and wildness of the natural environment are closely linked, the Center for Biological Diversity is working to secure a future for animals and plants hovering on the brink of extinction, for the ecosystems they need to survive, and for a healthy, livable future for all of us. The Center has more than 89,000 members, including over 3,100 members in Colorado.

Sierra Club's mission is to explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out these objectives. In addition to helping people from all backgrounds explore nature and our outdoor heritage, Sierra Club works to promote clean energy, safeguard the health of our communities, protect wildlife, and preserve our remaining wild places through grassroots activism, public education, lobbying, and legal action. Sierra Club currently has 684,994 members nationwide, and 20,091 members in Colorado.

Plaintiffs and their members are adversely affected by EPA's failure to issue a revised permit or deny Suncor's Permit. The facility releases large amounts of air pollution that are harmful to public health and the environment. Suncor's East Plant Title V Permit was last revised on September 1, 2022, in a renewal that EPA has since objected to. Prior to that renewal, the Permit was first issued on October 1, 2006, revised on June 15, 2009, and subsequently expired on October 1, 2011—despite the Clean Air Act's framework requiring Title V permits to be updated every five years.

In keeping with the requirements of 40 C.F.R. § 54.3, you are hereby notified that the full names and addresses of the persons providing this notice are:

GreenLatinos
1919 14th St.
Suite 700
Boulder, CO 80302

Center for Biological Diversity
1411 K Street, NW Suite 1300
Washington, DC 20005

Sierra Club
2101 Webster St., Suite 1300
Oakland, CA 94612

BACKGROUND

The Colorado Air Pollution Control Division (“Division”) is the agency responsible for issuing Title V operating permits in Colorado. Suncor submitted a renewal application to the Division on October 1, 2010, prior to the Permit’s expiration on October 1, 2011. Almost ten years later, on February 17, 2021, the Division issued a draft Title V operating permit for public comment. Plaintiffs and a coalition of environmental and community groups submitted two rounds of comments to the Division on the draft permit. On February 8, 2022, the Division submitted a proposed Title V Permit to EPA for review. On March 25, 2022, EPA objected to the initial proposed permit on narrow grounds. On June 22, 2022, the Division submitted a revised proposed permit to EPA. EPA did not object to the revised proposed permit within its 45-day review period, which ended on August 7, 2022. The Division issued the final renewal permit on September 1, 2022.

On October 11, 2022, pursuant to 42 U.S.C. § 7661d(b)(2), Plaintiffs and a coalition of environmental and community groups submitted a petition to the Administrator of EPA to object to the Permit renewal. The Clean Air Act, at 42 U.S.C. § 7661d(b)(2), provides that “the administrator shall grant or deny such [Title V] petition within 60 days after the petition is filed.” EPA therefore had until December 10, 2022, to grant or deny the Title V petition. EPA neither granted nor denied the Title V petition by that date. Accordingly, on May 5, 2023, Plaintiffs informed EPA of their intent to file suit against EPA for its failure to grant or deny the Title V petition. Subsequently, on July 31, 2023, EPA granted the Title V petition, in part, and objected to the Permit (“Objection”)—more than seven months after the statutory deadline.

The Objection explained that Suncor’s history of violations and continued noncompliance with its Permit warrant consideration of additional pollution control measures. Any additional pollution control measures would reduce toxic emissions from Suncor’s Fluid Catalytic Cracking Unit (“FCCU”)—a high-emitting piece of equipment that frequently exceeds its permitted emission limits. In addition, among other objections, EPA found that the Permit inappropriately determined that modification to Suncor’s main flare was a minor modification. Proper classification of a major modification would result in more stringent pollution controls and limits for the flare, another high-emitting source that often exceeds permitted emission limits.

DISCUSSION

Plaintiffs intend to sue EPA for its failure to perform two non-discretionary duties. Any person may sue EPA upon its failure to perform any non-discretionary duty after providing 60 days’ notice. Here, EPA has violated its non-discretionary duty to modify, terminate, or revoke the Permit following EPA’s July 31, 2023 Objection to the Permit. In addition, EPA has violated its non-discretionary duty to issue a revised permit or deny the Permit after the Division failed to submit a revised proposed permit to EPA by the statutory deadline.

In the alternative, Plaintiffs intend to sue EPA for its unreasonable delay in performing those two duties. Any person may sue EPA to compel agency action unreasonably delayed after providing 180 days’ notice. EPA’s delay in performing its duties is unreasonable in light of the history of delay on the Permit and the nature of EPA’s specific objections to the Permit, which remain unresolved.

I. EPA’s Failure to Perform Its Non-Discretionary Duties Following (i) EPA’s Objection to the Permit, and (ii) the Division’s Failure to Submit a Revised Permit by the Statutory Deadline

Under the Clean Air Act, “any person may commence a civil action . . . against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.” 42 U.S.C. § 7604(a)(2). Here, EPA has failed to perform two non-discretionary duties following its Objection to the Permit.

First, EPA failed to modify, terminate, or revoke the Permit following the Objection. Under the Clean Air Act, if a state permitting authority has already issued a permit prior to receiving an EPA objection, “the Administrator shall modify, terminate, or revoke such permit.” 42 U.S.C. § 7661d(b)(3). Here, the Division issued the Permit on September 1, 2022—eleven months before EPA’s July 31, 2023 Objection. Therefore, EPA had a non-discretionary duty to modify, terminate, or revoke the Permit upon issuance of its Objection. As of the date of this Letter, EPA has not modified, terminated, or revoked the Permit, in violation of 42 U.S.C. § 7661d(b)(3).

Second, EPA has failed to issue a revised permit or deny the Permit after the Division failed to submit a revised proposed permit to EPA by the statutory deadline. The Clean Air Act requires the Division “to submit a permit revised to meet the objection” to EPA within 90 days of an objection. 42 U.S.C. § 7661d(c). If the Division fails to meet the deadline, “the Administrator shall issue or deny the permit.” *Id.* EPA issued its Objection on July 31, 2023, so the Division’s deadline to submit a revised permit was October 30, 2023. As of the date of this Letter, the Division has not submitted a revised permit to EPA and the Administrator has not issued a revised permit or denied the Permit. Acting on a Title V permit after the permitting authority’s failure to respond to an objection is a non-discretionary duty under the Clean Air Act. EPA’s failure to issue a revised permit or deny the Permit, in accordance with its Objection, is a violation of the non-discretionary duty in 42 U.S.C. § 7661d(c).

For the foregoing reasons, EPA has violated non-discretionary duties imposed by 42 U.S.C. §§ 7661d(b)(3) and (c), and Plaintiffs intend to bring a suit 60 days or later from the date of this letter, under section 304(a)(2) of the Clean Air Act, 42 U.S.C. § 7604(a)(2). The suit will seek injunctive relief, declaratory relief, the cost of litigation, and other relief.

II. Alternatively, EPA Has Unreasonably Delayed Performing Its Duties Under 42 U.S.C. §§ 7661d(b)(3) and (c)

In the alternative, EPA has unreasonably delayed taking the actions mandated by 42 U.S.C. §§ 7661d(b)(3) and (c) described above. Under Clean Air Act Section 304(a), “the district courts of the United States shall have jurisdiction to compel . . . agency action unreasonably delayed.” 42 U.S.C. § 7604(a). EPA’s delay is particularly unreasonable in light of the history of delay on the permit, the continuing harms to the surrounding community, and the relief that a revised permit would bring.

The prior version of the Permit expired in 2011. Although the Division issued the updated Permit in 2022, EPA's Objection makes clear that the Permit violates the Clean Air Act. An outdated or legally invalid permit has therefore governed Suncor's East Plant for twelve years—an unacceptable delay. EPA is directly responsible for portions of this delay, as it did not act on Plaintiffs' Title V petition until seven months after the statutory deadline, and only after Plaintiffs notified EPA of its intent to sue over the delay.

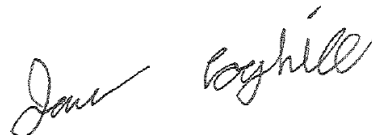
The twelve-year delay is especially unreasonable given EPA's specific objections to the Permit. The objections relate to Suncor's egregious history of noncompliance, as well as pollution controls and emission limits for some of the highest-emitting pieces of equipment at Suncor. A legally sound permit would reduce the pollution impacting the community surrounding Suncor. Yet the community has been waiting to experience the benefits of those emission reductions for more than a decade already. In light of the ongoing and longstanding harms, any additional delay in issuing a legally valid permit is unreasonable.

EPA's unreasonable delay will be further compounded if EPA fails to remedy its delay before Plaintiffs commence suit. Under Clean Air Act Section 304(a), Plaintiffs may not commence an action for unreasonable delay until 180 days after the date of this notice letter. *See* 42 U.S.C. § 7604(a). Therefore, by the time Plaintiffs can initiate an unreasonable delay suit, EPA's action would be a further *six months* delayed.

For the foregoing reasons, EPA has unreasonably delayed in meeting the duties imposed by 42 U.S.C. §§ 7661d(b)(3) and (c), and Plaintiffs intend to bring a suit 180 days or later from the date of this letter, under section 304(a) of the Clean Air Act, 42 U.S.C. § 7604(a). The suit will seek injunctive relief, declaratory relief, the cost of litigation, and other relief.

If you wish to discuss this matter, please contact me using the information below.

Sincerely,



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EARTHJUSTICE

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