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August 25, 2016

VIA CERTIFIED MAIL

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

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

Dear Administrator McCarthy:

This letter provides notice, pursuant to 42 U.S.C. § 7604(b), that the Sierra Club intends to file a citizen suit against the United States Environmental Protection Agency (“EPA”) and the Administrator of the EPA, based on your failure to perform a nondiscretionary duty set forth under Title V of the Clean Air Act (“CAA” or “Act”). Specifically, Sierra Club intends to file suit over your failure to, within the timeframe required by Section 505(b)(2) of the Act,<sup>1</sup> grant or deny the petition submitted by Sierra Club seeking an objection by EPA to the Title V Operating Permit, Permit No. 01001T49 (“Proposed Permit”), proposed by the North Carolina Department of Environmental Quality, Division of Air Quality (“DAQ”) for Duke Energy Progress, LLC’s Roxboro Steam Electric Plant (“Roxboro Plant”), located in Caswell County, North Carolina. The petition was mailed to EPA on June 23, 2016, via FedEx overnight delivery. As of today, more than 60 days have passed without EPA taking action on said petition, in violation of the Administrator’s nondiscretionary duty under Section 505(b)(2) to grant or deny the petition within 60 days after it was filed.<sup>2</sup>

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<sup>1</sup> See 42 U.S.C. § 7661d(b)(2).

<sup>2</sup> *Id.*

I. The Roxboro Plant Is Subject to Title V of the Clean Air Act

Title V of the CAA requires specified sources of air pollution to obtain an operating permit from a permitting authority.<sup>3</sup> EPA delegated to North Carolina the authority to administer the CAA's Title V operating permit program within the state.<sup>4</sup> North Carolina adopted laws and regulations granting the North Carolina Department of Environmental Quality the authority to fulfill this delegation, including administering the CAA's Title V permit program.<sup>5</sup>

The current Title V permit for the Roxboro Plant was issued on February 7, 2014. On June 26, 2016, DAQ received from Duke Energy an application for modification of Roxboro's Title V permit<sup>6</sup> and, subsequently, noticed a Draft Permit for public comment, with comments due on May 4, 2016.<sup>7</sup> On May 4, 2016, Sierra Club submitted timely comments on the Draft Permit, urging DAQ to establish modeling-based, numerical emission limits stringent enough to ensure that the people who live near the Roxboro Plant and who recreate on Hyco Lake would no longer be exposed to unsafe amounts of sulfur dioxide.<sup>8</sup>

Among other issues raised in those comments, Sierra Club criticized the Draft Permit as failing to comply with requirements under the Clean Air Act and the North Carolina state implementation plan due to the impermissibly lenient proposed numerical limits for sulfur dioxide emissions.<sup>9</sup> More specifically, Sierra Club called for modeling-based numerical limits stringent enough to ensure that compliance with such limits will ensure compliance with the applicable narrative prohibition that the Plant not cause downwind exceedances of the 75-ppb standard—*i.e.*, one-hour limits of approximately 0.12 pounds of sulfur dioxide per MMBtu (an emission rate that the Plant was achieving in 2008 and 2009).<sup>10</sup>

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<sup>3</sup> 42 U.S.C. § 7661a(a).

<sup>4</sup> Clean Air Act Final Full Approval of Operating Permit Programs; North Carolina, Mecklenburg County, and Western North Carolina, 66 Fed. Reg. 45,941 (Aug. 31, 2001).

<sup>5</sup> See generally 15A N.C.A.C. 2Q.0501 *et seq.*

<sup>6</sup> See North Carolina Division of Air Quality, Air Permit Review, Duke Energy Progress, LLC – Roxboro Plant, available at [https://ncdenr.s3.amazonaws.com/s3fs-public/Air%20Quality/permits/permit\\_reviews/Duke\\_Roxboro\\_rev\\_04012016.pdf](https://ncdenr.s3.amazonaws.com/s3fs-public/Air%20Quality/permits/permit_reviews/Duke_Roxboro_rev_04012016.pdf).

<sup>7</sup> See Public Notice of Intent to Issue an Air Quality Permit to Duke Energy Progress, LLC – Roxboro Steam Electric Plant, State of North Carolina Department of Environmental Quality Division of Air Quality, available at [https://ncdenr.s3.amazonaws.com/s3fs-public/Air%20Quality/permits/public\\_notice/Duke\\_Roxboro\\_int\\_04012016.pdf](https://ncdenr.s3.amazonaws.com/s3fs-public/Air%20Quality/permits/public_notice/Duke_Roxboro_int_04012016.pdf).

<sup>8</sup> Sierra Club Comments on DAQ's Intent to Issue an Air Quality Title V Operating Permit to Duke Energy Progress for its Roxboro Steam Electric Plant, Permit No. 01001T49 (May 4, 2016).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 5.

II. EPA Failed to Grant or Deny Sierra Club’s Petition to Object to the Proposed Permit for the Roxboro Plant within the Statutorily Required Timeframe

As per CAA section 505(b)(1), within 45 days of receipt of a proposed Title V permit, the Administrator of the EPA “shall . . . object” to the permit’s issuance if it “contains provisions that are determined by the Administrator as not in compliance with the applicable requirements” of the CAA and “the requirements of an applicable implementation plan.”<sup>11</sup> If EPA does not object during this period, any person may petition the Administrator for issuance of an objection within 60 days after the expiration of the 45-day review period.<sup>12</sup> Accordingly, the timing for EPA to object to the Proposed Permit for Roxboro and for the public to petition EPA to object to the Proposed Permit was as follows: EPA’s 45-day review period ended on May 19, 2016;<sup>13</sup> and the 60-day public petition period ended on July 18, 2016.

EPA did not object to the Roxboro Proposed Permit within the allotted 45-day time frame. Consequently, Sierra Club filed a petition to object to the Proposed Permit on June 23, 2016, within 60 days after the expiration of EPA’s 45-day review period, in accordance with 42 U.S.C. § 7661d(b)(2). The Petition to EPA was properly based on issues raised during the public comment period for the Proposed Permit. Specifically, Sierra Club’s Petition showed that the Proposed Permit lacks the conditions necessary to ensure compliance with applicable requirements that prohibit the exceedance of governing ambient air quality standards—*i.e.*, sufficiently stringent numerical limits on the emission of sulfur dioxide.

According to CAA section 505(b)(2) of the CAA, the Administrator was required to respond to Sierra Club’s June 23, 2016 petition to object within 60 days, either granting or denying the petition.<sup>14</sup> However, as of August 25, 2016, EPA has yet to respond to the petition to object to Roxboro’s Title V Permit.

III. Citizens May Sue EPA for Failure to Timely Grant or Deny a Petition to Object

Section 304(a)(2) of the CAA provides that any person may sue the Administrator of the EPA “where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary.”<sup>15</sup> Section 505(b)(2) of the CAA expressly provides that the “Administrator shall grant or deny [a petition to object] within 60 days after the petition is

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<sup>11</sup> 42 U.S.C. § 7661d(b)(1).

<sup>12</sup> 42 U.S.C. § 7661d(b)(2).

<sup>13</sup> See NC Environmental Quality “EPA Comment Period for Duke Energy Progress, LLC - Roxboro Steam Electric Plant” (webpage), available at <http://deq.nc.gov/event/epa-comment-period-duke-energy-progress-llc-roxboro-steam-electric-plant>.

<sup>14</sup> 42 U.S.C. § 7661d(b)(2) (“The Administrator shall grant or deny such petition within 60 days after the petition is filed.”).

<sup>15</sup> 42 U.S.C. § 7604(a)(2).

filed.”<sup>16</sup> This provision imposes a mandatory, nondiscretionary duty upon EPA to act within 60 days of the filing of a petition under this section. Accordingly, in the event that the Administrator fails to perform this nondiscretionary duty, citizens may bring suit to compel such action.

IV. Sierra Club Intends to File a Citizen Suit to Compel EPA to Grant or Deny the Petition to Object

Sierra Club filed a timely petition to object to the Proposed Title V Permit for the Roxboro Plant on June 23, 2016. The Administrator had 60 days to grant or deny the petition to object to the Proposed Permit.<sup>17</sup> To date, the Administrator has not granted or denied the Petition to Object. Therefore, the Administrator has failed to perform the nondiscretionary duty to grant or deny Sierra Club’s Petition within the statutorily mandated time frame, in violation of 42 U.S.C. § 7661d(b)(2).

The CAA requires citizens to provide the Administrator with 60 days notice prior to bringing an action under CAA section 304(a)(2) where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.<sup>18</sup> Accordingly, Sierra Club hereby notifies EPA and the Administrator of its intent to file suit under CAA section 304(a)(2) for failing to perform the nondiscretionary duty of granting or denying Sierra Club’s June 23, 2016 petition to object to the proposed Title V permit modification for the Roxboro Plant. If the violation remains unresolved at the end of the 60-day notice period, Sierra Club intends to seek the following relief:

1. An order compelling EPA and the Administrator to grant or deny Sierra Club’s Petition within 60 days from the date of the order;
2. Attorneys’ fees and other litigation costs; and
3. Other appropriate relief as allowed.

If you would like to discuss the matters identified in this letter or offer a proposal for resolving this issue, please contact me directly at [kmalawoffice@gmail.com](mailto:kmalawoffice@gmail.com) or (703) 771-8394.

Sincerely,

/s Kathryn Amirpashaie

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<sup>16</sup> 42 U.S.C. § 7661d(b)(2) (emphasis added).

<sup>17</sup> See *id.*

<sup>18</sup> *Id.*; see also 40 C.F.R. § 54.2(a).

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Admin Gina McCarthy

US EPA  
200 PA AVE NW

