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December 22, 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 and Environmental Integrity Project (“EIP”) intend to file a citizen suit against the United States Environmental Protection Agency (“EPA”) and the Administrator of the EPA, based on your failure to perform a nondiscretionary duty set forth under Title V of the Clean Air Act (“CAA” or “Act”). Specifically, Sierra Club and EIP intend to file suit over your failure to, within the time frame required by 42 U.S.C. § 7661d(b)(2), grant or deny their petition seeking an objection by EPA to the Title V Operating Permit renewal, Permit No. 54-00005 (hereafter “Proposed Permit”), proposed by the Pennsylvania Department of Environmental Protection (“DEP”) for the Wheelabrator Frackville Energy, Inc. power generating facility (hereinafter “Wheelabrator”) in Schuylkill County, Pennsylvania. The petition was delivered via electronic filing to EPA on October 15, 2016. On the same day, copies of the petition were also sent via e-mail and first class mail to the permitting authority and permit applicant. 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 CAA section 505(b)(2) to grant or deny the petition within 60 days after it was filed. *See* 42 U.S.C. § 7661d(b)(2).

I. Wheelabrator Is Subject to Title V of the Clean Air Act

Title V of the CAA requires specified sources of air pollution to obtain an operating permit from a permitting authority. 42 U.S.C. § 7661a(a). Pennsylvania's state operating permit and Title V permit programs have been approved by EPA and, accordingly, DEP is responsible for issuing Title V permits to facilities within the State. 25 Pa. Code Chapter 127, Subchapters F and G; 61 Fed. Reg. 39,597 (July 30, 1996). On May 21, 2016, DEP issued notice of its intent to issue a renewal Title V Operating Permit for the Wheelabrator Plant, initiating a 30-day public comment period. On June 20, 2016, Sierra Club and EIP submitted timely comments on the Proposed Permit. In pertinent part, these comments raised issue with the permit's exceedingly infrequent reporting requirements and otherwise unacceptably lax compliance mechanisms for particulate matter.

II. EPA Failed to Grant or Deny Sierra Club and EIP's Petition to Object to the Proposed Permit for the Wheelabrator Plant within the Statutorily Required Time Frame

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], including the requirements of an applicable implementation plan." 42 U.S.C. § 7661d(b)(1). If EPA fails to object during this period, any person may petition the Administrator for issuance of an objection within 60 days after the expiration of the 45-day review period. 42 U.S.C. § 7661d(b)(2). Accordingly, the timing for EPA to object to the Proposed Permit for Wheelabrator and for the public to petition EPA to object to the Proposed Permit was as follows: EPA's 45-day review period ended on August 19, 2016; the 60-day public petition period ended on October 18, 2016. *See* EPA Title V Operating Permit Public Petition Deadlines, attached hereto as Exhibit 1.

EPA failed to object to the Wheelabrator Proposed Permit within the allotted 45-day time frame. Consequently, Sierra Club and EIP filed a petition to object to the Proposed Permit on October 15, 2016, within 60 days after the expiration of EPA's 45-day review period, in accordance with 42 U.S.C. § 7661d(b)(2). *See* EPA Title V Operating Permits Title V Petition Database, attached hereto as Exhibit 2. The Petition to EPA was properly based on issues raised during the public comment period for the Proposed Permit. Specifically, the Petition raised objection with the Proposed Permit's impermissibly lax compliance requirements for particulate matter emissions from the Plant's electric generating unit (Source 031).

According to CAA section 505(b)(2), the Administrator was required to respond to Sierra Club and EIP's October 15, 2016 petition within 60 days, either granting or denying the Petition. 42 U.S.C. § 7661d(b)(2) ("The Administrator shall grant or deny such petition within 60 days

after the petition is filed.”). However, as of December 22, 2016, EPA has yet to respond to the petition to object to the Wheelabrator 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.” 42 U.S.C. § 7604(a)(2). Section 505(b)(2) of the CAA expressly provides that the “Administrator shall grant or deny [a petition to object] within 60 days after the petition is filed.” 42 U.S.C. § 7661d(b)(2) (emphasis added). This provision imposes a mandatory, nondiscretionary duty upon EPA to act within 60 days of the filing of a petition under this section. Accordingly, in the event that the Administrator fails to perform this nondiscretionary duty, citizens may bring suit to compel such action.

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

The CAA requires citizens to provide the Administrator with 60 days notice prior to bringing an action under CAA section 304(a)(2) where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator. 42 U.S.C. § 7604(b)(2); *see also* 40 C.F.R. 54.2(a). Accordingly, through this letter, Sierra Club and EIP hereby notify EPA and the Administrator of their intent to file suit against EPA and the Administrator of the EPA under CAA section 304(a)(2) for failing to perform the nondiscretionary duty of granting or denying Sierra Club and EIP’s October 15, 2016 petition to object to the Proposed Title V Permit renewal for Wheelabrator. The Administrator had 60 days—until December 14, 2016—to grant or deny the petition to object to the Proposed Permit. *See* 42 U.S.C. § 7661d(b)(2). As of December 22, 2016, the Administrator has not yet granted or denied the petition. If the violation remains unresolved at the end of the 60-day notice period, Sierra Club and EIP intend to seek the following relief:

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

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

Sincerely,

/s Kathryn Amirpashaie

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EXHIBIT 1



Title V Operating Permit Public Petition Deadlines

CAA Permitting Links

CAA Permitting in EPA's Mid-Atlantic Region

The table below lists proposed Title V permits submitted to EPA and undergoing EPA's 45 day review, including the start and expiration dates for EPA's 45 day review period. It also shows the start and expiration dates for the public's 60 day petition period following EPA's review period.

Hint: Click on a column heading to sort the table by that column. Table data last updated on August 9, 2016.

Show entries

Search:

Title V Operating Permit Public Petition Deadlines in Region 3

| State | Facility Name | FRS No. | AFS No. | Permit No. | EPA 45-day Review Period Start Date | EPA 45-day Review Period End Date | 60-day Public Petition Period Start Date | 60-day Public Petition Period End Date | Permit Action |
|-------|--------------------------------|--------------|--------------|------------|-------------------------------------|-----------------------------------|--|--|------------------------------------|
| PA | Wheelabrator Frackville Energy | 110014012157 | 42-107-00066 | 54-00005 | 07/06/2016 | 08/19/2016 | 08/20/2016 | 10/18/2016 | INITIAL PERMIT ISSUANCE OR RENEWAL |

Showing 1 to 1 of 1 entries (filtered from 66 total entries)

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1

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EXHIBIT 2

We are refreshing our website design. Learn more ...



Title V Operating Permits

Title V Petition Database

Title V Petition Database

Title V allows the public to petition the EPA Administrator to object to specific permits or operating permit program deficiencies when it has provided timely comment to the permitting authority during the public review period. Below are petitions, responses and other documents received during the Title V Operating Permit Program petition process.

- For more information on how to file a petition, see Title V Petitions.
- For more information on how to provide timely public input on operating permits and programs, see EPA's Operating Permits website.
- If you are looking for title V related policy and guidance documents issued by EPA see the Title V Policy and Guidance database.

Table Instructions

- The table is sorted, by default, by the most recent date. To re-sort by another element, click on the column header of interest (e.g. Who Filed). To re-sort by multiple elements, hold down the Shift key and select each column in the order of interest. Click header again to toggle between ascending and descending sort order.
- Some documents in the database are a scanned or retyped version of a paper photocopy of the original. Although we have taken considerable effort to quality assure the documents, some may contain typographical errors.
- Click on icons in the **Action** column to view available documents. You can also search documents by keyword or phrase. Documents marked "pending" are still under review; those marked "final" are completed.
- You will need Adobe Reader to view some of the files on this page. See EPA's PDF page to learn more.

Show entries

Filter:

| Who Filed | Who Received | Region | State | City | NAICS | Action | Date | Status |
|---|--------------------------------|--------|-------|------------|--------|----------|------------|---------|
| Sierra Club and Environmental Integrity Project | Wheelabrator Frackville Energy | 3 | PA | Frackville | 221112 | Petition | 2016-10-15 | Pending |

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Sent To: **GINA MCCORMY, US EPA**
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PS Form 3800, April 2015 PSN 7530-02-000-9047

See Reverse for Instructions

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