



VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED AND ELECTRONIC MAIL

September 13, 2022

Administrator Michael S. Regan
United States Environmental Protection Agency
Mail Code 1101A
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460
Regan.Michael@epa.gov

Re: Notice of intent to sue for EPA’s failure to perform a nondiscretionary duty under the Clean Air Act; failure to respond to petition requesting that the Administrator object to UNC’s Air Quality Permit No. 03069T36 in Orange County, North Carolina

Dear Administrator Regan,

Pursuant to section 505(b) of the Clean Air Act, 42 U.S.C. § 7661d(b), and 42 U.S.C. § 7604(b)(2), this letter provides notice that the Center for Biological Diversity (“Center”), Sierra Club, and the Town of Carrboro (jointly, the “Petitioners”) intend to file a citizen suit in federal district court against the United States Environmental Protection Agency (“EPA”) and the Administrator of the EPA in your official capacity based on your failure to perform your nondiscretionary duty under the Clean Air Act. *See* 42 U.S.C. § 7604(a)(2). Petitioners intend to file suit over your failure to act within the express sixty-day time frame required by 42 U.S.C. § 7661d(b)(2) to grant or deny our petition (“UNC Petition”) filed on October 1, 2021 seeking an objection to the Title V Air Quality Permit No. 03069T36 (“the Permit”) issued by the North Carolina Division of Air Quality (“DAQ”) for the University of North Carolina at Chapel Hill’s (“UNC”) cogeneration facility in Chapel Hill, North Carolina.¹

I. Parties Providing Notice

As required by 40 C.F.R. § 54.3, the persons providing this notice of intent to sue are as follows:

Center for Biological Diversity
P.O. Box 710
Tucson, AZ 85702-0710
(520) 623-5252

¹ See Petition to Object to Air Quality Permit No. 03069T36 for the Univ. of N.C. at Chapel Hill (Oct. 1, 2021), available at: https://www.epa.gov/system/files/documents/2021-10/unc-chapel-hill-petition_10-01-21.pdf. [hereinafter the “Petition”].

Sierra Club
2101 Webster St.
Suite 1300
Oakland, CA 94612
(415) 977-5500

Town of Carrboro
c/o Mayor Damon Seils
301 West Main Street
Carrboro, NC 27510
(919) 942-8541

While EPA regulations require this information, please direct all correspondence and communications regarding this matter to the undersigned counsel.

The Center for Biological Diversity is a nonprofit, 501(c)(3) organization that works through science, law, and creative media to secure a future for all species, great or small, hovering on the brink of extinction. The Center also pursues the protection of human health as one of its primary environmental objectives. The Center is incorporated in California and headquartered in Tucson, Arizona, with field offices across the United States, including in North Carolina. The Center has more than 69,000 members, including over 1,300 members in North Carolina. The Center and its members have interests in the conservation of air quality in North Carolina and with the effective implementation of the Clean Air Act.

The Sierra Club is one of the oldest and largest national nonprofit environmental organizations in the United States, with over 3.5 million members and supporters, including more than 20,000 members in North Carolina. Sierra Club is a nonprofit, membership organization incorporated in California. Its national headquarters are located in Oakland, California, and its North Carolina offices are located in Raleigh, North Carolina. Sierra Club's members and supporters are dedicated to exploring, enjoying, and protecting the wild places and resources of the Earth; practicing and promoting the responsible use of the Earth's resources and ecosystems; educating and enlisting humanity to protect and restore the quality of the natural and human environment; and using all lawful means to carry out these objectives. One of Sierra Club's priority national goals is promoting and improving air quality. Another is endeavoring to secure environmental justice for those disproportionately impacted by air pollution. Sierra Club and its members are greatly concerned about the effects of air pollution on the environment and human health and have a long history of involvement in activities related to air quality and source permitting under the Clean Air Act.

Carrboro is a municipality of the state of North Carolina with a population of 21,295 (2020 U.S. Census Bureau). Petitioner Carrboro is deeply concerned about the peril of exposure to the Cameron Avenue Cogeneration Plant. Since this coal-fired cogeneration plant is located a mere tenth of a mile from Carrboro's border, its emissions put at risk the health, safety, and well-being of its residents as well as visitors to its central business district. Petitioner Carrboro is especially concerned that the plant's emissions disproportionately negatively impact the air quality for residents of Carrboro's historically Black neighborhoods of Tin Top, Pine Knolls,

Lloyd-Broad, and Northside, further burdening these residents. Furthermore, in recent years, Petitioner Carrboro has adopted robust climate justice goals through its Energy and Climate Protection Plan and Community Climate Action Plan.

II. UNC’s Cogeneration Plant is Subject to Title V of the Clean Air Act

Title V of the Clean Air Act requires that “major source[s]” of air pollution obtain an operating permit from a permitting authority. 42 U.S.C. § 7661a(a). North Carolina’s Title V permit program has been approved by EPA, and DAQ is responsible for issuing Title V permits to facilities within the State. N.C.G.S. §§ 215.107; 215.107D; 215.108. As a “major source” of air pollution, UNC is subject to Title V of the Clean Air Act, and possesses a Title V permit for its polluting facilities.²

III. Petitioners Supported the Petition with Timely Comments on the Draft Permits

DAQ released two draft Title V permits for public comment on September 25, 2018 and March 31, 2021, and set comment deadlines of October 25, 2018 and May 6, 2021. On October 25, 2018, the Center submitted comments on the September 25, 2018 draft permit. On May 6, 2021, the Center and Sierra Club submitted joint comments on the March 31, 2021 draft permit. Additionally, on May 5, 2021, the Town of Carrboro submitted comments on the March 31, 2021 draft permit. The Petitioners’ comments identified multiple bases for objecting to the draft permit’s pollution control provisions; air pollution modeling; and pollution control monitoring, record keeping, and reporting requirements. All of the grounds for objection delineated in the UNC Petition were raised in Petitioners’ timely comments.

IV. EPA Failed to Grant or Deny the Petition within the Statutorily Prescribed Period

The Clean Air Act imposes on the EPA Administrator a nondiscretionary duty to respond to any petition to object to a Title V permit within sixty days of the petition being filed. 42 U.S.C. § 7661d(b)(2). After Petitioners submitted timely comments on the draft permit during the public comment period, DAQ responded to public comments and forwarded a proposed permit to EPA for its 45-day review period, which ended on August 2, 2021 without EPA’s objection. Petitioners filed the UNC Petition with EPA on October 1, 2021, within 60 days of the close of EPA’s 45-day review period, as required by 42 U.S.C. § 7661d(b)(2).³

The Administrator was required to grant or deny the UNC Petition within sixty days after it was filed—*i.e.*, by November 30, 2021. 42 U.S.C. § 7661d(b)(2). However, over seven months later, the Administrator has neither granted nor denied the UNC Petition and, therefore, is in violation of his nondiscretionary duty under Clean Air Act section 505. *Id.*

² See N.C. Dep’t Env’tl. Quality, Air Quality Permit, No. 03069T36 (Aug. 5, 2021), available at: <https://deq.nc.gov/media/20726/download>.

³ See Petition, *supra* note 1; see also U.S. EPA, North Carolina Proposed Title V Permits, at <https://www.epa.gov/caa-permitting/north-carolina-proposed-title-v-permits> (storing a full copy of the Permit, with all supporting materials).

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

Clean Air Act section 304(a)(2) 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). Since Section 505(b)(2) of the Clean Air Act expressly provides that “[t]he Administrator *shall* grant or deny [a petition to object] within 60 days after the petition is filed,” the Administrator has a clear, mandatory, nondiscretionary duty to act within sixty days of the filing of a petition under this section. 42 U.S.C. § 7661d(b)(2) (emphasis added). Accordingly, in the event that the Administrator fails to perform this nondiscretionary duty, citizens may bring suit to compel such action.

VI. Petitioners Intend to File a Citizen Suit to Compel EPA to Grant or Deny the Petition

The Clean Air Act requires citizens to provide the Administrator with sixty days’ notice prior to bringing an action under Clean Air Act section 304(a)(2) where there is an alleged failure of the Administrator to perform any act or duty 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, Petitioners notify EPA and the Administrator of their intent to file suit against EPA and the Administrator of the EPA under Clean Air Act section 304(a)(2) for failing to perform the nondiscretionary duty of timely granting or denying the UNC Petition. Petitioners intend to seek the following relief:

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

VII. Urgency of the Matter

EPA must respond to the UNC Petition as soon as practicable, as it provides substantial evidence to support the allegations that DAQ has permitted UNC to operate its polluting facilities in a manner that threatens to exceed National Ambient Air Quality Standards (“NAAQS”) for SO₂ and NO₂. Additionally, the UNC Petition documents how the Permit fails to ensure that UNC will comply with pollution limits for particulate matter (“PM”), visible emissions (“VE”), and SO₂. Allowing UNC to operate its polluting facilities in a manner that threatens to violate pollution limits and exceed SO₂ and NO₂ NAAQS exposes residents of Carrboro and Chapel Hill to a significant risk of disease and premature mortality.

A. UNC’s Permit Deficiencies Threaten Carrboro and Chapel Hill with Excess Pollution

DAQ removed the heat input design rating capacity for Boilers #6 and #7 from the new Permit’s “Specific Limitations and Conditions” section, where it had been found in the previous

version of the permit.⁴ Therefore, no such heat input limit exists in the Permit for UNC's operations. Furthermore, the UNC Petition documented hundreds of instances when UNC exceeded this design rating capacity between May 2019 and March 2021. Exs. 2, 3, 4, 5; *see also* Ex. 6. Using heat input values that Petitioners documented UNC employing in these boilers as recently as 2020, Petitioners modeled significant SO₂ and NO₂ NAAQS exceedances in the Chapel Hill/Carrboro community. Ex. 1 at 6-7, 9-10. UNC's currently-permitted operating conditions were found to result in local ambient air concentrations of NO₂ that were over 400% of levels considered safe under the NAAQS. *Id.* at 10. Likewise, UNC's permitted operating conditions were found to result in local ambient air concentrations of SO₂ that were 111% of levels considered safe under the NAAQS. *Id.* at 7.

The Permit also lacks monitoring, recordkeeping, and reporting requirements for SO₂ and PM emissions from a total of 88 boilers, generators, and fire pumps at UNC.⁵ Similarly, the Permit contains no monitoring, recordkeeping, or reporting requirements for VE from 86 of UNC's generators and fire pumps.⁶ Without these requirements, DAQ is left without a means to assure compliance with pollution limits and enable enforcement of permit deviations. Petitioners have demonstrated that excess pollution events are a regular occurrence at UNC. Exs. 2, 3, 4, 5, 6. Also, UNC's admissions of its systematic failures to properly operate its polluting equipment demonstrate that, without oversight, UNC's excess pollution events will go undetected and unregulated. *See*, Ex. 8 at 35-37; *see also*, e.g., Ex. 9. Ultimately, this unregulated pollution threatens the Chapel Hill/Carrboro community with public health harms caused by excess PM, VE, SO₂, and NO₂ pollution. Ex. 1 at 6-7, 9-10.

B. Public Health Repercussions of Excess Pollution from UNC

Exposure to SO₂ in even very short time periods—such as five minutes—has significant health impacts, including decrements in lung function, aggravation of asthma, and respiratory and cardiovascular morbidity. *See* EPA's Primary National Ambient Air Quality Standard for Sulfur Dioxide Final Rule, 75 Fed. Reg. 35,520, 35,525 (June 22, 2010) ("Final SO₂ NAAQS Rule"). Further, short-term SO₂ exposure is especially risky for children with asthma. *See* Final SO₂ NAAQS Rule, 75 Fed. Reg. at 35,525. To address the dangers flowing from short-term exposure to SO₂, EPA not only lowered the NAAQS from 140 parts per billion ("ppb") to 75 ppb, but slashed the averaging period for the standard from 24 hours to just one hour. This standard is evaluated through reference to the 4th-highest daily maximum ambient concentration annually, meaning that ambient air quality conditions can be rendered unsafe by as few as four hours of elevated emissions over the course of a year.

Exposure to elevated levels of NO₂ also has significant—and sometimes deadly—health impacts. *See* EPA's Primary National Ambient Air Quality Standard for Sulfur Dioxide Final Rule, 75 Fed. Reg. 6,474, 6,479-83 (Feb. 9, 2010) ("Final NO₂ NAAQS Rule"). Most significantly, exposure to elevated levels of NO₂ can be fatal. "Both cardiovascular and

⁴ *See* N.C. Dep't Env'tl. Quality, Air Quality Permit, No. 03069T36 (Aug. 5, 2021) at 5-59, available at: <https://deq.nc.gov/media/20726/download>.

⁵ *Id.* at Sections 2.1.C.1.c, 2.1.C.3.c, 2.1.G.1.c, 2.1.H.1.d.

⁶ *See* N.C. Dep't Env'tl. Quality, Air Quality Permit, No. 03069T36 (Aug. 5, 2021) at Sections 2.1.G.2.c, 2.1.H.2.c., available at: <https://deq.nc.gov/media/20726/download>.

respiratory mortality have been associated with increased NO₂ concentrations in epidemiologic studies . . .” 75 Fed. Reg. at 6,480. Furthermore, the Final NO₂ NAAQS Rule delineates multiple harmful health outcomes resulting from exposure to NO₂:

The first was increased airway responsiveness in asthmatic individuals after short-term exposures. The second was increased respiratory illness among children associated with longer-term exposures to NO₂. Evidence also was found for increased risk of emphysema . . .

Id. at 6,479. The robust evidence indicating a causal link between NO₂ exposure and dangerous health outcomes indicates that the health problems it produces can be so serious as to require hospitalization:

[E]pidemiologic and experimental data sets form a plausible, consistent, and coherent description of a relationship between NO₂ exposures and an array of adverse respiratory health effects that range from the onset of respiratory symptoms to hospital admissions.

Id. at 6,480. Furthermore, these debilitating health problems disproportionately impact the most vulnerable members of society:

Subpopulations considered potentially more susceptible to the effects of NO₂ exposure included persons with preexisting respiratory disease, children, and the elderly.

Id. Elevated NO₂ pollution threatens tens of millions of Americans with acute harm, and creates an environmental injustice for low-income communities and communities of color, including African-American communities:

In the United States, approximately 10% of adults and 13% of children (approximately 22.2 million people in 2005) have been diagnosed with asthma, and 6% of adults have been diagnosed with COPD . . . The prevalence and severity of asthma is higher among certain ethnic or racial groups such as Puerto Ricans, American Indians, Alaskan Natives, and African Americans (ISA, section 4.4). A higher prevalence of asthma among persons of lower SES and an excess burden of asthma hospitalizations and mortality in minority and inner-city communities have been observed.

Id. at 6,482. Notably, EPA’s above-captioned finding highlights that asthma is not only a debilitating disease; it is also known to kill its victims.

The deleterious health effects of elevated SO₂ and NO₂ pollution pose a threat to the populations of Carrboro and Chapel Hill at large. However, UNC’s polluting facilities pose a particular risk to historically Black fence line communities along the Chapel Hill-Carrboro border. Carrboro’s former mayor, Lydia Lavelle, outlined these environmental justice harms to DAQ during the comment period for UNC’s Permit:

The Town of Carrboro has a significant interest in this issue, as UNC's coal-burning power plant lies on the border between Chapel Hill and Carrboro and disproportionately negatively impacts the air quality for residents of Carrboro's historically Black community and Environmental Justice and Equity (EJE) neighborhoods of Tin Top, Pine Knolls, Northside and visitors to our central business district as much as it impacts those in Chapel Hill.

Ex. 10 at 1. Due to the tremendous harm with which excess SO₂ and NO₂ pollution threaten local residents, the urgency of EPA's obligation to discharge its nondiscretionary duty to respond to the UNC Petition is great.

VIII. Conclusion

The Center for Biological Diversity, Sierra Club, and the Town of Carrboro would prefer to resolve this matter without the need for litigation. Therefore, we look forward to you contacting us within 60 days about voluntarily complying with your obligation to respond to the Petition. However, if you do not voluntarily comply, we will be compelled to file suit.

Sincerely,



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CC: *Via electronic mail:*

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Attachments: *Attached and included on the enclosed CD-R:*

Exhibit 1: Air Quality Review and Comments: UNC Manning and Cogeneration Power Plants, Lindsey Meyers, May 6, 2021

Exhibit 2: Boiler 6 Heat Input Summary, UNC, 5/1/2019-12/31/2019

Exhibit 3: Boiler 6 Heat Input Summary, UNC, 12/1/2019-3/17/2021

Exhibit 4: Boiler 7 Heat Input Summary, UNC, 5/1/2019-12/31/2019

Exhibit 5: Boiler 7 Heat Input Summary, UNC, 12/1/2019-3/17/2021

Exhibit 6: Memo re Emissions Testing for UNC Boilers 6 and 7, N.C. DAQ, July 18, 2015

Exhibit 7: Hearing Officer's Report and Recommendations, N.C. DAQ, August 5, 2021

Exhibit 8: Excerpts of 30(b)(6) Deposition Transcript for UNC Corporate Representative Lewis Kellogg, September 3, 2020

Exhibit 9: UNC letter to N.C. DAQ documenting generator noncompliance events, November 14, 2019

Exhibit 10: Mayor Lydia Lavelle. Comments of the Town of Carrboro on the Title V permit renewal and modification application for the University of North Carolina at Chapel Hill. May 5, 2021.