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August 6, 2013

Via Certified Mail

Administrator Gina McCarthy
U.S. Environmental Protection Agency
Ariel Rios Building, Mail Code 6101A
1200 Pennsylvania Avenue, NW
Washington, DC 20460

AC-13-000-8745

RE: Notice of Intent to Bring Suit Against Administrator McCarthy for Failure to Grant or Deny Plaintiffs' Petition to Object to the Proposed Title V Operating Permit No. 24-023-0042 for Mettiki Coal, LLC, a Nondiscretionary Duty Under 42 U.S.C. § 7661d(b)(2)

Dear Administrator McCarthy,

I am writing on behalf of the Environmental Integrity Project and Benjamin Feldman (collectively "Plaintiffs") to provide you with notice of intent to bring suit against the Administrator of the U.S. Environmental Protection Agency ("EPA") for failing to perform a nondiscretionary duty.

As explained more fully below, EPA failed to grant or deny Plaintiffs' petition objecting to Mettiki Coal, LLC's ("Mettiki") proposed Title V Federal Operating Permit for operation of the coal preparation/processing plant located at 293 Table Rock Road, Oakland, Maryland, 21550. Plaintiffs' petition was timely filed on February 5, 2013. The Administrator's failure to act on Plaintiffs' petition is a violation of 42 U.S.C. § 7661d(b)(2), which requires the Administrator to grant or deny such petitions within 60 days after the petition is filed.

Authority to Bring Suit

Clean Air Act section 304(a)(2) authorizes citizen suits "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). The Administrator has a nondiscretionary duty to grant or deny petitions filed by citizens that object to the issuance of a federal operating permit on the basis that it contains provisions not in compliance with the Clean Air Act. 42 U.S.C. § 7661d(b)(2). In the event that the Administrator fails to perform this nondiscretionary duty, citizens may bring suit to compel such action. The district courts have jurisdiction over these suits. 42 U.S.C. § 7604(a).

The Clean Air Act requires citizens to give the Administrator 60 days' notice before bringing an action under section 304(a)(2). 42 U.S.C. § 7604(b)(2). Plaintiffs are hereby giving Administrator McCarthy notice of their intent to file suit against her in her official capacity as Administrator of the EPA, under Clean Air Act section 304(a)(2), for failing to perform a non-discretionary duty. Plaintiffs have authority to commence this suit at any time 60 days after the Administrator has received this notice.

EPA's Failure to Perform a Nondiscretionary Duty

During the Maryland Department of the Environment's ("MDE's") review of Mettiki's application to renew the Title V Federal Operating Permit for its coal preparation/processing plant, Mr. Feldman, for whom MDE had extended the public comment period,¹ submitted timely comments on October 5, 2012. Mr. Feldman's comments asserted that the draft permit did not require monitoring sufficient to assure compliance with SO₂ and PM emissions limits for the thermal dryer. Specifically, Mr. Feldman's comments stated that, because the Compliance Assurance Monitoring (CAM) plan allowed Mettiki to deviate from parametric monitoring values for PM and SO₂ for up to an hour a day due to startup and shutdown and on an unlimited basis during malfunction, the CAM plan was insufficient to assure compliance with short-term SO₂ and PM limits for the thermal dryer.

The Environmental Integrity Project ("EIP") also submitted timely comments on the draft permit on September 17, 2012. The objections presented in EIP's comments were not raised in the subsequent petition to EPA and are not at issue in the present Notice of Intent to Bring Suit. Nevertheless, the Clean Air Act allows "any person" to petition the Administrator for an objection so long as that petition is based on "objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting agency." 42 U.S.C. § 7661d(b)(2). Because the objections in the petition were raised with reasonable specificity by Mr. Feldman during the comment period provided by MDE, EIP was properly a party to the petition and is properly a plaintiff in an action against EPA for failing to grant or deny that petition.

MDE responded to public comments by cover letter dated January 14, 2013. MDE's response to comments failed to show that the draft permit required monitoring sufficient to assure compliance with SO₂ and PM limits for the thermal dryer. MDE submitted the proposed Title V permit for the Mettiki plant to EPA on October 24, 2012. EPA's 45-day review period

¹MDE extended the public comment period for Mr. Feldman because MDE initially failed to provide Mr. Feldman, who had asked to receive public notices about Mettiki's Title V renewal, notice of its tentative determination to issue the draft permit. MDE was required to provide Mr. Feldman with notice of this tentative determination under COMAR 26.11.03.07(B)(2)(b).

ended on December 7, 2012. EPA did not object to the permit during the review period, and MDE appears to have issued the final permit to Mettiki on January 1, 2013.²

When the Administrator does not object to a permit containing provisions that are not in compliance with the Clean Air Act, citizens may petition the Administrator to object. 42 U.S.C. § 7661d(b)(2). The Administrator must respond within 60 days after such a petition is filed by either granting or denying the petition. *Id.* The language of the statute states: “[t]he Administrator *shall* grant or deny such petition within 60 days after the petition is filed.” *Id.* (emphasis added). This is very clearly a nondiscretionary duty.

Because the permit is not in compliance with the Clean Air Act, Plaintiffs filed a Petition for Objection on February 5, 2013, under Clean Air Act section 505(b)(2). 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d); COMAR 26.11.03.10; Attachment A (Plaintiffs’ Petition for Objection). This petition was timely filed within 60 days following the end of EPA’s 45 day review period. The petition was based on objections to the permit that had been raised in Mr. Feldman’s comments to MDE.

The Administrator has not yet granted or denied the petition. Therefore, the Administrator has failed to perform the nondiscretionary duty to grant or deny Plaintiffs’ petition and is in violation of 42 U.S.C. § 7661d(b)(2).

Relief Requested

Plaintiffs intend to file suit 60 days after the Administrator receives this notice to compel the Administrator to perform her nondiscretionary duty to grant or deny Plaintiffs’ petition. Plaintiffs will seek the following relief:

1. An order compelling Administrator McCarthy to grant or deny Plaintiffs’ petition within 30 days from the date of the order;
2. Attorneys’ fees and other litigation costs; and
3. Other appropriate relief as allowed.

If you have any questions regarding the allegations in this notice, believe any of the foregoing information to be in error, wish to discuss the exchange of information, or would otherwise like to discuss a settlement of this matter prior to the initiation of litigation, please contact us at the address below.

² See MDE, Issued Part 70 Permits, available at http://www.mde.state.md.us/programs/Permits/AirManagementPermits/TitleVProgramInformation/Pages/title5_issued_permits.aspx

DATED: August 6, 2013

Sincerely,



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*On behalf of Environmental Integrity
Project and Benjamin Feldman*

Attachment

CC w/o attachment via U.S. Mail Certified Return Receipt

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