



**SIERRA  
CLUB**



April 8, 2022

**Via Email & Certified Mail - Return Receipt Requested**

Administrator Michael S. Regan  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460  
[regan.michael@epa.gov](mailto:regan.michael@epa.gov)

**RE: Notice of intent to sue for EPA's failure to perform non-discretionary duty under the Clean Air Act to respond to petition requesting that the Administrator object to the Barry Plant Title V operating permit in Mobile County, Alabama**

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 Greater-Birmingham Alliance to Stop Pollution (“GASP”), Mobile Environmental Justice Action Coalition (“MEJAC”), and Sierra Club (jointly, the “Organizations”) 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). The Organizations 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 GASP and Sierra Club’s petition filed on March 30, 2021 seeking an objection to the Title V operating permit No. 503-1001 (“the Permit”) issued by the Alabama Department of Environmental Management (“ADEM”) for Alabama Power Company’s (“APC”) Barry Steam Electric Generating Plant (“the Barry Plant”) in Bucks, Alabama. *See* Petition to Object to the Title V Operating Permit for Alabama Power Company’s Barry Steam Electric Generating Plant, available at

[https://www.epa.gov/sites/default/files/2021-04/documents/apc\\_barry\\_petition\\_3-30-21.pdf](https://www.epa.gov/sites/default/files/2021-04/documents/apc_barry_petition_3-30-21.pdf) (“the Barry Petition”).

## **I. Organizations Providing Notice**

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

GASP  
2320 Highland Ave S  
Suite 270  
Birmingham, AL 35205  
(205) 701-4277

MEJAC  
PO Box 717  
Mobile, AL 36601  
(251) 308-5872

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

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

GASP is a health advocacy organization focused on air quality issues in the Greater Birmingham Area. However, GASP has been actively involved in addressing community concerns involving air quality issues in communities throughout the State. One way in which GASP seeks to improve air quality and address historic and ongoing air pollution issues is through advocating for a stronger Title V permit for Plant Barry.

MEJAC was formed in 2013 by residents of Africatown in partnership with regional stakeholders and advocates. Their mission is to engage and organize with Mobile’s most threatened communities in order to defend the inalienable rights to clean air, water, soil, health, and safety, and to take direct action when the government fails to do so, ensuring community self-determination.

Sierra Club is one of the oldest and largest national nonprofit environmental organizations in the country, with over 3.5 million members and supporters dedicated to exploring, enjoying, and protecting the wild places and resources of the earth; practicing and promoting the responsible use of the earth's ecosystems and resources; 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 pollution.

## **II. Plant Barry Is Subject to Title V of the Clean Air Act**

Title V of the Clean Air Act requires specified sources of air pollution to obtain an operating permit from a permitting authority. 42 U.S.C. § 7661a(a). Alabama's state operating permit and Title V permit programs have been approved by EPA, and ADEM is responsible for issuing Title V permits to facilities within the State. Ala. Admin. Code r. 335-3-16. ADEM released the draft permit for public comment on June 30, 2020, and set a comment deadline of October 22, 2020. GASP and Sierra Club submitted joint comments on October 22, 2020. Among other issues and as further discussed below, the Organizations' identified multiple bases for objecting to the draft permit's SO<sub>2</sub> limits.

## **III. EPA Failed to Grant or Deny the Barry Petition within the Statutorily Required Time Frame**

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. *See* 42 U.S.C. § 7661d(b)(2). The Sierra Club and GASP submitted joint comments to the draft permit on October 22, 2020, raising issues with the SO<sub>2</sub> limits proposed in the proposed permit as well as its impact on environmental justice communities. ADEM submitted the draft permit materials for Plant Barry to EPA on December 18, 2020, and EPA's 45-day period to review expired on February 1, 2021, with no objection from EPA. *See* 42 U.S.C. § 7661d(b)(1); *see* U.S. E.P.A., Alabama Proposed Title V Permits, available at <https://www.epa.gov/caa-permitting/alabama-proposed-title-v-permits>; *see also* EPA Alabama Proposed Title V Permits, attached as Exhibit 1. The Barry Petition was filed on March 30, 2021, which was within 60 days following the end of EPA's 45-day review period, as required by Clean Air Act § 505(b)(2). The Administrator must have granted or denied the Barry Petition within sixty days after it was filed, i.e., by May 29, 2021. *See* 42 U.S.C. § 7661d(b)(2). However, almost ten months later, the Administrator has neither granted nor denied the Barry Petition and, therefore, is in violation of their nondiscretionary duty under Clean Air Act section 505. 42 U.S.C. § 7661d(b)(2) ("The Administrator shall grant or deny such petition within 60

days after the petition is filed.”). *See* EPA Title V Operating Permits Title V Petition Database, attached as Exhibit 2.

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

#### **V. The Organizations Intend to File a Citizen Suit to Compel EPA to Grant or Deny the Barry 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, the Organizations 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 granting or denying the Barry Petition. The Organizations intend to seek the following relief:

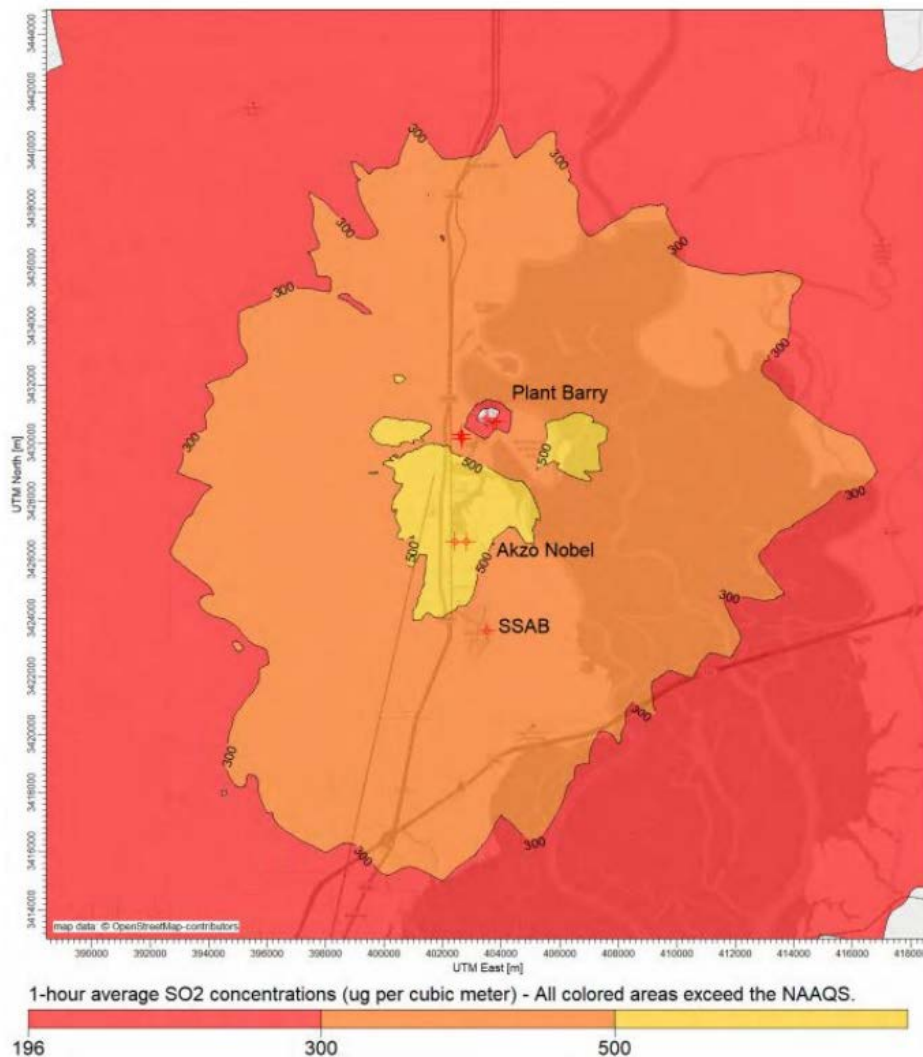
1. An order compelling EPA and the Administrator to grant or deny the Barry Petition within 60 days from the date of the order;
2. Attorneys’ fees and other litigation costs; and
3. Other appropriate relief as allowed.

#### **VI. Urgency of This Matter**

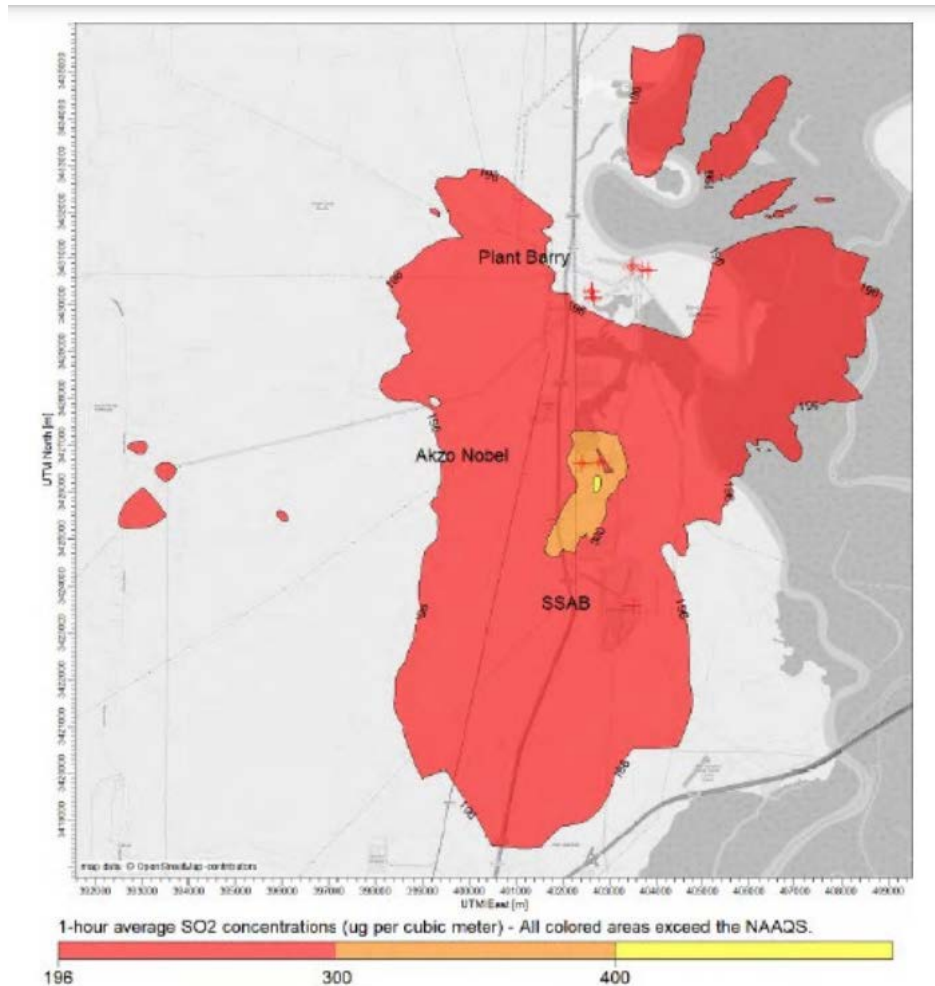
EPA and the Administrator should prioritize this matter. As discussed in the Barry Petition, the Permit has grave public health implications and will especially impact environmental justice (“EJ”) communities.

First, regarding public health implications, the Permit’s SO<sub>2</sub> limits contravene the Alabama State Implementation Plan’s applicable requirement that “the administration of the [Air] Division by

the Director shall provide for the attainment of the [National Ambient Air Quality Standards [NAAQS]] throughout the State as expeditiously as practicable.” Ala. Admin. Code r. 335-3-1-.03(3). Indeed, the evidence submitted by GASP and Sierra Club—which is the *only* evidence in the record—demonstrates that the SO<sub>2</sub> limits in the Permit will lead to massive exceedances of the 2010 SO<sub>2</sub> NAAQS in the communities in the vicinity of the Barry Plant. In fact, air dispersion modeling submitted with GASP and Sierra Club’s comments on October 22, 2020, (Figures 1 and 2, below) demonstrates that the limits contained in the Permit can lead to SO<sub>2</sub> levels as high as 681 ug/m<sup>3</sup> or 430 ug/m<sup>3</sup> (depending on what limit one of the coal units complies with), versus the NAAQS limit of 196.2 ug/m<sup>3</sup>—exceedances over two or three times the allowable health-based limit.



**Figure 1 – Regional View of Predicted Exceedances Due to All Sources & Unit 5 at 1.8 lbs/mmbtu**

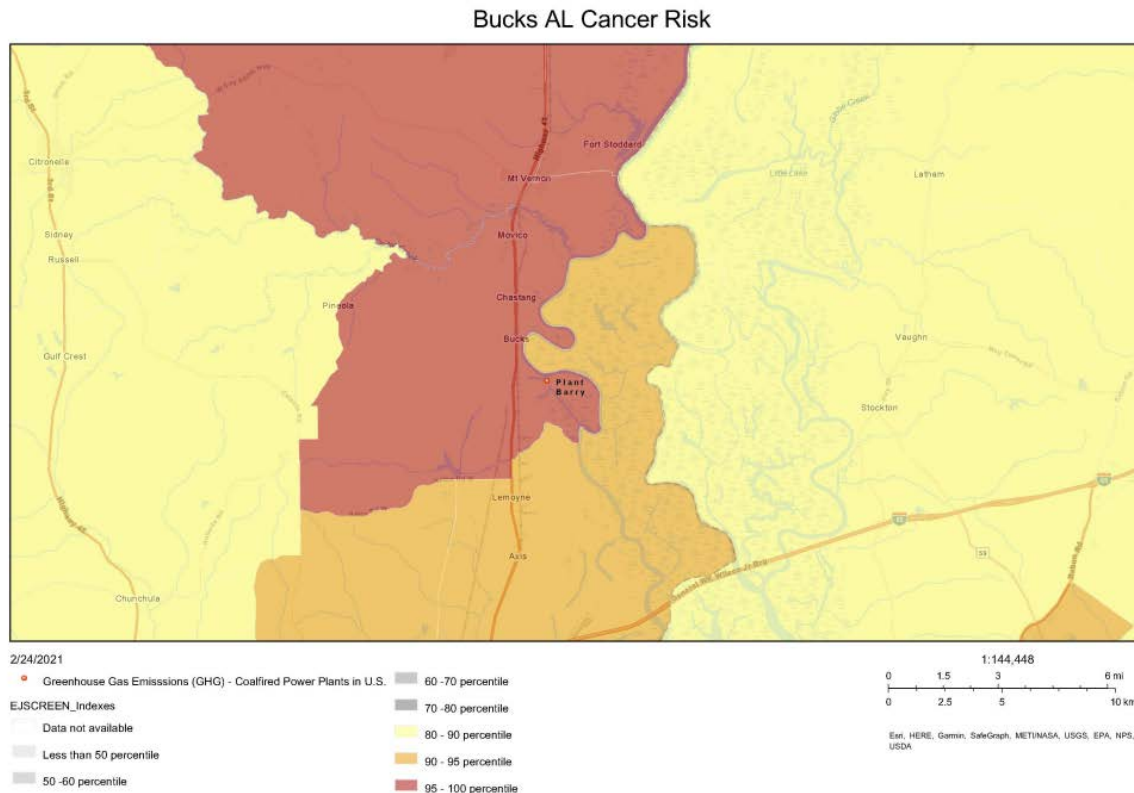


**Figure 2 - Regional View of Predicted Exceedances Due to All Sources & Unit 5 at 0.2 lbs/mmbtu**

Second, the massive exceedances will have tremendous impacts on EJ communities living in the vicinity of the Barry Plant. The plume of unsafe SO<sub>2</sub> levels will blanket the EJ communities living near the plant. Additionally, as reflected in the map generated using EPA’s EJSCREEN mapping tool, copied below and included in the Petition, EPA must recognize that such populations also suffer from the highest levels of cancer risk (Figure 3, below). Recent Executive Orders affirm the urgency of addressing such impacts now. EPA, in reviewing objections like the ones set forth in the Barry Petition, “must hold polluters accountable for their actions [and] must deliver environmental justice in [the] communities [surrounding the Barry Plant],”<sup>1</sup> and confront pervasive environmental justice concerns. Allowing the Barry Plant to

<sup>1</sup> “Executive Order on Tackling the Climate Crisis at Home and Abroad,” § 201 (Jan. 27, 2021), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/>; see also, White House Fact Sheet, “President Biden Takes Executive Actions to Tackle the Climate Crisis at Home and Abroad, Create Jobs, and Restore Scientific Integrity Across Federal Government,”

continue to emit SO<sub>2</sub> at levels that could exceed the NAAQS will have “disproportionately high and adverse human health impacts” on the surrounding minority populations and low-income populations. The current Administration’s “policy ... is to secure environmental justice.”<sup>2</sup> To “deliver” and “secure” environmental justice, EPA must confront pervasive environmental justice concerns when it reviews ADEM’s permits and further requires EPA to perform its statutory discretionary duty of responding to the Barry Petition.



**Figure 3 - National Percentiles of Cancer Risk Surrounding Plant Barry in Bucks, Alabama from Inhalation of Air Toxics<sup>3</sup> -- Darkest Red Correlates with 95 to 100 percentile.**

(Jan. 27, 2021), available at

<https://www.whitehouse.gov/briefing-room/statementsreleases/2021/01/27/fact-sheet-president-bidentakes-executive-actions-to-tackle-the-climate-crisis-at-home-and-abroad-create-jobs-and-restorescientific-integrity-across-federal-government/>.

<sup>2</sup> Executive Order on Tackling the Climate Crisis at Home and Abroad,” § 201 (Jan. 27, 2021) , available at

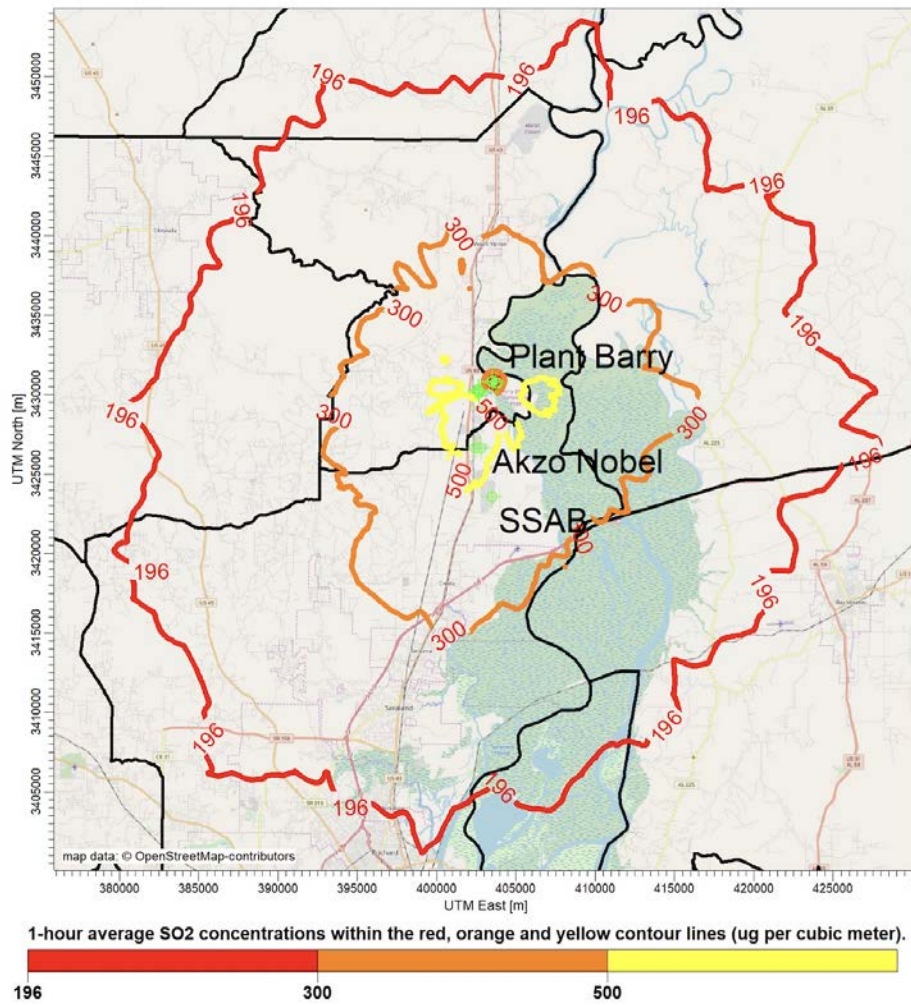
<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/>; see also, White House Fact Sheet, “President Biden Takes Executive Actions to Tackle the Climate Crisis at Home and Abroad, Create Jobs, and Restore Scientific Integrity Across Federal Government,”

(Jan. 27, 2021), available at

<https://www.whitehouse.gov/briefing-room/statementsreleases/2021/01/27/fact-sheet-president-biden-takes-executive-actions-to-tackle-the-climate-crisis-at-home-and-abroad-create-jobs-and-restore-scientific-integrity-across-federal-government/>.

<sup>3</sup> See EPA’s Environmental Justice Screening and Mapping Tool (Version 2020).

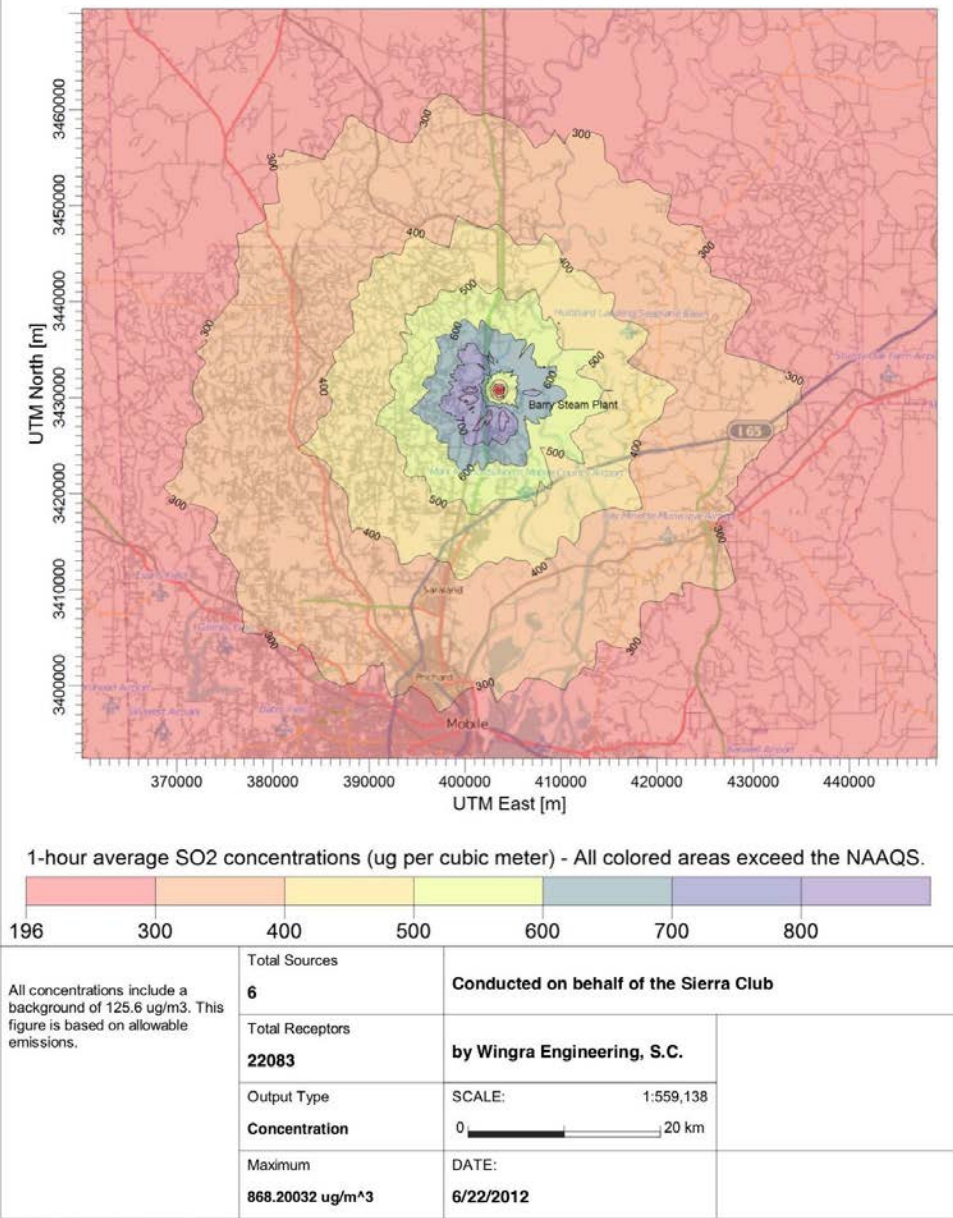
Third, the exceedances at Plant Barry are so tremendous that they will reach into EJ communities in other parts of Mobile County like Africatown, which already struggles under the pressures of hosting dozens of permitted industrial facilities and regional transportation thoroughfares, including 3 petrochemical refineries, 2 wastewater treatment facilities, a paper mill, 2 petrochemical above ground storage tank farms, a lumber mill and treatment facility, 2 federal interstates, 2 state highways, 4 major railways, and additional port facilities. Previously mentioned air dispersion modeling submitted with GASP and Sierra Club's comments on October 22, 2020, (Figures 4 and 5, below) demonstrates that the limits contained in the Permit can lead to SO<sub>2</sub> levels above the NAAQS limit of 196.2 µg/m<sup>3</sup> in Africatown.



**Figure 4 - 55-km Square Regional View of Predicted Exceedances Due to All Sources & Plant Barry Unit 5 at 1.8 lbs/mmbtu. Base map shows county borders and geographical features.**



**Barry Steam Electric Generating Station - Bucks, Alabama**  
**Evaluation of Compliance with the 1-hour NAAQS for SO<sub>2</sub>**



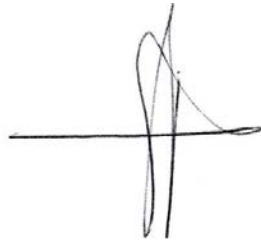
*Figure 5 - As submitted within Sub Attachment 3 to the GASP and Sierra Club petition*

## VII. Conclusion

The Organizations 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 the Barry Petition.

If you would like to discuss the matters identified in this letter or offer a proposal for resolving this issue, please contact us directly at [josh.stebbins@sierraclub.org](mailto:josh.stebbins@sierraclub.org) or (202) 294-5421.

Sincerely,

A handwritten signature in black ink, appearing to read 'Joshua Stebbins', written over a horizontal line.

Joshua Stebbins, Esq.  
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Sierra Club  
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cc:

Administrator Daniel Blackman  
U.S. Environmental Protection Agency, Region IV  
Sam Nunn Atlanta Federal Center Mail Code 9T25  
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Atlanta, GA 30303-8960  
[blackman.daniel@epa.gov](mailto:blackman.daniel@epa.gov)

# EXHIBIT 1



MENU

Search EPA.gov

**Related Topics:** [Permitting Under the Clean Air Act <https://epa.gov/caa-permitting>](https://epa.gov/caa-permitting)

[CONTACT US <https://epa.gov/caa-permitting/forms/contact-us-about-permitting-under-clean-air-act>](https://epa.gov/caa-permitting/forms/contact-us-about-permitting-under-clean-air-act)

## Alabama Proposed Title V Permits

The following permits have been submitted to EPA Region 4 as Proposed Title V permits. While EPA has the right to a 45-day review period for all Proposed Title V permits, EPA Region 4 targets only a subset of these permits for comprehensive review. To find out which permits have been targeted for EPA Region 4 review, please contact the Region 4 staff person(s) listed at the bottom of this page.

Return to Region 4 Proposed Title V Permits and State Contacts <https://epa.gov/caa-permitting/region-4-proposed-title-v-permits-and-state-contacts>

Instructions for Table: Scroll to the right to view the petition period and the associated files. Click on the title of any column to sort by that column. Users can also use the "Select Columns" button to change or narrow down what columns are displayed. Use the "Filter rows by text" box to search for specific key words. Click on the "View Files" button in the far right column to view the permit documents in the public docket.

SELECT COLUMNS

Barry

Facility Name	Public Notice Period End Date	End of EPA 45-Day Review	Petition Period Start Date	Petition Period End Date
BARRY STEAM PLANT-ALA POWER CO	10/22/2020	02/01/2021	02/02/2021	04/05/2021

# EXHIBIT 2

[Title V Operating Permits](#)

[CONTACT US](#)

## 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.

Show  entries

Filter:

Petitioner	Facility/Source	Region	State	County	NAICS	Action	Date	Status
Sierra Club, Greater-Birmingham Alliance to Stop Pollution	APC Barry Steam Electric Generating Plant	4	AL	Mobile	221112	<a href="#">Petition</a>	2021-03-30	Pending

Showing 1 to 1 of 1 entries (filtered from 825 total entries)

Previous  Next