

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

CENTER FOR BIOLOGICAL )  
DIVERSITY and SIERRA CLUB, )  
 )  
Plaintiffs, )  
v. )  
 )  
UNIVERSITY OF NORTH )  
CAROLINA AT CHAPEL HILL, )  
 )  
Defendant. )

1:19-CV-1179

**MEMORANDUM OPINION AND ORDER**

Catherine C. Eagles, District Judge.

The defendant University of North Carolina operates multiple sources of air pollution that are regulated by the Clean Air Act. Pursuant to permits issued by the North Carolina Division of Air Quality, UNC is authorized to emit limited amounts of certain air pollutants. The plaintiffs, Center for Biological Diversity and Sierra Club, contend that UNC has violated various permit conditions related to the recordkeeping, reporting, monitoring, inspection, and operation of some of its major air pollution sources.

UNC is entitled to summary judgment on all nine claims. The plaintiffs lack standing to bring Claims Two through Eight, and the uncontroverted extrinsic evidence as to Claim One shows that the ambiguous heat input capacity term of Section 2.1.A in the permit is not an enforceable limit. As for Claim Nine, the undisputed evidence shows that UNC's violation of Section 2.2 was not repeated. UNC's motion for summary judgment will be granted and the plaintiffs' cross-motion will be denied.

## I. The Pollution Sources and UNC's Permit

UNC operates multiple major stationary sources of air pollution that are regulated by Title V of the Clean Air Act on its Chapel Hill campus. Doc. 58 at § I ¶ 1; Doc. 42-10 at 7–13. UNC must operate these stationary pollution sources in compliance with an air pollution permit issued by North Carolina's Division of Air Quality. 42 U.S.C. §§ 7661a(a), 7661c(a); 40 C.F.R. § 70.6(a)(1). UNC has operated its major stationary air pollution sources under four different permits over the relevant time period, identical in relevant part. *See* Docs. 42-7, 42-8, 42-9, 42-10. For ease of reference, the Court will cite Permit No. 03069T35 as the operative permit. Doc. 42-10.<sup>1</sup>

The permit authorizes UNC to use coal, natural gas, No. 2 fuel oil, wood, and torrefied wood to fire two circulating fluidized combustion boilers, identified in the permit as Boilers 6 and 7.<sup>2</sup> *See* Doc. 42-10 at 7, 14–24. The permit also authorizes UNC to operate an emergency diesel-fired generator, identified as ES-Gen-12. Doc. 42-10 at 10, 48. These air pollution sources emit a variety of air pollutants, including particulate matter (PM), sulfur dioxide (SO<sub>2</sub>), Carbon Monoxide (CO), Hydrochloric acid (HCl), Mercury (Hg), and nitrogen oxides (NO<sub>x</sub>). Doc. 42-10 at 14–15; Doc. 42-11 at 2; Doc. 43-5 at 1.

---

<sup>1</sup> During the course of this litigation, DAQ issued Permit No. 03069T36 to replace Permit No. 0306T35, which became effective August 5, 2021, after briefing was completed. Doc. 59-1 at 12; Doc. 58 at § I ¶ 6;

<sup>2</sup> Boilers 6 and 7 are also identified more specifically in the permit as ES-001 and ES-002, respectively.

## II. Citizen Suits under the Clean Air Act

In 1990, Congress amended the Clean Air Act to authorize citizen suits against any person “alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of . . . an emission standard or limitation under this chapter . . . .” 42 U.S.C. § 7604(a)(1). An “emission standard or limitation under this chapter” includes “any. . . standard, limitation, or schedule established under any permit issued . . . under any applicable State implementation plan approved by the [EPA] Administrator, any permit term or condition, and any requirement to obtain a permit as a condition of operations.” *Id.* § 7604(f)(4); *Nat’l Parks Conservation Ass’n. v. Tenn. Valley Auth.*, 480 F.3d 410, 418 (6th Cir. 2007).

An action alleging wholly past violations can be maintained if the plaintiff asserts at least two violations of the same standard, even if the violations are not ongoing. *See Env’t Tex. Citizen Lobby v. ExxonMobil Corp.*, 968 F.3d 357, 365 (5th Cir. 2020) .

## III. Standing

UNC contends that the plaintiffs lack standing to bring their claims because they have not shown concrete injuries traceable to the alleged violations. *See* Doc. 40 at 17–27; Doc. 46 at 7–14; Doc. 50 at 6–13. The Court also has an “independent duty to assure that standing exists.” *Ctr. for Biological Diversity v. EPA*, 90 F. Supp. 3d 1177, 1186 (W.D. Wa. 2015) (relying on *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009)). Plaintiffs must demonstrate standing for each claim, for each form of relief sought, *see DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006), and at each stage of the litigation. *See Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 561 (1992).

Organizational plaintiffs, like the Center and the Sierra Club, can show standing to sue in two ways: (1) on their own behalf (organizational standing) or (2) on behalf of their members (representational or associational standing). *Guilford Coll. v. McAleenan*, 389 F. Supp. 3d 377, 388 (M.D.N.C. 2019) (citing *White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 458 (4th Cir. 2005)). Here, the plaintiffs rely on representational standing to sue on behalf of individual members Sonia Desai and Bridget Farrell.<sup>3</sup>

An organization has representational standing if “at least one of its ‘identified’ members ‘would otherwise have standing to sue in their own right, the interests at stake are germane to the organization’s purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.’” *Outdoor Amusement Bus. Ass’n, Inc. v. Dep’t of Homeland Sec.*, 983 F.3d 671, 683 (4th Cir. 2020) (quoting *Friends of the Earth, Inc. v. Laidlaw Env’t. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000)); *Guilford Coll.*, 389 F. Supp. 3d at 388.

UNC does not challenge the existence of the latter two factors, and the Court finds that the interests at stake are germane to the purposes of these two organizations and that neither the claims asserted, nor the relief requested, require the participation of individual members beyond their role as witnesses. Both organizations are conservation groups committed to

---

<sup>3</sup> In the briefing, the Center and the Sierra Club relied only on representational standing. See Doc. 42 at 10–14; Doc. 48 at 8–14; Doc. 51 at 6–12. At oral argument, the plaintiffs asserted for the first time that they had standing because of their own injuries. Minute Entry 6/30/2021. The Court does not ordinarily consider arguments raised for the first time at oral argument. See *Deseret Trust Co. v. Unique Investment Corp.*, No. 2:17-cv-00569, 2018 WL 8110959, at \*4 (D. Utah July 3, 2018) (collecting cases); see also LR 7.3(h) (prohibiting parties from raising new arguments in a reply brief).

preservation and protection of the environment and its ecosystems and resources. Doc. 42-5 at ¶ 2 (Center for Biological Diversity); Doc. 42-4 at ¶¶ 2–3 (Center for Biological Diversity and the Sierra Club). UNC challenges the first requirement, contending that the individual members do not have standing to sue in their own right. An individual has standing “in their own right” if they can show an “injury-in-fact” that is “fairly traceable” to the defendant’s conduct and is “likely to be redressed by a favorable decision.” *Lujan*, 504 U.S. at 560–61 (cleaned up).

The plaintiffs’ claims can be usefully divided into “recordkeeping” and “operating” claims. The Court will consider standing for each group separately. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021) (“[S]tanding is not dispensed in gross; rather plaintiffs must demonstrate standing for each claim that they press . . .”).

#### **A. Claims Related to Recordkeeping, Reporting, Inspecting, and Monitoring**

Claims Two through Eight assert various failures to maintain records,<sup>4</sup> inspect equipment,<sup>5</sup> report permit deviations to government authorities,<sup>6</sup> and monitor pollution controls,<sup>7</sup> as required by UNC’s permit. To demonstrate that Ms. Desai and Ms. Farrell

---

<sup>4</sup> Claims Two, Five, and Six. Doc. 33 at ¶¶ 40–42, 47–50.

<sup>5</sup> Claims Three and Four. *Id.* at ¶¶ 43–46.

<sup>6</sup> Claim Seven. *Id.* at ¶¶ 51–54.

<sup>7</sup> Claim Eight. *Id.* at ¶¶ 55–57.

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.