

April 15, 2013

The Honorable Bob Perciasepe
Acting Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Mail Code: 1101A
Washington, D.C. 20460

By Certified Mail, Return Receipt Requested and By Email Transmission

Re: Notice of Intent to Sue for Failure to Timely Promulgate New Source Performance Standards (NSPS) and Emission Guidelines for Greenhouse Gas Emissions from Electric Utility Generating Units (EGUs)

Dear Acting Administrator Perciasepe:

Environmental Defense Fund, the Sierra Club and the Natural Resources Defense Council hereby notify you of their intent to sue the U.S. Environmental Protection Agency (EPA) for failure to perform its nondiscretionary duty under the Clean Air Act (CAA, or “the Act”) to issue final New Source Performance Standards (NSPS) regulating emissions of greenhouse gases (GHGs) from new electric generating units (EGUs) within one year of proposing these standards, and for unreasonable delay in carrying out that duty.

We also provide notice of our intent to sue EPA for its failure to carry out its nondiscretionary duty to issue proposed and final emission guidelines for emissions of GHGs from existing EGUs, a duty it is required to execute under section 111(d) of the Act and EPA regulations, and for its unreasonable delay in failing to take such action.

This letter is sent on behalf of our organizations’ combined membership of more than one million members nationwide, who are harmed by EPA’s failure to fulfill its statutory obligation to limit carbon pollution from the power sector. The Environmental Defense Fund is a national not-for-profit, non-partisan environmental organization that links science, economics, and law to create innovative, equitable, and cost-effective solutions to society’s most urgent environmental problems. The Sierra Club is a national nonprofit environmental organization engaged in a coordinated effort to promote a clean energy economy and protect communities and natural environments threatened by climate change. The Natural Resources Defense Council (NRDC) uses law, science, and the support of its members to ensure a safe and healthy environment for all living things; one of NRDC’s top priorities is to reduce the emissions of air pollutants that are driving dangerous climate change.

Fossil fuel-fired EGUs are the nation’s largest source of greenhouse gas emissions, currently accounting for nearly 40 percent of the nation’s output of carbon dioxide (CO₂).¹ Acting in response to the Supreme Court’s decision in *Massachusetts v. EPA*,² EPA formally determined in 2009 that the buildup of CO₂ and other greenhouse gases in the atmosphere is driving rapid changes in our climate that endanger public health and welfare.³ As EPA recognized in the preamble to the proposed GHG NSPS, the effects of climate change are projected to include “more frequent and intense heat waves, more severe wildfires, degraded air quality, heavier and more frequent downpours and flooding, increased drought, greater sea level rise and storm surge, more intense storms, harm to water resources, continued ocean acidification, harm to agriculture, and harm to wildlife and ecosystems.”⁴

Our organizations, joined by many other environmental organizations, states, and municipalities, have long argued that these dangerous impacts of climate change obligate EPA to act under section 111 of the CAA to mitigate carbon pollution from EGUs. Under section 111(b) of the Act, EPA must issue “standards of performance” (NSPS) regulating emissions from each category of new stationary sources that “causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health and welfare.”⁵ Section 111(d) of the Act requires EPA to issue emission guidelines covering the release of certain pollutants from any existing stationary source for which new source standards of performance have been issued.⁶

Numerous states and environmental organizations have requested standards to control dangerous greenhouse gas emissions from power plants for more than ten years.⁷ Our organizations have specifically sought the inclusion of greenhouse gas emission limits in the NSPS for power plants for nearly a decade, at least since our 2005 comments on EPA’s proposed revision of the power plant NSPS. On February 27, 2006, EPA published a final rule revising the NSPS for EGUs, but declined to establish a standard for greenhouse gases.⁸ Following the decision in *Massachusetts v. EPA*, the D.C. Circuit responded to state and environmental challenges to the flawed 2006 rule by remanding it to EPA for further proceedings focused on regulation of greenhouse gas emissions.⁹

On April 13, 2012, EPA published a proposed NSPS for greenhouse gas emissions from new fossil fuel-fired EGUs – a long-awaited and urgently needed first step towards reducing harmful

¹ Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units, 77 Fed. Reg. 22,392, 22,403-04 (Apr. 13, 2012) (“proposed GHG NSPS”).

² 549 U.S. 497 (2007).

³ Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act (“Endangerment Finding”), 74 Fed. Reg. 66,496 (Dec. 15, 2009).

⁴ Proposed GHG NSPS, 77 Fed. Reg. at 22,396.

⁵ 42 U.S.C. § 7411(b).

⁶ 42 U.S.C. § 7411(d)(1); 40 C.F.R. § 60.22(a).

⁷ Notice of Intent to Sue Under Clean Air Act § 304(b)(2), filed by States of New York, Connecticut, Maine, Massachusetts, New Jersey, Rhode Island, and Washington (Feb. 20, 2003).

⁸ Standards of Performance for Electric Utility Steam Generating Units for Which Construction Is Commenced After September 18, 1978; Standards of Performance for Industrial-Commercial-Institutional Steam Generating Units; and Standards of Performance for Small Industrial-Commercial-Institutional Steam Generating Units, 71 Fed. Reg. 9,866 (Feb. 27, 2006).

⁹ *State of New York, et al. v. EPA*, No. 06-1322 (D.C. Cir. Sept. 24, 2007).

emissions from this source category.¹⁰ EPA has neither finalized that proposed rule nor proposed or finalized emission guidelines for the large population of existing EGUs that will continue to account for the majority of power sector CO₂ emissions for many years into the future. EPA's inaction with respect to the proposed NSPS violates Section 111(b)(1)(B) of the Act,¹¹ which unambiguously directs EPA to issue final rules within one year of publication of a proposed NSPS. EPA's failure to promptly propose and finalize emission guidelines for carbon pollution from existing power plants violates section 111(d) of the Act and EPA's regulations implementing that section.¹²

Given the extensive length of time that has elapsed since the 2006 NSPS revisions, the Supreme Court's 2007 decision in *Massachusetts v. EPA* and the D.C. Circuit's remand of the EPA's 2006 revision of the power plant NSPS in *New York v. EPA*, as well as the long time that has elapsed since EPA's Endangerment Finding, EPA has also unreasonably delayed the promulgation of the final GHG NSPS and the issuance of proposed and final emission guidelines within the meaning of section 304(a) of the Act.¹³

Accordingly, EPA's failure to finalize the proposed GHG NSPS and to propose and finalize emissions guidelines is proper grounds for citizen suit under section 304(a) of the Act, which authorizes lawsuits against the EPA when the Administrator has failed to "perform any act or duty . . . which is not discretionary."¹⁴ These failures are also grounds for citizen suit under section 304(a) in that it further authorizes lawsuits against the EPA to compel agency action unreasonably delayed. District courts have jurisdiction to enforce such duties against EPA.¹⁵ This letter constitutes 60-days notice of failure to perform the above-described non-discretionary duties and 180-days notice of failure to perform the above-described actions that are unreasonably delayed. Unless EPA takes the required actions before the end of the applicable notice periods, our organizations intend to file civil actions in United States District Court to compel EPA to perform its nondiscretionary duties under Clean Air Act §111 and to enforce such agency action unreasonably delayed. *See* 42 U.S.C. §7604(a), (b), and 40 C.F.R. §§ 54.2; 54.3. The litigation will seek injunctive and declaratory relief.¹⁶

¹⁰ 77 Fed. Reg. 22,392 (Apr. 13, 2012).

¹¹ 42 U.S.C. §7411(b)(1)(B).

¹² 40 C.F.R. §60.22(a).

¹³ 42 U.S.C. § 7604(a).

¹⁴ *Id.*

¹⁵ *Id.*; *see Env. Def. Fund v. Thomas*, 870 F.2d 892, 897 (2d Cir. 1989); *Portland Cement Ass'n v. EPA*, 665 F.3d 177, 194 (D.C. Cir. 2011).

¹⁶ We hereby reserve all of our rights under the law to take immediate legal action, without further notice, to enforce the D.C. Circuit's long-standing September 24, 2007 remand order in light of EPA's unreasonable delay. *Telecomm. Research & Action Ctr. v. FCC*, 750 F.2d 70, 79-80 (D.C. Cir. 1984).

Respectfully submitted,

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