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The Honorable Robert Perciasepe
Acting Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
Washington, DC 20460

Re: Response of the Utility Air Regulatory Group to Notices of Intent to Sue Filed by the Environmental Defense Fund, *et al.*, and the State of New York, *et al.*

Dear Administrator Perciasepe:

The Utility Air Regulatory Group ("UARG") hereby responds to the Notices of Intent to Sue of the Environmental Defense Fund, *et al.* ("EDF") and the State of New York, *et al.* ("States"), dated April 15, 2013, and April 17, 2013, respectively (separately, the "EDF NOI" and "State NOI"; collectively, the "Notices").[1] The Notices allege that the Administrator of the U.S. Environmental Protection Agency ("EPA" or "Agency") failed to perform certain acts or duties under the CAA that are "not discretionary with the Administrator" within the meaning of the citizen suit provisions of CAA § 304(a)(2) or are "unreasonably delayed." CAA § 304(a). As discussed herein, there is no merit to any of the claims advanced by EDF and the States in the two Notices.

The Notices assert that, in light of EPA's publication on April 13, 2012, of a proposed new source performance standard ("NSPS") for emissions of carbon dioxide ("CO_2") from

[1] UARG is a not-for-profit association of individual electric generating companies and national trade associations that participates on behalf of its members collectively in administrative proceedings under the Clean Air Act ("CAA" or "Act"), and in litigation arising from those proceedings, that affect electric generators. Members of UARG own and operate fossil fuel-fired electric generating units ("EGUs"), including coal- and gas-fired units. On June 25, 2012, UARG submitted extensive comments on the April 13, 2012 proposed rule at issue in the present rulemaking. EPA Doc. ID No. EPA-HQ-OAR-2011-0660-9995.

new EGUs, 77 Fed. Reg. 22,392, CAA § 111(b)(1)(B) required EPA "to issue final New Source Performance Standards . . . within one year of" that proposal, *i.e.*, by April 13, 2013. EDF NOI at 1; *see also* State NOI at 1-2 ("EPA failed to promulgate final standards within one year after publication of the proposed standards as required under [CAA] section 111(b)(1)(B) . . . ."). In addition, the Notices contend that EPA has failed to perform a nondiscretionary duty by not having "issue[d] proposed and final emission guidelines for [CO_2] emissions . . . from existing EGUs," actions that, according to the Notices, EPA "is required to execute under section 111(d) of the Act and EPA regulations." EDF NOI at 1; *see also* State NOI at 2 (EPA's "failure to issue emission guidelines for existing power plants violates the [CAA] . . . .").

The Notices also allege that EPA has unreasonably delayed carrying out these supposed duties. EDF NOI at 3 ("EPA has also unreasonably delayed the promulgation of the final . . . NSPS and the issuance of proposed and final emission guidelines within the meaning of § 304(a) of the Act"); State NOI at 4 ("EPA has unreasonably delayed in taking final action to establish standards of performance and related emission guidelines for greenhouse gas emissions from power plants as required under sections 111(b) and 111(d) of the [CAA]").

For the reasons discussed below, EPA should not, in response to EDF and the States' threats to sue or for any other reason, take the regulatory actions urged by the Notices. *See* EDF NOI at 3; State NOI at 3. To the contrary, with respect to its section 111(b) rulemaking, EPA should recognize that the statutory one-year period for promulgation of final NSPS has expired and that, given the unique and highly unusual nature of regulated sources' compliance obligations under that provision of the CAA, the existing rulemaking must be deemed terminated and EPA cannot any longer promulgate NSPS unless it first publishes, and allows for public comment on, a new proposed rule. Thus, EPA is in breach of neither a nondiscretionary duty under the Act nor any obligation to avoid unreasonable delay. As for regulatory action under section 111(d), as discussed below, there is likewise no basis for any claim of breach of nondiscretionary duty or unreasonable delay; indeed, any action by EPA under that provision would be both premature and unauthorized.

Background

The proposed NSPS would "create a new subpart in 40 CFR part 60" – to be codified as new Subpart TTTT – by "combining the sources in subpart Da . . . and a subset of the

sources in subpart KKKK."[2] 77 Fed. Reg. at 22,410. The sources to which the requirements of the new Subpart TTTT would apply include (with certain specified exceptions)[3] each "electric utility generating unit that commences construction after April 13, 2012," and that has "a base load rating of more than 73 megawatts . . . heat input of fossil fuel." *See proposed* 40 C.F.R. § 60.5509; 77 Fed. Reg. at 22,436. EGUs would be regulated under Subpart TTTT only with respect to their greenhouse gas emissions ("GHGs"), with CO_2 being the only GHG specified by the proposed rule. *See proposed* 40 C.F.R. §§ 60.5508, 60.5515; 77 Fed. Reg. at 22,436. With respect to emissions other than CO_2, EGUs would continue to be subject to regulation under Subpart Da and Subpart KKKK, as may be applicable.

EPA stated that its "proposal to combine the relevant parts of the Da and KKKK categories is authorized under CAA section 111(b)(1)(A) because that provision authorizes the EPA, after drawing up the list of affected source categories, to 'revise' that list from time to time." 77 Fed. Reg. at 22,398. "Combining the relevant parts of the categories," EPA asserted, "is one method to 'revise' the list." *Id.*

Each EGU to which proposed new Subpart TTTT would apply would be subject to an emission limit of 1,000 pounds of CO_2 per gross output, measured in megawatt hours ("lbs/MWh"), on a 12-operating-month annual average basis. *See proposed* 40 C.F.R. § 60.5520(a); 77 Fed. Reg. at 22,436. Although each EGU to which the requirements of Subpart TTTT would apply would be subject to this proposed 1,000 lbs/MWh limit – including coal-fired EGUs – EPA acknowledged that the "proposed standard is based on the demonstrated performance of natural gas combined cycle (NGCC) units." 77 Fed. Reg. at 22,394. As EPA acknowledged, no new coal-fired EGU can achieve this 1,000 lbs/MWh

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[2] The "sources in subpart Da" to which the proposed rule refers are "electric utility steam generating unit[s]" that are "capable of combusting more than 73 megawatts (MW) . . . heat input of fossil fuel (either alone or in combination with any other fuel)" for which "construction, modification, or reconstruction is commenced after September 18, 1978," along with certain specified "IGCC [Integrated Gasification Combined Cycle] electric utility steam generating unit[s]" – *i.e.*, IGCC units that are "capable of combusting more than 73 MW . . . heat input of fossil fuel" and that "commenced construction, modification, or reconstruction after February 28, 2005." *See* 40 C.F.R. § 60.40Da(a), (b). The "sources in subpart KKKK" are "stationary combustion turbine[s]" with a "heat input at peak load equal to or greater than 10.7 gigajoules" per hour. *See* 40 C.F.R. § 60.4305(a). The "subset" of Subpart KKKK sources to which the proposed rule refers are "stationary combined cycle units, but not stationary simple cycle units." 77 Fed. Reg. at 22,410.

[3] The specified exceptions include "steam electric generating unit[s]" that meet the "definition of municipal waste combustor unit" and that are "subject to subpart Eb," along with "steam electric generating unit[s]" that meet the "definition of a commercial or industrial solid waste incineration unit" and that are "subject to subpart CCCC." *See proposed* 40 C.F.R. § 60.5510(b)(1), (2); 77 Fed. Reg. at 22,436. In addition, EGUs falling within a designated category of "[t]ransitional sources" would not be subject to Subpart TTTT. *Id.* § 60.5510(b)(3).

limit with any demonstrated system of emission reduction that is available to such units. *Id.* at 22,398.

The proposed rule also sets forth an "alternative" 30-year-averaging compliance option for coal-fired EGUs that are "designed to allow installation and operation of a carbon capture and storage (CCS) system." *See proposed* 40 C.F.R. § 60.5520(b); 77 Fed Reg. at 22,436. In the proposal, however, EPA does not suggest that CCS is an "adequately demonstrated" control system within the meaning of CAA § 111(a)(1) or that this proposed option was based on evaluation of the other standard-setting criteria that must be considered in selecting a "best" system from among "demonstrated" systems.

At the conclusion of the proposed rule, EPA stated that it was "request[ing] comments on all aspects of the proposed rulemaking." 77 Fed. Reg. at 22,430. At the same time, EPA stated that it was "not proposing that CCS does or does not qualify as the 'best system of emission reduction' that 'has been adequately demonstrated' for new coal-fired power plants." *Id.* at 22,411. EPA did not identify any "system of emission reduction" that might possibly be applied to reduce CO_2 emissions from coal-fired EGUs. EPA did not describe, much less solicit comment on, any standard of performance that coal-fired EGUs might possibly achieve using any "system of emission reduction," whether or not that system is available and "adequately demonstrated."[4]

EPA also did not solicit comment on the April 13, 2012 applicability date. Indeed, the extensive justification EPA provided for excluding "transitional sources" from the requirements of the proposed rule[5] – with the exclusion providing that such sources commence construction "within 12 months after April 13, 2012," *see Proposed* 40 C.F.R. § 60.5510(b)(3)(i); 77 Fed. Reg. at 22,436 – implies that EPA believes it has no discretion with respect to that issue and that it is compelled by the CAA to establish April 13, 2012, as the applicability date for those sources that are not "transitional sources." *See, e.g., id.* at 22,400 ("CAA section 111 *provides by its terms* that sources that have not 'commenced construction' before the date of proposed standards for new sources *will be* subject to the NSPS when they do commence construction.") (emphases added).

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[4] EPA did state that it was "taking comment" on a standard within "a range from 950 lb CO_2/MWh to 1,100 lb CO_2/MWh." 77 Fed. Reg. at 22,406. No new coal-fired EGU could meet a limit as low as the high end of this range, a fact that EPA acknowledged when it described that "upper limit" as "incorporat[ing] essentially all available new combined cycle designs," which is a reference to combined cycle *natural gas-fired* combustion turbines. *Id.* at 22,414.

[5] *See* 77 Fed Reg. at 22,423-27.

Discussion

I. EPA Is Not at This Time Subject to a Nondiscretionary Duty Under CAA § 111(b)(1)(B) To Promulgate an NSPS, Has Not "Unreasonably Delayed" Doing So, and Indeed Has No Authority To Do So.

EDF contends that CAA § 111(b)(1)(B) "unambiguously directs EPA to issue final rules within one year of publication of a proposed NSPS." EDF NOI at 3. The States argue the same. State NOI at 3 ("Section 111 of the Clean Air Act requires EPA to promulgate final standards of performance within one year after publication of proposed standards."). Because more than one year has now passed, EDF and the States claim, "EPA's failure to finalize the proposed GHG NSPS . . . is proper grounds for citizen suit under section 304(a) of the Act . . . ." EDF NOI at 3; State NOI at 3 ("EPA's failure to finalize the proposed greenhouse gas performance standards for new EGUs by April 13, 2013 violates" CAA § 111(b)(1)(B)).

EDF and the States misconstrue the relevant provisions of CAA § 111(b)(1)(B). Those provisions state that, after publishing "proposed regulations, establishing Federal standards of performance for new sources within" the specified source category, EPA "shall afford interested persons an opportunity for written comment on such proposed regulations." CAA § 111(b)(1)(B). "After considering such comments," the Act states, EPA "shall promulgate, within one year after such publication, *such standards* with *such modifications* as [EPA] *deems appropriate*." *Id.* (emphases added). On its face, this provision does not indicate that EPA must "finalize" the proposal and promulgate an NSPS within one year of proposal, as the Notices contend.

Rather, given that CAA § 111(b)(1)(B) directs EPA to "promulgate . . . such standards" as EPA "deems appropriate" – with "such modifications" being made to the proposed standards as EPA deems appropriate in light of the Agency's consideration of the comments it received on the proposal – the provision is properly construed as requiring nothing more of EPA than that it *take final action* on the rulemaking within one year of proposal. This may include promulgating a final rule *or* it may include EPA determining *not* to promulgate a rule and to terminate the rulemaking, if EPA were to determine, after considering the comments received, that such a conclusion to the rulemaking is "appropriate." In fact, this is how EPA itself understands its authority and obligations under CAA § 111(b)(1)(B), as the Agency has represented to the U.S. Court of Appeals for the District of Columbia Circuit. *See* EPA's Response in Opposition to Utility Air Regulatory Group's Motion for Declaratory Relief at 7 n.5, *Las Brisas Energy Center, LLC v. EPA*, No. 12-1248

and consolidated cases (D.C. Cir. filed Sept. 6, 2012) (ECF Doc. No. 1393206) (stating that "the operative text of this provision [*i.e.*, CAA § 111(b)(1)(B)] – requiring that '*[a]fter considering such comments*, [the Administrator] shall promulgate, within one year after such proposal, such standards with such modifications *as [s]he deems appropriate*' – necessarily encompasses the discretion *not* to promulgate standards if the Administrator considers it *inappropriate* to do so in light of the comments") (emphases in original). In short, the claims of EDF and the States that EPA is at this time in breach of a nondiscretionary duty to promulgate a final NSPS find no support in the plain language of the CAA.

Equally without merit are the claims in the Notices that EPA has "unreasonably delayed" promulgating a GHG NSPS for EGUs. Given that the rulemaking that EDF and the States contend is necessary was in fact initiated, and given that – even under their own view of the law – EPA has a year in which to finalize any NSPS, there are no grounds to argue that exceeding the one-year period by only a few weeks constitutes "agency action unreasonably delayed" within the meaning of CAA § 304(a).

As to this, EDF and the States complain that they have been calling for EPA to adopt GHG NSPS for "more than ten years." *See* EDF NOI at 2; State NOI at 4. But the *most* that EDF and the States might make of this is that, in their view, EPA "unreasonably delayed" *initiating* an NSPS rulemaking. Even if there were any validity to this complaint – and, in UARG's view, there is none – with EPA's publication of the proposed rule in April 2012, that complaint was effectively rendered moot.

The baseless allegations of EDF and the States aside, it remains the case that EPA has not taken any final action on the NSPS proposed rule. What should be the consequence? In UARG's view, it is incumbent on EPA at this time to recognize that *this rulemaking has concluded without promulgation of any final rule and that the proposed rule should be deemed withdrawn.* EPA cannot promulgate any final NSPS on the basis of the April 2012 proposed rule.

The rationale for Congress's directive, in CAA § 111(b)(1)(B), that EPA take final action on a proposed NSPS within no more than one year after EPA's publication of the proposed rule derives from the fact that Congress provided, for purposes of CAA § 111 regulation, that a "new source" that is subject to a promulgated final NSPS includes any "stationary source, the construction or modification of which is commenced after the publication of regulations *(or, if earlier, proposed regulations)* prescribing a standard of performance under this section which will be applicable to such source." CAA § 111(a)(2) (emphasis added). This is a highly unusual requirement that, in its retroactive effect, appears

to be unique among all of the applicability provisions of the CAA. In the proposed rule, EPA proposed that the requirements of new Subpart TTTT will apply to an EGU that "commences construction after April 13, 2012." *See proposed* 40 C.F.R. § 60.5509; 77 Fed. Reg. at 22,436.

Through its statutory definition of "new source," Congress allowed for a measure of uncertainty to exist during the pendency of the NSPS rulemaking. A source owner that commences construction of a new source after the date on which EPA publishes a *proposed* new standard of performance, but before the date on which EPA publishes such a standard in *final* form, must proceed without being sure of the precise parameters of the standard that the new source may ultimately have to meet pursuant to EPA's final rulemaking action. Evidently, Congress did not consider that some degree of such uncertainty would present an unacceptable burden for source owners. At the same time, however, Congress sought to mitigate the temporal extent of the uncertainty by requiring EPA to take final rulemaking action no later than one year after the date of publication of proposed standards. As a practical matter, it could be expected that EPA's adherence to this one-year deadline would result in a standard of performance being made final by the Agency while a source that commenced construction after proposal was still under construction, thereby allowing the source owner an opportunity to take account of any changes that EPA's final rulemaking action might make to the proposed standard before the source's construction was complete.

Further mitigating the potential uncertainty is the expectation that the final rule would closely reflect the standard that EPA had proposed, and on which there had been an opportunity for public comment. The very fact that, under CAA § 111(a)(2), the date of an NSPS *proposal* can be the applicability date for the requirements of the final rule reflects congressional intent that the final rule be something that *was* proposed. Although EPA is expected (indeed, is required) to take account of comments it receives on a proposed NSPS, and may "modif[y]" the proposed NSPS as the Agency "deems appropriate," CAA § 111(b)(1)(B), a final NSPS that is based on factors or considerations that were never noticed for public comment would violate congressional intent.

Now that more than one year has passed since EPA published the proposed NSPS – and given that, as noted above, EPA proposed the applicability date of April 13, 2012 – the only action open to the Agency at this time that would conform to CAA § 111(b)(1)(B) is to recognize that the rulemaking that began in April 2012 is terminated and cannot be the basis of promulgation of any final NSPS. What EPA may not and must not do is to give credence to EDF and the States' claims and proceed to take final rulemaking action based on the April 2012 proposed NSPS.

Finally, EPA also cannot correct the deficiencies in the proposed rule, as identified by UARG and others in their comments, through adoption of a final rule that the Agency never proposed. In this regard, EPA has previously asserted that, because it "sought comments on all aspects" of the April 13, 2012 proposed rule, the Agency "may modify its final action in any number of ways in response to those comments." Respondent EPA's Motion To Dismiss Petitions for Lack of Subject-Matter Jurisdiction at 14, *Las Brisas Energy Center, LLC v. EPA*, No. 12-1248 and consolidated cases (D.C. Cir. filed Aug. 9, 2012) (ECF Doc. No. 1388445) (emphasis omitted). Yet nothing in the proposed rule invited comment on the proposal's most fundamental flaw: the establishment of an NSPS that is based on NGCC technology but that nonetheless applies to coal-fired EGUs. To the contrary, EPA announced that its consideration of comments advocating changes to the standard as proposed would be *limited* to consideration of a range of controlled CO_2 emission levels that *only* NGCC units might achieve. At the same time, EPA failed to include in the proposal any evaluation of the "cost," "nonair quality health and environmental impact," and "energy requirements" associated with coal-fired EGUs applying any system that would reduce CO_2 emissions from coal-fired EGUs, as CAA § 111(a)(1) requires. As a result, EPA's proposal cannot be viewed as offering any standard of performance that applies to coal-fired EGUs. EPA is precluded, therefore, from adopting in this rulemaking a final standard for coal-fired EGUs, *i.e.*, a standard that purports to reflect the "best system" demonstrated for coal-fired EGUs.

II. EPA Is Not Subject to Any Nondiscretionary Duty To Take Action Under CAA § 111(d) and Has Not "Unreasonably Delayed" Doing So.

EDF and the States also contend that EPA breached a nondiscretionary duty by having failed to "promptly propose and finalize emission guidelines for carbon pollution from existing power plants" under CAA § 111(d). EDF NOI at 3; State NOI at 3 ("EPA's continuing failure to publish [emission] guidelines [covering GHG emissions from existing power plants] is contrary to [CAA] section 111(d) . . . ."). EDF and the States also argue that EPA has unreasonably delayed issuing these emissions guidelines. EDF NOI at 3; State NOI at 4. No basis exists for these claims.

EPA has breached no nondiscretionary duty here. The only duty to promulgate any regulatory requirement that CAA § 111(d) even arguably imposes on EPA is an obligation that the Agency "prescribe regulations which shall establish a procedure similar to that provided by [CAA § 110] . . . under which each State shall submit to the Administrator a plan which . . . establishes standards of performance" for existing sources and which "provides for the implementation and enforcement of such standards of performance." CAA § 111(d)(1).

The regulations that CAA § 111(d)(1) required EPA to prescribe were promulgated by the Agency in 1975. *See* 40 Fed. Reg. 53,340, 53,346-49 (Nov. 17, 1975); 40 C.F.R. pt. 60, subpt. B, §§ 60.20-60.29, "Adoption and Submittal of State Plans for Designated Facilities." In other words, the nondiscretionary duty that EDF and the States allege EPA has failed to satisfy, and that they claim has been unreasonably delayed, was discharged by EPA over 37 years ago.

The purported duty about which EDF and the States complain – *i.e.*, publication of a "draft guideline document" and subsequent publication of a "final guideline document" containing, among other things, an "emission guideline" – is a task assigned to EPA by the Agency's own *regulations* at 40 C.F.R. Part 60, Subpart B, not by the statute itself. That fact is fatal to EDF and the States' nondiscretionary-duty allegation. Jurisdiction arises under CAA § 304(a)(2) only where EPA is alleged to have failed to perform a *statutory* duty under some section of the CAA. *See Envtl. Def. Fund v. Thomas*, 870 F.2d 892, 896 (2d Cir. 1989) ("Section 304 grants jurisdiction to district courts to compel the Administrator to perform non-discretionary *statutory* duties.") (emphasis added). The duty EPA is alleged to have violated here is grounded (if at all) in an EPA *regulatory* provision. This is insufficient to give rise to a citizen suit action under CAA § 304(a)(2). *See Maine v. Thomas*, 874 F.2d 883, 888 n.7 (1st Cir. 1989) (noting that although certain "*regulatory* duties are perhaps nondiscretionary, . . . they are not *statutory* nondiscretionary duties; hence, they are not proper grist for the [CAA § 304] mill") (emphases added).

Even assuming for the sake of argument that failure to perform a purported nondiscretionary duty to which EPA is subject due solely to EPA's own rules *could* support a CAA § 304(a)(2) suit, EDF and the States' claims still would fail. The regulations that EPA promulgated to meet its statutory responsibility under CAA § 111(d)(1) specify that the Agency "will publish a draft guideline document" but provide that EPA is to do so "[c]oncurrently upon *or after* proposal of standards of performance." 40 C.F.R. § 60.22(a) (emphasis added). The regulations establish no deadline by which EPA *must* "publish a draft guideline document." Similarly, with respect to a final guideline document, the regulations state that "[a]fter consideration of public comments and upon *or after* promulgation of standards of performance . . ., a final guideline document will be published . . . ." *Id.* (emphasis added).

In short, the very rules on which EDF and the States must rely in asserting some putative nondiscretionary duty that EPA supposedly has breached in fact give EPA broad *discretion* as to the timing of publication of a draft guideline document: EPA *may* issue it in conjunction with publication of a proposed NSPS but, alternatively, may do so *any time*

thereafter. As to the *final* guideline document, it is only upon final promulgation of an NSPS that EPA is even authorized to publish it, and the rules do not require EPA to publish it by any particular date thereafter. As to a final guideline document, therefore, it is impossible for EPA either to have breached a nondiscretionary duty by not issuing it or to have unreasonably delayed issuing it.

For the foregoing reasons, there is no merit to any of the claims advanced in the two Notices, and EPA should not take any of the actions urged by EDF and the States. In addition, EPA should recognize that the rulemaking initiated by the April 13, 2012 proposed rule is terminated. In the event EPA should nevertheless decide to engage in any discussions with EDF and/or the States with regard to the Notices, UARG hereby requests to participate in any such discussions.

Respectfully submitted,

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