

October 19, 2020

Mr. Andrew Wheeler
Administrator
Environmental Protection Agency
1101A EPA Headquarters
William Jefferson Clinton Building
1200 Pennsylvania Avenue, NW
Washington D.C. 20460
wheeler.andrew@epa.gov

Via Certified Mail

RE: Notice of Intent to Bring Citizen Suit Concerning Clean Air Act Deadlines for the Synthetic Organic Chemical Manufacturing Industry ("SOCMI")

Dear Administrator Wheeler,

This is a notice of "a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator" under Clean Air Act § 304, 42 U.S.C. § 7604(a)(2). This notice is provided to you as Administrator of the U.S. Environmental Protection Agency ("EPA"), in your official capacity, pursuant to 42 U.S.C. § 7604(b)(2) and 40 C.F.R. Part 54 as a prerequisite to bringing a civil action.

The organizations giving this notice are: California Communities Against Toxics (P.O. Box 845, Rosamond, CA 93560), Environmental Integrity Project (1000 Vermont Ave. NW, Suite 1100, Washington, D.C. 20005), Louisiana Environmental Action Network (P.O. Box 66323 Baton Rouge, LA 70896), Ohio Valley Environmental Coalition (PO Box 6753, Huntington, WV 25773-6753), RISE St. James (8581 Hwy 18, St. James, Louisiana 70086), Sierra Club (2101 Webster Street, Suite 1300, Oakland, CA 94612), and Texas Environmental Justice Advocacy Services, 900 North Wayside Drive, Houston, TX 77023).

This letter provides notice of intent to sue and compel EPA action to complete long overdue Clean Air Act rulemakings pursuant to sections 111 and 112 of the Act for the Synthetic Organic Chemical Manufacturing ("SOCMI") Industry and SOCMI source categories. These rulemakings are greatly needed to protect public health and the environment.

Section 112(d)(6) – Emission Standards and Technology Review and Revision.

Section 112(d)(6) of the Clean Air Act requires EPA to "review, and revise as necessary (taking into account developments in practices, processes, and control technologies), emission standards promulgated under [§ 112] no less often than every 8 years." 42 U.S.C. § 7412(d)(6).

More than eight years have passed since EPA promulgated Clean Air Act § 112 regulations for the Organic Hazardous Air Pollutants from the Synthetic Organic Chemical Manufacturing Industry, Subparts F-I also known as Hazardous Organic NESHAP ("HON"). See 40 C.F.R. §§ 63.100-63.193; Final Rule, 71 Fed. Reg. 76,603 (Dec. 21, 2006).

EPA has not reviewed and revised, as necessary, emission standards for the SOCM/HON category, as Clean Air Act § 112(d)(6) requires.

In its failure to review and revise, as necessary, Part 63 Subparts F-I, EPA violated and is in ongoing violation of the Act as of its final action deadline of December 21, 2014. Each day that passes worsens the impact of EPA's continuing violation of § 112(d)(6) and repeats it. Accordingly, EPA has failed to perform a nondiscretionary duty within the meaning of Clean Air Act § 304. 42 U.S.C. § 7604(a)(2).

Section 112(f) – Health Risk Assessment and Standards to Protect Health and Environment. Section 112(f) of the Clean Air Act requires that:

(A) . . . [T]he Administrator shall, within 8 years after promulgation of standards for each category or subcategory of sources pursuant to [§ 112(d)], promulgate standards for such category or subcategory if promulgation of such standards is required in order to provide an ample margin of safety to protect public health in accordance with this section (as in effect before November 15, 1990) or to prevent, taking into consideration costs, energy, safety, and other relevant factors, an adverse environmental effect. . . .

If standards promulgated pursuant to [§ 112(d)] and applicable to a category or subcategory of sources emitting a pollutant (or pollutants) classified as a known, probable or possible human carcinogen do not reduce lifetime excess cancer risks to the individual most exposed to emissions from a source in the category or subcategory to less than one in one million, the Administrator shall promulgate standards under this subsection for this source category.

. . .

(C) The Administrator shall determine whether or not to promulgate such standards and, if the Administrator decides to promulgate such standards, shall promulgate the standards 8 years after promulgation of the standards under [§ 112(d)] for each source category or subcategory concerned.

42 U.S.C. § 7412(f)(2).

More than eight years have passed since EPA promulgated standards for this source category under § 112(d), yet EPA has failed to conduct the residual risk review and rulemaking for such promulgation as required by § 112(f)(2).

EPA promulgated standards for the SOCM/HON category in 2006 and 2008. First, in the 2006 HON rulemaking, the agency promulgated a determination under § 112(d) for the emission standards and promulgated revisions to the standards that amended them under CAA section 112(d)(2), for example, “to clarify provisions of the existing rule and provide for effective implementation.”¹ This promulgation of standards under § 112(d) in 2006 triggered a non-

¹ 2006 Final Rule, 71 Fed. Reg. at 76,606, (e.g., revising standards for wastewater streams, and changing requirements for certain owners or operators and off-site reloading and cleaning operations).

discretionary duty to complete a § 112(f) health and environmental residual risk review and rulemaking within eight years, *i.e.*, by December 21, 2014.

Second, in 2008, EPA promulgated standards under its § 112(d) authority. This is because subparts G and H of 40 C.F.R. Part 63 incorporate 40 C.F.R. § 63.11 Subpart A. In 2008, EPA promulgated new standards under EPA's § 112(d)(6) authority that automatically also amended the HON standards.² This too triggered a non-discretionary duty to complete a § 112(f)(2) health and environmental residual risk review within eight years, *i.e.*, by December 22, 2016.

As more than eight years have passed since EPA promulgated standards under § 112(d), EPA is in violation of its ongoing duty to review the health and environmental risk and to determine whether to promulgate emission standards under § 112(f)(2) for the HON category.

For 40 C.F.R. Part 63, Subparts F-I, after the 2006 and 2008 promulgations under § 112(d), EPA has failed and is in ongoing violation of its legal obligation to either promulgate § 112(f) standards or determine that such standards are not "required in order to provide an ample margin of safety to protect public health in accordance with this section . . . or to prevent . . . an adverse environmental effect." 42 U.S.C. § 7412(f)(2)(A). Accordingly, EPA has failed to perform a nondiscretionary duty within the meaning of Clean Air Act § 304. 42 U.S.C. § 7604(a)(2). Each day that passes worsens the impact of EPA's continuing violation and repeats it.

Especially in light of substantial new information on the potent carcinogenicity of ethylene oxide and other pollutants emitted by the SOCFMI/HON sources, there is a strong need for EPA to review and determine whether to revise the standards.³ The health threats from this pollutant and cumulative HON sources' emissions need to be evaluated under 112(f)(2). In doing so, EPA is likely to find much higher cancer and other health risks than EPA or the public was aware of from SOCFMI chemical plants in 2006.

Section 111(b) - List of categories of stationary sources; standards of performance; information on pollution control techniques; sources owned or operated by United States; particular systems; revised standards. Certain SOCFMI facilities are also regulated under Section 111 of the CAA due to their emission of volatile organic compounds (VOCs). Section 111(b) of the Clean Air Act directs:

(A) The Administrator shall, within 90 days after December 31, 1970, publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if in his judgment it

² See 73 Fed. Reg. 78,199 (Dec. 22, 2008) (establishing alternative work practices to detect leaks from equipment).

³ See, e.g., MON Rule (2020), 85 Fed. Reg. 49,084 (Aug. 12, 2020) (highlighting risks from SOCFMI/HON as causing and contributing to unacceptable cancer risks); EPA, 2014 National Air Toxics Assessment Results (2018), <https://www.epa.gov/national-air-toxics-assessment/2014-nata-assessment-results>; EPA, Evaluation of the Inhalation Carcinogenicity of Ethylene Oxide In Support of Summary Information on the Integrated Risk Information System (IRIS) (Dec. 2016), https://cfpub.epa.gov/ncea/iris/iris_documents/documents/toxreviews/1025tr.pdf.

causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.

(B) Within one year after the inclusion of a category of stationary sources in a list under subparagraph (A), the Administrator shall publish proposed regulations, establishing Federal standards of performance for new sources within such category.... The Administrator shall, at least every 8 years, review and, if appropriate, revise such standards following the procedure required by this subsection for promulgation of such standards. Notwithstanding the requirements of the previous sentence, the Administrator need not review any such standard if the Administrator determines that such review is not appropriate in light of readily available information on the efficacy of such standard....

42 U.S.C. § 7411(b)(1).

More than eight years have passed since EPA promulgated standards under § 111(b) for the following categories:

(1) SOCMi Air Oxidation Unit Processes, 40 C.F.R. Part 60 Subpart III, 40 C.F.R. § 60.610-60.618 (Final Rule, 65 Fed. Reg. 78,275 (Dec. 14, 2000));

(2) SOCMi Distillation, 40 C.F.R. Part 60 Subpart NNN, 40 C.F.R. § 60.660-60.668 (Final Rule, 65 Fed. Reg. 78,275 (Dec. 14, 2000));

(3) SOCMi Reactor Processes, 40 C.F.R. Part 60 Subpart RRR, 40 C.F.R. § 60.700-60.708 (Final Rule, 65 Fed. Reg. 78,275 (Dec. 14, 2000));

and

(4) SOCMi Equipment Leaks, 40 C.F.R. Part 60 Subpart VV-VVa, 40 C.F.R. § 60.480-60.489, 40 C.F.R. § 60.480a.-60.489a (Final Rule, 72 Fed. Reg. 64,860 (Nov. 16, 2007)).

EPA has not reviewed and, as appropriate, revised emission standards for these categories, as Clean Air Act § 111(b)(1)(B) requires. EPA violated and is in ongoing violation of the Act as of its action deadlines of December 14, 2008 for the first three rules listed above (Subparts III, NNN, RRR), and November 16, 2015 for the fourth listed (Subpart VV-VVa) . Each day that passes repeats these violations and worsens their impact. Accordingly, EPA has failed to perform a nondiscretionary duty within the meaning of Clean Air Act § 304. 42 U.S.C. § 7604(a)(2).

As these categories also emit carcinogenic and otherwise dangerous pollutants that can contribute to ozone and the health and environmental effects it causes, the delay in this review has dire implications for those living and working around these emission sources for the same reasons outlined above.

Section 111(d) - Standards of performance for existing sources. Section 111(d) of the Clean Air Act requires EPA to “prescribe regulations” to establish a procedure where States submit plans to 1) establish standards of performance for any existing air pollutant not already

subject to air quality criteria or regulated under § 7412, but would have to follow a standard of performance under this section if the existing source were instead a new source and 2) provide for the implementation and enforcement of those standards.⁴ These regulations were to be similar to § 110 of the Clean Air Act, which covers State implementation plans for national primary and secondary ambient air quality standards. EPA must promulgate or enforce a plan for a State where that State has failed to submit a satisfactory plan or enforce an approved plan.⁵

In 2019, EPA established new timetables for state plan submissions and EPA approvals. States are required to submit their plans, at most, three years after emissions guidelines are promulgated. EPA then has six months to determine whether a plan is “complete” and twelve months to approve or disapprove of a completed plan.⁶ If EPA disapproves a plan or a plan was not submitted by the deadline, EPA has two years to promulgate its own federal plan the State must implement. Due to this timeline, the date of promulgation of final emissions guidelines for SO2 starts the 3-year clock for States to submit their plans.

40 CFR § 60.22 states, “[c]oncurrently upon or after proposal of standards of performance for the control of a designated pollutant from affected facilities, the Administrator will publish a draft guideline document containing information pertinent to control of the designated pollutant from designated facilities.” EPA has not promulgated emission guidelines for the SO2 source category or categories.

In particular, EPA has not published the required draft or final guideline document for the following categories, despite promulgating standards of performance:

(1) NSPS for SO2 Air Oxidation Unit Processes, 40 C.F.R. Part 60 Subpart III, 40 C.F.R. §§ 60.610-60.618 (originally promulgated through Final Rule, 55 Fed. Reg. 26,922 (June 29, 1990), last updated at 65 Fed. Reg. 78,275 (Dec. 14, 2000));

(2) NSPS for SO2 Distillation, 40 C.F.R. Part 60 Subpart NNN, 40 C.F.R. § 60.660-60.668 (originally promulgated through Final Rule, 55 Fed. Reg. 26,922 (June 29, 1990), last updated at 65 Fed. Reg. 78,275 (Dec. 14, 2000));

(3) NSPS for SO2 Reactor Processes, 40 C.F.R. Part 60 Subpart RRR, 40 C.F.R. § 60.700-60.708 (originally promulgated through 58 Fed. Reg. 45,962 (Aug. 31, 1993), last updated 65 Fed. Reg. 78,275 (Dec. 14, 2000));

and

(4) NSPS for SO2 Equipment Leaks, 40 C.F.R. Part 60 Subpart VV, 40 C.F.R. § 60.480-60.489 (originally promulgated 48 Fed. Reg. 48,335 (Oct. 18, 1983), last updated 65 Fed. Reg. 78,275 (Dec. 14, 2000)); SO2 Equipment Leaks, 40 C.F.R. Part

⁴ 42 U.S.C. § 7411(d)(1).

⁵ 42 U.S.C. § 7411(d)(2).

⁶ *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 423-28 (2011).

60 Subpart VVa, 40 C.F.R. § 60.480a.-60.489a (originally promulgated 72 Fed. Reg. 64,883 (Nov. 16, 2007)).

EPA must issue emissions guidelines for the above listed categories to satisfy its non-discretionary duty under § 111(d). Further, as the standards of performance for these categories were issued prior to 2007, all states should have submitted their plans by 2010 at the latest, and EPA must have issued notices of approval of these plans, a notice of disapproval, or a finding of failure to submit state plans. EPA has failed to act and is in continuing violation of each of these obligations and therefore has failed to perform a nondiscretionary duty within the meaning of Clean Air Act § 304. 42 U.S.C. § 7604(a)(2). With each day passing, EPA's continuing violation recurs and becomes more harmful.

There is an urgent need for EPA to update the section 112 standards for the HON category and the section 111 standards for SOCFI facilities.

The failures to perform the health and environmental residual risk and emission standards and technology review rulemakings and the failure to revise the emission standards based on the new circumstances leaves people exposed to dangerous levels of toxic air pollution and volatile organic compounds. EPA's failures to act elevate exposed communities' likelihood of experiencing prolonged adverse health effects like cancer and asthma, as these threats increase with exposure time.

EPA's failures to act are especially troubling, as EPA's own National Air Toxics Assessment released in 2018 found that ethylene oxide, one of the pollutants emitted from HON facilities, is causing unacceptable cancer risk hot spots around the United States.⁷ New health science has also evolved since EPA's last rulemaking on air toxics that EPA must address in the overdue rulemakings, to account for cumulative health risks and impacts for the most-exposed individuals and communities – including through assessing the real-world impacts that occur from exposure in early life, and from exposure to multiple pollutants, through multiple pathways, and from multiple sources. For example, EPA has recognized the need to assess the multipathway health risks from pollutants like arsenic that HON sources emit. In 2008, the National Academy of Sciences published a report highlighting many ways in which EPA must strengthen its approach for health risk assessments to follow the best available science, including to account for vulnerability, uncertainty, and socioeconomic disparities.⁸ And in recent years, the California EPA's Office of Environmental Health Hazard Assessment (OEHHA) has strengthened its health reference values and risk assessment guidelines based on the best available science, illustrating ways in which EPA must do the same.⁹

Following the current science to assess cumulative health risks from multiple pollutants, pathways, and sources would likely lead EPA to recognize that the health threats from SOCFI/HON sources are greater than it found in 2006, are unacceptable, and that EPA must

⁷ EPA 2014 National Air Toxics Assessment (2018), *supra* n.3.

⁸ National Research Council, *Science and Decisions: Advancing Risk Assessment*. Washington, DC: The National Academies Press (2009), <https://doi.org/10.17226/12209>.

⁹ *See, e.g.*, Cal. EPA, *Air Toxics Hot Spots Program Guidance Manual* (Mar. 6, 2015), <https://oehha.ca.gov/air/crnrr/notice-adoption-air-toxics-hot-spots-program-guidance-manual-preparation-health-risk-0>.

strengthen the emission standards to protect public health under § 112(f)(2). The longstanding exposure of communities to these health threats since that time shows a great need for EPA to review and strengthen the standards now – before another generation of children grow up with insufficiently protective emission standards.

Second, intervening facts and court precedent since EPA’s last § 112 rulemaking are likely to require EPA to strengthen the emission standards to satisfy the Act. As discussed above, the overdue § 112(d)(6) duty requires EPA to “review, and revise as necessary” the emission standards for this source category, which includes making all changes that are “necessary” to bring standards into full compliance with the Clean Air Act, such as setting limits on all uncontrolled HAP emissions. *See Louisiana Envtl. Action Network v. EPA*, 955 F.3d 1088, 1096 (D.C. Cir. 2020) [hereinafter *LEAN*]. To satisfy this provision, EPA must review the standards to assure it sets limits on all currently uncontrolled HAP emissions from the HON/SOCMI source category, and to remove the unlawful exemptions the current rules contain for excess emissions during startup shutdown, and malfunction periods. The D.C. Circuit held such exemptions illegal in 2008, as § 112-compliant emission standards must be “continuous” and apply at all times. *See Sierra Club v. EPA*, 551 F.3d 1019, 1027-28 (D.C. Cir. 2008). And in 2020, the D.C. Circuit held that EPA must set all missing HAP emission limits and otherwise assure the standards comply with the Act during the § 112(d)(6) review. *LEAN*, 955 F.3d at 1096.

It is also “necessary” to revise the emission standards to require fenceline monitoring, as EPA did for petroleum refineries. In 2015, EPA determined there were developments in control technologies that required revisions to the MACT standards under § 112(d)(6), particularly to require fenceline monitoring and corrective action for benzene at the fenceline of source facilities to assure compliance with the standards and improve control of fugitive emissions. Final Rule, 80 Fed. Reg. 75,178 (Dec. 1, 2015).

Further, both the section 112 standards for the HON category and the section 111 standards for SOCMI facilities incorporate EPA’s general flare standards under 40 C.F.R. § 63.11 and 40 C.F.R. § 60.18, respectively, which are outdated and also decades overdue for review. For example, at least nine regulations within the HON category standards under 40 C.F.R. Part 63 Subpart G reference the general flare standards under 40 C.F.R. § 63.11.¹⁰ Similarly, the section 111 standards for the five SOCMI categories listed above all reference the general flare standards of 40 C.F.R. § 60.18.¹¹ On multiple occasions, EPA itself has stated that the general flare standards under 40 C.F.R. § 63.11 and 40 C.F.R. § 60.18 are outdated, lead to the operation of flares with poor destruction efficiency, and require revision.¹² The HON/SOCMI

¹⁰ *See* 40 C.F.R. §§ 63.113(a)(1)(i), 63.116(a)(1)-(3), 63.119(e)(1), 63.120(e)(1), (6), 63.122(g)(3), 63.126(b)(2)(i), 63.128(b)(1)-(3), 63.139(a)(3), (d)(3), 63.145(j)(1)-(3).

¹¹ *See* 40 C.F.R. §§ 60.482-10(d) (Subpart VV, equipment leaks), 60.482-10a(d) (Subpart VVa, equipment leaks), 60.612(b) (Subpart III, Air Oxidation Unit processes), 60.614(d) (same), 60.662(b) (Subpart NNN, Distillation Operations), 60.664(d) (same), 60.702(b) (Subpart RRR, Reactor Processes), 60.704(c) (same).

¹² EPA published two documents in 2012 that acknowledged the shortcomings of the general flare standards. First, EPA published an Enforcement Alert regarding flaring violations, in which the agency recognized that certain needed parameters affecting the efficiency of flares are not captured within current standards, including maintaining the appropriate steam-to-vent-gas ratio and ensuring that the heating value of combustion zone gas is high enough to maximize combustion efficiency, neither of which are

flare standards should be updated, as they were in recent rulemakings for similar chemical and petrochemical source categories which set out specific revisions that improved flare operational and monitoring requirements (in part) and show some of the essential revisions EPA should undertake here (though without adding the unlawful exemptions EPA added in some of these rules).¹³

60-Day Notice. Under Clean Air Act § 304, the above-listed organizations may commence a citizen suit to compel you to perform any or all of the above duties at any time beginning 60 days from the postmark of this letter which is October 19, 2020. *See* 40 C.F.R. § 54.2(d). This means that these groups may file suit on or after December 18, 2020, to compel EPA to fulfill these important non-discretionary duties and seek a court order for EPA to comply with the Clean Air Act as expeditiously as possible.

Contact Information. We are acting as attorneys for the above listed organizations in this matter. Please contact us at your earliest convenience regarding this matter. Please address any communications to us at the addresses and telephone numbers set forth below.

included in the General Flare Requirements. *See* EPA, EPA Enforcement Targets Flaring Efficiency Violations, Enforcement Alert (Aug. 2012), <https://www.epa.gov/sites/production/files/documents/flaringviolations.pdf>. Second, following on the uniform emission standards rulemaking, EPA published a report in April 2012 entitled “Parameters for Properly Designed and Operated Flares”, which noted in particular that reliance on the net heating value of the vent gas—the parameter the General Flare Requirements use—“as an indicator of good combustion ignores any effect of steaming. EPA Office of Air Quality Planning and Standards, Parameters for Properly Designed and Operated Flares (April 2012), <https://www3.epa.gov/airtoxics/flare/2012flaretechreport.pdf>.

¹³ EPA has promulgated revised, stricter flare NESHAP standards for similar industries: petroleum refineries, miscellaneous organic chemical manufacturing, ethylene production, and organic liquids distribution facilities. *See* 80 Fed. Reg. 75,178 (revising petroleum refinery flare standards to ensure better combustion efficiency); National Emission Standards for Hazardous Air Pollutants: Organic Liquids Distribution (Non-Gasoline) Residual Risk and Technology Review, 85 Fed. Reg. 40,740 (July 7, 2020); National Emission Standards for Hazardous Air Pollutants: Generic Maximum Achievable Control Technology Standards Residual Risk and Technology Review for Ethylene Production, 85 Fed. Reg. 40,386 (July 6, 2020); National Emission Standards for Hazardous Air Pollutants: Miscellaneous Organic Chemical Manufacturing Residual Risk and Technology Review, 85 Fed. Reg. 49,084 (Aug. 12, 2020). The record for these rulemakings well shows that flares are not achieving the requisite 98% destruction efficiency but a far lower percentage that fails to assure compliance with the emission standards. *See, e.g.,* Memorandum from Andrew Bouchard to EPA Docket No. EPA-HQ-OAR-2017-0357, Re: Control Option Impacts for Flares Located in the Ethylene Production Source Category 8 (March 2019), <https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0357-0017>.



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Sincerely,



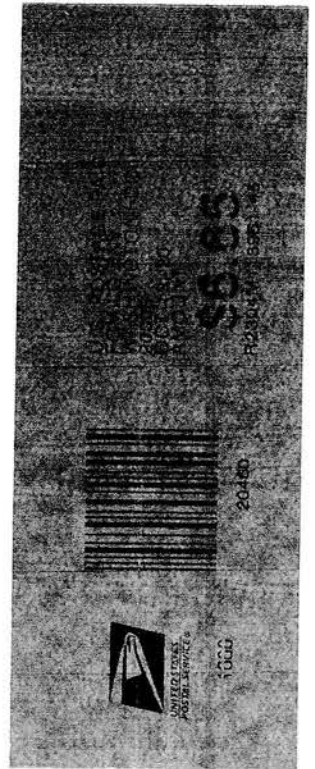
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