



1050 Thomas Jefferson Street, NW  
Seventh Floor  
Washington, DC 20007  
(202) 298-1800 Phone  
(202) 338-2416 Fax

**VIA CERTIFIED MAIL – RETURN RECEIPT REQUESTED**

February 20, 2015

The Honorable Regina McCarthy  
Administrator  
Environmental Protection Agency  
1101A EPA Headquarters  
William Jefferson Clinton Building  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

**RE: Notice of Intent to Sue Concerning EPA’s Failure to Act on Petition for Reconsideration**

Dear Administrator McCarthy:

We submit this letter on behalf of Hawaiian Electric Company, Inc. (“Hawaiian Electric”) to serve as notice of a “failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator” within the meaning of section 304(a)(2) of the Clean Air Act (“CAA”), 42 U.S.C. § 7604(a)(2). We provide this notice to you in your official capacity as Administrator of the U.S. Environmental Protection Agency (“EPA”), pursuant to section 304(b), 42 U.S.C. § 7604(b), and 40 C.F.R. Part 54 as a prerequisite to bringing a civil action.

On April 16, 2012, Hawaiian Electric submitted a timely Petition for Reconsideration (“Petition”) of the *National Emission Standards for Hazardous Air Pollutants From Coal-Fired and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units*, 77 Fed. Reg. 9304 (Feb. 16, 2012) (“MATS Rule”). Specifically, Hawaiian Electric petitioned EPA to reconsider the final standards applicable to non-continental oil-fired units and, in particular, the filterable particulate matter standard (“PM standard”) applicable to that subcategory of units. EPA has failed to either grant or deny the Petition in the considerable length of time that has passed since Hawaiian Electric submitted the Petition.

Section 307(d)(7)(B) of the CAA, 42 U.S.C. § 7607(d)(7)(B), provides for EPA’s reconsideration of a CAA rule upon objection by a petitioner. EPA *must* grant reconsideration when the petitioner:

[c]an demonstrate to the Administrator that it was impracticable to raise [an] objection [during the period for public comment] or if the grounds for such objection arose after the period for public comment . . . and if such objection is of central relevance to the outcome of the rule.

Section 307(d)(7)(B), 42 U.S.C. §7607(d)(7)(B). In such a situation, reconsideration is mandatory as the CAA commands that EPA “*shall* convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed.” *Id.* (emphasis added). The reconsideration provision of section 307(d)(7)(B) is applicable to the MATS rulemaking and this is expressly stated in the MATS Rule. *See* 77 Fed. Reg. at 9305.

The grounds for Hawaiian Electric’s objection only arose at EPA’s issuance of the final MATS Rule, when the Agency adopted a 30-day rolling average limit for filterable PM of 0.03 lb/MMBtu for the non-continental oil-fired unit subcategory. This limit does not reflect the actual performance of the relevant units. Hawaiian Electric’s Petition was the first opportunity to identify and formally present to EPA objections to the data and methodological flaws associated with the final PM standard for non-continental oil-fired units. Thus, EPA is required to reconsider the MATS Rule pursuant to section 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B). Failure to do so gives rise to a civil action under section 304(a)(2), 42 U.S.C. § 7604(a)(2).

The Administrative Procedure Act (“APA”) requires EPA to conclude matters raised in petitions within a reasonable time. Specifically, the APA provides that “within a reasonable time, each agency shall proceed to conclude a matter presented to it.” 5 U.S.C. § 555(b). Furthermore, the CAA explicitly contemplates that the Administrator will act within a reasonable time as demonstrated in section 304(a), 42 U.S.C. § 7604(a), which provides that “district courts of the United States shall have jurisdiction to compel . . . agency action unreasonably delayed.”<sup>1</sup>

Subsequent to submitting a timely Petition, Hawaiian Electric has made numerous requests for EPA to act on that Petition, yet EPA has since failed to take any action. EPA’s failure to respond to the Petition in over two years and ten months is unreasonable delay under both the APA and the Clean Air Act. The D.C. Circuit has made plain that “a reasonable time for agency action is typically counted in weeks or months, not years.” *In re American Rivers*, 372 F.3d 413, 419 (D.C. Cir. 2004); *see also Telecommunications Research & Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) (identifying a six-factor test for unreasonable delay including a “rule of reason”).

---

<sup>1</sup> Similarly, section 706(1) of the APA requires the “reviewing court” to “compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1).



An expeditious timeframe for EPA action is especially merited here given that the compliance deadline for the MATS Rule is fast approaching. Hawaiian Electric's best option for complying with the MATS Rule final standards applicable to non-continental oil-fired units is to procure and use substantial amounts of a special blend of diesel and low-sulfur fuel oil in its covered units at an added cost to its customers of approximately \$100 million per year.<sup>2</sup> Hawaiian Electric will need to begin the process of procuring this compliant fuel by no later than July 1, 2015 to ensure it has the ability to comply with the MATS requirements by April 16, 2016, the final compliance date.

EPA's delay in responding to Hawaiian Electric's Petition is unreasonable. Accordingly, this letter constitutes a 180-day notice pursuant to CAA section 304(a), 42 U.S.C. § 7604(a), and 40 C.F.R. § 54.3 of Hawaiian Electric's intent to sue EPA for unreasonably delaying action on its Petition for Reconsideration.

As required by 40 C.F.R. § 54.3, the full name and address of the party providing this notice, through its undersigned counsel, is Hawaiian Electric Company, Inc., P.O. Box 2750, Honolulu, HI 96840-0001.

If you would like to discuss any portion of this notice or a proposal for the resolution of the issues presented in this notice, please contact the undersigned counsel at the address and telephone number set forth above in the letterhead.

Sincerely,

A handwritten signature in blue ink, appearing to read "B-S7-f", is written over a horizontal line.

Tom Roberts  
Stephen Fotis  
Britt Fleming  
VAN NESS FELDMAN, LLP  
*Counsel to Hawaiian Electric Company, Inc.*

---

<sup>2</sup> This additional cost equates to approximately a \$9.50 increase in the average residential customer's monthly bill for 600 kilowatt hours of electricity.