



VIA CERTIFIED MAIL – RETURN RECEIPT REQUESTED AND EMAIL

October 13, 2016

Ms. Gina McCarthy
Administrator
Environmental Protection Agency
1101A EPA Headquarters
William Jefferson Clinton Building
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460
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RE: Notice of Citizen Suit Concerning Clean Air Act Deadlines Related to Commercial and Industrial Solid Waste Incinerators and Other Categories of Solid Waste Incinerators

Dear Administrator McCarthy,

This is a notice of three “failure[s] of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator,” within the meaning of the Clean Air Act, 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 organization giving this notice is Sierra Club, which is located at 2101 Webster Street, Suite 1300, Oakland, CA 94612, (415) 977-5500.

Background. Section 129 of the Clean Air Act directs EPA to promulgate standards for units incinerating solid waste. These standards must be reviewed every five years following promulgation. Specifically, § 129(a)(5) of the Clean Air Act provides that:

Not later than 5 years following the initial promulgation of any performance standards and other requirements under this section and section 7411 of this title applicable to a category of solid waste incineration units, and at 5 year intervals thereafter, the Administrator shall review, and in accordance with this section and section 7411 of this title, revise such standards and requirements.

42 U.S.C. § 7429(a)(5).

Furthermore, EPA has a duty to ensure that the standards it publishes are implemented. When EPA promulgates standards under § 129, all states with units covered by those standards have one year from the standards’ promulgation date to submit a state implementation plan to

EPA. *Id.* § 7429(b)(2). EPA allows states with no covered units to submit negative declarations by the same date to excuse themselves from this requirement. 40 C.F.R. § 60.2982. If any state fails to fulfill this obligation, § 129(b)(3) of the Clean Air Act states that “[t]he Administrator shall develop, implement and enforce a plan for existing solid waste incineration units within any category located in any State which has not submitted an approvable plan under this subsection with respect to units in such category within 2 years after the date on which the Administrator promulgated the relevant guidelines.” 42 U.S.C. § 7429(b)(3). That plan “shall assure that each unit subject to the plan is in compliance with all provisions of the guidelines not later than 5 years after the date the relevant guidelines are promulgated.” *Id.*

As Administrator of EPA, you have failed to fulfill these duties. With respect to EPA’s standards for commercial and industrial solid waste incineration units (“CISWI”), you have failed to promulgate a federal implementation plan by the required deadline. With respect to other categories of solid waste incinerators (“OSWI”), you have failed both to timely promulgate a federal implementation plan and to timely review the standards you have set.

1. Failure to Promulgate a Federal Implementation Plan for § 129 Standards Applicable to Commercial and Industrial Solid Waste Incinerators. EPA promulgated standards for commercial and industrial solid waste incinerators on May 18, 2011. 76 Fed. Reg. 28,662. On February 7, 2013, EPA amended these standards, following reconsideration of several issues, and updated the effective dates. 78 Fed. Reg. 9112. Since that time, only two states have revised their implementation plans or resubmitted a negative declaration, as required by law. All other states remain delinquent. Although more than two years have passed since these standards were promulgated, you have failed to develop, implement, and enforce a federal implementation plan as required by Clean Air Act § 129(b)(3).

2. Failure to Promulgate a Federal Implementation Plan for § 129 Standards Applicable to Other Categories of Solid Waste Incinerators. EPA promulgated standards for other categories of solid waste incineration units on December 16, 2005. 70 Fed. Reg. 74,870. To date, only fourteen states have responded to this action by either submitting a state implementation plan or a negative declaration. All other states are delinquent in this duty. According to an inventory of OSWI units conducted by EPA during the OSWI rulemaking and republished in 2006, at least 24 additional states may have OSWI units. *See Memorandum from Jason Huckaby, Eastern Research Group, Inc. to Mary Johnson, EPA/Combustion Group, EPA-HQ-OAR-2003-0156-0093* (Oct. 6, 2005); *Memorandum from Martha Smith, EPA Natural Resources and Commerce Group to Docket EPA-HQ-OAR-2006-0364, EPA-HQ-OAR-2006-0364-0002* (Aug. 8, 2006). Although more than two years have passed since these standards were promulgated, you have failed to develop, implement, and enforce a federal implementation plan as required by Clean Air Act § 129(b)(3).

3. Failure to Review and Revise § 129 Standards for Other Categories of Solid Waste Incinerators. You have also failed to timely review, and in accordance with §§ 129 and 111 of the Clean Air Act, revise the standards and requirements applicable to OSWI units. EPA promulgated its most recent OSWI standards on December 16, 2005. 70 Fed. Reg. 74,870. Under Clean Air Act §129(a)(5) you have a mandatory duty to review and revise these standards no

later than 5 years after this initial promulgation – that is, no later than December 16, 2010. As Administrator, you have failed to fulfill this mandatory duty.

60-Day Notice. Under § 304 of the Clean Air Act, Sierra Club may commence a citizen suit to compel you to perform any or all of the above duties at any time beginning sixty days from the postmark date of this letter, which is October 13, 2016. *See* 40 C.F.R. § 54.2(d).

Contact Information. We are acting as attorneys for Sierra Club in this matter. Please contact us at your earliest convenience regarding this matter. Please address any communications to us at the address and telephone number set forth below.

Sincerely,



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cc: Avi S. Garbow, General Counsel, Office of the General Counsel, EPA
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Steve Page, Director, Office of Air Quality Planning and Standards, EPA