

**ENVIRONMENTAL INTEGRITY PROJECT—CLEAN AIR COUNCIL
AIR ALLIANCE HOUSTON—CHESAPEAKE CLIMATE ACTION NETWORK
EARTHWORKS—ENVIRONMENT AMERICA—ENVIRONMENT TEXAS
HOOSIER ENVIRONMENTAL COUNCIL—PENNVIRONMENT
TEXAS CAMPAIGN FOR THE ENVIRONMENT**

March 2, 2021

Jane Nishida, Acting Administrator
U.S. Environmental Protection Agency
Office of the Administrator, Mail Code 1101A
1200 Pennsylvania Avenue N.W.
Washington, D.C. 20460

Via Certified Mail and Electronic Mail (nishida.jane@epa.gov)

**Re: Supplemental Notice of Intent to Sue the Environmental Protection Agency
for Failure to Perform a Nondiscretionary Duty under the Clean Air Act**

Dear Acting Administrator Nishida,

We write on behalf of the Environmental Integrity Project, Clean Air Council, Air Alliance Houston, Chesapeake Climate Action Network, Earthworks, Environment America, Environment Texas, Hoosier Environmental Council, PennEnvironment, and Texas Campaign for the Environment (“Parties”) to provide supplemental notice of the Parties’ intent to sue the U.S. Environmental Protection Agency (EPA) for failure to review the general control device requirements for flares (“NSPS General Flare Requirements”) under the New Source Performance Standards (NSPS), 40 C.F.R. § 60.18(b)–(f), or, in the alternative, the overdue source categories identified in Table 1 below that incorporate the NSPS General Flare Requirements at least every eight years, as required by section 111(b) of the Clean Air Act. *See* 42 U.S.C. § 7411(b)(1)(B), (h)(1), (h)(5).

On Parties’ information and belief, EPA has not conducted the statutorily mandated review of the NSPS General Flare Requirements since EPA’s initial promulgation in 1986. At the very least, EPA has not conducted this review within the last eight years. In addition to EPA’s failure to conduct the statutorily mandated review of the NSPS General Flare Requirements themselves, there are presently at least nine categories of stationary sources within ten subparts under 40 C.F.R. Part 60 that reference and incorporate the NSPS General Flare Requirements, yet also are overdue for EPA’s statutorily mandated review.

In providing this supplemental notice, Parties cite and incorporate by reference the notice that Parties previously provided to EPA in a letter dated June 11, 2020 (“June 2020 Notice Letter”).¹ While Parties believe that previous letter adequately put EPA on notice as to the ten NSPS subparts under 40 C.F.R. Part 60 that are also overdue for EPA’s review, Parties hereby

¹ The Parties additionally cite and incorporate by reference all relevant regulatory background and supporting facts contained within the Parties’ subsequent notice letter dated August 17, 2020, regarding the NESHAP General Flare Requirements (“August 2020 Notice Letter”).

provide this supplemental notice out of an abundance of caution in order to make these violations clear.

Section 304(a)(2) of the Clean Air Act authorizes citizen suits “against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.” 42 U.S.C. § 7604(a)(2). We hereby provide notice of the Parties’ intent to file suit against EPA and you in your official capacity as Acting Administrator of the EPA for failure to perform the nondiscretionary duties under the Clean Air Act. *See* 42 U.S.C. § 7604(b). Parties may commence this suit any time at least sixty days after the postmark date of this letter. *See* 40 C.F.R. § 54.2(d).

I. LEGAL REQUIREMENTS AND REGULATORY BACKGROUND

Section 111(b) of the Clean Air Act requires the Administrator to promulgate and to periodically review and revise the NSPS for each category of stationary source at least every eight years. *See* 42 U.S.C. § 7411(b). Specifically:

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)(B).

Alternatively, section 111(h) allows the Administrator, where he has determined “it is not feasible to prescribe or enforce a standard of performance,” to “instead promulgate a design, equipment, work practice, or operational standard, or combination thereof, which reflects the best technological system of continuous emission reduction” *See* 42 U.S.C. § 7411(h)(1). Any such “design, equipment, work practice, or operational standard, or any combination thereof . . . shall be treated as a standard of performance,” including with respect to the eight-year review and revision deadlines of subsection (b). *See* 42 U.S.C. § 7411(h)(5).

As provided in Parties’ notice letter dated June 11, 2020, EPA has not conducted the statutorily mandated review of the NSPS General Flare Requirements under section 111(b)(1)(B), nor has the Administrator determined 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)(B); *see* June 2020 Notice Letter at 2-5.

In addition to this failure to conduct the statutorily mandated review of the NSPS General Flare Requirements themselves, there are presently at least nine categories of stationary sources within ten subparts under 40 C.F.R. Part 60 that reference and incorporate the NSPS General Flare Requirements, yet also are overdue for EPA’s statutorily mandated review.

Table 1: Overdue Source Categories Incorporating NSPS General Flare Requirements

Source Category	40 C.F.R. Part 60 Subpart	Last Revised	Citation
Volatile organic liquid storage vessels	Kb	Oct. 2003	EPA, Standards of Performance for Volatile Organic Liquid Storage Vessels (Including Petroleum Liquid Storage Vessels) for Which Construction, Reconstruction, or Modification Commenced After July 23, 1984, 68 Fed. Reg. 59,328 (Oct. 15, 2003); EPA, Volatile Organic Liquid Storage Vessels - Including Petroleum Storage Vessels: New Source Performance Standards (NSPS), https://www.epa.gov/stationary-sources-air-pollution/volatile-organic-liquid-storage-vessels-including-petroleum-storage (last visited March 1, 2021)
SOCMI Equipment Leaks	VV, VVa	Nov. 2007	EPA, Standards of Performance for Equipment Leaks of VOC in the Synthetic Organic Chemicals Manufacturing Industry; Standards of Performance for Equipment Leaks of VOC in Petroleum Refineries, 72 Fed. Reg. 64,860 (Nov. 16, 2007)
Bulk Gasoline Terminals	XX	Dec. 2003	EPA, Standards of Performance for Bulk Gasoline Terminals and National Emission Standards for Gasoline Distribution Facilities (Bulk Gasoline Terminals and Pipeline Breakout Stations), 68 Fed. Reg. 70,960 (Dec. 19, 2003); EPA, Bulk Gasoline Terminals: New Source Performance Standards (NSPS), https://www.epa.gov/stationary-sources-air-pollution/bulk-gasoline-terminals-new-source-performance-standards-nsps (last visited March 1, 2021)
Polymer manufacturing industry	DDD	Dec. 2000	EPA, Consolidated Federal Air Rule (CAR): Synthetic Organic Chemical Manufacturing Industry, 65 Fed. Reg. 78,267 (Dec. 14, 2000); EPA, Polymer Manufacturing Industry: Standards of Performance for Volatile Organic Compound (VOC) Emissions, https://www.epa.gov/stationary-sources-air-pollution/polymer-manufacturing-industry-standards-performance-volatile (last visited March 1, 2021)

SOCMI air oxidation unit processes	III	Dec. 2000	EPA, Consolidated Federal Air Rule (CAR): Synthetic Organic Chemical Manufacturing Industry, 65 Fed. Reg. 78,267 (Dec. 14, 2000)
Onshore natural gas processing plant equipment leaks	KKK	Aug. 2012	EPA, Oil and Natural Gas Sector: New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants Reviews, 77 Fed. Reg. 49,489 (Aug. 16, 2012); EPA, Equipment Leaks of Volatile Organic Compounds From Onshore Natural Gas Processing Plants for Which Construction, Reconstruction, or Modification Commenced After January 20, 1984, and on or Before August 23, 2011: New Source Performance Standards (NSPS), https://www.epa.gov/stationary-sources-air-pollution/equipment-leaks-volatile-organic-compounds-onshore-natural-gas (last visited March 1, 2021)
SOCMI distillation operations	NNN	Dec. 2000	EPA, Consolidated Federal Air Rule (CAR): Synthetic Organic Chemical Manufacturing Industry, 65 Fed. Reg. 78,267 (Dec. 14, 2000)
Petroleum refinery wastewater systems	QQQ	Dec. 2000	EPA, Volatile Organic Compounds (VOC) Emissions from Petroleum Refinery Wastewater Systems: New Source Performance Standards (NSPS), https://www.epa.gov/stationary-sources-air-pollution/volatile-organic-compounds-voc-emissions-petroleum-refinery (last visited March 1, 2021)
SOCMI reactor processes	RRR	Dec. 2000	EPA, Consolidated Federal Air Rule (CAR): Synthetic Organic Chemical Manufacturing Industry, 65 Fed. Reg. 78,267 (Dec. 14, 2000)

For each of these ten subparts incorporating the NSPS General Flare Requirements, EPA has not conducted the statutorily mandated review under section 111(b)(1)(B) within the last eight years, nor has the Administrator determined 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)(B).

As provided in greater detail in the June 2020 Notice Letter and August 2020 Notice Letter, there is an urgent need to update the NSPS General Flare Standards themselves and these ten subparts that incorporate them, as EPA itself has determined on multiple recent occasions that the standards are outdated for specific industry sectors, that they lead to the operation of flares with poor destruction efficiency, and that they require revision. *See* June 2020 Notice Letter at 5-8; August 2020 Notice Letter at 7-9. While review and revision of the NSPS General Flare Standards is the best and most efficient way to address this need across the board, there is

also a legal duty and substantive need for EPA to review and revise the ten subparts that continue to incorporate these outdated flare standards.

II. PARTIES GIVING NOTICE

The names, addresses, and telephone numbers of Parties giving notice are:

Environmental Integrity Project 1000 Vermont Ave. NW Suite 1100 Washington, DC 20005 (202) 296-8800	Clean Air Council 135 S. 19th Street Suite 300 Philadelphia, PA 19103 (215) 567-4004	Air Alliance Houston 2520 Caroline St. Suite 100 Houston, TX 77004 (713) 528-3779
Chesapeake Climate Action Network 6930 Carroll Ave., Suite 720 Takoma Park, MD 20912 (240) 396-1981	Earthworks 1612 K St. NW Suite 904 Washington, DC 20006 (202) 887-1872	Environment America 1543 Wazee St. Suite 410 Denver, CO 80202 (303) 801-0581
Environment America d/b/a Environment Texas 200 East 30th Street Austin, TX 78705 (512) 479-0388	Hoosier Environmental Council 3951 N. Meridian St. Suite 100 Indianapolis, IN 46208 (317) 685-8800	PennEnvironment 1429 Walnut Street Suite 1100 Philadelphia, PA 19102 (215) 732-5897
	Texas Campaign for the Environment 105 W. Riverside Dr. Suite 120 Austin, TX 78704 (512) 326-5655	

Adam Kron is the counsel representing the Environmental Integrity Project, Air Alliance Houston, Chesapeake Climate Action Network, Earthworks, Environment America, Environment Texas, Hoosier Environmental Council, PennEnvironment, and Texas Campaign for the Environment, with contact information provided in the signature block below. Joseph Otis Minott, Alexander G. Bomstein, and Kathryn L. Urbanowicz are the attorneys representing Clean Air Council, with contact information provided in the signature block below.

III. CONCLUSION

Section 111(b) of the Clean Air Act requires the Administrator to promulgate and to periodically review and revise the NSPS at least every eight years. *See* 42 U.S.C. § 7411(b)(1)(B). As provided with respect to the ten subparts above, the Administrator has made no such review within the last eight years, as required by section 111(b) of the Clean Air Act. Furthermore, the Administrator has not made the alternative determination that “such review is

not appropriate in light of readily available information on the efficacy of such standard.” See 42 U.S.C. § 7411(b)(1)(B). For these reasons, EPA has failed to perform a nondiscretionary act or duty. See 42 U.S.C. § 7604(a).

Parties may commence a citizen suit to compel EPA to perform any or all of the above acts or duties at any time beginning sixty days from the postmark date of this letter, which is June 11, 2020. See 42 U.S.C. § 7604(a); 40 C.F.R. § 54.2(d). If EPA fails to cure its noncompliance with these statutory mandates, Parties intend to file suit in the U.S. District Court for the District of Columbia, seeking declaratory relief, injunctive relief, and litigation costs, as appropriate.

If you have any questions regarding the allegations in this notice or believe any of the foregoing information may be in error, please do not hesitate to contact us using the contact information listed below. Parties would also welcome an opportunity to discuss a resolution of this matter prior to expiration of the notice period if you are prepared to remedy the violations discussed above.

Thank you for your prompt attention to this matter.

Respectfully submitted,



Adam Kron
Senior Attorney
Environmental Integrity Project
1000 Vermont Avenue NW, Suite 1100
Washington, DC 20005
(202) 263-4451
akron@environmentalintegrity.org

*Attorney for Environmental Integrity Project,
Air Alliance Houston, Chesapeake Climate
Action Network, Earthworks, Environment
America, Environment Texas, Hoosier
Environmental Council, PennEnvironment,
and Texas Campaign for the Environment*



Joseph Otis Minott
Executive Director and Chief Counsel
Alexander G. Bomstein
Senior Litigation Attorney
Kathryn L. Urbanowicz
Staff Attorney
135 S. 19th Street, Suite 300
Philadelphia, PA 19103
(215) 567-4004
joe_minott@cleanair.org
abomstein@cleanair.org
kurbanowicz@cleanair.org

Attorneys for Clean Air Council