

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

July 15, 2021

Michael Regan, 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 (regan.michael@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 Administrator Regan,

We write on behalf of 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 (the “Parties”) to provide supplemental notice of the Parties’ intent to sue the U.S. Environmental Protection Agency (“EPA”) for failure to review—at least every eight years, as required by § 112(d)(6) of the Clean Air Act—the general control device requirements for flares (“NESHAP General Flare Requirements”) under the National Emission Standards for Hazardous Air Pollutants (“NESHAP”), 40 C.F.R. § 63.11(b), or, in the alternative, the overdue source categories identified in Table 1 below that incorporate the NESHAP General Flare Requirements. *See* 42 U.S.C. §7412(d)(6).

In providing this supplemental notice, the Parties cite and incorporate by reference the notice that the Parties previously provided to EPA in a letter dated August 17, 2020 (“August 2020 Notice Letter”).¹ As the Parties explained in their August 2020 Notice Letter, on the Parties’ information and belief, EPA has not conducted the statutorily mandated review of the NESHAP General Flare Requirements since EPA’s initial promulgation of those requirements in 1994. 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 NESHAP General Flare Requirements themselves, there are presently at least ten categories of stationary sources within 11 subparts under 40 C.F.R. Part 63 that reference and incorporate the NESHAP General Flare Requirements, yet also are overdue for EPA’s statutorily mandated review. The

¹ The Parties additionally cite and incorporate by reference all relevant regulatory background and supporting facts contained within the Parties’ notice letter dated June 11, 2020 and supplemental notice letter dated March 2, 2021, regarding the general control device requirements for flares under the New Source Performance Standards (“June 2020 Notice Letter” and “March 2021 Supplemental Notice Letter,” respectively).

Parties' August 2020 Notice Letter listed five categories of stationary sources within six subparts under Part 63 that are overdue for review, and this supplemental notice letter lists five additional categories that are overdue for EPA's statutorily mandated review.

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 Administrator of the EPA for failure to perform the nondiscretionary duties under the Clean Air Act. *See* 42 U.S.C. § 7604(b). The Parties may commence this suit any time at least 60 days after the postmark date of this letter. *See* 40 C.F.R. § 54.2(d).

The Parties are presently plaintiffs in the case captioned *Environmental Integrity Project et al. v. Regan*, Case No. 1:20-cv-03119-TNM (D.D.C.), which seeks to require EPA to review the NESHAP General Flare Requirements and the general control device requirements for flares under the New Source Performance Standards ("NSPS General Flare Requirements") or, in the alternative, the overdue source categories that incorporate the NESHAP and NSPS General Flare Requirements. In lieu of filing a new lawsuit 60 days after the postmark date of this letter, the Parties may, under Federal Rule of Civil Procedure 15(a)(2), seek to amend the complaint in the above-captioned lawsuit to list the additional five overdue categories that were not listed in the August 2020 Notice Letter.²

I. LEGAL REQUIREMENTS AND REGULATORY BACKGROUND

Section 112(d)(6) of the Clean Air Act requires the Administrator to promulgate and to periodically review and revise all NESHAP emission standards at least every eight years. Specifically:

The Administrator shall review, and revise as necessary (taking into account developments in practices, processes, and control technologies), emission standards promulgated under this section no less often than every 8 years.

42 U.S.C. § 7412(d)(6).

As described in the August 2020 Notice Letter, EPA has not conducted the statutorily mandated review of the NESHAP General Flare Requirements under § 112(d)(6). *See* August 2020 Notice Letter at 3-4.

In addition to this failure to conduct the statutorily mandated review of the NESHAP General Flare Requirements themselves, there are presently at least ten categories of stationary sources within 11 subparts under 40 C.F.R. Part 63 that reference and incorporate the NESHAP

² Federal Rule of Civil Procedure 15(a)(2) provides that a party may amend its pleading with the opposing party's written consent or the court's leave—and that the court "should freely give leave when justice so requires."

General Flare Requirements, yet also are overdue for EPA’s statutorily mandated review. These overdue categories are listed below in Table 1.³

Table 1: Overdue Source Categories Incorporating NESHAP General Flare Requirements

Source Category	40 C.F.R. Part 63 Subpart	Last Revised	Citation
Hazardous Organics NESHAP	G	Dec. 2006	71 Fed. Reg. 76,603 (Dec. 21, 2006); EPA, Synthetic Organic Chemical Manufacturing Industry: Organic National Emission Standards for Hazardous Air Pollutants (NESHAP) - 40 CFR 63 Subparts F,G,H,I, https://www.epa.gov/stationary-sources-air-pollution/synthetic-organic-chemical-manufacturing-industry-organic-national (last visited July 6, 2021).
Gasoline Distribution	R, BBBB	April 2006 (R), Jan. 2011 (BBBB)	EPA, Risk and Technology Review of the National Emissions Standards for Hazardous Air Pollutants, https://www.epa.gov/stationary-sources-air-pollution/risk-and-technology-review-national-emissions-standards-hazardous (last visited July 6, 2021); EPA, Gasoline Distribution MACT and GACT: National Emission Standards for Hazardous Air Pollutants (NESHAP) - 40 CFR 63 Subparts R, BBBB & CCCCC, https://www.epa.gov/stationary-sources-air-pollution/gasoline-distribution-mact-and-gact-national-emission-standards (last visited July 6, 2021).
Polymers and Resins I	U	April 2011 (Epichlorohydrin Elastomers, Nitrile Butadiene Rubber, Polybutadiene Rubber, Styrene Butadiene Rubber and	76 Fed. Reg. 22,566 (April 21, 2011); 73 Fed. Reg. 76,220 (Dec. 16, 2008); EPA, Group I Polymers and Resins: National Emission Standards for Hazardous Air Pollutants (NESHAP), https://www.epa.gov/stationary-sources-air-pollution/group-i-polymers-and-resins-national-emission-standards-hazardous (last visited July 6, 2021).

³ The August 2020 Notice Letter also listed Subparts G, R, BBBB, U, HH, and GGG. The present notice letter lists Subparts W, Y, YY, HHH, and BBBB for the first time.

Source Category	40 C.F.R. Part 63 Subpart	Last Revised	Citation
		Latex); Dec. 2008 (Polysulfide Rubber, Ethylene Propylene Rubber, Butyl Rubber, Neoprene)	
Epoxy Resins Production and Non-Nylon Polyamides Production (Polymers and Resins II)	W	Dec. 2008	73 Fed. Reg. 76,220 (Dec. 16, 2008); EPA, Epoxy Resins Production and Non-Nylon Polyamides: National Emission Standards for Hazardous Air Pollutants (NESHAP), https://www.epa.gov/stationary-sources-air-pollution/epoxy-resins-production-and-non-nylon-polyamides-national-emission (last visited July 6, 2021).
Marine Tank Vessel Loading Operations	Y	April 2011	76 Fed. Reg. 22,566 (April 21, 2011); EPA, Marine Vessel Loading Operations: National Emission Standards for Hazardous Air Pollutants (NESHAP), https://www.epa.gov/stationary-sources-air-pollution/marine-vessel-loading-operations-national-emission-standards (last visited July 6, 2021).
Oil and Natural Gas Production	HH	Aug. 2012	77 Fed. Reg. 49,490 (Aug. 16, 2012); EPA, Oil and Natural Gas Production Facilities: National Emission Standards for Hazardous Air Pollutants (NESHAP), https://www.epa.gov/stationary-sources-air-pollution/oil-and-natural-gas-production-facilities-national-emission (last visited July 6, 2021).
Acetal Resins (part of Generic Maximum Achievable Control	YY ⁴	Dec. 2008	73 Fed. Reg. 76,220 (Dec. 16, 2008); EPA, Acetal Resins, Acrylic & Modacrylic Fibers, Carbon Black, Hydrogen Fluoride, Polycarbonate, Ethylene, Spandex & Cyanide Chemical Manufacturing:

⁴ Table 1 to 40 C.F.R. § 63.1103(a) from Subpart YY requires flares to meet the requirements of 40 C.F.R. Part 63, Subpart SS. Subpart SS, at 40 C.F.R. § 63.987(a), incorporates the NESHAP General Flare Requirements from § 63.11(b).

Source Category	40 C.F.R. Part 63 Subpart	Last Revised	Citation
Technology Standards)			NESHAP for Source Categories, Generic Maximum Achievable Control Technology Standards (40 CFR 63, Subpart YY), https://www.epa.gov/stationary-sources-air-pollution/acetal-resins-acrylic-modacrylic-fibers-carbon-black-hydrogen (last visited July 6, 2021).
Pharmaceuticals Production	GGG	April 2011	76 Fed. Reg. 22,566 (April 21, 2011); EPA, Pharmaceuticals Production Industry: National Emission Standards for Hazardous Air Pollutants (NESHAP), https://www.epa.gov/stationary-sources-air-pollution/pharmaceuticals-production-industry-national-emission-standards (last visited July 6, 2021).
Natural Gas Transmission and Storage Facilities	HHH	Aug. 2012	77 Fed. Reg. 49,490 (Aug. 16, 2012); EPA, Natural Gas Transmission and Storage Facilities: National Emission Standards for Hazardous Air Pollutants (NESHAP), https://www.epa.gov/stationary-sources-air-pollution/natural-gas-transmission-and-storage-facilities-national-emission (last visited July 6, 2021).
Semiconductor manufacturing	BBBBB	July 2008	73 Fed. Reg. 42,529 (July 22, 2008).

For each of these 11 subparts incorporating the NESHAP General Flare Requirements, EPA has not conducted the statutorily mandated review under section 112(d)(6) within the last eight years.

As provided in greater detail in the June 2020 Notice Letter and August 2020 Notice Letter, there is an urgent need to update the NESHAP General Flare Standards themselves and these 11 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 NESHAP 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 11 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	

Patton Dycus and Eric Schaeffer are the counsel representing 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 112(d)(6) of the Clean Air Act requires the Administrator to promulgate and to periodically review and revise the NESHAP at least every eight years. 42 U.S.C. § 7412(d)(6). As discussed above with respect to the NESHAP General Flare Requirements and the 11 subparts listed above, the Administrator has made no such review within the last eight years, as required by § 112(d)(6) of the Act. For these reasons, EPA has failed to perform a nondiscretionary act or duty. *See* 42 U.S.C. § 7604(a).

The Parties may commence a citizen suit to compel EPA to perform any or all of the above acts or duties at any time beginning 60 days from the postmark date of this letter, which is September 13, 2021. *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, the Parties may, as discussed above, seek to amend the complaint in *Environmental Integrity Project et al. v. Regan*, Case No. 1:20-cv-03119-TNM (D.D.C.), to add allegations regarding the five overdue categories not listed in the August 2020 Notice Letter. The Parties will seek 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. The 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,



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