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EPAExecSec <EPAExecSec@epa.gov>

FW: Notice of Intent to Bring Citizen Suit Concerning Clean Air Act Deadlines for Chemical Manufacturing Area Sources

To: "CMS.OEX" <cms.oex@epa.gov>

From: Gonzalo E. Rodriguez <grodriguez@earthjustice.org>

Sent: Friday, March 18, 2022 3:22 PM

To: Regan, Michael <Regan.Michael@epa.gov>

Cc: akron@earthjustice.org; vhuggett@earthjustice.org

Subject: Notice of Intent to Bring Citizen Suit Concerning Clean Air Act Deadlines for Chemical Manufacturing Area Sources

Dear Administrator Regan:

Please find attached a notice of "a failure of the Administrator to perform any act or duty under [the Clean Air Act] which is not discretionary." Clean Air Act. § 304, 42 U.S.C. § 7604(a)(2). As further specified in the attached notice, the following organizations intend to sue and compel U.S. Environmental Protection Agency action to complete the overdue Clean Air Act rulemaking for Chemical Manufacturing Area Sources ("CMAS") required under section 112(d)(6) of the Clean Air Act. 42 U.S.C. § 7412(d)(6):

California Communities Against Toxics, Clean Air Council, Clean Power Lake County, Delaware Concerned Residents for Environmental Justice, Greater-Birmingham Alliance to Stop Pollution, Kentucky Resources Council, New Castle Prevention Coalition, United Congregations of Metro-East, and Sierra Club.

This notice is provided to you as Administrator of the U.S. Environmental Protection Agency, in your official capacity, pursuant to section 304(b)(2) of the Clean Air Act, 42 U.S.C. § 7604(b)(2), and 40 C.F.R. Part 54 as a prerequisite to bringing a civil action. We have also sent you a copy of the petition via USPS First Class Mail.

If you have any questions regarding this notice, please do not hesitate to contact me.

Thank you,

Gonzalo E. Rodriguez

(he/him/his)

Associate Attorney

Earthjustice

1001 G St., NW, Ste. 1000

Washington, DC 20001

P: 202.797.5235

earthjustice.org



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March 18, 2022

Mr. Michael Regan, Administrator
U.S. Environmental Protection Agency
Office of the Administrator: mail code 1101A
1200 Pennsylvania Ave, NW
Washington, DC 20460
regan.michael@epa.gov

Via Email and Certified Mail

Re: 60-Day Notice of Intent to Bring Citizen Suit Concerning Clean Air Act Deadlines for Chemical Manufacturing Area Sources

Dear Administrator Regan:

This is a notice of “a failure of the Administrator to perform any act or duty under [the Clean Air Act] which is not discretionary with the Administrator.” 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 section 304(b)(2) of the Clean Air Act, 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 (PO Box 845, Rosamond, CA 93560); Clean Air Council (135 S. 19th Street, Suite 300, Philadelphia, PA 19103); Clean Power Lake County (1245 St. John Avenue, Highland Park, IL 60035); Delaware Concerned Residents for Environmental Justice (719 N. Shipley Street, Wilmington, DE 19801); Greater-Birmingham Alliance to Stop Pollution (2320 Highland Avenue S, Suite 270, Birmingham, AL 35205); Kentucky Resources Council (PO Box 1070, Frankfort, KY 40602); New Castle Prevention Coalition (19 Lambston Lane, New Castle, DE 19720); United Congregations of Metro-East (13 Vieux Carre Drive, Suite 2, East St. Louis, IL 62203); and Sierra Club (2101 Webster Street, Suite 1300, Oakland, CA 94612).

As further specified below, these organizations intend to sue and compel EPA action to complete the overdue Clean Air Act rulemaking for Chemical Manufacturing Area Sources (“CMAS”) required under section 112(d)(6) of the Clean Air Act. 42 U.S.C. § 7412(d)(6). In conjunction with this rulemaking under 112(d)(6), EPA must also conduct a new residual risk review under section 112(f)(2) to address ethylene oxide emissions from CMAS sources. 42 U.S.C. § 7412(d)(6), (f)(2). This rulemaking is

necessary to ensure these sources are equipped with the most recent control technologies for reducing hazardous air pollution and to protect public health and the environment.

EPA is Overdue in Conducting a Technology Review and Rulemaking for the Chemical Manufacturing Area Source NESHAP

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 of the Clean Air Act] no less often than every eight years.” 42 U.S.C. § 7412(d)(6). More than eight years have passed since EPA promulgated National Emission Standards for Hazardous Air Pollutants (NESHAP) for the CMAS sector. 40 C.F.R. Part 63 Subpart VVVVVV; 77 Fed. Reg. 75,740 (Dec. 21, 2012). The EPA is therefore in violation of a nondiscretionary duty under the Clean Air Act.

EPA first issued NESHAP for CMAS facilities on October 16, 2009. EPA defined the sector as comprising area sources within nine chemical manufacturing industry categories: Agricultural Chemicals and Pesticides Manufacturing, Cyclic Crude and Intermediate Production, Industrial Inorganic Chemical Manufacturing, Industrial Organic Chemical Manufacturing, Inorganic Pigments Manufacturing, Miscellaneous Organic Chemical Manufacturing, Plastic Materials and Resins Manufacturing, Pharmaceutical Production, and Synthetic Rubber Manufacturing.¹

EPA sets emission standards for these sources collectively through a single CMAS NESHAP. *See* 40 C.F.R. Part 63 Subpart VVVVVV. These standards apply to the process units of facilities within these nine source categories that emit one or more of 15 specified urban air toxics. 40 C.F.R. Part 63 Subpart VVVVVV, Table 1. The CMAS NESHAP consists of management practices and generally available control technology (GACT) for certain process equipment. Because EPA last reviewed the CMAS NESHAP on December 21, 2012, EPA’s deadline to review and revise these standards was December 21, 2020. *See* 77 Fed. Reg. at 75,740; 42 U.S.C. § 7412(d)(6).

Chemical manufacturing facilities cause serious health impacts and threats to communities around the US, particularly communities of color and low-income communities. Even those chemical manufacturing plants classified as area sources carry a significant risk of harm to surrounding communities, since some of the pollutants they emit are highly dangerous even in low concentrations. As each day passes, the impact of

¹ *See* National Emission Standards for Hazardous Air Pollutants for Chemical Manufacturing Area Sources, 74 Fed. Reg. 56,008 (Oct. 29, 2009).

EPA's violation worsens and repeats it. More importantly, with each passing day of inaction, EPA allows the continuation of environmental injustices long suffered by communities located near chemical manufacturing facilities.

Revision of the Chemical Manufacturing Area Source NESHAP is Necessary

As discussed above, the Clean Air Act requires EPA to “review and revise as necessary” the NESHAP for Chemical Manufacturing Area Sources. 42 U.S.C. § 7412(d)(6). Here, revision is “necessary” to bring the CMAS NESHAP into compliance with the Clean Air Act for at least four reasons: (1) EPA must remove the unlawful affirmative defense for violations of emission standards during malfunction events; (2) EPA must revise the CMAS NESHAP to account for developments, including fenceline monitoring and flare operational and monitoring standards (3) EPA is required to develop Maximum Available Control Technology (MACT) for hexachlorobenzene emissions; and (4) EPA is required under the Clean Air Act to set limits in the CMAS NESHAP for ethylene oxide, toluene, and any other hazardous air pollutant emitted by these facilities that is not currently addressed by the CMAS NESHAP.

EPA Must Remove the Chemical Manufacturing Area Source NESHAP's Unlawful Affirmative Defense for Violations of Emission Standards During Malfunction Events

In the 2009 CMAS NESHAP, EPA included a provision creating an “affirmative defense to a claim for civil penalties for violations of [the NESHAP] that are caused by malfunction” 40 C.F.R. § 63.11501(e). Since then, however, the U.S. Court of Appeals for the D.C. Circuit has held that affirmative defense provisions such as this are unlawful under the Clean Air Act. *See Natural Res. Def. Council v. EPA*, 749 F.3d 1055, 1062 (D.C. Cir. 2014). Thus, EPA must revise the CMAS NESHAP and eliminate the affirmative defense provision under 40 C.F.R. § 63.11501(e).

EPA Must Revise the CMAS NESHAP to Account for Developments, including Fenceline Monitoring and Flare Operational and Monitoring Standards

EPA must also revise the CMAS NESHAP to account for recent developments, including fenceline monitoring and improvements to flare operational and monitoring standards, which EPA has adopted in air toxics standards for related source categories.

Under section 112(d)(6) of the Act, EPA must “review, and revise as necessary” emission standards promulgated for a source category every eight years. 42 U.S.C. § 7412(d)(6). This review specifically must include “taking into account developments in practices, processes, and pollution control technologies.” *Id.* As discussed above, the D.C. Circuit recently held that EPA is required to make all other changes “necessary” to

assure compliance with the Act, such as setting limits on uncontrolled or inadequately controlled emissions. *LEAN*, 955 F.3d at 1096.

Fenceline monitoring is plainly such a development that EPA must take into account in its revision of the CMAS NESHAP. In 2015, EPA determined there were developments in control technologies that required revisions to the petroleum refineries standards under section 112(d)(6), particularly to require monitoring and corrective action for benzene at the fenceline of source facilities to assure compliance with the standards and improve control of fugitive emissions.² Robust monitoring requirements, including fenceline air monitoring, are necessary to ensure continuous compliance with emissions standards, as required under the Clean Air Act. See 42 U.S.C. § 7412(d)(6); see also *id.* § 7602(k). In subsequent rulemakings for petrochemical source categories, EPA has recognized that fenceline monitoring is a “development” for petrochemical sources that have significant fugitive emissions that can be hard to measure and control.³

Recent improvements in flare monitoring and operational standards also constitute a development that EPA must take into account. Specifically, three recent NESHAP rules for similar and related source categories “all recognize ‘developments’ in flare operation, monitoring and emission reductions”: the 2020 Miscellaneous Organic Chemical Manufacturing (“MON”) rule, the 2020 ethylene production rule, and the 2015 refinery rule.⁴ By contrast, the CMAS NESHAP incorporates by reference EPA’s general flare standards under 40 C.F.R. § 63.11, which are also decades overdue for review. See 40 C.F.R. Part 63 Subpart VVVVVV, Table 9. On multiple occasions, EPA

² See Final Rule, Petroleum Refinery Sector Risk and Technology Review and New Source Performance Standards, 80 Fed. Reg. 75,178, 75,182-83 (Dec. 1, 2015) [hereinafter 2015 Refinery NESHAP]; Proposed Rule, Final Rule, Petroleum Refinery Sector Risk and Technology Review and New Source Performance Standards 79 Fed. Reg. 36,880, 36,920 (June 30, 2014).

³ See EPA, Clean Air Act Section 112(d)(6) Technology Review for Equipment Leaks Located in the Organic Liquids Distribution Source Category 5 (April 28, 2019) (EPA-HQ-OAR-2018-0074-0015), *available at* <https://www.regulations.gov/document/EPA-HQ-OAR-2018-0074-0015>; EPA, Ethylene Production Response to Comments at 192 (March 2020) (EPA-HQ-OAR-2017-0357-0074) (“evaluate[d] fenceline monitoring as a development”), *available at* <https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0357-0074>.

⁴ See NESHAP for MON Final Rule, 85 Fed. Reg. 49,084, 49,094 (Aug. 12, 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, 40,389 (July 6, 2020); 2015 Refinery NESHAP, 80 Fed. Reg. at 75,206.

itself has stated that the general flare standards under 40 C.F.R. § 63.11 are outdated, lead to the operation of flares with poor destruction efficiency, and require revision.⁵

In fact, it is likely that EPA already has the data it needs to apply these standards to CMAS facilities. In support of its adoption of the improved flare standards in the ethylene production NESHAP, EPA reviewed its analyses for the 2015 refinery rule and the 2012 Flare Study, concluding:

*Given that flares at petrochemical plants were also included in the flare dataset that formed the underlying basis of the new standards for refinery flares, we believe that it is appropriate to apply the finalized suite of operational and monitoring requirements for refinery flares to flares at ethylene production facilities as well.*⁶

For these reasons, it is necessary for EPA to revise the CMAS NESHAP to adopt fenceline monitoring requirements and improved flare standards.

The Clean Air Act Requires EPA to Promulgate MACT for Hexachlorobenzene

Hexachlorobenzene is a potent toxic that can cause serious neurological effects such as weakness, tremors, and convulsions; skin lesions; liver damage; and thyroid effects such as decreased thyroid hormones.⁷ Despite having been banned in the United States since the 1960s, hexachlorobenzene continues to be created as a by-product of chemical manufacturing. Congress's concern with the effects of this toxic pollutant is

⁵ See, e.g., EPA, *Enforcement Alert: EPA Enforcement Targets Flaring Efficiency Violations 1* (Aug. 2012), available at <https://www.epa.gov/sites/production/files/documents/flaringviolations.pdf>; EPA, *Parameters for Properly Designed and Operated Flares 1-1-1-2* (April 2012) [hereinafter 2012 Flare Study] (identifying four primary factors “that can reduce the destruction efficiency capabilities of the flare,” including over steaming, excess aeration, high winds, and flame lift-off), available at <https://www3.epa.gov/airtoxics/flare/2012flaretechreport.pdf>; *In the Matter of Premcor Refining Group, Inc., Valero Port Arthur Refinery, Jefferson County, Texas*, Order Responding to Petition Requesting Objection to the Issuance of Title V Operating Permit, Petition No. VI-2018-4, at 20 (Nov. 30, 2021), available at https://www.epa.gov/system/files/documents/2021-12/premcor-port-arthur-order_11-30-21.pdf.

⁶ See Memo 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 5 (March 2019) (emphasis added), available at <https://www.regulations.gov/document/EPA-HQ-OAR-2017-0357-0017>.

⁷ ATSDR, *Public Health Statement for Hexachlorobenzene 4* (Aug. 2015), available at <https://www.atsdr.cdc.gov/ToxProfiles/tp90-c1-b.pdf>.

such that the Clean Air Act limits EPA's discretion, requiring EPA to issue MACT standards for hexachlorobenzene regardless of whether the emitting facility is an area or major source. 42 U.S.C. § 7412(c)(6).

Despite this unambiguous command, EPA has yet to issue MACT for hexachlorobenzene emissions from chemical manufacturing area sources. Instead, and in violation of the Clean Air Act's unambiguous command, EPA has only issued GACT standards for CMAS emissions of hexachlorobenzene. National Emission Standards for Hazardous Air Pollutants for Chemical Manufacturing Area Sources, 74 Fed. Reg. 56,008 (Oct. 29, 2009). To protect communities and to comply with the Clean Air Act, it is necessary for EPA to issue MACT standards for hexachlorobenzene-emitting chemical manufacturing area sources as part of the overdue CMAS technical review & revision rulemaking.

The Clean Air Act Requires EPA to Establish Limits for Hazardous Air Pollutants Currently Not Regulated by the CMAS NESHAP, Including Ethylene Oxide and Toluene.

EPA's duty under section 112(d)(6) does not end with reviewing and revising existing emission standards. The Clean Air Act requires that EPA "add limits, consistent with section 112(d)(2)-(3), for *any* air toxics the source emits that the existing standard does not address." *Louisiana Env'tl. Action Network v. EPA*, 955 F.3d 1088, 1095 (D.C. Cir. 2020) [hereinafter *LEAN*] (emphasis added). As highlighted by EPA's Office of the Inspector General, EPA currently allows chemical manufacturing area sources to emit ethylene oxide without any controls.⁸ Further, CMAS facilities are emitting, without controls, hazardous air pollutants such as toluene. EPA must revise the CMAS NESHAP and issue standards for HAPs that are not currently addressed by the NESHAP, including ethylene oxide and toluene.

EPA must regulate ethylene oxide emissions.

Ethylene oxide is an air toxic used in the chemical manufacturing process and for sterilization. Exposure to ethylene oxide can irritate the eyes, skin, nose, throat, and lungs; harm the brain and nervous system; and increase the risk of cancers such as non-

⁸ EPA Office of Inspector General, *EPA Should Conduct New Residual Risk and Technology Reviews for Chloroprene- and Ethylene Oxide-Emitting Source Categories to Protect Human Health* 24 (May 6, 2021) [hereinafter *OIG Ethylene Oxide Report*], available at https://www.epa.gov/sites/default/files/2021-05/documents/_epaig_20210506-21-p-0129.pdf.

Hodgkin lymphoma, myeloma, lymphocytic leukemia, and breast cancer.⁹ Although, EPA's Office of the Inspector General has issued multiple reports urging EPA to address the serious health concerns caused by ethylene oxide emissions,¹⁰ EPA continues to allow chemical manufacturing area sources to emit ethylene oxide without any controls.¹¹ Specifically, the Office of the Inspector General has recommended that EPA "revise the NESHAP for chemical manufacturing area sources to include regulating ethylene oxide and conducting a residual risk review."¹²

To protect the health of vulnerable communities, and to comply with the Clean Air Act, it is necessary that EPA add ethylene oxide to the list of air toxics under Subpart VVVVVV and swiftly issue MACT NESHAP for ethylene oxide emissions from chemical manufacturing area sources.¹³ Further, because of the serious health consequences of low-level exposure to ethylene oxide and due to the unreliability of toxic emissions reporting,¹⁴ any ethylene oxide NESHAP must include fence-line air monitoring requirements to ensure compliance with the standards and improve control of fugitive emissions.

EPA should also follow the Office of the Inspector General's recommendation to "conduct a residual risk review to ensure that the public is not exposed to unacceptable risks."¹⁵ As outlined in the Office of the Inspector General's report, communities of color and low-income communities are disproportionately affected by ethylene oxide emissions.¹⁶ Communities near ethylene oxide-emitting facilities often have lifetime

⁹ See EPA, *Background Information on Ethylene Oxide*, <https://www.epa.gov/hazardous-air-pollutants-ethylene-oxide/background-information-ethylene-oxide#what> (last visited Dec. 3, 2021).

¹⁰ See EPA Office of Inspector General, *Management Alert: Prompt Action Needed to Inform Residents Living Near Ethylene Oxide-Emitting Facilities About Health Concerns and Actions to Address Those Concerns* (March 31, 2020), available at https://www.epa.gov/sites/default/files/2020-03/documents/_epaog_20200331-20-n-0128_0.pdf; OIG Ethylene Oxide Report, *supra*, at 24.

¹¹ See 40 C.F.R. Part 63, Subpart VVVVVV, Table 1 (listing air toxics regulated under CMAS NESHAP).

¹² OIG Ethylene Oxide Report, *supra*, at 28.

¹³ See *id.* at 24 ("This NESHAP, however, applies to each chemical manufacturing process unit that uses as feedstock, generates as byproducts, or produces as products any of 15 air toxics listed in the rule. Ethylene oxide is not one of the 15 listed air toxics in Subpart VVVVVV.").

¹⁴ Ava Kofman, *What's Polluting the Air? Not Even the EPA Can Say*, ProPublica (Dec. 16, 2021), <https://www.propublica.org/article/whats-polluting-the-air-not-even-the-epa-can-say>.

¹⁵ See OIG Ethylene Oxide Report, *supra*, at 27-28.

¹⁶ *Id.* at 25-26.

cancer risks that EPA considers unacceptable.¹⁷ By allowing CMAS facilities to emit ethylene oxide without any controls, EPA not only continues to jeopardize the health of vulnerable communities throughout the United States, but also guarantees that the EPA will “not meet its commitment and responsibility under Executive Order 12898 to achieve environmental justice.”¹⁸ Conducting a residual risk review is essential to ensuring that communities are protected from the known dangers of ethylene oxide.

EPA must regulate HAPs not currently addressed by the CMAS NESHAP, including toluene.

Since EPA’s last review of the CMAS NESHAP, the D.C. Circuit made clear that, during the technology review process for a source category, EPA has a duty to “add limits, consistent with section 112(d)(2)-(3), for *any* air toxics the source emits that the existing standard does not address.” *LEAN*, 955 F.3d at 1095 (emphasis added). Chemical manufacturing area sources are currently emitting hazardous air pollutants that have no emission limits under the NESHAP. EPA must correct this.

Toluene is one such example of a HAP that EPA must regulate. Often used by chemical manufacturers as a solvent, toluene is known to cause neurologic and respiratory effects, and developmental effects in children.¹⁹ Although, EPA is aware that chemical manufacturing area sources are emitting toluene,²⁰ it has yet to establish emission limits for this pollutant. To comply with the Clean Air Act and to protect health and the environment, EPA must not only establish emission limits for toluene, but inventory HAP emissions for the hundreds of chemical manufacturing area sources and regulate any other HAPs that are not currently addressed by the NESHAP.

60-Day Notice

The above-listed organizations hereby give notice of their intent to file suit 60 days from the postmark of this letter, May 17, 2022, to compel EPA to promptly perform the technology review and revision for the CMAS category, which is required by section 112(d)(6) of the Clean Air Act. *See* 40 C.F.R. § 54.2(d).

¹⁷ *See id.*; L. Younes et al., *Poison in the Air*, ProPublica (Nov. 2, 2021), <https://www.propublica.org/article/toxmap-poison-in-the-air>.

¹⁸ *See* OIG Ethylene Oxide Report, *supra*, at 26.

¹⁹ EPA, Toxicological Review of Toluene 88 (Sept. 2005),

²⁰ EPA, TRI Facility Report: PPG Industries Inc, <https://enviro.epa.gov/facts/tri/ef-facilities/#/Release/15146PPGND440CO>.

Contact Information

We are acting as attorneys for the above-listed organizations. Please contact the undersigned counsel at your earliest convenience at the addresses and telephone numbers set forth below to further discuss this matter.

Sincerely,



Gonzalo E. Rodriguez
Adam Kron
EARTHJUSTICE
1001 G Street, NW, Suite 1000
Washington, D.C. 20001
grodriguez@earthjustice.org
Tel: (202) 797-5235
akron@earthjustice.org
Tel: (202) 794-8039

*Counsel for California Communities
Against Toxics, Clean Air Council,
Clean Power Lake County, Delaware
Concerned Residents for Environmental
Justice, Greater-Birmingham Alliance to
Stop Pollution, Kentucky Resources
Council, New Castle Prevention Coalition,
United Congregations of Metro-East,
and Sierra Club.*