



2023-EPA-028

August 31, 2023

*Via Registered Mail- Return Receipt Requested*

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

RE: 60-Day Notice of Intent to Sue for Failure to Perform Nondiscretionary Duty under the Resource Conservation and Recovery Act

Dear Administrator Regan:

California Communities Against Toxics, Citizens for Arsenal Accountability, Central Louisiana Coalition for a Clean and Healthy Environment, Concerned Citizens for Nuclear Safety, Kentucky Environmental Foundation, and Prutehi Litekyan: Save Ritidian (referred to collectively herein as the “Parties”), hereby provide notice of their intent to sue the U.S. Environmental Protection Agency and you, in your official capacity as Administrator (referred to collectively herein as “EPA”), under 42 U.S.C. § 6972(a)(2) for failure to perform a non-discretionary duty required by the Resource Conservation and Recovery Act (“RCRA”). Specifically, EPA has failed to satisfy its mandatory duty under RCRA § 2002(b) (42 U.S.C. § 6912(b)) to review and revise a decades-old regulation allowing the open burning and open detonation (“OB/OD”) of hazardous waste explosives—which are dangerous and antiquated practices that release uncontrolled toxic pollution into communities across the U.S. and its territories.

40 C.F.R. § 265.382 bans OB/OD of hazardous wastes except for waste explosives that “cannot safely be disposed of through other modes of treatment.” Even when promulgating this regulation more than forty years ago, EPA recognized that OB/OD presents serious risks to human health and the environment and that the exception for hazardous waste explosives should only be permitted until alternative treatment technology became available. That time has come. As EPA itself has found, safe alternative technologies are available for virtually all hazardous waste streams that are currently open burned and open detonated. There is no justification for the existing OB/OD exception.

Despite RCRA’s mandate directing EPA to review and, as necessary, revise RCRA regulations every three years, EPA has not satisfied that duty with respect to the OB/OD rule ever since it was promulgated in 1980, let alone in the last three years. EPA’s performance of its nondiscretionary duty to review and revise the OB/OD regulation is long overdue.

## I. THE PARTIES

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Concerned Citizens for Nuclear Safety  
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Kentucky Environmental Foundation  
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## II. BACKGROUND

### A. OB/OD Use and Dangers

Open burning and open detonation are crude and archaic forms of hazardous waste explosives treatment. They have been used for decades by the U.S. government and private facilities to destroy excess, unserviceable, or obsolete military munitions, including small arms cartridges, rockets, mortars, missiles, and other wastes containing toxic compounds. Open burning is used primarily to destroy propellants and involves placing the explosives on concrete pads or metal pans and burning them. In some instances, if the explosives are large, open burning occurs directly on the ground or in trenches. Open detonation is mainly used to treat munitions and can involve detonations directly on the soil surface or in a pit or trench below ground.

As of May 2022, there are 66 OB/OD facilities operating across the country.<sup>1</sup> In 2017, the Department of Defense (“DoD”) estimated that its “demilitarization stockpile” totaled over 440,000 tons.<sup>2</sup> The average quantity of munitions demilitarized through OB/OD by the military in Fiscal Years 2016 and 2017 was about 23,203 tons per year out of a total of 75,474 tons of munitions that were demilitarized each year.<sup>3</sup> These munitions are primarily composed of energetic materials such

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<sup>1</sup> EPA, Memorandum, Open Burning and Detonation (OB/OD) of Waste Explosives Under the Resource Conservation and Recovery Act (RCRA), at 6 (June 7, 2022), [https://www.epa.gov/system/files/documents/2022-06/OBOD\\_Policy\\_Memo\\_signed\\_6.7.22\\_508.pdf](https://www.epa.gov/system/files/documents/2022-06/OBOD_Policy_Memo_signed_6.7.22_508.pdf) (hereinafter EPA Memo).

<sup>2</sup> EPA, EPA 530-R-19-007, *Alternative Treatment Technologies to Open Burning and Open Detonation of Energetic Hazardous Wastes* at 6 (Dec. 2019), [https://www.epa.gov/sites/default/files/2019-12/documents/final\\_obod\\_alttechreport\\_for\\_publication\\_dec2019\\_508\\_v2.pdf](https://www.epa.gov/sites/default/files/2019-12/documents/final_obod_alttechreport_for_publication_dec2019_508_v2.pdf) (hereinafter EPA Report).

<sup>3</sup> NASEM, *Alternatives for the Demilitarization of Conventional Munitions* at 27 (2019), <https://doi.org/10.17226/25140> (hereinafter NASEM Report).

as secondary explosive compounds (*e.g.*, TNT, RDX, and HMX) and propellant compounds (including ammonium perchlorate and substances containing plasticizers and stabilizers)—byproducts from munitions manufacturing and filling practices and research and development facilities.<sup>4</sup>

OB/OD poses a wide variety of hazards to human health and the environment. As the National Academies of Sciences, Engineering, and Medicine (“NASEM”) noted, “by definition ... byproducts of the burning or detonation are released directly into the environment—plumes of smoke and particulate matter are often quite visible during and following OB/OD operations ... Energetic compounds are commonly ejected and other contaminants, including heavy metals, are commonly released to the surrounding media (air, soil, water) during OB/OD events.”<sup>5</sup>

EPA itself acknowledges that “OB/OD is generally the least environmentally preferred treatment technology for waste explosives.”<sup>6</sup> This is because “[o]pen burning and open detonation lack the controls needed for the efficient and complete combustion of wastes and the ability to control and measure the emission of combustion products.”<sup>7</sup> As a result, “[c]ontamination of air, soils, surface water, sediments, and groundwater has been caused by OB/OD through release and deposition of hazardous residuals, explosive kickout, and contaminants.”<sup>8</sup> EPA is aware that the contamination is long-lasting, making “clean closure of OB/OD units, including the removal of hazardous waste residuals and explosive kickout, [] generally difficult and costly to achieve.”<sup>9</sup> “EPA has documented contaminants that exceed action levels in environmental media at closed OB/OD units,” including explosives, heavy metals, dioxins/furans, and other contaminants.<sup>10</sup>

OB/OD is a significant environmental injustice. The vast majority—more than 90%—of active OB/OD sites in the country are located in communities where the per capita income is below the low-income threshold, many with an average annual individual income below \$30,000 and some that are characterized by the federal government as “very low-income.” Several of these communities are also communities-of-color facing the impacts of environmental racism.

## B. The OB/OD Regulation

In 1980, when promulgating its first set of RCRA hazardous waste regulations, EPA expressly addressed OB/OD of hazardous wastes and declared that the “potential human health hazards associated with the practice dictate that open burning be ended now.” Standards Applicable to Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities, 45 Fed. Reg. 33154, 33217 (May 19, 1980). Citing comments claiming “the military’s need to dispose of explosives in the open,” however, EPA accepted that open burning and open detonation were “currently the only alternatives for disposal of most munitions,” and thus created an exemption for

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<sup>4</sup> EPA Report, *supra* note 2 at 6.

<sup>5</sup> NASEM Report, *supra* note 3 at 7.

<sup>6</sup> EPA Memo, *supra* note 1 at 6.

<sup>7</sup> *Id.* at 5.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 5 n.15.

OB/OD of waste explosives. *Id.* The final OB/OD regulation, codified at 40 C.F.R. § 265.382 (Open burning; waste explosives), states:

Open burning of hazardous waste is prohibited except for the open burning and detonation of waste explosives. Waste explosives include waste which has the potential to detonate and bulk military propellants which cannot safely be disposed of through other modes of treatment. . . Owners or operators choosing to open burn or detonate waste explosives must do so in accordance with the following table and in a manner that does not threaten human health or the environment.

Pounds of waste explosives or propellants	Minimum distance from open burning or detonation to the property of others
0 to 100	204 meters (670 feet)
101 to 1,000	380 meters (1,250 feet)
1,001 to 10,000	530 meters (1,730 feet)
10,001 to 30,000	690 meters (2,260 feet)

As EPA recently reaffirmed, however, “[t]his exception . . . from the ban on OB/OD was not intended to be indefinite.”<sup>11</sup>

### C. Advances in Alternatives to OB/OD

Since EPA’s issuance of 40 C.F.R. § 265.382 in 1980, alternative technologies for treating hazardous waste have advanced significantly. In 2019, NASEM completed a study on alternative technologies for conventional munitions demilitarization and found, among other things, that “[e]ach of the alternative technologies that the committee evaluated as potential replacements for OB and OD would have lower emissions and less of an environmental and public health impact, would be monitorable, and would likely be more acceptable to the public.”<sup>12</sup> Further, “[t]here are no significant technical, safety, or regulatory barriers to the full-scale deployment of alternative technologies for the demilitarization of the vast majority of the conventional waste munitions, bulk energetics, and associated wastes.”<sup>13</sup>

Subsequently, in December 2019, EPA published its own report on alternative technologies for OB/OD, finding that “there is a wide range of available alternative treatment technologies that can be, and have been used successfully, in place of OB/OD.”<sup>14</sup> EPA reaffirmed these findings in 2022, noting that “the 2019 EPA and NASEM published reports . . . identify safe available alternative technologies for most, if not all waste streams that are currently being open burned and many waste explosives that are being open detonated.”<sup>15</sup>

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<sup>11</sup> EPA Memo, *supra* note 1 at 3.

<sup>12</sup> NASEM Report, *supra* note 3 at 4.

<sup>13</sup> *Id.* at 4.

<sup>14</sup> EPA Report, *supra* note 2, at 12.

<sup>15</sup> EPA Memo, *supra* note 1 at 7.

Given the state of technological advancements and the serious human health and environmental risks OB/OD presents, there is no justification for continuing the exception to the ban on OB/OD. EPA must satisfy its long overdue obligation to review and revise 40 C.F.R. § 265.382 and finally protect communities exposed to OB/OD as RCRA demands.

### III. THE CITIZEN SUIT PROVISION OF RCRA

Section 7002(a)(2) of RCRA 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. § 6972(a)(2). Citizens must provide notice to the Administrator at least sixty days before commencing a citizen suit under section 7002(a)(2). *Id.* § 6972(c).

### IV. EPA HAS FAILED TO PERFORM A NONDISCRETIONARY DUTY AND MUST REMEDY ITS LEGAL VIOLATION BY COMPLETING REGULATORY REVIEW AND REVISION AS SOON AS POSSIBLE

To ensure protection of health and the environment, RCRA section 2002(b) imposes a nondiscretionary duty on the EPA Administrator to review and revise each regulation promulgated pursuant to the statute. *Appalachian Voices v. McCarthy*, 989 F. Supp. 2d 30, 54 (D.D.C. 2013). Specifically, section 2002(b) provides: "Each regulation promulgated under this chapter shall be reviewed and, where necessary, revised not less frequently than every three years." 42 U.S.C. § 6912(b).

EPA has violated RCRA's express, mandatory requirement under section 2002(b). Since 40 C.F.R. § 265.382 was promulgated more than 40 years ago, EPA has not once undertaken rulemaking to review and revise this rule, despite the emergence and availability of safe alternative technologies. Although EPA has acknowledged the need to revise the outdated regulations allowing OB/OD, EPA has yet to take action to satisfy its review and revise duty. EPA can delay no longer and must now remedy this legal violation by undertaking the requisite review and finalizing revisions necessary to protect human health and the environment from the dangers of OB/OD.

As EPA has acknowledged and the U.S. District Court for the District of Columbia has held, citizens can compel timely action when EPA fails to comply with RCRA's mandatory review and revise duty. *See Appalachian Voices*, 989 F. Supp. 2d at 55 ("[T]he Court finds that § 2002(b) creates a non-discretionary duty that may be enforced pursuant to the RCRA's citizen suit provision."). The court further explained:

By its plain terms, the statute charges the EPA with the ongoing obligation to review and, if necessary, revise the regulations promulgated under the RCRA every three years. The language is unambiguous in its command and contains no limitation ending the EPA's obligation to undertake such reviews and revisions at least every three years. The interpretation of § 2002(b) as imposing a continuing obligation on the EPA to review and revise its regulations is consistent with the Act's emphasis on the ongoing development of improved solid waste disposal methods.

*Id.* at 45. Accordingly, EPA has an obligation under RCRA to review and revise the OB/OD regulation with expedience in order to provide affected communities with long-overdue protections

from the harmful impacts of OB/OD. In failing to perform its nondiscretionary duty, “EPA has not merely missed a deadline, it has nullified the congressional scheme for a fixed interval review and revision process.” *Am. Lung Ass’n v. Browner*, 884 F. Supp. 345, 348 (D. Ariz. 1994).

## V. CONCLUSION

EPA has failed to satisfy its nondiscretionary duty under RCRA § 2002(b) by failing to review and revise the regulation allowing OB/OD of waste explosives within the last three years. It is crucial that EPA perform this outstanding obligation as expeditiously as possible to end the crude and unjustified practice of OB/OD and protect communities from the serious dangers associated with uncontrolled open burning and open detonation of hazardous wastes.

This letter serves as notice that the Parties intend to file suit pursuant to 42 U.S.C. § 6972(a)(2) to compel EPA’s overdue performance of its mandatory duty to review and revise the regulation allowing OB/OD of waste explosives as required by RCRA.

Please contact counsel for the Parties at the numbers or emails below with any questions or to discuss this matter.

Respectfully submitted,

/s/ Thien Chau

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