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April 17, 2013

AK-13-060-4622

Bob Perciasepe  
 Acting Administrator  
 Environmental Protection Agency  
 Ariel Rios Building  
 1200 Pennsylvania Avenue, N.W.  
 Mail Code: 1101A  
 Washington, DC 20460

**RE: Clean Air Act Notice of Intent to Sue for Failure to Promulgate  
 Standards of Performance and Emissions Guidelines for Greenhouse Gas  
Emissions from Electric Utility Generating Units**

Dear Acting Administrator Perciasepe:

The States of New York, Connecticut, Delaware, Maine, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, the District of Columbia and the City of New York, petitioners in *New York v. EPA* (D.C. Cir. 06-1322), respectfully request that the Environmental Protection Agency remedy its failure under the Clean Air Act to promulgate final standards of performance for greenhouse gas emissions from new electric utility generating units (power plants) and to issue emission guidelines for existing power plants. It has been over ten years since many of the undersigned states first petitioned EPA to set performance standards for greenhouse gas emissions from power plants. Although last year EPA published proposed Standards for Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units, 40 CFR part 60, subpart TTTT, 77 Fed. Reg. 22,392 (Apr. 13, 2012), EPA failed to promulgate final standards within one year after

publication of the proposed standards as required under section 111(b)(1)(B) of the Clean Air Act. EPA's failure to finalize greenhouse gas emission standards for new power plants and its failure to issue emission guidelines for existing power plants violates the Clean Air Act and harms the health and welfare of our residents.

## **I. Background**

From severe droughts and heat waves to a string of devastating storms in the northeast over the last two years, the undersigned states and cities and our residents already have experienced substantial economic costs, damages to physical infrastructure, disruption to natural ecosystems, and threats to public health as a result of climate disruption caused by increasing greenhouse gas pollution. Unless significant reductions in greenhouse gas emissions occur, adverse impacts from climate change will increase in magnitude and scale. Those adverse impacts include increased heat deaths and illnesses from intensified and prolonged heat waves; increased ground-level smog with concomitant increases in respiratory problems like asthma; beach erosion, temporary and permanent inundation of portions of coastal States' property, damage to publicly owned coastal facilities and infrastructure, and salinization of water supplies from accelerated sea level rise and more frequent flooding from more severe rains and higher storm surges; shrinking of water supplies due to reduced snowpack; more droughts and floods resulting in property damage and hazard to human safety; additional state emergency response costs caused by more frequent and intense storm surges and floods; shortened winter seasons for skiing, snowshoeing and other recreational activities and state tourism activities; and widespread loss of species and biodiversity, including the disappearance of hardwood forests from the northern United States.

Fossil fuel-fired power plants are the nation's leading source of climate change pollution. Currently, the electricity sector is responsible for approximately 40 percent of the nation's carbon dioxide (CO<sub>2</sub>) emissions. Absent emission limits, the U.S. Energy Information Administration projects that greenhouse gas emissions from the electricity generating sector are expected to continue to grow.

Under section 111(b) of the Clean Air Act, EPA must issue "standards of performance" (NSPS) regulating emissions from any category of new stationary sources that "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health and welfare." 42 U.S.C. § 7411(b). Pursuant to section 111(b)(1)(B), EPA is required "at least every eight years, to review and, if appropriate, revise such standards following the procedure required by [section 111(b)] for promulgation of such standards." 42 U.S.C. § 7411(b)(1)(B). Concurrently upon or after proposal of standards for new sources, section 111(d) of the Act also requires EPA to issue emission guidelines covering the release of greenhouse gases from any existing stationary source for which standards of performance have been issued. 42 U.S.C. § 7411(d)(1)(A); 40 C.F.R. § 60.22(a).

Numerous scientific assessments, including, but not limited to, EPA's 2009 endangerment determination, 74 Fed. Reg. 66,496 (Dec. 15, 2009), the 2010 and 2011 assessments of the National Academy of Sciences, and recent scientific studies undertaken by states across the nation, establish that anthropogenic greenhouse gas emissions are already

endangering, and in the future may reasonably be anticipated to continue to endanger, public health and welfare. Power plants undoubtedly cause or contribute significantly to such greenhouse gas air pollution. Thus, section 111(b) the Clean Air Act mandates that EPA establish performance standards for greenhouse gas emissions from new power plants and section 111(d) mandates that EPA issue guidelines to address greenhouse emissions from existing power plants.

On April 27, 2006, the undersigned States filed a petition, captioned *New York v. EPA* (D.C. Cir., No. 06-1322), seeking judicial review of EPA's 2006 revisions to the new source performance standards for power plants on the basis that EPA was required to include standards of performance for greenhouse gas emissions. On September 24, 2007, after the Supreme Court issued its decision in *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), holding that EPA has legal authority to regulate CO<sub>2</sub> and other greenhouse gases from motor vehicles as "air pollutants" under the Clean Air Act, the D.C. Circuit remanded the 2006 rule to EPA for further proceedings on greenhouse gas emissions in light of *Massachusetts v. EPA*.

EPA published a proposed rule to establish performance standards for greenhouse gas emissions from new power plants in April 2012. 77 Fed. Reg. 22,392 (Apr. 13, 2012). In June 2012, several State petitioners in *New York v. EPA* submitted comments supporting EPA's proposed rule. See June 25, 2012 Letter to EPA in Docket ID No. EPA-HQ-OAR-2011-0660. The comment period on the proposed rule closed on June 25, 2012. To date, EPA has failed to finalize the proposed final greenhouse gas emission standards for new power plants and has failed to issue proposed or final guidelines for the control of greenhouse gas emissions from existing power plants.

## **II. EPA Failed to Perform Its Non-Discretionary Duty to Promulgate Final Standards of Performance for Greenhouse Gas Emissions from New Power Plants and Related Emission Guidelines for Existing Power Plants**

Section 111 of the Clean Air Act requires EPA to promulgate final standards of performance within one year after publication of proposed standards. 42 U.S.C. § 7411(b)(1)(B). Because EPA published proposed performance standards for greenhouse gas emissions from new power plants on April 13, 2012, 77 Fed. Reg. 22,392, EPA's failure to finalize the proposed greenhouse gas performance standards for new EGUs by April 13, 2013 violates 42 U.S.C. § 7411(b)(1)(B) of the Clean Air Act. EPA's failure to finalize the proposed standards for new power plants also has prevented EPA from fulfilling its mandatory duty to publish emission guidelines covering greenhouse gas emissions from existing power plants, which are the largest source of greenhouse gas emissions in the United States. EPA's continuing failure to publish these guidelines is contrary to section 111(d) of the Clean Air Act and the regulations implementing that section. See 42 U.S.C. § 7411(d); 40 C.F.R. § 60.22(a).

Unless you promptly correct these failures by promulgating final performance standards for greenhouse gas emissions from new power plants and issuing emission guidelines for existing power plants, we are providing you with notice that, as of 60 days from the date of this letter, we intend to file suit in federal district court against you as EPA administrator and EPA for failure to take these non-discretionary duties set forth in 42 U.S.C. §§ 7411(b)(1)(B),

7411(d)(1) and 40 C.F.R. § 60.22(a). Jurisdiction to adjudicate and enforce the Administrator's failure to carry out non-discretionary duties lies with the district court under section 304 of the Clean Air Act. See *Environmental Defense Fund v. Thomas*, 870 F.2d 892, 897 (2d Cir. 1989); *Portland Cement Ass'n v. EPA*, 665 F.3d 177, 194 (D.C. Cir. 2011). This letter provides notice as required under section 304 of the Clean Air Act, 42 U.S.C. § 7604, and 40 C.F.R. part 54.

### **III. EPA Has Unreasonably Delayed in Promulgating Standards of Performance for New Power Plants and in Issuing Emission Guidelines for Existing Power Plants**

EPA has unreasonably delayed in taking final action to establish standards of performance and related emission guidelines for greenhouse gas emissions from power plants as required under sections 111(b) and 111(d) of the Clean Air Act. Section 111(b)(1)(A) states that the Administrator "shall include" a category of sources in the list for which standards are required "if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." EPA has already found that greenhouse gas emissions endanger public health and welfare. 74 Fed. Reg. at 66,496. Power plants undeniably "significantly contribute" to such emissions since they are the largest domestic source of greenhouse emissions. Currently, fossil fuel combustion for electricity generation is responsible for more than 2.3 billion metric tons per year of CO<sub>2</sub> emissions, approximately 40% of the nation's total CO<sub>2</sub> emissions.

More than ten years have elapsed since several states and environmental groups requested that EPA review existing standards to determine whether standards should be promulgated for greenhouse gas emissions from power plants, six years since EPA refused to establish such standards based on a rationale that was rejected by the Supreme Court in *Massachusetts v. EPA*, over five years since the D.C. Circuit's remand in *New York v. EPA*, and over three years since EPA determined that greenhouse gas emissions endanger public health and welfare. Given the urgent need for agency action due to the adverse effects on human health and welfare from climate change already being experienced, any further delay by EPA in finalizing standards of performance and related emission guidelines for greenhouse gas emissions from power plants is unwarranted and unreasonable. See *In re Core Communications, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008) ("timeliness is implicit in every remand by this Court"); *In re American Rivers*, 372 F.3d 413, 419 (D.C. Cir. 2004) ("a reasonable time for agency action is typically counted in weeks or months, not years"). Therefore, we are also providing 180-day notice that we intend to sue you as EPA administrator and EPA for EPA's unreasonable delay in taking final agency action to promulgate standards of performance for greenhouse gas emissions from new power plants under section 111(b) and to issue emission guidelines for existing power plants under section 111(d).

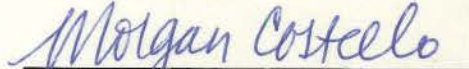
We are willing to explore any effective means of resolving this matter without the need for litigation. However, if we do not hear from you within the applicable time periods provided in section 304 of the Clean Air Act, we intend to file suit in United States District Court seeking injunctive and declaratory relief and the costs of litigation.

Very truly yours,

FOR THE STATE OF NEW YORK

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