December 9, 2021

Mr. Michael S. Regan
Administrator
Environmental Protection Agency
1101A EPA Headquarters
William Jefferson Clinton Building
1200 Pennsylvania Avenue, NW
Washington D.C. 20460
Regan.Michael@epa.gov

BY CERTIFIED MAIL

RE: Notice of Intent to Bring Citizen Suit Concerning Clean Air Act Deadline and Unreasonable Delay of Action to Complete Reconsideration of the 2012 National Emission Standards for Hazardous Air Pollutants ("NESHAP"): Oil and Natural Gas Production and Natural Gas Transmission and Storage, 40 C.F.R. Part 63 Subparts HH, HHH

Dear Administrator Regan,

This is a notice of "a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator" under Clean Air Act section 304(a)(2) and notice of a failure of the Administrator to perform "agency action unreasonably delayed" under section 304(a) of the Act. This notice is provided to you in your official capacity as Administrator of the U.S. Environmental Protection Agency ("EPA") as a prerequisite to bringing a civil action. 42 U.S.C. § 7604(a); 40 C.F.R. Part 54.

The following organizations provide the notice included in this letter: California Communities Against Toxics (P.O. Box 845, Rosamond, CA 935360), Coalition For A Safe Environment (1601 N. Wilmington Blvd., Ste. B, Wilmington, CA 90744), and Sierra Club (2101 Webster Street, Suite 1300, Oakland, CA 94612) (collectively, "the environmental organizations").

The environmental organizations intend to sue to compel you to (i) complete final agency action on reconsideration of the final action taken at 77 Fed. Reg. 49,489 (Aug. 16, 2012), entitled "Oil and Natural Gas Sector: New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants Reviews; Final Rule," addressing 40 C.F.R. Part 63 Subpart HH: Oil and Natural Gas Production and Subpart HHH: Natural Gas Transmission and Storage ("2012 NESHAP rule") that you have unreasonably delayed; and (ii) complete a review of and rulemaking for the emission standards for the Oil and Natural Gas Production and Natural Gas Transmission and Storage source categories, 40 C.F.R. 63 Subparts HH and HHH ("Oil and Gas source categories") pursuant to section 112(d)(6) of the Clean Air Act. The environmental organizations may commence suit on their Clean Air Act section 112(d)(6) claim within 60 days of this notice, and on their unreasonable delay claim within 180 days of this notice.

EPA has failed to complete action on and has unreasonably delayed completion of its reconsideration process for the 2012 NESHAP rule.

EPA first promulgated the NESHAP for the Oil and Gas source categories under section 112(d) of the Clean Air Act on June 17, 1999. *See* 40 C.F.R. Part 63, Subparts HH and HHH; Final Rule, 64 Fed. Reg. 32,610 (June 17, 1999); Proposed Rule, 63 Fed. Reg. 6,288 (Feb. 6, 1998). These standards apply to oil and natural gas production facilities and natural gas transmission and storage facilities that are major and area sources of hazardous air pollutants emissions. In the 2012 NESHAP rule, EPA conducted a section 112(d)(6) review of the standards for the Oil and Gas source categories and decided to revise certain provisions and not to revise others. *See* 40 C.F.R. 63 Subparts HH & HHH; Final Rule, 77 Fed. Reg. 49,489. The agency also conducted a section 112(f)(2) residual risk review in 2012, but determined no additional modifications were needed to the 2012 NESHAP rule. *See* 77 Fed. Reg. at 49,503-05, 49,505-07.

On October 15, 2012, the environmental organizations filed a petition for reconsideration of certain aspects of the 2012 NESHAP rule. The petition seeks to rectify a number of serious flaws in the 2012 NESHAP rule pursuant to 42 U.S.C. § 7607(d)(7)(B), including EPA's failure to regulate all emission points within the Oil and Gas source categories, failure to require controls for all hazardous air pollutants emitted by the Oil and Gas source categories, provision of an affirmative defense to civil penalties for violations of emission standards that are caused by malfunctions, and failure to consider new health risk and pollution control information that has become available since the comment period closed.

The reconsideration petition has been pending for over nine years. While EPA has granted the petition in part, its process for reconsideration remains ongoing.[1] EPA appears to have made little progress during that time and has repeatedly walked back its own timelines on completing its reconsideration process. For example, on December 13, 2012, EPA informed the environmental organizations that the agency anticipated granting reconsideration on certain issues raised in the administrative petitions concerning the 2012 NESHAP rule. EPA did not propose action on or complete reconsideration in the spring of 2013, claiming the need to study additional issues. In 2015 and 2016, EPA solicited information from the public that would support the reconsideration process, including through a formal Information Collection Request ("ICR").[2] The environmental organizations submitted detailed comments to EPA on this issue.[3]

In November 2016, EPA issued the finalized ICR to oil and gas resources that would have included data on hazardous air pollutants.[4] Shortly thereafter, in December 2016, EPA issued a response letter to the environmental organizations, which stated that its process for reconsideration of the 2012 NESHAP rule was still "on-going" and included the review of at

[1] *See* EPA's Status Report, *Am. Petroleum Inst. v. EPA*, Case No. 12-1405, Doc. No. 1923054, at 2 (D.C. Cir. Nov. 18, 2021) [hereinafter EPA Status Report]; *see also* Letter from P. Tsirigotis, Dir., Sector Policies & Programs Div., Ofc. of Air Quality Planning & Standards, EPA, to Earthjustice (Dec. 14, 2016) [hereinafter Tsirigotis Letter].
[2] *See* 81 Fed. Reg. 35,763 (June 3, 2016).
[3] *See* Technical Comments of Community and Environmental Groups Addressing the Inclusion of Hazardous Air Pollutants in the Oil and Gas Information Collection Request, filed by Natural Resources Defense Council, Dkt. ID No. EPA-HQ-OAR-2016-0204-0066 (Aug. 2, 2016).
[4] Tsirigotis Letter, *supra*, at 1-2.

least three key issues.[5] By early 2017, EPA once again changed course by abruptly withdrawing the ICR.[6] This long-running stop-and-go pattern on reconsideration of the 2012 NESHAP rule is unacceptable.

EPA has a clear legal duty under section 307(d)(7)(B) of the Clean Air Act to complete final action on reconsideration, and the environmental organizations have a legal right to and significant interests in this action. Nine years of delay in completion of reconsideration constitutes unreasonable delay of this duty within the meaning of the Clean Air Act. For example, courts consider whether delay is unreasonable based on whether an agency has violated a statutory "right to timely decisionmaking or some other interest that will be irreparably harmed through delay." *Sierra Club v. Thomas*, 828 F.3d 783, 794-95 (D.C. Cir. 1987); *see also Mexichem Specialty Resins v. EPA*, 787 F.3d 544, 553 & n.6 (D.C. Cir. 2015) (noting abrogation of *Sierra Club v. Thomas* in part by statute, but reaffirming analytical framework). EPA's delay on reconsideration of the 2012 NESHAP rule is unreasonable under any such test.

First, in requiring EPA to conduct a section 112(d)(6) review no less frequently than once every eight years, *see* 42 U.S.C. § 7412(d)(6), Congress "implicitly contemplate[d] timely final action" on each rulemaking. *Sierra Club v. Thomas*, 828 F.3d at 795. To extend the reconsideration process of a section 112(d)(6) rulemaking such that it overtakes the subsequent eight-year deadline would run counter to the text and logic of the entire regulatory scheme carefully designed by Congress to protect public health from toxic air pollution. Here, EPA has delayed reconsideration of the 2012 NESHAP rule for so long that a *new* section 112(d)(6) deadline has come and gone. Such delay is plainly inconsistent with the expectation of timely final action embodied in the statute and is therefore unreasonable.

Second, EPA's delay is also unreasonable because it has caused, and is continuing to cause, irreparable harm to the environmental organizations' members and other members of the public who live near oil and gas facilities. Delayed completion of reconsideration has left illegal and arbitrary standards in place for nine years—as demonstrated by the environmental organizations' 2012 reconsideration petition. It has extended and worsened the exposure and resulting serious health impacts and threats from the hazardous air pollution emitted by oil and gas sources, which EPA's inaction has left uncontrolled or insufficiently regulated. For example, oil and gas sources emit the carcinogen benzene, the neurotoxin mercury, and other hazardous air pollutants. Benzene is a chemical of particular concern, being one of four hazardous air pollutants that EPA has identified as the greatest contributors to overall cancer risks nationwide.[7] The environmental organizations' members have been breathing and have therefore been exposed to more toxic air for *nine more years* due to EPA's delay in completing action that, when finalized, should lead to stronger protections for public health and the environment. This harmful exposure is ongoing due to EPA's delay.

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[5] Tsirigotis Letter, *supra*, at 1.

[6] *See* 82 Fed. Reg. 12,817 (Mar. 7, 2017); *see also* EPA's Motion to Hold Cases in Abeyance Pending Administrative Reconsideration, *Am. Petroleum Inst. v. EPA*, Case No. 12-1405, Doc. No. 1698120 ¶¶ 7-8 (Oct. 10, 2017).

[7] 2014 NATA Summary of Results, at 4, https://www.epa.gov/sites/default/files/2020-07/documents/nata_2014_summary_of_results.pdf.

In addition to this ongoing exposure, there are a number of blatantly illegal components of the 2012 NESHAP rule that intervening caselaw has made clear EPA must fix. These include, for example, an affirmative defense to civil penalties for malfunctions that the D.C. Circuit held to be illegal in 2014, *Natural Res. Def. Council v. EPA*, 749 F.3d 1055, 1062-64 (D.C. Cir. 2014), and missing emission standards for certain pollutants known to be emitted by industry sources, which the D.C. Circuit held to be illegal in 2020. *Louisiana Envtl. Action Network v. EPA*, 955 F.3d 1088, 1096 (D.C. Cir. 2020) (hereinafter "*LEAN*"). EPA's unreasonable delay on reconsideration has improperly left and continues to leave these illegal loopholes in place, causing harm that should never have occurred or been extended this long.

Finally, it bears noting that EPA's reconsideration process has now spanned three presidential administrations. Courts have found delayed agency action of far shorter duration to be patently unreasonable. *See, e.g., In re American Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004) (finding an agency's "six-year-plus delay [was] nothing less than egregious."). EPA's persistent failure to complete reconsideration, whether by reason of neglect, intentional decision, or some other unexplained grounds, represents the type of "breakdown of regulatory processes" that courts have found sufficient to merit judicial intervention. *See id.* at 418.

This delay is not happening in a vacuum. The court and all petitioners in D.C. Circuit Case No. 12-1405 are awaiting this action to determine whether litigation on any or all pending issues on the 2012 NESHAP rule is still needed or whether EPA's reconsideration process and action will resolve those matters. That case remains in abeyance pending EPA's final action.[8] The environmental organizations have challenged EPA's 2012 NESHAP rule as illegally and arbitrarily weak and insufficient to protect public health under Clean Air Act sections 112(d)(6) and 112(f)(2). EPA's delay of final action on reconsideration, therefore, has also delayed the efficient litigation over the underlying 2012 NESHAP rule in federal court and has thwarted the environmental organizations' ability to have timely judicial review of the rule pursuant to section 307(b)(1) of the Clean Air Act. *See American Rivers*, 372 F.3d at 319 (explaining that a court may compel agency action "to ensure that an agency does not thwart [the court's] jurisdiction by withholding a reviewable decision.").

EPA's delay is all the more unreasonable in light of the fact that the agency has moved forward with *two* updates (a final rule in 2016 and a proposed rule in 2021, respectively) to the New Source Performance Standards ("NSPS") for the oil and gas industry under section 111 (which EPA revised in concert with the NESHAP in 2012) while, inexplicably, choosing not to yet propose *any* action on reconsideration of the air toxics rules. Rather than moving to regulate part of the air pollution from this sector piecemeal, EPA's action on the NSPS shows that the agency can and must move expeditiously to complement that action with the much-needed and long-overdue action on air toxics from many of the same or collocated sources.

For these and related reasons, EPA has unreasonably delayed action to complete a reconsideration proceeding by issuing final action and/or new final rules for the above listed categories that would satisfy sections 112(d)(6) and 112(f)(2). Thus, EPA has violated and is in

[8] *See* EPA Status Report, *supra*, at 2 ("EPA believes these cases should continue to remain in abeyance pending the conclusion of the reconsideration proceedings.").

continuing violation of these provisions and sections 304(a) and 307(d)(7)(B) for the above listed categories. With each passing day, EPA's continuing violation recurs and becomes more harmful. EPA must perform the overdue reconsideration and section 112(d)(6) rulemaking and must promulgate final action, including a new final rule, for the above listed categories to satisfy sections 304(a), 307(d)(7)(B), 112(d)(6), and 112(f)(2) without any further delay. 42 U.S.C. §§ 7604(a)(2), 7607(d)(7)(B), 7412(d)(6), (f)(2).

EPA is overdue in conducting a review of and rulemaking for the emission standards for Oil and Natural Gas Production and Natural Gas Transmission and Storage pursuant to section 112(d)(6) of the Clean Air Act.

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 [section 112] no less often than every 8 years." 42 U.S.C. § 7412(d)(6). As described above, EPA last completed a section 112(d)(6) rulemaking on August 16, 2012. Thus, the next section 112(d)(6) review and rulemaking was due no later than August 16, 2020. *See id.*

More than eight years after the promulgation of the 2012 NESHAP rule, EPA has not even commenced, let alone finalized, a mandatory review under section 112(d)(6) of the air toxics emission standards for the Oil and Gas source categories. In its continuing failure to review and revise, as necessary, the standards under 40 C.F.R. Part 63 Subparts HH and HHH, EPA has violated and is in ongoing violation of the Act, as of its final action deadline of August 16, 2020. Each day that passes worsens the impact of EPA's continuing violation of section 112(d)(6) and repeats it. Accordingly, EPA has failed to perform a nondiscretionary duty within the meaning of section 304 of the Clean Air Act. 42 U.S.C. § 7604(a)(2).

Intervening caselaw and other developments require revisions to the standards for the Oil and Gas source categories, which EPA can best achieve by completing reconsideration and a new section 112(d)(6) review together.

Intervening facts and court precedent since EPA's last section 112(d)(6) rulemaking require EPA to strengthen the NESHAP for the Oil and Gas source categories to satisfy the Act. As discussed above, the overdue section 112(d)(6) duty requires EPA to "review, and revise as necessary" the emission standards for this source category, which includes making all changes that are "necessary" to bring standards into full compliance with the Clean Air Act, such as setting limits on all uncontrolled hazardous air pollutant emissions. *See* 42 U.S.C. § 7412(d)(6); *LEAN*, 955 F.3d at 1096. To satisfy this provision, EPA must review the NESHAP to assure it sets limits on all currently uncontrolled HAP emissions from the Oil and Gas source categories. As promulgated in the 2012 NESHAP rule, the standards allow uncontrolled emissions of, for example, toluene, ethylbenzene, and xylene from certain emission points, an issue raised in the 2012 reconsideration process that remains uncompleted. Under section 112(d)(6) and *LEAN*, EPA must set emission limits that satisfy sections 112(d)(2)-(3) in the overdue rulemaking.

New court precedent also requires EPA to revise the 2012 NESHAP rule to remove the illegal affirmative defense to civil penalties for exceedances of the emission standards caused by

malfunctions. *See* 40 C.F.R. §§ 63.762, 63.1272. Such a defense is illegal because it exceeds EPA's authority and violates the Clean Air Act citizen suit provision under section 304(a). *See* 42 U.S.C. § 7604(a); *Natural Res. Def. Council v. EPA*, 749 F.3d at 1062-63.

It is also "necessary" to revise the emission standards to require fenceline monitoring, as EPA did for petroleum refineries. In 2015, EPA determined there were developments in control technologies that required revisions to the Maximum Achievable Control Technology 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. *See* Final Rule, Petroleum Refinery Sector Risk and Technology Review and New Source Performance Standards, 80 Fed. Reg. 75,178 (Dec. 1, 2015). 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).

Further, the Oil and Gas source categories incorporate by reference EPA's general flare standards under 40 C.F.R. § 63.11, which are also decades overdue for review. On multiple occasions, EPA 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.[9] EPA must revise the NESHAP to include strengthened flare standards for the Oil and Gas source categories. In doing so, EPA should follow recent NESHAP rulemakings for chemical and petrochemical source categories, which set out improved flare operational and monitoring requirements (though without adding the unlawful exemptions EPA added in some of these rules).[10]

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[9] EPA published two documents in 2012 that acknowledged the shortcomings of the general flare standards. First, EPA published a report in April 2012 entitled "Parameters for Properly Designed and Operated Flares", which noted in particular that reliance on the net heating value of the vent gas—the parameter that the General Flare Requirements use—"as an indicator of good combustion ignores any effect of steaming." EPA Ofc. of Air Quality Planning & Standards, Parameters for Properly Designed and Operated Flares (April 2012), https://www3.epa.gov/airtoxics/flare/2012flaretechreport.pdf. Second, EPA published an Enforcement Alert regarding flaring violations, in which the agency recognized that certain needed parameters affecting the efficiency of flares are not captured within current standards, including maintaining the appropriate steam-to-vent-gas ratio and ensuring that the heating value of combustion zone gas is high enough to maximize combustion efficiency, neither of which are included in the General Flare Requirements. *See* EPA, EPA Enforcement Targets Flaring Efficiency Violations, Enforcement Alert (Aug. 2012), https://www.epa.gov/sites/production/files/documents/flaringviolations.pdf.

[10] EPA has promulgated revised, stricter flare NESHAP standards for similar industries: petroleum refineries, miscellaneous organic chemical manufacturing, ethylene production, and organic liquids distribution facilities. *See* 80 Fed. Reg. 75,178 (revising petroleum refinery flare standards to ensure better combustion efficiency); National Emission Standards for Hazardous Air Pollutants: Organic Liquids Distribution (Non-Gasoline) Residual Risk and Technology Review, 85 Fed. Reg. 40,740 (July 7, 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 (July 6, 2020); National Emission Standards for Hazardous Air Pollutants: Miscellaneous Organic Chemical Manufacturing Residual Risk and Technology Review, 85 Fed. Reg. 49,084 (Aug. 12, 2020). The record for these rulemakings well shows that flares are not achieving the requisite 98-percent destruction efficiency, but a far lower percentage that fails to assure compliance with the emission standards. *See, e.g.*, Memorandum from Andrew Bouchard to EPA, Dkt. ID No. EPA-HQ-OAR-2017-0357, Re: Control Option Impacts for Flares Located in the Ethylene Production Source Category, at 8 (March 2019), https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0357-0017.

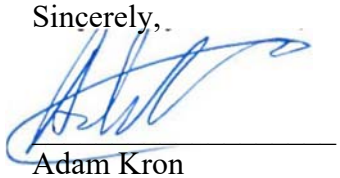
EPA must address and resolve these and all other problems with the existing emission standards expeditiously, without any further delay. It may be efficient to review and issue all necessary updates to the standards for the Oil and Gas source categories by coordinating its reconsideration review with its required section 112(d)(6) review and promulgating a final combined rule. It is essential that EPA move forward to address this as soon as possible, well before another presidential term has passed.

60-Day Notice of Section 112(d)(6) Claim. Under Clean Air Act section 304, the environmental organizations may commence a citizen suit to compel you to perform any or all of the above duties under section 112(d)(6) for the Oil and Gas source categories at any time beginning 60 days from the postmark of this letter, which would be February 7, 2022. *See* 42 U.S.C. § 7604(b)(2); 40 C.F.R. § 54.2(d).

180-Day Notice of Unreasonable Delay Claim. Under Clean Air Act section 304(a), the environmental organizations may commence a citizen suit to compel you to complete final agency action on reconsideration that you have unreasonably delayed under section 307(d)(7)(B) for these Oil and Gas source categories on or after 180 days from the postmark of this letter which would be June 7, 2022. *See* 42 U.S.C. §§ 7604(a), 7607(d)(7)(B); 40 C.F.R. § 54.2(d).

Contact Information. We are acting as attorneys for the environmental organizations in this matter. Please contact us at your earliest convenience regarding this matter at the addresses or phone number listed below.

Sincerely,



Adam Kron
Senior Attorney
Adrienne Y. Lee
Associate Attorney
Emma Cheuse
Senior Attorney
EARTHJUSTICE
1001 G Street, NW, Suite 1000
Washington, D.C. 20001
akron@earthjustice.org
alee@earthjustice.org
echeuse@earthjustice.org
(202) 667-4500

Counsel for California Communities Against Toxics, Coalition For A Safe Environment, and Sierra Club