May 25, 2022

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

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") from Secondary Lead Smelting, 40 C.F.R. Part 63 Subpart X

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 93560), Missouri Coalition for the Environment Foundation (725 Kingsland Avenue, Suite 100, St. Louis, MO 63130), Natural Resources Defense Council (40 West 20th Street, 11th Floor, New York, NY 10011), 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 the overdue review of and rulemaking for the emission standards for the secondary lead smelting source category, 40 C.F.R. 63 Subpart X, pursuant to section 112(d)(6) of the Clean Air Act; and (ii) complete final agency action on reconsideration of the final action taken at 77 Fed. Reg. 556 (Jan. 5, 2012), entitled "National Emission Standards for Hazardous Air Pollutants From Secondary Lead Smelting," addressing 40 C.F.R. Part 63 Subpart X ("2012 NESHAP rule") that you have unreasonably delayed. 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 unreasonably delayed completion of its reconsideration process for the 2012 NESHAP rule.

EPA first promulgated the NESHAP for the secondary lead smelting source category under section 112(d) of the Clean Air Act on June 23, 1995. *See* 40 C.F.R. Part 63, Subpart X; Final Rule, 60 Fed. Reg. 32,587 (June 23, 1995). These standards apply to secondary lead smelting facilities that are major and area sources of hazardous air pollutant emissions. Despite EPA's duty to promulgate standards required to provide an ample margin of safety to protect public health pursuant to section 112(f)(2), and to review and revise the 112(d) standards no less than every eight years pursuant to section 112(d)(6), EPA did not take action to issue standards pursuant to these provisions until 2012—and only after a legal challenge by the Sierra Club. 77 Fed. Reg. 556.[1] In the 2012 NESHAP rule, EPA conducted a section 112(d)(6) review rulemaking and a section 112(f)(2) residual risk review rulemaking for the 1995 secondary lead smelting source category and standards. *See* 77 Fed. Reg. 556.

On March 5, 2012, the environmental organizations filed a petition for reconsideration of certain aspects of the 2012 NESHAP rule. The petition seeks to rectify serious flaws in the 2012 NESHAP rule, such as EPA's failure to satisfy the requirement under section 112(f) to provide an "ample margin of safety," including because the 2012 NESHAP rule unlawfully and arbitrarily relied solely on the National Ambient Air Quality Standards' ("NAAQS") less stringent requirement to achieve an "adequate margin of safety" from lead. In 2012, EPA granted reconsideration on the ample margin of safety determination, including this issue.[2]

The reconsideration petition has been pending for over nine years. While EPA has granted the petition in part, the agency has yet to complete its reconsideration. Over the course of the past nine-plus years, the environmental organizations submitted two supplemental reconsideration petitions, presenting new health risk and monitoring data that further highlight the health risk posed by secondary lead smelters and that underscore the need for EPA to take immediate action to protect public health.[3] During

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[1] Consent Decree Judgement, Sierra Club v. Jackson, No. 09-cv-00152 SBA (N.D. Cal. Sept. 26, 2011).

[2] Letter from EPA Administrator Gina McCarthy to Earthjustice (Dec. 10, 2012) (granting reconsideration on "at least the following issue: Petitioners' allegation that the 'ample margin of safety' analysis performed for the final rule considered only cost, emission reductions and cost effectiveness, and did not include consideration of health and other metrics (Petition at 12-16)" and stating "EPA will publish in the near future a Federal Register notice initiating a Notice and Comment rulemaking on the issue. . . . We are continuing to review the other issues . . . and intend to take final action on those issues no later than the date we take final action on the issue for which we are granting reconsideration today.").

[3] *See* Supplement to Sierra Club et al. Reconsideration Petition (June 21, 2012), National Emission Standards for Hazardous Air Pollutants: Secondary Lead Smelting (EPA Docket ID No. EPA-HQ-OAR-2011-0344),

the course of EPA's unreasonable delay in completing its reconsideration of the 2012 NESHAP's residual risk review, the scientific evidence proving the significant and often irreversible impacts of lead exposure to human health, and particularly children, has continued to accumulate.

EPA has a legal duty under section 307(d)(7)(B) of the Clean Air Act to complete final action on reconsideration. Delay is unreasonable when 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 is unreasonable under both and either test.

Nine years of delay in completion of reconsideration constitutes unreasonable delay of EPA's duty within the meaning of the Clean Air Act. Courts have found much shorter agency delays to be 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 failure to complete reconsideration, whether by reason of neglect, intentional decision, or some other grounds, represents the type of "breakdown of regulatory processes" that courts have found sufficient to merit judicial intervention. *See id.* at 418.

In addition to the unwarranted passage of time, EPA's delay is 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 secondary lead smelters. There is no safe level of exposure to lead.[4] Even a small blood-lead level increase can cause harm, and exposure to lead can cause irreversible neurological damage in children.[5] Lead bioaccumulates in bone tissue and is released into the bloodstream, wreaking havoc on the body, affecting the gastrointestinal, neurological, cardiovascular, renal, endocrine, and reproductive systems.[6] While lead exposure carries significant health risks, no matter the exposure pathway, lead in air is particularly pernicious because "the body absorbs higher levels of lead when it is

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https://www.regulations.gov/comment/EPA-HQ-OAR-2011-0344-0189; Supplement to Sierra Club et al. Reconsideration Petition (Jan. 31, 2014) (EPA Docket ID No. EPA-HQ-OAR-2011-0344).

[4] Lead Poisoning, World Health Organization (Oct. 11, 2021), https://www.who.int/news-room/fact-sheets/detail/lead-poisoning-and-health#:~:text=There%20is%20no%20known%20safe,symptoms%20and%20effects%20also%20increase; CDC, Lead Factsheet (July 12, 2013), https://www.cdc.gov/biomonitoring/lead_factsheet.html.

[5] *Id.*; *see* Child-Specific Benchmark Change in Blood Lead Concentration for School Site Risk Assessment, Final Report at 1 (April 2007), https://oehha.ca.gov/media/downloads/crnr/pbhgv041307.pdf.

[6] WHO, Recycling used lead-acid batteries: health considerations at 15-18 (2017), https://www.who.int/publications/i/item/recycling-used-lead-acid-batteries-health-considerations.

breathed-in."[7] Delayed completion of reconsideration has left unlawful and arbitrary standards unremedied for nine years—as demonstrated by the environmental organizations' 2012 reconsideration petition and 2011 comments.[8] It has extended and worsened the exposure and resulting serious health impacts and threats from the hazardous air pollution emitted by secondary lead smelters, which EPA's inaction has left insufficiently regulated. The environmental organizations' members have been and are breathing and, therefore, have 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.

This delay is not happening in a vacuum. The court and all parties in D.C. Circuit Case No. 12-1373 are awaiting EPA's action on reconsideration 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 which EPA has stated "is likely to affect the scope of this matter."[9] 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.

EPA has unreasonably delayed action to complete reconsideration of its 2012 residual risk review rulemaking for secondary lead smelters. EPA has violated and is in continuing violation of section 112(f) and sections 304(a) and 307(d)(7)(B). With each passing day, EPA's continuing violation recurs and becomes more harmful. EPA must perform and complete the overdue reconsideration rulemaking and must issue a new residual risk review rule for secondary lead smelters that satisfies the Act without any further delay. 42 U.S.C. §§ 7604(a)(2), 7607(d)(7)(B), 7412(f)(2).

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[7] Centers for Disease Control, *Health Problems Caused by Lead* (Dec. 8, 2021), https://www.cdc.gov/niosh/topics/lead/health.html.

[8] *See* Comments submitted by Sierra Club, et al. (Jul. 29, 2011), National Emission Standards for Hazardous Air Pollutants: Secondary Lead Smelting (EPA Docket ID No. EPA-HQ-OAR-2011-0344), https://www.regulations.gov/comment/EPA-HQ-OAR-2011-0344-0098; Petition for Reconsideration submitted by Sierra Club, et al. (Apr. 9, 2012), National Emission Standards for Hazardous Air Pollutants: Secondary Lead Smelting (EPA Docket ID No. EPA-HQ-OAR-2011-0344), https://www.regulations.gov/comment/EPA-HQ-OAR-2011-0344-0173.

[9] *See* EPA Mot. to Continue Abeyance (Mar. 11, 2022) (seeking new motion to govern deadline of Sept. 12, 2022).

EPA is overdue in conducting a review of and rulemaking for the emission standards for Secondary Lead Smelting sources 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 [§ 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 reviewed the National Emission Standards for Hazardous Air Pollutants for the Secondary Lead Smelting sector. 40 C.F.R. Part 63 Subpart X, 77 Fed. Reg. 556 (Jan. 5, 2012). The EPA is therefore in violation of a nondiscretionary duty under the Clean Air Act.

Revision of the Secondary Lead Smelting NESHAP is "necessary."

As discussed above, the Clean Air Act requires EPA to "review and revise as necessary" the NESHAP for Secondary Lead Smelters. 42 U.S.C. § 7412(d)(6). Here, revision is "necessary" to bring the Secondary Lead NESHAP into compliance with the Clean Air Act for a number of reasons, such as: (1) EPA must improve air toxics-specific standards to further reduce pollution and eliminate emissions of new lead to the maximum degree achievable; (2) EPA must remove the unlawful affirmative defense for violations of emission standards during malfunction events; and (3) EPA must revise the Secondary Lead Smelting NESHAP to account for developments and require additional pollution control, including fenceline monitoring and other methods.

EPA must improve air toxics standards to eliminate new lead emissions

Under the Clean Air Act, EPA has a duty to "require the maximum degree of reduction in emissions" of hazardous air pollutants like lead. 42 U.S.C. § 7412(d)(2). Where as here, a source category with facilities often located near communities emits into the air an air pollutant as harmful as lead, the Act empowers EPA to protect human health by "eliminat[ing] emissions of . . . such pollutants" or issuing "a prohibition on such emissions." *Id*. Because of the unique threat posed by lead pollution, it is necessary for EPA to revise the Secondary Lead Smelting NESHAP to account for all developments and to assure compliance with the Act.

EPA must revise the standards as "necessary" to comply with the Act, including removing the Secondary Lead Smelting NESHAP's unlawful affirmative defense for violations of emission standards during malfunction events.

The D.C. Circuit recently held that EPA is required to make all changes "necessary" to assure compliance with the Act, such as setting limits on uncontrolled or inadequately controlled emissions. *Louisiana Envtl. Action Network v. EPA*, 955 F.3d 1088, 1096 (D.C. Cir. 2020). Therefore, EPA must make such changes in the rulemaking that is overdue. For example, in the 2012 NESHAP rule, EPA promulgated an "affirmative defense to a claim for civil penalties for exceedances of [emission]

standards that are caused by malfunction." 77 Fed. Reg. 589. Since then, however, the U.S. Court of Appeals for the D.C. Circuit has held that an affirmative defense provision "immuniz[ing]" malfunction emissions is unlawful under the Clean Air Act. *See Natural Res. Def. Council v. EPA*, 749 F.3d 1055, 1062 (D.C. Cir. 2014). Thus, it is necessary for EPA to revise the Secondary Lead Smelting NESHAP and eliminate the affirmative defense provision under 40 C.F.R. § 63.552.

EPA must revise the Secondary Lead Smelting NESHAP to account for developments, including fenceline monitoring and other pollution reduction methods.

EPA must also revise the Secondary Lead Smelting NESHAP to account for developments, including fenceline monitoring and other pollution control methods. EPA's duty to review under section 112(d)(6) specifically includes "taking into account developments in practices, processes, and pollution control technologies." 42 U.S.C. § 7412(d)(6).

Fenceline monitoring is plainly such a development that EPA must take into account in its revision of the Secondary Lead Smelting NESHAP. For example, local rules show this is a "development" implemented in part of the source category, requiring lead battery recycling facilities to employ fenceline monitors to track lead and arsenic concentrations in ambient air.[10] The South Coast Air Quality Management District's Rule 1420 also requires the adoption of other developments that go well beyond the emission limits required by the existing secondary lead smelting NESHAP.[11] EPA has also implemented fenceline monitoring in one national NESHAP (for petroleum refineries).[12] Robust monitoring requirements, including fenceline air monitoring, together with corrective action requirements, are necessary to ensure continuous compliance with emissions standards, and required under the Clean Air Act. *See* 42 U.S.C. § 7412(d)(6); *see also id*. § 7602(k).

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 Secondary Lead Smelting source category on or after 60 days from the postmark of this letter, which would be July 24, 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

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[10] *See* SCAQMD Rule 1420.1(j), http://www.aqmd.gov/docs/default-source/rule-book/reg-xiv/rule-1420-1.pdf; *see also* Supplement to Sierra Club et al. Reconsideration Petition 3-4 (Jan. 31, 2014) (EPA Docket ID No. EPA-HQ-OAR-2011-0344); *cf.* EPA, EMC: Metals and Mercury Emissions Monitoring (discussing multi-metal fenceline monitor currently under development), https://www.epa.gov/emc/emc-metals-and-mercury-emissions-monitoring.

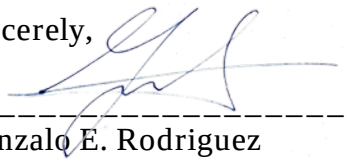
[11] *Id*.

[12] Final Rule, Petroleum Refinery Sector Risk and Technology Review and New Source Performance Standards, 80 Fed. Reg. 75,178 (Dec. 1, 2015).

complete final agency action on reconsideration that you have unreasonably delayed under section 307(d)(7)(B) for the Secondary Lead Smelting source category on or after 180 days from the postmark of this letter which would be November 21, 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,



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