



August 2, 2022

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

RE: Notice of Intent to Bring Citizen Suit Concerning Unreasonably Delayed Promulgation of Federal Implementation Plans Pursuant to 42 U.S.C. § 7429(b)(3) for Commercial and Industrial Solid Waste Incineration Units and Other Solid Waste Incineration Units

Dear Administrator Regan:

This is a notice of a failure of the Administrator to perform “agency action unreasonably delayed” under Section 304(a) of the Clean Air Act. 42 U.S.C. § 7604(a). 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. *Id.*; 40 C.F.R. Part 54. Sierra Club intends to sue to compel EPA to issue unreasonably delayed Federal Implementation Plans pursuant to 42 U.S.C. § 7429(b)(3) for: (1) Commercial and Industrial Solid Waste Incineration Units, 40 C.F.R. Part 60, Subparts CCCC and DDDD, and (2) Other Solid Waste Incinerators, *id.* Subparts EEEE and FFFF.¹ Sierra Club may commence suit on its unreasonable delay claims within 180 days of this notice. 42 U.S.C. § 7604(a).

A. Legal Background

Congress enacted the Clean Air Act “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.” *Id.* § 7401(b)(1). Because waste-burning incinerators emit large amounts of highly toxic air pollution, the Clean Air Act directs EPA to “establish performance standards and other requirements . . . for solid waste incineration units,” including “commercial or industrial” solid waste incineration units and (2) “other categories” of solid waste incineration units. *Id.* § 7429(a)(1)(A), (D)-(E).

EPA’s performance standards for incineration units must require the maximum achievable reduction in emissions of particulate matter, opacity, sulfur dioxide, hydrogen chloride, nitrogen

¹ Sierra Club’s address is 2101 Webster Street, Suite 1300, Oakland, CA 94612.

oxides, carbon monoxide, lead, cadmium, mercury, and dioxins and furans. *Id.* § 7429(a)(1)(A), (a)(2), (a)(4). These standards must include, among other requirements, emission guidelines for existing CISWI and OSWI units. *Id.* § 7429(a)(1), (b)(1).

No later than one year after EPA promulgates emission guidelines for existing units, states with existing units must submit a state implementation plan (“SIP”) to EPA for approval. *Id.* § 7429(b)(2). If a state has no existing units subject to the guidelines, it must submit to EPA a “negative declaration” saying so by the same date. 40 C.F.R. §§ 60.2510, 60.2982.

If within two years of EPA’s promulgation of guidelines for existing units, any state has submitted neither an approvable SIP nor a negative declaration, then EPA “shall develop, implement and enforce” a federal implementation plan (“FIP”). 42 U.S.C. § 7429(b)(3). The FIP “shall assure that each unit subject to the plan is in compliance with all provisions of the guidelines not later than 5 years after the date the relevant guidelines are promulgated.” *Id.*

EPA must review and revise performance standards and other requirements it promulgates under Section 129 every five years: “Not later than 5 years following the initial promulgation of any performance standards and other requirements . . . applicable to a category of solid waste incineration units, and at 5 year intervals thereafter, the Administrator shall review, and . . . revise such standards and requirements.” *Id.* § 7429(a)(5).

When EPA revises performance standards, federal and state implementation plans must be updated accordingly. As with promulgation of the initial guidelines, promulgation of revised guidelines triggers a new implementation duty on the states. *Id.* § 7429(a)(5),(b)(2). If any state fails to carry out this duty, then EPA must promulgate a FIP for the revised guidelines. *Id.* § 7429(a)(5), (b)(3).

B. Factual Background

i. Commercial and Industrial Solid Waste Incineration Units

Commercial and industrial solid waste incineration (“CISWI”) units include any facility which combusts any solid waste material from commercial or industrial establishments. *Nat. Res. Def. Council v. EPA*, 489 F.3d 1250, 1257 (D.C. Cir. 2007). EPA first promulgated guidelines for existing CISWI units in 2000.² In 2003, EPA promulgated a FIP applicable to states that submitted neither an approvable SIP for the 2000 CISWI guidelines nor a negative declaration stating they contained no CISWI units.³

On March 21, 2011, EPA promulgated new guidelines that were amended and adopted on February 7, 2013.⁴ Within two years of the adoption of revised standards—that is, between

² Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units; Final Rule, 65 Fed. Reg. 75,338 (Dec. 1, 2000).

³ Federal Plan Requirements for Commercial and Industrial Solid Waste Incinerators Constructed On or Before November 30, 1999; Final Rule, 68 Fed. Reg. 57,518 (Oct. 3, 2003).

⁴ On March 21, 2011, EPA promulgated final standards for existing CISWI units. Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units; Final Rule, 76 Fed. Reg. 15,704 (March 21, 2011). EPA delayed the effectiveness of the 2011 rule until

February 7, 2013, and February 7, 2015—many states submitted neither an approvable SIP for the 2013 CISWI guidelines nor a negative declaration stating they contained no CISWI units. 42 U.S.C. § 7429(b)(3). Those states include Alaska, California, Georgia, Hawaii, Illinois, Louisiana, Maine, Michigan, Nebraska, New York, and Texas, among others.⁵

Thus, since February 7, 2015, more than seven years ago, the Clean Air Act required EPA to “develop, implement and enforce a plan for existing solid waste incineration units” within those states. *Id.* In 2017, EPA issued a proposed FIP for the 2013 guidelines in states that had submitted neither an approvable SIP for those guidelines nor a negative declaration.⁶ But EPA has not issued a final FIP for the 2013 CISWI guidelines as required under Section 129(b)(3). *Id.* As a result of EPA’s inaction, CISWI units in some states continue to operate subject to the outdated guidelines that EPA adopted in 2000.

ii. Other Categories of Solid Waste Incineration Units

Other categories of solid waste incineration (“OSWI”) units include small municipal waste combustion units and institutional waste incineration units. 40 C.F.R. § 60.3078. EPA promulgated guidelines for existing OSWI units on December 16, 2005.⁷ Most states submitted neither an approvable SIP nor a negative declaration within two years—that is, between December 16, 2005, and December 16, 2007.⁸ *See* 42 U.S.C. § 7429(b)(3). Thus, since December 16, 2007, over fourteen years ago, the Clean Air Act required EPA to “develop, implement and enforce a plan for existing solid waste incineration units” within those states. *Id.* On December 18, 2006, EPA issued a proposed FIP for the 2005 guidelines in states that had submitted neither an approvable SIP for those guidelines nor a negative declaration.⁹ Since 2006, EPA has issued no final FIP for the 2006 OSWI guidelines as required under Section 129(b)(3). *Id.* As a result of EPA’s inaction, OSWI units in some states are subject to no limits for pollutants regulated under Section 129. *Id.* § 7429.

C. Unreasonable Delay Claim

The Clean Air Act empowers district courts to compel nondiscretionary agency action “unreasonably delayed.” 42 U.S.C. § 7604(a). EPA has a nondiscretionary duty under Section 129(b)(3) of the Clean Air Act to “develop, implement and enforce” FIPs for CISWI and OSWI units. *Id.* § 7429(b)(3). Sierra Club has a legal right to and significant interest in compelling EPA to promulgate these FIPs. Over seven years of delay in promulgating a CISWI FIP and over

proceedings for judicial review of the rule was completed or the EPA completed its reconsideration of the rule, whichever was earlier. Industrial, Commercial, and Institutional Boilers and Process Heaters and Commercial and Industrial Solid Waste Incineration Units, 76 Fed. Reg. 28,662, 28,662 (May 18, 2011). The 2011 standards became effective on February 7, 2013. Commercial and Industrial Solid Waste Incineration Units: Reconsideration and Final Amendments, 78 Fed. Reg. 9,112, 9,112 (Feb. 7, 2013).

⁵ *See* 40 C.F.R. § 62 Subparts B-DDD.

⁶ Federal Plan Requirements for Commercial and Industrial Solid Waste Incineration Units, 82 Fed. Reg. 3,554 (proposed Jan. 11, 2017).

⁷ Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Other Solid Waste Incineration Units; Final Rule, 70 Fed. Reg. 74,870 (Dec. 16, 2005).

⁸ *See* 40 C.F.R. § 62 Subparts B-DDD.

⁹ Federal Plan Requirements for Other Solid Waste Incineration Units Constructed on or Before December 9, 2004, 71 Fed. Reg. 75,816 (proposed December 18, 2006).

fourteen years of delay in promulgating an OSWI FIP constitute unreasonable delay of these duties within the meaning of the Clean Air Act.

An agency's delay is unreasonable if: (1) "an agency violated a statutory 'right to timely decisionmaking' implicit in the agency's regulatory scheme," or (2) another interest, including an interest in "human health and welfare," will be "irreparably harmed through delay." *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 554 (D.C. Cir. 2015) (quoting *Sierra Club v. Thomas*, 828 F.2d 783, 796-97 (D.C. Cir. 1987)). Although one condition alone establishes an unreasonable delay claim, EPA's delay in issuing FIPs satisfies both. EPA's delay violated Sierra Club's statutory right to timely decisionmaking, and further delay will irreparably harm human health and welfare.

i. EPA's delay in issuing FIPs violated Sierra Club's statutory right to timely decisionmaking.

In evaluating whether an agency violated a statutory right to timely decisionmaking, a court considers the following factors: (1) "whether Congress has imposed any applicable deadlines," "exhorted swift deliberation concerning the matter," or otherwise "implicitly contemplate[d] timely final action;" (2) "whether interests other than that of timely decisionmaking will be prejudiced by delay;" and (3) "whether an order expediting the proceedings will adversely affect the agency in addressing matters of a competing or higher priority." *Thomas*, 828 F.2d at 797, *superseded by statute on other grounds as recognized in Mexichem*, 787 F.3d at 553 n.6. All three factors weigh in favor of holding that EPA has unreasonably delayed issuing FIPs for CISWI and OSWI units.

First, Congress "implicitly contemplate[d] timely final action" in issuance of FIPs. *Id.* at 795. The Clean Air Act requires a FIP to "assure that each unit subject to the plan is in compliance with all provisions of the guidelines not later than 5 years after the date the relevant guidelines are promulgated." 42 U.S.C. § 7429(b)(3). Extending the promulgation of a FIP beyond the five-year compliance deadline runs counter to the text and logic of the regulatory scheme designed by Congress to protect public health from toxic air pollution. In delaying issuance of FIPs by over seven and fourteen years, EPA violated Sierra Club's right to timely decisionmaking. Second, "interests other than that of timely decisionmaking will be prejudiced by delay." *Thomas*, 828 F.2d at 797. Further delay in issuing FIPs will irreparably harm human health and welfare, discussed in further detail below. Third, issuing the FIPs will not adversely affect EPA in addressing other priorities because the FIPs will be largely copies of the guidelines the agency has already promulgated and FIPs it has already proposed.

ii. EPA's delay in issuing FIPs will irreparably harm human health and welfare.

EPA's delay is unreasonable because Sierra Club's interest in human health and welfare will be "irreparably harmed through delay." *Id.* at 796. EPA's delay in issuing FIPs has and will continue to irreparably harm Sierra Club's members and others who live near OSWI or CISWI units. As a result of EPA's inaction, CISWI units in some states are currently regulated by outdated standards promulgated in 2000, and OSWI units in some states are not subject to any limits for pollutants regulated under Section 129. 42 U.S.C. § 7429. EPA's inaction has prolonged and

increased fenceline community members' exposure to and resulting health impacts from toxic air pollution emissions from incinerators.

Waste combustion releases “acid gases, organics, metals, nitrogen oxides and ash, some of which are considered to be carcinogens or to have other adverse effects when inhaled.” *Davis Cty. Solid Waste Mgmt. v. EPA*, 101 F.3d 1395, 1397 (D.C. Cir. 1996), *modified on reh'g*, 108 F.3d 1454 (D.C. Cir. 1997). Pollutants emitted by incinerators—such as lead, mercury, particulate matter, and dioxins—can cause acute and chronic human health problems, including damage to the respiratory, neurological, developmental, and reproductive systems. Childhood exposure to lead can cause devastating and lifelong health problems, including permanent neurological damage, behavioral disorders, and cognitive impairments.¹⁰ Scientists have identified no safe level of lead exposure.¹¹ Exposure to mercury impacts the nervous system and kidneys,¹² and exposure to particulate matter is linked to aggravated asthma, decreased lung function, and premature death in people with heart or lung disease.¹³ Dioxins are highly toxic and can cause cancer; damage the immune, reproductive and developmental systems; and interfere with hormones.¹⁴ Dioxins are persistent organic pollutants, which means they take a long time to break down.¹⁵

Sierra Club's members and other community members who live near CISWI or OSWI units have been breathing these hazardous air pollutants for at least seven more years due to EPA's delay in issuing final FIPs that would deliver stronger protection for public health and the environment. According to prior EPA estimates, implementing the 2013 CISWI guidelines for existing sources in all states would eliminate 34,771 tons per year of pollution, including: 20,093 tons per year of carbon monoxide, 6,211 tons per year of sulfur dioxide, 5,292 tons per year of nitrogen oxides, 2,397 tons per year of particulate matter, 772.2 tons per year of hydrogen chloride, 2.5 tons per year of lead, 1.807 tons per year of cadmium, 0.341 tons per year of mercury, and 62 grams per year of dioxins and furans.¹⁶ According to prior EPA estimates, implementing the 2005 OSWI guidelines for existing sources in all states would eliminate 1,925 tons per year of pollution, including: 837 tons per year of hydrogen chloride, 598 tons per year of sulfur dioxide, 245 tons per year of nitrogen oxides, 227 tons per year of particulate matter, 13 tons per year of carbon monoxide, 4.6 tons per year of lead, 0.49 tons per year of mercury, 0.33 tons per year of cadmium, and 300 grams per year of dioxins and furans.¹⁷

Courts have held that delayed agency action of shorter duration is patently unreasonable. *See, e.g., In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004) (holding that

¹⁰ Ctr. for Disease Control and Prevention, *Decreases in Young Children Who Received Blood Lead Level Testing During COVID-19 — 34 Jurisdictions, January–May 2020* (Feb. 5, 2021), <https://www.cdc.gov/mmwr/volumes/70/wr/mm7005a2.htm>.

¹¹ *Id.*

¹² Agency for Toxic Substances and Disease Registry, *Mercury–ToxFAQs* (Apr. 2022), <https://www.atsdr.cdc.gov/toxfaqs/tfacts46.pdf>.

¹³ EPA, *Health and Environmental Effects of Particulate Matter (PM)*, <https://www.epa.gov/pm-pollution/health-and-environmental-effects-particulate-matter-pm> (last updated July 18, 2022).

¹⁴ EPA, *Learn about Dioxin*, <https://www.epa.gov/dioxin/learn-about-dioxin> (last updated June 1, 2022).

¹⁵ *Id.*

¹⁶ Commercial and Industrial Solid Waste Incineration Units: Reconsideration and Final Amendments; Non-Hazardous Secondary Materials That Are Solid Waste; Final Rule, 78 Fed. Reg. 9,112, 9,131-32 tbl.5 (Feb. 7, 2013).

¹⁷ Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Other Solid Waste Incineration Units; Final Rule, 70 Fed. Reg. 74,870, 74,888 (Dec. 16, 2005).

an agency's "six-year-plus delay [was] nothing less than egregious."). EPA's persistent failure to promulgate final FIPs indicate the type of "breakdown of regulatory processes" that courts have found sufficient to merit judicial intervention. *Id.* at 418 (quoting *Cutler v. Hayes*, 818 F.2d 879, 897 n.156 (D.C. Cir. 1987)).

For these and other reasons, EPA has unreasonably delayed issuance of FIPs for OSWI and CISWI units. *See* 42 U.S.C. § 7429 (b)(3). With each passing day, EPA's continuing violation recurs and becomes more harmful. EPA must promulgate the overdue FIPs for CISWI and OSWI units without any further delay.

D. 180-Day Notice of Unreasonable Delay Claim

Under Clean Air Act Section 304(a), Sierra Club may file a citizen suit to compel EPA to issue the unreasonably delayed FIPs for CISWI and OSWI units on or after 180 days from the postmark of this letter. *Id.* § 7604(a); 40 C.F.R. § 54.2(d).

We are Sierra Club's attorneys 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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