

May 31, 2023

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 2014 “National Emission Standards for Hazardous Air Pollutants: Group IV Polymers and Resins; Pesticide Active Ingredient Production; and Polyether Polyols Production,” addressing 40 C.F.R. Part 63 Subparts JJJ, MMM, and PPP

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: Louisiana Environmental Action Network (P.O. Box 66323, Baton Rouge, LA 70896), People Concerned About Chemical Safety (P.O. Box 184, Institute, WV 25112), and Sierra Club (2101 Webster Street, Suite 1300, Oakland, CA 94612) (collectively, “the organizations”).

The organizations intend to sue to compel EPA to:

- (i) complete a review of and rulemaking for the emission standards for the Polyether Polyols Production source category, addressing 40 C.F.R. Part 63 Subpart PPP 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 79 Fed. Reg. 17,340 (Mar. 27, 2014), entitled “National Emission Standards for Hazardous Air Pollutant Emissions: Group IV Polymers and Resins; Pesticide Active Ingredient Production; and Polyether Polyols Production,” addressing 40 C.F.R. Part 63, Subparts JJJ, MMM, and PPP (“2014 NESHAP Rule”), which EPA has unreasonably delayed.

The 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 is overdue in conducting a review of and rulemaking for the emission standards for Polyether Polyols Production 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) review and rulemaking for the Polyether Polyols Production source category on March 27, 2014. *See* 79 Fed. Reg. at 17,340. Therefore, EPA was required to complete the next section 112(d)(6) review and rulemaking no later than March 27, 2022. *See id.*

More than eight years after the promulgation of the 2014 NESHAP Rule, EPA has not even commenced, let alone finalized, a mandatory review under section 112(d)(6) for the Polyether Polyols Production source category. In its continuing failure to review and revise, as necessary, the standards under 40 C.F.R. Part 63, Subpart PPP, EPA has violated and is in ongoing violation of the Act, as of its final action deadline of March 27, 2022. 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).

EPA has failed to complete action on and has unreasonably delayed completion of its reconsideration process for the 2014 NESHAP Rule.

In addition to EPA’s failure to conduct the mandatory review under section 112(d)(6) for the Polyether Polyols Production source category, EPA has also unreasonably delayed completion of the still-outstanding reconsideration process of the 2014 NESHAP Rule for the source category.

EPA first promulgated the NESHAP for the Polyether Polyols Production source category under section 112(d) of the Clean Air Act on June 1, 1999. *See* 40 C.F.R. Part 63, Subpart PPP; Final Rule, 64 Fed. Reg. 29,420 (June 1, 1999); Proposed Rule, 62 Fed. Reg. 46,804 (Sept. 4, 1997). These standards apply to manufacturers of polyether polyols that are sources of hazardous air pollutants.

In the 2014 NESHAP Rule, EPA conducted a “residual risk and technology review” under sections 112(d)(6) and 112(f)(2) of the Clean Air Act for the Polyether Polyols Production source category, as well as for the source categories Group IV Polymers and Resins and Pesticide Active Ingredient Production, and “determined that no rule amendments [were] needed based on” those reviews. *See* 2014 NESHAP Rule, 79 Fed. Reg. at 17,341. However, EPA decided to revise all three NESHAP in three specific areas by (i) removing exemptions during

periods of startup, shutdown, and malfunction (“SSM”) and adding provisions to provide an affirmative defense to civil penalties for violations of emission standards caused by malfunctions; (ii) requiring electronic reporting of performance test results; and (iii) requiring monitoring of pressure relief devices in organic HAP service that release to the atmosphere.¹

On May 27, 2014, community and environmental organizations, including two of the undersigned, filed a petition for reconsideration of certain aspects of the 2014 NESHAP Rule, pursuant to 42 U.S.C. § 7607(d)(7)(B).² The petition seeks to rectify a number of serious flaws in the 2014 NESHAP Rule, including in particular:

- EPA’s provision of an affirmative defense to civil penalties for violations of emission standards that are caused by malfunctions;
- the rule’s failure to require electronic indicators and alarms to provide immediate notice of releases from pressure relief devices; and
- EPA’s failure to consider new health risk and pollution control information that has become available since the comment period closed.

EPA granted the petition for reconsideration on August 26, 2014, agreeing to address at least petitioners’ request that EPA remove the affirmative defense provision from the 2014 NESHAP Rule in light of *Natural Resources Defense Council v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014), and petitioners’ request that EPA reconsider the requirements associated with emissions from pressure relief devices.³ The reconsideration petition has been pending for almost nine years. While EPA has granted the petition in part, its process for reconsideration remains ongoing.⁴

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 organizations have a legal right to and significant interests in this action. Nearly 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 itself 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.

¹*Id.* EPA also made certain additional revisions specific to the NESHAP for Group IV Polymers and Resins, but did not make those revisions for the Polyether Polyols Production or Pesticide Active Ingredient source categories.

² *See* Respondent’s Motion to Hold Case in Abeyance ¶ 3, Dkt No. 1510491, Case No. 14-083 (Sept. 3, 2014).

³ *See id.* at ¶ 4 (citing Letter from Janet McCabe, EPA, to Emma Cheuse, Earthjustice (Aug. 26, 2014)).

⁴ *See* EPA Status Report, Case No. 14-1083 (March 8, 2023).

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 2014 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 organizations’ members and other members of the public who live near chemical manufacturing facilities that produce polyether polyols. Delayed completion of reconsideration has left illegal and arbitrary standards in place for nine years—as demonstrated by the organizations’ 2014 reconsideration petition. It has extended and worsened the exposure and resulting serious health impacts and threats from the hazardous air pollution emitted by these chemical manufacturing sources, which EPA’s inaction has left uncontrolled or insufficiently regulated.

EPA’s delay with respect to the Polyether Polyols Production source category is particularly concerning, given that it is a known emitter of ethylene oxide. In December 2016, EPA issued an updated inhalation unit risk estimate pursuant to its Integrated Risk Information System (“IRIS”) for ethylene oxide, which revealed that ethylene oxide’s cancer risk is far greater than previously understood.⁵ While the DNA-damaging effects of ethylene oxide have been well known since the 1940s, newer studies also showed that this mutagenic effect increased cancer risks in humans and other mammals, especially lymphoma and breast cancer. Due to the weight of this evidence, IRIS concluded that ethylene oxide is ““carcinogenic to humans’ by the inhalation route of exposure.”⁶ Based on this conclusion, EPA determined that ethylene oxide’s unit risk assessment is nearly 60 times greater than previously understood, with a greater risk posed to children whose cells divide more frequently than adults.⁷ Other authoritative scientific agencies, including the National Toxicology Program, International Agency for Research on

⁵ *See* EPA/635/R-16/350Fc, Evaluation of the Inhalation Carcinogenicity of Ethylene Oxide, Executive Summary, In Support of Summary Information on the Integrated Risk Information System (IRIS), December 2016).

⁶ EPA, IRIS, Evaluation of the Inhalation Carcinogenicity of Ethylene Oxide, Executive Summary at 2 (Dec. 2016),

https://cfpub.epa.gov/ncea/iris/iris_documents/documents/subst/1025_summary.pdf.

⁷ EPA established a cancer risk factor for EtO of 3.0×10^{-3} per $\mu\text{g}/\text{m}^3$ for adult exposure, or 5.0×10^{-3} per $\mu\text{g}/\text{m}^3$ over a lifetime, accounting for increased vulnerability from early-life exposure. *Id.*; *see also*, EPA, Additional Questions about Ethylene Oxide (EtO), <https://www.epa.gov/hazardous-air-pollutants-ethylene-oxide/frequent-questions-about-ethylene-oxide-eto>.

Cancer, and the Occupational Safety and Health Administration, have also concluded that ethylene oxide is carcinogenic to humans.⁸

In 2021, EPA’s Office of the Inspector General (“OIG”) issued a report focusing on ethylene oxide-emitting source categories—including Polyether Polyols Production—with recommendations that urged EPA to fulfill its overdue duty to complete new risk and technology reviews that would protect “people in some areas of the country” from “unacceptable health risks from ...ethylene oxide emissions.”⁹ The OIG’s report noted that “[i]n the absence of updated reviews for the applicable source categories, the Agency cannot provide assurance that its current NESHAPs are protective” of public health.¹⁰ And furthermore, EPA was failing to meet its statutory deadlines for conducting technology reviews, including a review for the Polyether Polyols Production source category. The OIG specifically noted that “[t]he [Clean Air Act] does not provide any exceptions for this requirement.”¹¹

In response to the OIG report, EPA stated that it would conduct the required technology review for the Polyether Polyols Production source category, and “will determine whether the Agency should conduct a discretionary residual risk review during the rulemaking” based on the updated ethylene oxide toxicity information.¹² EPA provided a “Planned Completion Date” of Quarter 4, FY 2024.¹³ However, this “Planned Completion Date” is not a commitment or deadline in any legal sense, and EPA has lengthened completion dates for at least two other rulemakings subject to the OIG report.¹⁴

⁸ National Toxicology Program, Report on Carcinogens, Fifteenth Edition, Ethylene Oxide (Dec. 21, 2021), <https://ntp.niehs.nih.gov/ntp/roc/content/profiles/ethyleneoxide.pdf>; International Agency for Research on Cancer, IARC Monographs 100F Ethylene Oxide (2012), <https://monographs.iarc.fr/wp-content/uploads/2018/06/mono100F-28.pdf>; Occupational Safety and Health Administration, OSHA Fact Sheet Ethylene Oxide (2002), <https://www.osha.gov/sites/default/files/publications/ethylene-oxide-factsheet.pdf>.

⁹ EPA OIG, EPA Should Conduct New Residual Risk and Technology Reviews for Chloroprene- and Ethylene Oxide-Emitting Source Categories to Protect Human Health, Report No. 21-P-0129 (May 6, 2021), https://www.epa.gov/sites/default/files/2021-05/documents/epa_oig_20210506-21-p-0129.pdf.

¹⁰ *Id.* at 21.

¹¹ *Id.* at 24.

¹² *Id.* at 35-36.

¹³ *See id.* at 36; EPA, EPA Response #3 to Final Report: “EPA Should Conduct New Residual Risk and Technology Reviews for Chloroprene- and Ethylene Oxide-Emitting Source Categories to Protect Human Health” - Report No. 21-P-0129, May 6, 2021, at 3-5 (June 1, 2022), https://www.epa.gov/system/files/documents/2022-06/epa_oig_21-P-0129_Agency_Response2.pdf.

¹⁴ *See* EPA, EPA Update Regarding Accepted Corrected Actions for Office of Inspector General Report NO. 21-P-0129, EPA Should Conduct new Residual Risk and Technology Reviews for Chloroprene- and Ethylene Oxide-Emitting Source Categories to Protect Human Health, issued May 6, 2021, at 2 (Oct. 14, 2022).

EPA's failure to act means that there are numerous Polyether Polyols Production facilities that continue to threaten the public's health with emissions that are more dangerous than previously thought.

In addition to this ongoing exposure, there are a number of blatantly illegal components of the 2014 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, *Nat. 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 Env't 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. 14-1083 are awaiting this action to determine whether litigation on any or all pending issues on the 2014 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.¹⁵ The organizations have challenged EPA's 2014 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 2014 NESHAP Rule in federal court and has thwarted the 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 419 (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.").

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 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

¹⁵ *See* EPA Status Report, Case No. 14-1083 (March 8, 2023).

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).

Intervening caselaw and other developments require revisions to the standards for Polyether Polyols Production, 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 Polyether Polyols Production source category 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 Polyether Polyols Production source category.

New court precedent also requires EPA to revise the 2014 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); *Nat. Res. Def. Council v. EPA*, 749 F.3d at 1062-63. In recent reviews for similar source categories, EPA has admitted its legal duty to remove the affirmative defense.¹⁶

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). In fact, EPA recently published a proposed rule for related petrochemical source categories—including sources co-located with Polyether Polyols Production sources—in which the agency proposed to require fenceline for sources emitting one of six hazardous air pollutants.¹⁷

¹⁶ *See, e.g.*, New Source Performance Standards for the Synthetic Organic Chemical Manufacturing Industry and National Emission Standards for Hazardous Air Pollutants for the Synthetic Organic Chemical Manufacturing Industry and Group I & II Polymers and Resins Industry, 79 Fed. Reg. 25,080, 25,170 (April 25, 2023) (“In light of *NRDC*, the EPA is proposing to remove all of the regulatory affirmative defense provisions from P&R I at 40 CFR 480(j)(4) in its entirety and all other rule text that references these provisions . . .”).

¹⁷ *See id.* at 25,086, 25,087 (proposing to require fenceline monitoring for sources subject to the Hazardous Organic NESHAP and the Group I Polymers and Resins NESHAP).

Further, EPA has acknowledged that flares “may” be used in the Polyether Polyols Production source category, but declined to update flare requirements as part of the 2014 NESHAP Rule. *See* Response to Comments at 28, EPA-HQ-OAR-2011-0435-0083. Since the comment period for the 2014 NESHAP Rule closed, substantial new information has become available to support the need for reducing emissions from and ending routine use of flares, flare minimization, and monitoring requirements. EPA must revise the NESHAP to include strengthened flare standards for the Polyether Polyols Production source category. 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).¹⁸

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 Polyether Polyols Production source category 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 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 Polyether Polyols Production source category at any time beginning 60 days from the postmark of this letter, which would be July 30, 2023. *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 organizations may commence a citizen suit to compel you to complete final agency action on

¹⁸ 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 also recently proposed stricter operating and monitoring flare requirements for sources subject to the Hazardous Organic NESHAP and the Group I Polymers and Resins NESHAP. *See* 79 Fed. Reg. at 25,084, 25,086.

reconsideration that you have unreasonably delayed under section 307(d)(7)(B) for the Polyether Polyols Production source category on or after 180 days from the postmark of this letter which would be November 27, 2023. *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 organizations in this matter. Please contact us at your earliest convenience regarding this matter at the addresses or phone number listed below.

Sincerely,



Adrienne Y. Lee
Senior Associate Attorney
Adam Kron
Senior Attorney

EARTHJUSTICE
1001 G Street, NW, Suite 1000
Washington, D.C. 20001
alee@earthjustice.org
akron@earthjustice.org
(202) 667-4500

*Counsel for Louisiana
Environmental Action Network,
People Concerned About Chemical
Safety, and Sierra Club*