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June 18, 2013

*Via Certified Mail & Email*

Acting Administrator Bob Perciasepe  
Office of the Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Mail Code 1101A  
Washington, DC 20460  
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**Re: New Source Performance Standards for Greenhouse Gases**

Acting Administrator Perciasepe:

We are writing in response to the Notices of Intent to sue filed with the United States Environmental Protection Agency on April 15 and 17, 2013. These notices allege a failure by EPA to perform its non-discretionary duties of promulgating standards of performance for greenhouse gas emissions from new electric generating units (EGUs) and issuing emission guidelines for existing units.

The signatory parties to the notices indicate they "are willing to explore any effective means of resolving this matter without the need for litigation." As discussed below, there is no legal merit in the notices' Clean Air Act (CAA) § 304 allegations. Accordingly, the undersigned Attorneys General request that EPA decline to enter into any form of settlement negotiations to resolve the concerns of the petitioners. Air quality is of equal concern to all States. Appropriate process should not be subjugated, and effective policymaking cannot be forced to fruition, by threatening litigation.

In the event EPA deems it necessary and appropriate to allow the petitioners to commandeer the policymaking process under the threat of litigation, we request notice and an opportunity to participate in the resolution of the notices.

**EPA Did Not Fail To Perform, or Unreasonably Delay, a Non-Discretionary Duty**

The notices allege EPA failed to perform the non-discretionary duty of finalizing standards of performance for greenhouse gas emissions from new EGUs. That claim is incorrect.

Under CAA § 304, a district court may only compel “unreasonably delayed” action if that action is non-discretionary. The CAA makes clear that EPA must review the standards of performance for a listed source category at least every eight years, but is only required to revise such standards “if appropriate”. CAA § 111(b). In 2006, EPA revised the standards of performance applicable to new EGUs. These revisions were challenged by petitioners in *New York v. EPA* (D.C. Cir. No. 06-1322). The revisions, which lacked performance standards for GHG emissions, were remanded to EPA in light of the Supreme Court’s holding that various GHGs constitute “air pollutants” in *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007).

Following the *Massachusetts* decision, EPA conducted another review of the standard of performance for new EGUs and proposed standards for GHG emissions. 77 Fed. Reg. 22,392 (April 13, 2012). Although EPA has yet to finalize these standards, actual revision of the standards is discretionary under CAA § 111(b), and occurs only “if appropriate”. Because the review has been conducted in a timely fashion and revisions are discretionary, suit is inappropriate under CAA § 304 for failure to perform a non-discretionary duty.

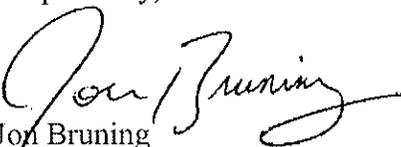
Likewise, because the issuance of emission guidelines is self-imposed by EPA regulation and not a non-discretionary duty under the CAA, § 304 is inapplicable to these claims. In any event, EPA’s guideline publication regulations do not impose a specific timeframe for issuance of emissions guidelines. Indeed, they vest EPA with discretion to issue emission guidelines “upon or after promulgation of standards of performance.” 40 C.F.R. § 60.22(a). Thus, were a duty to exist “under the CAA” it could not be deemed non-discretionary.

The CAA provides the States, rather than EPA, with responsibility for developing the standards of performance for existing sources under § 111(d). The only statutorily-imposed duty for EPA is to develop a process for States to submit plans for regulating existing sources; and this duty only arises when a standard of performance for new sources is found to be applicable. Accordingly, petitioners’ § 304 allegations concerning EPA’s failure to issue emission guidelines for existing sources also lack merit.

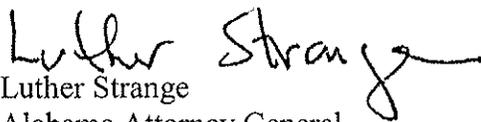
## Conclusion

As the foregoing discussion establishes, EPA did not have a non-discretionary duty to take the actions petitioners’ notices request. We therefore request that EPA refrain from allowing petitioners to unduly influence the policymaking process via settlement negotiations. However, if EPA feels compelled to engage in such negotiations, we request notice and an opportunity to be involved in the resolution of the notices.

Respectfully,

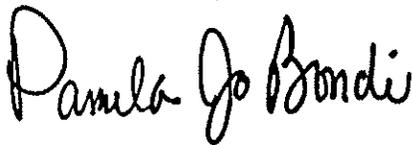
  
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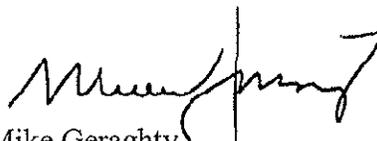
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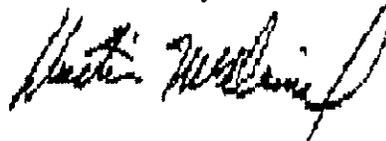


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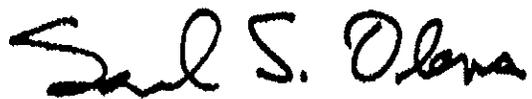


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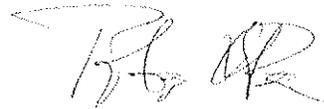
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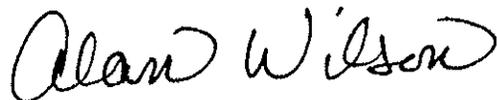
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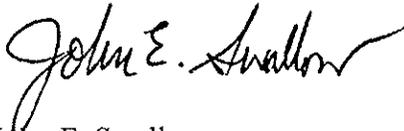
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