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VIA CERTIFIED MAIL AND EMAIL

The Honorable Lisa P. Jackson
Administrator, U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Ave NW
Washington, DC 20460
jackson.lisa@epa.gov

Re: Notice of Intent to Sue for Violation of Nondiscretionary Duties to Review Steam Electric Power Generating Category Effluent Limitation Guidelines Annually and Effluent Limits Every Five Years

Dear Administrator Jackson:

We are writing on behalf of the Defenders of Wildlife and the Sierra Club (Plaintiffs) to provide you with notice of our intent to sue the U.S. Environmental Protection Agency (EPA) for failure to conduct and complete a review of the effluent limitation guidelines (ELGs) annually and effluent limitations at least once every five years for the Steam Electric Power Generating category, as required by 33 U.S.C. § 1314(b) and 33 U.S.C. § 1311(d).

Section 505(a)(2) of the Clean Water Act authorizes citizen suits “against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.” 33 U.S.C. § 1365(a)(2). Citizens must provide notice to the Administrator at least sixty days before commencing a citizen suit under section 505(a)(2). 33 U.S.C. § 1365(b).

Plaintiffs are hereby giving Administrator Jackson notice of intent to file suit against her, in her official capacity as Administrator of the EPA, under the Clean Water Act for failure to perform the nondiscretionary duties explained in detail below. Plaintiffs may commence this suit any time sixty days after the Administrator has received this notice.

I. Background: Effluent Limitation Guidelines Review Process

Under the Clean Water Act, EPA is required to promulgate ELGs and effluent limitations to control discharges of pollutants into the waters of the United States from industrial point

sources. 33 U.S.C. §§ 1311(b), 1314(b). Section 304(b) instructs EPA to promulgate ELGs that identify “attainable effluent reductions and the factors relevant thereto” for each individual industrial category. 33 U.S.C. § 1314(b); Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1020 n.2 (D.C. Cir. 1978). EPA is to use the ELGs to adopt and revise specific effluent limitations for industrial categories as required under section 301(b). 33 U.S.C. §§ 1311(b), 1314(b).

Because of the technical complexity of the task, however, EPA has “telescope[d] into one proceeding per industry the identification of the attainable effluent reductions and the factors relevant thereto under § 304(b) and the actual establishment of the various industry-wide limitations under § 301(b).” Weyerhaeuser Co. v. Costle, 590 F.2d at 1020 n.2. In other words, EPA has condensed the two-step procedure of promulgating ELGs and then effluent limitations into one streamlined process that does not distinguish between ELGs and effluent limitations. “The courts have validated this exercise of EPA discretion in carrying out the Act upon a showing that the unified procedure has effectively achieved the ends of the statute’s bifurcated and apparently impractical plans.” Id.; See also American Frozen Food Inst. v. Train, 539 F. 2d 107, 130-31 (D.C. Cir. 1976); E. I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 124 (1977).

“[F]or over three decades, EPA has implemented sections 301 and 304 through the promulgation of effluent limitations guidelines.” 73 Fed. Reg. 53,218, 53,221 (Sept. 15, 2008). Accordingly, EPA has chosen to concurrently fulfill their duties of review under sections 304(b) and 301(d). 69 Fed. Reg. 53,705, 53,707 (Sept. 2, 2004) (noting that, “as part of its annual review of effluent limitations guidelines under section 304(b), EPA is also reviewing the effluent limitations they contain, thereby fulfilling its obligations under section 301(d) and 304(b) simultaneously”).

II. Steam Electric Power Generating Effluent Limitation Guidelines

EPA has concluded that the Steam Electric Power Generating category is the second-largest discharger of toxic pollutants, and the toxicity of these discharges is primarily driven by metals associated with coal combustion waste (CCW or coal ash) handling and wet Flue Gas Desulfurization (FGD) systems. 72 Fed. Reg. 61,335, 61,342 (Oct. 30, 2007). In 2002 alone, steam electric power plants reported discharging millions of pounds of copper, aluminum, arsenic, boron, chlorine, selenium, lead, fluoride, iron, mercury, cadmium, zinc, manganese, hexavalent chromium, and nickel.¹ Toxic metal discharges from steam electric power plants pose a serious threat to public health and the environment, and EPA’s own research demonstrates that zero-discharge effluent limitations for these waste streams is possible through the use of the best available technology economically achievable (BAT).²

Yet the existing ELGs and effluent limitations fail to address metals discharges from coal ash handling and wet FGD systems and other dangerous waste streams. Although EPA revised the initial effluent limitations and standards for the Steam Electric Power Generating category in

¹ U.S. Env’tl. Prot. Agency, Interim Detailed Study Report for the Steam Electric Power Generating Point Source Category 5–7, tbl 5-4 (Nov. 2006).

² U.S. Env’tl. Prot. Agency, Steam Electric Power Generating Point Source Category: 2007/2008 Detailed Study Report 3-30, 3-47 (2008)

1982, the limits have not been revised since, and contain minimal limits on metals for the Metal Cleaning Wastes and Cooling Tower Blowdown waste streams only. *See* 40 C.F.R. pt. 423.

Currently, the ELGs for the Steam Electric Power Generating category consist of best practicable control technology (BPT) limits for: pH and polychlorinated biphenyl compounds (PCBs) for all waste streams; total suspended solids (TSS), and oil and grease (O & G) for Low-Volume Wastes, Fly Ash Transport, and Bottom Ash Transport; TSS, O & G, copper, and iron for Metal Cleaning Wastes; free available chlorine (FAC) for Once-Through Cooling and Cooling Tower Blowdown; and TSS for Coal Pile Runoff. 40 C.F.R. pt 423. In addition, the ELGs contain BAT limits for PCBs for all waste streams; TSS, O & G, copper, and iron for Metal Cleaning Wastes; total residual chlorine for Once-Through Cooling; and FAC, chromium, zinc, and 126 priority pollutants for Cooling Tower Blowdown. 40 C.F.R. pt 423. The BPT and BAT limits have not been revised since 1982, and do not include effluent limits for most of the toxic metals that are discharged in large quantities from Steam Electric Power Generators.

Although the ELGs for the Steam Electric Power Generating category have not been revised in twenty-six years, EPA has been “studying” toxic discharges from this category since 1994.³ 59 Fed. Reg. 44,234, 44,235 (Aug. 26, 1994). In 1994, EPA identified the Steam Electric Power Generating Category as a candidate for future rulemaking and began a preliminary study of discharges from the Steam Electric Power Generating category in response to a lawsuit filed by the Natural Resources Defense Council. 59 Fed. Reg. 25,859, 25,862 (May 18, 1994). This study was completed in 1995. 61 Fed. Reg. 35,042, 35,052 (July 3, 1996). EPA again identified the category as a candidate for future rulemaking in 1996 and 1998. 61 Fed. Reg. at 35,047; 63 Fed. Reg. 29,203, 29,208 (May 28, 1998).

In 2003, EPA identified the Steam Electric Category as having a “relatively high estimate of potential hazard or risk” and stated that EPA would “continue investigating pollutant discharges” from this category. 68 Fed. Reg. 75,515, 75,528 (Dec. 31, 2003). EPA’s specific finding with respect to the Steam Electric Category was “Incomplete data available for analysis: Need to collect more information for the next biennial plan.” *Id.* at 75,523. In 2004, EPA’s finding for this category was “Incomplete data available for full analysis. EPA intends to collect more information for the next annual review.” 69 Fed. Reg. 53,705, 53,716–53,717 (Sept. 2, 2004). In 2005, EPA’s finding was “Incomplete data available for a full analysis. EPA intends to complete a detailed study of this industry for the 2006 Plan.” 70 Fed. Reg. 51,042, 51,050 (Aug. 29, 2005). The following year, EPA again resolved to continue its study of the Steam Electric Category. 71 Fed. Reg. 76,644, 76,656–76,657 (Dec. 21, 2006) (finding that “EPA intends to start or continue a detailed study of this industry in its 2007 and 2008 annual reviews to determine whether to identify the category for effluent guidelines rulemaking”). And again in 2007 and 2008, EPA’s specific finding for the Steam Electric Category was: “EPA intends to continue a detailed study...to determine whether to identify the category for effluent guidelines rulemaking.” 72 Fed. Reg. 61,335, 61,344–61,345 (Oct. 30, 2007); 73 Fed. Reg. 53,218, 53,230–53,231 (Sept. 15, 2008).

³ EIP is unable to identify EPA actions regarding the Steam Electric Power Generating ELGs between 1982 and 1994. However, even if EPA did take action during this time period, such actions would not affect the status of the claims identified in this letter.

III. EPA's Failure to Perform Nondiscretionary Duties

The Clean Water Act mandates that EPA regularly conduct and complete a review of the ELGs and effluent limitations, and make a decision as to whether revision of the ELGs and effluent limitations is appropriate. 33 U.S.C. §§ 1314(b); 1311(d). Specifically, section 304(b) states that EPA “shall...provide[] guidelines for effluent limitations, and, at least annually thereafter, revise, if appropriate, such regulations. Id. § 1314(b).⁴ Section 301(d) states that “[a]ny effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised...” Id. § 1311(d). As discussed above, EPA has combined its duties under section 304(b) and 301(d) and “as part of its annual review of effluent limitations guidelines under section 304(b), EPA is also reviewing the effluent limitations they contain, thereby fulfilling its obligations under sections 301(d) and 304(b) simultaneously. See, e.g., 73 Fed. Reg. at 53,221.

“It is undisputed that EPA has an obligation to review effluent guidelines and limitations for possible revision, and that such a review is mandatory.” Our Children’s Earth Found. v. U.S. Env’tl. Prot. Agency, 527 F.3d 842, 849 (9th Cir. 2008). Implicit in the statutory command to review and revise, if appropriate, is the duty to make a determination—yes or no—as to whether revision of the ELGs and effluent limitations is appropriate. See Env’tl. Defense Fund v. U.S. Env’tl. Prot. Agency, 870 F.2d 892, 900 (2nd Cir. 1989) (“Although the district court does not have jurisdiction to order the Administrator to make a particular revision, we cannot agree with appellees that the Administrator may simply make no formal decision to revise or not to revise, leaving the matter in a bureaucratic limbo subject neither to review in the District of Columbia Circuit nor to challenge in the district court.”). While EPA’s decision as to whether revision of the ELGs and effluent limitations is “appropriate” is discretionary, EPA has a mandatory duty to make that decision—annually and every five years. 33 U.S.C. §§ 1314(b); 1311(d).

⁴ Implicit in the statutory command to annually revise the ELGs if appropriate is the duty to conduct and complete a review of the ELGs and make a decision as to whether or not it is appropriate to revise the ELGs. See, e.g., 73 Fed. Reg. 53,218, 53,221 (“Section 304(b) requires EPA to review its existing effluent guidelines for direct dischargers each year and revise such regulations if appropriate.”).

Since the ELGs and effluent limitations were revised in 1982, however, EPA has never made a decision as to whether or not revision of the ELGs and effluent limitations is appropriate:

EPA Findings from Review of ELGs and Effluent Limitations Conducted under Sections 304(b) and 301(d) Reviews Since 1982

YEAR	FINDING	CITATION
1994	Identified Category as Candidate for Future Rulemaking	59 Fed. Reg. 25,859, 25,862 (May 18, 1994)
1996	Identified Category as Candidate for Future Rulemaking	61 Fed. Reg. 35,042, 35,047 (July 3, 1996)
1998	Identified Category as Candidate for Future Rulemaking	63 Fed. Reg. 29,203, 29,208 (May 28, 1998)
2003	“Incomplete data available for analysis: Need to collect more information for the next biennial plan.”	68 Fed. Reg. 75,515, 75,523 (Dec. 31, 2003)
2004	“Incomplete data available for full analysis. EPA intends to collect more information for the next annual review.”	69 Fed. Reg. 53,705, 53,716–53,717 (Sept. 2, 2004)
2005	“Incomplete data available for a full analysis. EPA intends to complete a detailed study of this industry for the 2006 Plan.”	70 Fed. Reg. 51,042, 51,050 (Aug. 29, 2005)
2006	“EPA intends to start or continue a detailed study of this industry in its 2007 and 2008 annual reviews to determine whether to identify the category for effluent guidelines rulemaking.”	71 Fed. Reg. 76,644, 76,656–76,657 (Dec. 21, 2006)
2007	“EPA intends to continue a detailed study of this industry in its 2008 annual review to determine whether to identify the category for effluent guidelines rulemaking.”	72 Fed. Reg. 61,335, 61,344–61,345 (Oct. 30, 2007)
2008	“EPA intends to continue a detailed study of this industry in its 2009 annual review to determine whether to identify the category for effluent guidelines rulemaking.”	73 Fed. Reg. 53,218, 53,230–53,231 (Sept. 15, 2008)

EPA cannot sidestep its mandatory duty to make a determination annually (or every five years) as to whether revision of the ELGs and effluent limitations is appropriate by engaging in an endless review process that has no foreseeable end date. EPA itself states it is not making a decision as to whether revision is appropriate or not with respect to the Steam Electric Category. See, e.g., 73 Fed. Reg. at 53,230–53,231. For example, EPA’s 2008 finding for the category was: “EPA intends to continue a detailed study of this industry in its 2009 review *to determine whether to identify the category for effluent guidelines rulemaking.*” *Id.* (emphasis added). In the “Notice of Final 2008 Effluent Guidelines Program Plan” EPA expressed its intent to “use the detailed study to obtain information on hazard, availability and cost of technology options,

cost of technology options, and other factors in order to *determine if it would be appropriate* to identify the category for possible effluent guidelines revision.” *Id.* at 53,224 (emphasis added).

EPA has failed to complete the required reviews of the Steam Electric Power ELGs and effluent limitations, or to make a decision whether to revise or not to revise the standards set forth in 40 C.F.R. Part 423, since 1982. A finding of “incomplete data” and/or “continue review to determine whether revision is appropriate” is not a decision as to whether revision is appropriate or not. Accordingly, EPA is in violation of its mandatory duties under sections 304(b) and 301(d) of the Clean Air Act.

Conclusion

EPA is subject to a statutory mandate to conduct and complete a review of the ELGs annually and the effluent limits at least once every five years for the Steam Electric Power Generating category. Since 1982, however, EPA has failed to complete a review of this category or to make a determination as to whether revision of the ELGs and effluent limitations is appropriate. EIP intends to bring suit against EPA to compel compliance with its mandatory duties to conduct and complete a review of the standards set forth in 40 C.F.R. Part 423, and to make a determination as to whether revision of the ELGs and effluent limitations is appropriate.

If you have any questions regarding the allegations in this notice or would like to discuss this matter further, please contact us at the number or email below.

Respectfully submitted,



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