

**STATE OF NEW YORK
STATE OF CONNECTICUT
STATE OF MAINE
COMMONWEALTH OF MASSACHUSETTS
STATE OF NEW JERSEY
STATE OF RHODE ISLAND
STATE OF WASHINGTON**

February 20, 2003

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

The Honorable Christine Todd Whitman
Administrator, Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Notice of Intent to Sue Under Clean Air Act § 304(b)(2)

Dear Administrator Whitman:

Representing the States of New York, Connecticut, Maine, New Jersey, Rhode Island and Washington, and the Commonwealth of Massachusetts, we notify you, pursuant to section 304(b)(2) of the Act, 42 U.S.C. § 7604(b)(2), of our intent to sue EPA for its failure to review and, if appropriate, revise the New Source Performance Standard (NSPS) for fossil fuel fired electric generating units (EGUs or power plants) found at 40 CFR subpart Da. Pursuant to section 111(b)(1)(B) of the Act, 42 U.S.C. § 7411(b)(1)(B), EPA is required to “at least every 8 years, review and, if appropriate, revise such [NSPS] following the procedures required by this subsection.” The information available to us indicates that EPA has not undertaken the required review of the efficacy of the subpart Da standards for at least two decades. Accordingly, EPA is in violation of its nondiscretionary duty to “review and, if appropriate, revise” subpart Da.

As explained below, we believe that EPA’s review of the existing standard will reveal the need for significant revisions to the standard. The existing standards for sulfur dioxide and particulate matter fail to reflect the technological advances that have occurred in the past two decades as well as the current information regarding the environmental harm posed by those

pollutants. In addition, we believe that subpart Da is inadequate in that it does not contain a standard for emissions of carbon dioxide, a pollutant that causes global warming with its attendant adverse health and environmental impacts. In this regard, recent information confirms that:

1. Carbon dioxide emissions from power plants in the United States are significant contributors to global warming;
2. Global warming and other aspects of climate change will significantly endanger public health and welfare; and
3. Demonstrated, effective technology exists to significantly reduce carbon dioxide emissions from electric utility generating systems.

Thus, power plant carbon dioxide emissions meet all the conditions set forth in the Act for inclusion within an NSPS. We therefore call on EPA to add limitations for carbon dioxide emissions when it revises subpart Da.

EPA's Mandatory Duty to Review and, If Appropriate, Revise Subpart Da.

Clean Air Act § 111(b)(1)(B) imposes on EPA a mandatory duty to review the continued efficacy of each existing NSPS every eight years:

The Administrator shall, at least every 8 years, review and, if appropriate, revise such standards following the procedures required by this subsection for promulgation of such standards.

42 U.S.C. § 7411(b)(1)(B).

The word “shall” indicates a congressional demand that EPA undertake this review. When “a statute sets forth a bright-line rule for agency action ..., there is no room for debate – congress has prescribed a categorical mandate that deprives [the agency] of all discretion over the timing of its work.” *American Lung Association v. Reilly*, 962 F. 2d 258, 263 (2d Cir. 1992). *See also NRDC v. Reilly*, 983 F.2d 259, 266 (D.C. Cir. 1992) (CAA § 202, which states that EPA shall promulgate onboard refueling vapor recovery standards, “most manifestly obligates” EPA to issue the standards); *State of New York v. Thomas*, 613 F. Supp. 1472, 1485 (D.D.C. 1985)(“As reiterated by the United States Court of Appeals for the District of Columbia Circuit, when the Clean Air Act uses ‘shall,’ the normal inference is that the act is mandatory.”).

EPA is in Violation of its Mandatory Duty

The NSPS for electricity generating units was published on June 11, 1979, 44 Federal Register 33613. Although there have been technical amendments since that date, none of these constitute the “review” mandated by the Clean Air Act. The only recent substantive modification to subpart Da was a modification to the nitrogen oxides limit undertaken pursuant

to a Congressional direction contained in the 1990 Clean Air Act Amendments, rather than pursuant to EPA's duty to conduct 8 year reviews. *See Lignite Energy Council, et al. v. U.S. Environmental Protection Agency*, 198 F.3d 930 (D.C. Cir. 1999). Thus, EPA has not fulfilled its duty to review, every eight years, the existing rule.

The sole exception provided for in the statute applies only "if the Administrator determines that such review is not appropriate in light of readily available information on the efficacy of such standard." *Id.* Such a determination, if made, should have been based on an administrative record and made in accordance with applicable procedures of administrative law, including public notice and comment. In this case, there is no indication that EPA ever made the determination that such review was not appropriate, let alone a formal determination in accordance with administrative procedures; EPA simply never reviewed the standard.

The Existing Standard is in Need of Revision

Furthermore, the facial inadequacy of subpart Da establishes that EPA could not have made a determination that review was inappropriate. Section 111(b)(1)(B) provides:

When implementation and enforcement of any requirement of this chapter indicate that emission limitations and percent reductions beyond those required by the standards promulgated under this section are achieved in practice, the Administrator shall, when revising the standards promulgated under this section, consider the emission limitations and percent reductions achieved in practice.

The following are a few notable ways in which subpart Da is substantially obsolete and inadequate:

- The sulfur dioxide standard for coal-fired power plants of 1.20 lbs/mmBtu is substantially in excess of levels that can be achieved through the use of established flue gas desulfurization systems. For example, the current standard is 800% greater than the emission rate of .150 lbs/mmBtu required by the recent consent decree that EPA entered into with PSEG. *United States and New Jersey v. PSEG Fossil LLC*, civ action no. 02-340 (JCL) D. N.J. (consent decree entered on July 26, 2002.).
- Similarly, current technologies for control of particulate emissions, such as precipitators and baghouse, can reduce particulate emissions to levels at least 50% below the current standard of .03 lb/mmBtu.
- In the years since subpart Da was initially promulgated, it has been established that carbon dioxide emissions cause global warming, resulting in significant harm to health and the environment. Not only do power plants contribute over 35% of carbon dioxide emissions in the United States, but their emissions are expected to

increase by 35% over the next two decades. U.S. General Accounting Office, *AIR POLLUTION: Meeting Future Electricity Demand Will Increase Emissions of Some Harmful Substances*, GAO-03-49 (dated October 30, 2002) (*Future Demand*). Because technological developments have made it easier to reduce, control or capture carbon dioxide emissions from EGUs, a revised NSPS should contain limits on emissions of carbon dioxide from EGUs. Attached to this submission, for EPA's consideration in reviewing and revising subpart Da, is a summary of the scientific and technological basis for inclusion of standards for carbon dioxide emissions in a revised subpart Da.

Need for Prompt Action

Subpart Da is significantly obsolete to the extent that it does not reflect current information regarding the technological means for minimizing the emissions of these pollutants from newly constructed or modified power plants. Fossil fuel fired power plants are the largest sources of sulfur dioxide and carbon dioxide emissions in the United States, accounting for more than one-third of the nation's carbon dioxide emissions and two-thirds of the nation's sulfur dioxide emissions. See EPA, National Air Quality and Emissions Trend Report 1999, March 2001 (for sulfur dioxide). Application of demonstrated, commercially available technologies will significantly reduce the emissions of these pollutants from new and modified power plants. Given the significance and concentration of the utility sector, pollution reductions from these plants will be among the quickest and most cost-effective steps that can be taken to reduce these harmful emissions.

Prompt action is necessary in order to prevent the continued harm caused by these pollutants. Indeed, with regard to emissions of carbon dioxide, you told environmental leaders from around the world: "If we fail to take the steps necessary to address the very real concern of global climate change, we put our people, our economies, and our way of life at risk." G8 Environmental Ministerial Meeting, Working Session on Climate Change, Trieste, Italy (March 3, 2001). Review and revision of subpart Da provides you with an ideal opportunity to significantly reduce emissions of these harmful pollutants.

Conclusion

Accordingly, we intend to sue EPA for failure to comply with its mandatory duty to review and, if appropriate, revise subpart Da. In the event that you wish to settle this matter without the need for litigation, please contact the undersigned legal representatives of the States submitting this notice.

Sincerely,

ELIOT SPITZER
ATTORNEY GENERAL OF NEW YORK

By: _____
PETER LEHNER
J. JARED SNYDER
Assistant Attorneys General
The Capitol
Albany, NY 12224

RICHARD BLUMENTHAL
ATTORNEY GENERAL OF CONNECTICUT

By: _____
KIMBERLY MASSICOTTE
MATTHEW I. LEVINE
Assistant Attorneys General
P.O. Box 120
55 Elm Street
Hartford, CT 06141-0120

G. STEVEN ROWE
ATTORNEY GENERAL OF MAINE

By: _____
GERALD D. REID
Assistant Attorney General
Department of the Attorney General
State House Station #6
Augusta, Maine 04333-0006

THOMAS F. REILLY
ATTORNEY GENERAL OF MASSACHUSETTS

By: _____
JAMES R. MILKEY
Assistant Attorney General
Environmental Protection Division
200 Portland Street, 3rd Floor
Boston, Massachusetts 02114

PETER C. HARVEY
ACTING ATTORNEY GENERAL OF
NEW JERSEY

By: _____
JAMES MURPHY
Deputy Attorney General
Richard J. Hughes Justice Complex
25 Market Street, P.O. Box 093
Trenton, New Jersey 08625-4503

PATRICK LYNCH
ATTORNEY GENERAL OF RHODE ISLAND

By: _____
TRICIA K. JEDELE
Assistant Attorney General
Department of Attorney General
150 South Main Street
Providence, Rhode Island

CHRISTINE O. GREGOIRE
ATTORNEY GENERAL OF WASHINGTON

By: _____
LESLIE SEFFERN
Assistant Attorney General
P.O.Box 40100
1125 Washington St., SE
Olympia, WA 98504-0100

