IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CALIFORNIA COMMUNITIES AGAINST TOXICS, *et al.*, *Plaintiffs*, v. GINA McCARTHY, Administrator, United States Environmental Protection Agency, *Defendant*.	Civil Action 1:15-cv-00512-TSC

EPA'S REPLY MEMORANDUM IN
SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

Defendant Gina McCarthy, in her official capacity as Administrator of the United States Environmental Protection Agency (hereinafter "EPA" or "Agency"), files this reply in support of EPA's cross-motion for summary judgment on remedy (ECF 31) on the complaint filed by Plaintiffs California Communities Against Toxics, Californians Against Waste Foundation, Coalition For A Safe Environment, Del Amo Action Committee, Desert Citizens Against Pollution, Louisiana Bucket Brigade, Louisiana Environmental Action Network, Neighbors For Clean Air, and Ohio Citizen Action (collectively, "Plaintiffs"). ECF 1.

INTRODUCTION

EPA has not contested liability in this matter. With respect to the 20 source categories identified by Plaintiffs, EPA did not timely perform its non-discretionary duty under the Clean Air Act ("CAA") to "review, and revise as necessary" the applicable national emission standards for hazardous air pollutants ("NESHAPs") considering relevant technological developments (referred to as the "technology review"). 42 U.S.C. § 7412(d)(6). EPA also did not timely perform the "residual risk review" for these same categories pursuant to Section

7412(f)(2) and, for each category either: (1) promulgate residual risk standards in order to protect human health with an ample margin of safety, or to protect against an adverse environmental effect; or (2) determine that it is not necessary to promulgate such standards. (The residual risk and technology reviews are jointly referred to as the "RTR reviews.")[1]

The question before the Court is the amount of time necessary for EPA to complete these obligations.[2] Plaintiffs assert that the Agency should be ordered to comply "immediately," unless compliance is impossible. Plaintiffs' Combined Opposition To EPA's Cross-Motion For Summary Judgment and Reply In Support Of Plaintiffs' Motion For Summary Judgment, at 3 (Apr.7, 2016) ("Pltfs. Opp.") (emphasis added). ECF 34. Plaintiffs' demand for urgency, while easily stated, cannot overcome the practical realities regarding the amount of work by EPA that is required to complete these rules. As noted in NRDC v. New York, the issue of setting a deadline must be approached on a "pragmatic basis." 700 F. Supp. 173, 181 (S.D.N.Y. 1988). The public will not benefit from a schedule that is expedited to the point where the resulting 20 rules are insufficient to accomplish the statutory purpose or to withstand judicial review if challenged.[3] Imposing a schedule that "is simply too compressed

[1] As noted in Mr. Tsirigotis' Declaration, ¶ 4, completing the two actions together is important to ensure that costly and potentially redundant controls are not required for sources through two separate rules or that tighter controls are rejected as being too costly in a second rule in light of marginal improvements from controls required in a first rulemaking.

[2] Plaintiffs suggest that discovery "may become appropriate" if the Court should decide that more information may be useful. Opp. at 22 n.9. The purpose of this vague statement is unclear, particularly since Plaintiffs also state that they "do not believe at present that discovery on the question of remedy is needed." Id. Fed. R. Civ. P. 56(d) sets out a specific process for a nonmovant to seek discovery after a motion for summary judgment has been filed. Given that Plaintiffs have moved for summary judgment, however, it is not clear that this procedure would be available to them or that there is any means for them to seek discovery at this stage of the litigation.

[3] Plaintiffs point to EPA's statement that the Agency will comply with any court-ordered deadline as evidence that the Agency can meet the deadlines they propose. Opp. at 16. Federal

at this stage to afford any reasonable possibility of compliance," does not serve the public interest nor would it be consistent with the overall purpose of the relevant statutory provisions. Sierra Club v. Johnson, 444 F. Supp. 2d 46, 58 (D.D.C. 2006) (declining to impose plaintiffs' proposed schedule.).

ARGUMENT

I. PLAINTIFFS' PROPOSED SCHEDULE IS NOT VIABLE

Plaintiffs' proposed schedule would require EPA to promulgate ten final RTR reviews within 1 year and the remaining ten rules within 2 years. For each group, the Agency would be allowed only four months between issuing the proposed and final rules. This truncated schedule, if ordered by the Court, would substantially limit, if not eliminate, EPA's ability to collect and evaluate the information necessary to make the scientific and technical judgments required by Section 7412, and would undercut the notice and comment process by truncating the time available for public comment and for EPA's consideration of those comments. There are two chief weaknesses in Plaintiffs' argument in support of their proposal. First, they suggest that the Court should ignore the fact that EPA is undertaking a substantial number of risk and technology reviews at once, which shows the unrealistic nature of Plaintiffs' proposal. Second, Plaintiffs underestimate the amount of time necessary to complete particular phases of these rulemakings.

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agencies do not disobey the federal courts, and thus any deadlines ordered by the Court will be met (unless they are later amended). See EPA Memo at 22. As discussed in the text, however, the more expedited the schedule for EPA action, the more likely that the quality of the resulting rules will suffer.

A. Plaintiffs Wrongly Ask the Court to Disregard the Fact that EPA Must Complete A Substantial Number of RTR ReviewsWithin a Short Time Frame.

EPA is now working on a number of RTR reviews, including five that must be completed before the end of 2018 under court orders in other cases, in addition to the 20 RTR reviews at issue in this matter. EPA's Memorandum In Opposition To Plaintiffs' Motion For Summary Judgment and In Support Of Cross-Motion For Summary Judgment, at 8-9, 11 & n.3 (Feb. 25, 2016) ("EPA Memo").[4] ECF 31-2. On February 24, 2016, another lawsuit was filed requesting that the Court set deadlines by which EPA must complete an additional 13 RTR reviews. Blue Ridge Environmental Defense League v. McCarthy, Case 1:16-cv-00364-CRC (D.D.C.) ("Blue Ridge"). In addition, consistent with the requirements of the CAA citizen suit provision, 42 U.S.C. § 7604(b), EPA has received a notice from several parties stating that they intend to sue the Agency for failure to timely complete another ten RTR reviews. EPA Exhibit E (attached) (Letter from Nicholas Morales, et al., to EPA Administrator McCarthy (Apr. 8, 2016)). Neither the Blue Ridge complaint nor the notice of intent to sue specify a date by which the parties expect EPA to complete the 23 RTR rules identified in those documents.

Thus, between the present case and Blue Ridge, this Court has been asked to address the schedules for 33 RTR rules. Depending on where and when the parties to the notice of intent file suit, deadlines for another ten RTR rules will have to be addressed. Plaintiffs are aware of the Blue Ridge complaint and the notice of intent to sue because Plaintiffs' counsel

[4] When EPA's Memo was filed, EPA was subject to three court-ordered deadlines and cross-motions for summary judgment to establish deadlines for EPA to act on two RTR rules were pending in Sierra Club v. McCarthy, Case No: 3:15-cv-01165-HSG, 2016 WL 1,055,120 at *4 (N.D. Cal., Mar. 15,2016). On March 15, 2016, that court ordered EPA to complete two RTR rulemakings no later than October 1, 2017 – two years from the date that briefing on the cross-motions for summary judgment had been completed. ECF 41.

also appear in those matters. Plaintiffs' proposal that the Court should ignore these other demands on EPA regarding RTR rules, particularly the existing court-ordered deadlines, and consider the 20 rules at issue in this one complaint in isolation is asking the Court to ignore the real world. See Sierra Club v. McCarthy, 2016 WL 1,055,120 at *4 (rejecting plaintiffs' argument that the court should consider the schedule for "the requested rulemakings in isolation.").

B. Plaintiffs' Claim That Their Proposed Schedule Is Required By the CAA Is Unfounded.

Plaintiffs propose that EPA be required to complete the RTR reviews for ten of the 20 sources categories at issue within 12 months and the remaining ten before the end of the next year. Plaintiffs expect that, during the first year, in addition to completing ten RTR reviews, EPA will also be able to work on steps such as data collection for any rules that are too complex to be completed within a single 12-month period and then to complete such reviews by the end of the second year. Plaintiffs' proposed schedule is premised on their claim that Congress mandated a two year-deadline for RTR reviews. Opp. at 6-8.

Plaintiffs make no serious effort to reconcile their demand that EPA be required to complete half of the 20 rules at issue in one year with their argument that Congress that Congress allowed EPA two years to complete an RTR review. This internal inconsistency shows that their proposal that EPA be required to complete ten RTR reviews within one year should be rejected. See Sierra Club v. McCarthy, 2016 WL 1,055,120, at 5 (rejecting plaintiffs' request that EPA be allowed only one year to complete two RTR rulemakings.).

Moreover, Plaintiffs' statutory argument is wrong. Congress required EPA to promulgate emission standards for 40 source categories within two years after November 15, 1990. 42 U.S.C. § 7412(e)(1)(A). Congress further required EPA to complete the RTR

reviews for these standards within the next eight years. Id. § 7412(d)(6), (f)(2). There is no statutory basis for importing the two-year promulgation deadline into the RTR process. Plaintiffs assert that Congress intended that a part of this eight-year period was to allow for implementation of the initial standards, which the statute requires be implemented within three years, with the possibility of a one year extension on a case-by-case basis. Opp. at 7-8 (citing 42 U.S.C. § 7412(i)(3)). That conclusion, however, leaves a four to five year gap between the latest implementation date for the initial standards and the required statutory completion of the RTR review. Thus, Plaintiffs' arguments do not rebut the plain fact that Congress chose not to specify how long an RTR review should take.[5] Accordingly, their argument that Congress intended for the RTR reviews to be completed within two years is without statutory support.

Plaintiffs' assumption that the RTR reviews should be subject to the same time limit as the promulgation of the original standards also ignores the fact that the standard-setting rulemaking and the risk portion of the RTR reviews require very different analyses. Under section 7412(d)(2)-(3), in setting the original standards, the Agency must address the means of achieving the maximum emission reductions, whether through design, technology, work

[5] Plaintiffs also cite to the two-year period provided in Section 7412(c)(5). As an initial matter, this provision provides that the standards should be issued within 10 years after November 15, 1990 or within 2 years of when a source category is listed, whichever is later. Thus, it does not presuppose a two-year period for issuing rules for newly-listed source categories. In any event, this provision is not relevant for purposes of determining the intent of Congress regarding the eight-year periods specified in Section 7412(d)(6) and (f)(2). EPA's standard practice for issuing rules under section 112(c)(5) has been to issue the proposal at the same time as it lists the source category and to then issue the final rule within two years of the proposal. See, e.g., National Emission Standards for Hazardous Air Pollutants: Gold Ore Mine Processing and Production Area Source Category; and Addition to Source Category List for Standards, 76 Fed. Reg. 9450 (Feb. 17, 2011).

practices, or other methods. This section does not allow for the consideration of the effect of air emissions on public health and the environment.[6]

Instead, Congress reserved consideration of those important issues for the RTR review, where EPA must determine whether the previously-promulgated standards "provide an ample margin of safety to protect public health . . . [and] to prevent, taking into consideration costs, energy, safety, and other relevant factors, an adverse environmental effect." 42 U.S.C. § 7412(f)(2)(A). As detailed in the Tsirigotis Declaration, the risk review requires the collection of information regarding emissions from the source category at issue, which can take a considerable amount of time, depending on the particular source category. Analyzing this information is a complex technical process that requires computer modelling. If, after completing the process of collecting and analyzing the necessary information, EPA concludes that the existing standards are not adequate to protect public health with an ample margin of safety or to prevent an adverse environmental effect, the Agency must then promulgate additional standards.[7] Given that the risk review is such a different process from the setting of standards, there is simply no basis for Plaintiffs' assumption that Congress intended to subject the two rulemakings to the same time limit.

[6] Under Section 7412(d)(2), EPA is limited to consideration of the "non-air quality health and environmental impacts" of emissions from a particular source category. In the 1990 Amendments to the CAA, Congress recognized the inherent difficulties in setting risk-based standards and so revised the Act to set the initial standards based on technology. EPA Memo at 5.

[7] The technology review portion of the RTR rulemaking for each source does address essentially the same factors as were at issue in the promulgation of the standard, but in light of any intervening developments in "practices, processes, and control technologies." 42 U.S.C. § 7412(d)(6). The technology review is conducted simultaneously with part of the risk review and so does not add time to the rulemaking schedule. See Tsirigotis Decl. ¶ 16(e).

C. The Court Should Not Disregard the Agency's Experience in Past RTR Rulemakings.

Plaintiffs criticize the Tsirigotis Declaration for using "speculative and equivocal language" in predicting how long these RTR rulemakings may take. Opp. at 18. Plaintiffs appear to be fully confident that the RTR reviews will be uniform, predictable proceedings. The Agency's actual experience, however, contradicts Plaintiffs' certainty. In Mr. Tsirigotis's Declaration, ¶ 21, EPA established that, since 2012,[8] the Agency has completed RTR reviews for 30 source categories.[9] The shortest rulemaking took 2.5 years; 16 rules were completed in 3-4 years; and 12 rulemakings lasted for 5-8 years. Id. In the Sierra Club v. Jackson consent decree, entered in 2011, EPA had committed to complete 27 RTR reviews (most of which were already underway) by 2013. Because the Agency was unable to do so, many of these deadlines had to be extended. EPA Memo at 21 and Exhibit C. This history demonstrates the difficulty of predicting the amount of time that will be required to complete a specific rule, and illustrates the reality that setting unduly expedited deadlines does not promote efficiency in the long term for either the litigation or the rulemaking.

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[8] Plaintiffs criticize EPA for not including the RTR review for the Secondary Lead source category on the list of these RTR reviews, which was attached to Mr. Tsiriogotis' Declaration. Opp. at 13. This particular review, however, was completed before 2012; it was signed on December 16, 2011. 77 Fed. Reg. 556, 580 (Jan. 5 2012). Furthermore, Plaintiffs underestimate the time required to complete that review. EPA issued an information collection request to all of the 14 facilities in this source category in 2010, but had begun work on the rule as far back as 2007. The request was prepared between June and December 2009. Declaration of Brian L. Shrager, Coordinator of the Risk and Technology Review Program in the Sector Policies and Programs Division, Office of Air Quality Planning and Standards, EPA Office of Air and Radiation, ¶¶ 4-5 (Apr. 27, 2016). EPA Exhibit F. Thus, the inclusion of the Secondary Lead RTR review on the list would not have lent support to Plaintiffs' argument that EPA should be required to complete 20 RTR reviews in two years.

[9] These schedules were established in Sierra Club v. Jackson, Case No. 09-cv-00152 SBA (N.D. Cal.), Wildearth Guardians v. Jackson, Case No. 1:09-cv-00089-CKK (D.D.C.), and Air Alliance Houston v. EPA, Case No. 12-1607 (D.D.C.). See EPA Memo at 9.

Plaintiffs say that this history is irrelevant because EPA had been acting to meet deadlines set by consent decrees negotiated by the parties, rather than deadlines decided by a court upon a contested motion. EPA does not suggest that the deadlines negotiated in those cases are somehow precedential here. However, the actual facts regarding the time necessary to complete similar rulemakings are more probative than Plaintiffs' speculation as to the minimum amount of time that should be necessary to complete RTR reviews.

Plaintiffs also suggest that the fact that EPA completed RTR reviews for two source categories in 2.5 years somehow demonstrates that EPA should be able to complete RTR reviews for the 20 source categories at issue here in 2 years. Pltfs. Opp. at 14. In an effort to support their counterintuitive claim that EPA should be able to do ten times *more* work in even *less* time, plaintiffs note that the two source categories they refer to (Natural Gas Transmission and Storage and Oil and Natural Gas Production) involved many more sources than do the 18 of the 20 RTR rules at issue here. Id. at 14. EPA's declarant has, however, testified that EPA considers Natural Gas reviews to be "relatively simple."[10] Tsirigotis Decl. ¶ 21. More importantly, the fact that EPA can complete two reviews in two years is not probative as to whether 18 additional rules could be completed at the same time. Not all rules can be completed in the same length of time. For example, for source categories that require the collection of substantial amount of information from facilities, the review will take longer than one were the Agency can proceed based on generally available information. See id. ¶ 21.

[10] The number of sources within the source category is only one factor that affects the complexity of the RTR review; other considerations include the availability of emissions data; the number of emission points at facilities; and the number of different hazardous air pollutants emitted. Tsirigotis Decl. ¶ 11.

Plaintiffs next assert that Mr. Tsirigotis' account of the Agency's experience in completing RTR reviews since 2012 establishes that EPA can work on multiple RTR rules at once. Opp. at 14. This is undisputed. Indeed, under EPA's proposed schedule submitted in this matter, between 2017 and 2018, EPA would sign nine proposed rules and 4 final rules between 2017 and 2018, while simultaneously completing the five RTR rules required by the court orders referenced supra. EPA's proposed schedule further provides that between 2019 and 2021, EPA would sign proposed and final rules as follows:

	Proposed	Final
2019	3	4
2020	8	4
2021		8

EPA Memo at 10.

Finally, Plaintiffs argue that a number of past RTR reviews addressed in Mr. Tsirigotis' Declaration that took a long time should be disregarded as "outliers," because EPA ultimately had to re-propose rules and take additional comment. Opp. at 14-15. As Plaintiffs note, EPA does not state that it plans to take such actions in the RTR rulemakings at issue here. The potential need for a supplemental notice cannot be assessed before the review even begins. It will depend on developments during the rulemaking, such as the nature of additional information generated. These "outliers" demonstrate that these rulemakings are unpredictable. While, as Plaintiffs suggest, a motion for additional time may be a sensible method of dealing with a major disruption, such as the need for a supplemental notice and comment period, motions practice is not an effective or efficient means of dealing with the many unexpected developments that can occur. Therefore, the unpredictability of these reviews cautions against an unduly restrictive schedule.

II. PLAINTIFFS' OBJECTIONS TO EPA'S PROPOSED SCHEDULE ARE UNFOUNDED

EPA's proposed schedule for completing the 20 RTR reviews was prepared after careful consideration of the Agency's experience in similar rulemakings. The Agency's expertise and experience with such proceedings are entitled to greater weight than Plaintiffs' speculations as to what may be possible. Plaintiffs' objections should be rejected.

A. Plaintiffs Fail to Recognize the Importance of Information Collection In Evaluating the Effect of Emissions on Public Health and the Environment So That the Need For Additional or Revised Standards Can Be Properly Evaluated.

1. Plaintiffs' claim that the Court should not allow any time for EPA to collect supplemental information should be rejected.

One of EPA's first steps in an RTR review is to collect information that is generally available through libraries, the internet, or other open sources. Decl. ¶ 13. Based on currently-available information, EPA expects that supplemental information will be necessary to properly complete the RTR reviews for 13 source categories. Id. ¶ 14(b). Plaintiffs argue that the Court should not consider the Agency's initial conclusions regarding the need for supplemental information in setting the schedule because the Agency cannot now make a specific determination regarding its information needs for each review. They contend that the need for time for information collection should be addressed by a motion to extend the deadline for a particular RTR review. Opp. at 19-20.

This approach is impracticable. While a motion to extend was pending, EPA would have to proceed with the rulemaking based on the information immediately available in order to be able to meet the current deadline in case the extension is denied. If the motion were granted, some of EPA's effort would be wasted. Furthermore, EPA cannot effectively determine the scope of an information request without knowing how much time would be available for the

recipient to adequately complete the response and for EPA to analyze the information received. Therefore, until EPA obtained a Court ruling on any request for an extension, it would be impractical for EPA to proceed with seeking the necessary information. Moreover, such extension motions would only divert resources from working on the actual rules.

In sum, Plaintiffs' proposal that the Court, in setting a schedule, should not allow any time for EPA to complete the information collection efforts described in the Tsirigotis Declaration would leave EPA unable to plan the rulemakings effectively and would involve the Court in an unnecessary number of motions. The collection of supplemental information, where needed, is an important part of the review process. The Agency has done its best to identify the source categories for which supplemental information will be necessary and to estimate the time needed to obtain this information for each RTR rule.[11] Decl. 14. Plaintiffs' argument that the Court should ignore this part of the rulemaking schedule should be disregarded.

2. Plaintiffs' claim that EPA has overestimated the time required for the gathering of supplemental information is wrong.

Plaintiffs suggest that EPA can draft a request for information in "much less time" than requested by EPA, although they do not specify an actual time period. Opp. 20. Preparation of a request, however, is much more than one office simply preparing a list of questions. If the request is not prepared carefully, the request may unintentionally fail to seek useful information. Avoiding this possibility by careful preparation and review will ultimately be more efficient because it will avoid information gaps that may have to be addressed later, thereby delaying the

[11] EPA has identified the potential requirements, such as emissions testing for certain source categories, which the Agency does not currently expect to compel, but may ultimately prove to be necessary. For these more speculative possibilities, the Agency has not included time, but has only identified them as a possible development that could require EPA to seek an extension of a deadline. See Decl. ¶ 14(c).

overall progress of the rule. To ensure the adequacy of these requests, the Agency provides for both internal review and review by stakeholders of the initial draft, and of course, time to incorporate appropriate revisions before the request is sent out. Tsirigotis Decl. ¶ 14(c). The amount of time required depends on the number of recipients because the requirements of the Paperwork Reduction Act apply only where the request is directed to ten or more entities. 44 U.S.C. § 3502(3)(A)(i). See EPA Memo at 13.

This full process takes approximately four months if the request is limited to nine or fewer entities. Decl. ¶ 14(a). (A request so limited is referred to as a "survey.") EPA also had to assess the length of time that the recipients should be allowed to submit responses. Given that that the preparation of these responses is a complicated process, the Agency's experience shows that 3 months is a reasonable deadline for the responses. Decl. ¶ 14(a). Again, truncating the time will increase the likelihood of errors or incomplete responses by the recipients, which will complicate future stages of the rulemaking.

Where EPA expects to issue an Information Collection Request ("ICR") (a request directed to 10 or more entities), which entails review under the Paperwork Reduction Act ("PRA"), a substantially longer time is required.[12] Tsirigotis Decl. ¶ 14(a). Due to the significant time and resources involved in completing an ICR and the potential for schedules that may not allow for such efforts, EPA carefully identified the seven categories for which EPA currently anticipates sending ICRs. Tsirigotis Decl. 14(d). As Plaintiffs note, the PRA does allow EPA to request the Office of Management and Budget to waive the requirements if

[12] A full description of the statutory requirements is set forth in EPA Memo at 13 n.4. In brief, the PRA requires two opportunities for public comment, as well as consideration by EPA and OMB, before an ICR can be issued. See 44 U.S.C. § 3507.

necessary to meet a court-ordered deadline, but does not compel OMB to grant the request. See EPA Memo at 13 n.5. That process, however, also takes time. Thus, if faced with a very short schedule, the Agency may have to avoid requests that would trigger PRA's requirements.

Finally, Plaintiffs claim that EPA can expedite the information-gathering process by including requirements for new emissions testing in the request for information, rather than making this a two-step process.[13] While Plaintiffs claim that requesting new testing simultaneous with gathering existing emissions information "would make the process more efficient for all involved," Opp. at 22, this assertion is not correct. Requiring new emissions testing can place a substantial cost and time burden on facilities and can interfere with source operation. Thus, requiring new testing before the Agency can review existing data, which would be received in response to an information request, could impose an undue burden on the facilities that will result only in information that is not useful to the RTR review process. In the Ethylene Process category, EPA avoided this circumstance by requiring new testing only after considering the existing data received in response to a survey. Tsirigotis Decl. ¶ 14(c).

[13] Plaintiffs again complain that EPA has not made a definite determination regarding the need for new emissions testing for particular source categories, arguing that because EPA cannot state with certainty that new testing will be required the Court should ignore that possibility entirely. Opp. at 21. The need for new emissions testing rests on what existing information is available and often cannot be assessed until facilities have provided existing test data. The Agency has provided the Court with its best expert evaluation, based on currently available information as to where new emissions testing would be appropriate. Failing to take into account the Agency's informed evaluation in establishing a schedule would unnecessarily increase the possibility for motions practice and the interruptions and delay in EPA's proceedings that could result.

3. Plaintiffs' modification to the proposed order to establish enforceable obligations regarding information collection is not authorized by the CAA.

The CAA citizen suit provision, on which Plaintiffs' claim is based, authorizes only one remedy: an order requiring EPA to perform a non-discretionary duty. 42 U.S.C. § 7604(a). Plaintiffs have suggested modifying their proposed order to provide:

> For any categories for which EPA does not seek supplemental information, EPA must issue proposed rules within 8 months and final rules within 1 year; For the thirteen categories for which EPA will request supplemental information from facilities, EPA must send to facilities an information collection request within 3 months and file a notification informing this Court that it has done so; must issue proposed rules within 1 year and 8 months; and must issue final rules within 2 years.

Opp. at 22. Plaintiffs base this modification on EPA's statement that it plans to request supplemental information for, at a minimum, 13 source categories. Plaintiffs have not added any overall time to the schedule – all that they have done is rearranged it such that instead of splitting the 20 rules at issue evenly between two years (10 one year, 10 the next), EPA could do 7 RTR reviews during the first year and complete remaining 13 in the second year.[14]

The most significant change in Plaintiffs' modified order is that they have added an enforceable obligation that EPA must send information requests to the appropriate entities for each of the 13 source categories identified in Paragraph 14(c) and (d) of the Tsirigotis Declaration within three months after the Court issues an order in this matter. This relief is unavailable under the citizen suit provision. As Plaintiffs acknowledge elsewhere, Mr.

[14] Plaintiffs assert that this modification is necessary to avoid a circumstance where EPA receives extra time to collect supplemental information, but then does not do so. Id. This explanation does not make sense, however, since Plaintiffs are not proposing to extend EPA's deadline, but would still require that all rules be finished within the two-year period they have already requested.

Tsirigotis' Declaration makes clear that the Agency has not yet reached any final conclusions regarding the supplemental information that may be necessary for any particular source category. Decisions regarding the scope of supplemental information needed for a particular rule are a matter for the Agency's discretion. Plaintiffs are effectively asking the Court to order EPA to collect supplemental information from these 13 source categories and to send the information requests within a three-month period. While the Court can order EPA to complete these rules by a set deadline, the order cannot require EPA to undertake specific steps to gather additional information or define a timetable for EPA to do so.[15] Instead, once the Court orders a final schedule for the proposed and final rules, EPA will have to decide how the allotted time can best be allocated to timely complete rules that will meet the purposes of section 7412(d)(6) and (f)(2). As modified, Plaintiffs' proposed order goes beyond the relief contemplated by the CAA citizen suit provision and should not be adopted by the Court.

B. Plaintiffs' Other Complaints Regarding the Schedule Proposed by EPA Are Not Persuasive.

Plaintiffs object to the approach that EPA has taken for the purpose of explaining to the Court how an RTR review proceeds of dividing the work at issue into nine phases on the ground that the statute does not specifically require these phases. Opp at 17-18. The statute requires EPA to promulgate RTR reviews consistent with the procedural requirements of CAA, 42 U.S.C. § 7607, but leaving it to EPA to structure the rulemaking process within the statutory parameters. The approach of dividing the work into phases is intended to inform the Court regarding the actual work that must be accomplished to promulgate these rules and explain the process that the Agency uses to ensure that the appropriate tasks are completed efficiently and with the degree of

[15] 42 U.S.C. §7604(a) authorizes this Court only to provide one specific remedy: "to order the Administrator to perform [a nondiscretionary] act or duty."

rigor necessary to produce viable rules that will serve their intended purpose. Plaintiffs' particular objections to each phase are addressed below, except with respect to the information collection phase (Phases II and III), discussed *supra*.

1. Contrary to plaintiffs' contention, Phases I and II are not complete.

Plaintiffs argue that EPA completed all the tasks described in Paragraph 11 of the Declaration by developing the "complexity" rankings listed in Table 3 of the Declaration. Opp. at 19. This assumption is easily rebutted. The rough and informal analysis that EPA performs to do a preliminary ranking of this nature would not be acceptable in assembling the information to be the basis of a rulemaking. Instead, EPA must ensure that it has accurately identified both the regulated entities and the number of facilities that each entity operates. Finally, while EPA did seek to identify the stakeholders – regulated entities and public interest groups – in developing the complexity ratings, the tasks in this phase also include preparing briefings for and meeting with these groups. Tsirigotis Decl. ¶ 11.

Plaintiffs also suggest that EPA should not need time to identify the personnel to be assigned to each particular rulemaking or to ascertain the availability of contractor funds, determine which projects should receive the assistance of contractors, and complete the procurement teams. The fact that EPA knows which sections within the Sector Policies and Programs Division ("SPPD") will handle a given rule does not answer the question as to which employees should be assigned to a particular rule. Finally, given that Plaintiffs advocate for the use of contractors to supplement EPA's resources, Opp. at 23, they should not be surprised that EPA must take time to decide where and how to use contractors and to complete the necessary contracting procedures required by federal procurement requirements.

2. Plaintiffs understate the complexity of Phase IV.

Plaintiffs argue that EPA's conclusion that Phase IV – Data Analysis and Modeling File Development -- will require 3-4 months is not warranted. Opp. 22-23 Plaintiffs point to a statement by Janet McCabe, Acting Assistant Administrator for the Office of Air and Radiation, that this phase "would take a minimum of two months" for the yeast manufacturing source category. Id. (citing Declaration of Janet McCabe, ¶ 15(a) (Aug. 28, 2015) (filed in Sierra Club v. McCarthy, Case No: 3:15-cv-01165-HSG). Plaintiffs, however, fail to acknowledge that Ms. McCabe explained that this phase could be completed quickly for the particular RTR rule because EPA believed there were only 5 facilities in the yeast manufacturing category and, although these facilities are "moderately complex," there are few emission points -- a fact which simplifies the Agency's task. McCabe Decl. § 15(a). Thus, Plaintiffs' suggestion that a prediction regarding one particular rule can be applied to all rules, and that therefore two months should be accepted as a ceiling for this phase for all RTR rules – no matter how many facilities or emission points are involved -- is unfounded.

3. Plaintiffs' objection to the time for the multi-pathway assessment ignores the value of this process.

EPA has included two months to allow time for the Agency to complete three levels of the multi-path screenings for persistent and bioaccumulative hazardous air pollutants for the seven source categories where EPA expects these pollutants to be included in the emissions. Decl. ¶ 16(c). Plaintiffs object to including any time for this process in the initial schedule to be ordered by the Court because EPA has not made a definitive determination that this screening will be necessary for any particular RTR review. They again argue that EPA should be required to move for additional time after such a determination has been made. Opp. at 23. The initial schedule however, should accommodate the Agency's reasonable predictions regarding the need

for these screenings so that the Agency can plan an orderly rulemaking. Id. Increasing the need for motions for additional time for a particular rulemaking will not expedite the process.

Finally, Plaintiffs object to allowing EPA two weeks to conduct risk-based demographic assessments. Id. As EPA has stated, this step is not required to complete the RTR rules, but does allow EPA to evaluate the impact of emissions on particular areas from the perspective of environmental justice concerns. This analysis helps facilitate EPA's efforts to address important social concerns. Decl. ¶ 16(d).

4. Plaintiffs underestimate the complexity of simultaneously preparing numerous proposed rules.

With respect to Phase VI , "Development of Rule Proposal Package," Plaintiffs claim that EPA has "inflated" the amount for time required. Opp. at 23. First, they claim that the time necessary for work group meetings and OMB review must be eliminated because it is "discretionary." Id. The fact that Congress was silent as to how the Agency would employ its staff to develop the rule should not be read to bar the creation of workgroups or to bar meetings between staff and between staff and management to determine the parameters of the rule. The Agency's internal procedures provides for the creation of work groups, including individuals outside SPPD; this process enables EPA to coordinate rules promulgated by different Agency programs to ensure consistency and also to allow input by counsel to ensure that legal considerations regarding both the defense of the rule and future enforcement actions are given due attention. Decl. ¶ 16(e).

Plaintiffs also complain about the time allowed for management review. Given that the proposed rule must be signed by the Administrator, however, it must also be reviewed by the upper management of EPA's Office of Air and Radiation so that preliminary decisions can be made and briefings prepared for and presented to the Administrator, who cannot be expected to

sign a document without being familiar with the content and the relevant requirements. Id. ¶ 16(f).

Finally, Plaintiffs suggest that EPA can prepare the actual proposal by using "templates." Opp. at 23. While it is true that certain portions of the preamble to a proposed RTR rule are not rewritten every time, e.g., the explanation of EPA's statutory authority, because each source category presents different issues regarding the nature of the facilities and the emissions data, the technical discussions and the conclusions are different for each RTR review. Accordingly, the suggestion that there are templates that can eliminate a large amount of work necessary to prepare the proposed rule, including the preamble, is unwarranted. Moreover, the fact that certain sections of the preamble are not rewritten every time is the Agency's standard practice and has already been factored into the Agency's proposed schedule.

4. Plaintiffs claim that EPA can sign final rules within four months after signing the proposal is impractical.

Plaintiffs' assertion that EPA would require no more than four months from proposal to final rule ignores the fact that a large part of the four months Plaintiffs propose would be consumed by the public comment process. After the proposal is signed, it takes between two and four weeks for the notice to be published by the Office of the Federal Register. Decl. ¶ 18. Publication begins the comment period, which continues for a minimum of 45 days. Id. EPA has planned to provide 60 days to ensure that the public has a sufficient opportunity to review the underlying technical data and prepare reasoned comments. Id. Even if only the minimum period is allowed, however, EPA would be left with only 60 days to reply to the comments; prepare the final rule and regulatory preamble; complete the necessary review of the final documents; and finalize the administrative record.

In support of their argument that four months from proposed to final rule is adequate, Plaintiffs point to several cases and rulemakings, all of which are distinguishable. Opp. at 24. Plaintiffs state that, in Sierra Club v. Ruckelshaus, the court allowed EPA only 90 days from the date of the order to complete the final rule. They fail, however, to address the fact that the proposed rule in that case had been issued more than a year before the decision. 602 F. Supp. 892, 895 (N.D. Cal. 1984). In NRDC v. EPA, where the court allowed for four months between proposal and final, only one rule was at issue. 797 F. Supp. 194, 195 (E.D.N.Y. 1992). See also Sierra Club, 2016 WL 1055120, at *6 ("[T]he Court finds that it is feasible to complete phases seven through nine for both source categories within five to seven months.") (emphasis added). Plaintiffs also state that EPA "only took 3.5 months between the proposed and final rules for the first 10 rulemakings issued pursuant to the Court's order in Sierra Club v. Johnson, [444 F. Supp. 2d at 58]." Opp. at 24. As EPA has previously explained, however, these rules were much simpler and so have little relevance to the time needed for the RTR reviews at issue here. EPA Memo at 22 n.10. Finally, Plaintiffs cite a declaration submitted by Mr. Tsirigotis in another case stating that the Agency would complete a final rule within eight months, but fail to address the fact that only one rule was at issue there; here, by contrast, plaintiffs are asking that EPA be required to complete 10 rules at a time within about two months after the comment period closes. *See* Opp. at 24.

CONCLUSION

In sum, the time period proposed by Plaintiffs is too compressed to allow for a fully-informed Agency process in conducting the RTR reviews at issue. Truncating this process unduly will not serve the public interest. EPA has, moreover, provided a firm evidentiary basis

for its proposed schedule. The Court should deny Plaintiffs' motion for summary judgment on remedy and instead grant the cross-motion submitted by EPA.

Respectfully submitted,

JOHN C. CRUDEN
Assistant Attorney General
Environment and Natural Resources Division

/s/ *Eileen T. McDonough*
United States Department of Justice
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044
eileen.mcdonough@usdoj.gov
(202) 514-3126

Of Counsel

JAN TIERNEY
U.S. Environmental Protection Agency
Office of General Counsel
ARN: MC-2344A
1200 Pennsylvania Ave., N.W.
Washington, DC 20460

EARTHJUSTICE

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES
NORTHWEST ROCKY MOUNTAIN WASHINGTON, D.C. INTERNATIONAL

VIA CERTIFIED MAIL – RETURN RECEIPT REQUESTED AND EMAIL

April 8, 2016

Ms. Gina McCarthy
Administrator
Environmental Protection Agency
1101A EPA Headquarters
William Jefferson Clinton Building
1200 Pennsylvania Avenue, NW
Washington D.C. 20460
mccarthy.gina@epa.gov

RE: Notice of Citizen Suit Concerning Clean Air Act Deadlines

Dear Administrator McCarthy,

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" within the meaning of the Clean Air Act, 42 U.S.C. § 7604(a)(2). This notice is provided to you as Administrator of the U.S. Environmental Protection Agency ("EPA"), in your official capacity, pursuant to 42 U.S.C. § 7604(b)(2) and 40 C.F.R. Part 54 as a prerequisite to bringing a civil action.

The organizations giving this notice are: Community In-Power and Development Association Inc., 600 Austin Ave., Port Arthur, TX 77640, (409) 498-1088; Hoosier Environmental Council, 3951 N. Meridian St., Suite 100, Indianapolis, IN 46208, (317) 685-8800; Ohio Valley Environmental Coalition, P.O. Box 6753, Huntington, WV 25773, (304) 522-0246; Utah Physicians for a Healthy Environment, 423 W. 800 S., Suite A108, Salt Lake City, UT 84101, (801) 502-5450.

Section 7412(f) - Standards to Protect Health and Environment. Title 42, section 7412(f) of the Clean Air Act provides that:

> (A) . . . [T]he Administrator shall, within 8 years after promulgation of standards for each category or subcategory of sources pursuant to [§ 7412(d)], promulgate standards for such category or subcategory if promulgation of such standards is required in order to provide an ample margin of safety to protect public health in accordance with this section (as in effect before November 15, 1990) or to prevent, taking into consideration costs, energy, safety, and other relevant factors, an adverse environmental effect. . . . If standards promulgated pursuant to

> [§ 7412(d)] and applicable to a category or subcategory of sources emitting a pollutant (or pollutants) classified as a known, probable or possible human carcinogen do not reduce lifetime excess cancer risks to the individual most exposed to emissions from a source in the category or subcategory to less than one in one million, the Administrator shall promulgate standards under this subsection for this source category.
>
> . . .
>
> (C) The Administrator shall determine whether or not to promulgate such standards and, if the Administrator decides to promulgate such standards, shall promulgate the standards 8 years after promulgation of the standards under [§ 7412(d)] for each source category or subcategory concerned.

42 U.S.C. § 7412(f)(2). More than eight years have passed since EPA promulgated the following standards under 42 U.S.C. § 7412(d) for the following categories of major sources of hazardous air pollutants:

(1) Primary Copper Smelting, 67 Fed. Reg. 40,478 (June 12, 2002) (40 C.F.R. Part 63 Subpart QQQ);
(2) Generic MACT II - Carbon Black Production, 67 Fed. Reg. 46,258 (July 12, 2002) (40 C.F.R. Part 63 Subpart YY, UU);
(3) Generic MACT II – Cyanide Chemicals Manufacturing, 67 Fed. Reg. 46,258 (July 12, 2002) (40 C.F.R. Part 63 Subpart YY, UU);
(4) Generic MACT II – Spandex Production, 67 Fed. Reg. 46,258 (July 12, 2002) (40 C.F.R. Part 63 Subpart YY, UU);
(5) Coke Ovens: Pushing, Quenching, and Battery Stacks, 68 Fed. Reg. 18,008 (Apr. 14, 2003) (40 C.F.R. Part 63 Subpart CCCCC);
(6) Flexible Polyurethane Foam Fabrication Operations, 68 Fed. Reg. 18,062 (Apr. 14, 2003) (40 C.F.R. Part 63 Subpart MMMMM);
(7) Refractory Products Manufacturing, 68 Fed. Reg. 18,730 (Apr. 16, 2003) (40 C.F.R. Part 63 Subpart SSSSS);
(8) Semiconductor Manufacturing, 68 Fed. Reg. 27,913 (May 22, 2003) (40 C.F.R. Part 63 Subpart BBBBB);
(9) Primary Magnesium Refining, 68 Fed. Reg. 58,615 (Oct. 10, 2003) (40 C.F.R. Part 63 Subpart TTTTT); and
(10) Mercury Emissions from Mercury Cell Chlor-Alkali Plants, 68 Fed. Reg. 70,904 (Dec. 19, 2003) (40 C.F.R. Part 63 Subpart IIIII).

Nonetheless, you have neither promulgated standards for these categories pursuant to Clean Air Act § 7412(f), nor determined that such standards are not "required in order to provide an ample margin of safety to protect public health in accordance with this section . . . or to prevent, taking into consideration costs, energy, safety, and other relevant factors, an adverse environmental effect." 42 U.S.C. § 7412(f)(2). There are no § 7412(f)(2) standards or final

residual risk determinations currently in force or effect after publication in the Federal Register for these sources. Accordingly, you have failed to perform a nondiscretionary duty within the meaning of Clean Air Act § 7604(a)(2) for each of the above-listed standards and source categories.

Section 7412(d)(6) – MACT Review and Revision. Title 42, section 7412(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 [§ 112] no less often than every 8 years." 42 U.S.C. § 7412(d)(6). More than eight years have passed since EPA promulgated Clean Air Act § 7412 regulations for the following categories:

(1) Primary Copper Smelting, 67 Fed. Reg. 40,478 (June 12, 2002) (40 C.F.R. Part 63 Subpart QQQ);
(2) Generic MACT II - Carbon Black Production, 67 Fed. Reg. 46,258 (July 12, 2002) (40 C.F.R. Part 63 Subpart YY, UU);
(3) Generic MACT II – Cyanide Chemicals Manufacturing, 67 Fed. Reg. 46,258 (July 12, 2002) (40 C.F.R. Part 63 Subpart YY, UU);
(4) Generic MACT II – Spandex Production, 67 Fed. Reg. 46,258 (July 12, 2002) (40 C.F.R. Part 63 Subpart YY, UU);
(5) Coke Ovens: Pushing, Quenching, and Battery Stacks, 68 Fed. Reg. 18,008 (Apr. 14, 2003) (40 C.F.R. Part 63 Subpart CCCCC);
(6) Flexible Polyurethane Foam Fabrication Operations, 68 Fed. Reg. 18,062 (Apr. 14, 2003) (40 C.F.R. Part 63 Subpart MMMMM);
(7) Refractory Products Manufacturing, 68 Fed. Reg. 18,730 (Apr. 16, 2003) (40 C.F.R. Part 63 Subpart SSSSS);
(8) Semiconductor Manufacturing, 68 Fed. Reg. 27,913 (May 22, 2003) (40 C.F.R. Part 63 Subpart BBBBB);
(9) Primary Magnesium Refining, 68 Fed. Reg. 58,615 (Oct. 10, 2003) (40 C.F.R. Part 63 Subpart TTTTT); and
(10) Mercury Emissions from Mercury Cell Chlor-Alkali Plants, 68 Fed. Reg. 70,904 (Dec. 19, 2003) (40 C.F.R. Part 63 Subpart IIIII).

Nonetheless, you have not reviewed and revised EPA's emission standards for these categories, as Clean Air Act § 7412(d)(6) requires. There are no revised, final standards promulgated as a result of the requisite § 7412(d)(6) review, or a § 7412(d)(6) determination currently in force or effect after publication in the Federal Register for these sources. Accordingly, you have failed to perform a nondiscretionary duty within the meaning of Clean Air Act § 7604(a)(2).

60-Day Notice. Under § 7604 of the Clean Air Act, the above-listed organizations may commence a citizen suit to compel you to perform any or all of the above duties at any time beginning sixty days from the postmark date of this letter, which is April 8, 2016. *See* 40 C.F.R. § 54.2(d).

Contact Information. We are acting as attorneys for the above-listed organizations in this matter. Please contact us at your earliest convenience regarding this matter. Please address any communications to us at the address and telephone number set forth below.

Sincerely,

Nicholas Morales

Nicholas Morales
Emma C. Cheuse
James S. Pew
Earthjustice
1625 Massachusetts Ave., NW, Suite 702
Washington, D.C. 20036-2243
Tel: (202) 667-4500
nmorales@earthjustice.org
echeuse@earthjustice.org
jpew@earthjustice.org

cc: Avi S. Garbow, General Counsel, Office of General Counsel, EPA
Janet McCabe, Acting Assistant Administrator, Office of Air and Radiation, EPA
Steve Page, Director, Office of Air Quality Planning and Standards, EPA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CALIFORNIA COMMUNITIES AGAINST TOXICS, *et al.*, *Plaintiffs*, v. GINA McCARTHY, Administrator, United States Environmental Protection Agency, *Defendant.*	Civil Action 1:15-cv-00512-TSC

DECLARATION OF BRIAN L. SHRAGER

1. I, Brian L. Shrager, under penalty of perjury, affirm and declare that the following statements are true and correct to the best of my knowledge and belief and are based on my own personal knowledge or on information contained in the records of the United States Environmental Protection Agency (EPA) or supplied to me by EPA employees.

2. I am the Coordinator of the Risk and Technology Review (RTR) Program in the Sector Policies and Programs Division (SPPD) within the Office of Air Quality Planning and Standards (OAQPS), Office of Air and Radiation at EPA; a position I have held since March 26, 2012. SPPD has responsibility for, among other things, developing regulations under section 112 of the Clean Air Act, 42

U.S.C. § 7412, the national emission standards for hazardous air pollutants (NESHAP) program, which includes RTR rules.

3. In my current capacity as RTR Coordinator, I am responsible for maintaining consistency within the RTR program and am involved in all of the RTR projects. In this capacity, I am familiar with the program and have access to records and staff associated with RTR projects including the secondary lead RTR.

4. Through consultation with other SPPD staff, I obtained a PowerPoint presentation documenting preliminary residual risk modeling results for the secondary lead category. The presentation was developed to inform the EPA work group for that project and was dated July 2007. This demonstrates that EPA was working on the secondary lead RTR in 2007.

5. Through consultation with other SPPD staff, I obtained e-mail messages regarding the survey that was being developed to gather information and require emission testing from secondary lead facilities. The e-mails, dated between June and December 2009, show that the survey was developed during that period.

SO DECLARED:

BRIAN L. SHRAGER

Dated: April 27, 2016