



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



August 5, 2014

**Via Certified Mail**

Honorable Gina McCarthy  
Administrator  
U.S. Environmental Protection Agency  
Office of the Administrator (1101A)  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

Honorable Christopher Grundler  
Director, Office of Transportation and Air Quality  
U.S. Environmental Protection Agency  
Office of Transportation and Air Quality (6401A)  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

**Re: Notice of Intent to File Suit Under Section 304 of the Clean Air Act with Respect to Endangerment Finding and Rulemaking to Reduce Greenhouse Gas Emissions from Aircraft**

Dear Administrator McCarthy and Director Grundler:

Section 231(a)(2)(A) of the Clean Air Act (CAA), 42 U.S.C. § 7571(a)(2)(A), requires the United States Environmental Protection Agency (EPA) to determine whether emissions of greenhouse gases from aircraft engines cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. *See Center for Biological Diversity v. EPA*, 794 F. Supp. 2d 151, 159–62 (D.D.C. 2011). If EPA determines that these emissions do contribute to such endangerment, it must propose and adopt standards to limit those emissions. 42 U.S.C. § 7571(a)(2)(A), (a)(3). This mandatory duty was brought to EPA's attention in 2007, when Earthjustice, on behalf of Friends of the Earth, the Center for Biological Diversity, Oceana, and the Natural Resources Defense Council, petitioned EPA to take this action. In July of 2011, the U.S. District Court for the District of Columbia confirmed the mandate, holding that EPA's duty to make an endangerment finding is compulsory. *Center for Biological Diversity v. EPA*,

794 F. Supp. 2d at 162. Because, more than six and a half years after it received petitions to do so, EPA has still not made the mandatory endangerment finding or promulgated regulations to address greenhouse gas emissions from aircraft under section 231, the Center for Biological Diversity and Friends of the Earth intend to file suit for unreasonable delay.

Section 304(a)(3) of the CAA provides that “the district courts of the United States shall have jurisdiction to compel . . . agency action unreasonably delayed,” and requires that any person intending to file a legal action against EPA for unreasonable delay must provide notice of his or her intention to sue 180 days before commencing such action. 42 U.S.C. § 7604; *see* 40 C.F.R. § 54. When intent to sue is based on a failure to act, the notice must identify the provisions of the CAA that require agency action and must describe the agency’s failure to act. 40 C.F.R. § 54.3(a). This letter constitutes that notice.

Section 231 of the CAA, 42 U.S.C. § 7571, applies to aircraft emission standards. Subsection 231(a)(1) directs EPA to study air pollutants from aircraft “to determine (A) the extent to which such emissions affect air quality in air quality control regions throughout the United States, and (B) the technological feasibility of controlling such emissions.” 42 U.S.C. § 7571(a)(1). Under subsections (a)(2) and (a)(3), if EPA finds that emissions from aircraft and aircraft engines cause or contribute to “air pollution which may reasonably be anticipated to endanger public health or welfare,” it “shall” propose and issue standards to control such emissions. *Id.* at § 7571(a)(2), (a)(3).

The 2007 petition, submitted pursuant to the Administrative Procedure Act, 5 U.S.C. § 553(e) and section 231 of the CAA, 42 U.S.C. § 7571, requested that EPA:

- (1) Make a finding that greenhouse gas emissions from aircraft engines cause and contribute to air pollution that may reasonably be anticipated to endanger public health and welfare pursuant to section 231(a)(2)(A) of the CAA, 42 U.S.C. § 7571(a)(2)(A);
- (2) Issue proposed standards for greenhouse gas emissions from aircraft engines pursuant to section 231(a)(2)(A) of the CAA, 42 U.S.C. § 7571(a)(2)(A); and
- (3) Promulgate final regulations within 90 days of the issuance of such proposed standards pursuant to section 231(a)(3) of the CAA, 42 U.S.C. § 7571(a)(3).

In 2010, when EPA failed to respond to the petition, the Center for Biological Diversity and Friends of the Earth filed suit, asserting that EPA had unreasonably delayed both in responding and in taking the requested actions. EPA agreed to respond to the petition, *Center for Biological Diversity v. EPA*, No. 1:10-CV-985 (FJS), 2012 WL 967662, at\*1 (D.D.C. Mar. 20, 2012), but claimed that Section 231 imposed no legal obligation to proceed with an endangerment finding, *Center for Biological Diversity v. EPA*, 794 F. Supp. 2d at 158–59. The D.C. District Court disagreed, holding that EPA must make the endangerment finding, and that judicial review is available for claims of unreasonable delay under CAA section 304. *See id.* at 161–62. However, the court ultimately held that even though EPA had not made the required determination, its delay was not yet unreasonable. *Center for Biological Diversity v. EPA*, 2012 WL 967662 at\*1. The court ordered EPA to respond to the petition within 90 days. *Id.*

In its June 14, 2012 response to the petition, EPA acknowledged its obligation to conduct an endangerment finding for greenhouse gases from aircraft engines and indicated that it would begin work on the finding after the U.S. Court of Appeals for the District of Columbia Circuit ruled on the validity of EPA's 2009 endangerment finding on greenhouse gas emissions from new motor vehicles.<sup>1</sup> EPA estimated that it would take 22 months of work to finalize an endangerment finding for aircraft, including developing, publishing, and taking comment on a draft determination. Twelve days after EPA made this representation, the D.C. Circuit upheld EPA's motor vehicle endangerment finding. *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012), *reh'g en banc denied*, 2012 WL 6621785 (D.C. Cir. 2012), 2012 WL 6681996 (D.C. Cir. 2012), *cert. denied*, 134 S. Ct. 468 (2013). Two years later, EPA has not yet taken even the preliminary step of issuing a draft endangerment finding for aircraft emissions (or of reaffirming that another endangerment finding for greenhouse gases is unnecessary, as EPA has repeatedly done in connection with regulating greenhouse gases from other sources<sup>2</sup>). EPA's delay continues even though it received petitions to act more than six and one-half years ago and was ordered by the court to conduct an endangerment finding more than three years ago.

Reducing aircraft emissions of air pollutants that contribute to global warming is urgent. Already by 2005, aircraft emissions caused an estimated 4.9% of global anthropogenic climate forcing,<sup>3</sup> up from 3.5% in 1992.<sup>4</sup> U.S. domestic aviation accounted for about 3% of total U.S. greenhouse gas emissions in 2006.<sup>5</sup> By 2008, aviation was viewed as the fastest growing source of carbon dioxide emissions worldwide, increasing at a rate of nearly 5 percent per year.<sup>6</sup> The International Civil Aviation Organization expects the trend to continue, projecting 4.9% annual growth in air passenger traffic<sup>7</sup> and 5.2% annual growth in air freight traffic from 2010,<sup>8</sup> more than doubling global air traffic by 2030.<sup>9</sup>

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<sup>1</sup> Memorandum in Response to Petition Regarding Greenhouse Gas Emissions from Aircraft, enclosed with Letter from Gina McCarthy, Assistant Administrator, U.S. Environmental Protection Agency, to J. Martin Wagner, Attorney, Earthjustice, at 5 (June 14, 2012) [hereinafter EPA memo].

<sup>2</sup> See EPA, "Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act," 74 FED. REG. 66496 (Dec. 15, 2009) (greenhouse gases endanger public health and welfare); 75 FED. REG. 25324 (May 7, 2010) (emission standards for greenhouse gases from cars and light trucks); 76 FED. REG. 57106 (Sept. 15, 2011) (emission standards for heavy trucks); 77 FED. REG. 62623 (Oct. 15, 2012) (additional standards for cars and light trucks); 77 FED. REG. 22392 (Apr. 13, 2012) (proposed standards for new power plants); "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," FED. REG. 34830 (JUNE 18, 2014) (proposed emission standards for existing power plants); "Carbon Pollution Standards for Modified and Reconstructed Stationary Sources: Electric Utility Generating Units, 79 FED. REG. 34960 (June 18, 2014) (proposed standards for modified and reconstructed power plants).

<sup>3</sup> D.S. Lee, et al., "Transport Impacts on Atmosphere and Climate: Aviation," 44 ATMOSPHERIC ENVIRONMENT 4678, 4678 (2010).

<sup>4</sup> Intergovernmental Panel on Climate Change, IPCC SPECIAL REPORT: AVIATION AND THE GLOBAL ATMOSPHERE: SUMMARY FOR POLICYMAKERS 8 (1999), <http://www.ipcc.ch/ipccreports/sres/aviation/index.htm>.

<sup>5</sup> See U.S. Dep't of Transp., "Transportation's Role in Climate Change," Transportation and Climate Change Clearinghouse, <http://climate.dot.gov/about/transportations-role/overview.html>.

<sup>6</sup> Elisabeth Rosenthal, "Air Travel and Carbon on Increase in Europe," The New York Times (June 22, 2008), <http://travel.nytimes.com/2008/06/22/world/europe/22fly.html>.

<sup>7</sup> Environment Branch, International Civil Aviation Organization, ICAO ENVIRONMENTAL REPORT 2013: AVIATION AND CLIMATE CHANGE 18 (2013), <http://www.icao.int/environmental-protection/Pages/EnvReport13.aspx>.

EPA has found that greenhouse gas emissions endanger the public health and welfare and has taken action to regulate them from other sources.<sup>10</sup> This action reflects the unequivocal scientific evidence that the global climate system is warming<sup>11</sup> and the clear causal link to human activity.<sup>12</sup> As EPA recognized in its endangerment finding for greenhouse gas emissions from motor vehicles, “the climate change associated with elevated atmospheric concentrations of carbon dioxide and the other well-mixed greenhouse gases [has] the potential to affect essentially every aspect of human health, society and the natural environment.”<sup>13</sup> In May 2014, the Obama administration issued its National Climate Assessment, concluding that climate change has “moved firmly into the present” and is currently “triggering wide-ranging impacts in every region of our country and throughout our economy.”<sup>14</sup> Because of the significant role that aircraft play in global climate change, and in light of the exponential growth projected in air travel, the United States must lead the way in regulating global warming pollutants from these sources.

And there is no time to lose. The Intergovernmental Panel on Climate Change recently concluded that delaying emission reductions increases the overall medium- to long-term costs of reductions, and could even put goals for limiting atmospheric greenhouse gas concentrations out of reach.<sup>15</sup> Just last month, the Obama administration reached a similar conclusion, confirming that the cost of delay is extremely steep, and rises exponentially as delay continues. Even using highly conservative assumptions, the report values the cost of *delay alone* as at least \$150 billion for *every year* of delayed action if the delay results in temperatures going just one degree beyond a target of 2° Celsius above pre-industrial levels, and sharply higher annual amounts for every

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<sup>8</sup> *Id.* at 19.

<sup>9</sup> *Id.* at 11.

<sup>10</sup> *See* note 2 *supra*.

<sup>11</sup> Intergovernmental Panel on Climate Change, “Summary for Policymakers,” in CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS. CONTRIBUTION OF WORKING GROUP I TO THE FIFTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 4 (2013), [http://www.climatechange2013.org/images/report/WG1AR5\\_SPM\\_FINAL.pdf](http://www.climatechange2013.org/images/report/WG1AR5_SPM_FINAL.pdf).

<sup>12</sup> *Id.* at 15.

<sup>13</sup> 74 FED. REG. at 66523.

<sup>14</sup> U.S. Global Change Research Program, *Climate Change Impacts in the United States: The Third National Climate Assessment*, at 1 (2014), [nca2014.globalchange.gov](http://nca2014.globalchange.gov).

<sup>15</sup> Intergovernmental Panel on Climate Change, “Summary for Policymakers,” in CLIMATE CHANGE 2014: MITIGATION OF CLIMATE CHANGE: CONTRIBUTION OF WORKING GROUP III TO THE FIFTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 15 (2014), [http://report.mitigation2014.org/spm/ipcc\\_wg3\\_ar5\\_summary-for-policy-makers\\_approved.pdf](http://report.mitigation2014.org/spm/ipcc_wg3_ar5_summary-for-policy-makers_approved.pdf).[http://report.mitigation2014.org/spm/ipcc\\_wg3\\_ar5\\_summary-for-policy-makers\\_approved.pdf](http://report.mitigation2014.org/spm/ipcc_wg3_ar5_summary-for-policy-makers_approved.pdf).

degree of warming thereafter, costs the Administration acknowledges are recurring, irreversible, and persistent.<sup>16</sup>

In sum, EPA has not acted on its duty to determine whether global warming pollutants from aircraft emissions cause or contribute to air pollution that may reasonably be anticipated to endanger the public health or welfare, and if so, to regulate those emissions. Based on this unreasonable and unjustifiable delay, the Center for Biological Diversity and Friends of the Earth intend to file suit against EPA 180 days from the date of this notice. Please feel free to contact the undersigned to discuss the basis for these claims, or to explore options for resolving these claims short of litigation.

Sincerely,



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<sup>16</sup> The White House, *Cost of Delaying Action to Stem Climate Change* at 2 (July 29, 2014), <http://www.whitehouse.gov/the-press-office/2014/07/29/white-house-report-cost-delaying-action-stem-climate-change>.