

June 13, 2007

Via Certified Mail

Stephen L. Johnson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Notice of Intent to File Clean Air Act Citizen Suit

Dear Administrator Johnson:

Earthjustice submits this letter on behalf of Friends of the Earth, to notify you, pursuant to section 304(b) of the Clean Air Act (“CAA” or “Act”), 42 U.S.C. § 7604(b), that they intend to sue the U.S. Environmental Protection Agency (“EPA”) to address its failure to perform non-discretionary actions as mandated by Congress in section 213(a)(3) of the Clean Air Act. 42 U.S.C. § 7547(a)(3). Specifically, EPA has failed to meet the mandatory deadline for promulgation of regulations setting standards for emissions from Category 3 marine diesel engines.¹

I. Emissions from Category 3 Marine Diesel Engines

Category 3 marine diesel engines are used primarily for propulsion power on large ocean going vessels (“OGVs”) such as container ships, tankers, bulk carriers, and cruise ships, and are some of the largest engines in the world. *See* 68 Fed. Reg. at 9747. The engines burn residual fuel oil – a byproduct of refining crude oil into higher-grade products – which tends to have higher ash, sulfur, and nitrogen content than other fuels. *See id.* at 9767. The emissions from these engines contribute significantly to national ozone, carbon monoxide, nitrogen oxide (NO_x) and particulate matter (PM) levels, especially near commercial ports like New Orleans, LA, and along coastal areas like Santa Barbara and Los Angeles, CA. *See id.* at 9751.

The engines on OGVs are one of the largest anthropogenic sources of air pollution in the world, yet remain one of the last major sources of air pollution to be adequately controlled. Global annual emissions from OGVs for the year 2002 were 5,000,000 metric tons of NO_x, 4,720,000 metric tons of SO_x, and 176,000,000 metric tons of CO₂.² *See* Friends of the Earth International, “New Global and Regional Inventories of Air Pollution from International Shipping,” submitted to the International Maritime Organization subcommittee on Bulk Liquids

¹ Category 3 marine diesel engines are marine compression-ignition engines with per cylinder displacement at or above 30 liters. *See* 68 Fed. Reg. at 9747.

²Following the Supreme Court decision in *Massachusetts v. EPA*, ___ U.S. ___, 127 S. Ct. 1438 (2007), EPA has little choice but to set standards for CO₂ emissions from marine diesel engines.

and Gases (Jan. 12, 2007)(“FOEI Inventory Report”). It is estimated that emissions from OGVs represent at least 18-30% of the world’s NOx emissions,³ and emissions are growing significantly as marine transportation increases.⁴ EPA estimates that by 2030, OGVs will account for, at a minimum, 28% of the country’s mobile source NOx emissions, 20% of direct PM emissions, and 83% of SOx emissions.⁵

Recent inventories of ship emissions conducted for public agencies including U.S. EPA found that, under “business as usual” scenarios, energy used by ships bringing global trade to and from North America will double from 2002 levels by or before 2020; some scenarios predict doubling before 2015.⁶ As new engines are built to accommodate this rapid growth, urgent action is needed on the part of EPA to set stringent standards for controlling the emissions from this source at the earliest possible date.

II. Environmental, public health, and environmental justice impacts

The environmental and public health impacts from such high levels of pollution are undeniable. NOx is a precursor to the formation of both ground-level ozone, or smog, and fine particulate matter pollution. Smog causes harmful respiratory effects including but not limited to chest pain, coughing, shortness of breath, decreased lung function, inflammation of the lung tissue, aggravation of existing respiratory diseases, and may impair the body’s immune system. *See* 68 Fed. Reg. at 9751. Children and the elderly are most severely affected by these health effects. *Id.* Exposure to smog leads to increased hospital admissions and emergency room visits and increases the use of medications. *Id.*

Particulate matter and diesel exhaust from marine diesel engines are of particular concern to public health. Exposure to fine particles such as those emitted by marine diesel engines can lead to aggravation of respiratory and cardiovascular disease, increased asthma, coughing, wheezing, difficulty breathing, chronic bronchitis, decreased lung function, increased allergenicity, and premature death. *Id.* at 9752. Diesel exhaust itself is considered toxic and carcinogenic, as the chemical components include several hazardous air pollutants or air toxics. *Id.* at 9753. Particulate matter also causes soiling and erosion damage to materials, including culturally important objects, promotes and accelerates the corrosion of metals, degrades paints, and deteriorates building materials. *Id.* at 9752.

³ Corbett, J.J., and Koehler, H. 2003. Updated Emissions from Ocean Shipping. *Journal of Geophysical Research*, Vol. 108 (as cited in the United States’ proposal entitled “Development of Standards for NOx, PM, and SOx” submitted to the International Maritime Organization subcommittee on Bulk Liquids and Gases, Feb. 9, 2007)(“U.S. NOx, PM, and SOx Standards Proposal”).

⁴ The FOEI Inventory Report estimates that emissions will increase at a rate of 4.1% per year through 2040. FOEI Inventory Report at 3.

⁵ *Id.*

⁶ North American Emissions Inventory, “Tasks 3 and 4: Forecast Inventories for 2010 and 2020, Final Report” (8 December 2006), at p.vii.

In addition to health and welfare concerns, emissions from large marine diesel engines also harm the environment by degrading visibility, contributing to haze, acid rain, eutrophication, and nitrophication, and reducing crop yields and productivity of forest ecosystems. *Id* at 9751, 9753.

Approximately 70% of global shipping emissions occur within 400 kilometers of shore, making them significant sources of air pollution in coastal areas where a majority of the world's population live.⁷ Furthermore, studies have shown that emissions from marine diesel engines can substantially contribute to pollution from 400 to 1,200 kilometers inland and that transport of secondary products such as ozone and fine aerosol particles can travel thousands of kilometers in the atmosphere.⁸

While the impacts from marine diesel emissions can affect all people, those facing the challenges of poverty, poor access to medical care, very low rates of insurance coverage, and virtual exclusion from public policy decisions that most impact them, are most likely to live and work near pollution sources such as ports, transportation corridors, freeways, and industrial centers.⁹ Environmental justice communities often suffer from disproportionately high cancer, disease, and death rates as they are exposed to the highest levels of carcinogenic, toxic, and hazardous chemicals.¹⁰

III. EPA's Marine Diesel Rule creates a mandatory deadline for EPA action

Section 213 of the Clean Air Act Amendments of 1990 requires EPA to reduce emissions from most types of nonroad engines, including marine engines. Congress directed EPA to study nonroad engine emissions and to regulate pollutants, including NO_x, that "are significant contributors to ozone or carbon monoxide concentrations" in areas that do not meet federal air quality standards ("nonattainment areas"). 42 U.S.C. § 7547(a)(1)-(3). EPA completed the required study in 1991, made a finding of the "significance" of NO_x emissions in 1994, Docket A-92-28, No. II-A-01 (Nov. 1991), and has since engaged in multiple rulemakings setting standards for nonroad engines.

One source of nonroad engine emissions that EPA studied was Category 3 marine diesel engines, which are "very large high-power engines that are used almost exclusively for propulsion on vessels engaged in international trade." 64 Fed. Reg. at 73306. EPA acknowledged that Category 3 engines "generate NO_x...emissions that contribute to [air pollution] levels above the National Ambient Air Quality Standards." 68 Fed. Reg. at 9751.

⁷ Friends of the Earth International, "Air Pollution from Shipping Emissions – Environmental Justice: Public Health and Community Impacts," submitted to the International Maritime Organization's Marine Environment Protection Committee, May 12, 2005 ("FOEI Environmental Justice Report")

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

EPA has also found that these engines “are a considerable source” of NO_x, and that controlling their emissions “may yield important reductions in national NO_x...inventories.” Notice of Proposed Rulemaking, 63 Fed. Reg. 68508, 68510 (Dec. 11, 1998).

Once EPA has made an affirmative determination that a source is a significant contributor to ozone concentrations, section 213(a)(3) requires that the Administrator “shall... promulgate...regulations containing standards applicable to emissions from those classes or categories of new nonroad engines and new nonroad vehicles...which in the Administrator’s judgment cause, or contribute to, such [ozone] pollution.” 42 U.S.C. § 7547(a)(3). In setting emissions standards for such engines, Congress mandated that EPA “shall achieve the greatest degree of emission reduction achievable through the application of technology” with appropriate consideration given to cost, noise, energy, and safety concerns. *Id.* Because EPA has determined that emissions from Category 3 marine diesel engines significantly contribute to air pollution, including ozone, in nonattainment areas, EPA is required to promulgate emissions standards “*within 12 months after the completion of the study under [section 213(a)(1)].*” *Id.* (emphasis added). Because EPA completed its study in November 1991, the deadline for promulgating standards was November 1992. *Id.*

On February 28, 2003, well after the statutory deadline, EPA published a final rule on the Control of Emissions from New Marine Compression-Ignition Engines at or Above 30 Liters per Cylinder. *See* 68 Fed. Reg. 9746 (“2003 Final Rule”).¹¹ The Final 2003 Final Rule provided a two-step approach for setting emissions standards for Category 3 marine diesel engines under the CAA. The first step was to codify emissions standards set forth by the International Marine Organization (IMO) in Annex VI to the International Convention on the Prevention of Pollution from Ships, as Modified by the Protocol of 1978 Relating Thereto (MARPOL 73/78). The second step committed EPA to take final action on appropriate standards for marine diesel engines “on or before April 27, 2007.” 68 Fed. Reg. 9783. This commitment was codified at 40 C.F.R. § 94.8(a)(2)(ii).

On April 23, 2003, Bluewater Network (now a division of Friends of the Earth), petitioned the D.C. Circuit Court of Appeals for review of EPA’s 2003 Final Rule, claiming that EPA acted arbitrarily and capriciously in failing to adopt meaningful emission standards for marine diesel engines and that the agency violated section 213(a)(3) of the CAA by failing to regulate emissions from engines on foreign-flagged vessels. Without reaching the merits of Bluewater Network’s arguments, the court upheld the 2003 Final Rule, relying in part upon

¹¹ Prior to the 2003 Final Rule, EPA had issued a Final Rule for Category 3 marine diesel engines in December 1999. However, in February 2000, Bluewater Network (now Friends of the Earth) challenged the 1999 Final Rule on the grounds that EPA did not have the authority to ignore section 213 of the Clean Air Act in favor of a voluntary emission control program. *See Bluewater Network v. EPA*, No. 00-1065 (D.C. Cir. July 19, 2004). The case resulted in a settlement agreement, pursuant to which EPA agreed to issue a final rule regulating Category 3 marine diesel emissions no later than January 31, 2003.

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EPA's commitment to publish a final rule for Category 3 marine engines by April 27, 2007. *Bluewater Network v. EPA*, 372 F.3d 404 (D.C. Cir. 2004).

The 2003 Final Rule, approved by the D.C. Circuit in *Bluewater Network v. EPA*, creates a mandatory deadline by which EPA must promulgate regulations containing standards applicable to emissions from Category 3 marine diesel engines. See *Sierra Club v. Leavitt*, 355 F.Supp.2d 544, 549-50 (D.D.C. 2005) ("the regulation designates a subsequent mandatory date by which the Administrator's action must be finalized"). In *Sierra Club v. Leavitt*, the Court held that a regulatory deadline created in the course of meeting the statutory deadline is nondiscretionary. The Court further explained that when a regulation imposes a requirement that the Administrator must act by a certain date and specifies what action must be taken, the intent of the regulation is to impose a nondiscretionary duty on the Administrator. *Id.* at 549. Thus the April 27, 2007 deadline set in the 2003 Final Rule is a nondiscretionary deadline. However, April 27, 2007 has passed and EPA has failed to issue final standards for Category 3 engines.¹²

IV. Citizen Suit Enforcement under CAA section 304

Section 304(a)(2) of the Act provides that "any person may commence a civil action on his own behalf 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." 42 U.S.C. § 7604(a)(2). In *Sierra Club*, the court held that when a regulation designates a mandatory date by which the Administrator's action must be finalized, "the plain language of the regulation imposes a nondiscretionary duty on the Administrator to either affirmatively act or decide that no action was needed." 355 F.Supp.2d at 550. Moreover, the court held that the phrase "under this chapter" in section 304(a)(2) of the Act "includes not only statutory duties but also duties created by regulations promulgated pursuant to the Clean Air Act." *Id.* at 556. Therefore, because it is a nondiscretionary duty, a mandatory rulemaking deadline is enforceable through citizen suits under section 304 of the Clean Air Act. See *Sierra Club*, 355 F.Supp.2d at 553-57.

Section 304(b) of the Clean Air Act requires that notice of intent to bring suit under section 304(a)(2) must be provided to the Administrator 60 days prior to commencement of such an action. 42 U.S.C. § 7604(b)(2). As described above, EPA has declined to issue a final rule containing standards applicable to emissions from Category 3 marine diesel engines by April 27, 2007 – the mandatory deadline set in the 2003 Final Rule. Accordingly, unless this failure to set standards for Category 3 marine diesel engines is mitigated, we anticipate filing suit in the U.S. District Court for the District of Columbia sixty days after your receipt of this letter. Please feel

¹² Instead of issuing final standards for Category 3 engines, on April 27, 2007 EPA issued a direct final rule and parallel proposal to change the deadline for rulemaking to address the control of emissions from Category 3 marine diesel engines. 72 Fed. Reg. 20948. The direct final rulemaking must be withdrawn because significant adverse comments were submitted on the parallel proposal.

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free to contact Michael Sherwood or Sarah Burt at the address and telephone number provided above to further discuss the basis for these claims, or to explore possible options for resolving these claims short of litigation.

Sincerely,

MICHAEL R. SHERWOOD
SARAH BURT
Attorneys for Friends of the Earth

cc: Teri Shore, Friends of the Earth