



July 31, 2008

**Via Certified Mail**

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

Honorable Margo Tsirigotis Oge  
Director, Office of Transportation and Air Quality  
U.S. Environmental Protection Agency  
Ariel Rios Building  
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 Petitions for Rulemaking to Reduce Greenhouse Gas Emissions from Marine Shipping Vessels and Aircraft, EPA Docket Numbers \_\_\_\_\_ and \_\_\_\_\_.**

Dear Administrator Johnson and Director Oge:

On October 3, 2007, Earthjustice, on behalf of Oceana, Friends of the Earth, and the Center for Biological Diversity, submitted a formal petition with the Administrator of the United States Environmental Protection Agency (EPA), pursuant to the Administrative Procedure Act, 5 U.S.C. § 553(e), for a rulemaking to control and reduce the emissions from marine shipping vessels that contribute to global climate change (the “marine vessels petition”). The marine vessels petition requested that EPA:

- (1) Make a finding that carbon dioxide, nitrous oxide, and black carbon emissions from new marine engines and vehicles significantly contribute to air pollution which may reasonably be anticipated to endanger public health and welfare pursuant to section 213(a)(4), of the Clean Air Act (CAA), 42 U.S.C. § 7547(a)(4);
- (2) Promulgate emission standards for carbon dioxide, nitrous oxide, and black carbon emissions from marine engines and vehicles pursuant to Section 213(a)(4) of the CAA, 42 U.S.C. § 7547(a)(4);
- (3) Make a finding that climate change related pollutants are emission products of the fuels used in marine engines and vehicles, and that these emission products contribute to air pollution which may reasonably be anticipated to endanger public health and welfare pursuant to section 211(c)(1) of the CAA, 42 U.S.C. § 7545(c)(1); and

- (4) Promulgate regulations limiting the maximum sulfur content of marine diesel fuels, and prohibit the manufacture, introduction into commerce, offering for sale, or sale of any fuel with a sulfur concentration in excess of such limits for use in any marine engine or vehicle pursuant to section 211(c)(1) of the CAA, 42 U.S.C. § 7545(c)(1).

On December 5, 2007, Earthjustice submitted a second petition on behalf of Oceana, Friends of the Earth, and the Center for Biological Diversity<sup>1</sup> for a rulemaking to control and reduce the emissions of air pollutants from aircraft that contribute to global climate change (the “aircraft petition”). The aircraft petition requested that EPA:

- (1) Make a finding that greenhouse gas emissions from aircraft engines 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 keeping with the urgency of addressing global warming, Petitioners requested that EPA provide a substantive response to each petition within one hundred eighty (180) calendar days of their filing. Those 180 days expired on March 31, 2008, for the marine vessels petition and on June 2, 2008, for the aircraft petition, yet Petitioners have received no response to their petitions.<sup>2</sup> Although EPA issued an Advanced Notice of Proposed Rulemaking on July 11, 2008, which “presents information relevant to, and solicits public comment on, how to respond to the U.S. Supreme Court’s decision in *Massachusetts v. EPA*,” it has not proposed any regulations applicable to marine vessels or aircraft, or affirmed that it either will or will not propose such regulations in the future. *See* Advance Notice of Proposed Rulemaking: “Regulating Greenhouse Gas Emissions under the Clean Air Act,” EPA-HQ-OAR-2008-0318, July 11, 2008 (“ANPR”). To our knowledge EPA has not opened a rule-making docket on either petition, as required by section 307(d) of the Clean Air Act, 42 U.S.C. § 7607(d)(1)(F), (d)(1)(R), and (d)(2).

Section 304(a)(3) of the Clean Air Act 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 the Administrator 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. Part 54. When notice of intent to sue is based on a failure to act, the notice must identify the provisions of the Clean Air Act that require the agency to take action, and describe the agency’s failure to perform. 40 C.F.R. § 54.3(a). This letter constitutes that notice. We intend to file suit for an unreasonable delay in responding to both the marine vessels petition and the aircraft petition should EPA not grant or deny our request within 180 days of this notice.

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<sup>1</sup> The aircraft petition was resubmitted on December 31, 2007 to include the Natural Resources Defense Council as a petitioner.

<sup>2</sup> On October 25, 2007, Petitioners received a letter from Director Oge acknowledging receipt of the marine vessels petition and expressing an intention to “evaluate the petition carefully.” This letter does not amount to a substantive response to the petition. Petitioners did not receive a letter in response to the aircraft petition.

Section 213 of the Clean Air Act, 42 U.S.C. § 7547, applies to nonroad vehicles and engines, including ocean-going vessels. As set forth in the marine vessels petition, subsection 213(a)(1) directs EPA “to determine if ... emissions [from nonroad vehicles] cause, or significantly contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” 42 U.S.C. § 7547(a)(1). Subsections (a)(2) and (a)(3) specifically require EPA to study and if appropriate, regulate the impacts of nitrous oxide, carbon monoxide or volatile organic compounds. *Id.* at § 7547(a)(2), (3). Under subsection (a)(4), if EPA determines that nonroad vehicle and engine emissions not referred to in subsection (a)(2) “significantly contribute to air pollution,” the Administrator may adopt standards to reduce such emissions. *Id.* at § 7547(a)(4). Accordingly, and as confirmed by the Supreme Court in *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), EPA is authorized to study and regulate emissions, including greenhouse gas emissions, from nonroad vehicles and engines. The marine vessels petition requested that EPA make a determination that greenhouse gas emissions from marine vessels significantly contribute to air pollution that may reasonably be anticipated to endanger public health and welfare and to regulate those emissions. EPA has not acted on our request.

Section 231 of the Clean Air Act, 42 U.S.C. § 7571, applies to aircraft emission standards. Subsection 231(a)(1) directs EPA to undertake a study of 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), (3). Despite our December 5, 2007, petition asking EPA to make a finding that greenhouse gas emissions from aircraft significantly contribute to air pollution that may reasonably be anticipated to endanger public health and welfare, and to propose and issue standards for greenhouse gas emissions from aircraft, EPA has taken no action.

Reducing emissions of air pollutants from marine vessels and aircraft that contribute to global warming is a matter of urgency. As the marine vessels petition describes, only five countries in the world - the United States, China, Russia, India and Japan - emit more carbon dioxide than the world’s fleet of marine vessels. Since we submitted the marine vessels petition, new information has come to light revealing that carbon dioxide emissions from ships may be up to three times higher than previously thought.<sup>3</sup> A study by the International Maritime Organization to be released in August 2008 is expected to indicate that annual emissions from

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<sup>3</sup> John Vidal, “True Scale of CO2 Emissions From Shipping Revealed,” *The Guardian* (Feb. 13, 2008) at A1, available at: <http://www.guardian.co.uk/environment/2008/feb/13/climatechange.pollution>. See also Submission from the International Maritime Organization to the United Nations Framework Convention on Climate Change Subsidiary Body for Scientific and Technological Advice, “Emissions from Fuel Used for International Aviation and Maritime Transport,” ¶ 7 (May 30, 2008).

the world's shipping fleet have reached 1.12 billion tons,<sup>4</sup> or over three percent of all global emissions of carbon dioxide.<sup>5</sup>

Of even greater concern is the projected growth in ship emissions that contribute to global climate change. Over the last three decades the shipping industry has grown by an average of five percent per year.<sup>6</sup> The International Maritime Organization projects a 72 percent increase in ship emissions between 2000 and 2020, assuming only a three percent annual rate of growth.<sup>7</sup> However if fuel consumption increases at the rate forecast by current studies, by 2020 shipping emissions may be double 2002 levels, and triple those levels by 2030.<sup>8</sup>

Similarly, as the aircraft petition describes, aviation was responsible for 3 percent of the United States' total carbon dioxide emissions in 2005, and anticipated growth in the industry may result in air travel becoming responsible for between 6 and 10 percent of anthropogenic forcing of climate by 2050. In fact, aviation is now viewed as the fastest growing source of carbon dioxide emissions worldwide, increasing at a rate of nearly 5 percent per year.<sup>9</sup> Moreover, a recently disclosed report, produced in part by the U.S. Department of Transportation, concluded that total emissions of carbon dioxide and nitrogen oxides from aircraft could double by 2025.<sup>10</sup>

Despite being labeled an "Advanced Notice of Proposed Rulemaking," the ANPR that EPA issued on July 11, 2008, does not indicate whether EPA intends to regulate greenhouse gases, does not propose a specific course of action for doing so, and is not responsive to the specific requests made in the marine vessels and aircraft petitions. Rather, the ANPR is a compilation of comments from other government agencies on the subject of regulating greenhouse gas emissions, a review of the provisions of the Clean Air Act, and a broad summary of all possible ways to approach the issue of greenhouse gases. Although the ANPR summarizes the marine vessels and aircraft petitions, *see* ANPR at 309-318, it does not make a definitive finding as to whether greenhouse gas emissions from marine vessels and aircraft endanger public health or welfare. Nor does it offer a timetable or proposal for regulating such emissions. To the contrary, the ANPR suggests that the Clean Air Act is "ill-suited for the task of regulating greenhouse gases" at all. ANPR at 5. This suggestion is irrelevant to the issue raised by the

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<sup>4</sup> Sub-Committee on Bulk Liquids and Gases (2007) Review of MARPOL Annex VI and the NOx Technical Code: Report on the outcome of the Informal Cross Government/Industry Scientific Group of Experts established to evaluate the effects of the different fuel options proposed under the revision of MARPOL Annex VI, IMO.

<sup>5</sup> Calculated from Global Carbon Dioxide Emissions figures provided in Canadell, Josep, et al., *Contributions to accelerating atmospheric CO<sub>2</sub> growth from economic activity, carbon intensity, and efficiency of natural sinks*, Proceedings of the National Academy of Sciences (2007), at 104:47.

<sup>6</sup> International Council on Clean Transportation (ICCT), *Air Pollution and Greenhouse Gas Emissions from Ocean-Going Ships: Impacts, Mitigation Options and Opportunities for Managing Growth*, (Mar. 2007), at 7.

<sup>7</sup> IMO, *Study of Greenhouse Gas Emissions from Ships: Final Report to the International Maritime Organization* at 17.

<sup>8</sup> Friends of the Earth International, *Prevention of Air Pollution from Ships: Recent Findings on Global Warming Justifying the Need for Speedy Reductions of Greenhouse Gas Emissions from Shipping*, submitted to Marine Environment Protection Committee, IMO (May 4, 2007), at 2.

<sup>9</sup> Elisabeth Rosenthal, "Air Travel and Carbon on Increase in Europe," The New York Times (June 22, 2008), available at: <http://travel.nytimes.com/2008/06/22/world/europe/22fly.html?scp=1&sq=&st=nyt>.

<sup>10</sup> Gregg Fleming, et al., "Trends in Global Noise and Emissions from Commercial Aviation for 2000 through 2025," (2007), available at: [http://www.aef.org.uk/uploads/Trends\\_Assessment\\_ATM2007\\_2006\\_12\\_12.doc](http://www.aef.org.uk/uploads/Trends_Assessment_ATM2007_2006_12_12.doc).

petitions of EPA's legal obligation to regulate greenhouse gases under the Act, and contrary to the Supreme Court's decision in *Massachusetts v. EPA*, which held that greenhouse gases are air pollutants subject to regulation under the Clean Air Act. 127 S. Ct. 1438, 1444 (2007).

EPA's failure to determine that climate change endangers the public health and welfare is particularly troubling given that the agency has already submitted to the Office of Management and Budget a proposed determination that greenhouse gas emissions contribute to air pollution which may reasonably be anticipated to endanger public welfare.<sup>11</sup> Further evidence that the Administrator has in fact completed his scientific review and reached his conclusions regarding the adverse effects of greenhouse gas emissions was published in the Federal Register in March to explain the Administrator's denial of California's request for permission to implement its own greenhouse gas emission standards. 73 Fed. Reg. 12,156 (Mar. 6, 2008). In this denial notice, the EPA Administrator concluded that greenhouse gas emissions contribute to global warming and are causing significant public harm. *Id.* at 12,163-69. For example, the Administrator noted that, as a result of global warming caused by the emission of greenhouse gases, "[s]evere heat waves are projected to intensify in magnitude and duration over portions of the U.S. where these events already occur, with likely increases in mortality and morbidity, especially among the elderly, young, and frail." *Id.* at 12167.

Moreover, in the latest report commissioned by the U.S. Climate Change Science Program, EPA again recognized significant adverse impacts from global warming on both human health and welfare. For example, economic damage from severe weather has increased dramatically in recent years, and rising sea levels are exacerbating storm-surge flooding and shoreline erosion.<sup>12</sup> Rising temperatures have already diminished snow pack and accelerated evaporation in much of the western United States, increasing vulnerability to drought and forest fires.<sup>13</sup> Given this evidence of EPA's ability to make an affirmative decision on the endangerment question, the failure to do so in response to the marine vessels and aircraft petitions is unreasonable.

The Intergovernmental Panel on Climate Change recently concluded that "delayed emission reductions significantly constrain the opportunities to achieve lower stabilization levels and increase the risk of more severe climate change impacts."<sup>14</sup> Because of the significant role that marine vessels and aircraft are playing in global climate change, and in light of the exponential growth projected in ship transport and air travel, it is essential that the United States lead the way in regulating global warming pollutants from these sources.

In sum, EPA has not responded to our petitions for rulemaking to control and reduce the emissions from marine shipping vessels and aircraft that contribute to global climate change.

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<sup>11</sup> Juliet Eilperin, "EPA E-Mail Concluded Global Warming Endangers Public Health, Senator Says," The Washington Post (July 25, 2008) at A19, available at: <http://www.washingtonpost.com/wp-dyn/content/article/2008/07/24/AR2008072403423.html>.

<sup>12</sup> U.S. Climate Change Science Program, *Analyses of the Effects of Global Change on Human Health and Welfare and Human Systems Final Report, Synthesis and Assessment Product 4.6* ("EPA Climate Analysis") (July 2008), at 1-10, available at: <http://downloads.climatechange.gov/sap/sap4-6/sap4-6-final-all.pdf>.

<sup>13</sup> *Id.* at 1-9 – 1-13, 2-6 – 2-7.

<sup>14</sup> Intergovernmental Panel on Climate Change, *Climate Change 2007 Fourth Assessment Synthesis Report* (Nov. 2007), at 19.

Based on this unreasonable and unjustifiable delay, Petitioners 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 possible options for resolving these claims short of litigation.

Sincerely,

A handwritten signature in black ink that reads "Martin Wagner". The signature is written in a cursive style with a large, looping initial "M".

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