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Mark Asmundson
Director, Northwest Clean Air Agency
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Craig Kenworthy
Director, Puget Sound Clean Air Agency
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Re: 60-Day Notice of Violations of Washington State Implementation Plan Provisions Relating to Control of Greenhouse Gas Emissions from Oil Refineries.

Dear Messrs. Sturdevant, Asmundson, and Kenworthy,

Washington Environmental Council and Sierra Club Cascade Chapter (collectively "Conservation Groups") hereby provide notice, pursuant to 42 U.S.C. § 7604(b)(1)(A), that the Washington State Department of Ecology, Northwest Clean Air Agency, and Puget Sound Clean Air Agency (collectively "Air Pollution Agencies" or "Agencies") are in violation of the federal Clean Air Act ("CAA"), 42 U.S.C. §§ 7401-7671q, because they have failed to implement mandatory provisions of Washington's State Implementation Plan ("SIP") relating to control of greenhouse gas emissions from oil refineries. If these violations are not adequately addressed within 60 days of receipt of this notice, the Conservation Groups intend to file a lawsuit against the Agencies pursuant to 42 U.S.C. § 7604(a)(1).

Below, you will find a more specific description of the Air Pollution Agencies' violations of the Washington SIP. Please contact us as at (206) 448-1230 if you have any questions regarding this notice or would like to discuss resolution of the violations described herein prior to commencement of litigation.

BACKGROUND

Oil refineries are a significant source of greenhouse gas emissions in the United States. Refineries combust large quantities of fossil fuels in the process of converting crude oil into usable products such as gasoline, jet fuel, and asphalt. As a result, greenhouse gases are emitted from various refinery sources including process heaters, boilers, fluid catalytic cracking units, hydrogen production units, and sulfur recovery plants.¹ Oil refineries also emit greenhouse gases from process equipment leaks, crude oil storage tanks, asphalt blowing, and delayed coking units.² In addition, refineries emit greenhouse gases as a result of system blow down and the flaring of waste gas.³

There are five oil refineries operating in Washington State—BP Cherry Point in Blaine, ConocoPhillips in Ferndale, Shell Oil in Anacortes, Tesoro in Anacortes, and U.S. Oil in Tacoma.⁴ These refineries contribute significantly to statewide greenhouse gas emissions. For example, the BP Cherry Point facility directly emitted 1.84 million metric tons of carbon dioxide in 2004, approximately two percent of total statewide greenhouse gas emissions that year.⁵ The Tesoro refinery emitted 1.37 million tons of carbon dioxide in 2008.⁶ Oil refineries in the state also emit methane and nitrous oxide, which are potent greenhouse gases, as well as several other air contaminants such as hydrogen sulfide, sulfur dioxide, nitrogen oxides, particulate matter, and volatile organic compounds.⁷

The Air Pollution Agencies have a poor record of regulating air pollution from the oil refineries. For example, although EPA approved Washington's "Title V" permit programs for air emissions from stationary sources in 1994, as of the year 2000 the Air Pollution Agencies had not issued the required Title V permits to the oil refineries, forcing a coalition of conservation groups to send 60-day notices threatening legal action. Those notices prompted settlement, and the Air Pollution Agencies ultimately issued Title V permits to the oil refineries in 2002 and

¹ EPA, *Technical Support Document for the Petroleum Refining Sector: Proposed Rule for Mandatory Reporting of Greenhouse Gases*, at 11 (Sept. 2008).

² EPA, *Technical Support Document for the Petroleum Refining Sector: Proposed Rule for Mandatory Reporting of Greenhouse Gases*, at 11 (Sept. 2008).

³ EPA, *Technical Support Document for the Petroleum Refining Sector: Proposed Rule for Mandatory Reporting of Greenhouse Gases*, at 11 (Sept. 2008).

⁴ The Northwest Clean Air Agency ("NWCAA") has regulatory authority over air emissions from all these refineries except the U.S. Oil facility, which is under the jurisdiction of the Puget Sound Clean Air Agency ("PSCAA"). See RCW 70.94.053. The Department of Ecology has concurrent authority over SIP implementation and regulation of all five refineries. See RCW 70.94.405, .410.

⁵ BP, *Cherry Point Refinery, Blaine, Washington, 2004 Health, Safety and Environmental Statement*, at 14 (Sept. 2005); CTED, *Summary Report of Washington's Greenhouse Gas Emissions: Sources and Trends*, at 2 (Dec. 2006).

⁶ NWCAA, *Statement of Basis for the Air Operating Permit – FINAL: Tesoro Refining and Marketing*, at 42 (Jan. 26, 2010).

⁷ NWCAA, *BP West Coast Products Air Operating Permit*, at ii (modified Sept. 06, 2006).

2003. However, because Title V permits have a term of five years,⁸ the operating permits for the oil refineries expired in 2007 and 2008. Only one of these permits (for the Tesoro facility) has been renewed; the remaining four oil refineries are currently operating under expired permits.⁹ None of the permits, including the Tesoro permit that was renewed in January 2010, contain requirements for controlling greenhouse gas emissions. Nor have the Agencies taken any significant steps outside of the Title V program to curb greenhouse gas emissions from the refineries.

The Air Pollution Agencies' failure to control greenhouse gas emissions is particularly egregious in light of recent legal and political developments on both the state and federal level confirming that the Agencies have the duty to control greenhouse gas emissions from oil refineries. For example:

- In 2007, the United States Supreme Court issued the landmark decision in *Massachusetts v. EPA*,¹⁰ in which the Court held that “greenhouse gases fit well within the [federal] Clean Air Act’s capacious definition of ‘air pollutant’”
- In 2008, the Washington State Legislature enacted a law requiring the State to “limit emissions of greenhouse gases” to specified levels.¹¹
- In 2009, Governor Gregoire issued an executive order confirming that “greenhouse gases are air contaminants within the meaning of the state’s Clean Air Act and pose a serious threat to the health and welfare of Washington’s citizens and the quality of the environment”¹²
- In 2009, the federal EPA proclaimed that “six greenhouse gases taken in combination endanger both the public health and the public welfare of current and future generations.”¹³

⁸ WAC 173-601-610; *see also* 42 U.S.C. § 7661a(b)(5)(B).

⁹ BP Cherry Point and the U.S. Oil renewals were due in June 2009, the ConocoPhillips renewal was due in May 2009, and the Shell Oil renewal was due in November 2008. *See* NWCAA, *BP West Coast Products Air Operating Permit*, at ii (modified Sept. 06, 2006); PSCAA, *U.S. Oil & Refining Co. Air Operating Permit*, at 2 (amended Apr. 15, 2003); NWCAA, *ConocoPhillips Air Operating Permit*, at i (May 20, 2003); NWCAA, *Shell Oil Products Air Operating Permit*, at ii (modified Sept. 24, 2004).

¹⁰ 549 U.S. 497, 532 (2007).

¹¹ The State is required to reduce greenhouse gas emissions to 1990 levels by 2020, 25 percent below 1990 levels by 2035, and 50 percent below 1990 levels by 2050. RCW 70.235.020(1)(a).

¹² Washington State Governor, Executive Order 09-05 (May 25, 2009).

¹³ 74 Fed. Reg. 66,496 (Dec. 15, 2009). The EPA-approved portions of Washington’s SIP are listed on EPA’s website. *Federally Approved Washington State Implementation Plan for Air Quality*, available at <http://yosemite.epa.gov/r10/airpage.nsf/webpage/SIP+-+WA+Table+of+Contents?OpenDocument> (last viewed Apr. 30, 2010).

In light of such developments, it is indisputable that greenhouse gas emissions pose a serious threat to the health and welfare of Washington's residents and are subject to regulation under both the federal and state Clean Air Acts.

LEGAL FRAMEWORK

The federal CAA allows the states to develop SIPs, which establish strategies a state will take for controlling air pollution and complying with federal air pollution standards.¹⁴ EPA may only approve a SIP if it meets all of the requirements of the federal CAA.¹⁵ Once EPA issues its approval, the terms of the SIP are binding on the state as a matter of federal law.¹⁶ Individuals may file suit in a federal district court "to compel state and local agencies and officials to comply with the requirements of a state implementation plan . . . approved by EPA."¹⁷

EPA approved the bulk of Washington's current SIP in 1995.¹⁸ At issue in this case are two SIP provisions, described in more detail below, that require the Air Pollution Agencies to review and implement control technologies and other strategies for reducing greenhouse gas emissions from oil refineries. Because the Air Pollution Agencies have failed to take even minimal steps towards implementing these mandates, the Conservation Organizations intend to file a lawsuit in federal court seeking an order compelling the Agencies to comply with the SIP.

VIOLATIONS

I. The Air Pollution Agencies are in violation WAC 173-400-040 because they have failed to define and require RACT for emissions of greenhouse gases from oil refineries.

One of the provisions of Washington's SIP that EPA approved in 1995 requires the Air Pollution Agencies to review and implement "reasonably available control technology" ("RACT") for emissions of "air contaminants" from "sources." Specifically, WAC 173-400-040 provides as follows:

[A]ll emissions units are required to use reasonably available control technology (RACT) which may be determined for some sources or source categories to be more stringent than the applicable emission limitations of any chapter of Title 173 WAC. Where current controls are determined to be less than RACT, ecology or

¹⁴ 42 U.S.C. §§ 7410(a), 7409(a)-(b).

¹⁵ 42 U.S.C. §§ 7410(a)(3)(A), 7502(b).

¹⁶ 42 U.S.C. § 7413(a)(2).

¹⁷ *Council of Commuter Orgs. v. Metro. Transp. Auth.*, 683 F.2d 663, 665 (2d Cir. 1982); *see also Clean Air Council v. Mallory*, 226 F. Supp. 2d 705, 720-21 (E.D. Penn. 2002); *Cmtys. for a Better Env't v. Cenco Refining Co.*, 180 F. Supp. 2d 1062, 1077-82 (C.D. Cal. 2001); *Oregon Envtl. Council v. Dep't of Envtl. Quality*, 775 F. Supp. 353, 360 (D. Or. 1991).

¹⁸ 60 Fed. Reg. 28,726 (June 2, 1995).

the [regional air] authority shall, as provided in [RCW 70.94.154], define RACT for each source or source category and issue a rule or regulatory order requiring the installation of RACT.¹⁹

The Washington Legislature has provided further instruction to the Air Pollution Agencies on implementing this RACT standard:

By January 1, 1994, ecology shall develop a list of sources and source categories requiring RACT review and a schedule for conducting that review. Ecology shall review the list and schedule within six months of receiving the initial operating permit applications and at least once every five years thereafter. . . . The department and local authorities shall revise RACT requirements, as needed, based on the review conducted under this subsection.

. . . . In establishing or revising RACT requirements, ecology and local authorities shall address, where practicable, all air contaminants deemed to be of concern for that source or source category.²⁰

Because the term “air contaminants” is defined in Washington law to include greenhouse gases,²¹ and oil refineries qualify as “sources” or “source categories,”²² the federally enforceable SIP unambiguously mandates that the Air Pollution Agencies review and implement RACT for greenhouse gas emissions from oil refineries whenever practicable and at least every five years.²³

It is entirely practicable for the Air Pollution Agencies to comply with these RACT

¹⁹ WAC 173-400-040 (emphasis added). EPA has approved this provision as part of Washington’s current SIP. 40 C.F.R. § 52.2479.

²⁰ RCW 70.94.154(4)-(5) (emphasis added).

²¹ RCW 70.94.030(1) (“‘Air contaminant’ means dust, fumes, mist, smoke, other particulate matter, vapor, gas, odorous substance, or any combination thereof.”); *see also* WAC 173-400-030(3); Washington State Governor, Executive Order 09-05 (May 25, 2009) (“[G]reenhouse gases are air contaminants within the meaning of the state’s Clean Air Act and pose a serious threat to the health and welfare of Washington’s citizens and the quality of the environment . . .”).

²² “Source” is broadly defined as “all of the emissions unit(s) including quantifiable fugitive emissions, that are located on one or more contiguous or adjacent properties, and are under the control of the same person or persons under common control, whose activities are ancillary to the production of a single product or functionally related group of products.” WAC 173-400-030(76); *see also* RCW 70-94-030(22). “Emissions unit” is defined as “any part of a stationary source or source which emits or would have the potential to emit any pollutant subject to regulation under the Federal Clean Air Act, chapter 70.94 or 70.98 RCW.” WAC 173-400-030(28).

²³ *See Sierra Club v. Sw. Clean Air Agency*, No. 09-108, 2010 WL 1636869, *12-13 (PCHB Apr. 19, 2010) (“The statute anticipates that Ecology will develop a list of sources and source categories requiring RACT review, and review it every five years. Ecology and local air authorities are expected to revise RACT requirements, as needed, based on that review. . . . Ecology and local air authorities are also to address, where practicable, all air contaminants deemed to be of concern for a source when establishing or revising RACT requirements . . .”).

mandates for greenhouse gas emissions from oil refineries. Indeed, according to a 2008 draft EPA report, “there appear to be numerous efficiency improvements that currently exist and have been adequately demonstrated” for reducing greenhouse gas emissions from oil refineries, including “boiler and steam system optimization, heat exchanger fouling mitigation and optimization, efficiency improvements in processes heaters and motors, waste gas and power recovery, and process optimization and process technology improvements.”²⁴ Under the SIP, the Air Pollution Agencies have an obligation to evaluate these energy efficiency measures and other potential greenhouse gas control strategies, and to issue a regulatory order or rule mandating whatever greenhouse gas emissions controls and/or limits constitute RACT.²⁵

II. The Air Agencies are in violation of WAC 173-400-040(5) because they have failed to protect the health and welfare of Washington’s residents from greenhouse gas emissions from oil refineries.

Washington law also provides that “[n]o person shall cause or allow the emission of any air contaminant from any source if it is detrimental to the health, safety, or welfare of any person, or causes damage to property or business.”²⁶ Like the RACT requirement discussed above, this standard is incorporated into Washington’s SIP and is “enforceable as written.”²⁷

Despite the SIP requirement, the Air Pollution Agencies have failed to take any action to protect the health and welfare of Washington’s residents from greenhouse gas emissions, which constitute “air contaminants” under Washington law and therefore fall within the scope of WAC 173-400-040(5).²⁸ If the Air Pollution Agencies continue to allow uncontrolled emissions of greenhouse gases, mountain snowpack will be diminished resulting in less water availability throughout the Pacific Northwest for human, commercial, and industrial use.²⁹ In addition, changes in precipitation patterns and temperatures are expected to bring more frequent extreme weather events, an increase in the occurrence of forest fires, diminished agricultural activity, a rising sea level, and reduced hydropower electricity generation.³⁰ These changes threaten to

²⁴ EPA, *Technical Support Document for the Advanced Notice of Proposed Rulemaking for Greenhouse Gases; Stationary Sources, Section VII, Final Draft*, at 19 (June 2008).

²⁵ RCW 70.94.154(2)-(3).

²⁶ WAC 173-400-050(5).

²⁷ *Sierra Club*, 2010 WL 1636869 at *10 (“The Board concludes that the general emissions standards of WAC 173-400-050(5) and SWCAA 400-040(5) are applicable requirements for purposes of the Operating Permit because they are included within the Washington SIP and Washington Administrative Code and within a regulation adopted by SWCAA, but also concludes that the general emissions standards are enforceable as written”); 40 C.F.R. § 52.2479.

²⁸ *Supra* note 27.

²⁹ Climate Impacts Group, *The Washington Climate Change Impacts Assessment: Evaluating Washington’s Future in a Changing Climate-Executive Summary*, at 8 (2009) [hereinafter “CIG Report”].

³⁰ CIG Report at 2, 10, 31-32; see also United States Geological Survey, *Vulnerability of U.S. National Parks to Sea-Level Rise and Coastal Change* (September 2002); Climate Leadership Initiative, *An overview of Potential Economic Costs to Washington of a Business-As Usual Approach to Climate Change*, at iv, 16 (February 2009).

devastate Washington's economy and seriously injure the health of Washington's residents.

In light of these severe potential impacts, the Governor of Washington has declared that "greenhouse gases . . . pose a serious threat to the health and welfare of Washington's citizens and the quality of the environment . . ." ³¹ The Air Pollution Agencies must give heed to this declaration and take immediate steps, as mandated in the SIP, to protect the health and welfare of Washington's residents from greenhouse gas emissions from oil refineries.

CONCLUSION

The Air Pollution Agencies have a legal duty and a moral imperative to control greenhouse gas emissions from oil refineries. If the Air Pollution Agencies do not immediately begin to discharge this responsibility, the Conservation Organizations have no choice but to initiate legal action to compel the Agencies to comply with the SIP and take necessary first steps towards protecting Washington's residents from the adverse impacts of climate change.

We look forward to working with you to resolve these complex issues. Do not hesitate to contact us at 206-448-1230 if you have any questions or would like to discuss a schedule for remedying the violations outlined herein.

Sincerely,

ZIONTZ, CHESTNUT, VARNELL,
BERLEY & SLONIM



John B. Arum
Joshua Osborne-Klein

*Attorneys for Washington Environmental Council
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cc: Joan Crooks, Executive Director, Washington Environmental Council
Morgan Ahouse, Chair, Sierra Club Cascade Chapter

³¹ Washington State Governor, Executive Order 09-05 (May 25, 2009)