

**To:** Patricia Embrey/DC/USEPA/US@EPA;"Joanne Spalding"  
[Joanne.Spalding@sierraclub.org]; Joanne Spalding" [Joanne.Spalding@sierraclub.org]  
**Cc:** "Vickie Patton" [Vickie\_Patton@environmentaldefense.org]; Iliott  
Zenick/DC/USEPA/US@EPA;"ddoniger" [ddoniger@nrdc.org]; ddoniger" [ddoniger@nrdc.org]  
**From:** "Michael Myers"  
**Sent:** Fri 9/24/2010 6:37:18 PM  
**Subject:** Re: Resend: Combined state/environmental edits on draft

I'm available Monday afternoon.

>>> <Embrey.Patricia@epamail.epa.gov> 9/24/2010 2:34 PM >>>

We are hoping to get back to you on Monday. Can you hold some time Monday afternoon eastern time?

From: Joseph Goffman  
Sent: 09/24/2010 11:14 AM EDT  
To: "Joanne Spalding" <Joanne.Spalding@sierraclub.org>; "Gunter, David (ENRD)"  
<David.Gunter2@usdoj.gov>  
Cc: Patricia Embrey; "Vickie\_Patton" <Vickie\_Patton@environmentaldefense.org>; "ddoniger"  
<ddoniger@nrdc.org>; "Michael Myers" <Michael.Myers@ag.ny.gov>; Avi Garbow; Elliott Zenick; Eric  
Ginsburg; Peter Tsirigotis  
Subject: Re: Resend: Combined state/environmental edits on draft

Joanne, Vickie, David and Mike - Thank you very much for getting this to us promptly. We will be  
conferring internally and getting in touch. Thanks, again.

From: Joanne Spalding [Joanne.Spalding@sierraclub.org]  
Sent: 09/24/2010 01:17 AM MST  
To: "Gunter, David (ENRD)" <David.Gunter2@usdoj.gov>  
Cc: Patricia Embrey; Vickie\_Patton@environmentaldefense.org; ddoniger@nrdc.org;  
Michael.Myers@ag.ny.gov; Avi Garbow; Elliott Zenick; Eric Ginsburg; Joseph Goffman; Peter Tsirigotis  
Subject: Resend: Combined state/environmental edits on draft

Resending because delivery to David Gunter failed the first time.

-----Joanne Spalding/Sierraclub wrote: -----

To: Embrey.Patricia@epamail.epa.gov  
From: Joanne Spalding/Sierraclub  
Date: 09/24/2010 01:12AM  
Cc: Vickie\_Patton@environmentaldefense.org, ddoniger@nrdc.org, Michael.Myers@ag.ny.gov,  
DGunter@ENRD.USDOJ.GOV, Garbow.Avi@epamail.epa.gov, Zenick.Elliott@epamail.epa.gov,  
Ginsburg.Eric@epamail.epa.gov, Goffman.Joseph@epamail.epa.gov, Tsirigotis.Peter@epamail.epa.gov

Subject: Combined state/environmental edits on draft

CONFIDENTIAL

Thank you for offering the draft settlement agreement. It is a meaningful step toward resolving our claims. The attached version includes the combined proposed edits of the state and environmental petitioners. We have not made any changes to the schedule. We have, however, changed "addresses" to "includes" in paragraphs 1 and 2, as we discussed in our last call. We think it is very important that EPA commit to proposing performance standards for greenhouse gas emissions from EGUs. EPA has already found that GHGs endanger health and welfare, and both individually and as a category, EGUs are the largest GHG emitters. Over the past year, EPA has examined a variety of effective methods to limit GHG emissions from EGUs, along with other stationary sources. We do not see any legal or technical obstacle that would preclude a commitment to including GHG performance standards in a proposed rule.

Our very cursory review of prior settlements has yielded several instances in which EPA has agreed to include specific content in proposed rules. In a number of situations, the settlement has recited at length the exact language that would appear in the proposed rule. A few sample settlements are attached. The circumstances of this case do not warrant a different treatment.

The attached draft also contains other edits, which we can explain further in our next conversation. We are available Friday to discuss these proposed changes and work together to resolve any remaining differences.

Joanne Spalding  
Managing Attorney  
Sierra Club  
85 Second Street, Second Floor  
San Francisco, CA 94105  
415-977-5725  
415-977-5793 (Fax)  
joanne.spalding@sierraclub.org

CONFIDENTIAL LEGAL COMMUNICATION/WORK PRODUCT

This e-mail may contain privileged and confidential attorney-client communications and/or confidential attorney work product. If you receive this e-mail inadvertently, please reply and notify the sender and delete all versions on your system. Thank you.

[attachment "Draft EGU settlement Sept 21 NRDC-State-EDF comments 9-23 3pm - Circulate.doc" removed by Joanne Spalding/Sierraclub]

[attachment "UARG v. EPA settlement.pdf" removed by Joanne Spalding/Sierraclub]

[attachment "ACC v. EPA settlement.pdf" removed by Joanne Spalding/Sierraclub]

[attachment "API v. EPA settlement.pdf" removed by Joanne Spalding/Sierraclub]

[attachment "DENVER-#292635-v2-PANNA\_amended\_settlement\_agmt\_7\_30.DOC" removed by Joanne Spalding/Sierraclub]



**To:** vpatton@environmentaldefense.org[vpatton@environmentaldefense.org];  
ddoniger@nrdc.org>;[Joanne.Spalding@sierraclub.org];  
Joanne.Spalding@sierraclub.org>;"David (ENRD) Gunter" [David.Gunter2@usdoj.gov]; David  
(ENRD) Gunter" [David.Gunter2@usdoj.gov]  
**Cc:** Patricia Embrey/DC/USEPA/US@EPA;Elliott Zenick/DC/USEPA/US@EPA[]; Iliott  
Zenick/DC/USEPA/US@EPA[]  
**From:** "Michael Myers"  
**Sent:** Tue 9/28/2010 1:22:34 PM  
**Subject:** Re: Boiler NSPS -- EPA September 27 draft

\*Privileged and Confidential Settlement Communication\*

Dave, thanks for the revised version of the settlement agreement. NY is fine with the changes and I don't anticipate any problems getting buy-in from the other state petitioners on the language. I've corresponded last night/this morning with David, Joanne, and Vickie, and understand that they have some minor language changes that state petitioners are on board with. With respect to the filing in court aspect, I believe that EPA/DOJ has some discretion here to file this with the court, despite the language of Circuit Rule 41(b), especially given the precedent in Mass. that David alluded to yesterday. Although I understand your desire not to set a precedent that you may not like to follow in other cases, I don't think it can be seriously debated that EPA has a legal obligation to set NSPS for EGUs, so the technical distinction that there is no pending litigation in the D.C. Circuit does not seem to me to be a meaningful one. That being said, state petitioners are amenable, because of the importance of this commitment by EPA and the public health and environmental benefits that should result, not to hold the agreement up by insisting on the filing of the agreement with the court (or pursuing the mandamus route, which would also likely delay things).

In addition to the substance of the agreement, state petitioners are also very interested in the timing for finalizing the settlement (when signature pages will be due, EPA's preferred course on announcement of the settlement, etc.). I would hope that we can discuss these issues today or tomorrow, assuming we're there on the terms. Thanks for your work on this.--Mike

>>> "Gunter, David (ENRD)" <David.Gunter2@usdoj.gov> 9/27/2010 8:15 PM >>>

Counsel,

Thank you for your participation in the call today about the Boiler NSPS settlement. The attached draft represents our changes, in redline, reflecting the compromise that we reached on certain points today. If this draft is acceptable to you, then I believe we have staff-level agreement on a draft that we can recommend to our respective clients and reviewing agency officials for approval. However, as we discussed, I would still appreciate your written confirmation (by letter or e-mail) that you do not presently intend to seek attorneys' fees in this case.

That leaves the question that we discussed on our call today about the possibility of filing a status report with the D.C. Circuit to inform it of this agreement. I have raised this question with my management within DOJ, and I have been instructed that it would be very difficult for us to compromise on this point. As David said on our call, a fight on this issue is not in anyone's interest. I am therefore asking you to agree that you will not file the final settlement with the Court unless further litigation becomes necessary.

We've made remarkable progress on this matter in a very short time, and I hope that you can advise us we have an agreement with this draft. If we need to discuss this further, we're available for a call at 9:00 tomorrow morning.

Thanks,

Dave Gunter

**To:** vpatton@environmentaldefense.org[vpatton@environmentaldefense.org];  
ddoniger@nrdc.org>;[Joanne.Spalding@sierraclub.org];  
Joanne.Spalding@sierraclub.org>;"David (ENRD) Gunter" [David.Gunter2@usdoj.gov]; David  
(ENRD) Gunter" [David.Gunter2@usdoj.gov]  
**Cc:** Patricia Embrey/DC/USEPA/US@EPA;Elliott Zenick/DC/USEPA/US@EPA[]; Iliott  
Zenick/DC/USEPA/US@EPA[]  
**From:** "Michael Myers"  
**Sent:** Tue 9/28/2010 1:38:37 PM  
**Subject:** RE: Boiler NSPS -- EPA September 27 draft

Ok, thanks. Shall we pencil in a quick call for 4 or 4:30?

>>> "Gunter, David (ENRD)" <David.Gunter2@usdoj.gov> 9/28/2010 9:31 AM >>>

Mike: Thanks for this communication. I would like to hear from the environmental petitioners as well, and even if we are not able to persuade each other on the point of a status report, I hope their answer will be similar to yours.

On the question of timing: Once we hear from all petitioners that the most recent draft is an acceptable agreement, both EPA and DOJ will be moving quickly to line up our approval authorities. At that point we'll have a better idea of what our timetable will be from here. I'm in court this morning, but I'll be available this afternoon after 4:00, and we may be able to share more details at that time.

Thanks,  
Dave

From: Michael Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Tuesday, September 28, 2010 9:23 AM  
To: vpatton@environmentaldefense.org; ddoniger@nrdc.org; Joanne.Spalding@sierraclub.org; Gunter, David (ENRD)  
Cc: embrey.patricia@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov  
Subject: Re: Boiler NSPS -- EPA September 27 draft

\*Privileged and Confidential Settlement Communication\*

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distinction that there is no pending litigation in the D.C. Circuit does not seem to me to be a meaningful one. That being said, state petitioners are amenable, because of the importance of this commitment by EPA and the public health and environmental benefits that should result, not to hold the agreement up by insisting on the filing of the agreement with the court (or pursuing the mandamus route, which would also likely delay things).

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>>> "Gunter, David (ENRD)" <David.Gunter2@usdoj.gov> 9/27/2010 8:15 PM >>>

Counsel,

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That leaves the question that we discussed on our call today about the possibility of filing a status report with the D.C. Circuit to inform it of this agreement. I have raised this question with my management within DOJ, and I have been instructed that it would be very difficult for us to compromise on this point. As David said on our call, a fight on this issue is not in anyone's interest. I am therefore asking you to agree that you will not file the final settlement with the Court unless further litigation becomes necessary.

We've made remarkable progress on this matter in a very short time, and I hope that you can advise us we have an agreement with this draft. If we need to discuss this further, we're available for a call at 9:00 tomorrow morning.

Thanks,

Dave Gunter

**To:** "Michael J. Myers" [Michael.Myers@ag.ny.gov]  
**Cc:** "Avi Garbow" [Garbow.Avi@epamail.epa.gov]  
**From:** CN=Patricia Embrey/OU=DC/O=USEPA/C=US  
**Sent:** Fri 10/28/2011 8:58:19 PM  
**Subject:** Re: Boiler NSPS settlement

[David.Gunter2@usdoj.gov](mailto:David.Gunter2@usdoj.gov)  
[michael.myers@ag.ny.gov](mailto:michael.myers@ag.ny.gov)  
[Embrey.Patricia@epamail.epa.gov](mailto:Embrey.Patricia@epamail.epa.gov)  
[Embrey.Patricia@epamail.epa.gov](mailto:Embrey.Patricia@epamail.epa.gov)  
[Morgan.Costello@ag.ny.gov](mailto:Morgan.Costello@ag.ny.gov)  
[Goffman.Joseph@epamail.epa.gov](mailto:Goffman.Joseph@epamail.epa.gov)  
[Jordan.Scott@epamail.epa.gov](mailto:Jordan.Scott@epamail.epa.gov)  
[Zenick.Elliott@epamail.epa.gov](mailto:Zenick.Elliott@epamail.epa.gov)  
[Joanne.Spalding@sierraclub.org](mailto:Joanne.Spalding@sierraclub.org)  
[thomas.lorenzen@usdoj.gov](mailto:thomas.lorenzen@usdoj.gov)  
[thomas.lorenzen@usdoj.gov](mailto:thomas.lorenzen@usdoj.gov)  
[Embrey.Patricia@epamail.epa.gov](mailto:Embrey.Patricia@epamail.epa.gov)  
[mceronsky@edf.org](mailto:mceronsky@edf.org)  
[vpattton@edf.org](mailto:vpattton@edf.org)  
[Goffman.Joseph@epamail.epa.gov](mailto:Goffman.Joseph@epamail.epa.gov)  
[Jordan.Scott@epamail.epa.gov](mailto:Jordan.Scott@epamail.epa.gov)  
[Zenick.Elliott@epamail.epa.gov](mailto:Zenick.Elliott@epamail.epa.gov)  
[Joanne.Spalding@sierraclub.org](mailto:Joanne.Spalding@sierraclub.org)  
[Thomas.Lorenzen@usdoj.gov](mailto:Thomas.Lorenzen@usdoj.gov)  
[Embrey.Patricia@epamail.epa.gov](mailto:Embrey.Patricia@epamail.epa.gov)  
[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)  
[www.nrdc.org](http://www.nrdc.org)  
<http://switchboard.nrdc.org/blogs/ddoniger/>

From: "Michael J. Myers" [Michael.Myers@ag.ny.gov]  
Sent: 10/28/2011 04:52 PM AST  
To: "'David (ENRD) Gunter'" <David.Gunter2@usdoj.gov>; "mceronsky@edf.org" <mceronsky@edf.org>;  
Joanne Spalding <Joanne.Spalding@sierraclub.org>  
Cc: "vpattton@edf.org" <vpattton@edf.org>; Patricia Embrey; Joseph Goffman; Scott Jordan; Elliott  
Zenick; "ddoniger@nrdc.org" <ddoniger@nrdc.org>; "Thomas (ENRD) Lorenzen"  
<Thomas.Lorenzen@usdoj.gov>; "garbo.avi@epamail.epa.gov" <garbo.avi@epamail.epa.gov>  
Subject: RE: Boiler NSPS settlement

Here's a draft letter. If the above doesn't reflect Avi's correct address, can someone please send to him?  
thanks.

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Thursday, October 27, 2011 11:45 AM  
To: mceronsky@edf.org; Michael J. Myers; Joanne Spalding  
Cc: Morgan Costello; vpatton@edf.org; Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; ddoniger@nrdc.org; Thomas (ENRD) Lorenzen  
Subject: RE: Boiler NSPS settlement

Mike: Thanks for your forbearance. Everyone, we would like to set the call for 10:15 ET, using the following call-in information:

Dial: 866-410-9426

Code: 202-514-3785

Thank you all,

Dave

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Thursday, October 27, 2011 10:02 AM  
To: 'Joanne Spalding'; mceronsky@edf.org  
Cc: Morgan Costello; vpatton@edf.org; Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; ddoniger@nrdc.org; Gunter, David (ENRD); Lorenzen, Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Given the status (at least as I understand it) and tomorrow's deadline, you should proceed with a call as early as possible tomorrow, which would appear from these e-mails to be 10 a.m. eastern. I'm not sure when I will be back from court, but my environmental colleagues can share my thoughts with you in the meantime.

From: Joanne Spalding [mailto:Joanne.Spalding@sierraclub.org]  
Sent: Thursday, October 27, 2011 1:20 AM  
To: mceronsky@edf.org  
Cc: Morgan Costello; vpatton@edf.org; Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Michael J. Myers; ddoniger@nrdc.org; David.Gunter2@usdoj.gov; thomas.lorenzen@usdoj.gov  
Subject: Re: Boiler NSPS settlement

I'm booked 12-12:30 and 1:30-2 ET, but otherwise available, possibly while driving, any time after 9:30 ET.

-----Megan Ceronsky <mceronsky@edf.org> wrote: -----

To: "'ddoniger@nrdc.org'" <ddoniger@nrdc.org>, "'David.Gunter2@usdoj.gov'" <David.Gunter2@usdoj.gov>, "'michael.myers@ag.ny.gov'" <michael.myers@ag.ny.gov>, "'Embrey.Patricia@epamail.epa.gov'" <Embrey.Patricia@epamail.epa.gov>  
From: Megan Ceronsky <mceronsky@edf.org>  
Date: 10/26/2011 09:57PM  
Cc: "'Morgan.Costello@ag.ny.gov'" <Morgan.Costello@ag.ny.gov>, Vickie Patton <vpatton@edf.org>, "'Goffman.Joseph@epamail.epa.gov'" <Goffman.Joseph@epamail.epa.gov>, "'Jordan.Scott@epamail.epa.gov'" <Jordan.Scott@epamail.epa.gov>, "'Zenick.Elliott@epamail.epa.gov'" <Zenick.Elliott@epamail.epa.gov>, "'Joanne.Spalding@sierraclub.org'" <Joanne.Spalding@sierraclub.org>, "'thomas.lorenzen@usdoj.gov'" <thomas.lorenzen@usdoj.gov>  
Subject: Re: Boiler NSPS settlement

Vickie's schedule Friday is too uncertain to plan around, but I can be available anytime.

Best,  
Megan

----- Original Message -----

From: Doniger, David [mailto:ddoniger@nrdc.org]  
Sent: Wednesday, October 26, 2011 04:10 PM  
To: David.Gunter2@usdoj.gov <David.Gunter2@usdoj.gov>; michael.myers@ag.ny.gov <michael.myers@ag.ny.gov>; Embrey.Patricia@epamail.epa.gov <Embrey.Patricia@epamail.epa.gov>  
Cc: Morgan.Costello@ag.ny.gov <Morgan.Costello@ag.ny.gov>; Megan Ceronsky; Vickie Patton; Goffman.Joseph@epamail.epa.gov <Goffman.Joseph@epamail.epa.gov>; Jordan.Scott@epamail.epa.gov <Jordan.Scott@epamail.epa.gov>; Zenick.Elliott@epamail.epa.gov <Zenick.Elliott@epamail.epa.gov>; Joanne.Spalding@sierraclub.org <Joanne.Spalding@sierraclub.org>; thomas.lorenzen@usdoj.gov <thomas.lorenzen@usdoj.gov>  
Subject: Re: Boiler NSPS settlement

I'll make myself available anytime Friday, though I may be on a train.

David Doniger  
NRDC  
202 321-3435

----- Original Message -----

From: Gunter, David (ENRD) [mailto:David.Gunter2@usdoj.gov]  
Sent: Wednesday, October 26, 2011 04:05 PM  
To: Michael J. Myers <Michael.Myers@ag.ny.gov>; Embrey.Patricia@epamail.epa.gov <Embrey.Patricia@epamail.epa.gov>; Doniger, David  
Cc: Morgan Costello <Morgan.Costello@ag.ny.gov>; mceronsky@edf.org <mceronsky@edf.org>; vpatton@edf.org <vpatton@edf.org>; Goffman.Joseph@epamail.epa.gov <Goffman.Joseph@epamail.epa.gov>; Jordan.Scott@epamail.epa.gov <Jordan.Scott@epamail.epa.gov>; Zenick.Elliott@epamail.epa.gov <Zenick.Elliott@epamail.epa.gov>; Joanne.Spalding@sierraclub.org <Joanne.Spalding@sierraclub.org>; Lorenzen, Thomas (ENRD) <Thomas.Lorenzen@usdoj.gov>

Subject: RE: Boiler NSPS settlement

Mike, I'm sorry, but EPA is still fully engaged in the review and approval process and will not have meaningful information to share until Friday morning. If there are times on Friday afternoon when everyone is available, please let me know and I'll do the best I can to get everyone on the phone at the same time.

Thanks,  
Dave

-----Original Message-----

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Wednesday, October 26, 2011 12:36 PM  
To: Gunter, David (ENRD); Embrey.Patricia@epamail.epa.gov; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Lorenzen,  
Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Dave, unfortunately Morgan is out Friday so can't cover a call in the morning. Given Friday's deadline, I may be willing to have you go ahead with a call Fri. a.m. without NY based on the assumptions that (1) that's the earliest EPA/DOJ can inform us of whether you have received final approval on the revised settlement agreement, and (2) you anticipate receiving such approval. However, if either of my assumptions are incorrect, then we should convene a call today with whomever is available to discuss.

-----Original Message-----

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Wednesday, October 26, 2011 11:55 AM  
To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD)  
Lorenzen  
Subject: RE: Boiler NSPS settlement

Mike,

I was just preparing to ask for a call on Friday morning. Can you please let me know when on Friday you think you would be available, and whether Morgan could cover a call for you if we held it between 10 and 12 ET on Friday? Everyone else, please let me know available times on Friday also.

Thanks,  
Dave

-----Original Message-----

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Wednesday, October 26, 2011 11:53 AM  
To: Gunter, David (ENRD); Embrey.Patricia@epamail.epa.gov; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Lorenzen,  
Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Don't mean to nag on this, but I'm going to be in court on Friday morning, likely not back until early afternoon and would like to have a better sense of where we are and when we're going to talk this week. Thanks.



-----Original Message-----

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Monday, October 24, 2011 10:12 AM  
To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD) Lorenzen  
Subject: RE: Boiler NSPS settlement

Mike and David,

Thanks for clarifying that all the petitioners are on board. I understand that meetings are still taking place to secure the necessary federal approvals. We're certainly aware of the deadline and the need to coordinate, so I will be in touch as soon as I can tell you more.

Thanks,  
Dave Gunter

-----Original Message-----

From: Doniger, David [mailto:ddoniger@nrdc.org]  
Sent: Friday, October 21, 2011 2:30 PM  
To: Michael J. Myers; Gunter, David (ENRD); Embrey.Patricia@epamail.epagov  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Lorenzen, Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Also to clarify that the three environmental petitioners are onboard. So we are eager for news on the federal side.

David D. Doniger  
Policy Director, Climate Center  
Natural Resources Defense Council

Please note our new address:  
1152 15th Street, NW, Suite 300  
Washington, DC 20005

Phone: (202) 289-2403  
Cell: (202) 321-3435  
Fax: (202) 789-0859  
ddoniger@nrdc.org  
on the web at [www.nrdc.org](http://www.nrdc.org)  
read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

-----Original Message-----

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Friday, October 21, 2011 2:02 PM  
To: 'David (ENRD) Gunter'; Embrey.Patricia@epamail.epa.gov; Doniger, David  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD) Lorenzen

Subject: RE: Boiler NSPS settlement

All--Just wanted to communicate that I have now received approvals from all of the state petitioners. What's the status of the federal approvals? I've been getting questions re. a communications call to discuss a potential announcement, press, etc. for next week so please let us know when something's been arranged. Thanks.--Mike

-----Original Message-----

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Wednesday, October 19, 2011 11:20 AM  
To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD) Lorenzen  
Subject: RE: Boiler NSPS settlement

Thanks, Mike -- This looks good to me, and we'll also use this for our internal approval processes.

Dave

-----Original Message-----

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Tuesday, October 18, 2011 12:31 PM  
To: Gunter, David (ENRD); Embrey.Patricia@epamail.epa.gov; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org;  
Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov;  
Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org;  
Lorenzen, Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Dave and co.--I've removed the bolded/bracketed language from the draft version we approved last Thursday and have made some minor signature block revisions. Unless I hear otherwise from you or the agency, we will plan to use this as the final document for purposes of obtaining signatures by next Friday the 28th. Thanks.--Mike

-----Original Message-----

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Thursday, October 13, 2011 2:02 PM  
To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org;  
Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov;  
Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD) Lorenzen  
Subject: RE: Boiler NSPS settlement

Counsel: Attached please find a draft of our proposed agreement modification, with the term that we discussed today in bold.

Thanks,  
Dave Gunter

This e-mail and any attachments may contain confidential and privileged information. If you are not the intended recipient, please notify the sender immediately by return e-mail, delete this e-mail and destroy any copies. Any dissemination or use of this information by a person other than the intended recipient is unauthorized and may be illegal.

**To:** "David (ENRD) Gunter" [David.Gunter2@usdoj.gov]; 'mceronsky@edf.org' [mceronsky@edf.org]; Joanne Spalding' [Joanne.Spalding@sierraclub.org]  
**Cc:** "vpatton@edf.org" [vpatton@edf.org]; atricia Embrey/DC/USEPA/US@EPA; Joseph Goffman/DC/USEPA/US@EPA; Scott Jordan/DC/USEPA/US@EPA; Elliott Zenick/DC/USEPA/US@EPA; "ddoniger@nrdc.org" [ddoniger@nrdc.org]; oseph Goffman/DC/USEPA/US@EPA; Scott Jordan/DC/USEPA/US@EPA; Elliott Zenick/DC/USEPA/US@EPA; "ddoniger@nrdc.org" [ddoniger@nrdc.org]; cott Jordan/DC/USEPA/US@EPA; Elliott Zenick/DC/USEPA/US@EPA; "ddoniger@nrdc.org" [ddoniger@nrdc.org]; lliott Zenick/DC/USEPA/US@EPA; "ddoniger@nrdc.org" [ddoniger@nrdc.org]; 'ddoniger@nrdc.org' [ddoniger@nrdc.org]; 'Thomas (ENRD) Lorenzen' [Thomas.Lorenzen@usdoj.gov]; vi Garbow/DC/USEPA/US@EPA[]

**From:** "Michael J. Myers"

**Sent:** Fri 10/28/2011 9:01:42 PM

**Subject:** RE: Boiler NSPS settlement

[MM Oct 28 Extension Letter 2.doc](#)

[David.Gunter2@usdoj.gov](#)

[michael.myers@ag.ny.gov](#)

[Embrey.Patricia@epamail.epagov](#)

[Embrey.Patricia@epamail.epa.gov](#)

[Morgan.Costello@ag.ny.gov](#)

[Goffman.Joseph@epamail.epa.gov](#)

[Jordan.Scott@epamail.epa.gov](#)

[Zenick.Elliott@epamail.epa.gov](#)

[Joanne.Spalding@sierraclub.org](#)

[thomas.lorenzen@usdoj.gov](#)

[thomas.lorenzen@usdoj.gov](#)

[Embrey.Patricia@epamail.epagov](#)

[mceronsky@edf.org](#)

[vpatton@edf.org](#)

[Goffman.Joseph@epamail.epa.gov](#)

[Jordan.Scott@epamail.epa.gov](#)

[Zenick.Elliott@epamail.epa.gov](#)

[Joanne.Spalding@sierraclub.org](#)

[Thomas.Lorenzen@usdoj.gov](#)

[Embrey.Patricia@epamail.epagov](#)

[ddoniger@nrdc.org](#)

[www.nrdc.org](#)

<http://switchboard.nrdc.org/blogs/ddoniger/>

Re-sending the letter so that Avi's correct address is included in this list (thanks Patricia)

From: Michael J. Myers

Sent: Friday, October 28, 2011 4:53 PM

To: 'David (ENRD) Gunter'; mceronsky@edf.org; Joanne Spalding

Cc: vpatton@edf.org; Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov;

Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; ddoniger@nrdc.org; Thomas (ENRD)

Lorenzen; 'garbo.avi@epamail.epa.gov'

Subject: RE: Boiler NSPS settlement

Here's a draft letter. If the above doesn't reflect Avi's correct address, can someone please send to him? thanks.

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Thursday, October 27, 2011 11:45 AM  
To: mceronsky@edf.org; Michael J. Myers; Joanne Spalding  
Cc: Morgan Costello; vpatton@edf.org; Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; ddoniger@nrdc.org; Thomas (ENRD) Lorenzen  
Subject: RE: Boiler NSPS settlement

Mike: Thanks for your forbearance. Everyone, we would like to set the call for 10:15 ET, using the following call-in information:

Dial 866-410-9426

Code 202-514-3785

Thank you all,

Dave

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Thursday, October 27, 2011 10:02 AM  
To: 'Joanne Spalding'; mceronsky@edf.org  
Cc: Morgan Costello; vpatton@edf.org; Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; ddoniger@nrdc.org; Gunter, David (ENRD); Lorenzen, Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Given the status (at least as I understand it) and tomorrow's deadline, you should proceed with a call as early as possible tomorrow, which would appear from these e-mails to be 10 a.m. eastern. I'm not sure when I will be back from court, but my environmental colleagues can share my thoughts with you in the meantime.

From: Joanne Spalding [mailto:Joanne.Spalding@sierraclub.org]  
Sent: Thursday, October 27, 2011 1:20 AM  
To: mceronsky@edf.org  
Cc: Morgan Costello; vpatton@edf.org; Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Michael J. Myers; ddoniger@nrdc.org; David.Gunter2@usdoj.gov; thomas.lorenzen@usdoj.gov  
Subject: Re: Boiler NSPS settlement

I'm booked 12-12:30 and 1:30-2 ET, but otherwise available, possibly while driving, any time after 9:30 ET.

-----Megan Ceronsky <mceronsky@edf.org> wrote: -----

To: "'ddoniger@nrdc.org'" <ddoniger@nrdc.org>, "David.Gunter2@usdoj.gov" <David.Gunter2@usdoj.gov>, "michael.myers@ag.ny.gov" <michael.myers@ag.ny.gov>, "Embrey.Patricia@epamail.epa.gov" <Embrey.Patricia@epamail.epa.gov>  
From: Megan Ceronsky <mceronsky@edf.org>  
Date: 10/26/2011 09:57PM  
Cc: "'Morgan.Costello@ag.ny.gov'" <Morgan.Costello@ag.ny.gov>, Vickie Patton <vpatton@edf.org>, "Goffman.Joseph@epamail.epa.gov" <Goffman.Joseph@epamail.epa.gov>, "Jordan.Scott@epamail.epa.gov" <Jordan.Scott@epamail.epa.gov>, "Zenick.Elliott@epamail.epa.gov" <Zenick.Elliott@epamail.epa.gov>, "Joanne.Spalding@sierraclub.org" <Joanne.Spalding@sierraclub.org>, "thomas.lorenzen@usdoj.gov" <thomas.lorenzen@usdoj.gov>  
Subject: Re: Boiler NSPS settlement

Vickie's schedule Friday is too uncertain to plan around, but I can be available anytime.

Best,  
Megan

----- Original Message -----

From: Doniger, David [mailto:ddoniger@nrdc.org]  
Sent: Wednesday, October 26, 2011 04:10 PM  
To: David.Gunter2@usdoj.gov <David.Gunter2@usdoj.gov>; michael.myers@ag.ny.gov <michael.myers@ag.ny.gov>; Embrey.Patricia@epamail.epagov <Embrey.Patricia@epamail.epa.gov>  
Cc: Morgan.Costello@ag.ny.gov <Morgan.Costello@ag.ny.gov>; Megan Ceronsky; Vickie Patton; Goffman.Joseph@epamail.epa.gov <Goffman.Joseph@epamail.epa.gov>; Jordan.Scott@epamail.epa.gov <Jordan.Scott@epamail.epa.gov>; Zenick.Elliott@epamail.epa.gov <Zenick.Elliott@epamail.epa.gov>; Joanne.Spalding@sierraclub.org <Joanne.Spalding@sierraclub.org>; thomas.lorenzen@usdoj.gov <thomas.lorenzen@usdoj.gov>  
Subject: Re: Boiler NSPS settlement

I'll make myself available anytime Friday, though I may be on a train.  
David Doniger  
NRDC  
202 321-3435

----- Original Message -----

From: Gunter, David (ENRD) [mailto:David.Gunter2@usdoj.gov]  
Sent: Wednesday, October 26, 2011 04:05 PM  
To: Michael J. Myers <Michael.Myers@ag.ny.gov>; Embrey.Patricia@epamail.epagov <Embrey.Patricia@epamail.epa.gov>; Doniger, David  
Cc: Morgan Costello <Morgan.Costello@ag.ny.gov>; mceronsky@edf.org <mceronsky@edf.org>; vpatton@edf.org <vpatton@edf.org>; Goffman.Joseph@epamail.epa.gov <Goffman.Joseph@epamail.epa.gov>; Jordan.Scott@epamail.epa.gov <Jordan.Scott@epamail.epa.gov>; Zenick.Elliott@epamail.epa.gov <Zenick.Elliott@epamail.epa.gov>; Joanne.Spalding@sierraclub.org <Joanne.Spalding@sierraclub.org>; Lorenzen, Thomas (ENRD) <Thomas.Lorenzen@usdoj.gov>  
Subject: RE: Boiler NSPS settlement

Mike, I'm sorry, but EPA is still fully engaged in the review and approval process and will not have meaningful information to share until Friday morning. If there are times on Friday afternoon when everyone is available, please let me know and I'll do the best I can to get everyone on the phone at the same time.

Thanks,  
Dave

-----Original Message-----

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Wednesday, October 26, 2011 12:36 PM  
To: Gunter, David (ENRD); Embrey.Patricia@epamail.epa.gov; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Lorenzen, Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Dave, unfortunately Morgan is out Friday so can't cover a call in the morning. Given Friday's deadline, I may be willing to have you go ahead with a call Fri. a.m. without NY based on the assumptions that (1) that's the earliest EPA/DOJ can inform us of whether you have received final approval on the revised settlement agreement, and (2) you anticipate receiving such approval. However, if either of my assumptions are incorrect, then we should convene a call today with whomever is available to discuss.

-----Original Message-----

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Wednesday, October 26, 2011 11:55 AM  
To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD) Lorenzen  
Subject: RE: Boiler NSPS settlement

Mike,

I was just preparing to ask for a call on Friday morning. Can you please let me know when on Friday you think you would be available, and whether Morgan could cover a call for you if we held it between 10 and 12 ET on Friday? Everyone else, please let me know available times on Friday also.

Thanks,  
Dave

-----Original Message-----

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Wednesday, October 26, 2011 11:53 AM  
To: Gunter, David (ENRD); Embrey.Patricia@epamail.epa.gov; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Lorenzen,  
Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Don't mean to nag on this, but I'm going to be in court on Friday morning, likely not back until early afternoon and would like to have a better sense of where we are and when we're going to talk this week. Thanks.

-----Original Message-----

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Monday, October 24, 2011 10:12 AM  
To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD)  
Lorenzen  
Subject: RE: Boiler NSPS settlement

Mike and David,

Thanks for clarifying that all the petitioners are on board. I understand that meetings are still taking place to secure the necessary federal approvals. We're certainly aware of the deadline and the need to coordinate, so I will be in touch as soon as I can tell you more.

Thanks,  
Dave Gunter

-----Original Message-----

From: Doniger, David [mailto:ddoniger@nrdc.org]  
Sent: Friday, October 21, 2011 2:30 PM  
To: Michael J. Myers; Gunter, David (ENRD); Embrey.Patricia@epamail.epagov  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Lorenzen,  
Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Also to clarify that the three environmental petitioners are onboard. So we are eager for news on the federal side.

David D. Doniger  
Policy Director, Climate Center  
Natural Resources Defense Council

Please note our new address:  
1152 15th Street, NW, Suite 300  
Washington, DC 20005

Phone: (202) 289-2403  
Cell: (202) 321-3435  
Fax: (202) 789-0859  
ddoniger@nrdc.org  
on the web at www.nrdc.org



read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

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Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD) Lorenzen  
Subject: RE: Boiler NSPS settlement

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Subject: RE: Boiler NSPS settlement

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Dave

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Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org;  
Lorenzen, Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Dave and co.--I've removed the bolded/bracketed language from the draft version we approved last Thursday and have made some minor signature block revisions. Unless I hear otherwise from you or the agency, we will plan to use this as the final document for purposes of obtaining signatures by next Friday the 28th. Thanks.--Mike

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Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org;  
Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov;  
Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas

(ENRD) Lorenzen  
Subject: RE: Boiler NSPS settlement

Counsel: Attached please find a draft of our proposed agreement modification, with the term that we discussed today in bold.

Thanks,  
Dave Gunter

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STATE OF NEW YORK  
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN

ATTORNEY GENERAL

DIVISION OF SOCIAL  
JUSTICE  
ENVIRONMENTAL PROTECTION  
BUREAU

October 28, 2011

BY ELECTRONIC MAIL

David Gunter  
U.S. Department of Justice  
Environment and Natural Resources Division  
Appellate Section  
P.O. Box 23795  
Washington, D.C. 20024

RE: *New York v. EPA* (D.C. Cir. 06-1322)/Negotiations to Revise Settlement  
Agreement

Dear Mr. Gunter:

On behalf of State Petitioners and Environmental Petitioners (collectively, "Petitioners") in the above-referenced case, this letter is to memorialize the parties' understanding of the terms allowing for additional time needed to negotiate a revised Settlement Agreement. This letter supplements my letter to you dated October 14, 2011.

In light of the progress made to date, Petitioners are amenable to extend the time for negotiations until November 30, 2011. Petitioners agree not to invoke their remedies under ¶ 7 of the Settlement Agreement through that date. Please let me know if anything in this letter does not accurately reflect our discussions.

Sincerely,

---

Michael J. Myers  
Assistant Attorney General  
(518) 402-2594

**To:** Avi Garbow/DC/USEPA/US@EPA[]  
**Cc:** "mceronsky@edf.org" [mceronsky@edf.org]; 'vpatton@edf.org' [vpatton@edf.org]; atricia Embrey/DC/USEPA/US@EPA; Joseph Goffman/DC/USEPA/US@EPA; Scott Jordan/DC/USEPA/US@EPA; Elliott Zenick/DC/USEPA/US@EPA; "ddoniger@nrdc.org" [ddoniger@nrdc.org]; oseph Goffman/DC/USEPA/US@EPA; Scott Jordan/DC/USEPA/US@EPA; Elliott Zenick/DC/USEPA/US@EPA; "ddoniger@nrdc.org" [ddoniger@nrdc.org]; cott Jordan/DC/USEPA/US@EPA; Elliott Zenick/DC/USEPA/US@EPA; "ddoniger@nrdc.org" [ddoniger@nrdc.org]; Elliott Zenick/DC/USEPA/US@EPA; "ddoniger@nrdc.org" [ddoniger@nrdc.org]; 'Joanne.Spalding@sierraclub.org' [Joanne.Spalding@sierraclub.org]; 'David.Gunter2@usdoj.gov' [David.Gunter2@usdoj.gov]; 'Thomas.Lorenzen@usdoj.gov' [Thomas.Lorenzen@usdoj.gov]  
**From:** "Michael J. Myers"  
**Sent:** Fri 10/28/2011 9:55:21 PM  
**Subject:** Re: Boiler NSPS settlement (CONFIDENTIAL/DRAFT)

Thanks Avi. Can you quantify "very near term" to the 7 to 10 days discussed?

Message sent from a Blackberry device

----- Original Message -----

**From:** Garbow.Avi@epamail.epa.gov <Garbow.Avi@epamail.epa.gov>  
**To:** Michael J. Myers  
**Cc:** 'mceronsky@edf.org' <mceronsky@edf.org>; 'vpatton@edf.org' <vpatton@edf.org>; Embrey.Patricia@epamail.epa.gov <Embrey.Patricia@epamail.epa.gov>; Goffman.Joseph@epamail.epa.gov <Goffman.Joseph@epamail.epa.gov>; Jordan.Scott@epamail.epa.gov <Jordan.Scott@epamail.epa.gov>; Zenick.Elliott@epamail.epa.gov <Zenick.Elliott@epamail.epa.gov>; 'ddoniger@nrdc.org' <ddoniger@nrdc.org>; 'Joanne Spalding' <Joanne.Spalding@sierraclub.org>; 'David (ENRD) Gunter' <David.Gunter2@usdoj.gov>; 'Thomas (ENRD) Lorenzen' <Thomas.Lorenzen@usdoj.gov>  
**Sent:** Fri Oct 28 17:50:42 2011  
**Subject:** RE: Boiler NSPS settlement (CONFIDENTIAL/DRAFT)

Folks,

As discussed, below is the text of a letter we propose to send to Mike Myers and David Doniger, as representatives of petitioners, in exchange for the agreed upon extension of the forbearance until November 30, 2011. As written, I have received the requisite approvals to proceed. Thanks for your work on this matter today.

Regards,

Avi

\*\*\*\*\*

DRAFT/FOR SETTLEMENT DISCUSSION ONLY

I write concerning our recent discussions regarding the schedule for

rulemaking activity under section 111 of the Clean Air Act pertaining to electric generating unit source category. As you know, the parties had entered into a settlement agreement contemplating that the Agency would propose new source performance standards addressing greenhouse gas emissions from this sector by September 30, 2011— a schedule that proved unrealistic for the Agency. Since that time, the parties have been engaged in settlement discussions regarding a new schedule, with the petitioners agreeing not to invoke their remedies under paragraph 7 of the settlement agreement pending further productive settlement discussions. This forbearance period was to extend to today's date; my understanding is that petitioners are willing to extend this period further to November 30, 2011.

As we have indicated, notwithstanding our continued negotiations, the Agency intends to move forward on the section 111(b) aspect of the rulemaking by proposing a section 111(b) standard by the end of January 2012 and promulgating a final section 111(b) standard by mid-November 2012. To this end, and to accommodate this schedule, we expect to transmit to the Office of Management and Budget for interagency review a proposed rulemaking package in the very near term.

We look forward to continued dialogue of matters yet to be resolved.

\*\*\*\*\*

Avi Garbow  
Deputy General Counsel  
U.S. Environmental Protection Agency  
(202) 564-1917

From: "Michael J. Myers" <Michael.Myers@ag.ny.gov>  
To: "'David (ENRD) Gunter'" <David.Gunter2@usdoj.gov>,  
"'mceronsky@edf.org'" <mceronsky@edf.org>, 'Joanne Spalding'  
<Joanne.Spalding@sierraclub.org>  
Cc: "'vpatton@edf.org'" <vpatton@edf.org>, Patricia  
Embrey/DC/USEPA/US@EPA, Joseph Goffman/DC/USEPA/US@EPA,  
Scott Jordan/DC/USEPA/US@EPA, Elliott  
Zenick/DC/USEPA/US@EPA, "'ddoniger@nrdc.org'"  
<ddoniger@nrdc.org>, "'Thomas (ENRD) Lorenzen'"  
<Thomas.Lorenzen@usdoj.gov>, Avi Garbow/DC/USEPA/US@EPA  
Date: 10/28/2011 05:01 PM  
Subject: RE: Boiler NSPS settlement

Re-sending the letter so that Avi's correct address is included in this list (thanks Patricia)

From: Michael J. Myers  
Sent: Friday, October 28, 2011 4:53 PM  
To: 'David (ENRD) Gunter'; mceronsky@edf.org; Joanne Spalding  
Cc: vpatton@edf.org; Embrey.Patricia@epamail.epa.gov;  
Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov;  
Zenick.Elliott@epamail.epa.gov; ddoniger@nrdc.org; Thomas (ENRD)  
Lorenzen; 'garbo.avi@epamail.epa.gov'  
Subject: RE: Boiler NSPS settlement

Here's a draft letter. If the above doesn't reflect Avi's correct address, can someone please send to him? thanks.

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Thursday, October 27, 2011 11:45 AM  
To: mceronsky@edf.org; Michael J. Myers; Joanne Spalding  
Cc: Morgan Costello; vpatton@edf.org; Embrey.Patricia@epamail.epa.gov;  
Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov;  
Zenick.Elliott@epamail.epa.gov; ddoniger@nrdc.org; Thomas (ENRD)  
Lorenzen  
Subject: RE: Boiler NSPS settlement

Mike: Thanks for your forbearance. Everyone, we would like to set the call for 10:15 ET, using the following call-in information:

Dial 866-410-9426  
Code 202-514-3785

Thank you all,

Dave

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Thursday, October 27, 2011 10:02 AM  
To: 'Joanne Spalding'; mceronsky@edf.org  
Cc: Morgan Costello; vpatton@edf.org; Embrey.Patricia@epamail.epa.gov;  
Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov;  
Zenick.Elliott@epamail.epa.gov; ddoniger@nrdc.org; Gunter, David (ENRD);  
Lorenzen, Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Given the status (at least as I understand it) and tomorrow's deadline, you should proceed with a call as early as possible tomorrow, which would appear from these e-mails to be 10 a.m. eastern. I'm not sure when I will be back from court, but my environmental colleagues can share my thoughts with you in the meantime.

From: Joanne Spalding [mailto:Joanne.Spalding@sierraclub.org]  
Sent: Thursday, October 27, 2011 1:20 AM  
To: mceronsky@edf.org

Cc: Morgan Costello; vpatton@edf.org; Embrey.Patricia@epamail.epa.gov;  
Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov;  
Zenick.Elliott@epamail.epa.gov; Michael J. Myers; ddoniger@nrdc.org;  
David.Gunter2@usdoj.gov; thomas.lorenzen@usdoj.gov  
Subject: Re: Boiler NSPS settlement

I'm booked 12-12:30 and 1:30-2 ET, but otherwise available, possibly  
while driving, any time after 9:30 ET.

-----Megan Ceronsky <mceronsky@edf.org> wrote: -----  
To: "'ddoniger@nrdc.org'" <ddoniger@nrdc.org>,  
"'David.Gunter2@usdoj.gov'" <David.Gunter2@usdoj.gov>,  
"'michael.myers@ag.ny.gov'" <michael.myers@ag.ny.gov>,  
"'Embrey.Patricia@epamail.epa.gov'" <Embrey.Patricia@epamail.epa.gov>  
From: Megan Ceronsky <mceronsky@edf.org>  
Date: 10/26/2011 09:57PM  
Cc: "'Morgan.Costello@ag.ny.gov'" <Morgan.Costello@ag.ny.gov>, Vickie  
Patton <vpatten@edf.org>, "'Goffman.Joseph@epamail.epa.gov'"  
<Goffman.Joseph@epamail.epa.gov>, "'Jordan.Scott@epamail.epa.gov'"  
<Jordan.Scott@epamail.epa.gov>, "'Zenick.Elliott@epamail.epa.gov'"  
<Zenick.Elliott@epamail.epa.gov>, "'Joanne.Spalding@sierraclub.org'"  
<Joanne.Spalding@sierraclub.org>, "'thomas.lorenzen@usdoj.gov'"  
<thomas.lorenzen@usdoj.gov>  
Subject: Re: Boiler NSPS settlement

Vickie's schedule Friday is too uncertain to plan around, but I can be  
available anytime.

Best,  
Megan

----- Original Message -----  
From: Doniger, David [mailto:ddoniger@nrdc.org]  
Sent: Wednesday, October 26, 2011 04:10 PM  
To: David.Gunter2@usdoj.gov <David.Gunter2@usdoj.gov>;  
michael.myers@ag.ny.gov <michael.myers@ag.ny.gov>;  
Embrey.Patricia@epamail.epa.gov <Embrey.Patricia@epamail.epa.gov>  
Cc: Morgan.Costello@ag.ny.gov <Morgan.Costello@ag.ny.gov>; Megan  
Ceronsky; Vickie Patton; Goffman.Joseph@epamail.epa.gov  
<Goffman.Joseph@epamail.epa.gov>; Jordan.Scott@epamail.epa.gov  
<Jordan.Scott@epamail.epa.gov>; Zenick.Elliott@epamail.epa.gov  
<Zenick.Elliott@epamail.epa.gov>; Joanne.Spalding@sierraclub.org  
<Joanne.Spalding@sierraclub.org>; thomas.lorenzen@usdoj.gov <  
thomas.lorenzen@usdoj.gov>  
Subject: Re: Boiler NSPS settlement

I'll make myself available anytime Friday, though I may be on a train.  
David Doniger  
NRDC

202-321-3435

----- Original Message -----

From: Gunter, David (ENRD) [mailto:David.Gunter2@usdoj.gov]  
Sent: Wednesday, October 26, 2011 04:05 PM  
To: Michael J. Myers <Michael.Myers@ag.ny.gov>;  
Embrey.Patricia@epamail.epagov <Embrey.Patricia@epamail.epa.gov>;  
Doniger, David  
Cc: Morgan Costello <Morgan.Costello@ag.ny.gov>; mceronsky@edf.org  
<mceronsky@edf.org>; vpatton@edf.org <vpatton@edf.org>;  
Goffman.Joseph@epamail.epa.gov <Goffman.Joseph@epamail.epa.gov>;  
Jordan.Scott@epamail.epa.gov <Jordan.Scott@epamail.epa.gov>;  
Zenick.Elliott@epamail.epa.gov <Zenick.Elliott@epamail.epa.gov>;  
Joanne.Spalding@sierraclub.org <Joanne.Spalding@sierraclub.org>;  
Lorenzen, Thomas (ENRD) <Thomas.Lorenzen@usdoj.gov>  
Subject: RE: Boiler NSPS settlement

Mike, I'm sorry, but EPA is still fully engaged in the review and approval process and will not have meaningful information to share until Friday morning. If there are times on Friday afternoon when everyone is available, please let me know and I'll do the best I can to get everyone on the phone at the same time.

Thanks,  
Dave

-----Original Message-----

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Wednesday, October 26, 2011 12:36 PM  
To: Gunter, David (ENRD); Embrey.Patricia@epamail.epa.gov; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org;  
Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov;  
Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org;  
Lorenzen, Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Dave, unfortunately Morgan is out Friday so can't cover a call in the morning. Given Friday's deadline, I may be willing to have you go ahead with a call Fri. a.m. without NY based on the assumptions that (1) that's the earliest EPA/DOJ can inform us of whether you have received final approval on the revised settlement agreement, and (2) you anticipate receiving such approval. However, if either of my assumptions are incorrect, then we should convene a call today with whomever is available to discuss.

-----Original Message-----

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Wednesday, October 26, 2011 11:55 AM  
To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org;  
Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov;  
Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD) Lorenzen  
Subject: RE: Boiler NSPS settlement



Mike,

I was just preparing to ask for a call on Friday morning. Can you please let me know when on Friday you think you would be available, and whether Morgan could cover a call for you if we held it between 10 and 12 ET on Friday? Everyone else, please let me know available times on Friday also.

Thanks,  
Dave

-----Original Message-----

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Wednesday, October 26, 2011 11:53 AM  
To: Gunter, David (ENRD); Embrey.Patricia@epamail.epa.gov; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Lorenzen, Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Don't mean to nag on this, but I'm going to be in court on Friday morning, likely not back until early afternoon and would like to have a better sense of where we are and when we're going to talk this week. Thanks.

-----Original Message-----

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Monday, October 24, 2011 10:12 AM  
To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD) Lorenzen  
Subject: RE: Boiler NSPS settlement

Mike and David,

Thanks for clarifying that all the petitioners are on board. I understand that meetings are still taking place to secure the necessary federal approvals. We're certainly aware of the deadline and the need to coordinate, so I will be in touch as soon as I can tell you more.

Thanks,  
Dave Gunter

-----Original Message-----

From: Doniger, David [mailto:ddoniger@nrdc.org]  
Sent: Friday, October 21, 2011 2:30 PM  
To: Michael J. Myers; Gunter, David (ENRD); Embrey.Patricia@epamail.epagov  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org;

Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov;  
Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org;  
Lorenzen, Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Also to clarify that the three environmental petitioners are onboard.  
So we are eager for news on the federal side.

David D. Doniger  
Policy Director, Climate Center  
Natural Resources Defense Council

Please note our new address:  
1152 15th Street, NW, Suite 300  
Washington, DC 20005

Phone: (202) 289-2403  
Cell: (202) 321-3435  
Fax: (202) 789-0859  
ddoniger@nrdc.org  
on the web at [www.nrdc.org](http://www.nrdc.org)  
read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

-----Original Message-----

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Friday, October 21, 2011 2:02 PM  
To: 'David (ENRD) Gunter'; Embrey.Patricia@epamail.epa.gov; Doniger, David  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org;  
Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov;  
Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD) Lorenzen  
Subject: RE: Boiler NSPS settlement

All--Just wanted to communicate that I have now received approvals from all of the state petitioners. What's the status of the federal approvals? I've been getting questions re. a communications call to discuss a potential announcement, press, etc. for next week so please let us know when something's been arranged. Thanks.--Mike

-----Original Message-----

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Wednesday, October 19, 2011 11:20 AM  
To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org;  
Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov;  
Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD) Lorenzen  
Subject: RE: Boiler NSPS settlement

Thanks, Mike -- This looks good to me, and we'll also use this for our internal approval processes.

Dave

-----Original Message-----

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Tuesday, October 18, 2011 12:31 PM  
To: Gunter, David (ENRD); Embrey.Patricia@epamail.epa.gov; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Lorenzen, Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Dave and co.--I've removed the bolded/bracketed language from the draft version we approved last Thursday and have made some minor signature block revisions. Unless I hear otherwise from you or the agency, we will plan to use this as the final document for purposes of obtaining signatures by next Friday the 28th. Thanks.--Mike

-----Original Message-----

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Thursday, October 13, 2011 2:02 PM  
To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD) Lorenzen  
Subject: RE: Boiler NSPS settlement

Counsel: Attached please find a draft of our proposed agreement modification, with the term that we discussed today in bold.

Thanks,  
Dave Gunter

This e-mail and any attachments may contain confidential and privileged information. If you are not the intended recipient, please notify the sender immediately by return e-mail, delete this e-mail and destroy any copies. Any dissemination or use of this information by a person other than the intended recipient is unauthorized and may be illegal. (See attached file: MM Oct 28 Extension Letter 2.doc)

**To:** Avi Garbow/DC/USEPA/US@EPA;"Michael J. Myers" [Michael.Myers@ag.ny.gov]; Michael J. Myers" [Michael.Myers@ag.ny.gov]  
**Cc:** "David (ENRD) Gunter" [David.Gunter2@usdoj.gov]; Iliott Zenick/DC/USEPA/US@EPA;"Joanne Spalding" [Joanne.Spalding@sierraclub.org]; Joanne Spalding" [Joanne.Spalding@sierraclub.org]; oseph Goffman/DC/USEPA/US@EPA;[mceronsky@edf.org]; mceronsky@edf.org>; Patricia Embrey/DC/USEPA/US@EPA;Scott Jordan/DC/USEPA/US@EPA;"Thomas (ENRD) Lorenzen" [Thomas.Lorenzen@usdoj.gov]; atricia Embrey/DC/USEPA/US@EPA;Scott Jordan/DC/USEPA/US@EPA;"Thomas (ENRD) Lorenzen" [Thomas.Lorenzen@usdoj.gov]; cott Jordan/DC/USEPA/US@EPA;"Thomas (ENRD) Lorenzen" [Thomas.Lorenzen@usdoj.gov]; Thomas (ENRD) Lorenzen" [Thomas.Lorenzen@usdoj.gov]; vpatton@edf.org>[]  
**From:** "Doniger, David"  
**Sent:** Fri 10/28/2011 9:56:41 PM  
**Subject:** RE: Boiler NSPS settlement (CONFIDENTIAL/DRAFT)

Avi,

Thanks for the draft. Give us a little while to confer among ourselves.

David

David D. Doniger  
Policy Director, Climate and Clean Air Program  
Natural Resources Defense Council

Please note our new address:  
1152 15th Street, NW, Suite 300  
Washington, DC 20005

Phone: (202) 289-2403  
Cell: (202) 321-3435  
Fax: (202) 289-1060  
ddoniger@nrdc.org  
on the web at [www.nrdc.org](http://www.nrdc.org)  
read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

-----Original Message-----

From: Garbow.Avi@epamail.epa.gov [mailto:Garbow.Avi@epamail.epa.gov]  
Sent: Friday, October 28, 2011 5:51 PM  
To: Michael J. Myers  
Cc: 'David (ENRD) Gunter'; Doniger, David; Zenick.Elliott@epamail.epa.gov; 'Joanne Spalding'; Goffman.Joseph@epamail.epa.gov; 'mceronsky@edf.org'; Embrey.Patricia@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; 'Thomas (ENRD) Lorenzen'; 'vpattton@edf.org'  
Subject: RE: Boiler NSPS settlement (CONFIDENTIAL/DRAFT)

Folks,

As discussed, below is the text of a letter we propose to send to Mike Myers and David Doniger, as representatives of petitioners, in exchange for the agreed upon extension of the forbearance until November 30, 2011. As written, I have received the requisite approvals to proceed.  
Thanks for your work on this matter today.

Regards,

Avi

\*\*\*\*\*

DRAFT/FOR SETTLEMENT DISCUSSION ONLY

I write concerning our recent discussions regarding the schedule for rulemaking activity under section 111 of the Clean Air Act pertaining to electric generating unit source category. As you know, the parties had entered into a settlement agreement contemplating that the Agency would propose new source performance standards addressing greenhouse gas emissions from this sector by September 30, 2011— a schedule that proved unrealistic for the Agency. Since that time, the parties have been engaged in settlement discussions regarding a new schedule, with the petitioners agreeing not to invoke their remedies under paragraph 7 of the settlement agreement pending further productive settlement discussions. This forbearance period was to extend to today's date; my understanding is that petitioners are willing to extend this period further to November 30, 2011.

As we have indicated, notwithstanding our continued negotiations, the Agency intends to move forward on the section 111(b) aspect of the rulemaking by proposing a section 111(b) standard by the end of January 2012 and promulgating a final section 111(b) standard by mid-November 2012. To this end, and to accommodate this schedule, we expect to transmit to the Office of Management and Budget for interagency review a proposed rulemaking package in the very near term.

We look forward to continued dialogue of matters yet to be resolved.

\*\*\*\*\*

Avi Garbow  
Deputy General Counsel  
U.S. Environmental Protection Agency  
(202) 564-1917

From: "Michael J. Myers" <Michael.Myers@ag.ny.gov>  
To: "'David (ENRD) Gunter'" <David.Gunter2@usdoj.gov>,  
"'mceronsky@edf.org'" <mceronsky@edf.org>, 'Joanne Spalding'  
<Joanne.Spalding@sierraclub.org>  
Cc: "'vpatton@edf.org'" <vpatton@edf.org>, Patricia  
Embrey/DC/USEPA/US@EPA, Joseph Goffman/DC/USEPA/US@EPA,  
Scott Jordan/DC/USEPA/US@EPA, Elliott  
Zenick/DC/USEPA/US@EPA, "'ddoniger@nrdc.org'"  
<ddoniger@nrdc.org>, "Thomas (ENRD) Lorenzen"  
<Thomas.Lorenzen@usdoj.gov>, Avi Garbow/DC/USEPA/US@EPA  
Date: 10/28/2011 05:01 PM  
Subject: RE: Boiler NSPS settlement

Re-sending the letter so that Avi's correct address is included in this list (thanks Patricia)

From: Michael J. Myers  
Sent: Friday, October 28, 2011 4:53 PM  
To: 'David (ENRD) Gunter'; mceronsky@edf.org; Joanne Spalding  
Cc: vpatton@edf.org; Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; ddoniger@nrdc.org; Thomas (ENRD) Lorenzen;  
'garbo.avi@epamail.epa.gov'  
Subject: RE: Boiler NSPS settlement

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From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Thursday, October 27, 2011 11:45 AM  
To: mceronsky@edf.org; Michael J. Myers; Joanne Spalding  
Cc: Morgan Costello; vpatton@edf.org; Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; ddoniger@nrdc.org; Thomas (ENRD) Lorenzen  
Subject: RE: Boiler NSPS settlement

Mike: Thanks for your forbearance. Everyone, we would like to set the call for 10:15 ET, using the following call-in information:

Dial 866-410-9726  
Code 202-514-3785

Thank you all,

Dave

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Thursday, October 27, 2011 10:02 AM  
To: 'Joanne Spalding'; mceronsky@edf.org  
Cc: Morgan Costello; vpatton@edf.org; Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; ddoniger@nrdc.org; Gunter, David (ENRD);  
Lorenzen, Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Given the status (at least as I understand it) and tomorrow's deadline, you should proceed with a call as early as possible tomorrow, which would appear from these e-mails to be 10 a.m. eastern. I'm not sure when I will be back from court, but my environmental colleagues can share my thoughts with you in the meantime.

From: Joanne Spalding [mailto:Joanne.Spalding@sierraclub.org]  
Sent: Thursday, October 27, 2011 1:20 AM  
To: mceronsky@edf.org  
Cc: Morgan Costello; vpatton@edf.org; Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Michael J. Myers; ddoniger@nrdc.org;  
David.Gunter2@usdoj.gov; thomas.lorenzen@usdoj.gov

Subject: Re: Boiler NSPS settlement

I'm booked 12-12:30 and 1:30-2 ET, but otherwise available, possibly while driving, any time after 9:30 ET.

-----Megan Ceronsky <mceronsky@edf.org> wrote: -----

To: "'ddoniger@nrdc.org'" <ddoniger@nrdc.org>, "'David.Gunter2@usdoj.gov'" <David.Gunter2@usdoj.gov>, "'michael.myers@ag.ny.gov'" <michael.myers@ag.ny.gov>, "'Embrey.Patricia@epamail.epa.gov'" <Embrey.Patricia@epamail.epa.gov>

From: Megan Ceronsky <mceronsky@edf.org>

Date: 10/26/2011 09:57PM

Cc: "'Morgan.Costello@ag.ny.gov'" <Morgan.Costello@ag.ny.gov>, Vickie Patton <vpatton@edf.org>, "'Goffman.Joseph@epamail.epa.gov'"

<Goffman.Joseph@epamail.epa.gov>, "'Jordan.Scott@epamail.epa.gov'"

<Jordan.Scott@epamail.epa.gov>, "'Zenick.Elliott@epamail.epa.gov'"

<Zenick.Elliott@epamail.epa.gov>, "'Joanne.Spalding@sierraclub.org'"

<Joanne.Spalding@sierraclub.org>, "'thomas.lorenzen@usdoj.gov'"

<thomas.lorenzen@usdoj.gov>

Subject: Re: Boiler NSPS settlement

Vickie's schedule Friday is too uncertain to plan around, but I can be available anytime.

Best,  
Megan

----- Original Message -----

From: Doniger, David [mailto:ddoniger@nrdc.org]

Sent: Wednesday, October 26, 2011 04:10 PM

To: David.Gunter2@usdoj.gov <David.Gunter2@usdoj.gov>; michael.myers@ag.ny.gov <michael.myers@ag.ny.gov>; Embrey.Patricia@epamail.epa.gov <Embrey.Patricia@epamail.epa.gov>

Cc: Morgan.Costello@ag.ny.gov <Morgan.Costello@ag.ny.gov>; Megan Ceronsky; Vickie Patton; Goffman.Joseph@epamail.epa.gov <Goffman.Joseph@epamail.epa.gov>; Jordan.Scott@epamail.epa.gov <Jordan.Scott@epamail.epa.gov>; Zenick.Elliott@epamail.epa.gov <Zenick.Elliott@epamail.epa.gov>; Joanne.Spalding@sierraclub.org <Joanne.Spalding@sierraclub.org>; thomas.lorenzen@usdoj.gov <thomas.lorenzen@usdoj.gov>

Subject: Re: Boiler NSPS settlement

I'll make myself available anytime Friday, though I may be on a train.

David Doniger

NRDC

202-321-3435 vacy

----- Original Message -----

From: Gunter, David (ENRD) [mailto:David.Gunter2@usdoj.gov]

Sent: Wednesday, October 26, 2011 04:05 PM

To: Michael J. Myers <Michael.Myers@ag.ny.gov>; Embrey.Patricia@epamail.epa.gov <Embrey.Patricia@epamail.epa.gov>

Doniger, David

Cc: Morgan Costello <Morgan.Costello@ag.ny.gov>; mceronsky@edf.org <mceronsky@edf.org>; vpatton@edf.org <vpatton@edf.org>; Goffman.Joseph@epamail.epa.gov <Goffman.Joseph@epamail.epa.gov>;

Jordan.Scott@epamail.epa.gov <Jordan.Scott@epamail.epa.gov>; Zenick.Elliott@epamail.epa.gov

<Zenick.Elliott@epamail.epa.gov>; Joanne.Spalding@sierraclub.org <Joanne.Spalding@sierraclub.org>; Lorenzen, Thomas (ENRD) <Thomas.Lorenzen@usdoj.gov>

Subject: RE: Boiler NSPS settlement

Mike, I'm sorry, but EPA is still fully engaged in the review and approval process and will not have meaningful information to share until Friday morning. If there are times on Friday afternoon when everyone is available, please let me know and I'll do the best I can to get everyone on the phone at the same time.

Thanks,  
Dave

-----Original Message-----

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Wednesday, October 26, 2011 12:36 PM  
To: Gunter, David (ENRD); Embrey.Patricia@epamail.epa.gov; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Lorenzen,  
Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Dave, unfortunately Morgan is out Friday so can't cover a call in the morning. Given Friday's deadline, I may be willing to have you go ahead with a call Fri. a.m. without NY based on the assumptions that (1) that's the earliest EPA/DOJ can inform us of whether you have received final approval on the revised settlement agreement, and (2) you anticipate receiving such approval. However, if either of my assumptions are incorrect, then we should convene a call today with whomever is available to discuss.

-----Original Message-----

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Wednesday, October 26, 2011 11:55 AM  
To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas  
(ENRD) Lorenzen  
Subject: RE: Boiler NSPS settlement

Mike,

I was just preparing to ask for a call on Friday morning. Can you please let me know when on Friday you think you would be available, and whether Morgan could cover a call for you if we held it between 10 and 12 ET on Friday? Everyone else, please let me know available times on Friday also.

Thanks,  
Dave

-----Original Message-----

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Wednesday, October 26, 2011 11:53 AM  
To: Gunter, David (ENRD); Embrey.Patricia@epamail.epa.gov; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Lorenzen,  
Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Don't mean to nag on this, but I'm going to be in court on Friday morning, likely not back until early afternoon and would like to have a better sense of where we are and when we're going to talk this week.



Thanks.

-----Original Message-----

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Monday, October 24, 2011 10:12 AM  
To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas  
(ENRD) Lorenzen  
Subject: RE: Boiler NSPS settlement

Mike and David,

Thanks for clarifying that all the petitioners are on board. I understand that meetings are still taking place to secure the necessary federal approvals. We're certainly aware of the deadline and the need to coordinate, so I will be in touch as soon as I can tell you more.

Thanks,  
Dave Gunter

-----Original Message-----

From: Doniger, David [mailto:ddoniger@nrdc.org]  
Sent: Friday, October 21, 2011 2:30 PM  
To: Michael J. Myers; Gunter, David (ENRD); Embrey.Patricia@epamail.epagov  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Lorenzen,  
Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Also to clarify that the three environmental petitioners are onboard.  
So we are eager for news on the federal side.

David D. Doniger  
Policy Director, Climate Center  
Natural Resources Defense Council

Please note our new address:  
1152 15th Street, NW, Suite 300  
Washington, DC 20005

Phone: (202) 289-2403  
Cell: (202) 321-3435  
Fax: (202) 789-0859  
ddoniger@nrdc.org  
on the web at [www.nrdc.org](http://www.nrdc.org)  
read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

-----Original Message-----

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Friday, October 21, 2011 2:02 PM  
To: 'David (ENRD) Gunter'; Embrey.Patricia@epamail.epa.gov; Doniger, David  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;

Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD) Lorenzen  
Subject: RE: Boiler NSPS settlement

All--Just wanted to communicate that I have now received approvals from all of the state petitioners. What's the status of the federal approvals? I've been getting questions re. a communications call to discuss a potential announcement, press, etc. for next week so please let us know when something's been arranged. Thanks.--Mike

-----Original Message-----

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Wednesday, October 19, 2011 11:20 AM  
To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD) Lorenzen  
Subject: RE: Boiler NSPS settlement

Thanks, Mike -- This looks good to me, and we'll also use this for our internal approval processes.

Dave

-----Original Message-----

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Tuesday, October 18, 2011 12:31 PM  
To: Gunter, David (ENRD); Embrey.Patricia@epamail.epa.gov; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Lorenzen, Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Dave and co.--I've removed the bolded/bracketed language from the draft version we approved last Thursday and have made some minor signature block revisions. Unless I hear otherwise from you or the agency, we will plan to use this as the final document for purposes of obtaining signatures by next Friday the 28th. Thanks.--Mike

-----Original Message-----

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Thursday, October 13, 2011 2:02 PM  
To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD) Lorenzen  
Subject: RE: Boiler NSPS settlement

Counsel: Attached please find a draft of our proposed agreement modification, with the term that we discussed today in bold.

Thanks,  
Dave Gunter

This e-mail and any attachments may contain confidential and privileged information. If you are not the intended recipient, please notify the sender immediately by return e-mail, delete this e-mail and destroy any copies. Any dissemination or use of this information by a person other than the intended recipient is unauthorized and may be

illegal. (See attached file: MM Oct 28 Extension Letter 2.doc)

**To:** Avi Garbow/DC/USEPA/US@EPA;"Michael J. Myers" [Michael.Myers@ag.ny.gov]; Michael J. Myers" [Michael.Myers@ag.ny.gov]  
**Cc:** "David (ENRD) Gunter" [David.Gunter2@usdoj.gov]; Iliott Zenick/DC/USEPA/US@EPA;"Joanne Spalding" [Joanne.Spalding@sierraclub.org]; Joanne Spalding" [Joanne.Spalding@sierraclub.org]; oseph Goffman/DC/USEPA/US@EPA;[mceronsky@edf.org]; mceronsky@edf.org>; Patricia Embrey/DC/USEPA/US@EPA;Scott Jordan/DC/USEPA/US@EPA;"Thomas (ENRD) Lorenzen" [Thomas.Lorenzen@usdoj.gov]; atricia Embrey/DC/USEPA/US@EPA;Scott Jordan/DC/USEPA/US@EPA;"Thomas (ENRD) Lorenzen" [Thomas.Lorenzen@usdoj.gov]; cott Jordan/DC/USEPA/US@EPA;"Thomas (ENRD) Lorenzen" [Thomas.Lorenzen@usdoj.gov]; Thomas (ENRD) Lorenzen" [Thomas.Lorenzen@usdoj.gov]; vpatton@edf.org>[]  
**From:** "Doniger, David"  
**Sent:** Fri 10/28/2011 10:18:25 PM  
**Subject:** RE: Boiler NSPS settlement (CONFIDENTIAL/DRAFT)  
[mime.htm](#)  
[settlement letter draft.docx](#)  
<http://switchboard.nrdc.org/blogs/ddoniger/>  
<http://switchboard.nrdc.org/blogs/ddoniger/>  
<mailto:Garbow.Avi@epamail.epa.gov>  
<mailto:David.Gunter2@usdoj.gov>  
<mailto:Michael.Myers@ag.ny.gov>  
<mailto:Joanne.Spalding@sierraclub.org>  
<mailto:ddoniger@nrdc.org>  
<mailto:David.Gunter2@usdoj.gov>  
<mailto:Michael.Myers@ag.ny.gov>  
<mailto:David.Gunter2@usdoj.gov>  
<mailto:Michael.Myers@ag.ny.gov>  
<mailto:David.Gunter2@usdoj.gov>  
<mailto:ddoniger@nrdc.org>  
<http://switchboard.nrdc.org/blogs/ddoniger/>  
<mailto:Michael.Myers@ag.ny.gov>  
<mailto:David.Gunter2@usdoj.gov>  
<mailto:Michael.Myers@ag.ny.gov>  
<mailto:David.Gunter2@usdoj.gov>

Avi,

This looks generally fine. We have the following edits to suggest (attached also in Word in case the formatting is lost in email):

\*\*\*

I write concerning our recent discussions regarding the schedule for rulemaking activity under section 111 of the Clean Air Act pertaining to the electric generating unit source category. As you know, the parties had entered into a settlement agreement contemplating that the Agency would propose new source performance standards under sections 111(b) and (d) addressing greenhouse gas emissions from this sector by September 30, 2011— a schedule that proved unrealistic for the Agency. Since that time, the parties have been engaged in settlement discussions regarding a new schedule, with the petitioners agreeing not to invoke their remedies under paragraph 7 of the settlement agreement pending further productive settlement discussions. This forbearance period was to extend to today's date; my understanding is that petitioners are willing to extend this period further to November 30, 2011.

As we have indicated, notwithstanding our continued as we continue negotiations, the Agency intends to

move forward on the section 111(b) aspect of the rulemaking by proposing a section 111(b) standard by the end of January 2012 and promulgating a final section 111(b) standard by mid-November 2012. To this end, and to accommodate this schedule, we expect to transmit to the Office of Management and Budget for interagency review a proposed rulemaking package in the very near term within 10 days.

We look forward to continued dialogue negotiations to resolve the Section 111(d) schedule and any other remaining issues of matters yet to be resolved.

\*\*\*

Query whether the "draft/for settlement purposes" is intended to be on the final letter.

<<settlement letter draft.docx>>

David

David D. Doniger

Policy Director, Climate and Clean Air Program

Natural Resources Defense Council

Please note our new address:

1152 15th Street, NW, Suite 300

Washington, DC 20005

Phone: (202) 289-2403

Cell: (202) 321-3435

Fax: (202) 289-1060

ddoniger@nrdc.org

on the web at [www.nrdc.org](http://www.nrdc.org)

read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

-----Original Message-----

From: Doniger, David

Sent: Friday, October 28, 2011 5:57 PM

To: Garbow.Avi@epamail.epa.gov; Michael J. Myers

Cc: 'David (ENRD) Gunter'; Zenick.Elliott@epamail.epa.gov; 'Joanne Spalding'; Goffman.Joseph@epamail.epa.gov;

'mceronsky@edf.org'; Embrey.Patricia@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; 'Thomas (ENRD)

Lorenzen'; 'vpatton@edf.org'

Subject: RE: Boiler NSPS settlement (CONFIDENTIAL/DRAFT)

Avi,

Thanks for the draft. Give us a little while to confer among ourselves.

David

David D. Doniger

Policy Director, Climate and Clean Air Program

Natural Resources Defense Council

Please note our new address:

1152 15th Street, NW, Suite 300

Washington, DC 20005

Phone: (202) 289-2403

Cell: (202) 321-3435

Fax: (202) 289-1060

ddoniger@nrdc.org

on the web at [www.nrdc.org](http://www.nrdc.org)

read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

-----Original Message-----

From: Garbow.Avi@epamail.epa.gov [mailto:Garbow.Avi@epamail.epa.gov]

Sent: Friday, October 28, 2011 5:51 PM

To: Michael J. Myers

Cc: 'David (ENRD) Gunter'; Doniger, David; Zenick.Elliott@epamail.epa.gov; 'Joanne Spalding'; Goffman.Joseph@epamail.epa.gov; 'mceronsky@edf.org'; Embrey.Patricia@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; 'Thomas (ENRD) Lorenzen'; 'vpatton@edf.org'

Subject: RE: Boiler NSPS settlement (CONFIDENTIAL/DRAFT)

Folks,

As discussed, below is the text of a letter we propose to send to Mike Myers and David Doniger, as representatives of petitioners, in exchange for the agreed upon extension of the forbearance until November 30, 2011. As written, I have received the requisite approvals to proceed.

Thanks for your work on this matter today.

Regards,

Avi

\*\*\*\*\*

DRAFT/FOR SETTLEMENT DISCUSSION ONLY

I write concerning our recent discussions regarding the schedule for rulemaking activity under section 111 of the Clean Air Act pertaining to electric generating unit source category. As you know, the parties had entered into a settlement agreement contemplating that the Agency would propose new source performance standards addressing greenhouse gas emissions from this sector by September 30, 2011— a schedule that proved unrealistic for the Agency. Since that time, the parties have been engaged in settlement discussions regarding a new schedule, with the petitioners agreeing not to invoke their remedies under paragraph 7 of the settlement agreement pending further productive settlement discussions. This forbearance period was to extend to today's date; my understanding is that petitioners are willing to extend this period further to November 30, 2011.

As we have indicated, notwithstanding our continued negotiations, the Agency intends to move forward on the section 111(b) aspect of the rulemaking by proposing a section 111(b) standard by the end of January

2012 and promulgating a final section 111(b) standard by mid-November 2012. To this end, and to accommodate this schedule, we expect to transmit to the Office of Management and Budget for interagency review a proposed rulemaking package in the very near term.

We look forward to continued dialogue of matters yet to be resolved.

\*\*\*\*\*

Avi Garbow

Deputy General Counsel

U.S. Environmental Protection Agency

(202) 564-1917

From: "Michael J. Myers" <Michael.Myers@ag.ny.gov>

To: "'David (ENRD) Gunter'" <David.Gunter2@usdoj.gov>,

"mceronsky@edf.org" <mceronsky@edf.org>, 'Joanne Spalding'  
<Joanne.Spalding@sierraclub.org>

Cc: "'vpatton@edf.org'" <vpatton@edf.org>, Patricia

Embrey/DC/USEPA/US@EPA, Joseph Goffman/DC/USEPA/US@EPA,

Scott Jordan/DC/USEPA/US@EPA, Elliott

Zenick/DC/USEPA/US@EPA, "'ddoniger@nrdc.org'"

<ddoniger@nrdc.org>, "'Thomas (ENRD) Lorenzen'"

<Thomas.Lorenzen@usdoj.gov>, Avi Garbow/DC/USEPA/US@EPA

Date: 10/28/2011 05:01 PM

Subject: RE: Boiler NSPS settlement

Re-sending the letter so that Avi's correct address is included in this list (thanks Patricia)

From: Michael J. Myers

Sent: Friday, October 28, 2011 4:53 PM

To: 'David (ENRD) Gunter'; mceronsky@edf.org; Joanne Spalding

Cc: vpatton@edf.org; Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; ddoniger@nrdc.org; Thomas (ENRD) Lorenzen; 'garbo.avi@epamail.epa.gov'

Subject: RE: Boiler NSPS settlement

Here's a draft letter. If the above doesn't reflect Avi's correct address, can someone please send to him? thanks.

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]

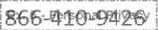
Sent: Thursday, October 27, 2011 11:45 AM

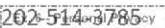
To: mceronsky@edf.org; Michael J. Myers; Joanne Spalding

Cc: Morgan Costello; vpatton@edf.org; Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; ddoniger@nrdc.org; Thomas (ENRD) Lorenzen

Subject: RE: Boiler NSPS settlement

Mike: Thanks for your forbearance. Everyone, we would like to set the call for 10:15 ET, using the following call-in information:

Dial  866-410-9126

Code  202-514-3785

Thank you all,

Dave

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]

Sent: Thursday, October 27, 2011 10:02 AM

To: 'Joanne Spalding'; mceronsky@edf.org

Cc: Morgan Costello; vpatton@edf.org; Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; ddoniger@nrdc.org; Gunter, David (ENRD); Lorenzen, Thomas (ENRD)



Subject: RE: Boiler NSPS settlement

Given the status (at least as I understand it) and tomorrow's deadline, you should proceed with a call as early as possible tomorrow, which would appear from these e-mails to be 10 a.m. eastern. I'm not sure when I will be back from court, but my environmental colleagues can share my thoughts with you in the meantime.

From: Joanne Spalding [mailto:Joanne.Spalding@sierraclub.org]

Sent: Thursday, October 27, 2011 1:20 AM

To: mceronsky@edf.org

Cc: Morgan Costello; vpatton@edf.org; Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Michael J. Myers; ddoniger@nrdc.org; David.Gunter2@usdoj.gov; thomas.lorenzen@usdoj.gov

Subject: Re: Boiler NSPS settlement

I'm booked 12-12:30 and 1:30-2 ET, but otherwise available, possibly while driving, any time after 9:30 ET.

-----Megan Ceronsky <mceronsky@edf.org> wrote: -----

To: "ddoniger@nrdc.org" <ddoniger@nrdc.org>, "David.Gunter2@usdoj.gov" <David.Gunter2@usdoj.gov>, "michael.myers@ag.ny.gov" <michael.myers@ag.ny.gov>, "Embrey.Patricia@epamail.epa.gov" <Embrey.Patricia@epamail.epa.gov>

From: Megan Ceronsky <mceronsky@edf.org>

Date: 10/26/2011 09:57PM

Cc: "Morgan.Costello@ag.ny.gov" <Morgan.Costello@ag.ny.gov>, Vickie Patton <vpatton@edf.org>, "Goffman.Joseph@epamail.epa.gov"

<Goffman.Joseph@epamail.epa.gov>, "Jordan.Scott@epamail.epa.gov"

<Jordan.Scott@epamail.epa.gov>, "Zenick.Elliott@epamail.epa.gov"

<Zenick.Elliott@epamail.epa.gov>, "Joanne.Spalding@sierraclub.org"

<Joanne.Spalding@sierraclub.org>, "thomas.lorenzen@usdoj.gov"

<thomas.lorenzen@usdoj.gov>

Subject: Re: Boiler NSPS settlement

Vickie's schedule Friday is too uncertain to plan around, but I can be available anytime.

Best,

Megan

----- Original Message -----

From: Doniger, David [mailto:ddoniger@nrdc.org]

Sent: Wednesday, October 26, 2011 04:10 PM

To: David.Gunter2@usdoj.gov <David.Gunter2@usdoj.gov>; michael.myers@ag.ny.gov  
<michael.myers@ag.ny.gov>; Embrey.Patricia@epamail.epagov <Embrey.Patricia@epamail.epa.gov>

Cc: Morgan.Costello@ag.ny.gov <Morgan.Costello@ag.ny.gov>; Megan Ceronsky; Vickie Patton;  
Goffman.Joseph@epamail.epa.gov <Goffman.Joseph@epamail.epa.gov>; Jordan.Scott@epamail.epa.gov  
<Jordan.Scott@epamail.epa.gov>; Zenick.Elliott@epamail.epa.gov <Zenick.Elliott@epamail.epa.gov>;  
Joanne.Spalding@sierraclub.org <Joanne.Spalding@sierraclub.org>; thomas.lorenzen@usdoj.gov <  
thomas.lorenzen@usdoj.gov>

Subject: Re: Boiler NSPS settlement

I'll make myself available anytime Friday, though I may be on a train.

David Doniger

NRDC

202 321-3435

----- Original Message -----

From: Gunter, David (ENRD) [mailto:David.Gunter2@usdoj.gov]

Sent: Wednesday, October 26, 2011 04:05 PM

To: Michael J. Myers <Michael.Myers@ag.ny.gov>; Embrey.Patricia@epamail.epagov  
<Embrey.Patricia@epamail.epa.gov>;

Doniger, David

Cc: Morgan Costello <Morgan.Costello@ag.ny.gov>; mceronsky@edf.org <mceronsky@edf.org>;  
vpatton@edf.org <vpatton@edf.org>; Goffman.Joseph@epamail.epa.gov <Goffman.Joseph@epamail.epa.gov>;  
Jordan.Scott@epamail.epa.gov <Jordan.Scott@epamail.epa.gov>; Zenick.Elliott@epamail.epa.gov  
<Zenick.Elliott@epamail.epa.gov>; Joanne.Spalding@sierraclub.org <Joanne.Spalding@sierraclub.org>; Lorenzen,  
Thomas (ENRD) <Thomas.Lorenzen@usdoj.gov>

Subject: RE: Boiler NSPS settlement

Mike, I'm sorry, but EPA is still fully engaged in the review and approval process and will not have meaningful information to share until Friday morning. If there are times on Friday afternoon when everyone is available, please let me know and I'll do the best I can to get everyone on the phone at the same time.

Thanks,

Dave

-----Original Message-----

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]

Sent: Wednesday, October 26, 2011 12:36 PM

To: Gunter, David (ENRD); Embrey.Patricia@epamail.epa.gov; David Doniger

Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Lorenzen, Thomas (ENRD)

Subject: RE: Boiler NSPS settlement

Dave, unfortunately Morgan is out Friday so can't cover a call in the morning. Given Friday's deadline, I may be willing to have you go ahead with a call Fri. a.m. without NY based on the assumptions that (1) that's the earliest EPA/DOJ can inform us of whether you have received final approval on the revised settlement agreement, and (2) you anticipate receiving such approval. However, if either of my assumptions are incorrect, then we should convene a call today with whomever is available to discuss.

-----Original Message-----

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]

Sent: Wednesday, October 26, 2011 11:55 AM

To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger

Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas

(ENRD) Lorenzen

Subject: RE: Boiler NSPS settlement

Mike,

I was just preparing to ask for a call on Friday morning. Can you please let me know when on Friday you think you would be available, and whether Morgan could cover a call for you if we held it between 10 and

12 ET on Friday? Everyone else, please let me know available times on Friday also.

Thanks,

Dave

-----Original Message-----

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]

Sent: Wednesday, October 26, 2011 11:53 AM

To: Gunter, David (ENRD); Embrey.Patricia@epamail.epa.gov; David Doniger

Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;

Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Lorenzen, Thomas (ENRD)

Subject: RE: Boiler NSPS settlement

Don't mean to nag on this, but I'm going to be in court on Friday morning, likely not back until early afternoon and would like to have a better sense of where we are and when we're going to talk this week.

Thanks.

-----Original Message-----

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]

Sent: Monday, October 24, 2011 10:12 AM

To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger

Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas

(ENRD) Lorenzen

Subject: RE: Boiler NSPS settlement

Mike and David,

Thanks for clarifying that all the petitioners are on board. I understand that meetings are still taking place to secure the necessary federal approvals. We're certainly aware of the deadline and the need to coordinate, so I will be in touch as soon as I can tell you more.

Thanks,

Dave Gunter

-----Original Message-----

From: Doniger, David [mailto:ddoniger@nrdc.org]

Sent: Friday, October 21, 2011 2:30 PM

To: Michael J. Myers; Gunter, David (ENRD); Embrey.Patricia@epamail.epagov

Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Lorenzen, Thomas (ENRD)

Subject: RE: Boiler NSPS settlement

Also to clarify that the three environmental petitioners are onboard.

So we are eager for news on the federal side.

David D. Doniger

Policy Director, Climate Center

Natural Resources Defense Council

Please note our new address:

1152 15th Street, NW, Suite 300

Washington, DC 20005

Phone: (202) 289-2403

Cell: (202) 321-3435

Fax: (202) 789-0859

ddoniger@nrdc.org

on the web at [www.nrdc.org](http://www.nrdc.org)

read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

-----Original Message-----

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]

Sent: Friday, October 21, 2011 2:02 PM

To: 'David (ENRD) Gunter'; Embrey.Patricia@epamail.epa.gov; Doniger, David

Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas

(ENRD) Lorenzen

Subject: RE: Boiler NSPS settlement

All--Just wanted to communicate that I have now received approvals from all of the state petitioners. What's the status of the federal approvals? I've been getting questions re. a communications call to discuss a potential announcement, press, etc. for next week so please let us know when something's been arranged. Thanks.--Mike

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To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger

Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas

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Subject: RE: Boiler NSPS settlement

Thanks, Mike -- This looks good to me, and we'll also use this for our internal approval processes.

Dave

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From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]

Sent: Tuesday, October 18, 2011 12:31 PM

To: Gunter, David (ENRD); Embrey.Patricia@epamail.epa.gov; David Doniger

Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Lorenzen, Thomas (ENRD)

Subject: RE: Boiler NSPS settlement

Dave and co.--I've removed the bolded/bracketed language from the draft version we approved last Thursday and have made some minor signature block revisions. Unless I hear otherwise from you or the agency, we will plan to use this as the final document for purposes of obtaining signatures by next Friday the 28th. Thanks.--Mike

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(ENRD) Lorenzen

Subject: RE: Boiler NSPS settlement

Counsel: Attached please find a draft of our proposed agreement modification, with the term that we discussed today in bold.

Thanks,

Dave Gunter

This e-mail and any attachments may contain confidential and privileged information. If you are not the intended recipient, please notify the sender immediately by return e-mail, delete this e-mail and destroy any copies. Any dissemination or use of this information by a person other than the intended recipient is unauthorized and may be illegal. (See attached file: MM Oct 28 Extension Letter 2.doc)



Avi,

This looks generally fine. We have the following edits to suggest (attached also in Word in case the formatting is lost in email):

\*\*\*

I write concerning our recent discussions regarding the schedule for rulemaking activity under section 111 of the Clean Air Act pertaining to the electric generating unit source category. As you know, the parties had entered into a settlement agreement contemplating that the Agency would propose new source performance standards under sections 111(b) and (d) addressing greenhouse gas emissions from this sector by September 30, 2011— a schedule that proved unrealistic for the Agency. Since that time, the parties have been engaged in settlement discussions regarding a new schedule, with the petitioners agreeing not to invoke their remedies under paragraph 7 of the settlement agreement pending further productive settlement discussions. This forbearance period was to extend to today's date; my understanding is that petitioners are willing to extend this period further to November 30, 2011.

As we have indicated, ~~notwithstanding our continued~~ as we continue negotiations, the Agency intends to move forward on the section 111(b) aspect of the rulemaking by proposing a section 111(b) standard by the end of January 2012 and promulgating a final section 111(b) standard by mid-November 2012. To this end, and to accommodate this schedule, we expect to transmit to the Office of Management and Budget for interagency review a proposed rulemaking package— ~~in the very near term~~ within 10 days.

We look forward to continued ~~dialogue~~ negotiations to resolve the Section 111(d) schedule and any other remaining issues ~~of matters yet to be resolved~~.

\*\*\*

Query whether the “draft/for settlement purposes” is intended to be on the final letter.

<<settlement letter draft.docx>>

David

David D. Doniger

Policy Director, Climate and Clean Air Program

Natural Resources Defense Council



Please note our new address:

1152 15th Street, NW, Suite 300

Washington, DC 20005

Phone: (202) 289-2403

Cell: (202) 321-3435

Fax: (202) 289-1060

ddoniger@nrdc.org

on the web at [www.nrdc.org](http://www.nrdc.org)

read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

-----Original Message-----

From: Doniger, David

Sent: Friday, October 28, 2011 5:57 PM

To: Garbow.Avi@epamail.epa.gov; Michael J. Myers

Cc: 'David (ENRD) Gunter'; Zenick.Elliott@epamail.epa.gov; 'Joanne

Spalding'; Goffman.Joseph@epamail.epa.gov; 'mceronsky@edf.org';

Embrey.Patricia@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; 'Thomas

(ENRD) Lorenzen'; 'vpatton@edf.org'

Subject: RE: Boiler NSPS settlement (CONFIDENTIAL/DRAFT)

Avi,

Thanks for the draft. Give us a little while to confer among ourselves.

David

David D. Doniger

Policy Director, Climate and Clean Air Program

Natural Resources Defense Council

Please note our new address:

1152 15th Street, NW, Suite 300

Washington, DC 20005

Phone: (202) 289-2403

Cell: (202) 321-3435

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ddoniger@nrdc.org

on the web at [www.nrdc.org](http://www.nrdc.org)

read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

-----Original Message-----

From: Garbow.Avi@epamail.epa.gov [<mailto:Garbow.Avi@epamail.epa.gov>]

Sent: Friday, October 28, 2011 5:51 PM

To: Michael J. Myers

Cc: 'David (ENRD) Gunter'; Doniger, David;  
Zenick.Elliott@epamail.epa.gov; 'Joanne Spalding';  
Goffman.Joseph@epamail.epa.gov; 'mceronsky@edf.org';  
Embrey.Patricia@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; 'Thomas  
(ENRD) Lorenzen'; 'vpatton@edf.org'

Subject: RE: Boiler NSPS settlement (CONFIDENTIAL/DRAFT)

Folks,

As discussed, below is the text of a letter we propose to send to Mike Myers and David Doniger, as representatives of petitioners, in exchange for the agreed upon extension of the forbearance until November 30, 2011. As written, I have received the requisite approvals to proceed.

Thanks for your work on this matter today.

Regards,

Avi

\*\*\*\*\*

DRAFT/FOR SETTLEMENT DISCUSSION ONLY

I write concerning our recent discussions regarding the schedule for rulemaking activity under section 111 of the Clean Air Act pertaining to electric generating unit source category. As you know, the parties had entered into a settlement agreement contemplating that the Agency would propose new source performance standards addressing greenhouse gas emissions from this sector by September 30, 2011- a schedule that proved unrealistic for the Agency. Since that time, the parties have been engaged in settlement discussions regarding a new schedule, with the petitioners agreeing not to invoke their remedies under paragraph 7 of the settlement agreement pending further productive settlement discussions. This forbearance period was to extend to today's date; my understanding is that petitioners are willing to extend this period further to November 30, 2011.

As we have indicated, notwithstanding our continued negotiations, the Agency intends to move forward on the section 111(b) aspect of the rulemaking by proposing a section 111(b) standard by the end of January

2012 and promulgating a final section 111(b) standard by mid-November 2012. To this end, and to accommodate this schedule, we expect to transmit to the Office of Management and Budget for interagency review a proposed rulemaking package in the very near term.

We look forward to continued dialogue of matters yet to be resolved.

\*\*\*\*\*

Avi Garbow

Deputy General Counsel

U.S. Environmental Protection Agency

(202) 564-1917

From: "Michael J. Myers" <Michael.Myers@ag.ny.gov>  
To: "'David (ENRD) Gunter'" <David.Gunter2@usdoj.gov>,  
"'mceronsky@edf.org'" <mceronsky@edf.org>, 'Joanne  
Spalding'  
<Joanne.Spalding@sierraclub.org>  
Cc: "'vpatton@edf.org'" <vpatton@edf.org>, Patricia  
Embrey/DC/USEPA/US@EPA, Joseph Goffman/DC/USEPA/US@EPA,  
Scott Jordan/DC/USEPA/US@EPA, Elliott  
Zenick/DC/USEPA/US@EPA, "'ddoniger@nrdc.org'"  
<ddoniger@nrdc.org>, "'Thomas (ENRD) Lorenzen'"  
<Thomas.Lorenzen@usdoj.gov>, Avi Garbow/DC/USEPA/US@EPA  
Date: 10/28/2011 05:01 PM  
Subject: RE: Boiler NSPS settlement

Re-sending the letter so that Avi's correct address is included in  
this list (thanks Patricia)

From: Michael J. Myers  
Sent: Friday, October 28, 2011 4:53 PM  
To: 'David (ENRD) Gunter'; mceronsky@edf.org; Joanne Spalding  
Cc: vpatton@edf.org; Embrey.Patricia@epamail.epa.gov;  
Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov;  
Zenick.Elliott@epamail.epa.gov; ddoniger@nrdc.org; Thomas (ENRD)  
Lorenzen; 'garbo.avi@epamail.epa.gov'  
Subject: RE: Boiler NSPS settlement

Here's a draft letter. If the above doesn't reflect Avi's correct address, can someone please send to him? thanks.

From: David (ENRD) Gunter [<mailto:David.Gunter2@usdoj.gov>]

Sent: Thursday, October 27, 2011 11:45 AM

To: mceronsky@edf.org; Michael J. Myers; Joanne Spalding

Cc: Morgan Costello; vpatton@edf.org; Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; ddoniger@nrdc.org; Thomas (ENRD) Lorenzen

Subject: RE: Boiler NSPS settlement

Mike: Thanks for your forbearance. Everyone, we would like to set the call for 10:15 ET, using the following call-in information:

Dial [866-410-9426](tel:866-410-9426)

Code [202-514-3785](tel:202-514-3785)

Thank you all,

Dave

From: Michael J. Myers [<mailto:Michael.Myers@ag.ny.gov>]

Sent: Thursday, October 27, 2011 10:02 AM

To: 'Joanne Spalding'; mceronsky@edf.org

Cc: Morgan Costello; vpatton@edf.org; Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; ddoniger@nrdc.org; Gunter, David (ENRD); Lorenzen, Thomas (ENRD)

Subject: RE: Boiler NSPS settlement

Given the status (at least as I understand it) and tomorrow's deadline, you should proceed with a call as early as possible tomorrow, which would appear from these e-mails to be 10 a.m.

eastern. I'm not sure when I will be back from court, but my environmental colleagues can share my thoughts with you in the meantime.

From: Joanne Spalding [<mailto:Joanne.Spalding@sierraclub.org>]

Sent: Thursday, October 27, 2011 1:20 AM

To: mceronsky@edf.org

Cc: Morgan Costello; vpatton@edf.org; Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Michael J. Myers; ddoniger@nrdc.org; David.Gunter2@usdoj.gov; thomas.lorenzen@usdoj.gov

Subject: Re: Boiler NSPS settlement

I'm booked 12-12:30 and 1:30-2 ET, but otherwise available, possibly while driving, any time after 9:30 ET.

-----Megan Ceronsky <mceronsky@edf.org> wrote: -----

To: "'ddoniger@nrdc.org'" <ddoniger@nrdc.org>,  
"'David.Gunter2@usdoj.gov'" <David.Gunter2@usdoj.gov>,  
"'michael.myers@ag.ny.gov'" <michael.myers@ag.ny.gov>,  
"'Embrey.Patricia@epamail.epa.gov'" <Embrey.Patricia@epamail.epa.gov>

From: Megan Ceronsky <mceronsky@edf.org>

Date: 10/26/2011 09:57PM

Cc: "'Morgan.Costello@ag.ny.gov'" <Morgan.Costello@ag.ny.gov>,  
Vickie Patton <vpatton@edf.org>, "'Goffman.Joseph@epamail.epa.gov'"

<Goffman.Joseph@epamail.epa.gov>, "'Jordan.Scott@epamail.epa.gov'"

<Jordan.Scott@epamail.epa.gov>, "'Zenick.Elliott@epamail.epa.gov'"

<Zenick.Elliott@epamail.epagov>, "'Joanne.Spalding@sierraclub.org'"

<Joanne.Spalding@sierraclub.org>, "'thomas.lorenzen@usdoj.gov'"

<thomas.lorenzen@usdoj.gov>

Subject: Re: Boiler NSPS settlement

Vickie's schedule Friday is too uncertain to plan around, but I can be available anytime.

Best,

Megan

----- Original Message -----

From: Doniger, David [<mailto:ddoniger@nrdc.org>]

Sent: Wednesday, October 26, 2011 04:10 PM

To: David.Gunter2@usdoj.gov <David.Gunter2@usdoj.gov>;  
michael.myers@ag.ny.gov <michael.myers@ag.ny.gov>;  
Embrey.Patricia@epamail.epa.gov <Embrey.Patricia@epamail.epa.gov>

Cc: Morgan.Costello@ag.ny.gov <Morgan.Costello@ag.ny.gov>; Megan  
Ceronisky; Vickie Patton; Goffman.Joseph@epamail.epa.gov  
<Goffman.Joseph@epamail.epa.gov>; Jordan.Scott@epamail.epa.gov  
<Jordan.Scott@epamail.epa.gov>; Zenick.Elliott@epamail.epa.gov  
<Zenick.Elliott@epamail.epa.gov>; Joanne.Spalding@sierraclub.org  
<Joanne.Spalding@sierraclub.org>; thomas.lorenzen@usdoj.gov <  
thomas.lorenzen@usdoj.gov>

Subject: Re: Boiler NSPS settlement

I'll make myself available anytime Friday, though I may be on a train.

David Doniger

NRDC

202-321-3435 Privacy

----- Original Message -----

From: Gunter, David (ENRD) [<mailto:David.Gunter2@usdoj.gov>]

Sent: Wednesday, October 26, 2011 04:05 PM

To: Michael J. Myers <Michael.Myers@ag.ny.gov>;

Embrey.Patricia@epamail.epa.gov <Embrey.Patricia@epamail.epa.gov>;

Doniger, David

Cc: Morgan Costello <Morgan.Costello@ag.ny.gov>; mceronsky@edf.org  
<mceronsky@edf.org>; vpatton@edf.org <vpatton@edf.org>;  
Goffman.Joseph@epamail.epa.gov <Goffman.Joseph@epamail.epa.gov>;  
Jordan.Scott@epamail.epa.gov <Jordan.Scott@epamail.epa.gov>;  
Zenick.Elliott@epamail.epa.gov <Zenick.Elliott@epamail.epa.gov>;  
Joanne.Spalding@sierraclub.org <Joanne.Spalding@sierraclub.org>;  
Lorenzen, Thomas (ENRD) <Thomas.Lorenzen@usdoj.gov>

Subject: RE: Boiler NSPS settlement

Mike, I'm sorry, but EPA is still fully engaged in the review and approval process and will not have meaningful information to share until Friday morning. If there are times on Friday afternoon when everyone is available, please let me know and I'll do the best I can to get everyone on the phone at the same time.

Thanks,

Dave

-----Original Message-----

From: Michael J. Myers [<mailto:Michael.Myers@ag.ny.gov>]

Sent: Wednesday, October 26, 2011 12:36 PM

To: Gunter, David (ENRD); Embrey.Patricia@epamail.epa.gov; David Doniger

Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org;  
Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov;  
Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org;  
Lorenzen, Thomas (ENRD)

Subject: RE: Boiler NSPS settlement

Dave, unfortunately Morgan is out Friday so can't cover a call in the morning. Given Friday's deadline, I may be willing to have you go ahead with a call Fri. a.m. without NY based on the assumptions that (1) that's the earliest EPA/DOJ can inform us of whether you have received final approval on the revised settlement agreement, and (2) you anticipate receiving such approval. However, if either of my



assumptions are incorrect, then we should convene a call today with whomever is available to discuss.

-----Original Message-----

From: David (ENRD) Gunter [<mailto:David.Gunter2@usdoj.gov>]

Sent: Wednesday, October 26, 2011 11:55 AM

To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger

Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org;  
Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov;  
Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas

(ENRD) Lorenzen

Subject: RE: Boiler NSPS settlement

Mike,

I was just preparing to ask for a call on Friday morning. Can you please let me know when on Friday you think you would be available, and whether Morgan could cover a call for you if we held it between 10 and

12 ET on Friday? Everyone else, please let me know available times on Friday also.

Thanks,

Dave

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Sent: Wednesday, October 26, 2011 11:53 AM

To: Gunter, David (ENRD); Embrey.Patricia@epamail.epa.gov; David Doniger

Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org;  
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Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org;  
Lorenzen, Thomas (ENRD)

Subject: RE: Boiler NSPS settlement

Don't mean to nag on this, but I'm going to be in court on Friday morning, likely not back until early afternoon and would like to have a better sense of where we are and when we're going to talk this week.

Thanks.

-----Original Message-----

From: David (ENRD) Gunter [<mailto:David.Gunter2@usdoj.gov>]

Sent: Monday, October 24, 2011 10:12 AM

To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger

Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org;  
Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov;  
Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas

(ENRD) Lorenzen

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Embrey.Patricia@epamail.epagov

Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org;  
Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov;  
Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org;  
Lorenzen, Thomas (ENRD)

Subject: RE: Boiler NSPS settlement

Also to clarify that the three environmental petitioners are onboard.

So we are eager for news on the federal side.

David D. Doniger

Policy Director, Climate Center

Natural Resources Defense Council

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Washington, DC 20005

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Cell: (202) 321-3435

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David

Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org;  
Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov;  
Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas

(ENRD) Lorenzen

Subject: RE: Boiler NSPS settlement

All--Just wanted to communicate that I have now received approvals from all of the state petitioners. What's the status of the federal approvals? I've been getting questions re. a communications call to discuss a potential announcement, press, etc. for next week so please let us know when something's been arranged. Thanks.--Mike

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Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas

(ENRD) Lorenzen

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Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov;

Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org;  
Lorenzen, Thomas (ENRD)

Subject: RE: Boiler NSPS settlement

Dave and co.--I've removed the bolded/bracketed language from the draft version we approved last Thursday and have made some minor signature block revisions. Unless I hear otherwise from you or the agency, we will plan to use this as the final document for purposes of obtaining signatures by next Friday the 28th. Thanks.--Mike

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Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov;  
Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas

(ENRD) Lorenzen

Subject: RE: Boiler NSPS settlement

Counsel: Attached please find a draft of our proposed agreement modification, with the term that we discussed today in bold.

Thanks,

Dave Gunter

This e-mail and any attachments may contain confidential and privileged information. If you are not the intended recipient, please notify the sender immediately by return e-mail, delete this e-mail and destroy any copies. Any dissemination or use of this information by a person other than the intended recipient is unauthorized and may be illegal. (See attached file: MM Oct 28 Extension Letter 2.doc)

I write concerning our recent discussions regarding the schedule for rulemaking activity under section 111 of the Clean Air Act pertaining to the electric generating unit source category. As you know, the parties had entered into a settlement agreement contemplating that the Agency would propose new source performance standards under sections 111(b) and (d) addressing greenhouse gas emissions from this sector by September 30, 2011— a schedule that proved unrealistic for the Agency. Since that time, the parties have been engaged in settlement discussions regarding a new schedule, with the petitioners agreeing not to invoke their remedies under paragraph 7 of the settlement agreement pending further productive settlement discussions. This forbearance period was to extend to today's date; my understanding is that petitioners are willing to extend this period further to November 30, 2011.

As we have indicated, ~~notwithstanding our continued~~ as we continue negotiations, the Agency intends to move forward on the section 111(b) aspect of the rulemaking by proposing a section 111(b) standard by the end of January 2012 and promulgating a final section 111(b) standard by mid-November 2012. To this end, and to accommodate this schedule, we expect to transmit to the Office of Management and Budget for interagency review a proposed rulemaking package ~~in the very near term~~ within 10 days.

We look forward to continued ~~dialogue~~ negotiations to resolve the Section 111(d) schedule and any other remaining issues ~~of matters yet to be resolved~~.

**To:** Avi Garbow/DC/USEPA/US@EPA;"Michael J. Myers" [Michael.Myers@ag.ny.gov]; Michael J. Myers" [Michael.Myers@ag.ny.gov]  
**Cc:** "David (ENRD) Gunter" [David.Gunter2@usdoj.gov]; mceronsky@edf.org>; "Joanne Spalding" [Joanne.Spalding@sierraclub.org]; Joanne Spalding" [Joanne.Spalding@sierraclub.org]; vpatton@edf.org>; Patricia Embrey/DC/USEPA/US@EPA; Joseph Goffman/DC/USEPA/US@EPA; Scott Jordan/DC/USEPA/US@EPA; Elliott Zenick/DC/USEPA/US@EPA;"Thomas (ENRD) Lorenzen" [Thomas.Lorenzen@usdoj.gov]; atricia Embrey/DC/USEPA/US@EPA; Joseph Goffman/DC/USEPA/US@EPA; Scott Jordan/DC/USEPA/US@EPA; Elliott Zenick/DC/USEPA/US@EPA;"Thomas (ENRD) Lorenzen" [Thomas.Lorenzen@usdoj.gov]; osepoh Goffman/DC/USEPA/US@EPA; Scott Jordan/DC/USEPA/US@EPA; Elliott Zenick/DC/USEPA/US@EPA;"Thomas (ENRD) Lorenzen" [Thomas.Lorenzen@usdoj.gov]; cott Jordan/DC/USEPA/US@EPA; Elliott Zenick/DC/USEPA/US@EPA;"Thomas (ENRD) Lorenzen" [Thomas.Lorenzen@usdoj.gov]; Elliott Zenick/DC/USEPA/US@EPA;"Thomas (ENRD) Lorenzen" [Thomas.Lorenzen@usdoj.gov]; Thomas (ENRD) Lorenzen" [Thomas.Lorenzen@usdoj.gov]; Thomas (ENRD) Lorenzen" [Thomas.Lorenzen@usdoj.gov]  
**From:** "Doniger, David"  
**Sent:** Sat 10/29/2011 2:15:13 AM  
**Subject:** RE: Boiler NSPS settlement  
MM Oct 28 Extension Letter 2.pdf

Avi,

Thank you for your email.

Attached is a letter from Mike Myers on behalf of the petitioners agreeing to extend the forbearance period to November 30th.

David

David D. Doniger  
Policy Director, Climate and Clean Air Program  
Natural Resources Defense Council

Please note our new address:  
1152 15th Street, NW, Suite 300  
Washington, DC 20005

Phone: (202) 289-2403  
Cell: (202) 321-3435  
Fax: (202) 289-1060  
ddoniger@nrdc.org  
on the web at [www.nrdc.org](http://www.nrdc.org)  
read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

-----Original Message-----

From: Garbow.Avi@epamail.epa.gov [mailto:Garbow.Avi@epamail.epa.gov]  
Sent: Friday, October 28, 2011 10:03 PM  
To: Michael J. Myers  
Cc: 'David (ENRD) Gunter'; 'mceronsky@edf.org'; 'Joanne Spalding'; 'vpattton@edf.org'; Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Doniger, David; 'Thomas (ENRD) Lorenzen'  
Subject: RE: Boiler NSPS settlement

As we discussed today, in exchange for your agreement not to invoke the remedies set forth in Paragraph 7 of the Settlement Agreement concerning the proposal and promulgation of NSPS for GHG emissions from EGU's, through November 30, 2011, EPA, under signature of the General Counsel, will provide on Monday a letter to contain the following text:

"I write concerning our recent discussions regarding the schedule for rule making activity under Section 111 of the Clean Air Act pertaining to the electric generating unit source category. As you know, the parties had entered into a settlement agreement contemplating that the Agency would propose new source performance standards under Sections 111(b) and (d) addressing greenhouse gas emissions from this sector by September 30, 2011 - a schedule that proved unrealistic for the Agency. Since that time, the parties have been engaged in settlement discussions regarding a new schedule, with the petitioners agreeing not to invoke their remedies under Paragraph 7 of the Settlement Agreement pending further productive settlement discussions. This forbearance period was to extend to October 28, 2011; my understanding is that petitioners are willing to extend this period further to November 30, 2011.

As we have indicated, and as we continue negotiations, the Agency intends to move forward on the Section 111(b) aspect of the rulemaking by proposing a Section 111(b) standard by the end of January 2012 and promulgating a final Section 111(b) standard by mid-November 2012. To this end, and to accommodate this schedule, we expect to transmit to the Office of Management and Budget for inter-agency review a proposed rule making package in November.

We look forward to continued negotiations to resolve the Section 111(d) schedule and any other remaining issues."

Thank you, once again, for your efforts in reaching this agreement. I look forward to receipt of the letter memorializing the continued forbearance through November 30, 2012, and will ensure that the letter containing the text above is sent on Monday.

Regards,

Avi

Avi Garbow  
Deputy General Counsel  
U.S. Environmental Protection Agency  
(202) 564-1917

-----"Michael J. Myers" <Michael.Myers@ag.ny.gov> wrote: -----

=====  
To: "'David (ENRD) Gunter'" <David.Gunter2@usdoj.gov>, "'mceronsky@edf.org'" <mceronsky@edf.org>, 'Joanne Spalding' <Joanne.Spalding@sierraclub.org>  
From: "Michael J. Myers" <Michael.Myers@ag.ny.gov>  
Date: 10/28/2011 05:01PM  
Cc: "'vpatton@edf.org'" <vpatton@edf.org>, Patricia Embrey/DC/USEPA/US@EPA, Joseph Goffman/DC/USEPA/US@EPA, Scott Jordan/DC/USEPA/US@EPA, Elliott Zenick/DC/USEPA/US@EPA, "'ddoniger@nrdc.org'" <ddoniger@nrdc.org>, "'Thomas (ENRD) Lorenzen'" <Thomas.Lorenzen@usdoj.gov>, Avi Garbow/DC/USEPA/US@EPA  
Subject: RE: Boiler NSPS settlement  
=====



Re-sending the letter so that Avi's correct address is included in this list (thanks Patricia)

---

From: Michael J. Myers  
Sent: Friday, October 28, 2011 4:53 PM  
To: 'David (ENRD) Gunter'; mceronsky@edf.org; Joanne Spalding  
Cc: vpatton@edf.org; Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; ddoniger@nrdc.org; Thomas (ENRD) Lorenzen;  
'garbo.avi@epamail.epa.gov'  
Subject: RE: Boiler NSPS settlement

Here's a draft letter. If the above doesn't reflect Avi's correct address, can someone please send to him? thanks.

---

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Thursday, October 27, 2011 11:45 AM  
To: mceronsky@edf.org; Michael J. Myers; Joanne Spalding  
Cc: Morgan Costello; vpatton@edf.org; Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; ddoniger@nrdc.org; Thomas (ENRD) Lorenzen  
Subject: RE: Boiler NSPS settlement

Mike: Thanks for your forbearance. Everyone, we would like to set the call for 10:15 ET, using the following call-in information:

Dial 866-410-9426  
Code 202-514-3785

Thank you all,

Dave

---

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Thursday, October 27, 2011 10:02 AM  
To: 'Joanne Spalding'; mceronsky@edf.org  
Cc: Morgan Costello; vpatton@edf.org; Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; ddoniger@nrdc.org; Gunter, David (ENRD);  
Lorenzen, Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Given the status (at least as I understand it) and tomorrow's deadline, you should proceed with a call as early as possible tomorrow, which would appear from these e-mails to be 10 a.m. eastern. I'm not sure when I will be back from court, but my environmental colleagues can share my thoughts with you in the meantime.

---

From: Joanne Spalding [mailto:Joanne.Spalding@sierraclub.org]  
Sent: Thursday, October 27, 2011 1:20 AM  
To: mceronsky@edf.org  
Cc: Morgan Costello; vpatton@edf.org; Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Michael J. Myers; ddoniger@nrdc.org;  
David.Gunter2@usdoj.gov; thomas.lorenzen@usdoj.gov  
Subject: Re: Boiler NSPS settlement

I'm booked 12-12:30 and 1:30-2 ET, but otherwise available, possibly while driving, any time after 9:30 ET.

-----Megan Ceronsky <mceronsky@edf.org> wrote: -----

To: "ddoniger@nrdc.org" <ddoniger@nrdc.org>, "David.Gunter2@usdoj.gov" <David.Gunter2@usdoj.gov>, "michael.myers@ag.ny.gov" <michael.myers@ag.ny.gov>, "Embrey.Patricia@epamail.epa.gov" <Embrey.Patricia@epamail.epa.gov>

From: Megan Ceronsky <mceronsky@edf.org>

Date: 10/26/2011 09:57PM

Cc: "Morgan.Costello@ag.ny.gov" <Morgan.Costello@ag.ny.gov>, Vickie Patton <vpatton@edf.org>, "Goffman.Joseph@epamail.epa.gov" <Goffman.Joseph@epamail.epa.gov>, "Jordan.Scott@epamail.epa.gov" <Jordan.Scott@epamail.epa.gov>, "Zenick.Elliott@epamail.epa.gov" <Zenick.Elliott@epamail.epa.gov>, "Joanne.Spalding@sierraclub.org" <Joanne.Spalding@sierraclub.org>, "thomaslorenzen@usdoj.gov" <thomas.lorenzen@usdoj.gov>

Subject: Re: Boiler NSPS settlement

Vickie's schedule Friday is too uncertain to plan around, but I can be available anytime.

Best,  
Megan

----- Original Message -----

From: Doniger, David [mailto:ddoniger@nrdc.org]

Sent: Wednesday, October 26, 2011 04:10 PM

To: David.Gunter2@usdoj.gov<mailto:David.Gunter2@usdoj.gov>; michael.myers@ag.ny.gov<mailto:michael.myers@ag.ny.gov>; Embrey.Patricia@epamail.epa.gov<mailto:Embrey.Patricia@epamail.epa.gov>>

Cc: Morgan.Costello@ag.ny.gov<mailto:Morgan.Costello@ag.ny.gov>; Megan Ceronsky; Vickie Patton; Goffman.Joseph@epamail.epa.gov<mailto:Goffman.Joseph@epamail.epa.gov>; Jordan.Scott@epamail.epa.gov<mailto:Jordan.Scott@epamail.epa.gov>; Zenick.Elliott@epamail.epa.gov<mailto:Zenick.Elliott@epamail.epa.gov>; Joanne.Spalding@sierraclub.org<mailto:Joanne.Spalding@sierraclub.org>; thomas.lorenzen@usdoj.gov<mailto:thomas.lorenzen@usdoj.gov>>

Subject: Re: Boiler NSPS settlement

I'll make myself available anytime Friday, though I may be on a train.

David Doniger  
NRDC  
202 321-3435

----- Original Message -----

From: Gunter, David (ENRD) [mailto:David.Gunter2@usdoj.gov]

Sent: Wednesday, October 26, 2011 04:05 PM

To: Michael J. Myers <Michael.Myers@ag.ny.gov>; Embrey.Patricia@epamail.epa.gov<mailto:Embrey.Patricia@epamail.epa.gov>>

Cc: Morgan Costello <Morgan.Costello@ag.ny.gov>; mceronsky@edf.org<mailto:mceronsky@edf.org>; vpatton@edf.org<mailto:vpatton@edf.org>; Goffman.Joseph@epamail.epa.gov<mailto:Goffman.Joseph@epamail.epa.gov>; Jordan.Scott@epamail.epa.gov<mailto:Jordan.Scott@epamail.epa.gov>; Zenick.Elliott@epamail.epa.gov<mailto:Zenick.Elliott@epamail.epa.gov>

<Zenick.Elliott@epamail.epa.gov>; Joanne.Spalding@sierraclub.org<mailto:Joanne.Spalding@sierraclub.org>  
<Joanne.Spalding@sierraclub.org>; Lorenzen, Thomas (ENRD)  
<Thomas.Lorenzen@usdoj.gov<mailto:Thomas.Lorenzen@usdoj.gov>>  
Subject: RE: Boiler NSPS settlement

Mike, I'm sorry, but EPA is still fully engaged in the review and approval process and will not have meaningful information to share until Friday morning. If there are times on Friday afternoon when everyone is available, please let me know and I'll do the best I can to get everyone on the phone at the same time.

Thanks,  
Dave

-----Original Message-----

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Wednesday, October 26, 2011 12:36 PM  
To: Gunter, David (ENRD); Embrey.Patricia@epamail.epa.gov; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Lorenzen,  
Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Dave, unfortunately Morgan is out Friday so can't cover a call in the morning. Given Friday's deadline, I may be willing to have you go ahead with a call Fri. a.m. without NY based on the assumptions that (1) that's the earliest EPA/DOJ can inform us of whether you have received final approval on the revised settlement agreement, and (2) you anticipate receiving such approval. However, if either of my assumptions are incorrect, then we should convene a call today with whomever is available to discuss.

-----Original Message-----

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Wednesday, October 26, 2011 11:55 AM  
To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD)  
Lorenzen  
Subject: RE: Boiler NSPS settlement

Mike,

I was just preparing to ask for a call on Friday morning. Can you please let me know when on Friday you think you would be available, and whether Morgan could cover a call for you if we held it between 10 and 12 ET on Friday? Everyone else, please let me know available times on Friday also.

Thanks,  
Dave

-----Original Message-----

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Wednesday, October 26, 2011 11:53 AM  
To: Gunter, David (ENRD); Embrey.Patricia@epamail.epa.gov; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Lorenzen,  
Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Don't mean to nag on this, but I'm going to be in court on Friday morning, likely not back until early afternoon and would like to have a better sense of where we are and when we're going to talk this week. Thanks.

-----Original Message-----

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Monday, October 24, 2011 10:12 AM  
To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD) Lorenzen  
Subject: RE: Boiler NSPS settlement

Mike and David,

Thanks for clarifying that all the petitioners are on board. I understand that meetings are still taking place to secure the necessary federal approvals. We're certainly aware of the deadline and the need to coordinate, so I will be in touch as soon as I can tell you more.

Thanks,  
Dave Gunter

-----Original Message-----

From: Doniger, David [mailto:ddoniger@nrdc.org]  
Sent: Friday, October 21, 2011 2:30 PM  
To: Michael J. Myers; Gunter, David (ENRD);  
Embrey.Patricia@epamail.epagov<mailto:Embrey.Patricia@epamail.epa.gov>  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Lorenzen, Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Also to clarify that the three environmental petitioners are onboard. So we are eager for news on the federal side.

David D. Doniger  
Policy Director, Climate Center  
Natural Resources Defense Council

Please note our new address:  
1152 15th Street, NW, Suite 300  
Washington, DC 20005

Phone: (202) 289-2403  
Cell: (202) 321-3435  
Fax: (202) 789-0859  
ddoniger@nrdc.org<mailto:ddoniger@nrdc.org>  
on the web at [www.nrdc.org](http://www.nrdc.org)<<http://www.nrdc.org/>>  
read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

-----Original Message-----

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Friday, October 21, 2011 2:02 PM

To: 'David (ENRD) Gunter'; Embrey.Patricia@epamail.epa.gov; Doniger, David  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD)  
Lorenzen  
Subject: RE: Boiler NSPS settlement

All--Just wanted to communicate that I have now received approvals from all of the state petitioners. What's the status of the federal approvals? I've been getting questions re. a communications call to discuss a potential announcement, press, etc. for next week so please let us know when something's been arranged. Thanks.--Mike

-----Original Message-----

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Wednesday, October 19, 2011 11:20 AM  
To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD)  
Lorenzen  
Subject: RE: Boiler NSPS settlement

Thanks, Mike -- This looks good to me, and we'll also use this for our internal approval processes.

Dave

-----Original Message-----

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Tuesday, October 18, 2011 12:31 PM  
To: Gunter, David (ENRD); Embrey.Patricia@epamail.epa.gov; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org;  
Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov;  
Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org;  
Lorenzen, Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Dave and co.--I've removed the bolded/bracketed language from the draft version we approved last Thursday and have made some minor signature block revisions. Unless I hear otherwise from you or the agency, we will plan to use this as the final document for purposes of obtaining signatures by next Friday the 28th. Thanks.--Mike

-----Original Message-----

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Thursday, October 13, 2011 2:02 PM  
To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org;  
Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov;  
Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD) Lorenzen  
Subject: RE: Boiler NSPS settlement

Counsel: Attached please find a draft of our proposed agreement modification, with the term that we discussed today in bold.

Thanks,  
Dave Gunter

This e-mail and any attachments may contain confidential and privileged information. If you are not the intended recipient, please notify the sender immediately by return e-mail, delete this e-mail and destroy any copies. Any dissemination or use of this information by a person other than the intended recipient is unauthorized and may be illegal.

[attachment(s) "MM Oct 28 Extension Letter 2.doc" removed by Avi Garbow/DC/USEPA/US]



STATE OF NEW YORK  
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN  
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE  
ENVIRONMENTAL PROTECTION BUREAU

October 28, 2011

BY ELECTRONIC MAIL

David Gunter  
U.S. Department of Justice  
Environment and Natural Resources Division  
Appellate Section  
P.O. Box 23795  
Washington, D.C. 20024

RE: *New York v. EPA* (D.C. Cir. 06-1322)/Negotiations to Revise Settlement  
Agreement

Dear Mr. Gunter:

On behalf of State Petitioners and Environmental Petitioners (collectively, "Petitioners") in the above-referenced case, this letter is to memorialize the parties' understanding of the terms allowing for additional time needed to negotiate a revised Settlement Agreement. This letter supplements my letter to you dated October 14, 2011.

In light of the progress made to date, Petitioners are amenable to extend the time for negotiations until November 30, 2011. Petitioners agree not to invoke their remedies under ¶ 7 of the Settlement Agreement through that date. Please let me know if anything in this letter does not accurately reflect our discussions.

Sincerely,

/s/ Michael J. Myers

---

Michael J. Myers  
Assistant Attorney General  
(518) 402-2594

**To:** "Doniger, David" [ddoniger@nrdc.org]; N=Avi Garbow/OU=DC/O=USEPA/C=US@EPA;"Michael J. Myers" [Michael.Myers@ag.ny.gov]; Michael J. Myers" [Michael.Myers@ag.ny.gov]  
**Cc:** "David (ENRD) Gunter" [David.Gunter2@usdoj.gov]; mceronsky" [mceronsky@edf.org]; Joanne Spalding" [Joanne.Spalding@sierraclub.org]; vpatton" [vpattton@edf.org]; N=Patricia Embrey/OU=DC/O=USEPA/C=US@EPA;CN=Scott Jordan/OU=DC/O=USEPA/C=US@EPA;CN=Elliott Zenick/OU=DC/O=USEPA/C=US@EPA;"Thomas (ENRD) Lorenzen" [Thomas.Lorenzen@usdoj.gov]; N=Scott Jordan/OU=DC/O=USEPA/C=US@EPA;CN=Elliott Zenick/OU=DC/O=USEPA/C=US@EPA;"Thomas (ENRD) Lorenzen" [Thomas.Lorenzen@usdoj.gov]; N=Elliott Zenick/OU=DC/O=USEPA/C=US@EPA;"Thomas (ENRD) Lorenzen" [Thomas.Lorenzen@usdoj.gov]; Thomas (ENRD) Lorenzen" [Thomas.Lorenzen@usdoj.gov]  
**From:** CN=Joseph Goffman/OU=DC/O=USEPA/C=US  
**Sent:** Sat 10/29/2011 2:22:58 AM  
**Subject:** Re: Boiler NSPS settlement

Thanks very much, everybody, for your perseverance and patience.

----- Original Message -----

From: "Doniger, David" [ddoniger@nrdc.org]  
Sent: 10/28/2011 10:15 PM AST  
To: Avi Garbow; "Michael J. Myers" <Michael.Myers@ag.ny.gov>  
Cc: "David (ENRD) Gunter" <David.Gunter2@usdoj.gov>; <mceronsky@edf.org>; "Joanne Spalding" <Joanne.Spalding@sierraclub.org>; <vpattton@edf.org>; Patricia Embrey; Joseph Goffman; Scott Jordan; Elliott Zenick; "Thomas (ENRD) Lorenzen" <Thomas.Lorenzen@usdoj.gov>  
Subject: RE: Boiler NSPS settlement

Avi,

Thank you for your email.

Attached is a letter from Mike Myers on behalf of the petitioners agreeing to extend the forbearance period to November 30th.

David

David D. Doniger  
Policy Director, Climate and Clean Air Program  
Natural Resources Defense Council

Please note our new address:  
1152 15th Street, NW, Suite 300  
Washington, DC 20005

Phone: (202) 289-2403  
Cell: (202) 321-3435  
Fax: (202) 289-1060  
ddoniger@nrdc.org  
on the web at [www.nrdc.org](http://www.nrdc.org)  
read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>



-----Original Message-----

From: Garbow.Avi@epamail.epa.gov [mailto:Garbow.Avi@epamail.epa.gov]

Sent: Friday, October 28, 2011 10:03 PM

To: Michael J. Myers

Cc: 'David (ENRD) Gunter'; 'mceronsky@edf.org'; 'Joanne Spalding'; 'vpatton@edf.org';

Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov;

Zenick.Elliott@epamail.epa.gov; Doniger, David; 'Thomas (ENRD) Lorenzen'

Subject: RE: Boiler NSPS settlement

As we discussed today, in exchange for your agreement not to invoke the remedies set forth in Paragraph 7 of the Settlement Agreement concerning the proposal and promulgation of NSPS for GHG emissions from EGU's, through November 30, 2011, EPA, under signature of the General Counsel, will provide on Monday a letter to contain the following text:

"I write concerning our recent discussions regarding the schedule for rule making activity under Section 111 of the Clean Air Act pertaining to the electric generating unit source category. As you know, the parties had entered into a settlement agreement contemplating that the Agency would propose new source performance standards under Sections 111(b) and (d) addressing greenhouse gas emissions from this sector by September 30, 2011 - a schedule that proved unrealistic for the Agency. Since that time, the parties have been engaged in settlement discussions regarding a new schedule, with the petitioners agreeing not to invoke their remedies under Paragraph 7 of the Settlement Agreement pending further productive settlement discussions. This forbearance period was to extend to October 28, 2011; my understanding is that petitioners are willing to extend this period further to November 30, 2011.

As we have indicated, and as we continue negotiations, the Agency intends to move forward on the Section 111(b) aspect of the rulemaking by proposing a Section 111(b) standard by the end of January 2012 and promulgating a final Section 111(b) standard by mid-November 2012. To this end, and to accommodate this schedule, we expect to transmit to the Office of Management and Budget for inter-agency review a proposed rule making package in November.

We look forward to continued negotiations to resolve the Section 111(d) schedule and any other remaining issues."

Thank you, once again, for your efforts in reaching this agreement. I look forward to receipt of the letter memorializing the continued forbearance through November 30, 2012, and will ensure that the letter containing the text above is sent on Monday.

Regards,

Avi

Avi Garbow  
Deputy General Counsel  
U.S. Environmental Protection Agency  
(202) 564-1917

-----"Michael J. Myers" <Michael.Myers@ag.ny.gov> wrote: -----

=====  
To: "'David (ENRD) Gunter'" <David.Gunter2@usdoj.gov>, "'mceronsky@edf.org'" <mceronsky@edf.org>, 'Joanne Spalding' <Joanne.Spalding@sierraclub.org>  
From: "Michael J. Myers" <Michael.Myers@ag.ny.gov>  
Date: 10/28/2011 05:01PM  
Cc: "'vpatton@edf.org'" <vpatton@edf.org>, Patricia Embrey/DC/USEPA/US@EPA, Joseph Goffman/DC/USEPA/US@EPA, Scott Jordan/DC/USEPA/US@EPA, Elliott Zenick/DC/USEPA/US@EPA, "'ddoniger@nrdc.org'" <ddoniger@nrdc.org>, "'Thomas (ENRD) Lorenzen'" <Thomas.Lorenzen@usdoj.gov>, Avi Garbow/DC/USEPA/US@EPA  
Subject: RE: Boiler NSPS settlement  
=====  
Re-sending the letter so that Avi's correct address is included in this list (thanks Patricia)

---

From: Michael J. Myers  
Sent: Friday, October 28, 2011 4:53 PM  
To: 'David (ENRD) Gunter'; mceronsky@edf.org; Joanne Spalding  
Cc: vpatton@edf.org; Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; ddoniger@nrdc.org; Thomas (ENRD) Lorenzen; 'garbo.avi@epamail.epa.gov'  
Subject: RE: Boiler NSPS settlement

Here's a draft letter. If the above doesn't reflect Avi's correct address, can someone please send to him? thanks.

---

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Thursday, October 27, 2011 11:45 AM  
To: mceronsky@edf.org; Michael J. Myers; Joanne Spalding  
Cc: Morgan Costello; vpatton@edf.org; Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; ddoniger@nrdc.org; Thomas (ENRD) Lorenzen  
Subject: RE: Boiler NSPS settlement

Mike: Thanks for your forbearance. Everyone, we would like to set the call for 10:15 ET, using the following call-in information:

Dial 866-410-9426  
Code 202-514-3785

Thank you all,

Dave

---

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Thursday, October 27, 2011 10:02 AM  
To: 'Joanne Spalding'; mceronsky@edf.org  
Cc: Morgan Costello; vpatton@edf.org; Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; ddoniger@nrdc.org; Gunter, David (ENRD); Lorenzen, Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Given the status (at least as I understand it) and tomorrow's deadline, you should proceed with a call as early as possible tomorrow, which would appear from these e-mails to be 10 a.m. eastern. I'm not sure when I will be back

from court, but my environmental colleagues can share my thoughts with you in the meantime.

---

From: Joanne Spalding [mailto:Joanne.Spalding@sierraclub.org]  
Sent: Thursday, October 27, 2011 1:20 AM  
To: mceronsky@edf.org  
Cc: Morgan Costello; vpatton@edf.org; Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Michael J. Myers; ddoniger@nrdc.org; David.Gunter2@usdoj.gov; thomas.lorenzen@usdoj.gov  
Subject: Re: Boiler NSPS settlement

I'm booked 12-12:30 and 1:30-2 ET, but otherwise available, possibly while driving, any time after 9:30 ET.

-----Megan Ceronsky <mceronsky@edf.org> wrote: -----

To: "'ddoniger@nrdc.org'" <ddoniger@nrdc.org>, "'David.Gunter2@usdoj.gov'" <David.Gunter2@usdoj.gov>, "'michael.myers@ag.ny.gov'" <michael.myers@ag.ny.gov>, "'Embrey.Patricia@epamail.epa.gov'" <Embrey.Patricia@epamail.epa.gov>

From: Megan Ceronsky <mceronsky@edf.org>

Date: 10/26/2011 09:57PM

Cc: "'Morgan.Costello@ag.ny.gov'" <Morgan.Costello@ag.ny.gov>, Vickie Patton <vpatton@edf.org>, "'Goffman.Joseph@epamail.epa.gov'" <Goffman.Joseph@epamail.epa.gov>, "'Jordan.Scott@epamail.epa.gov'" <Jordan.Scott@epamail.epa.gov>, "'Zenick.Elliott@epamail.epa.gov'" <Zenick.Elliott@epamail.epa.gov>, "'Joanne.Spalding@sierraclub.org'" <Joanne.Spalding@sierraclub.org>, "'thomaslorenzen@usdoj.gov'" <thomas.lorenzen@usdoj.gov>

Subject: Re: Boiler NSPS settlement

Vickie's schedule Friday is too uncertain to plan around, but I can be available anytime.

Best,  
Megan

----- Original Message -----

From: Doniger, David [mailto:ddoniger@nrdc.org]

Sent: Wednesday, October 26, 2011 04:10 PM

To: David.Gunter2@usdoj.gov<mailto:David.Gunter2@usdoj.gov> <David.Gunter2@usdoj.gov>; michael.myers@ag.ny.gov<mailto:michael.myers@ag.ny.gov> <michael.myers@ag.ny.gov>; Embrey.Patricia@epamail.epa.gov<mailto:Embrey.Patricia@epamail.epa.gov> <Embrey.Patricia@epamail.epa.gov><mailto:Embrey.Patricia@epamail.epa.gov>>

Cc: Morgan.Costello@ag.ny.gov<mailto:Morgan.Costello@ag.ny.gov> <Morgan.Costello@ag.ny.gov>; Megan Ceronsky; Vickie Patton; Goffman.Joseph@epamail.epa.gov<mailto:Goffman.Joseph@epamail.epa.gov> <Goffman.Joseph@epamail.epa.gov>; Jordan.Scott@epamail.epa.gov<mailto:Jordan.Scott@epamail.epa.gov> <Jordan.Scott@epamail.epa.gov>; Zenick.Elliott@epamail.epa.gov<mailto:Zenick.Elliott@epamail.epa.gov> <Zenick.Elliott@epamail.epa.gov>; Joanne.Spalding@sierraclub.org<mailto:Joanne.Spalding@sierraclub.org> <Joanne.Spalding@sierraclub.org>; thomas.lorenzen@usdoj.gov<mailto:thomas.lorenzen@usdoj.gov> <thomas.lorenzen@usdoj.gov><mailto:thomas.lorenzen@usdoj.gov>>

Subject: Re: Boiler NSPS settlement

I'll make myself available anytime Friday, though I may be on a train.

David Doniger  
NRDC

201-321-3435

----- Original Message -----

From: Gunter, David (ENRD) [mailto:David.Gunter2@usdoj.gov]  
Sent: Wednesday, October 26, 2011 04:05 PM  
To: Michael J. Myers <Michael.Myers@ag.ny.gov>;  
Embrey.Patricia@epamail.epa.gov<mailto:Embrey.Patricia@epamail.epa.gov>  
<Embrey.Patricia@epamail.epa.gov>; Doniger, David  
Cc: Morgan Costello <Morgan.Costello@ag.ny.gov>; mceronsky@edf.org<mailto:mceronsky@edf.org>  
<mceronsky@edf.org>; vpatton@edf.org<mailto:vpatton@edf.org> <vpatton@edf.org>;  
Goffman.Joseph@epamail.epa.gov<mailto:Goffman.Joseph@epamail.epa.gov>  
<Goffman.Joseph@epamail.epa.gov>; Jordan.Scott@epamail.epa.gov<mailto:Jordan.Scott@epamail.epa.gov>  
<Jordan.Scott@epamail.epa.gov>; Zenick.Elliott@epamail.epa.gov<mailto:Zenick.Elliott@epamail.epa.gov>  
<Zenick.Elliott@epamail.epa.gov>; Joanne.Spalding@sierraclub.org<mailto:Joanne.Spalding@sierraclub.org>  
<Joanne.Spalding@sierraclub.org>; Lorenzen, Thomas (ENRD)  
<Thomas.Lorenzen@usdoj.gov<mailto:Thomas.Lorenzen@usdoj.gov>>  
Subject: RE: Boiler NSPS settlement

Mike, I'm sorry, but EPA is still fully engaged in the review and approval process and will not have meaningful information to share until Friday morning. If there are times on Friday afternoon when everyone is available, please let me know and I'll do the best I can to get everyone on the phone at the same time.

Thanks,  
Dave

-----Original Message-----

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Wednesday, October 26, 2011 12:36 PM  
To: Gunter, David (ENRD); Embrey.Patricia@epamail.epa.gov; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Lorenzen,  
Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Dave, unfortunately Morgan is out Friday so can't cover a call in the morning. Given Friday's deadline, I may be willing to have you go ahead with a call Fri. a.m. without NY based on the assumptions that (1) that's the earliest EPA/DOJ can inform us of whether you have received final approval on the revised settlement agreement, and (2) you anticipate receiving such approval. However, if either of my assumptions are incorrect, then we should convene a call today with whomever is available to discuss.

-----Original Message-----

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Wednesday, October 26, 2011 11:55 AM  
To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD)  
Lorenzen  
Subject: RE: Boiler NSPS settlement

Mike,

I was just preparing to ask for a call on Friday morning. Can you please let me know when on Friday you think you would be available, and whether Morgan could cover a call for you if we held it between 10 and 12 ET on Friday? Everyone else, please let me know available times on Friday also.

Thanks,  
Dave

-----Original Message-----

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Wednesday, October 26, 2011 11:53 AM  
To: Gunter, David (ENRD); Embrey.Patricia@epamail.epa.gov; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Lorenzen,  
Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Don't mean to nag on this, but I'm going to be in court on Friday morning, likely not back until early afternoon and would like to have a better sense of where we are and when we're going to talk this week. Thanks.

-----Original Message-----

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Monday, October 24, 2011 10:12 AM  
To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD)  
Lorenzen  
Subject: RE: Boiler NSPS settlement

Mike and David,

Thanks for clarifying that all the petitioners are on board. I understand that meetings are still taking place to secure the necessary federal approvals. We're certainly aware of the deadline and the need to coordinate, so I will be in touch as soon as I can tell you more.

Thanks,  
Dave Gunter

-----Original Message-----

From: Doniger, David [mailto:ddoniger@nrdc.org]  
Sent: Friday, October 21, 2011 2:30 PM  
To: Michael J. Myers; Gunter, David (ENRD);  
Embrey.Patricia@epamail.epa.gov<mailto:Embrey.Patricia@epamail.epa.gov>  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Lorenzen,  
Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Also to clarify that the three environmental petitioners are onboard. So we are eager for news on the federal side.

David D. Doniger  
Policy Director, Climate Center  
Natural Resources Defense Council

Please note our new address:  
1152 15th Street, NW, Suite 300  
Washington, DC 20005

Phone: (202) 289-2403  
Cell: (202) 321-3435  
Fax: (202) 789-0859  
ddoniger@nrdc.org<mailto:ddoniger@nrdc.org>  
on the web at [www.nrdc.org](http://www.nrdc.org)<<http://www.nrdc.org/>>  
read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

-----Original Message-----

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Friday, October 21, 2011 2:02 PM  
To: 'David (ENRD) Gunter'; Embrey.Patricia@epamail.epa.gov; Doniger, David  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD) Lorenzen  
Subject: RE: Boiler NSPS settlement

All--Just wanted to communicate that I have now received approvals from all of the state petitioners. What's the status of the federal approvals? I've been getting questions re. a communications call to discuss a potential announcement, press, etc. for next week so please let us know when something's been arranged. Thanks.--Mike

-----Original Message-----

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Wednesday, October 19, 2011 11:20 AM  
To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD) Lorenzen  
Subject: RE: Boiler NSPS settlement

Thanks, Mike -- This looks good to me, and we'll also use this for our internal approval processes.

Dave

-----Original Message-----

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Tuesday, October 18, 2011 12:31 PM  
To: Gunter, David (ENRD); Embrey.Patricia@epamail.epa.gov; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org;  
Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov;  
Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org;  
Lorenzen, Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Dave and co.--I've removed the bolded/bracketed language from the draft version we approved last Thursday and have made some minor signature block revisions. Unless I hear otherwise from you or the agency, we will plan to use this as the final document for purposes of obtaining signatures by next Friday the 28th. Thanks.--Mike

-----Original Message-----

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]

Sent: Thursday, October 13, 2011 2:02 PM

To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org;  
Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov;  
Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas  
(ENRD) Lorenzen  
Subject: RE: Boiler NSPS settlement

Counsel: Attached please find a draft of our proposed agreement  
modification, with the term that we discussed today in bold.

Thanks,  
Dave Gunter

This e-mail and any attachments may contain confidential and privileged information. If you are not the intended recipient, please notify the sender immediately by return e-mail, delete this e-mail and destroy any copies. Any dissemination or use of this information by a person other than the intended recipient is unauthorized and may be illegal.

[attachment(s) "MM Oct 28 Extension Letter 2.doc" removed by Avi Garbow/DC/USEPA/US]

**To:** Joseph Goffman/DC/USEPA/US@EPA; Avi Garbow/DC/USEPA/US@EPA; David Doniger [ddoniger@nrdc.org]; vi Garbow/DC/USEPA/US@EPA; David Doniger [ddoniger@nrdc.org]; avid Doniger [ddoniger@nrdc.org]  
**Cc:** mceronsky [mceronsky@edf.org]; patton [vpatton@edf.org]; atricia Embrey/DC/USEPA/US@EPA; Scott Jordan/DC/USEPA/US@EPA; Elliott Zenick/DC/USEPA/US@EPA; Joanne Spalding [Joanne.Spalding@sierraclub.org]; cott Jordan/DC/USEPA/US@EPA; Elliott Zenick/DC/USEPA/US@EPA; Joanne Spalding [Joanne.Spalding@sierraclub.org]; Elliott Zenick/DC/USEPA/US@EPA; Joanne Spalding [Joanne.Spalding@sierraclub.org]; oanne Spalding [Joanne.Spalding@sierraclub.org]; David (ENRD) Gunter" [David.Gunter2@usdoj.gov]; Thomas (ENRD) Lorenzen" [Thomas.Lorenzen@usdoj.gov]  
**From:** "Michael J. Myers"  
**Sent:** Mon 11/21/2011 1:59:45 PM  
**Subject:** RE: Boiler NSPS settlement

Nov. 30 is fast approaching and we have the holiday this week. When can we expect to hear back from EPA on the renegotiated schedule?

-----Original Message-----

From: Goffman.Joseph@epamail.epa.gov [mailto:Goffman.Joseph@epamail.epa.gov]  
Sent: Friday, October 28, 2011 10:23 PM  
To: Garbow.Avi@epamail.epa.gov; Michael J. Myers; David Doniger  
Cc: mceronsky; vpatton; Embrey.Patricia@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne Spalding; David (ENRD) Gunter; Thomas (ENRD) Lorenzen  
Subject: Re: Boiler NSPS settlement

Thanks very much, everybody, for your perseverance and patience.

----- Original Message -----

From: "Doniger, David" [ddoniger@nrdc.org]  
Sent: 10/28/2011 10:15 PM AST  
To: Avi Garbow; "Michael J. Myers" <Michael.Myers@ag.ny.gov>  
Cc: "David (ENRD) Gunter" <David.Gunter2@usdoj.gov>; <mceronsky@edf.org>; "Joanne Spalding" <Joanne.Spalding@sierraclub.org>; <vpatton@edf.org>; Patricia Embrey; Joseph Goffman; Scott Jordan; Elliott Zenick; "Thomas (ENRD) Lorenzen" <Thomas.Lorenzen@usdoj.gov>  
Subject: RE: Boiler NSPS settlement

Avi,

Thank you for your email.

Attached is a letter from Mike Myers on behalf of the petitioners agreeing to extend the forbearance period to November 30th.

David

David D. Doniger  
Policy Director, Climate and Clean Air Program  
Natural Resources Defense Council

Please note our new address:



1152 15th Street, NW, Suite 300  
Washington, DC 20005

Phone: (202) 289-2403  
Cell: (202) 321-3435  
Fax: (202) 289-1060  
ddoniger@nrdc.org  
on the web at [www.nrdc.org](http://www.nrdc.org)  
read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

-----Original Message-----

From: Garbow.Avi@epamail.epa.gov [mailto:Garbow.Avi@epamail.epa.gov]  
Sent: Friday, October 28, 2011 10:03 PM  
To: Michael J. Myers  
Cc: 'David (ENRD) Gunter'; 'mceronsky@edf.org'; 'Joanne Spalding'; 'vpatton@edf.org';  
Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov;  
Zenick.Elliott@epamail.epa.gov; Doniger, David; 'Thomas (ENRD) Lorenzen'  
Subject: RE: Boiler NSPS settlement

As we discussed today, in exchange for your agreement not to invoke the remedies set forth in Paragraph 7 of the Settlement Agreement concerning the proposal and promulgation of NSPS for GHG emissions from EGU's, through November 30, 2011, EPA, under signature of the General Counsel, will provide on Monday a letter to contain the following text:

"I write concerning our recent discussions regarding the schedule for rule making activity under Section 111 of the Clean Air Act pertaining to the electric generating unit source category. As you know, the parties had entered into a settlement agreement contemplating that the Agency would propose new source performance standards under Sections 111(b) and (d) addressing greenhouse gas emissions from this sector by September 30, 2011 - a schedule that proved unrealistic for the Agency. Since that time, the parties have been engaged in settlement discussions regarding a new schedule, with the petitioners agreeing not to invoke their remedies under Paragraph 7 of the Settlement Agreement pending further productive settlement discussions. This forbearance period was to extend to October 28, 2011; my understanding is that petitioners are willing to extend this period further to November 30, 2011.

As we have indicated, and as we continue negotiations, the Agency intends to move forward on the Section 111(b) aspect of the rulemaking by proposing a Section 111(b) standard by the end of January 2012 and promulgating a final Section 111(b) standard by mid-November 2012. To this end, and to accommodate this schedule, we expect to transmit to the Office of Management and Budget for inter-agency review a proposed rule making package in November.

We look forward to continued negotiations to resolve the Section 111(d) schedule and any other remaining issues."

Thank you, once again, for your efforts in reaching this agreement. I look forward to receipt of the letter memorializing the continued forbearance through November 30, 2012, and will ensure that the letter containing the text above is sent on Monday.

Regards,

Avi

Avi Garbow  
Deputy General Counsel  
U.S. Environmental Protection Agency  
(202) 564-1917

-----"Michael J. Myers" <Michael.Myers@ag.ny.gov> wrote: -----

=====  
To: "'David (ENRD) Gunter'" <David.Gunter2@usdoj.gov>, "'mceronsky@edf.org'" <mceronsky@edf.org>, 'Joanne Spalding' <Joanne.Spalding@sierraclub.org>  
From: "Michael J. Myers" <Michael.Myers@ag.ny.gov>  
Date: 10/28/2011 05:01PM  
Cc: "'vpatton@edf.org'" <vpatton@edf.org>, Patricia Embrey/DC/USEPA/US@EPA, Joseph Goffman/DC/USEPA/US@EPA, Scott Jordan/DC/USEPA/US@EPA, Elliott Zenick/DC/USEPA/US@EPA, "'ddoniger@nrdc.org'" <ddoniger@nrdc.org>, "'Thomas (ENRD) Lorenzen'" <Thomas.Lorenzen@usdoj.gov>, Avi Garbow/DC/USEPA/US@EPA  
Subject: RE: Boiler NSPS settlement  
=====

Re-sending the letter so that Avi's correct address is included in this list (thanks Patricia)

---

From: Michael J. Myers  
Sent: Friday, October 28, 2011 4:53 PM  
To: 'David (ENRD) Gunter'; mceronsky@edf.org; Joanne Spalding  
Cc: vpatton@edf.org; Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; ddoniger@nrdc.org; Thomas (ENRD) Lorenzen; 'garbo.avi@epamail.epa.gov'  
Subject: RE: Boiler NSPS settlement

Here's a draft letter. If the above doesn't reflect Avi's correct address, can someone please send to him? thanks.

---

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Thursday, October 27, 2011 11:45 AM  
To: mceronsky@edf.org; Michael J. Myers; Joanne Spalding  
Cc: Morgan Costello; vpatton@edf.org; Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; ddoniger@nrdc.org; Thomas (ENRD) Lorenzen  
Subject: RE: Boiler NSPS settlement

Mike: Thanks for your forbearance. Everyone, we would like to set the call for 10:15 ET, using the following call-in information:

Dial 866-410-9426  
Code 202-514-3785

Thank you all,

Dave

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]

Sent: Thursday, October 27, 2011 10:02 AM

To: 'Joanne Spalding'; mceronsky@edf.org

Cc: Morgan Costello; vpatton@edf.org; Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; ddoniger@nrdc.org; Gunter, David (ENRD); Lorenzen, Thomas (ENRD)

Subject: RE: Boiler NSPS settlement

Given the status (at least as I understand it) and tomorrow's deadline, you should proceed with a call as early as possible tomorrow, which would appear from these e-mails to be 10 a.m. eastern. I'm not sure when I will be back from court, but my environmental colleagues can share my thoughts with you in the meantime.

---

From: Joanne Spalding [mailto:Joanne.Spalding@sierraclub.org]

Sent: Thursday, October 27, 2011 1:20 AM

To: mceronsky@edf.org

Cc: Morgan Costello; vpatton@edf.org; Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Michael J. Myers; ddoniger@nrdc.org; David.Gunter2@usdoj.gov; thomas.lorenzen@usdoj.gov

Subject: Re: Boiler NSPS settlement

I'm booked 12-12:30 and 1:30-2 ET, but otherwise available, possibly while driving, any time after 9:30 ET.

-----Megan Ceronsky <mceronsky@edf.org> wrote: -----

To: "ddoniger@nrdc.org" <ddoniger@nrdc.org>, "David.Gunter2@usdoj.gov" <David.Gunter2@usdoj.gov>, "michael.myers@ag.ny.gov" <michael.myers@ag.ny.gov>, "Embrey.Patricia@epamail.epa.gov" <Embrey.Patricia@epamail.epa.gov>

From: Megan Ceronsky <mceronsky@edf.org>

Date: 10/26/2011 09:57PM

Cc: "Morgan.Costello@ag.ny.gov" <Morgan.Costello@ag.ny.gov>, Vickie Patton <vpatton@edf.org>, "Goffman.Joseph@epamail.epa.gov" <Goffman.Joseph@epamail.epa.gov>, "Jordan.Scott@epamail.epa.gov" <Jordan.Scott@epamail.epa.gov>, "Zenick.Elliott@epamail.epa.gov" <Zenick.Elliott@epamail.epa.gov>, "Joanne.Spalding@sierraclub.org" <Joanne.Spalding@sierraclub.org>, "thomaslorenzen@usdoj.gov" <thomas.lorenzen@usdoj.gov>

Subject: Re: Boiler NSPS settlement

Vickie's schedule Friday is too uncertain to plan around, but I can be available anytime.

Best,

Megan

----- Original Message -----

From: Doniger, David [mailto:ddoniger@nrdc.org]

Sent: Wednesday, October 26, 2011 04:10 PM

To: David.Gunter2@usdoj.gov<mailto:David.Gunter2@usdoj.gov> <David.Gunter2@usdoj.gov>; michael.myers@ag.ny.gov<mailto:michael.myers@ag.ny.gov> <michael.myers@ag.ny.gov>; Embrey.Patricia@epamail.epagov<mailto:Embrey.Patricia@epamail.epa.gov> <Embrey.Patricia@epamail.epa.gov><mailto:Embrey.Patricia@epamail.epa.gov>>

Cc: Morgan.Costello@ag.ny.gov<mailto:Morgan.Costello@ag.ny.gov> <Morgan.Costello@ag.ny.gov>; Megan Ceronsky; Vickie Patton; Goffman.Joseph@epamail.epagov<mailto:Goffman.Joseph@epamail.epa.gov> <Goffman.Joseph@epamail.epa.gov>; Jordan.Scott@epamail.epa.gov<mailto:Jordan.Scott@epamail.epa.gov> <Jordan.Scott@epamail.epa.gov>; Zenick.Elliott@epamail.epa.gov<mailto:Zenick.Elliott@epamail.epa.gov> <Zenick.Elliott@epamail.epa.gov>; Joanne.Spalding@sierraclub.org<mailto:Joanne.Spalding@sierraclub.org>

<Joanne.Spalding@sierraclub.org>; thomas.lorenzen@usdoj.gov<mailto:thomas.lorenzen@usdoj.gov>  
<thomaslorenzen@usdoj.gov<mailto:thomas.lorenzen@usdoj.gov>>  
Subject: Re: Boiler NSPS settlement

I'll make myself available anytime Friday, though I may be on a train.

David Doniger

NRDC

202 321 9435

----- Original Message -----

From: Gunter, David (ENRD) [mailto:David.Gunter2@usdoj.gov]  
Sent: Wednesday, October 26, 2011 04:05 PM  
To: Michael J. Myers <Michael.Myers@ag.ny.gov>;  
Embrey.Patricia@epamail.epa.gov<mailto:Embrey.Patricia@epamail.epa.gov>  
<Embrey.Patricia@epamail.epa.gov>; Doniger, David  
Cc: Morgan Costello <Morgan.Costello@ag.ny.gov>; mceronsky@edf.org<mailto:mceronsky@edf.org>  
<mceronsky@edf.org>; vpatton@edf.org<mailto:vpattton@edf.org> <vpattton@edf.org>;  
Goffman.Joseph@epamail.epa.gov<mailto:Goffman.Joseph@epamail.epa.gov>  
<Goffman.Joseph@epamail.epa.gov>; Jordan.Scott@epamail.epa.gov<mailto:Jordan.Scott@epamail.epa.gov>  
<Jordan.Scott@epamail.epa.gov>; Zenick.Elliott@epamail.epa.gov<mailto:Zenick.Elliott@epamail.epa.gov>  
<Zenick.Elliott@epamail.epa.gov>; Joanne.Spalding@sierraclub.org<mailto:Joanne.Spalding@sierraclub.org>  
<Joanne.Spalding@sierraclub.org>; Lorenzen, Thomas (ENRD)  
<Thomas.Lorenzen@usdoj.gov<mailto:Thomas.Lorenzen@usdoj.gov>>  
Subject: RE: Boiler NSPS settlement

Mike, I'm sorry, but EPA is still fully engaged in the review and approval process and will not have meaningful information to share until Friday morning. If there are times on Friday afternoon when everyone is available, please let me know and I'll do the best I can to get everyone on the phone at the same time.

Thanks,

Dave

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From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Wednesday, October 26, 2011 12:36 PM  
To: Gunter, David (ENRD); Embrey.Patricia@epamail.epa.gov; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Lorenzen,  
Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Dave, unfortunately Morgan is out Friday so can't cover a call in the morning. Given Friday's deadline, I may be willing to have you go ahead with a call Fri. a.m. without NY based on the assumptions that (1) that's the earliest EPA/DOJ can inform us of whether you have received final approval on the revised settlement agreement, and (2) you anticipate receiving such approval. However, if either of my assumptions are incorrect, then we should convene a call today with whomever is available to discuss.

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From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Wednesday, October 26, 2011 11:55 AM  
To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD)

Lorenzen  
Subject: RE: Boiler NSPS settlement

Mike,

I was just preparing to ask for a call on Friday morning. Can you please let me know when on Friday you think you would be available, and whether Morgan could cover a call for you if we held it between 10 and 12 ET on Friday? Everyone else, please let me know available times on Friday also.

Thanks,  
Dave

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To: Gunter, David (ENRD); Embrey.Patricia@epamail.epa.gov; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Lorenzen,  
Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Don't mean to nag on this, but I'm going to be in court on Friday morning, likely not back until early afternoon and would like to have a better sense of where we are and when we're going to talk this week. Thanks.

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Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD)  
Lorenzen  
Subject: RE: Boiler NSPS settlement

Mike and David,

Thanks for clarifying that all the petitioners are on board. I understand that meetings are still taking place to secure the necessary federal approvals. We're certainly aware of the deadline and the need to coordinate, so I will be in touch as soon as I can tell you more.

Thanks,  
Dave Gunter

-----Original Message-----

From: Doniger, David [mailto:ddoniger@nrdc.org]  
Sent: Friday, October 21, 2011 2:30 PM  
To: Michael J. Myers; Gunter, David (ENRD);  
Embrey.Patricia@epamail.epagov<mailto:Embrey.Patricia@epamail.epa.gov>  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Lorenzen,  
Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Also to clarify that the three environmental petitioners are onboard. So we are eager for news on the federal side.

David D. Doniger  
Policy Director, Climate Center  
Natural Resources Defense Council

Please note our new address:  
1152 15th Street, NW, Suite 300  
Washington, DC 20005

Phone: (202) 289-2403  
Cell: (202) 321-3435  
Fax: (202) 789-0859  
ddoniger@nrdc.org<mailto:ddoniger@nrdc.org>  
on the web at [www.nrdc.org](http://www.nrdc.org)<<http://www.nrdc.org/>>  
read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

-----Original Message-----

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Friday, October 21, 2011 2:02 PM  
To: 'David (ENRD) Gunter'; Embrey.Patricia@epamail.epa.gov; Doniger, David  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD)  
Lorenzen  
Subject: RE: Boiler NSPS settlement

All--Just wanted to communicate that I have now received approvals from all of the state petitioners. What's the status of the federal approvals? I've been getting questions re. a communications call to discuss a potential announcement, press, etc. for next week so please let us know when something's been arranged. Thanks.--Mike

-----Original Message-----

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Wednesday, October 19, 2011 11:20 AM  
To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD)  
Lorenzen  
Subject: RE: Boiler NSPS settlement

Thanks, Mike -- This looks good to me, and we'll also use this for our internal approval processes.

Dave

-----Original Message-----

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Tuesday, October 18, 2011 12:31 PM  
To: Gunter, David (ENRD); Embrey.Patricia@epamail.epa.gov; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org;  
Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov;  
Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org;  
Lorenzen, Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Dave and co.--I've removed the bolded/bracketed language from the draft version we approved last Thursday and have made some minor signature block revisions. Unless I hear otherwise from you or the agency, we will plan to use this as the final document for purposes of obtaining signatures by next Friday the 28th. Thanks.--Mike

-----Original Message-----

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Thursday, October 13, 2011 2:02 PM  
To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org;  
Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov;  
Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD) Lorenzen  
Subject: RE: Boiler NSPS settlement

Counsel: Attached please find a draft of our proposed agreement modification, with the term that we discussed today in bold.

Thanks,  
Dave Gunter

This e-mail and any attachments may contain confidential and privileged information. If you are not the intended recipient, please notify the sender immediately by return e-mail, delete this e-mail and destroy any copies. Any dissemination or use of this information by a person other than the intended recipient is unauthorized and may be illegal.

[attachment(s) "MM Oct 28 Extension Letter 2.doc" removed by Avi Garbow/DC/USEPA/US]

**To:** "ddoniger@nrdc.org" [ddoniger@nrdc.org]; 'David.Gunter2@usdoj.gov'  
[David.Gunter2@usdoj.gov]; 'michael.myers@ag.ny.gov'  
[michael.myers@ag.ny.gov]; atricia Embrey/DC/USEPA/US@EPA[]  
**Cc:** "Morgan.Costello@ag.ny.gov" [Morgan.Costello@ag.ny.gov]; ickie Patton  
[vpatt@edf.org]; oseph Goffman/DC/USEPA/US@EPA;Scott  
Jordan/DC/USEPA/US@EPA;Elliott  
Zenick/DC/USEPA/US@EPA;"Joanne.Spalding@sierraclub.org"  
[Joanne.Spalding@sierraclub.org]; cott Jordan/DC/USEPA/US@EPA;Elliott  
Zenick/DC/USEPA/US@EPA;"Joanne.Spalding@sierraclub.org"  
[Joanne.Spalding@sierraclub.org]; lliott  
Zenick/DC/USEPA/US@EPA;"Joanne.Spalding@sierraclub.org"  
[Joanne.Spalding@sierraclub.org]; 'Joanne.Spalding@sierraclub.org'  
[Joanne.Spalding@sierraclub.org]; 'thomas.lorenzen@usdoj.gov'  
[thomas.lorenzen@usdoj.gov]

**From:** Megan Ceronsky  
**Sent:** Thur 10/27/2011 4:57:26 AM  
**Subject:** Re: Boiler NSPS settlement

[David.Gunter2@usdoj.gov](mailto:David.Gunter2@usdoj.gov)  
[michael.myers@ag.ny.gov](mailto:michael.myers@ag.ny.gov)  
[Embrey.Patricia@epamail.epa.gov](mailto:Embrey.Patricia@epamail.epa.gov)  
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[www.nrdc.org](http://www.nrdc.org)  
<http://switchboard.nrdc.org/blogs/ddoniger/>

Vickie's schedule Friday is too uncertain to plan around, but I can be available anytime.

Best,  
Megan

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Sent: Wednesday, October 26, 2011 04:10 PM  
To: David.Gunter2@usdoj.gov <David.Gunter2@usdoj.gov>; michael.myers@ag.ny.gov  
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<Jordan.Scott@epamail.epa.gov>; Zenick.Elliott@epamail.epa.gov <Zenick.Elliott@epamail.epa.gov>;  
Joanne.Spalding@sierraclub.org <Joanne.Spalding@sierraclub.org>; thomas.lorenzen@usdoj.gov  
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Subject: Re: Boiler NSPS settlement

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David Doniger

NRDC

E202321-3435

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Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Also to clarify that the three environmental petitioners are onboard. So we are eager for news on the federal side.

David D. Doniger  
Policy Director, Climate Center  
Natural Resources Defense Council

Please note our new address:  
1152 15th Street, NW, Suite 300  
Washington, DC 20005

Phone: (202) 289-2403  
Cell: (202) 321-3435  
Fax: (202) 789-0859  
ddoniger@nrdc.org  
on the web at [www.nrdc.org](http://www.nrdc.org)  
read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

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Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD) Lorenzen  
Subject: RE: Boiler NSPS settlement

All--Just wanted to communicate that I have now received approvals from all of the state petitioners. What's the status of the federal approvals? I've been getting questions re. a communications call to discuss a potential announcement, press, etc. for next week so please let us know when something's been arranged. Thanks.--Mike

-----Original Message-----

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Wednesday, October 19, 2011 11:20 AM  
To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD) Lorenzen  
Subject: RE: Boiler NSPS settlement

Thanks, Mike -- This looks good to me, and we'll also use this for our internal approval processes.

Dave

-----Original Message-----

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Tuesday, October 18, 2011 12:31 PM  
To: Gunter, David (ENRD); Embrey.Patricia@epamail.epa.gov; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org;  
Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov;  
Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org;  
Lorenzen, Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Dave and co.--I've removed the bolded/bracketed language from the draft version we approved last Thursday and have made some minor signature block revisions. Unless I hear otherwise from you or the agency, we

will plan to use this as the final document for purposes of obtaining signatures by next Friday the 28th. Thanks.--Mike

-----Original Message-----

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Thursday, October 13, 2011 2:02 PM  
To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org;  
Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov;  
Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas  
(ENRD) Lorenzen  
Subject: RE: Boiler NSPS settlement

Counsel: Attached please find a draft of our proposed agreement modification, with the term that we discussed today in bold.

Thanks,  
Dave Gunter

This e-mail and any attachments may contain confidential and privileged information. If you are not the intended recipient, please notify the sender immediately by return e-mail, delete this e-mail and destroy any copies. Any dissemination or use of this information by a person other than the intended recipient is unauthorized and may be illegal.

**To:** "Doniger, David" [ddoniger@nrdc.org];  
Joanne.Spalding@sierraclub.org>;[vpatton@environmentaldefense.org];  
vpatton@environmentaldefense.org>;[michael.myers@ag.ny.gov];  
michael.myers@ag.ny.gov>;[morgan.costello@ag.ny.gov]; morgan.costello@ag.ny.gov>[]  
**Cc:** Scott Jordan/DC/USEPA/US@EPA;Elliott Zenick/DC/USEPA/US@EPA[]; Iliott  
Zenick/DC/USEPA/US@EPA[]  
**From:** "Gunter, David (ENRD)"  
**Sent:** Tue 5/31/2011 2:13:31 PM  
**Subject:** Boiler NSPS settlement modification  
APPELLATE #263457-v1-Boiler NSPS -- Agreement modification.DOC

Dear counsel,

Attached please find a draft of the modification that we discussed to the Boiler NSPS agreement. We look forward to receiving your approval or comments. Thank you very much for accommodating us in this matter.

Regards,

David Gunter

Appellate Section

Environment and Natural Resources Division

United States Department of Justice

950 Pennsylvania Ave, NW

Washington, DC 20530

202-514-3785

David.Gunter2@usdoj.gov

## **MODIFICATION TO SETTLEMENT AGREEMENT**

WHEREAS, on December 21, 2010, the following parties executed a “Settlement Agreement:” (1) the States of New York, California, Connecticut, Delaware, Maine, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, the District of Columbia, and the City of New York (collectively “State Petitioners”); and (2) Natural Resources Defense Council (NRDC), Sierra Club, and Environmental Defense Fund (EDF) (collectively “Environmental Petitioners”), and Respondent, the U.S. Environmental Protection Agency (“EPA”) (collectively “the Parties”);

WHEREAS, the Settlement Agreement became final on March 2, 2011;

WHEREAS, on September 24, 2007, in a case entitled *State of New York, et al. v. EPA*, No. 06-1322, the United States Court of Appeals for the District of Columbia Circuit remanded to EPA a final action entitled “Standards of Performance for Electric Utility Steam Generating Units, Industrial-Commercial-Institutional Steam Generating Units, and Small Industrial-Commercial-Institutional Steam Generating Units,” 71 Fed. Reg. 9,866 (Feb. 27, 2006) (the “Final Rule”);

WHEREAS, Petitioners subsequently notified EPA of their potential claims to compel EPA to take action pursuant to the remand of the Final Rule;

WHEREAS, the Settlement Agreement resolved those potential claims;

WHEREAS, Paragraph 1 of the Settlement Agreement provided that: “EPA will sign by July 26, 2011, and will transmit to the Office of the Federal Register within five business days, a proposed rule under section 111(b) that includes standards of performance for GHGs for new and modified EGUs that are subject to 40 C.F.R. part 60, subpart Da. EPA shall provide the State

and Environmental Petitioners a copy of the proposed rule within five business days of signature;”

WHEREAS, Paragraph 2 of the Settlement Agreement provided that: “EPA will also sign by July 26, 2011, and will transmit to the Office of the Federal Register within five business days, a proposed rule under section 111(d) that includes emissions guidelines for GHGs from existing EGUs that would have been subject to 40 C.F.R. part 60, subpart Da if they were new sources. EPA shall provide the State and Environmental Petitioners a copy of the proposed rule within five business days of signature;”

WHEREAS, Paragraph 10 of the Settlement Agreement provided that: “The provisions of this Settlement Agreement can be modified at any time by written mutual consent of the Parties;”

WHEREAS, EPA has engaged in an extensive public process in preparation of a proposed rule that would satisfy its obligation under Paragraphs 1 and 2 of the Settlement Agreement, including five public “listening sessions” as well as additional meetings and discussions with a wide variety of public stakeholders;

WHEREAS, in the course of that public process, EPA has received a significant number of innovative and potentially productive ideas concerning issues relevant to the proposed rule;

WHEREAS, EPA requires additional time to consider the nature of the information and ideas presented by the public stakeholders to EPA;

WHEREAS, Petitioners desire to enable EPA to give due attention and consideration to all information and ideas presented to EPA in the public process;

WHEREAS, the Parties now desire to modify Paragraphs 1 and 2 of the Settlement Agreement;

NOW THEREFORE, without any change to any other part of the Settlement Agreement, the parties hereby agree as follows:

1. Paragraph 1 of the Settlement Agreement shall be stricken, and replaced with the following: "EPA will sign by September 30, 2011, and will transmit to the Office of the Federal Register within five business days, a proposed rule under section 111(b) that includes standards of performance for GHGs for new and modified EGUs that are subject to 40 C.F.R. part 60, subpart Da. EPA shall provide the State and Environmental Petitioners a copy of the proposed rule within five business days of signature."
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DATE: \_\_\_\_\_

\_\_\_\_\_  
DAVID GUNTER  
U.S. Department of Justice  
Environment and Natural Resources Division  
Environmental Defense Section  
P.O. Box 23986  
Washington, D.C. 20026-3986

*Counsel for U.S. Environmental Protection Agency*



DATE: \_\_\_\_\_

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MICHAEL J. MYERS  
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*Counsel for State of New York*

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KIMBERLY MASSICOTTE  
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VALERIE S. CZISMADIA  
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Assistant Attorney General

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JUDITH ANN MOORE  
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PHILIP SCHRADLE  
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1162 Court Street, N.E.  
Salem, Oregon 97301

*Counsel for State of Oregon*

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TRICIA K. JEDELE  
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150 South Main Street  
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*Counsel for State of Rhode Island*

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KEVIN O. LESKE  
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DATE: \_\_\_\_\_

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LESLIE SEFFERN RILEY  
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Office of the Attorney General  
Olympia, Washington 98504

*Counsel for State of Washington*

DATE: \_\_\_\_\_

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DONNA M. MURASKY  
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Department of the Environment  
441 Fourth Street, N.W.  
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*Counsel for District of Columbia*

DATE: \_\_\_\_\_

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JAMES R. MILKEY  
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Environmental Protection Division  
One Ashburton Place  
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*Counsel for Commonwealth of Massachusetts*

DATE: \_\_\_\_\_

\_\_\_\_\_  
CHRISTOPHER G. KING  
New York City Law Department  
100 Church Street  
New York, NY 10007

*Counsel for City of New York*

DATE: \_\_\_\_\_

\_\_\_\_\_  
DAVID D. DONIGER  
Natural Resources Defense Council  
1200 New York Avenue NW, Suite 400  
Washington, DC 20005

*Counsel for Natural Resources Defense Council*

DATE: \_\_\_\_\_

\_\_\_\_\_  
JOANNE SPALDING  
Sierra Club  
85 Second Street  
San Francisco, CA 94105

*Counsel for Sierra Club*

DATE: \_\_\_\_\_

\_\_\_\_\_  
VICKIE PATTON  
Environmental Defense Fund  
2334 N. Broadway  
Boulder, CO 80304

*Counsel for Environmental Defense Fund*

**To:** "Morgan Costello" [Morgan.Costello@ag.ny.gov];  
vpatton@environmentaldefense.org>; "David Doniger" [ddoniger@nrdc.org]; David Doniger"  
[ddoniger@nrdc.org]; Joanne.Spalding@sierraclub.org>; "David (ENRD) Gunter"  
[David.Gunter2@usdoj.gov]; David (ENRD) Gunter" [David.Gunter2@usdoj.gov]  
**Cc:** Scott Jordan/DC/USEPA/US@EPA; Elliott Zenick/DC/USEPA/US@EPA[]; Iliott  
Zenick/DC/USEPA/US@EPA[]  
**From:** "Michael Myers"  
**Sent:** Wed 6/1/2011 3:09:22 PM  
**Subject:** RE: Boiler NSPS settlement modification  
APPELLATE #263457-v1-Boiler NSPS -- Agreement modification - Petitioners comments  
2.DOC  
[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)  
[www.nrdc.org](http://www.nrdc.org)  
<http://switchboard.nrdc.org/blogs/ddoniger/>

Dave, NY concurs with the comments in David's draft. As they are consistent with the revision concept that Morgan and I described to the other states, I expect that the other states will be okay with the draft as revised also. I've marked up David's revised draft to incorporate up-to-date signature block info for the states. Let us know how you'd like to proceed and what your proposed deadline is for signing the revised agreement (as you may recall, it usually takes some time for all of the states to get the necessary approvals). Thanks.

>>> "Doniger, David" <ddoniger@nrdc.org> 5/31/2011 7:06 PM >>>

Dave,

The draft you sent us earlier today is a good start; attached are a few edits that we would propose to make. Please let us know if these are acceptable. If you'd like to discuss them with me by phone, let me know.

David

David D. Doniger

Policy Director, Climate Center

Natural Resources Defense Council

1200 New York Ave., NW

Washington, DC 20005

Phone: (202) 289-2403

Cell: (202) 321-3435

Fax: (202) 789-0859

ddoniger@nrdc.org

on the web at [www.nrdc.org](http://www.nrdc.org)

read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

From: Gunter, David (ENRD) [mailto:David.Gunter2@usdoj.gov]  
Sent: Tuesday, May 31, 2011 10:14 AM  
To: Doniger, David; Joanne.Spalding@sierraclub.org; vpatton@environmentaldefense.org;  
michael.myers@ag.ny.gov; morgan.costello@ag.ny.gov  
Cc: Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov  
Subject: Boiler NSPS settlement modification

Dear counsel,

Attached please find a draft of the modification that we discussed to the Boiler NSPS agreement. We look forward to receiving your approval or comments. Thank you very much for accommodating us in this matter.

Regards,

David Gunter

Appellate Section

Environment and Natural Resources Division

United States Department of Justice

950 Pennsylvania Ave, NW

Washington, DC 20530

202-514-3785

David.Gunter2@usdoj.gov

## **MODIFICATION TO SETTLEMENT AGREEMENT**

WHEREAS, on December 21, 2010, the following parties executed a “Settlement Agreement:” (1) the States of New York, California, Connecticut, Delaware, Maine, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, the District of Columbia, and the City of New York (collectively “State Petitioners”); and (2) Natural Resources Defense Council (NRDC), Sierra Club, and Environmental Defense Fund (EDF) (collectively “Environmental Petitioners”), and Respondent, the U.S. Environmental Protection Agency (“EPA”) (collectively “the Parties”);

WHEREAS, the Settlement Agreement became final on March 2, 2011;

WHEREAS, on September 24, 2007, in a case entitled *State of New York, et al. v. EPA*, No. 06-1322, the United States Court of Appeals for the District of Columbia Circuit remanded to EPA a final action entitled “Standards of Performance for Electric Utility Steam Generating Units, Industrial-Commercial-Institutional Steam Generating Units, and Small Industrial-Commercial-Institutional Steam Generating Units,” 71 Fed. Reg. 9,866 (Feb. 27, 2006) (the “Final Rule”);

WHEREAS, Petitioners subsequently notified EPA of their potential claims to compel EPA to take action pursuant to the remand of the Final Rule;

WHEREAS, the Settlement Agreement resolved those potential claims;

WHEREAS, Paragraph 1 of the Settlement Agreement provided that: “EPA will sign by July 26, 2011, and will transmit to the Office of the Federal Register within five business days, a proposed rule under section 111(b) that includes standards of performance for GHGs for new and modified EGUs that are subject to 40 C.F.R. part 60, subpart Da. EPA shall provide the State



and Environmental Petitioners a copy of the proposed rule within five business days of signature;”

WHEREAS, Paragraph 2 of the Settlement Agreement provided that: “EPA will also sign by July 26, 2011, and will transmit to the Office of the Federal Register within five business days, a proposed rule under section 111(d) that includes emissions guidelines for GHGs from existing EGUs that would have been subject to 40 C.F.R. part 60, subpart Da if they were new sources. EPA shall provide the State and Environmental Petitioners a copy of the proposed rule within five business days of signature;”

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WHEREAS, EPA has engaged in an extensive public process in preparation of proposed rules that would satisfy its obligations under Paragraphs 1 and 2 of the Settlement Agreement, including five public “listening sessions” as well as additional meetings and discussions with a wide variety of public stakeholders;

WHEREAS, in the course of that public process, EPA has received a significant amount of useful information and ideas from a range of stakeholders concerning issues relevant to the proposed rules;

WHEREAS, EPA requires additional time to consider the information and ideas presented by the public stakeholders to EPA;

WHEREAS, the Parties desire to enable EPA to give due attention and consideration to all information and ideas presented to EPA in the public process leading to the proposed rules

while EPA remains committed to the date for taking final action as specified in paragraphs 3 and 4 of the Settlement Agreement;

WHEREAS, the Parties now desire to modify Paragraphs 1 and 2 of the Settlement Agreement;

NOW THEREFORE, without any change to any other part of the Settlement Agreement, the parties hereby agree as follows:

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DATE: \_\_\_\_\_

\_\_\_\_\_  
DAVID GUNTER

U.S. Department of Justice  
Environment and Natural Resources Division  
Environmental Defense Section  
P.O. Box 23986  
Washington, D.C. 20026-3986

*Counsel for U.S. Environmental Protection Agency*

DATE: \_\_\_\_\_

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MICHAEL J. MYERS  
MORGAN A. COSTELLO  
Assistant Attorneys General  
Environmental Protection Bureau  
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Albany, New York 12224

*Counsel for State of New York*

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1515 Clay Street, 20th Floor  
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*Counsel for State of California*

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VALERIE M. SATTERFIELD

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Assistant Attorney General  
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PAUL LOGAN  
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*Counsel for State of Oregon*

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GREGORY S. SCHULTZ  
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*Counsel for State of Rhode Island*

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Office of the Attorney General  
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*Counsel for State of Washington*

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Deputy Solicitor General  
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441 Fourth Street, N.W.  
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*Counsel for District of Columbia*

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WILLIAM L. PARDEE  
CAROL IANCU  
Assistant Attorneys General  
Environmental Protection Division  
One Ashburton Place  
Boston, Massachusetts 02108

*Counsel for Commonwealth of Massachusetts*

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CHRISTOPHER G. KING  
CARRIE NOTEBOOM  
New York City Law Department  
100 Church Street  
New York, NY 10007

*Counsel for City of New York*

DATE: \_\_\_\_\_

\_\_\_\_\_  
DAVID D. DONIGER  
Natural Resources Defense Council  
1200 New York Avenue NW, Suite 400  
Washington, DC 20005

*Counsel for Natural Resources Defense Council*

DATE: \_\_\_\_\_

\_\_\_\_\_  
JOANNE SPALDING  
Sierra Club  
85 Second Street  
San Francisco, CA 94105

*Counsel for Sierra Club*

DATE: \_\_\_\_\_

\_\_\_\_\_  
VICKIE PATTON  
Environmental Defense Fund  
2334 N. Broadway  
Boulder, CO 80304

*Counsel for Environmental Defense Fund*

**To:** "Michael Myers" [Michael.Myers@ag.ny.gov]; Morgan Costello" [Morgan.Costello@ag.ny.gov]; vpatton@environmentaldefense.org>; "David Doniger" [ddoniger@nrdc.org]; David Doniger" [ddoniger@nrdc.org]; Joanne.Spalding@sierraclub.org>[]  
**Cc:** Scott Jordan/DC/USEPA/US@EPA; Elliott Zenick/DC/USEPA/US@EPA[]; lliott Zenick/DC/USEPA/US@EPA[]  
**From:** "Gunter, David (ENRD)"  
**Sent:** Thur 6/2/2011 2:03:19 PM  
**Subject:** RE: Boiler NSPS settlement modification  
[APPELLATE-#263457-v2-Boiler NSPS -- Agreement modification.DOC](#)  
[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)  
[www.nrdc.org](http://www.nrdc.org)  
<http://switchboard.nrdc.org/blogs/ddoniger/>

Everyone: Thanks for your comments and changes. We've accepted all of them except one: In the Whereas clause where you suggested we state that "EPA remains committed" to the final dates, we would prefer slightly softer language that states that the parties desire to give EPA more time to consider public comments "without any change to" the final dates. A draft reflecting these changes is attached. Please let us know whether this draft is acceptable. If it is OK with everyone (including all states), we can go ahead and get DOJ approval to sign the modification.

Thanks,

Dave

From: Michael Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Wednesday, June 01, 2011 11:09 AM  
To: Morgan Costello; vpatton@environmentaldefense.org; David Doniger; Joanne.Spalding@sierraclub.org; Gunter, David (ENRD)  
Cc: Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov  
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>>> "Doniger, David" <ddoniger@nrdc.org> 5/31/2011 7:06 PM >>>

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make. Please let us know if these are acceptable. If you'd like to discuss them with me by phone, let me know.

David

David D. Doniger

Policy Director, Climate Center

Natural Resources Defense Council

1200 New York Ave., NW

Washington, DC 20005

Phone: (202) 289-2403

Cell: (202) 321-3435

Fax: (202) 789-0859

ddoniger@nrdc.org

on the web at [www.nrdc.org](http://www.nrdc.org)

read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

From: Gunter, David (ENRD) [mailto:David.Gunter2@usdoj.gov]

Sent: Tuesday, May 31, 2011 10:14 AM

To: Doniger, David; Joanne.Spalding@sierraclub.org; vpatton@environmentaldefense.org;

michael.myers@ag.ny.gov; morgan.costello@ag.ny.gov

Cc: Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov

Subject: Boiler NSPS settlement modification

Dear counsel,

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Regards,

David Gunter

Appellate Section

Environment and Natural Resources Division

United States Department of Justice

950 Pennsylvania Ave, NW

Washington, DC 20530

202-514-3785

David.Gunter2@usdoj.gov

## **MODIFICATION TO SETTLEMENT AGREEMENT**

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WHEREAS, the Settlement Agreement became final on March 2, 2011;

WHEREAS, on September 24, 2007, in a case entitled *State of New York, et al. v. EPA*, No. 06-1322, the United States Court of Appeals for the District of Columbia Circuit remanded to EPA a final action entitled “Standards of Performance for Electric Utility Steam Generating Units, Industrial-Commercial-Institutional Steam Generating Units, and Small Industrial-Commercial-Institutional Steam Generating Units,” 71 Fed. Reg. 9,866 (Feb. 27, 2006) (the “Final Rule”);

WHEREAS, Petitioners subsequently notified EPA of their potential claims to compel EPA to take action pursuant to the remand of the Final Rule;

WHEREAS, the Settlement Agreement resolved those potential claims;

WHEREAS, Paragraph 1 of the Settlement Agreement provided that: “EPA will sign by July 26, 2011, and will transmit to the Office of the Federal Register within five business days, a proposed rule under section 111(b) that includes standards of performance for GHGs for new and modified EGUs that are subject to 40 C.F.R. part 60, subpart Da. EPA shall provide the State

and Environmental Petitioners a copy of the proposed rule within five business days of signature;”

WHEREAS, Paragraph 2 of the Settlement Agreement provided that: “EPA will also sign by July 26, 2011, and will transmit to the Office of the Federal Register within five business days, a proposed rule under section 111(d) that includes emissions guidelines for GHGs from existing EGUs that would have been subject to 40 C.F.R. part 60, subpart Da if they were new sources. EPA shall provide the State and Environmental Petitioners a copy of the proposed rule within five business days of signature;”

WHEREAS, Paragraph 10 of the Settlement Agreement provided that: “The provisions of this Settlement Agreement can be modified at any time by written mutual consent of the Parties;”

WHEREAS, EPA has engaged in an extensive public process in preparation of proposed rules that would satisfy its obligation under Paragraphs 1 and 2 of the Settlement Agreement, including five public “listening sessions” as well as additional meetings and discussions with a wide variety of public stakeholders;

WHEREAS, in the course of that public process, EPA has received a significant amount of useful information and ideas from a range of stakeholder concerning issues relevant to the proposed rule;

WHEREAS, EPA requires additional time to consider the information and ideas presented by the public stakeholders to EPA;

WHEREAS, the Parties desire to enable EPA to give due attention and consideration to all information and ideas presented to EPA in the public process leading to the proposed rules,

without any change to the date for taking final action as specified in Paragraphs 3 and 4 of the Settlement Agreement;

WHEREAS, the Parties now desire to modify Paragraphs 1 and 2 of the Settlement Agreement;

NOW THEREFORE, without any change to any other part of the Settlement Agreement, the parties hereby agree as follows:

1. Paragraph 1 of the Settlement Agreement shall be stricken, and replaced with the following: "EPA will sign by September 30, 2011, and will transmit to the Office of the Federal Register within five business days, a proposed rule under section 111(b) that includes standards of performance for GHGs for new and modified EGUs that are subject to 40 C.F.R. part 60, subpart Da. EPA shall provide the State and Environmental Petitioners a copy of the proposed rule within five business days of signature."
2. Paragraph 2 of the Settlement Agreement shall be stricken, and replaced with the following: "EPA will also sign by September 30, 2011, and will transmit to the Office of the Federal Register within five business days, a proposed rule under section 111(d) that includes emissions guidelines for GHGs from existing EGUs that would have been subject to 40 C.F.R. part 60, subpart Da if they were new sources. EPA shall provide the State and Environmental Petitioners a copy of the proposed rule within five business days of signature."

DATE: \_\_\_\_\_

\_\_\_\_\_  
DAVID GUNTER

U.S. Department of Justice  
Environment and Natural Resources Division  
Environmental Defense Section  
P.O. Box 23986  
Washington, D.C. 20026-3986

*Counsel for U.S. Environmental Protection Agency*

DATE: \_\_\_\_\_

\_\_\_\_\_  
MICHAEL J. MYERS  
MORGAN A. COSTELLO  
Assistant Attorneys General  
Environmental Protection Bureau  
Office of the Attorney General  
The Capitol  
Albany, New York 12224

*Counsel for State of New York*

DATE: \_\_\_\_\_

\_\_\_\_\_  
SUSAN DURBIN  
Office of the Attorney General, State of California  
1515 Clay Street, 20th Floor  
P.O. Box 70550  
Oakland, CA 94612

*Counsel for State of California*

DATE: \_\_\_\_\_

\_\_\_\_\_  
KIMBERLY MASSICOTTE  
MATTHEW I. LEVINE  
Office of the Attorney General  
Assistant Attorney General  
P.O. Box 120, 55 Elm Street  
Hartford, Connecticut 06141-0120

*Counsel for State of Connecticut*

DATE: \_\_\_\_\_

\_\_\_\_\_  
VALERIE M. SATTERFIELD

Deputy Attorney General  
Department of Justice  
102 W. Water Street  
Dover, DE 19904

*Counsel for State of Delaware*

DATE: \_\_\_\_\_

GERALD D. REID  
Assistant Attorney General  
Department of the Attorney General  
State House Station #6  
Augusta, Maine 04333-0006

*Counsel for State of Maine*

DATE: \_\_\_\_\_

SETH COHEN  
STEPHEN R. FARRIS  
JUDITH ANN MOORE  
Assistant Attorneys General  
P.O. Drawer 1508  
Santa Fe, New Mexico 87504-1508

*Counsel for State of New Mexico*

DATE: \_\_\_\_\_

PAUL LOGAN  
Assistant Attorney General  
1162 Court Street, N.E.  
Salem, Oregon 97301

*Counsel for State of Oregon*

DATE: \_\_\_\_\_

GREGORY S. SCHULTZ  
MICHAEL RUBIN  
Assistant Attorneys General  
Department of the Attorney General  
150 South Main Street  
Providence, Rhode Island 02903

*Counsel for State of Rhode Island*

DATE: \_\_\_\_\_

\_\_\_\_\_  
THEA J. SCHWARTZ  
Assistant Attorney General  
Office of the Attorney General  
109 State Street  
Montpelier, VT 05609-1001

*Counsel for State of Vermont*

DATE: \_\_\_\_\_

\_\_\_\_\_  
LESLIE R. SEFFERN  
Assistant Attorney General  
Office of the Attorney General  
P.O. Box 40117  
Olympia, Washington 98504

*Counsel for State of Washington*

DATE: \_\_\_\_\_

\_\_\_\_\_  
DONNA M. MURASKY  
Deputy Solicitor General  
Department of the Environment  
441 Fourth Street, N.W.  
Washington, D.C. 20001

*Counsel for District of Columbia*

DATE: \_\_\_\_\_

\_\_\_\_\_  
WILLIAM L. PARDEE  
CAROL IANCU  
Assistant Attorneys General  
Environmental Protection Division  
One Ashburton Place  
Boston, Massachusetts 02108

*Counsel for Commonwealth of Massachusetts*





DATE: \_\_\_\_\_

CHRISTOPHER G. KING\  
CARRIE NOTEBOOM  
New York City Law Department  
100 Church Street  
New York, NY 10007

*Counsel for City of New York*

DATE: \_\_\_\_\_

DAVID D. DONIGER  
Natural Resources Defense Council  
1200 New York Avenue NW, Suite 400  
Washington, DC 20005

*Counsel for Natural Resources Defense Council*

DATE: \_\_\_\_\_

JOANNE SPALDING  
Sierra Club  
85 Second Street  
San Francisco, CA 94105

*Counsel for Sierra Club*

DATE: \_\_\_\_\_

VICKIE PATTON  
Environmental Defense Fund  
2334 N. Broadway  
Boulder, CO 80304

*Counsel for Environmental Defense Fund*

**To:** "Doniger, David" [ddoniger@nrdc.org]; Michael Myers" [Michael.Myers@ag.ny.gov]; Morgan Costello" [Morgan.Costello@ag.ny.gov]; vpatton@environmentaldefense.org>;[Joanne.Spalding@sierraclub.org]; Joanne.Spalding@sierraclub.org>[]  
**Cc:** Scott Jordan/DC/USEPA/US@EPA;Elliott Zenick/DC/USEPA/US@EPA[]; lliott Zenick/DC/USEPA/US@EPA[]  
**From:** "Gunter, David (ENRD)"  
**Sent:** Fri 6/3/2011 1:22:50 PM  
**Subject:** RE: Boiler NSPS settlement modification  
[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)  
[www.nrdc.org](http://www.nrdc.org)  
<http://switchboard.nrdc.org/blogs/ddoniger/>  
[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)  
[www.nrdc.org](http://www.nrdc.org)  
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Thanks, David. My initial view is that the edits you propose are fine, so New York should let us know the states' view of the draft that you circulated.

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Dave Gunter

From: Doniger, David [mailto:ddoniger@nrdc.org]  
Sent: Thursday, June 02, 2011 6:10 PM  
To: Gunter, David (ENRD); Michael Myers; Morgan Costello; vpatton@environmentaldefense.org; Joanne.Spalding@sierraclub.org  
Cc: Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov  
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As for next steps, how do you propose to collect signatures? When would you want to finalize this? And since this is not going to be filed with the court, what is the mechanism going to be for making it official and public?

David

David D. Doniger

Policy Director, Climate Center

Natural Resources Defense Council

1200 New York Ave., NW

Washington, DC 20005

Phone: (202) 289-2403

Cell: (202) 321-3435

Fax: (202) 789-0859

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read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

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Sent: Thursday, June 02, 2011 10:03 AM

To: Michael Myers; Morgan Costello; vpatton@environmentaldefense.org; Doniger, David;

Joanne.Spalding@sierraclub.org

Cc: Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov

Subject: RE: Boiler NSPS settlement modification

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Thanks,

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From: Michael Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Wednesday, June 01, 2011 11:09 AM  
To: Morgan Costello; vpatton@environmentaldefense.org; David Doniger; Joanne.Spalding@sierraclub.org; Gunter, David (ENRD)  
Cc: Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov  
Subject: RE: Boiler NSPS settlement modification

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>>> "Doniger, David" <ddoniger@nrdc.org> 5/31/2011 7:06 PM >>>

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From: Gunter, David (ENRD) [mailto:David.Gunter2@usdoj.gov]  
Sent: Tuesday, May 31, 2011 10:14 AM  
To: Doniger, David; Joanne.Spalding@sierraclub.org; vpatton@environmentaldefense.org;  
michael.myers@ag.ny.gov; morgan.costello@ag.ny.gov  
Cc: Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov  
Subject: Boiler NSPS settlement modification

Dear counsel,

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Regards,

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Appellate Section

Environment and Natural Resources Division

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950 Pennsylvania Ave, NW

Washington, DC 20530

202-514-3785

David.Gunter2@usdoj.gov

**To:** "Michael Myers" [Michael.Myers@ag.ny.gov]; vpatton@environmentaldefense.org>; "David Doniger" [ddoniger@nrdc.org]; David Doniger" [ddoniger@nrdc.org]; Joanne.Spalding@sierraclub.org>; "David (ENRD) Gunter" [David.Gunter2@usdoj.gov]; David (ENRD) Gunter" [David.Gunter2@usdoj.gov]  
**Cc:** Scott Jordan/DC/USEPA/US@EPA; Elliott Zenick/DC/USEPA/US@EPA[]; Iliott Zenick/DC/USEPA/US@EPA[]  
**From:** "Morgan Costello"  
**Sent:** Tue 6/7/2011 12:25:03 PM  
**Subject:** RE: Boiler NSPS settlement modification

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Morgan A. Costello  
Assistant Attorney General  
NYS Office of the Attorney General  
Environmental Protection Bureau  
The Capitol  
Albany, NY 12224-0341  
(518) 473-5843  
(518) 473-2534 (FAX)  
morgan.costello@ag.ny.gov

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Sent: Thursday, June 02, 2011 10:03 AM

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From: Gunter, David (ENRD) [<mailto:David.Gunter2@usdoj.gov>]  
Sent: Tuesday, May 31, 2011 10:14 AM  
To: Doniger, David; [Joanne.Spalding@sierraclub.org](mailto:Joanne.Spalding@sierraclub.org);  
[vpattton@environmentaldefense.org](mailto:vpattton@environmentaldefense.org); [michael.myers@ag.ny.gov](mailto:michael.myers@ag.ny.gov);  
[morgan.costello@ag.ny.gov](mailto:morgan.costello@ag.ny.gov)  
Cc: [Jordan.Scott@epamail.epa.gov](mailto:Jordan.Scott@epamail.epa.gov); [Zenick.Elliott@epamail.epa.gov](mailto:Zenick.Elliott@epamail.epa.gov)  
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Appellate Section

Environment and Natural Resources Division

United States Department of Justice

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202-514-3785

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**To:** "Morgan Costello" [Morgan.Costello@ag.ny.gov]; Michael Myers" [Michael.Myers@ag.ny.gov]; vpatton@environmentaldefense.org>; "David Doniger" [ddoniger@nrdc.org]; David Doniger" [ddoniger@nrdc.org]; Joanne.Spalding@sierraclub.org>[]  
**Cc:** Scott Jordan/DC/USEPA/US@EPA; Elliott Zenick/DC/USEPA/US@EPA[]; lliott Zenick/DC/USEPA/US@EPA[]  
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Thanks,  
Dave Gunter

-----Original Message-----

From: Morgan Costello [mailto:Morgan.Costello@ag.ny.gov]  
Sent: Tuesday, June 07, 2011 8:25 AM  
To: Michael Myers; vpatton@environmentaldefense.org; David Doniger; Joanne.Spalding@sierraclub.org; Gunter, David (ENRD)  
Cc: Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov  
Subject: RE: Boiler NSPS settlement modification

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Environmental Protection Bureau  
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To: Gunter, David (ENRD); Michael Myers; Morgan Costello;  
vpatton@environmentaldefense.org; Joanne.Spalding@sierraclub.org  
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**Cc:** Scott Jordan/DC/USEPA/US@EPA;Elliott Zenick/DC/USEPA/US@EPA[]; lliott Zenick/DC/USEPA/US@EPA[]  
**From:** "Gunter, David (ENRD)"  
**Sent:** Mon 6/13/2011 1:10:19 PM  
**Subject:** RE: Boiler NSPS settlement modification

I received word over the weekend that we have final approval from DOJ. I do still need to collect signatures from everyone, so please forward those at your earliest convenience, so we can have them all before anyone makes a public statement. Scanned signatures are fine; I will collate them and send everyone a final copy of the agreement modification. I don't know that we have plan for any EPA announcements, but EPA has notified its press office to be prepared for inquiries.

Dave Gunter

-----Original Message-----

**From:** Doniger, David [mailto:ddoniger@nrdc.org]  
**Sent:** Sunday, June 12, 2011 5:39 PM  
**To:** Gunter, David (ENRD); Morgan Costello; Michael Myers; vpatton@environmentaldefense.org; Joanne.Spalding@sierraclub.org  
**Cc:** Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov  
**Subject:** RE: Boiler NSPS settlement modification

Dave,

Any update on the timing of approval and announcement?

David

David D. Doniger  
Policy Director, Climate Center  
Natural Resources Defense Council  
1200 New York Ave., NW  
Washington, DC 20005  
Phone: (202) 289-2403  
Cell: (202) 321-3435  
Fax: (202) 789-0859  
ddoniger@nrdc.org  
on the web at [www.nrdc.org](http://www.nrdc.org)  
read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

-----Original Message-----

**From:** Gunter, David (ENRD) [mailto:David.Gunter2@usdoj.gov]  
**Sent:** Tuesday, June 07, 2011 8:27 AM  
**To:** Morgan Costello; Michael Myers; vpatton@environmentaldefense.org; Doniger, David; Joanne.Spalding@sierraclub.org  
**Cc:** Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov  
**Subject:** RE: Boiler NSPS settlement modification

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Thanks,  
Dave Gunter

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Sent: Tuesday, June 07, 2011 8:25 AM  
To: Michael Myers; vpatton@environmentaldefense.org; David Doniger; Joanne.Spalding@sierraclub.org; Gunter, David (ENRD)  
Cc: Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov  
Subject: RE: Boiler NSPS settlement modification

All of the states have now signed off on the modification. We have some signature block edits, which we will forward to you later this morning.

Morgan A. Costello  
Assistant Attorney General  
NYS Office of the Attorney General  
Environmental Protection Bureau  
The Capitol  
Albany, NY 12224-0341  
(518) 473-5843  
(518) 473-2534 (FAX)  
morgan.costello@ag.ny.gov

>>> "Gunter, David (ENRD)" <David.Gunter2@usdoj.gov> 6/3/2011 9:22 AM

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Thanks, David. My initial view is that the edits you propose are fine, so New York should let us know the states' view of the draft that you circulated.

EPA is interested in moving quickly to completion on this. After we have approval from the states, the next step is concurrence within DOJ, which I hope to expedite. When we have DOJ approval, I will collect signatures from all parties by PDF and circulate a final copy with signatures appended. It will be official at that point – no public comment period is necessary – but publicity is a separate question. I recommend that we keep this quiet until it is finalized and then reconvene on a call to discuss options for making the modification public.

Dave Gunter

From: Doniger, David [mailto:ddoniger@nrdc.org]  
Sent: Thursday, June 02, 2011 6:10 PM

To: Gunter, David (ENRD); Michael Myers; Morgan Costello;  
vpatton@environmentaldefense.org; Joanne.Spalding@sierraclub.org  
Cc: Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov  
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Dave,

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As for next steps, how do you propose to collect signatures? When would you want to finalize this? And since this is not going to be filed with the court, what is the mechanism going to be for making it official and public?

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Subject: RE: Boiler NSPS settlement modification

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Sent: Wednesday, June 01, 2011 11:09 AM  
To: Morgan Costello; vpatton@environmentaldefense.org; David Doniger; Joanne.Spalding@sierraclub.org; Gunter, David (ENRD)  
Cc: Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov  
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Dave, NY concurs with the comments in David's draft. As they are consistent with the revision concept that Morgan and I described to the other states, I expect that the other states will be okay with the draft as revised also. I've marked up David's revised draft to incorporate up-to-date signature block info for the states. Let us know how you'd like to proceed and what your proposed deadline is for signing the revised agreement (as you may recall, it usually takes some time for all of the states to get the necessary approvals). Thanks.

>>> "Doniger, David" <ddoniger@nrdc.org> 5/31/2011 7:06 PM >>>

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From: Gunter, David (ENRD) [mailto:David.Gunter2@usdoj.gov]  
Sent: Tuesday, May 31, 2011 10:14 AM  
To: Doniger, David; Joanne.Spalding@sierraclub.org;  
vpatton@environmentaldefense.org; michael.myers@ag.ny.gov;  
morgan.costello@ag.ny.gov  
Cc: Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov  
Subject: Boiler NSPS settlement modification

Dear counsel,

Attached please find a draft of the modification that we discussed to the Boiler NSPS agreement. We look forward to receiving your approval or comments. Thank you very much for accommodating us in this matter.

Regards,

David Gunter

Appellate Section

Environment and Natural Resources Division

United States Department of Justice

950 Pennsylvania Ave, NW

Washington, DC 20530

202-514-3785

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**To:** David.Gunter2@usdoj.gov[David.Gunter2@usdoj.gov];  
Morgan.Costello@ag.ny.gov>;[michael.myers@ag.ny.gov];  
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Joanne.Spalding@sierraclub.org>[]  
**Cc:** Scott Jordan/DC/USEPA/US@EPA;Elliott Zenick/DC/USEPA/US@EPA;Patricia  
Embrey/DC/USEPA/US@EPA[]; Elliott Zenick/DC/USEPA/US@EPA;Patricia  
Embrey/DC/USEPA/US@EPA[]; atricia Embrey/DC/USEPA/US@EPA[]  
**From:** "Doniger, David"  
**Sent:** Mon 6/13/2011 3:44:17 PM  
**Subject:** Re: Boiler NSPS settlement modification

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David Doniger, NRDC  
(202) 321-3435  
Sent from Blackberry

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To: Doniger, David; Morgan Costello <Morgan.Costello@ag.ny.gov>; Michael Myers  
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<Zenick.Elliott@epamail.epa.gov>; Embrey.Patricia@epamail.epa.gov  
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Subject: RE: Boiler NSPS settlement modification

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Sent: Tuesday, May 31, 2011 10:14 AM  
To: Doniger, David; Joanne.Spalding@sierraclub.org;  
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Appellate Section

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**To:** "Michael Myers" [Michael.Myers@ag.ny.gov];  
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David.Gunter2@usdoj.gov>[]  
**Cc:** Patricia Embrey/DC/USEPA/US@EPA; Scott Jordan/DC/USEPA/US@EPA; Elliott  
Zenick/DC/USEPA/US@EPA[]; cott Jordan/DC/USEPA/US@EPA; Elliott  
Zenick/DC/USEPA/US@EPA[]; lliott Zenick/DC/USEPA/US@EPA[]  
**From:** "Morgan Costello"  
**Sent:** Mon 6/13/2011 6:12:14 PM  
**Subject:** Re: Boiler NSPS settlement modification  
[Settlement Agreement Modification State Signature Pages.pdf](#)

Dave: Attached is a PDF of the state signature pages. Please keep us posted on when EPA/DOJ plans to make the modification public.

Thanks,

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Environmental Protection Bureau  
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signatures from all parties by PDF and circulate a final copy with  
signatures appended. It will be official at that point – no public  
comment period is necessary – but publicity is a separate question.  
I  
recommend that we keep this quiet until it is finalized and then  
reconvene on a call to discuss options for making the modification  
public.

Dave Gunter

From: Doniger, David [mailto:ddoniger@nrdc.org]  
Sent: Thursday, June 02, 2011 6:10 PM  
To: Gunter, David (ENRD); Michael Myers; Morgan Costello;  
vpatton@environmentaldefense.org; Joanne.Spalding@sierraclub.org  
Cc: Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov  
Subject: RE: Boiler NSPS settlement modification

Dave,

The environmental petitioners are OK with this draft, with the  
correction of a couple of typos and small wording issues that we've  
spotted in a final read (see attached). I am counting on NY to let  
you  
know for the states.

As for next steps, how do you propose to collect signatures? When would you want to finalize this? And since this is not going to be filed with the court, what is the mechanism going to be for making it official and public?

David

David D. Doniger

Policy Director, Climate Center

Natural Resources Defense Council

1200 New York Ave., NW

Washington, DC 20005

Phone: (202) 289-2403

Cell: (202) 321-3435

Fax: (202) 789-0859

[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)

on the web at [www.nrdc.org](http://www.nrdc.org) <<http://www.nrdc.org>>

read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

From: Gunter, David (ENRD) [<mailto:David.Gunter2@usdoj.gov>]  
Sent: Thursday, June 02, 2011 10:03 AM  
To: Michael Myers; Morgan Costello; [vpatton@environmentaldefense.org](mailto:vpatton@environmentaldefense.org);  
Doniger, David; Joanne.Spalding@sierraclub.org  
Cc: Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov  
Subject: RE: Boiler NSPS settlement modification

Everyone: Thanks for your comments and changes. Weve accepted all of them except one: In the Whereas clause where you suggested we state that "EPA remains committed" to the final dates, we would prefer slightly softer language that states that the parties desire to give EPA

more time to consider public comments "without any change to" the final dates. A draft reflecting these changes is attached. Please let us know whether this draft is acceptable. If it is OK with everyone (including all states), we can go ahead and get DOJ approval to sign the modification.

Thanks,

Dave

From: Michael Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Wednesday, June 01, 2011 11:09 AM  
To: Morgan Costello; vpatton@environmentaldefense.org; David Doniger; Joanne.Spalding@sierraclub.org; Gunter, David (ENRD)  
Cc: Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov  
Subject: RE: Boiler NSPS settlement modification

Dave, NY concurs with the comments in David's draft. As they are consistent with the revision concept that Morgan and I described to the other states, I expect that the other states will be okay with the draft as revised also. I've marked up David's revised draft to incorporate up-to-date signature block info for the states. Let us know how you'd like to proceed and what your proposed deadline is for signing the revised agreement (as you may recall, it usually takes some time for all of the states to get the necessary approvals). Thanks.

>>> "Doniger, David" <ddoniger@nrdc.org> 5/31/2011 7:06 PM >>>

Dave,

The draft you sent us earlier today is a good start; attached are a few edits that we would propose to make. Please let us know if these are acceptable. If you'd like to discuss them with me by phone, let me know.

David

David D. Doniger

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Natural Resources Defense Council

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read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

From: Gunter, David (ENRD) [mailto:David.Gunter2@usdoj.gov]

Sent: Tuesday, May 31, 2011 10:14 AM

To: Doniger, David; Joanne.Spalding@sierraclub.org;  
vpatton@environmentaldefense.org; michael.myers@ag.ny.gov;  
morgan.costello@ag.ny.gov

Cc: Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov

Subject: Boiler NSPS settlement modification

Dear counsel,

Attached please find a draft of the modification that we discussed to the Boiler NSPS agreement. We look forward to receiving your approval or comments. Thank you very much for accommodating us in this matter.

Regards,

David Gunter

Appellate Section

Environment and Natural Resources Division

United States Department of Justice

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202-514-3785

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Environmental Protection Bureau  
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Augusta, Maine 04333-0006

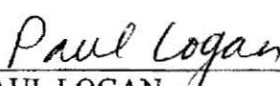
*Counsel for State of Maine*

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JUDITH ANN MOORE  
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*Counsel for State of Delaware*

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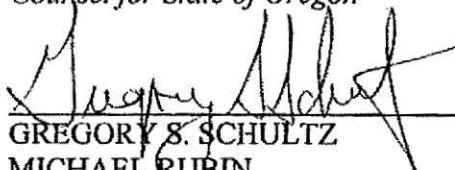
*Counsel for State of New Mexico*

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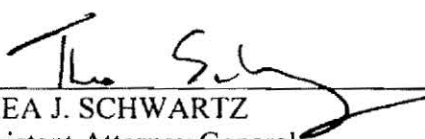
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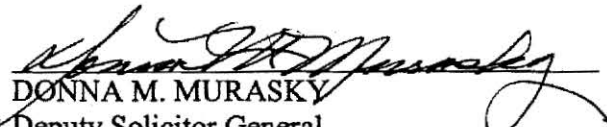
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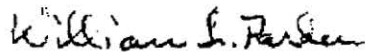
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DATE: June 9, 2011

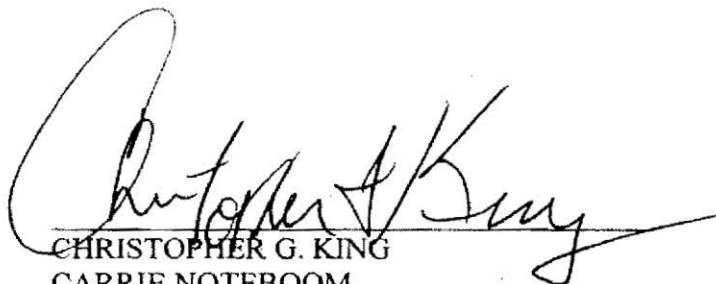


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6/13/2011



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**To:** "Doniger, David" [ddoniger@nrdc.org];  
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**Cc:** Scott Jordan/DC/USEPA/US@EPA;Elliott Zenick/DC/USEPA/US@EPA;"Lorenzen,  
Thomas (ENRD)" [Thomas.Lorenzen@usdoj.gov]; lliott Zenick/DC/USEPA/US@EPA;"Lorenzen,  
Thomas (ENRD)" [Thomas.Lorenzen@usdoj.gov]; Lorenzen, Thomas (ENRD)"  
[Thomas.Lorenzen@usdoj.gov]  
**From:** "Gunter, David (ENRD)"  
**Sent:** Wed 3/2/2011 8:31:09 PM  
**Subject:** Boiler NSPS settlement -- final notice of consent  
APPELLATE #256987-v1-Boiler NSPS -- Finality letter.PDF

Dear counsel:

Attached please find a letter indicating the United States' consent to the settlement in the potential Boiler NSPS litigation, after consideration of public comments. Since I do not have a full e-mail list for the state petitioners, I would appreciate if one of you would forward this letter to your petitioner group. Please contact me if you have any questions.

Regards,

David Gunter

Appellate Section

Environment and Natural Resources Division

United States Department of Justice

950 Pennsylvania Ave, NW

Washington, DC 20530

202-514-3785

David.Gunter2@usdoj.gov



U.S. Department of Justice

Environment and Natural Resources Division

Environmental Defense Section  
P.O. Box 23986  
L'Enfant Plaza Station  
Washington, DC 20026-3986

Telephone (202) 514-2219  
Facsimile (202) 514-8865

**VIA E-MAIL**

March 2, 2011

TO: Counsel of record for Environmental and State Petitioners

Re: Final notice of consent to settlement

Dear counsel:

I write to inform you that the United States will not withdraw or withhold its consent to the Settlement Agreement signed on December 21, 2010, concerning EPA's actions in response to the remand in *State of New York v. EPA*, No. 06-1322.

As provided in Paragraph 14 of the Settlement Agreement, EPA has completed a public comment process for this Settlement Agreement under docket number EPA-HQ-OGC-2010-1057. The Attorney General and the Administrator of EPA have concluded, after review of public comments, that those comments do not disclose facts or considerations which indicate that the settlement is improper, inadequate, or inconsistent with the requirements of the Clean Air Act.

Therefore, by its terms, the Settlement Agreement is considered final as of March 2, 2011.

Sincerely,

/s/ David Gunter

David Gunter  
Trial Attorney  
Environment and Natural Resources Division  
United States Department of Justice

**To:** "egroten@velaw.com" [egroten@velaw.com]; 'peter.glaser@troutmansanders.com'" [peter.glaser@troutmansanders.com]; 'pbarmeyer@kslaw.com'" [pbarmeyer@kslaw.com]; 'awood@hunton.com'" [awood@hunton.com]; 'jsuttles@selcnc.org'" [jsuttles@selcnc.org]; 'aweeks@catf.us'" [aweeks@catf.us]; 'bbrownell@hunton.com'" [bbrownell@hunton.com]; 'sean@donahuegoldberg.com'" [sean@donahuegoldberg.com]; 'blongstreth@nrdc.org'" [blongstreth@nrdc.org]; 'nfichthorn@hunton.com'" [nfichthorn@hunton.com]; 'hnickel@hunton.com'" [hnickel@hunton.com]; 'jeff.holmstead@bgllp.com'" [jeff.holmstead@bgllp.com]; 'john.riley@bgllp.com'" [john.riley@bgllp.com]; 'chris.thiele@bgllp.com'" [chris.thiele@bgllp.com]; 'jmarwell@velaw.com'" [jmarwell@velaw.com]; 'dschroeder@catf.us'" [dschroeder@catf.us]; 'michael.higgins@troutmansanders.com'" [michael.higgins@troutmansanders.com]; 'sandra.snyder@bgllp.com'" [sandra.snyder@bgllp.com]; 'jfortuna@kslaw.com'" [jfortuna@kslaw.com]; 'joanne.spalding@sierraclub.org'" [joanne.spalding@sierraclub.org]; 'george.sugiyama@troutmansanders.com'" [george.sugiyama@troutmansanders.com]  
**Cc:** Howard Hoffman/DC/USEPA/US@EPA; Elliott Zenick/DC/USEPA/US@EPA[]; Iliott Zenick/DC/USEPA/US@EPA[]  
**From:** "Lynk, Brian (ENRD)"  
**Sent:** Sat 7/21/2012 1:01:25 AM  
**Subject:** Motion for two-week extension in Las Brisas Energy Center, LLC v. EPA, et al, 12-1248 & consolidated (D.C. Circuit)

[mime.htm](#)

[ENV DEFENSE-#608669-v1-Las Brisas \(DC Cir\) EPA s Unopp Mot for Two-Week\\_Extension.PDF](#)

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12-1248  
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Environmental Defense Section

U.S. Department of Justice

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'nathan.matthews@sierraclub.org'  
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Regards,

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'jsuttles@selcnc.org'; 'aweeks@catf.us'; 'bbrownell@hunton.com'; 'thgeorge.sugiyama@troutmansanders.com';  
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'dschroeder@catf.us'; 'michael.higgins@troutmansanders.com'; 'sandra.snyder@bgllp.com'; 'jfortuna@kslaw.com'  
Cc: 'Howard Hoffman'  
Subject: Motion for two-week extension in Las Brisas Energy Center, LLC v. EPA, et al, 12-1248 & consolidated (D.C. Circuit)

Counsel,

EPA presently anticipates that it will likely file a motion to dismiss these consolidated petitions for review (challenging EPA's proposed new source performance standards for GHG emissions, 77 Fed. Reg. 22,392 (Apr. 13, 2012)) on one or more jurisdictional grounds. We plan to move by this evening for a two-week extension of the July 27 dispositive motion deadline until August 10, 2012, to ensure there is adequate time to prepare the motion and coordinate with management and the client agency before filing. We will not seek to extend the deadline for filing EPA's certified index of the record for the proposed rule, as we expect to have that on file by July 27.

The extension is necessitated by the complex and unusual jurisdictional issues presented in this matter and the need to coordinate our positions on these issues and the draft motion itself with management reviewers before it is filed. I am the assigned DOJ attorney and am dealing with several other matters that also involve significant court-imposed deadlines on July 27 and 30. Because I will be on vacation the week of July 30th, the two-week extension we plan to seek in this case effectively will only equate to one additional week to prepare and file a dispositive motion.

Please let me know if your clients take any position on this extension. We would willing to request a specific date for dispositive motion responses to be due, as a condition of non-opposition. Under the Circuit Rules you ordinarily have 10 days to respond to a motion, but if you anticipate needing more time that would not be a problem.

Regards,

Brian

Brian H. Lynk

Trial Attorney

Environmental Defense Section

U.S. Department of Justice

(202) 514-6187

From: [ecfnoticing@cadc.uscourts.gov](mailto:ecfnoticing@cadc.uscourts.gov) [mailto:[ecfnoticing@cadc.uscourts.gov](mailto:ecfnoticing@cadc.uscourts.gov)]

Sent: Thursday, July 12, 2012 7:20 PM

To: Lynk, Brian (ENRD)



Subject: 12-1248 Las Brisas Energy Center, LLC v. EPA, et al "Certificate as to Parties, Rulings and Related Cases Filed" (EPA-77FR22392)

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United States Court of Appeals for District of Columbia Circuit

Notice of Docket Activity

The following transaction was entered on 07/12/2012 at 7:19:53 PM EDT and filed on 07/12/2012

Case Name:

Las Brisas Energy Center, LLC v. EPA, et al

Case Number:

12-1248

Document(s):

Document(s)

Docket Text:

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES FILED [1383426] by Las Brisas Energy Center, LLC in 12-1248 [Service Date: 07/12/2012 ] [12-1248, 12-1251, 12-1252, 12-1253, 12-1254, 12-1257] (Riley, John)

Notice will be electronically mailed to:

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Mr. John L Fortuna: jfortuna@kslaw.com

The following document(s) are associated with this transaction:

Document Description: Certificate as to Parties, Rulings and Related Cases Filed

Original Filename: Las Brisas Certificate of Parties.pdf

Electronic Document Stamp:

[STAMP acecfStamp\_ID=1109186823 [Date=07/12/2012] [FileNumber=1383426-0]

[bc832988d6566e684993192d68974d411f889140d13fe9f82efe00d8f756b64fe12bc2f9e9244c552c92607cf81c7cfb  
cc43629eea37f7b2568eb433c628998b]]

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Thank You.



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**Sent:** Friday, July 20, 2012 7:20 AM

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**Cc:** 'Howard Hoffman'

**Subject:** Motion for two-week extension in Las Brisas Energy Center, LLC v. EPA, et al, 12-1248 & consolidated (D.C. Circuit)

Counsel,



EPA presently anticipates that it will likely file a motion to dismiss these consolidated petitions for review (challenging EPA's proposed new source performance standards for GHG emissions, 77 Fed. Reg. 22,392 (Apr. 13, 2012)) on one or more jurisdictional grounds. We plan to move by this evening for a two-week extension of the July 27 dispositive motion deadline until August 10, 2012, to ensure there is adequate time to prepare the motion and coordinate with management and the client agency before filing. We will not seek to extend the deadline for filing EPA's certified index of the record for the proposed rule, as we expect to have that on file by July 27.

The extension is necessitated by the complex and unusual jurisdictional issues presented in this matter and the need to coordinate our positions on these issues and the draft motion itself with management reviewers before it is filed. I am the assigned DOJ attorney and am dealing with several other matters that also involve significant court-imposed deadlines on July 27 and 30. Because I will be on vacation the week of July 30<sup>th</sup>, the two-week extension we plan to seek in this case effectively will only equate to one additional week to prepare and file a dispositive motion.

Please let me know if your clients take any position on this extension. We would willing to request a specific date for dispositive motion responses to be due, as a condition of non-opposition. Under the Circuit Rules you ordinarily have 10 days to respond to a motion, but if you anticipate needing more time that would not be a problem.

Regards,

Brian

Brian H. Lynk

Trial Attorney

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**Sent:** Thursday, July 12, 2012 7:20 PM

**To:** Lynk, Brian (ENRD)

**Subject:** 12-1248 Las Brisas Energy Center, LLC v. EPA, et al "Certificate as to Parties, Rulings and



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**United States Court of Appeals for District of Columbia Circuit**

**Notice of Docket Activity**

The following transaction was entered on 07/12/2012 at 7:19:53 PM EDT and filed on 07/12/2012

**Case Name:** Las Brisas Energy Center, LLC v. EPA,  
et al

**Case** 12-1248

**Number:**

**Document(s):** Document(s)

**Docket Text:**

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES FILED [1383426] by Las Brisas Energy Center, LLC in 12-1248 [Service Date: 07/12/2012 ] [12-1248, 12-1251, 12-1252, 12-1253, 12-1254, 12-1257] (Riley, John)

**Notice will be electronically mailed to:**

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The following document(s) are associated with this transaction:

**Document Description:** Certificate as to Parties, Rulings and Related Cases Filed

**Original Filename:** Las Brisas Certificate of Parties.pdf

**Electronic Document Stamp:**

[STAMP acecfStamp\_ID=1109186823 [Date=07/12/2012] [FileNumber=1383426-0]

[bc832988d6566e684993192d68974d411f889140d13fe9f82efe00d8f756b64fe12bc2f9e9244c552c92607cf81c7c]

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UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

_____	)	
	)	
LAS BRISAS ENERGY CENTER, LLC,	)	
	)	
Petitioner,	)	
	)	No. 12-1248 (and consolidated
v.	)	cases)
	)	
UNITED STATES ENVIRONMENTAL	)	
PROTECTION AGENCY AND LISA	)	
PEREZ JACKSON,	)	
	)	
Respondents.	)	
_____	)	

**RESPONDENTS' UNOPPOSED MOTION FOR TWO-WEEK EXTENSION  
OF DEADLINES FOR DISPOSITIVE MOTIONS AND RESPONSES**

Respondents the United States Environmental Protection Agency ("EPA") and EPA Administrator Lisa Perez Jackson (collectively, "EPA") hereby move the Court for an order granting: (1) a two-week extension until Friday, August 10, 2012, of the current Court-ordered deadline for the parties to file dispositive motions; and (2) a corresponding two-week extension until Thursday, September 6, 2012, of the deadline under the Circuit Rules for filing responses to dispositive motions. The six Petitioners in these consolidated cases all have confirmed through counsel that they do not oppose this motion, and it also has the consent of the movant-Intervenors. In support of this motion, EPA further avers as follows:

1. This matter involves consolidated petitions for review challenging EPA's proposed "Standards of Performance for Greenhouse Gas Emissions for new Stationary Sources: Electricity Utility Generating Units" ("GHG NSPS"), which were published in the Federal Register on April 13, 2012. See 77 Fed. Reg. 22,392.

2. A total of six petitions have been filed by the following entities: Las Brisas Energy Center, LLC, Case No. 12-1248; White Stallion Energy Center, LLC, Case No. 12-1251; Utility Air Regulatory Group, Case No. 12-1252; Sunflower Electric Power Corp., Case No. 12-1253; Tri-State Generation and Transmission Association Inc., Case No. 12-1254; and Power4Georgians, LLC, Case No. 12-1257. All petitions were consolidated by this Court on its own motion by an Order dated June 21, 2012.

3. On July 11, 2012, the following entities jointly moved to intervene in the case in support of Respondents: Natural Resources Defense Council, Sierra Club, Environmental Defense Fund, Conservation Law Foundation, Fall-Line Alliance for a Clean Environment, Ogeechee Riverkeeper, and Southern Alliance for Clean Energy. That motion remains pending at this time.

4. Petitioner Las Brisas Energy Center timely filed its Certificate as to Parties, Rulings, and Related Cases, its Statement of Issues to be Raised, and its other required initial filings on July 12, 2012. Pursuant to the consolidation order,

the remaining Petitioners are required to file their Docketing Statement Forms and Statements of Issues to be Raised by Monday, July 23, 2012.

5. Under the Court's initial scheduling order, EPA is due to file the certified index to the administrative record by Friday, July 27, 2012. EPA expects to timely file the certified index, and accordingly it does not seek an extension of that deadline.

6. The initial scheduling order also requires the parties to file dispositive motions, if any, by July 27, 2012. EPA presently anticipates that it will likely file a motion to dismiss the petitions on one or more jurisdictional grounds. However, EPA has concluded that a two-week extension of the deadline until August 10, 2012, is necessary to ensure that there will be adequate time for its Department of Justice ("DOJ") counsel to prepare the motion and to coordinate the review of the draft both with DOJ management and with the client agency before filing the motion.

7. This extension is necessitated by the complex and unusual jurisdictional issues presented in this matter, as well as the need to internally coordinate the government's positions on these issues and the review of the draft motion itself with management-level reviewers at DOJ and EPA before it is filed. The assigned DOJ counsel also has several other matters with significant court-ordered deadlines on July 27 or July 30, 2012 (i.e., the same or virtually the same



date as the dispositive motions deadline in this case) and will be unavailable due to long-scheduled travel during the week ending August 3. EPA seeks a modest extension of only two weeks in order to minimize any resulting delay in the proceedings. There is not yet a schedule for merits briefing or an oral argument date in this matter; thus, granting this motion will not require the Court to alter any merits briefing deadlines, nor will it require the Court to re-schedule oral argument.

8. In fairness to Petitioners, and to avoid possible schedule conflicts that those parties may have in mid-to-late August, EPA also requests that the deadline for parties to respond to dispositive motions be subject to a corresponding two-week extension. Under the Circuit Rules (and assuming service by means other than hand delivery), if dispositive motions are made due on August 10, 2012, then responses to such motions will be due on August 23, 2012. EPA requests that the Court extend this deadline by two weeks until Thursday, September 6, 2012.

9. Petitioners White Stallion Energy Center, LLC, Utility Air Regulatory Group, Sunflower Electric Power Corp, Tri-State Generation and Transmission Association Inc., and Power4Georgians, LLC, all have stated through counsel that they do not oppose this motion provided that it requests the same two-week extension for responses to dispositive motions as it does for the initial filing of dispositive motions. Petitioner Las Brisas Energy Center, LLC, also has confirmed that it does not oppose either the extension until August 10, 2012 for dispositive

motions or the extension until September 6, 2012 for responses to dispositive motions.

10. The movant-Intervenors have confirmed through counsel that they consent to this motion.

11. For the foregoing reasons, and based on its consultation with counsel for Petitioners and the movant-Intervenors, EPA respectfully requests that the Court enter an order: (1) extending until Friday, August 10, 2012, the deadline for parties to file dispositive motions; and (2) extending until Thursday, September 6, 2012, the deadline for parties to file responses to dispositive motions.

Respectfully submitted,

IGNACIA S. MORENO  
Assistant Attorney General  
Environment and Natural Resources Division

Dated: July 21, 2012

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### **CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Respondent's Unopposed Motion for Two-Week Extension of Deadlines for Dispositive Motions and Responses has been filed with the Clerk of the Court this 21st day of July 2012 using the CM/ECF System, through which true and correct copies will be served electronically on all counsel of record that are registered to use CM/ECF, including each of the counsel listed below.

Dated: July 21, 2012

/s/ Brian H. Lynk  
Brian H. Lynk



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ENV DEFENSE-#610840-v1-Las Brisas (DC Cir) As-  
filed EPA Motion to Dismiss Petitions.PDF  
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Ben,

Attached is a courtesy copy of the Motion to Dismiss EPA filed today.

Regards,

Brian

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To: Lynk, Brian (ENRD)  
Subject: 12-1248 Las Brisas Energy Center, LLC v. EPA, et al "Motion Filed" (EPA-77FR22392)

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United States Court of Appeals for District of Columbia Circuit

Notice of Docket Activity

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12-1248

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MOTION filed [1388445] by EPA and Lisa Perez Jackson in 12-1248, EPA in 12-1252, 12-1253, 12-1254, 12-1251, 12-1257 to dismiss case for lack of jurisdiction (Response to Motion served by mail due on 08/23/2012) [Service Date: 08/09/2012 by Email, CM/ECF NDA] Pages: 16-20. [12-1248, 12-1251, 12-1252, 12-1253, 12-1254, 12-1257] (Lynk, Brian)

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

_____	)	
	)	
LAS BRISAS ENERGY CENTER, LLC,	)	
	)	
Petitioner,	)	
	)	No. 12-1248 (and consolidated
v.	)	cases)
	)	
UNITED STATES ENVIRONMENTAL	)	
PROTECTION AGENCY and LISA	)	
PEREZ JACKSON,	)	
	)	
Respondents.	)	
_____	)	

**RESPONDENT EPA’S MOTION TO DISMISS PETITIONS FOR LACK OF  
SUBJECT-MATTER JURISDICTION**

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## **INTRODUCTION AND SUMMARY**

Respondents the United States Environmental Protection Agency (“EPA”) and EPA Administrator Lisa Perez Jackson (collectively, “EPA”) hereby move to dismiss these consolidated petitions for review of EPA’s *proposed* Clean Air Act rule regarding “Standards of Performance for Greenhouse Gas Emissions for New Statutory Sources: Electric Utility Generating Units.” See 77 Fed. Reg. 22,392 (Apr. 13, 2012) (the “Proposed Carbon Pollution Standard” or “Proposed Rule”). Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), very clearly limits this Court’s jurisdiction to review of *final* agency actions taken under the Act. Because the challenged publication is only a *proposed* rule, by definition it does not represent EPA’s final determination with respect to the matters addressed in the proposal. Indeed, while EPA could adopt the proposal, it also remains a possibility – until EPA makes a final determination – that the Agency could choose *not* to adopt the proposal. In either event, EPA will make its final determinations on these matters and will promulgate a final rule only after consideration of the public comments it has received on the Proposed Rule. See 42 U.S.C. § 7411(b)(1)(B); 77 Fed. Reg. at 22,392 (comments were due by June 12, 2012).

Petitioners seek to have the Court intervene prematurely at the outset of this statutorily-prescribed process, *before* EPA has had the opportunity to evaluate any information presented by Petitioners and other stakeholders and, in light of that

information, “promulgate . . . such standards with such modifications as [EPA] deems appropriate.” 42 U.S.C. § 7411(b)(1)(B). The Court should reject this invitation and dismiss the petitions for review. After the administrative process concludes, any remaining issues requiring judicial resolution may then be heard based on what EPA has actually *promulgated*, and based on a complete record.

## **I. STATUTORY AND REGULATORY BACKGROUND**

### **A. Standards of Performance under CAA Section 111**

The Clean Air Act (“CAA” or “Act”), enacted in 1970 and extensively amended in 1977 and 1990, provides a comprehensive program for controlling and improving the nation’s air quality through a combination of state and federal regulation. Section 111 of the Act, 42 U.S.C. § 7411, establishes a step-by-step process for controlling emissions of air pollutants from stationary sources. In the first step, EPA must list categories of stationary sources that the Administrator, in his or her judgment, finds “cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.” 42 U.S.C. § 7411(b)(1)(A). Once it has listed a source category, EPA then establishes “standards of performance” that apply to “new sources,” which are defined in the statute as “any stationary source, the construction or modification of which is commenced after the publication of regulations (or if earlier, proposed regulations) prescribing a standard of performance” for the relevant category. *Id.* § 7411(a)(2).



Standards of performance for new sources are sometimes referred to as “new source performance standards” or “NSPS.”

The Act defines a “standard of performance” as:

a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

Id. § 7411(a)(1). Although the standard is thus determined by ascertaining the best-performing emissions reduction system that has been adequately demonstrated in the applicable source category, the standard generally does not *mandate* the use of one specific technology to reduce emissions, and thus leaves new sources free to employ innovation in determining how they may most efficiently and cost-effectively meet an applicable standard of performance. See id. § 7411(b)(5).

Section 111 prescribes a specific process and timeline for proposing and then promulgating NSPS. First, after listing a category of sources, “the Administrator shall publish proposed regulations, establishing Federal standards of performance for new sources within such category.” Id. § 7411(b)(1)(B). Next, “[t]he Administrator shall afford interested persons an opportunity for written comment on such proposed regulations.” Id. Finally, “[a]fter considering such comments, [the Administrator] shall promulgate, within one year after such publication, such standards with such modifications as [s]he deems appropriate.”

Id. At least every eight years, the Administrator must review and, if appropriate, revise the standards. Id.

**B. Background Regarding Greenhouse Gas Regulation and the Litigation Preceding the Current Proposed Rule**

The Proposed Rule aims to reduce greenhouse gas (“GHG”) emissions from new fossil fuel-fired power plants by limiting emissions of carbon dioxide (CO<sub>2</sub>). 77 Fed. Reg. at 22,395. The Proposed Rule reflects a common-sense approach to greenhouse gas regulation, under which EPA proposes to focus initially on reducing emissions from the largest greenhouse gas emitters through measures that can be implemented at a reasonable cost. Id. Fossil fuel-fired power plants emit more greenhouse gases than any other stationary source category in the United States, including approximately 40 percent of all anthropogenic CO<sub>2</sub> emissions in the United States. Id. Moreover, individual new coal-fired power plants are among the largest individual new sources of greenhouse gas emissions. Id.

In 2009, EPA issued a finding that greenhouse gas air pollution may reasonably be anticipated to endanger Americans’ public health and welfare, now and in the future, by contributing to climate change. See “Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act” (“Endangerment Finding”), 74 Fed. Reg. 66,496 (Dec. 15, 2009). This Court upheld EPA’s Endangerment Finding in Coalition for Responsible Regulation, Inc. v. EPA, 684 F.3d 102 (D.C. Cir. 2012). See also Massachusetts v.

EPA, 549 U.S. 497, 529 (2007) (holding that greenhouse gases “unambiguous[ly]” may be regulated as an “air pollutant” under the CAA); American Electric Power Co., Inc. v. Connecticut, 131 S. Ct. 2527, 2538-40 (2011) (the CAA and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon dioxide emissions from fossil fuel-fired power plants).

As EPA subsequently stated in the preamble to this Proposed Rule, “[a]ction to reduce [greenhouse gas] emissions is warranted because, as the EPA stated in [the] Endangerment Finding, greenhouse gases endanger the public health and public welfare of current and future generations.” 77 Fed. Reg. at 22,395. The anthropogenic buildup of greenhouse gases in the atmosphere is “very likely (90 to 99 percent probability) the cause of most of the observed global warming over the last 50 years.” Id. (citing 74 Fed. Reg. at 66,518). Climate change is associated with a host of adverse effects that have already been observed or are projected to occur in the future including, but not limited to, “more frequent and intense heat waves, more severe wildfires, degraded air quality, heavier and more frequent downpours and flooding, increased drought, greater sea level rise and storm surge, more intense storms, harm to water resources, continued ocean acidification, harm to agriculture, and harm to wildlife and ecosystems.” 77 Fed. Reg. at 22,396.

The Endangerment Finding was the first of several greenhouse gas-related regulations that EPA promulgated sequentially, including: (1) the “Tailpipe Rule”

setting greenhouse gas emission standards for cars and light trucks; (2) the “Timing Rule”; and (3) the “Tailoring Rule,” the latter two rules phasing in the application of permitting requirements to stationary sources that emit greenhouse gases, including construction permits under the Prevention of Significant Deterioration of Air Quality (“PSD”) program, and operating permits under Title V of the Clean Air Act. These too were upheld in Coalition for Responsible Regulation. See generally 684 F.3d at 114-16, 126-49.

In 2006, prior to the Supreme Court’s holding in Massachusetts v. EPA that greenhouse gases meet the Act’s definition of “air pollutant,” EPA, in accordance with the eight-year review requirement, had promulgated revised standards of performance for power plants. Those standards, which did not address greenhouse gas emissions, were challenged in this Court. See 77 Fed. Reg. at 22,397. EPA subsequently obtained from this Court a voluntary remand for the purpose of administrative reconsideration in light of the holding in Massachusetts v. EPA. Id. EPA thereafter agreed to a timetable for issuing the current Proposed Rule “in response to threatened litigation over the EPA’s failure to act on the remand.” Id.

### **C. Summary of the Proposed Rule and Remaining Steps in the Section 111 Process**

In the Proposed Rule, EPA proposes to combine two groups of stationary sources that are presently listed in different categories – electric utility steam generating units, and combined cycle units that generate electricity for sale and

meet certain size criteria – into one new category of new sources for the purpose of controlling greenhouse gas emissions. 77 Fed. Reg. at 22,397-98. For this newly proposed category, EPA is proposing standards of performance that would require that all new fossil-fueled electricity generating units (“EGUs”) meet an electricity-output-based emission rate of 1,000 lb CO<sub>2</sub>/MWh of electricity generated on a gross basis. Id. at 22,398. The proposed emission rate is based on the demonstrated performance of natural gas combined cycle units, which are currently in wide use throughout the country, and are likely to be the predominant fossil fuel-fired technology for new electricity generation in the future. Id. EPA recognizes, however, that new coal-, coal refuse-, oil- and petroleum coke-fired EGUs could also meet this standard by employing carbon capture and storage (“CCS”) technology (also known as “carbon capture and sequestration,” id. at 22,392 n.1), and therefore EPA identified that approach as an alternative means of compliance. Id. at 22,398. While a coal-fired plant EGU with CCS technology may be more expensive to construct than a natural gas combined cycle unit, EPA expects the cost difference to decrease over time as CCS becomes a more mature and less expensive technology. Id. Most importantly, even in the absence of this rulemaking, “energy industry modeling forecasts uniformly predict that few, if any, new coal-fired power plants will be built in the foreseeable future” and that, instead, new natural-gas fired plants will predominate due to a number of

economic factors, “including the present and expected abundance and relatively low cost of natural gas.” Id. at 22,399. The Proposed Rule “is consistent with that trend[,] but, at the same time, . . . is not intended to affect that apparent trend.” Id.

EPA also stated that the standards of performance would *not* apply to several groups of sources. For purposes of this case, the most significant of these groups is the “transitional sources”; under the Proposed Rule, transitional sources are those that, in general, “have been issued a PSD permit by the date of proposal . . . and that commence construction within 12 months of the date of publication of this proposal in the Federal Register.” Id. at 22,400. The Proposed Rule also does not apply to sources that undertake modifications, those that are located outside the continental United States, those that do not meet designated size thresholds, or those that are subject to requirements under 42 U.S.C. § 7429. Id. at 22,401 and 22,405-06; see also id. at 22,426 (describing precedents in prior NSPS rules).

EPA specifically sought public comments on a variety of issues presented by the Proposed Rule, such as: (1) comments on the approach of combining two source categories for purposes of controlling greenhouse gas emissions, id. at 22,410; (2) comments on EPA’s proposal that “an endangerment finding and a cause-or-contribute-significantly finding” are not necessary to promulgate standards of performance for CO<sub>2</sub> emissions from EGUs, along with proposals in the alternative on this point, id. at 22,411; (3) comments on “all aspects of the

proposed standard of performance,” id. at 22,406; (4) comments regarding the list of sources EPA identified as “transitional” for purposes of the Proposed Rule, id. at 22,422-23; (5) comments on the appropriateness of a proposed “30-year averaging compliance option” to enable coal- and petroleum coke-fired EGUs that employ carbon capture and storage technology to more readily comply with the proposed standard of performance, as well as other “reasonable variations” of this proposed compliance option, id. at 22,398 and 22,406-07; and (6) a number of related questions regarding how such a compliance option may be implemented and how the 30-year averaging period may be enforced, and the potential need to extend this option to other fossil fuels besides coal and petroleum coke, id. at 22,406-07.

In addition to the above-noted and other specific requests for comment, EPA requested comments more generally “on all aspects of the proposed rulemaking” and made clear that “[a]ll significant comments received will be considered in the development and selection of the final rule.” Id. at 22,430. By the close of the public comment period, EPA had received more than *two million* comments, including *thousands* of substantively unique comments that EPA must evaluate. These include comments both supporting and objecting to the Proposed Rule and addressing all of the above-noted questions as well as many other issues.

Pursuant to 42 U.S.C. § 7411(b)(1)(B), “after considering [the] comments” on the Proposed Rule, the Administrator “shall promulgate . . . such standards [of

performance] with such modifications as [s]he deems appropriate.” Id. EPA is presently evaluating the comments it received and preparing responses to those comments, which would be included in the record for the final rule. As noted above, the statute provides that the final rule shall be promulgated “within one year after . . . publication” of the proposal. Id.

## **II. ON A MOTION TO DISMISS FOR LACK OF JURISDICTION, IT IS PETITIONERS’ BURDEN TO ESTABLISH THAT THE COURT HAS JURISDICTION.**

At all stages of the case, Petitioners bear the burden of demonstrating that subject-matter jurisdiction in fact exists. See Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994); cf. Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83, 94-95 (1998) (the court must satisfy itself that it has jurisdiction before considering the merits). Petitioners have not met, and cannot meet, that burden here.

## **III. ARGUMENT**

### **A. The Proposed Rule Is a Non-Final Action and Therefore Is Not Subject to Judicial Review.**

#### **1. The Proposed Rule is not a “promulgated standard of performance” within the meaning of 42 U.S.C. § 7607(b)(1).**

The Clean Air Act’s judicial review provision states, in pertinent part, that action “*promulgating . . . any standard of performance or requirement under* [42 U.S.C. § 7411],” or “any other . . . *final* action taken, by the Administrator under this chapter” is subject to review by this Court. 42 U.S.C. § 7607(b)(1) (emphasis



added); see also Acker v. EPA, 290 F.3d 892, 894 (7th Cir. 2002) (“We are . . . without jurisdiction unless the EPA action at issue falls within . . . section[] 7607(b)(1) [or a separate provision applicable only when EPA assesses or orders an administrative penalty]”). The Proposed Rule is not a “promulgat[ed] . . . standard of performance” within the meaning of the statute. The Clean Air Act’s general “rulemaking” provision in 42 U.S.C. § 7607(d) – which expressly applies to standards of performance under Section 111, id. § 7607(d)(1)(C) – makes a clear distinction between “proposed rules” and “promulgated rules.” “Proposed rules” are to be made available for public comment in the Federal Register and must include a notice specifying the period available for public comment. Id. § 7607(d)(3). “Promulgated rules,” in contrast, are only issued *after* the public comment period and must be accompanied, inter alia, by “an explanation of the reasons for any major changes in the promulgated rule from the proposed rule,” and “a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.” Id. § 7607(d)(6)(A)(ii), (B); see e.g., Northeast Maryland Waste Disposal Auth. v. EPA, 358 F.3d 936, 950 (D.C. Cir. 2004) (remanding, in part, because when EPA issued the promulgated rule it failed to respond to certain comments on the proposed rule). The Proposed Rule here obviously does not meet these criteria.

The text of Section 111 also makes a clear distinction between “proposed” and “promulgated” standards of performance. It provides that “[w]ithin one year” after listing a category of stationary sources, “the Administrator shall publish *proposed* regulations, establishing Federal standards of performance for new sources within such category.” 42 U.S.C. § 7411(b)(1)(B) (emphasis added). Then, *after* “afford[ing] interested persons an opportunity for written comment on such proposed regulations” and “[a]fter considering such comments,” the Administrator “shall *promulgate*, within one year after such publication, such standards with such modifications as he deems appropriate.” *Id.* (emphasis added). Thus, like the judicial review provision, Section 111 clearly defines “promulgated” standards as those issued following the period for public comment on the “proposed” standards, and reflecting the Administrator’s responses to those public comments. In short, it could not be clearer that the Proposed Rule is not a “promulgated . . . standard of performance” within the meaning of the Act.

**2. The Proposed Rule also does not constitute “other final agency action” within the meaning of the statute.**

Because the Proposed Rule is not a “promulgated” standard of performance, the only remaining question for purposes of determining its suitability for judicial review is whether it constitutes “other . . . final action of the Administrator” within the meaning of 42 U.S.C. § 7607(b)(1). This inquiry is governed by the familiar two-part test described in Bennett v. Spear, 520 U.S. 154 (1997): “First, the action

must mark the consummation of the agency’s decisionmaking process . . . it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.” Id. at 177-78 (internal quotations and citations omitted); see also Whitman v. American Trucking Ass’ns, 531 U.S. 457, 478 (2001) (holding that “the phrase ‘final action’ . . . bears the same meaning in [42 U.S.C. § 7607(b)(1)] that it does under the Administrative Procedure Act” and applying Bennett to determine whether implementation policy for a national ambient air quality standard was final action); American Petroleum Inst. (“API”) v. EPA, No. 10-1079, 2012 WL 2894566, at \*9-10 (July 17, 2012) (also applying Bennett).

Here, Petitioners cannot demonstrate that the first Bennett criterion is met, because the Proposed Rule clearly does not represent “the consummation of [the Administrator’s] decision-making process.” Unlike the Whitman and API cases cited above, where courts had to examine the underlying regulatory context to ascertain whether preamble statements should be understood to represent EPA’s “final word” on NAAQS implementation issues, here the answer to the finality question is a simple one – the process by which the Administrator promulgates standards of performance for new sources is prescribed by 42 U.S.C. §§ 7411(b) and 7607(d) as shown above, and EPA indisputably has not completed that process. The Proposed Rule is “interlocutory,” Bennett, 520 U.S. at 178, because

the Clean Air Act directs that it “shall” be followed within one year by a “promulgated” rule issued after consideration of public comments. 42 U.S.C. § 7411(b)(1)(B). It is also “tentative,” in that EPA has sought comments on all aspects of the Proposed Rule – including on questions that likely go to the heart of Petitioners’ challenges – *and EPA may modify its final action in any number of ways in response to those comments.* See 42 U.S.C. § 7411(b)(1)(B) (referring to “promulgation” of standards “with such modifications as [the Administrator] deems appropriate” following consideration of comments on the proposed rule); supra at 8-9 (listing examples of issues on which EPA has requested comment); 77 Fed. Reg. at 22,430-32 (additional issues). Indeed, hypothetically it would be well within EPA’s administrative discretion to issue a supplemental proposal, issue a modification to the Proposed Rule, or withdraw the Proposed Rule entirely, if the Administrator determined, after consideration of the comments, that such action was appropriate. Cf., e.g., Center for Auto Safety v. National Highway Traffic Safety Admin., 710 F.2d 842, 846-47 (D.C. Cir. 1983) (evaluating whether agency’s decision to terminate a rulemaking was ripe for review).<sup>1</sup> Thus, the

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<sup>1</sup> Petitioners cite, as evidence that the decision-making process is complete, EPA’s preamble statement that the 12-month time period it used to define the proposed group of “transitional sources” (*i.e.*, they must have begun construction within 12 months following publication of the Proposed Rule in the Federal Register) “would not be extended for any reason.” 77 Fed. Reg. at 22,422; see Las Brisas Petition at 5. However, Petitioners miss the larger point that EPA: (a) has not made a final decision to promulgate standards; (b) has not made a final decision regarding what

Proposed Rule *cannot* be regarded as – and EPA expressly did not intend the Proposed Rule to constitute – the Administrator’s “final” decision.

The second Bennett criterion also is not satisfied here, because the Proposed Rule does not “determine” rights or obligations or impose binding legal consequences. The *statute* – not the Proposed Rule – establishes the requirement that “[t]he term ‘new source’ means any stationary source, the construction or modification of which is commenced after the publication of regulations (or if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.” 42 U.S.C. § 7411(a)(2). Thus, *under the statute*, whenever EPA publishes proposed standards of performance for new sources in a source category, stationary sources in the category that commence construction after the publication date of the proposal have the *potential* to become subject to the standards *when they are promulgated*.<sup>2</sup> However, it is only the “promulgation” of standards (as proposed, or with revisions) that imposes a binding legal consequence on owners or operators of new sources, as Section 111(e) of the Clean Air Act makes clear: “After the effective date of standards of

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provisions such standards will contain; and (c) has not made a final decision about whether such standards will be inapplicable to the transitional sources or other sources noted above (supra at 8-9).

<sup>2</sup> As explained above, here EPA has stated that several groups of sources, including “transitional sources,” are not subject to the Proposed Rule. Supra at 8-9.

performance *promulgated* under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.” *Id.* § 7411(e) (emphasis added).

In short, until EPA makes a final decision to *promulgate* standards of performance, it has not created or imposed any new binding legal consequences or “determined” any new rights or obligations.<sup>3</sup> As of today, there is no standard of performance for greenhouse gas emissions applicable to and enforceable against “new” power plants. Rather, there is only a proposal.

EPA is not aware of any reported cases specifically addressing whether a proposed rule under the Clean Air Act is a “final action” – perhaps because, until now, the answer to that question seemed obvious. However, courts have held in

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<sup>3</sup> Petitioners note that “under the Clean Air Act’s NSPS program, any source yet to commence construction as of an NSPS *proposal date* is a ‘new source’ that must comply with the NSPS upon finalization”; as a result, according to Petitioners, EPA’s publication of the Proposed Rule has led to market uncertainty and stymied development projects. *Las Brisas* Petition at 3-4. Thus, they contend, the Proposed Rule “is immediately impactful.” *Id.* at 4. But this uncertainty is a direct consequence of the *statute’s* definition of “new source,” as Petitioners implicitly acknowledge (e.g., *id.* at 3 n.1, *citing* 42 U.S.C. § 7411(a)(2)), and it therefore does not make the “proposed” standards of performance subject to judicial review. *See Coalition for Responsible Regulation*, 684 F.3d at 146 (industry petitioners lacked standing to challenge the Timing and Tailoring Rules since their asserted injury occurred “not because of anything EPA did in [those] Rules, but by automatic operation of the statute”); *American Farm Bureau v. EPA*, 121 F. Supp. 2d 84, 99-100 (D.D.C. 2000) (pesticide manufacturers lacked standing to challenge EPA’s action or alleged inaction in reassessing pesticide tolerances under the Federal Food, Drug and Cosmetic Act, because their asserted economic injury from market uncertainty about pesticides was “attributable primarily to acts of Congress rather than to EPA decisionmaking”).

other contexts that proposed rules have no binding legal effect and are not “final actions.” For example, in Commodity Futures Trading Comm’n v. Schor, 478 U.S. 833 (1986), the Supreme Court rejected an argument that an agency’s statutory interpretation expressed in a proposed rule should be deemed a “change” in the agency’s historic position on the scope of its authority under the relevant statute (and, thus, should be treated as evidence that the agency had not been consistent in interpreting the statute and merited less deference). Id. at 844-45. The Court found this reasoning to be in error because “[i]t goes without saying that a proposed regulation does not represent an agency’s considered interpretation of its statute and that an agency is entitled to consider alternative interpretations before settling on the view it considers most sound.” Id. at 845.

In another case, the Eighth Circuit held that a district court had erred in treating as “final” a proposal by the Attorney General to remove a drug from the federal list of “controlled substances” in accordance with a recommendation by the Secretary of Health and Human Services. United States v. Springer, 354 F.3d 772, 776 (8th Cir. 2004). As the court of appeals explained:

A major purpose of formal rulemaking is to ensure that agencies gather as much relevant information as possible before promulgating final rules that will have the force and effect of law. For this reason, an agency that exercises its discretion to propose a rule has no duty to promulgate its proposal as a final rule. Thus, it is well-settled that proposed regulations . . . have no legal effect.

Id. at 776 (internal quotation and citations omitted). The Eighth Circuit’s reasoning is equally apt here, since the above-cited provisions of the Clean Air Act expressly require that the Administrator make the Proposed Rule available for comment and that she “promulgate” the final rule only after consideration of those comments and responding to the significant comments. Supra Argument A.1.

This Court similarly has held that preamble statements that “appear[ed] for the first time in a proposed rulemaking” were not subject to judicial review under the Resource Conservation and Recovery Act, 42 U.S.C. § 6976(a). Florida Power & Light Co. v. EPA, 145 F.3d 1414, 1418 (D.C. Cir. 1998). The Court noted that, “[o]n its face, the action at issue is merely a *proposed*, not a final rulemaking.” Id. at 1418 (emphasis in original). Indeed, “the fact that [EPA] has yet to promulgate final rules on many of the issues addressed in the . . . Proposed Rule” was clear evidence to this Court “that EPA is still in the process of clarifying” its position on the issues in dispute, and that the preamble statements therefore were not final for purposes of judicial review. Id. at 1418-19; see also Center for Law & Educ. v. United States Dep’t of Educ., 209 F. Supp. 2d 102, 111 (D.D.C. 2002), aff’d, 396 F.3d 1152 (D.C. Cir. 2005) (dismissing the complaint because “proposed rules have only recently been published,” and “[i]t is the final rule which will mark the consummation of the agency’s decisionmaking process and set forth the agency’s definitive position”) (internal quotations omitted); Carlton v. Babbitt, 147 F. Supp.



2d 4, 5-8 (D.D.C. 2001) (proposal to change classification of grizzly bear populations under the Endangered Species Act is not reviewable unless and until the agency “promulgate[s] a final rule combining [the bear populations]”).<sup>4</sup>

For all the above reasons, and consistent with the cited case law, the Court should hold that the Proposed Rule is not reviewable and dismiss the petitions.

**B. Alternatively, the Petitions Should Be Dismissed As Unripe.**

Because the Proposed Rule is not a “final action,” the Court need not consider the secondary question of whether it is ripe for review. However, lack of ripeness is an additional reason to dismiss the petitions for review. The ripeness doctrine “prevent[s] courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also [protects] the agencies from judicial interference until an administrative decision has been formalized.” Center for Auto Safety, 710 F.2d at 848 (internal quotation omitted). To determine ripeness, courts consider the fitness of the issue

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<sup>4</sup> The Supreme Court’s recent decision in Sackett v. EPA, 132 S. Ct. 1367 (2012), is not relevant here. Sackett did not involve a challenge to a proposed rule or preamble statement, but rather an administrative compliance “order” that EPA issued pursuant to the Clean Water Act, which “found” that the order’s recipients were in violation of that statute and specified actions necessary to bring them into compliance. Unlike the Proposed Rule – which as shown above must undergo further steps in a statutorily-mandated procedure before EPA may “promulgate” it, including a public comment period and EPA’s consideration of and responses to those comments – the order in Sackett was *not* subject to any further required administrative procedures, and the Court concluded that the mere possibility that EPA might “informally” reconsider the order’s findings “[did] not suffice to make an otherwise final agency action nonfinal.” 132 S. Ct. at 1372.

for judicial decision – encompassing factors such as whether the issue is purely legal, whether consideration of the issue would benefit from a more concrete setting, and whether the agency’s action is sufficiently final – as well as the hardship to the parties of postponing review. Abbott Laboratories v. Gardner, 387 U.S. 136, 149-52 (1967); Ciba-Geigy Corp. v. EPA, 801 F.2d 430, 434-35 (D.C. Cir. 1986). Here, Petitioners cannot satisfy the “fitness” test for the same reasons discussed in Argument A. See, e.g., Utility Air Regulatory Group v. EPA, 320 F.3d 272, 278-79 (D.C. Cir. 2003) (review of guidance document interpreting regulatory provisions was premature since EPA was undertaking a rulemaking to amend those provisions); Center for Auto Safety, 710 F.2d at 848-49 (preliminary decision not to amend fuel efficiency standard was not ripe, as the standard would not take effect for several years and the agency could reconsider it); cf. Natural Resources Defense Council v. EPA, 824 F.2d 1146, 1150 (D.C. Cir. 1987) (the CAA requires exhaustion of administrative remedies, including the public comment process). Moreover, any asserted hardship from postponing review is mitigated here because the CAA requires EPA to take final action on the Proposed Rule within one year following its publication. 42 U.S.C. § 7411(b)(1)(B).

### **CONCLUSION**

For the foregoing reasons, the Court should grant EPA’s motion and dismiss the petitions for review for lack of subject-matter jurisdiction.

Respectfully submitted,

IGNACIA S. MORENO  
Assistant Attorney General  
Environmental and Natural Resources  
Division

Dated: August 9, 2012

By: /s/ Brian H. Lynk  
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Environmental Defense Section  
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U.S. Environmental Protection Agency  
1200 Pennsylvania Ave., NW  
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### **CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Respondent EPA's Motion to Dismiss Petitions for Lack of Subject-Matter Jurisdiction has been filed with the Clerk of the Court this 9th day of August 2012 using the CM/ECF System, through which true and correct copies will be served electronically on all counsel of record that are registered to use CM/ECF, including each of the counsel listed below.

/s/ Brian H. Lynk  
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**Cc:** "Morgan Costello" [Morgan.Costello@ag.ny.gov]; atricia Embrey/DC/USEPA/US@EPA;Elliott Zenick/DC/USEPA/US@EPA[]; Elliott Zenick/DC/USEPA/US@EPA[]  
**From:** "Michael Myers"  
**Sent:** Thur 9/30/2010 6:32:14 PM  
**Subject:** RE: Boiler NSPS -- Final draft  
[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)  
[www.nrdc.org](http://www.nrdc.org)  
<http://switchboard.nrdc.org/blogs/ddoniger/>

That change is fine with the States

>>> "Gunter, David (ENRD)" <David.Gunter2@usdoj.gov> 9/30/2010 2:19 PM >>>

Counsel:

I apologize for this inconvenience, but during agency review of this agreement, we were requested to make one change to the language. Specifically, we have moved each of the four stated deadlines for signature of proposed and final rules in this agreement five days earlier, and then provided that transmittal to the Federal Register should take place within five business days. I hope that none of the parties will object to this change, which I think serves your interests: It reaches the same final result but establishes an earlier signature date. However, if you or your clients object to this new language, or if you will need more time for review, please let me know as soon as possible. A new final draft is attached.

The only other change in this draft: The District of Columbia has been added to the list of State Petitioners.

Thanks for accommodating these changes.

Dave Gunter

From: Gunter, David (ENRD)  
Sent: Tuesday, September 28, 2010 4:28 PM  
To: 'Doniger, David'; Joanne.Spalding@sierraclub.org; vpatton@environmentaldefense.org; michael.myers@ag.ny.gov  
Cc: Zenick.Elliott@epamail.epa.gov; embrey.patricia@epamail.epa.gov  
Subject: RE: Boiler NSPS -- Final draft

Counsel,

We are comfortable with the changes that are suggested in your most recent draft, and I believe this means we have agreement on text. I have attached a clean copy to this e-mail. Next steps: As you know, this is still subject to review by approval authorities at EPA and DOJ. We intend to move quickly to secure that review, and to that end, I would appreciate a statement of final approval from each of the named parties to the agreement as soon as possible. I know that some of you are interested in the question of when this agreement might be disclosed or announced, and we are also working on that question. In the meantime, of course, we expect that everyone will continue to keep this agreement confidential until we have final approval.

Thanks again for your hard work and cooperation.

Dave Gunter

From: Doniger, David [mailto:ddoniger@nrdc.org]  
Sent: Tuesday, September 28, 2010 9:31 AM  
To: Gunter, David (ENRD); Joanne.Spalding@sierraclub.org; vpatton@environmentaldefense.org;  
michael.myers@ag.ny.gov  
Cc: Zenick.Elliott@epamail.epa.gov; embrey.patricia@epamail.epa.gov  
Subject: RE: Boiler NSPS -- EPA September 27 draft

David and colleagues,

Thanks for the continued progress on this matter. Enclosed is the draft agreement with some small edits that are intended to clarify certain of the recent additions. We hope and trust that these will not pose any problems, and if these are acceptable, then on behalf of the environmental petitioners I can state that we too believe we have staff-level agreement on the draft.

Although reluctantly, we can agree to proceed without the initial filing of the settlement with the Court, bearing in mind that the terms of the settlement preserve our ability to return to the Court and our ability to refer to the settlement if there should be a failure to implement.

This note confirms that although the agreement preserves our right to seek attorneys fees and costs, the environmental petitioners do not intend to seek fees or costs for work done to date in connection with the underlying case or these settlement negotiations.

We too appreciate the cooperation of the government team and the speed at which we have been able to conduct

these negotiations.

David

David D. Doniger

Policy Director, Climate Center

Natural Resources Defense Council

1200 New York Ave., NW

Washington, DC 20005

Phone: (202) 289-2403

Cell: (202) 321-3435

Fax: (202) 789-0859

ddoniger@nrdc.org

on the web at [www.nrdc.org](http://www.nrdc.org)

read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

From: Gunter, David (ENRD) [mailto:David.Gunter2@usdoj.gov]

Sent: Monday, September 27, 2010 8:15 PM

To: Joanne.Spalding@sierraclub.org; vpatton@environmentaldefense.org; Doniger, David;  
michael.myers@ag.ny.gov

Cc: Zenick.Elliott@epamail.epa.gov; embrey.patricia@epamail.epa.gov

Subject: Boiler NSPS -- EPA September 27 draft

Counsel,

Thank you for your participation in the call today about the Boiler NSPS settlement. The attached draft represents our changes, in redline, reflecting the compromise that we reached on certain points today. If this draft is acceptable to you, then I believe we have staff-level agreement on a draft that we can recommend to our respective clients and reviewing agency officials for approval. However, as we discussed, I would still appreciate your written confirmation (by letter or e-mail) that you do not presently intend to seek attorneys' fees in this case.



That leaves the question that we discussed on our call today about the possibility of filing a status report with the D.C. Circuit to inform it of this agreement. I have raised this question with my management within DOJ, and I have been instructed that it would be very difficult for us to compromise on this point. As David said on our call, a fight on this issue is not in anyone's interest. I am therefore asking you to agree that you will not file the final settlement with the Court unless further litigation becomes necessary.

We've made remarkable progress on this matter in a very short time, and I hope that you can advise us we have an agreement with this draft. If we need to discuss this further, we're available for a call at 9:00 tomorrow morning.

Thanks,

Dave Gunter

**To:** vpatton@environmentaldefense.org[vpatton@environmentaldefense.org]; David Doniger" [ddoniger@nrdc.org]; Joanne.Spalding@sierraclub.org>; "David (ENRD) Gunter" [David.Gunter2@usdoj.gov]; David (ENRD) Gunter" [David.Gunter2@usdoj.gov]  
**Cc:** Patricia Embrey/DC/USEPA/US@EPA; Elliott Zenick/DC/USEPA/US@EPA[]; Iliott Zenick/DC/USEPA/US@EPA[]  
**From:** "Michael Myers"  
**Sent:** Tue 12/7/2010 7:42:43 PM  
**Subject:** Re: Boiler NSPS approval steps

thanks Dave. Morgan and I have conferred with our environmental petitioner colleagues cc'd here and believe that the change in the proposal date will be acceptable to the states and environmental groups. What I would like to do prior to asking the states for their formal signoff is for you put the settlement agreement into final form (i.e., remove the draft label and insert the signature blocks) so that I can seek approval and obtain actual signatures at the same time. I don't anticipate anyone in the state group will object to moving back the proposal date by two months and it would be more efficient and expeditious to collect the signatures at the same time. If that's okay with you and EPA, then please circulate a final agreement.

>>> "Gunter, David (ENRD)" <David.Gunter2@usdoj.gov> 12/7/2010 9:58 AM >>>

Dear Counsel:

I am writing with an update on the status of our approval process for the Boiler NSPS settlement that we negotiated earlier this fall. OMB reports that it will approve the package if the date for publication of the proposed rule is changed from May 2011 to July 2011. The date for the final rule would remain the same, May 2012. All other terms would also remain the same. I have attached a revised version of our agreement. The only change is the date for the proposal in paragraphs 1 and 2.

We appreciate both your patience in this process and the confidentiality that you've maintained. If all the parties will agree to this change, then we expect complete federal approval in very short order and a public announcement of the settlement before the end of the year.

Although I can't offer specifics about the reasoning behind OMB's request, I would be happy to answer your questions about how we can move from here to a final agreement. Please let me know by COB on Thursday, December 9 whether you will agree to this change.

Thanks,

Dave Gunter

David Gunter

Environmental Defense Section

U.S. Department of Justice

(202) 514-3785

**To:** "David Doniger" [ddoniger@nrdc.org]; David (ENRD) Gunter"  
[David.Gunter2@usdoj.gov]  
**Cc:** "Morgan Costello" [Morgan.Costello@ag.ny.gov]; atricia  
Embrey/DC/USEPA/US@EPA; Elliott  
Zenick/DC/USEPA/US@EPA; [Joanne.Spalding@sierraclub.org]; Iliott  
Zenick/DC/USEPA/US@EPA; [Joanne.Spalding@sierraclub.org];  
Joanne.Spalding@sierraclub.org>[]  
**From:** "Michael Myers"  
**Sent:** Tue 12/7/2010 7:58:04 PM  
**Subject:** Re: Boiler/Refinery NSPS approval

Dave--Per the e-mail I just sent you, could you also put the refinery NSPS in final form so that I can send the states involved in both cases final agreements at the same time for signature? Joanne (cc'd here) will be reaching out to Tim Ballo to give him the heads up that things have progressed in the interagency review process and that the agreement's being finalized. The states and environmental groups are available to do a call early next week with EPA to discuss an announcement. Thanks.--Mike

>>> "Gunter, David (ENRD)" <David.Gunter2@usdoj.gov> 12/7/2010 9:59 AM >>>

Mike and David:

Since we don't have complete overlap between counsel for the Refinery NSPS and the Boiler NSPS agreement, I'm sending this message just to you. In addition to the information about the Boiler NSPS settlement contained in my previous e-mail, OMB reports that if the Boiler NSPS settlement is changed to conform to their request, then the Refinery NSPS settlement will also be approved as written. We could announce both of them by the end of the year, mitigating Mike's concerns about the states' changes in administration. EPA would like to set up a meeting early next week about a rollout strategy for both packages.

I hope you'll be amenable to this change to the Boiler NSPS; if we can all agree to it then the finish line is in sight for these settlements.

Regards,

Dave Gunter

---

David Gunter

Environmental Defense Section

U.S. Department of Justice

(202) 514-3785



**To:** vpatton@environmentaldefense.org[vpatton@environmentaldefense.org]; David Doniger" [ddoniger@nrdc.org]; Joanne.Spalding@sierraclub.org>;"David (ENRD) Gunter" [David.Gunter2@usdoj.gov]; David (ENRD) Gunter" [David.Gunter2@usdoj.gov]  
**Cc:** Patricia Embrey/DC/USEPA/US@EPA;Elliott Zenick/DC/USEPA/US@EPA[]; Iliott Zenick/DC/USEPA/US@EPA[]  
**From:** "Michael Myers"  
**Sent:** Wed 12/8/2010 2:58:44 PM  
**Subject:** RE: Boiler NSPS approval steps  
Final Settlement Agreement NSPS EGUs.DOC

Dave, attached is a revised version with changes to the signature blocks. Environmental counsel please take note that your signature page has changed (NRDC now is on the same page as SC and EDF). This will facilitate any additional changes to the state blocks that I'm asked to make without requiring environmental counsel to re-execute. Thanks.

>>> "Gunter, David (ENRD)" <David.Gunter2@usdoj.gov> 12/7/2010 3:54 PM >>>

Mike – Here is a final version of the Boiler NSPS agreement with signature blocks. Incidentally, some of these may be outdated because I was using the Boiler NSPS court docket to get the names of some of the state signatories – please let me know if it needs to be updated.

Thanks,  
Dave

From: Michael Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Tuesday, December 07, 2010 2:43 PM  
To: vpatton@environmentaldefense.org; David Doniger; Joanne.Spalding@sierraclub.org; Gunter, David (ENRD)  
Cc: embrey.patricia@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov  
Subject: Re: Boiler NSPS approval steps

thanks Dave. Morgan and I have conferred with our environmental petitioner colleagues cc'd here and believe that the change in the proposal date will be acceptable to the states and environmental groups. What I would like to do prior to asking the states for their formal signoff is for you put the settlement agreement into final form (i.e., remove the draft label and insert the signature blocks) so that I can seek approval and obtain actual signatures at the same time. I don't anticipate anyone in the state group will object to moving back the proposal date by two months and it would be more efficient and expeditious to collect the signatures at the same time. If that's okay with you and EPA, then please circulate a final agreement.

>>> "Gunter, David (ENRD)" <David.Gunter2@usdoj.gov> 12/7/2010 9:58 AM >>>

Dear Counsel:

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negotiated earlier this fall. OMB reports that it will approve the package if the date for publication of the proposed rule is changed from May 2011 to July 2011. The date for the final rule would remain the same, May 2012. All other terms would also remain the same. I have attached a revised version of our agreement. The only change is the date for the proposal in paragraphs 1 and 2.

We appreciate both your patience in this process and the confidentiality that you've maintained. If all the parties will agree to this change, then we expect complete federal approval in very short order and a public announcement of the settlement before the end of the year.

Although I can't offer specifics about the reasoning behind OMB's request, I would be happy to answer your questions about how we can move from here to a final agreement. Please let me know by COB on Thursday, December 9 whether you will agree to this change.

Thanks,

Dave Gunter

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David Gunter

Environmental Defense Section

U.S. Department of Justice

(202) 514-3785

## **SETTLEMENT AGREEMENT**

This Settlement Agreement is made by and between the following groups of Petitioners: (1) the States of New York, California, Connecticut, Delaware, Maine, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, the District of Columbia, and the City of New York (collectively “State Petitioners”); and (2) Natural Resources Defense Council (NRDC), Sierra Club, and Environmental Defense Fund (EDF) (collectively “Environmental Petitioners”), and Respondent, the U.S. Environmental Protection Agency (“EPA”) (collectively “the Parties”).

WHEREAS, EPA published a final action entitled “Standards of Performance for Electric Utility Steam Generating Units, Industrial-Commercial-Institutional Steam Generating Units, and Small Industrial-Commercial-Institutional Steam Generating Units,” 71 Fed. Reg. 9,866 (Feb. 27, 2006) (the “Final Rule”);

WHEREAS, the Final Rule included amendments to the standards of performance for electric utility steam generating units subject to 40 C.F.R. part 60, subpart Da (“EGUs”);

WHEREAS, in connection with this Final Rule, EPA declined to establish standards of performance for greenhouse gas (“GHG”) emissions;

WHEREAS, State and Environmental Petitioners filed petitions for judicial review of the Final Rule under the Clean Air Act (“CAA”) Section 111, 42 U.S.C. § 7411, contending, *inter alia*, that the Final Rule was required to include standards of performance for GHG emissions from EGUs;

WHEREAS, the portions of State and Environmental Petitioners’ petitions for review of the Final Rule that related to GHG emissions were severed from other petitions for review of the Final Rule, and were formerly pending before the United States Court of Appeals for the District



of Columbia Circuit (the “Court”) under the caption *State of New York, et al. v. EPA*, No. 06-1322;

WHEREAS, following the Supreme Court’s decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), EPA requested remand of the Final Rule to EPA for further consideration of the issues related to GHG emissions in light of that decision;

WHEREAS, the Court remanded the Final Rule to EPA for further proceedings on GHG emissions in light of *Massachusetts v. EPA*, by its Order of September 24, 2007 (the “Remand Order”);

WHEREAS, as of the date of this Settlement Agreement, EPA has not taken any publicly noticed action to respond to the Remand Order;

WHEREAS, the State Petitioners submitted letters to EPA dated June 16, 2008 and August 4, 2009 inquiring as to the status of EPA’s action on the remand and stating their position that EPA had a legal obligation to act promptly to comply with the requirements of Section 111, and Environmental Petitioners submitted a letter to EPA on August 20, 2010 seeking commitments to rulemaking on GHG emissions from EGUs as a means of avoiding further litigation;

WHEREAS, EGUs are, collectively, the largest source category of GHG emissions in the United States, according to a recent EPA analysis. *See* 74 Fed. Reg. 56,260, 56,363 (Oct. 30, 2009);

WHEREAS, EPA’s initial evaluation of available GHG control strategies indicates that there are cost-effective control strategies for reducing GHGs from EGUs;

WHEREAS, EPA believes it would be appropriate for it to concurrently propose performance standards for GHG emissions from new and modified EGUs under CAA section

111(b), 42 U.S.C. § 7411(b), and emissions guidelines for GHG emissions from existing affected EGUs pursuant to CAA section 111(d), 42 U.S.C. § 7411(d), and 40 C.F.R. § 60.22;

WHEREAS, the Parties wish to enter into this Settlement Agreement to resolve the State and Environmental Petitioners' request for performance standards and emission guidelines for GHG emissions under CAA sections 111(b) and 111(d) and to avoid further litigation on this issue, without any admission or adjudications of fact or law;

NOW THEREFORE, the Parties, intending to be bound by this Settlement Agreement, hereby stipulate and agree as follows:

1. EPA will sign by July 26, 2011, and will transmit to the Office of the Federal Register within five business days, a proposed rule under section 111(b) that includes standards of performance for GHGs for new and modified EGUs that are subject to 40 C.F.R. part 60, subpart Da. EPA shall provide the State and Environmental Petitioners a copy of the proposed rule within five business days of signature.
2. EPA will also sign by July 26, 2011, and will transmit to the Office of the Federal Register within five business days, a proposed rule under section 111(d) that includes emissions guidelines for GHGs from existing EGUs that would have been subject to 40 C.F.R. part 60, subpart Da if they were new sources. EPA shall provide the State and Environmental Petitioners a copy of the proposed rule within five business days of signature.
3. After considering any public comments received concerning the proposed rule described in Paragraph 1, EPA will sign no later than May 26, 2012, and will transmit to the Office of the Federal Register within five business days, a final rule that takes final action with respect to the proposed rule described in Paragraph 1. EPA shall provide the

Environmental and State Petitioners with a copy of its final action within five business days of signature.

4. If EPA finalizes standards of performance for GHGs pursuant to Paragraph 3, then based on consideration of the public comments received concerning the proposed rule described in Paragraph 2, EPA will sign no later than May 26, 2012, and will transmit to the Office of the Federal Register within five business days, a final rule that takes final action with respect to the proposed rule describe in Paragraph 2. EPA shall provide the State and Environmental Petitioners with a copy of its final action within five business days of signature.
5. EPA agrees that it will make staff available by telephone at least every 60 days to update State and Environmental Petitioners on EPA's progress in completing the actions described in Paragraphs (1) through (4). In addition, EPA will provide State and Environmental Petitioners with a status letter every 60 days, which shall include an affirmative statement of whether EPA believes it will timely complete all actions described in Paragraphs 1 through 4.
6. Upon EPA's fulfillment of each of the obligations stated in Paragraphs 1 through 4 above, this Settlement Agreement shall constitute a full and final release of any claims that State and Environmental Petitioners may have under any provision of law to compel EPA to respond to the Court's Remand Order with respect to GHG emissions from EGUs.
7. State and Environmental Petitioners shall not file any motion or petition seeking to compel EPA action in response to the Remand Order with respect to GHG emissions from EGUs unless EPA has first failed to meet an obligation stated in Paragraphs 1

through 4 above. If EPA fails to meet such an obligation, or if an EPA status letter described in Paragraph 5 does not affirm that EPA believes it will timely complete all actions described in Paragraphs 1 through 4, or if EPA fails to send a status letter as described in Paragraph 5 and does not promptly cure that failure upon receiving notice, State and Environmental Petitioners' sole remedy shall be to file an appropriate motion or petition with the Court or other civil action seeking to compel EPA to take action responding to the Remand Order. In that event, all Parties reserve any claims or defenses they may have in such an action, and the dates stated in Paragraphs 1 through 4 shall be construed to represent only the parties' attempt to compromise claims in litigation, and not to represent agreement that any particular schedule for further agency action is reasonable or otherwise required by law. State and Environmental Petitioners reserve all rights under the law to file petitions for review of final agency actions under this Settlement Agreement, pursuant to section 307(b), 42 U.S.C. § 7607(b).

8. This Settlement Agreement constitutes the sole and entire understanding of EPA and the Environmental and State Petitioners and no statement, promise or inducement made by any Party to this Settlement Agreement, or any agent of such Parties, that is not set forth in this Settlement Agreement shall be valid or binding.
9. Except as expressly provided in this Settlement Agreement, none of the Parties waives or relinquishes any legal rights, claims or defenses it may have. State and Environmental Petitioners reserve the right to seek attorneys' fees and costs relating to this litigation, and EPA reserves any defenses it may have relating to such claims.
10. The provisions of this Settlement Agreement can be modified at any time by written mutual consent of the Parties.

11. Except as expressly provided herein, nothing in the terms of this Settlement Agreement shall be construed to limit or modify the discretion accorded EPA by the CAA or by general principles of administrative law.
12. The commitments by EPA in this Settlement Agreement are subject to the availability of appropriated funds. No provision of this Settlement Agreement shall be interpreted as or constitute a commitment or requirement that EPA obligate, expend or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. 1341, or any other applicable appropriations law or regulation, or otherwise take any action in contravention of those laws or regulations.
13. Nothing in the terms of this Settlement Agreement shall be construed to limit EPA's authority to alter, amend or revise any final rule EPA may issue pursuant to Paragraphs 3 or 4, or to promulgate superseding regulations.
14. The Parties agree and acknowledge that before this Settlement Agreement is final, EPA must provide notice in the Federal Register and an opportunity for public comment pursuant to CAA Section 113(g), 42 U.S.C. 7413(g). After this Settlement Agreement has undergone an opportunity for notice and comment, the Administrator and/or the Attorney General, as appropriate, shall promptly consider any such written comments in determining whether to withdraw or withhold her/his consent to the Settlement Agreement, in accordance with section 113(g) of the CAA. Within 30 days of the close of the public comment period, EPA shall provide written notice to State and Environmental Petitioners of any decision to withdraw or withhold consent or shall provide written notice of finality. This Settlement Agreement shall become final on the

date that EPA provides written notice of such finality to the State and Environmental Petitioners.

15. The undersigned representatives of each Party certify that they are fully authorized by the Party that they represent to bind that respective Party to the terms of this Settlement Agreement. This Settlement Agreement will be deemed to be executed when it has been signed by the representatives of the Parties set forth below, subject to final approvals pursuant to Paragraph 14.

DATE: \_\_\_\_\_

\_\_\_\_\_  
DAVID GUNTER  
U.S. Department of Justice  
Environment and Natural Resources Division  
Environmental Defense Section  
P.O. Box 23986  
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*Counsel for U.S. Environmental Protection Agency*

DATE: \_\_\_\_\_

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MORGAN A. COSTELLO  
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Environmental Protection Bureau  
Office of the Attorney General, The Capitol  
Albany, New York 12224

*Counsel for State of New York*

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KENNETH P. ALEX  
SUSAN DURBIN  
Office of the Attorney General, State of California  
1515 Clay Street, 20th Floor, P.O. Box 70550  
Oakland, CA 94612

*Counsel for State of California*

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MATTHEW I. LEVINE  
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Office of the Attorney General  
P.O. Box 120, 55 Elm Street  
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*Counsel for State of Connecticut*

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VALERIE M. SATTERFIELD  
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Dover, DE 19904

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GERALD D. REID  
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Department of the Attorney General  
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*Counsel for State of Maine*

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STEPHEN R. FARRIS  
JUDITH ANN MOORE  
Assistant Attorneys General  
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Santa Fe, New Mexico 87504-1508

*Counsel for State of New Mexico*

DATE: \_\_\_\_\_

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1162 Court Street, N.E.  
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*Counsel for State of Oregon*

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GREGORY S. SCHULTZ  
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Rhode Island Department of the Attorney General  
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*Counsel for State of Rhode Island*

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LESLIE R. SEFFERN  
Assistant Attorney General  
Office of the Attorney General  
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Olympia, Washington 98504

*Counsel for State of Washington*



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DONNA M. MURASKY  
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Office of the D.C. Attorney General  
441 Fourth Street, N.W.  
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*Counsel for District of Columbia*

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WILLIAM L. PARDEE  
CAROL IANCU  
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Environmental Protection Division  
Office of the Attorney General  
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*Counsel for Commonwealth of Massachusetts*

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CHRISTOPHER G. KING  
CARRIE NOTEBOOM  
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100 Church Street  
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*Counsel for City of New York*

DATE: \_\_\_\_\_

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DAVID D. DONIGER  
Natural Resources Defense Council  
1200 New York Avenue NW, Suite 400  
Washington, DC 20005

*Counsel for Natural Resources Defense Council*

DATE: \_\_\_\_\_

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JOANNE SPALDING  
Sierra Club  
85 Second Street  
San Francisco, CA 94105

*Counsel for Sierra Club*

DATE: \_\_\_\_\_

\_\_\_\_\_  
VICKIE PATTON  
Environmental Defense Fund  
2334 N. Broadway  
Boulder, CO 80304

*Counsel for Environmental Defense Fund*

**To:** "Doniger, David" [ddoniger@nrdc.org];  
vpatton@environmentaldefense.org>;[Joanne.Spalding@sierraclub.org];  
Joanne.Spalding@sierraclub.org>;[michael.myers@ag.ny.gov];  
michael.myers@ag.ny.gov>;[morgan.costello@ag.ny.gov]; morgan.costello@ag.ny.gov>[]  
**Cc:** Elliott Zenick/DC/USEPA/US@EPA;Scott Jordan/DC/USEPA/US@EPA[]; cott  
Jordan/DC/USEPA/US@EPA[]  
**From:** "Gunter, David (ENRD)"  
**Sent:** Tue 5/24/2011 5:05:45 PM  
**Subject:** RE: Boiler NSPS agreement  
[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)  
[www.nrdc.org](http://www.nrdc.org)  
<http://switchboard.nrdc.org/blogs/ddoniger/>

David: That will work for us. Thanks for setting it up.

Dave Gunter

From: Doniger, David [mailto:ddoniger@nrdc.org]  
Sent: Tuesday, May 24, 2011 12:32 PM  
To: Gunter, David (ENRD); vpatton@environmentaldefense.org; Joanne.Spalding@sierraclub.org;  
michael.myers@ag.ny.gov; morgan.costello@ag.ny.gov  
Subject: RE: Boiler NSPS agreement

Dave,

How about a call on Thursday at 1PM eastern? We could use this number:

202-289-4814



David

David D. Doniger

Policy Director, Climate Center

Natural Resources Defense Council

1200 New York Ave., NW

Washington, DC 20005

Phone: (202) 289-2403

Cell: (202) 321-3435

Fax: (202) 789-0859

ddoniger@nrdc.org

on the web at [www.nrdc.org](http://www.nrdc.org)

read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

From: Gunter, David (ENRD) [mailto:David.Gunter2@usdoj.gov]

Sent: Tuesday, May 24, 2011 11:21 AM

To: Doniger, David; vpatton@environmentaldefense.org; Joanne.Spalding@sierraclub.org;

michael.myers@ag.ny.gov; morgan.costello@ag.ny.gov

Subject: Boiler NSPS agreement

Dear Counsel,

Joe Goffman at EPA would like to set up a conference call to discuss its progress on meeting the deadlines in our Boiler NSPS settlement. We are available today from 1:30-4:00, and on Thursday from 12:00-4:00, all Eastern times. Would you please let me know whether either of those times will work for you?

Regards,

Dave Gunter

---

David Gunter

Appellate Section, Environment and Natural Resources Division

United States Department of Justice

(202) 514-3785

**To:** "Gunter, David (ENRD)" [David.Gunter2@usdoj.gov];  
Joanne.Spalding@sierraclub.org>;[vpatton@environmentaldefense.org];  
vpatton@environmentaldefense.org>;[michael.myers@ag.ny.gov];  
michael.myers@ag.ny.gov>;[morgan.costello@ag.ny.gov]; morgan.costello@ag.ny.gov>[]  
**Cc:** Scott Jordan/DC/USEPA/US@EPA;Elliott Zenick/DC/USEPA/US@EPA[]; lliott  
Zenick/DC/USEPA/US@EPA[]  
**From:** "Doniger, David"  
**Sent:** Tue 5/31/2011 11:06:45 PM  
**Subject:** RE: Boiler NSPS settlement modification  
[APPELLATE #263457-v1-Boiler NSPS -- Agreement modification - Petitioners comments.DOC](#)  
[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)  
[www.nrdc.org](http://www.nrdc.org)  
<http://switchboard.nrdc.org/blogs/ddoniger/>

Dave,

The draft you sent us earlier today is a good start; attached are a few edits that we would propose to make. Please let us know if these are acceptable. If you'd like to discuss them with me by phone, let me know.

David

David D. Doniger

Policy Director, Climate Center

Natural Resources Defense Council

1200 New York Ave., NW

Washington, DC 20005

Phone: (202) 289-2403

Cell: (202) 321-3435

Fax: (202) 789-0859

[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)

on the web at [www.nrdc.org](http://www.nrdc.org)

read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

From: Gunter, David (ENRD) [mailto:David.Gunter2@usdoj.gov]  
Sent: Tuesday, May 31, 2011 10:14 AM  
To: Doniger, David; Joanne.Spalding@sierraclub.org; vpatton@environmentaldefense.org;  
michael.myers@ag.ny.gov; morgan.costello@ag.ny.gov  
Cc: Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov  
Subject: Boiler NSPS settlement modification

Dear counsel,

Attached please find a draft of the modification that we discussed to the Boiler NSPS agreement. We look forward to receiving your approval or comments. Thank you very much for accommodating us in this matter.

Regards,

David Gunter

Appellate Section

Environment and Natural Resources Division

United States Department of Justice

950 Pennsylvania Ave, NW

Washington, DC 20530

202-514-3785

David.Gunter2@usdoj.gov

## **MODIFICATION TO SETTLEMENT AGREEMENT**

WHEREAS, on December 21, 2010, the following parties executed a “Settlement Agreement:” (1) the States of New York, California, Connecticut, Delaware, Maine, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, the District of Columbia, and the City of New York (collectively “State Petitioners”); and (2) Natural Resources Defense Council (NRDC), Sierra Club, and Environmental Defense Fund (EDF) (collectively “Environmental Petitioners”), and Respondent, the U.S. Environmental Protection Agency (“EPA”) (collectively “the Parties”);

WHEREAS, the Settlement Agreement became final on March 2, 2011;

WHEREAS, on September 24, 2007, in a case entitled *State of New York, et al. v. EPA*, No. 06-1322, the United States Court of Appeals for the District of Columbia Circuit remanded to EPA a final action entitled “Standards of Performance for Electric Utility Steam Generating Units, Industrial-Commercial-Institutional Steam Generating Units, and Small Industrial-Commercial-Institutional Steam Generating Units,” 71 Fed. Reg. 9,866 (Feb. 27, 2006) (the “Final Rule”);

WHEREAS, Petitioners subsequently notified EPA of their potential claims to compel EPA to take action pursuant to the remand of the Final Rule;

WHEREAS, the Settlement Agreement resolved those potential claims;

WHEREAS, Paragraph 1 of the Settlement Agreement provided that: “EPA will sign by July 26, 2011, and will transmit to the Office of the Federal Register within five business days, a proposed rule under section 111(b) that includes standards of performance for GHGs for new and modified EGUs that are subject to 40 C.F.R. part 60, subpart Da. EPA shall provide the State

and Environmental Petitioners a copy of the proposed rule within five business days of signature;”

WHEREAS, Paragraph 2 of the Settlement Agreement provided that: “EPA will also sign by July 26, 2011, and will transmit to the Office of the Federal Register within five business days, a proposed rule under section 111(d) that includes emissions guidelines for GHGs from existing EGUs that would have been subject to 40 C.F.R. part 60, subpart Da if they were new sources. EPA shall provide the State and Environmental Petitioners a copy of the proposed rule within five business days of signature;”

WHEREAS, Paragraph 10 of the Settlement Agreement provided that: “The provisions of this Settlement Agreement can be modified at any time by written mutual consent of the Parties;”

WHEREAS, EPA has engaged in an extensive public process in preparation of proposed rules that would satisfy its obligations under Paragraphs 1 and 2 of the Settlement Agreement, including five public “listening sessions” as well as additional meetings and discussions with a wide variety of public stakeholders;

WHEREAS, in the course of that public process, EPA has received a significant amount of useful information and ideas from a range of stakeholders concerning issues relevant to the proposed rules;

WHEREAS, EPA requires additional time to consider the information and ideas presented by the public stakeholders to EPA;

WHEREAS, the Parties desire to enable EPA to give due attention and consideration to all information and ideas presented to EPA in the public process leading to the proposed rules



while EPA remains committed to the date for taking final action as specified in paragraphs 3 and 4 of the Settlement Agreement;

WHEREAS, the Parties now desire to modify Paragraphs 1 and 2 of the Settlement Agreement;

NOW THEREFORE, without any change to any other part of the Settlement Agreement, the parties hereby agree as follows:

1. Paragraph 1 of the Settlement Agreement shall be stricken, and replaced with the following: "EPA will sign by September 30, 2011, and will transmit to the Office of the Federal Register within five business days, a proposed rule under section 111(b) that includes standards of performance for GHGs for new and modified EGUs that are subject to 40 C.F.R. part 60, subpart Da. EPA shall provide the State and Environmental Petitioners a copy of the proposed rule within five business days of signature."
2. Paragraph 2 of the Settlement Agreement shall be stricken, and replaced with the following: "EPA will also sign by September 30, 2011, and will transmit to the Office of the Federal Register within five business days, a proposed rule under section 111(d) that includes emissions guidelines for GHGs from existing EGUs that would have been subject to 40 C.F.R. part 60, subpart Da if they were new sources. EPA shall provide the State and Environmental Petitioners a copy of the proposed rule within five business days of signature."

DATE: \_\_\_\_\_

\_\_\_\_\_  
DAVID GUNTER

U.S. Department of Justice  
Environment and Natural Resources Division  
Environmental Defense Section  
P.O. Box 23986  
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*Counsel for U.S. Environmental Protection Agency*

DATE: \_\_\_\_\_

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*Counsel for Sierra Club*

DATE: \_\_\_\_\_

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*Counsel for Environmental Defense Fund*

**To:** "Vickie Patton" [vpatton@edf.org]; Joanne Spalding" [Joanne.Spalding@sierraclub.org]; ddoniger@nrdc.org>;[Michael.Myers@ag.ny.gov]; Michael.Myers@ag.ny.gov>;[Morgan.Costello@ag.ny.gov]; Morgan.Costello@ag.ny.gov>;"Megan Ceronsky" [mceronsky@edf.org]; Megan Ceronsky" [mceronsky@edf.org]  
**Cc:** Scott Jordan/DC/USEPA/US@EPA;Elliott Zenick/DC/USEPA/US@EPA;Patricia Embrey/DC/USEPA/US@EPA;"Lorenzen, Thomas (ENRD)" [Thomas.Lorenzen@usdoj.gov]; Iliott Zenick/DC/USEPA/US@EPA;Patricia Embrey/DC/USEPA/US@EPA;"Lorenzen, Thomas (ENRD)" [Thomas.Lorenzen@usdoj.gov]; atricia Embrey/DC/USEPA/US@EPA;"Lorenzen, Thomas (ENRD)" [Thomas.Lorenzen@usdoj.gov]; Lorenzen, Thomas (ENRD)" [Thomas.Lorenzen@usdoj.gov]  
**From:** "Gunter, David (ENRD)"  
**Sent:** Tue 6/14/2011 1:15:58 PM  
**Subject:** RE: Boiler NSPS settlement modification  
APPELLATE-#267527-v1-Boiler NSPS -- Final signed modification.PDF

All: Attached please find a final, executed version of the Boiler NSPS modification. I understand that EPA's press office will make this available on the agency's web site today. We greatly appreciate your accommodation in this matter. Please let me know if you have any questions before EPA's next status letter is due on July 1.

Regards,

David Gunter

Appellate Section

Environment and Natural Resources Division

United States Department of Justice

950 Pennsylvania Ave, NW

Washington, DC 20530

202-514-3785

David.Gunter2@usdoj.gov

## MODIFICATION TO SETTLEMENT AGREEMENT

WHEREAS, on December 21, 2010, the following parties executed a "Settlement Agreement:" (1) the States of New York, California, Connecticut, Delaware, Maine, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, the District of Columbia, and the City of New York (collectively "State Petitioners"); and (2) Natural Resources Defense Council (NRDC), Sierra Club, and Environmental Defense Fund (EDF) (collectively "Environmental Petitioners"), and Respondent, the U.S. Environmental Protection Agency ("EPA") (collectively "the Parties");

WHEREAS, the Settlement Agreement became final on March 2, 2011;

WHEREAS, on September 24, 2007, in a case entitled *State of New York, et al. v. EPA*, No. 06-1322, the United States Court of Appeals for the District of Columbia Circuit remanded to EPA a final action entitled "Standards of Performance for Electric Utility Steam Generating Units, Industrial-Commercial-Institutional Steam Generating Units, and Small Industrial-Commercial-Institutional Steam Generating Units," 71 Fed. Reg. 9,866 (Feb. 27, 2006) (the "Final Rule");

WHEREAS, Petitioners subsequently notified EPA of their potential claims to compel EPA to take action pursuant to the remand of the Final Rule;

WHEREAS, the Settlement Agreement resolves those potential claims;

WHEREAS, Paragraph 1 of the Settlement Agreement provided that: "EPA will sign by July 26, 2011, and will transmit to the Office of the Federal Register within five business days, a proposed rule under section 111(b) that includes standards of performance for GHGs for new and modified EGUs that are subject to 40 C.F.R. part 60, subpart Da. EPA shall provide the State and Environmental Petitioners a copy of the proposed rule within five business days of signature;"



WHEREAS, Paragraph 2 of the Settlement Agreement provided that: "EPA will also sign by July 26, 2011, and will transmit to the Office of the Federal Register within five business days, a proposed rule under section 111(d) that includes emissions guidelines for GHGs from existing EGUs that would have been subject to 40 C.F.R. part 60, subpart Da if they were new sources. EPA shall provide the State and Environmental Petitioners a copy of the proposed rule within five business days of signature;"

WHEREAS, Paragraph 10 of the Settlement Agreement provided that: "The provisions of this Settlement Agreement can be modified at any time by written mutual consent of the Parties;"

WHEREAS, EPA has engaged in an extensive public process in preparation of proposed rules that would satisfy its obligation under Paragraphs 1 and 2 of the Settlement Agreement, including five public "listening sessions" as well as additional meetings and discussions with a wide variety of public stakeholders;

WHEREAS, in the course of that public process, EPA has received a significant amount of useful information and ideas from a range of public stakeholders concerning issues relevant to the proposed rule;

WHEREAS, EPA requires additional time to consider the information and ideas presented by the public stakeholders to EPA;

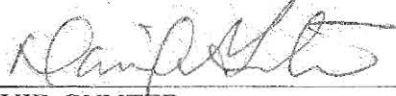
WHEREAS, the Parties desire to enable EPA to give due attention and consideration to all information and ideas presented to EPA in the public process leading to the proposed rules, without any change to the date for taking final action as specified in Paragraphs 3 and 4 of the Settlement Agreement;

WHEREAS, the Parties now desire to modify Paragraphs 1 and 2 of the Settlement Agreement;

NOW THEREFORE, without any change to any other part of the Settlement Agreement, the parties hereby agree as follows:

1. Paragraph 1 of the Settlement Agreement shall be stricken, and replaced with the following: "EPA will sign by September 30, 2011, and will transmit to the Office of the Federal Register within five business days, a proposed rule under section 111(b) that includes standards of performance for GHGs for new and modified EGUs that are subject to 40 C.F.R. part 60, subpart Da. EPA shall provide the State and Environmental Petitioners a copy of the proposed rule within five business days of signature."
2. Paragraph 2 of the Settlement Agreement shall be stricken, and replaced with the following: "EPA will also sign by September 30, 2011, and will transmit to the Office of the Federal Register within five business days, a proposed rule under section 111(d) that includes emissions guidelines for GHGs from existing EGUs that would have been subject to 40 C.F.R. part 60, subpart Da if they were new sources. EPA shall provide the State and Environmental Petitioners a copy of the proposed rule within five business days of signature."

DATE: 6/13/11

  
\_\_\_\_\_  
DAVID GUNTER  
U.S. Department of Justice  
Environment and Natural Resources Division  
Environmental Defense Section  
P.O. Box 23986

Washington, D.C. 20026-3986

*Counsel for U.S. Environmental Protection Agency*

DATE: 10/13/11

Morgan Costello

MICHAEL J. MYERS  
MORGAN A. COSTELLO  
Assistant Attorneys General  
Environmental Protection Bureau  
Office of the Attorney General  
The Capitol  
Albany, New York 12224

*Counsel for State of New York*

DATE: 6/9/14

Susan Durbin

SUSAN DURBIN  
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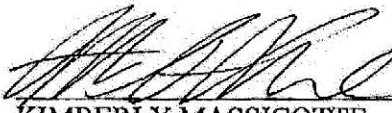
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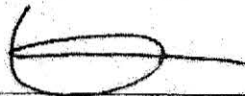
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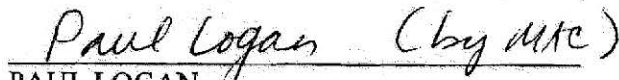
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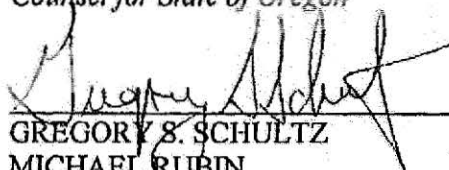
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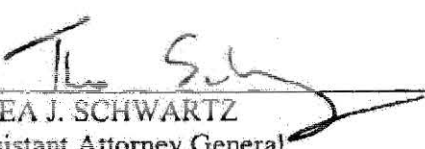
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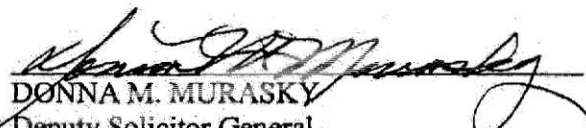
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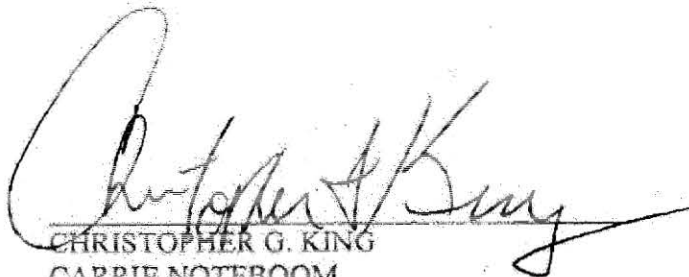
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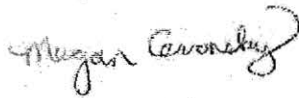
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**To:** Patricia Embrey/DC/USEPA/US@EPA[]

**Cc:**

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**From:** Joanne Spalding

**Sent:** Fri 9/24/2010 8:12:53 AM

**Subject:** Combined state/environmental edits on draft

[Draft EGU settlement Sept 21 NRDC-State-EDF comments 9-23 3pm - Circulate.doc](#)

[UARG v. EPA settlement.pdf](#)

[ACC v. EPA settlement.pdf](#)

[API v. EPA settlement.pdf](#)

[DENVER-#292635-v2-PANNA amended settlement agmt 7 30.DOC](#)

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Thank you for offering the draft settlement agreement. It is a meaningful step toward resolving our claims. The attached version includes the combined proposed edits of the state and environmental petitioners. We have not made any changes to the schedule. We have, however, changed "addresses" to "includes" in paragraphs 1 and 2, as we discussed in our last call. We think it is very important that EPA commit to proposing performance standards for greenhouse gas emissions from EGUs. EPA has already found that GHGs endanger health and welfare, and both individually and as a category, EGUs are the largest GHG emitters. Over the past year, EPA has examined a variety of effective methods to limit GHG emissions from EGUs, along with other stationary sources. We do not see any legal or technical obstacle that would preclude a commitment to including GHG performance standards in a proposed rule.

Our very cursory review of prior settlements has yielded several instances in which EPA has agreed to include specific content in proposed rules. In a number of situations, the settlement has recited at length the exact language that would appear in the proposed rule. A few sample settlements are attached. The circumstances of this case do not warrant a different treatment.

The attached draft also contains other edits, which we can explain further in our next conversation. We are available Friday to discuss these proposed changes and work together to resolve any remaining differences.

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## **SETTLEMENT AGREEMENT**

This Settlement Agreement is made by and between the following groups of Petitioners: (1) the States of New York, California, Connecticut, Delaware, Maine, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, and the City of New York (collectively “State Petitioners”); and (2) Natural Resources Defense Council (NRDC), Sierra Club, and Environmental Defense Fund (EDF) (collectively “Environmental Petitioners”), and Respondent, the U.S. Environmental Protection Agency (“EPA”) (collectively “the Parties”).

WHEREAS, EPA published a final action entitled “Standards of Performance for Electric Utility Steam Generating Units, Industrial-Commercial-Institutional Steam Generating Units, and Small Industrial-Commercial-Institutional Steam Generating Units,” 71 Fed. Reg. 9,866 (Feb. 27, 2006) (the “Final Rule”);

WHEREAS, the Final Rule included amendments to the standards of performance for steam generating units subject to 40 C.F.R. part 60, subpart Da;

WHEREAS, in connection with this Final Rule, EPA declined to establish standards of performance for greenhouse gas (“GHG”) emissions;

WHEREAS, State and Environmental Petitioners filed petitions for judicial review of the Final Rule under the Clean Air Act (“CAA”) Section 111, 42 U.S.C. § 7411, contending, *inter alia*, that the Final Rule was required to include standards of performance for GHG emissions from electric utility steam generating units (“EGUs”);

WHEREAS, the portion of State and Environmental Petitioners’ petitions for review of the Final Rule that related to GHG emissions were severed from other petitions for review of the Final Rule, and were formerly pending before the United States Court of Appeals for the District

of Columbia Circuit (the “Court”) under the caption *State of New York, et al. v. EPA*, No. 06-1322;

WHEREAS, following the Supreme Court’s decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), EPA requested remand of the Final Rule to EPA for further consideration of the issues related to GHG emissions in light of that decision;

WHEREAS, the Court remanded the Final Rule to EPA for further proceedings on GHG emissions in light of *Massachusetts v. EPA*, by its Order of September 24, 2007 (the “Remand Order”);

WHEREAS, as of the date of this Settlement Agreement, EPA has not taken any publicly noticed action to respond to the Remand Order;

WHEREAS, the State Petitioners submitted letters to EPA dated June 16, 2008 and August 4, 2009 inquiring as to the status of EPA’s action on the remand and stating their position that EPA had a legal obligation to act promptly to comply with the requirements of Section 111 and Environmental Petitioners submitted a letter to EPA on August 20, 2010 seeking commitments to rulemaking on GHG emissions from EGUs, and from other source categories covered by the Final Rule, as a means of avoiding further litigation ;

WHEREAS, EGUs are, collectively, the largest source category of GHG emissions in the United States, according to a recent EPA analysis. *See* 74 Fed. Reg. 56,260, 56,363 (Oct. 30, 2009);

WHEREAS, EPA’s initial evaluation of available GHG control strategies indicates that there are cost-effective control strategies for reducing GHGs from EGUs;

WHEREAS, EPA believes it would be appropriate for it to concurrently issue performance standards for GHG emissions from new and modified EGUs under CAA section

111(b), 42 U.S.C. § 7411(b), and emissions guidelines for GHG emissions from existing affected EGUs pursuant to CAA section 111(d), 42 U.S.C. § 7411(d), and 40 C.F.R. § 60.22;

WHEREAS, the Parties wish to enter into this Settlement Agreement to resolve the State and Environmental Petitioners' request for performance standards and emission guidelines for GHG emissions under CAA sections 111(b) and 111(d) and to avoid further litigation on this issue, without any admission or adjudications of fact or law;

NOW THEREFORE, the Parties, intending to be bound by this Settlement Agreement, hereby stipulate and agree as follows:

1. EPA will sign and promptly transmit to the Office of the Federal Register a proposed rule under section 111(b) by May 31, 2011, that includes standards of performance for GHGs for new and modified EGUs that are subject to 40 C.F.R. part 60, subpart Da. EPA shall provide the State and Environmental Petitioners a copy of the proposed rule within five business days of signature.
2. EPA will also sign and promptly transmit to the Office of the Federal Register a proposed rule under section 111(d) by May 31, 2011, that includes emissions guidelines for GHGs from existing EGUs that would have been subject to 40 C.F.R. part 60, subpart Da if they were new sources. EPA shall provide the State and Environmental Petitioners a copy of the proposed rule within five business days of signature.
3. After considering any public comments received concerning the proposed rule described in Paragraph 1, EPA will sign and promptly submit to the Office of the Federal Register a final rule no later than May 31, 2012, that takes final action with respect to the proposed rule described in Paragraph 1. EPA shall provide the Environmental and State Petitioners with a copy of its final action within five business days of signature.

4. If EPA finalizes standards of performance for GHGs pursuant to Paragraph 3, then based on consideration of the public comments received concerning the proposed rule described in Paragraph 2, EPA will sign and promptly submit to the Office of the Federal Register a final rule no later than May 31, 2012, that takes final action with respect to the proposed rule describe in Paragraph 2. EPA shall provide the State and Environmental Petitioners with a copy of its final action within five business days of signature.
5. EPA agrees that it will make staff available by telephone on at least a monthly basis to update State and Environmental Petitioners on EPA's progress in completing the actions described in Paragraphs (1) through (4) and will file written status reports with the Court every 90 days starting from the date this Settlement Agreement is deemed to be executed under Paragraph 15, to inform the Court of EPA's progress in completing the actions described in Paragraphs (1) through (4).
6. Upon EPA's fulfillment of each of the obligations stated in Paragraphs 1 through 4 above, this Settlement Agreement shall constitute a full and final release of any claims that State and Environmental Petitioners may have under any provision of law to compel EPA to respond to the Court's Remand Order with respect to GHG emissions from EGUs.
7. State and Environmental Petitioners shall not file any motion or petition seeking to compel EPA action in response to the Remand Order with respect to GHG emissions from EGUs unless EPA has first failed to meet (or has notified Petitioners or the Court pursuant to paragraph (5) that it will fail to meet) an obligation stated in Paragraphs 1 through 4 above. If EPA fails (or notifies Petitioners or the Court pursuant to Paragraph (5) that it will fail) to meet such an obligation, State and Environmental Petitioners' sole

remedy shall be to file an appropriate motion or petition with the Court or other civil action seeking to compel EPA to take action responding to the Remand Order. In that event, all Parties reserve any claims or defenses they may have in such an action. State and Environmental Petitioners reserve all rights under the law to file petitions for review of final agency actions under this Settlement Agreement, pursuant to section 307(b), 42 U.S.C. § 7607(b).

8. This Settlement Agreement constitutes the sole and entire understanding of EPA and the Environmental and State Petitioners and no statement, promise or inducement made by any Party to this Settlement Agreement, or any agent of such Parties, that is not set forth in this Settlement Agreement shall be valid or binding.
9. Except as expressly provided in this Settlement Agreement, none of the Parties waives or relinquishes any legal rights, claims or defenses it may have. State and Environmental Petitioners reserve their right to seek attorneys' fees and costs relating to this litigation, and EPA reserves any defenses it may have relating to such claims. State and Environmental Petitioners reserve the right to seek to compel EPA to take action responding to the Remand Order with respect to categories of sources covered by the Final Rule but not covered by Paragraphs (1) through (4) of this Settlement Agreement.
10. The provisions of this Settlement Agreement can be modified at any time by written mutual consent of the Parties.
11. Except as expressly provided herein, nothing in the terms of this Settlement Agreement shall be construed to limit or modify the discretion accorded EPA by the CAA or by general principles of administrative law.

12. The commitments by EPA in this Settlement Agreement are subject to the availability of appropriated funds. No provision of this Settlement Agreement shall be interpreted as or constitute a commitment or requirement that EPA obligate, expend or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. 1341, or any other applicable appropriations law or regulation, or otherwise take any action in contravention of those laws or regulations.
13. Nothing in the terms of this Settlement Agreement shall be construed to limit EPA's authority to alter, amend or revise any final rule EPA may issue pursuant to Paragraphs 3 or 4, or to promulgate superseding regulations.
14. The Parties agree and acknowledge that before this Settlement Agreement is final, EPA must provide notice in the Federal Register and an opportunity for public comment pursuant to CAA Section 113(g), 42 U.S.C. 7413(g). After this Settlement Agreement has undergone an opportunity for notice and comment, the Administrator and/or the Attorney General, as appropriate, shall promptly consider any such written comments in determining whether to withdraw or withhold her/his consent to the Settlement Agreement, in accordance with section 113(g) of the CAA. Within 30 days of the close of the public comment period, EPA shall provide written notice to State and Environmental Petitioners of any decision to withdraw or withhold consent or shall provide written notice of finality. This Settlement Agreement shall become final on the date that EPA provides written notice of such finality to the State and Environmental Petitioners.
15. The undersigned representatives of each Party certify that they are fully authorized by the Party that they represent to bind that respective Party to the terms of this Settlement

Agreement. This Settlement Agreement will be deemed to be executed when it has been signed by the representatives of the Parties set forth below, subject to final approvals pursuant to Paragraph 14.

DATE: \_\_\_\_\_

\_\_\_\_\_  
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Counsel for EPA

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Counsel for **[environmental petitioners]**

Counsel for **[state petitioners]**

**To:** "Gunter, David (ENRD)" [David.Gunter2@usdoj.gov]  
**Cc:** Patricia Embrey/DC/USEPA/US@EPA; Vickie\_Patton@environmentaldefense.org; ddoniger@nrdc.org; Michael.Myers@ag.ny.gov; Avi Garbow/DC/USEPA/US@EPA; Elliott Zenick/DC/USEPA/US@EPA; Eric Ginsburg/RTP/USEPA/US@EPA; Joseph Goffman/DC/USEPA/US@EPA; Peter Tsirigotis/RTP/USEPA/US@EPA[]; ickie\_Patton@environmentaldefense.org; ddoniger@nrdc.org; Michael.Myers@ag.ny.gov; Avi Garbow/DC/USEPA/US@EPA; Elliott Zenick/DC/USEPA/US@EPA; Eric Ginsburg/RTP/USEPA/US@EPA; Joseph Goffman/DC/USEPA/US@EPA; Peter Tsirigotis/RTP/USEPA/US@EPA[]; doniger@nrdc.org; Michael.Myers@ag.ny.gov; Avi Garbow/DC/USEPA/US@EPA; Elliott Zenick/DC/USEPA/US@EPA; Eric Ginsburg/RTP/USEPA/US@EPA; Joseph Goffman/DC/USEPA/US@EPA; Peter Tsirigotis/RTP/USEPA/US@EPA[]; ichael.Myers@ag.ny.gov; Avi Garbow/DC/USEPA/US@EPA; Elliott Zenick/DC/USEPA/US@EPA; Eric Ginsburg/RTP/USEPA/US@EPA; Joseph Goffman/DC/USEPA/US@EPA; Peter Tsirigotis/RTP/USEPA/US@EPA[]; vi Garbow/DC/USEPA/US@EPA; Elliott Zenick/DC/USEPA/US@EPA; Eric Ginsburg/RTP/USEPA/US@EPA; Joseph Goffman/DC/USEPA/US@EPA; Peter Tsirigotis/RTP/USEPA/US@EPA[]; Elliott Zenick/DC/USEPA/US@EPA; Eric Ginsburg/RTP/USEPA/US@EPA; Joseph Goffman/DC/USEPA/US@EPA; Peter Tsirigotis/RTP/USEPA/US@EPA[]; ric Ginsburg/RTP/USEPA/US@EPA; Joseph Goffman/DC/USEPA/US@EPA; Peter Tsirigotis/RTP/USEPA/US@EPA[]; oseph Goffman/DC/USEPA/US@EPA; Peter Tsirigotis/RTP/USEPA/US@EPA[]; eter Tsirigotis/RTP/USEPA/US@EPA[]  
**From:** Joanne Spalding  
**Sent:** Fri 9/24/2010 8:17:19 AM  
**Subject:** Resend: Combined state/environmental edits on draft

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-----Joanne Spalding/Sierraclub wrote: -----

**To:** Embrey.Patricia@epamail.epa.gov  
**From:** Joanne Spalding/Sierraclub  
**Date:** 09/24/2010 01:12AM  
**Cc:** Vickie\_Patton@environmentaldefense.org, ddoniger@nrdc.org, Michael.Myers@ag.ny.gov, DGunter@ENRD.USDOJ.GOV, Garbow.Avi@epamail.epa.gov, Zenick.Elliott@epamail.epa.gov, Ginsburg.Eric@epamail.epa.gov, Goffman.Joseph@epamail.epa.gov, Tsirigotis.Peter@epamail.epa.gov  
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[Zenick.Elliott@epamail.epa.gov]  
**From:** CN=Patricia Embrey/OU=DC/O=USEPA/C=US  
**Sent:** Fri 9/24/2010 6:34:46 PM  
**Subject:** Re: Resend: Combined state/environmental edits on draft

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[Michael.Myers@ag.ny.gov]; Elliott Zenick/DC/USEPA/US@EPA[]  
**From:** Vickie Patton  
**Sent:** Fri 9/24/2010 6:35:34 PM  
**Subject:** Re: Resend: Combined state/environmental edits on draft

Yes, will do.

From: Embrey.Patricia@epamail.epa.gov [mailto:Embrey.Patricia@epamail.epa.gov]  
Sent: Friday, September 24, 2010 02:34 PM  
To: Joanne Spalding <Joanne.Spalding@sierraclub.org>  
Cc: Vickie Patton; ddoniger <ddoniger@nrdc.org>; Michael Myers <Michael.Myers@ag.ny.gov>; Elliott  
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**To:** Patricia Embrey/DC/USEPA/US@EPA;"Joanne Spalding"  
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Zenick/DC/USEPA/US@EPA;"ddoniger" [ddoniger@nrdc.org]; ddoniger" [ddoniger@nrdc.org]  
**From:** "Michael Myers"  
**Sent:** Fri 9/24/2010 6:37:18 PM  
**Subject:** Re: Resend: Combined state/environmental edits on draft

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**Cc:** "Vickie Patton" [Vickie\_Patton@environmentaldefense.org]; Elliott Zenick/DC/USEPA/US@EPA[]  
**From:** "Doniger, David"  
**Sent:** Fri 9/24/2010 6:39:04 PM  
**Subject:** RE: Resend: Combined state/environmental edits on draft  
[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)  
[www.nrdc.org](http://www.nrdc.org)  
<http://switchboard.nrdc.org/blogs/ddoniger/>

I am free from 12:30 on, except 3-4:30.

David D. Doniger

Policy Director, Climate Center

Natural Resources Defense Council

1200 New York Ave., NW

Washington, DC 20005

Phone: (202) 289-2403

Cell: (202) 321-3435

Fax: (202) 789-0859

[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)

on the web at [www.nrdc.org](http://www.nrdc.org)

read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

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Sent: Friday, September 24, 2010 2:37 PM  
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Zenick/DC/USEPA/US@EPA[]  
**From:** "Gunter, David (ENRD)"  
**Sent:** Fri 9/24/2010 10:15:40 PM  
**Subject:** EGU Boiler NSPS settlement discussions  
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ENV DEFENSE-#491503-v1-Boiler NSPS --  
\_Redline\_Enviro\_draft\_to\_EPA\_draft\_Sept\_24.DOC

CONFIDENTIAL SETTLEMENT DISCUSSIONS

Counsel,

Attached please find a new EPA draft of the proposed Boiler NSPS settlement agreement, and a redline copy that compares this documents to the petitioners' most recent proposal. Please recall that this proposed draft is still subject to EPA and DOJ senior management review, as well as OMB clearance. You will find that we have accepted many of the minor changes that you proposed, and made a couple of other minor changes that we can explain as necessary. However, I do want to highlight the following points that have either been prominent in our discussions or that caused us some concern:

Significant points on which EPA is willing to agree to petitioners' proposals:

- For purposes of this agreement, we can agree that EPA's proposed rules under this settlement will "include" standards of performance and emission guidelines rather than "address" them; this change is reflected in paragraphs 1 and 2.
- In the Whereas clauses, we can accept your suggestion that the agency make a stronger statement about the appropriateness of proposing regulations under both 111(b) and 111(d).
- We are willing to agree to limit this agreement to your EGU claims, preserving any claims you may have (and EPA's defenses) concerning rulemaking related to subpart Db and Dc sources. Please note that this change is reflected in paragraph 6 which, in our view, is sufficient to preserve your Db and Dc arguments. We have therefore removed references to subpart Db and Dc issues in one of the Whereas clauses and in paragraph 9. Our goal is to avoid any suggestion that there would be imminent litigation on those issues; we hope you will also see the value of this.

Significant points on which EPA or DOJ has concerns about petitioners' proposals:

- Your proposed paragraph 5 seems to us a poor fit with the context of this agreement. We are amenable to periodic phone conferences, and we suggest every 60 days instead of 30 days to ensure that

each call is productive and EPA can report substantive progress. However, there is no need for status reports before the Court because there is no pending litigation, and no need to put our dispute before the Court at this time.

- We have concerns about preserving attorneys' fee claims in this agreement. Because the agency has been so responsive to your letter raising this issue, the amount of attorney activity leading up to this point has been relatively small. In some respects, your activity (and our response) has had more the character of petitioning the agency for new action than of settling pending litigation claims. We also note that payment of fees under Section 307(f) requires a "judicial proceeding," and no petition has yet been filed. Under these circumstances, we think it would be appropriate for each party to bear its own costs.

- We are unwilling at this time to strike the language providing that in the event of further litigation, the terms of this settlement agreement may not be put before the Court. Although this will be a matter of public notice for interested third parties, it is essentially the terms of a litigation compromise, and we are not comfortable with the idea that the terms of a proposed compromise may be relevant to litigation of the underlying merits claims.

In short, we think you will agree that this draft represents a move toward your position on some of the most important substantive points. In the interest of keeping this matter moving quickly, we hope you will be able to accept our position on the other points.

We are available on Monday at 2 p.m. to discuss this further.

Regards,

Dave Gunter

## **SETTLEMENT AGREEMENT**

This Settlement Agreement is made by and between the following groups of Petitioners: (1) the States of New York, California, Connecticut, Delaware, Maine, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, and the City of New York (collectively “State Petitioners”); and (2) Natural Resources Defense Council (NRDC), Sierra Club, and Environmental Defense Fund (EDF) (collectively “Environmental Petitioners”), and Respondent, the U.S. Environmental Protection Agency (“EPA”) (collectively “the Parties”).

WHEREAS, EPA published a final action entitled “Standards of Performance for Electric Utility Steam Generating Units, Industrial-Commercial-Institutional Steam Generating Units, and Small Industrial-Commercial-Institutional Steam Generating Units,” 71 Fed. Reg. 9,866 (Feb. 27, 2006) (the “Final Rule”);

WHEREAS, the Final Rule included amendments to the standards of performance for electric utility steam generating units subject to 40 C.F.R. part 60, subpart Da (“EGUs”);

WHEREAS, in connection with this Final Rule, EPA declined to establish standards of performance for greenhouse gas (“GHG”) emissions;

WHEREAS, State and Environmental Petitioners filed petitions for judicial review of the Final Rule under the Clean Air Act (“CAA”) Section 111, 42 U.S.C. § 7411, contending, *inter alia*, that the Final Rule was required to include standards of performance for GHG emissions from EGUs;

WHEREAS, the portion of State and Environmental Petitioners’ petitions for review of the Final Rule that related to GHG emissions were severed from other petitions for review of the Final Rule, and were formerly pending before the United States Court of Appeals for the District

of Columbia Circuit (the “Court”) under the caption *State of New York, et al. v. EPA*, No. 06-1322;

WHEREAS, following the Supreme Court’s decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), EPA requested remand of the Final Rule to EPA for further consideration of the issues related to GHG emissions in light of that decision;

WHEREAS, the Court remanded the Final Rule to EPA for further proceedings on GHG emissions in light of *Massachusetts v. EPA*, by its Order of September 24, 2007 (the “Remand Order”);

WHEREAS, as of the date of this Settlement Agreement, EPA has not taken any publicly noticed action to respond to the Remand Order;

WHEREAS, the State Petitioners submitted letters to EPA dated June 16, 2008 and August 4, 2009 inquiring as to the status of EPA’s action on the remand and stating their position that EPA had a legal obligation to act promptly to comply with the requirements of Section 111 and Environmental Petitioners submitted a letter to EPA on August 20, 2010 seeking commitments to rulemaking on GHG emissions from EGUs as a means of avoiding further litigation;

WHEREAS, EGUs are, collectively, the largest source category of GHG emissions in the United States, according to a recent EPA analysis. *See* 74 Fed. Reg. 56,260, 56,363 (Oct. 30, 2009);

WHEREAS, EPA’s initial evaluation of available GHG control strategies indicates that there are cost-effective control strategies for reducing GHGs from EGUs;

WHEREAS, EPA believes it would be appropriate for it to concurrently propose performance standards for GHG emissions from new and modified EGUs under CAA section

111(b), 42 U.S.C. § 7411(b), and emissions guidelines for GHG emissions from existing affected EGUs pursuant to CAA section 111(d), 42 U.S.C. § 7411(d), and 40 C.F.R. § 60.22;

WHEREAS, the Parties wish to enter into this Settlement Agreement to resolve the State and Environmental Petitioners' request for performance standards and emission guidelines for GHG emissions under CAA sections 111(b) and 111(d) and to avoid further litigation on this issue, without any admission or adjudications of fact or law;

NOW THEREFORE, the Parties, intending to be bound by this Settlement Agreement, hereby stipulate and agree as follows:

1. EPA will sign and promptly transmit to the Office of the Federal Register a proposed rule under section 111(b) by May 31, 2011, that includes standards of performance for GHGs for new and modified EGUs that are subject to 40 C.F.R. part 60, subpart Da. EPA shall provide the State and Environmental Petitioners a copy of the proposed rule within five business days of signature.
2. EPA will also sign and promptly transmit to the Office of the Federal Register a proposed rule under section 111(d) by May 31, 2011, that includes emissions guidelines for GHGs from existing EGUs that would have been subject to 40 C.F.R. part 60, subpart Da if they were new sources. EPA shall provide the State and Environmental Petitioners a copy of the proposed rule within five business days of signature.
3. After considering any public comments received concerning the proposed rule described in Paragraph 1, EPA will sign and promptly submit to the Office of the Federal Register a final rule no later than May 31, 2012, that takes final action with respect to the proposed rule described in Paragraph 1. EPA shall provide the Environmental and State Petitioners with a copy of its final action within five business days of signature.



4. If EPA finalizes standards of performance for GHGs pursuant to Paragraph 3, then based on consideration of the public comments received concerning the proposed rule described in Paragraph 2, EPA will sign and promptly submit to the Office of the Federal Register a final rule no later than May 31, 2012, that takes final action with respect to the proposed rule describe in Paragraph 2. EPA shall provide the State and Environmental Petitioners with a copy of its final action within five business days of signature.
5. EPA agrees that it will make staff available by telephone at least every 60 days to update State and Environmental Petitioners on EPA's progress in completing the actions described in Paragraphs (1) through (4).
6. Upon EPA's fulfillment of each of the obligations stated in Paragraphs 1 through 4 above, this Settlement Agreement shall constitute a full and final release of any claims that State and Environmental Petitioners may have under any provision of law to compel EPA to respond to the Court's Remand Order with respect to GHG emissions from EGUs, or for any attorneys' fees and costs in such an action.
7. State and Environmental Petitioners shall not file any motion or petition seeking to compel EPA action in response to the Remand Order with respect to GHG emissions from EGUs unless EPA has first failed to meet an obligation stated in Paragraphs 1 through 4 above. If EPA fails to meet such an obligation, State and Environmental Petitioners' sole remedy shall be to file an appropriate motion or petition with the Court or other civil action seeking to compel EPA to take action responding to the Remand Order. In that event, all Parties reserve any claims or defenses they may have in such an action, and the terms of this Settlement Agreement shall not be included in the record or other filings presented to the Court nor referenced in any such filing. State and

Environmental Petitioners reserve all rights under the law to file petitions for review of final agency actions under this Settlement Agreement, pursuant to section 307(b), 42 U.S.C. § 7607(b).

8. This Settlement Agreement constitutes the sole and entire understanding of EPA and the Environmental and State Petitioners and no statement, promise or inducement made by any Party to this Settlement Agreement, or any agent of such Parties, that is not set forth in this Settlement Agreement shall be valid or binding.
9. Except as expressly provided in this Settlement Agreement, none of the Parties waives or relinquishes any legal rights, claims or defenses it may have.
10. The provisions of this Settlement Agreement can be modified at any time by written mutual consent of the Parties.
11. Except as expressly provided herein, nothing in the terms of this Settlement Agreement shall be construed to limit or modify the discretion accorded EPA by the CAA or by general principles of administrative law.
12. The commitments by EPA in this Settlement Agreement are subject to the availability of appropriated funds. No provision of this Settlement Agreement shall be interpreted as or constitute a commitment or requirement that EPA obligate, expend or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. 1341, or any other applicable appropriations law or regulation, or otherwise take any action in contravention of those laws or regulations.
13. Nothing in the terms of this Settlement Agreement shall be construed to limit EPA's authority to alter, amend or revise any final rule EPA may issue pursuant to Paragraphs 3 or 4, or to promulgate superseding regulations.

14. The Parties agree and acknowledge that before this Settlement Agreement is final, EPA must provide notice in the Federal Register and an opportunity for public comment pursuant to CAA Section 113(g), 42 U.S.C. 7413(g). After this Settlement Agreement has undergone an opportunity for notice and comment, the Administrator and/or the Attorney General, as appropriate, shall promptly consider any such written comments in determining whether to withdraw or withhold her/his consent to the Settlement Agreement, in accordance with section 113(g) of the CAA. Within 30 days of the close of the public comment period, EPA shall provide written notice to State and Environmental Petitioners of any decision to withdraw or withhold consent or shall provide written notice of finality. This Settlement Agreement shall become final on the date that EPA provides written notice of such finality to the State and Environmental Petitioners.
15. The undersigned representatives of each Party certify that they are fully authorized by the Party that they represent to bind that respective Party to the terms of this Settlement Agreement. This Settlement Agreement will be deemed to be executed when it has been signed by the representatives of the Parties set forth below, subject to final approvals pursuant to Paragraph 14.

DATE: \_\_\_\_\_

\_\_\_\_\_  
DAVID GUNTER  
U.S. Department of Justice  
Environment and Natural Resources Division  
Environmental Defense Section  
P.O. Box 23986  
Washington, D.C. 20026-3986  
(202) 514-3785  
David.Gunter2@usdoj.gov

Counsel for EPA

DATE: \_\_\_\_\_

Counsel for **[environmental petitioners]**

Counsel for **[state petitioners]**

## **SETTLEMENT AGREEMENT**

This Settlement Agreement is made by and between the following groups of Petitioners: (1) the States of New York, California, Connecticut, Delaware, Maine, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, and the City of New York (collectively “State Petitioners”); and (2) Natural Resources Defense Council (NRDC), Sierra Club, and Environmental Defense Fund (EDF) (collectively “Environmental Petitioners”), and Respondent, the U.S. Environmental Protection Agency (“EPA”) (collectively “the Parties”).

WHEREAS, EPA published a final action entitled “Standards of Performance for Electric Utility Steam Generating Units, Industrial-Commercial-Institutional Steam Generating Units, and Small Industrial-Commercial-Institutional Steam Generating Units,” 71 Fed. Reg. 9,866 (Feb. 27, 2006) (the “Final Rule”);

WHEREAS, the Final Rule included amendments to the standards of performance for steam generating units subject to 40 C.F.R. part 60, subpart Da (“EGUs”);

WHEREAS, in connection with this Final Rule, EPA declined to establish standards of performance for greenhouse gas (“GHG”) emissions;

WHEREAS, State and Environmental Petitioners filed petitions for judicial review of the Final Rule under the Clean Air Act (“CAA”) Section 111, 42 U.S.C. § 7411, contending, *inter alia*, that the Final Rule was required to include standards of performance for GHG emissions from EGUs;

WHEREAS, the portion of State and Environmental Petitioners’ petitions for review of the Final Rule that related to GHG emissions were severed from other petitions for review of the Final Rule, and were formerly pending before the United States Court of Appeals for the District

of Columbia Circuit (the “Court”) under the caption *State of New York, et al. v. EPA*, No. 06-1322;

WHEREAS, following the Supreme Court’s decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), EPA requested remand of the Final Rule to EPA for further consideration of the issues related to GHG emissions in light of that decision;

WHEREAS, the Court remanded the Final Rule to EPA for further proceedings on GHG emissions in light of *Massachusetts v. EPA*, by its Order of September 24, 2007 (the “Remand Order”);

WHEREAS, as of the date of this Settlement Agreement, EPA has not taken any publicly noticed action to respond to the Remand Order;

WHEREAS, the State Petitioners submitted letters to EPA dated June 16, 2008 and August 4, 2009 inquiring as to the status of EPA’s action on the remand and stating their position that EPA had a legal obligation to act promptly to comply with the requirements of Section 111 and Environmental Petitioners submitted a letter to EPA on August 20, 2010 seeking commitments to rulemaking on GHG emissions from EGUs as a means of avoiding further litigation;

WHEREAS, EGUs are, collectively, the largest source category of GHG emissions in the United States, according to a recent EPA analysis. *See* 74 Fed. Reg. 56,260, 56,363 (Oct. 30, 2009);

WHEREAS, EPA’s initial evaluation of available GHG control strategies indicates that there are cost-effective control strategies for reducing GHGs from EGUs;

WHEREAS, EPA believes it would be appropriate for it to concurrently propose performance standards for GHG emissions from new and modified EGUs under CAA section

111(b), 42 U.S.C. § 7411(b), and emissions guidelines for GHG emissions from existing affected EGUs pursuant to CAA section 111(d), 42 U.S.C. § 7411(d), and 40 C.F.R. § 60.22;

WHEREAS, the Parties wish to enter into this Settlement Agreement to resolve the State and Environmental Petitioners' request for performance standards and emission guidelines for GHG emissions under CAA sections 111(b) and 111(d) and to avoid further litigation on this issue, without any admission or adjudications of fact or law;

NOW THEREFORE, the Parties, intending to be bound by this Settlement Agreement, hereby stipulate and agree as follows:

1. EPA will sign and promptly transmit to the Office of the Federal Register a proposed rule under section 111(b) by May 31, 2011, that includes standards of performance for GHGs for new and modified EGUs that are subject to 40 C.F.R. part 60, subpart Da. EPA shall provide the State and Environmental Petitioners a copy of the proposed rule within five business days of signature.
2. EPA will also sign and promptly transmit to the Office of the Federal Register a proposed rule under section 111(d) by May 31, 2011, that includes emissions guidelines for GHGs from existing EGUs that would have been subject to 40 C.F.R. part 60, subpart Da if they were new sources. EPA shall provide the State and Environmental Petitioners a copy of the proposed rule within five business days of signature.
3. After considering any public comments received concerning the proposed rule described in Paragraph 1, EPA will sign and promptly submit to the Office of the Federal Register a final rule no later than May 31, 2012, that takes final action with respect to the proposed rule described in Paragraph 1. EPA shall provide the Environmental and State Petitioners with a copy of its final action within five business days of signature.

4. If EPA finalizes standards of performance for GHGs pursuant to Paragraph 3, then based on consideration of the public comments received concerning the proposed rule described in Paragraph 2, EPA will sign and promptly submit to the Office of the Federal Register a final rule no later than May 31, 2012, that takes final action with respect to the proposed rule describe in Paragraph 2. EPA shall provide the State and Environmental Petitioners with a copy of its final action within five business days of signature.
5. EPA agrees that it will make staff available by telephone at least every 60 days to update State and Environmental Petitioners on EPA's progress in completing the actions described in Paragraphs (1) through (4).
6. Upon EPA's fulfillment of each of the obligations stated in Paragraphs 1 through 4 above, this Settlement Agreement shall constitute a full and final release of any claims that State and Environmental Petitioners may have under any provision of law to compel EPA to respond to the Court's Remand Order with respect to GHG emissions from EGUs, or for any attorneys' fees and costs in such an action.
7. State and Environmental Petitioners shall not file any motion or petition seeking to compel EPA action in response to the Remand Order with respect to GHG emissions from EGUs unless EPA has first failed to meet an obligation stated in Paragraphs 1 through 4 above. If EPA fails to meet such an obligation, State and Environmental Petitioners' sole remedy shall be to file an appropriate motion or petition with the Court or other civil action seeking to compel EPA to take action responding to the Remand Order. In that event, all Parties reserve any claims or defenses they may have in such an action, and the terms of this Settlement Agreement shall not be included in the record or other filings presented to the Court nor referenced in any such filing. State and



Environmental Petitioners reserve all rights under the law to file petitions for review of final agency actions under this Settlement Agreement, pursuant to section 307(b), 42 U.S.C. § 7607(b).

8. This Settlement Agreement constitutes the sole and entire understanding of EPA and the Environmental and State Petitioners and no statement, promise or inducement made by any Party to this Settlement Agreement, or any agent of such Parties, that is not set forth in this Settlement Agreement shall be valid or binding.
9. Except as expressly provided in this Settlement Agreement, none of the Parties waives or relinquishes any legal rights, claims or defenses it may have.
10. The provisions of this Settlement Agreement can be modified at any time by written mutual consent of the Parties.
11. Except as expressly provided herein, nothing in the terms of this Settlement Agreement shall be construed to limit or modify the discretion accorded EPA by the CAA or by general principles of administrative law.
12. The commitments by EPA in this Settlement Agreement are subject to the availability of appropriated funds. No provision of this Settlement Agreement shall be interpreted as or constitute a commitment or requirement that EPA obligate, expend or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. 1341, or any other applicable appropriations law or regulation, or otherwise take any action in contravention of those laws or regulations.
13. Nothing in the terms of this Settlement Agreement shall be construed to limit EPA's authority to alter, amend or revise any final rule EPA may issue pursuant to Paragraphs 3 or 4, or to promulgate superseding regulations.

14. The Parties agree and acknowledge that before this Settlement Agreement is final, EPA must provide notice in the Federal Register and an opportunity for public comment pursuant to CAA Section 113(g), 42 U.S.C. 7413(g). After this Settlement Agreement has undergone an opportunity for notice and comment, the Administrator and/or the Attorney General, as appropriate, shall promptly consider any such written comments in determining whether to withdraw or withhold her/his consent to the Settlement Agreement, in accordance with section 113(g) of the CAA. Within 30 days of the close of the public comment period, EPA shall provide written notice to State and Environmental Petitioners of any decision to withdraw or withhold consent or shall provide written notice of finality. This Settlement Agreement shall become final on the date that EPA provides written notice of such finality to the State and Environmental Petitioners.
15. The undersigned representatives of each Party certify that they are fully authorized by the Party that they represent to bind that respective Party to the terms of this Settlement Agreement. This Settlement Agreement will be deemed to be executed when it has been signed by the representatives of the Parties set forth below, subject to final approvals pursuant to Paragraph 14.

DATE: \_\_\_\_\_

\_\_\_\_\_  
DAVID GUNTER  
U.S. Department of Justice  
Environment and Natural Resources Division  
Environmental Defense Section  
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Counsel for EPA

DATE: \_\_\_\_\_

Counsel for **[environmental petitioners]**

Counsel for **[state petitioners]**

**To:** michael.myers@ag.ny.gov[michael.myers@ag.ny.gov];  
Joanne.Spalding@sierraclub.org>;[skhandeshi@environmentalintegrity.org];  
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jpeter@environmentalintegrity.org>;[ddoniger@nrdc.org];  
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mgeertsma@nrdc.org>;[morgan.costello@ag.ny.gov]; morgan.costello@ag.ny.gov>[]  
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Embrey/DC/USEPA/US@EPA[]  
**From:** "Gunter, David (ENRD)"  
**Sent:** Tue 9/28/2010 12:09:25 AM  
**Subject:** Refinery NSPS -- Draft agreement (EPA Sept 27 draft)  
ENV DEFENSE-#491621-v1-Refinery NSPS -- Enviro draft Sept 27 with DG edit.DOC

Counsel,

Thank you for forwarding your most recent draft of the Refinery NSPS agreement. We have accepted all your changes. However, we have added language to paragraph 7 providing that if the settlement agreement is put before the court in the event of future litigation, the deadlines will not be construed to represent agreement about what kind of schedule would be reasonable.

Based upon further review of this agreement within our approval chains, we have also made a couple of additional changes that are not intended to be substantive: We have removed the case caption from the top of the agreement since it is not a pleading to be filed with the Court, although it will be attached to the motion contemplated in paragraph 1. We have also modified paragraph 6 to indicate that we will recommend that the Court require us to file 90-day status reports, recognizing that it is usually the Court's prerogative to decide how often it will require status reports.

If you are amenable to these changes, then I believe we will have agreement on a draft that EPA and DOJ staff could recommend to their reviewers for approval. In light of this, we will plan to file an extension motion on Thursday that would give us until October 31 to finalize the agreement. Please let us know whether you consent.

Thank you for your hard work in helping us reach this point. We look forward to hearing that we can all agree on the attached draft.

Thanks,

Dave Gunter

## **SETTLEMENT AGREEMENT**

This Settlement Agreement is made by and between the following groups of Petitioners: (1) the States of New York, California, Connecticut, Delaware, Maine, New Hampshire, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, the District of Columbia, and the City of New York (collectively “State Petitioners”); (2) Natural Resources Defense Council (NRDC), Sierra Club, and Environmental Integrity Project (EIP) (collectively “Environmental Petitioners”); and (3) Respondent, the U.S. Environmental Protection Agency (“EPA”) (collectively “the Parties”).

WHEREAS, the State and Environmental Petitioners filed petitions for judicial review of the final action under the Clean Air Act (“CAA”) Section 111, 42 U.S.C. § 7411, entitled, “Standards of Performance for Petroleum Refineries, Final Rule,” published at 73 Fed. Reg. 35,838 (June 24, 2008) (“Final Rule”). These petitions for review currently are pending before the U.S. Court of Appeals for the District of Columbia Circuit in consolidated cases under the lead case *American Petroleum Institute, et al. v. EPA*, No. 08-1277;

WHEREAS, the Final Rule includes amendments to the current standards of performance (40 CFR part 60, subpart J) and separate standards of performance for new process units (40 CFR part 60, subpart Ja) at petroleum refineries;

WHEREAS, in connection with this Final Rule, EPA declined to establish standards of performance for greenhouse gas emissions (“GHGs”);

WHEREAS, the Environmental Petitioners also filed a petition for administrative reconsideration pursuant to CAA section 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B), and EPA granted reconsideration with respect to some of the issues raised in that petition for

reconsideration. *See* “Standards of Performance for Petroleum Refineries,” 73 Fed. Reg. 55,751 (Sept. 26, 2008).

WHEREAS, on December 22, 2008, EPA published a proposed rule concerning issues that were raised in the Environmental Petitioners’ administrative petition for reconsideration. *See* “Standards of Performance for Petroleum Refineries; Standards of Performance for Petroleum Refineries for Which Construction, Reconstruction, or Modification Commenced after May 14, 2007,” 73 Fed. Reg. 78,522 (Dec. 22, 2008) (“Proposed Rule”). EPA has accepted public comment on the Proposed Rule;

WHEREAS, starting on December 15, 2008, the Court has held the consolidated cases in abeyance pending further order;

WHEREAS, on December 29, 2009, EPA granted reconsideration of all remaining issues that were raised in the petitions for administrative reconsideration, including the failure to regulate GHGs. *See* Letter from Gina McCarthy, Assistant Administrator, Office of Air and Radiation, U.S. EPA to petitioners’ counsel (Dec. 29, 2009);

WHEREAS, refineries are estimated to be the second largest direct stationary source category of GHGs in the United States, according to a recent EPA analysis (based on data in Table 5-1, Regulatory Impact Analysis for the Mandatory Reporting of Greenhouse Gas Emissions, Final Report, September 2009.);

WHEREAS, EPA’s initial evaluation of available GHG control strategies indicates that there are cost-effective control strategies for reducing GHGs from refineries;

WHEREAS, based on current knowledge, EPA believes that it is appropriate for it to set standards of performance for GHGs from refineries;

WHEREAS, EPA believes it will be more effective to address GHGs and various other pollutants from refineries in a comprehensive manner rather than just addressing such pollutants from those affected facilities that are subject to regulation under NSPS subparts J and Ja;

WHEREAS, EPA believes that if it sets standards of performance for GHGs, it is also appropriate for it to concurrently issue emissions guidelines for GHGs from existing affected facilities at refineries pursuant to CAA section 111(d), 42 U.S.C. § 7411(d), and 40 C.F.R. § 60.22;

WHEREAS, this comprehensive approach of simultaneously addressing all affected facilities at refineries will require more time than would be required were EPA only addressing the pending issues on reconsideration;

WHEREAS, the State and Environmental Petitioners desire that EPA complete its reconsideration of GHG standards of performance for refineries as expeditiously as possible, but agree that allowing additional time for EPA to complete a rulemaking that follows the comprehensive approach discussed above is warranted in light of the potentially greater emissions reductions possible through such an approach, when compared to a rulemaking addressing only the remaining issues on reconsideration for NSPS subparts J and Ja;

WHEREAS, the Parties wish to implement this Settlement Agreement resolving the State and Environmental Petitioners' challenges to the Final Rule and the issues raised in the Environmental Petitioners' administrative petition for reconsideration and thereby avoid protracted litigation, and to preserve judicial resources, without any admission or adjudications of fact or law;

NOW THEREFORE, the Parties, intending to be bound by this Settlement Agreement, hereby stipulate and agree as follows:

1. Within three business days after this Settlement Agreement is executed by the Parties, but before finalization pursuant to Paragraph 14 of this Settlement Agreement, the Parties shall file a joint motion with the Court notifying it of this Settlement Agreement and requesting that the consolidated cases be held in abeyance pending completion of the process under CAA section 113(g) as set forth in Paragraph 14 and the actions described in Paragraphs 2 and 3 below.

2. EPA agrees that it will sign by December 15, 2011, and promptly transmit to the Office of the Federal Register, a proposed rule that includes, at a minimum, the following: (A) standards of performance for GHGs pursuant to 42 U.S.C. § 7411(b) for affected facilities at refineries that are subject to the following NSPS: (1) subparts J and Ja, (2) subpart Db, (3) subpart Dc, (4) subpart GGG, and (5) subpart QQQ, and emissions guidelines for GHGs pursuant to 42 U.S.C. § 7411(d) and 40 C.F.R. § 60.22 from existing affected facilities at refineries in the source categories covered by those NSPS subparts; (B) a review of the emission standards set forth in 40 C.F.R. Part 63, subpart UUU, pursuant to CAA sections 112(d)(6) and (f)(2), 42 U.S.C. §§ 7412(d)(6) and (f)(2); and (C) a proposed resolution of all other issues raised in Environmental Petitioners' August 25, 2008 petition for administrative reconsideration. EPA shall provide the State and Environmental Petitioners a copy of the proposed rule within five business days of signature.

3. After considering any public comments received concerning the proposed rule addressed in Paragraph 2, EPA will sign no later than November 15, 2012, and promptly submit to the Office of the Federal Register, a final rule that includes final determinations with regard to each of the elements, including all proposed standards and guidelines, listed in Paragraph 2.



EPA shall provide the State and Environmental Petitioners with a copy of this final rule within five business days of signature.

4. If EPA signs a final rule by November 15, 2012, as described in Paragraph 3 above, the State and Environmental Petitioners and EPA shall, no later than five business days after the date on which that final rule takes effect, file an appropriate pleading seeking the dismissal of Petitions for Review Nos. 08-1279 and 08-1281, with prejudice, in accordance with Rule 42(b) of the Federal Rules of Appellate Procedure. The State and Environmental Petitioners reserve their right to seek attorneys' fees and costs relating to this litigation, and EPA reserves any defenses it may have relating to such claims.

5. The State and Environmental Petitioners agree that performance of the obligations described in Paragraphs 2 and 3 shall constitute full and complete settlement of all claims they have or could have asserted under any provision of law in connection with this case, excluding any claims for attorneys' fees or other litigation costs as a result of this case.

6. EPA agrees that it will make staff available by telephone on at least a monthly basis to update the State and Environmental Petitioners on EPA's progress in completing the actions described in Paragraphs 2 and 3 and will recommend to the Court that EPA be ordered to file written status reports with the Court every 90 days starting from the date these cases are stayed under Paragraph 1, to inform the Court of EPA's progress in completing the actions described in Paragraphs 2 and 3. Such written status reports shall include an affirmative statement of whether EPA believes it will timely complete all actions described in Paragraphs 2 and 3.

7. If EPA does not sign a proposed rule by December 15, 2011, as described above in Paragraph 2, or a final rule by November 15, 2012, as described above in Paragraph 3, or if

the written status reports described in Paragraph 6 state that EPA will not timely complete all actions described in Paragraphs 2 or 3, or if the Administrator and/or the Attorney General determines to withdraw or withhold his/her consent to this Settlement Agreement as described in Paragraph 14, then the State and Environmental Petitioners' sole remedy with respect to the Final Rule at issue in these consolidated cases shall be the right to ask the Court to lift the stay of proceedings and establish a schedule for briefing and oral argument of the pending petitions for judicial review.

8. This Settlement Agreement constitutes the sole and entire understanding of EPA and the State and Environmental Petitioners and no statement, promise or inducement made by any Party to this Settlement Agreement, or any agent of such Parties, that is not set forth in this Settlement Agreement shall be valid or binding.

9. Except as expressly provided in this Settlement Agreement, none of the Parties waives or relinquishes any legal rights, claims or defenses it may have. In the event of further litigation, the dates stated in Paragraphs 2 and 3 shall be construed to represent only the parties' attempt to compromise claims in litigation, and not to represent agreement that any particular schedule for further agency action is reasonable or otherwise required by law.

10. The provisions of this Settlement Agreement can be modified at any time by written mutual consent of the Parties.

11. Nothing in the terms of this Settlement Agreement shall be construed to limit or modify the discretion accorded EPA by the CAA or by general principles of administrative law.

12. The commitments by EPA in this Settlement Agreement are subject to the availability of appropriated funds. No provision of this Settlement Agreement shall be interpreted as or constitute a commitment or requirement that EPA obligate, expend or pay funds

in contravention of the Anti-Deficiency Act, 31 U.S.C. 1341, or any other applicable appropriations law or regulation, or otherwise take any action in contravention of those laws or regulations.

13. Nothing in the terms of this Settlement Agreement shall be construed to limit EPA's authority to alter, amend or revise any final rule EPA may issue pursuant to Paragraph 3, or to promulgate superseding regulations.

14. The Parties agree and acknowledge that before this Settlement Agreement is final, EPA must provide notice in the Federal Register and an opportunity for public comment pursuant to CAA Section 113(g), 42 U.S.C. 7413(g). After this Settlement Agreement has undergone an opportunity for notice and comment, the Administrator and/or the Attorney General, as appropriate, shall promptly consider any such written comments in determining whether to withdraw or withhold her/his consent to the Settlement Agreement, in accordance with section 113(g) of the CAA. Within 30 days of the close of the public comment period, EPA shall provide written notice to State and Environmental Petitioners of any decision to withdraw or withhold consent or shall provide written notice of finality. This Settlement Agreement shall become final on the date that EPA provides written notice of such finality to the State and Environmental Petitioners.

15. The undersigned representatives of each Party certify that they are fully authorized by the Party that they represent to bind that respective Party to the terms of this Settlement Agreement. This Settlement Agreement will be deemed to be executed when it has been signed by the representatives of the Parties set forth below, subject to final approvals pursuant to Paragraph 14.

DATE: \_\_\_\_\_

\_\_\_\_\_  
DAVID GUNTER  
U.S. Department of Justice  
Environment and Natural Resources Division  
Environmental Defense Section  
P.O. Box 23986  
Washington, D.C. 20026-3986  
(202) 514-3785  
David.Gunter2@usdoj.gov

Counsel for EPA

DATE: \_\_\_\_\_

\_\_\_\_\_  
Counsel for [state petitioners]

Counsel for [environmental petitioners]

**To:** Joanne.Spalding@sierraclub.org[Joanne.Spalding@sierraclub.org];  
vpatton@environmentaldefense.org>;[ddoniger@nrdc.org];  
ddoniger@nrdc.org>;[michael.myers@ag.ny.gov]; michael.myers@ag.ny.gov>[]  
**Cc:** Elliott Zenick/DC/USEPA/US@EPA;Patricia Embrey/DC/USEPA/US@EPA[]; atricia  
Embrey/DC/USEPA/US@EPA[]  
**From:** "Gunter, David (ENRD)"  
**Sent:** Tue 9/28/2010 12:15:05 AM  
**Subject:** Boiler NSPS -- EPA September 27 draft  
ENV DEFENSE-#491791-v1-Boiler NSPS -- EPA draft Sept 27.DOC

Counsel,

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Dave Gunter

## **SETTLEMENT AGREEMENT**

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WHEREAS, EPA published a final action entitled “Standards of Performance for Electric Utility Steam Generating Units, Industrial-Commercial-Institutional Steam Generating Units, and Small Industrial-Commercial-Institutional Steam Generating Units,” 71 Fed. Reg. 9,866 (Feb. 27, 2006) (the “Final Rule”);

WHEREAS, the Final Rule included amendments to the standards of performance for electric utility steam generating units subject to 40 C.F.R. part 60, subpart Da (“EGUs”);

WHEREAS, in connection with this Final Rule, EPA declined to establish standards of performance for greenhouse gas (“GHG”) emissions;

WHEREAS, State and Environmental Petitioners filed petitions for judicial review of the Final Rule under the Clean Air Act (“CAA”) Section 111, 42 U.S.C. § 7411, contending, *inter alia*, that the Final Rule was required to include standards of performance for GHG emissions from EGUs;

WHEREAS, the portion of State and Environmental Petitioners’ petitions for review of the Final Rule that related to GHG emissions were severed from other petitions for review of the Final Rule, and were formerly pending before the United States Court of Appeals for the District

of Columbia Circuit (the “Court”) under the caption *State of New York, et al. v. EPA*, No. 06-1322;

WHEREAS, following the Supreme Court’s decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), EPA requested remand of the Final Rule to EPA for further consideration of the issues related to GHG emissions in light of that decision;

WHEREAS, the Court remanded the Final Rule to EPA for further proceedings on GHG emissions in light of *Massachusetts v. EPA*, by its Order of September 24, 2007 (the “Remand Order”);

WHEREAS, as of the date of this Settlement Agreement, EPA has not taken any publicly noticed action to respond to the Remand Order;

WHEREAS, the State Petitioners submitted letters to EPA dated June 16, 2008 and August 4, 2009 inquiring as to the status of EPA’s action on the remand and stating their position that EPA had a legal obligation to act promptly to comply with the requirements of Section 111 and Environmental Petitioners submitted a letter to EPA on August 20, 2010 seeking commitments to rulemaking on GHG emissions from EGUs as a means of avoiding further litigation;

WHEREAS, EGUs are, collectively, the largest source category of GHG emissions in the United States, according to a recent EPA analysis. *See* 74 Fed. Reg. 56,260, 56,363 (Oct. 30, 2009);

WHEREAS, EPA’s initial evaluation of available GHG control strategies indicates that there are cost-effective control strategies for reducing GHGs from EGUs;

WHEREAS, EPA believes it would be appropriate for it to concurrently propose performance standards for GHG emissions from new and modified EGUs under CAA section

111(b), 42 U.S.C. § 7411(b), and emissions guidelines for GHG emissions from existing affected EGUs pursuant to CAA section 111(d), 42 U.S.C. § 7411(d), and 40 C.F.R. § 60.22;

WHEREAS, the Parties wish to enter into this Settlement Agreement to resolve the State and Environmental Petitioners' request for performance standards and emission guidelines for GHG emissions under CAA sections 111(b) and 111(d) and to avoid further litigation on this issue, without any admission or adjudications of fact or law;

NOW THEREFORE, the Parties, intending to be bound by this Settlement Agreement, hereby stipulate and agree as follows:

1. EPA will sign and promptly transmit to the Office of the Federal Register a proposed rule under section 111(b) by May 31, 2011, that includes standards of performance for GHGs for new and modified EGUs that are subject to 40 C.F.R. part 60, subpart Da. EPA shall provide the State and Environmental Petitioners a copy of the proposed rule within five business days of signature.
2. EPA will also sign and promptly transmit to the Office of the Federal Register a proposed rule under section 111(d) by May 31, 2011, that includes emissions guidelines for GHGs from existing EGUs that would have been subject to 40 C.F.R. part 60, subpart Da if they were new sources. EPA shall provide the State and Environmental Petitioners a copy of the proposed rule within five business days of signature.
3. After considering any public comments received concerning the proposed rule described in Paragraph 1, EPA will sign and promptly submit to the Office of the Federal Register a final rule no later than May 31, 2012, that takes final action with respect to the proposed rule described in Paragraph 1. EPA shall provide the Environmental and State Petitioners with a copy of its final action within five business days of signature.



4. If EPA finalizes standards of performance for GHGs pursuant to Paragraph 3, then based on consideration of the public comments received concerning the proposed rule described in Paragraph 2, EPA will sign and promptly submit to the Office of the Federal Register a final rule no later than May 31, 2012, that takes final action with respect to the proposed rule describe in Paragraph 2. EPA shall provide the State and Environmental Petitioners with a copy of its final action within five business days of signature.
5. EPA agrees that it will make staff available by telephone at least every 60 days to update State and Environmental Petitioners on EPA's progress in completing the actions described in Paragraphs (1) through (4). In addition, EPA will provide State and Environmental Petitioners with a status letter every 60 days, which shall include an affirmative statement of whether EPA believes it will timely complete all actions described in Paragraphs 1 through 4.
6. Upon EPA's fulfillment of each of the obligations stated in Paragraphs 1 through 4 above, this Settlement Agreement shall constitute a full and final release of any claims that State and Environmental Petitioners may have under any provision of law to compel EPA to respond to the Court's Remand Order with respect to GHG emissions from EGUs.
7. State and Environmental Petitioners shall not file any motion or petition seeking to compel EPA action in response to the Remand Order with respect to GHG emissions from EGUs unless EPA has first failed to meet an obligation stated in Paragraphs 1 through 4 above. If EPA fails to meet such an obligation, or if EPA's status letters described in Paragraph 5 state that EPA does not believe it will timely complete all actions described in Paragraphs 1 through 4, State and Environmental Petitioners' sole

remedy shall be to file an appropriate motion or petition with the Court or other civil action seeking to compel EPA to take action responding to the Remand Order. In that event, all Parties reserve any claims or defenses they may have in such an action, and the dates stated in Paragraphs 1 through 4 shall be construed to represent only the parties' attempt to compromise claims in litigation, and not to represent agreement that any particular schedule for further agency action is reasonable or otherwise required by law. State and Environmental Petitioners reserve all rights under the law to file petitions for review of final agency actions under this Settlement Agreement, pursuant to section 307(b), 42 U.S.C. § 7607(b).

8. This Settlement Agreement constitutes the sole and entire understanding of EPA and the Environmental and State Petitioners and no statement, promise or inducement made by any Party to this Settlement Agreement, or any agent of such Parties, that is not set forth in this Settlement Agreement shall be valid or binding.
9. Except as expressly provided in this Settlement Agreement, none of the Parties waives or relinquishes any legal rights, claims or defenses it may have. State and Environmental Petitioners reserve the right to seek attorneys' fees and costs relating to this litigation, and EPA reserves any defenses it may have relating to such claims.
10. The provisions of this Settlement Agreement can be modified at any time by written mutual consent of the Parties.
11. Except as expressly provided herein, nothing in the terms of this Settlement Agreement shall be construed to limit or modify the discretion accorded EPA by the CAA or by general principles of administrative law.

12. The commitments by EPA in this Settlement Agreement are subject to the availability of appropriated funds. No provision of this Settlement Agreement shall be interpreted as or constitute a commitment or requirement that EPA obligate, expend or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. 1341, or any other applicable appropriations law or regulation, or otherwise take any action in contravention of those laws or regulations.
13. Nothing in the terms of this Settlement Agreement shall be construed to limit EPA's authority to alter, amend or revise any final rule EPA may issue pursuant to Paragraphs 3 or 4, or to promulgate superseding regulations.
14. The Parties agree and acknowledge that before this Settlement Agreement is final, EPA must provide notice in the Federal Register and an opportunity for public comment pursuant to CAA Section 113(g), 42 U.S.C. 7413(g). After this Settlement Agreement has undergone an opportunity for notice and comment, the Administrator and/or the Attorney General, as appropriate, shall promptly consider any such written comments in determining whether to withdraw or withhold her/his consent to the Settlement Agreement, in accordance with section 113(g) of the CAA. Within 30 days of the close of the public comment period, EPA shall provide written notice to State and Environmental Petitioners of any decision to withdraw or withhold consent or shall provide written notice of finality. This Settlement Agreement shall become final on the date that EPA provides written notice of such finality to the State and Environmental Petitioners.
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DATE: \_\_\_\_\_

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DAVID GUNTER  
U.S. Department of Justice  
Environment and Natural Resources Division  
Environmental Defense Section  
P.O. Box 23986  
Washington, D.C. 20026-3986  
(202) 514-3785  
David.Gunter2@usdoj.gov

Counsel for EPA

DATE: \_\_\_\_\_

\_\_\_\_\_  
Counsel for **[environmental petitioners]**

Counsel for **[state petitioners]**

**To:** vpatton@environmentaldefense.org[vpatton@environmentaldefense.org];  
ddoniger@nrdc.org>;[Joanne.Spalding@sierraclub.org];  
Joanne.Spalding@sierraclub.org>;"David (ENRD) Gunter" [David.Gunter2@usdoj.gov]; David  
(ENRD) Gunter" [David.Gunter2@usdoj.gov]  
**Cc:** Patricia Embrey/DC/USEPA/US@EPA;Elliott Zenick/DC/USEPA/US@EPA[]; Iliott  
Zenick/DC/USEPA/US@EPA[]  
**From:** "Michael Myers"  
**Sent:** Tue 9/28/2010 1:22:34 PM  
**Subject:** Re: Boiler NSPS -- EPA September 27 draft

\*Privileged and Confidential Settlement Communication\*

Dave, thanks for the revised version of the settlement agreement. NY is fine with the changes and I don't anticipate any problems getting buy-in from the other state petitioners on the language. I've corresponded last night/this morning with David, Joanne, and Vickie, and understand that they have some minor language changes that state petitioners are on board with. With respect to the filing in court aspect, I believe that EPA/DOJ has some discretion here to file this with the court, despite the language of Circuit Rule 41(b), especially given the precedent in Mass. that David alluded to yesterday. Although I understand your desire not to set a precedent that you may not like to follow in other cases, I don't think it can be seriously debated that EPA has a legal obligation to set NSPS for EGUs, so the technical distinction that there is no pending litigation in the D.C. Circuit does not seem to me to be a meaningful one. That being said, state petitioners are amenable, because of the importance of this commitment by EPA and the public health and environmental benefits that should result, not to hold the agreement up by insisting on the filing of the agreement with the court (or pursuing the mandamus route, which would also likely delay things).

In addition to the substance of the agreement, state petitioners are also very interested in the timing for finalizing the settlement (when signature pages will be due, EPA's preferred course on announcement of the settlement, etc.). I would hope that we can discuss these issues today or tomorrow, assuming we're there on the terms. Thanks for your work on this.--Mike

>>> "Gunter, David (ENRD)" <David.Gunter2@usdoj.gov> 9/27/2010 8:15 PM >>>

Counsel,

Thank you for your participation in the call today about the Boiler NSPS settlement. The attached draft represents our changes, in redline, reflecting the compromise that we reached on certain points today. If this draft is acceptable to you, then I believe we have staff-level agreement on a draft that we can recommend to our respective clients and reviewing agency officials for approval. However, as we discussed, I would still appreciate your written confirmation (by letter or e-mail) that you do not presently intend to seek attorneys' fees in this case.

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We've made remarkable progress on this matter in a very short time, and I hope that you can advise us we have an agreement with this draft. If we need to discuss this further, we're available for a call at 9:00 tomorrow morning.

Thanks,

Dave Gunter

**To:** "Michael Myers" [Michael.Myers@ag.ny.gov];  
vpatton@environmentaldefense.org>;[ddoniger@nrdc.org];  
ddoniger@nrdc.org>;[Joanne.Spalding@sierraclub.org]; Joanne.Spalding@sierraclub.org>[]  
**Cc:** Patricia Embrey/DC/USEPA/US@EPA;Elliott Zenick/DC/USEPA/US@EPA[]; Iliott  
Zenick/DC/USEPA/US@EPA[]  
**From:** "Gunter, David (ENRD)"  
**Sent:** Tue 9/28/2010 1:31:23 PM  
**Subject:** RE: Boiler NSPS -- EPA September 27 draft

Mike: Thanks for this communication. I would like to hear from the environmental petitioners as well, and even if we are not able to persuade each other on the point of a status report, I hope their answer will be similar to yours.

On the question of timing: Once we hear from all petitioners that the most recent draft is an acceptable agreement, both EPA and DOJ will be moving quickly to line up our approval authorities. At that point we'll have a better idea of what our timetable will be from here. I'm in court this morning, but I'll be available this afternoon after 4:00, and we may be able to share more details at that time.

Thanks,  
Dave

From: Michael Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Tuesday, September 28, 2010 9:23 AM  
To: vpatton@environmentaldefense.org; ddoniger@nrdc.org; Joanne.Spalding@sierraclub.org; Gunter, David (ENRD)  
Cc: embrey.patricia@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov  
Subject: Re: Boiler NSPS -- EPA September 27 draft

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**To:** "Gunter, David (ENRD)" [David.Gunter2@usdoj.gov];  
Joanne.Spalding@sierraclub.org>;[vpatton@environmentaldefense.org];  
vpatton@environmentaldefense.org>;[michael.myers@ag.ny.gov]; michael.myers@ag.ny.gov>[]  
**Cc:** Elliott Zenick/DC/USEPA/US@EPA;Patricia Embrey/DC/USEPA/US@EPA[]; atricia  
Embrey/DC/USEPA/US@EPA[]  
**From:** "Doniger, David"  
**Sent:** Tue 9/28/2010 1:30:53 PM  
**Subject:** RE: Boiler NSPS -- EPA September 27 draft  
ENV\_DEFENSE-#491791-v1-Boiler NSPS -- EPA draft Sept 27 enviro comments Sept 28.doc  
ddoniger@nrdc.org  
www.nrdc.org  
http://switchboard.nrdc.org/blogs/ddoniger/

David and colleagues,

Thanks for the continued progress on this matter. Enclosed is the draft agreement with some small edits that are intended to clarify certain of the recent additions. We hope and trust that these will not pose any problems, and if these are acceptable, then on behalf of the environmental petitioners I can state that we too believe we have staff-level agreement on the draft.

Although reluctantly, we can agree to proceed without the initial filing of the settlement with the Court, bearing in mind that the terms of the settlement preserve our ability to return to the Court and our ability to refer to the settlement if there should be a failure to implement.

This note confirms that although the agreement preserves our right to seek attorneys fees and costs, the environmental petitioners do not intend to seek fees or costs for work done to date in connection with the underlying case or these settlement negotiations.

We too appreciate the cooperation of the government team and the speed at which we have been able to conduct these negotiations.

David

David D. Doniger

Policy Director, Climate Center

Natural Resources Defense Council

1200 New York Ave., NW

Washington, DC 20005

Phone: (202) 289-2403

Cell: (202) 321-3435

Fax: (202) 789-0859

ddoniger@nrdc.org

on the web at [www.nrdc.org](http://www.nrdc.org)

read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

From: Gunter, David (ENRD) [mailto:David.Gunter2@usdoj.gov]

Sent: Monday, September 27, 2010 8:15 PM

To: Joanne.Spalding@sierraclub.org; vpatton@environmentaldefense.org; Doniger, David;  
michael.myers@ag.ny.gov

Cc: Zenick.Elliott@epamail.epa.gov; embrey.patricia@epamail.epa.gov

Subject: Boiler NSPS -- EPA September 27 draft

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WHEREAS, the Final Rule included amendments to the standards of performance for electric utility steam generating units subject to 40 C.F.R. part 60, subpart Da (“EGUs”);

WHEREAS, in connection with this Final Rule, EPA declined to establish standards of performance for greenhouse gas (“GHG”) emissions;

WHEREAS, State and Environmental Petitioners filed petitions for judicial review of the Final Rule under the Clean Air Act (“CAA”) Section 111, 42 U.S.C. § 7411, contending, *inter alia*, that the Final Rule was required to include standards of performance for GHG emissions from EGUs;

WHEREAS, the portions of State and Environmental Petitioners’ petitions for review of the Final Rule that related to GHG emissions were severed from other petitions for review of the Final Rule, and were formerly pending before the United States Court of Appeals for the District

of Columbia Circuit (the “Court”) under the caption *State of New York, et al. v. EPA*, No. 06-1322;

WHEREAS, following the Supreme Court’s decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), EPA requested remand of the Final Rule to EPA for further consideration of the issues related to GHG emissions in light of that decision;

WHEREAS, the Court remanded the Final Rule to EPA for further proceedings on GHG emissions in light of *Massachusetts v. EPA*, by its Order of September 24, 2007 (the “Remand Order”);

WHEREAS, as of the date of this Settlement Agreement, EPA has not taken any publicly noticed action to respond to the Remand Order;

WHEREAS, the State Petitioners submitted letters to EPA dated June 16, 2008 and August 4, 2009 inquiring as to the status of EPA’s action on the remand and stating their position that EPA had a legal obligation to act promptly to comply with the requirements of Section 111, and Environmental Petitioners submitted a letter to EPA on August 20, 2010 seeking commitments to rulemaking on GHG emissions from EGUs as a means of avoiding further litigation;

WHEREAS, EGUs are, collectively, the largest source category of GHG emissions in the United States, according to a recent EPA analysis. *See* 74 Fed. Reg. 56,260, 56,363 (Oct. 30, 2009);

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WHEREAS, EPA believes it would be appropriate for it to concurrently propose performance standards for GHG emissions from new and modified EGUs under CAA section

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3. After considering any public comments received concerning the proposed rule described in Paragraph 1, EPA will sign and promptly submit to the Office of the Federal Register a final rule no later than May 31, 2012, that takes final action with respect to the proposed rule described in Paragraph 1. EPA shall provide the Environmental and State Petitioners with a copy of its final action within five business days of signature.

4. If EPA finalizes standards of performance for GHGs pursuant to Paragraph 3, then based on consideration of the public comments received concerning the proposed rule described in Paragraph 2, EPA will sign and promptly submit to the Office of the Federal Register a final rule no later than May 31, 2012, that takes final action with respect to the proposed rule describe in Paragraph 2. EPA shall provide the State and Environmental Petitioners with a copy of its final action within five business days of signature.
5. EPA agrees that it will make staff available by telephone at least every 60 days to update State and Environmental Petitioners on EPA's progress in completing the actions described in Paragraphs (1) through (4). In addition, EPA will provide State and Environmental Petitioners with a status letter every 60 days, which shall include an affirmative statement of whether EPA believes it will timely complete all actions described in Paragraphs 1 through 4.
6. Upon EPA's fulfillment of each of the obligations stated in Paragraphs 1 through 4 above, this Settlement Agreement shall constitute a full and final release of any claims that State and Environmental Petitioners may have under any provision of law to compel EPA to respond to the Court's Remand Order with respect to GHG emissions from EGUs.
7. State and Environmental Petitioners shall not file any motion or petition seeking to compel EPA action in response to the Remand Order with respect to GHG emissions from EGUs unless EPA has first failed to meet an obligation stated in Paragraphs 1 through 4 above. If EPA fails to meet such an obligation, or if an EPA status letter described in Paragraph 5 does not affirm that EPA believes it will timely complete all actions described in Paragraphs 1 through 4, or if EPA fails to send a status letter as

described in Paragraph 5 and does not promptly cure that failure upon receiving notice, State and Environmental Petitioners' sole remedy shall be to file an appropriate motion or petition with the Court or other civil action seeking to compel EPA to take action responding to the Remand Order. In that event, all Parties reserve any claims or defenses they may have in such an action, and the dates stated in Paragraphs 1 through 4 shall be construed to represent only the parties' attempt to compromise claims in litigation, and not to represent agreement that any particular schedule for further agency action is reasonable or otherwise required by law. State and Environmental Petitioners reserve all rights under the law to file petitions for review of final agency actions under this Settlement Agreement, pursuant to section 307(b), 42 U.S.C. § 7607(b).

8. This Settlement Agreement constitutes the sole and entire understanding of EPA and the Environmental and State Petitioners and no statement, promise or inducement made by any Party to this Settlement Agreement, or any agent of such Parties, that is not set forth in this Settlement Agreement shall be valid or binding.
9. Except as expressly provided in this Settlement Agreement, none of the Parties waives or relinquishes any legal rights, claims or defenses it may have. State and Environmental Petitioners reserve the right to seek attorneys' fees and costs relating to this litigation, and EPA reserves any defenses it may have relating to such claims.
10. The provisions of this Settlement Agreement can be modified at any time by written mutual consent of the Parties.
11. Except as expressly provided herein, nothing in the terms of this Settlement Agreement shall be construed to limit or modify the discretion accorded EPA by the CAA or by general principles of administrative law.



12. The commitments by EPA in this Settlement Agreement are subject to the availability of appropriated funds. No provision of this Settlement Agreement shall be interpreted as or constitute a commitment or requirement that EPA obligate, expend or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. 1341, or any other applicable appropriations law or regulation, or otherwise take any action in contravention of those laws or regulations.
13. Nothing in the terms of this Settlement Agreement shall be construed to limit EPA's authority to alter, amend or revise any final rule EPA may issue pursuant to Paragraphs 3 or 4, or to promulgate superseding regulations.
14. The Parties agree and acknowledge that before this Settlement Agreement is final, EPA must provide notice in the Federal Register and an opportunity for public comment pursuant to CAA Section 113(g), 42 U.S.C. 7413(g). After this Settlement Agreement has undergone an opportunity for notice and comment, the Administrator and/or the Attorney General, as appropriate, shall promptly consider any such written comments in determining whether to withdraw or withhold her/his consent to the Settlement Agreement, in accordance with section 113(g) of the CAA. Within 30 days of the close of the public comment period, EPA shall provide written notice to State and Environmental Petitioners of any decision to withdraw or withhold consent or shall provide written notice of finality. This Settlement Agreement shall become final on the date that EPA provides written notice of such finality to the State and Environmental Petitioners.
15. The undersigned representatives of each Party certify that they are fully authorized by the Party that they represent to bind that respective Party to the terms of this Settlement

Agreement. This Settlement Agreement will be deemed to be executed when it has been signed by the representatives of the Parties set forth below, subject to final approvals pursuant to Paragraph 14.

DATE: \_\_\_\_\_

\_\_\_\_\_  
DAVID GUNTER  
U.S. Department of Justice  
Environment and Natural Resources Division  
Environmental Defense Section  
P.O. Box 23986  
Washington, D.C. 20026-3986  
(202) 514-3785  
David.Gunter2@usdoj.gov

Counsel for EPA

DATE: \_\_\_\_\_

\_\_\_\_\_  
Counsel for **[environmental petitioners]**

Counsel for **[state petitioners]**

**To:** vpatton@environmentaldefense.org[vpatton@environmentaldefense.org];  
ddoniger@nrdc.org>;[Joanne.Spalding@sierraclub.org];  
Joanne.Spalding@sierraclub.org>;"David (ENRD) Gunter" [David.Gunter2@usdoj.gov]; David  
(ENRD) Gunter" [David.Gunter2@usdoj.gov]  
**Cc:** Patricia Embrey/DC/USEPA/US@EPA;Elliott Zenick/DC/USEPA/US@EPA[]; Iliott  
Zenick/DC/USEPA/US@EPA[]  
**From:** "Michael Myers"  
**Sent:** Tue 9/28/2010 1:38:37 PM  
**Subject:** RE: Boiler NSPS -- EPA September 27 draft

Ok, thanks. Shall we pencil in a quick call for 4 or 4:30?

>>> "Gunter, David (ENRD)" <David.Gunter2@usdoj.gov> 9/28/2010 9:31 AM >>>

Mike: Thanks for this communication. I would like to hear from the environmental petitioners as well, and even if we are not able to persuade each other on the point of a status report, I hope their answer will be similar to yours.

On the question of timing: Once we hear from all petitioners that the most recent draft is an acceptable agreement, both EPA and DOJ will be moving quickly to line up our approval authorities. At that point we'll have a better idea of what our timetable will be from here. I'm in court this morning, but I'll be available this afternoon after 4:00, and we may be able to share more details at that time.

Thanks,  
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From: Michael Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Tuesday, September 28, 2010 9:23 AM  
To: vpatton@environmentaldefense.org; ddoniger@nrdc.org; Joanne.Spalding@sierraclub.org; Gunter,  
David (ENRD)  
Cc: embrey.patricia@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov  
Subject: Re: Boiler NSPS -- EPA September 27 draft

\*Privileged and Confidential Settlement Communication\*

Dave, thanks for the revised version of the settlement agreement. NY is fine with the changes and I don't anticipate any problems getting buy-in from the other state petitioners on the language. I've corresponded last night/this morning with David, Joanne, and Vickie, and understand that they have some minor language changes that state petitioners are on board with. With respect to the filing in court aspect, I believe that EPA/DOJ has some discretion here to file this with the court, despite the language of Circuit Rule 41(b), especially given the precedent in Mass. that David alluded to yesterday. Although I understand your desire not to set a precedent that you may not like to follow in other cases, I don't think it can be seriously debated that EPA has a legal obligation to set NSPS for EGUs, so the technical

distinction that there is no pending litigation in the D.C. Circuit does not seem to me to be a meaningful one. That being said, state petitioners are amenable, because of the importance of this commitment by EPA and the public health and environmental benefits that should result, not to hold the agreement up by insisting on the filing of the agreement with the court (or pursuing the mandamus route, which would also likely delay things).

In addition to the substance of the agreement, state petitioners are also very interested in the timing for finalizing the settlement (when signature pages will be due, EPA's preferred course on announcement of the settlement, etc.). I would hope that we can discuss these issues today or tomorrow, assuming we're there on the terms. Thanks for your work on this.--Mike

>>> "Gunter, David (ENRD)" <David.Gunter2@usdoj.gov> 9/27/2010 8:15 PM >>>

Counsel,

Thank you for your participation in the call today about the Boiler NSPS settlement. The attached draft represents our changes, in redline, reflecting the compromise that we reached on certain points today. If this draft is acceptable to you, then I believe we have staff-level agreement on a draft that we can recommend to our respective clients and reviewing agency officials for approval. However, as we discussed, I would still appreciate your written confirmation (by letter or e-mail) that you do not presently intend to seek attorneys' fees in this case.

That leaves the question that we discussed on our call today about the possibility of filing a status report with the D.C. Circuit to inform it of this agreement. I have raised this question with my management within DOJ, and I have been instructed that it would be very difficult for us to compromise on this point. As David said on our call, a fight on this issue is not in anyone's interest. I am therefore asking you to agree that you will not file the final settlement with the Court unless further litigation becomes necessary.

We've made remarkable progress on this matter in a very short time, and I hope that you can advise us we have an agreement with this draft. If we need to discuss this further, we're available for a call at 9:00 tomorrow morning.

Thanks,

Dave Gunter

**To:** "Michael Myers" [Michael.Myers@ag.ny.gov]  
**Cc:** Elliott Zenick/DC/USEPA/US@EPA[]  
**From:** "Gunter, David (ENRD)"  
**Sent:** Tue 9/28/2010 3:50:00 PM  
**Subject:** RE: Boiler NSPS -- EPA September 27 draft

Mike: I'm not sure we'll have the answers you want by 4:00, particularly with respect to announcing the settlement – that's someone else's department. What I can tell you is that we are trying to move quickly to get the necessary legal approvals so that officials within the agency can be ready to make an announcement whenever they decide it is appropriate. For that task, we are targeting a timeline of days, not weeks.

In order for me to focus on the DOJ approval, it would help to know the approval status within the NYAG office. Before I seek final approval from the Assistant Attorney General, we ordinarily need to know that all the other parties to the agreement have also approved. When do you think you will have review complete at a sufficient level to make that representation to me?

Since our organizations have approval requirements that the environmental groups don't share, I'm not sure an all-hands call is needed to talk this through. But I am available to talk after 4 if you have questions – feel free to give me a call at 202-514-3785.

Dave

From: Michael Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Tuesday, September 28, 2010 9:39 AM  
To: vpatton@environmentaldefense.org; ddoniger@nrdc.org; Joanne.Spalding@sierraclub.org; Gunter, David (ENRD)  
Cc: embrey.patricia@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov  
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respective clients and reviewing agency officials for approval. However, as we discussed, I would still appreciate your written confirmation (by letter or e-mail) that you do not presently intend to seek attorneys' fees in this case.

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We've made remarkable progress on this matter in a very short time, and I hope that you can advise us we have an agreement with this draft. If we need to discuss this further, we're available for a call at 9:00 tomorrow morning.

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**To:** "David (ENRD) Gunter" [David.Gunter2@usdoj.gov]  
**Cc:** "Morgan Costello" [Morgan.Costello@ag.ny.gov]; Elliott Zenick/DC/USEPA/US@EPA[]  
**From:** "Michael Myers"  
**Sent:** Tue 9/28/2010 4:23:18 PM  
**Subject:** RE: Boiler NSPS -- EPA September 27 draft

\*Privileged and Confidential Settlement Communication\*

Thanks Dave. I have approval here in my office. For my co-states, I have a mix of approvals and "expect to get approvals," with two states not weighing in as of yet (I don't anticipate problems with either of them joining). We may have a bit of a chicken and egg problem here though, as I may have difficulty extracting the remaining final approvals unless I have a firm deadline from you guys. That being said, I'm hopeful that I'll be able to let you know by COB Thursday that all of the states have approval. You'll need to let me know how the timing of your approval process works with us getting you actual signatures to the agreement. Speaking of actual signatures, my guess is that once AGs (or AAGs) sign the settlement agreement, there will be significant pressure to announce the settlement at the same time (or very shortly afterwards). I'm not sure what EPA is thinking about timing of an announcement (it sounds like I'll need to talk to someone else about that), but I just wanted to make sure you guys were aware of that dynamic.

>>> "Gunter, David (ENRD)" <David.Gunter2@usdoj.gov> 9/28/2010 11:50 AM >>>

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Dave Gunter

## **SETTLEMENT AGREEMENT**

This Settlement Agreement is made by and between the following groups of Petitioners: (1) the States of New York, California, Connecticut, Delaware, Maine, New Hampshire, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, the District of Columbia, and the City of New York (collectively “State Petitioners”); (2) Natural Resources Defense Council (NRDC), Sierra Club, and Environmental Integrity Project (EIP) (collectively “Environmental Petitioners”); and (3) Respondent, the U.S. Environmental Protection Agency (“EPA”) (collectively “the Parties”).

WHEREAS, the State and Environmental Petitioners filed petitions for judicial review of the final action under the Clean Air Act (“CAA”) Section 111, 42 U.S.C. § 7411, entitled, “Standards of Performance for Petroleum Refineries, Final Rule,” published at 73 Fed. Reg. 35,838 (June 24, 2008) (“Final Rule”). These petitions for review currently are pending before the U.S. Court of Appeals for the District of Columbia Circuit in consolidated cases under the lead case *American Petroleum Institute, et al. v. EPA*, No. 08-1277;

WHEREAS, the Final Rule includes amendments to the current standards of performance (40 CFR part 60, subpart J) and separate standards of performance for new process units (40 CFR part 60, subpart Ja) at petroleum refineries;

WHEREAS, in connection with this Final Rule, EPA declined to establish standards of performance for greenhouse gas emissions (“GHGs”);

WHEREAS, the Environmental Petitioners also filed a petition for administrative reconsideration pursuant to CAA section 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B), and EPA granted reconsideration with respect to some of the issues raised in that petition for

reconsideration. *See* “Standards of Performance for Petroleum Refineries,” 73 Fed. Reg. 55,751 (Sept. 26, 2008).

WHEREAS, on December 22, 2008, EPA published a proposed rule concerning issues that were raised in the Environmental Petitioners’ administrative petition for reconsideration. *See* “Standards of Performance for Petroleum Refineries; Standards of Performance for Petroleum Refineries for Which Construction, Reconstruction, or Modification Commenced after May 14, 2007,” 73 Fed. Reg. 78,522 (Dec. 22, 2008) (“Proposed Rule”). EPA has accepted public comment on the Proposed Rule;

WHEREAS, starting on December 15, 2008, the Court has held the consolidated cases in abeyance pending further order;

WHEREAS, on December 29, 2009, EPA granted reconsideration of all remaining issues that were raised in the petitions for administrative reconsideration, including the failure to regulate GHGs. *See* Letter from Gina McCarthy, Assistant Administrator, Office of Air and Radiation, U.S. EPA to petitioners’ counsel (Dec. 29, 2009);

WHEREAS, refineries are estimated to be the second largest direct stationary source category of GHGs in the United States, according to a recent EPA analysis (based on data in Table 5-1, Regulatory Impact Analysis for the Mandatory Reporting of Greenhouse Gas Emissions, Final Report, September 2009.);

WHEREAS, EPA’s initial evaluation of available GHG control strategies indicates that there are cost-effective control strategies for reducing GHGs from refineries;

WHEREAS, based on current knowledge, EPA believes that it is appropriate for it to set standards of performance for GHGs from refineries;

WHEREAS, EPA believes it will be more effective to address GHGs and various other pollutants from refineries in a comprehensive manner rather than just addressing such pollutants from those affected facilities that are subject to regulation under NSPS subparts J and Ja;

WHEREAS, EPA believes that if it sets standards of performance for GHGs, it is also appropriate for it to concurrently issue emissions guidelines for GHGs from existing affected facilities at refineries pursuant to CAA section 111(d), 42 U.S.C. § 7411(d), and 40 C.F.R. § 60.22;

WHEREAS, this comprehensive approach of simultaneously addressing all affected facilities at refineries will require more time than would be required were EPA only addressing the pending issues on reconsideration;

WHEREAS, the State and Environmental Petitioners desire that EPA complete its reconsideration of GHG standards of performance for refineries as expeditiously as possible, but agree that allowing additional time for EPA to complete a rulemaking that follows the comprehensive approach discussed above is warranted in light of the potentially greater emissions reductions possible through such an approach, when compared to a rulemaking addressing only the remaining issues on reconsideration for NSPS subparts J and Ja;

WHEREAS, the Parties wish to implement this Settlement Agreement resolving the State and Environmental Petitioners' challenges to the Final Rule and the issues raised in the Environmental Petitioners' administrative petition for reconsideration and thereby avoid protracted litigation, and to preserve judicial resources, without any admission or adjudications of fact or law;

NOW THEREFORE, the Parties, intending to be bound by this Settlement Agreement, hereby stipulate and agree as follows:

1. Within three business days after this Settlement Agreement is executed by the Parties, but before finalization pursuant to Paragraph 14 of this Settlement Agreement, the Parties shall file a joint motion with the Court notifying it of this Settlement Agreement and requesting that the consolidated cases be held in abeyance pending completion of the process under CAA section 113(g) as set forth in Paragraph 14 and the actions described in Paragraphs 2 and 3 below.

2. EPA agrees that it will sign by December 15, 2011, and promptly transmit to the Office of the Federal Register, a proposed rule that includes, at a minimum, the following: (A) standards of performance for GHGs pursuant to 42 U.S.C. § 7411(b) for affected facilities at refineries that are subject to the following NSPS: (1) subparts J and Ja, (2) subpart Db, (3) subpart Dc, (4) subpart GGG, and (5) subpart QQQ, and emissions guidelines for GHGs pursuant to 42 U.S.C. § 7411(d) and 40 C.F.R. § 60.22 from existing affected facilities at refineries in the source categories covered by those NSPS subparts; (B) a review of the emission standards set forth in 40 C.F.R. Part 63, subpart UUU, pursuant to CAA sections 112(d)(6) and (f)(2), 42 U.S.C. §§ 7412(d)(6) and (f)(2); and (C) a proposed resolution of all other issues raised in Environmental Petitioners' August 25, 2008 petition for administrative reconsideration. EPA shall provide the State and Environmental Petitioners a copy of the proposed rule within five business days of signature.

3. After considering any public comments received concerning the proposed rule addressed in Paragraph 2, EPA will sign no later than November 15, 2012, and promptly submit to the Office of the Federal Register, a final rule that includes final determinations with regard to each of the elements, including all proposed standards and guidelines, listed in Paragraph 2.

EPA shall provide the State and Environmental Petitioners with a copy of this final rule within five business days of signature.

4. If EPA signs a final rule by November 15, 2012, as described in Paragraph 3 above, the State and Environmental Petitioners and EPA shall, no later than five business days after the date on which that final rule takes effect, file an appropriate pleading seeking the dismissal of Petitions for Review Nos. 08-1279 and 08-1281, with prejudice, in accordance with Rule 42(b) of the Federal Rules of Appellate Procedure. The State and Environmental Petitioners reserve their right to seek attorneys' fees and costs relating to this litigation, and EPA reserves any defenses it may have relating to such claims.

5. The State and Environmental Petitioners agree that performance of the obligations described in Paragraphs 2 and 3 shall constitute full and complete settlement of all claims they have or could have asserted under any provision of law in connection with this case, excluding any claims for attorneys' fees or other litigation costs as a result of this case.

6. EPA agrees that it will make staff available by telephone on at least a monthly basis to update the State and Environmental Petitioners on EPA's progress in completing the actions described in Paragraphs 2 and 3 and will recommend to the Court that EPA be ordered to file written status reports with the Court every 90 days starting from the date these cases are stayed under Paragraph 1, to inform the Court of EPA's progress in completing the actions described in Paragraphs 2 and 3. Such written status reports shall include an affirmative statement of whether EPA believes it will timely complete all actions described in Paragraphs 2 and 3.

7. If EPA does not sign a proposed rule by December 15, 2011, as described above in Paragraph 2, or a final rule by November 15, 2012, as described above in Paragraph 3, or if

the written status reports described in Paragraph 6 state that EPA will not timely complete all actions described in Paragraphs 2 or 3, or if the Administrator and/or the Attorney General determines to withdraw or withhold his/her consent to this Settlement Agreement as described in Paragraph 14, then the State and Environmental Petitioners' sole remedy with respect to the Final Rule at issue in these consolidated cases shall be the right to ask the Court to lift the stay of proceedings and establish a schedule for briefing and oral argument of the pending petitions for judicial review.

8. This Settlement Agreement constitutes the sole and entire understanding of EPA and the State and Environmental Petitioners and no statement, promise or inducement made by any Party to this Settlement Agreement, or any agent of such Parties, that is not set forth in this Settlement Agreement shall be valid or binding.

9. Except as expressly provided in this Settlement Agreement, none of the Parties waives or relinquishes any legal rights, claims or defenses it may have. In the event of further litigation, the dates stated in Paragraphs 2 and 3 shall be construed to represent only the parties' attempt to compromise claims in litigation, and not to represent agreement that any particular schedule for further agency action is reasonable or otherwise required by law.

10. The provisions of this Settlement Agreement can be modified at any time by written mutual consent of the Parties.

11. Nothing in the terms of this Settlement Agreement shall be construed to limit or modify the discretion accorded EPA by the CAA or by general principles of administrative law.

12. The commitments by EPA in this Settlement Agreement are subject to the availability of appropriated funds. No provision of this Settlement Agreement shall be interpreted as or constitute a commitment or requirement that EPA obligate, expend or pay funds



in contravention of the Anti-Deficiency Act, 31 U.S.C. 1341, or any other applicable appropriations law or regulation, or otherwise take any action in contravention of those laws or regulations.

13. Nothing in the terms of this Settlement Agreement shall be construed to limit EPA's authority to alter, amend or revise any final rule EPA may issue pursuant to Paragraph 3, or to promulgate superseding regulations.

14. The Parties agree and acknowledge that before this Settlement Agreement is final, EPA must provide notice in the Federal Register and an opportunity for public comment pursuant to CAA Section 113(g), 42 U.S.C. 7413(g). After this Settlement Agreement has undergone an opportunity for notice and comment, the Administrator and/or the Attorney General, as appropriate, shall promptly consider any such written comments in determining whether to withdraw or withhold her/his consent to the Settlement Agreement, in accordance with section 113(g) of the CAA. Within 30 days of the close of the public comment period, EPA shall provide written notice to State and Environmental Petitioners of any decision to withdraw or withhold consent or shall provide written notice of finality. This Settlement Agreement shall become final on the date that EPA provides written notice of such finality to the State and Environmental Petitioners.

15. The undersigned representatives of each Party certify that they are fully authorized by the Party that they represent to bind that respective Party to the terms of this Settlement Agreement. This Settlement Agreement will be deemed to be executed when it has been signed by the representatives of the Parties set forth below, subject to final approvals pursuant to Paragraph 14.

DATE: \_\_\_\_\_

\_\_\_\_\_  
DAVID GUNTER  
U.S. Department of Justice  
Environment and Natural Resources Division  
Environmental Defense Section  
P.O. Box 23986  
Washington, D.C. 20026-3986  
(202) 514-3785  
David.Gunter2@usdoj.gov

Counsel for EPA

DATE: \_\_\_\_\_

\_\_\_\_\_  
Counsel for [state petitioners]

Counsel for [environmental petitioners]

**To:** "Michael Myers" [Michael.Myers@ag.ny.gov]  
**Cc:** "Morgan Costello" [Morgan.Costello@ag.ny.gov]; Elliott Zenick/DC/USEPA/US@EPA[]  
**From:** "Gunter, David (ENRD)"  
**Sent:** Tue 9/28/2010 6:22:46 PM  
**Subject:** RE: Boiler NSPS -- EPA September 27 draft

Thanks for letting me know about the announcement dynamic. Given this, I don't know that Elliott and I will have any more information to share at 4:00, but we'll try to get back to you quickly on the broader question of how the approval schedule connects to potential public disclosure.

Dave

From: Michael Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Tuesday, September 28, 2010 12:23 PM  
To: Gunter, David (ENRD)  
Cc: Morgan Costello; Zenick.Elliott@epamail.epa.gov  
Subject: RE: Boiler NSPS -- EPA September 27 draft

\*Privileged and Confidential Settlement Communication\*

Thanks Dave. I have approval here in my office. For my co-states, I have a mix of approvals and "expect to get approvals," with two states not weighing in as of yet (I don't anticipate problems with either of them joining). We may have a bit of a chicken and egg problem here though, as I may have difficulty extracting the remaining final approvals unless I have a firm deadline from you guys. That being said, I'm hopeful that I'll be able to let you know by COB Thursday that all of the states have approval. You'll need to let me know how the timing of your approval process works with us getting you actual signatures to the agreement. Speaking of actual signatures, my guess is that once AGs (or AAGs) sign the settlement agreement, there will be significant pressure to announce the settlement at the same time (or very shortly afterwards). I'm not sure what EPA is thinking about timing of an announcement (it sounds like I'll need to talk to someone else about that), but I just wanted to make sure you guys were aware of that dynamic.

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office. Before I seek final approval from the Assistant Attorney General, we ordinarily need to know that all the other parties to the agreement have also approved. When do you think you will have review complete at a sufficient level to make that representation to me?

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From: Michael Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Tuesday, September 28, 2010 9:39 AM  
To: vpatton@environmentaldefense.org; ddoniger@nrdc.org; Joanne.Spalding@sierraclub.org; Gunter, David (ENRD)  
Cc: embrey.patricia@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov  
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Ok, thanks. Shall we pencil in a quick call for 4 or 4:30?

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Dave, thanks for the revised version of the settlement agreement. NY is fine with the changes and I don't anticipate any problems getting buy-in from the other state petitioners on the language. I've corresponded last night/this morning with David, Joanne, and Vickie, and understand that they have some minor language changes that state petitioners are on board with. With respect to the filing in court aspect, I believe that EPA/DOJ has some discretion here to file this with the court, despite the language of Circuit Rule 41(b), especially given the precedent in Mass. that David alluded to yesterday. Although I understand your desire not to set a precedent that you may not like to follow in other cases, I don't think it can be seriously debated that EPA has a legal obligation to set NSPS for EGUs, so the technical distinction that there is no pending litigation in the D.C. Circuit does not seem to me to be a meaningful one. That being said, state petitioners are amenable, because of the importance of this commitment by EPA and the public health and environmental benefits that should result, not to hold the agreement up by insisting on the filing of the agreement with the court (or pursuing the mandamus route, which would also likely delay things).

In addition to the substance of the agreement, state petitioners are also very interested in the timing for finalizing the settlement (when signature pages will be due, EPA's preferred course on announcement of the settlement, etc.). I would hope that we can discuss these issues today or tomorrow, assuming we're there on the terms. Thanks for your work on this.--Mike

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Counsel,

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That leaves the question that we discussed on our call today about the possibility of filing a status report with the D.C. Circuit to inform it of this agreement. I have raised this question with my management within DOJ, and I have been instructed that it would be very difficult for us to compromise on this point. As David said on our call, a fight on this issue is not in anyone's interest. I am therefore asking you to agree that you will not file the final settlement with the Court unless further litigation becomes necessary.

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**To:** "David (ENRD) Gunter" [David.Gunter2@usdoj.gov]  
**Cc:** "Morgan Costello" [Morgan.Costello@ag.ny.gov]; Elliott Zenick/DC/USEPA/US@EPA[]  
**From:** "Michael Myers"  
**Sent:** Tue 9/28/2010 6:41:21 PM  
**Subject:** RE: Boiler NSPS -- EPA September 27 draft

Great. We have a call with some other co-states tomorrow afternoon at 2, so if you have some intelligence for us before then, it would be most appreciated.

>>> "Gunter, David (ENRD)" <David.Gunter2@usdoj.gov> 9/28/2010 2:22 PM >>>

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Counsel,

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That leaves the question that we discussed on our call today about the possibility of filing a status report with the D.C. Circuit to inform it of this agreement. I have raised this question with my management within DOJ, and I have been instructed that it would be very difficult for us to compromise on this point. As David said on our call, a fight on this issue is not in anyone's interest. I am therefore asking you to agree that you will not file the final settlement with the Court unless further litigation becomes necessary.

We've made remarkable progress on this matter in a very short time, and I hope that you can advise us we have an agreement with this draft. If we need to discuss this further, we're available for a call at 9:00 tomorrow morning.

Thanks,

Dave Gunter

**To:** "Doniger, David" [ddoniger@nrdc.org]; Joanne.Spalding@sierraclub.org>;[vpatton@environmentaldefense.org]; vpatton@environmentaldefense.org>;[michael.myers@ag.ny.gov]; michael.myers@ag.ny.gov>[]  
**Cc:** Elliott Zenick/DC/USEPA/US@EPA;Patricia Embrey/DC/USEPA/US@EPA[]; atricia Embrey/DC/USEPA/US@EPA[]  
**From:** "Gunter, David (ENRD)"  
**Sent:** Tue 9/28/2010 8:27:53 PM  
**Subject:** RE: Boiler NSPS -- Final draft  
[ENV\\_DEFENSE-#491951-v1-Boiler NSPS -- Settlement final draft.DOC](#)  
[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)  
[www.nrdc.org](http://www.nrdc.org)  
<http://switchboard.nrdc.org/blogs/ddoniger/>

Counsel,

We are comfortable with the changes that are suggested in your most recent draft, and I believe this means we have agreement on text. I have attached a clean copy to this e-mail. Next steps: As you know, this is still subject to review by approval authorities at EPA and DOJ. We intend to move quickly to secure that review, and to that end, I would appreciate a statement of final approval from each of the named parties to the agreement as soon as possible. I know that some of you are interested in the question of when this agreement might be disclosed or announced, and we are also working on that question. In the meantime, of course, we expect that everyone will continue to keep this agreement confidential until we have final approval.

Thanks again for your hard work and cooperation.

Dave Gunter

From: Doniger, David [mailto:ddoniger@nrdc.org]  
Sent: Tuesday, September 28, 2010 9:31 AM  
To: Gunter, David (ENRD); Joanne.Spalding@sierraclub.org; vpatton@environmentaldefense.org; michael.myers@ag.ny.gov  
Cc: Zenick.Elliott@epamail.epa.gov; embrey.patricia@epamail.epa.gov  
Subject: RE: Boiler NSPS -- EPA September 27 draft

David and colleagues,

Thanks for the continued progress on this matter. Enclosed is the draft agreement with some small edits that are intended to clarify certain of the recent additions. We hope and trust that these will not pose any problems, and if these are acceptable, then on behalf of the environmental petitioners I can state that we too believe we have staff-level agreement on the draft.

Although reluctantly, we can agree to proceed without the initial filing of the settlement with the Court, bearing in mind that the terms of the settlement preserve our ability to return to the Court and our ability to refer to the settlement if there should be a failure to implement.

This note confirms that although the agreement preserves our right to seek attorneys fees and costs, the environmental petitioners do not intend to seek fees or costs for work done to date in connection with the underlying case or these settlement negotiations.

We too appreciate the cooperation of the government team and the speed at which we have been able to conduct these negotiations.

David

David D. Doniger

Policy Director, Climate Center

Natural Resources Defense Council

1200 New York Ave., NW

Washington, DC 20005

Phone: (202) 289-2403

Cell: (202) 321-3435

Fax: (202) 789-0859

[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)

on the web at [www.nrdc.org](http://www.nrdc.org)

read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

From: Gunter, David (ENRD) [<mailto:David.Gunter2@usdoj.gov>]

Sent: Monday, September 27, 2010 8:15 PM

To: [Joanne.Spalding@sierraclub.org](mailto:Joanne.Spalding@sierraclub.org); [vpatton@environmentaldefense.org](mailto:vpatton@environmentaldefense.org); Doniger, David;  
[michael.myers@ag.ny.gov](mailto:michael.myers@ag.ny.gov)

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Subject: Boiler NSPS -- EPA September 27 draft

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Thanks,

Dave Gunter

## **SETTLEMENT AGREEMENT**

This Settlement Agreement is made by and between the following groups of Petitioners: (1) the States of New York, California, Connecticut, Delaware, Maine, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, and the City of New York (collectively “State Petitioners”); and (2) Natural Resources Defense Council (NRDC), Sierra Club, and Environmental Defense Fund (EDF) (collectively “Environmental Petitioners”), and Respondent, the U.S. Environmental Protection Agency (“EPA”) (collectively “the Parties”).

WHEREAS, EPA published a final action entitled “Standards of Performance for Electric Utility Steam Generating Units, Industrial-Commercial-Institutional Steam Generating Units, and Small Industrial-Commercial-Institutional Steam Generating Units,” 71 Fed. Reg. 9,866 (Feb. 27, 2006) (the “Final Rule”);

WHEREAS, the Final Rule included amendments to the standards of performance for electric utility steam generating units subject to 40 C.F.R. part 60, subpart Da (“EGUs”);

WHEREAS, in connection with this Final Rule, EPA declined to establish standards of performance for greenhouse gas (“GHG”) emissions;

WHEREAS, State and Environmental Petitioners filed petitions for judicial review of the Final Rule under the Clean Air Act (“CAA”) Section 111, 42 U.S.C. § 7411, contending, *inter alia*, that the Final Rule was required to include standards of performance for GHG emissions from EGUs;

WHEREAS, the portions of State and Environmental Petitioners’ petitions for review of the Final Rule that related to GHG emissions were severed from other petitions for review of the Final Rule, and were formerly pending before the United States Court of Appeals for the District

of Columbia Circuit (the “Court”) under the caption *State of New York, et al. v. EPA*, No. 06-1322;

WHEREAS, following the Supreme Court’s decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), EPA requested remand of the Final Rule to EPA for further consideration of the issues related to GHG emissions in light of that decision;

WHEREAS, the Court remanded the Final Rule to EPA for further proceedings on GHG emissions in light of *Massachusetts v. EPA*, by its Order of September 24, 2007 (the “Remand Order”);

WHEREAS, as of the date of this Settlement Agreement, EPA has not taken any publicly noticed action to respond to the Remand Order;

WHEREAS, the State Petitioners submitted letters to EPA dated June 16, 2008 and August 4, 2009 inquiring as to the status of EPA’s action on the remand and stating their position that EPA had a legal obligation to act promptly to comply with the requirements of Section 111, and Environmental Petitioners submitted a letter to EPA on August 20, 2010 seeking commitments to rulemaking on GHG emissions from EGUs as a means of avoiding further litigation;

WHEREAS, EGUs are, collectively, the largest source category of GHG emissions in the United States, according to a recent EPA analysis. *See* 74 Fed. Reg. 56,260, 56,363 (Oct. 30, 2009);

WHEREAS, EPA’s initial evaluation of available GHG control strategies indicates that there are cost-effective control strategies for reducing GHGs from EGUs;

WHEREAS, EPA believes it would be appropriate for it to concurrently propose performance standards for GHG emissions from new and modified EGUs under CAA section

111(b), 42 U.S.C. § 7411(b), and emissions guidelines for GHG emissions from existing affected EGUs pursuant to CAA section 111(d), 42 U.S.C. § 7411(d), and 40 C.F.R. § 60.22;

WHEREAS, the Parties wish to enter into this Settlement Agreement to resolve the State and Environmental Petitioners' request for performance standards and emission guidelines for GHG emissions under CAA sections 111(b) and 111(d) and to avoid further litigation on this issue, without any admission or adjudications of fact or law;

NOW THEREFORE, the Parties, intending to be bound by this Settlement Agreement, hereby stipulate and agree as follows:

1. EPA will sign and promptly transmit to the Office of the Federal Register a proposed rule under section 111(b) by May 31, 2011, that includes standards of performance for GHGs for new and modified EGUs that are subject to 40 C.F.R. part 60, subpart Da. EPA shall provide the State and Environmental Petitioners a copy of the proposed rule within five business days of signature.
2. EPA will also sign and promptly transmit to the Office of the Federal Register a proposed rule under section 111(d) by May 31, 2011, that includes emissions guidelines for GHGs from existing EGUs that would have been subject to 40 C.F.R. part 60, subpart Da if they were new sources. EPA shall provide the State and Environmental Petitioners a copy of the proposed rule within five business days of signature.
3. After considering any public comments received concerning the proposed rule described in Paragraph 1, EPA will sign and promptly submit to the Office of the Federal Register a final rule no later than May 31, 2012, that takes final action with respect to the proposed rule described in Paragraph 1. EPA shall provide the Environmental and State Petitioners with a copy of its final action within five business days of signature.



4. If EPA finalizes standards of performance for GHGs pursuant to Paragraph 3, then based on consideration of the public comments received concerning the proposed rule described in Paragraph 2, EPA will sign and promptly submit to the Office of the Federal Register a final rule no later than May 31, 2012, that takes final action with respect to the proposed rule describe in Paragraph 2. EPA shall provide the State and Environmental Petitioners with a copy of its final action within five business days of signature.
5. EPA agrees that it will make staff available by telephone at least every 60 days to update State and Environmental Petitioners on EPA's progress in completing the actions described in Paragraphs (1) through (4). In addition, EPA will provide State and Environmental Petitioners with a status letter every 60 days, which shall include an affirmative statement of whether EPA believes it will timely complete all actions described in Paragraphs 1 through 4.
6. Upon EPA's fulfillment of each of the obligations stated in Paragraphs 1 through 4 above, this Settlement Agreement shall constitute a full and final release of any claims that State and Environmental Petitioners may have under any provision of law to compel EPA to respond to the Court's Remand Order with respect to GHG emissions from EGUs.
7. State and Environmental Petitioners shall not file any motion or petition seeking to compel EPA action in response to the Remand Order with respect to GHG emissions from EGUs unless EPA has first failed to meet an obligation stated in Paragraphs 1 through 4 above. If EPA fails to meet such an obligation, or if an EPA status letter described in Paragraph 5 does not affirm that EPA believes it will timely complete all actions described in Paragraphs 1 through 4, or if EPA fails to send a status letter as

described in Paragraph 5 and does not promptly cure that failure upon receiving notice, State and Environmental Petitioners' sole remedy shall be to file an appropriate motion or petition with the Court or other civil action seeking to compel EPA to take action responding to the Remand Order. In that event, all Parties reserve any claims or defenses they may have in such an action, and the dates stated in Paragraphs 1 through 4 shall be construed to represent only the parties' attempt to compromise claims in litigation, and not to represent agreement that any particular schedule for further agency action is reasonable or otherwise required by law. State and Environmental Petitioners reserve all rights under the law to file petitions for review of final agency actions under this Settlement Agreement, pursuant to section 307(b), 42 U.S.C. § 7607(b).

8. This Settlement Agreement constitutes the sole and entire understanding of EPA and the Environmental and State Petitioners and no statement, promise or inducement made by any Party to this Settlement Agreement, or any agent of such Parties, that is not set forth in this Settlement Agreement shall be valid or binding.
9. Except as expressly provided in this Settlement Agreement, none of the Parties waives or relinquishes any legal rights, claims or defenses it may have. State and Environmental Petitioners reserve the right to seek attorneys' fees and costs relating to this litigation, and EPA reserves any defenses it may have relating to such claims.
10. The provisions of this Settlement Agreement can be modified at any time by written mutual consent of the Parties.
11. Except as expressly provided herein, nothing in the terms of this Settlement Agreement shall be construed to limit or modify the discretion accorded EPA by the CAA or by general principles of administrative law.

12. The commitments by EPA in this Settlement Agreement are subject to the availability of appropriated funds. No provision of this Settlement Agreement shall be interpreted as or constitute a commitment or requirement that EPA obligate, expend or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. 1341, or any other applicable appropriations law or regulation, or otherwise take any action in contravention of those laws or regulations.
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Agreement. This Settlement Agreement will be deemed to be executed when it has been signed by the representatives of the Parties set forth below, subject to final approvals pursuant to Paragraph 14.

DATE: \_\_\_\_\_

\_\_\_\_\_  
DAVID GUNTER  
U.S. Department of Justice  
Environment and Natural Resources Division  
Environmental Defense Section  
P.O. Box 23986  
Washington, D.C. 20026-3986  
(202) 514-3785  
David.Gunter2@usdoj.gov

Counsel for EPA

DATE: \_\_\_\_\_

\_\_\_\_\_  
Counsel for **[environmental petitioners]**

Counsel for **[state petitioners]**

**To:** "Gunter, David (ENRD)" [David.Gunter2@usdoj.gov];  
Joanne.Spalding@sierraclub.org>;[vpatton@environmentaldefense.org];  
vpatton@environmentaldefense.org>;[michael.myers@ag.ny.gov]; michael.myers@ag.ny.gov>[]  
**Cc:** Elliott Zenick/DC/USEPA/US@EPA;Patricia Embrey/DC/USEPA/US@EPA[]; atricia  
Embrey/DC/USEPA/US@EPA[]  
**From:** "Doniger, David"  
**Sent:** Tue 9/28/2010 8:34:11 PM  
**Subject:** RE: Boiler NSPS -- Final draft  
[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)  
[www.nrdc.org](http://www.nrdc.org)  
<http://switchboard.nrdc.org/blogs/ddoniger/>  
[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)  
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Dave, What exactly do you mean by a statement of final approval? What do you need beyond this morning's email?

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Sent: Tuesday, September 28, 2010 9:31 AM  
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**From:** "Gunter, David (ENRD)"  
**Sent:** Tue 9/28/2010 8:40:56 PM  
**Subject:** RE: Boiler NSPS -- Final draft  
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Specifically with respect to New York, I need to make sure the agreement is sufficiently advanced through their review chain to ensure no further changes before I seek AAG approval. Mike Myers and I have communicated about this already. I assume that's not an issue with the environmental organizations, but since we had not yet circulated a clean, final draft, I thought I would give everyone one more chance to review and make sure this is the language to which they have agreed.

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Sent: Tuesday, September 28, 2010 4:34 PM  
To: Gunter, David (ENRD); Joanne.Spalding@sierraclub.org; vpatton@environmentaldefense.org; michael.myers@ag.ny.gov  
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**To:** "Michael Myers" [Michael.Myers@ag.ny.gov]  
**Cc:** Elliott Zenick/DC/USEPA/US@EPA[]  
**From:** "Gunter, David (ENRD)"  
**Sent:** Thur 9/30/2010 12:49:26 PM  
**Subject:** RE: Boiler NSPS -- Final draft  
[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)  
[www.nrdc.org](http://www.nrdc.org)  
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Dave, I'm still shooting for end of the day today to let you know, and have approvals from all but 3 states and one city. I expect the 3 states will let me know that they have approval by days' end but am unsure about the city (D.C.). Although D.C. was with us when we filed the petition and when we filed the refineries NSPS petition, they subsequently had a change in AGs and have largely backed away from involvement in global warming-related cases (although have not formally withdrawn from anything). Your former colleague at DOJ, Todd Kim, the DC SG, is working on the approvals and hopes that the District can join. If you know Todd, you may want to call him directly to get further intelligence. I have stressed with them that if they choose not to join (which, given the lack of "present litigation" in the EGU case, I don't think should pose a problem for the rest of us moving forward with a settlement), they please keep word of the settlement confidential, and was told that they would.

If the plan is to do staff attorney (AAG) signatures, there should not be any more approval chain process that the states need to go through, just the logistics of running down the signature pages. As I think I suggested to you the other day, however, if EPA's desire is to hold off on an announcement of the settlement for a few weeks, I would suggest doing the same in terms of the signatures. Speaking of signatures, I assume that the process for you guys would consist of (1) interagency review, (2) signature, (3) publication in the FR, (4) waiting 30 days, and (5) notifying us that the settlement is final (assuming there are no issues that come up in the comments that you feel you need to address). Let me know if that's incorrect.

You can expect to hear from me by phone or e-mail at the end of the day on where we are. Thanks.--Mike  
>>> "Gunter, David (ENRD)" <David.Gunter2@usdoj.gov> 9/30/2010 8:49 AM >>>

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**Subject:** RE: Boiler NSPS -- Final draft  
[091510 NAM, et al.'s motion for stay -- Ex. 17.pdf](#)  
[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)  
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BTW, in reviewing declarations on NAM's stay motion in the D.C. Circuit last night, I noticed that John Graham (former Bush OMB dtr.) touts 111(d) as an "innovative direction" in climate change regulation. Might come in handy.

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Subject: RE: Boiler NSPS -- Final draft

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>>> "Gunter, David (ENRD)" <David.Gunter2@usdoj.gov> 9/28/2010 4:27 PM >>>

Counsel,

We are comfortable with the changes that are suggested in your most recent draft, and I believe this means we have agreement on text. I have attached a clean copy to this e-mail. Next steps: As you know, this is still subject to review by approval authorities at EPA and DOJ. We intend to move quickly to secure that review, and to that end, I would appreciate a statement of final approval from each of the named

parties to the agreement as soon as possible. I know that some of you are interested in the question of when this agreement might be disclosed or announced, and we are also working on that question. In the meantime, of course, we expect that everyone will continue to keep this agreement confidential until we have final approval.

Thanks again for your hard work and cooperation.

Dave Gunter

From: Doniger, David [mailto:ddoniger@nrdc.org]  
Sent: Tuesday, September 28, 2010 9:31 AM  
To: Gunter, David (ENRD); Joanne.Spalding@sierraclub.org; vpatton@environmentaldefense.org;  
michael.myers@ag.ny.gov  
Cc: Zenick.Elliott@epamail.epa.gov; embrey.patricia@epamail.epa.gov  
Subject: RE: Boiler NSPS -- EPA September 27 draft

David and colleagues,

Thanks for the continued progress on this matter. Enclosed is the draft agreement with some small edits that are intended to clarify certain of the recent additions. We hope and trust that these will not pose any problems, and if these are acceptable, then on behalf of the environmental petitioners I can state that we too believe we have staff-level agreement on the draft.

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This note confirms that although the agreement preserves our right to seek attorneys fees and costs, the environmental petitioners do not intend to seek fees or costs for work done to date in connection with the underlying case or these settlement negotiations.

We too appreciate the cooperation of the government team and the speed at which we have been able to conduct these negotiations.

David

David D. Doniger

Policy Director, Climate Center

Natural Resources Defense Council

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Sent: Monday, September 27, 2010 8:15 PM

To: Joanne.Spalding@sierraclub.org; vpatton@environmentaldefense.org; Doniger, David;  
michael.myers@ag.ny.gov

Cc: Zenick.Elliott@epamail.epa.gov; embrey.patricia@epamail.epa.gov

Subject: Boiler NSPS -- EPA September 27 draft

Counsel,

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Thanks,

Dave Gunter



# Exhibit 17

STATEMENT OF JOHN D. GRAHAM, PH.D. (September 11, 2010)

1. My name is John D. Graham. I am a senior faculty member and Dean of the School of Public and Environmental Affairs at Indiana University (Bloomington and Indianapolis). From 2001 to 2006 I served as Administrator of the Office of Information and Regulatory Affairs in the U.S. Office of Management and Budget. In that capacity, I worked with a staff of fifty career public servants to review hundreds of federal rulemakings from multiple federal agencies. I also spearheaded efforts to provide clear guidance to agencies about the procedural steps that are necessary to justify the creation of a new regulatory obligation. From 1985 to 2001 I was a full-time faculty member at Harvard University, where I published extensively on regulatory policy and taught the tools of risk analysis and benefit-cost analysis to graduate-level public health students. I also created and led the Center for Risk Analysis at the Harvard School of Public Health. The statements in my testimony are my own opinion, and do not necessarily represent the position of Indiana University or the State of Indiana.

2. Request for Expert Commentary. I have been asked by the U.S. National Association of Manufacturers to comment on the steps the U.S. Environmental Protection Agency (EPA) is taking to regulate greenhouse gas emissions from stationary sources pursuant to the Clean Air Act and the instructions in a recent decision of the United States Supreme Court. I have prepared this report on a volunteer basis, and have not accepted any financial compensation for preparing the report.

3. Summary of Comments. As a matter of good public policy, I support regulation of greenhouse gas emissions from motor vehicles and stationary sources as a prudent approach to reducing the risks of global climate change, assuming Europe, China, and India continue to move in a similar direction. Moreover, the U.S. Department of Transportation and EPA have undertaken a careful joint rulemaking to support mandatory greenhouse gas controls as applied to motor vehicles (cars and light trucks). However, I am concerned that EPA appears to be imposing regulatory obligations for control of greenhouse gases (GHGs) on stationary sources (e.g., industrial factories) without undertaking the necessary technical and economic analyses to help define these obligations, and without following the accepted procedures for public participation in federal rulemaking proceedings.

4. Recent EPA Actions and Statements Regarding Stationary Sources. In EPA's "SIP Call" (pp.13-14), the agency posits that "prevention of significant deterioration" (PSD) requirements for GHGs will be applied to stationary sources on and after January 2, 2011, even though a complete rulemaking on stationary sources of GHGs has never been conducted. EPA has issued a so-called "Tailoring Rule" that seeks to justify an exemption from PSD requirements for all sources that emit less than a threshold amount of GHGs. However, that rulemaking was not designed to define what PSD requirements should be applied to stationary sources in various sectors of the economy. In fact, the "Tailoring Rule" is designed to define which stationary sources should NOT be subjected to GHG regulation. The agency has not yet engaged in the critical work of proposing and finalizing specific GHG controls applicable to the highly diverse group of covered stationary sources in the American economy (e.g., steel plants, oil refineries, chemical manufacturing plants, industrial boilers, cement kilns, electric utilities and so forth).

John D. Graham, Ph.D.  
Page 2

5. Define Best Available Control Technology Requirements Under PSD for GHGs. EPA has acknowledged that the application of the PSD program (and related Title V permitting requirements) to stationary sources could cause these stationary sources to be subjected to a mandatory requirement to install best available control technology (BACT) for the control of GHGs. Although the agency has already applied BACT requirements to many stationary sources of several pollutants, the concept of a BACT requirement for GHGs is, to the best of my knowledge, completely unprecedented. There is no way a factory owner could know what BACT means for greenhouse gas emissions because EPA has never developed the appropriate regulation. Indeed, in a letter to Senator Jay D. Rockefeller IV (dated February 22, 2010), EPA Administrator Lisa B. Jackson acknowledged (in an attached question and answer document) that the agency has not yet completed its analyses of BACT as applied to GHGs from stationary sources. From a technical point of view, what is BACT for one pollutant (e.g., sulphur dioxide) is not the same as BACT for another pollutant (e.g., GHGs). Adding a scrubber to an industrial boiler to reduce sulphur dioxide emissions (and thereby satisfy BACT) will not necessarily reduce GHGs. In fact, since the operation of scrubbers consumes energy, it is quite possible that complying with BACT for sulphur dioxide will actually increase GHGs (since the consumption of energy typically generates GHGs). Moreover, there are multiple GHGs (e.g., carbon dioxide and methane), and each may have a different BACT at a specific source. The agency may also find that, in a particular sector, the control of GHGs causes an unintended increase in emissions of other pollutants, and thus the final BACT determination may entail a balancing of different pollution outcomes. Based on decades of regulatory experience, I am confident that a reasoned BACT determination for GHGs can only be made after the agency undertakes detailed analyses of specific industries and relevant control technologies, including consideration of multiple pollutants, such as the analyses that DOT and EPA have performed in the joint rulemaking for cars and light trucks that emit GHGs. EPA, by its own public admission, has not yet done the appropriate analysis to support a BACT (or any technology) requirement at stationary sources of GHGs.

6. Consider Alternative Regulatory Strategies. If EPA were to open public comment on how stationary sources should be regulated, it is quite possible that the traditional instruments applied under PSD rules may be shown to be less effective, more costly, and less cost-effective than alternative regulatory strategies. For example, I believe that the Agency should consider regulation of GHGs through an emissions fee or cap-and-trade program under section 111(d) of the Clean Air Act (and related authority) rather than deploy the conventional command-and-control instruments applied to other pollutants. Public analysis and debate of alternative regulatory strategies can occur only if EPA allows stationary source controls to be open for public comment and deliberation. If the agency were to move in such an innovative direction (e.g., the section 111(d) approach), it may not be necessary to apply PSD requirements to any stationary sources of GHGs. One of my fears about EPA's current pathway is that they may seek to apply command-and-control requirements to stationary sources indirectly, through application of PSD and Title V permitting requirements, without ever having to justify why more cost-effective regulatory strategies were not considered.

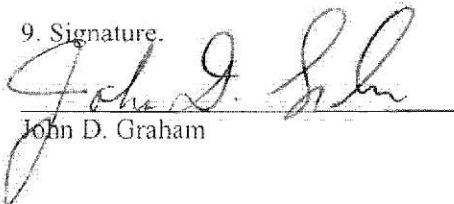
John D. Graham, Ph.D.

Page 3

7. Perform Required Analyses and Follow Proper Procedural Steps. In order to impose a major regulation on the industrial sector of the U.S. economy, a federal agency would typically be required to perform the following analyses and procedures: scientific and engineering analyses (e.g., risk assessments of pollutants and feasibility analyses of various control technologies), regulatory impact analyses (including benefit-cost analyses of regulatory alternatives), impact analyses relevant to the welfare of small businesses (including consultation with a panel of small businesses before any rule is proposed), assessments on the impacts on state and local governments (e.g., the costs of controlling greenhouse gases at municipal boilers and similar facilities at state-supported colleges and universities), and paperwork-reduction requirements (e.g., to ensure that unnecessary permitting and reporting requirements are not imposed before controls are ready to be applied). These are NOT discretionary analyses. They are required either by presidential executive order (e.g., EO 12866) or by statute (e.g., the Unfunded Mandates Act, the Regulatory Flexibility Act, and the Paperwork Reduction Act). Once such analyses are prepared and a proposed rule formulated, the public (including all stakeholders) is given an opportunity to comment on the agency's analyses and proposal. Based on this public comment process, the agency may then issue a final rule, including responses to all significant public comments. In the course of the rulemaking, the agency is also expected to respond to any information-quality petitions that are submitted by the public under the Information Quality Act. Moreover, this rulemaking process permits the entire federal government (including the Office of Management and Budget and other affected agencies such as the Departments of Commerce and Agriculture) to participate in the development of the EPA rule. OMB would typically supervise an interagency review of the rule twice: once before the rule is proposed for public comment, and again before the rule is finalized. Although this rulemaking process may seem to be cumbersome, it is my opinion, based on decades of experience in regulatory policy, that an agency such as EPA crafts better regulations when the discipline of these required analyses and procedural steps are followed. I therefore conclude that it would be unwise, inefficient and unfair for legal obligations concerning greenhouse gas emissions to be imposed on stationary sources without EPA first performing the required analyses and taking the well-established procedural steps that define the federal rulemaking process.

8. Declaration. I, John D. Graham, declare under penalty of perjury under the laws of the United States that the forgoing is true and correct. Executed this 11th day of September, 2010.

9. Signature.



John D. Graham

**To:** "David (ENRD) Gunter" [David.Gunter2@usdoj.gov]  
**Cc:** Elliott Zenick/DC/USEPA/US@EPA[]  
**From:** "Michael Myers"  
**Sent:** Thur 9/30/2010 6:07:56 PM  
**Subject:** RE: Boiler NSPS -- Final draft  
[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)  
[www.nrdc.org](http://www.nrdc.org)  
<http://switchboard.nrdc.org/blogs/ddoniger/>

I'm pleased to report that all of the state petitioners plus NYC and the District of Columbia have approval to join this settlement. Please re-insert the District in the description of "State Petitioners" in the first paragraph of page 1. I'll expect to hear from DOJ/EPA shortly on the logistics of executing the agreement and what you suggest on the timing for an announcement. Also, Dave, don't forget to let me know if my characterization of steps in the process in my last e-mail was correct. Thanks.--Mike

>>> "Gunter, David (ENRD)" <David.Gunter2@usdoj.gov> 9/30/2010 8:49 AM >>>

Mike – In your e-mail below you indicated that you thought you would hear from the states by COB Thursday – that would be ideal for us, if you can still do it. The next process we're interested in is your own AG approval process, which you had mentioned might relate to the timing of final DOJ approval. I don't have a clear answer for you on DOJ's timing, but I can tell you that I've put the Boilers agreement into my own approval chain and tried to expedite it. I think my approval can follow pretty closely after yours, as long as EPA has also completed its own review processes, which are also happening concurrently. If you have any more insight on what your review timing looks like, it would be valuable for planning at both EPA and DOJ.

Thanks,

Dave

From: Michael Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Tuesday, September 28, 2010 5:51 PM  
To: Gunter, David (ENRD)  
Subject: RE: Boiler NSPS -- Final draft

Thanks Dave. I have heard from most of the states and anticipate that I will hear from all of them by COB Thursday, as I indicated to you earlier today.

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that review, and to that end, I would appreciate a statement of final approval from each of the named parties to the agreement as soon as possible. I know that some of you are interested in the question of when this agreement might be disclosed or announced, and we are also working on that question. In the meantime, of course, we expect that everyone will continue to keep this agreement confidential until we have final approval.

Thanks again for your hard work and cooperation.

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Subject: RE: Boiler NSPS -- EPA September 27 draft

David and colleagues,

Thanks for the continued progress on this matter. Enclosed is the draft agreement with some small edits that are intended to clarify certain of the recent additions. We hope and trust that these will not pose any problems, and if these are acceptable, then on behalf of the environmental petitioners I can state that we too believe we have staff-level agreement on the draft.

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Embrey/DC/USEPA/US@EPA[]  
**From:** "Gunter, David (ENRD)"  
**Sent:** Thur 9/30/2010 6:19:44 PM  
**Subject:** RE: Boiler NSPS -- Final draft  
ENV DEFENSE-#491951-v2-Boiler NSPS -- Settlement final draft.DOC  
ddoniger@nrdc.org  
www.nrdc.org  
http://switchboard.nrdc.org/blogs/ddoniger/

Counsel:

I apologize for this inconvenience, but during agency review of this agreement, we were requested to make one change to the language. Specifically, we have moved each of the four stated deadlines for signature of proposed and final rules in this agreement five days earlier, and then provided that transmittal to the Federal Register should take place within five business days. I hope that none of the parties will object to this change, which I think serves your interests: It reaches the same final result but establishes an earlier signature date. However, if you or your clients object to this new language, or if you will need more time for review, please let me know as soon as possible. A new final draft is attached.

The only other change in this draft: The District of Columbia has been added to the list of State Petitioners.

Thanks for accommodating these changes.

Dave Gunter

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Dave Gunter

## **SETTLEMENT AGREEMENT**

This Settlement Agreement is made by and between the following groups of Petitioners: (1) the States of New York, California, Connecticut, Delaware, Maine, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, the District of Columbia, and the City of New York (collectively “State Petitioners”); and (2) Natural Resources Defense Council (NRDC), Sierra Club, and Environmental Defense Fund (EDF) (collectively “Environmental Petitioners”), and Respondent, the U.S. Environmental Protection Agency (“EPA”) (collectively “the Parties”).

WHEREAS, EPA published a final action entitled “Standards of Performance for Electric Utility Steam Generating Units, Industrial-Commercial-Institutional Steam Generating Units, and Small Industrial-Commercial-Institutional Steam Generating Units,” 71 Fed. Reg. 9,866 (Feb. 27, 2006) (the “Final Rule”);

WHEREAS, the Final Rule included amendments to the standards of performance for electric utility steam generating units subject to 40 C.F.R. part 60, subpart Da (“EGUs”);

WHEREAS, in connection with this Final Rule, EPA declined to establish standards of performance for greenhouse gas (“GHG”) emissions;

WHEREAS, State and Environmental Petitioners filed petitions for judicial review of the Final Rule under the Clean Air Act (“CAA”) Section 111, 42 U.S.C. § 7411, contending, *inter alia*, that the Final Rule was required to include standards of performance for GHG emissions from EGUs;

WHEREAS, the portions of State and Environmental Petitioners’ petitions for review of the Final Rule that related to GHG emissions were severed from other petitions for review of the Final Rule, and were formerly pending before the United States Court of Appeals for the District

of Columbia Circuit (the “Court”) under the caption *State of New York, et al. v. EPA*, No. 06-1322;

WHEREAS, following the Supreme Court’s decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), EPA requested remand of the Final Rule to EPA for further consideration of the issues related to GHG emissions in light of that decision;

WHEREAS, the Court remanded the Final Rule to EPA for further proceedings on GHG emissions in light of *Massachusetts v. EPA*, by its Order of September 24, 2007 (the “Remand Order”);

WHEREAS, as of the date of this Settlement Agreement, EPA has not taken any publicly noticed action to respond to the Remand Order;

WHEREAS, the State Petitioners submitted letters to EPA dated June 16, 2008 and August 4, 2009 inquiring as to the status of EPA’s action on the remand and stating their position that EPA had a legal obligation to act promptly to comply with the requirements of Section 111, and Environmental Petitioners submitted a letter to EPA on August 20, 2010 seeking commitments to rulemaking on GHG emissions from EGUs as a means of avoiding further litigation;

WHEREAS, EGUs are, collectively, the largest source category of GHG emissions in the United States, according to a recent EPA analysis. *See* 74 Fed. Reg. 56,260, 56,363 (Oct. 30, 2009);

WHEREAS, EPA’s initial evaluation of available GHG control strategies indicates that there are cost-effective control strategies for reducing GHGs from EGUs;

WHEREAS, EPA believes it would be appropriate for it to concurrently propose performance standards for GHG emissions from new and modified EGUs under CAA section

111(b), 42 U.S.C. § 7411(b), and emissions guidelines for GHG emissions from existing affected EGUs pursuant to CAA section 111(d), 42 U.S.C. § 7411(d), and 40 C.F.R. § 60.22;

WHEREAS, the Parties wish to enter into this Settlement Agreement to resolve the State and Environmental Petitioners' request for performance standards and emission guidelines for GHG emissions under CAA sections 111(b) and 111(d) and to avoid further litigation on this issue, without any admission or adjudications of fact or law;

NOW THEREFORE, the Parties, intending to be bound by this Settlement Agreement, hereby stipulate and agree as follows:

1. EPA will sign by May 26, 2011, and will transmit to the Office of the Federal Register within five business days, a proposed rule under section 111(b) that includes standards of performance for GHGs for new and modified EGUs that are subject to 40 C.F.R. part 60, subpart Da. EPA shall provide the State and Environmental Petitioners a copy of the proposed rule within five business days of signature.
2. EPA will also sign by May 26, 2011, and will transmit to the Office of the Federal Register within five business days, a proposed rule under section 111(d) that includes emissions guidelines for GHGs from existing EGUs that would have been subject to 40 C.F.R. part 60, subpart Da if they were new sources. EPA shall provide the State and Environmental Petitioners a copy of the proposed rule within five business days of signature.
3. After considering any public comments received concerning the proposed rule described in Paragraph 1, EPA will sign no later than May 26, 2012, and will transmit to the Office of the Federal Register within five business days, a final rule that takes final action with respect to the proposed rule described in Paragraph 1. EPA shall provide the

- Environmental and State Petitioners with a copy of its final action within five business days of signature.
4. If EPA finalizes standards of performance for GHGs pursuant to Paragraph 3, then based on consideration of the public comments received concerning the proposed rule described in Paragraph 2, EPA will sign no later than May 26, 2012, and will transmit to the Office of the Federal Register within five business days, a final rule that takes final action with respect to the proposed rule describe in Paragraph 2. EPA shall provide the State and Environmental Petitioners with a copy of its final action within five business days of signature.
  5. EPA agrees that it will make staff available by telephone at least every 60 days to update State and Environmental Petitioners on EPA's progress in completing the actions described in Paragraphs (1) through (4). In addition, EPA will provide State and Environmental Petitioners with a status letter every 60 days, which shall include an affirmative statement of whether EPA believes it will timely complete all actions described in Paragraphs 1 through 4.
  6. Upon EPA's fulfillment of each of the obligations stated in Paragraphs 1 through 4 above, this Settlement Agreement shall constitute a full and final release of any claims that State and Environmental Petitioners may have under any provision of law to compel EPA to respond to the Court's Remand Order with respect to GHG emissions from EGUs.
  7. State and Environmental Petitioners shall not file any motion or petition seeking to compel EPA action in response to the Remand Order with respect to GHG emissions from EGUs unless EPA has first failed to meet an obligation stated in Paragraphs 1



through 4 above. If EPA fails to meet such an obligation, or if an EPA status letter described in Paragraph 5 does not affirm that EPA believes it will timely complete all actions described in Paragraphs 1 through 4, or if EPA fails to send a status letter as described in Paragraph 5 and does not promptly cure that failure upon receiving notice, State and Environmental Petitioners' sole remedy shall be to file an appropriate motion or petition with the Court or other civil action seeking to compel EPA to take action responding to the Remand Order. In that event, all Parties reserve any claims or defenses they may have in such an action, and the dates stated in Paragraphs 1 through 4 shall be construed to represent only the parties' attempt to compromise claims in litigation, and not to represent agreement that any particular schedule for further agency action is reasonable or otherwise required by law. State and Environmental Petitioners reserve all rights under the law to file petitions for review of final agency actions under this Settlement Agreement, pursuant to section 307(b), 42 U.S.C. § 7607(b).

8. This Settlement Agreement constitutes the sole and entire understanding of EPA and the Environmental and State Petitioners and no statement, promise or inducement made by any Party to this Settlement Agreement, or any agent of such Parties, that is not set forth in this Settlement Agreement shall be valid or binding.
9. Except as expressly provided in this Settlement Agreement, none of the Parties waives or relinquishes any legal rights, claims or defenses it may have. State and Environmental Petitioners reserve the right to seek attorneys' fees and costs relating to this litigation, and EPA reserves any defenses it may have relating to such claims.
10. The provisions of this Settlement Agreement can be modified at any time by written mutual consent of the Parties.

11. Except as expressly provided herein, nothing in the terms of this Settlement Agreement shall be construed to limit or modify the discretion accorded EPA by the CAA or by general principles of administrative law.
12. The commitments by EPA in this Settlement Agreement are subject to the availability of appropriated funds. No provision of this Settlement Agreement shall be interpreted as or constitute a commitment or requirement that EPA obligate, expend or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. 1341, or any other applicable appropriations law or regulation, or otherwise take any action in contravention of those laws or regulations.
13. Nothing in the terms of this Settlement Agreement shall be construed to limit EPA's authority to alter, amend or revise any final rule EPA may issue pursuant to Paragraphs 3 or 4, or to promulgate superseding regulations.
14. The Parties agree and acknowledge that before this Settlement Agreement is final, EPA must provide notice in the Federal Register and an opportunity for public comment pursuant to CAA Section 113(g), 42 U.S.C. 7413(g). After this Settlement Agreement has undergone an opportunity for notice and comment, the Administrator and/or the Attorney General, as appropriate, shall promptly consider any such written comments in determining whether to withdraw or withhold her/his consent to the Settlement Agreement, in accordance with section 113(g) of the CAA. Within 30 days of the close of the public comment period, EPA shall provide written notice to State and Environmental Petitioners of any decision to withdraw or withhold consent or shall provide written notice of finality. This Settlement Agreement shall become final on the

date that EPA provides written notice of such finality to the State and Environmental Petitioners.

15. The undersigned representatives of each Party certify that they are fully authorized by the Party that they represent to bind that respective Party to the terms of this Settlement Agreement. This Settlement Agreement will be deemed to be executed when it has been signed by the representatives of the Parties set forth below, subject to final approvals pursuant to Paragraph 14.

DATE: \_\_\_\_\_

\_\_\_\_\_  
DAVID GUNTER  
U.S. Department of Justice  
Environment and Natural Resources Division  
Environmental Defense Section  
P.O. Box 23986  
Washington, D.C. 20026-3986  
(202) 514-3785  
David.Gunter2@usdoj.gov  
  
Counsel for EPA

DATE: \_\_\_\_\_

\_\_\_\_\_  
Counsel for **[environmental petitioners]**

Counsel for **[state petitioners]**

**To:** vpatton@environmentaldefense.org[vpatton@environmentaldefense.org]; David Doniger" [ddoniger@nrdc.org]; Joanne.Spalding@sierraclub.org>;"David (ENRD) Gunter" [David.Gunter2@usdoj.gov]; David (ENRD) Gunter" [David.Gunter2@usdoj.gov]  
**Cc:** "Morgan Costello" [Morgan.Costello@ag.ny.gov]; atricia Embrey/DC/USEPA/US@EPA;Elliott Zenick/DC/USEPA/US@EPA[]; Elliott Zenick/DC/USEPA/US@EPA[]  
**From:** "Michael Myers"  
**Sent:** Thur 9/30/2010 6:32:14 PM  
**Subject:** RE: Boiler NSPS -- Final draft  
[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)  
[www.nrdc.org](http://www.nrdc.org)  
<http://switchboard.nrdc.org/blogs/ddoniger/>

That change is fine with the States

>>> "Gunter, David (ENRD)" <David.Gunter2@usdoj.gov> 9/30/2010 2:19 PM >>>

Counsel:

I apologize for this inconvenience, but during agency review of this agreement, we were requested to make one change to the language. Specifically, we have moved each of the four stated deadlines for signature of proposed and final rules in this agreement five days earlier, and then provided that transmittal to the Federal Register should take place within five business days. I hope that none of the parties will object to this change, which I think serves your interests: It reaches the same final result but establishes an earlier signature date. However, if you or your clients object to this new language, or if you will need more time for review, please let me know as soon as possible. A new final draft is attached.

The only other change in this draft: The District of Columbia has been added to the list of State Petitioners.

Thanks for accommodating these changes.

Dave Gunter

From: Gunter, David (ENRD)  
Sent: Tuesday, September 28, 2010 4:28 PM  
To: 'Doniger, David'; Joanne.Spalding@sierraclub.org; vpatton@environmentaldefense.org; michael.myers@ag.ny.gov  
Cc: Zenick.Elliott@epamail.epa.gov; embrey.patricia@epamail.epa.gov  
Subject: RE: Boiler NSPS -- Final draft

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We too appreciate the cooperation of the government team and the speed at which we have been able to conduct

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David

David D. Doniger

Policy Director, Climate Center

Natural Resources Defense Council

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Washington, DC 20005

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Cell: (202) 321-3435

Fax: (202) 789-0859

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Embrey/DC/USEPA/US@EPA[]; atricia Embrey/DC/USEPA/US@EPA[]  
**From:** Joanne Spalding  
**Sent:** Sun 10/3/2010 2:34:07 AM  
**Subject:** RE: Boiler NSPS -- Final draft  
[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)  
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Joanne

Joanne Spalding  
Managing Attorney  
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415-977-5793 (Fax)  
[joanne.spalding@sierraclub.org](mailto:joanne.spalding@sierraclub.org)

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Date: 09/28/2010 01:27PM  
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Dave Gunter

[attachment "ENV\_DEFENSE-#491951-v1-Boiler\_NSPS\_--\_Settlement\_final\_draft.DOC" removed by Joanne Spalding/Sierraclub]

**To:** Joanne.Spalding@sierraclub.org[Joanne.Spalding@sierraclub.org];  
David.Gunter2@usdoj.gov>[]  
**Cc:** vpatton@environmentaldefense.org[vpatton@environmentaldefense.org];  
michael.myers@ag.ny.gov>; Elliott Zenick/DC/USEPA/US@EPA; Patricia  
Embrey/DC/USEPA/US@EPA[]; Elliott Zenick/DC/USEPA/US@EPA; Patricia  
Embrey/DC/USEPA/US@EPA[]; Patricia Embrey/DC/USEPA/US@EPA[]  
**From:** "Doniger, David"  
**Sent:** Sun 10/3/2010 4:01:28 AM  
**Subject:** Re: Boiler NSPS -- Final draft  
[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)  
[www.nrdc.org](http://www.nrdc.org)  
<http://switchboard.nrdc.org/blogs/ddoniger/>

Dave,

You also have NRDC's approval.

David Doniger, NRDC  
(202) 321-3435  
Sent from Blackberry

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To: Gunter, David (ENRD) <David.Gunter2@usdoj.gov>  
Cc: Doniger, David; vpatton@environmentaldefense.org <vpattton@environmentaldefense.org>;  
michael.myers@ag.ny.gov <michael.myers@ag.ny.gov>; Zenick.Elliott@epamail.epa.gov  
<Zenick.Elliott@epamail.epa.gov>; embrey.patricia@epamail.epa.gov  
<embrey.patricia@epamail.epa.gov>  
Sent: Sat Oct 02 22:34:07 2010  
Subject: RE: Boiler NSPS -- Final draft

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Best,

Joanne

Joanne Spalding  
Managing Attorney  
Sierra Club  
85 Second Street, Second Floor  
San Francisco, CA 94105  
415-977-5725  
415-977-5793 (Fax)  
[joanne.spalding@sierraclub.org](mailto:joanne.spalding@sierraclub.org)

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**Cc:** "michael.myers@ag.ny.gov" [michael.myers@ag.ny.gov]; lliott Zenick/DC/USEPA/US@EPA; Patricia Embrey/DC/USEPA/US@EPA[]; atricia Embrey/DC/USEPA/US@EPA[]  
**From:** Vickie Patton  
**Sent:** Mon 10/4/2010 6:04:12 AM  
**Subject:** Re: Boiler NSPS -- Final draft  
[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)  
[www.nrdc.org](http://www.nrdc.org)  
<http://switchboard.nrdc.org/blogs/ddoniger/>

EDF, also, has approved. And thank you for identifying the additional edits.

Sincerely yours, Vickie

From: Doniger, David [mailto:ddoniger@nrdc.org]  
Sent: Sunday, October 03, 2010 12:01 AM  
To: Joanne.Spalding@sierraclub.org <Joanne.Spalding@sierraclub.org>; David.Gunter2@usdoj.gov <David.Gunter2@usdoj.gov>  
Cc: Vickie Patton; michael.myers@ag.ny.gov <michael.myers@ag.ny.gov>; Zenick.Elliott@epamail.epa.gov <Zenick.Elliott@epamail.epa.gov>; embrey.patricia@epamail.epa.gov <embrey.patricia@epamail.epa.gov>  
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Subject: RE: Boiler NSPS -- EPA September 27 draft

David and colleagues,

Thanks for the continued progress on this matter. Enclosed is the draft agreement with some small edits that are intended to clarify certain of the recent additions. We hope and trust that these will not pose any problems, and if these are acceptable, then on behalf of the environmental petitioners I can state that we too believe we have staff-level agreement on the draft.

Although reluctantly, we can agree to proceed without the initial filing of the settlement with the Court, bearing in mind that the terms of the settlement preserve our ability to return to the Court and our ability to refer to the settlement if there should be a failure to implement.

This note confirms that although the agreement preserves our right to seek attorneys fees and costs, the environmental petitioners do not intend to seek fees or costs for work done to date in connection with the underlying case or these settlement negotiations.

We too appreciate the cooperation of the government team and the speed at which we have been able to conduct these negotiations.

David

David D. Doniger

Policy Director, Climate Center

Natural Resources Defense Council

1200 New York Ave., NW

Washington, DC 20005

Phone: (202) 289-2403

Cell: (202) 321-3435

Fax: (202) 789-0859

ddoniger@nrdc.org

on the web at [www.nrdc.org](http://www.nrdc.org)

read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

From: Gunter, David (ENRD) [mailto:David.Gunter2@usdoj.gov]  
Sent: Monday, September 27, 2010 8:15 PM  
To: Joanne.Spalding@sierraclub.org; vpatton@environmentaldefense.org; Doniger, David;  
michael.myers@ag.ny.gov  
Cc: Zenick.Elliott@epamail.epa.gov; embrey.patricia@epamail.epa.gov  
Subject: Boiler NSPS -- EPA September 27 draft

Counsel,

Thank you for your participation in the call today about the Boiler NSPS settlement. The attached draft represents our changes, in redline, reflecting the compromise that we reached on certain points today. If this draft is acceptable to you, then I believe we have staff-level agreement on a draft that we can recommend to our respective clients and reviewing agency officials for approval. However, as we discussed, I would still appreciate your written confirmation (by letter or e-mail) that you do not presently intend to seek attorneys' fees in this case.

That leaves the question that we discussed on our call today about the possibility of filing a status report with the D.C. Circuit to inform it of this agreement. I have raised this question with my management within DOJ, and I have been instructed that it would be very difficult for us to compromise on this point. As David said on our call, a fight on this issue is not in anyone's interest. I am therefore asking you to agree that you will not file the final settlement with the Court unless further litigation becomes necessary.

We've made remarkable progress on this matter in a very short time, and I hope that you can advise us we have an agreement with this draft. If we need to discuss this further, we're available for a call at 9:00 tomorrow morning.

Thanks,

Dave Gunter

[attachment "ENV\_DEFENSE-#491951-v1-Boiler\_NSPTS\_-\_Settlement\_final\_draft.DOC" removed by Joanne Spalding/Sierraclub]

This e-mail and any attachments may contain confidential and privileged information. If you are not the intended recipient, please notify the sender immediately by return e-mail, delete this e-mail and destroy any copies. Any dissemination or use of this information by a person other than the intended recipient is unauthorized and may be illegal.

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Embrey/DC/USEPA/US@EPA[]  
**From:** "Gunter, David (ENRD)"  
**Sent:** Tue 12/7/2010 2:58:16 PM  
**Subject:** Boiler NSPS approval steps  
ENV DEFENSE-#501890-v1-Boiler NSPS -- Revised final agreement.DOC

Dear Counsel:

I am writing with an update on the status of our approval process for the Boiler NSPS settlement that we negotiated earlier this fall. OMB reports that it will approve the package if the date for publication of the proposed rule is changed from May 2011 to July 2011. The date for the final rule would remain the same, May 2012. All other terms would also remain the same. I have attached a revised version of our agreement. The only change is the date for the proposal in paragraphs 1 and 2.

We appreciate both your patience in this process and the confidentiality that you've maintained. If all the parties will agree to this change, then we expect complete federal approval in very short order and a public announcement of the settlement before the end of the year.

Although I can't offer specifics about the reasoning behind OMB's request, I would be happy to answer your questions about how we can move from here to a final agreement. Please let me know by COB on Thursday, December 9 whether you will agree to this change.

Thanks,

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---

David Gunter

Environmental Defense Section

U.S. Department of Justice

(202) 514-3785

**To:** "Doniger, David" [ddoniger@nrdc.org];  
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## **SETTLEMENT AGREEMENT**

This Settlement Agreement is made by and between the following groups of Petitioners: (1) the States of New York, California, Connecticut, Delaware, Maine, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, the District of Columbia, and the City of New York (collectively “State Petitioners”); and (2) Natural Resources Defense Council (NRDC), Sierra Club, and Environmental Defense Fund (EDF) (collectively “Environmental Petitioners”), and Respondent, the U.S. Environmental Protection Agency (“EPA”) (collectively “the Parties”).

WHEREAS, EPA published a final action entitled “Standards of Performance for Electric Utility Steam Generating Units, Industrial-Commercial-Institutional Steam Generating Units, and Small Industrial-Commercial-Institutional Steam Generating Units,” 71 Fed. Reg. 9,866 (Feb. 27, 2006) (the “Final Rule”);

WHEREAS, the Final Rule included amendments to the standards of performance for electric utility steam generating units subject to 40 C.F.R. part 60, subpart Da (“EGUs”);

WHEREAS, in connection with this Final Rule, EPA declined to establish standards of performance for greenhouse gas (“GHG”) emissions;

WHEREAS, State and Environmental Petitioners filed petitions for judicial review of the Final Rule under the Clean Air Act (“CAA”) Section 111, 42 U.S.C. § 7411, contending, *inter alia*, that the Final Rule was required to include standards of performance for GHG emissions from EGUs;

WHEREAS, the portions of State and Environmental Petitioners’ petitions for review of the Final Rule that related to GHG emissions were severed from other petitions for review of the Final Rule, and were formerly pending before the United States Court of Appeals for the District



of Columbia Circuit (the “Court”) under the caption *State of New York, et al. v. EPA*, No. 06-1322;

WHEREAS, following the Supreme Court’s decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), EPA requested remand of the Final Rule to EPA for further consideration of the issues related to GHG emissions in light of that decision;

WHEREAS, the Court remanded the Final Rule to EPA for further proceedings on GHG emissions in light of *Massachusetts v. EPA*, by its Order of September 24, 2007 (the “Remand Order”);

WHEREAS, as of the date of this Settlement Agreement, EPA has not taken any publicly noticed action to respond to the Remand Order;

WHEREAS, the State Petitioners submitted letters to EPA dated June 16, 2008 and August 4, 2009 inquiring as to the status of EPA’s action on the remand and stating their position that EPA had a legal obligation to act promptly to comply with the requirements of Section 111, and Environmental Petitioners submitted a letter to EPA on August 20, 2010 seeking commitments to rulemaking on GHG emissions from EGUs as a means of avoiding further litigation;

WHEREAS, EGUs are, collectively, the largest source category of GHG emissions in the United States, according to a recent EPA analysis. *See* 74 Fed. Reg. 56,260, 56,363 (Oct. 30, 2009);

WHEREAS, EPA’s initial evaluation of available GHG control strategies indicates that there are cost-effective control strategies for reducing GHGs from EGUs;

WHEREAS, EPA believes it would be appropriate for it to concurrently propose performance standards for GHG emissions from new and modified EGUs under CAA section

111(b), 42 U.S.C. § 7411(b), and emissions guidelines for GHG emissions from existing affected EGUs pursuant to CAA section 111(d), 42 U.S.C. § 7411(d), and 40 C.F.R. § 60.22;

WHEREAS, the Parties wish to enter into this Settlement Agreement to resolve the State and Environmental Petitioners' request for performance standards and emission guidelines for GHG emissions under CAA sections 111(b) and 111(d) and to avoid further litigation on this issue, without any admission or adjudications of fact or law;

NOW THEREFORE, the Parties, intending to be bound by this Settlement Agreement, hereby stipulate and agree as follows:

1. EPA will sign by July 26, 2011, and will transmit to the Office of the Federal Register within five business days, a proposed rule under section 111(b) that includes standards of performance for GHGs for new and modified EGUs that are subject to 40 C.F.R. part 60, subpart Da. EPA shall provide the State and Environmental Petitioners a copy of the proposed rule within five business days of signature.
2. EPA will also sign by July 26, 2011, and will transmit to the Office of the Federal Register within five business days, a proposed rule under section 111(d) that includes emissions guidelines for GHGs from existing EGUs that would have been subject to 40 C.F.R. part 60, subpart Da if they were new sources. EPA shall provide the State and Environmental Petitioners a copy of the proposed rule within five business days of signature.
3. After considering any public comments received concerning the proposed rule described in Paragraph 1, EPA will sign no later than May 26, 2012, and will transmit to the Office of the Federal Register within five business days, a final rule that takes final action with respect to the proposed rule described in Paragraph 1. EPA shall provide the

- Environmental and State Petitioners with a copy of its final action within five business days of signature.
4. If EPA finalizes standards of performance for GHGs pursuant to Paragraph 3, then based on consideration of the public comments received concerning the proposed rule described in Paragraph 2, EPA will sign no later than May 26, 2012, and will transmit to the Office of the Federal Register within five business days, a final rule that takes final action with respect to the proposed rule describe in Paragraph 2. EPA shall provide the State and Environmental Petitioners with a copy of its final action within five business days of signature.
  5. EPA agrees that it will make staff available by telephone at least every 60 days to update State and Environmental Petitioners on EPA's progress in completing the actions described in Paragraphs (1) through (4). In addition, EPA will provide State and Environmental Petitioners with a status letter every 60 days, which shall include an affirmative statement of whether EPA believes it will timely complete all actions described in Paragraphs 1 through 4.
  6. Upon EPA's fulfillment of each of the obligations stated in Paragraphs 1 through 4 above, this Settlement Agreement shall constitute a full and final release of any claims that State and Environmental Petitioners may have under any provision of law to compel EPA to respond to the Court's Remand Order with respect to GHG emissions from EGUs.
  7. State and Environmental Petitioners shall not file any motion or petition seeking to compel EPA action in response to the Remand Order with respect to GHG emissions from EGUs unless EPA has first failed to meet an obligation stated in Paragraphs 1

through 4 above. If EPA fails to meet such an obligation, or if an EPA status letter described in Paragraph 5 does not affirm that EPA believes it will timely complete all actions described in Paragraphs 1 through 4, or if EPA fails to send a status letter as described in Paragraph 5 and does not promptly cure that failure upon receiving notice, State and Environmental Petitioners' sole remedy shall be to file an appropriate motion or petition with the Court or other civil action seeking to compel EPA to take action responding to the Remand Order. In that event, all Parties reserve any claims or defenses they may have in such an action, and the dates stated in Paragraphs 1 through 4 shall be construed to represent only the parties' attempt to compromise claims in litigation, and not to represent agreement that any particular schedule for further agency action is reasonable or otherwise required by law. State and Environmental Petitioners reserve all rights under the law to file petitions for review of final agency actions under this Settlement Agreement, pursuant to section 307(b), 42 U.S.C. § 7607(b).

8. This Settlement Agreement constitutes the sole and entire understanding of EPA and the Environmental and State Petitioners and no statement, promise or inducement made by any Party to this Settlement Agreement, or any agent of such Parties, that is not set forth in this Settlement Agreement shall be valid or binding.
9. Except as expressly provided in this Settlement Agreement, none of the Parties waives or relinquishes any legal rights, claims or defenses it may have. State and Environmental Petitioners reserve the right to seek attorneys' fees and costs relating to this litigation, and EPA reserves any defenses it may have relating to such claims.
10. The provisions of this Settlement Agreement can be modified at any time by written mutual consent of the Parties.

11. Except as expressly provided herein, nothing in the terms of this Settlement Agreement shall be construed to limit or modify the discretion accorded EPA by the CAA or by general principles of administrative law.
12. The commitments by EPA in this Settlement Agreement are subject to the availability of appropriated funds. No provision of this Settlement Agreement shall be interpreted as or constitute a commitment or requirement that EPA obligate, expend or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. 1341, or any other applicable appropriations law or regulation, or otherwise take any action in contravention of those laws or regulations.
13. Nothing in the terms of this Settlement Agreement shall be construed to limit EPA's authority to alter, amend or revise any final rule EPA may issue pursuant to Paragraphs 3 or 4, or to promulgate superseding regulations.
14. The Parties agree and acknowledge that before this Settlement Agreement is final, EPA must provide notice in the Federal Register and an opportunity for public comment pursuant to CAA Section 113(g), 42 U.S.C. 7413(g). After this Settlement Agreement has undergone an opportunity for notice and comment, the Administrator and/or the Attorney General, as appropriate, shall promptly consider any such written comments in determining whether to withdraw or withhold her/his consent to the Settlement Agreement, in accordance with section 113(g) of the CAA. Within 30 days of the close of the public comment period, EPA shall provide written notice to State and Environmental Petitioners of any decision to withdraw or withhold consent or shall provide written notice of finality. This Settlement Agreement shall become final on the

date that EPA provides written notice of such finality to the State and Environmental Petitioners.

15. The undersigned representatives of each Party certify that they are fully authorized by the Party that they represent to bind that respective Party to the terms of this Settlement Agreement. This Settlement Agreement will be deemed to be executed when it has been signed by the representatives of the Parties set forth below, subject to final approvals pursuant to Paragraph 14.

DATE: \_\_\_\_\_

\_\_\_\_\_  
DAVID GUNTER  
U.S. Department of Justice  
Environment and Natural Resources Division  
Environmental Defense Section  
P.O. Box 23986  
Washington, D.C. 20026-3986  
(202) 514-3785  
David.Gunter2@usdoj.gov  
  
Counsel for EPA

DATE: \_\_\_\_\_

\_\_\_\_\_  
Counsel for **[environmental petitioners]**

Counsel for **[state petitioners]**

**To:** "Doniger, David" [ddoniger@nrdc.org]; michael.myers@ag.ny.gov>[]  
**Cc:** Elliott Zenick/DC/USEPA/US@EPA; Patricia Embrey/DC/USEPA/US@EPA[]; atricia Embrey/DC/USEPA/US@EPA[]  
**From:** "Gunter, David (ENRD)"  
**Sent:** Tue 12/7/2010 2:59:36 PM  
**Subject:** Boiler/Refinery NSPS approval

Mike and David:

Since we don't have complete overlap between counsel for the Refinery NSPS and the Boiler NSPS agreement, I'm sending this message just to you. In addition to the information about the Boiler NSPS settlement contained in my previous e-mail, OMB reports that if the Boiler NSPS settlement is changed to conform to their request, then the Refinery NSPS settlement will also be approved as written. We could announce both of them by the end of the year, mitigating Mike's concerns about the states' changes in administration. EPA would like to set up a meeting early next week about a rollout strategy for both packages.

I hope you'll be amenable to this change to the Boiler NSPS; if we can all agree to it then the finish line is in sight for these settlements.

Regards,

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Environmental Defense Section

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**From:** "Doniger, David"  
**Sent:** Tue 12/7/2010 4:56:02 PM  
**Subject:** Re: Boiler/Refinery NSPS approval

Thanks for both messages. The two enviro groups will confer (separately). Given that I am in Cancun, it may take all day or into tomorrow to get us all together.

David Doniger, NRDC  
(202) 321-3435  
Sent from Blackberry

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**Cc:** Patricia Embrey/DC/USEPA/US@EPA; Elliott Zenick/DC/USEPA/US@EPA[]; Iliott Zenick/DC/USEPA/US@EPA[]  
**From:** "Michael Myers"  
**Sent:** Tue 12/7/2010 7:42:43 PM  
**Subject:** Re: Boiler NSPS approval steps

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**Cc:** "Morgan Costello" [Morgan.Costello@ag.ny.gov]; atricia  
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**Sent:** Tue 12/7/2010 7:58:04 PM  
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[David.Gunter2@usdoj.gov]  
**Cc:** "Morgan Costello" [Morgan.Costello@ag.ny.gov]; atricia  
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Zenick/DC/USEPA/US@EPA[]  
**From:** "Gunter, David (ENRD)"  
**Sent:** Tue 12/7/2010 8:54:13 PM  
**Subject:** RE: Boiler NSPS approval steps  
ENV DEFENSE-#502027-v1-Boiler NSPS -- Final agreement with blocks.DOC

Mike – Here is a final version of the Boiler NSPS agreement with signature blocks. Incidentally, some of these may be outdated because I was using the Boiler NSPS court docket to get the names of some of the state signatories – please let me know if it needs to be updated.

Thanks,  
Dave

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To: vpatton@environmentaldefense.org; David Doniger; Joanne.Spalding@sierraclub.org; Gunter, David (ENRD)  
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>>> "Gunter, David (ENRD)" <David.Gunter2@usdoj.gov> 12/7/2010 9:58 AM >>>

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Thanks,

Dave Gunter

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David Gunter

Environmental Defense Section

U.S. Department of Justice

(202) 514-3785

## **SETTLEMENT AGREEMENT**

This Settlement Agreement is made by and between the following groups of Petitioners:

(1) the States of New York, California, Connecticut, Delaware, Maine, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, the District of Columbia, and the City of New York (collectively “State Petitioners”); and (2) Natural Resources Defense Council (NRDC), Sierra Club, and Environmental Defense Fund (EDF) (collectively “Environmental Petitioners”), and Respondent, the U.S. Environmental Protection Agency (“EPA”) (collectively “the Parties”).

WHEREAS, EPA published a final action entitled “Standards of Performance for Electric Utility Steam Generating Units, Industrial-Commercial-Institutional Steam Generating Units, and Small Industrial-Commercial-Institutional Steam Generating Units,” 71 Fed. Reg. 9,866 (Feb. 27, 2006) (the “Final Rule”);

WHEREAS, the Final Rule included amendments to the standards of performance for electric utility steam generating units subject to 40 C.F.R. part 60, subpart Da (“EGUs”);

WHEREAS, in connection with this Final Rule, EPA declined to establish standards of performance for greenhouse gas (“GHG”) emissions;

WHEREAS, State and Environmental Petitioners filed petitions for judicial review of the Final Rule under the Clean Air Act (“CAA”) Section 111, 42 U.S.C. § 7411, contending, *inter alia*, that the Final Rule was required to include standards of performance for GHG emissions from EGUs;

WHEREAS, the portions of State and Environmental Petitioners’ petitions for review of the Final Rule that related to GHG emissions were severed from other petitions for review of the Final Rule, and were formerly pending before the United States Court of Appeals for the District

of Columbia Circuit (the “Court”) under the caption *State of New York, et al. v. EPA*, No. 06-1322;

WHEREAS, following the Supreme Court’s decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), EPA requested remand of the Final Rule to EPA for further consideration of the issues related to GHG emissions in light of that decision;

WHEREAS, the Court remanded the Final Rule to EPA for further proceedings on GHG emissions in light of *Massachusetts v. EPA*, by its Order of September 24, 2007 (the “Remand Order”);

WHEREAS, as of the date of this Settlement Agreement, EPA has not taken any publicly noticed action to respond to the Remand Order;

WHEREAS, the State Petitioners submitted letters to EPA dated June 16, 2008 and August 4, 2009 inquiring as to the status of EPA’s action on the remand and stating their position that EPA had a legal obligation to act promptly to comply with the requirements of Section 111, and Environmental Petitioners submitted a letter to EPA on August 20, 2010 seeking commitments to rulemaking on GHG emissions from EGUs as a means of avoiding further litigation;

WHEREAS, EGUs are, collectively, the largest source category of GHG emissions in the United States, according to a recent EPA analysis. *See* 74 Fed. Reg. 56,260, 56,363 (Oct. 30, 2009);

WHEREAS, EPA’s initial evaluation of available GHG control strategies indicates that there are cost-effective control strategies for reducing GHGs from EGUs;

WHEREAS, EPA believes it would be appropriate for it to concurrently propose performance standards for GHG emissions from new and modified EGUs under CAA section

111(b), 42 U.S.C. § 7411(b), and emissions guidelines for GHG emissions from existing affected EGUs pursuant to CAA section 111(d), 42 U.S.C. § 7411(d), and 40 C.F.R. § 60.22;

WHEREAS, the Parties wish to enter into this Settlement Agreement to resolve the State and Environmental Petitioners' request for performance standards and emission guidelines for GHG emissions under CAA sections 111(b) and 111(d) and to avoid further litigation on this issue, without any admission or adjudications of fact or law;

NOW THEREFORE, the Parties, intending to be bound by this Settlement Agreement, hereby stipulate and agree as follows:

1. EPA will sign by July 26, 2011, and will transmit to the Office of the Federal Register within five business days, a proposed rule under section 111(b) that includes standards of performance for GHGs for new and modified EGUs that are subject to 40 C.F.R. part 60, subpart Da. EPA shall provide the State and Environmental Petitioners a copy of the proposed rule within five business days of signature.
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3. After considering any public comments received concerning the proposed rule described in Paragraph 1, EPA will sign no later than May 26, 2012, and will transmit to the Office of the Federal Register within five business days, a final rule that takes final action with respect to the proposed rule described in Paragraph 1. EPA shall provide the

Environmental and State Petitioners with a copy of its final action within five business days of signature.

4. If EPA finalizes standards of performance for GHGs pursuant to Paragraph 3, then based on consideration of the public comments received concerning the proposed rule described in Paragraph 2, EPA will sign no later than May 26, 2012, and will transmit to the Office of the Federal Register within five business days, a final rule that takes final action with respect to the proposed rule describe in Paragraph 2. EPA shall provide the State and Environmental Petitioners with a copy of its final action within five business days of signature.
5. EPA agrees that it will make staff available by telephone at least every 60 days to update State and Environmental Petitioners on EPA's progress in completing the actions described in Paragraphs (1) through (4). In addition, EPA will provide State and Environmental Petitioners with a status letter every 60 days, which shall include an affirmative statement of whether EPA believes it will timely complete all actions described in Paragraphs 1 through 4.
6. Upon EPA's fulfillment of each of the obligations stated in Paragraphs 1 through 4 above, this Settlement Agreement shall constitute a full and final release of any claims that State and Environmental Petitioners may have under any provision of law to compel EPA to respond to the Court's Remand Order with respect to GHG emissions from EGUs.
7. State and Environmental Petitioners shall not file any motion or petition seeking to compel EPA action in response to the Remand Order with respect to GHG emissions from EGUs unless EPA has first failed to meet an obligation stated in Paragraphs 1

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8. This Settlement Agreement constitutes the sole and entire understanding of EPA and the Environmental and State Petitioners and no statement, promise or inducement made by any Party to this Settlement Agreement, or any agent of such Parties, that is not set forth in this Settlement Agreement shall be valid or binding.
9. Except as expressly provided in this Settlement Agreement, none of the Parties waives or relinquishes any legal rights, claims or defenses it may have. State and Environmental Petitioners reserve the right to seek attorneys' fees and costs relating to this litigation, and EPA reserves any defenses it may have relating to such claims.
10. The provisions of this Settlement Agreement can be modified at any time by written mutual consent of the Parties.



11. Except as expressly provided herein, nothing in the terms of this Settlement Agreement shall be construed to limit or modify the discretion accorded EPA by the CAA or by general principles of administrative law.
12. The commitments by EPA in this Settlement Agreement are subject to the availability of appropriated funds. No provision of this Settlement Agreement shall be interpreted as or constitute a commitment or requirement that EPA obligate, expend or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. 1341, or any other applicable appropriations law or regulation, or otherwise take any action in contravention of those laws or regulations.
13. Nothing in the terms of this Settlement Agreement shall be construed to limit EPA's authority to alter, amend or revise any final rule EPA may issue pursuant to Paragraphs 3 or 4, or to promulgate superseding regulations.
14. The Parties agree and acknowledge that before this Settlement Agreement is final, EPA must provide notice in the Federal Register and an opportunity for public comment pursuant to CAA Section 113(g), 42 U.S.C. 7413(g). After this Settlement Agreement has undergone an opportunity for notice and comment, the Administrator and/or the Attorney General, as appropriate, shall promptly consider any such written comments in determining whether to withdraw or withhold her/his consent to the Settlement Agreement, in accordance with section 113(g) of the CAA. Within 30 days of the close of the public comment period, EPA shall provide written notice to State and Environmental Petitioners of any decision to withdraw or withhold consent or shall provide written notice of finality. This Settlement Agreement shall become final on the

date that EPA provides written notice of such finality to the State and Environmental Petitioners.

15. The undersigned representatives of each Party certify that they are fully authorized by the Party that they represent to bind that respective Party to the terms of this Settlement Agreement. This Settlement Agreement will be deemed to be executed when it has been signed by the representatives of the Parties set forth below, subject to final approvals pursuant to Paragraph 14.

DATE: \_\_\_\_\_

\_\_\_\_\_  
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Environment and Natural Resources Division  
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*Counsel for U.S. Environmental Protection Agency*

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*Counsel for State of New York*

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Assistant Attorney General  
P.O. Box 120, 55 Elm Street  
Hartford, Connecticut 06141-0120

*Counsel for State of Connecticut*

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Deputy Attorney General  
Department of Justice  
102 W. Water Street  
Dover, DE 19904

*Counsel for State of Delaware*

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GERALD D. REID  
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Department of the Attorney General  
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Augusta, Maine 04333-0006

*Counsel for State of Maine*

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STEPHEN R. FARRIS  
JUDITH ANN MOORE  
Assistant Attorneys General  
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*Counsel for State of New Mexico*

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PHILIP SCHRADLE  
Special Counsel to the Attorney General  
1162 Court Street, N.E.  
Salem, Oregon 97301

*Counsel for State of Oregon*

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TRICIA K. JEDELE  
Special Assistant Attorney General  
Department of the Attorney General  
150 South Main Street  
Providence, Rhode Island 02903

*Counsel for State of Rhode Island*

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KEVIN O. LESKE  
Assistant Attorneys General  
Office of the Attorney General  
109 State Street  
Montpelier, VT 05609-1001

*Counsel for State of Vermont*

DATE: \_\_\_\_\_

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LESLIE SEFFERN RILEY  
Assistant Attorney General  
Office of the Attorney General  
Olympia, Washington 98504

*Counsel for State of Washington*

DATE: \_\_\_\_\_

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DONNA M. MURASKY  
Deputy Solicitor General  
Department of the Environment  
441 Fourth Street, N.W.  
Washington, D.C. 20001

*Counsel for District of Columbia*

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\_\_\_\_\_  
JAMES R. MILKEY  
Assistant Attorney General  
Environmental Protection Division  
One Ashburton Place  
Boston, Massachusetts 02108

*Counsel for Commonwealth of Massachusetts*

DATE: \_\_\_\_\_

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CHRISTOPHER G. KING  
New York City Law Department  
100 Church Street  
New York, NY 10007

*Counsel for City of New York*

DATE: \_\_\_\_\_

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DAVID D. DONIGER  
Natural Resources Defense Council  
1200 New York Avenue NW, Suite 400  
Washington, DC 20005

*Counsel for Natural Resources Defense Council*

DATE: \_\_\_\_\_

\_\_\_\_\_  
JOANNE SPALDING  
Sierra Club  
85 Second Street  
San Francisco, CA 94105

*Counsel for Sierra Club*

DATE: \_\_\_\_\_

\_\_\_\_\_  
VICKIE PATTON  
Environmental Defense Fund  
2334 N. Broadway  
Boulder, CO 80304

*Counsel for Environmental Defense Fund*

**To:** vpatton@environmentaldefense.org[vpatton@environmentaldefense.org]; David Doniger" [ddoniger@nrdc.org]; Joanne.Spalding@sierraclub.org>;"David (ENRD) Gunter" [David.Gunter2@usdoj.gov]; David (ENRD) Gunter" [David.Gunter2@usdoj.gov]  
**Cc:** Patricia Embrey/DC/USEPA/US@EPA;Elliott Zenick/DC/USEPA/US@EPA[]; Iliott Zenick/DC/USEPA/US@EPA[]  
**From:** "Michael Myers"  
**Sent:** Wed 12/8/2010 2:58:44 PM  
**Subject:** RE: Boiler NSPS approval steps  
Final Settlement Agreement NSPS EGUs.DOC

Dave, attached is a revised version with changes to the signature blocks. Environmental counsel please take note that your signature page has changed (NRDC now is on the same page as SC and EDF). This will facilitate any additional changes to the state blocks that I'm asked to make without requiring environmental counsel to re-execute. Thanks.

>>> "Gunter, David (ENRD)" <David.Gunter2@usdoj.gov> 12/7/2010 3:54 PM >>>

Mike – Here is a final version of the Boiler NSPS agreement with signature blocks. Incidentally, some of these may be outdated because I was using the Boiler NSPS court docket to get the names of some of the state signatories – please let me know if it needs to be updated.

Thanks,  
Dave

From: Michael Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Tuesday, December 07, 2010 2:43 PM  
To: vpatton@environmentaldefense.org; David Doniger; Joanne.Spalding@sierraclub.org; Gunter, David (ENRD)  
Cc: embrey.patricia@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov  
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Environmental Defense Section

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DATE: \_\_\_\_\_

\_\_\_\_\_  
DAVID GUNTER  
U.S. Department of Justice  
Environment and Natural Resources Division  
Environmental Defense Section  
P.O. Box 23986  
Washington, D.C. 20026-3986

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DATE: \_\_\_\_\_

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*Counsel for State of Maine*

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JUDITH ANN MOORE  
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*Counsel for State of Oregon*

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*Counsel for State of Rhode Island*

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Office of the D.C. Attorney General  
441 Fourth Street, N.W.  
Washington, D.C. 20001

*Counsel for District of Columbia*

DATE: \_\_\_\_\_

\_\_\_\_\_  
WILLIAM L. PARDEE  
CAROL IANCU  
Assistant Attorneys General  
Environmental Protection Division  
Office of the Attorney General  
One Ashburton Place  
Boston, Massachusetts 02108

*Counsel for Commonwealth of Massachusetts*

DATE: \_\_\_\_\_

\_\_\_\_\_  
CHRISTOPHER G. KING  
CARRIE NOTEBOOM  
New York City Law Department  
100 Church Street  
New York, NY 10007

*Counsel for City of New York*

DATE: \_\_\_\_\_

\_\_\_\_\_  
DAVID D. DONIGER  
Natural Resources Defense Council  
1200 New York Avenue NW, Suite 400  
Washington, DC 20005

*Counsel for Natural Resources Defense Council*

DATE: \_\_\_\_\_

\_\_\_\_\_  
JOANNE SPALDING  
Sierra Club  
85 Second Street  
San Francisco, CA 94105

*Counsel for Sierra Club*

DATE: \_\_\_\_\_

\_\_\_\_\_  
VICKIE PATTON  
Environmental Defense Fund  
2334 N. Broadway  
Boulder, CO 80304

*Counsel for Environmental Defense Fund*

**To:** "Doniger, David" [ddoniger@nrdc.org]; Joanne.Spalding@sierraclub.org>;[vpatton@environmentaldefense.org]; vpatton@environmentaldefense.org>;[michael.myers@ag.ny.gov]; michael.myers@ag.ny.gov>[]  
**Cc:** Elliott Zenick/DC/USEPA/US@EPA;Patricia Embrey/DC/USEPA/US@EPA[]; atricia Embrey/DC/USEPA/US@EPA[]  
**From:** "Gunter, David (ENRD)"  
**Sent:** Fri 12/10/2010 9:43:15 PM  
**Subject:** RE: Boiler NSPS approval steps

Everyone: It sounds like the states have already begun to get their signatures in on the revised agreement, but I don't believe I have heard anything substantive from the environmental petitioners. If you can let us know on Monday your response to the proposed settlement change, that would be very helpful in planning how we proceed.

Thanks,

Dave Gunter

From: Gunter, David (ENRD)  
Sent: Tuesday, December 07, 2010 9:58 AM  
To: 'Doniger, David'; 'Joanne.Spalding@sierraclub.org'; 'vpatton@environmentaldefense.org'; 'michael.myers@ag.ny.gov'  
Cc: 'Zenick.Elliott@epamail.epa.gov'; 'embrey.patricia@epamail.epa.gov'  
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Thanks,

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David Gunter

Environmental Defense Section

U.S. Department of Justice

(202) 514-3785

**To:** "Gunter, David (ENRD)" [David.Gunter2@usdoj.gov]  
**Cc:** "Doniger, David" [ddoniger@nrdc.org];  
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michael.myers@ag.ny.gov>; Elliott Zenick/DC/USEPA/US@EPA; Patricia  
Embrey/DC/USEPA/US@EPA[]; Elliott Zenick/DC/USEPA/US@EPA; Patricia  
Embrey/DC/USEPA/US@EPA[]; atricia Embrey/DC/USEPA/US@EPA[]  
**From:** Joanne Spalding  
**Sent:** Fri 12/10/2010 9:49:29 PM  
**Subject:** RE: Boiler NSPS approval steps

Dave,

The Sierra Club agrees to changing the date for the proposed rule from May 2011 to July 2011. I can get you a signature Monday.

Best,

Joanne

Joanne Spalding  
Managing Attorney  
Sierra Club  
85 Second Street, Second Floor  
San Francisco, CA 94105  
415-977-5725  
415-977-5793 (Fax)  
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-----"Gunter, David (ENRD)" <David.Gunter2@usdoj.gov> wrote: -----

To: "Doniger, David" <ddoniger@nrdc.org>, <Joanne.Spalding@sierraclub.org>,  
<vpatton@environmentaldefense.org>, <michael.myers@ag.ny.gov>  
From: "Gunter, David (ENRD)" <David.Gunter2@usdoj.gov>  
Date: 12/10/2010 01:43PM  
Cc: <Zenick.Elliott@epamail.epa.gov>, <embrey.patricia@epamail.epa.gov>  
Subject: RE: Boiler NSPS approval steps

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David Gunter

Environmental Defense Section

U.S. Department of Justice

(202) 514-3785



**To:** "Gunter, David (ENRD)" [David.Gunter2@usdoj.gov];  
Joanne.Spalding@sierraclub.org>;[vpatton@environmentaldefense.org];  
vpatton@environmentaldefense.org>;[michael.myers@ag.ny.gov]; michael.myers@ag.ny.gov>[]  
**Cc:** Elliott Zenick/DC/USEPA/US@EPA;Patricia Embrey/DC/USEPA/US@EPA[]; atricia  
Embrey/DC/USEPA/US@EPA[]  
**From:** "Doniger, David"  
**Sent:** Fri 12/10/2010 9:51:07 PM  
**Subject:** RE: Boiler NSPS approval steps  
[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)  
[www.nrdc.org](http://www.nrdc.org)  
<http://switchboard.nrdc.org/blogs/ddoniger/>

We are onboard.

David D. Doniger

Policy Director, Climate Center

Natural Resources Defense Council

1200 New York Ave., NW

Washington, DC 20005

Phone: (202) 289-2403

Cell: (202) 321-3435

Fax: (202) 789-0859

[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)

on the web at [www.nrdc.org](http://www.nrdc.org)

read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

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Sent: Friday, December 10, 2010 4:43 PM  
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Cc: Zenick.Elliott@epamail.epa.gov; embrey.patricia@epamail.epa.gov  
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Environmental Defense Section

U.S. Department of Justice

(202) 514-3785

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**From:** "Gunter, David (ENRD)"  
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**Subject:** RE: Boiler NSPS approval steps  
[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)  
[www.nrdc.org](http://www.nrdc.org)  
<http://switchboard.nrdc.org/blogs/ddoniger/>

Great, thanks. We'll talk next week.

Dave

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Sent: Friday, December 10, 2010 4:51 PM  
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We are onboard.

David D. Doniger

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Environmental Defense Section

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[David.Gunter2@usdoj.gov]; Joanne.Spalding@sierraclub.org"  
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[michael.myers@ag.ny.gov]  
**Cc:** Elliott Zenick/DC/USEPA/US@EPA; Patricia Embrey/DC/USEPA/US@EPA[]; atricia  
Embrey/DC/USEPA/US@EPA[]  
**From:** Vickie Patton  
**Sent:** Mon 12/13/2010 8:11:20 AM  
**Subject:** RE: Boiler NSPS approval steps  
[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)  
[www.nrdc.org](http://www.nrdc.org)  
<http://switchboard.nrdc.org/blogs/ddoniger/>

Dave,

Environmental Defense Fund also is fine with the proposed change.

Note that May 26, 2012 falls on a Saturday.

Sincerely yours,  
Vickie

From: Doniger, David [mailto:ddoniger@nrdc.org]  
Sent: Friday, December 10, 2010 2:51 PM  
To: Gunter, David (ENRD); Joanne.Spalding@sierraclub.org; Vickie Patton; michael.myers@ag.ny.gov  
Cc: Zenick.Elliott@epamail.epa.gov; embrey.patricia@epamail.epa.gov  
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David Gunter

Environmental Defense Section

U.S. Department of Justice

(202) 514-3785

This e-mail and any attachments may contain confidential and privileged information. If you are not the intended recipient, please notify the sender immediately by return e-mail, delete this e-mail and destroy any copies. Any dissemination or use of this information by a person other than the intended recipient is unauthorized and may be illegal.

**To:** "Timothy Ballo" [tballo@earthjustice.org]; David (ENRD) Gunter"  
[David.Gunter2@usdoj.gov]  
**Cc:** "Morgan Costello" [Morgan.Costello@ag.ny.gov]; Elliott  
Zenick/DC/USEPA/US@EPA;[ddoniger@nrdc.org]; ddoniger@nrdc.org>;"Joanne Spalding"  
[Joanne.Spalding@sierraclub.org]; Joanne Spalding" [Joanne.Spalding@sierraclub.org]; Thomas  
(ENRD) Lorenzen" [Thomas.Lorenzen@usdoj.gov]  
**From:** "Michael Myers"  
**Sent:** Thur 12/16/2010 10:17:24 PM  
**Subject:** RE: Agreement with signatures  
[NY v. EPA State Petitioners' signature pages.pdf](#)  
[API v. EPA State Petitioners' signature pages.pdf](#)

Dave, attached are two sets of signature pages for the state petitioners in the power plant and refinery settlements. The only outstanding signature at the moment is Vermont's in the refineries case. They're fully on board with the settlement and will be sending me their signature page shortly. I'll forward it to the folks on this e-mail when I receive it (likely won't be until tomorrow). I will hold onto the originals unless you would like them.

>>> "Gunter, David (ENRD)" <David.Gunter2@usdoj.gov> 12/16/2010 2:48 PM >>>

Thanks, Tim. Elliott and Tom – please see attached.

Dave

From: Timothy Ballo [mailto:tballo@earthjustice.org]  
Sent: Thursday, December 16, 2010 2:45 PM  
To: Michael Myers; Gunter, David (ENRD)  
Cc: 'Joanne Spalding'; ddoniger@nrdc.org  
Subject: RE: Agreement with signatures

Mike and Dave,

This version of the refinery settlement has signatures from all three enviro petitioners.

-Tim

**To:** "Timothy Ballo" [tballo@earthjustice.org]; David (ENRD) Gunter"  
[David.Gunter2@usdoj.gov]  
**Cc:** "Morgan Costello" [Morgan.Costello@ag.ny.gov]; Elliott  
Zenick/DC/USEPA/US@EPA;[ddoniger@nrdc.org]; ddoniger@nrdc.org>;"Joanne Spalding"  
[Joanne.Spalding@sierraclub.org]; Joanne Spalding" [Joanne.Spalding@sierraclub.org]; Thomas  
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-Tim

From: Joanne Spalding [mailto:Joanne.Spalding@sierraclub.org]  
Sent: Thursday, December 16, 2010 1:47 PM  
To: Timothy Ballo; ddoniger@nrdc.org  
Subject: Agreement with DD and JS signatures

Joanne Spalding  
Managing Attorney  
Sierra Club  
85 Second Street, Second Floor  
San Francisco, CA 94105  
415-977-5725  
415-977-5793 (Fax)  
joanne.spalding@sierraclub.org

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Sent: Thursday, December 16, 2010 1:47 PM  
To: Timothy Ballo; ddoniger@nrdc.org  
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Joanne Spalding  
Managing Attorney  
Sierra Club  
85 Second Street, Second Floor  
San Francisco, CA 94105  
415-977-5725  
415-977-5793 (Fax)  
joanne.spalding@sierraclub.org

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date that EPA provides written notice of such finality to the State and Environmental Petitioners.


15. The undersigned representatives of each Party certify that they are fully authorized by the Party that they represent to bind that respective Party to the terms of this Settlement Agreement. This Settlement Agreement will be deemed to be executed when it has been signed by the representatives of the Parties set forth below, subject to final approvals pursuant to Paragraph 14.

DATE: \_\_\_\_\_

\_\_\_\_\_  
DAVID GUNTER  
U.S. Department of Justice  
Environment and Natural Resources Division  
Environmental Defense Section  
P.O. Box 23986  
Washington, D.C. 20026-3986

*Counsel for U.S. Environmental Protection Agency*

DATE: 12/16/2010

\_\_\_\_\_  
  
MICHAEL J. MYERS  
MORGAN A. COSTELLO  
Assistant Attorneys General  
Environmental Protection Bureau  
Office of the Attorney General, The Capitol  
Albany, New York 12224

*Counsel for State of New York*

DATE: \_\_\_\_\_

\_\_\_\_\_  
KENNETH P. ALEX  
SUSAN DURBIN  
Office of the Attorney General, State of California  
1515 Clay Street, 20th Floor, P.O. Box 70550  
Oakland, CA 94612

*Counsel for State of California*

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DAVID GUNTER  
U.S. Department of Justice  
Environment and Natural Resources Division  
Environmental Defense Section  
P.O. Box 23986  
Washington, D.C. 20026-3986

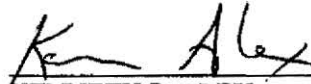
*Counsel for U.S. Environmental Protection Agency*

DATE: \_\_\_\_\_

\_\_\_\_\_  
MICHAEL J. MYERS  
MORGAN A. COSTELLO  
Assistant Attorneys General  
Environmental Protection Bureau  
Office of the Attorney General, The Capitol  
Albany, New York 12224

*Counsel for State of New York*

DATE: 12/8/10

  
\_\_\_\_\_  
KENNETH P. ALEX  
SUSAN DURBIN  
Office of the Attorney General, State of California  
1515 Clay Street, 20th Floor, P.O. Box 70550  
Oakland, CA 94612

*Counsel for State of California*

DATE: \_\_\_\_\_



KIMBERLY MASSICOTTE  
MATTHEW I. LEVINE  
Assistant Attorneys General  
Office of the Attorney General  
P.O. Box 120, 55 Elm Street  
Hartford, Connecticut 06141-0120

*Counsel for State of Connecticut*

DATE: \_\_\_\_\_

VALERIE M. SATTERFIELD  
Deputy Attorney General  
Department of Justice  
102 W. Water Street  
Dover, DE 19904

*Counsel for State of Delaware*

DATE: \_\_\_\_\_

GERALD D. REID  
Assistant Attorney General  
Department of the Attorney General  
State House Station #6  
Augusta, Maine 04333-0006

*Counsel for State of Maine*

DATE: \_\_\_\_\_

SETH COHEN  
STEPHEN R. FARRIS  
JUDITH ANN MOORE  
Assistant Attorneys General  
P.O. Drawer 1508  
Santa Fe, New Mexico 87504-1508

*Counsel for State of New Mexico*




DATE: \_\_\_\_\_

KIMBERLY MASSICOTTE  
MATTHEW I. LEVINE  
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Office of the Attorney General  
P.O. Box 120, 55 Elm Street  
Hartford, Connecticut 06141-0120

*Counsel for State of Connecticut*

DATE: 12/15/2010

  
VALERIE M. SATTERFIELD  
Deputy Attorney General  
Department of Justice  
102 W. Water Street  
Dover, DE 19904

*Counsel for State of Delaware*

DATE: \_\_\_\_\_

GERALD D. REID  
Assistant Attorney General  
Department of the Attorney General  
State House Station #6  
Augusta, Maine 04333-0006

*Counsel for State of Maine*

DATE: \_\_\_\_\_

SETH COHEN  
STEPHEN R. FARRIS  
JUDITH ANN MOORE  
Assistant Attorneys General  
P.O. Drawer 1508  
Santa Fe, New Mexico 87504-1508

*Counsel for State of New Mexico*

DATE: \_\_\_\_\_

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KIMBERLY MASSICOTTE  
MATTHEW I. LEVINE  
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Hartford, Connecticut 06141-0120

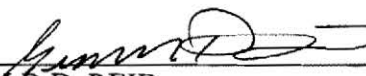
*Counsel for State of Connecticut*

DATE: \_\_\_\_\_

\_\_\_\_\_  
VALERIE M. SATTERFIELD  
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102 W. Water Street  
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*Counsel for State of Delaware*

DATE: 12/8/10

\_\_\_\_\_  
  
GERALD D. REID  
Assistant Attorney General  
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DATE: 12/8/2010

  
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DATE: 12/14/2010



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*Counsel for State of Oregon*

DATE: \_\_\_\_\_

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MICHAEL RUBIN  
Special Assistant Attorneys General  
Rhode Island Department of the Attorney General  
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*Counsel for State of Rhode Island*

DATE: \_\_\_\_\_

THEA J. SCHWARTZ  
Assistant Attorney General  
Environmental Division  
Office of the Attorney General  
109 State Street  
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*Counsel for State of Vermont*

DATE: \_\_\_\_\_

LESLIE R. SEFFERN  
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P.O. Box 40117  
Olympia, Washington 98504

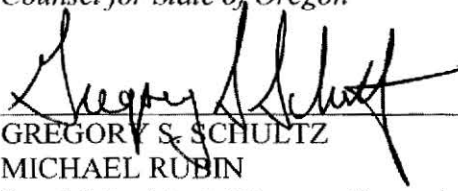
*Counsel for State of Washington*

DATE: \_\_\_\_\_

\_\_\_\_\_  
PAUL S. LOGAN  
Assistant Attorney General  
Department of Justice  
1162 Court Street, N.E.  
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*Counsel for State of Oregon*

DATE: 12/13/2010

  
\_\_\_\_\_  
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*Counsel for State of Rhode Island*

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*Counsel for State of Rhode Island*

DATE: 12/10/10

  
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109 State Street  
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*Counsel for State of Rhode Island*

DATE: \_\_\_\_\_

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*Counsel for State of Vermont*

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LESLIE R. SEFFERN  
Assistant Attorney General  
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DATE: \_\_\_\_\_

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DONNA M. MURASKY  
Deputy Solicitor General  
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441 Fourth Street, N.W.  
Washington, D.C. 20001

*Counsel for District of Columbia*

DATE: Dec. 8, 2010

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WILLIAM L. PARDEE  
CAROL IANCU  
Assistant Attorneys General  
Environmental Protection Division  
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One Ashburton Place  
Boston, Massachusetts 02108

*Counsel for Commonwealth of Massachusetts*

DATE: \_\_\_\_\_

\_\_\_\_\_  
CHRISTOPHER G. KING  
CARRIE NOTEBOOM  
New York City Law Department  
100 Church Street  
New York, NY 10007

*Counsel for City of New York*



DATE: \_\_\_\_\_

\_\_\_\_\_  
DONNA M. MURASKY  
Deputy Solicitor General  
Office of the D.C. Attorney General  
441 Fourth Street, N.W.  
Washington, D.C. 20001

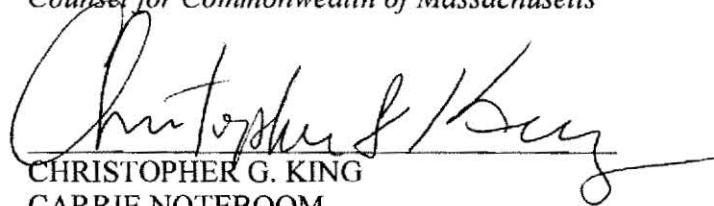
*Counsel for District of Columbia*

DATE: \_\_\_\_\_

\_\_\_\_\_  
WILLIAM L. PARDEE  
CAROL IANCU  
Assistant Attorneys General  
Environmental Protection Division  
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One Ashburton Place  
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*Counsel for Commonwealth of Massachusetts*


DATE: 12.10.10



CHRISTOPHER G. KING  
CARRIE NOTEBOOM  
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*Counsel for City of New York*

DATE: September 17, 2010

  
DONNA M. MURASKY  
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Office of the D.C. Attorney General  
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*Counsel for District of Columbia*

DATE: \_\_\_\_\_

\_\_\_\_\_  
WILLIAM L. PARDEE  
Assistant Attorney General  
Environmental Protection Division  
One Ashburton Place  
Boston, Massachusetts 02108

*Counsel for Commonwealth of Massachusetts*

DATE: \_\_\_\_\_

\_\_\_\_\_  
CHRISTOPHER G. KING  
New York City Law Department  
100 Church Street  
New York, NY 10007

*Counsel for City of New York*


15. The undersigned representatives of each Party certify that they are fully authorized by the Party that they represent to bind that respective Party to the terms of this Settlement Agreement. This Settlement Agreement will be deemed to be executed when it has been signed by the representatives of the Parties set forth below, subject to final approvals pursuant to Paragraph 14.

DATE: \_\_\_\_\_

\_\_\_\_\_  
DAVID GUNTER  
U.S. Department of Justice  
Environment and Natural Resources Division  
Environmental Defense Section  
P.O. Box 23986  
Washington, D.C. 20026-3986  
(202) 514-3785  
David.Gunter2@usdoj.gov

Counsel for EPA

DATE: 12/16/2010

  
\_\_\_\_\_  
MICHAEL J. MYERS  
MORGAN A. COSTELLO  
Assistant Attorneys General  
Environmental Protection Bureau  
Office of the Attorney General  
The Capitol  
Albany, New York 12224

*Counsel for State of New York*

DATE: \_\_\_\_\_

\_\_\_\_\_  
KENNETH P. ALEX  
SUSAN DURBIN  
Office of the Attorney General, State of California  
1515 Clay Street, 20th Floor  
P.O. Box 70550  
Oakland, CA 94612

*Counsel for State of California*

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David.Gunter2@usdoj.gov

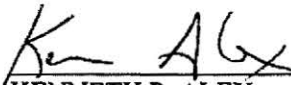
Counsel for EPA

DATE: \_\_\_\_\_

\_\_\_\_\_  
MICHAEL J. MYERS  
MORGAN A. COSTELLO  
Assistant Attorneys General  
Environmental Protection Bureau  
Office of the Attorney General  
The Capitol  
Albany, New York 12224

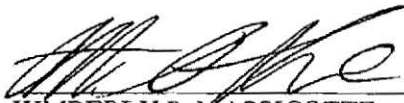
*Counsel for State of New York*

DATE: 12/8/10

  
\_\_\_\_\_  
KENNETH P. ALEX  
SUSAN DURBIN  
Office of the Attorney General, State of California  
1515 Clay Street, 20th Floor  
P.O. Box 70550  
Oakland, CA 94612

*Counsel for State of California*

DATE: \_\_\_\_\_



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*Counsel for State of Connecticut*

DATE: \_\_\_\_\_

VALERIE M. SATTERFIELD  
Deputy Attorney General  
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*Counsel for State of Delaware*

DATE: \_\_\_\_\_

GERALD D. REID  
Assistant Attorney General  
Department of the Attorney General  
State House Station #6  
Augusta, Maine 04333-0006

*Counsel for State of Maine*

DATE: \_\_\_\_\_

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P.O. Drawer 1508  
Santa Fe, New Mexico 87504-1508


*Counsel for State of New Mexico*

DATE: \_\_\_\_\_

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*Counsel for State of Connecticut*

DATE: 12/15/2010

  
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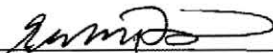
*Counsel for State of Connecticut*

DATE: \_\_\_\_\_

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102 W. Water Street  
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DATE: 12/8/10

  
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State House Station #6  
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*Counsel for State of Maine*

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DATE: 12/15/10

JS 292

K. ALLEN BROOKS  
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*Counsel for State of New Hampshire*

DATE: \_\_\_\_\_

PAUL S. LOGAN  
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1162 Court Street, N.E.  
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DATE: \_\_\_\_\_

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Special Assistant Attorney General  
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DATE: \_\_\_\_\_

THEA SCHWARTZ  
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Environmental Division  
Office of the Attorney General  
109 State Street  
Montpelier, VT 05609-1001

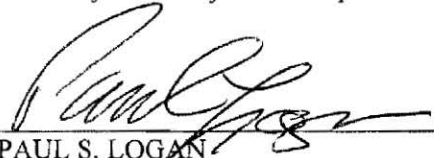
*Counsel for State of Vermont*

DATE: \_\_\_\_\_

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33 Capitol Street  
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DATE: 12/14/2010

  
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DATE: \_\_\_\_\_

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109 State Street  
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*Counsel for State of Vermont*

DATE: \_\_\_\_\_

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33 Capitol Street  
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*Counsel for State of New Hampshire*

DATE: \_\_\_\_\_

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DATE: 12/13/2010

  
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DATE: 12-10-10

  
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LESLIE R. SEFFERN  
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*Counsel for State of Washington*

DATE: \_\_\_\_\_

\_\_\_\_\_  
DONNA M. MURASKY  
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*Counsel for District of Columbia*

DATE: \_\_\_\_\_

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WILLIAM L. PARDEE  
CAROL IANCU  
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Environmental Protection Division  
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*Counsel for Commonwealth of Massachusetts*

DATE: \_\_\_\_\_

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CHRISTOPHER G. KING  
CARRIE NOTEBOOM  
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100 Church Street  
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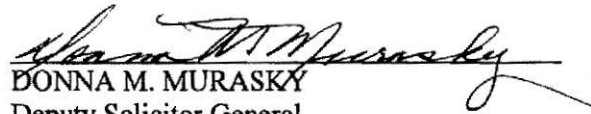
*Counsel for City of New York*

DATE: \_\_\_\_\_

\_\_\_\_\_  
LESLIE R. SEFFERN  
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P.O. Box 40117  
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DATE: September 14, 2010

  
DONNA M. MURASKY  
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Office of the D.C. Attorney General  
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DATE: \_\_\_\_\_

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WILLIAM L. PARDEE  
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*Counsel for Commonwealth of Massachusetts*

DATE: \_\_\_\_\_

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CHRISTOPHER G. KING  
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*Counsel for City of New York*

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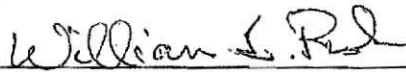
*Counsel for State of Washington*

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DONNA M. MURASKY  
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441 Fourth Street, N.W.  
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*Counsel for District of Columbia*

DATE: Dec. 8, 2010

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WILLIAM L. PARDEE  
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One Ashburton Place  
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*Counsel for Commonwealth of Massachusetts*

DATE: \_\_\_\_\_

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CHRISTOPHER G. KING  
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*Counsel for City of New York*

DATE: \_\_\_\_\_

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LESLIE R. SEFFERN  
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*Counsel for State of Washington*

DATE: \_\_\_\_\_

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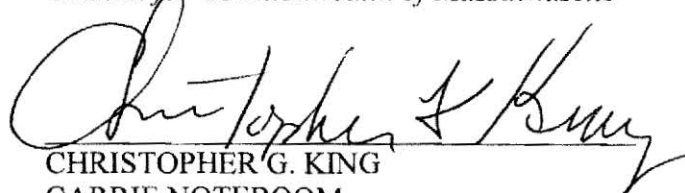
*Counsel for District of Columbia*

DATE: \_\_\_\_\_

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WILLIAM L. PARDEE  
CAROL IANCU  
Assistant Attorneys General  
Environmental Protection Division  
One Ashburton Place  
Boston, Massachusetts 02108

*Counsel for Commonwealth of Massachusetts*

DATE: 12.10.10

  
\_\_\_\_\_  
CHRISTOPHER G. KING  
CARRIE NOTEBOOM  
New York City Law Department  
100 Church Street  
New York, NY 10007

*Counsel for City of New York*

**To:** "Michael J. Myers" [Michael.Myers@ag.ny.gov]  
**Cc:** "David (ENRD) Gunter" [David.Gunter2@usdoj.gov]; avid Doniger [ddoniger@nrdc.org]; N=Elliott Zenick/OU=DC/O=USEPA/C=US@EPA;"Joanne.Spalding@sierraclub.org" [Joanne.Spalding@sierraclub.org]; Joanne.Spalding@sierraclub.org" [Joanne.Spalding@sierraclub.org]; N=Joseph Goffman/OU=DC/O=USEPA/C=US@EPA;"mceronsky@edf.org" [mceronsky@edf.org]; mceronsky@edf.org" [mceronsky@edf.org]; organ Costello [Morgan.Costello@ag.ny.gov]; N=Scott Jordan/OU=DC/O=USEPA/C=US@EPA;"Thomas (ENRD) Lorenzen" [Thomas.Lorenzen@usdoj.gov]; Thomas (ENRD) Lorenzen" [Thomas.Lorenzen@usdoj.gov]; vpatton@edf.org" [vpatton@edf.org]  
**Bcc:** []  
**From:** CN=Patricia Embrey/OU=DC/O=USEPA/C=US  
**Sent:** Fri 10/7/2011 6:17:10 PM  
**Subject:** RE: Boiler NSPS settlement

My fault -- it should be January 31.

From: "Michael J. Myers" <Michael.Myers@ag.ny.gov>  
To: "David (ENRD) Gunter" <David.Gunter2@usdoj.gov>, Morgan Costello <Morgan.Costello@ag.ny.gov>, "mceronsky@edf.org" <mceronsky@edf.org>, "vpatton@edf.org" <vpatton@edf.org>, David Doniger <ddoniger@nrdc.org>, "Joanne.Spalding@sierraclub.org" <Joanne.Spalding@sierraclub.org>  
Cc: Patricia Embrey/DC/USEPA/US@EPA, Joseph Goffman/DC/USEPA/US@EPA, Scott Jordan/DC/USEPA/US@EPA, Elliott Zenick/DC/USEPA/US@EPA, "Thomas (ENRD) Lorenzen" <Thomas.Lorenzen@usdoj.gov>  
Date: 10/07/2011 02:13 PM  
Subject: RE: Boiler NSPS settlement

Thanks Dave. A quick question. The new proposal date for new sources is listed as "January 1" Is that correct? I'm fine with seeing the earliest possible day in January, but just wanted to double check that there wasn't a "9" missing (previously the agency had mentioned a January 19 date).

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Friday, October 07, 2011 2:08 PM  
To: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Michael J. Myers; David Doniger; Joanne.Spalding@sierraclub.org  
Cc: Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Thomas (ENRD) Lorenzen  
Subject: RE: Boiler NSPS settlement

Dear counsel:

Attached please find a draft of our proposed Boiler NSPS modification, including dates. There are two boldface sections that are still up in the air. The first is a reserved area for additional "whereas" clauses that we can fill in later to make sure it is consistent with the communications strategy to be discussed. The second is the proposal date for the 111(d) portion of the rule. The current draft contains May 15, but EPA is still considering whether to move this earlier or later in May 2012.



Please let us know what comments you have on this draft.

Thanks,  
Dave

---

David Gunter  
Appellate Section, Environment and Natural Resources Division  
United States Department of Justice  
(202) 514-3785

**To:** "Michael J. Myers" [Michael.Myers@ag.ny.gov]  
**Cc:** "David (ENRD) Gunter" [David.Gunter2@usdoj.gov]; 'ddoniger@nrdc.org'  
[ddoniger@nrdc.org]; N=Elliott Zenick/OU=DC/O=USEPA/C=US@EPA;'Joanne Spalding'  
[Joanne.Spalding@sierraclub.org]; Joanne Spalding' [Joanne.Spalding@sierraclub.org];  
N=Joseph Goffman/OU=DC/O=USEPA/C=US@EPA;'mceronsky@edf.org'  
[mceronsky@edf.org]; 'mceronsky@edf.org' [mceronsky@edf.org]; N=Patricia  
Embrey/OU=DC/O=USEPA/C=US@EPA;CN=Scott  
Jordan/OU=DC/O=USEPA/C=US@EPA;'Thomas (ENRD) Lorenzen'  
[Thomas.Lorenzen@usdoj.gov]; N=Scott Jordan/OU=DC/O=USEPA/C=US@EPA;'Thomas  
(ENRD) Lorenzen' [Thomas.Lorenzen@usdoj.gov]; 'Thomas (ENRD) Lorenzen'  
[Thomas.Lorenzen@usdoj.gov]; 'vpatton@edf.org' [vpatton@edf.org]

**Bcc:** []  
**From:** CN=Avi Garbow/OU=DC/O=USEPA/C=US  
**Sent:** Fri 10/28/2011 9:50:42 PM  
**Subject:** RE: Boiler NSPS settlement (CONFIDENTIAL/DRAFT)

MM Oct 28 Extension Letter 2.doc  
David.Gunter2@usdoj.gov  
michael.myers@ag.ny.gov  
Embrey.Patricia@epamail.epagov  
Embrey.Patricia@epamail.epa.gov  
Morgan.Costello@ag.ny.gov  
Goffman.Joseph@epamail.epa.gov  
Jordan.Scott@epamail.epa.gov  
Zenick.Elliott@epamail.epa.gov  
Joanne.Spalding@sierraclub.org  
thomas.lorenzen@usdoj.gov  
thomas.lorenzen@usdoj.gov  
Embrey.Patricia@epamail.epagov  
mceronsky@edf.org  
vpatton@edf.org  
Goffman.Joseph@epamail.epa.gov  
Jordan.Scott@epamail.epa.gov  
Zenick.Elliott@epamail.epa.gov  
Joanne.Spalding@sierraclub.org  
Thomas.Lorenzen@usdoj.gov  
Embrey.Patricia@epamail.epagov  
ddoniger@nrdc.org  
www.nrdc.org  
http://switchboard.nrdc.org/blogs/ddoniger/

Folks,

As discussed, below is the text of a letter we propose to send to Mike Myers and David Doniger, as representatives of petitioners, in exchange for the agreed upon extension of the forbearance until November 30, 2011. As written, I have received the requisite approvals to proceed. Thanks for your work on this matter today.

Regards,

Avi

\*\*\*\*\*

DRAFT/FOR SETTLEMENT DISCUSSION ONLY

I write concerning our recent discussions regarding the schedule for rulemaking activity under section 111 of the Clean Air Act pertaining to electric generating unit source category. As you know, the parties had entered into a settlement agreement contemplating that the Agency would propose new source performance standards addressing greenhouse gas emissions from this sector by September 30, 2011— a schedule that proved unrealistic for the Agency. Since that time, the parties have been engaged in settlement discussions regarding a new schedule, with the petitioners agreeing not to invoke their

remedies under paragraph 7 of the settlement agreement pending further productive settlement discussions. This forbearance period was to extend to today's date; my understanding is that petitioners are willing to extend this period further to November 30, 2011.

As we have indicated, notwithstanding our continued negotiations, the Agency intends to move forward on the section 111(b) aspect of the rulemaking by proposing a section 111(b) standard by the end of January 2012 and promulgating a final section 111(b) standard by mid-November 2012. To this end, and to accommodate this schedule, we expect to transmit to the Office of Management and Budget for interagency review a proposed rulemaking package in the very near term.

We look forward to continued dialogue of matters yet to be resolved.

\*\*\*\*\*

Avi Garbow  
Deputy General Counsel  
U.S. Environmental Protection Agency  
(202) 564-1917

From: "Michael J. Myers" <Michael.Myers@ag.ny.gov>  
To: "'David (ENRD) Gunter'" <David.Gunter2@usdoj.gov>, "'mceronsky@edf.org'" <mceronsky@edf.org>, 'Joanne Spalding' <Joanne.Spalding@sierraclub.org>  
Cc: "'vpatton@edf.org'" <vpatton@edf.org>, Patricia Embrey/DC/USEPA/US@EPA, Joseph Goffman/DC/USEPA/US@EPA, Scott Jordan/DC/USEPA/US@EPA, Elliott Zenick/DC/USEPA/US@EPA, "'ddoniger@nrdc.org'" <ddoniger@nrdc.org>, "'Thomas (ENRD) Lorenzen'" <Thomas.Lorenzen@usdoj.gov>, Avi Garbow/DC/USEPA/US@EPA  
Date: 10/28/2011 05:01 PM  
Subject: RE: Boiler NSPS settlement

Re-sending the letter so that Avi's correct address is included in this list (thanks Patricia)

From: Michael J. Myers  
Sent: Friday, October 28, 2011 4:53 PM  
To: 'David (ENRD) Gunter'; mceronsky@edf.org; Joanne Spalding  
Cc: vpatton@edf.org; Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; ddoniger@nrdc.org; Thomas (ENRD) Lorenzen; 'garbo.avi@epamail.epa.gov'  
Subject: RE: Boiler NSPS settlement

Here's a draft letter. If the above doesn't reflect Avi's correct address, can someone please send to him? thanks.

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Thursday, October 27, 2011 11:45 AM  
To: mceronsky@edf.org; Michael J. Myers; Joanne Spalding  
Cc: Morgan Costello; vpatton@edf.org; Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; ddoniger@nrdc.org; Thomas (ENRD) Lorenzen  
Subject: RE: Boiler NSPS settlement

Mike: Thanks for your forbearance. Everyone, we would like to set the call for 10:15 ET, using the following call-in

information:

Dial 866-410-9426  
Ex. 6 - Personal Privacy  
Code 202-514-3785

Thank you all,

Dave

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Thursday, October 27, 2011 10:02 AM  
To: 'Joanne Spalding'; mceronsky@edf.org  
Cc: Morgan Costello; vpatton@edf.org; Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; ddoniger@nrdc.org; Gunter, David (ENRD); Lorenzen, Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Given the status (at least as I understand it) and tomorrow's deadline, you should proceed with a call as early as possible tomorrow, which would appear from these e-mails to be 10 a.m. eastern. I'm not sure when I will be back from court, but my environmental colleagues can share my thoughts with you in the meantime.

From: Joanne Spalding [mailto:Joanne.Spalding@sierraclub.org]  
Sent: Thursday, October 27, 2011 1:20 AM  
To: mceronsky@edf.org  
Cc: Morgan Costello; vpatton@edf.org; Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Michael J. Myers; ddoniger@nrdc.org; David.Gunter2@usdoj.gov; thomas.lorenzen@usdoj.gov  
Subject: Re: Boiler NSPS settlement

I'm booked 12-12:30 and 1:30-2 ET, but otherwise available, possibly while driving, any time after 9:30 ET.

-----Megan Ceronsky <mceronsky@edf.org> wrote: -----

To: "'ddoniger@nrdc.org'" <ddoniger@nrdc.org>, "'David.Gunter2@usdoj.gov'" <David.Gunter2@usdoj.gov>, "'michael.myers@ag.ny.gov'" <michael.myers@ag.ny.gov>, "'Embrey.Patricia@epamail.epa.gov'"

<Embrey.Patricia@epamail.epa.gov>

From: Megan Ceronsky <mceronsky@edf.org>

Date: 10/26/2011 09:57PM

Cc: "'Morgan.Costello@ag.ny.gov'" <Morgan.Costello@ag.ny.gov>, Vickie Patton <vpatton@edf.org>, "'Goffman.Joseph@epamail.epa.gov'" <Goffman.Joseph@epamail.epa.gov>, "'Jordan.Scott@epamail.epa.gov'" <Jordan.Scott@epamail.epa.gov>, "'Zenick.Elliott@epamail.epa.gov'" <Zenick.Elliott@epamail.epa.gov>, "'Joanne.Spalding@sierraclub.org'" <Joanne.Spalding@sierraclub.org>, "'thomas.lorenzen@usdoj.gov'" <thomas.lorenzen@usdoj.gov>

Subject: Re: Boiler NSPS settlement

Vickie's schedule Friday is too uncertain to plan around, but I can be available anytime.

Best,  
Megan

----- Original Message -----

From: Doniger, David [mailto:ddoniger@nrdc.org]

Sent: Wednesday, October 26, 2011 04:10 PM

To: David.Gunter2@usdoj.gov <David.Gunter2@usdoj.gov>; michael.myers@ag.ny.gov <michael.myers@ag.ny.gov>; Embrey.Patricia@epamail.epa.gov <Embrey.Patricia@epamail.epa.gov>  
Cc: Morgan.Costello@ag.ny.gov <Morgan.Costello@ag.ny.gov>; Megan Ceronsky; Vickie Patton; Goffman.Joseph@epamail.epa.gov <Goffman.Joseph@epamail.epa.gov>; Jordan.Scott@epamail.epa.gov <Jordan.Scott@epamail.epa.gov>; Zenick.Elliott@epamail.epa.gov <Zenick.Elliott@epamail.epa.gov>; Joanne.Spalding@sierraclub.org <Joanne.Spalding@sierraclub.org>; thomas.lorenzen@usdoj.gov <thomas.lorenzen@usdoj.gov>  
Subject: Re: Boiler NSPS settlement

I'll make myself available anytime Friday, though I may be on a train.

David Doniger  
NRDC  
202 321-3435

----- Original Message -----

From: Gunter, David (ENRD) [mailto:David.Gunter2@usdoj.gov]  
Sent: Wednesday, October 26, 2011 04:05 PM  
To: Michael J. Myers <Michael.Myers@ag.ny.gov>; Embrey.Patricia@epamail.epa.gov <Embrey.Patricia@epamail.epa.gov>; Doniger, David  
Cc: Morgan Costello <Morgan.Costello@ag.ny.gov>; mceronsky@edf.org <mceronsky@edf.org>; vpatton@edf.org <vpattton@edf.org>; Goffman.Joseph@epamail.epa.gov <Goffman.Joseph@epamail.epa.gov>; Jordan.Scott@epamail.epa.gov <Jordan.Scott@epamail.epa.gov>; Zenick.Elliott@epamail.epa.gov <Zenick.Elliott@epamail.epa.gov>; Joanne.Spalding@sierraclub.org <Joanne.Spalding@sierraclub.org>; Lorenzen, Thomas (ENRD) <Thomas.Lorenzen@usdoj.gov>  
Subject: RE: Boiler NSPS settlement

Mike, I'm sorry, but EPA is still fully engaged in the review and approval process and will not have meaningful information to share until Friday morning. If there are times on Friday afternoon when everyone is available, please let me know and I'll do the best I can to get everyone on the phone at the same time.

Thanks,  
Dave

-----Original Message-----

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Wednesday, October 26, 2011 12:36 PM  
To: Gunter, David (ENRD); Embrey.Patricia@epamail.epa.gov; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Lorenzen, Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Dave, unfortunately Morgan is out Friday so can't cover a call in the morning. Given Friday's deadline, I may be willing to have you go ahead with a call Fri. a.m. without NY based on the assumptions that (1) that's the earliest EPA/DOJ can inform us of whether you have received final approval on the revised settlement agreement, and (2) you anticipate receiving such approval. However, if either of my assumptions are incorrect, then we should convene a call today with whomever is available to discuss.

-----Original Message-----

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Wednesday, October 26, 2011 11:55 AM  
To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger

Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD) Lorenzen  
Subject: RE: Boiler NSPS settlement

Mike,

I was just preparing to ask for a call on Friday morning. Can you please let me know when on Friday you think you would be available, and whether Morgan could cover a call for you if we held it between 10 and 12 ET on Friday? Everyone else, please let me know available times on Friday also.

Thanks,  
Dave

-----Original Message-----

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Wednesday, October 26, 2011 11:53 AM  
To: Gunter, David (ENRD); Embrey.Patricia@epamail.epa.gov; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Lorenzen, Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Don't mean to nag on this, but I'm going to be in court on Friday morning, likely not back until early afternoon and would like to have a better sense of where we are and when we're going to talk this week. Thanks.

-----Original Message-----

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Monday, October 24, 2011 10:12 AM  
To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD) Lorenzen  
Subject: RE: Boiler NSPS settlement

Mike and David,

Thanks for clarifying that all the petitioners are on board. I understand that meetings are still taking place to secure the necessary federal approvals. We're certainly aware of the deadline and the need to coordinate, so I will be in touch as soon as I can tell you more.

Thanks,  
Dave Gunter

-----Original Message-----

From: Doniger, David [mailto:ddoniger@nrdc.org]  
Sent: Friday, October 21, 2011 2:30 PM  
To: Michael J. Myers; Gunter, David (ENRD); Embrey.Patricia@epamail.epagov  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Lorenzen, Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Also to clarify that the three environmental petitioners are onboard. So we are eager for news on the federal side.

David D. Doniger  
Policy Director, Climate Center  
Natural Resources Defense Council

Please note our new address:  
1152 15th Street, NW, Suite 300  
Washington, DC 20005

Phone: (202) 289-2403  
Cell: (202) 321-3435  
Fax: (202) 789-0859  
ddoniger@nrdc.org  
on the web at [www.nrdc.org](http://www.nrdc.org)  
read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

-----Original Message-----

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Friday, October 21, 2011 2:02 PM  
To: 'David (ENRD) Gunter'; Embrey.Patricia@epamail.epa.gov; Doniger, David  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD)  
Lorenzen  
Subject: RE: Boiler NSPS settlement

All--Just wanted to communicate that I have now received approvals from all of the state petitioners. What's the status of the federal approvals? I've been getting questions re. a communications call to discuss a potential announcement, press, etc. for next week so please let us know when something's been arranged. Thanks.--Mike

-----Original Message-----

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Wednesday, October 19, 2011 11:20 AM  
To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD)  
Lorenzen  
Subject: RE: Boiler NSPS settlement

Thanks, Mike -- This looks good to me, and we'll also use this for our internal approval processes.

Dave

-----Original Message-----

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Tuesday, October 18, 2011 12:31 PM  
To: Gunter, David (ENRD); Embrey.Patricia@epamail.epa.gov; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org;  
Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov;  
Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org;  
Lorenzen, Thomas (ENRD)

Subject: RE: Boiler NSPS settlement

Dave and co.--I've removed the bolded/bracketed language from the draft version we approved last Thursday and have made some minor signature block revisions. Unless I hear otherwise from you or the agency, we will plan to use this as the final document for purposes of obtaining signatures by next Friday the 28th. Thanks.--Mike

-----Original Message-----

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Thursday, October 13, 2011 2:02 PM  
To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org;  
Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov;  
Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD) Lorenzen  
Subject: RE: Boiler NSPS settlement

Counsel: Attached please find a draft of our proposed agreement modification, with the term that we discussed today in bold.

Thanks,  
Dave Gunter

This e-mail and any attachments may contain confidential and privileged information. If you are not the intended recipient, please notify the sender immediately by return e-mail, delete this e-mail and destroy any copies. Any dissemination or use of this information by a person other than the intended recipient is unauthorized and may be illegal.



**To:** "Michael J. Myers" [Michael.Myers@ag.ny.gov]  
**Cc:** "David (ENRD) Gunter" [David.Gunter2@usdoj.gov]; 'mceronsky@edf.org' [mceronsky@edf.org]; Joanne Spalding' [Joanne.Spalding@sierraclub.org]; 'vpatton@edf.org' [vpatton@edf.org]; N=Patricia Embrey/OU=DC/O=USEPA/C=US@EPA;CN=Joseph Goffman/OU=DC/O=USEPA/C=US@EPA;CN=Scott Jordan/OU=DC/O=USEPA/C=US@EPA;CN=Elliott Zenick/OU=DC/O=USEPA/C=US@EPA;"ddoniger@nrdc.org" [ddoniger@nrdc.org]; N=Joseph Goffman/OU=DC/O=USEPA/C=US@EPA;CN=Scott Jordan/OU=DC/O=USEPA/C=US@EPA;CN=Elliott Zenick/OU=DC/O=USEPA/C=US@EPA;"ddoniger@nrdc.org" [ddoniger@nrdc.org]; N=Scott Jordan/OU=DC/O=USEPA/C=US@EPA;CN=Elliott Zenick/OU=DC/O=USEPA/C=US@EPA;"ddoniger@nrdc.org" [ddoniger@nrdc.org]; N=Elliott Zenick/OU=DC/O=USEPA/C=US@EPA;"ddoniger@nrdc.org" [ddoniger@nrdc.org]; 'ddoniger@nrdc.org' [ddoniger@nrdc.org]; 'Thomas (ENRD) Lorenzen' [Thomas.Lorenzen@usdoj.gov]  
**Bcc:** []  
**From:** CN=Avi Garbow/OU=DC/O=USEPA/C=US  
**Sent:** Sat 10/29/2011 2:02:43 AM  
**Subject:** RE: Boiler NSPS settlement

As we discussed today, in exchange for your agreement not to invoke the remedies set forth in Paragraph 7 of the Settlement Agreement concerning the proposal and promulgation of NSPS for GHG emissions from EGU's, through November 30, 2011, EPA, under signature of the General Counsel, will provide on Monday a letter to contain the following text:

"I write concerning our recent discussions regarding the schedule for rule making activity under Section 111 of the Clean Air Act pertaining to the electric generating unit source category. As you know, the parties had entered into a settlement agreement contemplating that the Agency would propose new source performance standards under Sections 111(b) and (d) addressing greenhouse gas emissions from this sector by September 30, 2011 - a schedule that proved unrealistic for the Agency. Since that time, the parties have been engaged in settlement discussions regarding a new schedule, with the petitioners agreeing not to invoke their remedies under Paragraph 7 of the Settlement Agreement pending further productive settlement discussions. This forbearance period was to extend to October 28, 2011; my understanding is that petitioners are willing to extend this period further to November 30, 2011.

As we have indicated, and as we continue negotiations, the Agency intends to move forward on the Section 111(b) aspect of the rulemaking by proposing a Section 111(b) standard by the end of January 2012 and promulgating a final Section 111(b) standard by mid-November 2012. To this end, and to accommodate this schedule, we expect to transmit to the Office of Management and Budget for inter-agency review a proposed rule making package in November.

We look forward to continued negotiations to resolve the Section 111(d) schedule and any other remaining issues."

Thank you, once again, for your efforts in reaching this agreement. I look forward to receipt of the letter memorializing the continued forbearance through November 30, 2012, and will ensure that the letter containing the text above is sent on Monday.

Regards,

Avi

Avi Garbow  
Deputy General Counsel  
U.S. Environmental Protection Agency  
(202) 564-1917

-----"Michael J. Myers" <Michael.Myers@ag.ny.gov> wrote: -----

=====  
To: "'David (ENRD) Gunter'" <David.Gunter2@usdoj.gov>, "'mceronsky@edf.org'" <mceronsky@edf.org>, 'Joanne Spalding' <Joanne.Spalding@sierraclub.org>  
From: "Michael J. Myers" <Michael.Myers@ag.ny.gov>  
Date: 10/28/2011 05:01PM  
Cc: "'vpatton@edf.org'" <vpatton@edf.org>, Patricia Embrey/DC/USEPA/US@EPA, Joseph Goffman/DC/USEPA/US@EPA, Scott Jordan/DC/USEPA/US@EPA, Elliott Zenick/DC/USEPA/US@EPA, "'ddoniger@nrdc.org'" <ddoniger@nrdc.org>, "'Thomas (ENRD) Lorenzen'" <Thomas.Lorenzen@usdoj.gov>, Avi Garbow/DC/USEPA/US@EPA  
Subject: RE: Boiler NSPS settlement  
=====

Re-sending the letter so that Avi's correct address is included in this list (thanks Patricia)

---

From: Michael J. Myers  
Sent: Friday, October 28, 2011 4:53 PM  
To: 'David (ENRD) Gunter'; mceronsky@edf.org; Joanne Spalding  
Cc: vpatton@edf.org; Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; ddoniger@nrdc.org; Thomas (ENRD) Lorenzen; 'garbo.avi@epamail.epa.gov'  
Subject: RE: Boiler NSPS settlement

Here's a draft letter. If the above doesn't reflect Avi's correct address, can someone please send to him? thanks.

---

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Thursday, October 27, 2011 11:45 AM  
To: mceronsky@edf.org; Michael J. Myers; Joanne Spalding  
Cc: Morgan Costello; vpatton@edf.org; Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; ddoniger@nrdc.org; Thomas (ENRD) Lorenzen  
Subject: RE: Boiler NSPS settlement

Mike: Thanks for your forbearance. Everyone, we would like to set the call for 10:15 ET, using the following call-in information:

Dial 866-410-9426  
Code 202-514-3785  
Ex. 6 - Personal Privacy

Thank you all,

Dave

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Thursday, October 27, 2011 10:02 AM

To: 'Joanne Spalding'; mceronsky@edf.org  
Cc: Morgan Costello; vpatton@edf.org; Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; ddoniger@nrdc.org; Gunter, David (ENRD); Lorenzen, Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Given the status (at least as I understand it) and tomorrow's deadline, you should proceed with a call as early as possible tomorrow, which would appear from these e-mails to be 10 a.m. eastern. I'm not sure when I will be back from court, but my environmental colleagues can share my thoughts with you in the meantime.

---

From: Joanne Spalding [mailto:Joanne.Spalding@sierraclub.org]  
Sent: Thursday, October 27, 2011 1:20 AM  
To: mceronsky@edf.org  
Cc: Morgan Costello; vpatton@edf.org; Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Michael J. Myers; ddoniger@nrdc.org; David.Gunter2@usdoj.gov; thomas.lorenzen@usdoj.gov  
Subject: Re: Boiler NSPS settlement

I'm booked 12-12:30 and 1:30-2 ET, but otherwise available, possibly while driving, any time after 9:30 ET.

-----Megan Ceronsky <mceronsky@edf.org> wrote: -----

To: "ddoniger@nrdc.org" <ddoniger@nrdc.org>, "David.Gunter2@usdoj.gov" <David.Gunter2@usdoj.gov>, "michael.myers@ag.ny.gov" <michael.myers@ag.ny.gov>, "Embrey.Patricia@epamail.epa.gov" <Embrey.Patricia@epamail.epa.gov>

From: Megan Ceronsky <mceronsky@edf.org>

Date: 10/26/2011 09:57PM

Cc: "Morgan.Costello@ag.ny.gov" <Morgan.Costello@ag.ny.gov>, Vickie Patton <vpatton@edf.org>, "Goffman.Joseph@epamail.epa.gov" <Goffman.Joseph@epamail.epa.gov>, "Jordan.Scott@epamail.epa.gov" <Jordan.Scott@epamail.epa.gov>, "Zenick.Elliott@epamail.epa.gov" <Zenick.Elliott@epamail.epa.gov>, "Joanne.Spalding@sierraclub.org" <Joanne.Spalding@sierraclub.org>, "thomaslorenzen@usdoj.gov" <thomas.lorenzen@usdoj.gov>

Subject: Re: Boiler NSPS settlement

Vickie's schedule Friday is too uncertain to plan around, but I can be available anytime.

Best,  
Megan

----- Original Message -----

From: Doniger, David [mailto:ddoniger@nrdc.org]

Sent: Wednesday, October 26, 2011 04:10 PM

To: David.Gunter2@usdoj.gov<mailto:David.Gunter2@usdoj.gov> <David.Gunter2@usdoj.gov>; michael.myers@ag.ny.gov<mailto:michael.myers@ag.ny.gov> <michael.myers@ag.ny.gov>; Embrey.Patricia@epamail.epa.gov<mailto:Embrey.Patricia@epamail.epa.gov> <Embrey.Patricia@epamail.epa.gov><mailto:Embrey.Patricia@epamail.epa.gov>>

Cc: Morgan.Costello@ag.ny.gov<mailto:Morgan.Costello@ag.ny.gov> <Morgan.Costello@ag.ny.gov>; Megan Ceronsky; Vickie Patton; Goffman.Joseph@epamail.epa.gov<mailto:Goffman.Joseph@epamail.epa.gov> <Goffman.Joseph@epamail.epa.gov>; Jordan.Scott@epamail.epa.gov<mailto:Jordan.Scott@epamail.epa.gov> <Jordan.Scott@epamail.epa.gov>; Zenick.Elliott@epamail.epa.gov<mailto:Zenick.Elliott@epamail.epa.gov> <Zenick.Elliott@epamail.epa.gov>; Joanne.Spalding@sierraclub.org<mailto:Joanne.Spalding@sierraclub.org> <Joanne.Spalding@sierraclub.org>; thomas.lorenzen@usdoj.gov<mailto:thomas.lorenzen@usdoj.gov>

<thomas.lorenzen@usdoj.govmailto:thomas.lorenzen@usdoj.gov>  
Subject: Re: Boiler NSPS settlement

I'll make myself available anytime Friday, though I may be on a train.  
David Doniger  
NRDC  
202 321-3435

----- Original Message -----

From: Gunter, David (ENRD) [mailto:David.Gunter2@usdoj.gov]  
Sent: Wednesday, October 26, 2011 04:05 PM  
To: Michael J. Myers <Michael.Myers@ag.ny.gov>;  
Embrey.Patricia@epamail.epa.gov<mailto:Embrey.Patricia@epamail.epa.gov>  
<Embrey.Patricia@epamail.epa.gov>; Doniger, David  
Cc: Morgan Costello <Morgan.Costello@ag.ny.gov>; mceronsky@edf.org<mailto:mceronsky@edf.org>  
<mceronsky@edf.org>; vpatton@edf.org<mailto:vpatton@edf.org> <vpatton@edf.org>;  
Goffman.Joseph@epamail.epa.gov<mailto:Goffman.Joseph@epamail.epa.gov>  
<Goffman.Joseph@epamail.epa.gov>; Jordan.Scott@epamail.epa.gov<mailto:Jordan.Scott@epamail.epa.gov>  
<Jordan.Scott@epamail.epa.gov>; Zenick.Elliott@epamail.epa.gov<mailto:Zenick.Elliott@epamail.epa.gov>  
<Zenick.Elliott@epamail.epa.gov>; Joanne.Spalding@sierraclub.org<mailto:Joanne.Spalding@sierraclub.org>  
<Joanne.Spalding@sierraclub.org>; Lorenzen, Thomas (ENRD)  
<Thomas.Lorenzen@usdoj.govmailto:Thomas.Lorenzen@usdoj.gov>  
Subject: RE: Boiler NSPS settlement

Mike, I'm sorry, but EPA is still fully engaged in the review and approval process and will not have meaningful information to share until Friday morning. If there are times on Friday afternoon when everyone is available, please let me know and I'll do the best I can to get everyone on the phone at the same time.

Thanks,  
Dave

-----Original Message-----

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Wednesday, October 26, 2011 12:36 PM  
To: Gunter, David (ENRD); Embrey.Patricia@epamail.epa.gov; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Lorenzen,  
Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Dave, unfortunately Morgan is out Friday so can't cover a call in the morning. Given Friday's deadline, I may be willing to have you go ahead with a call Fri. a.m. without NY based on the assumptions that (1) that's the earliest EPA/DOJ can inform us of whether you have received final approval on the revised settlement agreement, and (2) you anticipate receiving such approval. However, if either of my assumptions are incorrect, then we should convene a call today with whomever is available to discuss.

-----Original Message-----

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Wednesday, October 26, 2011 11:55 AM  
To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD)  
Lorenzen

Subject: RE: Boiler NSPS settlement

Mike,

I was just preparing to ask for a call on Friday morning. Can you please let me know when on Friday you think you would be available, and whether Morgan could cover a call for you if we held it between 10 and 12 ET on Friday? Everyone else, please let me know available times on Friday also.

Thanks,  
Dave

-----Original Message-----

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Wednesday, October 26, 2011 11:53 AM  
To: Gunter, David (ENRD); Embrey.Patricia@epamail.epa.gov; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Lorenzen,  
Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Don't mean to nag on this, but I'm going to be in court on Friday morning, likely not back until early afternoon and would like to have a better sense of where we are and when we're going to talk this week. Thanks.

-----Original Message-----

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Monday, October 24, 2011 10:12 AM  
To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD)  
Lorenzen  
Subject: RE: Boiler NSPS settlement

Mike and David,

Thanks for clarifying that all the petitioners are on board. I understand that meetings are still taking place to secure the necessary federal approvals. We're certainly aware of the deadline and the need to coordinate, so I will be in touch as soon as I can tell you more.

Thanks,  
Dave Gunter

-----Original Message-----

From: Doniger, David [mailto:ddoniger@nrdc.org]  
Sent: Friday, October 21, 2011 2:30 PM  
To: Michael J. Myers; Gunter, David (ENRD);  
Embrey.Patricia@epamail.epa.gov<mailto:Embrey.Patricia@epamail.epa.gov>  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Lorenzen,  
Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Also to clarify that the three environmental petitioners are onboard. So we are eager for news on the federal side.

David D. Doniger  
Policy Director, Climate Center  
Natural Resources Defense Council

Please note our new address:  
1152 15th Street, NW, Suite 300  
Washington, DC 20005

Phone: (202) 289-2403  
Cell: (202) 321-3435  
Fax: (202) 789-0859  
ddoniger@nrdc.org<mailto:ddoniger@nrdc.org>  
on the web at [www.nrdc.org](http://www.nrdc.org)<<http://www.nrdc.org/>>  
read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

-----Original Message-----

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Friday, October 21, 2011 2:02 PM  
To: 'David (ENRD) Gunter'; Embrey.Patricia@epamail.epa.gov; Doniger, David  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD)  
Lorenzen  
Subject: RE: Boiler NSPS settlement

All--Just wanted to communicate that I have now received approvals from all of the state petitioners. What's the status of the federal approvals? I've been getting questions re. a communications call to discuss a potential announcement, press, etc. for next week so please let us know when something's been arranged. Thanks.--Mike

-----Original Message-----

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Wednesday, October 19, 2011 11:20 AM  
To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD)  
Lorenzen  
Subject: RE: Boiler NSPS settlement

Thanks, Mike -- This looks good to me, and we'll also use this for our internal approval processes.

Dave

-----Original Message-----

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Tuesday, October 18, 2011 12:31 PM  
To: Gunter, David (ENRD); Embrey.Patricia@epamail.epa.gov; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org;  
Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov;  
Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org;  
Lorenzen, Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Dave and co.--I've removed the bolded/bracketed language from the draft version we approved last Thursday and have made some minor signature block revisions. Unless I hear otherwise from you or the agency, we will plan to use this as the final document for purposes of obtaining signatures by next Friday the 28th. Thanks.--Mike

-----Original Message-----

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Thursday, October 13, 2011 2:02 PM  
To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org;  
Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov;  
Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD) Lorenzen  
Subject: RE: Boiler NSPS settlement

Counsel: Attached please find a draft of our proposed agreement modification, with the term that we discussed today in bold.

Thanks,  
Dave Gunter

This e-mail and any attachments may contain confidential and privileged information. If you are not the intended recipient, please notify the sender immediately by return e-mail, delete this e-mail and destroy any copies. Any dissemination or use of this information by a person other than the intended recipient is unauthorized and may be illegal.

[attachment(s) "MM Oct 28 Extension Letter 2.doc" removed by Avi Garbow/DC/USEPA/US]

**To:** "Doniger, David" [ddoniger@nrdc.org]  
**From:** CN=Avi Garbow/OU=DC/O=USEPA/C=US  
**Sent:** Sat 10/29/2011 2:16:50 AM  
**Subject:** Re: Boiler NSPS settlement

Thanks.

----- Original Message -----

From: "Doniger, David" [ddoniger@nrdc.org]  
Sent: 10/28/2011 10:15 PM AST  
To: Avi Garbow; "Michael J. Myers" <Michael.Myers@ag.ny.gov>  
Cc: "David (ENRD) Gunter" <David.Gunter2@usdoj.gov>; <mceronsky@edf.org>; "Joanne Spalding" <Joanne.Spalding@sierraclub.org>; <vpatton@edf.org>; Patricia Embrey; Joseph Goffman; Scott Jordan; Elliott Zenick; "Thomas (ENRD) Lorenzen" <Thomas.Lorenzen@usdoj.gov>  
Subject: RE: Boiler NSPS settlement

Avi,

Thank you for your email.

Attached is a letter from Mike Myers on behalf of the petitioners agreeing to extend the forbearance period to November 30th.

David

David D. Doniger  
Policy Director, Climate and Clean Air Program  
Natural Resources Defense Council

Please note our new address:  
1152 15th Street, NW, Suite 300  
Washington, DC 20005

Phone: (202) 289-2403  
Cell: (202) 321-3435  
Fax: (202) 289-1060  
ddoniger@nrdc.org  
on the web at [www.nrdc.org](http://www.nrdc.org)  
read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

-----Original Message-----

From: Garbow.Avi@epamail.epa.gov [mailto:Garbow.Avi@epamail.epa.gov]  
Sent: Friday, October 28, 2011 10:03 PM  
To: Michael J. Myers  
Cc: 'David (ENRD) Gunter'; 'mceronsky@edf.org'; 'Joanne Spalding'; 'vpatton@edf.org'; Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Doniger, David; 'Thomas (ENRD) Lorenzen'  
Subject: RE: Boiler NSPS settlement



As we discussed today, in exchange for your agreement not to invoke the remedies set forth in Paragraph 7 of the Settlement Agreement concerning the proposal and promulgation of NSPS for GHG emissions from EGU's, through November 30, 2011, EPA, under signature of the General Counsel, will provide on Monday a letter to contain the following text:

"I write concerning our recent discussions regarding the schedule for rule making activity under Section 111 of the Clean Air Act pertaining to the electric generating unit source category. As you know, the parties had entered into a settlement agreement contemplating that the Agency would propose new source performance standards under Sections 111(b) and (d) addressing greenhouse gas emissions from this sector by September 30, 2011 - a schedule that proved unrealistic for the Agency. Since that time, the parties have been engaged in settlement discussions regarding a new schedule, with the petitioners agreeing not to invoke their remedies under Paragraph 7 of the Settlement Agreement pending further productive settlement discussions. This forbearance period was to extend to October 28, 2011; my understanding is that petitioners are willing to extend this period further to November 30, 2011.

As we have indicated, and as we continue negotiations, the Agency intends to move forward on the Section 111(b) aspect of the rulemaking by proposing a Section 111(b) standard by the end of January 2012 and promulgating a final Section 111(b) standard by mid-November 2012. To this end, and to accommodate this schedule, we expect to transmit to the Office of Management and Budget for inter-agency review a proposed rule making package in November.

We look forward to continued negotiations to resolve the Section 111(d) schedule and any other remaining issues."

Thank you, once again, for your efforts in reaching this agreement. I look forward to receipt of the letter memorializing the continued forbearance through November 30, 2012, and will ensure that the letter containing the text above is sent on Monday.

Regards,

Avi

Avi Garbow  
Deputy General Counsel  
U.S. Environmental Protection Agency  
(202) 564-1917

-----"Michael J. Myers" <Michael.Myers@ag.ny.gov> wrote: -----

=====  
To: "'David (ENRD) Gunter'" <David.Gunter2@usdoj.gov>, "'mceronsky@edf.org'" <mceronsky@edf.org>, 'Joanne Spalding' <Joanne.Spalding@sierraclub.org>  
From: "Michael J. Myers" <Michael.Myers@ag.ny.gov>  
Date: 10/28/2011 05:01PM  
Cc: "'vpatton@edf.org'" <vpatton@edf.org>, Patricia Embrey/DC/USEPA/US@EPA, Joseph Goffman/DC/USEPA/US@EPA, Scott Jordan/DC/USEPA/US@EPA, Elliott Zenick/DC/USEPA/US@EPA, "'ddoniger@nrdc.org'" <ddoniger@nrdc.org>, "'Thomas (ENRD) Lorenzen'" <Thomas.Lorenzen@usdoj.gov>, Avi Garbow/DC/USEPA/US@EPA  
Subject: RE: Boiler NSPS settlement  
=====

Re-sending the letter so that Avi's correct address is included in this list (thanks Patricia)

---

From: Michael J. Myers  
Sent: Friday, October 28, 2011 4:53 PM  
To: 'David (ENRD) Gunter'; mceronsky@edf.org; Joanne Spalding  
Cc: vpatton@edf.org; Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; ddoniger@nrdc.org; Thomas (ENRD) Lorenzen;  
'garbo.avi@epamail.epa.gov'  
Subject: RE: Boiler NSPS settlement

Here's a draft letter. If the above doesn't reflect Avi's correct address, can someone please send to him? thanks.

---

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Thursday, October 27, 2011 11:45 AM  
To: mceronsky@edf.org; Michael J. Myers; Joanne Spalding  
Cc: Morgan Costello; vpatton@edf.org; Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; ddoniger@nrdc.org; Thomas (ENRD) Lorenzen  
Subject: RE: Boiler NSPS settlement

Mike: Thanks for your forbearance. Everyone, we would like to set the call for 10:15 ET, using the following call-in information:

Dial 866-410-9426  
Ex. 6 - Personal Privacy  
Code 202-514-3785

Thank you all,

Dave

---

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Thursday, October 27, 2011 10:02 AM  
To: 'Joanne Spalding'; mceronsky@edf.org  
Cc: Morgan Costello; vpatton@edf.org; Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; ddoniger@nrdc.org; Gunter, David (ENRD);  
Lorenzen, Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Given the status (at least as I understand it) and tomorrow's deadline, you should proceed with a call as early as possible tomorrow, which would appear from these e-mails to be 10 a.m. eastern. I'm not sure when I will be back from court, but my environmental colleagues can share my thoughts with you in the meantime.

---

From: Joanne Spalding [mailto:Joanne.Spalding@sierraclub.org]  
Sent: Thursday, October 27, 2011 1:20 AM  
To: mceronsky@edf.org  
Cc: Morgan Costello; vpatton@edf.org; Embrey.Patricia@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Michael J. Myers; ddoniger@nrdc.org;  
David.Gunter2@usdoj.gov; thomas.lorenzen@usdoj.gov  
Subject: Re: Boiler NSPS settlement

I'm booked 12-12:30 and 1:30-2 ET, but otherwise available, possibly while driving, any time after 9:30 ET.

-----Megan Ceronsky <mceronsky@edf.org> wrote: -----

To: "ddoniger@nrdc.org" <ddoniger@nrdc.org>, "David.Gunter2@usdoj.gov" <David.Gunter2@usdoj.gov>, "michael.myers@ag.ny.gov" <michael.myers@ag.ny.gov>, "Embrey.Patricia@epamail.epa.gov" <Embrey.Patricia@epamail.epa.gov>

From: Megan Ceronsky <mceronsky@edf.org>

Date: 10/26/2011 09:57PM

Cc: "Morgan.Costello@ag.ny.gov" <Morgan.Costello@ag.ny.gov>, Vickie Patton <vpatton@edf.org>, "Goffman.Joseph@epamail.epa.gov" <Goffman.Joseph@epamail.epa.gov>, "Jordan.Scott@epamail.epa.gov" <Jordan.Scott@epamail.epa.gov>, "Zenick.Elliott@epamail.epa.gov" <Zenick.Elliott@epamail.epa.gov>, "Joanne.Spalding@sierraclub.org" <Joanne.Spalding@sierraclub.org>, "thomaslorenzen@usdoj.gov" <thomas.lorenzen@usdoj.gov>

Subject: Re: Boiler NSPS settlement

Vickie's schedule Friday is too uncertain to plan around, but I can be available anytime.

Best,  
Megan

----- Original Message -----

From: Doniger, David [mailto:ddoniger@nrdc.org]

Sent: Wednesday, October 26, 2011 04:10 PM

To: David.Gunter2@usdoj.gov<mailto:David.Gunter2@usdoj.gov>; michael.myers@ag.ny.gov<mailto:michael.myers@ag.ny.gov>; Embrey.Patricia@epamail.epa.gov<mailto:Embrey.Patricia@epamail.epa.gov>>

Cc: Morgan.Costello@ag.ny.gov<mailto:Morgan.Costello@ag.ny.gov>; Megan Ceronsky; Vickie Patton; Goffman.Joseph@epamail.epa.gov<mailto:Goffman.Joseph@epamail.epa.gov>; Jordan.Scott@epamail.epa.gov<mailto:Jordan.Scott@epamail.epa.gov>; Zenick.Elliott@epamail.epa.gov<mailto:Zenick.Elliott@epamail.epa.gov>; Joanne.Spalding@sierraclub.org<mailto:Joanne.Spalding@sierraclub.org>; thomas.lorenzen@usdoj.gov<mailto:thomas.lorenzen@usdoj.gov>>

Subject: Re: Boiler NSPS settlement

I'll make myself available anytime Friday, though I may be on a train.

David Doniger  
NRDC  
202 321-3435

----- Original Message -----

From: Gunter, David (ENRD) [mailto:David.Gunter2@usdoj.gov]

Sent: Wednesday, October 26, 2011 04:05 PM

To: Michael J. Myers <Michael.Myers@ag.ny.gov>; Embrey.Patricia@epamail.epa.gov<mailto:Embrey.Patricia@epamail.epa.gov>>

Cc: Morgan Costello <Morgan.Costello@ag.ny.gov>; mceronsky@edf.org<mailto:mceronsky@edf.org>; vpatton@edf.org<mailto:vpatton@edf.org>; Goffman.Joseph@epamail.epa.gov<mailto:Goffman.Joseph@epamail.epa.gov>; Jordan.Scott@epamail.epa.gov<mailto:Jordan.Scott@epamail.epa.gov>; Zenick.Elliott@epamail.epa.gov<mailto:Zenick.Elliott@epamail.epa.gov>

<Zenick.Elliott@epamail.epa.gov>; Joanne.Spalding@sierraclub.org<mailto:Joanne.Spalding@sierraclub.org>  
<Joanne.Spalding@sierraclub.org>; Lorenzen, Thomas (ENRD)  
<Thomas.Lorenzen@usdoj.gov<mailto:Thomas.Lorenzen@usdoj.gov>>  
Subject: RE: Boiler NSPS settlement

Mike, I'm sorry, but EPA is still fully engaged in the review and approval process and will not have meaningful information to share until Friday morning. If there are times on Friday afternoon when everyone is available, please let me know and I'll do the best I can to get everyone on the phone at the same time.

Thanks,  
Dave

-----Original Message-----

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Wednesday, October 26, 2011 12:36 PM  
To: Gunter, David (ENRD); Embrey.Patricia@epamail.epa.gov; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Lorenzen,  
Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Dave, unfortunately Morgan is out Friday so can't cover a call in the morning. Given Friday's deadline, I may be willing to have you go ahead with a call Fri. a.m. without NY based on the assumptions that (1) that's the earliest EPA/DOJ can inform us of whether you have received final approval on the revised settlement agreement, and (2) you anticipate receiving such approval. However, if either of my assumptions are incorrect, then we should convene a call today with whomever is available to discuss.

-----Original Message-----

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Wednesday, October 26, 2011 11:55 AM  
To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD)  
Lorenzen  
Subject: RE: Boiler NSPS settlement

Mike,

I was just preparing to ask for a call on Friday morning. Can you please let me know when on Friday you think you would be available, and whether Morgan could cover a call for you if we held it between 10 and 12 ET on Friday? Everyone else, please let me know available times on Friday also.

Thanks,  
Dave

-----Original Message-----

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Wednesday, October 26, 2011 11:53 AM  
To: Gunter, David (ENRD); Embrey.Patricia@epamail.epa.gov; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Lorenzen,  
Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Don't mean to nag on this, but I'm going to be in court on Friday morning, likely not back until early afternoon and would like to have a better sense of where we are and when we're going to talk this week. Thanks.

-----Original Message-----

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Monday, October 24, 2011 10:12 AM  
To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD) Lorenzen  
Subject: RE: Boiler NSPS settlement

Mike and David,

Thanks for clarifying that all the petitioners are on board. I understand that meetings are still taking place to secure the necessary federal approvals. We're certainly aware of the deadline and the need to coordinate, so I will be in touch as soon as I can tell you more.

Thanks,  
Dave Gunter

-----Original Message-----

From: Doniger, David [mailto:ddoniger@nrdc.org]  
Sent: Friday, October 21, 2011 2:30 PM  
To: Michael J. Myers; Gunter, David (ENRD);  
Embrey.Patricia@epamail.epagov<mailto:Embrey.Patricia@epamail.epa.gov>  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Lorenzen, Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Also to clarify that the three environmental petitioners are onboard. So we are eager for news on the federal side.

David D. Doniger  
Policy Director, Climate Center  
Natural Resources Defense Council

Please note our new address:  
1152 15th Street, NW, Suite 300  
Washington, DC 20005

Phone: (202) 289-2403  
Cell: (202) 321-3435  
Fax: (202) 789-0859  
ddoniger@nrdc.org<mailto:ddoniger@nrdc.org>  
on the web at [www.nrdc.org](http://www.nrdc.org)<<http://www.nrdc.org/>>  
read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

-----Original Message-----

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Friday, October 21, 2011 2:02 PM

To: 'David (ENRD) Gunter'; Embrey.Patricia@epamail.epa.gov; Doniger, David  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD)  
Lorenzen  
Subject: RE: Boiler NSPS settlement

All--Just wanted to communicate that I have now received approvals from all of the state petitioners. What's the status of the federal approvals? I've been getting questions re. a communications call to discuss a potential announcement, press, etc. for next week so please let us know when something's been arranged. Thanks.--Mike

-----Original Message-----

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Wednesday, October 19, 2011 11:20 AM  
To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD)  
Lorenzen  
Subject: RE: Boiler NSPS settlement

Thanks, Mike -- This looks good to me, and we'll also use this for our internal approval processes.

Dave

-----Original Message-----

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Tuesday, October 18, 2011 12:31 PM  
To: Gunter, David (ENRD); Embrey.Patricia@epamail.epa.gov; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org;  
Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov;  
Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org;  
Lorenzen, Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Dave and co.--I've removed the bolded/bracketed language from the draft version we approved last Thursday and have made some minor signature block revisions. Unless I hear otherwise from you or the agency, we will plan to use this as the final document for purposes of obtaining signatures by next Friday the 28th. Thanks.--Mike

-----Original Message-----

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Thursday, October 13, 2011 2:02 PM  
To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org;  
Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov;  
Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD) Lorenzen  
Subject: RE: Boiler NSPS settlement

Counsel: Attached please find a draft of our proposed agreement modification, with the term that we discussed today in bold.

Thanks,  
Dave Gunter

This e-mail and any attachments may contain confidential and privileged information. If you are not the intended recipient, please notify the sender immediately by return e-mail, delete this e-mail and destroy any copies. Any dissemination or use of this information by a person other than the intended recipient is unauthorized and may be illegal.

[attachment(s) "MM Oct 28 Extension Letter 2.doc" removed by Avi Garbow/DC/USEPA/US]

**To:** Patricia Embrey/DC/USEPA/US@EPA[]  
**From:** Vickie Patton  
**Sent:** Thur 10/13/2011 2:50:53 PM  
**Subject:** Re: NSPS Draft Settlement Agreement Revisions

303-447-7215al Privacy

From: Embrey.Patricia@epamail.epa.gov [mailto:Embrey.Patricia@epamail.epa.gov]  
Sent: Thursday, October 13, 2011 10:50 AM  
To: Vickie Patton  
Subject: Re: NSPS Draft Settlement Agreement Revisions

Ok. What number shall I call?

From: Vickie Patton [vpatton@edf.org]  
Sent: 10/13/2011 10:47 AM AST  
To: Patricia Embrey  
Subject: NSPS Draft Settlement Agreement Revisions

Hi Patricia - Do you have a moment to talk before the call? Best wishes, Vickie

This e-mail and any attachments may contain confidential and privileged information. If you are not the intended recipient, please notify the sender immediately by return e-mail, delete this e-mail and destroy any copies. Any dissemination or use of this information by a person other than the intended recipient is unauthorized and may be illegal.



**To:** "David (ENRD) Gunter" [David.Gunter2@usdoj.gov]; atricia Embrey/DC/USEPA/US@EPA[]  
**Cc:** "ddoniger@nrdc.org" [ddoniger@nrdc.org]; oanne Spalding [Joanne.Spalding@sierraclub.org]; Megan Ceronosky' [mceronsky@edf.org]; ickie Patton [vpattton@edf.org]  
**From:** "Michael J. Myers"  
**Sent:** Fri 10/14/2011 5:38:53 PM  
**Subject:** NSPS/Revised letter  
MM Oct 14 Extension Letter - 1014 plain.doc

Dave and Patricia--Attached is a revised letter on settlement negotiations to reflect changes suggested by EPA/DOJ. If you confirm the new language is acceptable, I will finalize and send back to you. Thanks.--  
Mike



STATE OF NEW YORK  
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN

ATTORNEY GENERAL

DIVISION OF SOCIAL  
JUSTICE  
ENVIRONMENTAL PROTECTION  
BUREAU

October 14, 2011

BY ELECTRONIC MAIL

David Gunter  
U.S. Department of Justice  
Environment and Natural Resources Division  
Appellate Section  
P.O. Box 23795  
Washington, D.C. 20024

RE: *New York v. EPA* (D.C. Cir. 06-1322)/Extension on Deadline for Negotiations to  
Revise Settlement Agreement

Dear Mr. Gunter:

On behalf of State Petitioners and Environmental Petitioners (collectively, "Petitioners"), this letter is to reflect the parties' understanding of the additional time needed to allow Petitioners and EPA to complete negotiations on revising the Settlement Agreement in the above-referenced case. This letter supplements my letter to you dated September 30, 2011.

In light of the progress made since the September 30 letter, Petitioners are amenable to extend the time for negotiations until October 28, 2011. Petitioners agree not to invoke their remedies under ¶ 7 of the Settlement Agreement through that date. Please let me know if anything in this letter does not accurately reflect our discussions.

Sincerely,

\_\_\_\_\_  
Michael J. Myers  
Assistant Attorney General  
(518) 402-2594

**To:** "Michael J. Myers" [Michael.Myers@ag.ny.gov]; atricia Embrey/DC/USEPA/US@EPA[]  
**Cc:** ddoniger@nrdc.org[ddoniger@nrdc.org]; Joanne Spalding" [Joanne.Spalding@sierraclub.org]; Megan Ceronsky" [mceronsky@edf.org]; Vickie Patton" [vpatton@edf.org]  
**From:** "Gunter, David (ENRD)"  
**Sent:** Fri 10/14/2011 5:41:38 PM  
**Subject:** RE: NSPS/Revised letter

Mike – thanks for giving me the chance to review this. It looks OK to me.

Dave

---

David Gunter

Appellate Section, Environment and Natural Resources Division

United States Department of Justice

(202) 514-3785

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Friday, October 14, 2011 1:39 PM  
To: Gunter, David (ENRD); Embrey.Patricia@epamail.epa.gov  
Cc: ddoniger@nrdc.org; Joanne Spalding; 'Megan Ceronsky'; Vickie Patton  
Subject: NSPS/Revised letter

Dave and Patricia--Attached is a revised letter on settlement negotiations to reflect changes suggested by EPA/DOJ. If you confirm the new language is acceptable, I will finalize and send back to you. Thanks.--  
Mike

**To:** Patricia Embrey/DC/USEPA/US@EPA;"David (ENRD) Gunter"  
[David.Gunter2@usdoj.gov]; David (ENRD) Gunter" [David.Gunter2@usdoj.gov]  
**Cc:** Megan Ceronsky [mceronsky@edf.org]; ickie Patton [vpattton@edf.org];  
ddoniger@nrdc.org" [ddoniger@nrdc.org]; oanne Spalding  
[Joanne.Spalding@sierraclub.org]  
**From:** "Michael J. Myers"  
**Sent:** Fri 10/14/2011 5:51:33 PM  
**Subject:** RE: NSPS/Revised letter  
[ltr to Gunter 10-14-11.pdf](#)

Here's a signed version of the letter. Thanks all.

-----Original Message-----

From: Embrey.Patricia@epamail.epa.gov [mailto:Embrey.Patricia@epamail.epa.gov]  
Sent: Friday, October 14, 2011 1:44 PM  
To: David (ENRD) Gunter  
Cc: Megan Ceronsky; Vickie Patton; Michael J. Myers; ddoniger@nrdc.org; Joanne Spalding  
Subject: RE: NSPS/Revised letter

Me too.

From: "Gunter, David (ENRD)" <David.Gunter2@usdoj.gov>  
To: "Michael J. Myers" <Michael.Myers@ag.ny.gov>, Patricia  
Embrey/DC/USEPA/US@EPA  
Cc: <ddoniger@nrdc.org>, "Joanne Spalding"  
<Joanne.Spalding@sierraclub.org>, "Megan Ceronsky"  
<mceronsky@edf.org>, "Vickie Patton" <vpattton@edf.org>  
Date: 10/14/2011 01:41 PM  
Subject: RE: NSPS/Revised letter

Mike - thanks for giving me the chance to review this. It looks OK to me.

Dave

---

David Gunter  
Appellate Section, Environment and Natural Resources Division  
United States Department of Justice  
(202) 514-3785

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Friday, October 14, 2011 1:39 PM  
To: Gunter, David (ENRD); Embrey.Patricia@epamail.epa.gov  
Cc: ddoniger@nrdc.org; Joanne Spalding; 'Megan Ceronsky'; Vickie Patton  
Subject: NSPS/Revised letter

Dave and Patricia--Attached is a revised letter on settlement negotiations to reflect changes suggested by EPA/DOJ. If you confirm the new language is acceptable, I will finalize and send back to you.  
Thanks.--Mike



STATE OF NEW YORK  
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN  
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE  
ENVIRONMENTAL PROTECTION BUREAU

October 14, 2011

BY ELECTRONIC MAIL

David Gunter  
U.S. Department of Justice  
Environment and Natural Resources Division  
Appellate Section  
P.O. Box 23795  
Washington, D.C. 20024

RE: *New York v. EPA* (D.C. Cir. 06-1322)/Extension on Deadline for Negotiations to  
Revise Settlement Agreement

Dear Mr. Gunter:

On behalf of State Petitioners and Environmental Petitioners (collectively, "Petitioners"), this letter is to reflect the parties' understanding of the additional time needed to allow Petitioners and EPA to complete negotiations on revising the Settlement Agreement in the above-referenced case. This letter supplements my letter to you dated September 30, 2011.

In light of the progress made since the September 30 letter, Petitioners are amenable to extend the time for negotiations until October 28, 2011. Petitioners agree not to invoke their remedies under ¶ 7 of the Settlement Agreement through that date. Please let me know if anything in this letter does not accurately reflect our discussions.

Sincerely,

Michael J. Myers  
Assistant Attorney General  
(518) 402-2594

**To:** "ddoniger@nrdc.org" [ddoniger@nrdc.org]; 'David.Gunter2@usdoj.gov'  
[David.Gunter2@usdoj.gov]; 'michael.myers@ag.ny.gov'  
[michael.myers@ag.ny.gov]; atricia Embrey/DC/USEPA/US@EPA[]  
**Cc:** "Morgan.Costello@ag.ny.gov" [Morgan.Costello@ag.ny.gov]; ickie Patton  
[vpatt@edf.org]; oseph Goffman/DC/USEPA/US@EPA;Scott  
Jordan/DC/USEPA/US@EPA;Elliott  
Zenick/DC/USEPA/US@EPA;"Joanne.Spalding@sierraclub.org"  
[Joanne.Spalding@sierraclub.org]; cott Jordan/DC/USEPA/US@EPA;Elliott  
Zenick/DC/USEPA/US@EPA;"Joanne.Spalding@sierraclub.org"  
[Joanne.Spalding@sierraclub.org]; lliott  
Zenick/DC/USEPA/US@EPA;"Joanne.Spalding@sierraclub.org"  
[Joanne.Spalding@sierraclub.org]; 'Joanne.Spalding@sierraclub.org'  
[Joanne.Spalding@sierraclub.org]; 'thomas.lorenzen@usdoj.gov'  
[thomas.lorenzen@usdoj.gov]

**From:** Megan Ceronsky  
**Sent:** Thur 10/27/2011 4:57:26 AM  
**Subject:** Re: Boiler NSPS settlement

[David.Gunter2@usdoj.gov](mailto:David.Gunter2@usdoj.gov)  
[michael.myers@ag.ny.gov](mailto:michael.myers@ag.ny.gov)  
[Embrey.Patricia@epamail.epa.gov](mailto:Embrey.Patricia@epamail.epa.gov)  
[Embrey.Patricia@epamail.epa.gov](mailto:Embrey.Patricia@epamail.epa.gov)  
[Morgan.Costello@ag.ny.gov](mailto:Morgan.Costello@ag.ny.gov)  
[Goffman.Joseph@epamail.epa.gov](mailto:Goffman.Joseph@epamail.epa.gov)  
[Jordan.Scott@epamail.epa.gov](mailto:Jordan.Scott@epamail.epa.gov)  
[Zenick.Elliott@epamail.epa.gov](mailto:Zenick.Elliott@epamail.epa.gov)  
[Joanne.Spalding@sierraclub.org](mailto:Joanne.Spalding@sierraclub.org)  
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[Embrey.Patricia@epamail.epa.gov](mailto:Embrey.Patricia@epamail.epa.gov)  
[mceronsky@edf.org](mailto:mceronsky@edf.org)  
[vpatt@edf.org](mailto:vpatt@edf.org)  
[Goffman.Joseph@epamail.epa.gov](mailto:Goffman.Joseph@epamail.epa.gov)  
[Jordan.Scott@epamail.epa.gov](mailto:Jordan.Scott@epamail.epa.gov)  
[Zenick.Elliott@epamail.epa.gov](mailto:Zenick.Elliott@epamail.epa.gov)  
[Joanne.Spalding@sierraclub.org](mailto:Joanne.Spalding@sierraclub.org)  
[Thomas.Lorenzen@usdoj.gov](mailto:Thomas.Lorenzen@usdoj.gov)  
[Embrey.Patricia@epamail.epa.gov](mailto:Embrey.Patricia@epamail.epa.gov)  
[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)  
[www.nrdc.org](http://www.nrdc.org)  
<http://switchboard.nrdc.org/blogs/ddoniger/>

Vickie's schedule Friday is too uncertain to plan around, but I can be available anytime.

Best,  
Megan

----- Original Message -----

From: Doniger, David [mailto:ddoniger@nrdc.org]  
Sent: Wednesday, October 26, 2011 04:10 PM  
To: David.Gunter2@usdoj.gov <David.Gunter2@usdoj.gov>; michael.myers@ag.ny.gov  
<michael.myers@ag.ny.gov>; Embrey.Patricia@epamail.epa.gov <Embrey.Patricia@epamail.epa.gov>  
Cc: Morgan.Costello@ag.ny.gov <Morgan.Costello@ag.ny.gov>; Megan Ceronsky; Vickie Patton;  
Goffman.Joseph@epamail.epa.gov <Goffman.Joseph@epamail.epa.gov>; Jordan.Scott@epamail.epa.gov

<Jordan.Scott@epamail.epa.gov>; Zenick.Elliott@epamail.epa.gov <Zenick.Elliott@epamail.epa.gov>;  
Joanne.Spalding@sierraclub.org <Joanne.Spalding@sierraclub.org>; thomas.lorenzen@usdoj.gov  
<thomas.lorenzen@usdoj.gov>  
Subject: Re: Boiler NSPS settlement

I'll make myself available anytime Friday, though I may be on a train.

David Doniger

NRDC

202 321-3435

----- Original Message -----

From: Gunter, David (ENRD) [mailto:David.Gunter2@usdoj.gov]  
Sent: Wednesday, October 26, 2011 04:05 PM  
To: Michael J. Myers <Michael.Myers@ag.ny.gov>; Embrey.Patricia@epamail.epa.gov  
<Embrey.Patricia@epamail.epa.gov>; Doniger, David  
Cc: Morgan Costello <Morgan.Costello@ag.ny.gov>; mceronsky@edf.org <mceronsky@edf.org>; vpatton@edf.org  
<vpattton@edf.org>; Goffman.Joseph@epamail.epa.gov <Goffman.Joseph@epamail.epa.gov>;  
Jordan.Scott@epamail.epa.gov <Jordan.Scott@epamail.epa.gov>; Zenick.Elliott@epamail.epa.gov  
<Zenick.Elliott@epamail.epa.gov>; Joanne.Spalding@sierraclub.org <Joanne.Spalding@sierraclub.org>; Lorenzen,  
Thomas (ENRD) <Thomas.Lorenzen@usdoj.gov>  
Subject: RE: Boiler NSPS settlement

Mike, I'm sorry, but EPA is still fully engaged in the review and approval process and will not have meaningful information to share until Friday morning. If there are times on Friday afternoon when everyone is available, please let me know and I'll do the best I can to get everyone on the phone at the same time.

Thanks,

Dave

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Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Dave, unfortunately Morgan is out Friday so can't cover a call in the morning. Given Friday's deadline, I may be willing to have you go ahead with a call Fri. a.m. without NY based on the assumptions that (1) that's the earliest EPA/DOJ can inform us of whether you have received final approval on the revised settlement agreement, and (2) you anticipate receiving such approval. However, if either of my assumptions are incorrect, then we should convene a call today with whomever is available to discuss.

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Thanks,  
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Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Lorenzen,  
Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Don't mean to nag on this, but I'm going to be in court on Friday morning, likely not back until early afternoon and would like to have a better sense of where we are and when we're going to talk this week. Thanks.

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To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD)  
Lorenzen  
Subject: RE: Boiler NSPS settlement

Mike and David,

Thanks for clarifying that all the petitioners are on board. I understand that meetings are still taking place to secure the necessary federal approvals. We're certainly aware of the deadline and the need to coordinate, so I will be in touch as soon as I can tell you more.

Thanks,  
Dave Gunter

-----Original Message-----

From: Doniger, David [mailto:ddoniger@nrdc.org]  
Sent: Friday, October 21, 2011 2:30 PM  
To: Michael J. Myers; Gunter, David (ENRD); Embrey.Patricia@epamail.epa.gov  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Lorenzen,  
Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Also to clarify that the three environmental petitioners are onboard. So we are eager for news on the federal side.

David D. Doniger  
Policy Director, Climate Center  
Natural Resources Defense Council

Please note our new address:  
1152 15th Street, NW, Suite 300  
Washington, DC 20005

Phone: (202) 289-2403  
Cell: (202) 321-3435  
Fax: (202) 789-0859  
ddoniger@nrdc.org  
on the web at [www.nrdc.org](http://www.nrdc.org)  
read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

-----Original Message-----

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Friday, October 21, 2011 2:02 PM  
To: 'David (ENRD) Gunter'; Embrey.Patricia@epamail.epa.gov; Doniger, David  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD) Lorenzen  
Subject: RE: Boiler NSPS settlement

All--Just wanted to communicate that I have now received approvals from all of the state petitioners. What's the status of the federal approvals? I've been getting questions re. a communications call to discuss a potential announcement, press, etc. for next week so please let us know when something's been arranged. Thanks.--Mike

-----Original Message-----

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Wednesday, October 19, 2011 11:20 AM  
To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org; Goffman.Joseph@epamail.epa.gov;  
Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas (ENRD) Lorenzen  
Subject: RE: Boiler NSPS settlement

Thanks, Mike -- This looks good to me, and we'll also use this for our internal approval processes.

Dave

-----Original Message-----

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Tuesday, October 18, 2011 12:31 PM  
To: Gunter, David (ENRD); Embrey.Patricia@epamail.epa.gov; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org;  
Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov;  
Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org;  
Lorenzen, Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Dave and co.--I've removed the bolded/bracketed language from the draft version we approved last Thursday and have made some minor signature block revisions. Unless I hear otherwise from you or the agency, we

will plan to use this as the final document for purposes of obtaining signatures by next Friday the 28th. Thanks.--Mike

-----Original Message-----

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Thursday, October 13, 2011 2:02 PM  
To: Embrey.Patricia@epamail.epa.gov; Michael J. Myers; David Doniger  
Cc: Morgan Costello; mceronsky@edf.org; vpatton@edf.org;  
Goffman.Joseph@epamail.epa.gov; Jordan.Scott@epamail.epa.gov;  
Zenick.Elliott@epamail.epa.gov; Joanne.Spalding@sierraclub.org; Thomas  
(ENRD) Lorenzen  
Subject: RE: Boiler NSPS settlement

Counsel: Attached please find a draft of our proposed agreement modification, with the term that we discussed today in bold.

Thanks,  
Dave Gunter

This e-mail and any attachments may contain confidential and privileged information. If you are not the intended recipient, please notify the sender immediately by return e-mail, delete this e-mail and destroy any copies. Any dissemination or use of this information by a person other than the intended recipient is unauthorized and may be illegal.

**To:** "Doniger, David" [ddoniger@nrdc.org];  
Joanne.Spalding@sierraclub.org>;[michael.myers@ag.ny.gov];  
michael.myers@ag.ny.gov>;[mceronsky@edf.org];  
mceronsky@edf.org>;[Morgan.Costello@ag.ny.gov];  
Morgan.Costello@ag.ny.gov>;[vpatton@edf.org]; vpatton@edf.org>[]  
**Cc:** Elliott Zenick/DC/USEPA/US@EPA;Joseph  
Goffman/DC/USEPA/US@EPA;"Lorenzen, Thomas (ENRD)" [Thomas.Lorenzen@usdoj.gov];  
oseph Goffman/DC/USEPA/US@EPA;"Lorenzen, Thomas (ENRD)"  
[Thomas.Lorenzen@usdoj.gov]; Lorenzen, Thomas (ENRD)" [Thomas.Lorenzen@usdoj.gov];  
oward Hoffman/DC/USEPA/US@EPA;Patricia Embrey/DC/USEPA/US@EPA;Kristi  
Smith/DC/USEPA/US@EPA;Scott Jordan/DC/USEPA/US@EPA;Avi  
Garbow/DC/USEPA/US@EPA;Kevin Culligan/DC/USEPA/US@EPA;Peter  
Tsirigotis/RTP/USEPA/US@EPA[]; atricia Embrey/DC/USEPA/US@EPA;Kristi  
Smith/DC/USEPA/US@EPA;Scott Jordan/DC/USEPA/US@EPA;Avi  
Garbow/DC/USEPA/US@EPA;Kevin Culligan/DC/USEPA/US@EPA;Peter  
Tsirigotis/RTP/USEPA/US@EPA[]; risti Smith/DC/USEPA/US@EPA;Scott  
Jordan/DC/USEPA/US@EPA;Avi Garbow/DC/USEPA/US@EPA;Kevin  
Culligan/DC/USEPA/US@EPA;Peter Tsirigotis/RTP/USEPA/US@EPA[]; cott  
Jordan/DC/USEPA/US@EPA;Avi Garbow/DC/USEPA/US@EPA;Kevin  
Culligan/DC/USEPA/US@EPA;Peter Tsirigotis/RTP/USEPA/US@EPA[]; vi  
Garbow/DC/USEPA/US@EPA;Kevin Culligan/DC/USEPA/US@EPA;Peter  
Tsirigotis/RTP/USEPA/US@EPA[]; evin Culligan/DC/USEPA/US@EPA;Peter  
Tsirigotis/RTP/USEPA/US@EPA[]; eter Tsirigotis/RTP/USEPA/US@EPA[]  
**From:** "Gunter, David (ENRD)"  
**Sent:** Wed 10/5/2011 3:17:31 PM  
**Subject:** RE: Boiler NSPS settlement  
[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)  
[www.nrdc.org](http://www.nrdc.org)  
<http://switchboard.nrdc.org/blogs/ddoniger/>

David: Is your group available tomorrow morning ET for a call to discuss this? Because we have west coast participants, I recommend 11:00 ET, 8:00 PT.

Thanks,

Dave

From: Doniger, David [mailto:ddoniger@nrdc.org]  
Sent: Monday, October 03, 2011 6:10 PM  
To: Gunter, David (ENRD); Joanne.Spalding@sierraclub.org; michael.myers@ag.ny.gov;  
mceronsky@edf.org; Morgan.Costello@ag.ny.gov; vpatton@edf.org  
Cc: Zenick.Elliott@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Lorenzen, Thomas (ENRD);  
hoffman.howard@epamail.epa.gov; Embrey.Patricia@epamail.epa.gov  
Subject: RE: Boiler NSPS settlement

Dave and others,

I'm checking in to see if you have any update on EPA's deliberations, and if we should schedule a call for tomorrow or Wednesday.

David

David D. Doniger

Policy Director, Climate Center

Natural Resources Defense Council

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on the web at [www.nrdc.org](http://www.nrdc.org)

read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

From: Gunter, David (ENRD) [<mailto:David.Gunter2@usdoj.gov>]

Sent: Friday, September 30, 2011 10:04 AM

To: Doniger, David; Joanne.Spalding@sierraclub.org; michael.myers@ag.ny.gov; mceronsky@edf.org; Morgan.Costello@ag.ny.gov; vpatton@edf.org

Cc: Zenick.Elliott@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Lorenzen, Thomas (ENRD); hoffman.howard@epamail.epa.gov; Embrey.Patricia@epamail.epa.gov

Subject: RE: Boiler NSPS settlement

Yes, same number (see the thread below). Talk to you all at 11.

Dave Gunter

From: Doniger, David [mailto:ddoniger@nrdc.org]  
Sent: Thursday, September 29, 2011 5:38 PM  
To: Gunter, David (ENRD); Joanne.Spalding@sierraclub.org; michael.myers@ag.ny.gov; mceronsky@edf.org; Morgan.Costello@ag.ny.gov; vpatton@edf.org  
Cc: Zenick.Elliott@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Lorenzen, Thomas (ENRD); hoffman.howard@epamail.epa.gov  
Subject: Re: Boiler NSPS settlement

Yes that time will work. We will talk with you then. Same number?  
David Doniger  
NRDC  
202 321-3435

From: Gunter, David (ENRD) [mailto:David.Gunter2@usdoj.gov]  
Sent: Thursday, September 29, 2011 04:45 PM  
To: Doniger, David; Joanne.Spalding@sierraclub.org <Joanne.Spalding@sierraclub.org>; michael.myers@ag.ny.gov <michael.myers@ag.ny.gov>; mceronsky@edf.org <mceronsky@edf.org>; Morgan.Costello@ag.ny.gov <Morgan.Costello@ag.ny.gov>; vpatton@edf.org <vpattton@edf.org>  
Cc: Zenick.Elliott@epamail.epa.gov <Zenick.Elliott@epamail.epa.gov>; Goffman.Joseph@epamail.epa.gov <Goffman.Joseph@epamail.epa.gov>; Lorenzen, Thomas (ENRD) <Thomas.Lorenzen@usdoj.gov>; hoffman.howard@epamail.epa.gov <hoffman.howard@epamail.epa.gov>  
Subject: RE: Boiler NSPS settlement

David --

We are aware of the call and were just about to propose the same. We can speak tomorrow from 11-12 ET, using the same call-in information shown in the thread below. Will that work for your group?

Thanks,

Dave Gunter

From: Doniger, David [mailto:ddoniger@nrdc.org]  
Sent: Thursday, September 29, 2011 4:40 PM  
To: Gunter, David (ENRD); Joanne.Spalding@sierraclub.org; michael.myers@ag.ny.gov; mceronsky@edf.org; Morgan.Costello@ag.ny.gov; vpatton@edf.org  
Cc: Zenick.Elliott@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Lorenzen, Thomas (ENRD); hoffman.howard@epamail.epa.gov  
Subject: Re: Boiler NSPS settlement

Folks,

Sorry for the late notice, but we would like to postpone our 5PM call until tomorrow, because our principals will be having a call with Lisa Jackson today at 4:45.

Could you, through Dave Gunter, propose a time tomorrow that would work for you?

David  
David Doniger  
NRDC  
202 321-3435

From: Gunter, David (ENRD) [mailto:David.Gunter2@usdoj.gov]  
Sent: Wednesday, September 28, 2011 11:57 AM  
To: Joanne Spalding <Joanne.Spalding@sierraclub.org>; Michael J. Myers <Michael.Myers@ag.ny.gov>; Doniger, David; Megan Ceronsky <mceronsky@edf.org>; Morgan Costello <Morgan.Costello@ag.ny.gov>; Vickie Patton <vpatton@edf.org>  
Cc: Elliott Zenick <Zenick.Elliott@epamail.epa.gov>; Goffman.Joseph@epamail.epa.gov <Goffman.Joseph@epamail.epa.gov>; Lorenzen, Thomas (ENRD) <Thomas.Lorenzen@usdoj.gov>; hoffman.howard@epamail.epa.gov <hoffman.howard@epamail.epa.gov>  
Subject: RE: Boiler NSPS settlement

Everyone: I've just found out that Joe Goffman is held up in another meeting and will be unavailable to start the call until 12:15. Although I hate to change the schedule at the last minute, Joe knows the latest information that EPA can share and it would not be helpful to start without him. Please call in to the number below at 12:15 and we'll get started.

Thanks,  
Dave

From: Gunter, David (ENRD)  
Sent: Wednesday, September 28, 2011 10:44 AM  
To: 'Joanne Spalding'; 'Michael J. Myers'; 'ddoniger@nrdc.org'; 'Megan Ceronsky'; 'Morgan Costello'; 'Vickie Patton'  
Cc: 'Elliott Zenick'; 'Goffman.Joseph@epamail.epa.gov'; Lorenzen, Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Everyone:

This is a reminder that we'll have another call today at 12:00 ET. The call-in information is the same:

Dial 866-410-9426

Conference code 202-514-3785

Ex. 6 - Personal Privacy

Thanks,

David Gunter

Appellate Section

Environment and Natural Resources Division

United States Department of Justice

950 Pennsylvania Ave, NW

Washington, DC 20530

202-514-3785

David.Gunter2@usdoj.gov



**To:** "Gunter, David (ENRD)" [David.Gunter2@usdoj.gov]  
**Cc:** "Doniger, David" [ddoniger@nrdc.org]; michael.myers@ag.ny.gov"  
[michael.myers@ag.ny.gov]; mceronsky@edf.org" [mceronsky@edf.org];  
Morgan.Costello@ag.ny.gov" [Morgan.Costello@ag.ny.gov]; vpatton@edf.org"  
[vpatton@edf.org]; Iliott Zenick/DC/USEPA/US@EPA;Joseph  
Goffman/DC/USEPA/US@EPA;"Lorenzen, Thomas (ENRD)" [Thomas.Lorenzen@usdoj.gov];  
oseph Goffman/DC/USEPA/US@EPA;"Lorenzen, Thomas (ENRD)"  
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oward Hoffman/DC/USEPA/US@EPA;Patricia Embrey/DC/USEPA/US@EPA;Kristi  
Smith/DC/USEPA/US@EPA;Scott Jordan/DC/USEPA/US@EPA;Avi  
Garbow/DC/USEPA/US@EPA;Kevin Culligan/DC/USEPA/US@EPA;Peter  
Tsirigotis/RTP/USEPA/US@EPA[]; atricia Embrey/DC/USEPA/US@EPA;Kristi  
Smith/DC/USEPA/US@EPA;Scott Jordan/DC/USEPA/US@EPA;Avi  
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Tsirigotis/RTP/USEPA/US@EPA[]; risti Smith/DC/USEPA/US@EPA;Scott  
Jordan/DC/USEPA/US@EPA;Avi Garbow/DC/USEPA/US@EPA;Kevin  
Culligan/DC/USEPA/US@EPA;Peter Tsirigotis/RTP/USEPA/US@EPA[]; cott  
Jordan/DC/USEPA/US@EPA;Avi Garbow/DC/USEPA/US@EPA;Kevin  
Culligan/DC/USEPA/US@EPA;Peter Tsirigotis/RTP/USEPA/US@EPA[]; vi  
Garbow/DC/USEPA/US@EPA;Kevin Culligan/DC/USEPA/US@EPA;Peter  
Tsirigotis/RTP/USEPA/US@EPA[]; evin Culligan/DC/USEPA/US@EPA;Peter  
Tsirigotis/RTP/USEPA/US@EPA[]; eter Tsirigotis/RTP/USEPA/US@EPA[]

**From:** Joanne Spalding

**Sent:** Wed 10/5/2011 3:27:07 PM

**Subject:** Re: Boiler NSPS settlement

[David.Gunter2@usdoj.gov](mailto:David.Gunter2@usdoj.gov)

[Joanne.Spalding@sierraclub.org](mailto:Joanne.Spalding@sierraclub.org)

[michael.myers@ag.ny.gov](mailto:michael.myers@ag.ny.gov)

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[hoffman.howard@epamail.epa.gov](mailto:hoffman.howard@epamail.epa.gov)  
[Joanne.Spalding@sierraclub.org](mailto:Joanne.Spalding@sierraclub.org)  
[michael.myers@ag.ny.gov](mailto:michael.myers@ag.ny.gov)  
[mceronsky@edf.org](mailto:mceronsky@edf.org)  
[Morgan.Costello@ag.ny.gov](mailto:Morgan.Costello@ag.ny.gov)  
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[Michael.Myers@ag.ny.gov](mailto:Michael.Myers@ag.ny.gov)  
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[Morgan.Costello@ag.ny.gov](mailto:Morgan.Costello@ag.ny.gov)  
[vpatt@edf.org](mailto:vpatt@edf.org)  
[Zenick.Elliott@epamail.epa.gov](mailto:Zenick.Elliott@epamail.epa.gov)  
[Goffman.Joseph@epamail.epa.gov](mailto:Goffman.Joseph@epamail.epa.gov)  
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[Goffman.Joseph@epamail.epa.gov](mailto:Goffman.Joseph@epamail.epa.gov)  
[David.Gunter2@usdoj.gov](mailto:David.Gunter2@usdoj.gov)

I can do that or any time from 10 ET on.

Sent from my iPhone

On Oct 5, 2011, at 8:17 AM, "Gunter, David (ENRD)" <David.Gunter2@usdoj.gov> wrote:

David: Is your group available tomorrow morning ET for a call to discuss this? Because we have west coast participants, I recommend 11:00 ET, 8:00 PT.

Thanks,

Dave

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Subject: RE: Boiler NSPS settlement

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I'm checking in to see if you have any update on EPA's deliberations, and if we should schedule a call for tomorrow or Wednesday.

David

David D. Doniger

Policy Director, Climate Center

Natural Resources Defense Council

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Cc: Zenick.Elliott@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Lorenzen, Thomas (ENRD); hoffman.howard@epamail.epa.gov; Embrey.Patricia@epamail.epa.gov  
Subject: RE: Boiler NSPS settlement

Yes, same number (see the thread below). Talk to you all at 11.

Dave Gunter

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Sent: Thursday, September 29, 2011 5:38 PM  
To: Gunter, David (ENRD); Joanne.Spalding@sierraclub.org; michael.myers@ag.ny.gov; mceronsky@edf.org; Morgan.Costello@ag.ny.gov; vpatton@edf.org  
Cc: Zenick.Elliott@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Lorenzen, Thomas (ENRD); hoffman.howard@epamail.epa.gov  
Subject: Re: Boiler NSPS settlement

Yes that time will work. We will talk with you then. Same number?

David Doniger  
NRDC  
202 321-3435

From: Gunter, David (ENRD) [mailto:David.Gunter2@usdoj.gov]  
Sent: Thursday, September 29, 2011 04:45 PM  
To: Doniger, David; Joanne.Spalding@sierraclub.org <Joanne.Spalding@sierraclub.org>; michael.myers@ag.ny.gov <michael.myers@ag.ny.gov>; mceronsky@edf.org <mceronsky@edf.org>; Morgan.Costello@ag.ny.gov <Morgan.Costello@ag.ny.gov>; vpatton@edf.org <vpatton@edf.org>  
Cc: Zenick.Elliott@epamail.epa.gov <Zenick.Elliott@epamail.epa.gov>; Goffman.Joseph@epamail.epa.gov <Goffman.Joseph@epamail.epa.gov>; Lorenzen, Thomas (ENRD) <Thomas.Lorenzen@usdoj.gov>; hoffman.howard@epamail.epa.gov <hoffman.howard@epamail.epa.gov>

Subject: RE: Boiler NSPS settlement

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To: Gunter, David (ENRD); Joanne.Spalding@sierraclub.org; michael.myers@ag.ny.gov; mceronsky@edf.org; Morgan.Costello@ag.ny.gov; vpatton@edf.org  
Cc: Zenick.Elliott@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Lorenzen, Thomas (ENRD); hoffman.howard@epamail.epa.gov  
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Folks,

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David  
David Doniger  
NRDC  
202 321-3435

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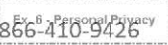
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Conference code  202-514-3785

Thanks,  
  
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Appellate Section  
Environment and Natural Resources Division  
United States Department of Justice  
950 Pennsylvania Ave, NW  
Washington, DC 20530  
202-514-3785  
David.Gunter2@usdoj.gov



**To:** "David (ENRD) Gunter" [David.Gunter2@usdoj.gov]; organ Costello [Morgan.Costello@ag.ny.gov]; mceronsky@edf.org [mceronsky@edf.org]; vpatton@edf.org [vpattont@edf.org]; avid Doniger [ddoniger@nrdc.org]; Joanne.Spalding@sierraclub.org [Joanne.Spalding@sierraclub.org]

**Cc:** Kevin Culligan/DC/USEPA/US@EPA; Avi Garbow/DC/USEPA/US@EPA; Peter Tsirigotis/RTP/USEPA/US@EPA; Patricia Embrey/DC/USEPA/US@EPA; Joseph Goffman/DC/USEPA/US@EPA; Howard Hoffman/DC/USEPA/US@EPA; Scott Jordan/DC/USEPA/US@EPA; Kristi Smith/DC/USEPA/US@EPA; Elliott Zenick/DC/USEPA/US@EPA; "Thomas (ENRD) Lorenzen" [Thomas.Lorenzen@usdoj.gov]; vi Garbow/DC/USEPA/US@EPA; Peter Tsirigotis/RTP/USEPA/US@EPA; Patricia Embrey/DC/USEPA/US@EPA; Joseph Goffman/DC/USEPA/US@EPA; Howard Hoffman/DC/USEPA/US@EPA; Scott Jordan/DC/USEPA/US@EPA; Kristi Smith/DC/USEPA/US@EPA; Elliott Zenick/DC/USEPA/US@EPA; "Thomas (ENRD) Lorenzen" [Thomas.Lorenzen@usdoj.gov]; eter Tsirigotis/RTP/USEPA/US@EPA; Patricia Embrey/DC/USEPA/US@EPA; Joseph Goffman/DC/USEPA/US@EPA; Howard Hoffman/DC/USEPA/US@EPA; Scott Jordan/DC/USEPA/US@EPA; Kristi Smith/DC/USEPA/US@EPA; Elliott Zenick/DC/USEPA/US@EPA; "Thomas (ENRD) Lorenzen" [Thomas.Lorenzen@usdoj.gov]; atricia Embrey/DC/USEPA/US@EPA; Joseph Goffman/DC/USEPA/US@EPA; Howard Hoffman/DC/USEPA/US@EPA; Scott Jordan/DC/USEPA/US@EPA; Kristi Smith/DC/USEPA/US@EPA; Elliott Zenick/DC/USEPA/US@EPA; "Thomas (ENRD) Lorenzen" [Thomas.Lorenzen@usdoj.gov]; oseph Goffman/DC/USEPA/US@EPA; Howard Hoffman/DC/USEPA/US@EPA; Scott Jordan/DC/USEPA/US@EPA; Kristi Smith/DC/USEPA/US@EPA; Elliott Zenick/DC/USEPA/US@EPA; "Thomas (ENRD) Lorenzen" [Thomas.Lorenzen@usdoj.gov]; oward Hoffman/DC/USEPA/US@EPA; Scott Jordan/DC/USEPA/US@EPA; Kristi Smith/DC/USEPA/US@EPA; Elliott Zenick/DC/USEPA/US@EPA; "Thomas (ENRD) Lorenzen" [Thomas.Lorenzen@usdoj.gov]; cott Jordan/DC/USEPA/US@EPA; Kristi Smith/DC/USEPA/US@EPA; Elliott Zenick/DC/USEPA/US@EPA; "Thomas (ENRD) Lorenzen" [Thomas.Lorenzen@usdoj.gov]; risti Smith/DC/USEPA/US@EPA; Elliott Zenick/DC/USEPA/US@EPA; "Thomas (ENRD) Lorenzen" [Thomas.Lorenzen@usdoj.gov]; lliott Zenick/DC/USEPA/US@EPA; "Thomas (ENRD) Lorenzen" [Thomas.Lorenzen@usdoj.gov]; Thomas (ENRD) Lorenzen [Thomas.Lorenzen@usdoj.gov]

**From:** "Michael J. Myers"

**Sent:** Wed 10/5/2011 3:33:48 PM

**Subject:** RE: Boiler NSPS settlement  
[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)  
[www.nrdc.org](http://www.nrdc.org)  
<http://switchboard.nrdc.org/blogs/ddoniger/>

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David D. Doniger

Policy Director, Climate Center

Natural Resources Defense Council

Please note our new address:

1152 15th Street, NW, Suite 300

Washington, DC 20005

Phone: (202) 289-2403

Cell: (202) 321-3435

Fax: (202) 789-0859

ddoniger@nrdc.org

on the web at [www.nrdc.org](http://www.nrdc.org)

read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

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Appellate Section

Environment and Natural Resources Division

United States Department of Justice

950 Pennsylvania Ave, NW

Washington, DC 20530

202-514-3785

David.Gunter2@usdoj.gov

**To:** michael.myers@ag.ny.gov[michael.myers@ag.ny.gov];  
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**Cc:** Kevin Culligan/DC/USEPA/US@EPA;Avi Garbow/DC/USEPA/US@EPA;Peter  
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lliott Zenick/DC/USEPA/US@EPA;[thomas.lorenzen@usdoj.gov]; thomas.lorenzen@usdoj.gov>[]  
**From:** "Doniger, David"  
**Sent:** Wed 10/5/2011 3:35:50 PM  
**Subject:** Re: Boiler NSPS settlement  
ddoniger@nrdc.org  
www.nrdc.org  
http://switchboard.nrdc.org/blogs/ddoniger/

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David Doniger  
NRDC  
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To: Joanne Spalding <Joanne.Spalding@sierraclub.org>; Michael J. Myers <Michael.Myers@ag.ny.gov>; Doniger, David; Megan Ceronsky <mceronsky@edf.org>; Morgan Costello <Morgan.Costello@ag.ny.gov>; Vickie Patton <vpatton@edf.org>  
Cc: Elliott Zenick <Zenick.Elliott@epamail.epa.gov>; Goffman.Joseph@epamail.epa.gov <Goffman.Joseph@epamail.epa.gov>; Lorenzen, Thomas (ENRD) <Thomas.Lorenzen@usdoj.gov>; hoffman.howard@epamail.epa.gov <hoffman.howard@epamail.epa.gov>  
Subject: RE: Boiler NSPS settlement


Everyone: I've just found out that Joe Goffman is held up in another meeting and will be unavailable to start the call until 12:15. Although I hate to change the schedule at the last minute, Joe knows the latest information that EPA can share and it would not be helpful to start without him. Please call in to the number below at 12:15 and we'll get started.

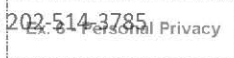
Thanks,  
Dave

From: Gunter, David (ENRD)  
Sent: Wednesday, September 28, 2011 10:44 AM  
To: 'Joanne Spalding'; 'Michael J. Myers'; 'ddoniger@nrdc.org'; 'Megan Ceronsky'; 'Morgan Costello'; 'Vickie Patton'  
Cc: 'Elliott Zenick'; 'Goffman.Joseph@epamail.epa.gov'; Lorenzen, Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Everyone:

This is a reminder that we'll have another call today at 12:00 ET. The call-in information is the same:

Dial  Ex. 6 - Personal Privacy  
866-410-9426

Conference code  Ex. 6 - Personal Privacy  
202-514-3785

Thanks,  
  
David Gunter

Appellate Section

Environment and Natural Resources Division

United States Department of Justice

950 Pennsylvania Ave, NW

Washington, DC 20530

202-514-3785

David.Gunter2@usdoj.gov

**To:** "ddoniger@nrdc.org" [ddoniger@nrdc.org]; 'Michael.Myers@ag.ny.gov'"  
 [Michael.Myers@ag.ny.gov]; 'david.gunter2@usdoj.gov'"  
 [david.gunter2@usdoj.gov]; 'Morgan.Costello@ag.ny.gov'"  
 [Morgan.Costello@ag.ny.gov]; egan Ceronsky [mceronsky@edf.org];  
 'Joanne.Spalding@sierraclub.org'" [Joanne.Spalding@sierraclub.org]  
**Cc:** Kevin Culligan/DC/USEPA/US@EPA;Avi Garbow/DC/USEPA/US@EPA;Peter  
 Tsirigotis/RTP/USEPA/US@EPA;Patricia Embrey/DC/USEPA/US@EPA;Joseph  
 Goffman/DC/USEPA/US@EPA;Howard Hoffman/DC/USEPA/US@EPA;Scott  
 Jordan/DC/USEPA/US@EPA;Kristi Smith/DC/USEPA/US@EPA;Elliott  
 Zenick/DC/USEPA/US@EPA;"thomas.lorenzen@usdoj.gov" [thomas.lorenzen@usdoj.gov];  
 vi Garbow/DC/USEPA/US@EPA;Peter Tsirigotis/RTP/USEPA/US@EPA;Patricia  
 Embrey/DC/USEPA/US@EPA;Joseph Goffman/DC/USEPA/US@EPA;Howard  
 Hoffman/DC/USEPA/US@EPA;Scott Jordan/DC/USEPA/US@EPA;Kristi  
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 [thomas.lorenzen@usdoj.gov]; risti Smith/DC/USEPA/US@EPA;Elliott  
 Zenick/DC/USEPA/US@EPA;"thomas.lorenzen@usdoj.gov" [thomas.lorenzen@usdoj.gov];  
 lliott Zenick/DC/USEPA/US@EPA;"thomas.lorenzen@usdoj.gov"  
 [thomas.lorenzen@usdoj.gov]; 'thomas.lorenzen@usdoj.gov'"  
 [thomas.lorenzen@usdoj.gov]  
**From:** Vickie Patton  
**Sent:** Wed 10/5/2011 3:45:34 PM  
**Subject:** Re: Boiler NSPS settlement  
[mime.htm](#)  
[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)  
[www.nrdc.org](http://www.nrdc.org)  
<http://switchboard.nrdc.org/blogs/ddoniger/>

EDF attorney Megan Ceronsky is available as well (I have a conflict).

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 To: michael.myers@ag.ny.gov <michael.myers@ag.ny.gov>; David.Gunter2@usdoj.gov  
 <David.Gunter2@usdoj.gov>; Morgan.Costello@ag.ny.gov <Morgan.Costello@ag.ny.gov>; Megan  
 Ceronsky; Vickie Patton; Joanne.Spalding@sierraclub.org <Joanne.Spalding@sierraclub.org>  
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 tsirigotis.peter@epa.gov <tsirigotis.peter@epa.gov>; Embrey.Patricia@epamail.epa.gov  
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<hoffman.howard@epamail.epa.gov>; Jordan.Scott@epamail.epa.gov <Jordan.Scott@epamail.epa.gov>;  
smith.kristi@epamail.epa.gov <smith.kristi@epamail.epa.gov>; Zenick.Elliott@epamail.epa.gov  
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NRDC  
202 321-3435

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To: 'David (ENRD) Gunter' <David.Gunter2@usdoj.gov>; Morgan Costello <Morgan.Costello@ag.ny.gov>;  
mceronsky@edf.org <mceronsky@edf.org>; vpatton@edf.org <vpatton@edf.org>; Doniger, David;  
Joanne.Spalding@sierraclub.org <Joanne.Spalding@sierraclub.org>  
Cc: culligan.kevin@epa.gov <culligan.kevin@epa.gov>; garbow.avi@epa.gov <garbow.avi@epa.gov>;  
tsirigotis.peter@epa.gov <tsirigotis.peter@epa.gov>; Embrey.Patricia@epamail.epa.gov  
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hoffman.howard@epamail.epa.gov <hoffman.howard@epamail.epa.gov>; Jordan.Scott@epamail.epa.gov  
<Jordan.Scott@epamail.epa.gov>; smith.kristi@epamail.epa.gov <smith.kristi@epamail.epa.gov>;  
Zenick.Elliott@epamail.epa.gov <Zenick.Elliott@epamail.epa.gov>; Thomas (ENRD) Lorenzen  
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Sent: Monday, October 03, 2011 6:10 PM  
To: Gunter, David (ENRD); Joanne.Spalding@sierraclub.org; michael.myers@ag.ny.gov; mceronsky@edf.org;  
Morgan.Costello@ag.ny.gov; vpatton@edf.org  
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Dave and others,

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David

David D. Doniger

Policy Director, Climate Center

Natural Resources Defense Council

Please note our new address:

1152 15th Street, NW, Suite 300

Washington, DC 20005

Phone: (202) 289-2403

Cell: (202) 321-3435

Fax: (202) 789-0859

ddoniger@nrdc.org

on the web at [www.nrdc.org](http://www.nrdc.org)

read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

From: Gunter, David (ENRD) [mailto:David.Gunter2@usdoj.gov]  
Sent: Friday, September 30, 2011 10:04 AM  
To: Doniger, David; Joanne.Spalding@sierraclub.org; michael.myers@ag.ny.gov; mceronsky@edf.org; Morgan.Costello@ag.ny.gov; vpatton@edf.org  
Cc: Zenick.Elliott@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Lorenzen, Thomas (ENRD); hoffman.howard@epamail.epa.gov; Embrey.Patricia@epamail.epa.gov  
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NRDC  
202 321-3435

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To: Gunter, David (ENRD); Joanne.Spalding@sierraclub.org; michael.myers@ag.ny.gov; mceronsky@edf.org; Morgan.Costello@ag.ny.gov; vpatton@edf.org  
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Folks,

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Could you, through Dave Gunter, propose a time tomorrow that would work for you?

David  
David Doniger  
NRDC  
202 321-3435

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David Gunter

Appellate Section

Environment and Natural Resources Division

United States Department of Justice

950 Pennsylvania Ave, NW

Washington, DC 20530

202-514-3785

David.Gunter2@usdoj.gov

This e-mail and any attachments may contain confidential and privileged information. If you are not the intended recipient, please notify the sender immediately by return e-mail, delete this e-mail and destroy any copies. Any dissemination or use of this information by a person other than the intended recipient is unauthorized and may be illegal.

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**To:** michael.myers@ag.ny.gov <michael.myers@ag.ny.gov>; David.Gunter2@usdoj.gov <David.Gunter2@usdoj.gov>; Morgan.Costello@ag.ny.gov <Morgan.Costello@ag.ny.gov>; Megan Ceronsky; Vickie Patton; Joanne.Spalding@sierraclub.org <Joanne.Spalding@sierraclub.org>  
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**Cc:** culligan.kevin@epa.gov <culligan.kevin@epa.gov>; garbow.avi@epa.gov <garbow.avi@epa.gov>; tsirigotis.peter@epa.gov <tsirigotis.peter@epa.gov>; Embrey.Patricia@epamail.epa.gov <Embrey.Patricia@epamail.epa.gov>; Goffman.Joseph@epamail.epa.gov <Goffman.Joseph@epamail.epa.gov>; hoffman.howard@epamail.epa.gov <hoffman.howard@epamail.epa.gov>; Jordan.Scott@epamail.epa.gov <Jordan.Scott@epamail.epa.gov>; smith.kristi@epamail.epa.gov <smith.kristi@epamail.epa.gov>; Zenick.Elliott@epamail.epa.gov <Zenick.Elliott@epamail.epa.gov>; Thomas (ENRD) Lorenzen <Thomas.Lorenzen@usdoj.gov>  
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Policy Director, Climate Center

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Washington, DC 20005

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Cell: (202) 321-3435

Fax: (202) 789-0859

[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)

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**From:** Gunter, David (ENRD) [mailto:David.Gunter2@usdoj.gov]

**Sent:** Wednesday, September 28, 2011 11:57 AM

**To:** Joanne Spalding <Joanne.Spalding@sierraclub.org>; Michael J. Myers <Michael.Myers@ag.ny.gov>; Doniger, David; Megan Ceronsky <mceronsky@edf.org>; Morgan Costello <Morgan.Costello@ag.ny.gov>; Vickie Patton <vpatton@edf.org>  
**Cc:** Elliott Zenick <Zenick.Elliott@epamail.epa.gov>; Goffman.Joseph@epamail.epa.gov <Goffman.Joseph@epamail.epa.gov>; Lorenzen, Thomas (ENRD) <Thomas.Lorenzen@usdoj.gov>; hoffman.howard@epamail.epa.gov <hoffman.howard@epamail.epa.gov>  
**Subject:** RE: Boiler NSPS settlement

Everyone: I've just found out that Joe Goffman is held up in another meeting and will be unavailable to start the call until 12:15. Although I hate to change the schedule at the last minute, Joe knows the latest information that EPA can share and it would not be helpful to start without him. Please call in to the number below at 12:15 and we'll get started.

Thanks,  
Dave

**From:** Gunter, David (ENRD)  
**Sent:** Wednesday, September 28, 2011 10:44 AM  
**To:** 'Joanne Spalding'; 'Michael J. Myers'; 'ddoniger@nrdc.org'; 'Megan Ceronsky'; 'Morgan Costello'; 'Vickie Patton'  
**Cc:** 'Elliott Zenick'; 'Goffman.Joseph@epamail.epa.gov'; Lorenzen, Thomas (ENRD)  
**Subject:** RE: Boiler NSPS settlement

Everyone:

This is a reminder that we'll have another call today at 12:00 ET. The call-in information is the same:

Dial 866-410-5426 Ex: 6 - Personal Privacy

Conference code 202-514-3795 Ex: 6 - Personal Privacy

Thanks,  
  
David Gunter

Appellate Section

Environment and Natural Resources Division

United States Department of Justice

950 Pennsylvania Ave, NW

Washington, DC 20530

202-514-3785

David.Gunter2@usdoj.gov

This e-mail and any attachments may contain confidential and privileged information. If you are not the intended recipient, please notify the sender immediately by return e-mail, delete this e-mail and destroy any copies. Any dissemination or use of this information by a person other than the intended recipient is unauthorized and may be illegal.

**To:** "Gunter, David (ENRD)" [David.Gunter2@usdoj.gov];  
Joanne.Spalding@sierraclub.org>;[michael.myers@ag.ny.gov];  
michael.myers@ag.ny.gov>;[mceronsky@edf.org];  
mceronsky@edf.org>;[Morgan.Costello@ag.ny.gov];  
Morgan.Costello@ag.ny.gov>;[vpatton@edf.org]; vpatton@edf.org>[]  
**Cc:** Elliott Zenick/DC/USEPA/US@EPA;Joseph  
Goffman/DC/USEPA/US@EPA;"Lorenzen, Thomas (ENRD)" [Thomas.Lorenzen@usdoj.gov];  
oseph Goffman/DC/USEPA/US@EPA;"Lorenzen, Thomas (ENRD)"  
[Thomas.Lorenzen@usdoj.gov]; Lorenzen, Thomas (ENRD)" [Thomas.Lorenzen@usdoj.gov];  
oward Hoffman/DC/USEPA/US@EPA;Patricia Embrey/DC/USEPA/US@EPA;Kristi  
Smith/DC/USEPA/US@EPA;Scott Jordan/DC/USEPA/US@EPA;Avi  
Garbow/DC/USEPA/US@EPA;Kevin Culligan/DC/USEPA/US@EPA;Peter  
Tsirigotis/RTP/USEPA/US@EPA[]; atricia Embrey/DC/USEPA/US@EPA;Kristi  
Smith/DC/USEPA/US@EPA;Scott Jordan/DC/USEPA/US@EPA;Avi  
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Jordan/DC/USEPA/US@EPA;Avi Garbow/DC/USEPA/US@EPA;Kevin  
Culligan/DC/USEPA/US@EPA;Peter Tsirigotis/RTP/USEPA/US@EPA[]; cott  
Jordan/DC/USEPA/US@EPA;Avi Garbow/DC/USEPA/US@EPA;Kevin  
Culligan/DC/USEPA/US@EPA;Peter Tsirigotis/RTP/USEPA/US@EPA[]; vi  
Garbow/DC/USEPA/US@EPA;Kevin Culligan/DC/USEPA/US@EPA;Peter  
Tsirigotis/RTP/USEPA/US@EPA[]; evin Culligan/DC/USEPA/US@EPA;Peter  
Tsirigotis/RTP/USEPA/US@EPA[]; eter Tsirigotis/RTP/USEPA/US@EPA[]  
**From:** "Doniger, David"  
**Sent:** Wed 10/5/2011 10:38:58 PM  
**Subject:** RE: Boiler NSPS settlement  
[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)  
[www.nrdc.org](http://www.nrdc.org)  
<http://switchboard.nrdc.org/blogs/ddoniger/>  
[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)  
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Dave,

I believe the other members of the petitioner side have already responded that they can do 11. I am now available also. So please confirm this time, and the number.

David

David D. Doniger

Policy Director, Climate Center

Natural Resources Defense Council



Please note our new address:

1152 15th Street, NW, Suite 300

Washington, DC 20005

Phone: (202) 289-2403

Cell: (202) 321-3435

Fax: (202) 789-0859

ddoniger@nrdc.org

on the web at [www.nrdc.org](http://www.nrdc.org)

read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

From: Gunter, David (ENRD) [mailto:David.Gunter2@usdoj.gov]

Sent: Wednesday, October 05, 2011 11:18 AM

To: Doniger, David; Joanne.Spalding@sierraclub.org; michael.myers@ag.ny.gov; mceronsky@edf.org;

Morgan.Costello@ag.ny.gov; vpatton@edf.org

Cc: Zenick.Elliott@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Lorenzen, Thomas (ENRD);

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Jordan.Scott@epamail.epa.gov; garbow.avi@epa.gov; culligan.kevin@epa.gov; tsirigotis.peter@epa.gov

Subject: RE: Boiler NSPS settlement

David: Is your group available tomorrow morning ET for a call to discuss this? Because we have west coast participants, I recommend 11:00 ET, 8:00 PT.

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From: Doniger, David [mailto:ddoniger@nrdc.org]

Sent: Monday, October 03, 2011 6:10 PM

To: Gunter, David (ENRD); Joanne.Spalding@sierraclub.org; michael.myers@ag.ny.gov; mceronsky@edf.org;

Morgan.Costello@ag.ny.gov; vpatton@edf.org

Cc: Zenick.Elliott@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Lorenzen, Thomas (ENRD);

hoffman.howard@epamail.epa.gov; Embrey.Patricia@epamail.epa.gov

Subject: RE: Boiler NSPS settlement

Dave and others,

I'm checking in to see if you have any update on EPA's deliberations, and if we should schedule a call for tomorrow or Wednesday.

David

David D. Doniger

Policy Director, Climate Center

Natural Resources Defense Council

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on the web at [www.nrdc.org](http://www.nrdc.org)

read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

From: Gunter, David (ENRD) [<mailto:David.Gunter2@usdoj.gov>]

Sent: Friday, September 30, 2011 10:04 AM

To: Doniger, David; [Joanne.Spalding@sierraclub.org](mailto:Joanne.Spalding@sierraclub.org); [michael.myers@ag.ny.gov](mailto:michael.myers@ag.ny.gov); [mceronsky@edf.org](mailto:mceronsky@edf.org);

[Morgan.Costello@ag.ny.gov](mailto:Morgan.Costello@ag.ny.gov); [vpatton@edf.org](mailto:vpatton@edf.org)

Cc: [Zenick.Elliott@epamail.epa.gov](mailto:Zenick.Elliott@epamail.epa.gov); [Goffman.Joseph@epamail.epa.gov](mailto:Goffman.Joseph@epamail.epa.gov); Lorenzen, Thomas (ENRD);

[hoffman.howard@epamail.epa.gov](mailto:hoffman.howard@epamail.epa.gov); [Embrey.Patricia@epamail.epa.gov](mailto:Embrey.Patricia@epamail.epa.gov)

Subject: RE: Boiler NSPS settlement

Yes, same number (see the thread below). Talk to you all at 11.

Dave Gunter

From: Doniger, David [mailto:ddoniger@nrdc.org]  
Sent: Thursday, September 29, 2011 5:38 PM  
To: Gunter, David (ENRD); Joanne.Spalding@sierraclub.org; michael.myers@ag.ny.gov; mceronsky@edf.org; Morgan.Costello@ag.ny.gov; vpatton@edf.org  
Cc: Zenick.Elliott@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Lorenzen, Thomas (ENRD); hoffman.howard@epamail.epa.gov  
Subject: Re: Boiler NSPS settlement

Yes that time will work. We will talk with you then. Same number?  
David Doniger  
NRDC  
202 321-3435

From: Gunter, David (ENRD) [mailto:David.Gunter2@usdoj.gov]  
Sent: Thursday, September 29, 2011 04:45 PM  
To: Doniger, David; Joanne.Spalding@sierraclub.org <Joanne.Spalding@sierraclub.org>; michael.myers@ag.ny.gov <michael.myers@ag.ny.gov>; mceronsky@edf.org <mceronsky@edf.org>; Morgan.Costello@ag.ny.gov <Morgan.Costello@ag.ny.gov>; vpatton@edf.org <vpatton@edf.org>  
Cc: Zenick.Elliott@epamail.epa.gov <Zenick.Elliott@epamail.epa.gov>; Goffman.Joseph@epamail.epa.gov <Goffman.Joseph@epamail.epa.gov>; Lorenzen, Thomas (ENRD) <Thomas.Lorenzen@usdoj.gov>; hoffman.howard@epamail.epa.gov <hoffman.howard@epamail.epa.gov>  
Subject: RE: Boiler NSPS settlement

David --

We are aware of the call and were just about to propose the same. We can speak tomorrow from 11-12 ET, using the same call-in information shown in the thread below. Will that work for your group?

Thanks,

Dave Gunter

From: Doniger, David [mailto:ddoniger@nrdc.org]  
Sent: Thursday, September 29, 2011 4:40 PM  
To: Gunter, David (ENRD); Joanne.Spalding@sierraclub.org; michael.myers@ag.ny.gov; mceronsky@edf.org;

Morgan.Costello@ag.ny.gov; vpatton@edf.org  
Cc: Zenick.Elliott@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Lorenzen, Thomas (ENRD);  
hoffman.howard@epamail.epa.gov  
Subject: Re: Boiler NSPS settlement

Folks,

Sorry for the late notice, but we would like to postpone our 5PM call until tomorrow, because our principals will be having a call with Lisa Jackson today at 4:45.

Could you, through Dave Gunter, propose a time tomorrow that would work for you?

David  
David Doniger  
NRDC  
202 321-3435

From: Gunter, David (ENRD) [mailto:David.Gunter2@usdoj.gov]  
Sent: Wednesday, September 28, 2011 11:57 AM  
To: Joanne Spalding <Joanne.Spalding@sierraclub.org>; Michael J. Myers <Michael.Myers@ag.ny.gov>; Doniger, David; Megan Ceronky <mceronsky@edf.org>; Morgan Costello <Morgan.Costello@ag.ny.gov>; Vickie Patton <vpattton@edf.org>  
Cc: Elliott Zenick <Zenick.Elliott@epamail.epa.gov>; Goffman.Joseph@epamail.epa.gov <Goffman.Joseph@epamail.epa.gov>; Lorenzen, Thomas (ENRD) <Thomas.Lorenzen@usdoj.gov>; hoffman.howard@epamail.epa.gov <hoffman.howard@epamail.epa.gov>  
Subject: RE: Boiler NSPS settlement

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Dave

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Sent: Wednesday, September 28, 2011 10:44 AM  
To: 'Joanne Spalding'; 'Michael J. Myers'; 'ddoniger@nrdc.org'; 'Megan Ceronky'; 'Morgan Costello'; 'Vickie Patton'  
Cc: 'Elliott Zenick'; 'Goffman.Joseph@epamail.epa.gov'; Lorenzen, Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Everyone:

This is a reminder that we'll have another call today at 12:00 ET. The call-in information is the same:

Dial Ex. 6 - Personal Privacy  
866-410-9426

Conference code 202-514-3785  
Ex. 6 - Personal Privacy

Thanks,

David Gunter

Appellate Section

Environment and Natural Resources Division

United States Department of Justice

950 Pennsylvania Ave, NW

Washington, DC 20530

202-514-3785

David.Gunter2@usdoj.gov

**To:** "Doniger, David" [ddoniger@nrdc.org];  
Joanne.Spalding@sierraclub.org>;[michael.myers@ag.ny.gov];  
michael.myers@ag.ny.gov>;[mceronsky@edf.org];  
mceronsky@edf.org>;[Morgan.Costello@ag.ny.gov];  
Morgan.Costello@ag.ny.gov>;[vpatton@edf.org]; vpatton@edf.org>[]  
**Cc:** Elliott Zenick/DC/USEPA/US@EPA;Joseph  
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oseph Goffman/DC/USEPA/US@EPA;"Lorenzen, Thomas (ENRD)"  
[Thomas.Lorenzen@usdoj.gov]; Lorenzen, Thomas (ENRD)" [Thomas.Lorenzen@usdoj.gov];  
oward Hoffman/DC/USEPA/US@EPA;Patricia Embrey/DC/USEPA/US@EPA;Kristi  
Smith/DC/USEPA/US@EPA;Scott Jordan/DC/USEPA/US@EPA;Avi  
Garbow/DC/USEPA/US@EPA;Kevin Culligan/DC/USEPA/US@EPA;Peter  
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Tsirigotis/RTP/USEPA/US@EPA[]; risti Smith/DC/USEPA/US@EPA;Scott  
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Jordan/DC/USEPA/US@EPA;Avi Garbow/DC/USEPA/US@EPA;Kevin  
Culligan/DC/USEPA/US@EPA;Peter Tsirigotis/RTP/USEPA/US@EPA[]; vi  
Garbow/DC/USEPA/US@EPA;Kevin Culligan/DC/USEPA/US@EPA;Peter  
Tsirigotis/RTP/USEPA/US@EPA[]; evin Culligan/DC/USEPA/US@EPA;Peter  
Tsirigotis/RTP/USEPA/US@EPA[]; eter Tsirigotis/RTP/USEPA/US@EPA[]  
**From:** "Gunter, David (ENRD)"  
**Sent:** Thur 10/6/2011 12:18:17 PM  
**Subject:** RE: Boiler NSPS settlement  
[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)  
[www.nrdc.org](http://www.nrdc.org)  
<http://switchboard.nrdc.org/blogs/ddoniger/>  
[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)  
[www.nrdc.org](http://www.nrdc.org)  
<http://switchboard.nrdc.org/blogs/ddoniger/>

Very good. We'll talk this morning at 11:00 ET, at the following number:

Dial 866-410-9426

Code 202-514-3785

Thanks,

Dave

From: Doniger, David [mailto:ddoniger@nrdc.org]  
Sent: Wednesday, October 05, 2011 6:39 PM  
To: Gunter, David (ENRD); Joanne.Spalding@sierraclub.org; michael.myers@ag.ny.gov;  
mceronsky@edf.org; Morgan.Costello@ag.ny.gov; vpatton@edf.org

**To:** "Doniger, David" [ddoniger@nrdc.org];  
Joanne.Spalding@sierraclub.org>;[michael.myers@ag.ny.gov];  
michael.myers@ag.ny.gov>;[mceronsky@edf.org];  
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Morgan.Costello@ag.ny.gov>;[vpatton@edf.org]; vpatton@edf.org>[]  
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Goffman/DC/USEPA/US@EPA;"Lorenzen, Thomas (ENRD)" [Thomas.Lorenzen@usdoj.gov];  
oseph Goffman/DC/USEPA/US@EPA;"Lorenzen, Thomas (ENRD)"  
[Thomas.Lorenzen@usdoj.gov]; Lorenzen, Thomas (ENRD)" [Thomas.Lorenzen@usdoj.gov];  
oward Hoffman/DC/USEPA/US@EPA;Patricia Embrey/DC/USEPA/US@EPA;Kristi  
Smith/DC/USEPA/US@EPA;Scott Jordan/DC/USEPA/US@EPA;Avi  
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Tsirigotis/RTP/USEPA/US@EPA[]; risti Smith/DC/USEPA/US@EPA;Scott  
Jordan/DC/USEPA/US@EPA;Avi Garbow/DC/USEPA/US@EPA;Kevin  
Culligan/DC/USEPA/US@EPA;Peter Tsirigotis/RTP/USEPA/US@EPA[]; cott  
Jordan/DC/USEPA/US@EPA;Avi Garbow/DC/USEPA/US@EPA;Kevin  
Culligan/DC/USEPA/US@EPA;Peter Tsirigotis/RTP/USEPA/US@EPA[]; vi  
Garbow/DC/USEPA/US@EPA;Kevin Culligan/DC/USEPA/US@EPA;Peter  
Tsirigotis/RTP/USEPA/US@EPA[]; evin Culligan/DC/USEPA/US@EPA;Peter  
Tsirigotis/RTP/USEPA/US@EPA[]; eter Tsirigotis/RTP/USEPA/US@EPA[]  
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[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)  
[www.nrdc.org](http://www.nrdc.org)  
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Very good. We'll talk this morning at 11:00 ET, at the following number:

Dial

Code  Privacy

Thanks,

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To: Gunter, David (ENRD); Joanne.Spalding@sierraclub.org; michael.myers@ag.ny.gov; mceronsky@edf.org;  
Morgan.Costello@ag.ny.gov; vpatton@edf.org  
Cc: Zenick.Elliott@epamail.epa.gov; Goffman.Joseph@epamail.epa.gov; Lorenzen, Thomas (ENRD);  
hoffman.howard@epamail.epa.gov; Embrey.Patricia@epamail.epa.gov  
Subject: RE: Boiler NSPS settlement

Dave and others,

I'm checking in to see if you have any update on EPA's deliberations, and if we should schedule a call for tomorrow or Wednesday.

David

David D. Doniger

Policy Director, Climate Center

Natural Resources Defense Council

Please note our new address:

1152 15th Street, NW, Suite 300

Washington, DC 20005

Phone: (202) 289-2403

Cell: (202) 321-3435

Fax: (202) 789-0859

ddoniger@nrdc.org

on the web at [www.nrdc.org](http://www.nrdc.org)

read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

From: Gunter, David (ENRD) [mailto:David.Gunter2@usdoj.gov]  
Sent: Friday, September 30, 2011 10:04 AM  
To: Doniger, David; Joanne.Spalding@sierraclub.org; michael.myers@ag.ny.gov; mceronsky@edf.org;  
Morgan.Costello@ag.ny.gov; vpatton@edf.org  
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hoffman.howard@epamail.epa.gov; Embrey.Patricia@epamail.epa.gov  
Subject: RE: Boiler NSPS settlement

Yes, same number (see the thread below). Talk to you all at 11.

Dave Gunter

From: Doniger, David [mailto:ddoniger@nrdc.org]  
Sent: Thursday, September 29, 2011 5:38 PM  
To: Gunter, David (ENRD); Joanne.Spalding@sierraclub.org; michael.myers@ag.ny.gov; mceronsky@edf.org;  
Morgan.Costello@ag.ny.gov; vpatton@edf.org  
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Subject: Re: Boiler NSPS settlement

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NRDC  
202 321-3435

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To: Doniger, David; Joanne.Spalding@sierraclub.org <Joanne.Spalding@sierraclub.org>; michael.myers@ag.ny.gov <michael.myers@ag.ny.gov>; mceronsky@edf.org <mceronsky@edf.org>; Morgan.Costello@ag.ny.gov <Morgan.Costello@ag.ny.gov>; vpatton@edf.org <vpatton@edf.org>  
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Subject: RE: Boiler NSPS settlement

David --

We are aware of the call and were just about to propose the same. We can speak tomorrow from 11-12 ET, using the same call-in information shown in the thread below. Will that work for your group?

Thanks,

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Sent: Thursday, September 29, 2011 4:40 PM  
To: Gunter, David (ENRD); Joanne.Spalding@sierraclub.org; michael.myers@ag.ny.gov; mceronsky@edf.org; Morgan.Costello@ag.ny.gov; vpatton@edf.org  
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Folks,

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Could you, through Dave Gunter, propose a time tomorrow that would work for you?

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David Doniger  
NRDC  
202 321-3435

From: Gunter, David (ENRD) [mailto:David.Gunter2@usdoj.gov]  
Sent: Wednesday, September 28, 2011 11:57 AM  
To: Joanne Spalding <Joanne.Spalding@sierraclub.org>; Michael J. Myers <Michael.Myers@ag.ny.gov>; Doniger, David; Megan Ceronky <mceronsky@edf.org>; Morgan Costello <Morgan.Costello@ag.ny.gov>; Vickie Patton <vpatton@edf.org>  
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<Goffman.Joseph@epamail.epa.gov>; Lorenzen, Thomas (ENRD) <Thomas.Lorenzen@usdoj.gov>;  
hoffman.howard@epamail.epa.gov <hoffman.howard@epamail.epa.gov>  
Subject: RE: Boiler NSPS settlement

Everyone: I've just found out that Joe Goffman is held up in another meeting and will be unavailable to start the call until 12:15. Although I hate to change the schedule at the last minute, Joe knows the latest information that EPA can share and it would not be helpful to start without him. Please call in to the number below at 12:15 and we'll get started.

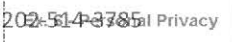
Thanks,  
Dave

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Cc: 'Elliott Zenick'; 'Goffman.Joseph@epamail.epa.gov'; Lorenzen, Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement

Everyone:

This is a reminder that we'll have another call today at 12:00 ET. The call-in information is the same:

Dial  866-410-9426

Conference code  202-514-3785

Thanks,

David Gunter

Appellate Section

Environment and Natural Resources Division

United States Department of Justice

950 Pennsylvania Ave, NW



<Goffman.Joseph@epamail.epa.gov>; Lorenzen, Thomas (ENRD) <Thomas.Lorenzen@usdoj.gov>;  
hoffman.howard@epamail.epa.gov <hoffman.howard@epamail.epa.gov>  
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David Gunter

Appellate Section  
Environment and Natural Resources Division  
United States Department of Justice  
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Washington, DC 20530

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David.Gunter2@usdoj.gov

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**To:** "Gunter, David (ENRD)" [David.Gunter2@usdoj.gov]; Doniger, David" [ddoniger@nrdc.org]; Joanne.Spalding@sierraclub.org"  
[Joanne.Spalding@sierraclub.org]; michael.myers@ag.ny.gov"  
[michael.myers@ag.ny.gov]; morgan.costello@ag.ny.gov"  
[morgan.costello@ag.ny.gov]  
**Cc:** Scott Jordan/DC/USEPA/US@EPA;Elliott Zenick/DC/USEPA/US@EPA;"Lorenzen, Thomas (ENRD)" [Thomas.Lorenzen@usdoj.gov]; Elliott Zenick/DC/USEPA/US@EPA;"Lorenzen, Thomas (ENRD)" [Thomas.Lorenzen@usdoj.gov]; Lorenzen, Thomas (ENRD)" [Thomas.Lorenzen@usdoj.gov]  
**From:** Vickie Patton  
**Sent:** Thur 3/3/2011 1:13:57 AM  
**Subject:** RE: Boiler NSPS settlement -- final notice of consent

David,

Thank you for the note.

Sincerely yours,  
Vickie

From: Gunter, David (ENRD) [mailto:David.Gunter2@usdoj.gov]  
Sent: Wednesday, March 02, 2011 1:31 PM  
To: Doniger, David; Joanne.Spalding@sierraclub.org; Vickie Patton; michael.myers@ag.ny.gov; morgan.costello@ag.ny.gov  
Cc: Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Lorenzen, Thomas (ENRD)  
Subject: Boiler NSPS settlement -- final notice of consent

Dear counsel:

Attached please find a letter indicating the United States' consent to the settlement in the potential Boiler NSPS litigation, after consideration of public comments. Since I do not have a full e-mail list for the state petitioners, I would appreciate if one of you would forward this letter to your petitioner group. Please contact me if you have any questions.

Regards,

David Gunter

Appellate Section

Environment and Natural Resources Division

United States Department of Justice

950 Pennsylvania Ave, NW

Washington, DC 20530

202-514-3785

David.Gunter2@usdoj.gov

This e-mail and any attachments may contain confidential and privileged information. If you are not the intended recipient, please notify the sender immediately by return e-mail, delete this e-mail and destroy any copies. Any dissemination or use of this information by a person other than the intended recipient is unauthorized and may be illegal.

Category or Project Name	Settlement, Court-Ordered or Other Status	Category Type	Proposal	Promulgation
<b>Agriculture and Forest Products</b>				
<b>Forest Products Manufacturing</b>				
Pulp and Paper MACT RTR	Court- Ordered	MACT	12/15/2011	7/31/2012
<b>Chemical Production and Distribution</b>				
<b>Generic Chemical Production Rules</b>				
National Uniform Emission Standards for Equipment Leaks and Ancillary Systems	Supports Court-Ordered Chemical & Refinery Sector Rules	MACT & NSPS	8/22/2011	8/25/2012
National Uniform Emission Standards for Wastewater Operations	Supports Court-Ordered Chemical & Refinery Sector Rules	MACT & NSPS	8/22/2011	8/25/2012
<b>Inorganic Chemical Production</b>				
Nitric Acid Plants	Court- Ordered	NSPS	9/30/2011	2/16/2012
<b>Organic Chemical Production</b>				
Ethylene Processes	Court- Ordered	MACT	11/30/2011	11/30/2012
Miscellaneous Organic NESHAP (MON)	Court- Ordered	MACT	11/30/2011	11/30/2012
Hazardous Organic NESHAP (HON)	Integral Part of Chemical Sector	MACT	11/30/2011	11/30/2012
Vinyl Chloride	Integral Part of Chemical Sector	MACT	11/30/2011	11/30/2012
Pesticide Active Ingredient	Court- Ordered	MACT	11/30/2011	11/30/2012
Polycarbonates	Court- Ordered	MACT	10/31/2012	10/31/2013
Acrylic and Modacrylic Fibers	Court- Ordered	MACT	10/31/2012	10/31/2013
Polyvinyl Chloride and Copolymer Production	Court- Ordered	MACT	4/15/2011	1/31/2012
Polyether Polyols	Court- Ordered	MACT	11/30/2011	11/30/2012
<b>Polymers and Resins Production</b>				
Polymers and Resins I	Court- Ordered	MACT	9/14/2010	3/31/2011
Polymers and Resins III	Court- Ordered	MACT	10/31/2012	10/31/2012
Polymers and Resins IV	Court- Ordered	MACT	11/30/2011	11/30/2012

Category or Project Name	Settlement, Court-Ordered or Other Status	Category Type	Proposal	Promulgation
<b>Consumer and Commercial Products Manufacturing</b>				
Flexible Polyurethane Foam Production	Court- Ordered	MACT	10/31/2012	10/31/2013
Aerospace NESHAP	Court- Ordered	MACT	8/31/2011	6/29/2012
National Emission Standards for Shipbuilding and Ship Repair (Surface Coatings)	Court- Ordered	MACT	12/3/2010	10/31/2011
<b>Furniture Manufacturing</b>				
Wood Furniture Surface Coatings	Court- Ordered	MACT	12/3/2010	10/31/2011
<b>Electric Utilities</b>				
Coal Preparation & Processing NSPS	Petition for reconsideration and judicial review	NSPS	3/14/2012	
EGU NSPS GHG	Court- Ordered	NSPS	9/30/2011	7/28/2012
Utility MACT	Court- Ordered	MACT	3/16/2011	11/16/2011
<b>Iron and Steel Production</b>				
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Ferroalloys Production Facilities	Court- Ordered	MACT	10/31/2011	6/29/2012
Stainless & Non-stainless Steel Manufacturing: Electric Arc Furnaces (EAF)	Voluntary Remand to address mercury	MACT	Feb, 2012	Dec, 2012
Integrated Iron and Steel Reconsideration	Voluntary Remand to address MACT	MACT	Aug, 2012	Aug, 2013
Steel Pickling	Court- Ordered	MACT	9/14/2012	8/15/2012
<b>Mineral Processing</b>				
<b>Clay Products Manufacturing</b>				
Brick & Structural Clay Products	Proposal to Address Court Vacature	MACT	3/30/2012	
<b>Fibrous Minerals Production</b>				
Mineral Wool	Court- Ordered	MACT	10/31/2011	6/29/2012
Wool Fiberglass	Court- Ordered	MACT	10/31/2011	6/29/2012
<b>Phosphate Rock Processing</b>				

Category or Project Name	Settlement, Court-Ordered or Other Status	Category Type	Proposal	Promulgation
Phosphate Fertilizer Production Plants	Court- Ordered	MACT	10/31/2012	10/31/2013
Phosphoric Acid Manufacturing Plants	Court- Ordered	MACT	10/31/2012	10/31/2013
<b>Non-Ferrous Metal Production and Electroplating</b>				
<b>Electroplating</b>				
Chrome Electroplating: Decorative, Hard, Chromic Acid Anodizing	Court- Ordered	MACT	9/14/2010	8/15/2012
Chrome Electroplating: Decorative, Hard, Chromic Acid Anodizing	Court- Ordered	MACT	9/14/2010	8/15/2012
<b>Non-Ferrous Metals Production</b>				
Primary Aluminum	Court- Ordered	MACT	10/31/2011	6/29/2012
Primary Lead Smelting	Court- Ordered	MACT	1/31/2011	10/31/2011
Secondary Aluminum Production	Court- Ordered	MACT	11/30/2011	8/31/2012
Secondary Lead Smelters	Court- Ordered	MACT	4/29/2011	12/16/2011
<b>Petroleum Refining and Distribution</b>				
<b>Petroleum Refining</b>				
Petroleum Refineries	Court- Ordered	NSPS	12/10/2011	11/10/2012
Petroleum Refineries I	Court- Ordered	MACT	12/10/2011	11/10/2012
Petroleum Refineries II	Court- Ordered	MACT	12/10/2011	11/10/2012
<b>SPPD Cross-Cutting Sector Activities and Infrastructure</b>				
<b>Monitoring for Regulatory Programs</b>				
Startup, Shutdown and Malfunction Amendments to Certain MACT Standards	Proposal to address court vacature	MACT	2/3/2012	2/3/2013
<b>Waste Management</b>				
<b>Incineration</b>				
<b>Landfill Municipal Waste Treatment and Disposal</b>				
Offsite Waste and Recovery RTR	Court- Ordered	MACT	10/31/2012	10/31/2013
<b>Oil &amp; Gas</b>				
Oil & Gas NSPS & MACT	Court- Ordered	MACT & NSPS	7/28/2011	2/28/2012



**To:** "Gunter, David (ENRD)" [David.Gunter2@usdoj.gov]  
**Cc:** ddoniger@nrdc.org; Joanne Spalding [Joanne.Spalding@sierraclub.org]; Joanne Spalding [Joanne.Spalding@sierraclub.org]; Megan Ceronisky [mceronsky@edf.org]; Michael J. Myers [Michael.Myers@ag.ny.gov]; Vickie Patton [vpatton@edf.org]  
**Bcc:** []  
**From:** CN=Patricia Embrey/OU=DC/O=USEPA/C=US  
**Sent:** Fri 10/14/2011 5:44:10 PM  
**Subject:** RE: NSPS/Revised letter

Me too.

From: "Gunter, David (ENRD)" <David.Gunter2@usdoj.gov>  
To: "Michael J. Myers" <Michael.Myers@ag.ny.gov>, Patricia Embrey/DC/USEPA/US@EPA  
Cc: <ddoniger@nrdc.org>, "Joanne Spalding" <Joanne.Spalding@sierraclub.org>, "Megan Ceronisky" <mceronsky@edf.org>, "Vickie Patton" <vpatton@edf.org>  
Date: 10/14/2011 01:41 PM  
Subject: RE: NSPS/Revised letter

Mike – thanks for giving me the chance to review this. It looks OK to me.

Dave

---

David Gunter  
Appellate Section, Environment and Natural Resources Division  
United States Department of Justice  
(202) 514-3785

From: Michael J. Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Friday, October 14, 2011 1:39 PM  
To: Gunter, David (ENRD); Embrey.Patricia@epamail.epa.gov  
Cc: ddoniger@nrdc.org; Joanne Spalding; 'Megan Ceronisky'; Vickie Patton  
Subject: NSPS/Revised letter

Dave and Patricia--Attached is a revised letter on settlement negotiations to reflect changes suggested by EPA/DOJ. If you confirm the new language is acceptable, I will finalize and send back to you. Thanks.--  
Mike

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**Cc:** Scott Jordan/DC/USEPA/US@EPA;Elliott Zenick/DC/USEPA/US@EPA[]; lliott  
Zenick/DC/USEPA/US@EPA[]  
**From:** "Doniger, David"  
**Sent:** Tue 5/31/2011 3:58:35 PM  
**Subject:** RE: Boiler NSPS settlement modification  
[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)  
[www.nrdc.org](http://www.nrdc.org)  
<http://switchboard.nrdc.org/blogs/ddoniger/>

Thanks, Dave,

We will review and respond shortly.

David

David D. Doniger

Policy Director, Climate Center

Natural Resources Defense Council

1200 New York Ave., NW

Washington, DC 20005

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Cell: (202) 321-3435

Fax: (202) 789-0859

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read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

From: Gunter, David (ENRD) [mailto:David.Gunter2@usdoj.gov]  
Sent: Tuesday, May 31, 2011 10:14 AM

To: Doniger, David; Joanne.Spalding@sierraclub.org; vpatton@environmentaldefense.org;  
michael.myers@ag.ny.gov; morgan.costello@ag.ny.gov  
Cc: Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov  
Subject: Boiler NSPS settlement modification

Dear counsel,

Attached please find a draft of the modification that we discussed to the Boiler NSPS agreement. We look forward to receiving your approval or comments. Thank you very much for accommodating us in this matter.

Regards,

David Gunter

Appellate Section

Environment and Natural Resources Division

United States Department of Justice

950 Pennsylvania Ave, NW

Washington, DC 20530

202-514-3785

David.Gunter2@usdoj.gov

**To:** "Morgan Costello" [Morgan.Costello@ag.ny.gov];  
vpatton@environmentaldefense.org>; "David Doniger" [ddoniger@nrdc.org]; David Doniger"  
[ddoniger@nrdc.org]; Joanne.Spalding@sierraclub.org>; "David (ENRD) Gunter"  
[David.Gunter2@usdoj.gov]; David (ENRD) Gunter" [David.Gunter2@usdoj.gov]  
**Cc:** Scott Jordan/DC/USEPA/US@EPA; Elliott Zenick/DC/USEPA/US@EPA[]; Iliott  
Zenick/DC/USEPA/US@EPA[]  
**From:** "Michael Myers"  
**Sent:** Wed 6/1/2011 3:09:22 PM  
**Subject:** RE: Boiler NSPS settlement modification  
APPELLATE #263457-v1-Boiler NSPS -- Agreement modification - Petitioners comments  
2.DOC  
[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)  
[www.nrdc.org](http://www.nrdc.org)  
<http://switchboard.nrdc.org/blogs/ddoniger/>

Dave, NY concurs with the comments in David's draft. As they are consistent with the revision concept that Morgan and I described to the other states, I expect that the other states will be okay with the draft as revised also. I've marked up David's revised draft to incorporate up-to-date signature block info for the states. Let us know how you'd like to proceed and what your proposed deadline is for signing the revised agreement (as you may recall, it usually takes some time for all of the states to get the necessary approvals). Thanks.

>>> "Doniger, David" <ddoniger@nrdc.org> 5/31/2011 7:06 PM >>>

Dave,

The draft you sent us earlier today is a good start; attached are a few edits that we would propose to make. Please let us know if these are acceptable. If you'd like to discuss them with me by phone, let me know.

David

David D. Doniger

Policy Director, Climate Center

Natural Resources Defense Council

1200 New York Ave., NW

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read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

From: Gunter, David (ENRD) [mailto:David.Gunter2@usdoj.gov]  
Sent: Tuesday, May 31, 2011 10:14 AM  
To: Doniger, David; Joanne.Spalding@sierraclub.org; vpatton@environmentaldefense.org;  
michael.myers@ag.ny.gov; morgan.costello@ag.ny.gov  
Cc: Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov  
Subject: Boiler NSPS settlement modification

Dear counsel,

Attached please find a draft of the modification that we discussed to the Boiler NSPS agreement. We look forward to receiving your approval or comments. Thank you very much for accommodating us in this matter.

Regards,

David Gunter

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Washington, DC 20530

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David.Gunter2@usdoj.gov

## **MODIFICATION TO SETTLEMENT AGREEMENT**

WHEREAS, on December 21, 2010, the following parties executed a “Settlement Agreement:” (1) the States of New York, California, Connecticut, Delaware, Maine, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, the District of Columbia, and the City of New York (collectively “State Petitioners”); and (2) Natural Resources Defense Council (NRDC), Sierra Club, and Environmental Defense Fund (EDF) (collectively “Environmental Petitioners”), and Respondent, the U.S. Environmental Protection Agency (“EPA”) (collectively “the Parties”);

WHEREAS, the Settlement Agreement became final on March 2, 2011;

WHEREAS, on September 24, 2007, in a case entitled *State of New York, et al. v. EPA*, No. 06-1322, the United States Court of Appeals for the District of Columbia Circuit remanded to EPA a final action entitled “Standards of Performance for Electric Utility Steam Generating Units, Industrial-Commercial-Institutional Steam Generating Units, and Small Industrial-Commercial-Institutional Steam Generating Units,” 71 Fed. Reg. 9,866 (Feb. 27, 2006) (the “Final Rule”);

WHEREAS, Petitioners subsequently notified EPA of their potential claims to compel EPA to take action pursuant to the remand of the Final Rule;

WHEREAS, the Settlement Agreement resolved those potential claims;

WHEREAS, Paragraph 1 of the Settlement Agreement provided that: “EPA will sign by July 26, 2011, and will transmit to the Office of the Federal Register within five business days, a proposed rule under section 111(b) that includes standards of performance for GHGs for new and modified EGUs that are subject to 40 C.F.R. part 60, subpart Da. EPA shall provide the State

and Environmental Petitioners a copy of the proposed rule within five business days of signature;”

WHEREAS, Paragraph 2 of the Settlement Agreement provided that: “EPA will also sign by July 26, 2011, and will transmit to the Office of the Federal Register within five business days, a proposed rule under section 111(d) that includes emissions guidelines for GHGs from existing EGUs that would have been subject to 40 C.F.R. part 60, subpart Da if they were new sources. EPA shall provide the State and Environmental Petitioners a copy of the proposed rule within five business days of signature;”

WHEREAS, Paragraph 10 of the Settlement Agreement provided that: “The provisions of this Settlement Agreement can be modified at any time by written mutual consent of the Parties;”

WHEREAS, EPA has engaged in an extensive public process in preparation of proposed rules that would satisfy its obligations under Paragraphs 1 and 2 of the Settlement Agreement, including five public “listening sessions” as well as additional meetings and discussions with a wide variety of public stakeholders;

WHEREAS, in the course of that public process, EPA has received a significant amount of useful information and ideas from a range of stakeholders concerning issues relevant to the proposed rules;

WHEREAS, EPA requires additional time to consider the information and ideas presented by the public stakeholders to EPA;

WHEREAS, the Parties desire to enable EPA to give due attention and consideration to all information and ideas presented to EPA in the public process leading to the proposed rules



while EPA remains committed to the date for taking final action as specified in paragraphs 3 and 4 of the Settlement Agreement;

WHEREAS, the Parties now desire to modify Paragraphs 1 and 2 of the Settlement Agreement;

NOW THEREFORE, without any change to any other part of the Settlement Agreement, the parties hereby agree as follows:

1. Paragraph 1 of the Settlement Agreement shall be stricken, and replaced with the following: "EPA will sign by September 30, 2011, and will transmit to the Office of the Federal Register within five business days, a proposed rule under section 111(b) that includes standards of performance for GHGs for new and modified EGUs that are subject to 40 C.F.R. part 60, subpart Da. EPA shall provide the State and Environmental Petitioners a copy of the proposed rule within five business days of signature."
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DATE: \_\_\_\_\_

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P.O. Box 23986  
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*Counsel for State of Oregon*

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*Counsel for State of Rhode Island*

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*Counsel for District of Columbia*

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CAROL IANCU  
Assistant Attorneys General  
Environmental Protection Division  
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Boston, Massachusetts 02108

*Counsel for Commonwealth of Massachusetts*

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CARRIE NOTEBOOM  
New York City Law Department  
100 Church Street  
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*Counsel for City of New York*

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Natural Resources Defense Council  
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DATE: \_\_\_\_\_

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Sierra Club  
85 Second Street  
San Francisco, CA 94105

*Counsel for Sierra Club*

DATE: \_\_\_\_\_

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VICKIE PATTON  
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*Counsel for Environmental Defense Fund*

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**Cc:** Scott Jordan/DC/USEPA/US@EPA;Elliott Zenick/DC/USEPA/US@EPA[]; Iliott Zenick/DC/USEPA/US@EPA[]  
**From:** "Doniger, David"  
**Sent:** Thur 6/2/2011 10:09:54 PM  
**Subject:** RE: Boiler NSPS settlement modification  
APPELLATE #263457-v2-Boiler NSPS -- Agreement modification petitioners' comments 6-2.DOC  
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Sent: Thursday, June 02, 2011 10:03 AM  
To: Michael Myers; Morgan Costello; vpatton@environmentaldefense.org; Doniger, David; Joanne.Spalding@sierraclub.org  
Cc: Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov  
Subject: RE: Boiler NSPS settlement modification

Everyone: Thanks for your comments and changes. We've accepted all of them except one: In the Whereas clause where you suggested we state that "EPA remains committed" to the final dates, we would prefer slightly softer language that states that the parties desire to give EPA more time to consider public comments "without any change to" the final dates. A draft reflecting these changes is attached. Please let us know whether this draft is acceptable. If it is OK with everyone (including all states), we can go ahead and get DOJ approval to sign the modification.

Thanks,

Dave

From: Michael Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Wednesday, June 01, 2011 11:09 AM  
To: Morgan Costello; vpatton@environmentaldefense.org; David Doniger; Joanne.Spalding@sierraclub.org; Gunter, David (ENRD)  
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To: Doniger, David; Joanne.Spalding@sierraclub.org; vpatton@environmentaldefense.org;

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WHEREAS, the Parties desire to enable EPA to give due attention and consideration to all information and ideas presented to EPA in the public process leading to the proposed rules,

without any change to the date for taking final action as specified in Paragraphs 3 and 4 of the Settlement Agreement;

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\_\_\_\_\_  
DAVID GUNTER

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Environment and Natural Resources Division  
Environmental Defense Section  
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Washington, D.C. 20026-3986

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*Counsel for State of Washington*

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*Counsel for Sierra Club*

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*Counsel for Environmental Defense Fund*

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**Cc:** Scott Jordan/DC/USEPA/US@EPA; Elliott Zenick/DC/USEPA/US@EPA[]; Iliott Zenick/DC/USEPA/US@EPA[]  
**From:** "Morgan Costello"  
**Sent:** Tue 6/7/2011 12:25:03 PM  
**Subject:** RE: Boiler NSPS settlement modification

All of the states have now signed off on the modification. We have some signature block edits, which we will forward to you later this morning.

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(518) 473-2534 (FAX)  
morgan.costello@ag.ny.gov

>>> "Gunter, David (ENRD)" <David.Gunter2@usdoj.gov> 6/3/2011 9:22 AM  
>>>

Thanks, David. My initial view is that the edits you propose are fine, so New York should let us know the states' view of the draft that you circulated.

EPA is interested in moving quickly to completion on this. After we have approval from the states, the next step is concurrence within DOJ, which I hope to expedite. When we have DOJ approval, I will collect signatures from all parties by PDF and circulate a final copy with signatures appended. It will be official at that point – no public comment period is necessary – but publicity is a separate question. I recommend that we keep this quiet until it is finalized and then reconvene on a call to discuss options for making the modification public.

Dave Gunter

From: Doniger, David [mailto:ddoniger@nrdc.org]  
Sent: Thursday, June 02, 2011 6:10 PM  
To: Gunter, David (ENRD); Michael Myers; Morgan Costello; vpatton@environmentaldefense.org; Joanne.Spalding@sierraclub.org  
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Subject: RE: Boiler NSPS settlement modification

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From: Michael Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Wednesday, June 01, 2011 11:09 AM  
To: Morgan Costello; vpatton@environmentaldefense.org; David Doniger; Joanne.Spalding@sierraclub.org; Gunter, David (ENRD)  
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Appellate Section

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United States Department of Justice

950 Pennsylvania Ave, NW

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202-514-3785

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**Cc:** Scott Jordan/DC/USEPA/US@EPA; Elliott Zenick/DC/USEPA/US@EPA[]; Iliott Zenick/DC/USEPA/US@EPA[]  
**From:** "Doniger, David"  
**Sent:** Sun 6/12/2011 9:38:31 PM  
**Subject:** RE: Boiler NSPS settlement modification

Dave,

Any update on the timing of approval and announcement?

David

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Sent: Tuesday, May 31, 2011 10:14 AM  
To: Doniger, David; Joanne.Spalding@sierraclub.org;  
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**Cc:** Scott Jordan/DC/USEPA/US@EPA; Elliott Zenick/DC/USEPA/US@EPA[]; Iliott Zenick/DC/USEPA/US@EPA[]  
**From:** "Gunter, David (ENRD)"  
**Sent:** Mon 6/13/2011 2:40:22 PM  
**Subject:** RE: Boiler NSPS settlement modification  
APPELLATE #263457-v3-Boiler NSPS -- Agreement modification.DOC

There has been one change in the final draft, to counsel information for EDF. This affects the signature page for NRDC, Sierra Club, EDF, and the City of New York. If those parties could please use the attached draft for your signature page, that will accommodate the change.

Thanks very much,

Dave Gunter

-----Original Message-----

From: Gunter, David (ENRD)  
Sent: Monday, June 13, 2011 9:10 AM  
To: 'Doniger, David'; Morgan Costello; Michael Myers; vpatton@environmentaldefense.org; Joanne.Spalding@sierraclub.org  
Cc: Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov  
Subject: RE: Boiler NSPS settlement modification

I received word over the weekend that we have final approval from DOJ. I do still need to collect signatures from everyone, so please forward those at your earliest convenience, so we can have them all before anyone makes a public statement. Scanned signatures are fine; I will collate them and send everyone a final copy of the agreement modification. I don't know that we have plan for any EPA announcements, but EPA has notified its press office to be prepared for inquiries.

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Sent: Sunday, June 12, 2011 5:39 PM  
To: Gunter, David (ENRD); Morgan Costello; Michael Myers; vpatton@environmentaldefense.org; Joanne.Spalding@sierraclub.org  
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ddoniger@nrdc.org

on the web at [www.nrdc.org](http://www.nrdc.org) <<http://www.nrdc.org>>

read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

From: Gunter, David (ENRD) [mailto:David.Gunter2@usdoj.gov]  
Sent: Tuesday, May 31, 2011 10:14 AM  
To: Doniger, David; Joanne.Spalding@sierraclub.org;  
vpatton@environmentaldefense.org; michael.myers@ag.ny.gov;



morgan.costello@ag.ny.gov  
Cc: Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov  
Subject: Boiler NSPS settlement modification

Dear counsel,

Attached please find a draft of the modification that we discussed to the Boiler NSPS agreement. We look forward to receiving your approval or comments. Thank you very much for accommodating us in this matter.

Regards,

David Gunter

Appellate Section

Environment and Natural Resources Division

United States Department of Justice

950 Pennsylvania Ave, NW

Washington, DC 20530

202-514-3785

David.Gunter2@usdoj.gov

## **MODIFICATION TO SETTLEMENT AGREEMENT**

WHEREAS, on December 21, 2010, the following parties executed a “Settlement Agreement:” (1) the States of New York, California, Connecticut, Delaware, Maine, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, the District of Columbia, and the City of New York (collectively “State Petitioners”); and (2) Natural Resources Defense Council (NRDC), Sierra Club, and Environmental Defense Fund (EDF) (collectively “Environmental Petitioners”), and Respondent, the U.S. Environmental Protection Agency (“EPA”) (collectively “the Parties”);

WHEREAS, the Settlement Agreement became final on March 2, 2011;

WHEREAS, on September 24, 2007, in a case entitled *State of New York, et al. v. EPA*, No. 06-1322, the United States Court of Appeals for the District of Columbia Circuit remanded to EPA a final action entitled “Standards of Performance for Electric Utility Steam Generating Units, Industrial-Commercial-Institutional Steam Generating Units, and Small Industrial-Commercial-Institutional Steam Generating Units,” 71 Fed. Reg. 9,866 (Feb. 27, 2006) (the “Final Rule”);

WHEREAS, Petitioners subsequently notified EPA of their potential claims to compel EPA to take action pursuant to the remand of the Final Rule;

WHEREAS, the Settlement Agreement resolves those potential claims;

WHEREAS, Paragraph 1 of the Settlement Agreement provided that: “EPA will sign by July 26, 2011, and will transmit to the Office of the Federal Register within five business days, a proposed rule under section 111(b) that includes standards of performance for GHGs for new and modified EGUs that are subject to 40 C.F.R. part 60, subpart Da. EPA shall provide the State

and Environmental Petitioners a copy of the proposed rule within five business days of signature;”

WHEREAS, Paragraph 2 of the Settlement Agreement provided that: “EPA will also sign by July 26, 2011, and will transmit to the Office of the Federal Register within five business days, a proposed rule under section 111(d) that includes emissions guidelines for GHGs from existing EGUs that would have been subject to 40 C.F.R. part 60, subpart Da if they were new sources. EPA shall provide the State and Environmental Petitioners a copy of the proposed rule within five business days of signature;”

WHEREAS, Paragraph 10 of the Settlement Agreement provided that: “The provisions of this Settlement Agreement can be modified at any time by written mutual consent of the Parties;”

WHEREAS, EPA has engaged in an extensive public process in preparation of proposed rules that would satisfy its obligation under Paragraphs 1 and 2 of the Settlement Agreement, including five public “listening sessions” as well as additional meetings and discussions with a wide variety of public stakeholders;

WHEREAS, in the course of that public process, EPA has received a significant amount of useful information and ideas from a range of public stakeholders concerning issues relevant to the proposed rule;

WHEREAS, EPA requires additional time to consider the information and ideas presented by the public stakeholders to EPA;

WHEREAS, the Parties desire to enable EPA to give due attention and consideration to all information and ideas presented to EPA in the public process leading to the proposed rules,

without any change to the date for taking final action as specified in Paragraphs 3 and 4 of the Settlement Agreement;

WHEREAS, the Parties now desire to modify Paragraphs 1 and 2 of the Settlement Agreement;

NOW THEREFORE, without any change to any other part of the Settlement Agreement, the parties hereby agree as follows:

1. Paragraph 1 of the Settlement Agreement shall be stricken, and replaced with the following: "EPA will sign by September 30, 2011, and will transmit to the Office of the Federal Register within five business days, a proposed rule under section 111(b) that includes standards of performance for GHGs for new and modified EGUs that are subject to 40 C.F.R. part 60, subpart Da. EPA shall provide the State and Environmental Petitioners a copy of the proposed rule within five business days of signature."
2. Paragraph 2 of the Settlement Agreement shall be stricken, and replaced with the following: "EPA will also sign by September 30, 2011, and will transmit to the Office of the Federal Register within five business days, a proposed rule under section 111(d) that includes emissions guidelines for GHGs from existing EGUs that would have been subject to 40 C.F.R. part 60, subpart Da if they were new sources. EPA shall provide the State and Environmental Petitioners a copy of the proposed rule within five business days of signature."

DATE: \_\_\_\_\_

\_\_\_\_\_  
DAVID GUNTER

U.S. Department of Justice  
Environment and Natural Resources Division  
Environmental Defense Section  
P.O. Box 23986  
Washington, D.C. 20026-3986

*Counsel for U.S. Environmental Protection Agency*

DATE: \_\_\_\_\_

\_\_\_\_\_  
MICHAEL J. MYERS  
MORGAN A. COSTELLO  
Assistant Attorneys General  
Environmental Protection Bureau  
Office of the Attorney General  
The Capitol  
Albany, New York 12224

*Counsel for State of New York*

DATE: \_\_\_\_\_

\_\_\_\_\_  
SUSAN DURBIN  
Office of the Attorney General, State of California  
1300 I Street  
P.O. Box 944255  
Oakland, CA 94244-2550

*Counsel for State of California*

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KIMBERLY MASSICOTTE  
MATTHEW I. LEVINE  
Office of the Attorney General  
Assistant Attorney General  
P.O. Box 120, 55 Elm Street  
Hartford, Connecticut 06141-0120

*Counsel for State of Connecticut*

DATE: \_\_\_\_\_

\_\_\_\_\_  
VALERIE M. SATTERFIELD

Deputy Attorney General  
Department of Justice  
102 W. Water Street  
Dover, DE 19904

*Counsel for State of Delaware*

DATE: \_\_\_\_\_

GERALD D. REID  
Assistant Attorney General  
Department of the Attorney General  
State House Station #6  
Augusta, Maine 04333-0006

*Counsel for State of Maine*

DATE: \_\_\_\_\_

SETH COHEN  
STEPHEN R. FARRIS  
JUDITH ANN MOORE  
Assistant Attorneys General  
P.O. Drawer 1508  
Santa Fe, New Mexico 87504-1508

*Counsel for State of New Mexico*

DATE: \_\_\_\_\_

PAUL LOGAN  
Assistant Attorney General  
1162 Court Street, N.E.  
Salem, Oregon 97301

*Counsel for State of Oregon*

DATE: \_\_\_\_\_

GREGORY S. SCHULTZ  
MICHAEL RUBIN  
Assistant Attorneys General  
Department of the Attorney General  
150 South Main Street  
Providence, Rhode Island 02903

*Counsel for State of Rhode Island*

DATE: \_\_\_\_\_

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THEA J. SCHWARTZ  
Assistant Attorney General  
Office of the Attorney General  
109 State Street  
Montpelier, VT 05609-1001

*Counsel for State of Vermont*

DATE: \_\_\_\_\_

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LESLIE R. SEFFERN  
Assistant Attorney General  
Office of the Attorney General  
P.O. Box 40117  
Olympia, Washington 98504

*Counsel for State of Washington*

DATE: \_\_\_\_\_

\_\_\_\_\_  
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Deputy Solicitor General  
Department of the Environment  
441 Fourth Street, N.W.  
Washington, D.C. 20001

*Counsel for District of Columbia*

DATE: \_\_\_\_\_

\_\_\_\_\_  
WILLIAM L. PARDEE  
CAROL IANCU  
Assistant Attorneys General  
Environmental Protection Division  
One Ashburton Place  
Boston, Massachusetts 02108

*Counsel for Commonwealth of Massachusetts*





DATE: \_\_\_\_\_

CHRISTOPHER G. KING  
CARRIE NOTEBOOM  
New York City Law Department  
100 Church Street  
New York, NY 10007

*Counsel for City of New York*

DATE: \_\_\_\_\_

DAVID D. DONIGER  
Natural Resources Defense Council  
1200 New York Avenue NW, Suite 400  
Washington, DC 20005

*Counsel for Natural Resources Defense Council*

DATE: \_\_\_\_\_

JOANNE SPALDING  
Sierra Club  
85 Second Street  
San Francisco, CA 94105

*Counsel for Sierra Club*

DATE: \_\_\_\_\_

MEGAN CERONSKY  
Environmental Defense Fund  
2060 Broadway, Suite 300  
Boulder, CO 80302

*Counsel for Environmental Defense Fund*

**To:** "Gunter, David (ENRD)" [David.Gunter2@usdoj.gov]; Morgan Costello" [Morgan.Costello@ag.ny.gov]; Michael Myers" [Michael.Myers@ag.ny.gov]; vpatton@environmentaldefense.org>; Joanne.Spalding@sierraclub.org>[]  
**Cc:** Scott Jordan/DC/USEPA/US@EPA; Elliott Zenick/DC/USEPA/US@EPA[]; Iliott Zenick/DC/USEPA/US@EPA[]  
**From:** "Doniger, David"  
**Sent:** Mon 6/13/2011 3:02:41 PM  
**Subject:** RE: Boiler NSPS settlement modification

Dave,

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David

David D. Doniger  
Policy Director, Climate Center  
Natural Resources Defense Council  
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Washington, DC 20005  
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**Cc:** Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov  
**Subject:** RE: Boiler NSPS settlement modification

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Dave Gunter

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**Sent:** Sunday, June 12, 2011 5:39 PM  
**To:** Gunter, David (ENRD); Morgan Costello; Michael Myers; vpatton@environmentaldefense.org; Joanne.Spalding@sierraclub.org  
**Cc:** Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov  
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Subject: RE: Boiler NSPS settlement modification

All of the states have now signed off on the modification. We have some signature block edits, which we will forward to you later this morning.

Morgan A. Costello  
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NYS Office of the Attorney General  
Environmental Protection Bureau  
The Capitol  
Albany, NY 12224-0341  
(518) 473-5843  
(518) 473-2534 (FAX)

morgan.costello@ag.ny.gov

>>> "Gunter, David (ENRD)" <David.Gunter2@usdoj.gov> 6/3/2011 9:22 AM  
>>>

Thanks, David. My initial view is that the edits you propose are fine, so New York should let us know the states' view of the draft that you circulated.

EPA is interested in moving quickly to completion on this. After we have approval from the states, the next step is concurrence within DOJ, which I hope to expedite. When we have DOJ approval, I will collect signatures from all parties by PDF and circulate a final copy with signatures appended. It will be official at that point – no public comment period is necessary – but publicity is a separate question. I recommend that we keep this quiet until it is finalized and then reconvene on a call to discuss options for making the modification public.

Dave Gunter

From: Doniger, David [mailto:ddoniger@nrdc.org]  
Sent: Thursday, June 02, 2011 6:10 PM  
To: Gunter, David (ENRD); Michael Myers; Morgan Costello;  
vpatton@environmentaldefense.org; Joanne.Spalding@sierraclub.org  
Cc: Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov  
Subject: RE: Boiler NSPS settlement modification

Dave,

The environmental petitioners are OK with this draft, with the correction of a couple of typos and small wording issues that we've spotted in a final read (see attached). I am counting on NY to let you know for the states.

As for next steps, how do you propose to collect signatures? When would you want to finalize this? And since this is not going to be filed with the court, what is the mechanism going to be for making it official and public?

David

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Sent: Thursday, June 02, 2011 10:03 AM  
To: Michael Myers; Morgan Costello; vpatton@environmentaldefense.org;  
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Subject: RE: Boiler NSPS settlement modification

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Thanks,

Dave

From: Michael Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Wednesday, June 01, 2011 11:09 AM  
To: Morgan Costello; vpatton@environmentaldefense.org; David Doniger;  
Joanne.Spalding@sierraclub.org; Gunter, David (ENRD)  
Cc: Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov  
Subject: RE: Boiler NSPS settlement modification

Dave, NY concurs with the comments in David's draft. As they are consistent with the revision concept that Morgan and I described to the other states, I expect that the other states will be okay with the draft as revised also. I've marked up David's revised draft to incorporate up-to-date signature block info for the states. Let us know how you'd like to proceed and what your proposed deadline is for signing the revised agreement (as you may recall, it usually takes some time for all of the states to get the necessary approvals). Thanks.

>>> "Doniger, David" <ddoniger@nrdc.org> 5/31/2011 7:06 PM >>>

Dave,

The draft you sent us earlier today is a good start; attached are a few edits that we would propose to make. Please let us know if these are acceptable. If you'd like to discuss them with me by phone, let me know.

David

David D. Doniger

Policy Director, Climate Center

Natural Resources Defense Council

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**From:** "Gunter, David (ENRD)"  
**Sent:** Mon 6/13/2011 3:33:44 PM  
**Subject:** RE: Boiler NSPS settlement modification

I checked with EPA on this, and it sounds like the press office is planning to post the modification on the web site as soon as we receive signature. If you want us to hold that posting so that we can coordinate, we can probably arrange that.

Dave Gunter

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Subject: RE: Boiler NSPS settlement modification

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>>> "Doniger, David" <ddoniger@nrdc.org> 5/31/2011 7:06 PM >>>

Dave,

The draft you sent us earlier today is a good start; attached are a few edits that we would propose to make. Please let us know if these are acceptable. If you'd like to discuss them with me by phone, let me know.

David

David D. Doniger

Policy Director, Climate Center

Natural Resources Defense Council

1200 New York Ave., NW

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Phone: (202) 289-2403

Cell: (202) 321-3435

Fax: (202) 789-0859

[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)

on the web at [www.nrdc.org](http://www.nrdc.org) <<http://www.nrdc.org>>

read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

From: Gunter, David (ENRD) [<mailto:David.Gunter2@usdoj.gov>]

Sent: Tuesday, May 31, 2011 10:14 AM

To: Doniger, David; [Joanne.Spalding@sierraclub.org](mailto:Joanne.Spalding@sierraclub.org);

[vpatton@environmentaldefense.org](mailto:vpatton@environmentaldefense.org); [michael.myers@ag.ny.gov](mailto:michael.myers@ag.ny.gov);

[morgan.costello@ag.ny.gov](mailto:morgan.costello@ag.ny.gov)

Cc: [Jordan.Scott@epamail.epa.gov](mailto:Jordan.Scott@epamail.epa.gov); [Zenick.Elliott@epamail.epa.gov](mailto:Zenick.Elliott@epamail.epa.gov)

Subject: Boiler NSPS settlement modification

Dear counsel,

Attached please find a draft of the modification that we discussed to the Boiler NSPS agreement. We look forward to receiving your approval or comments. Thank you very much for accommodating us in this matter.

Regards,

David Gunter

Appellate Section

Environment and Natural Resources Division

United States Department of Justice

950 Pennsylvania Ave, NW

Washington, DC 20530

202-514-3785

David.Gunter2@usdoj.gov

**To:** "Michael Myers" [Michael.Myers@ag.ny.gov];  
vpatton@environmentaldefense.org>; "David Doniger" [ddoniger@nrdc.org]; David Doniger"  
[ddoniger@nrdc.org]; Joanne.Spalding@sierraclub.org>; [David.Gunter2@usdoj.gov];  
David.Gunter2@usdoj.gov>[]  
**Cc:** Patricia Embrey/DC/USEPA/US@EPA; Scott Jordan/DC/USEPA/US@EPA; Elliott  
Zenick/DC/USEPA/US@EPA[]; cott Jordan/DC/USEPA/US@EPA; Elliott  
Zenick/DC/USEPA/US@EPA[]; lliott Zenick/DC/USEPA/US@EPA[]  
**From:** "Morgan Costello"  
**Sent:** Mon 6/13/2011 6:12:14 PM  
**Subject:** Re: Boiler NSPS settlement modification  
[Settlement Agreement Modification State Signature Pages.pdf](#)

Dave: Attached is a PDF of the state signature pages. Please keep us posted on when EPA/DOJ plans to make the modification public.

Thanks,

Morgan A. Costello  
Assistant Attorney General  
NYS Office of the Attorney General  
Environmental Protection Bureau  
The Capitol  
Albany, NY 12224-0341  
(518) 473-5843  
(518) 473-2534 (FAX)  
morgan.costello@ag.ny.gov

>>> "Doniger, David" <ddoniger@nrdc.org> 6/13/2011 11:44 AM >>>  
I think all we need is to know when EPA will do this, and then we can  
act at the same time. I think EPA/DOJ should assume all signatures will  
be in hand Wednesday. The announcement could be Thurs? Friday?

David Doniger, NRDC  
(202) 321-3435  
Sent from Blackberry

----- Original Message -----

From: Gunter, David (ENRD) [mailto:David.Gunter2@usdoj.gov]  
Sent: Monday, June 13, 2011 11:33 AM  
To: Doniger, David; Morgan Costello <Morgan.Costello@ag.ny.gov>;  
Michael Myers <Michael.Myers@ag.ny.gov>;  
vpatton@environmentaldefense.org <vpatton@environmentaldefense.org>;  
Joanne.Spalding@sierraclub.org <Joanne.Spalding@sierraclub.org>  
Cc: Jordan.Scott@epamail.epa.gov <Jordan.Scott@epamail.epa.gov>;  
Zenick.Elliott@epamail.epa.gov <Zenick.Elliott@epamail.epa.gov>;  
Embrey.Patricia@epamail.epa.gov <Embrey.Patricia@epamail.epa.gov>  
Subject: RE: Boiler NSPS settlement modification

I checked with EPA on this, and it sounds like the press office is  
planning to post the modification on the web site as soon as we receive  
signature. If you want us to hold that posting so that we can  
coordinate, we can probably arrange that.

Dave Gunter

-----Original Message-----

From: Doniger, David [mailto:ddoniger@nrdc.org]  
Sent: Monday, June 13, 2011 11:03 AM  
To: Gunter, David (ENRD); Morgan Costello; Michael Myers;  
vpatton@environmentaldefense.org; Joanne.Spalding@sierraclub.org  
Cc: Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov  
Subject: RE: Boiler NSPS settlement modification

Dave,

Would like to get EPA's confirmation that the agency will post the modification on the web page where the settlement now resides. And on the timing of that, once we all have signed.

David

David D. Doniger  
Policy Director, Climate Center  
Natural Resources Defense Council  
1200 New York Ave., NW  
Washington, DC 20005  
Phone: (202) 289-2403  
Cell: (202) 321-3435  
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ddoniger@nrdc.org  
on the web at [www.nrdc.org](http://www.nrdc.org)  
read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

-----Original Message-----

From: Gunter, David (ENRD) [mailto:David.Gunter2@usdoj.gov]  
Sent: Monday, June 13, 2011 9:10 AM  
To: Doniger, David; Morgan Costello; Michael Myers;  
vpatton@environmentaldefense.org; Joanne.Spalding@sierraclub.org  
Cc: Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov  
Subject: RE: Boiler NSPS settlement modification

I received word over the weekend that we have final approval from DOJ. I do still need to collect signatures from everyone, so please forward those at your earliest convenience, so we can have them all before anyone makes a public statement. Scanned signatures are fine; I will collate them and send everyone a final copy of the agreement modification. I don't know that we have plan for any EPA announcements, but EPA has notified its press office to be prepared for inquiries.

Dave Gunter

-----Original Message-----

From: Doniger, David [mailto:ddoniger@nrdc.org]  
Sent: Sunday, June 12, 2011 5:39 PM  
To: Gunter, David (ENRD); Morgan Costello; Michael Myers;  
vpatton@environmentaldefense.org; Joanne.Spalding@sierraclub.org



Cc: Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov  
Subject: RE: Boiler NSPS settlement modification

Dave,

Any update on the timing of approval and announcement?

David

David D. Doniger  
Policy Director, Climate Center  
Natural Resources Defense Council  
1200 New York Ave., NW  
Washington, DC 20005  
Phone: (202) 289-2403  
Cell: (202) 321-3435  
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ddoniger@nrdc.org  
on the web at [www.nrdc.org](http://www.nrdc.org)  
read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

-----Original Message-----

From: Gunter, David (ENRD) [mailto:David.Gunter2@usdoj.gov]  
Sent: Tuesday, June 07, 2011 8:27 AM  
To: Morgan Costello; Michael Myers; vpatton@environmentaldefense.org;  
Doniger, David; Joanne.Spalding@sierraclub.org  
Cc: Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov  
Subject: RE: Boiler NSPS settlement modification

Thank you very much. The next step is approval within DOJ, which I hope to expedite. Then signatures. When I receive your signature block changes, I'll circulate a final version to everyone to sign.

Thanks,  
Dave Gunter

-----Original Message-----

From: Morgan Costello [mailto:Morgan.Costello@ag.ny.gov]  
Sent: Tuesday, June 07, 2011 8:25 AM  
To: Michael Myers; vpatton@environmentaldefense.org; David Doniger;  
Joanne.Spalding@sierraclub.org; Gunter, David (ENRD)  
Cc: Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov  
Subject: RE: Boiler NSPS settlement modification

All of the states have now signed off on the modification. We have some signature block edits, which we will forward to you later this morning.

Morgan A. Costello  
Assistant Attorney General  
NYS Office of the Attorney General

Environmental Protection Bureau  
The Capitol  
Albany, NY 12224-0341  
(518) 473-5843  
(518) 473-2534 (FAX)  
morgan.costello@ag.ny.gov

>>> "Gunter, David (ENRD)" <David.Gunter2@usdoj.gov> 6/3/2011 9:22 AM  
>>>

Thanks, David. My initial view is that the edits you propose are fine,  
so New York should let us know the states' view of the draft that you  
circulated.

EPA is interested in moving quickly to completion on this. After we have approval from the states, the next step is concurrence within DOJ,  
which I hope to expedite. When we have DOJ approval, I will collect signatures from all parties by PDF and circulate a final copy with signatures appended. It will be official at that point – no public comment period is necessary – but publicity is a separate question. I  
recommend that we keep this quiet until it is finalized and then reconvene on a call to discuss options for making the modification public.

Dave Gunter

From: Doniger, David [mailto:ddoniger@nrdc.org]  
Sent: Thursday, June 02, 2011 6:10 PM  
To: Gunter, David (ENRD); Michael Myers; Morgan Costello; vpatton@environmentaldefense.org; Joanne.Spalding@sierraclub.org  
Cc: Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov  
Subject: RE: Boiler NSPS settlement modification

Dave,

The environmental petitioners are OK with this draft, with the correction of a couple of typos and small wording issues that we've spotted in a final read (see attached). I am counting on NY to let you know for the states.

As for next steps, how do you propose to collect signatures? When would you want to finalize this? And since this is not going to be filed with the court, what is the mechanism going to be for making it official and public?

David

David D. Doniger

Policy Director, Climate Center

Natural Resources Defense Council

1200 New York Ave., NW

Washington, DC 20005

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Cell: (202) 321-3435

Fax: (202) 789-0859

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on the web at [www.nrdc.org](http://www.nrdc.org) <<http://www.nrdc.org>>

read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

From: Gunter, David (ENRD) [<mailto:David.Gunter2@usdoj.gov>]  
Sent: Thursday, June 02, 2011 10:03 AM  
To: Michael Myers; Morgan Costello; [vpatton@environmentaldefense.org](mailto:vpatton@environmentaldefense.org);  
Doniger, David; Joanne.Spalding@sierraclub.org  
Cc: Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov  
Subject: RE: Boiler NSPS settlement modification

Everyone: Thanks for your comments and changes. Weve accepted all of them except one: In the Whereas clause where you suggested we state that "EPA remains committed" to the final dates, we would prefer slightly softer language that states that the parties desire to give EPA

more time to consider public comments "without any change to" the final dates. A draft reflecting these changes is attached. Please let us know whether this draft is acceptable. If it is OK with everyone (including all states), we can go ahead and get DOJ approval to sign the modification.

Thanks,

Dave

From: Michael Myers [mailto:Michael.Myers@ag.ny.gov]  
Sent: Wednesday, June 01, 2011 11:09 AM  
To: Morgan Costello; vpatton@environmentaldefense.org; David Doniger; Joanne.Spalding@sierraclub.org; Gunter, David (ENRD)  
Cc: Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov  
Subject: RE: Boiler NSPS settlement modification

Dave, NY concurs with the comments in David's draft. As they are consistent with the revision concept that Morgan and I described to the other states, I expect that the other states will be okay with the draft as revised also. I've marked up David's revised draft to incorporate up-to-date signature block info for the states. Let us know how you'd like to proceed and what your proposed deadline is for signing the revised agreement (as you may recall, it usually takes some time for all of the states to get the necessary approvals). Thanks.

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Sent: Tuesday, May 31, 2011 10:14 AM

To: Doniger, David; Joanne.Spalding@sierraclub.org;  
vpatton@environmentaldefense.org; michael.myers@ag.ny.gov;  
morgan.costello@ag.ny.gov

Cc: Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov

Subject: Boiler NSPS settlement modification

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*Counsel for U.S. Environmental Protection Agency*

DATE: 10/13/11

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MORGAN A. COSTELLO  
Assistant Attorneys General  
Environmental Protection Bureau  
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Albany, New York 12224

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DATE: 6/9/11

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*Counsel for State of California*

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*Counsel for State of Connecticut*

DATE: \_\_\_\_\_

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VALERIE M. SATTERFIELD  
Deputy Attorney General  
Department of Justice  
102 W. Water Street  
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*Counsel for U.S. Environmental Protection Agency*

DATE: 10/13/11

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Environmental Protection Bureau  
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Albany, New York 12224

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DATE: 6/9/11

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*Counsel for State of Connecticut*

DATE: 6/13/2011

  
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*Counsel for U.S. Environmental Protection Agency*

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DATE: 6/13/2011

  
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VALERIE M. SATTERFIELD  
Deputy Attorney General  
Department of Justice  
102 W. Water Street  
Dover, DE 19904

*Counsel for State of Delaware*

DATE: 2/13/11

  
GERALD D. REID  
Assistant Attorney General  
Department of the Attorney General  
State House Station #6  
Augusta, Maine 04333-0006

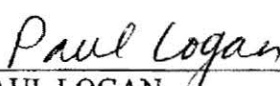
*Counsel for State of Maine*

DATE: \_\_\_\_\_

\_\_\_\_\_  
SETH COHEN  
STEPHEN R. FARRIS  
JUDITH ANN MOORE  
Assistant Attorneys General  
P.O. Drawer 1508  
Santa Fe, New Mexico 87504-1508

*Counsel for State of New Mexico*

DATE: 2/13/11

 (by mtc)  
\_\_\_\_\_  
PAUL LOGAN  
Assistant Attorney General  
1162 Court Street, N.E.  
Salem, Oregon 97301

*Counsel for State of Oregon*


DATE: \_\_\_\_\_

\_\_\_\_\_  
GREGORY S. SCHULTZ  
MICHAEL RUBIN  
Assistant Attorneys General  
Department of the Attorney General  
150 South Main Street  
Providence, Rhode Island 02903

*Counsel for State of Rhode Island*

*Counsel for State of Delaware*

DATE: 2/13/11

  
GERALD D. REID  
Assistant Attorney General  
Department of the Attorney General  
State House Station #6  
Augusta, Maine 04333-0006

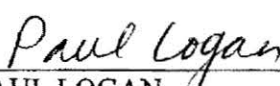
*Counsel for State of Maine*

DATE: \_\_\_\_\_

\_\_\_\_\_  
SETH COHEN  
STEPHEN R. FARRIS  
JUDITH ANN MOORE  
Assistant Attorneys General  
P.O. Drawer 1508  
Santa Fe, New Mexico 87504-1508

*Counsel for State of New Mexico*

DATE: 2/13/11

 (by mtc)  
\_\_\_\_\_  
PAUL LOGAN  
Assistant Attorney General  
1162 Court Street, N.E.  
Salem, Oregon 97301

*Counsel for State of Oregon*

DATE: \_\_\_\_\_

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GREGORY S. SCHULTZ  
MICHAEL RUBIN  
Assistant Attorneys General  
Department of the Attorney General  
150 South Main Street  
Providence, Rhode Island 02903

*Counsel for State of Rhode Island*


*Counsel for State of Delaware*

DATE: \_\_\_\_\_

\_\_\_\_\_  
GERALD D. REID  
Assistant Attorney General  
Department of the Attorney General  
State House Station #6  
Augusta, Maine 04333-0006

*Counsel for State of Maine*

DATE: 6/10/2011

  
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STEPHEN R. FARRIS  
JUDITH ANN MOORE  
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P.O. Drawer 1508  
Santa Fe, New Mexico 87504-1508

*Counsel for State of New Mexico*

DATE: \_\_\_\_\_

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PAUL LOGAN  
Assistant Attorney General  
1162 Court Street, N.E.  
Salem, Oregon 97301

*Counsel for State of Oregon*

DATE: \_\_\_\_\_

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GREGORY S. SCHULTZ  
MICHAEL RUBIN  
Assistant Attorneys General  
Department of the Attorney General  
150 South Main Street  
Providence, Rhode Island 02903

*Counsel for State of Rhode Island*


*Counsel for State of Delaware*

DATE: \_\_\_\_\_

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GERALD D. REID  
Assistant Attorney General  
Department of the Attorney General  
State House Station #6  
Augusta, Maine 04333-0006

*Counsel for State of Maine*

DATE: 6/10/2011

  
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SETH COHEN  
STEPHEN R. FARRIS  
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Assistant Attorneys General  
P.O. Drawer 1508  
Santa Fe, New Mexico 87504-1508

*Counsel for State of New Mexico*

DATE: \_\_\_\_\_

\_\_\_\_\_  
PAUL LOGAN  
Assistant Attorney General  
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Salem, Oregon 97301

*Counsel for State of Oregon*

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*Counsel for State of Delaware*

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GERALD D. REID  
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P.O. Drawer 1508  
Santa Fe, New Mexico 87504-1508

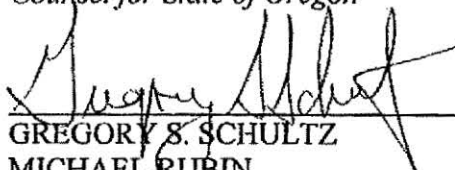
*Counsel for State of New Mexico*

DATE: \_\_\_\_\_

PAUL LOGAN  
Assistant Attorney General  
1162 Court Street, N.E.  
Salem, Oregon 97301

*Counsel for State of Oregon*

DATE: 6/9/2011

  
GREGORY S. SCHULTZ  
MICHAEL RUBIN  
Assistant Attorneys General  
Department of the Attorney General  
150 South Main Street  
Providence, Rhode Island 02903

*Counsel for State of Rhode Island*

*Counsel for State of Delaware*

DATE: \_\_\_\_\_

GERALD D. REID  
Assistant Attorney General  
Department of the Attorney General  
State House Station #6  
Augusta, Maine 04333-0006

*Counsel for State of Maine*

DATE: \_\_\_\_\_

SETH COHEN  
STEPHEN R. FARRIS  
JUDITH ANN MOORE  
Assistant Attorneys General  
P.O. Drawer 1508  
Santa Fe, New Mexico 87504-1508

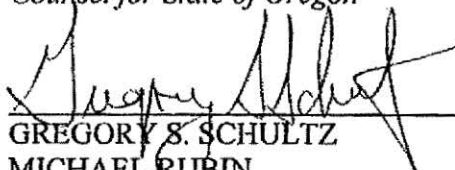
*Counsel for State of New Mexico*

DATE: \_\_\_\_\_

PAUL LOGAN  
Assistant Attorney General  
1162 Court Street, N.E.  
Salem, Oregon 97301

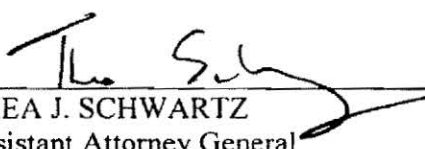
*Counsel for State of Oregon*

DATE: 6/9/2011

  
GREGORY S. SCHULTZ  
MICHAEL RUBIN  
Assistant Attorneys General  
Department of the Attorney General  
150 South Main Street  
Providence, Rhode Island 02903

*Counsel for State of Rhode Island*

DATE: 6/13/11

  
THEA J. SCHWARTZ  
Assistant Attorney General  
Office of the Attorney General  
109 State Street  
Montpelier, VT 05609-1001

*Counsel for State of Vermont*

DATE: \_\_\_\_\_

\_\_\_\_\_  
LESLIE R. SEFFERN  
Assistant Attorney General  
Office of the Attorney General  
P.O. Box 40117  
Olympia, Washington 98504

*Counsel for State of Washington*

DATE: \_\_\_\_\_

\_\_\_\_\_  
DONNA M. MURASKY  
Deputy Solicitor General  
Department of the Environment  
441 Fourth Street, N.W.  
Washington, D.C. 20001

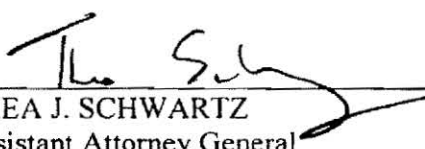
*Counsel for District of Columbia*

DATE: \_\_\_\_\_

\_\_\_\_\_  
WILLIAM L. PARDEE  
CAROL IANCU  
Assistant Attorneys General  
Environmental Protection Division  
One Ashburton Place  
Boston, Massachusetts 02108

*Counsel for Commonwealth of Massachusetts*

DATE: 6/13/11

  
THEA J. SCHWARTZ  
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Office of the Attorney General  
109 State Street  
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*Counsel for State of Vermont*

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*Counsel for District of Columbia*

DATE: \_\_\_\_\_

\_\_\_\_\_  
WILLIAM L. PARDEE  
CAROL IANCU  
Assistant Attorneys General  
Environmental Protection Division  
One Ashburton Place  
Boston, Massachusetts 02108


*Counsel for Commonwealth of Massachusetts*

DATE: \_\_\_\_\_

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THEA J. SCHWARTZ  
Assistant Attorney General  
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109 State Street  
Montpelier, VT 05609-1001

*Counsel for State of Vermont*

DATE: 6-9-11

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Olympia, Washington 98504

*Counsel for State of Washington*

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Department of the Environment  
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Washington, D.C. 20001

*Counsel for District of Columbia*

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WILLIAM L. PARDEE  
CAROL IANCU  
Assistant Attorneys General  
Environmental Protection Division  
One Ashburton Place  
Boston, Massachusetts 02108


*Counsel for Commonwealth of Massachusetts*

DATE: \_\_\_\_\_

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THEA J. SCHWARTZ  
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Office of the Attorney General  
109 State Street  
Montpelier, VT 05609-1001

*Counsel for State of Vermont*

DATE: 6-9-11

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Office of the Attorney General  
P.O. Box 40117  
Olympia, Washington 98504

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Washington, D.C. 20001

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Environmental Protection Division  
One Ashburton Place  
Boston, Massachusetts 02108

*Counsel for Commonwealth of Massachusetts*

DATE: \_\_\_\_\_

THEA J. SCHWARTZ  
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Office of the Attorney General  
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Montpelier, VT 05609-1001

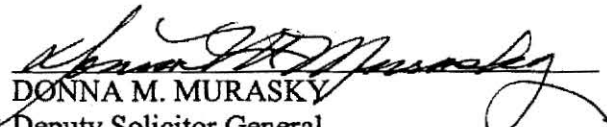
*Counsel for State of Vermont*

DATE: \_\_\_\_\_

LESLIE R. SEFFERN  
Assistant Attorney General  
Office of the Attorney General  
P.O. Box 40117  
Olympia, Washington 98504

*Counsel for State of Washington*

DATE: June 9 2011

  
DONNA M. MURASKY  
Deputy Solicitor General  
Department of the Environment  
441 Fourth Street, N.W.  
Washington, D.C. 20001

*Counsel for District of Columbia*

DATE: \_\_\_\_\_

WILLIAM L. PARDEE  
CAROL IANCU  
Assistant Attorneys General  
Environmental Protection Division  
One Ashburton Place  
Boston, Massachusetts 02108

*Counsel for Commonwealth of Massachusetts*

DATE: \_\_\_\_\_

THEA J. SCHWARTZ  
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Office of the Attorney General  
109 State Street  
Montpelier, VT 05609-1001

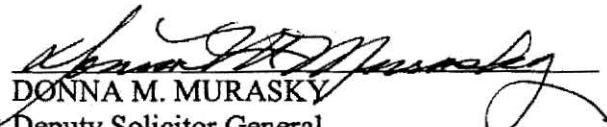
*Counsel for State of Vermont*

DATE: \_\_\_\_\_

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Office of the Attorney General  
P.O. Box 40117  
Olympia, Washington 98504

*Counsel for State of Washington*

DATE: June 9 2011

  
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Department of the Environment  
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*Counsel for District of Columbia*

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One Ashburton Place  
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*Counsel for Commonwealth of Massachusetts*



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*Counsel for State of Vermont*

DATE: \_\_\_\_\_

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Office of the Attorney General  
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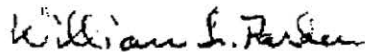
*Counsel for State of Washington*

DATE: \_\_\_\_\_

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Deputy Solicitor General  
Department of the Environment  
441 Fourth Street, N.W.  
Washington, D.C. 20001

*Counsel for District of Columbia*

DATE: June 9, 2011



WILLIAM L. PARDEE  
CAROL IANCU  
Assistant Attorneys General  
Environmental Protection Division  
One Ashburton Place  
Boston, Massachusetts 02108

*Counsel for Commonwealth of Massachusetts*

DATE: \_\_\_\_\_

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Office of the Attorney General  
109 State Street  
Montpelier, VT 05609-1001

*Counsel for State of Vermont*

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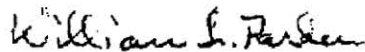
*Counsel for State of Washington*

DATE: \_\_\_\_\_

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Washington, D.C. 20001

*Counsel for District of Columbia*

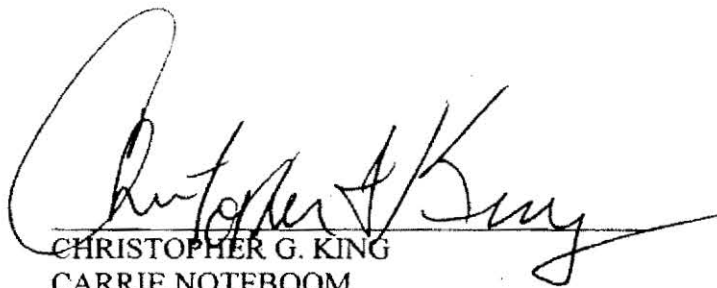
DATE: June 9, 2011



WILLIAM L. PARDEE  
CAROL IANCU  
Assistant Attorneys General  
Environmental Protection Division  
One Ashburton Place  
Boston, Massachusetts 02108

*Counsel for Commonwealth of Massachusetts*

DATE: 6/13/2011



CHRISTOPHER G. KING  
CARRIE NOTEBOOM  
New York City Law Department  
100 Church Street  
New York, NY 10007

*Counsel for City of New York*

DATE: \_\_\_\_\_

\_\_\_\_\_  
DAVID D. DONIGER  
Natural Resources Defense Council  
1200 New York Avenue NW, Suite 400  
Washington, DC 20005

*Counsel for Natural Resources Defense Council*

DATE: \_\_\_\_\_

\_\_\_\_\_  
JOANNE SPALDING  
Sierra Club  
85 Second Street  
San Francisco, CA 94105

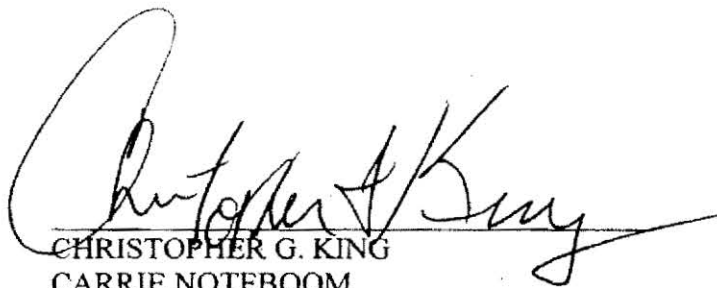
*Counsel for Sierra Club*

DATE: \_\_\_\_\_

\_\_\_\_\_  
MEGAN CERONSKY  
Environmental Defense Fund  
2060 Broadway, Suite 300  
Boulder, CO 80302

*Counsel for Environmental Defense Fund*

DATE: 6/13/2011



CHRISTOPHER G. KING  
CARRIE NOTEBOOM  
New York City Law Department  
100 Church Street  
New York, NY 10007

*Counsel for City of New York*

DATE: \_\_\_\_\_

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DAVID D. DONIGER  
Natural Resources Defense Council  
1200 New York Avenue NW, Suite 400  
Washington, DC 20005

*Counsel for Natural Resources Defense Council*

DATE: \_\_\_\_\_

\_\_\_\_\_  
JOANNE SPALDING  
Sierra Club  
85 Second Street  
San Francisco, CA 94105

*Counsel for Sierra Club*

DATE: \_\_\_\_\_

\_\_\_\_\_  
MEGAN CERONSKY  
Environmental Defense Fund  
2060 Broadway, Suite 300  
Boulder, CO 80302

*Counsel for Environmental Defense Fund*

**To:** "Gunter, David (ENRD)" [David.Gunter2@usdoj.gov]; oanne Spalding [Joanne.Spalding@sierraclub.org]; ddoniger@nrdc.org" [ddoniger@nrdc.org]; Michael.Myers@ag.ny.gov" [Michael.Myers@ag.ny.gov]; Morgan.Costello@ag.ny.gov" [Morgan.Costello@ag.ny.gov]; egan Ceronsky [mceronsky@edf.org]  
**Cc:** Scott Jordan/DC/USEPA/US@EPA;Elliott Zenick/DC/USEPA/US@EPA;Patricia Embrey/DC/USEPA/US@EPA;"Lorenzen, Thomas (ENRD)" [Thomas.Lorenzen@usdoj.gov]; lliott Zenick/DC/USEPA/US@EPA;Patricia Embrey/DC/USEPA/US@EPA;"Lorenzen, Thomas (ENRD)" [Thomas.Lorenzen@usdoj.gov]; atricia Embrey/DC/USEPA/US@EPA;"Lorenzen, Thomas (ENRD)" [Thomas.Lorenzen@usdoj.gov]; Lorenzen, Thomas (ENRD)" [Thomas.Lorenzen@usdoj.gov]  
**From:** Vickie Patton  
**Sent:** Tue 6/14/2011 1:29:47 PM  
**Subject:** RE: Boiler NSPS settlement modification

David, Thank you. Sincerely yours, Vickie

From: Gunter, David (ENRD) [mailto:David.Gunter2@usdoj.gov]  
Sent: Tuesday, June 14, 2011 7:16 AM  
To: Vickie Patton; Joanne Spalding; ddoniger@nrdc.org; Michael.Myers@ag.ny.gov; Morgan.Costello@ag.ny.gov; Megan Ceronsky  
Cc: Jordan.Scott@epamail.epa.gov; Zenick.Elliott@epamail.epa.gov; Embrey.Patricia@epamail.epa.gov; Lorenzen, Thomas (ENRD)  
Subject: RE: Boiler NSPS settlement modification

All: Attached please find a final, executed version of the Boiler NSPS modification. I understand that EPA's press office will make this available on the agency's web site today. We greatly appreciate your accommodation in this matter. Please let me know if you have any questions before EPA's next status letter is due on July 1.

Regards,

David Gunter

Appellate Section

Environment and Natural Resources Division

United States Department of Justice

950 Pennsylvania Ave, NW

Washington, DC 20530

202-514-3785

David.Gunter2@usdoj.gov

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**To:** "Joanne Spalding" [Joanne.Spalding@sierraclub.org]; Gunter, David (ENRD)" [David.Gunter2@usdoj.gov]  
**Cc:** CN=Patricia Embrey/OU=DC/O=USEPA/C=US@EPA;"Vickie\_Patton" [Vickie\_Patton@environmentaldefense.org]; Vickie\_Patton" [Vickie\_Patton@environmentaldefense.org]; ddoniger" [ddoniger@nrdc.org]; Michael Myers" [Michael.Myers@ag.ny.gov]; N=Avi Garbow/OU=DC/O=USEPA/C=US@EPA;CN=Elliott Zenick/OU=DC/O=USEPA/C=US@EPA;CN=Eric Ginsburg/OU=RTP/O=USEPA/C=US@EPA;CN=Peter Tsirigotis/OU=RTP/O=USEPA/C=US@EPA[]; N=Elliott Zenick/OU=DC/O=USEPA/C=US@EPA;CN=Eric Ginsburg/OU=RTP/O=USEPA/C=US@EPA;CN=Peter Tsirigotis/OU=RTP/O=USEPA/C=US@EPA[]; N=Eric Ginsburg/OU=RTP/O=USEPA/C=US@EPA;CN=Peter Tsirigotis/OU=RTP/O=USEPA/C=US@EPA[]; N=Peter Tsirigotis/OU=RTP/O=USEPA/C=US@EPA[]  
**From:** CN=Joseph Goffman/OU=DC/O=USEPA/C=US  
**Sent:** Fri 9/24/2010 3:14:27 PM  
**Subject:** Re: Resend: Combined state/environmental edits on draft

Joanne, Vickie, David and Mike - Thank you very much for getting this to us promptly. We will be conferring internally and getting in touch. Thanks, again.

From: Joanne Spalding [Joanne.Spalding@sierraclub.org]  
Sent: 09/24/2010 01:17 AM MST  
To: "Gunter, David (ENRD)" <David.Gunter2@usdoj.gov>  
Cc: Patricia Embrey; Vickie\_Patton@environmentaldefense.org; ddoniger@nrdc.org; Michael.Myers@ag.ny.gov; Avi Garbow; Elliott Zenick; Eric Ginsburg; Joseph Goffman; Peter Tsirigotis  
Subject: Resend: Combined state/environmental edits on draft

Resending because delivery to David Gunter failed the first time.

-----Joanne Spalding/Sierraclub wrote: -----

To: Embrey.Patricia@epamail.epa.gov  
From: Joanne Spalding/Sierraclub  
Date: 09/24/2010 01:12AM  
Cc: Vickie\_Patton@environmentaldefense.org, ddoniger@nrdc.org, Michael.Myers@ag.ny.gov, DGunter@ENRD.USDOJ.GOV, Garbow.Avi@epamail.epa.gov, Zenick.Elliott@epamail.epa.gov, Ginsburg.Eric@epamail.epa.gov, Goffman.Joseph@epamail.epa.gov, Tsirigotis.Peter@epamail.epa.gov  
Subject: Combined state/environmental edits on draft

CONFIDENTIAL

Thank you for offering the draft settlement agreement. It is a meaningful step toward resolving our claims. The attached version includes the combined proposed edits of the state and environmental petitioners. We have not made any changes to the schedule. We have, however, changed "addresses" to "includes" in paragraphs 1 and 2, as we discussed in our last call. We think it is very important that EPA

commit to proposing performance standards for greenhouse gas emissions from EGUs. EPA has already found that GHGs endanger health and welfare, and both individually and as a category, EGUs are the largest GHG emitters. Over the past year, EPA has examined a variety of effective methods to limit GHG emissions from EGUs, along with other stationary sources. We do not see any legal or technical obstacle that would preclude a commitment to including GHG performance standards in a proposed rule.

Our very cursory review of prior settlements has yielded several instances in which EPA has agreed to include specific content in proposed rules. In a number of situations, the settlement has recited at length the exact language that would appear in the proposed rule. A few sample settlements are attached. The circumstances of this case do not warrant a different treatment.

The attached draft also contains other edits, which we can explain further in our next conversation. We are available Friday to discuss these proposed changes and work together to resolve any remaining differences.

Joanne Spalding  
Managing Attorney  
Sierra Club  
85 Second Street, Second Floor  
San Francisco, CA 94105  
415-977-5725  
415-977-5793 (Fax)  
joanne.spalding@sierraclub.org

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This e-mail may contain privileged and confidential attorney-client communications and/or confidential attorney work product. If you receive this e-mail inadvertently, please reply and notify the sender and delete all versions on your system. Thank you.

[attachment "Draft EGU settlement Sept 21 NRDC-State-EDF comments 9-23 3pm - Circulate.doc" removed by Joanne Spalding/Sierraclub]

[attachment "UARG v. EPA settlement.pdf" removed by Joanne Spalding/Sierraclub]

[attachment "ACC v. EPA settlement.pdf" removed by Joanne Spalding/Sierraclub]

[attachment "API v. EPA settlement.pdf" removed by Joanne Spalding/Sierraclub]

[attachment "DENVER-#292635-v2-PANNA\_amended\_settlement\_agmt\_7\_30.DOC" removed by Joanne Spalding/Sierraclub]



**To:** ddoniger@nrdc.org[ddoniger@nrdc.org]; Joanne.Spalding@sierraclub.org>; "Megan Ceronsky" [mceronsky@edf.org]; Megan Ceronsky" [mceronsky@edf.org]; Vickie Patton" [vpatton@edf.org]; Michael.Myers@ag.ny.gov>; [Morgan.Costello@ag.ny.gov]; Morgan.Costello@ag.ny.gov>[]  
**Cc:** Elliott Zenick/DC/USEPA/US@EPA[]  
**From:** "Gunter, David (ENRD)"  
**Sent:** Thur 9/15/2011 6:11:51 PM  
**Subject:** Boiler NSPS settlement

Counsel:

EPA would like to hold a call today at 4:00 ET for whoever is available to discuss some recent media reports about the Boiler NSPS settlement. We can use the following call-in information:

Dial 866-410-9426

Conference Code 202-514-3785

Please let me know whether you can attend. I apologize for the short notice, but if there is anyone that cannot have a representative on the line, we'll follow up individually afterward.

Thanks,

David Gunter

Appellate Section

Environment and Natural Resources Division

United States Department of Justice

950 Pennsylvania Ave, NW

Washington, DC 20530

202-514-3785

David.Gunter2@usdoj.gov



**To:** "Gunter, David (ENRD)" [David.Gunter2@usdoj.gov];  
Joanne.Spalding@sierraclub.org>; "Megan Ceronsky" [mceronsky@edf.org]; Megan Ceronsky"  
[mceronsky@edf.org]; Vickie Patton" [vpatt@edf.org];  
Michael.Myers@ag.ny.gov>; [Morgan.Costello@ag.ny.gov]; Morgan.Costello@ag.ny.gov>[]  
**Cc:** Elliott Zenick/DC/USEPA/US@EPA[]  
**From:** "Doniger, David"  
**Sent:** Thur 9/15/2011 6:23:25 PM  
**Subject:** RE: Boiler NSPS settlement  
[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)  
[www.nrdc.org](http://www.nrdc.org)  
<http://switchboard.nrdc.org/blogs/ddoniger/>

I can be on the call.

David D. Doniger

Policy Director, Climate Center

Natural Resources Defense Council

Please note our new address:

1152 15th Street, NW, Suite 300

Washington, DC 20005

Phone: (202) 289-2403

Cell: (202) 321-3435

Fax: (202) 789-0859

[ddoniger@nrdc.org](mailto:ddoniger@nrdc.org)

on the web at [www.nrdc.org](http://www.nrdc.org)

read my blog: <http://switchboard.nrdc.org/blogs/ddoniger/>

From: Gunter, David (ENRD) [mailto:David.Gunter2@usdoj.gov]  
Sent: Thursday, September 15, 2011 2:12 PM  
To: Doniger, David; Joanne.Spalding@sierraclub.org; Megan Ceronsky; Vickie Patton;  
Michael.Myers@ag.ny.gov; Morgan.Costello@ag.ny.gov  
Cc: Elliott Zenick  
Subject: Boiler NSPS settlement

Counsel:

EPA would like to hold a call today at 4:00 ET for whoever is available to discuss some recent media reports about the Boiler NSPS settlement. We can use the following call-in information:

Dial Ex. 6 - Personal Privacy  
866-410-9426

Conference Code 202-514-3785  
Ex. 6 - Personal Privacy

Please let me know whether you can attend. I apologize for the short notice, but if there is anyone that cannot have a representative on the line, we'll follow up individually afterward.

Thanks,

David Gunter

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Environment and Natural Resources Division

United States Department of Justice

950 Pennsylvania Ave, NW

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[ddoniger@nrdc.org]; Joanne.Spalding@sierraclub.org"  
[Joanne.Spalding@sierraclub.org]; egan Ceronsky [mceronsky@edf.org];  
Michael.Myers@ag.ny.gov" [Michael.Myers@ag.ny.gov]; Morgan.Costello@ag.ny.gov"  
[Morgan.Costello@ag.ny.gov]  
**Cc:** Elliott Zenick/DC/USEPA/US@EPA[]  
**From:** Vickie Patton  
**Sent:** Thur 9/15/2011 6:25:13 PM  
**Subject:** RE: Boiler NSPS settlement

EDF is available.

From: Gunter, David (ENRD) [mailto:David.Gunter2@usdoj.gov]  
Sent: Thursday, September 15, 2011 12:12 PM  
To: ddoniger@nrdc.org; Joanne.Spalding@sierraclub.org; Megan Ceronsky; Vickie Patton;  
Michael.Myers@ag.ny.gov; Morgan.Costello@ag.ny.gov  
Cc: Elliott Zenick  
Subject: Boiler NSPS settlement

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Conference Code  202-514-2785 Ex. 6 - Personal Privacy

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Thanks,

David Gunter

Appellate Section

Environment and Natural Resources Division

United States Department of Justice

950 Pennsylvania Ave, NW

Washington, DC 20530

202-514-3785

David.Gunter2@usdoj.gov

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**To:** "David (ENRD) Gunter" [David.Gunter2@usdoj.gov]; organ Costello [Morgan.Costello@ag.ny.gov]; egan Ceronsky [mceronsky@edf.org]; ickie Patton [vpatton@edf.org]; ddoniger@nrdc.org" [ddoniger@nrdc.org]; Joanne.Spalding@sierraclub.org" [Joanne.Spalding@sierraclub.org]  
**Cc:** Elliott Zenick/DC/USEPA/US@EPA[]  
**From:** "Michael J. Myers"  
**Sent:** Thur 9/15/2011 6:58:09 PM  
**Subject:** RE: Boiler NSPS settlement

Yes, I'm available.

From: David (ENRD) Gunter [mailto:David.Gunter2@usdoj.gov]  
Sent: Thursday, September 15, 2011 2:12 PM  
To: Morgan Costello; Megan Ceronsky; Vickie Patton; Michael J. Myers; ddoniger@nrdc.org; Joanne.Spalding@sierraclub.org  
Cc: Elliott Zenick  
Subject: Boiler NSPS settlement

Counsel:

EPA would like to hold a call today at 4:00 ET for whoever is available to discuss some recent media reports about the Boiler NSPS settlement. We can use the following call-in information:

Dial Ex. 6 - Personal Privacy  
866-410-9426

Conference Code Ex. 6 - Personal Privacy  
202-544-2785

Please let me know whether you can attend. I apologize for the short notice, but if there is anyone that cannot have a representative on the line, we'll follow up individually afterward.

Thanks,

David Gunter

Appellate Section

Environment and Natural Resources Division

United States Department of Justice

950 Pennsylvania Ave, NW

Washington, DC 20530

202-514-3785

David.Gunter2@usdoj.gov



**To:** "Michael J. Myers" [Michael.Myers@ag.ny.gov]  
**Cc:** "David (ENRD) Gunter" [David.Gunter2@usdoj.gov]; ddoniger@nrdc.org  
[ddoniger@nrdc.org]; egan Ceronsky [mceronsky@edf.org]; organ Costello  
[Morgan.Costello@ag.ny.gov]; ickie Patton [vpatton@edf.org]; Iliott  
Zenick/DC/USEPA/US@EPA[]  
**From:** Joanne Spalding  
**Sent:** Thur 9/15/2011 7:00:54 PM  
**Subject:** RE: Boiler NSPS settlement  
<mailto:David.Gunter2@usdoj.gov>

I can join.

Joanne Spalding  
Managing Attorney  
Sierra Club  
85 Second Street, Second Floor  
San Francisco, CA 94105  
415-977-5725  
415-977-5793 (Fax)  
[joanne.spalding@sierraclub.org](mailto:joanne.spalding@sierraclub.org)

CONFIDENTIAL LEGAL COMMUNICATION/WORK PRODUCT

This e-mail may contain privileged and confidential attorney-client communications and/or confidential attorney work product. If you receive this e-mail inadvertently, please reply and notify the sender and delete all versions on your system. Thank you.

**From:** "Michael J. Myers" <Michael.Myers@ag.ny.gov>  
**To:** "David (ENRD) Gunter" <David.Gunter2@usdoj.gov>, Morgan Costello  
<Morgan.Costello@ag.ny.gov>, Megan Ceronsky <mceronsky@edf.org>, Vickie Patton  
<vpatton@edf.org>, "ddoniger@nrdc.org" <ddoniger@nrdc.org>, "Joanne.Spalding@sierraclub.org"  
<Joanne.Spalding@sierraclub.org>  
**Cc:** Elliott Zenick <Zenick.Elliott@epamail.epa.gov>  
**Date:** 09/15/2011 11:58 AM  
**Subject:** RE: Boiler NSPS settlement

Yes, I'm available.

**From:** David (ENRD) Gunter [<mailto:David.Gunter2@usdoj.gov>]  
**Sent:** Thursday, September 15, 2011 2:12 PM  
**To:** Morgan Costello; Megan Ceronsky; Vickie Patton; Michael J. Myers; ddoniger@nrdc.org;  
[Joanne.Spalding@sierraclub.org](mailto:Joanne.Spalding@sierraclub.org)  
**Cc:** Elliott Zenick  
**Subject:** Boiler NSPS settlement

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United States Department of Justice  
950 Pennsylvania Ave, NW  
Washington, DC 20530  
202-514-3785  
David.Gunter2@usdoj.gov

**To:** "Gunter, David (ENRD)" [David.Gunter2@usdoj.gov];  
ddoniger@nrdc.org>;[Joanne.Spalding@sierraclub.org];  
Joanne.Spalding@sierraclub.org>;"Megan Ceronsky" [mceronsky@edf.org]; Megan Ceronsky"  
[mceronsky@edf.org]; Vickie Patton" [vpatton@edf.org];  
Michael.Myers@ag.ny.gov>;[Morgan.Costello@ag.ny.gov]; Morgan.Costello@ag.ny.gov>[]  
**Cc:** Elliott Zenick/DC/USEPA/US@EPA[]  
**From:** "Gunter, David (ENRD)"  
**Sent:** Thur 9/15/2011 8:01:37 PM  
**Subject:** RE: Boiler NSPS settlement

I'm having trouble connecting through the conference line. Please stand by and I'll get this resolved as soon as I can.

Dave

From: Gunter, David (ENRD)  
Sent: Thursday, September 15, 2011 2:12 PM  
To: ddoniger@nrdc.org; Joanne.Spalding@sierraclub.org; Megan Ceronsky; 'Vickie Patton';  
Michael.Myers@ag.ny.gov; Morgan.Costello@ag.ny.gov  
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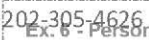
202-514-3785

David.Gunter2@usdoj.gov

**To:** "Gunter, David (ENRD)" [David.Gunter2@usdoj.gov];  
ddoniger@nrdc.org>;[Joanne.Spalding@sierraclub.org];  
Joanne.Spalding@sierraclub.org>;"Megan Ceronsky" [mceronsky@edf.org]; Megan Ceronsky"  
[mceronsky@edf.org]; Vickie Patton" [vpatton@edf.org];  
Michael.Myers@ag.ny.gov>;[Morgan.Costello@ag.ny.gov]; Morgan.Costello@ag.ny.gov>[]  
**Cc:** Elliott Zenick/DC/USEPA/US@EPA[]  
**From:** "Gunter, David (ENRD)"  
**Sent:** Thur 9/15/2011 8:05:01 PM  
**Subject:** RE: Boiler NSPS settlement

I apologize, but I've had to get a new call-in code for today's call. Please use the following information:

Dial   Ex. 6 - Personal Privacy

Conference code  Ex. 6 - Personal Privacy

I'll be on right away, and will wait for everyone to join before we begin. Thanks.

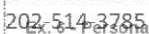
Dave

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David Gunter

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