

April 10, 2013

The Honorable Robert Perciasepe
Acting Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Acting Administrator Perciasepe,

Pursuant to the President's January 21, 2009 Open Government Directive (Directive) and the Environmental Protection Agency's (EPA) Open Government Plan, the undersigned businesses and organizations request the EPA develop a notification system that would immediately provide all stakeholders with timely and transparent access to information involving any legal action, or notice of intended legal action, against the EPA. In his Directive, the President instructed federal agency heads to promote openness in government by "establishing a system of transparency, public participation, and collaboration." The EPA has responded to the President's directive by developing and implementing an Open Government Plan. The development and implementation of the notification system described above will significantly further these critical open government goals and address a significant hole in the public's access to information while fulfilling the government's obligations to keep the public and stakeholders informed of actions and developments of potential impact.

As representatives of virtually every sector of the economy, we are very concerned about a growing path of influence, outside the confines of the Administrative Procedure Act's regulatory process, whereby groups use lawsuits that seek to force federal agencies to issue regulations that advance their policy priorities. These lawsuits are used to negotiate rulemaking schedules and other concessions from agencies outside of the traditional regulatory process. Unfortunately, impacted parties, including private citizens and states who may be subject to the regulations at issue, have been denied the opportunity to intervene in these suits as some courts have held that they lack standing to participate. See, e.g., *Defenders of Wildlife v. Jackson*, 284 F.R.D. 1 (D.D.C. 2012); *Center for Biological Diversity v. EPA*, 2012 WL 909831 (N.D. Cal. Mar. 16, 2012); *Center for Biological Diversity v. EPA*, 274 F.R.D. 305 (D.D.C. 2011).

In our view, this "sue and settle" approach is contrary to the principles of transparency, public participation, and collaboration that form the core of the President's Directive. It results in settlement agreements and consent decrees with minimal disclosure and limited opportunity for public comment that still have the force of law. Notably, the settlement agreements and consent decrees reached in such cases often have unintended and far-reaching impacts on the general public and the regulated community without providing affected interests with a timely and fair opportunity to consider such impacts, and more importantly, be heard on the issue at hand. Finally, this "sue and settle" approach forces a realignment of the government's priorities in an environment where these resources are limited and will continue to decrease in the foreseeable future.

More specifically, and despite the apparent efficiency of settlement agreements and consent decrees in some legitimate contexts, the "sue and settle" approach threatens the principles of the President's Directive as these discussions and agreements are typically reached with a restricted group of interested parties in the absence of full and broad stakeholder participation, collaboration and input. In the occasions the government does provide an opportunity for public comment after an agreement is reached, it is typically perfunctory, allowing at most minimal changes in order to avoid unraveling the settlement. Furthermore, the negotiated deadlines for rulemaking are frequently so compressed that the EPA lacks adequate time and resources to review and respond to comments before issuing final rules. Public participation is therefore foreclosed twice—at the settlement and at the rulemaking stages- resulting in a final agency action that circumvents the intended role of public participation, fails to account for broader views, and inevitably leads to even more litigation.

In our view, providing the general public and the regulated community with timely and transparent access to information involving any legal action, or notice of intended legal action, against the EPA is appropriate and can be achieved through the vehicle of a notification system. Such a tool could be a web portal or list serve that would provide information about such actions or communications in a judicious fashion. In fact, EPA's current database of civil cases and settlements (<http://cfpub.epa.gov/compliance/cases/>) provides similar information in EPA enforcement actions and could serve as a ready-made template to disclose information in actions against EPA.

Ultimately, we believe in many cases such transparency would allow collaboration with, and input from, the general public and the regulated community and would lead to more resilient outcomes in any actions or intended actions against the agency and a better use of government resources. Essentially, this tool would accomplish the goals of the President's Directive to: 1) "disclose information rapidly in forms that the public can readily find and use;" 2) afford "Americans increased opportunities to participate in policy making and to provide their Government with the benefits of their collective expertise and information;" and 3) allow the government to "use innovative tools, methods and systems to cooperate among themselves, across all levels of Government, and with nonprofit organizations, businesses and individuals in the private sector."

We would welcome an opportunity, either individually or as a group, to further discuss the request outlined in this letter. Please direct any responses to Ross Eisenberg (202.637.3173, reisenberg@nam.org) or Chip Yost (202.637.3175, cyst@nam.org). We look forward to receiving your timely response.

Sincerely,

ABB
Acme Brick Company
Agricultural Retailers Association
Alamo Cement Company
Ameren Corporation
American Agri-Women
American Chemistry Council

American Coatings Association
American Composites
Manufacturers Association
American Electric Power
American Forest & Paper
Association
American Foundry Society

American Fuel & Petrochemical
Manufacturers
American Iron and Steel Institute
American Nickeloid Company
American Road and Transportation
Builders Association
American Petroleum Institute
Arch Coal Inc.
Associated Industries Of Florida
Associated Oregon Industries
Association of Florida Community
Developers, Inc.
Automotive Recyclers Association
Bedford Machine & Tool, Inc.
Big Creek Lumber
Blazer Industries, Inc.
Bradford White Corporation
Brick Industry Association
Carter Products Co., Inc.
Caterpillar Inc.
CF Industries
Chart Industries, Inc.
Clark Reliance Corporation
Clearfield Machine Co.
Cloud Peak Energy Resources, LLC
Colorado Association of Commerce
& Industry
Consumer Energy Alliance
Consumer Specialty Products
Association
Cooper Tire & Rubber Company
Council of Industrial Boiler Owners
Devon Energy Corporation
Eastman Chemical Company
Ecolab
Edison Electric Institute
EMK Consultants of Florida, Inc.
Everhard Products, Inc.
Far West Agribusiness Association
Fellon-McCord & Associates
Fisher Barton Inc.
Florida Chamber of Commerce

Florida Electric Power Coordinating
Group EC
Florida Farm Bureau Federation
Florida Fertilizer & Agrichemical
Association
Florida Home Builders Association
Florida Pest Management
Association
Florida Pulp & Paper Association
Florida Rural Water Association
Florida Turfgrass Association
Florida Water Environment
Association Utility Council
Forging Industry Association
Formosa Plastics Corporation,
U.S.A. / Petrochemical
Formula Boats
Foundry Association of Michigan
General Aluminum Mfg. Co.
General Aviation Manufacturers
Association
Georgia Association of
Manufacturers
Gilbert Industries, Inc.
Graham Architectural Products, Inc.
Greater North Dakota Chamber
Green Star Environmental
Greene, Tweed & Co.
Gulf Citrus Growers Association
Heatbath Corporation
Henry Molded Products
Illinois Fertilizer & Chemical
Association
INDA, The Association of the
Nonwoven Fabrics Industry
Independent Bakers Association
Indiana Cast Metals Association
Industrial Energy Consumers of
America
Industrial Fasteners Institute
Industrial Minerals Association -
North America
Institute of Makers of Explosives

Interlocking Concrete Pavement
Institute
Iowa Association of Business and
Industry
JCM Industries, Inc.
Jupiter Aluminum Corporation
K+S North America Corporation
Kimber Mfg. Inc.
Lake Region Medical
Leviton Manufacturing Company,
Inc.
Liberty Pumps
Littlejohn Mann & Associates
Louisiana Association of Business &
Industry
Manufacturers Association of Florida
Marcellus Shale Coalition
Masco Corporation
MAX Environmental Technologies,
Inc.
Metals Service Center Institute
Metl-Span
Mid America CropLife Association
Miles Fiberglass & Composites Inc.
Minnesota Chamber of Commerce
Minnesota Crop Production Retailers
Mississippi Lime Company
Missouri Agribusiness Association
Motor & Equipment Manufacturers
Association
MWV
N.T. Ruddock Co
NAHAD - The Association for Hose
& Accessories Distribution
NAIOP Tampa Bay Chapter
Narragansett Improvement Co
National Association of
Manufacturers
National Cattlemen's Beef
Association
National Council of Farmer
Cooperatives
National Industrial Sand Association

National Marine Manufacturers
Association
National Pork Producers Council
National Oilseed Processors
Association
National Rural Electric Cooperative
Association
Natural Gas Services Group, Inc.
Non-Ferrous Founders' Society
North American Meat Association
Nuclear Energy Institute
Nucor Corporation
Ohio AgriBusiness Association
Ohio Cast Metals Association
Ohio Manufacturers' Association
Oregon Metals Industry Council
Oregon Women in Timber
Outdoor Power Equipment Institute
Paulo Products Company
Peace River Valley Citrus Growers
Association
Penn United Technologies Inc.
Pennsylvania Foundry Association
Petroleum Equipment Suppliers
Association
PotashCorp
Printing Industries of America
Procter & Gamble Company
Progressive Waste Solutions, Inc.
Rayonier Inc.
Reinke Manufacturing Company,
Inc.
Republic Services, Inc.
Rockford Fastener, Inc.
Rosenbauer South Dakota
Rowmark LLC
Rubber Manufacturers Association
Rudd Company, Inc.
S. Ralph Cross & Sons, Inc.
Saint-Gobain Corporation
Schnitzer Steel Industries, Inc.
Shultz Steel Co. VP & GM
Sigma-Aldrich Corporation

Society of Chemical Manufacturers
and Affiliates
Sonneborn, LLC
Southern Company
Southeast Milk Inc.
Southeastern Lumber Manufacturers
Association
Southern Crop Production
Association
Spartan ERV
SPI: The Plastics Industry Trade
Association
Standard Jig Boring Service
Steel Manufacturers Association
Stella-Jones Corporation
StormwaterJ Engineering, Inc.
Strongwell Corporation
Subaru of Indiana Automotive, Inc.
Superior Graphite Co.
Swift Energy Company
Synalloy Corporation
Tennessee Mining Association
Tennessee Oil & Gas Association
Texas Association of Business
Textile Care Allied Trades
Association

The Associated General Contractors
of America
The Fertilizer Institute
The North American Coal
Corporation
Tyson Foods, Inc.
U.S. Poultry & Egg Association
United States Steel Corporation
United States Sugar Corporation
USG Corporation
Utility Water Act Group
Vermeer Corporation
Vox International Corporation
Washington Friends of Farms &
Forests
Webco Industries, Inc.
Western Plant Health Association
Window and Door Manufacturers
Association
Wisconsin Cast Metals Association
Wisconsin Manufacturers &
Commerce
Woodworking Machinery Industry
Association
Zero Zone Inc.