IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY and FRIENDS OF THE EARTH, Plaintiffs, v. GINA McCARTHY and the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendants.	Civil Case No. 1:16-CV-00681 (ABJ)

DEFENDANTS' MOTION TO DISMISS

Defendants United States Environmental Protection Agency and Gina McCarthy, Administrator of the United States Environmental Protection Agency, respectfully move to dismiss the sole remaining count in Plaintiffs' complaint. As explained in the accompanying Memorandum in Support of Defendants' Motion to Dismiss, Plaintiffs have failed to demonstrate that the Court has jurisdiction over this claim or that they have stated a claim for which relief may be granted, and their complaint should therefore be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) and (6).

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Plaintiffs Center for Biological Diversity and Friends of the Earth bring this citizen suit under Clean Air Act ("CAA" or "Act") Section 304(a), 42 U.S.C. § 7604(a). The sole remaining count of Plaintiffs' complaint alleges that Defendants, the United States Environmental Protection Agency and Gina McCarthy, Administrator (collectively, "EPA" or "the Agency") have unreasonably delayed in issuing emission standards for aircraft greenhouse gas emissions under Section 231(a) of the Act, 42 U.S.C § 7571(a).[1] Plaintiffs have failed to demonstrate that the Court has jurisdiction over this claim or that they have stated a claim for which relief may be

[1] Count I of Plaintiffs' complaint alleged that EPA unreasonably delayed in issuing a final "endangerment determination" for aircraft greenhouse gas emissions under Section 231 of the Act. 42 U.S.C. § 7571(a)(2)(A). On July 25, 2016, EPA Administrator Gina McCarthy signed for publication in the Federal Register the final endangerment determination Plaintiffs sought to compel, which was then published on August 15, 2016. 81 Fed. Reg. 54,422. On August 5, 2016, the Court dismissed Count I of the complaint as moot, so that all that remains before the Court is Count II. See ECF Nos. 13, 14; Minute Order (Aug. 5, 2016).

granted, and their complaint should therefore be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) and (6).

A claim for unreasonable delay lies only where an agency has unreasonably delayed taking an action that it is *required* to take. See infra Part IV.A. The requirement that EPA issue emission standards for aircraft greenhouse gases was not triggered until EPA made a predicate determination that such emissions cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. 42 U.S.C. § 7571(a)(2)(A). That affirmative endangerment determination was signed on July 25, 2016—months after Plaintiffs' complaint was filed. Plaintiffs cannot pursue an unreasonable delay claim based on a duty that had not been triggered at the time they filed suit, and that even now has existed, at most, for just a few weeks.

More specifically, first, Plaintiffs' mandatory pre-suit notice is inadequate because it was premature. To file a complaint alleging unreasonable delay of performance of a non-discretionary duty under the CAA, a would-be plaintiff must provide the Agency 180-days' notice of its intent to sue. 42 U.S.C. § 7604(a). Plaintiffs provided their required notice of intent to sue for EPA's alleged unreasonable delay in promulgating emission standards under CAA Section 231 on August 5, 2014. However, EPA triggered its statutory duty to promulgate emissions standards under Section 231 when it issued its final endangerment determination—nearly two years *after* Plaintiffs provided notice of EPA's alleged unreasonable delay. Plaintiffs therefore improperly provided "anticipatory" notice of EPA's alleged unreasonable delay to promulgate emission standards before the Agency had any required duty to do so. For this reason, their remaining claim should be dismissed for failure to provide adequate, mandatory notice.

Second, Plaintiffs could not allege that EPA failed to perform its duty to promulgate emission standards at the time their complaint was filed. Plaintiffs' complaint was filed on April 12, 2016, about three months before the endangerment determination triggering the duty to issue emission standards was made. EPA had no duty to propose and issue aircraft greenhouse gas emission standards when Plaintiffs filed their claim alleging EPA had unreasonably delayed in discharging that duty. The allegations in Plaintiffs' complaint therefore fail to state any claim upon which relief can be granted or to identify the necessary waiver of sovereign immunity for their claim.

Finally, Plaintiffs cannot articulate a plausible unreasonable delay claim under Fed. R. Civ. P. 12(b)(6). See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). EPA's endangerment determination, which triggers the Agency's duty to promulgate aircraft greenhouse gas emission standards, was signed last month, was published in the Federal Register four days ago, and will not be effective until next month. EPA's duty to propose and promulgate emission standards requires notice and comment rulemaking, as well as other required actions, pursuant to specific provisions of the Act. 42 U.S.C. §§ 7607(d)(1)(F), 7571(a). Under these circumstances, Plaintiffs cannot plausibly claim that EPA has unreasonably delayed in proposing and promulgating emission standards. Iqbal, 556 U.S. at 678. For all of these reasons, the remaining count in Plaintiffs' complaint should be dismissed.

I. STATUTORY AND REGULATORY BACKGROUND

A. EPA's Regulation of Air Pollutants from Aircraft Engines under Title II of the Clean Air Act

The Clean Air Act, 42 U.S.C. §§ 7401-7671q, enacted in 1970 and extensively amended in 1977 and 1990, is intended to "protect and enhance the quality of the Nation's air resources so

as to promote the public health and welfare." 42 U.S.C. § 7401(b)(1). The CAA sets up a detailed program for control of air pollution through a system of shared federal and state responsibility.

Title II of the Act, 42 U.S.C. §§ 7521-7590, authorizes EPA to establish national emission standards for mobile sources of air pollution. Section 231 of the Act, 42 U.S.C. § 7571, addresses the regulation of emissions of air pollutants from aircraft engines. Section 231(a)(1) directs EPA to study and investigate emissions of air pollutants from aircraft, including investigating "the extent to which such emissions affect air quality in air quality control regions throughout the United States." 42 U.S.C. § 7571(a)(1)(A). Section 231(a)(2) provides that EPA shall "from time to time, issue proposed emission standards applicable to the emission of any air pollutant from any class or classes of aircraft engines which in [the Administrator's] judgment causes, or contributes to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7571(a)(2)(A).

Thus, under Section 231, EPA must regulate a pollutant emitted by aircraft engines if, and only if, the EPA Administrator makes a threshold finding that, in her judgment, emissions of that air pollutant "cause[], or contribute[] to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7571(a)(2)(A). This threshold finding under subsection (a)(2)(A) on whether or not a particular pollutant "causes or contributes" to pollution that may pose such an endangerment is commonly referred to as an "endangerment determination."

The statute also requires, after making the threshold endangerment determination, that EPA take certain actions before promulgating final emissions standards under Section 231. See National Ass'n of Clean Air Agencies v. EPA, 489 F.3d 1221 (D.C. Cir. 2007). Before adopting

any final emissions standards, EPA must consult with the Administrator of the Federal Aviation Administration. 42 U.S.C. § 7571(a)(2)(B)(i). The statute also requires that EPA hold public hearings before adopting any final emissions standards. 42 U.S.C. § 7571(a)(3).[2] Emission standards promulgated under Section 231 cannot take effect until after such period as the EPA Administrator finds necessary (after consultation with the Secretary of Transportation) to permit the development and application of requisite technology, giving appropriate consideration to compliance costs. 42 U.S.C. § 7571(b). EPA may not change aircraft engine emission standards if such a change would significantly increase noise and adversely affect safety, 42 U.S.C. § 7571(a)(2)(B)(ii), and even after becoming effective such standards may not apply if disapproved by the President, after notice and opportunity for public hearing, on the basis of a finding by the Secretary of Transportation that any such standards would create a hazard to aircraft safety. 42 U.S.C. § 7571(c).

B. Unreasonable Delay Suits under the Clean Air Act Citizen Suit Provision

Section 304(a) of the CAA, 42 U.S.C. § 7604(a), authorizes citizen suits against EPA "to compel . . . agency action unreasonably delayed." Jurisdiction for such "unreasonable delay" suits lies in the district courts. Id. Before commencing an action for unreasonable delay to compel EPA's performance of a duty, the statute requires that a plaintiff provide the Agency with 180 days' notice of its intent to sue. Id. The notice must identify the subject of the

[2] The Federal Aviation Administration ("FAA") also has separate legal authority to regulate the fuels used in aircraft engines. Title 49 requires that "[t]he Administrator of the [FAA] shall prescribe (1) standards for the composition or chemical or physical properties of an aircraft fuel or fuel additive to control or eliminate aircraft emissions the Administrator of the Environmental Protection Agency decides under section 231 of the Clean Air Act (42 U.S.C. 7571) endanger the public health or welfare; and (2) regulations providing for carrying out and enforcing those standards." 49 U.S.C. § 44714.

proposed citizen suit with reasonable specificity. 40 C.F.R. § 54.3(a). The notice requirement is a mandatory condition precedent for suit. Hallstrom v. Tillamook County, 493 U.S. 20, 26 (1989).

II. FACTUAL BACKGROUND

In 2007, Plaintiffs filed a rulemaking petition with EPA, requesting that the Agency regulate aircraft greenhouse gas emissions under CAA Section 231. Compl. ¶ 35. In 2010, Plaintiffs filed a citizen suit against EPA, claiming, inter alia, that EPA had unreasonably delayed because it had failed to answer the rulemaking petition and issue a CAA Section 231(a)(2)(A) endangerment determination. Id. ¶ 36; see Center for Biological Diversity v. EPA ("CBD"), 794 F. Supp. 2d 151, 153 (D.D.C. 2011). The CBD court determined that EPA had a duty under the statute to conduct an endangerment determination.[3] Id. at 162; Compl. ¶ 36; but see Friends of the Earth v. EPA, 934 F. Supp. 2d 40, 55 (D.D.C. 2013) (finding that "the endangerment determination [under Section 231] is not a nondiscretionary act or duty that the citizen suit provision grants the district courts the jurisdiction to compel"). As requested by the Agency, the CBD court ordered EPA to respond to Plaintiffs' 2007 petition within 90 days. Compl. ¶ 36; Center for Biological Diversity v. EPA, No. 1:10-CV-985 (FJS), 2012 WL 967662, at *1 (D.D.C. Mar. 20, 2012). The CBD court ultimately determined that EPA had not unreasonably delayed in making an endangerment determination regarding greenhouse gas emissions from aircraft. Center for Biological Diversity, 2012 WL 967662, at *1.

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[3] EPA respectfully disagrees with the court's finding in Center for Biological Diversity v. EPA, 794 F. Supp. 2d at 162, that the duty to make an endangerment determination under CAA Section 231(a)(2)(A) is a mandatory duty enforceable under the citizen suit provision. EPA does not concede that it ever had a duty to issue an endangerment determination. As the Court held in Friends of the Earth v. EPA, the CAA Section 231(a)(2)(A) endangerment determination is a discretionary determination under the statute. 934 F. Supp. 2d at 55.

Consequently, the CBD court did not place EPA under any binding schedule to complete the endangerment determination and trigger the subsequent duty to promulgate emission standards.

EPA issued a response to Plaintiffs' 2007 rulemaking petition on June 14, 2012, stating the Agency's intention to move forward with an endangerment determination for greenhouse gas emissions from aircraft engines. Compl. ¶ 37; Exhibit A (June 14, 2012 response). EPA stated in its response that issuing a proposed endangerment determination would take a minimum of 22 months following resolution of the then-pending challenge to EPA's endangerment determination and emission standards for greenhouse gases emitted by on-highway vehicles. Compl. ¶ 37; Exhibit A at 5. EPA also stated that it would not initiate rulemaking to establish standards concerning greenhouse gas emissions from aircraft engines in advance of issuing an affirmative endangerment finding for such emissions. Exhibit A at 9-10. Plaintiffs did not challenge EPA's 2012 response to their 2007 petition.

On June 26, 2012, the U.S. Court of Appeals for the D.C. Circuit denied all petitions for review challenging EPA's on-highway greenhouse gas endangerment determination and emission standards. Coalition for Responsible Regulation, Inc. v. EPA, 684 F.3d 102 (D.C. Cir. 2012), aff'd in part, rev'd in part by Utility Air Regulatory Group v. EPA, 134 S. Ct. 2427 (2014).

On August 5, 2014—soon after the expiration of the 22 month minimum period EPA described in its response to Plaintiffs' rulemaking petition—Plaintiffs sent EPA a notice of intent to file suit for EPA's alleged unreasonable delay in making the endangerment determination for greenhouse gas emissions from aircraft. Exhibit B (August 5, 2014 notice of intent to file suit); Compl. ¶ 40. Plaintiffs also stated that EPA had unreasonably delayed in promulgating emission standards, contingent on making an endangerment determination. Exhibit B at 5 ("In sum, EPA

has not acted on its duty to determine whether global warming pollutants from aircraft emissions cause or contribute to air pollution that may reasonably be anticipated to endanger the public health or welfare, and, *if so*, to regulate those emissions. (emphasis added)); Compl. ¶ 40. Assuming that this notice was adequate, see infra Part IV.B, the statutorily-required 180-day notice period expired on January 31, 2015, pursuant to CAA Section 304(a), 42 U.S.C. § 7604(a).

On June 10, 2015, EPA Administrator Gina McCarthy signed a proposed endangerment determination that greenhouse gas emissions from aircraft engines cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare. Compl. ¶¶ 38-39. The proposed endangerment determination was published in the Federal Register on July 1, 2015. Id. ¶ 38; 80 Fed. Reg. 37,758. EPA conducted a public hearing on its proposed determination on August 11, 2015, and the public comment period for the proposal ended on August 31, 2015. 80 Fed. Reg. at 37,758.

On April 12, 2016, Plaintiffs filed this lawsuit, alleging that EPA unreasonably delayed in issuing a final endangerment determination and proposing and promulgating emission standards under CAA Section 231. Compl. ¶¶ 43, 46. Plaintiffs ask that the Court direct EPA to issue an endangerment determination within 30 days after entry of the Court's judgment, and, *if* EPA makes an affirmative endangerment determination, to propose emission standards at the same time. Id. Prayer for Relief ¶¶ A, B.

On July 25, 2016, EPA Administrator McCarthy signed for publication in the Federal Register a final endangerment determination for greenhouse gases from aircraft, finding that emissions of greenhouse gases from certain aircraft engines cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare. This final

determination was published in the Federal Register on August 15, 2016, 81 Fed. Reg. 54,422, and would-be challengers have until October 14, 2016 to file any petitions for judicial review of the final determinations. 42 U.S.C. § 7607(b)(1). EPA has not yet proposed associated emission standards. See Compl. ¶ 40. However, in its final endangerment determination, EPA stated that it anticipates indicating an expected timeline for proposed aircraft greenhouse gas standards in its upcoming Unified Agenda of Federal Regulatory and Deregulatory Actions. 81 Fed. Reg. at 54,423.

Because the Administrator signed the final endangerment determination sought in Count I of Plaintiffs' complaint, the Court dismissed Count I as moot on August 5, 2016. See ECF Nos. 13, 14; Minute Order (Aug. 5, 2016). The only claim that remains, therefore, is Plaintiffs' claim that EPA has unreasonably delayed in proposing and promulgating emission standards for greenhouse gas emissions from aircraft.

III. STANDARD OF REVIEW

Federal courts are courts of limited jurisdiction and may hear cases only to the extent expressly provided by statute. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994). The first and most fundamental question presented by every case brought to a federal court is whether the court has jurisdiction to hear it. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998) (jurisdiction must "be established as a threshold matter"). On a motion to dismiss under Fed. R. Civ. P. 12(b)(1), the plaintiff bears the burden of demonstrating subject matter jurisdiction. See Erby v. United States, 424 F. Supp. 2d 180, 182 (D.D.C. 2006). In evaluating a motion to dismiss under Rule 12(b)(1), the Court must treat the complaint's factual allegations as true, Sparrow v. United Air Lines, Inc., 216 F.3d 1111, 1113 (D.C. Cir. 2000), but need not accept inferences drawn by the plaintiff that are unsupported by the facts alleged in the

complaint, nor must the Court accept plaintiff's legal conclusions, Browning v. Clinton, 292 F.3d 235, 242 (D.C. Cir. 2002). The court may consider materials outside the pleadings to resolve the question of jurisdiction. Jerome Stevens Pharms., Inc. v. FDA, 402 F.3d 1249, 1253 (D.C. Cir. 2005).

"To survive a [Rule 12(b)(6)] motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal quotation marks omitted); see also Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A claim is facially plausible when the pleaded factual content "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id. A pleading must offer more than "labels and conclusions" or a "formulaic recitation of the elements of a cause of action," id. at 678 (quoting Twombly, 550 U.S. at 555), and "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." Id.

On a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the moving party has the burden of demonstrating that a plaintiff has failed to state a claim for which relief may be granted. Kimberlin v. United States Dep't of Justice, 150 F. Supp. 2d 36, 41 (D.D.C. 2001), aff'd, 318 F.3d 228 (D.C. Cir. 2003). In ruling upon a motion to dismiss, a court may consider only "the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint, and matters about which the Court may take judicial notice." Kelley v. Federal Bureau of Investigation, 67 F. Supp. 3d 240, 256 (D.D.C. 2014) (citing Gustave–Schmidt v.

Chao, 226 F. Supp. 2d 191, 196 (D.D.C. 2002); EEOC v. St. Francis Xavier Parochial Sch., 117 F.3d 621, 624–25 (D.C. Cir. 1997)).

IV. ARGUMENT

A. EPA's duty to propose and promulgate emission standards under CAA Section 231 is not triggered until an affirmative endangerment determination is made.

To bring an unreasonable delay suit under Section 304(a), Plaintiffs must identify a duty that EPA is required to perform. 42 U.S.C. § 7604(a) (authorizing unreasonable delay suits for "failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator"); Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 63 n.1 (2004); Sierra Club v. Browner, 130 F. Supp. 2d 78, 82, 89 (D.D.C. 2001) ("The Court's power to grant relief in [CAA citizen] suits is limited to 'order[ing] the Administrator to perform such act or duty [or] compel[ling] . . . agency action unreasonably delayed.' . . . In other words, this Court's power is limited to requiring EPA to undertake the nondiscretionary duty at issue." (quoting 42 U.S.C. § 7604(a)); Friends of the Earth, 934 F. Supp. 2d at 46 ("The [CAA citizen suit] provision also authorizes suits to compel nondiscretionary agency action which has been unreasonably delayed."). By the plain terms of CAA Section 231, the Agency's duty to promulgate emission standards is not triggered unless and until the Agency makes the requisite endangerment determination:

> The Administrator shall, from time to time, issue proposed emission standards applicable to the emission of any air pollutant from any class or classes of aircraft engines which in his judgement causes, or contributes to, air pollution which may reasonably be anticipated to endanger public health or welfare.

42 U.S.C. § 7571(a)(2)(A).

For the greenhouse gas aircraft emission standards that are the subject of this case, EPA explained how it would proceed under CAA Section 231 in its response to Plaintiffs' 2007 rulemaking petition. That response described EPA's plan to initiate rulemaking to make an endangerment determination, and stated:

> EPA *will not initiate any rulemaking action at this time to establish standards concerning greenhouse gases from aircraft engines*. Such action would be premature at this point, given the lack of an affirmative endangerment or contribution finding for such emissions, the ongoing technical work EPA is currently engaged in on the subject, and EPA's current direction of its resources to regulatory action on the largest emitters of greenhouse gases. However, *if EPA's endangerment and cause and contribute proceeding results in affirmative findings, EPA would pursue the development of standards and potentially other requirements regulating greenhouse gas emissions from aircraft, in a timeframe consistent with its other priorities and the continuing technical activities regarding such emissions*.

Exhibit A at 9-10 (emphasis added). Plaintiffs did not challenge that response. In fact, Plaintiffs recognize this stepwise approach in their August 5, 2014 pre-suit notice of intent and in their April 12, 2016 complaint, which both anticipatorily allege that EPA has unreasonably delayed in promulgating emission standards *only if* EPA makes a final, affirmative endangerment finding. Exhibit B at 5; Compl. Prayer for Relief ¶ B.

Plaintiffs arbitrarily measure EPA's alleged years of delay in issuing emission standards from the date they filed their 2007 petition for rulemaking on this issue. See Compl. ¶ 5. Yet, Plaintiffs cannot state an unreasonable claim by merely alleging that EPA has failed to take action that Plaintiffs view as desirable, at the time they would have liked. See Rushing v. Leavitt, No. Civ. A. 03-1969 (CKK), 2005 WL 555415, at *3 (D.D.C. Mar. 7, 2005) ("[J]urisdiction over citizen suits does not encompass every grievance a citizen might have with [EPA's] actions."); see also Natural Res. Def. Council, Inc. v. Thomas, 885 F.2d 1067, 1073 (2d Cir. 1989) (recognizing "Congressional intent . . . to limit the number of citizen suits which

could be brought against [EPA]" (citation omitted)). Rather, Plaintiffs' unreasonable delay claim must be grounded in an action EPA was required to take under the statute, and measured from when that duty was triggered. See Norton, 542 U.S. at 63 n.1, 64. In this case, EPA's duty was triggered by the affirmative endangerment determination which was signed last month and will not be effective until next month. 81 Fed. Reg. at 54,422. It is for this central reason that Plaintiffs' remaining claim must be dismissed, as discussed in more detail below.

B. Plaintiffs' remaining claim should be dismissed because Plaintiffs pre-suit notice was premature and therefore inadequate.

Any party bringing a claim under the Act based on EPA's alleged unreasonable delay in taking a required action must notify EPA at least 180 days prior to filing suit. 42 U.S.C. § 7604(a). The Supreme Court has held that such notice requirements are a "mandatory, not optional, condition precedent for suit." Hallstrom v. Tillamook County, 493 U.S. 20, 26 (1989); see also id. at 31 (notice requirement is mandatory condition precedent that district court "may not disregard . . . at its discretion"); Environmental Integrity Project v. U.S. Environmental Protection Agency, No. 15-0139 (ABJ), 2015 WL 7737307, at *10 (D.D.C. Dec. 1, 2015) (citing Hallstrom in context of Clean Air Act notice requirement). Some courts have held that these notice requirements are conditions on the government's waiver of sovereign immunity, and when they are not met, the Court does not have jurisdiction over a plaintiff's claim. See Environmental Integrity Project, 2015 WL 7737307, at *10-11. Even if the pre-suit notice requirement is not jurisdictional, however, the failure to provide adequate notice mandates dismissal of a complaint. See Friends of Animals v. Ashe, 51 F. Supp. 3d 77, 87 (D.D.C. 2014) (dismissing complaint based on lack of adequate pre-suit notice, but declining to decide whether

dismissal is properly characterized in jurisdictional terms or as failure to state a claim), aff'd 808 F.3d 900 (D.C. Cir. 2015).

Plaintiffs' 2014 notice as to their remaining unreasonable delay claim is inadequate because it was premature: It was issued *before* EPA made the threshold endangerment determination, and, therefore, *before* EPA had triggered any statutory duty to promulgate emission standards under CAA Section 231. See Friends of Animals, 51 F. Supp. 3d at 84-85 (discussing inadequate "pre-violation" notices under the Endangered Species Act); id. at 86 (finding notice inadequate for a duty that had not yet been triggered). Allowing parties to file suit based on anticipatory notice of violations that *may* occur in the future would permit citizen suits to be filed not only when an agency has allegedly unreasonably delayed in performing a statutory duty, but when a party speculates that the agency *may* unreasonably delay in performing a statutory duty that might (or might not) exist in the future. Friends of the Animals, 51 F. Supp. 3d at 84-86. Such speculative notice renders the notice requirement meaningless and is contrary to the terms of the statute. Friends of the Animals v. Ashe, 808 F.3d 900, 904 (D.C. Cir. 2015) (holding that plaintiff must give notice "of an *existing* violation of a nondiscretionary duty" (emphasis in original)); 42 U.S.C. § 7604(a) (authorizing unreasonable delay claims for nondiscretionary duties); 42 U.S.C. § 7571(a)(2)(A).

In this case, Plaintiffs should have waited until they had a plausible cause of action alleging EPA had unreasonably delayed in issuing required standards before providing notice of their intent to sue for unreasonable delay. But at a minimum, Plaintiffs are required to wait until the duty to promulgate emission standards *arises* before informing EPA of their intention to sue for unreasonable delay in performing that duty. Because they instead provided their notice

nearly two years before the duty to promulgate emission standards arose, their notice is inadequate.

That EPA has now issued an affirmative endangerment determination for greenhouse gas emissions from aircraft does not alter this result. The notice requirement is not subject to "flexible or pragmatic construction" based on the circumstances of the litigants of a particular case—it is a mandatory precondition of suit. Hallstrom, 493 U.S. at 26. Plaintiffs therefore cannot argue that the recently-issued endangerment determination retroactively corrects their inadequate notice. Id. at 26, 31 ("[A] district court may not disregard these [notice] requirements at its discretion.").

Moreover, the purpose of the required notice period in citizen suit provisions is to provide a non-adversarial period during which the Agency may choose to remedy the alleged violation. Hallstrom, 493 U.S. at 32. Under Section 304(a) of the Act, that notice period is 180 days. 42 U.S.C. § 7604(a). Allowing Plaintiffs to provide notice for potential violations that have not yet occurred would undermine the purpose of this notice period and permit plaintiffs to tee up lawsuits long before any violations could have possibly arisen or been corrected by the Agency. Id. at 29 (explaining that notice requirement gives agency "opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit"). Because Plaintiffs have failed to provide adequate, statutorily-required notice for the remaining count in their complaint, the Court should dismiss this case.

C. Plaintiffs' remaining claim should be dismissed because at the time the complaint was filed, EPA had not triggered its duty to promulgate emission standards for greenhouse gases from aircraft.

Plaintiffs may bring an unreasonable delay claim only for actions that EPA is required to take. Norton, 542 U.S. at 63 n.1, 64; Browner, 130 F. Supp. 2d at 82 ("The Court's power to

grant relief in [CAA citizen] suits is limited to 'order[ing] the Administrator to perform such act or duty [or] compel[ling] . . . agency action unreasonably delayed.' . . . In other words, this Court's power is limited to requiring EPA to undertake the nondiscretionary duty at issue." (quoting 42 U.S.C. § 7604(a)). EPA's duty to issue emission standards was not triggered until it made the necessary affirmative endangerment determination, which occurred after Plaintiffs' complaint was filed. The absence of such a duty when a complaint is filed can be seen as a jurisdictional defect, in that a mandatory duty is required to invoke the CAA citizen suit provision's waiver of sovereign immunity. See Friends of the Earth, 934 F. Supp. 2d at 47. At a minimum, however, Plaintiffs' failure to identify a duty at the time their complaint was filed means that Plaintiffs failed to state a claim for which relief may be granted. Zook v. McCarthy, 52 F. Supp. 3d 69, 73 (D.D.C. 2014); see Sierra Club v. Jackson, 648 F.3d 848, 853-54 (D.C. Cir. 2011) (applying Fed. R. Civ. P. 12(b)(6) standard to complaint seeking review of agency action "committed to agency discretion by law" under the APA, 5 U.S.C. § 701(a)(2)). There was no enforceable duty for EPA to propose and issue aircraft greenhouse gas emission standards when Plaintiffs filed their complaint alleging EPA had unreasonably delayed in discharging that duty. Consequently, whether Plaintiffs' complaint was jurisdictionally defective or Plaintiffs were unable at the time they filed their complaint to state a claim for which relief could be granted, Plaintiffs' complaint must be dismissed.

D. Plaintiffs' remaining claim should be dismissed because they cannot articulate a plausible unreasonable delay claim where, at most, less than four weeks have passed since EPA's duty to promulgate emission standards was triggered.

Finally, Plaintiffs' remaining count must be dismissed for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Plaintiffs cannot articulate any facts that

would support a plausible claim that EPA has unreasonably delayed in issuing emission standards following EPA's recent endangerment finding, which is not yet even effective. Iqbal, 556 U.S. at 678. Therefore, Plaintiffs' claim fails under Fed. R. Civ. P. 12(b)(6). Iqbal, 556 U.S. at 678.

When evaluating an unreasonable delay claim, the Court is principally guided by a "rule of reason" that depends on the facts and circumstances of a particular case. Telecommunications Research & Action Ctr. v. FCC, 750 F.2d 70, 80 (D.C. Cir. 1984). As of the date of this filing, less than four weeks have passed since Administrator McCarthy signed the final endangerment determination, less than a week has passed since it was published in the Federal Register, and still 26 days must arrive before the final endangerment finding is effective. 81 Fed. Reg. at 54,422. Under the "rule of reason" standard, the circumstances here cannot possibly support a "plausible" claim for unreasonable delay. Iqbal, 556 U.S. at 678.

This is particularly true given the statutory requirements EPA must undertake in proposing and finalizing emission standards under CAA Section 231. Specifically, before adopting any final emissions standards, EPA must consult with the Administrator of the Federal Aviation Administration and may not change aircraft engine emissions standards if such change would significantly increase noise and adversely affect safety. 42 U.S.C. § 7571(a)(2)(B). EPA will also be required to follow the detailed procedural steps set forth in CAA Section 307(d), including providing for public comment and a public hearing on a proposed standard, and keeping the record open for 30 days following the public hearing. 42 U.S.C. §§ 7607(d)(1)(F); 7607(d)(5). Considering these statutory requirements, Plaintiffs' claim of unreasonable delay must be dismissed, even if it could be premised on a four-week delay since the Administrator's signature of the final endangerment determination.

In sum, given the short passage of time since the finding that triggered EPA's duty to promulgate emission standards—the existence of which duty is a necessary predicate for Plaintiffs' unreasonable delay claim—Plaintiffs cannot plead any allegations that would provide "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Iqbal, 556 U.S. at 678 (citation and quotation omitted). Plaintiffs' remaining claim should be dismissed for failure to state a claim under Fed. R. Civ. P. 12(b)(6).

CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiffs' complaint.

Respectfully submitted,

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DATED: August 19, 2016

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 19, 2016, a copy of the foregoing was served on the counsel of record who are registered with the Court's ECF system.

/s/ Lisa M. Bell
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