

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](mailto:reisenberg@nam.org)) or Chip Yost (202.637.3175, [cyst@nam.org](mailto: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.