



Sent via electronic mail and certified mail

February 5, 2018

Secretary Rex W. Tillerson
U.S. Department of State
2201 C Street NW
Washington, DC 20520

Re: Notice of Intent to File Suit with Respect to the Overdue Seventh U.S. Climate Action Report as Required under the United Nations Framework Convention on Climate Change

Dear Secretary Tillerson:

On behalf of the Center for Biological Diversity and our over 1.6 million members and online supporters, this letter serves as a notification of intent to sue the State Department for failure to issue the Seventh U.S. Climate Action Report by January 1, 2018, as mandated under the United Nations Framework Convention on Climate Change (“UNFCCC” or “the Convention”).¹

As a Party to the UNFCCC, the United States was required to submit the Seventh U.S. Climate Action Report by January 1, 2018 to the Convention’s secretariat (“Secretariat”). The Global Climate Protection Act of 1987 designates the State Department as the lead agency for U.S. compliance with its international obligations related to climate change, including those under the U.S.-ratified UNFCCC. However, the State Department has failed to submit the Seventh Climate Action Report by the mandated due date, much less issue any statements of the report’s preparation, draft texts, and notifications of public comment opportunities for the report’s final issuance—a process that has, in the past, taken over a year.

We urge the State Department to comply with this UNFCCC requirement as soon as possible by commencing the public comment process and issuing the final report. Expedient submission of the U.S. Climate Action Report is especially critical because adherence to the UNFCCC’s basic transparency requirements is the bedrock foundation to achieving meaningful global implementation of the UNFCCC and the international climate change treaty regime. Moreover, the U.S. itself cannot sustain any further inaction and regression on climate change. 2017 alone was recorded as one of the hottest years in history, according to NASA, and experienced record-breaking disasters, including the devastating trio of hurricanes amounting to over \$200 billion in damages for the United States.² The Trump Administration’s failure to comply with these UNFCCC transparency requirements is not only unprecedented with respect

¹ United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107 (“UNFCCC”).

² Chris Mooney, “The planet just had its hottest years in recorded history. Trump is dismantling efforts to fight climate change,” THE WASHINGTON POST (January 18, 2018), https://www.washingtonpost.com/news/energy-environment/wp/2018/01/18/2017-was-among-the-planets-hottest-years-on-record-government-scientists-report/?utm_term=.f0287e5254d3.

to prior U.S. administrations, but is morally unacceptable in light of the ever-increasing array of extreme disasters caused by the climate crisis.

The State Department's failure to issue the overdue Seventh Climate Action Report constitutes unlawfully withheld and unreasonably delayed agency action under Section 706(1) of the federal Administrative Procedure Act ("APA"). Accordingly, unless the State Department commits to complete these steps expeditiously, the Center for Biological Diversity intends to file suit to compel the State Department's action to issue the final report for UNFCCC compliance.

I. U.S. Reporting Requirements under the UNFCCC

The U.S. is a Party to the UNFCCC, the framework treaty of the international climate change regime that entered into force on March 21, 1994. As set forth in Article 2 of the UNFCCC (*emphasis added*):

The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, *stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system*. Such a level must be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food is not threatened and to enable economic development to proceed in a sustainable manner.

Further, UNFCCC Article 3(1) obligates Parties to protect the climate system on the basis of "equity and in accordance with their *common but differentiated responsibilities* and respective capabilities." As such, the Convention explicitly calls on developed country Parties, like the U.S., to "take the lead" to combat the climate crisis.

Instrumental to achieving the Convention's objective, Parties are subject to a few basic substantive commitments as outlined in Article 4, including reporting requirements as further specified in Articles 4 and 12. Specifically, countries listed on Annex I³ ("Annex I Parties") are obligated to periodically submit "national communications" detailing national greenhouse gas emission inventories and detailed mitigation and adaptation plans consistent with the Convention's objective. In meeting these reporting requirements, the outstanding Seventh U.S. Climate Action Report should contain two documents: (1) the Seventh U.S. National Communication and (2) the Third U.S. Biennial Report. As stated by the State Department in the 2014 Sixth U.S. Climate Action Report, these two reports are "separate, but complementary, communications to the UNFCCC in fulfillment of UNFCCC legal requirements."⁴

³ In implementing the principle of "common but differentiated responsibilities," the UNFCCC creates several classes of parties through annexes. Annex I includes industrialized countries, originally defined as wealthier member states of the Organization for Economic Co-operation and Development ("OECD") and former eastern bloc states. Annex II includes only OECD States. All remaining parties are considered developing countries.

⁴ U.S. DEPARTMENT OF STATE, U.S. CLIMATE ACTION REPORT 2014, *Foreward* (2014) ("U.S. CAR 2014"). See also Decision 2/CP.17 of the Conference of the Parties, Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, FCCC/CP/2011/9/Add.1 (11 December 2011). ("Decision 2/CP.17").

U.S. National Communication Report

Pursuant to UNFCCC Articles 4 and 12 and subsequent decisions⁵, the U.S. as an Annex I Party is required to submit “National Communications” (“NCs”) to the Secretariat every four years.⁶ This NC must include (i) a “national inventory of anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol”⁷; (ii) a “detailed description” of the mitigation and adaptation policies and measures that the U.S. has adopted to implement its commitments of aiming to return to 1990 levels of GHGs not controlled by the Montreal Protocol⁸; (iii) a “specific estimate of the effects” that such policies and measures will have on a Party’s GHG emissions⁹; (iv) “details of measures” taken in accordance with Article 4.3-5, including a Party’s international support of climate finance, adaptation support, and technology transfer, particularly to developing countries¹⁰; and (v) “any other information that the Party considers relevant to the achievement” of the Convention’s objective.¹¹ As such, the most recent Sixth U.S. National Communication issued in 2014 detailed: (i) U.S. GHG emissions inventories and trends to date; (ii) the federal climate action plan toward U.S. GHG mitigation targets; (iii) projections on meeting future GHG mitigation targets; and (iv) U.S. support for international climate finance.

U.S. Biennial Report

In addition to the NC, the U.S. as an Annex I Party is required to submit biennial reports (“BCs”) to the Secretariat every two years.¹² Pursuant to Article 5 of Decision 2/CP.17, the COP required “that in the years when the full national communications are submitted, developed country Parties should present the biennial reports as an annex to the national communications or as a separate report.” The BCs serve to “enhance reporting in national communications of Annex I Parties” and to communicate “on progress in achieving emission reductions and on the provision of financial, technology and capacity-building support to Parties not included in Annex I to the Convention (non-Annex I Parties), building on existing reporting and review guidelines, processes and experiences.”¹³ Similar to the NC, the U.S. 2014 Second Biennial Report detailed: (i) U.S. GHG emissions inventories and trends; (ii) federal and state/regional policies driving progress toward U.S. GHG mitigation targets; (iii) projections on meeting future GHG mitigation targets; and (iv) U.S. support for international climate finance and other global activities.

⁵ The following decisions provide rules and guidance to assist Parties to the UNFCCC in preparing their National Communications, among other things: 3/CP.1, 2/CP.1, 9/CP.2, 6/CP.3, 11/CP.4, 6/CP.5, 5/CP.5, 4/CP.5, 3/CP.5, 34/CP.7, 33/CP.7, 4/CP.8, 1/CP.9, 10/CP.13, 9/CP.16, 20/CP.18.

⁶ Decision 2/CP.17, *supra* n. 3.

⁷ UNFCCC, Article 12.1(a); *see also* Article 4.1(a).

⁸ *Id.*, Article 12.2(a); *see also* Article 4.2(a)-(b).

⁹ *Id.*, Article 12.2(b).

¹⁰ *Id.*, Article 12.3.

¹¹ *Id.*, Article 12.1(c).

¹² Decision 2/CP.17.

¹³ *Ibid.*

The Importance of UNFCCC Reporting Requirements

The global climate change crisis demands global cooperation. In the words of international legal scholar Malcolm Shaw, “the protection of the earth is truly a global problem requiring a global response . . . that cannot be successfully tackled in . . . an arbitrary and piecemeal fashion.”¹⁴ Transparency requirements like the Climate Action Report serve as the bedrock to collective action to address problems like climate change, for which individual countries are less prone to act if they believe other actors are foregoing their responsibilities. To address the “free rider” problem, transparency requirements serve to ensure Party-to-Party accountability by mandating individual member-states disclose greenhouse gas emissions and plans to curb those emissions as part of the collective effort—a campaign for which the United States has been an historic advocate.¹⁵ In sum, transparency drives collective climate action. The Trump Administration’s non-compliance with these regular reporting standards weakens the international transparency system of monitoring, verification, and implementation underpinning global efforts to collectively address this existential problem to our planet.

II. U.S. Non-Compliance with the UNFCCC Requirements – Violation of U.S. Domestic and International Law

U.S. Domestic Law Violations

The State Department’s failure to issue the Seventh Climate Action Report constitutes unlawfully withheld and unreasonably delayed agency action in violation of Section 706(1) of the federal Administrative Procedure Act (“APA”).¹⁶ U.S. law designates the State Department as the lead agency for U.S. compliance with its international obligations related to climate change. Specifically, the Global Climate Protection Act of 1987 provides that the Secretary of State “shall be responsible to coordinate those aspects of United States policy requiring action through the channels of multilateral diplomacy, including the United Nations Environment Program and other international organizations.”¹⁷

As such, the State Department is obligated to take the requisite agency actions necessary to comply with U.S. obligations under the UNFCCC. Here, pursuant to UNFCCC Articles 4 and 12 and Decision 2/CP.17 and section 1103(c) of the Global Climate Protection Act of 1987, the State Department was required to issue and submit both the Seventh U.S. National Communication and Third U.S. Biennial Report on January 1, 2018. Because the State Department has failed to take this “discrete agency action that it is required to take,” the State Department is engaged in unlawfully withheld and unreasonably delayed agency action under Section 706(1) of the APA. *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004); *see also, e.g., Vietnam Veterans of Am. v. CIA*, 811 F.3d 1068, 1078 (9th Cir.

¹⁴ MALCOLM SHAW, INTERNATIONAL LAW 862 (6th ed. 2008).

¹⁵ *See, e.g.,* Nate Hultman and Paul Bodnar, *Trump isn’t reporting CO2 emissions, ending an era of global transparency*, THE HILL (Jan. 18, 2018, 10:30 AM EST), <http://thehill.com/opinion/energy-environment/369516-trump-isnt-reporting-co2-emissions-ending-an-era-of-global>; Yamide Dagnet, “Why Transparency is a Pre-requisite for delivering on the Paris Agreement,” WORLD RESOURCES INSTITUTE (May 20, 2016), <http://www.wri.org/blog/2016/05/insider-why-transparency-prerequisite-delivering-paris-agreement>.

¹⁶ 5 U.S.C. § 706(1).

¹⁷ § 1103(c), Pub. L. 100–204, title XI, Dec. 22, 1987, 101 Stat. 1407, as amended by Pub. L. 103–199, title VI, § 603(1), Dec. 17, 1993, 107 Stat. 2327.

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2016 (enforcing a “specific, unequivocal command” for an agency “to take discrete agency action”)(citations omitted).

Moreover, given the multi-month production process involved with issuing the Seventh U.S. Climate Action Report, it is likely that even if the State Department began the process right away, the report’s issue date will be further delayed by several months if not years. Under past practice and compliance with the APA rulemaking requirements, the production process of the previous U.S. Climate Action Reports were announced in the Federal Register up to *eight months* prior to the UNFCCC due date. However, to date, the government has failed to give any indication as to the report’s progress, much less commencement. Specifically, the State Department has failed to issue any statement on the report’s preparation, draft texts, or Federal Register notifications of public comment opportunities for the report’s final issuance, as was done for the prior U.S. Climate Action Reports. As such, even if the State Department were to commence the Federal Register process now, the final issuance and submission to the Secretariat of the Climate Action Report would not occur until nearly the end of 2018 at a minimum, several months after the original due date of January 1, 2018. Such a vast delay further exacerbates the State Department’s ongoing violation of Section 706(1) of the APA.

To note, the U.S. is still a Party to the UNFCCC and is thus obligated to comply with its procedural requirements. President Trump’s June 2017 announcement¹⁸ regarding his intention to withdraw from the Paris Agreement¹⁹ does not have any legal effect and fails to in any way impact the U.S.’s current legal obligations under the UNFCCC.

U.S. International Law Violations

The U.S. has violated Articles 4 and 12 of the Convention and Decision 2/CP.17, which mandate that the U.S. submit both the Seventh U.S. National Communication and Third U.S. Biennial Report, together comprising the U.S.’s Seventh Climate Action Report, on January 1, 2018. The U.S. failed to meet this treaty deadline for both documents and has thus violated its Annex I Party obligations under the UNFCCC.

The U.S.’s basic procedural obligations under the UNFCCC are clear. The majority of Annex I Parties, including the European Union, Germany, the UK, Japan, and Russia, have complied with the January 1, 2018 deadline, having already submitted their respective NCs²⁰ and BRs²¹ to the Convention’s Secretariat. Moreover, the U.S. has consistently fulfilled its UNFCCC reporting obligations since 1992, having submitted all six previously required NCs and the two mandated BRs. In 2014, the U.S. completed the Sixth U.S. Climate Action Report, containing the Sixth U.S. National Communication and first-ever

¹⁸ *Statement by President Trump on the Paris Climate Accord*, THE WHITE HOUSE (Jun. 1, 2017), <https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord/>.

¹⁹ United Nations Framework Convention on Climate Change, Conference of the Parties Nov. 30-Dec. 11, 2015, Adoption of the Paris Agreement Art. 2, U.N. Doc. FCCC/CP/2015/L.9 (Dec. 12, 2015) (“Paris Agreement”).

²⁰ United Nations, *Submitted National Communications from Annex I Parties*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://unfccc.int/national_reports/annex_i_natcom/submitted_natcom/items/10138.php (last visited Jan. 31, 2018).

²¹ United Nations, *Submitted Biennial Reports from Annex I Parties*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://unfccc.int/national_reports/biennial_reports_and_iar/biennial_reports_data_interface/items/10132.php (last visited Jan. 31, 2018).

U.S. Biennial Report, and in 2016, issued its second U.S. Biennial Report. As stated in the *foreward* to the Sixth U.S. Climate Action Report, these reports were submitted to the Secretariat “in fulfillment of UNFCCC legal requirements.”²² Moreover, as recognized by the U.S. and as practiced by both the U.S. and other Convention Parties, the submission of the Climate Action Report is legally mandated by the UNFCCC.²³ The U.S.’s failure to comply with these substantive procedural obligations thus constitutes a breach of the Convention.

III. U.S. Role in the Climate Crisis

Given the U.S.’s position as the world’s largest emitter of greenhouse gases, the U.S.’s failure to meet its basic procedural commitments under the UNFCCC is not only unlawful but morally unacceptable. The U.S. has contributed more to climate change than any other country. It is the world’s largest cumulative emitter of greenhouse gas pollution, responsible for 27 percent of cumulative global CO₂ emissions since 1850, and is currently the world’s second highest emitter on an annual and per capita basis.²⁴

In 2016, the U.S. signed the Paris Agreement²⁵ and committed to hold the long-term global average temperature to well below 2°C and “to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels.” However, current U.S. climate policy is wholly inadequate to meet the international climate target to hold global average temperature rise to well below 2°C above pre-industrial levels to avoid the worst dangers of climate change. Moreover, the Trump administration has focused on pushing through harmful rollbacks of federal climate policy, and federal agencies are either failing to implement or only partially implementing domestic law and policy mandating greenhouse gas reductions. As a result, current U.S. climate policy has been ranked as “critically insufficient” by an international team of climate policy experts and climate scientists which concluded: “These steps represent a severe backwards move and an abrogation of the United States’ responsibility as the world’s second largest

²² U.S. CAR 2014, *Foreward*. See also of Decision 2/CP.17.

²³ There is strong evidence that customary law requires Parties to the Convention comply with the reporting requirements under Articles 4 and 12 and subsequent decisions. According to Article 38(1)(b) of the Statute of the International Court of Justice, custom is “evidence of the general practice accepted as law.” Customary international law, therefore, is “created by the fusion of (1) an objective element: practice; and (2) a subjective element: *opinio juris*.” (L. Guruswamy, *INTERNATIONAL ENVIRONMENTAL LAW* 16 (4th ed. 2012). Here, the objective element of practice is fulfilled because Convention Parties have practiced compliance with the reporting obligations since the Convention’s entry into force twenty-four years ago. The subjective element of *opinio juris* is also met through the Convention Parties’ written declarations within their national communication reports that they are fulfilling the Convention’s legal requirements by issuing such reports, including the U.S.’s statement in its Sixth National Communication.

²⁴ Mengpin Ge, Johannes Friedrich, and Thomas Damassa, “6 Graphs Explain the World’s Top 10 Emitters”, *WORLD RESOURCES INSTITUTE* (November 25, 2014), <https://wri.org/blog/2014/11/6-graphs-explain-world%E2%80%99s-top-10-emitters>.

²⁵ The United States signed the Paris Agreement on April 22, 2016 as a legally binding instrument through executive agreement. See United Nations Treaty Collection, Chapter XXVII, 7.d Paris Agreement, List of Signatories (last visited Jan. 31, 2018), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&lang=en&clang=en.

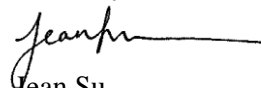
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emitter [on an annual basis] at a time when more, not less, commitment is needed from all governments to avert the worst impacts of climate change.”²⁶

Reporting requirements like the U.S. Climate Action Report constitute the minimum procedural obligations of the UNFCCC and serve as implementation measures aimed at combatting the planet’s existential climate crisis. The U.S.’s refusal to meet even the bare minimum reporting requirements is not only unlawful, but also destructive to the global implementation of mitigation and adaptation measures desperately needed to combat climate change. By failing to meet these transparency obligations, the U.S. renders itself a pariah on the world stage—instead of the leader it is morally obligated to be given its historical GHG emissions and place in the world order.

We look forward to your prompt response to this letter setting forth a concrete and expeditious timeline for compliance with the obligations of the UNFCCC and issuance of the Seventh U.S. Climate Action Report. If we do not hear from the State Department within two weeks, we will assume the State Department does not intend to fulfill this overdue legal obligation and will proceed accordingly.

Sincerely,



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²⁶ USA, CLIMATE ACTION TRACKER (last updated Nov. 6, 2017), <http://climateactiontracker.org/countries/usa>.
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