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Addressed to:

Directorate-General Climate Action
European Commission
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RE: Request for Internal Review of Administrative Omission by the Commission to Submit to a Proposal to Implement the Fuel Quality Directive

On behalf of Transport & Environment, Greenpeace and Friends of the Earth Europe (hereinafter “Applicants”), we submit this request for internal review (RIR) under Article 10 of the Aarhus Regulation¹ on the Commission’s administrative omission, namely the failure to submit, in accordance with Article 5(a)(4) of Decision 1999/468/EC,² the proposal necessary for the adoption of the implementation measures of Article 7a of the Fuel Quality Directive (FQD),³ in particular the fuel baseline standard and greenhouse gas emission calculation methodologies. Applicants are entitled to make this RIR under Article 11 of the Aarhus Regulation – see annex submitted with this RIR.

BACKGROUND ON FQD IMPLEMENTATION

1. Article 7a of the FQD requires the adoption of the fuel baseline standard and greenhouse gas emission calculation methodologies—both deemed necessary for FQD implementation, as shown below—via the regulatory procedure with scrutiny (RPS).⁴
2. The responsibility for the final adoption of the above-mentioned implementing acts falls either on the Commission or on the Council, depending on how the RPS concretely develops. The presentation of a Commission proposal relating to the measures to be taken constitutes a necessary condition for the adoption of the final implementing acts by either institution.
3. The Commission has failed to adopt said proposal and submit it to the Council, in view of the required adoption of the fuel baseline standard and greenhouse gas emission calculation methodologies via RPS. It should have done so, without delay, following the decision of the Fuels

¹ Regulation (EC) No 1367/2006.

² Council Decision 1999/468/EC,

³ Directive 98/70/EC, as amended by Directive 2009/30/EC.

⁴ Directive 98/70/EC, Article 7a(5) and 11(4) referencing Council Decision 1999/468/EC.

Committee on 23 February 2012 and, in accordance with the Commission Work Programme 2013, no later than 31 December 2013.⁵

4. The Commission is therefore in violation of its statutory obligations under the FQD and this submission requests internal review of that administrative omission and the adoption of the above proposal and its submission to the Council.

Supplier Reporting and Calculation Methodologies [FQD, Article 7a (5)(a) and (d)]

5. Article 7a(1) sets out the minimum information that suppliers⁶ must report—and should have already started reporting—as of 1 January 2011:

With effect from 1 January 2011, suppliers shall report annually, to the authority designated by the Member State, on the greenhouse gas intensity of fuel and energy supplied within each Member State by providing, as a minimum, the following information:

- (a) the total volume of each type of fuel or energy supplied, indicating where purchased and its origin; and
- (b) life cycle greenhouse gas emissions per unit of energy.⁷

Suppliers should therefore be reporting certain characteristics of the fuel or energy supplied by them and their lifecycle greenhouse gas emissions per unit of energy. Member States are further required to ensure those reports are subject to verification.

6. Article 7a(3) outlines how lifecycle greenhouse gas emissions are to be calculated for different types of fuel and energy: “Life cycle greenhouse gas emissions from biofuels shall be calculated in accordance with Article 7d. Life cycle greenhouse gas emissions from other fuels and energy shall be calculated using a methodology laid down in accordance with [Article 7a(5)].” This can be summarized as follows:

| Type of Fuel or Energy | Calculation Methodology |
|------------------------|--------------------------------------|
| Biofuels | Article 7d / Annex IV |
| Fuels and Energy | To Be Adopted under Article 7a(5)(a) |
| Electric Road Vehicles | To be Adopted under Article 7a(5)(d) |

7. Supplier reporting of lifecycle greenhouse gas emissions per unit of energy therefore requires, as a condition precedent, the adoption of “measures necessary for the implementation of [Article 7a]” via RPS, which specifically includes greenhouse gas emission calculation methodologies:⁸

⁵ *Planned Commission initiatives until end of 2013: Commission actions expected to be adopted / Actions prévues pour adoption par la Commission: 01/11/2013 – 31/12/2013*, p. 14, available at http://ec.europa.eu/atwork/pdf/forward_programming_2013.pdf (published 23 October 2012).

⁶ Article 2(8) of Directive 98/70/EC defines “supplier” as “the entity responsible for passing fuel or energy through an excise duty point or, if no excise is due, any other relevant entity designated by a Member State.”

⁷ Article 2(7) of Directive 98/70/EC defines “greenhouse gas emissions per unit of energy” to mean “the total mass of CO₂ equivalent greenhouse gas emissions associated with the fuel or energy supplied, divided by the total energy content of the fuel or energy supplied (for fuel, expressed as its low heating value).” Article 2(6) of Directive 98/70/EC defines “lifecycle greenhouse gas emissions as “all net emissions of CO₂, CH₄ and N₂O that can be assigned to the fuel (including any blended components) or energy supplied”, which includes “all relevant stages from extraction,... transport and distribution, processing and combustion, irrespective of where those emissions occur.”

⁸ Directive 98/70/EC, Article 7a(5) (emphasis added).

Measures necessary for the implementation of this Article, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 11(4). *Such measures include, in particular:*

- (a) the methodology for the calculation of life cycle greenhouse gas emissions from fuels other than biofuels and from energy;

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- (d) the methodology to calculate the contribution of electric road vehicles, which shall be compatible with Article 3(4) of Directive 2009/28/EC.

8. Greenhouse gas emission calculation methodologies have not been adopted. The absence of greenhouse gas emission calculation methodologies has a domino effect that is undermining supplier reporting, the gradual-reduction objective underlying FQD targets and the FQD targets themselves, as discussed below.

FQD Targets and the Fuel Baseline Standard [FQD, Article 7a (5)(b)]

9. Article 7a(2)(a) sets out the FQD targets on suppliers:

Member States shall require suppliers to reduce as gradually as possible life cycle greenhouse gas emissions per unit of energy from fuel and energy supplied by up to 10 % by 31 December 2020, compared with the fuel baseline standard referred to in paragraph 5(b). This reduction shall consist of:

- (a) 6% by 31 December 2020. Member States may require suppliers, for this reduction, to comply with the following intermediate targets: 2% by 31 December 2014 and 4% by 31 December 2017;

10. Taken together, Article 7a(1) and (2) contemplate three-year intervals for the major FQD implementation milestones: in 2011, suppliers begin to report pursuant to Article 7a(1); in 2014, an indicative target of 2% may be established; in 2017, an indicative target of 4% may be established; and in 2020, the mandatory target of 6% must be met.

11. This measured approach, which compels Member States to require “suppliers [to] reduce as gradually as possible life cycle greenhouse gas emissions,” is designed to prevent abrupt disruptions and burdens that might otherwise undermine the achievement of the mandatory FQD target in 2020.

12. Measurement of gradual progress against FQD targets requires, as a condition precedent, the adoption of certain “measures necessary for the implementation of [Article 7a]” via RPS, which specifically includes the fuel baseline standard:⁹

Measures necessary for the implementation of this Article, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 11(4). *Such measures include, in particular:*

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⁹ Directive 98/70/EC, Article 7a(5) (emphasis added).

- (b) the methodology specifying, before 1 January 2011, the fuel baseline standard based on the life cycle greenhouse gas emissions per unit of energy from fossil fuels in 2010 for the purposes of paragraph 2;

Article 7a(5)(b) provides a clear deadline for adoption of the baseline standard, 1 January 2011, to coincide with the first major FQD implementation milestone (supplier reporting) under Article 7a(1).

- 13. The fuel baseline standard has yet to be adopted. The lack of a fuel baseline standard has a domino effect that is undermining supplier reporting, the gradual-reduction objective underlying FQD targets and the FQD targets themselves, as evidenced by the imminent 2014 implementation milestone in which a 2% reduction is already foreseen to have occurred.

REQUEST FOR REVIEW OF ADMINISTRATIVE OMISSION

Administrative Review under the Aarhus Regulation

- 14. The Aarhus Regulation implements the obligation arising under the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention), by laying down rules to apply the provisions of the Aarhus Convention to European Union (EU) institutions and bodies, in particular by granting access to justice in environmental matters at EU level.
- 15. Under Article 10 (1) any non-governmental organisation which meets the criteria set out in Article 11 is entitled to make a request for internal review to the Community institution or body that has adopted an administrative act under environmental law or, in case of an alleged administrative omission, should have adopted such an act.

Criteria for Entitlement

- 16. In line with the criteria set in Article 11, a non-governmental organisation is entitled to make a request for internal review in accordance with Article 10, provided that:
 - a. it is an independent non-profit-making legal person in accordance with a Member State's national law or practice;
 - b. it has the primary stated objective of promoting environmental protection in the context of environmental law;
 - c. it has existed for more than two years and is actively pursuing the objective referred to under (b);
 - d. the subject matter in respect of which the request for internal review is made is covered by its objective and activities.

- 17. As detailed in the Annex, each applicant meets the criteria set out in Article 11.

Scope of Review of Administrative Omissions under the Aarhus Regulation

- 18. Under Article 2(1)(h), "administrative omission" means any failure of a EU institution or body to adopt an administrative act, i.e. a measure under environmental law having legally binding and external effects.
- 19. In accordance with Article 2(1)(c), omissions of an EU institution or body, acting in a judicial or legislative capacity, are not subject to internal review. Likewise, pursuant to Article 2(2),

administrative omissions do not include omissions by an EU institution or body in its capacity as an administrative review body, such as under competition rules, infringements proceedings, Ombudsman proceedings and OLAF proceedings.

20. Administrative omissions encompass, on the other hand, any failure of the Commission to act in the exercise of the implementing powers conferred upon it by an act of EU legislation. Such is the case at issue, where the Commission omitted to submit to the Council the proposal for the measures to implement Article 7a(5)(a), (b) and (d) of the FQD.
21. It should also be noted that, following the ruling of the General Court in the *Stichting Natuur en Milieu* case, the definition of administrative act is no longer limited to “measures of individual scope.”¹⁰ Accordingly, a request to review an administrative omission can refer to the failure to adopt implementing measures of general scope, such as those to which the present RIR refers.

Procedural Aspects

22. Pursuant to Article 10(2), request must be made, in the case of an alleged omission, within six weeks after the date when the administrative act was required. In the present case, the Applicants are requesting the review of the Commission’s omission to define its position in the RPS for the adoption of the FQD implementing measures.
23. As explained in the following paragraphs 25 to 31 under Article 5a(4) of Decision 1999/468/EC, which applies to and governs the relevant regulatory procedure, the Commission should have presented a proposal for the relevant FQD implementing measures to the Council, and forwarded it to the European Parliament, *without delay* after the vote of the Fuels Committee of 23 February 2012.
24. According to the Commission’s own Commission Work Programme 2013, the Commission should have submitted the proposal to the Council by the end of the 4th trimester of 2013.¹¹ Hence, 31 December 2013 serves as the final deadline on which the Commission was required to act for the purpose of Article 10(2) of the Aarhus Regulation.

GROUNDS FOR INTERNAL REVIEW

Regulatory Procedure with Scrutiny (RPS)

25. The Commission has not fulfilled its obligation to submit to the Council the preparatory acts for the adoption of the fuel baseline standard and greenhouse gas emission calculation methodologies via RPS, as outlined in Article 5a(1) to (4) of Decision 1999/468/EC.¹² RPS contains several steps that, following completion of each one, require certain actions by the Commission to be undertaken.
26. Article 5a(2) of Decision 1999/468/EC requires the Commission first to submit a draft of the measures to be taken to a committee composed of representatives of the Member States and

¹⁰ General Court of 14 June 2012, Case T-338/08, *Stichting Natuur en Milieu*, paragraph 83 (“Article 9(3) of the Aarhus Convention cannot be construed as referring exclusively to measures of individual scope. Consequently, in so far as Article 10(1) of Regulation No 1367/2006 limits the concept of ‘acts’, as used in Article 9(3) of the Aarhus Convention, to ‘administrative act[s]’ defined in Article 2(1)(g) of Regulation No 1367/2006 as ‘measure[s] of individual scope’, it is not compatible with Article 9(3) of the Aarhus Convention.”).

¹¹ *Planned Commission initiatives until end of 2013: Commission actions expected to be adopted / Actions prévues pour adoption par la Commission: 01/11/2013 – 31/12/2013*, p. 14, available at http://ec.europa.eu/atwork/pdf/forward_programming_2013.pdf (published 23 October 2012).

¹² Directive 98/70/EC, Article 7a(5), *referencing* Directive 98/70/EC, Article 11(4), *referencing* Decision 1999/468/EC, Article 5a(1) to (4).

chaired by a representative of the Commission (referred to as the “Fuels Committee”).¹³ The Fuels Committee shall deliver its opinion on the draft within a time-limit determined by the chairperson under qualified-majority voting rules.¹⁴

27. On 4 October 2011, the Commission sent a draft of the measures (hereinafter “proposed Directive”) to the Fuels Committee for consideration. The proposed Directive contained the fuel baseline standard and greenhouse gas emission calculation methodologies, among other measures. The proposed Directive was discussed at the 25 October 2011 and 2 December 2011 meetings of the Fuels Committee.
28. On 23 February 2012, the Fuels Committee voted on the proposed Directive: total weighted votes in favour were 89; total weighted votes against were 128; and total weighted abstentions were 128. With no qualified majority for or against the proposed Directive, the Fuels Committee therefore delivered no opinion.

The Commission’s Failure to Submit a Proposal “Without Delay” to the Council

29. In the absence of an opinion by the Fuels Committee, the procedures in Article 5a(4) of Decision 1999/468/EC apply.¹⁵ The Commission therefore should have without delay submitted a proposal relating to the measures to be taken to the Council and forwarded it to the European Parliament.¹⁶
30. It is well-accepted that “without delay,” as interpreted by the Court of Justice in the *Pharos* ruling, whilst requiring the Commission to act swiftly, allows the institution a certain degree of latitude and that, following the failure to obtain approval from the Fuel Committee, “if the Commission has the right to amend the proposal relating to the measures to be taken which it submits to the Council, it must have sufficient time to consider the various courses of action open to it.”¹⁷
31. Nevertheless, the Commission must act with a certain degree of rapidity and within a delay that is reasonable and justified in the light of the concrete circumstances. The Commission cannot interpret Article 5a(4) of Decision 1999/468/EC as authorizing it indefinitely to delay its obligation to submit the proposal to the Council.
32. Taking into account the legislative and political context, the Commission has taken an unreasonably long period to adopt and submit its proposal, which jeopardises FQD objectives.
33. At the time of submission of this RIR, over 22 months have passed since the Fuels Committee delivered a “no opinion” on 23 February 2012. This extremely long delay is inconsistent with the provisions of the FQD, especially taking into account the original deadline of 1 January 2011.
34. Strikingly, the Commission has even failed to meet its own (generous) timeframe and is protracting its inactivity beyond the deadline outlined in the Commission Work Programme 2013. In this document, the Commission indicated the following:

“The Fuel Quality Directive (98/70/EC) introduced an obligation on suppliers to reduce by 6% the lifecycle greenhouse gas intensity of fuel and other (electric) energy supplied for use in road vehicles (and in non-road mobile machinery) by 2020. In this context, the Commission submitted a proposal for an implementing

¹³ Decision 1999/468/EC, Article 5a(1).

¹⁴ Decision 1999/468/EC, Article 5a(2).

¹⁵ Decision 1999/468/EC, Article 5a(4).

¹⁶ Decision 1999/468/EC, Article 5a(4)(a).

¹⁷ Judgment of the Court of 18 November 1999, Case C-151/98 P, *Pharos SA v Commission*, paragraphs 20 and 24.

measure laying down a methodology for the calculation of lifecycle greenhouse gas emissions from fossil fuels and energy to the Fuel Quality Committee on 4 October 2011. The proposal was discussed on 25 October and 2 December 2011; the Committee vote on the implementing measure on 23 February 2012 resulted in a "no opinion". The proposal should now be submitted to the Council."¹⁸

35. The Commission estimated that it would have adopted a proposal and submitted it to the Council by the end of the 4th trimester of 2013. But it has clearly failed to do so, notwithstanding the fact that "in accordance with the relevant comitology procedure, an impact assessment considering a number of options was finalised in August 2013,"¹⁹ and that, therefore, the Commission had all the elements it needed to comply with its obligations.
36. Nor does the Commission Work Programme 2014 identify any actions to be undertaken in 2014 on the adoption of the fuel baseline standard and greenhouse gas emission calculation methodologies.

Effects of the Commission's Administrative Omission in RPS

37. Failure to meet this deadline means that the Council is still incapable of adopting the fuel baseline standard and greenhouse gas emission calculation methodologies necessary for the attainment of FQD objectives.
38. Had the Commission acted lawfully and submitted without delay the proposal to the Council, the proposed Directive would have advanced under the strict deadlines for action under Article 5a(4) of Decision 1999/468/EC. In particular, the Council would have been compelled to act on the proposal by a qualified majority within two months from the date of referral to it. In accordance with Decision 199/468/EC:
 - If within that period, the Council opposes the proposed measures by a qualified majority, the measures shall not be adopted and the Commission may submit an amended proposal or present a legislative proposal.
 - If within that period the Council envisages adopting the proposed measures, the Council shall without delay submit them to the European Parliament. If the Council does not act within the two-month period, the Commission shall without delay submit the measures for scrutiny by the European Parliament. The European Parliament, acting by a majority of its component members within four months, may oppose the adoption of the measures on certain grounds in which case the Commission may submit to the Fuels Committee an amended draft of the measures or present a legislative proposal. If, on the expiry of the four months, the European Parliament has not opposed the proposed measures, the proposed Directive shall be adopted.

The failure of the Commission to submit without delay a proposal relating to the measures to the Council is unduly delaying adoption of the fuel baseline standard and greenhouse gas emission calculation methodologies, in violation of the FQD.

Consequences of the Contested Omission on the EU Climate Policy

39. The consequences of Commission inaction are significant. The combustion of transport fuel alone contributes approximately 20% to overall greenhouse gas emissions in the European Union.²⁰ For

¹⁸ Commission Work Programme for 2013, page 14.

¹⁹ Commission Staff Working Document, Impact Assessment "Accompanying the Communication "A policy framework for climate and energy in the period from 2020 up to 2030"", Chapter 7.4.2., paragraph 12.

²⁰ Directive 2009/30/EC, Recitals 4 and 8.

this reason, the European Union set out to reduce the lifecycle greenhouse gas intensity of the transport fuels it consumes, in order to achieve a 6% reduction by 2020.

40. The FQD with its Article 7a is a landmark piece of climate change legislation that is designed to reduce the impact of the EU transport sector on the climate system. It establishes an obligation on EU transport fuel providers to contribute to the climate effort in a similar way as car producers, for example.
41. The EU is not alone in setting a clean fuel standard. The Commission notes that *“other major economies are reviewing proposals for or have/ has adopted similar legislation,”* further elaborating that *“The states of California and Oregon in the USA and the province of British Columbia in Canada have adopted legislation for reducing life cycle greenhouse gas emissions from transport fuels; commonly known as Low Carbon Fuel Standards (LCFS). In addition the governors of the state of Washington and eleven other north-eastern states have either directed their respective departments to evaluate and develop a similar LCFS or have joined to evaluate and develop one standard for their region. The latter includes the states of Connecticut, Delaware, Maine, Maryland, Massachusetts, New York, New Hampshire, New Jersey, Pennsylvania, Rhode Island and Vermont.”*²¹
42. Failure to implement Article 7a of the FQD would represent a major setback for the EU’s climate policy. It would be—and be seen as—a victory for those companies and countries that aim to sell high-carbon fuels to Europe and have chosen to ignore the climate change impact of their activities. Science has been clear that the extraction and use of ever-dirtier fossil fuels is leading the world towards dangerous global warming.²² Institutions, such as the International Energy Agency (IEA), have warned that humankind must leave two-thirds of fossil fuels in the ground if we are to avoid dangerous global warming.²³
43. This RIR is motivated by Applicants’ grave concern that the FQD targets could not be achieved. The failure to adopt the fuel baseline standard and greenhouse gas emission calculation methodologies, key measures that would allow fuel suppliers and Member States to measure progress toward this target, places the FQD and its underlying climate objectives at risk.
44. Indeed, if no fuel baseline standard and greenhouse gas emission calculation methodologies are established, suppliers cannot report progress toward FQD targets, and it remains impossible for EU Member States to monitor the achievement of FQD targets. If the fuel baseline standard and greenhouse gas emission calculation methodologies are established too late, suppliers will not know with certainty whether they are on track to achieving the 2020 target. As a result, the obligation could become unnecessarily burdensome, since they may have to reduce the lifecycle greenhouse gas emissions of their fuels abruptly, not gradually as intended. Gradual progress is fundamental to the regulatory design of the FQD.
45. The prompt adoption of the fuel baseline standard and greenhouse gas calculation methodologies is the only way in which this crucial piece of climate legislation can deliver.

CONCLUSION

Based on the foregoing, Applicants request the Commission to carry out the internal review of its administrative omission to adopt and submit a proposal to the Council without delay, the fuel baseline standard and greenhouse gas calculation methodologies in violation of its statutory obligations under Article 7a(5) of the FQD and Article 5a(4) of Decision 199/468/EC.

²¹ Commission Staff Working Document, *cited above*, Chapter 7.4.2, paragraph 12.

²² <http://www.transportenvironment.org/sites/te/files/publications/Barroso%20ScientistLetterReFQD%2016dec2013.pdf>

²³ <http://www.iea.org/publications/freepublications/publication/English.pdf>

Yours sincerely,



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