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NORTHWEST ROCKY MOUNTAIN WASHINGTON, D.C. INTERNATIONAL



Potomac RIVERKEEPER®
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August 5, 2014

*Via Certified Mail
Return Receipt Requested*

Gina McCarthy
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Eric Holder, Attorney General
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530

Re: Notice of Violation of Non-Discretionary Duty Under the Clean Water Act, 33 U.S.C. § 1313(d)(2), to Approve or Disapprove Virginia's Identification of the Attainment Status of the Shenandoah River Regarding Water Quality Standards for Recreational Use (9 VA. ADMIN. CODE § 25-260-10.A.), and for Substances Which Nourish Undesirable or Nuisance Aquatic Plant Life (9 VA. ADMIN. CODE § 25-260-20.A.)

Dear Ms. McCarthy:

On behalf of Shenandoah Riverkeeper and Potomac Riverkeeper, Inc. we request that you take immediate action to remedy an ongoing violation by the Administrator of U.S. Environmental Protection Agency ("Administrator" or "EPA") of a section of the Clean Water Act ("CWA") that imposes a non-discretionary duty to "either approve or disapprove" Virginia's identification of the water quality attainment status of the Shenandoah River, "not later than thirty days after the date of submission" to EPA.

I. Background

Shenandoah Riverkeeper has documented the presence of nuisance algae in all reaches of the Shenandoah River at various times throughout the last five years. Many people who use the Shenandoah River find that the frequent presence of excessive algae diminishes their use and enjoyment of the river for recreation, including swimming, wading, floating, canoeing, and fishing. Shenandoah Riverkeeper has submitted timely comments and evidence to the Virginia Department of Environmental Quality (“VDEQ”) and to EPA, documenting that the regular and extensive algae blooms impair recreational use of the Shenandoah River. On the basis of that evidence, Shenandoah Riverkeeper asked VDEQ to make a determination that existing effluent limits are not stringent enough to implement two water quality standards that each apply to the Shenandoah River under Virginia law: Virginia’s general criteria for all waters in the state, which governs “substances which nourish undesirable or nuisance aquatic plant life,” (9 VA. ADMIN. CODE § 25-260-20.A.), and Virginia’s designation of the Shenandoah River for recreational uses including swimming and boating (9 VA. ADMIN CODE § 25-260-10.A). Shenandoah Riverkeeper requested that VDEQ designate all reaches of the Shenandoah River as impaired by algae on Virginia’s “303(d) list” (containing the state’s identification of waters pursuant to 33 U.S.C. §1313(d)(1)(A)).

On October 2, 2012, VDEQ submitted a response to Shenandoah Riverkeeper’s comments, giving several reasons for its refusal to identify the Shenandoah River on the state’s 303(d) list as impaired by algae. First, VDEQ refused to acknowledge a violation of its general criteria, claiming that it could not do so because VDEQ has not adopted a “listing threshold” for what constitutes “nuisance aquatic plant life”—a prerequisite that does not apply under Virginia’s narrative criteria. Next VDEQ refused to acknowledge a violation of its designated use for recreation, which under federal and state law is itself an applicable water quality standard. *See* 40 C.F.R. 130.2(d), *State Water Control Bd. v. Captain’s Cove Util. Co., Inc.*, 2735-07-1, 2008 WL 2963851 (Va. Ct. App. Aug. 5, 2008) (reinstating water pollution control board’s denial of discharge permit on basis that the discharge would impair recreational uses). Instead VDEQ stated that it determines recreational use protection based solely on violations of the state’s *E. coli* or enterococci bacteria standards—again, a limitation that does not apply under Virginia’s recreational use water quality standard. Finally, VDEQ arbitrarily refused to consider photographic and testimonial evidence of actual impairment of recreational uses. VDEQ proposed to instead list the river under the state’s “Category 2B” (which applies to “waters [that] are of concern to the state but no water quality standard exists for a specific pollutant, or the water exceeds a state screening value or toxicity test”).

On October 25, 2012, Shenandoah Riverkeeper submitted comments to EPA reiterating and supplementing their documentation of the river’s algae problem as a basis for including the river on the state’s 303(d) list, and refuting each aspect of VDEQ’s rationale for refusing to acknowledge the river’s algae impairment. Several times afterward Shenandoah Riverkeeper submitted documentation of the ongoing algae problems as it became available.

On December 12, 2013, EPA Region 3 announced that it would “defer final action on the assessment status of the impacts of algal growth on recreation uses in the Shenandoah River, North Fork Shenandoah River, and South Fork Shenandoah River.” Region 3 stated further that “EPA does consider visual observation and statements by water users regarding algal blooms to be relevant to a determination whether one or more narrative criteria or designated uses are being achieved.” The Region approved the remainder of Virginia’s 303(d) list.

To date – nearly two years after VDEQ submitted its 303(d) list and nearly eight months after the Region announced its partial deferral – EPA has not taken action either to approve or to disapprove VDEQ’s identification of the status of the Shenandoah River with respect to the designated recreational use or the general criteria pertaining to excessive algae.

II. EPA is in Violation of its Non-Discretionary Duty Under CWA § 303(d)(2) to Approve or Disapprove Virginia’s Identification

The Clean Water Act requires each state to “identify those waters within its boundaries for which the effluent limitations required [by the Act] are not stringent enough to implement any water quality standard applicable to such waters.” 33 U.S.C. § 1313(d)(1)(A). The Act mandates that EPA “*shall either approve or disapprove such identification and load not later than thirty days after the date of submission.*” *Id.* § 1313(d)(2) (emphasis added). VDEQ submitted its 2012 303(d) list to EPA on or about October 2, 2012. The Administrator was required to either approve or disapprove that identification of waters no later than thirty days after the date of submission. As noted above, the Administrator has not taken action to either approve or disapprove Virginia’s identification of the Shenandoah River’s impairment status in the state’s 2012 303(d) list. The Administrator has failed to carry out this nondiscretionary duty.

III. Parties Providing Notice

The names and contact information for the parties giving notice are as follows:

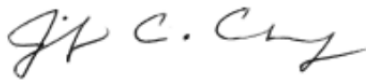
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CONCLUSION

The Administrator is in violation of her non-discretionary duty under 33 U.S.C. § 1313(d)(2) as specified above. If the Administrator does not complete performance of that non-discretionary duty within the next 60 days, Potomac Riverkeeper and Shenandoah Riverkeeper intend to file suit in federal court to compel the Administrator to complete performance of that duty.

I am acting as counsel for the parties giving this notice. My address and phone number are specified below. If you have any questions or wish to discuss this matter, please contact me.



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