

PACE ENVIRONMENTAL LITIGATION CLINIC, INC.

ELISABETH HAUB SCHOOL OF LAW

78 NORTH BROADWAY

WHITE PLAINS, NEW YORK 10603

PHONE: 914.422.4343

FAX: 914.422.4437

SUPERVISING ATTORNEYS

KARL S. COPLAN

ROBERT F. KENNEDY, JR.

TODD D. OMMEN

ADMINISTRATOR

JENNIFER RUHLE

April 27, 2017

Via Certified Mail, Return Receipt Requested

Administrator Scott Pruitt
U.S. Environmental Protection Agency
Aerial Rios Building, Mail Code 1101A
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Katherine McCabe
Acting Regional Administrator
Environmental Protection Agency, Region 2
290 Broadway
New York, NY 10007-1866

Hon. Jeff Sessions
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Re: Sixty-day notice of intent to sue for failure to carry out non-discretionary duty to approve or disapprove New York State's revised water quality standards in violation of Clean Water Act section 303(c)

Dear Administrator Pruitt, Acting Regional Administrator McCabe and Mr. Attorney General,

I write on behalf of Riverkeeper, Inc., Natural Resources Defense Council, Connecticut Fund for the Environment and its bi-state program Save the Sound, and the additional parties listed on Exhibit A (the "Noticing Parties") to provide you with notice of our intent to bring suit against you in your official capacities as Administrator and Acting Regional Administrator of the United States Environmental Protection Agency ("EPA"). This suit will seek redress of EPA's

continuous Clean Water Act (“CWA” or the “Act”) violation resulting from its failure to carry out its non-discretionary duties under section 303(c)(2)-(4) of the Clean Water Act, 33 U.S.C. § 1313(c)(2)-(4), to ensure the adoption of water quality standards that protect the human health of people seeking to recreate in New York State’s Class I and SD waterbodies.

These coastal waters, mostly located in New York City, provide recreational access and opportunities to millions of New Yorkers. While the revised standards require the maintenance in these waters of a water quality suitable for primary contact recreational uses, they failed to adopt water quality criteria based on enterococcus that would meet this standard. Instead, New York’s standards rely upon fecal coliform, which, in EPA’s own judgment, is scientifically indefensible and does not adequately protect public health.

New York State’s Department of Environmental Conservation (“NYSDEC”) and the City of New York rely on such standards to claim that coastal waters are or will be clean enough for in-water recreation, despite their expectation that billions of gallons per year of raw sewage and polluted runoff will continue flowing into these waterways indefinitely. EPA’s continuous CWA violation has allowed such waters to remain subject to water quality standards that fail to protect recreational users from water-borne diseases.

Pursuant to 33 U.C.S. § 1365(b)(2) and 40 C.F.R. § 135.2(c), the Noticing Parties will file suit if EPA’s violation is not cured within sixty days of the postmark date of this letter. As required by 40 C.F.R. § 135.2(b), a copy of this notice is being sent to the Attorney General of the United States.

I. STATUTORY FRAMEWORK

The CWA aims “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” and to attain “water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water.” 33 U.S.C. § 1251(a), (a)(2). Under the Act, the federal government and the State share the responsibility of regulating water pollution.

The CWA established the goal of achieving fishable and swimmable waters nationwide. Among other things, the Act created the National Pollutant Discharge Elimination System (NPDES) permit program, which regulates point sources discharging pollutants into waters of the United States. In New York, the NPDES permit program is administered by NYSDEC.

Pursuant to the CWA, the NYSDEC, on behalf of the State of New York, has established water quality standards for all navigable waters in the State. These water quality standards inform, among other things, the establishment of pollution discharge limits for dischargers regulated under the Act.

There are three basic components to water quality standards, two of which are relevant to this matter. First, states must establish the designated uses of their water bodies. *See* 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.6(a). Second, states must establish water quality criteria sufficient to protect the designated uses. *See* 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.6(c).

Although the CWA allows states to promulgate water quality standards, Congress established a mandatory federal oversight system to ensure states maintain adequate water quality standards. Section 303(c) of the CWA provides that “[w]henver the State revises or adopts a new [water quality] standard, such revised or new standard shall be submitted to the Administrator” of the EPA for review and a consistency determination. 33 U.S.C. § 1313(c)(2)(A), (c)(3). The CWA requires EPA to find whether revised water quality standards submitted by states are consistent or inconsistent with the Act. 33 U.S.C. § 1313 (c)(3).

EPA reviews water quality standards to determine whether they comply with multiple requirements, including: (1) the water quality criteria in the new or revised standard “are consistent with the requirements of the [CWA]”; (2) the water quality criteria “protect the designated water uses”; (3) in adopting or revising the standard, the state followed its own “legal procedures for revising or adopting standards”; (4) that “standards which do not include [fish and wildlife protection or recreational uses] are based upon “appropriate technical and scientific data and analyses”; and (5) that the new or revised standard “meets the requirements included in [EPA’s regulations].” 40 C.F.R. § 131.5.

If water quality standards submitted to EPA meet each of these five criteria, EPA must find the standard consistent within sixty days. 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.5(b). However, “[i]f the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this chapter, he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standard pursuant to [33 U.S.C. § 1313(c)(4)].” 33 U.S.C. § 1313(c)(3).

Under 33 U.S.C. § 1313(c)(4)(A), when EPA is required to promulgate such a rule under these circumstances, the Agency “shall promptly prepare and publish proposed regulations” and “shall promulgate any revised or new standard...not later than ninety days after [EPA] publishes such proposed standards, unless prior to such promulgation, [the] State has adopted a revised or new water quality standard which the Administrator determines to be in accordance with [the CWA].” *Id.* § 1313(c)(4).

In short, the CWA mandates EPA must either approve revised water quality standards within 60 days or disapprove within 90 days and promulgate federal standards if a state thereafter fails to submit acceptable revised water quality standards. 33 U.S.C. § 1313(c)(3)-(4). As described below, EPA has failed to follow this mandate.

II. FACTUAL BACKGROUND

In the waters surrounding New York City, pollution from combined sewer overflows and polluted runoff keep millions of New Yorkers from enjoying the water for recreation. Over 50 times a year, when New York City receives as little as one-tenth of an inch of rain, its outdated sewer systems are inundated with storm water and spew raw sewage from over 400 locations along the shoreline in all five boroughs.

Raw sewage fouls places where people of all ages, ethnicities, and income levels live, fish, swim, row, kayak, or engage in other direct water contact activities. Sewage in the water can cause gastroenteritis, skin rashes, pinkeye, ear, nose and throat problems, respiratory infections, meningitis, and hepatitis. Consequences are worse for children, the elderly, pregnant women, and anyone with a weakened immune system. As a result, use of and recreation on the waters is significantly impacted by sewage discharges.

Until recently, NYSDEC's water quality standards defined the best uses of a "Class I" water body as secondary contact recreation and fishing. The Class I waters are saline waters and include, among others, the Bronx River, Harlem River, East River, Flushing Bay, and certain tributaries of Jamaica Bay, in New York City. Class SD water bodies are also saline waters, but are less protective of public health and the environment. Examples include Newtown Creek, the Gowanus Canal, and the waters surrounding the north and west shores of Staten Island, also in New York City. Until 2015, the identified best use of Class SD waters was fishing. NYSDEC's full list of Class I and Class SD waters, along with descriptions of these categories, can be found at <http://www.dec.ny.gov/regulations/99693.html>.

In 2014, NYSDEC initiated a rulemaking to revise water quality standards for Class I and Class SD water bodies. Commenters (including some of the Noticing Parties) made several requests, including adding "primary contact recreation" to the designated uses of the waters and updating the water quality criteria for the waters. Commenters further urged that revised water quality criteria must be based on enterococcus bacteria as a fecal indicator, a modern scientific measure of water quality that is more protective of human health than NYDEC's preexisting criteria, which are based on coliform bacteria. EPA's 2012 Recreation Water Quality Criteria (RWQC) explain why enterococcus is the proper indicator, and set forth the maximum levels of enterococcus deemed by EPA to be scientifically defensible as protective of public health and the environment. Many commenters referenced the 2012 RWQC in testimony submitted during the NYSDEC rulemaking process (for further information see Notice of availability of the 2012 *Recreational Water Quality Criteria*, 77 F.R. 71191 (Nov. 29, 2012)).

In 2015, NYSDEC adopted revised water quality standards for both Class I and Class SD waters. The revised standards require the maintenance in these waters of a water quality suitable for primary contact recreational uses. However, the revised water quality standards did *not* adopt water quality criteria based on enterococcus and the 2012 RWQC. Rather, NYSDEC continued to utilize the outdated and scientifically indefensible total and fecal coliform water quality criteria.

NYSDEC submitted the 2015 revisions to EPA for approval on February 24, 2016, pursuant to 33 U.S.C. § 1313(c)(2)(A). In a letter dated May 9, 2016, EPA responded to NYSDEC's submission. EPA approved the addition of "primary contact recreation" to the use sections of standards for both Class I and Class SD waters. However, EPA harshly criticized NYSDEC's revised water quality criteria for Class I and Class SD waters.

EPA's letter explained that "when states adopt new or revised water quality standards, they must be scientifically defensible and protective of the designated uses of the waterbodies."

The letter explained that the agency “has not supported [NYSDEC’s proposed use of] fecal indicator bacteria (FIB) since 1986”; that EPA’s own 2012 RWQC, based on enterococcus bacteria, “are the scientifically defensible recreational criteria”; and that EPA therefore “expect[s] NYSDEC to adopt [those criteria] for all primary contact recreation waters in the state, including Class I and SD waters, as soon as possible. . . . [T]he State’s pathogen standards must be revised as quickly as possible to be both scientifically defensible and fully protective of the primary contact recreation use.” Despite these clear statements that NYSDEC’s proposed criteria are inadequate, EPA also asserted in the letter that the agency “is not taking action on [NYSDEC’s revised water quality criteria for Class I and Class SD waters] pursuant to Section 303(c) of the CWA [i.e., 33 U.S.C. § 1313(c)].”

III. VIOLATION OF CWA SECTION 303(c)(2)-(4) FOR FAILURE TO REVIEW AND EITHER APPROVE OR DISAPPROVE NYSDEC’S REVISIONS TO WATER QUALITY CRITERIA FOR CLASS I AND CLASS SD WATERS

Whether EPA’s May 9, 2016 letter is construed as “not taking action” or as a finding that NYSDEC’s revised water quality criteria are inconsistent with the CWA, EPA violated, and continues to violate, the CWA due to its failure to perform its mandatory duties under Section 303(c).

If EPA’s letter is deemed not to be a determination under 33 U.S.C. § 1313(c) that NYSDEC’s revised water quality criteria for Class I and Class SD waters are not consistent with the applicable requirements of the Clean Water Act, EPA is in violation of its mandatory duty under that provision to make a determination as to whether such standards are consistent with the Act. Furthermore, given EPA’s own findings presented in the letter, if EPA has not yet made a determination, it has no lawful option but to make a determination finding NYSDEC’s revised water quality criteria inconsistent with the CWA.

Alternatively, if EPA’s May 9, 2016 letter represents a determination that NYSDEC’s revised water quality criteria for Class I and Class SD waters are not consistent with the Act, and an instruction to adopt new criteria for those waters incorporating the 2012 RWQC, then EPA’s ongoing failure to promulgate such new criteria violates EPA’s mandatory duties under 33 U.S.C. § 1313(c)(3)-(4). Specifically, because NYSDEC has not revised its criteria as per EPA’s instruction, 33 U.S.C. § 1313(c)(4) requires EPA to “promptly prepare and publish proposed regulations” establishing for New York State the necessary water quality criteria, and to “promulgate [such standards] not later than ninety days after [EPA] publishes such proposed standards, unless prior to such promulgation, [the] State has adopted a revised or new water quality standard which the Administrator determines to be in accordance with [the CWA].” EPA has failed to do this.

The CWA’s citizen suit provision authorizes suit against “the Administrator where there is alleged a failure of the Administrator to perform such act or duty under this chapter which is not discretionary with the Administrator.” 33 U.S.C. §1365(a)(2). Under this provision, a citizen may sue to compel EPA to perform its mandatory duties under 33 U.S.C. § 1313(c). *See, e.g., Miccosukee Tribe of Indians v. EPA*, 105 F.3d 599, 602-03.

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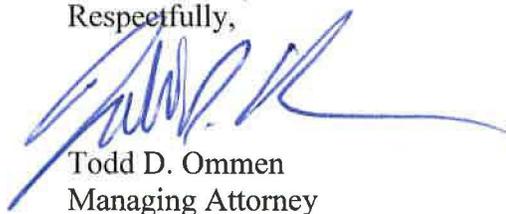
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At the close of the 60-day notice period, we intend to file a citizen suit against EPA to compel it to perform the nondiscretionary duties which it has failed to perform and continues to fail to perform. We intend to seek injunctive relief, attorneys' fees, and litigation costs for these violations. During the 60-day notice period, we are willing to discuss effective remedies for the violations noted in this letter. Please do not hesitate to contact us at (914) 422-4343 if you wish to discuss this matter.

IV. IDENTIFICATION OF PERSONS GIVING NOTICE AND LEGAL COUNSEL

The Noticing Parties are identified on Exhibit A to this letter.

Respectfully,

A handwritten signature in blue ink, appearing to read "Todd D. Ommen", with a long horizontal flourish extending to the right.

Todd D. Ommen
Managing Attorney

A handwritten signature in blue ink, appearing to read "Ashley N. Stilson", written in a cursive style.

Ashley N. Stilson
Legal Intern

Pace Environmental Litigation Clinic, Inc.
Elisabeth Haub School of Law
78 North Broadway
White Plains New York

Exhibit A

Connecticut Fund for the Environment
(d/b/a Save the Sound)
900 Chapel St., Upper Mezzanine
New Haven, CT 06510
Telephone: (203) 787-0646

Jamaica Bay Ecowatchers
Dan Mundy, Sr., President
56 West 14th Rd.
Broad Channel, NY 11693
Telephone: (718) 634-5032

Natural Resources Defense Council
40 W 20th St., 11th Fl.
New York, NY 10011
Telephone: (212) 727-2700

New York City Water Trail Association
251 Clermont Ave.,
Brooklyn, NY 11205
Telephone: (917) 656-7285

Riverkeeper, Inc.
20 Secor Rd.
Ossining, NY 10562
Telephone: (914) 478-4501

Waterkeeper Alliance, Inc.
180 Maiden Lane, Suite 603
New York, NY 10038
Telephone: (212) 747-0622

Raritan Baykeeper, Inc. (d/b/a NY/NJ
Baykeeper)
52 W. Front St.
Keyport, NJ 07735
Telephone: (732) 888-9870

Bronx Council for Environmental Quality
(c/o Friends of Van Cortlandt Park)
Joyce Hogi, President
80 Van Cortlandt Park South, apt. E1
Bronx, NY 10463
Telephone: (646) 529-1990

Newtown Creek Alliance
Michael Heimbinder, Board Chair
48-18 Skillman Ave.
Sunnyside, NY 11104
Telephone: (347) 504-6701