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June 10, 2018

Via Certified Mail, Return Receipt Requested

Scott Pruitt, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 1101A
Washington, DC 20460

Re: Notice of Intent to File Suit under Section 505(a)(2) of the Clean Water Act for Failure to Perform Non-Discretionary Duties

Dear Administrator Pruitt:

I am a resident of the City of Ann Arbor, Michigan, residing with my wife and family at 2099 Ascot Rd., Ann Arbor, MI 48103 for over 20 years. I am writing to notify you of my intent to file suit, sixty days after service of this letter, against the United States Environmental Protection Agency ("EPA") and you in your official capacity as EPA Administrator pursuant to Section 505(a)(2) of the Clean Water Act ("CWA"). 33 U.S.C. §1365(a)(2).

Attached as Exhibit A is a six-page official Michigan Department of Environmental Quality ("MDEQ") printout of publicly available data on *all* sewer overflow discharges reported by the City of Ann Arbor between 2000 and 2018 to the MDEQ. Similar data is available for all dischargers in Michigan from the MDEQ Discharge Data Portal at this link:

<http://www.deq.state.mi.us/csosso/>

As of the date of this letter, the City of Ann Arbor has reported to MDEQ a total of 60 sewage overflows totaling almost 15 million gallons of mostly raw sewage. This includes 36 discharges into waters of the State of Michigan in Ann Arbor, including the Huron River and tributary waters in Ann Arbor, such as Allen Creek, Mallet's Creek, Honey Creek and Swift Run. That amount of sewage would fill over 22 Olympic-sized swimming pools.

The locations of 15 sewage overflows out of the 36 that discharged into surface waters were reported as private residence addresses, business addresses or intersections, all upstream of the headworks of the City's wastewater treatment plant ("WWTP") located at 49 South Dixboro Road, Ann Arbor, MI 48105. Most or all are likely to be backups from sewer manholes nearby.

One is identified as such. Out of these, all but five were Dry Weather Overflows, or DWO's, as defined by the Clean Water Act and EPA.

On the listing in Exhibit A, sixteen of the overflows show no "receiving water" or just state "none" under that heading, indicating that the sewage overflows were only to the ground in the vicinity or path of the overflow. One was near a supermarket; six overflows were at private addresses. All of these were federally-defined DWO's.

There have also been seven raw sewage overflows from the WWTP into the Huron River, including from the storm drain at the WWTP. The rest were at government addresses, including one near the address of a City of Ann Arbor Field Operations Group office.

Eight overflows that were reported without showing a "receiving water" were raw sewage overflows in dry weather in or near important recreational venues in Ann Arbor. Three were DWOs to the ground near the entrance to Gallup Park in September 2016, including an overflow of 600,000 gallons of raw sewage from a bypass sewer on a City construction site; two sewage overflows occurred in dry weather at the Nichols Arboretum. Additionally, one DWO each occurred at Bluffs Nature Area and the Bird Hills Nature Area. One more was at or near a wooded area north of Washtenaw Avenue in Ann Arbor. Ann Arbor has never reported a wet weather overflow in a recreational area.

This points to the bigger picture in Ann Arbor, which is that over 81% of the total of 60 overflows reported were DWOs, by number of overflows, and over 90% by total volume. Most were upstream of the WWTP; problems occur mostly at different locations. It is axiomatic that all federal legislation and regulation of wastewater overflows is directed at sewer overflows *in heavy wet weather*. Based on Ann Arbor's reporting of wet and dry weather discharges over the last 18 years, it is fair to conclude that Ann Arbor's problems in 2018 are overwhelmingly related to DWOs, not to wet weather overflows by any means.

On those occasions, the limits of Ann Arbor's sewer system capacity were exceeded without a drop of precipitation. At the least, large segments of the City's sewer system are aging, rotting combined sewers. The City of Ann Arbor, including a City official in a deposition under oath, asserts the contrary, without evidence. The City of Ann Arbor has been repeatedly requested under the Michigan Freedom of Information Act, and in civil discovery, to produce sewer maps showing a separate sanitary sewer system. It has refused to do so claiming disclosure to the undersigned would pose a public safety risk against which the City is required to make plans under a Michigan anti-terrorism statute in the Michigan Penal Code.

There are approximately 20,000 houses in the City of Ann Arbor serviced by combined sewers. This is based on publicly available data, such as U.S. Census data on the age of construction of neighborhoods in Ann Arbor; a complete historical record of the design, construction and repair

of the combined sewers in one of the largest of the older subdivisions in Ann Arbor, Lansdowne in southwest Ann Arbor, where the undersigned resides; a City map indicating the absence of separate storm sewers in other such neighborhoods, such as Georgetown in the northeast of the City; and on statements by the City about its sewer system to MDEQ and publicly since the early 2000s.

Graphical representations by the City in 2000 of the sewer service lines at a “typical” Ann Arbor home showed a combined sewer in the street. After 2000, however, the City’s graphical representations of what would be those same service lines began to evolve. A separate storm sewer appeared for the first time in graphics in 2001; graphics in 2014 depicted a completely separated, large storm sewer in the street. These are indications that this case involves deception by the discharger.

Tragically, dry weather overflows are no longer uncommon in other Michigan cities. On the contrary, they are ubiquitous. Exhibit B, for example is the nine-page MDEQ Portal printout of the discharge history of the City of Flint from 2000 to 2018. Out of 85 overflows reported by Flint during those years, *fully 51 were DWOs*, or a startling 60%.

Of the *wet weather* overflows in Flint, 29 were from a single unnumbered outfall, “WWTP RTB, Beecher Rd, Flint.” On April 17, 2018, this single “Retention Treatment Basin,” in two separate overflows, discharged *120.1 million* gallons of untreated and/or under-treated sewage into the Flint River. I note that I am not aware of any notice by MDEQ of these overflows to the residents of Flint or the City government in Flint or the Michigan Department of Health and Human Services.

A senior permitting official in MDEQ’s Water Resources Division sent a memo dated December 11, 2017 to the EPA Region 5 Office of Water (“MDEQ Memo”) in response to EPA questions about certain sewer systems in certain Michigan cities, including Flint. The MDEQ Memo followed my complaint to EPA Region 5 on December 8, 2017 of the occurrence of the DWO’s in Ann Arbor shown in the MDEQ Portal printout at Exhibit A. I have been in regular communication with EPA Region 5 since. The matter was assigned to an official in Region 5’s Enforcement Branch in the Office of Water and an attorney from the Office of the Regional Counsel for review. Since that time, however, no action has been taken to continue the investigation that Region 5 had started promptly in December 2017.

In the MDEQ Memo in December to EPA Region 5, MDEQ stated as follows:

Flint is a separated system (not combined) and permitted under the NPDES program as such. *It is a very wet sanitary system and does have very dilute influent to the WWTP.* It

needs additional corrections in order to reduce wet weather excess sanitary flows in the collection system.

[Emphases added.] Flint’s own graphic representations of its sewer system, used in City of Flint PowerPoint slides dated December 2, 2009, for a “compliance” presentation, show a clearly combined sewer system labeled “Wet Separate Sewer System.” If this case comes to court, the evidence would show that Flint and Ann Arbor have non-permitted CSSs, not permitted SSSs. Such evidence and other evidence in MDEQ documents alone would show that the phrases “wet sanitary system” or a variant such as used in Flint, are Michigan-only terms created and propagated by MDEQ to replace, in official texts, the federally-defined term “combined sewer systems” under Clean Water Act.

There is no EPA term “dilute effluent,” let alone “very dilute effluent.” Rather, the use of the term discloses that a part of Michigan’s program for sewage overflow control is the long-ago discarded phrase, “the solution to pollution is dilution.”

The MDEQ Memo continues:

Some more recent bypasses from a storage basin on the WWTP site [that is, the above-referenced “WWTP RTB, Beecher Rd, Flint”] are noted. These are just the issues that we are working to correct. The discharges are to the Flint River[.] These *partially treated bypasses* are listed as SSOs in earlier notifications, but more recently as “other”. [sic] Despite how we label them, they are illegal discharges that must be corrected up to the 25 year 24 hour event as previously discussed.

[Emphasis added.] MDEQ’s labeling is in fact critical. MDEQ’s authority for its use of the term “partially treated” in communicating with EPA is Section 324.3112c of Michigan’s Natural Resources and Environmental Protection Act (“NREPA”). By enactment of this law, Michigan defined “partially treated sewage” as follows:

Partially Treated Sewage: Any sewage, sewage and storm water, or sewage and wastewater from domestic or industrial sources that meets *one or more* of the following: (1) Is not treated to national secondary treatment standards for wastewater or that is treated to a level less than that required by the person's NPDES Permit; (2) Is treated to a level less than that required by the person's Groundwater Discharge Permit; and (3) Is found on the ground surface

[Emphasis added.] This is not a term defined by EPA. In Michigan, however, if a bypass of “any sewage” at the referenced Beecher Rd. RTB overflows “on the ground,” it becomes “partially treated sewage” without *any* treatment. In Ann Arbor, this term has been frequently used by City spokespersons in communications to the local press, apparently to minimize publicly the impact

of sewer overflows. The resulting reporting misinforms the public about environmental and health dangers of raw and “partially treated” sewage overflows.

Dry Weather Overflows Are Always Illegal and Always Have Been

In 1989, acting under the Clean Water Act, EPA's Office of Water issued a National Combined Sewer Overflow Control Strategy (“National Control Strategy”) (54 *Federal Register* 37370). *The first of three prime objectives cited in the National Control Strategy is that sewage overflows not occur in dry weather.* In 1995, pursuant to the National Control Strategy, EPA issued its Combined Sewer Overflow Guidance for the Nine Minimum Controls (“NMC Guidance”). These controls are known as the “NMCs.” A copy is attached as Exhibit C. The fifth NMC is titled “Elimination of Combined Sewer Overflows during Dry Weather.”

The federal prohibition on dry weather overflows is unlike some other NMCs in that it is absolute. The NMC Guidance states that “[s]ince the NPDES program prohibits dry weather overflows (DWOs), the requirement for DWO elimination **is enforceable** independent of any programs for the control of CSOs.” [Emphasis added.] MDEQ acknowledged to EPA Region 5 in the MDEQ Memo that it “considers that all dry weather discharges from combined systems or sanitary systems ... are illegal in both cases.” MDEQ, however, has taken no enforcement actions concerning the DWOs shown in Exhibit A.

The City’s Dry Weather Overflows Violated the CWA and the Nine Minimum Controls

The City has failed to take any action as to any of the DWO’s listed in Exhibit A that would have complied with the provisions of Chapter 6 of the NMC and its other provisions relating to DWO’s.

1. The City lacks a visual inspection program of sufficient scope and frequency to provide reasonable assurance that DWOs will be detected. Early detection means a lesser DWO. For example, after the June 2013 overflow of an undetermined amount of raw sewage from a manhole in the Nichols Arboretum and then into the Huron River, a City spokesman told a local newspaper the City did not know how long the overflow had continued, that it could have been one day or ten days. According to a news report, the untreated sewage flowed out of the manhole, down the stone steps to a popular small beach on the Huron River known as the “Arb Beach”; over some portion of the surface of the beach, and then into the Huron River.

The City’s discharge in June 2016 of 600,000 gallons of raw sewage into the Huron from a City construction site near the entrance to Gallup Park is another example. All the City could tell the Ann Arbor News about the duration of the overflow was that it was sometime between 3 pm on Saturday, September 17, 2016 and 7 AM on Monday, September 19, 2016,

a period of forty hours. EPA recommends biweekly inspections, as well as inspections after wet weather events.

It is impractical for the City to have an effective monitoring program for DWOs here because of the numerous different locations where they have occurred and where they will occur in the future, with DWOs listed at private residence addresses and other locations all over the City upstream of the headworks of the WWTP. According to EPA, frequent DWOs occurring from multiple locations in a sewer system indicates the sewer system is not functioning properly.

2. There are repeated cases of DWOs resulting from poor operation and maintenance practices and plans. For example, a number of the overflows in dry weather from the Ann Arbor WWTP and the storm sewer there were due to simple electrical problems, particularly insufficient backup power capacity. During a regional power failure in August 2003, 13 million gallons of untreated sewage overflow was discharged into the Huron River. MDEQ took no enforcement action.

The City has reported to MDEQ on many occasions that the cause of an overflow was tree roots and other blockages in the sewer system. In a City publication, the City has documented its near-permanent loss of sewer capacity to fats, oil and grease in the sewer system. At the same time, aggressive property development in older parts of the City has added to the sanitary load on the sewer system, without corresponding increases in system capacity or improvements to its condition, also on the grounds of cost.

The City's position, stated to the Ann Arbor News recently at least twice, is that the City lacks sufficient staff or funds for more inspection of sewer lines. The City had plenty of money for a new City Hall and plans on a new and unnecessary second Amtrak station at a cost of \$65 million.

3. The City has acknowledged in widely-distributed City publications between 1999 and 2000, including in the City publication "Waterways," that the sewer system allows storm water and ground water to enter by infiltration. This is aggravated by the aging of the sewer system. The City has in some instances undertaken repairs at DWO problem locations in localized sewer segments, such as the area near the entrance to Gallup Park. EPA states in Paragraph 6.1.2 of the NMC Guidance, however, that such repairs are only a minimum control measure and that, "unlike DWOs caused by operational problems, DWOs caused by structural problems (e.g., insufficient interceptor capacity) may require long-term construction that is addressed through [a Long Term Compliance Plan]." No amount of O&M, however, will separate the combined sewer system in Ann Arbor or make its pipes newer or larger.
4. The City has not met notification requirements described in Paragraph 6.1.3 of the NMC Guidance and other provisions specific to DWOs. As shown in Exhibit A, however, the City reports all such DWOs to MDEQ as "SSOs," EPA does **not** include DWOs in the federal

definition of “Sanitary Sewer Overflow” or “SSO.” EPA requires that DWOs be identified and reported *as DWOs* because they are so dangerous, as EPA states in the NMC Guidance, as a risk to safety and property.

According to the MDEQ Memo, MDEQ is aware of and allows this practice. MDEQ states that “MDEQ does consider *all dry weather discharges from combined systems or sanitary systems to be SSOs*. They are illegal in both cases.” [Emphasis added.] Nevertheless, MDEQ reports to the public, in the attached sheets in Exhibit A, that these were “SSOs.” According to MDEQ Annual CSO/SSO Reports in detail, however, no later than the 1990s, MDEQ had taken the federal acronym “SSO” and substituted this Michigan-only definition:

SSO: Sanitary Sewer Overflow (raw or inadequately treated discharge), a discharge from the sanitary sewer collection system, *and a dry weather discharge from a combined sewer collection system*.

[Emphasis added.] Under federal clean water terminology, dry weather overflows from combined sewer systems are labeled as “DWOs.” In a city with a federally-defined combined sewer system, any dry weather overflows cannot, by definition, be federally-defined “SSOs.” Under federal law, by definition, sanitary sewer overflows only originate from a separate sanitary system.

MDEQ, however, defines and labels such combined sewer dry weather overflows with the federal acronym “SSOs.” No data available at MDEQ’s Public Portal online or from the City of Ann Arbor would give *any* indication to a resident that MDEQ or the City was especially concerned about any of the DWOs or that DWOs are illegal.

If the City makes the “DWO summary reports at regularly scheduled intervals” required by the cited paragraph, they are not made public. Paragraph 6.1.3 also states that “reports should document the DWOs that occurred during the reporting period, causes and problems noted by the inspections, corrective actions taken, results of such actions, and the status of ongoing inspection and remediation activities.” The City of Ann Arbor met none of these requirements for federally-defined “DWOs,” conveniently redefined by MDEQ statewide as Michigan “SSOs.” As discussed below, this has important benefits for Ann Arbor and Flint.

5. The corrective actions for fecal pathogens in the overflows in Gallup Park and the Arb, as reported by the local press, were limited to the spreading of lime on some of the affected area. Online, an Ann Arbor resident can obtain “Event Detail Reports” for each event listed on the printout at Exhibit A. This includes a record of communication between MDEQ and the City and the action MDEQ required to be taken. Unfortunately, the Event Detail Reports indicate that no follow-up action was taken or required by MDEQ in any of these cases.

There is no indication that the City has ever taken further actions with respect to testing and disposal of toxic substances typically found in raw sewage, including lead.

Michigan Policy of “Enforcement Discretion” as to “SSOs” since at least 2002

As noted, there are important benefits to Ann Arbor, as well as Flint, of the ability to report federally-defined DWOs and “CSOs” using the Michigan version of “SSO.” MDEQ’s “2002 Sanitary Sewer Overflow Policy Statement,” a copy of which is attached as Exhibit D, states as follows:

State and Federal Regulations for SSOs require either the elimination of all SSOs or treatment of SSOs to the Federal categorical secondary wastewater treatment standard. The MDEQ acknowledges that total elimination or secondary treatment of all SSOs is not practical or economically feasible.

This “acknowledgment” is a repudiation of the National Combined Sewer Overflow Strategy and the NMC Guidance requiring secondary treatment of *all* flows. The 2002 Policy Statement then states clearly that “MDEQ does not authorize the discharge of raw or partially treated SSOs,” which as previously stated Michigan “considers” to include DWOs. The 2002 “SSO Policy Statement” is therefore also a “DWO Policy Statement.” In the next statement, MDEQ states its “enforcement discretion” policy toward illegal DWOs, which it has defined as “SSOs”:

[E]nforcement discretion will be considered for communities experiencing SSOs that are implementing a corrective action program which is equivalent to the remedial design standard of the 25-year/24-hour storm, using growth conditions and normal soil moisture.

Whether Ann Arbor undertook a “Corrective Action Program” or not, it did not involve separation of sewers, the goal of the Clean Water Act, while “enforcement discretion” appears to have been applied by MDEQ to *all* reported Ann Arbor overflows listed in Exhibit A, including all DWO’s.

The MDEQ Memo states its expectations for the future results of this policy of paper “Correction Action Programs” and enforcement discretion for violators as follows:

An analysis of available data indicates that communities implementing corrective action programs to this remedial design standard will have on average *less than one overflow per ten years*.

[Emphasis added.] Obviously, Ann Arbor has not achieved “an average of less than one overflow per ten years.” MDEQ has never abandoned this policy, but rather cited it in its Memo to EPA Region 5. If MDEQ has taken any action in response to 20 years’ worth of DWOs in Ann Arbor since that Memo, I’m not aware of it.

Citizens have a right and responsibility to monitor the work of the State of Michigan as EPA’s delegee under the Clean Water Act. That requires transparency, not obfuscation. Transparency is necessary so that the People can hold our elected officials and their appointees accountable to the law and the tasks we have laid out for them through voting and legislation, state and federal. The Clean Water Act still stands. MDEQ cannot willy nilly (with the cooperation, for example, of the

City of Ann Arbor) change the categorization of overflows. It cannot change the purpose and objectives of the Clean Water Act, the NPDES Program and the Wet Weather Water Quality Act from protection of our surface waters and the Great Lakes to protection of the polluters of these national and state treasures.

Conclusion

I have demanded enforcement action through the regular channels at EPA Region 5. Region 5 had been responsive earlier in the complaint process, and staffed my complaint, as previously stated, but have failed to take any action to my knowledge since. As of this date, Region 5 no longer responds to correspondence. The NMC Guidance recognizes the especially hazardous quality of combined sewage, including the occurrence in combined sewage of substances on EPA's list of 169 Priority Toxic Substances, including lead. As stated in the NMC Guidance, EPA has specific enforcement authority for DWO violations under both the Clean Water Act and the NPDES permits governing Ann Arbor's operation of its POTW. Considering EPA's failure to exercise this authority in a case that provides no evident basis for enforcement discretion, I intend to sue the EPA in federal court to enforce those requirements. I will seek declaratory relief, injunctive relief, litigation costs, and other appropriate relief from the Court.

The full name, address, and telephone number of the person giving notice is:

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(734) 717-0383
nrglaw@gmail.com

All communications should be addressed to me at the above address. If or members of your staff have questions or comments concerning this Notice, please do not hesitate to contact me.

Sincerely,



Irvin A. Mermelstein
Attorney at Law

cc: (via certified mail, return receipt requested)
Hon. Jefferson Beauregard Sessions III
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U.S. Department of Justice
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