

April 4, 2016

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*Via Certified Mail
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EPA, REGION III
OFFICE OF REGIONAL ADMINISTRATOR

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

Loretta E. Lynch, 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 Potomac Riverkeeper, Inc., d/b/a Potomac Riverkeeper Network, and Shenandoah Riverkeeper (collectively, "Potomac Riverkeeper Network") 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

Potomac Riverkeeper Network has documented the presence of nuisance algae in all reaches of the Shenandoah River at various times throughout the last seven 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. The groups have submitted timely comments and evidence to the Virginia Department of Environmental Quality (“VADEQ”) and to EPA – most recently in January 2015 in response to VADEQ’s Draft 2014 Integrated Report – documenting that the regular and extensive algae blooms impair recreational use of the Shenandoah River. On the basis of that evidence, Potomac Riverkeeper Network asked VADEQ 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). The groups requested that VADEQ 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)).

EPA also submitted comments on the Draft 2014 Integrated Report in January 2015. Among other comments, EPA notes that “the draft 2014 IR has not outlined any additional information related to development of an assessment methodology” for evaluating whether the Shenandoah Riverkeeper’s documentation of excess algae demonstrates a violation of Virginia’s water quality standards. EPA’s letter “requests VADEQ to assess the information provided by the Shenandoah Riverkeeper to determine if sufficient evidence has been provided to document a violation of VADEQ’s narrative water quality standard (9VAC25-260-20) due to excess algal growth and an impairment of the recreational use on any segments of the Shenandoah River. “

On June 8, 2015, VADEQ submitted its Final Integrated Report to EPA including a response document. In response to EPA’s comments VADEQ first restated its rationale for refusing to list these waters as impaired in the 2012 Integrated Report, and noting its decision in the 2012 Integrated Report to classify these waters as “Category 2B” (having an observed effect, but no water quality standard exists for a particular pollutant). Next VADEQ pointed to a study submitted to VADEQ in March 2015 by the Interstate Commission on the Potomac River Basin (“ICPRB”) entitled “Methods for Estimating Filamentous Algae Cover in Streams and Rivers of the Shenandoah River Basin,” stating that DEQ would review the recommendations in the ICPRB report for *the next* Integrated Report. Additionally VADEQ stated that “because concerns over nuisance algae have been pushed to the national forefront, [VADEQ] has proposed a collaborative effort among the Mid-Atlantic jurisdictions that comprise EPA Region III (PA, WV, MD, VA, DEQ and DC) to develop a consistent strategy for discerning the causes of nuisance algae blooms and quantifying designated use impacts in a defensible manner.”

In response to Potomac Riverkeeper Network's comments, VADEQ cites the same rationale it stated in its 2012 Integrated Report, namely a "long-standing policy of basing impairment decisions on data collected with an agency-approved quality assurance plan, and using a scientifically valid assessment methodology that has a direct relation to an established water quality standard." VADEQ articulated numerous additional concerns about listing the Shenandoah River as impaired based on the Potomac Riverkeeper Network's evidence and information, almost all of which reflect or stem from this policy.

On September 8, 2015 VADEQ provided an updated submission, stating that it had "revised the final version of the 2014 IR to reclassify 7 stream segments in the Shenandoah River basin as Category 3C for the recreation use," (a category used to indicate "that [VADEQ] has received information suggesting water quality problems may exist, but this information is not sufficient for making a determination of impairment at this time"), and noting that "the potential cause has been identified as algae, and the waters will be prioritized for monitoring so that their attainment status can be resolved with additional data."

To date, 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 June 8, 2015. The Administrator was required to either approve or disapprove that identification of waters no later than thirty days after the date of submission. Because 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:

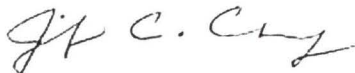
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CONCLUSION

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 Network intends 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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