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ENRD



February 1, 2017

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Acting Administrator Catherine McCabe
United States Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, NW
Mail Code: 1101A
Washington, DC 20460

17 MAR -9 P1:43

DEPT. OF JUSTICE - ENRD
ENVIRONMENT DIVISION

Re: Clean Water Act notice of intent to sue for failure to perform a nondiscretionary duty

Acting Administrator McCabe,

On behalf of the Natural Resources Defense Council (NRDC), we write to ask you to perform your mandatory duty under the Clean Water Act to finalize the Effluent Limitations Guidelines and Standards for the Dental Category that were proposed by the Environmental Protection Agency in October 2014. We hereby provide notice pursuant to 33 U.S.C. § 1365(b)(2) that, sixty days from your receipt of this letter, we intend to file suit against EPA for failure to perform a nondiscretionary duty under the Act, if the agency does not cure its violation of the law.

The Clean Water Act requires EPA to promulgate pretreatment standards for the discharge of pollutants into publicly owned treatment works, or POTWs. "The Administrator shall, within one hundred and eighty days after October 18, 1972, and from time to time thereafter, publish proposed regulations establishing pretreatment standards for introduction of pollutants into treatment works . . . which are publicly owned." 33 U.S.C. § 1317(b)(1). "Not later than ninety days after such publication, and after opportunity for public hearing, the Administrator shall promulgate such pretreatment standards." *Id.* (emphasis added)

EPA published a proposed rule under this section on October 22, 2014, titled "Effluent Limitations Guidelines and Standards for the Dental Category," 79 Fed. Reg. 63,258 (Oct. 22, 2014). EPA proposed to regulate "discharges of pollutants into publicly owned treatment works (POTWs) from existing and new dental practices

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that discharge dental amalgam.” *Id.* at 63,258. According to EPA, the rule would prevent the discharge of 5.1 tons of mercury and 5.3 tons of other metals contained in waste dental amalgam.

EPA took public comment on the proposed rule through February 20, 2015, and held a public hearing on November 10, 2014. NRDC filed comments during the public comment period. After reviewing public comments, the EPA Administrator signed the final mercury rule on December 15, 2016. *See* EPA, Effluent Limitations Guidelines and Standards for the Dental Category (Dec. 15, 2016), *available at* https://www.epa.gov/sites/production/files/2016-12/documents/dental-office-category_final_prepub_12-15-2016.pdf. EPA then sent the final rule to the Office of the Federal Register for publication.

The final rule was widely publicized, including within the regulated community. On the date the rule was signed by the Administrator, the American Dental Association published a statement referring to the final rule as a “fair and reasonable approach to the management of dental amalgam waste.” The National Association of Clean Water Agencies, the trade association representing POTWs, also published a statement, referring to the final rule as “a huge success” that “will have a minimal burden on POTWs.”

President Trump was inaugurated at noon on Friday, January 20. Later that day, White House Chief of Staff Reince Priebus issued a “Memorandum for the Heads of Executive Departments and Agencies.” The Priebus Memorandum was published in the Federal Register on Tuesday, January 24. *See* 82 Fed. Reg. 8346 (Jan. 24, 2017).

Among other things, the Priebus Memorandum purports to direct federal agencies to “immediately withdraw” final rules sent to the Office of the Federal Register but not yet published in the Federal Register. The Priebus Memorandum further states that “[t]his withdrawal must be conducted consistent with OFR procedures,” and that agencies should exclude from withdrawal “any regulations subject to statutory or judicial deadlines.”

Thereafter, according to the Office of the Federal Register website, EPA “requested the withdrawal of [the final mercury rule] after it was on public inspection.” EPA sent this withdrawal request in response to the Priebus Memorandum, even though the Memorandum by its terms did not apply to the final mercury effluent rule,

because the rule was subject to a statutory deadline contained in the Clean Water Act, 33 U.S.C. § 1317(b), and was required by law to be finalized within ninety days of its proposal. OFR acceded to the EPA withdrawal request and withdrew the final mercury rule from publication.

In a lawsuit filed today, NRDC asserts that the mercury rule became final no later than the moment it was filed by the Office of the Federal Register for public inspection, and that EPA's withdrawal of the final rule is unlawful because the agency failed to comply with mandatory notice and comment requirements under the Administrative Procedure Act. If EPA did properly withdraw the rule under the APA, however, then there is no final rule in effect, and EPA is violating a nondiscretionary duty contained in the Clean Water Act to finalize the rule within ninety days of its proposal. This letter therefore serves to put EPA on notice that NRDC intends to commence a civil action against the Administrator for failing to perform a nondiscretionary duty. 33 U.S.C. §§ 1365(a)(2), (b), 1317(b)(1).

NRDC's members are being harmed by EPA's failure to comply with the requirements of the Clean Water Act. This mercury rule would confer meaningful public health benefits. Mercury is a potent neurotoxin, and mercury discharges into the environment can cause serious human health harm, largely by contaminating fish and shellfish consumed by people. Dental offices, which discharge mercury used in amalgam for fillings, are the main source of mercury discharges to municipal sewage treatment plants. The mercury in dental amalgam is concentrated and easy to remove. Removing mercury from dental amalgam thus presents an efficient and cost-effective way to prevent mercury from being released into the environment. Accordingly, and to the extent EPA's withdrawal of the rule is deemed valid (which we dispute), we ask you to take immediate action to fulfill your statutory duty and finalize the proposed rule as soon as possible.

Parties Giving Notice

As required by 40 C.F.R. § 135.3, the name, address, and telephone number of the persons giving notice pursuant to this letter are as follows:

Natural Resources Defense Council
1152 15th Street, NW, Suite 300
Washington, DC 20005

Attention: Mae C Wu
(202) 289-2409

Legal Counsel

The names, addresses, and telephone numbers of the legal counsel representing the prospective plaintiff are as follows:

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Conclusion

The Clean Water Act requires EPA to promulgate final pretreatment standards within ninety days of publishing the proposed standards. 33 U.S.C. § 1317(b)(1). EPA published the proposed dental mercury pretreatment standards on October 22, 2014. The Clean Water Act thus imposed a nondiscretionary duty on EPA to promulgate a final rule by January 20, 2015. EPA's final mercury pretreatment standards, signed by the Administrator on December 15, 2016 and subsequently filed for public inspection, discharged that duty. If EPA's withdrawal of the final rule without notice and comment is deemed valid, then there is no final rule, and EPA is violating its mandatory duty under the law. We hereby give notice that, if EPA fails to cure this violation within sixty days of receipt of this letter, we intend to file suit in federal district court seeking declaratory relief, injunctive relief, and litigation costs, as appropriate.

Please do not hesitate to contact us if you would like to discuss this matter further.

Respectfully,



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cc (via certified mail, return receipt requested):

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