

SIVE, PAGET & RIESEL P.C.

Mark A. Chertok
Direct Dial: (646) 378-7228
mchertok@sprlaw.com

April 26, 2017

VIA CERTIFIED MAIL

Scott Pruitt, Administrator
USEPA Headquarters
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
Washington, DC 20460

Deborah Szaro, Regional Administrator
USEPA Region 1 – New England
5 Post Office Square
Mail Code: ORA01-4
Boston, MA 02109-3912

Re: NOTICE OF INTENT TO SUE UNDER THE CLEAN WATER ACT REGARDING THE WESTPORT RIVER ESTUARINE SYSTEM TMDL

Dear Administrator Pruitt and Regional Administrator Szaro:

We write on behalf of the Buzzard's Bay Coalition and the Westport Fisherman's Association, and their adversely affected members, to provide this 60-day notice of intent to file a citizen suit against you in your official capacities and the U.S. Environmental Protection Agency (collectively, "EPA") under Section 505(a)(2) of the Clean Water Act ("CWA"), 33 U.S.C. § 1365(a)(2), for EPA's failure to perform its nondiscretionary duty under 33 U.S.C. § 1313(d)(2) to either approve or disapprove within 30 days of submittal the total maximum daily load ("TMDL") for total nitrogen in the Westport River Estuarine System ("Westport River TMDL"), submitted on February 10, 2017 by the Massachusetts Department of Environmental Protection ("MassDEP").

Legal Background

The goal of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" in part by eliminating "the discharge of pollutants into the navigable waters." 33 U.S.C. § 1251(a). To meet these goals, states must establish surface water quality standards ("SWQS") based on designated uses (such as aquatic life support, fish and shellfish consumption, drinking water supply, etc.) and must evaluate waterbodies for their capacity to meet these standards. If states determine that certain waterbodies will not meet the SWQS after implementation of technology-based controls, they must develop TMDLs for the pollutants causing impairment of the waterbodies.

33 U.S.C. § 1313(d)(2) requires each state to submit to EPA a list of impaired waterbodies under CWA § 303(d) and the TMDLs for those waterbodies, and it requires EPA to “either approve or disapprove such identification and load not later than thirty days after the date of submission.” 33 U.S.C. § 1313(d)(2); *see City of Arcadia v. U.S. Envtl. Prot. Agency*, 411 F.3d 1103, 1106 (9th Cir. 2005) (“In fact, the States are authorized to submit waters identified and TMDLs ‘from time to time’ and the EPA is *required* either to approve or disapprove a TMDL upon submission by a State.”) (emphasis in original). This duty is delegated to the Regional Administrator. *See* 40 C.F.R. § 130.7(d)(2). The duty to approve or disapprove a state’s TMDL adheres as long as the waterbody is on the state’s Section 303(d) list, even if the waterbody is no longer impaired. *See Nat. Res. Def. Council, Inc. v. Fox* (“*Fox*”), 93 F. Supp. 2d 531 (S.D.N.Y. 2000), *aff’d in part, vacated in part sub nom. Nat. Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91 (2d Cir. 2001).

EPA’s duty to approve or disapprove a state’s submitted TMDL under Section 1313(d)(2) is nondiscretionary. *See Hayes v. Whitman*, 264 F.3d 1017, 1023 (10th Cir. 2001) (finding that a submission to EPA “would then trigger the EPA’s nondiscretionary duty under § 1313(d)(2) to approve or disapprove the submission of ‘no TMDLs’ within thirty days. If the EPA fails to respond within this period, it is subject to suit under the citizen-suit provision of the Clean Water Act to compel it to perform this nondiscretionary duty.”); *Fox*, 93 F. Supp. 2d at 558 (“This submission triggered EPA’s nondiscretionary duty to approve or disapprove the proposed TMDLs.”).

EPA’s Failure to Approve or Disapprove MassDEP’s Westport River TMDL

In 2014, MassDEP identified three segments of the Westport River as impaired under CWA § 303(d) for estuarine bioassessments, fecal coliform, and total nitrogen:

- East Branch Westport River (Segment ID: MA95-41),
- West Branch Westport River (Segment ID: MA95-37), and
- Westport River (Segment ID: MA95-54).¹

On February 23, 2016, EPA approved these listings in its approval of Massachusetts’ 2014 list of impaired waters.² There is already an EPA-approved TMDL for fecal coliform in these Westport River segments (EPA TMDL No. 36172); however, under 33 U.S.C. § 1313(d)(1)(C), Massachusetts is required to establish TMDLs for estuarine bioassessments and total nitrogen

¹ *See* Massachusetts Year 2014 Integrated List of Waters, *Final Listing of the Condition of Massachusetts’ Waters Pursuant to Sections 305(b), 314 and 303(d) of the Clean Water Act*, CN: 450.1, Dec. 2015, <http://www.mass.gov/eea/docs/dep/water/resources/07v5/14list2.pdf>.

² Letter from Kenneth Moraff, Office of Ecosystem Protection, U.S. EPA Region 1 to Martin Suuberg, Commissioner, Massachusetts Department of Environmental Conservation, Feb. 23, 2016, https://ofmpub.epa.gov/tmdl_waters10/attains_impaired_waters.show_list_approval_document?p_list_approval_docs_id=164.

because the Westport River segments are included on the Section 303(d) list for these pollutants and they do not already have TMDLs.

On February 10, 2017, MassDEP submitted to EPA Region 1 for review and approval its TMDL for total nitrogen in the Westport River Estuarine System, which encompasses the three segments listed above. EPA then had 30 days to approve or disapprove the TMDL. This period expired on March 12, 2017 without receipt of an approval or disapproval of the Westport River TMDL.

It is our understanding that EPA Region 1 has returned the Westport River TMDL to MassDEP for corrections related to the assertion that the Westport River (Segment ID: MA95-54) is no longer impaired. However, the Westport River (Segment ID: MA95-54) is still listed as impaired on Massachusetts' Section 303(d) list, which was approved by EPA approximately one year ago. Furthermore, this segment of the Westport River is listed as "TMDL needed" for total nitrogen on EPA's website.³ Even if this segment is no longer impaired for total nitrogen, EPA still must approve or disapprove the Westport River TMDL because the MA95-54 segment is on Massachusetts' Section 303(d) list. As the District Court for the Southern District of New York has said regarding approval or disapproval of TMDLs:

In requiring EPA to perform this simple, binary duty, Congress left no room for EPA, or the Court, to define subsets of listed WQLSs [water quality limited segments] that deserve differential treatment. If EPA wished not to review TMDLs for these waterbodies, it had an opportunity to disapprove their inclusion on the § 303(d) list. At that earlier stage, EPA could have argued that these waterbodies were not water quality limited, and should be omitted from the list and exempted from TMDL development. Having approved their inclusion on New York's § 303(d) list, however, EPA missed its opportunity to pass upon the wisdom of approving TMDLs for these segments.

Fox, 93 F. Supp. 2d at 559. Furthermore, to the extent that EPA's correction was intended to convey approval of the remainder of the Westport River TMDL, EPA should forthwith approve the entirety of the TMDL.

Therefore, EPA was required to approve or disapprove the Westport River TMDL for total nitrogen in the Westport River Estuarine System within 30 days of submittal, and there is no legal support for EPA's failure to do so. EPA's inaction constitutes a violation of the Clean Water Act.

³ United States Environmental Protection Agency, Waterbody Quality Assessment Report, https://ofmpub.epa.gov/waters10/attains_waterbody.control?p_au_id=MA95-54&p_cycle=2014&p_state=MA&p_report_type=.

Scott Pruitt, Administrator
Deborah Szaro, Regional Administrator
April 26, 2017
Page 4

Persons Giving Notice and Representing Attorneys

The name, address, and telephone number of the parties giving notice are:

Buzzards Bay Coalition
114 Front Street
New Bedford, MA 02740
(508) 999-6363

Westport Fishermen's Association
PO Box 83
Westport Point, MA 02791
(774) 264-9200

Please contact the Buzzards Bay Coalition and the Westport Fisherman's Association through their undersigned attorneys as follows:

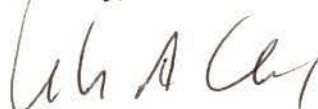
Mark A. Chertok
Sive, Paget & Riesel, P.C.
560 Lexington Avenue, 15th Floor
New York, NY 10022
(646) 378-7228
mchertok@sprlaw.com

Conclusion

Because EPA has failed to perform its nondiscretionary duty to approve or disapprove within 30 days MassDEP's TMDL for the Westport River Estuarine System, the Buzzards Bay Coalition and Westport Fisherman's Association intend to file a lawsuit under 33 U.S.C. § 1365(a)(2) against EPA sixty days from the date of this notice of intent to sue. Relief sought will include declaratory and injunctive relief, as well as the award of litigation expenses.

Please contact me if you wish to discuss the allegations in this notice of intent to sue or the potential for settlement of this matter. Thank you for your immediate attention to this matter.

Sincerely,



Mark A. Chertok

cc: Jeff Sessions, U.S. Attorney General (via Certified Mail)
Martin Suuberg, Commissioner, MassDEP (via Certified Mail)