



January 24, 2018

VIA CERTIFIED MAIL

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

Alexandra Dunn, 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 TOTAL MAXIMUM DAILY LOADS FOR THE TOWN OF
FALMOUTH'S COASTAL ESTUARIES**

Dear Administrator Pruitt and Regional Administrator Dunn:

On behalf of the Buzzards Bay Coalition and their adversely affected members, I write to you today 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 following town of Falmouth estuaries: Quissett Harbor Embayment System, Fiddlers Cove/Rands Harbor Embayment System, and the Wild Harbor Estuarine System (collectively, "Falmouth estuaries"), submitted to the EPA on December 1, 2017 by the Massachusetts Department of Environmental Protection ("MassDEP").

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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 SWQS after implementation of technology-based controls, they must develop TMDLs for the pollutants causing impairment of the waterbodies.

Pursuant to 33 U.S.C. §1313(d)(2) of the CWA each state is required to submit to EPA a list of impaired waterbodies 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 TMDLs for Falmouth Estuaries

MassDEP identified the following segments as impaired under the CWA for nutrients and eutrophication biological indicators:

- Wild Harbor River (Segment ID: MA95-68) in 2010,
- Fiddlers Cove (Segment ID: MA95-79) in 2014,
- Rands Harbor (Segment ID: MA95-78) in 2014,
- Wild Harbor (Segment ID: MA95-20) in 2017 and,
- Quissett Harbor (Segment ID: MA 95-25) in 2017.

On November 16, 2011 the EPA approved the listing of Wild Harbor River in its approval of Massachusetts' 2010 list of impaired waters.¹ Fiddlers Cove, and Rands Harbor were both listed as impaired for nutrients and eutrophication biological indicators on the Massachusetts 2014 list of impaired waters approved by EPA on February 23, 2016.² Wild Harbor and Quissett Harbor were found to be impaired by MassDEP for nutrients during the development of their TMDLs.³

On December 1, 2017, MassDEP submitted to EPA Region 1 for review and approval the TMDLs for total nitrogen for these Falmouth estuaries encompassing the five segments listed above. EPA then had 30 days to approve or disapprove the TMDLs. This period expired on January 1, 2018 without receipt of an approval or disapproval for the Falmouth TMDLs. EPA's inaction constitutes a violation of the Clean Water Act.

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

Please contact the Buzzards Bay Coalition through their undersigned attorney as follows:

Korrin N. Petersen
Buzzards Bay Coalition
114 Front Street
New Bedford, MA 02740
(508) 999-6363 ext 206
petersen@savebuzzardsbay.org

Conclusion

Because EPA has failed to perform its nondiscretionary duty to approve or disapprove within 30 days MassDEP's TMDL for the Falmouth estuaries, the Buzzards Bay Coalition intends 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.

¹ See Massachusetts Year 2010 Integrated List of Waters, *Final Listing of the Condition of Massachusetts' Waters Pursuant to Section 305(b), 314 and 303(d) of the Clean Water Act*, CN: 450.1 November 2011. https://ofmpub.epa.gov/tmdl_waters10/attains_impaired_waters.show_list_approval_document?p_list_approval_docs_id=3 last visited January 15, 2018.

² See Massachusetts Year 2014 Integrated List of Waters, *Final Listing of the Condition of Massachusetts' Waters Pursuant to Section 305(b), 314 and 303(d) of the Clean Water Act*, CN: 360.1 December 2015.

³ See Draft Quissett Harbor Embayment System Total Maximum Daily Loads For Total Nitrogen, CN 374.0, August 2017; and Draft Wild Harbor Estuarine System Total Maximum Daily Load For Total Nitrogen, CN 397.0, September 2017.

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,



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(508) 999-6363 ext 206
petersen@savebuzzardsbay.org

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

Julian Suso, Town Manager, Town of Falmouth