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VIA CERTIFIED MAIL

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Re: Sixty-day Notice of Intent to Sue for Violations of the Clean Water Act Related to the Untimely Promulgation of Final Water Quality Standards.

Dear Mr. Regan, Mr. Pigott, Ms. Nagle, and Ms. Hisel-McCoy,

On behalf of Delaware Riverkeeper Network and Maya K. van Rossum, the Delaware Riverkeeper, (collectively, “DRN”), this letter provides the Environmental Protection Agency (“EPA”), the EPA Administrator (“the Administrator”), and the EPA’s Assistant Administrator for the Office of Water (“the Assistant Administrator”), with notice pursuant to Section 505(b)(2)¹ of the Clean Water Act (“CWA”),² that DRN intends to sue EPA, the Administrator, and the Assistant Administrator for violations of the CWA related to the failure to promulgate final water quality standards (“WQS”) within the time period required by CWA Section 303(c)(4)(B), 33 U.S.C. § 1313(c)(4)(B).

¹ Federal Water Pollution Control Act (Clean Water Act) § 505, 33 U.S.C. § 1365(b)(2) (1946) (amended in 1972).

² The Act is officially entitled “Water Pollution Prevent and Control,” but is commonly known as the “Clean Water Act” inclusive of the 1972 amendments. *See Summary of the Clean Water Act*, U.S. ENV’T PROT. AGENCY [epa.gov/laws-regulations/summary-clean-water-act](https://www.epa.gov/laws-regulations/summary-clean-water-act) (June 12, 2024).

LEGAL BACKGROUND

The legal framework for this notice consists of the federal Clean Water Act and the interstate Delaware River Basin Compact because the states of Delaware, New Jersey, and Pennsylvania fulfill their Clean Water Act obligation to designate uses for surface waters by deferring to the water quality standards set by the Delaware River Basin Commission.³

Clean Water Act

The CWA was enacted in 1946 and significantly amended in 1972⁴ “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”⁵ The CWA, administered by EPA,⁶ sets two goals to achieve this objective: (1) Eliminating “the discharge of pollutants into the navigable [or jurisdictional] waters” of the United States and (2) achieving “wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water.”⁷ To effectuate these goals, the CWA requires states,⁸ and in limited instances, the Administrator, to establish WQS for jurisdictional waters that “protect the public health or welfare, enhance the quality of water[,] and serve the purposes” of the CWA while also contemplating the given water’s “use and value for the public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and . . . their use and value for navigation.”⁹ Put simply, CWA Section 101(a)(1)–(2) establishes the primary goals and CWA Section 303(c)(2) directs states to consider these goals when developing WQS.

WQS are provisions of state or federal law that set “water quality criteria” to protect the “designated uses” for a water body.¹⁰ Water quality criteria can be expressed through both numerical values and narrative criteria¹¹ and must “contain sufficient parameters or constituents to protect the designated use” based on “sound scientific rationale.”¹² Criteria for waters with multiple designated uses must “support the most sensitive use.”¹³ There are two primary categories of criteria: (1) Human health criteria to protect public water

³ DEL. RIVER BASIN COMM’N, *infra* note 54 at 1.

⁴ Federal Water Pollution Control Act (Clean Water Act), P. L. 92-500, 86 Stat. 896 (codified as amended at 33 U.S.C. § 1251 *et seq.*).

⁵ *Id.* § 1251(a).

⁶ 33 U.S.C. § 1251(d).

⁷ *Id.* § 1251(a)(1)–(2).

⁸ The definition of state includes “the [fifty s]tates, the District of Columbia, Guam, the Commonwealth of Puerto Rico, Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, and Indian Tribes that EPA determines to be eligible” 40 C.F.R. § 131.3(j).

⁹ 33 U.S.C. § 1313(c)(2)(A). *Accord* 40 C.F.R. § 131.2 (1983) (requiring WQS to “provide water quality for the protection and propagation of fish, shellfish and wildlife[,] . . . recreation . . . and . . . consider[] their use and value of public water supplies, propagation of fish, shellfish, and wildlife, recreation in and on the water, and agricultural, industrial, and other purposes including navigation” whenever attainable).

¹⁰ *Id.* §§ 131.2; 131.10(j).

¹¹ *Id.* § 131.11(b)(1)–(2).

¹² *Id.* § 131.11(a)(1).

¹³ *Id.*

supply, recreation, and fish and shellfish consumption uses and (2) aquatic life criteria to protect protection and propagation of fish, invertebrates, and other aquatic species uses.¹⁴

EPA interprets the CWA to differentiate between designated uses and “existing uses.” Whereas designated uses are “those uses specified in [WQS] for each water body or segment *whether or not* they are being attained,¹⁵ existing uses are “those uses that were *actually attained* on or after November 28, 1975,” regardless of their inclusion in WQS.¹⁶ States must revise WQS that specify designated uses less protective than the uses actually being attained.¹⁷ This concept is codified in CWA Section 303(c) by requiring states to review their WQS at least once every three years,¹⁸ and implemented by EPA in its CWA Section 303(d) regulations by prohibiting states from infringing on existing uses or “the level of water quality necessary to protect the existing uses” in their antidegradation policies.¹⁹

States are primarily responsible for “reviewing, establishing, and revising [WQS]” applicable to their waters.²⁰ States must hold public hearings at least once every three years to review, and if necessary, modify and adopt WQS.²¹ States must also reexamine water body segments that do not include the uses specified in CWA Section 101(a)(2) every three years to determine if new information has become available that indicates the CWA Section 101(a)(2) uses are attainable, and if so, revise the WQS accordingly.²² Additionally, states must revise a designated use whenever a designated use does not include any use that is actually occurring.²³ States must submit the results of such reviews and any revised or newly adopted WQS to the Administrator.²⁴ The Administrator is responsible for

¹⁴ Water Quality Standards to Protect Aquatic Life in the Delaware River, 88 Fed. Reg. 88315, 88317 (proposed Dec. 21, 2023) (to be codified at 40 C.F.R. § 131).

¹⁵ *Id.* § 131.3(f) (emphasis added).

¹⁶ *Id.* § 131.3(e) (emphasis added).

¹⁷ 40 C.F.R. § 131.10(i); *Table Rock Chapter of Trout Unlimited v. Env’t Mgmt. Comm’n*, 663 S.E.2d 333, 336 (2008).

¹⁸ 33 U.S.C. § 1313(c)(1).

¹⁹ 40 C.F.R. § 131.12(a)(1). *See also* P.U.D. No. 1 *Jefferson Cnty. v. Wash. Dep’t of Ecology*, 511 U.S. 700, 718 (1994) (upholding EPA position that “no activity is allowable ... which could partially or completely eliminate any existing use” in state or authorized tribe antidegradation policies).

²⁰ *Nat’l Mining Ass’n v. Jackson*, 768 F.Supp.2d 34, 39 (D.D.C. 2011) (“Section 303 of the Clean Water Act allocates primary responsibility for reviewing, establishing, and revising [WQS] to the states.”). *See* 33 U.S.C. § 1313(c)(1) (describing the state responsibility to review, modify, and adopt WQS); 40 C.F.R. § 131.4(a) (same).

²¹ 33 U.S.C. § 1313(c)(1), (2)(a); 40 C.F.R. § 131.20(a).

²² 40 C.F.R. § 131.20(a) (promulgated pursuant to 33 U.S.C. § 1313(c)(2)(A)).

²³ *Id.* § 131.10(i).

²⁴ 33 U.S.C. § 1313(c)(1)–(2); 40 C.F.R. § 131.20(c). This letter, as does the CWA, refers only to the Administrator but acknowledges that EPA delegated authority to the Regional Administrator for many circumstances requiring EPA review of state reviews and submitted WQS. *Compare* U.S.C. § 1313(c)(1), (2), (3) (directing states to make “[r]esults of such review shall be made available to the Administrator[,]” that “revised or new standard[s] shall be submitted to the Administrator[,]” and tasking “the Administrator[] ... [to] determine[] that such standard meets the requirements of this Act[,]” respectively) *with* 40 C.F.R. §§ 131.20(c) (directing states to “submit the results of the review[] ... and any revisions of the standards to the Regional Administrator”), 131.21(b) (requiring “the Regional Administrator’s approval or disapproval of a State [WQS] shall be based on the requirements of the Act”).

reviewing revised or newly adopted WQS submitted by states to determine if the WQS is consistent with the requirements of the CWA.²⁵

The Administrator²⁶ is responsible for promulgating regulations to ensure that WQS meet the requirements of the CWA.²⁷ The Administrator must promulgate regulations when the Administrator determines that WQS do not meet the requirements of the Act.²⁸ Such determination is referred to as an “Administrator’s determination.”²⁹ The Administrator is authorized to make such determinations when (1) revised or new WQS are submitted by a state³⁰ or (2) in any case the Administrator determines a revised or new WQS is necessary.³¹ If the Administrator issues an Administrator’s determination, the Administrator must “promptly prepare and publish proposed regulations setting forth a revised or new WQS”³² and then “promulgate any revised or new WQS not later than ninety days after he publishes such proposed standards.”³³ An Administrator’s determination must “(1) [b]e signed by the Administrator or his or her duly authorized delegate, and (2) [c]ontain a statement that the document constitutes an Administrator’s determination under [S]ection 303(c)(4)(B) of the [CWA].”³⁴

The CWA empowers citizens to “commence a civil action” against the United States and any other agency for violations of “(A) an effluent standard or limitation . . . or (B) an order issued by the Administrator or a State with respect to such a standard or limitation,”³⁵ and “against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator”³⁶ sixty-days after adequate notice is provided.³⁷

Delaware River Basin Compact

The federal government and the States of New York, New Jersey, Delaware, and Pennsylvania negotiated the Delaware River Basin Compact (“Compact”) entering into force in 1961 following the entry of a consent decree in *New Jersey v. New York*.³⁸ The

²⁵ 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.21(b).

²⁶ This authority has *not* been delegated to the Regional Administrator. *Compare* 33 U.S.C. § 1313(c)(4) (“*The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new [WQS] for the navigable waters involved— ... (B) in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this Act*” (emphasis added)) *with* 40 C.F.R. § 131.22(b) (“*The Administrator may also propose and promulgate a regulation, ... setting forth a new or revised standard upon determining such standard is necessary to meet the requirements of the Act*” (emphasis added)).

²⁷ 33 U.S.C. § 1313(c)(4).

²⁸ *Id.*

²⁹ *See* 40 C.F.R. § 131.22(b) (explaining that “an *Administrator’s determination* ... must: ... Contain a statement that the document³³ U.S.C. § 1313(c)(4) constitutes an *Administrator’s determination*” (emphasis added)).

³⁰ 33 U.S.C. § 1313(c)(4)(A); 40 C.F.R. § 131.22(a).

³¹ 33 U.S.C. § 1313(c)(4)(B); 40 C.F.R. § 131.22(b).

³² 33 U.S.C. § 1313(c)(4)(B); 40 C.F.R. § 131.22(a), (b).

³³ *Id.*

³⁴ 40 C.F.R. § 131.22(b)(1)–(2).

³⁵ 33 U.S.C. § 1365(a)(1).

³⁶ *Id.* § 1365(a)(2).

³⁷ *Id.* § 1365(b). *See also* 40 C.F.R. § 135.3(b).

³⁸ *New Jersey v. New York*, 347 U.S. 995 (1954).

Compact created the Delaware River Basin Commission (“DRBC”), a “regional body . . . with the force of law to oversee a unified approach to managing [the Delaware] [R]iver system without regard to political boundaries,” to conserve and manage the resources of the Delaware River.³⁹ The Compact directs DRBC to adopt a water resources program that “shall include a systematic presentation of the quantity and quality of water resource needs”⁴⁰ and provides that DRBC “may classify the waters of the basin and establish standards of treatment of sewage, industrial or other waste, according to such classes including allowance for the variable factors of surface and ground waters”⁴¹

To fulfill these Compact obligations, DRBC identifies “uses to be protected”—known as “designated uses” under the CWA—for the Delaware River Estuary waters.⁴² Stream quality objectives and effluent limitations are then developed in correspondence with the designated uses. As such, “[i]t is the policy of the [DRBC] to designate numerical stream quality objectives for the protection of aquatic life for the Delaware River Estuary and Bay (Zones 2 through 6) which correspond to the designated uses of each zone.”⁴³ DRBC then establishes water quality regulations and standards in its periodically-updated Comprehensive Plan to protect these uses.⁴⁴ These standards and uses, however, are not immutable: DRBC may need to amend them to protect public health and preserve the waters of the basin in accordance with the Comprehensive Plan.⁴⁵

Under the Delaware River Basin Water Code—a codification of DRBC’s regulations—existing uses will not receive protection unless those uses are formally adopted as designated uses because stream quality objectives and effluent limitations are calibrated only to protect the designated, rather than actual, uses of each zone.⁴⁶

The states of Delaware, New Jersey, and Pennsylvania (“States”) fulfill their CWA obligations to designate uses for surface waters by either (1) deferring to the WQS set by the Delaware River Basin Commission (“DRBC”) or (2) “provid[ing] for application of the more stringent of state and DRBC standards within the basin.”⁴⁷

FACTUAL BACKGROUND

As a consequence of the passage of the CWA after DRBC was established, the DRBC completed a Use Attainability Project in the 1980s to evaluate upgrades that would bring

³⁹ *An Introduction to the DRBC*, DELAWARE RIVER BASIN COMM’N <https://www.nj.gov/drbc/about/> (July 1, 2024).

⁴⁰ Delaware River Basin Compact, Pub. L. No. 87-328, 75 Stat. 688 (1961) (referring to §§ 1.3(e), 13.2).

⁴¹ *Id.* (referring to § 5.2).

⁴² Basin Regulations, Water Code and Administrative Manual, 18 C.F.R. § 410 (2001); DEL. RIVER BASIN COMM’N, DEL. RIVER BASIN WATER CODE 104 (2001) (referring to § 3.10.3 subparagraph C “Aquatic Life Objectives for Toxic Pollutants”) (adopted per Resolution No. 96-12).

⁴³ DEL. RIVER BASIN WATER CODE, *supra* note 42 at 104 (referring to § 3.10.3 subparagraph C “Aquatic Life Objectives for Toxic Pollutants”) (adopted per Resolution No. 96-12).

⁴⁴ Delaware River Basin Compact § 13.1(e).

⁴⁵ *Id.*

⁴⁶ DEL. RIVER BASIN WATER CODE, *supra* note 42 at 59 (referring to § 3.10.2 subparagraph C “Other Uses”) (adopted per Resolution No. 78-7).

⁴⁷ DEL. RIVER BASIN COMM’N, RESOL. NO. 2017 – 4 (2017).

its standards for the Delaware River into compliance with the CWA.⁴⁸ Although partial upgrades for primary contact recreation standards were adopted in 1991 as a direct result of the Use Attainability Project,⁴⁹ DRBC delayed action on designating aquatic life uses and dissolved oxygen (“D.O”) criteria as it continued to pursue additional studies throughout the 1990s.⁵⁰

DRBC began to assure interested stakeholders of rapid action to revise designated uses and update D.O. stream quality objectives in 2009 as part of the nutrient criteria development process.⁵¹ At that time, DRBC represented that D.O. improvements were a requisite early-action step prior to any regulatory action to control nutrient loads, and that both the designated use and the D.O. stream quality objectives would be quickly updated in order to address the more complex and time-consuming process of developing nutrient criteria.⁵²

Four years later, in 2013, three organizations—DRN, the Delaware River Shad Fishing Association, and the Lehigh River Stocking Association—petitioned DRBC for immediate action after it failed to initiate substantive work either to revise its standards or develop the models DRBC suggested were necessary.⁵³ Another four years passed after the petition before the DRBC passed its 2017 Resolution committing to a 6-year process of further studies and deliberations that would conclude in 2023.⁵⁴ Then, in September 2020, without much deliberation or notice, the DRBC approved an extension that provided an additional 1.5 years

for completing studies on the inclusion of propagation as a designated use in Zones 3 and 4 and the upper portion of Zone 5 [(“subject zones”)] of the Delaware River Estuary and for initiating DRBC rulemaking to revise the designated aquatic life uses consistent with the identified studies and the objectives and goals of the [Act].⁵⁵

This extension, without intervention from the EPA, would have meant that 2025 was the earliest possible date by which the WQS for the subject zones, including upgraded D.O. criteria, would be revised.⁵⁶ Nearly 20 years would pass after the DRBC’s assurances of

⁴⁸ See generally DEL. RIVER BASIN COMM’N, REPORT ON THE ATTAINABILITY OF SWIMMABLE WATER QUALITY, DEL USA PROJECT ELEMENT #19 REPORT (1988); DEL. RIVER BASIN COMM’N, ATTAINING FISHABLE AND SWIMMABLE WATER QUALITY IN THE DELAWARE ESTUARY, DEL USA PROJECT FINAL REPORT (1989); DELAWARE RIVER BASIN COMM’N, REPORT ON THE ATTAINABILITY OF FISHABLE WATER QUALITY, DEL USA PROJECT ELEMENT #19 REPORT (1990).

⁴⁹ DEL. RIVER BASIN COMM’N, RESOL. No. 1991 – 06 (1991).

⁵⁰ See DEL. RIVER BASIN COMM’N, RESOL. No. 1993-14 (1993); DEL. RIVER BASIN COMM’N, RESOL. No. 1995-07 (1995); DEL. RIVER BASIN COMM’N, RESOL. No. 1998-06 (1998); DEL. RIVER BASIN COMM’N, RESOL. No. 1998-06 (1998); DEL. RIVER BASIN COMM’N, RESOL. No. 1999-08 (1999).

⁵¹ See DEL. RIVERKEEPER NETWORK, ET AL., *infra* note 57 at 5.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 5–6.

⁵⁵ *Resolution for the Minutes*, DELAWARE RIVER BASIN COMM’N (Sept. 10, 2020) (“amending the schedules adopted by Resolution No. 2017-04 . . .”).

⁵⁶ See *id.*

swift action made in 2009 and a full 40 years after the initiation of the DRBC's Use Attainability Project.

The history of DRBC's lack of progress on revised WQS demonstrated a failure to take genuine action to protect actual uses of the Delaware River Estuary, and prompted five organizations—DRN, PennFuture, Clean Air Council, Environment New Jersey, and PennEnvironment (“Petitioners”)—to petition the EPA and its Administrator on April 29, 2022 to “to engage in rulemaking to revise the WQS” for the subject zones (“Petition”).⁵⁷ Petitioners requested the EPA to “promptly exercise its [CWA] Section 303(c)(4)(B) authority to prepare and publish regulations setting forth a revised WQS” which would “revise the designated uses for the subject zones to include: 1) maintenance and propagation of resident fish and other aquatic life; and 2) spawning and nursery habitat for anadromous fish (collectively “propagation”)” and “upgrade the [D.O.] criteria for the subject zones to at least 6.3 mg/L” to protect the propagation use.⁵⁸

In short, Petitioners concluded that EPA action under CWA Section 303(c)(4)(B) is authorized, but more importantly, necessary because the existing designated uses of the subject zones, and attendant D.O. criteria, did not satisfy the requirements of the CWA to achieve water quality that supports fish propagation.⁵⁹ In support of this conclusion, Petitioners highlighted the unique circumstances which permitted the D.O. criteria to escape revision: (1) The three states that share jurisdiction over the three subject zones—Delaware, New Jersey, and Pennsylvania—generally defer to the DRBC's WQS; (2) the DRBC has consistently stalled in revising the WQS to account for the existing use of fish propagation for the subject zones; and (3) the DRBC—as a commission created by interstate compact—does not have legal obligations under the Act.⁶⁰

Petitioners also detailed the numerous inadequacies of the challenged WQS in demonstrating that propagation is a well-documented existing use throughout the subject zones⁶¹ and the D.O. criteria does not support fish propagation,⁶² thus, the WQS does not

⁵⁷ DEL. RIVERKEEPER NETWORK, ET AL., RULEMAKING PETITION TO ENVIRONMENTAL PROTECTION AGENCY TO REVISE THE DESIGNATED USES AND DISSOLVED OXYGEN CRITERIA FOR THREE ZONES OF THE DELAWARE ESTUARY 1 (2022) (petition title amended) (on file with Del. Riverkeeper Network).

⁵⁸ *Id.* at 1, 3.

⁵⁹ DEL. RIVERKEEPER NETWORK, ET AL., *supra* note 64 at 11.

⁶⁰ *Id.* at 12.

⁶¹ *See e.g., id.* at 11 (citing DELAWARE RIVER BASIN COMM'N, EXISTING USE EVALUATION FOR ZONES 3, 4, & 5 OF THE DELAWARE ESTUARY BASED ON SPAWNING AND REARING OF RESIDENT AND ANADROMOUS FISHES 32 (2015) (finding that “[t]he combined data sets evaluated for this report nevertheless indicate that the “Existing Use” attained within the Delaware Estuary in the period between 2000 and 2014 includes ‘propagation’ for Zones 3, 4, and the upper 8.8 miles of Zone 5”));

⁶² *Id.* at 13 (relying on “USGS data for dissolved oxygen conditions and DNREC data for young-of-year Atlantic sturgeon” illustrating that “summers when dissolved oxygen is not maintained at the ... recommendation of 6.3 mg/L for 35 days or more, there is failure or near failure of Atlantic sturgeon to recruit new juveniles to the population that year”), 14 (“While DRBC's current standard for D.O. remains at 3.5 mg/L ... most key species exhibit lethal and sub-lethal effects below 5 mg/L concentration of D.O. For the critically endangered population of Delaware River Atlantic Sturgeon, ... a D.O. concentration of 6.3 mg/L or higher is necessary to support the spawning and rearing that occurs only in the tidal Delaware River itself, especially in the subject zones.”).

meet the requirements of the CWA because the WQS is not based on “sound scientific rationale.”⁶³ Petitioners further demonstrated that the DRBC’s continued delay of action to revise the D.O. criteria is correlated to an increased risk of extinction for the Delaware River’s unique population of endangered Atlantic sturgeon.⁶⁴

On December 1, 2022, EPA issued its response to the Petition, notifying Petitioners that EPA issued an Administrator’s Determination (“Determination”) under CWA Section 303(c)(4)(B) on December 1, 2022.⁶⁵ EPA’s response to the Petition acknowledged that “[r]esident and migratory fish species that utilize habitats in the specified zones of Delaware River Estuary, including the endangered Atlantic and shortnose sturgeon, are likely experiencing adverse effects under the currently applicable WQS[] established in 1967.”⁶⁶ EPA’s response also acknowledged the nondiscretionary duty under CWA Section 303(c)(4) which “requires that the Administrator promptly prepare and publish proposed regulations setting forth new or revised WQS following a [d]etermination that new or revised WQS are necessary to meet the requirements of the CWA.”⁶⁷

The Administrator delegated the authority to make a Determination under CWA Section 303(c)(4)(B)⁶⁸ to EPA’s Assistant Administrator for the Office of Water.⁶⁹ The Determination notified DRBC and the states of Delaware, New Jersey, and Pennsylvania that EPA’s review of the available information indicated that “‘propagation of fish’ is attainable in the specified zones of the Delaware River Estuary” and that “the currently applicable dissolved oxygen criterion for these zones is not sufficient to protect propagation through the specified zones.”⁷⁰ Accordingly, pursuant to CWA Section 303(c)(4)(B) and 40 C.F.R. § 131.22(b), EPA determined that “1) revised aquatic life designated uses that provide for propagation of fish, consistent with CWA Section 101(a)(2) and 40 CFR 131.20(a); and 2) corresponding [D.O.] criteria that protect a propagation use, consistent with 40 [C.F.R. §] 131.11, are necessary . . . to meet the requirements of the CWA.”⁷¹

EPA supported its Determination by citing “the *now abundant evidence* that fish species previously thought to only survive but not reproduce in the Delaware River Estuary have in fact been propagating there to some extent for at least two decades” and information and evidence on “ambient dissolved oxygen concentrations in the specified

⁶³ *Id.*

⁶⁴ *Id.* at 13–16.

⁶⁵ Letter from Radhika Fox, Assistant Adm’r, Env’t Prot. Agency, to Maya K. van Rossum, Del. Riverkeeper, Del. Riverkeeper Network (Dec. 1, 2022) (on file with the Del. Riverkeeper Network).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *See* 40 C.F.R. § 131.22(b)(1) (listing the requirements to constitute an Administrator’s determination which includes a signature “by the Administrator or his or her duly authorized delegate”).

⁶⁹ ENV’T PROT. AGENCY, ADMINISTRATOR’S DETERMINATION PURSUANT TO CLEAN WATER ACT SECTION 303(C)(4)(B) THAT REVISED WATER QUALITY STANDARDS ARE NECESSARY TO PROTECT AQUATIC LIFE IN THE DELAWARE RIVER ESTUARY 4 (2022) (on file with the Del. Riverkeeper Network).

⁷⁰ *Id.* at 11.

⁷¹ *Id.*

zones” that “further improvements in those ambient concentrations are attainable.”⁷² EPA elaborated further that “EPA’s regulation at 40 CFR 131.20(a) *requires* that states revise their WQS if new information indicates that CWA Section 101(a)(2) uses that were previously not included in the WQS are attainable.”⁷³

Thus, the Determination affirmed the claims advanced by the Petition: “[T]o be consistent with the CWA and EPA’s implementing regulation, the applicable aquatic life designated uses and corresponding dissolved oxygen criterion in the specified zones of the Delaware River Estuary *must be revised* to protect the propagation of resident and migratory fish species.”⁷⁴ EPA delineated a 12 month timeline to develop “proposed federal regulations setting forth revised aquatic life designated uses that provide for propagation and corresponding protective criteria” because of “the readily available information that DRBC and other stakeholders have generated[.]”⁷⁵

Petitioners responded to EPA on December 21, 2022 expressing concern for the length of time specific for the proposed rulemaking, highlighting the CWA requirement that the EPA to “promptly prepare and publish” proposed WQS after making a determination, and identifying case law which interpreted “promptly” to be the same timeline set for states to promulgate the same standards of ninety days.⁷⁶ Consequently, Petitioners requested that the EPA propose new WQS within one-hundred-and-eighty days after the determination.⁷⁷

EPA issued the proposed WQS on December 21, 2023 proposing revisions to (1) the designated uses for the Delaware River at river miles 108.4 to 70.0 for New Jersey and Pennsylvania and (2) the water quality criteria for the Delaware River at river miles 108.4 to 70.0 for Delaware, New Jersey, and Pennsylvania.⁷⁸ The proposed WQS would change the aquatic life designated use to include “protection and propagation of resident and migratory aquatic life.”⁷⁹ This designated use would be in addition to the other applicable designated uses in New Jersey and Pennsylvania.⁸⁰ The revised applicable D.O. criteria was proposed as a daily average magnitude of between 66% to 74% oxygen saturation for spawning and larval development between March 1 and June 30, juvenile development between July 1 and October 31, and overwintering between November 1 and February 28/29.⁸¹ This criterion would apply concurrently with other applicable water quality criteria for other parameters.⁸² EPA asked for comments on the proposed WQS to be

⁷² *Id.* at 2 (emphasis added).

⁷³ *Id.* (emphasis added).

⁷⁴ *Id.* (emphasis added).

⁷⁵ *Id.* at 11.

⁷⁶ Letter from Maya K. van Rossum, Del. Riverkeeper, Del. Riverkeeper Network, to Radhika Fox, Assistant Adm’r, Env’t Prot. Agency (Dec. 21, 2022) (on file with the Del. Riverkeeper Network).

⁷⁷ *Id.*

⁷⁸ Water Quality Standards to Protect Aquatic Life in the Delaware River, 88 Fed. Reg. 88315, 88336 (proposed Dec. 21, 2023) (to be codified at 40 C.F.R § 131 subparagraph a).

⁷⁹ *Id.* (to be codified at 40 C.F.R § 131 subparagraph b).

⁸⁰ *Id.* (to be codified at 40 C.F.R § 131 subparagraph d).

⁸¹ *Id.* (to be codified at 40 C.F.R § 131 subparagraph c).

⁸² *Id.* (to be codified at 40 C.F.R § 131 subparagraph d).

received on or before February 20, 2024.⁸³ The publication of the proposed WQS started the ninety-day time period for EPA to promulgate the final WQS.⁸⁴ As of the date of this notice, EPA has not promulgated the final WQS.

VIOLATIONS OF THE CLEAN WATER ACT

EPA, the Administrator, and the Assistant Administrator are in violation of the CWA for failing to undertake the nondiscretionary duty mandated by CWA Section 303(c)(4)(B), 33 U.S.C. § 1313(c)(4)(B), to promulgate the final WQS to protect aquatic life in the Delaware River within ninety days of publishing the proposed WQS⁸⁵ on December 21, 2023.

CWA Section 303(c)(4)(B) Imposes a Nondiscretionary Duty

CWA Section 303(c)(4)(B) independently authorizes the Administrator to determine that a new or revised standard is necessary to meet CWA requirements.⁸⁶ Courts have repeatedly affirmed that EPA’s duty to promptly propose and promulgate new or revised WQS after an Administrator’s determination is nondiscretionary.⁸⁷

The language and scheme of CWA Section 303 illustrates that such duties are nondiscretionary. First, the use of “shall” by Congress is indicative of and generally imposes a mandatory duty.⁸⁸ The United States Supreme Court held that “shall” usually means that

⁸³ *Id.* at 88315.

⁸⁴ See 33 U.S.C. § 1313(c)(4)(B) (“The Administrator shall promulgate any revised or new standard under this paragraph not later than ninety days after he publishes such proposed standards[.]”).

⁸⁵ See generally *id.*

⁸⁶ 33 U.S.C. § 1313(c)(4)(B).

⁸⁷ See *e.g.*, *Puget Soundkeeper Alliance v. Env’t Prot. Agency*, No. C13-1839-JCC, 2014 WL 4674393, at *6 (W.D. Wash. Sept. 18, 2024) (holding that “there is no mandatory obligation *until* a determination has been made” (emphasis added)); *NW Env’t Advocates v. Env’t Prot. Agency*, 549 F.Supp.3d 1218, 1232 (D. Id. 2021) (“The EPA’s duties to promptly publish and promulgate a new standard under Section 303(c) and under the circumstances of this case are nondiscretionary for numerous reasons.”); *CORALations v. Env’t Prot. Agency*, 477 F.Supp.2d 4, 418 (D.P.R. 2007) (holding that a determination “letter triggered the EPA’s mandatory duty” to prepare and publish water quality standards); *Kan. Nat. Res. Council, Inc. v. Whitman, F.Supp.2d 1208, 1212* (D. Kan. 2003) (holding that “EPA has a nondiscretionary duty” and “[u]nder the plain language of the statute, the EPA must take final action with respect to proposed water quality standards within ninety days of publishing such standards”); *Raymond Proffitt Found. v. Env’t Prot. Agency*, 930 F.Supp. 1088, 1097 (E.D. Pa. 1996) (“The language and design of the Clean Water Act as a whole supports the court’s conclusion that the duty imposed on the [EPA] Administrator under § 1313(c)(4) is nondiscretionary.”); *Sierra Club v. Hankinson*, 939 F.Supp. 865, 871 (N.D. Ga. 1996) (“... the Act requires EPA to step in when states fail to fulfill their duties under the Act.”) (deciding a case challenging failure to identify total maximum daily loads for all water quality limited segments); *Idaho Conservation League, Inc. v. Russell*, 946 F.2d 717, 720 (9th Cir. 1991) (“Section 303(c)(3) uses mandatory language, stating the Administrator shall promulgate such standard [pursuant to Section 303(c)(4)]” (sic)).

⁸⁸ *Russell*, 946 F.2d at 719 (determining whether to award the plaintiffs attorneys’ fees); *Raymond Proffitt Found.*, 930 F.Supp. at 1097 (deciding whether EPA violated the CWA for failure to “promptly prepare and publish” WQS for Pennsylvania after finding the standards submitted by the state deficient); *Idaho Conservation League v. Browner*, 968 F.Supp. 546, 548–49 (W.D. Wash. 1997) (determining whether EPA violated CWA Section 303(c) for failing to timely promulgate substitute standards after formally disapproving Idaho’s WQS); *NW Env’t Advocates*, 549 F.Supp.3d at 1232–33 (deciding whether EPA violated its duties under the CWA to promptly publish and promulgate a CWA-compliant WQS for mercury in Idaho after Idaho

“the relevant person or entity is under a mandatory duty.”⁸⁹ The Supreme Court in *United States v. Monsanto* found that in using “shall,” “Congress could not have chosen stronger words to express its intent” to impose a mandatory requirement.⁹⁰ In relying on such Supreme Court precedent, numerous courts have found that repeated use of “shall” in CWA Section 303 makes it “rife with mandatory language” which “underscores the nondiscretionary nature of the duties to promptly publish and promulgate a new standard.”⁹¹ Pertinently, CWA Section 303(c)(4) describes the Administrator’s duties using “shall.”⁹²

Second, the CWA Section 303(c) scheme is riddled with nondiscretionary duties “at every turn.”⁹³ The WQS review and promulgation process described in CWA Section 303(c)(4) demonstrates that Congress was addressing “situation[s] in which the Administrator had rejected the state’s water quality standard and the state was then unwilling or unable to promulgate standards that complied with the [CWA.]”⁹⁴ In addressing such situations, “Congress has stated that the Administrator—and nobody else—must promptly prepare and promulgate an acceptable [WQS].”⁹⁵ Congress could have addressed the situation utilizing other processes, but instead “Congress placed the burden on the Administrator to achieve the goals of the [CWA].”⁹⁶ This burden on the Administrator is illustrated in the multiple responsibilities tasked to the Administrator to fulfill its obligation to promulgate WQS after determining such WQS are necessary. EPA has two nondiscretionary duties per CWA Section 303(c)(4)(B): first, to promptly prepare proposed WQS after determining that such WQS are necessary to comply with the CWA, and second, to promulgate the WQS within ninety days of publishing the proposed WQS (in the absence of intervening state action).⁹⁷

The goals of the CWA require the Administrator to act.⁹⁸ Such goals “cannot be satisfied when neither the EPA nor the state has promulgated a [WQS] that complies with

failed to promulgate a revised WQS after EPA disapproval of Idaho’s revision of its mercury standard).

⁸⁹ *Raymond Proffitt Found.*, 930 F.Supp. at 1097. *Accord* *NW Env’t Advocates*, 549 F.Supp.3d at 1233 (noting that “this is a strong starting point that the duty is nondiscretionary because the word ‘shall’ generally imposes a mandatory duty”) (citation omitted).

⁹⁰ 491 U.S. 600 (1989).

⁹¹ *NW Env’t Advocates*, 549 F.Supp.3d at 1233 (citing to *United States v. Monsanto* in support of “shall” generally imposing a mandatory duty). *Accord* *Raymond Proffitt Found.*, 930 F.Supp. at 1097 (same).

⁹² See 33 U.S.C. § 1313(c)(4)(B) (“T setting forth a revised or new water quality standard for the navigable waters involved— . . . (B) in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter. The Administrator *shall* promulgate any revised or new standard under this paragraph not later than ninety days after he publishes such proposed standards, unless prior to such promulgation, such State has adopted a revised or new water quality standard which the Administrator determines to be in accordance with this chapter.” (emphasis added)).

⁹³ *NW Env’t Advocates*, 549 F.Supp.3d at 1233.

⁹⁴ *Raymond Proffitt Found.*, 930 F.Supp. at 1097.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ 33 U.S.C. § 1313(c)(4)(B).

⁹⁸ See *NW Env’t Advocates*, 549 F.Supp.3d at 1233 (finding that “not requiring the EPA to act in this situation would undermine the key purposes of the CWA”); *Raymond Proffitt Found.*, 930 F.Supp. at 1097 (finding that

federal law.”⁹⁹ Moreover, EPA’s failure to act in accordance with the 90-day requirement “would undermine the key purposes of the CWA,” otherwise “the agency’s inaction [would] leave old standards or no standards in place, thereby defeating the CWA’s purpose of restoring and maintaining ‘the chemical, physical, and biological integrity of the Nation’s waters.’”¹⁰⁰ This necessity to act to ensure satisfaction of the goals of the CWA is also illustrated by, and as described above, the several obligations tasked to the Administrator to ensure the WQS meet the criteria of the CWA.

Statutory Conditions Precedent to EPA’s Nondiscretionary Duty Occurred

The District Court for the District of Idaho, in *Northwest Environmental Advocates v. EPA*, conducted a “step-by-step analysis of Section 303(c)” to determine whether “the statutory conditions precedent to EPA’s duties to promptly promulgate a new or revised [WQS] occurred.”¹⁰¹ Although the court analyzed EPA’s duty to propose WQS per CWA Section 303(c)(4)(A), EPA’s duty per CWA Section (c)(4)(B) is textually and functionally the same. Thus, the court’s holding that satisfaction of a preceding statutory condition triggers the duty to act according to the next statutory condition is instructive and demonstrates that the 90-day requirement to promulgate the final WQS was triggered on December 21, 2023 upon publication of the proposed WQS.¹⁰²

The statutory conditions precedent to require EPA fulfill its nondiscretionary duty of promulgating the final WQS include—(1) issuance of an Administrator’s determination finding revised or new WQS are necessary to meet the requirements of the CWA¹⁰³ triggering (2) the duty to promptly prepare and publish proposed said WQS,¹⁰⁴ which triggers (3) the duty to promulgate the final WQS within ninety days¹⁰⁵ unless a state adopts an EPA-approved WQS.¹⁰⁶

Issuance of an Administrator’s determination. EPA made an Administrator’s determination on December 1, 2022, when it notified the relevant states and the DRBC that the WQS did not comply with the CWA. EPA’s regulations require Administrator’s determinations to “(1) [b]e signed by the Administrator or his or her duly authorized delegate, and (2) [c]ontain a statement that the document constitutes an Administrator’s determination under [S]ection 303(c)(4)(B) of the [CWA].”¹⁰⁷ Both requirements are satisfied by the Determination issued on December 1, 2022.

the duty must be nondiscretionary to fulfill the purposes of the CWA).

⁹⁹ Raymond Proffitt Found., 930 F.Supp. at 1097.

¹⁰⁰ NW Env’t Advocates, 549 F.Supp.3d at 1233.

¹⁰¹ *Id.* at 1224.

¹⁰² *See id.* at 1225 (holding that “all the statutory conditions precedent under Section 303(c) are met” so “[g]iven EPA’s inaction, the EPA has violated duties under Section 303(c)(4) to promptly publish and promulgate a water quality standard”).

¹⁰³ 33 U.S.C. § 1313(c)(4)(B); 40 C.F.R § 131.22(b).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ 40 C.F.R. § 131.22(b).

Preparation and Publication of Proposed Standards. EPA published proposed WQS on December, 21, 2023.¹⁰⁸ The proposed rule references the Determination issued on December 1, 2022 that “determined that revised [WQS] are necessary to protect the aquatic life in certain water quality management zones of the Delaware River.”¹⁰⁹ The proposed rule specifies the necessary WQS in stating that the Determination found that “a revised designated use to protect aquatic life propagation and corresponding dissolved oxygen criteria to protect that use are necessary.”¹¹⁰ Therefore, EPA prepared and published the WQS described by the Administrator’s determination.

No State Action Regarding the Necessary WQS. DRBC—while not a state under the Act—is nonetheless the organizational body created to “develop and effectuate the plans, policies, and projects relating to the water resources of the [Delaware River] Basin.”¹¹¹ As this notice demonstrates, and as acknowledged by EPA in its Determination,¹¹² DRBC has not taken any action to promulgate WQS that align with the WQS determined necessary by EPA to comply with the requirements of the CWA. As of the date of this notice, the DRBC nor the states of Delaware, New Jersey, or Pennsylvania have adopted WQS approved by EPA which would negate the EPA’s duty to promulgate the WQS described in the Determination.

Elapse of Ninety Day Deadline to Promulgate Final Standards. As a consequence of (1) determining revised WQS are necessary to meet the requirements of the CWA, (2) publishing the proposed WQS on December 21, 2023, and (3) no action by DRBC on behalf of the states of Delaware, New Jersey, and Pennsylvania, EPA maintains the obligation to fulfill its nondiscretionary duty to promulgate the final WQS within ninety days of the proposed WQS’ publication.¹¹³ As of the date of this notice, the EPA has failed to act pursuant to the nondiscretionary duty imposed by CWA Section 303(c)(4)(B), 33 U.S.C. § 1313(c)(4)(B), to promulgate the final WQS within ninety days of publication of such proposed WQS. EPA, the Administrator, and the Assistant Administrator are in violation of the CWA for said failure.

CONCLUSION

If the parties involved do not cure the violations of law described above immediately, upon the expiration of 60 days, the Delaware Riverkeeper, Maya van Rossum, and the Delaware Riverkeeper Network, intend to file suit against you pursuant to the citizen suit provision of the CWA, 33 U.S.C. § 1365(a)(2). If you would like to discuss the significant violations described herein and seek a mutually acceptable solution to them, please contact the undersigned.

¹⁰⁸ See generally 88 Fed. Reg. 88315 (proposed Dec. 21, 2023) (to be codified at 40 C.F.R § 131).

¹⁰⁹ *Id.* at 88315.

¹¹⁰ *Id.* at 88321.

¹¹¹ *Vision, Mission, and Values*, DEL. RIVER BASIN COMM’N, <https://www.state.nj.us/drbc/library/documents/DRBCvision-mission-values.pdf> (visited July 31, 2024).

¹¹² ENV’T PROT. AGENCY, *supra* note 79 at 4 (“EPA recognizes your states’ and DRBC’s awareness of the issue and efforts to ensure that the WQS for the Delaware River Estuary are consistent with the goals of the CWA. EPA is taking this step to make clear that the WQS must be revised to meet CWA requirements.”)

¹¹³ 33 U.S.C. § 1313(c)(4)(B).

Sincerely,



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