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December 18, 2015

**By Certified Mail**

Ms. Gina McCarthy, Administrator  
United States Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Mail Code: 1101A  
Washington, DC 20460

**Re: Notice of Violation of Nondiscretionary Duty under the Clean Water Act, 33 U.S.C. § 1313(c)(3), to Act on Proposed Site-Specific Copper Criterion for the Sanitary Board of the City of Charleston**

Dear Administrator McCarthy:

On behalf of the Sanitary Board of the City of Charleston, West Virginia (CSB), I hereby give notice pursuant to 33 U.S.C. § 1365(b)(2) that CSB intends to bring suit in federal district court against the Administrator of the United States Environmental Protection Agency (EPA), in her official capacity, for the Administrator's failure to perform a non-discretionary duty imposed by the Clean Water Act (CWA). 33 U.S.C. § 1365(a)(2). CWA 303(c)(3), 33 U.S.C. § 1313(c)(3), imposes a nondiscretionary duty on EPA to approve or disapprove proposed state water quality standards within 60 or 90 days of submission. The West Virginia Department of Environmental Protection (WVDEP) submitted a site-specific copper criterion for a segment of the Kanawha River on July 6, 2015. To date, EPA has failed to approve or disapprove this criterion notwithstanding that it is fully protective of all aquatic species. This failure to act is a violation of the nondiscretionary duty imposed by CWA 303(c)(3).

EPA's failure to act on the site-specific copper standard is an ongoing source of hardship for CSB. Despite asking for a longer compliance schedule to meet the stringent copper limit in its NPDES permit, CSB was only given three-years to comply. CSB has timely done everything asked of it to develop the site-specific standard. CSB performed the required Water Effects Ratio (WER) technical evaluations required by EPA, in consultation with DEP. It participated in the State rulemaking process. It participated in the West Virginia Legislature's review and approval of the updated legislative rule containing the copper WER for CSB. EPA has been aware of this proposal throughout these extensive, public processes.

The compliance schedule will expire on December 31, 2015. Because EPA has impermissibly deferred action on the WER, CSB will be subject to significant penalties for noncompliance with what is clearly an incorrect permit limit. CSB has been patient throughout this long, expensive, and frustrating regulatory process. EPA has known for an extended period of time about the

WER and the timing of its statutory approval window. Unfortunately, the circumstances compel CSB to file this notice and to bring suit if EPA does not promptly issue a decision approving the site-specific copper standard.

#### Identification of Party Giving Notice

CSB is a municipal sewer utility serving the City of Charleston in Kanawha County, West Virginia. The CSB operates a wastewater collection system and treatment plant that provides service for approximately 24,600 customers. CSB's contact information is as follows:

Sanitary Board of the City of Charleston  
208 26th Street  
Charleston, WV 25387  
(304) 348-1084

#### WER-Based Site-Specific Copper Standard

For more than three years, CSB has been diligently working with the WVDEP to develop a site-specific copper criterion based on a WER for a segment of the Kanawha River. As the Agency is aware, the starting point for a WER-based criterion for copper is the established aquatic life water quality standard. That standard was developed to be fully protective of all aquatic species in the state – including any threatened and endangered species that may be found in the state's waters. The 5.92 WER established in this case simply adjusts the national default criterion to account for local water chemistry. Put another way, the national copper criterion, developed in lab deionized water, is just as protective as the WER-adjusted national criterion is in the Kanawha River.

A suite of revised water quality standards, including the site-specific copper standard at issue here, was certified by WVDEP's General Counsel as duly adopted on June 9, 2015. This followed a multi-year process of rulemaking and legislative review – which EPA watched very closely. EPA Region III acknowledged receipt of the standards on July 6, 2015. On October 2, 2015, Region III sent the attached letter to WVDEP approving the standards with the exception of CSB's site-specific copper standard. EPA deferred taking any action on the WER due to a stated desire to further consider potential impacts to mussel species that may be in the river:

The submitted revisions also include a copper Water Effect Ratio for the Sanitary Board of the City of Charleston. This revision establishes a site-specific copper criterion for the protection of aquatic life in this segment of the Kanawha River. EPA is still considering the potential impact of this site-specific criterion on federally listed threatened and endangered species and is not taking a CWA 303(c)(3) action at this time. [emphasis added]

It is our understanding that EPA's decision to take no action on the site-specific copper standard is a result of consultation with the U.S. Fish and Wildlife Service (USFWS) and, specifically, USFWS' desire that WVDEP conduct a threatened and endangered mussel survey before the standard is approved.

The survey demanded by USFWS is both legally and technically unnecessary. As noted above, the national default copper standard is protective of all species, including mussels. Technically, the WER-adjusted brings the exact same level of protection taking into account the differences between Kanawha River water and lab water used in the national criteria development. Legally, as we explain below, the WER-based standard satisfies the specific approval criteria in the CWA and, accordingly, EPA must approve it regardless of USFWS' interest in having a mussel survey performed.

### EPA's Nondiscretionary Duty to Timely Act on Site-Specific Copper Standard

CWA 303(c)(3) imposes a nondiscretionary duty on EPA to approve or disapprove state-submitted water quality standards within 60 or 90 days, respectively. This section provides:

If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this chapter, such standard shall thereafter be the water quality standard for the applicable waters of that State. If the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this chapter, he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements.

...

33 U.S.C. § 1313(c)(3) (emphasis added).

When a state submits water quality standards, CWA 303(c)(3) authorizes EPA to take only one of two actions: (1) approve the state standards within 60 days of submission or (2) disapprove them within 90 days. EPA's regulations further clarify that this decision must be communicated to the state within the same 60- or 90-day timeframe. 40 C.F.R. § 131.21. Every court that has construed these provisions has concluded that they impose a nondiscretionary duty on EPA to issue decisions on state-submitted water quality standards within 60 or 90 days. *See, e.g., City of Dover v. EPA*, 956 F.Supp.2d 272, 278 (D.D.C. 2013) ("The EPA has a nondiscretionary duty to review all new and revised water quality standards within a set time."); *OVEC v. Whitman*, 2003 U.S. Dist. LEXIS 148 (S.D. W. Va. 2003) ("The statute further requires the EPA to either approve or disapprove state proposals within sixty to ninety days of their submission.").

Not only does EPA have a nondiscretionary duty to issue a decision within the 60- or 90-day timeframe, the Agency also has a nondiscretionary duty to approve state-submitted water quality standards if they satisfy the CWA's requirements. CWA 303(c)(3) provides that standards shall be approved if "such standard meets the requirements of this chapter." Conversely, the statute directs EPA to disapprove the standards if "such revised or new standard is not consistent with the applicable requirements of this chapter." EPA must limit its decision to the requirements of 33 U.S.C. Chapter 26. Those criteria are enumerated in EPA's regulations. 40 C.F.R. §§ 131.5(b), 131.21(b).

Where the CWA prescribes the criteria upon which EPA decisions must be made, the Agency is not empowered to create additional review criteria. See *Nat'l Assoc. of Home Builders v. Def. of Wildlife*, 551 U.S. 644, 663 (2007). Whether or not USFWS approves of proposed state water quality standards is not a relevant criterion that EPA may consider when it reviews proposed state water quality standards. In fact, because EPA's decision to approve state water quality standards that satisfy the CWA criteria is not discretionary, EPA has no duty to consult with USFWS under Section 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536(a)(2).<sup>\*</sup> *Nat'l Assoc. of Home Builders*, 551 U.S. at 671 (construing 50 C.F.R. § 402.03).

EPA's October 2, 2015 letter concedes that the WER-adjusted standard meets the CWA criteria because it identifies further USFWS consultation as the only obstacle to approval. Because USFWS consultation is not a legitimate statutory approval factor, EPA was legally required to approve the proposed standard by September 6. Substantively, if USFWS has concerns about the level of protection afforded to any endangered/threatened species then USFWS should raise those concerns with EPA for review on a national basis. Second-guessing the nationally applicable standard when it is translated to local waters with the same effective level of protection as is the case here is technically inappropriate.

### Conclusion

Because EPA has concluded that the WER-based site-specific copper standard for CSB meets all statutory criteria for approval, EPA has failed to perform its mandatory duty to approve that standard by September 6, 2015. 33 U.S.C. § 1313(c)(3). EPA's failure to act puts CSB into a position where it may now face penalties for not complying with an incorrect limit in its permit. After years of pushing this issue forward, CSB is now compelled to file this notice, and to sue, if EPA does not promptly issue an approval letter for the site-specific copper standard.

Please let me know if you have any questions or should your staff wish to discuss this matter.

Sincerely,



F. Paul Calamita  
*Counsel to CSB*

Encl. Letter from Jon Capacasa, EPA Reg. III, to Scott Mandirola, WVDEP (Oct. 2, 2015)  
C: Ms. Loretta E. Lynch, Attorney General  
Mr. Jon M. Capacasa, EPA Reg. III  
Mr. Scott Mandirola, WVDEP

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<sup>\*</sup> The provisions of EPA's 2001 Memorandum of Agreement with USFWS, 66 Fed. Reg. 11202 (Feb. 22, 2001), purporting to require Section 7 consultation on water quality standards approval decisions are irreconcilable with the Supreme Court's 2007 *National Association of Home Builders* decision. Nevertheless, even the Memorandum recognized that Section 7 consultation must conclude in time for EPA to "meet statutory and regulatory deadlines under the CWA." *Id.* at 11210. Thus, even if EPA believed it necessary to consult with USFWS regarding CSB's site-specific copper standard, that consultation process should have concluded in time for EPA to issue a decision within the timeframe required by CWA 303(c)(3).

## CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of December, 2015, I caused copies of the foregoing letter to be served by first class mail upon the parties listed below.



F. Paul Calamita

Ms. Gina McCarthy, Administrator  
United States Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Mail Code: 1101A  
Washington, DC 20460

Ms. Loretta E. Lynch, Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530-0001

Mr. Jon M. Capacasa, Director  
Environmental Protection Agency, Region III  
Water Protection Division  
1650 Arch Street  
Philadelphia, PA 19103-2029

Mr. Scott Mandirola, Director  
WV Department of Environmental Protection  
Division of Waste and Water Management  
601 57th Street S. E.  
Charleston, WV 25304