



February 23, 2016

Via Certified First Class Mail

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

RE: Conservation Law Foundation's Notice of Intent To Sue The Administrator of the United States Environmental Protection Agency for Failure to Establish a Lake Champlain Phosphorus TMDL within thirty (30) days of its Disapproval of Vermont's 2002 TMDL

Dear Administrator McCarthy:

Conservation Law Foundation ("CLF") submits this letter pursuant to section 505 of the Clean Water Act ("CWA") as notice of its intent to sue the Administrator of the Environmental Protection Agency ("Administrator") for violations of the CWA. *See* CWA § 505, 33 U.S.C. § 1365; 40 CFR § 135.2. In particular, CLF intends to sue the Administrator for failure to perform a mandatory duty under 33 U.S.C. § 1365(a)(2). Specifically, the Administrator has failed to establish a Lake Champlain phosphorus Total Maximum Daily Load ("TMDL") within 30 days of disapproving Vermont's 2002 TMDL pursuant to 33 U.S.C. § 1313(d)(2).

CLF intends to file suit no earlier than, and any time after sixty days following the postmarked date of this letter to obtain an order directing the Administrator to establish a Lake Champlain phosphorus TMDL, to recover attorneys' fees and costs of litigation, and to obtain any other appropriate relief. CWA § 505(a) & (d), 33 U.S.C. § 1365(a) & (d).

Identification of Plaintiff

Founded in 1966, CLF is a nonprofit, member-supported organization that operates advocacy centers in Boston, Massachusetts; Montpelier, Vermont; Concord, New Hampshire; Portland, Maine; and Providence, Rhode Island. CLF's corporate headquarters is located at 62 Summer



Street, Boston, MA 02110. CLF works on behalf of its New England-wide membership and with other environmental and community-based organizations and individuals to ensure compliance with environmental laws including the Clean Water Act. For over a decade CLF has maintained the Lake Champlain Lakekeeper as a component of its organizational structure. The Lakekeeper is entirely devoted to the restoration and protection of Lake Champlain, including remedying the lake's deterioration as a result of phosphorus pollution.

CLF will file suit on behalf of itself and its members living, working and/or recreating within the Lake Champlain Basin, who are adversely affected by the Administrator's failure to act which has caused Lake Champlain to suffer degraded water quality from nutrient impairment, including toxic algal blooms.

Facts

Phosphorus pollution threatens Lake Champlain

Phosphorus pollution is among the greatest threats to clean water in Lake Champlain. Phosphorus is a nutrient that stimulates excessive growth of algae in the lake. In excessive amounts, phosphorus and the associated algal growth can impair recreational uses and aesthetic enjoyment, reduce the quality of drinking water, and alter the biological community. Algal blooms – particularly cyanobacteria (or blue-green algae) can produce neurotoxins that harm animals and people.

Vermont's Water Quality Standards include total phosphorus concentration criteria for each of Vermont's twelve lake segments. These criteria vary among the different lake segments, and are expressed as the annual average phosphorus levels that must be achieved in order to support the many values and uses of the lake. Long-term monitoring of phosphorus levels throughout Lake Champlain by Vermont and New York with the Lake Champlain basin Program has documented phosphorus concentrations in excess of the water quality standards in most areas of the lake.¹

History of TMDL development

Section 303(d) of the CWA requires states to develop TMDLs for water bodies that do not currently meet water quality standards. The Vermont Department of Environmental

¹ Vermont Lake Champlain TMDL Phase I Implementation Plan (Draft August 2015), at 15, <http://www.epa.gov/sites/production/files/2015-09/documents/vt-lake-champlain-tmdl-phase1-ip.pdf>.



Conservation (DEC) submitted the final Lake Champlain Phosphorus TMDL to EPA Region 1 for review and approval under Section 303(d) of the CWA on September 25, 2002. Following a review of the final TMDL package, including DEC's response to public comments, the Region approved Vermont's TMDL on November 4, 2002.

On October 28, 2008, CLF filed suit in federal district court against EPA seeking to set aside the Region's November 4, 2002 approval of Vermont's Lake Champlain Phosphorus TMDL and seeking for EPA to establish a new TMDL. The complaint alleged that EPA's approval was arbitrary, capricious, and not in accordance with law under the CWA and the Administrative Procedure Act, 5 U.S.C. § 706(2).

In April 2010, CLF and EPA signed a settlement agreement, and EPA filed a motion with the court seeking a voluntary remand to allow the Region to reconsider its 2002 TMDL approval decision and a stay of the litigation. On August 25, 2010, the court granted EPA's motion for voluntary remand and stayed the case for 180 days. In the settlement agreement with CLF, EPA agreed to complete its reconsideration of the 2002 TMDL no later than 120 days from the court's order granting the remand. That date was December 24, 2010. On December 14, 2010, EPA received a 30-day extension from CLF of the date by which EPA must issue its decision, i.e., no later than January 23, 2011.

Upon reconsideration of the 2002 Vermont Lake Champlain Phosphorus TMDL, the Region concluded that several elements were inconsistent with EPA regulations and guidance available at the time of TMDL approval. Accordingly, on January 24, 2011, the Region withdrew its November 4, 2002 approval of the Vermont Lake Champlain Phosphorus TMDL.²

Legal Analysis

Failure to issue a Lake Champlain phosphorus TMDL within thirty days after the date of disapproval of Vermont's TMDL is a failure to perform a nondiscretionary duty

The Administrator has violated the CWA by failing to establish a Lake Champlain phosphorus TMDL within thirty days of disapproving Vermont's 2002 TMDL. CWA § 303(d)(2), 33 U.S.C. § 1313(d)(2). According to the CWA, if the Administrator disapproves a TMDL, "he

² U.S. Environmental Protection Agency. 2011b. Reconsideration of EPA's Approval of Vermont's 2002 Lake Champlain Phosphorus Total Maximum Daily Load and Determination to Disapprove. U.S. EPA New England Region, Boston, MA. <http://www.epa.gov/region1/eco/tmdl/pdfs/vt/LakeChamplainTMDLDisapprovalDecision.pdf>.



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shall not later than thirty days after the date of such disapproval . . . *establish such loads* for such waters as he determines necessary to implement the water quality standards applicable to such waters" CWA § 303(d)(2), 33 U.S.C. § 1313(d)(2) (emphasis added). In other words, if EPA disapproves a state's TMDL, EPA is under a mandatory duty to issue its own TMDL within 30 days.³

EPA disapproved Vermont's Lake Champlain phosphorus TMDL on January 24, 2011. Based on the mandatory duty set forth above, EPA had 30 days—i.e, until February 23, 2011—to establish a new phosphorus TMDL for Lake Champlain. To date, EPA has not established phosphorus loads for Lake Champlain. As a result, the Administrator has failed to perform her nondiscretionary duty.

Notice

By this letter, CLF now gives notice to the Administrator of its intent to sue for the Administrator's failure to perform her nondiscretionary duty to establish a phosphorus TMDL for Lake Champlain.

A handwritten signature in blue ink, appearing to read "C. Kilian", is written over a horizontal line.

Christopher M. Kilian
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³ See, e.g., *Scott v. City of Hammond, Ind.*, 741 F.2d 992, 997 (7th Cir. 1984).



CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on February 23, 2016, I caused a true and accurate copy of the *Conservation Law Foundation's Notice of Intent to Sue the Administrator of the United States Environmental Protection Agency* to be mailed via certified first class mail to:

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

Courtesy copies of the same document were mailed via postage pre-paid, first class mail to:

Curt Spalding, Regional Administrator
U.S. Environmental Protection Agency
5 Post Office Square, Suite 100
Boston, MA 02109-3912

Alyssa Schuren, Commissioner
VT Dept. of Environmental Conservation
Commissioner's Office
1 National Life Drive, Main 2
Montpelier, VT 05620

Eric Holder, Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001



Christopher Kiljan, Esq.