

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**  
**IN AND FOR NEW CASTLE COUNTY**

**DELAWARE RIVERKEEPER NETWORK, )  
MAYA VAN ROSSUM, THE DELAWARE )  
RIVERKEEPER, DELAWARE AUDUBON )  
SOCIETY, and SIERRA CLUB )**

**Petitioners, )**

**v. )**

**STATE OF DELAWARE, DEPARTMENT OF )  
NATURAL RESOURCES AND )  
ENVIRONMENTAL CONTROL, )  
A DELAWARE AGENCY, and )  
COLLIN O'MARA, IN HIS OFFICIAL )  
CAPACITY AS SECRETARY, STATE OF )  
DELAWARE, DEPARTMENT OF NATURAL )  
RESOURCES AND ENVIRONMENTAL )  
CONTROL, )**

**Respondents. )**

**C.A. No \_\_\_\_\_  
2013**

**Complaint in Proceeding  
for Writ of Mandamus**

**PETITION FOR WRIT OF MANDAMUS**

Pursuant to 10 *Del. C.* § 564, Petitioners Delaware Riverkeeper Network, Maya van Rossum, the Delaware Riverkeeper, Delaware Audubon Society and the Sierra Club, (together, "Petitioners") hereby seek a writ of mandamus directed to Collin O'Mara, in his official capacity as the Secretary of Delaware Department of Natural Resources and Environmental Control ("DNREC"), commanding him to issue a draft permit for public comment, and thereafter issue a final determination, on a permit application for the Delaware City Refinery's ("Refinery") operation of its cooling water intake structures

and associated discharges of wastewater and stormwater that was first submitted in 2002 (and updated in 2010). Despite the fact that federal and state law require DNREC to grant or deny the permit application, the agency has failed to act for more than 11 years, contributing to massive take of fish and holding hostage Petitioners' and the public's ability to challenge the permit in question. Petitioners support their position as follows:

### **PARTIES**

1. Petitioner Delaware Riverkeeper Network ("DRN") was established in 1988 to protect and restore the Delaware River, its tributaries and habitats. To achieve these goals, DRN organizes and implements streambank restoration, volunteer monitoring, educational programs, environmental advocacy initiatives, recreational activities, and environmental litigation throughout the entire Delaware River watershed, including the Delaware Estuary and Delaware Bay. The watershed includes portions of New York, New Jersey, Pennsylvania and Delaware. DRN is a membership organization with over 14,000 members throughout the watershed and approximately 400 members in the State of Delaware. DRN members live and recreate in the State of Delaware and throughout the watershed. DRN undertakes numerous activities and initiatives that take place in and/or directly affect State of Delaware waters, habitats, ecosystems and communities.

2. Petitioner the Delaware Riverkeeper, Maya K. van Rossum, is a full-time privately-funded ombudsman who is responsible for the protection of the waterways in the Delaware River Watershed. The Delaware Riverkeeper advocates for the protection and restoration of the ecological, recreational, commercial and aesthetic qualities of the Delaware River, its bay, tributaries and habitats. The Delaware Riverkeeper regularly visits the Delaware River and Delaware Estuary, including the areas affected by the

Refinery's operations, for personal and professional reasons. The Delaware Riverkeeper serves also as the Executive Director of the Delaware Riverkeeper Network.

3. Petitioner Delaware Audubon Society ("DAS") was incorporated in Delaware as a non-profit organization in 1977 and is a statewide chapter of the National Audubon Society. DAS is dedicated to developing a better appreciation of our natural environment and working for species and habitat protection and conservation. DAS consists of almost 1,900 members throughout the state advocating on a wide range of environmental issues and providing school education services. DAS focuses on the protection of the Delaware Bay and the Coastal Zone. The Delaware River and Bay ecosystem is considered an Important Bird Area (IBA) which warrants enhanced protection. DAS and its members have been rigorously pursuing a new updated water permit for the refinery since the last permit expired over a decade ago.

4. The Sierra Club is a national, member-supported environmental organization based in San Francisco, California. The Sierra Club is incorporated in the State of California as a Nonprofit Public Benefit Corporation and has approximately 1.4 million members and supporters dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Delaware Chapter of the Sierra Club is a membership association with approximately 1,600 members living in Delaware. The Delaware Chapter of the Sierra Club is dedicated to protecting the natural resources and quality of Delaware area ecosystems through public advocacy and education.

5. Respondent Collin O'Mara is the duly-appointed Secretary of DNREC.

6. Respondent Delaware Department of Natural Resources and Environmental Control is an administrative agency of the state of Delaware. The state legislature has directed DNREC to "control the development and use of the land, water, underwater and air resources of the State so as to effectuate full utilization, conservation and protection of the water and air resources of the State." *See* 7 Del. C. § 6001(b)(2). To that end, DNREC's stated mission is "to ensure the wise management, conservation, and enhancement of the State's natural resources, protect public health and the environment, provide quality outdoor recreation, improve the quality of life and educate the public on historic, cultural, and natural resource use, requirements and issues."

7. Petitioners bring this petition on behalf and their members, including those members who use and enjoy the Delaware River and Estuary, its tributaries and habitats, including those areas affected by the Refinery's operation, for recreational, scientific and aesthetic purposes, including canoeing, kayaking, fishing, sightseeing, bird watching and/or wildlife viewing. The Delaware Riverkeeper and Petitioners' members also use the Delaware River and Estuary to engage in scientific study and pollution and habitat monitoring activities. Respondents' failure to take action on the Refinery's permit application enables the Refinery to operate under a permit that fails to require adequate technological requirements to reduce the more than 46 million annual fish kills that occur from operation of its cooling water intake structures. Respondents' inaction also precludes Petitioners from challenging any DNREC action on the permit application to compel the inclusion of more environmental protective permit conditions.

8. Respondents' violations of law have injured and continue to injure the recreational, scientific, environmental and aesthetic interests of Petitioners and their members. These injuries are fairly traceable to Respondents' conduct and are capable of redress by action of the Court.

### **JURISDICTION**

9. This Court is authorized by 10 *Del. C.* § 564 to grant the mandamus relief sought by Petitioners.

### **STATUTORY AND REGULATORY BACKGROUND**

10. In 1972, Congress passed a comprehensive revision of the Federal Water Pollution Control Act known as the Clean Water Act ("CWA") to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), and established 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 [wherever possible] by July 1, 1983." 33 U.S.C. § 1251(a)(2). The CWA also sought to eliminate all discharges of pollutants to navigable waters by 1985. *See* 33 U.S.C. § 1251(a)(1).

11. To achieve these objectives, section 301(a) of the CWA prohibits the "discharge of any pollutant" by any "person" from a "point source" into "navigable waters" without a permit. *See* 33 U.S.C. §§ 1311(a) and 1362(12). A discharger may comply with the section 301(a) prohibition by obtaining a section 402 National Pollutant Discharge Elimination System ("NPDES") permit. *See* 33 U.S.C. § 1342. An NPDES permit controls and limits the discharge of pollutants by imposing technology-based

standards and requirements and, if necessary, standards to protect water quality and existing water uses. *See* 33 U.S.C. §§ 1311(b)(1)(A) and (C).

12. While the Environmental Protection Agency (“EPA”) Administrator is charged with administering water pollution prevention and regulation programs under the CWA, the CWA allows States to assume authority for administering the NPDES program within their borders, *see* 33 U.S.C. § 1342(b), and the State of Delaware has done so. *See* 39 Fed. Reg. 26,061 (July 16, 1974). Among other criteria, EPA may only approve state-administered NPDES programs that “insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application.” 33 U.S.C. 1342(b)(3).

13. Importantly, the environmental protections set out in the CWA are established as a regulatory floor and the state may enact more stringent environmental regulations should it choose to do so.

14. Delaware’s CWA program, implemented through Delaware’s Environmental Control Act and its associated regulations, includes laws and regulations that restrict the discharge of pollutants into the state’s surface waters and outlines procedures by which a facility may obtain a discharge permit. *See* 7 Del. C. §6003 and 7 *Del. Admin. C.* §7201-6.0 *et seq.*

15. Under Delaware’s NPDES program, once an NPDES renewal application is submitted, DNREC conducts an internal review of the facility’s operations, updates the permitting requirements, and sometimes issues a pre-notice draft of the permit along with a fact sheet. 7 *Del. Admin. C.* §7201-6.12. The permittee may provide initial comments

on any pre-notice draft permit. If the permittee does submit initial comments, DNREC reviews those comments and thereafter circulates a draft permit so that the public, the permittee and, in some circumstances, EPA, can comment on the draft permit. *Id.* The comment period on the draft permit is at least thirty (30) days from the date of notice. *Id.* at §7201-6.33. During the public comment period, a public hearing on the draft permit may be requested and had. *Id.* After the close of the public comment period, DNREC must consider all comments made, including those presented at a public hearing, and render a final permit decision. *Id.* at 7 *Del. Admin. C.* §7201-6.36. Only once DNREC makes a final determination on the permit may the public, the permittee, or any other interested party legally challenge DNREC's determination.

16. Under Delaware's NPDES program, and in line with federal standards, no NPDES permit may be issued for a term longer than five years. *See 7 Del. Admin. C.* §7201-6.21.1; 33 U.S.C. § 1342(b)(1)(B). However, an expired permit may be administratively extended if a permit application is submitted before expiration of the previous permit and DNREC is unable to issue a new permit before the expiration of the previous permit. *See 7 Del. Admin. C.* §7201-6.21.2.

17. Nevertheless, an administrative extension is not allowed to continue indefinitely. Rather, the five-year term limit requires DNREC to re-ensure compliance with the CWA, Delaware's Environmental Control Act, and their implementing regulations whenever a permit expires and is renewed. 33 U.S.C. § 1342(a)(1)-(2); 7 *Del. Admin. C.* §7201-6.15. Congress envisioned that progress in pollution control technology would permit the nation to move toward the goal of eliminating the discharge of pollutants altogether. 33 U.S.C. § 1251(a). For this reason, Congress wrote into the CWA

a process of reconsidering and revising technology and water-quality based standards, as well as revisiting the permits that implement these standards. 33 U.S.C. §§ 1311(d), 1313(c), 1342(b)(1)(B). Thus, in regular five year intervals, the CWA requires reevaluation of the relevant factors, and allows for the tightening of discharge conditions based on available technology. The CWA's goal of "eliminat[ing]" the discharge of pollutants by 1985 underscores the importance of reissuing permits in regular intervals. 33 U.S.C. § 1251(a)(1).

18. The CWA imposes further requirements on thermal dischargers and their cooling water intake structures, which use upwards of hundreds of millions of gallons of water per day and kill billions of fish and other aquatic organisms each year. In particular, CWA § 316(b) requires that as part of DNREC's review of a NPDES permit for a facility with cooling water intake structures, like the Refinery, DNREC is required to ensure that the "location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact." 33 U.S.C. § 1326(b)

19. EPA has made several attempts to promulgate regulations to implement section 316(b). Its latest attempt was challenged by both the environmental community and industry and resulted in the remand and suspension of the regulations. Currently, EPA is in the process of promulgating new regulations to implement section 316(b) and provide greater clarity as to what constitutes the best technology available (BTA) for minimizing adverse environmental impact from cooling water intake structures.

20. In the absence of specific regulations implementing section 316(b), DNREC is still required to use its best professional judgment (BPJ) in developing controls for



existing point source facilities with cooling water intake structures. *See* 40 C.F.R. § 125.90(b); 66 Fed. Reg. 65256 (Dec. 18, 2001).

### **FACTUAL BACKGROUND**

21. The Delaware City Refinery, a petroleum refinery located on the banks of the Delaware River in Delaware City, Delaware, processes crude oils into gasoline, distillates (like heating oil), petroleum coke, and other minor products. The Refinery has the capacity to process 190,000 barrels per day and, in order to cool process equipment during refining, the Refinery withdraws up to 452 million gallons of water each day (“mgd”) from the Delaware River (with long term average intake of 350 mgd) and circulates it through the facility. The water is then discharged back to the Delaware River at elevated temperatures of up to 110° Fahrenheit. Through the operation of the Refinery’s once-through cooling water intake facility, the Refinery kills approximately 46 million fish each year (this figure represents just four species of fish analyzed). Implementation of alternative technology, like a closed-cycle or recirculating cooling water intake system, could significantly reduce water intake and thereby reduce these fish kills by 90-98%.

22. On September 1, 1997, DNREC granted the then-current owner of the Refinery, Star Enterprises, an NPDES discharge permit (DE 0000256) (“1997 NPDES Permit”) authorizing the operation of water intake structures and the discharge of process and non-process wastewater from the Refinery. The term of the 1997 NPDES permit was five (5) years with an expiration date of August 31, 2002.

23. During the permit term, sometime between 1997 and 2002, the Refinery was sold to Motiva Enterprises LLC (“Motiva”) and, upon information and belief, the 1997 NPDES Permit was transferred to Motiva.

24. On March 1, 2002, more than six months before the expiration of its 1997 NPDES Permit, Motiva submitted an application to DNREC for renewal of the permit (“2002 NPDES Permit Application”).

25. In the more than eleven (11) years since submission of the 2002 NPDES Permit Application and expiration of the 1997 permit DNREC has failed to take action, whether by granting or denying the 2002 NPDES Permit Application, and the permit application remains pending before DNREC. The 1997 NPDES Permit has been administratively extended since that time enabling the Refinery to continue its operations.

26. On May 1, 2004, Motiva completed the sale of the Refinery to Premcor, Inc. (“Premcor”). In August 2005, Valero Energy Corporation (“Valero”) acquired Premcor, including the Refinery. Premcor continued ownership and operation of the Refinery as Valero’s wholly-owned subsidiary. Premcor/Valero announced its decision to discontinue operations at the Refinery on November 20, 2009, citing a history of poor performance and large operating losses. On May 31, 2010, Delaware City Refining Company, LLC (“DCRC”) acquired the Refinery from Premcor with the intent of restarting operations. The 1997 NPDES Permit was transferred to DCRC as part of the sale.

27. On May 31, 2010, DCRC entered into an Agreement with DNREC in order to ensure the prompt and lawful transfer of all required permits, authorizations, and other regulatory approvals under various environmental statutes and regulations, including the

NPDES Permit (the “Agreement”). The Agreement contemplates a five-year compliance timeline for DCRC to comply with the new BTA requirements that would begin with the issuance of a new NPDES permit. The Agreement required DCRC to submit updates to the outstanding permit reapplication prior to December 31, 2010.

28. On December 1, 2010, DCRC updated the 2002 NPDES Permit Application.

29. On June 21, 2011, DNREC circulated a pre-notice draft NPDES permit outlining proposed effluent limitations and monitoring requirements for the Refinery’s discharges. This pre-notice draft NPDES permit did not satisfy DNREC’s obligation to issue a draft NPDES permit for public comment. To date, DNREC has failed to circulate a draft NPDES permit for public comment.

30. With the pre-notice draft NPDES permit, DNREC also circulated a preliminary BTA determination as to the cooling water intake structure at the Refinery. The BTA determination, which is required by section 316(b) of the CWA, consists of two documents: 1) “Fact Sheet, Attachment A, BTA Determination – NPDES Permit Requirements for Cooling Water Intake and Discharges at Delaware City Refinery and Generating Station (DCR);” and 2) “Fact Sheet, Attachment B, BTA Determination – Baseline Economic Viability of Delaware City Refinery and Generating Station (DCR).” This determination is preliminary while the permit renewal remains pending. The preliminary BTA determination took into account applicable federal and state law, regulations and guidance, and cost considerations.

31. The DNREC BTA determination concludes that BTA for the cooling water intake structure is a closed cycle cooling system or its equivalence and states that the NPDES requirement for the existing Refinery cooling water intake structure will be either

1) a reduction of cooling water intake by at least 90%, from 452 mgd to 45.2 mgd, or 2) a 90% reduction in fish entrainment and impingement mortality caused by the intake to a level commensurate with a 45.2 mgd water intake.

32. The Refinery's current once-through cooling system, which is the same system that was originally installed fifty-seven (57) years ago when the Refinery was constructed, has contributed to the depletion of the Delaware Estuary and River fishery by destroying approximately 46 million fish per year for just four species (striped bass, weakfish, white perch and bay anchovy) studied in detail through entrainment and impingement impacts. Entrainment occurs when aquatic life, mostly early life stage fish eggs and larvae, are pulled into and through the cooling system and are killed by severe physical and chemical impacts and extreme water temperature. Impingement occurs as many juvenile and mature fish are trapped against the cooling system's intake screens.

33. Conversely, in a closed-cycle system, the cooling water is pumped through the Refinery's processing units and then through cooling towers, which cools the process water making it available for reuse and recirculation.

34. According to DNREC, the proposed BTA would require 90% to 98% less intake water, significantly reducing entrainment, impingement, and thermal discharge impacts, and the costs of the BTA would be substantially or completely offset if costs of noncompliance, loss of production due to intake problems, and costs of maintenance dredging in using the current system are taken into account.

35. On March 26, 2012, DCRC submitted its comments to the pre-notice draft permit responding that the preliminary BTA determination failed to take into account all available technology options including flow reduction, exclusion/collection and return

technologies, and relocation of the intake structure. DCRC also objected to what it described as DNREC's failure to take site-specific factors into account in its BTA determination and DNREC's failure to compare the relative costs and benefits of available technologies.

36. At a July 9, 2012 forum held by the Delaware Chapter of the Sierra Club, then-Surface Water Discharges Section Manager Robert Underwood explained that DNREC was in the process of drafting a new NPDES permit for the Refinery, but that EPA's regulations on cooling water intake structures standards would be forthcoming on July 27, 2012. EPA subsequently announced that it would take an additional eleven (11) months, until June 27, 2013, to finalize the standards. EPA again has further delayed issuance of the final regulations by four (4) months, with the regulations now asserted to be released by October 27, 2013.

37. The eleven (11) year delay and inaction by DNREC in failing to make a final decision on the Refinery's 2002 NPDES Permit Application precludes Petitioners from challenging any DNREC action on the permit application and advocating for the inclusion of more environmental protective permit conditions, if necessary. Meanwhile, during DNREC's delay, the Refinery has killed hundreds of millions of fish unnecessarily and continues to operate using antiquated technology.

**COUNT ONE**  
**FAILURE OF THE SECRETARY OF DNREC  
TO PERFORM A NON-DISCRETIONARY DUTY  
FOR WHICH PETITIONERS HAVE NO REMEDY AT LAW.**

38. Petitioners hereby incorporate by reference the allegations contained in paragraphs 1 through 37 as if fully set forth herein.

39. A DNREC NPDES permit is required for any activity “which may cause or contribute to discharge of a pollutant into any surface or ground water . . . .” 7 *Del. C.* § 6003(a)(2).

40. The Secretary of DNREC is charged with making a permit determination and has a non-discretionary duty to act on NPDES permit applications in that he “shall grant or deny a permit required by subsection (a) or (b) of this section in accordance with duly promulgated regulations . . . .” 7 *Del. C.* § 6003(c).

41. Prior to making a final determination on a permit application, a “draft NPDES permit and the statement of basis or fact sheet shall be publically noticed and made available for public comment.” 7 *Del. Admin. C.* §7201-6.12.2. These public notice and comment obligations are rooted in federal law and Delaware’s federally delegated NPDES program is dependent on the state’s ability to ensure public participation. *See* 33 U.S.C. 1342(b)(3), 40 C.F.R. §§ 123.25, 124.10, 124.11, 124.12.

42. As of the date of this filing, DNREC’s Secretary has failed to make a determination on the 2002 NPDES Permit Application, as updated, and a draft NPDES permit has not been noticed. These failures to act have now lasted over eleven (11) years since the permit reapplication, despite a clear duty to act following receipt of the reapplication.

43. The facts in this case undisputedly demonstrate that the Secretary of DNREC has failed to discharge his duties to issue a draft NPDES permit for public comment and to approve or deny the 2002 NPDES Permit Application.

44. DNREC’s failure to make a determination on the permit reapplication is in direct contravention of the CWA’s central goal to restore and maintain the chemical,

physical and biological integrity of the nation's waters. To accomplish this goal, the CWA requires that NPDES permits be re-evaluated on a regular basis to ensure that current technological controls are incorporated as permit conditions to minimize environmental degradation. DNREC's more than eleven (11) year delay in action, more than twice the five (5) year permitting cycle, in failing to evaluate whether the technological controls in the Refinery's NPDES permit should be tightened thwarts the fundamental goals of the CWA, and is therefore unlawful.

45. By failing to make a determination on the permit reapplication, DNREC has also failed to uphold its duty to "effectuate full utilization, conservation and protection of the water and air resources of the State" and its mission to "ensure the wise management, conservation, and enhancement of the State's natural resources, protect public health and the environment, [and] provide quality outdoor recreation."

46. DNREC's failure to carry out its mandatory duty has immunized the Refinery's operations, which have caused catastrophic damage to the Delaware River and Estuary by killing hundreds of millions of fish, and has allowed the Refinery's operations to escape public review, scrutiny and legal challenge.

47. Petitioners are entitled to the issuance of a draft NPDES permit for public comment and a final permit determination.

48. Petitioners have no adequate remedy at law for the Secretary's failure to make a determination.

49. Petitioners have a clear right to the relief requested.

50. A writ of mandamus, commanding the Secretary of DNREC to act forthwith, is necessary and appropriate.

**WHEREFORE**, Petitioners respectfully request that this Honorable Court:

1. Issue a writ compelling the Secretary of DNREC to: (a) issue draft NPDES permit for public comment within six months of this Court's decision in the present case; and (b) to issue a final decision on the Refinery's 2002 NPDES Permit Application, as updated in 2010, including a BTA determination in accordance with Delaware law, within one year of this Court's decision in the present case;
2. Order Respondents to pay all reasonable costs and expenses incurred by Petitioners in connection with this Petition; and
3. Provide such additional relief as the Court deems just and proper.

Respectfully Submitted,

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On Behalf of Delaware Riverkeeper  
Network, the Delaware Riverkeeper,  
Delaware Audubon Society, and Sierra Club

Dated: October 1, 2013