

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

THE PINE CREEK VALLEY
WATERSHED ASSOC., RAYMOND
PROFFITT FOUNDATION, THE
DELAWARE RIVERKEEPER
NETWORK, and THE DELAWARE
RIVERKEEPER c/o John Wilmer, Esq., 21
Paxon Hollow Road, Media, PA 19063

PLAINTIFFS,

V.

THE UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY, and GINA
McCARTHY, ADMINISTRATOR 401 M
Street, S.W., Washington, D.C. 20460 and
SHAWN GAVIN, REGION III
ADMINISTRATOR, 1650 Arch Street,
Philadelphia, PA 19103,

DEFENDANTS

CIVIL ACTION

NO.

COMPLAINT IN EQUITY

Plaintiffs, the Pine Creek Valley Watershed Association, the Raymond Proffitt Foundation the Delaware Riverkeeper Network and the Delaware Riverkeeper, through their legal counsel, allege as follows:

I. PRELIMINARY STATEMENT

1. Plaintiffs bring this citizen suit for declaratory and equitable relief pursuant to Section 505(a)(2) of the Water Pollution Prevention and Control Act (known as the Clean Water Act (“CWA”), 33 U.S.C. § 1365(a)(2)) and pursuant to the Administrative Procedures Act (“APA”), 5 U.S.C. §§ 701-706.

2. Plaintiffs request that this Court review the Pennsylvania law (Act 41, see Exhibit A of Exhibit 1) that prohibits the use of an antidegradation analysis of septic system approvals, and determine that it is a revision of Pennsylvania's antidegradation water quality standards that requires the United States Environmental Protection Agency ("EPA"), its Administrator, Gina McCarthy, in her official capacity, and its Regional Administrator for Region III, Shawn Gavin, in his official capacity, to perform mandatory and nondiscretionary duties pursuant to 33 U.S.C. §§ 1313(c)(2) and 1313(c)(3). Those duties include the duty to review and approve or disapprove the changes made by the State of Pennsylvania to EPA approved water quality standards.

3. The above duties also require that once a water quality standard is disapproved then the Administrator must promptly prepare and publish proposed regulations pursuant to 33 U.S.C. §§ 1313(c)(4)(A) and 40 CFR 131.22 (a) setting forth changes to those revisions.

4. Plaintiffs seek declaratory judgment and injunctive relief under 28 U.S.C. §§ 2201 and 2202, attorneys' fees and costs of litigation under 33 U.S.C. § 1365(d), and such other relief as this court deems just and proper under 28 U.S.C. § 2202.

5. In addition or in the alternative to the relief sought under the CWA, Plaintiff seeks relief pursuant to the APA, based on the Defendants' arbitrary and capricious actions, and attorneys' fees and costs pursuant to the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504; 28 U.S.C. § 2412.

II. JURISDICTION AND VENUE

6. This Court has original subject matter jurisdiction pursuant to 33 U.S.C. § 1365(a)(2), (district court jurisdiction of citizen suits against administrator under the CWA), 28 U.S.C. § 1331 (federal question) and 28 U.S.C. §§ 2201 and 2202 (declaratory judgment).

7. On August 27, 2013, Plaintiffs gave the required notice of the matter to the Administrator of the EPA, to the Region III Administrator of the EPA, to the Secretary of the Pennsylvania Department of Environmental Resources (hereinafter "DEP"), and to the Attorney General of the United States, as required by the CWA, 33 U.S.C. §1365 (b)(1)(A). (Attached as Exhibit 1)

8. On December 2, 2013, Plaintiffs gave additional notice to the same parties as above that EPA has failed to disapprove Pennsylvania's revisions to its water quality standards ninety (90) days after receiving actual notice of such revisions. (Attached as Exhibit 2)

9. More than sixty days have passed since notice was served and the matter complained of has not been resolved.

10. The Court has the power to issue a declaratory ruling concerning the rights of the parties.

11. Venue properly lies in the Eastern District of Pennsylvania because that is where EPA Region III is located.

12. In addition, venue properly lies in the Eastern District of Pennsylvania because Plaintiffs RPF, Delaware Riverkeeper Network and the Delaware Riverkeeper maintain principal places of business in the district.

III. THE PARTIES

13. Plaintiff, the Pine Creek Valley Watershed Association (PCVWA) is a non profit organization with its location at c/o Ingrid Morning, 220 Long Lane, Oley, PA 19547.

14. PCVWA has standing in this matter as an organization because it has dedicated time, resources and money towards protecting and improving the Exceptional Value and High Quality Watersheds in the Pennsylvania Pine Creek Valley Watershed and such efforts would be harmed

if sewage were to be allowed to flow into such watersheds. PCVWA has successfully defended against such pollution in several cases where an antidegradation analysis of septic systems has prevented the construction of such systems because they would pollute the Pine Creek and other special protection watersheds.

15. PCVWA has members who use streams in the Pine Creek Valley Watershed for fishing, studying and recreating and who would be harmed if such streams were to be polluted by sewage from septic systems that evaded review because of the subject revisions to Pennsylvania's antidegradation water quality standards.

16. The Raymond Proffitt Foundation (RPF), is a non profit organization with its location at c/o Joseph Turner P.O. Box 723, Langhorne, PA 19047-0723.

17. RPF has members who use streams in the Pine Creek Valley Watershed and other Pennsylvania watersheds for fishing, studying and recreating and who would be harmed if such streams were to be polluted by sewage from septic systems that evaded review because of the subject revisions to Pennsylvania's antidegradation water quality standards.

18. The Delaware Riverkeeper Network (DRN) is a non profit organization with its location at c/o Maya van Rossum, 925 Canal Street, Suite 3701, Bristol, PA 19007.

19. DRN was established in 1988 to protect and restore the Delaware River and its associated watershed, tributaries, and habitats. To achieve these goals, DRN organizes and implements streambank restorations, a volunteer monitoring program, educational programs, environmental advocacy initiatives, recreational activities, and environmental law enforcement efforts throughout the entire Delaware River Watershed – an area that includes portions of New York, New Jersey, Pennsylvania and Delaware. The DRN is a membership organization with

more than 14,000 members throughout the Delaware River Watershed, including 6,644 members within the Pennsylvania drainage area of the watershed. DRN brings this lawsuit on behalf of its members.

20. The Delaware Riverkeeper is a full-time privately funded ombudsman who is responsible for the protection of the waterways in the Delaware River Watershed. The Delaware Riverkeeper, Maya van Rossum, advocates for the protection and restoration of the ecological, recreational, commercial and aesthetic qualities of the Delaware River and its associated watershed, tributaries, and habitats.

21. The Delaware Riverkeeper and DRN members use streams in Pennsylvania watersheds for fishing, studying, aesthetic enjoyment, and/or recreating and would be harmed if such streams were to be polluted by sewage from septic systems that evaded review because of the subject revisions to Pennsylvania's antidegradation water quality standards.

22. Defendant, the United States Environmental Protection Agency is located at 401 M Street, S.W., Washington, D.C. 204060.

23. Defendant, Gina McCarthy is the Administrator of the EPA located at the same above address.

24. Defendant, Shawn Gavin, is the Regional Administrator of EPA Region III Regional Headquarters located at EPA, Region III, 1650 Arch Street, Philadelphia, PA 19103-2029.

IV. FEDERAL OVERSIGHT OF STATE WATER QUALITY STANDARDS

25. The purpose of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. (CWA, 33 U.S.C. §1251 (a)).

26. The CWA and regulations promulgated pursuant to the CWA require states to adopt water quality standards consistent with the requirements of the CWA. (CWA, 33 U.S.C. §1313 and 40 CFR §131.1, et seq.)

27. Regulations promulgated pursuant to the above Act require the state adopted water quality standards to include an antidegradation policy consistent with federal regulations. (40 CFR §131.6)

28. The federal regulations for an antidegradation policy (hereinafter "antidegradation policy") require the States to adopt a statewide antidegradation policy, require the States to identify methods for implementing such policy, and set forth the minimum requirements for such a policy. (40 CFR §131.12)

29. The antidegradation policy applies to any activity that may cause degradation of a water body, not just to discharges into a water body.

30. Pennsylvania has an EPA approved antidegradation policy which is found at 25 Pa. Code 93.4a, et seq.

31. A State is authorized to change or modify water quality standards but must submit any new or revised water quality standards to EPA for review. 33 U.S.C. § 1313(c); 40 CFR § 131.21.

32. Even if a State fails to submit a new or revised standard, EPA has a mandatory duty to review any state law or policy that effects a change to state water quality standards.

33. Upon review, EPA has a non-discretionary duty to either approve or disapprove the revisions. 33 U.S.C. § 1313(c)(3). The review must determine: whether the state has adopted criteria that protect the designated water uses; whether the State has followed its

legal procedures for revising or adopting standards; and whether the State standards which do not include the uses specified in section 101(a)(2) are based upon appropriate technical and scientific data and analyses. 40 C.F.R. § 131.5(a).

34. In addition, the EPA review must contemplate whether the revision or change to the water quality standards complies with the antidegradation policy each state must adopt. 33 U.S.C. § 1313(d)(4)(B); see 40 C.F.R. § 131.12. The change must not degrade the water quality.

35. If the EPA approves of the revised standards, the EPA must notify the state of its approval. 33 U.S.C. § 1313(c)(3). If the EPA determines that the revised standards are not consistent with the CWA, the EPA must notify the state of the changes required to correct the inconsistency. 33 U.S.C. § 1313(c)(3). If the state fails to adopt such changes, the EPA must promptly promulgate new standards consistent with the CWA. 33 U.S.C. § 1313(c)(4).

V. CLAIMS MADE

COUNT 1

UNDER THE CLEAN WATER ACT—EPA FAILURE TO DISAPPROVE PENNSYLVANIA’S REVISIONS TO ITS WATER QUALITY STANDARDS

36. Paragraphs 1 through 35 are incorporated by reference as though set forth fully at length.

37. All factual and legal assertions in Exhibits 1 and 2 are also incorporated by reference.

38. On July 2, 2013, Pennsylvania revised its antidegradation regulations and policy when the Governor of Pennsylvania signed Act 41 into law and which went into effect immediately upon signing. See, Exhibit A to Exhibit 1.

39. Act 41 became part of Pennsylvania’s Sewage Facilities Act, 35 P.S. 750.5 (e) (4) and

750 (a) (3).

40. Act 41 exempts on-lot septic systems from antidegradation review and requirements whenever said septic systems are made part of official plans or plan revisions or are subject to permits whenever such plans, revisions to plans or permits are approved pursuant to the requirements of the Pennsylvania Sewage Facilities Act. See Exhibit A to Exhibit 1.

41. Pennsylvania's administrative courts have held that discharges from on-lot septic systems could adversely affect waterways and were subject to review by Pennsylvania's EPA approved antidegradation regulations and policy.

42. Act 41 precludes review of any discharges to waterways by Pennsylvania's EPA approved antidegradation regulations and policy and thus constitutes a revision of said regulations and policy.

43. Review and permitting under Act 41 may have an adverse effect on surface waters covered by Pennsylvania's antidegradation policy because it will prohibit the use of said policy on septic systems which discharge into surface waters, thus potentially allowing sewage, a pollutant, to flow into surface waters.

44. Act 41 violates the Clean Water Act's antibacksliding provisions found at 33 U.S.C. 1342 (o) in that the Pennsylvania law allows pollutants in excess of federally approved effluent standards to enter Pennsylvania's waterways.

45. Particularly at risk are the Pennsylvania waterways designated as Exceptional Value (or federal Tier III) in that past and current approvals have been given to on-lot septic systems pursuant to Act 41 and which allow pollutants to enter and degrade those waterways.

46. Act 41 violates the Clean Water Act, 33 U.S.C. 1313 (d) (4) (B) in that it constitutes a

revision of Pennsylvania's water quality standards that is in violation of Pennsylvania's EPA approved antidegradation regulations and policy.

47. Pennsylvania's revision to its antidegradation water quality standards do not protect the designated water uses; have not adopted criteria that protect those water uses; are not based upon appropriate technical and scientific data and analyses; and, do not meet the minimum water quality standards consistent with 40 CFR 131.6.

48. States must submit any new or revised water quality standard to EPA for review. 33 U.S.C. § 1313(c)(2); 40 CFR § 131.20(c).

49. Pennsylvania failed to submit this revision to its antidegradation water quality standards to the EPA Regional Administrator for review and approval within 30 days of the final state action, in violation of 33 USC 1313 (c)(2)(A) and 40 CFR 131.

50. Pennsylvania cannot evade review of revisions to its water quality standard by failing to submit them as required by law.

51. EPA was notified of Act 41 and of Pennsylvania's failure to submit its revisions to water quality standards no later than August 27, 2013 via Plaintiffs' 60 Day Notice. Exhibit 1.

52. EPA has a mandatory duty to review any new or revised water quality standard, whether a State submits it or not. 33 U.S.C. § 1313(c)(3); 40 CFR § 131.21(a).

53. Pursuant to the CWA, 33 U.S.C. §1313 (c)(3) and 40 C.F.R. 131.21 (a), EPA is required to either approve the revisions within 60 days (which have expired) or disapprove the revisions within 90 days (which have expired) and so notify the state of the changes needed to be in compliance.

54. EPA failed to approve the revisions within 60 days.

55. EPA failed to disapprove the revisions within 90 days.

56. Failure to disapprove the revisions constitutes disapproval of said revisions because EPA failed to meet its statutory and regulatory requirements.

57. By failing to perform its nondiscretionary duty to review and approve or disapprove of the revisions to Pennsylvania's water quality standards, the EPA has violated its mandatory duties under 33 U.S.C. § 1313(c)(3) and EPA's regulations.

WHEREFORE, Plaintiffs request this court to find that the EPA has failed to perform an act or duty that is not discretionary under the CWA, 33 U.S.C. §1313 (c)(3) and 1313 (c)(4)(A); Plaintiffs further request that this court find that Pennsylvania's revisions are disapproved; Plaintiffs further request this court to order the EPA to deny Act 41 as a revision to Pennsylvania's water quality standards; Plaintiffs further request this court to award costs of litigation to Plaintiffs (including reasonable attorney and expert witness fees); and Plaintiffs further request this court to give any other relief it may deem proper.

COUNT 2

UNDER THE CLEAN WATER ACT—FAILURE TO PROMPTLY PREPARE AND PUBLISH PROPOSED REGULATIONS UNDER CWA, 33 U.S.C. §1313 (c)(4)(A)

58. Paragraphs 1 through 57 are incorporated by reference as though set forth fully at length.

59. "The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved--(A) if a revised or new water quality standard submitted by such State under paragraph (3) of this subsection for such waters is determined by the Administrator not to be consistent with the applicable requirements of this Act,...." CWA, 33 U.S.C. §1313 (c)(4)(A).

60. Pennsylvania's revisions to its water quality standards are not consistent with the applicable requirements of the CWA.

61. The EPA Administrator has failed to promptly prepare and publish regulations denying Pennsylvania's disputed revised water quality standards.

62. The EPA Administrator has a mandatory duty to promptly prepare and publish regulations denying Pennsylvania's disputed revised water quality standards.

WHEREFORE, Plaintiffs request this court to find that the EPA has failed to perform an act or duty that is not discretionary under the CWA, 33 U.S.C. §1313 (c)(4)(A); Plaintiffs further request this court to order the EPA to promptly prepare and publish regulations denying Pennsylvania's disputed revised water quality standards; Plaintiffs further request this court to require the EPA to promulgate said regulations not later than ninety days after publication, pursuant to the requirements of the CWA, 33 U.S.C. §1313 (c)(4); Plaintiffs further request this court to award costs of litigation to Plaintiff (including reasonable attorney and expert witness fees); and we further request this court to give any other relief it may deem proper.

COUNT 3

UNDER THE ADMINISTRATIVE PROCEDURE ACT—FAILURE TO DISAPPROVE AND FAILURE TO PROMPTLY PREPARE AND PUBLISH PROPOSED REGULATIONS IS ACTION UNLAWFULLY OR UNREASONABLY WITHHELD

63. Paragraphs 1 through 62 are incorporated by reference as though set forth fully at length.

64. The federal Administrative Procedure Act allows a court to conduct judicial review of the actions of an agency and to compel agency action unlawfully or unreasonably withheld.

(Administrative Procedure Act (hereinafter "APA"), 5 U.S.C. §706 (1))

65. The EPA's failure to disapprove Pennsylvania's revisions is agency action unlawfully

withheld or unreasonably delayed. (5 U.S.C. §706 (1)).

66. The EPA's failure to promptly prepare and publish proposed regulations for Pennsylvania is agency action unlawfully withheld or unreasonably delayed. (5 U.S.C. §706 (1)).

67. The titles of the persons responsible for the above EPA action are the Administrator of the EPA , Gina McCarthy; and the Regional III Administrator, Shawn Gavin.

WHEREFORE, Plaintiffs request this court to find that the EPA has failed to perform an act or duty that is not discretionary under the CWA, 33 U.S.C. §1313 (c)(3) and 1313 (c)(4)(A); Plaintiffs further request that this court find that Pennsylvania's revisions are disapproved; Plaintiffs further request this court to order the EPA to deny Act 41 as a revision to Pennsylvania's water quality standards; Plaintiffs further request this court to order the EPA to promptly prepare and publish regulations denying Pennsylvania's disputed revised water quality standards; Plaintiffs further request this court to require the EPA to promulgate regulations denying Pennsylvania's disputed revised water quality standards not later than ninety days after publication, pursuant to the requirements of the CWA, 33 U.S.C. §1313 (c)(4); Plaintiffs further request this court to award costs of litigation to Plaintiffs (including reasonable attorney and expert witness fees); and Plaintiffs further request this court to give any other relief it may deem proper.

COUNT 4

UNDER THE ADMINISTRATIVE PROCEDURE ACT—FAILURE TO DISAPPROVE PENNSYLVANIA'S REVISIONS AND FAILURE TO PROMPTLY PREPARE AND PUBLISH PROPOSED REGULATIONS IS ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION, AND OTHERWISE NOT IN ACCORDANCE WITH LAW

68. Paragraphs 1 through 67 are incorporated by reference as though set forth fully at length.

69. The APA allows a court to conduct judicial review of the actions of an agency and to hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. (APA, 5 U.S.C. §706 (2)(A))

70. The EPA's failure to disapprove Pennsylvania's revisions is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

71. The EPA's failure to promptly prepare and publish proposed regulations for Pennsylvania is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

WHEREFORE, Plaintiffs request this court to find that the EPA has failed to perform an act or duty that is not discretionary under the CWA, 33 U.S.C. §1313 (c)(3) and 1313 (c)(4)(A); Plaintiffs further request that this court find that Pennsylvania's revisions are disapproved; Plaintiffs further request this court to order the EPA to deny Act 41 as a revision to Pennsylvania's water quality standards; Plaintiffs further request this court to order the EPA to promptly prepare and publish regulations denying Pennsylvania's disputed revised water quality standards; Plaintiffs further request this court to require the EPA to promulgate regulations denying Pennsylvania's disputed revised water quality standards not later than ninety days after publication, pursuant to the requirements of the CWA, 33 U.S.C. §1313 (c)(4); Plaintiffs further request this court to award costs of litigation to Plaintiffs (including reasonable attorney and expert witness fees); and Plaintiffs further request this court to give any other relief it may deem proper.

COUNT 5

UNDER THE ADMINISTRATIVE PROCEDURE ACT—FAILURE TO DISAPPROVE PENNSYLVANIA’S REVISIONS AND FAILURE TO PROMPTLY PREPARE AND PUBLISH PROPOSED REGULATIONS IS CONTRARY TO CONSTITUTIONAL RIGHT, POWER, AND PRIVILEGE

72. Paragraphs 1 through 71 are incorporated by reference as though set forth fully at length.

73. The APA allows a court to conduct judicial review of the actions of an agency and to hold unlawful and set aside agency action, findings, and conclusions found to be contrary to constitutional right, power, privilege, or immunity. (APA, 5 U.S.C. §706 (2)(B)).

74. Failure of the EPA to exercise its mandatory or discretionary duties is a dereliction of duty and is a systemic failure of its enforcement responsibility.

75. Failure of the EPA, an Executive Office agency, to enforce the law is contrary to the constitutional right, power, or privilege of the President of the United States which requires that "he shall take Care that the Laws be faithfully executed,...." U.S. CONST. art II, §3.

76. Failure of the EPA to disapprove Pennsylvania’s revisions and failure to promptly prepare and publish new regulations violates the above provisions of the APA.

WHEREFORE, Plaintiffs request this court to find that the EPA has failed to perform an act or duty that is not discretionary under the CWA, 33 U.S.C. §1313 (c)(3) and 1313 (c)(4)(A); Plaintiffs further request that this court find that Pennsylvania’s revisions are disapproved; Plaintiffs further request this court to order the EPA to deny Act 41 as a revision to Pennsylvania’s water quality standards; Plaintiffs further request this court to order the EPA to promptly prepare and publish regulations denying Pennsylvania’s disputed revised water quality standards; Plaintiffs further request this court to require the EPA to promulgate regulations

denying Pennsylvania's disputed revised water quality standards not later than ninety days after publication, pursuant to the requirements of the CWA, 33 U.S.C. §1313 (c)(4); Plaintiffs further request this court to award costs of litigation to Plaintiffs (including reasonable attorney and expert witness fees); and Plaintiffs further request this court to give any other relief it may deem proper.

Respectfully submitted,

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