

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

GUNPOWDER RIVERKEEPER,)
P.O. Box 156)
Monkton, MD 21111,)
)
Plaintiff,)

v.)

CIV. NO. 20-cv-2063

ANDREW WHEELER, in his official capacity)
as Administrator of the United States)
Environmental Protection Agency,)

and)

UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY,)
1200 Pennsylvania Ave., N.W.)
Washington, DC 20460,)

Defendants.)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This complaint challenges a final action of the United States Environmental Protection Agency and its Administrator (collectively, “EPA” or “Defendants”) pursuant to the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1388 (the “Clean Water Act” or “CWA”) and the Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706 (the “APA”).

2. Plaintiff Gunpowder Riverkeeper challenges EPA’s October 3, 2016 approval of the Total Maximum Daily Load of Polychlorinated Biphenyls in the Gunpowder River and Bird River Subsegments of the Gunpowder River Oligohaline Segment, Baltimore County and Harford County, Maryland (the “Gunpowder and Bird rivers TMDL” or “TMDL”), submitted by

the Maryland Department of the Environment (“MDE”). Exs. A; B. Maryland’s tidal Gunpowder and Bird rivers suffer from polychlorinated biphenyl (“PCB”) pollution that violates applicable water quality standards. The TMDL, required to remediate pollution in the rivers, violates the CWA by failing to allocate pollution loads to all sources of PCBs.

3. Specifically, the Gunpowder and Bird rivers TMDL did not allocate a pollution load for the major source of PCBs in the rivers: resuspension and diffusion of PCB-laden bottom sediment. Ex. A, at 19.

4. Under Section 303(d)(2) of the CWA, 33 U.S.C. § 1313(d)(2), Defendants had a duty to disapprove the TMDL for its violation of the CWA.

5. Defendants failed to perform this duty and instead approved the TMDL.

6. Plaintiff commences this action under the citizen suit provision of the CWA, 33 U.S.C. § 505(a)(2), seeking declaratory relief declaring that Defendants failed to perform a nondiscretionary duty in violation of the CWA and injunctive relief to compel Defendants to disapprove the illegal TMDL.

7. Plaintiff also claims that Defendants’ approval of the TMDL is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(a).

PARTIES

8. Plaintiff Gunpowder Riverkeeper (“GRK”) is a 501(c)(3) nonprofit organization incorporated in Maryland.

9. GRK is a grassroots, advocacy-based membership organization dedicated to protecting, conserving, and restoring the Gunpowder River and its watershed, as well as strengthening ties within the communities that benefit from the river.

10. GRK has approximately 370 members who live, work, and recreate along the Gunpowder and Bird rivers. GRK's members benefit from water quality protections for the designated uses of these waterways, including fishing and shellfish harvesting.

11. Theaux M. Le Gardeur, Executive Director and member of GRK, owns and operates a fly-fishing shop and fishing guide service that caters to fishers on the Gunpowder River and its tributaries. Mr. Le Gardeur also fishes, wades, canoes, and boats in the Gunpowder and Bird rivers and hikes, photographs, and enjoys scenery along the rivers' banks.

12. GRK's members, including Mr. Le Gardeur, suffer environmental, aesthetic, recreational, and professional injuries as a result of EPA's unlawful approval of the TMDL, which fails to include pollution loads for all sources of PCBs, thus prolonging the rivers' violation of their designated uses.

13. As a result of EPA's approval of ongoing PCB pollution, GRK's members, including Mr. Le Gardeur, refrain from certain activities along these waterways, like consumption of fish, or risk exposure to carcinogenic PCBs if they undertake those activities. The continued pollution of the Gunpowder and Bird rivers also adversely affects members' enjoyment of recreational activities and the ability to generate income from the waterways. GRK members, including Mr. Le Gardeur, would engage in these activities were the PCB pollution abated.

14. If the unlawful TMDL is replaced by a TMDL compliant with the CWA and APA, then the harm to Plaintiff's members would be redressed.

15. Defendant EPA is the federal agency responsible for the implementation of Section 303 of the CWA, 33 U.S.C. § 1313.

16. Defendant Andrew Wheeler is the Administrator of EPA. He is charged with the supervision and management of all decisions and actions of the agency, including those pursuant to the CWA. Administrator Wheeler is being sued in his official capacity.

JURISDICTION AND VENUE

17. This Court has jurisdiction over this action pursuant to Section 505(a) of the CWA, 33 U.S.C. § 1365(a)(2), and 28 U.S.C. § 1331.

18. On February 27, 2020, Plaintiff mailed Defendants notice of intent to bring this action, as required by the CWA and implementing regulations. 33 U.S.C. § 1365(b)(2); 40 C.F.R. § 135.2 and 135.3. See Exs. C; D.

19. Pursuant to 40 C.F.R. § 135.2, a copy of the notice was provided to all other required parties, including the U.S. Attorney General. Ex. D

20. Sixty days have passed since Plaintiff's service of notice, as required under 33 U.S.C. § 1365(b)(2). See Exs. C; D.

21. Venue in this District is proper, pursuant to 28 U.S.C. § 1391(e)(1), because Defendants reside in this District.

STATUTORY AND REGULATORY FRAMEWORK

22. In 1972, Congress enacted the Clean Water Act to “restore and maintain the chemical, physical, and biological integrity of the Nation's waters.” 33 U.S.C. § 1251(a). The goals of the CWA are to eliminate pollution of the nation's waterways and to attain water quality that is protective of wildlife, recreation, and other uses. 33 U.S.C. § 1251(a)(1), (2).

23. To achieve Congress' goals, Section 303 of the CWA requires each state to establish and implement water quality standards (“WQS”), subject to review and approval by EPA. 33 U.S.C. § 1313(a)–(c).

24. WQS consist of the “designated uses” of a state’s waters and the water quality criteria necessary to protect such uses. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 130.2(d).

25. The CWA requires each state to identify and list the bodies of water within its boundaries that fail to attain WQS. 33 U.S.C. § 1313(d)(1)(A).

26. The resulting list of impaired waters is known as a “Section 303(d) list.”

27. States must establish TMDLs for each body of water on their Section 303(d) lists at levels necessary to implement WQS. 33 U.S.C. § 1313(d)(1)(C).

28. TMDLs must be set for each pollutant that prevents, or is expected to prevent, a body of water from attaining WQS. 40 C.F.R. § 130.7(c)(1)(ii).

29. Section 303(d) requires that each TMDL be set at a level “necessary to implement the applicable water quality standards” 33 U.S.C. § 1313(d)(1)(C).

30. Under EPA’s implementing regulations, a TMDL is “[t]he sum of the individual [wasteload allocations] for point sources and [load allocations] for nonpoint sources and natural background.” 40 C.F.R. § 130.2(i).

31. TMDLs prepared by states must be submitted to EPA, triggering the agency’s duty to “either approve or disapprove” the TMDL within thirty days. 33 U.S.C. § 1313(d)(2).

32. If EPA disapproves the state’s submission, the agency must promulgate its own TMDL to implement the applicable WQS. Id.

FACTS

33. On October 3, 2016, EPA approved Maryland’s TMDL for PCBs in the Gunpowder and Bird rivers. Ex. B.

34. PCBs are manmade chemicals that persist in the environment and accumulate in plant and animal tissue.

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.