

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

DELAWARE RIVERKEEPER NETWORK and MAYA K. VAN ROSSUM, THE DELAWARE RIVERKEEPER

(b) County of Residence of First Listed Plaintiff BRISTOL (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number) Kacy C. Manahan, Delaware Riverkeeper Network, 925 Canal Street, Suite 3701, Bristol, PA 19007, 215-369-1188 x115

DEFENDANTS

MICHAEL S. REGAN, BRUNO PIGOTT, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, PTF DEF, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions.

Table with columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Includes various legal categories like Insurance, Personal Injury, Real Estate, Labor, etc.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District, 6 Multidistrict Litigation - Transfer, 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION: Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 33 U.S.C. 1365(a)(2); 5 U.S.C. 706(1). Brief description of cause: Failure to comply with nondiscretionary duty, agency action unlawfully withheld or unreasonably delayed.

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE DOCKET NUMBER

DATE 10/02/2024 SIGNATURE OF ATTORNEY OF RECORD /s/ Kacy C. Manahan

FOR OFFICE USE ONLY: RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DESIGNATION FORM

(to be used by counsel to indicate the category of the case for the purpose of assignment to the appropriate calendar)

Address of Plaintiff: 925 Canal Street, Suite 3701, Bristol, PA 19007

Address of Defendant: 1200 Pennsylvania Avenue, N.W., Washington, DC 20460

Place of Accident, Incident or Transaction: Pennsylvania, New Jersey, Delaware

RELATED CASE IF ANY:

Case Number: Judge: Date Terminated

Civil cases are deemed related when Yes is answered to any of the following questions:

- 1. Is this case related to property included in an earlier numbered suit pending or within one year previously terminated action in this court?
2. Does this case involve the same issue of fact or grow out of the same transaction as a prior suit Pending or within one year previously terminated action in this court?
3. Does this case involve the validity or infringement of a patent already in suit or any earlier Numbered case pending or within one year previously terminated action of this court?
4. Is this case a second or successive habeas corpus, social security appeal, or pro se case filed by the same individual?

I certify that, to my knowledge, the within case is/is not related to any now pending or within one year previously terminated action in this court except as note above.

DATE: /s/ Kacy C. Manahan 329031
Attorney-at-Law (Must sign above) Attorney I.D. # (if applicable)

Civil (Place a checkmark in one category only)

A. Federal Question Cases:

- 1. Indemnity Contract, Marine Contract, and All Other Contracts
2. FELA
3. Jones Act-Personal Injury
4. Antitrust
5. Wage and Hour Class Action/Collective Action
6. Patent
7. Copyright/Trademark
8. Employment
9. Labor-Management Relations
10. Civil Rights
11. Habeas Corpus
12. Securities Cases
13. Social Security Review Cases
14. Qui Tam Cases
15. All Other Federal Question Cases. (Please specify): Clean Water Act, Administrative Procedure Act

B. Diversity Jurisdiction Cases:

- 1. Insurance Contract and Other Contracts
2. Airplane Personal Injury
3. Assault, Defamation
4. Marine Personal Injury
5. Motor Vehicle Personal Injury
6. Other Personal Injury (Please specify):
7. Products Liability
8. All Other Diversity Cases: (Please specify)

ARBITRATION CERTIFICATION

(The effect of this certification is to remove the case from eligibility for arbitration)

I, Kacy C. Manahan, counsel of record or pro se plaintiff, do hereby certify:

Pursuant to Local Civil Rule 53.2 § 3(c)(2), that to the best of my knowledge and belief, the damages recoverable in this civil action case exceed the sum of \$150,000.00 exclusive of interest and costs:

Relief other than monetary damages is sought.

DATE: 10/02/2024 /s/ Kacy C. Manahan 329031
Attorney-at-Law (Sign here if applicable) Attorney ID # (if applicable)

NOTE: A trial de novo will be a jury only if there has been compliance with F.R.C.P. 38.

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

DELAWARE RIVERKEEPER
NETWORK; and MAYA K. VAN
ROSSUM, *the Delaware Riverkeeper,*

Plaintiffs,

v.

No.

MICHAEL S. REGAN, *in his official
capacity as Administrator of the United
States Environmental Protection Agency;*
BRUNO PIGOTT, *in his official capacity
as Acting Assistant Administrator for the
Office of Water of the United States
Environmental Protection Agency, and
the UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY,*

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Delaware Riverkeeper Network and Maya K. van Rossum, the Delaware Riverkeeper (collectively, “Plaintiffs”), hereby file this Complaint against Defendants Michael S. Regan, in his official capacity as Administrator of the United States Environmental Protection Agency (“EPA”), Bruno Pigott, in his official capacity as Acting Assistant Administrator for the Office of Water of the EPA, and the EPA (collectively, “Defendants”) and, in support thereof, state the following:

INTRODUCTION

1. This action is brought under the federal Clean Water Act (“CWA”), 33 U.S.C. §§ 1251 *et seq.*, and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 551 *et seq.*, to compel Defendants to comply with their nondiscretionary duty to promulgate final water quality standards (“WQS”) for specific zones of the Delaware River Estuary, as mandated by 33 U.S.C. 1313(c)(4)(B).

2. DRN and four other organizations petitioned EPA and its Administrator on April 29, 2022 to revise the WQS for specified zones of the Delaware River Estuary pursuant to its authority under the CWA, 33 U.S.C. § 1313(c)(4)(B) (water quality standards), and the APA, 5 U.S.C. § 553(e) (rule making).

3. On December 1, 2022, EPA issued an Administrator’s Determination (“Determination”) in response to the petition, finding “that revised [WQS] to protect aquatic life in . . . the Delaware River Estuary . . . are necessary to satisfy the requirements of the CWA.” Env’t Prot. Agency, Administrator’s Determination Pursuant to Clean Water Act Section 303(C)(4)(B) 1 (2022).

4. EPA’s response to the petition acknowledged resident and migratory fish species that utilize habitats in specified zones of the Delaware River Estuary are likely experiencing adverse effects under the currently-applicable WQS established in 1967.

5. The Determination found that the applicable aquatic life designated

uses and corresponding dissolved oxygen criteria must be revised to comply with the CWA and EPA's implementing regulations to protect the propagation of resident and migratory fish species. Letter from Radhika Fox, Assistant Adm'r, Env't Prot. Agency, to Maya K. van Rossum, Del. Riverkeeper, Del. Riverkeeper Network (Dec. 1, 2022).

6. EPA issued proposed WQS on December 21, 2023. Water Quality Standards to Protect Aquatic Life in the Delaware River, 88 Fed. Reg. 88,315 (proposed Dec. 21, 2023). The publication of the proposed WQS started the ninety-day period for EPA to promulgate the final WQS. 33 U.S.C. § 1313(c)(4)(B). As of the date of this filing, EPA has not promulgated the final WQS.

7. Plaintiffs bring this action against Defendants to compel compliance with the CWA and APA, and seek an injunction directing EPA to adhere to the CWA and APA to promulgate final WQS revising aquatic life uses and dissolved oxygen criteria.

JURISDICTION AND VENUE

8. This court has subject-matter jurisdiction over the CWA claim set forth in this Complaint pursuant to 28 U.S.C. § 1331 (federal question) because this case is a civil action arising under the laws of the United States, specifically CWA section 505(a)(2), 33 U.S.C. § 1365(a)(2) (citizen suits). This citizen suit provision grants jurisdiction to this Court to remedy violations arising under the CWA.

9. This Court also has subject matter jurisdiction over the APA claim set forth in this complaint under 5 U.S.C. § 706, which authorizes a reviewing court to compel an agency to take an action that has been unlawfully withheld or unreasonably delayed.

10. This court has the authority to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C § 2201, and to grant injunctive relief pursuant to *id.* § 2022, 33 U.S.C. 1365(a)(2), and 5 U.S.C. § 706(1).

11. Venue is proper under 28 U.S.C. § 1391(e)(1)(C) because Defendants are an agency and an officer of the United States and Plaintiffs reside in this judicial district.

12. Plaintiffs provided Defendants the statutorily required notice at least sixty days prior to commencing this action. 33 U.S.C. § 1365(b)(2). Plaintiffs provided notice via electronic and certified mail on August 2, 2024. Defendants received notice via certified mail on August 5, 2024. Defendants have failed to remedy their violations of the Act. A true and correct copy of Plaintiffs' Notice Letter and proofs of receipt are attached as Exhibit A and are incorporated herein by reference.

PARTIES

13. Plaintiff, Delaware Riverkeeper Network ("DRN"), is a not-for-profit 501(c)(3) membership organization established in 1988 to protect and restore the

Delaware River, its associated watershed, tributaries, and habitats. DRN has its principal place of business at 925 Canal Street, Bristol, PA 19007. DRN works throughout the entire Delaware River Watershed, including the four states that comprise the watershed: Pennsylvania, New Jersey, Delaware, and New York. DRN also works at the federal level on decisions that impact the health of the Delaware River watershed's waterways and the ability to protect and restore them. DRN has an extensive and robust history of work throughout the watershed to protect the main stem of the river, and is committed to the recovery and conservation of the Atlantic sturgeon species through, among other things, seeking more protective water quality standards, supporting the listing of the Atlantic sturgeon under the Endangered Species Act, and protecting Atlantic sturgeon habitat. DRN has members who live, recreate, vacation, and visit the Delaware River and enjoy the natural resources of the Delaware River, such as the Atlantic sturgeon. DRN has over 28,000 members.

14. Plaintiff, Maya K. van Rossum, the Delaware Riverkeeper, is the leader and Executive Director of DRN, serving in this role since 1994. Ms. van Rossum ensures that the Delaware River has a voice in all conversations that could bring harm or help to the watershed and its natural resources. Ms. van Rossum as the Delaware Riverkeeper regularly visits the Delaware River, Delaware Estuary, and areas adjacent to the watershed including the areas where Atlantic sturgeon are present and has taken family, friends, DRN members, and other interested people

onto the Delaware River and its tributaries to educate them and to share with them the aesthetic beauty of the river and its inhabitants.

15. Defendant, Michael S. Regan is the Administrator of EPA. Mr. Regan is the leader of EPA and is responsible for managing and enforcing the nation's environmental laws and regulations. The Office of the Administrator is based in EPA headquarters located at 1200 Pennsylvania Avenue, N.W., Washington, D.C. 20004. Mr. Regan is named in his official capacity.

16. Defendant, Bruno Pigott is the Acting Assistant Administrator for the Office of Water of EPA. Mr. Pigott leads the Office of Water, which is responsible for implementing the Clean Water Act. The Assistant Administrator for the Office of Water made the Determination pursuant to authority delegated by the Administrator. The Office of Water is based in EPA headquarters located at 1200 Pennsylvania Avenue NW, Washington, D.C. 20004. Mr. Pigott is named in his official capacity.

17. Defendant, EPA, is a federal agency within the meaning of the APA. *See* 5 U.S.C. §§ 551(a), 701(b)(1). EPA is responsible for implementing the CWA, including the requirements of Section 303, 33 U.S.C. § 1313. EPA headquarters is located at 1200 Pennsylvania Avenue NW, Washington, D.C. 20004.

LEGAL BACKGROUND

Clean Water Act

18. The CWA was enacted “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a).

19. CWA Section 101 establishes the goals of the Act stating that “wherever attainable, 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 be achieved.” *Id.* § 1251(a)(2).

20. To effectuate this goal, the CWA requires the states, and the Administrator in limited instances, to establish WQS for jurisdictional waters that “protect the public health or welfare, enhance the quality of water[,] and serve the purposes” of the CWA.” *Id.* § 1313(c)(2)(A). *Accord* 40 C.F.R. § 131.3(j).

21. WQS are provisions of state or federal law that set “water quality criteria” to protect the “designated uses” for a water body. 40 C.F.R. § 131.2.

22. States are primarily responsible for “reviewing, establishing, and revising [WQS]” applicable to their waters. *Nat’l Mining Ass’n v. Jackson*, 768 F.Supp.2d 34, 39 (D.D.C. 2011).

23. States are required to review their WQS at least once every three years and revise their WQS as appropriate, such as if such review indicates that Section 101 uses are attainable but not protected, and submit the result of such review and

any revised or newly adopted WQS to the EPA Administrator. 33 U.S.C. § 1313(c)(1) –(2); 40 C.F.R. § 131.20(a), (c).

24. The Administrator is responsible for reviewing the WQS submitted by states to determine if the WQS is consistent with the requirements of the CWA. 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.21(b).

25. The Administrator must promulgate revised or new WQS when either: a state’s submission of revised or new WQS is determined to be inconsistent with the CWA’s requirements; or at any time when the Administrator determines that a revised or new WQS is necessary to meet the requirements of the CWA.. 33 U.S.C. § 1313(c)(4).

26. If the Administrator issues such a determination, the Administrator must “promptly prepare and publish proposed regulations setting forth a revised or new [WQS].” 33 U.S.C. § 1313(c)(4); *see also* 40 C.F.R. § 131.22(a), (b).

27. The Administrator must “promulgate any revised or new [WQS] not later than ninety days after he publishes such proposed standards.” 33 U.S.C. § 1313(c)(4)(B).

28. The CWA empowers citizens to “commence a civil action . . . against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator” sixty days after adequate notice is provided. *Id.* § 1365(a)(2), (b)(2).

Delaware River Basin Compact

29. The Delaware River Basin Compact (“Compact”) resulted from the entry of a consent decree in *New Jersey v. New York* and created the Delaware River Basin Commission (“DRBC”). 347 U.S. 995 (1954); *An Introduction to the DRBC*, DELAWARE RIVER BASIN COMM’N <https://www.nj.gov/drbc/about/> (visited July 1, 2024).

30. DRBC identifies “uses to be protected”—otherwise known as “designated uses” under the CWA—and establishes WQS for the Delaware River Estuary Waters in its periodically updated Comprehensive Plan. 18 C.F.R. § 410; DEL. RIVER BASIN COMM’N, DEL. RIVER BASIN WATER CODE 104 (2001); Delaware River Basin Compact § 13.1(e).

31. The established uses and standards are subject to amendment to protect public health and water quality preservation. Delaware River Basin Compact § 13.1(e).

32. The states of Delaware, New Jersey, and Pennsylvania fulfill their CWA obligations to designate uses for surface waters by either (1) deferring to the WQS set by the Delaware River Basin Commission or (2) “provid[ing] for application of the more stringent of state and DRBC standards within the basin.” DELAWARE RIVER BASIN COMM’N, RESOL. NO. 2017–4 (2017).

Administrative Procedure Act

33. The APA authorizes courts to “compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1). Such agency action must be “discrete” and “nondiscretionary.” *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004). “When an agency fails to meet a concrete statutory deadline, it has unlawfully withheld agency action.” *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1191 (10th Cir. 1998).

FACTUAL ALLEGATIONS

34. The DRBC completed a Use Attainability Project in the 1980s to evaluate upgrades that would bring its standards for the Delaware River into compliance with the CWA.

35. DRBC delayed action on designating aquatic life uses and dissolved oxygen (“D.O.”) criteria to pursue additional studies throughout the 1990s.

36. DRBC assured interested stakeholders that the designated use and the D.O. stream quality objectives would be quickly updated to address the more complex and time-consuming process of developing nutrient criteria.

37. DRN and two other organizations petitioned DRBC in 2013 for immediate action in response to its failure to initiate substantive work either to revise its standards or develop the models DRBC suggested were necessary.

38. DRBC passed a resolution in 2017 that established a six-year plan to update the designated use and D.O. stream quality objectives by undertaking further

studies and deliberations that would conclude in 2024.

39. In 2020, over a decade after DRBC's assurance of swift action—and a full forty years after the initiation of DRBC's Use Attainability Project—the DRBC approved an extension that further delayed the revision of WQS, making 2025 the earliest possible date by which the WQS, including upgraded D.O. criteria, could be revised without intervention from EPA.

40. DRN and four other organizations (“Petitioners”) petitioned EPA and its Administrator on April 29, 2022 (“Petition”) to engage in rulemaking to revise the WQS for zones 3, 4, and upper 5 of the Delaware Estuary (“specified zones”) due to DRBC's demonstrated failure to take genuine action to protect actual uses of the Delaware River Estuary.

41. EPA issued the Determination to DRBC on December 1, 2022, that revised WQS are necessary to protect aquatic life in the specified zones and to satisfy the requirements of the CWA, and that the currently applicable WQS for the specified zones do not protect the propagation of fish as specified by CWA Section 101(a)(2).

42. On December 1, 2022, EPA notified Petitioners that EPA issued the Determination and acknowledged that resident and migratory fish species utilizing habitats in the specified zones are likely experiencing adverse effects under the currently applicable WQS established in 1967.

43. EPA published proposed WQS on December 21, 2023, which included revisions to (1) the designated uses for the specified zones of the Delaware River at river miles 108.4 to 70.0 for New Jersey and Pennsylvania and (2) the water quality criteria for the Delaware River at river miles 108.4 to 70.0 for Delaware, New Jersey, and Pennsylvania. *See* 88 Fed. Reg. at 88,336.

44. EPA proposed to revise the aquatic life designated use to include “protection and propagation of resident and migratory aquatic life” and to increase the applicable D.O. criteria to a daily average magnitude of between 66 percent to 74 percent oxygen saturation for spawning and larval development between March 1 and June 30, juvenile development between July 1 and October 31, and overwintering between November 1 and February 28/29. *Id.*

45. The publication of the proposed WQS started the ninety-day time period for Defendants to promulgate the final WQS. 33 U.S.C. § 1314(c)(4)(B).

46. Defendants were required to promulgate the final WQS by March 21, 2024.

47. As of the date of this filing, Defendants have not promulgated the final WQS.

CLAIMS FOR RELIEF

COUNT I

**Violation of the Clean Water Act, 33 U.S.C. § 1365(a)(2) –
Failure to Timely Promulgate Final Water Quality Standards**

48. The Plaintiffs repeat, allege, and incorporate, as fully set forth herein, each and every allegation contained in the paragraphs above.

49. The Defendants are obligated under 33 U.S.C. § 1313(c)(4)(B) to promulgate final WQS within ninety days of publication of such proposed standards.

50. The Defendants' duty to promulgate final WQS is nondiscretionary.

51. The Defendants published proposed WQS on December 21, 2023.

52. The Defendants have not issued final WQS as of the date of this filing.

53. The Defendants' failure to timely promulgate water quality standards violates, at a minimum, 33 U.S.C. § 1313(c)(4)(B) and the regulations promulgated thereunder.

COUNT II

**Violation of the Administrative Procedure Act 5 U.S.C. § 706(1)–
Agency Action Unlawfully Withheld and Unreasonably Delayed**

54. The Plaintiffs repeat, allege, and incorporate, as fully set forth herein, each and every allegation contained in the paragraphs above.

55. The APA provides this Court with the authority to compel agency action unlawfully withheld or unreasonably delayed. 5 U.S.C. § 706(1).

56. The Defendants are obligated under 33 U.S.C. § 1313(c)(4)(B) to

promulgate final WQS within ninety days of publication of such proposed standards.

57. The Defendants' duty to promulgate final WQS is discrete and nondiscretionary.

58. The Defendants published proposed WQS on December 21, 2023.

59. The Defendants have not issued final WQS as of the date of this filing.

60. The Defendants' failure to promulgate final WQS nearly two-hundred past the statutory deadline constitutes an agency action that is unlawfully withheld and unreasonably delayed.

61. The Defendants' failure to timely promulgate WQS violates, at a minimum, 5 U.S.C. § 706(1).

PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs request that this Court enter judgment in its favor and grant the following relief:

- a. Declare that Defendants are in violation of the CWA and APA with regard to their nondiscretionary duty under 33 U.S.C. 1313(c)(4)(B) to timely promulgate final water quality standards for designating aquatic life uses and dissolved oxygen criteria in specified zones of the Delaware River Estuary;
- b. Issue an injunction requiring Defendants to promulgate final water quality standards for specific zones of the Delaware River

Estuary by a date certain;

- c. Award Plaintiffs their attorneys' fees and other litigation costs reasonably incurred in this action pursuant to 33 U.S.C. § 1365(d), 28 U.S.C. § 2412 and/or 5 U.S.C. § 504(a); and
- d. Grant such other and further relief as the Court deems just and proper.

Respectfully submitted,

Dated: October 2, 2024

/s/ Kacy C. Manahan
Kacy C. Manahan
Senior Attorney
Pa. Attorney No. 329031
Devon E. Guyer
Legal Research Fellow
Pa. Attorney No. 334890

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