

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)
 FRIENDS OF THE EARTH)
 1100 15th Street, NW, 11th Floor)
 Washington, D.C. 20005)
)
 Plaintiff,)
)
 v.)
)
 UNITED STATES ENVIRONMENTAL)
 PROTECTION AGENCY, and)
 GINA MCCARTHY, in her official capacity)
 as Administrator,)
 United States Environmental Protection Agency)
 Ariel Rios Building)
 1200 Pennsylvania Avenue, NW)
 Washington, D.C. 20460)
)
 Defendants.)
 _____)

Civil Action No. 14-cv-00753

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This is a case to compel action unreasonably delayed by the Environmental Protection Agency (“EPA”) and Gina McCarthy, Administrator of the EPA, (collectively, “EPA” or “the agency”) on a Petition for Rulemaking and Collateral Relief submitted to the agency by Friends of the Earth over five years ago.

2. On April 28, 2009, Friends of the Earth petitioned EPA to take action under Section 312 of the Clean Water Act in order to prevent serious ongoing environmental and public health risks posed by large marine vessels discharging untreated or inadequately treated sewage into navigable U.S. waters. Specifically, the petition asked EPA (1) to update its 1976 performance standards and pollution limits for marine sanitation devices (“MSD”) to reflect

dramatic, cost-effective improvements in sewage treatment technologies, and (2) to establish new monitoring, recordkeeping, and reporting requirements to ensure compliance with the performance standards and pollution limits.

3. In May 2009, EPA informed Friends of the Earth that the agency would review the petition and produce a response. More than a year later, EPA sought and received public comments on the petition. Over five years have now passed since Friends of the Earth submitted the petition to EPA, and EPA has not yet issued a substantive response.

JURISDICTION AND VENUE

4. The instant action arises under the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 551 *et seq.* This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question).

5. Venue is properly vested in this Court under 28 U.S.C. § 1391(e) because Defendant EPA has its principal office in the District of Columbia, and Defendant Gina McCarthy is an officer of the United States sued for acts and omissions in her official capacity, and her official residence is in the District of Columbia. In addition, Plaintiff Friends of the Earth is headquartered in the District of Columbia.

PARTIES

6. Plaintiff Friends of the Earth is a national not-for-profit environmental advocacy organization founded in 1969 and incorporated in the District of Columbia, with its headquarters in Washington, D.C. Friends of the Earth’s mission is to defend the environment and champion a healthy and just world. To this end, Friends of the Earth promotes policies and actions that minimize the negative impacts of environmental pollution, including efforts to protect marine ecosystems and the people who live, work, and recreate near them. Friends of the Earth has

23,600 members across all 50 states in the United States and more than 235,000 activists. For many years, Friends of the Earth has actively engaged in advocacy to reduce and prevent sewage discharges from large marine vessels.

7. Friends of the Earth's members live, work, recreate and conduct other activities in areas near U.S. waters that receive substantial volumes of untreated or poorly treated sewage discharges from large marine vessels, including commercial cruise ships. In particular, Friends of the Earth's members engage in activities, like swimming, boating, and fishing, in waters affected by marine vessel sewage discharges. Their members also consume fish from these waters. EPA's failure to timely respond to the petition therefore prolongs Friends of the Earth's members' exposure to serious human health risks associated with exposure to these sewage discharges, and also threatens harm to the marine ecosystems their members use for recreation and aesthetic enjoyment.

8. EPA's failure to respond to Friends of the Earth's petition and to take the actions requested therein has also harmed Friends of the Earth by depriving it of a timely decision on its petition and any benefits and information such a decision would afford to the organization and its members. This in turn has impaired Friends of the Earth's ability to achieve its organizational aim of protecting its members, the public, and the marine environment from human and ecological health risks associated with marine vessel sewage discharges.

9. The health, recreational, aesthetic, and environmental interests of Friends of the Earth and its members have been and continue to be adversely affected by EPA's unreasonable delay and failure to act on the petition. Granting the requested declaratory and injunctive relief requiring EPA to satisfy its statutory obligation to respond to Friends of the Earth's petition would remedy these harms.

10. Defendant EPA is the federal agency charged with implementation of the Clean Water Act, including the specific provisions implicated by Friends of the Earth's petition.

11. Defendant Gina McCarthy is the Administrator of EPA, and is charged with the task of administering and implementing the agency's legal duties. Defendant McCarthy is sued in her official capacity only.

BACKGROUND AND FACTS

Sewage Discharges from Large Marine Vessels

12. Every day, large marine vessels, like commercial cruise ships the size of small towns, travel to and from ports around the United States. In many cases, these ships discharge substantial amounts of untreated or inadequately treated human wastes into the waters along the way. These sewage discharges consist of harmful pollutants that seriously endanger the health of marine ecosystems and the people who use the receiving waterways for swimming, fishing, boating, and other activities.

13. The Clean Water Act defines sewage as "human body wastes and the wastes from toilets and other receptacles intended to receive or retain body wastes." 33 U.S.C. § 1322(a)(6). With respect to commercial vessels on the Great Lakes, the term also includes galley, bath, and shower water (referred to as "graywater"). *Id.* Sewage can contain very high concentrations of fecal coliform, other bacteria and viruses, metals, and nutrients, like phosphorus and nitrogen. Sewage from marine vessels is particularly concentrated with such contaminants because their treatment systems tend to use less water for sanitary purposes than land-based facilities.

14. The discharge of untreated or inadequately treated sewage from marine vessels, especially into coastal ecosystems, contributes to the degradation of the marine environment and

poses dangerous risks to human health. Sewage discharges contaminate shellfish beds, pollute drinking water supplies, harm fish and other aquatic wildlife, and cause damage to coral reefs.

15. Sewage discharges release fecal pollution into waters that are used for various recreational activities, like swimming, water sports, and fishing. People who use sewage-contaminated waters for these purposes and those who eat fish from these waters are therefore at risk of suffering serious, potentially life-threatening, adverse health effects, such as gastrointestinal illnesses, hepatitis, ear, nose and throat illnesses, vomiting, and respiratory diseases. While the occurrence of these infections and diseases rises with increasing sewage contamination, even minimal amounts of contamination put users such as swimmers at elevated risk of harm.

16. Pathogens from a variety of sources, including vessel sewage discharges, can contribute to shellfish bed contamination and closure, and illness in human shellfish consumers. Sewage releases near shellfish beds can be particularly dangerous to public health. Shellfish and other filter-feeders concentrate pathogens and viruses in their tissues for months. When eaten raw or undercooked, contaminated shellfish can pose considerable health risks to humans who consume them.

17. Coral reefs are also vulnerable to harm by sewage discharges from marine vessels. Pathogens from sewage can cause disease and scarring in many coral species. Nutrients from sewage, like nitrogen and phosphorus, promote excessive algal growth, which consumes oxygen in the water and can smother reefs. This eutrophication can also lead to fish kills and the loss of other crucial components of the marine ecosystem, including seaweeds, seagrasses, and planktonic organisms, which can have detrimental effects throughout the food web.

18. Sewage discharges from marine vessels can also disrupt coastal economies and inhibit access to beaches and recreation. For example, in 2012, elevated levels of fecal coliform, from sources including vessel sewage and wastewater, led to more than 31,000 days of beach advisories and closings.

Clean Water Act and Regulatory Requirements Regarding Marine Vessel Discharges

19. Sewage discharges from marine vessels are regulated under Section 312 of the Clean Water Act. 33 U.S.C. § 1322.

20. Section 312 of the Clean Water Act prohibits vessels equipped with toilet facilities from operating on navigable U.S. waters without a Marine Sanitation Device (“MSD”) that is certified by the U.S. Coast Guard to meet applicable performance standards.

21. MSD is defined by the Act as “any equipment for installation on board a vessel which is designed to receive, retain, treat, or discharge sewage, and any process to treat such sewage.” 33 U.S.C. § 1322(a)(5).

22. Section 312(b)(1) requires EPA, “after giving appropriate consideration to the economic costs involved, and within the limits of available technology, [to] promulgate Federal standards of performance for [MSDs].” 33 U.S.C. § 1322(b)(1). These standards “shall be designed to prevent the discharge of untreated or inadequately treated sewage into or upon the navigable waters....” *Id.*

23. In 1976, pursuant to Section 312 of the Act, EPA established, and the U.S. Coast Guard certified, sewage effluent limits for three types of MSDs based on then-available treatment technologies. The different MSDs are referred to as Type I, Type II, and Type III.

24. Type II MSDs are the most common type used on cruise ships and other vessels with large volumes of sewage and other human wastewater. Under EPA’s standards, Type II

MSDs must be capable of producing an effluent with a “fecal coliform bacterial count of [no] greater than 200 per 100 milliliters [and] suspended solids [no] greater than 150 mg/l.” 40 C.F.R. § 140.3(d); 33 C.F.R. § 159.3. Type II MSDs can be installed on vessels of any length, but are typically installed on vessels over 65 feet in length. 33 C.F.R. §§ 159.3, 159.7(a)(2).

25. EPA estimates that there are approximately 60,000 domestic vessels and approximately 12,400 foreign flagged vessels at least 79 feet and larger operating in U.S. waters subject to Clean Water Act jurisdiction. If those vessels have a toilet, the Clean Water Act requires an operable MSD be installed.

26. Despite dramatic advancements in MSD technology, which allow for increased pollution reductions and stricter controls, EPA’s standards for vessel sewage discharges have not been updated once since they were promulgated 38 years ago.

27. In 2000, EPA acknowledged that its 1976 MSD standards “may no longer be sufficiently stringent in light of available new technologies.” U.S. EPA, Cruise Ship White Paper (2000). That year, Bluewater Network, which is now part of Friends of the Earth, petitioned EPA on behalf of 53 organizations to identify and take regulatory action on measures to address pollution by cruise ships. Eight years later, after the petitioners filed suit to compel the agency to act, EPA responded in December 2008 by issuing its “Cruise Ship Discharge Assessment Report” (hereafter the “2008 Report”).

28. Among other things, the 2008 Report analyzed cruise ship waste streams, effectiveness of treatment systems, regulatory compliance, and recommendations. The 2008 Report specifically highlighted the poor performance of existing Type II MSDs and the improvements offered by advanced wastewater treatment systems (“AWTS”), which are MSDs equipped with more modern treatment technologies. AWTS have already been successfully

installed on the majority of cruise ships operating in Alaskan waters, and approximately 58 percent of the major cruise company fleet has installed AWTS. However, new cruise ships continue to be built and launched without AWTS installed. Furthermore, without modern standards requiring AWTS in place in the U.S., ships may choose not to use AWTS in U.S. waters even if they have such systems installed.

29. In developing the 2008 Report, EPA received a number of comments and recommendations concerning cost-effective, pollution-reducing alternatives to traditional MSDs that would improve water quality and current effluent standards. Yet EPA did not then adopt or propose any action to address the continuing discharge of sewage from marine vessels pursuant to the agency's standards that it had noted in 2000 "may no longer be sufficiently stringent."

Petition for Rulemaking

30. As a result of EPA's inaction following its 2008 Report, Friends of the Earth petitioned EPA on April 28, 2009 to promulgate updated regulations for sewage discharges from large vessels pursuant to Section 312 of the Clean Water Act. The petition included detailed discussion and evidence concerning the public health and environmental risks posed by untreated or improperly treated vessel sewage discharges and the inadequacy of EPA's existing regulations. The petition asked EPA to take two specific actions: (1) issue standards under Section 312 of the Clean Water Act updating the vessel sewage discharge performance standards found in 40 C.F.R. § 140 for Type II MSDs; (2) create strong monitoring, recordkeeping, and reporting requirements under Section 312 of the Act to ensure compliance with vessel discharge performance standards.

31. Friends of the Earth's petition presented evidence that EPA's current MSD standards fail to prevent the discharge of untreated or inadequately treated sewage into navigable

waters. For example, the petition included specific data and information from EPA's 2008 Report showing that Type II MSDs allowed under EPA's current regulations routinely fail to treat sewage as necessary to meet EPA's standards and are thus inadequate to protect U.S. waters. In particular, the petition presented the results of MSD effluent samples, nearly all of which failed to comply with current discharge standards set forth at 40 C.F.R. § 140 for both fecal coliform and total suspended solids. The evidence showed that the average concentration of fecal coliform in the sampled MSD effluent exceeded EPA's standard by *10,200 times*.

32. The petition also identified MSD effluent test results detecting highly elevated levels of other pollutants, including chlorine, biological oxygen demand, metals, organics, and nutrients, that pose significant risks to marine ecosystems, aquatic life, and human health.

33. The petition showed that readily available advanced MSD technology that has developed over the more than 30 years that have passed since EPA promulgated its MSD performance standards can more effectively treat sewage discharges from marine vessels and meet more stringent performance requirements. The petition thus called on EPA to strengthen existing MSD performance standards to reflect the best practicable treatment technology.

34. Specifically, the petition explained that currently available standard technology can provide increased treatment and disinfection of sewage effluent from vessels, particularly fecal coliform, suspended solids, particulate metals, and volatile and semi-volatile organics.

35. The petition cited EPA's assessment that even current AWTS can be feasibly improved to more effectively reduce nutrients and metals in sewage discharges. EPA's 2008 Report identified several specific technological upgrades to AWTS that can yield lowered levels of these pollutants, such as biological nitrification, ion exchange, reverse osmosis, and chemical precipitation. EPA's 2008 Report stated that the agency "believes these technologies are

potentially feasible for this application because they currently are used in other shipboard applications or because they currently are used in land-based wastewater treatment facilities and could be adapted for shipboard application.”

36. The petition also presented data showing that the installation and operation of improved sewage treatment systems representing the best practicable control technologies on large vessels is cost-effective. Specifically, the cost of installing a new AWTS on a large cruise ship is approximately two to ten million dollars, or the price of a single can of cola per passenger every day for a five-year period. The continued operation and maintenance of the system would cost approximately seven dollars per passenger. The cost of installing an AWTS on a new cruise ship is approximately one to two percent of the total cost of building a new cruise ship, which can range from 750 million to one billion dollars.

37. In addition to calling for updates to the MSD performance standards, the petition asked EPA to set monitoring, recordkeeping, and reporting requirements for current or updated vessel discharge standards. The petition explained that existing compliance measures do not ensure adequate protection of sewage-receiving oceans and navigable waterways, and of public health as required by the Clean Water Act, and that the implementation of new monitoring, recordkeeping, and reporting requirements would not be overly burdensome on the agency or the regulated marine vessels.

38. Citing the APA, Friends of the Earth asked EPA to respond to the 2009 petition within 180 calendar days of its submission.

39. On May 14, 2009, the Director of EPA’s Office of Wetlands, Oceans and Watersheds sent Friends of the Earth a letter acknowledging receipt of the petition and stating

that the agency would review the petition and “respond back to you when we have made our determination.”

40. On July 12, 2010, EPA published in the Federal Register a “Notice Seeking Stakeholder Input” on Friends of the Earth’s petition and a separate request for rulemaking under Section 312 of the Clean Water Act. 75 Fed. Reg. 39683. The Notice specifically sought comment on “[t]he universe of vessels operating on navigable waters that use sewage treatment devices; technical information on the performance, effectiveness and costs of vessel sewage treatment devices, including performance testing data; suggestions on what, if any, changes to the performance standards might be appropriate; and information on monitoring, recordkeeping and reporting approaches for vessel sewage discharges.” *Id.*

41. The public comment period for EPA’s request for input ended on November 9, 2010 with the submission of approximately 20 comment letters, including a comment letter from Friends of the Earth. Since then, Friends of the Earth has been in contact with EPA periodically to share new information and to check on the status of the petition. To date, EPA has not issued a final substantive response to Friends of the Earth’s petition.

CLAIM FOR RELIEF

Violation of the Administrative Procedure Act for Failure to Respond to the 2009 Petition

42. Friends of the Earth adopts and incorporates by reference all preceding paragraphs of this Complaint in this Claim for Relief.

43. By failing to respond to Friends of the Earth’s 2009 petition regarding marine vessel sewage discharge standards and requirements, EPA has unreasonably delayed agency action. EPA’s failure to act for more than five years since the filing of the petition allows the continued, but preventable, release of infection- and disease-causing sewage into navigable U.S.

waters that are used for a variety of purposes, including swimming, scuba diving, boating, recreational and commercial fishing, and water supplies.

44. EPA's unreasonable delay and failure to act violates the APA, which requires federal agencies "to within a reasonable time...conclude a matter presented to it." 5 U.S.C. § 555(b).

45. This Court is authorized to review EPA's unreasonable delay and failure to act as final "agency action" under the APA, 5 U.S.C. § 551(13).

46. The APA further mandates that the Court "shall ... compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

47. The failure of the EPA to act upon the 2009 petition filed by Friends of the Earth has harmed and is continuing to cause injury to Friends of the Earth and its members.

RELIEF REQUESTED

WHEREFORE, Plaintiff Friends of the Earth respectfully requests that the Court:

(1) Adjudge and declare that EPA's failure to issue a final decision on Friends of the Earth's 2009 petition violates the APA;

(2) Order EPA to make a final decision to grant or deny the 2009 petition and initiate rulemaking as appropriate within 90 days after entry of this Court's judgment;

(3) Retain jurisdiction of this matter until EPA has fulfilled its legal and Court-ordered obligations as set forth in this complaint;

(4) Award Friends of the Earth its reasonable fees, expenses, costs, and disbursements, including attorneys' fees associated with this litigation.

(5) Grant such other and further relief as the Court deems just and proper.

DATED: this 30th day of April, 2014.

Respectfully submitted,

/s/ Stephen E. Rody
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