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Via certified mail and electronic mail

Andrew Wheeler, Administrator
U.S. Environmental Protection Agency
Office of the Administrator, Mail Code 1101A
1200 Pennsylvania Avenue NW
Washington, DC 20640
wheeler.andrew@epa.gov

Re: Notice of Intent to Sue for Violation of Nondiscretionary Duties to Review Meat and Poultry Products Category Effluent Limitation Guidelines and Pretreatment Guidelines

Dear Administrator Wheeler,

The Environmental Integrity Project and Earthjustice write on behalf of Animal Legal Defense Fund, Center for Biological Diversity, Environment America, Food & Water Watch, Waterkeeper Alliance, and Waterkeepers Chesapeake (“Parties”) to provide notice of the Parties’ intent to sue the U.S. Environmental Protection Agency (EPA or “Agency”) and you, in your official capacity as Administrator, for failure to perform nondiscretionary duties required by the Clean Water Act (CWA), 33 U.S.C. § 1251 *et seq.*

First, EPA has failed to meet its duty under CWA section 304(b), 33 U.S.C. § 1314(b), to review and, if necessary, revise at least once per year the effluent limitation guidelines (ELGs) for the Meat and Poultry Products category. Second, EPA has failed to meet its duty under section 304(g), 33 U.S.C. § 1314(g), to review and, if appropriate, revise the pretreatment standard guidelines for the Meat and Poultry Products category.

Section 505(a)(2) of the CWA authorizes citizen suits “against the Administrator where there is an alleged failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.” 33 U.S.C. § 1365(a)(2). Citizens must provide notice to the Administrator at least sixty days before commencing a citizen suit under CWA section 505(a)(2), 33 U.S.C. § 1365(b).

This letter serves as notice of our intent to file suit against the Agency and you, in your official capacity as Administrator of EPA, under the CWA for failure to perform these nondiscretionary duties. Parties may commence suit in federal district court at any time after sixty days from the postmarked date of this notice. 40 C.F.R. § 135.2(b).

I. GUIDELINES FOR EFFLUENT LIMITATIONS AND PRETREATMENT STANDARDS: REVIEW PROCESS

Under section 304(b) of the CWA, EPA is required to promulgate ELGs to control discharges of pollutants into the waters of the United States from designated categories of industrial users that discharge wastewater directly into waterways (known as “direct dischargers”). 33 U.S.C. §1314(b). These ELGs must reflect pollution reductions achievable by these categories or subcategories of industrial point sources through the implementation of available treatment and pollution prevention technologies. EPA must “at least annually thereafter, revise, if appropriate, such regulations.” *Id.*

In addition, the CWA requires EPA to establish guidelines for pretreatment standards for designated industries that send wastewater to publicly owned treatment works (known as “indirect dischargers”) for pollutants that the Agency “determines are not susceptible to treatment” by these plants. 33 U.S.C. § 1314(g). EPA must also “review at least annually . . . and, if appropriate, revise guidelines for pretreatment standards.” *Id.*

In order to “complete a review” and thereby fulfill its mandatory duties under sections 304(b) and 304(g) of the CWA, EPA must review these guidelines for effluent limitations and pretreatment standards every year and either (1) decide that revision is not appropriate or (2) decide that revision is appropriate and revise these guidelines. *Id.* § 1314(b), (g).

II. HISTORY OF THE MEAT AND POULTRY PRODUCTS CATEGORY GUIDELINES

The Meat and Poultry Products industry includes facilities that slaughter livestock and/or poultry, or that process meat and/or poultry into products for further processing or sale to consumers.¹ The industry is often divided into three categories: (1) meat slaughtering and processing, (2) poultry slaughtering and processing, and (3) rendering.² As of 2004, the Meat and Poultry Products industry sector included almost 6,620 facilities, of which an estimated 4,700 discharged process wastewater.³ Meanwhile, it was reported earlier this year that meat companies are building new processing plants that will expand pork and chicken production capacity in the United States by 10 percent and 8.4 percent, respectfully.⁴ Of the facilities discharging process

¹ EPA, Technical Development Document for the Final Effluent Limitation Guidelines & Standards for the Meat and Poultry Products Point Source Category (2004) (hereinafter “2004 Technical Development Document”), pg. 4-2.

² *Id.*; see 40 C.F.R. 432.2(g) (“*Meat* means products derived from the slaughter and processing of cattle, calves, hogs, sheep and any meat that is not listed under the definition of poultry below.”); see also 40 C.F.R. 432.2(i) (“*Poultry* means products derived from the slaughter and processing of broilers, other young chickens, mature chickens, hens, turkeys, capons, geese, ducks, small game fowl such as quail or pheasants, and small game such as rabbits.”).

³ 2004 Technical Development Document, pg. 1-2.

⁴ Jacob Bunge, The Wall Street Journal, *Tyson Made Its Fortune Packing Meat. Now It Wants to Sell You Frittatas* (Feb. 13, 2019), accessible via <https://www.wsj.com/articles/tyson-which-made-its-fortune-packing-meat-now-wants-to-sell-you-frittatas-11550076140>.

wastewater, EPA estimates that 94 percent are indirect dischargers and 6 percent are direct dischargers.⁵

1. 1974-1975 Promulgation of Meat and Poultry ELGs

In 1974, EPA promulgated ELGs for various types of existing and new meat slaughterhouses and packinghouses. 39 Fed. Reg. 7,894 (Feb. 28, 1974). In 1975, the Agency promulgated separate ELGs for existing and new meat further processing subcategories and the independent rendering subcategory. 40 Fed. Reg. 902 (Jan. 3, 1975).

In 1975, EPA also proposed ELGs for existing and new poultry slaughterers and processors.⁶ However, these regulations were never finalized.⁷ In addition, EPA did not establish any pretreatment standards for indirect dischargers within the Meat and Poultry Products category in either the 1974 or 1975 regulations.⁸

2. 2004 Revisions

In 2004, EPA established new or revised ELGs and standards for 9 out of the 10 meat subcategories of the Meat and Poultry Products category. 69 Fed. Reg. 54,476 (Sept. 8, 2004). However, EPA defined the following facilities as “small” and excluded these “small facilities” from the revised (and more stringent) limitations:

- Slaughterhouses and packinghouses that slaughter less than or equal to 50 million pounds of live weight killed (LWK) per year;⁹
- Meat cutters and processors that produce less than or equal to 50 million pounds of finished product per year;¹⁰ and
- Independent rendering facilities that render less than 10 million pounds per year of raw material.¹¹

In other words, the original ELGs and corresponding effluent limitations promulgated in 1974 and 1975 still apply to these “small facilities” listed above. Using EPA’s estimates from 2004, this means about 38 percent of Meat and Poultry Products facilities that discharge directly into waterways must merely meet standards established 44 years ago.¹²

⁵ *Id.*

⁶ *Id.*, pg. 2-15.

⁷ *Id.*

⁸ *Id.*, pg. 2-11.

⁹ 40 C.F.R. Subparts A, B, C, and D.

¹⁰ *Id.* Subparts E, F, G, H, and I.

¹¹ *Id.* Subpart J.

¹² According to EPA’s 2004 estimates, there are 110 facilities that discharge directly into waterways (63 from Subcategories A, B, C, and D; 25 from Subcategory E; and 22 from Subcategories F, G, H, and I) that EPA classified as “small” and excluded from the 2004 revised ELGs. The 2004 revised ELGs created new or revised limitations for 178 direct dischargers (108 from Subcategories K and L regardless of size; and 70 “non-small” facilities from the rest of the 40 CFR 432 subcategories). *See* 2004 Technical Development Document, pg. 1-2 (Table 1-1).

EPA also established ELGs for two poultry processing subcategories.¹³ Although these new subcategories cover both small and large facilities, EPA set less stringent ELGs for direct dischargers slaughtering less than 100 million pounds of poultry in LWK per year and for further processors producing less than 7 million pounds of poultry per year.¹⁴ EPA's reasoning was that the treatment options promulgated for larger poultry slaughtering and further processing facilities were economically unachievable for small poultry slaughtering and further processing facilities.¹⁵

Although EPA acknowledged that no regulations existed for indirect dischargers, EPA once again decided not to promulgate any pretreatment standards for the Meat and Poultry Product industry. 69 Fed. Reg. 54,476 (Sept. 8, 2004).

3. 2016 Determination

Based on EPA's 2015 Annual Review Report, the Agency conducted a toxicity ranking analysis and identified the Meat and Poultry Products category "for preliminary review because it ranked high again, in terms of toxic-weighted pound equivalents ranking (TWPE)"¹⁶ According to the Preliminary 2016 Effluent Guidelines Program Plan, EPA determined that the estimated toxicity of the Meat and Poultry Products category discharges resulted primarily from nitrate compounds and hydrogen sulfide releases reported to Toxic Release Inventory.¹⁷

In reviewing nitrate discharges, EPA stated that its 2015 preliminary review focused on five facilities whose nitrate compound TWPE increased from 2009 to 2013.¹⁸ For hydrogen sulfide, EPA determined that four facilities accounted for the majority of these discharges.¹⁹ However, "EPA [was] uncertain as to how representative the data [was] of actual releases," and concluded that more data was necessary for EPA to conduct further review.²⁰ In summary, EPA declined to identify the Meat and Poultry Products category for further review, stating that it "may do so in the future for nitrate and hydrogen sulfide as additional data become available."²¹

In its Final 2016 Plan, EPA extended its conclusion that no further action was warranted at that time for the ELGs for this category.²² Although this Final 2016 Plan was released on May 2, 2018, it included no further analysis on the Meat and Poultry Products category since the Preliminary Plan, which based its findings on data gathered from EPA's 2015 preliminary review. Further, EPA determined that no pretreatment standard guidelines were necessary for the Meat and Poultry Products category, despite the fact that neither the Preliminary or Final 2016 Plans nor the associated docket include information on EPA's review of these guidelines for this category.²³

¹³ *Id.* Subpart K, L.

¹⁴ *Id.*; 2004 Technical Development Document, pg. 2-15.

¹⁵ *Id.*

¹⁶ EPA, 2015 Annual Effluent Guidelines Review Report (June 2016), pg. 3-45.

¹⁷ EPA, Preliminary 2016 Effluent Guidelines Program Plan (June 2016), pg. 4-7; 81 Fed. Reg. 41,535 (June 27, 2016).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² EPA, Final 2016 Effluent Guidelines Program Plan (April 2018); 83 Fed. Reg. 19,281 (May 2, 2018).

²³ 83 Fed. Reg. 19,281, 19,282; EPA, Final 2016 Effluent Guidelines Program Plan (May 2018), pg. 8-1; *see also* Docket EPA-HQ-OW-2015-0665.

III. EPA'S FAILURE TO PERFORM NONDISCRETIONARY DUTIES

The CWA mandates that EPA conduct and complete a review of the ELGs and pretreatment guidelines, and make a decision as to whether revision of the ELGs and pretreatment guidelines are appropriate once per year. *See* 33 U.S.C. § 1314(b), (g). The CWA's citizen-suit provision waives "sovereign immunity for claims involving the Administrator's failure . . . to perform any non-discretionary act or duty." *Def. of Wildlife v. Jackson*, 284 F.R.D. 1, 4 (D.D.C. 2012), *aff'd in part, appeal dismissed in part sub nom. Def. of Wildlife v. Perciasepe*, 714 F.3d 1317 (D.C. Cir. 2013) (citing *Sierra Club v. EPA*, 475 F.Supp.2d 29, 31–32 (D.D.C.2007)); *see also* 33 U.S.C. § 1365(a)(2). The CWA imposes a nondiscretionary duty when its provisions set "bright-line, date-specific deadlines for specified action." *Raymond Proffitt Found. v. EPA*, 930 F.Supp. 1088, 1098 (E.D. Pa.1996).

The Court of Appeals for the District of Columbia Circuit has held that EPA has a nondiscretionary duty to conduct an annual review of ELGs. *See Defs. of Wildlife v. Jackson*, 284 F.R.D. 1, 4 (D.D.C. 2012). "EPA has an obligation to review effluent guidelines annually . . . for possible revision." *Def. of Wildlife v. Jackson*, 284 F.R.D. at 4 (emphasis in original) (citing *OCEF v. EPA*, 527 F.3d at 849); *see also* 33 U.S.C. §1314(b). "[S]uch . . . review is mandatory." *Id.* Likewise, EPA has a nondiscretionary duty to review pretreatment guidelines annually. *Compare* 33 U.S.C. § 1314(b) ("[T]he Administrator shall . . . provid[e] guidelines for effluent limitations, and, at least annually thereafter, revise, if appropriate, such regulations.") *with* 33 U.S.C. § 1314(g) ("[T]he Administrator shall . . . review at least annually thereafter and, if appropriate, revise guidelines for pretreatment of pollutants which he determines are not susceptible to treatment by publicly owned treatment works."). Even if the "ultimate decision whether to revise the guidelines and limitations is discretionary[,] . . . it is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking." *Def. of Wildlife v. Jackson*, 284 F.R.D. at 4 (quoting *Bennett v. Spear*, 520 U.S. 154, 172 (1997)).

Here, EPA has failed to conduct a review of the ELGs and pretreatment standard guidelines since at least 2016. These reviews were not complete as EPA concluded that more data was necessary for the Agency to conduct further review, and the Agency cannot sidestep its duties under the CWA by pushing data-gathering and in-depth reviews to another year. EPA last revised some of the ELGs for the Meat and Poultry Products category in 2004, while other facilities in this category are still only required to meet the ELGs originally promulgated in 1974 and 1975. Meanwhile, EPA has not promulgated any pretreatment standards for the category despite the fact that the majority of facilities are indirect dischargers.

At the very least, EPA has failed to complete a review for more than a year, given that the Final 2016 Effluent Guidelines Plan was published on May 2, 2018 in the Federal Register. EPA's mandatory review duties under sections 304(b) and 304(g) are continuous and must be performed annually. Accordingly, EPA is in violation of its mandatory duties under sections 304(b) and 304(g) of the CWA.

IV. PARTIES GIVING NOTICE

The parties giving notice are listed below along with the addresses and telephone numbers of their principal place of business:

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(202) 423-0504

Sylvia Lam of the Environmental Integrity Project and Carrie Apfel of Earthjustice are the counsel representing these parties. Their addresses and telephone numbers can be found in the signature blocks below.

V. Conclusion

EPA is subject to a statutory mandate to conduct and complete a review of the ELGs and pretreatment standard guidelines annually for the Meat and Poultry Products category. EPA has failed to conduct an annual review and to make determinations as to whether revision of the ELGs and promulgation of pretreatment standard guidelines for the industry is appropriate, since at least 2016.

If you have any questions regarding this notice or would like to discuss this matter further, please do not hesitate to contact us.

Sincerely,



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cc (via certified mail):

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