

NRDC

February 27, 2017

VIA CERTIFIED MAIL

Scott Pruitt
Administrator
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
Washington, D.C. 20460

Alexis Strauss
Acting Regional Administrator, Region IX
United States Environmental Protection Agency
75 Hawthorne Street
San Francisco, CA 94105

RE: Notice of Intent to File a Citizen Suit under the Clean Water Act

Dear Administrator Pruitt and Acting Regional Administrator Strauss,

On behalf of the Natural Resources Defense Council (NRDC), Los Angeles Waterkeeper, and American Rivers, we write to ask you to perform your duty under the Clean Water Act to require permits for stormwater discharges from commercial, industrial, and institutional (CII) sites in two Southern California watersheds: (1) the Dominguez Channel and Los Angeles/Long Beach Inner Harbor watershed (Dominguez Channel watershed), and (2) the Alamos Bay/Los Cerritos Channel watershed (Los Cerritos Channel watershed). We also provide notice pursuant to 33 U.S.C. § 1365(b)(2) that, sixty days from your receipt of this letter, we intend to file suit against EPA and you in your official capacities as Administrator and Acting Regional Administrator for failure to perform a nondiscretionary duty under the Act pursuant to 33 U.S.C. § 1365(a)(2).

The Clean Water Act requires permits for sources and categories of sources of stormwater discharges that EPA has determined are contributing to violations of water quality standards. Last fall, in response to petitions from our organizations, EPA determined that CII sources are contributing to water quality impairments in

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the Dominguez Channel and Los Cerritos Channel watersheds. Nonetheless, the agency has refused to require permits for these discharges.

EPA's determinations triggered an immediate, nondiscretionary duty to require permits, and EPA's refusal to require permits is unlawful under the Clean Water Act. Our members are being harmed by EPA's failure to comply with the requirements of the Clean Water Act. Accordingly, we ask you to take immediate action to fulfill your statutory duty and require permits for stormwater discharges that are contributing to water quality standard violations in the Dominguez Channel and Los Cerritos Channel watersheds.

I. Urban stormwater runoff is impairing water quality in the Dominguez Channel and Los Cerritos Channel watersheds

Stormwater runoff is "one of the most significant sources of water pollution in the nation." *Env'tl. Def. Ctr. v. EPA*, 344 F.3d 832, 840 (9th Cir. 2003). The problem is of particular concern in urban and developing areas, where impervious surfaces cover large proportions of a watershed. These surfaces generate both a greater volume of runoff and higher concentrations of pollutants than undisturbed land, resulting in dramatically increased pollutant loadings.

Unsurprisingly, this increased pollution contributes to water body impairments and violations of water quality standards. According to the National Research Council, as of 2002, urban stormwater runoff sources were "responsible for about 38,114 miles of impaired rivers and streams, 948,420 acres of impaired lakes, 2,742 square miles of impaired bays and estuaries, and 79,582 acres of impaired wetlands." National Research Council, Committee on Reducing Stormwater Discharge Contributions to Water Pollution, *Urban Stormwater Management in the United States* 25 (2009), available at http://www.nap.edu/catalog.php?record_id=12465. Indeed, the National Research Council believes that these values *underestimate* the actual extent of impairments. *Id.*

Stormwater is a leading source of water pollution in the Los Angeles area. Portions of the Dominguez Channel and Los Cerritos Channel watersheds are currently failing to meet water quality standards for many pollutants, including copper and zinc. Stormwater and urban runoff from CII sites are undoubtedly contributing to these failures: these sites make up approximately thirty percent of

the land area in each watershed, and modeling indicates they are significant contributors to zinc and copper loadings in the watersheds. Yet stormwater discharges from these significant pollutant sources are not directly regulated by permits.

II. EPA has failed to fulfill its nondiscretionary duty under the Clean Water Act to require permits for stormwater discharges that are contributing to water quality standard violations in the Dominguez Channel and Los Cerritos Channel watersheds

The fundamental goal of the Clean Water Act is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). To achieve this goal, the Act requires EPA and delegated states to set minimum water quality standards for each body of water covered by the Act. *Id.* § 1313; 40 C.F.R. § 131.2. These standards set tailored goals for the water body based on the uses to be made of the water and criteria that ensure such uses are safe and protected. 40 C.F.R. § 131.2.

The Clean Water Act prohibits the discharge of pollutants from a point source without a permit. 33 U.S.C. §§ 1311(a), 1362(12)(A). Although the Act exempts certain stormwater discharges from this prohibition, *see id.* § 1342(p)(1), that exemption does not cover “[a] discharge for which the Administrator . . . determines that the stormwater discharge contributes to a violation of a water quality standard,” *id.* § 1342(p)(2)(E). Stormwater discharges that the Administrator determines are contributing to water quality standard violations are required to obtain National Pollutant Discharge Elimination System (NPDES) permits. *See id.*; 40 C.F.R. § 122.26(a)(1)(v), (a)(9)(i)(D).

Any person may petition EPA “to require a NPDES permit for a discharge which is composed entirely of storm water which contributes to a violation of a water quality standard.” 40 C.F.R. § 122.26(f)(2). The Director “*shall* make a final determination” on such a petition within ninety days. *Id.* § 122.26(f)(5) (emphasis added).

On September 17, 2015, NRDC, Los Angeles Waterkeeper, and American Rivers submitted two petitions to the EPA Region 9 Administrator, related to the Dominguez Channel and Los Cerritos Channel watersheds. Each petition sought “a

determination that currently unpermitted stormwater discharges from privately-owned commercial, industrial, and institutional sites are contributing to violations of water quality standards [in the watershed], and therefore require National Pollutant Discharge Elimination System (NPDES) permits.” Dominguez Channel Petition at 2 (attached as Exhibit A); Los Cerritos Channel Petition at 2 (attached as Exhibit B). The petitions provided evidence that CII sites, which occupy approximately a third of the land area in both watersheds, contribute to the impairment of both watersheds for zinc and copper. The petitions requested that EPA “[f]ulfill[] [its] statutory obligation and designat[e] these sites for permitting.” Dominguez Channel Petition at 30; Los Cerritos Channel Petition at 31.

EPA responded to the petitions on October 17, 2016. In its response to the Dominguez Channel petition, EPA determined that “as a category, CII sources contribute to water quality impairments for copper and zinc in the Dominguez Channel and Los Angeles/Long Beach Inner Harbor.” EPA Denial of Dominguez Channel Petition, Denial at 5 (attached as Exhibit C). In its response to the Los Cerritos Channel petition, EPA determined that “as a category, CII sources contribute to water quality impairments for copper and zinc in the Los Cerritos Channel and Colorado Lagoon.” EPA Denial of Los Cerritos Channel Petition, Enclosure at 5 (attached as Exhibit D). However, the agency refused to require permitting for these sources because it “conclude[d] that existing programs are already in place to address the pollutants of concern.” Enclosure to EPA Denial of Dominguez Channel Petition at 7; Enclosure to EPA Denial of Los Cerritos Channel Petition at 8.

EPA’s refusal to require permits for CII sources in the Dominguez and Los Cerritos Channel watersheds violates the requirements of the Clean Water Act and its implementing regulations. Once the Administrator determines that a stormwater discharge is contributing to water quality standard violations, the Administrator *must* require the discharger to obtain NPDES permits. 33 U.S.C. § 1342(p)(2)(E); 40 C.F.R. § 122.26(a)(1)(v), (a)(9)(i)(D). The Act provides for no exceptions to this mandatory duty, nor does it allow EPA to rely on other factors to avoid its permitting obligation.

EPA has failed to require NPDES permits for CII sources in the Dominguez Channel and Los Cerritos Channel watersheds. This refusal to require permits, despite making the determination that triggers the duty to do so, constitutes a

failure to perform a nondiscretionary act, and is unlawful under the Clean Water Act.

Relief Sought

EPA cannot ignore the Clean Water Act's requirements simply because it prefers a different regulatory approach. NRDC, Los Angeles Waterkeeper, and American Rivers will seek an order that EPA must fulfill its duty under the Clean Water Act to require NPDES permits for the discharges in question.

Parties Giving Notice

As required by 40 C.F.R. § 135.3(b), the names, addresses, and telephone numbers of the persons giving notice pursuant to this letter are as follows:

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Washington, DC 20005
Attention: Rebecca Hammer
(202) 513-6254

American Rivers
120 Union Street
Nevada City, CA 95959
Attention: Jeffrey Odefey
(530) 478-0206

Los Angeles Waterkeeper
120 Broadway
Santa Monica, CA 90401
Attention: Arthur Pugsley
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Conclusion

By determining that the stormwater runoff discharges identified by our 2015 petitions contribute to water quality impairments in the Dominguez Channel and Los Cerritos Channel watersheds, but refusing to require permits for these sources, EPA has failed to perform a nondiscretionary duty under the Clean Water Act. This violation is continuing, and members of NRDC, Los Angeles Waterkeeper, and American Rivers are being harmed by the agency's failure to fulfill its obligations. We hereby give notice that, if EPA fails to cure this violation within sixty days of receipt of this letter, we intend to file suit in federal district court seeking

declaratory relief, injunctive relief, and litigation costs, as appropriate. As required by 40 C.F.R. § 135.2(b), we are sending a copy of this notice letter by certified mail to the Attorney General of the United States.

In the meantime, we remain open to further discussions about these violations and potential remedies. Please do not hesitate to contact us if you would like to discuss this matter further.

Respectfully,



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