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June 2, 2010

BY CERTIFIED MAIL

Lisa P. Jackson, Administrator
Environmental Protection Agency
Ariel Ross Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: 60-day notice of intent to sue EPA Administrator for failure to perform
nondiscretionary duty to impose numeric water quality criteria for
nutrients in Kansas

Dear Ms. Jackson:

We represent Friends of the Kaw (FOK), an environmental organization dedicated to the protection of the Kansas River and its tributaries. This letter is to inform you that in 60 days, FOK intends to file a citizen suit under Section 505(a)(2) of the Federal Water Pollution Control Act, 33 U.S.C. § 1365(a)(2), on behalf of its members and itself against the Administrator for failure to perform the nondiscretionary duty of imposing numeric water quality criteria for nutrients in the State of Kansas.

Nutrient pollution, including phosphorus and nitrogen, has long been a concern in Kansas. Nutrients, which enter waters of the United States most commonly from sewage treatment plants and as runoff from agricultural sites, have negatively affected hundreds of Kansas streams. While nutrients are essential in certain amounts, excessive nutrients can result in algal blooms that deprive water systems of oxygen, harm spawning grounds and nursery habitats, kill fish, and create oxygen-starved "dead" zones where fish and other aquatic life cannot survive. As the Kansas Department of Health and Environment has recognized, blue-green algae resulting from nutrient pollution has caused taste and odor problems in numerous drinking water reservoirs and has interfered in recreational use of Kansas waterways.

Nutrient pollution manifests itself not only locally, but far downstream. One of the most well known "dead" zones, for example, is a large oxygen-deprived zone in the Gulf of Mexico, into which waters from Kansas rivers and streams ultimately flow.

Phosphorus is particularly problematic. Necessary in certain amounts but harmful in excessive amounts, it is an element of fertilizers used in agriculture. The earth's supply of phosphorus is diminishing as the use of fertilizers increases in the developed world. After use, phosphorus is ultimately deposited in waterways, causing the harm described above. Imposing numeric criteria for phosphorus can be an important element not only of increasing the health of aquatic systems, but extending the ability to grow food sustainably.

Kansas, like many other states, has imposed narrative water quality standards, but not numeric standards. For example, for support of aquatic life, the Kansas water quality standards require that:

The introduction of plant nutrients into streams, lakes, or wetlands from artificial sources shall be controlled to prevent the accelerated succession or replacement of aquatic biota or the production of undesirable quantities or kinds of aquatic life.

K.A.R. 28-16-28e(c)(2)(A). With respect to waterways that support recreational use, Kansas regulations provide that:

The introduction of plant nutrients into surface waters designated for primary or secondary contact recreational use shall be controlled to prevent the development of objectionable concentrations of algae or algal by-products or nuisance growths of submersed, floating, or emergent aquatic vegetation.

K.A.R. . 28-16-28e(c)(7)(A).

Since Kansas adopted subjective, narrative criteria for nutrients in 1987, the Kansas Department of Health and Environment has held numerous meetings, prepared various analyses, and generally resisted any pressure to impose numeric criteria for nutrients.

In 1998, EPA announced its national nutrient strategy, in which states would either adopt EPA numeric criteria for nutrients or develop their own criteria by the end of 2003. EPA has stated that it is important to impose numeric criteria, as opposed to merely narrative criteria, because numeric criteria will permit easier and faster development of total maximum daily loads for certain pollutants in certain waterways; make it easier to prepare discharge permits under the National Pollutant Discharge Elimination System; increase the ability to evaluate nutrient runoff minimization programs; and provide water quality baselines against which to measure environmental progress. EPA has stated that "we cannot afford delays or ineffective responses to this major source of environmental degradation," and it has called on states to develop numeric criteria for causal (nitrogen and phosphorus) and response (chlorophyll-a and transparency) variables for all waters that carry nutrients.

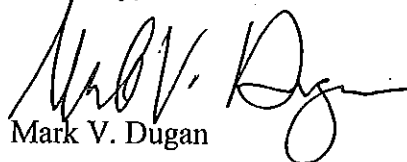
Delays, however, have been the norm in many states, including Kansas. An EPA report in 2008 found that the large majority of states, including Kansas, had failed to adopt any numeric criteria for nutrients. Now, two years later, Kansas still has not adopted such criteria.

Section 303(c)(4)(B) of the Act provides that "[t]he Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard . . . where the Administrator determines that a revised or new standard is necessary to meet the requirements" of the Act. 33 U.S.C. § 1313(c)(4)(B). Thus, after the EPA Administrator determined that numeric water quality criteria for nutrients were necessary to meet the requirements of the Clean Water Act, a nondiscretionary duty arose under Section 303(c)(4)(B) to ensure that such standards were imposed, either by the states or by EPA itself.

EPA determined 12 years ago, in June 1998, that numeric water quality criteria for nutrients were necessary to meet the requirements of the Act. Kansas, however, still has not imposed such numeric criteria. The time for "prompt" response has long since passed in Kansas, and the Administrator is subject to a nondiscretionary duty to directly impose such standards. The purpose of our anticipated lawsuit is to require the Administrator to fulfill that duty.

While this letter is a formal expression of FOK's intent to sue, we are willing to discuss with you the matters set forth in this letter during the 60-day notice period. If you believe that FOK's potential claims would be invalid for any reason, or if you would like to attempt to negotiate a resolution of those claims, please contact us as soon as possible. In addition, please provide any documentation you believe relevant to your compliance status. I note, however, that while we are willing to discuss these issues, we do not intend to delay the filing of litigation beyond 60 days absent extraordinary circumstances. We look forward to hearing from you.

Sincerely,



Mark V. Dugan

cc: Eric Holder, United States Attorney General (By certified mail)
Karl Brooks, Regional Administrator, EPA Region VII
Roderick L. Bremby, Kansas Department of Health and Environmental Control

