

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CASE NUMBER_____

KENTUCKY WATERWAYS ALLIANCE,
SIERRA CLUB, APPALACHIAN VOICES, and
KENTUCKIANS FOR THE COMMONWEALTH

Plaintiffs

V.

GINA MCCARTHY, in her official capacity as
ADMINISTRATOR, UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,

And

A. STANLEY MEIBURG, in his official
capacity as ACTING REGIONAL
ADMINISTRATOR, UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 4,

Defendants

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

This action arises under 28 U.S.C. § 1331, and Plaintiffs seek a declaration that the United States Environmental Protection Agency's (EPA) approval on November 15, 2013 of Kentucky Administrative Regulation 401 KAR 10:031 as being consistent with federal water quality standards and the Clean Water Act (CWA), was arbitrary, capricious and otherwise contrary to law; an order setting aside that approval; and injunctive relief directing the EPA to disapprove the chronic aquatic life water quality criteria for selenium submitted by the Commonwealth of Kentucky.

PARTIES

1. The Kentucky Waterways Alliance (KWA) is a nonprofit, membership organization recognized as tax exempt under Section 501(c)(3) of the Internal Revenue Code, with over 700 members whose use and enjoyment of the water resources of the Commonwealth of Kentucky for recreational, aesthetic and other beneficial purposes. The KWA and its members are adversely affected by the approval by the EPA of chronic water quality criteria for selenium that do not comply with the Clean Water Act. The Director of the Kentucky Waterways Alliance is Judith D. Petersen, and the address and telephone number of the organization is 120 Webster Street, Suite 217, Louisville, KY 40206, 502-589-8008.

2. Judith Petersen is both a member of and Director of the Kentucky Waterways Alliance. Ms. Petersen uses and enjoys rivers, streams and lakes in the Commonwealth where the water quality is threatened or has been impaired by selenium. Ms. Petersen, as a citizen and user of waters of the Commonwealth, has recreational, aesthetic and economic interests that have been and will be adversely affected by the approval of chronic aquatic life water quality criteria for selenium that are inconsistent with the Clean Water Act and risk allowing selenium pollution discharges to occur without effective control.

3. The Cumberland Chapter of the Sierra Club is the state chapter of a national conservation organization with a long tradition of advocacy on behalf of the environment. The Cumberland Chapter has more than 4,800 members whose use and enjoyment of the water resources of the Commonwealth of Kentucky for recreational, aesthetic and other beneficial purposes is adversely affected by the EPA Acting Regional Administrator's

approval on November 15, 2013 of chronic aquatic life water quality criteria for selenium that do not comply with the Clean Water Act. The Chair of the Cumberland Chapter is Alice Howell, and the address and phone number of that organization is P.O. Box 1368, Lexington, KY 40588-1368, ph. 859-296-4335.

4. Alice Howell is also a member of the Sierra Club Cumberland Chapter, and is a resident of Lexington, Kentucky. Ms. Howell uses and enjoys the rivers, streams and lakes in the Commonwealth, including those where the water quality is threatened or has been impaired by the discharge of selenium. Ms. Howell is a Sierra Club member and volunteers in the Kentucky River Watershed Watch. As a citizen and user of the waters of the Commonwealth, Ms. Howell has recreational, aesthetic and economic interests that have been and will be impaired by the approval by the Administrator of a water quality standard for selenium that is contrary to the Clean Water Act.

5. Appalachian Voices is a nonprofit, membership organization recognized as tax exempt under Section 501(c)(3) of the Internal Revenue Code incorporated under the laws of the State of North Carolina, working to solve the environmental problems that have the greatest impact on the people who live in the central and southern Appalachian Mountains. Appalachian Voices has approximately 800 total members and approximately 30 members in Kentucky whose use and enjoyment of the water resources of the Commonwealth of Kentucky for recreational, aesthetic and other beneficial purposes is adversely affected by the EPA Acting Regional Administrator's approval on November 15, 2013 of chronic aquatic life water quality criteria for selenium that do not comply with the Clean Water Act. Among those members is Landra Lewis, a Kentucky resident who uses and enjoys the water resources of the Commonwealth and whose use

and enjoyment is adversely affected by the approval of a water quality standard for selenium that is not protective of aquatic life. The executive director of Appalachian Voices is Tom Cormons, and the address and phone number of the organization is Appalachian Voices, 171 Grand Boulevard, Boone, North Carolina 28607, (828)-262-1500.

6. Kentuckians For The Commonwealth is a social justice organization with roughly 8,000 members in 90 counties in the Commonwealth, whose use and enjoyment of the water resources of the Commonwealth of Kentucky for recreational, aesthetic and other beneficial purposes is adversely affected by the Acting Regional Administrator's approval of a state water quality standard that does not comply with the Clean Water Act. The Executive Director of Kentuckians For The Commonwealth is Burt Lauderdale, and the address and phone number of the organization is P.O. Box 1450, London, Kentucky 40743, (606) 878- 2161.

7. Doug Doerrfeld is a member of Kentuckians For The Commonwealth and a resident of Elliott County, Kentucky. Mr. Doerrfeld uses and enjoys rivers, streams and lakes in the Commonwealth where water quality is threatened or has been impaired by selenium and, as a citizen and user of the waters of the Commonwealth, has recreational, aesthetic and economic interests that have been and will be impaired by the approval by the Acting Regional Administrator of water quality criteria for selenium that are inconsistent with the Clean Water Act.

8. Each of the Plaintiff organizations and their members are persons with interests which are adversely affected by the Acting Regional Administrator's approval on November 15, 2013 of a state water quality standard that does not comply with the Clean

Water Act, and those interests in the use, enjoyment, and protection of waters of the Commonwealth from selenium pollution are within the zone of interests sought to be protected by the Clean Water Act. The injuries complained of herein are a direct result of the approval of the state water quality standard by the EPA under 33 U.S.C. 1313, and the relief sought in this Complaint will redress those injuries.

9. Gina McCarthy is sued in her official capacity as Administrator of the United States Environmental Protection Agency, which is that agency of the federal government to which administration and enforcement of the Clean Water Act ("CWA" or "the Act") has been delegated by Congress.

10. A. Stanley Meiburg is sued in his official capacity as the Acting Regional Administrator of the United States Environmental Protection Agency's Region 4, which is the office of EPA directly responsible for approving or disapproving revisions to water quality standards submitted by the Commonwealth of Kentucky.

JURISDICTION AND VENUE

11. Jurisdiction to review the EPA's decision to approve the Kentucky state water quality standard, 401 KAR 10:031, is vested in this Court under 28 U.S.C. § 1331, which vests this Court with original jurisdiction over all civil actions arising under the Constitution, laws or treaties of the United States and the decision is reviewable under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706. The approval by the EPA Administrator of a state water quality standard under 33 U.S.C. § 1313 is a matter arising under a law of the United States. Venue is appropriate in this District under 28 U.S.C. 1331(e).

LEGAL BACKGROUND

12. Paragraphs 1-11 are incorporated herein by reference as if fully set forth below.
13. The Clean Water Act, 33 U.S.C. § 1251 et seq., is a comprehensive water quality statute designed “to restore and maintain the chemical, physical and biological integrity of the Nation’s waters.” 33 U.S.C. 1251(a). The Act establishes a goal of attaining “water quality which provides for the protection and propagation of fish, shellfish, and wildlife.” 33 U.S.C. 1251(a)(2). States are obligated by 33 U.S.C. § 1313 to develop and implement standards for protection of water quality conforming to the minimum standards established by the EPA Administrator. Such water quality standards consist of a designated use for the water bodies involved and water quality criteria that will protect the designated use. 33 U.S.C. § 1313(c)(2)(A).
14. States are required to identify waters within their boundaries that are not attaining water quality standards. For each such impaired water, states must develop a “total maximum daily load” for the offending pollutant, which when achieved will result in compliance with the water quality standard. 33 U.S.C. § 1313(d).
15. Pursuant to 33 U.S.C. § 1313(c)(1), states must hold public hearings to review their water quality standards and, if appropriate, modify existing standards or adopt new standards. See also 40 C.F.R. § 131.20(a).
16. When establishing water quality criteria, “[s]tates must adopt those water quality criteria that protect the designated use. Such criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use. For waters with multiple use designations, the criteria shall support the most sensitive use.” 40 C.F.R. § 131.11(a)(1); see also id. at § 131.5(a)(2).

17. When establishing numeric water quality criteria, states must base the values on US EPA's National Recommended Water Quality Criteria Guidance, published pursuant to CWA § 304(a), 33 U.S.C. § 1314(a), on the 304(a) Guidance "modified to reflect site-specific conditions," or on "[o]ther scientifically defensible methods." 40 C.F.R. § 131.11(b).

18. Whenever a state adopts a new or revised standard, it must submit that standard to EPA for approval. 33 U.S.C. § 1313(c)(2); 40 C.F.R. § 131.20(c). The new or revised standard only becomes the applicable water quality standard for the state if EPA determines that the standard meets all requirements of the Act. 33 U.S.C. §§ 1313(c)(3); 40 C.F.R. § 131.21(c).

19. All surface waters in Kentucky are by default designated for the use of, among others, warm water aquatic habitat. 401 KAR 10:026 § 5(2)(a). Kentucky defines the "indigenous aquatic community" to mean "naturally occurring aquatic organisms including bacteria, fungi, algae, aquatic insects, other aquatic invertebrates, reptiles, amphibians, and fishes." 401 KAR 10:001(40).

20. EPA Guidance explains that aquatic life criteria need not necessarily fully protect "all species at times and places." However, the criteria should fully protect sensitive species that are "commercially or recreationally important." Stephens et al., U.S. EPA, Office of Research and Development, *Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic Organisms and their Uses* (1985) at 1–3.

21. The Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-06, provides that "[a] person suffering legal wrong because of agency action, or adversely affected or

aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702.

22. The EPA is a federal agency whose actions are subject to review under the APA.

23. The APA provides that a court shall “hold unlawful and set aside agency action, findings, and conclusions found to be … arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law,” 5 U.S.C. § 706(2)(A), or agency action that is undertaken “without observance of procedure required by law,” 5 U.S.C. § 706(2)(D).

FACTUAL BACKGROUND

24. Paragraphs 1-23 are incorporated herein by reference as if full set forth below.

25. The federal water quality standard at issue in this case revised the chronic warm water aquatic life water quality criteria for selenium.

26. EPA has designated selenium as a toxic pollutant pursuant to CWA Section 307(a)(1), 33 U.S.C. § 1317(a)(1). *See* 40 C.F.R. § 401.15.

27. On May 31, 2013, revisions to 401 KAR 10:031 relating to water quality standards promulgated by the Commonwealth of Kentucky, Natural Resources and Environmental Protection Cabinet, Division of Water (DOW), became effective under Kentucky law after referral to the second legislative committee pursuant to KRS Chapter 13A, the statutory chapter governing the state process for adopting and revising administrative regulations. Included in the revisions to 401 KAR 10:031 were changes to the existing warm water aquatic life water quality criteria for selenium.

28. The DOW transmitted those revisions for review by the EPA on May 23, 2013, stating that the revisions were duly adopted pursuant to Kentucky law.

29. The revision of the chronic water quality criteria for selenium transformed the former chronic limit of 5 ug/l as measured in the water column, to fish tissue-based water quality criteria, with the former regulatory limit of 5 ug/l now serving as a “trigger” for when fish tissue would need to be collected in order to determine whether the concentration of selenium in the sampled tissue exceeded the new regulatory standard.

Kentucky explained the new standard in this manner:

Kentucky has adopted chronic water quality criteria for selenium of 8.6 ug/g (dry weight) of whole fish tissue or, 19.3 ug/g (dry weight) of fish egg/ovary tissue in 401 KAR 10:031 Section 6, Table 1. In developing the proposed chronic water quality criteria for selenium, the agency determined that the trigger level of 5.0 ug/l is a protective approach. The 5.0 ug/l trigger level is a screening tool that will assure that fish communities, and therefore aquatic life, are protected from potentially harmful selenium bioaccumulation.

November 1, 2013 letter from Kentucky Department of Environmental Protection Commissioner Bruce Scott, to Region IV Water Protection Division Director James Giattina. A copy of the letter is annexed hereto as Appendix A.

30. The standard’s fish tissue concentration was derived by averaging the fish tissue concentrations deemed to be protective in four separate taxa: *Lepomis* (bluegill), *Salvelinus* (Brook Trout), *Esox* (Northern Pike), and *Micropterus* (Largemouth Bass).

31. Effluent limitations in CWA discharge permits, (called Kentucky Pollutant Discharge Elimination System or “KPDES” permits in Kentucky), are established based on categorical effluent limitations adopted for the industrial activity, or through water-quality based effluent limitations (WQBEL) based on the water quality, flow, and other characteristics of the particular receiving water, or through a combination of both approaches. WQBELs are required where categorical effluent limitations are not adequate to ensure that a discharge does not cause or contribute to a violation of a water

quality standard. 33 U.S.C. § 1311(b)(1)(A), (C). The KPDES permit translates the general water quality criteria into enforceable permit limits applicable to the particular discharge and discharger.

32. By letter dated October 25, 2013, EPA Region IV Water Protection Division Director James Giattina requested information “concerning how the Commonwealth plans to establish KPDES permit limitations for the chronic fish tissue criteria for dischargers where fish are present in or immediately downstream of the receiving water and also where fish are not present in such waters.” The Division Director explained that “This information will assist the EPA in its review of the Commonwealth’s water quality criteria submission.” A copy of that letter is annexed hereto as Appendix B.

33. The EPA inquiry reflected a concern voiced by Plaintiff organizations, among others, that a regulatory standard based on fish-tissue concentration could not be effectively monitored or enforced if sufficient fish tissue could not be obtained.

34. In response to the October 25, 2013 letter, Kentucky Department of Environmental Protection Commissioner Bruce Scott explained that, while the implementation procedures for implementing the new chronic selenium criteria were “still in development,” that “in the event that sufficient fish tissue cannot be obtained, the proposed KPDES permit will state that if adequate fish tissue cannot be obtained to determine permit compliance with the fish-tissue limit the permit holder will be deemed to be in non-compliance with the proposed KPDES permit for exceeding the chronic trigger level as established in the proposed KPDES permit.” November 1, 2013 letter, supra. Commissioner Scott made clear that the letter represented only Kentucky’s

“intentions” for implementing the standard, and that the implementation procedures would be subject to future public comment and review by the Department. Id.

35. On November 15, 2013, Acting Regional Administrator Stanley Meiburg issued a *Decision Document of the United States Environmental Protection Agency Review of Amendments to Kentucky’s Water Quality Regulations at Chapter 401 KAR 10:001, 10:026 and 10:031 Under [Section] 303(c) of the Clean Water Act*. A copy of that document is annexed hereto at pages of Appendix C.

36. Through the decision document, EPA disapproved a revision to the Kentucky acute water quality criterion for selenium because “[t]he acute criterion that Kentucky has adopted does not provide [aquatic life] protection because it is based on water-only exposure [to selenium], with no associated dietary exposure. Therefore the acute criterion adopted by the Commonwealth is not scientifically defensible or consistent with 40 CFR 131 and the CWA.” *Decision Document*, supra, at 12.

37. With respect to the chronic water quality criteria for warm water aquatic habitat for selenium, the *Decision Document* approved the amended chronic water quality criteria for warm water aquatic habitat for selenium as being “scientifically defensible” and “protective of the designated uses of warm water aquatic habitat in the Commonwealth’s water bodies. The criteria are therefore consistent with 40 C.F.R. 131 and the CWA and are approved.”

38. With respect to the 5.0 ug/l “trigger,” the *Decision Document* stated that “[t]he 5.0 ug/l trigger value is not a new or revised water quality standard. Therefore, the EPA is not acting under CWA Section 303(c) authorities on the trigger value. The EPA recognizes the advantages of expressing the chronic aquatic life criteria as a tissue-based

concentration, yet also understands the need for appropriate translation unto a water column value for purposes such as meeting the permitting requirements of Clean Water Act Section 402 and the implementing regulations at 40 CFR 122.44. In fact, the EPA intends to recommend a water column translation as part of its forthcoming CWA 304(a) criteria. At that time the EPA will urge states to modify their water quality standards to include a water column translation for selenium as they undertake their respective triennial reviews in accordance with the Clean Water Act.”

39. Prior to EPA’s approval, the Kentucky Ecological Services Field Office of the U.S. Fish and Wildlife Service (“USFWS”) reviewed and sent comments on the proposed fish tissue-based chronic selenium standard to the Kentucky Division of Water. USFWS noted that tissue-based criteria for selenium are “unprecedented in the United States” and recommended that DOW seek “independent peer review at a nation scale for the criteria” so that recognized selenium experts could “review the DOW’s interpretation of the literature and criteria derivation for scientific soundness.” March 7, 2013 Letter from Kentucky Ecological Services Field Office Field Supervisor Virgil Lee Andrews, Jr., to Kentucky Division of Water Director Sandy Gruzesky. A copy of the letter is annexed hereto as Appendix D.

40. The USFWS letter also criticized Kentucky’s proposed chronic fish tissue-based criteria for, among other things, allowing selenium to “cycl[e] in the food web at an undetermined level, thus posing risks to biota that are more sensitive than fish” and for failing to address situations where “fish are absent in selenium-affected waters.”

41. In comments to the Kentucky DOW and to US EPA, citizen groups likewise criticized the proposed chronic selenium criteria. They noted that because the criteria

only measure compliance based on the selenium concentrations in fish tissue, they wrongly exempt fishless streams and fail to protect aquatic life such as salamanders, crayfish, and insects. They argued that the standard lacks any means by which streams that have been polluted by selenium to the point that they no longer support fish populations can be determined to be impaired for selenium for the purposes of 33 U.S.C. §§ 1311(b)(1)(C) and 1313(d).

42. The citizen commenters also criticized the standard for failing to protect sensitive, commercially and recreationally important species such as bluegill and catfish. They faulted DOW for deriving the standard by averaging the fish-tissue values for four common genera instead of basing it on the most sensitive commercially or recreationally species, such as bluegill. They also criticized DOW for failing to include available data on sensitive catfish.

COUNT IEPA'S RELIANCE ON KENTUCKY DEPARTMENT OF ENVIRONMENTAL PROTECTION COMMISSIONER BRUCE SCOTT'S NOVEMBER 1, 2013 LETTER IN APPROVING THE REVISED CHRONIC WATER QUALITY CRITERIA FOR SELENIUM WAS ARBITRARY, CAPRICIOUS AND OTHERWISE INCONSISTENT WITH LAW

43. Paragraphs 1-42 are incorporated herein by reference as if fully set out below.

44. The EPA approval of the tissue-based chronic water quality criteria for selenium was premised on a commitment made by Commissioner Bruce Scott in the November 1, 2013 letter to James Giattina, that in those instances in which the water column value of 5 ug/l triggered the requirement for sampling of fish tissue but where sufficient fish tissue for analysis could not be collected, a KPDES permittee would be deemed in noncompliance for exceeding the water column trigger value of 5.0 ug/l.

45. This commitment was made in violation of KRS Chapter 13A, which expressly prohibits any agency of the Commonwealth from altering or abridging any regulation by policy or interpretation.

46. 401 KAR 10:031 Section 6(1) Table 1 contains the water quality criteria for selenium, and notes clearly that the chronic criteria are 8.6 and 19.2, the former being the “concentration in u/g (dry weight) of whole fish tissue[,]” and the latter being “the concentration in ug/l (dry weight) of fish egg/ovary tissue.”

47. That same table includes a footnote 11 to the 8.6 ug/g tissue-based criteria, noting that “[a] concentration of five and zero tenths (5.0) ug/l or greater selenium in the water column shall trigger further sampling and analysis of whole-body fish tissue or alternatively of fish egg/ovary tissue.” The 5.0 ug/l value is thus plainly a trigger for sampling of fish tissue in order to determine if a violation of the water quality criteria exists, and is not, under the plain language of 401 KAR 10:031 Section 6(1) Table 1, a regulatory value the exceedance of which constitutes a violation without more.

48. The commitment to use this “trigger” value as a regulatory limit in the absence of fish tissue or eggs to sample, is in direct violation of KRS Chapter 13A and is beyond the capacity of the agency to promise absent further regulatory changes to transform the former regulatory value and now “trigger value” back to a regulatory standard in the absence of sufficient tissue for sampling.

49. Inasmuch as the proposed tissue-based criteria lack a water-column translator value, since the proposed translator value cannot be enforced by Kentucky, EPA acted arbitrarily, capriciously, and in a manner inconsistent with law in relying on the November 1, 2013 letter to conclude that the proposed chronic tissue-based criteria are

“protective of the designated use of warm water aquatic habitat in the Commonwealth’s water bodies” and is therefore “consistent with 40 C.F.R. 131 and the CWA[.]”

COUNT 2

EPA’S CONCLUSION THAT THE REVISED CHRONIC WATER QUALITY CRITERIA FOR SELENIUM WILL PROTECT THE DESIGNATED USE OF WARM WATER AQUATIC HABITAT WAS ARBITRARY, CAPRICIOUS AND OTHERWISE INCONSISTENT WITH LAW BECAUSE THE CRITERIA FAIL TO PROTECT FISHLESS STREAMS

50. Paragraphs 1-49 are incorporated herein by reference as if fully set out below.
51. EPA may only approve a revision to a state water quality standard if the standard is protective of the designated use to which it applies. 40 C.F.R. §§ 131.5, 131-21(b).
52. Protection of aquatic life includes protection of not only fish communities, but also other “naturally occurring aquatic organisms including bacteria, fungi, algae, aquatic insects, other aquatic invertebrates, reptiles, [and] amphibians.” *See* 401 KAR 10:001(40).
53. Kentucky’s chronic aquatic life fish tissue criteria for selenium measure compliance based solely on the concentration of selenium in fish tissue and provide no means for determining compliance when a water body lacks fish.
54. Because Kentucky’s criteria rely solely on fish tissue concentrations to determine compliance, the criteria fail to protect non-fish aquatic life and fishless bodies of water and thus is not protective of the designated use of warm water aquatic habitat.
55. EPA’s approval of Kentucky’s standard was thus arbitrary, capricious, and not in accordance with law.

COUNT 3

EPA’S CONCLUSION THAT THE REVISED CHRONIC WATER QUALITY CRITERIA FOR SELENIUM WILL PROTECT THE DESIGNATED USE OF

**WARM WATER AQUATIC HABITAT WAS ARBITRARY, CAPRICIOUS AND
OTHERWISE INCONSISTENT WITH LAW BECAUSE THE CRITERIA FAIL
TO PROTECT SENSITIVE COMMERCIALLY AND RECREATIONALLY
IMPORTANT SPECIES**

56. Paragraphs 1-55 are incorporated herein by reference as if fully set out below.

57. EPA may only approve a revision to a state water quality standard if the standard is protective of the designated use to which it applies. 40 C.F.R. §§ 131.5(a)(2), 131.21(b).

58. According to EPA Guidance, criteria developed for the protection of aquatic life should protect all commercially or recreationally important species.

59. Kentucky's chronic aquatic life fish tissue criteria were derived by averaging the fish-tissue values for four common genera of fish. It was not based on the fish tissue values for sensitive, commercially or recreationally important fish such as bluegill and catfish.

60. Because Kentucky's criteria do not protect all commercially or recreationally important species, they are not protective of the designated use of warm water aquatic habitat.

61. EPA's approval of Kentucky's standard was thus arbitrary, capricious, and not in accordance with law.

CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, for the reasons above stated, Plaintiffs respectfully request that this

Court:

1. Accept jurisdiction over this action,
2. Determine and declare that the Administrator's November 15, 2013 approval of the Kentucky water quality chronic criteria for selenium was unlawful within the meaning of

5 U.S.C. 706 in that the action was arbitrary, capricious and otherwise not in accordance with law;

3. Enter a mandatory injunction under Fed. R. Civ. Pro. 65 setting aside the November 15, 2013 approval and directing the Administrator to finalize a federal water quality standard that complies with the Clean Water Act within thirty days;

4. Award the plaintiffs all costs and expenses incurred in this action (including attorney and expert witness fees); and

5. Award the plaintiffs all other relief to which they appear or may become entitled.

Respectfully submitted,

/s/ THOMAS J. FITZGERALD

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