



October 27, 2020

Dennis Deziel
Regional Administrator
U.S. Environmental Protection Agency
Region I
5 Post Office Square - Suite 100
Boston, MA 02109-3912

RE: OVERFILE REQUEST – Unauthorized discharges of sewage into Sakonnet Harbor, Rhode Island

Dear Mr. Deziel:

Public Employees for Environmental Responsibility (PEER) formally requests that the U.S. Environmental Protection Agency (EPA) initiate enforcement action against entities, possibly including the Sakonnet Point Club and boats (particularly large off-shore fishing vessels, moored or docked in Sakonnet Harbor), dumping raw sewage into the Sakonnet Harbor in Little Compton, RI, for violations of the federal Water Pollution Control Act (aka Clean Water Act or “CWA”), 33 U.S.C. 1251 et seq. With respect to these violations, the Rhode Island Department of Environmental Management (DEM), the state agency with delegated authority to enforce the CWA in Rhode Island, has failed to take adequate enforcement action.

We are seeking this action on EPA’s part due to the imminent and substantial threat to public health presented by the repeated violations of National Pollutant Discharge Elimination System (NPDES) prohibitions overseen by the State of Rhode Island, Department of Environmental Management (RIDEM) under its delegated authority pursuant to the Clean Water Act. Specifically, PEER requests that the EPA, pursuant to the EPA’s response authority under the Clean Water Act (CWA), 33 U.S.C. § 1251 et seq, immediately assert primary jurisdiction over the NPDES program with respect to these unauthorized discharges, and, with full public participation, take action to comprehensively assess and mitigate the imminent and substantial threat to public health and environmental harm caused by discharges of what appear to be raw sewage into Sakonnet Harbor. The discharges in question are subject to the regulatory authority of RIDEM pursuant to R.I. Gen. Laws Chapter 46- 12, and § 312 of

the Clean Water Act, 33 U.S.C. § 1322. These discharges are of particular concern during the pandemic, as recent research has shown that the SARS-CoV-2 virus might be spread by contact with sewage.¹

Background. DEM's enforcement response against the unpermitted discharges in the Sakonnet Harbor have fallen far short of both EPA's and DEM's own enforcement standards and policies, such that protection of the environment and public health requires federal intervention in this case. Failure to enforce against CWA violations is not new: in 2007, PEER requested that the DEM terminate, revoke or modify the Rhode Island Pollutant Discharge Elimination System (RIPDES) permit for Sakonnet Point Club in Little Compton, Rhode Island (RIPDES No. R10023558) due to the fact that the submerged outfall with the diffuser was not installed at the correct ocean depth.² PEER had to resort to hiring a diver to prove the location of the outfall because DEM would not confirm it. Several months later, and only because PEER exposed the violation, DEM issued a Notice of Violation to the Sakonnet Point Club for unauthorized discharges.³

Since that time, abutters and concerned citizens have *repeatedly* contacted DEM regarding possible unauthorized discharges at/or near Sakonnet Point Club, beginning in at least March of 2019, to no avail. Abutters called and wrote to DEM with complaints of: strong sewage odors emanating from the Club; the use of an old well contaminated with sewage for cleaning off boats; septic alarms going off; men with hoses and pipes working in the vicinity of the permitted seawall wells and the allegedly sealed desalination discharge pipe; diners reporting a strange sewage odor in their tap water and ice when eating at the Club; failure of the onsite septic system; presence of emergency water tankers, etc. In addition, on August 10, 2019, a member of the public provided DEM with some of the laboratory results showing the presence of enterococci contamination in the Harbor. Of particular note is the refusal of DEM Chief of Compliance and Enforcement, Water Pollution Program, David Chopy, to assign an additional water sampling station to the monthly DEM Shellfish Program harbor monitoring at the site of the former outside jetty desal discharge pipe. This refusal occurred when someone reported sewage clouds two weeks in a row going by the seawall north of the jetty on Baily's Ledge. The discharge appeared to be coming from the outside shoulder of the jetty in the very same vicinity of the supposed sealed pipe. Despite the numerous complaints from different citizens, and evidence of fecal contamination, there appeared to be no effort by DEM to monitor, sample, or confirm what residents were saying.

Classification of Sakonnet Harbor. Sakonnet Harbor (Waterbody ID #: RI0010031E-01D) is classified as a SA{b} water. According to the Rhode Island Water Quality Regulations,⁴ SA waters are designated for shellfish harvesting for direct human consumption, primary and secondary contact recreational activities, and fish and wildlife habitat, and must have good aesthetic value. The {b} partial use designation is due to the fact that the waters are in the vicinity of marinas and/or mooring fields, and are therefore subject to seasonal shellfishing closures. The enterococci criteria for SA{b} waters are a geometric mean of 35 colonies/100 mL, and a single sample maximum of 104 colonies/100 mL.⁵

Discharge of sewage is prohibited. Rhode Island statute § 46-12-5(b) states, "It shall be unlawful for any person to discharge any pollutant into the waters except as in compliance with the provisions of this

¹ Jun Yuan, MD, et al., Sewage as a Possible Transmission Vehicle During a Coronavirus Disease 2019 Outbreak in a Densely populated Community: Guangzhou, China, April 2020, *Clinical Infectious Diseases*, c1aa1494, (October 2020).

² https://www.peer.org/wp-content/uploads/attachments/07_15_10_spc_dem_ltr.pdf

³ https://www.peer.org/wp-content/uploads/attachments/08_31_3_sakonnet_nov.pdf

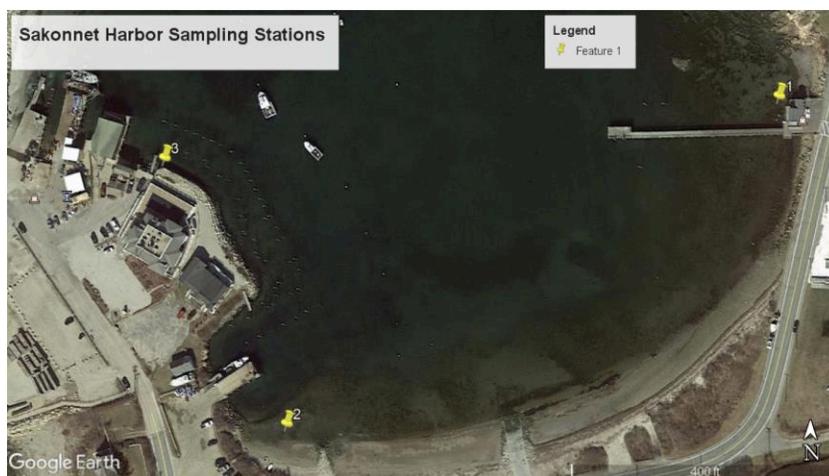
⁴ <https://rules.sos.ri.gov/regulations/part/250-150-05-1>

⁵ Id.

chapter and any rules and regulations promulgated hereunder and pursuant to the terms and conditions of a permit.”⁶ Section 46-12-39 (a) through (d) states that it is unlawful to: discharge any sewage from a boat into the waters of the state in an area which has been declared to be a no discharge zone; operate or moor a boat which is equipped with a marine toilet not in proper working condition; and operate or moor a boat in a no discharge zone, which is equipped with a marine toilet which is not properly sealed to prevent discharge of sewage into the water.⁷ "Sewage from vessels" is defined as “human body wastes and the wastes from toilets and other receptacles intended to receive or retain body wastes that are discharged from vessels,” and is regulated under Section 312 of the Clean Water Act, 33 U.S.C. § 1322, and under R.I. Gen. Laws Chapter 46- 12.⁸ Sakonnet Harbor is a no discharge zone.⁹ Finally, Rhode Island has a No-Discharge Compliance Program, which took effect in 2006, and requires all boats with marine toilets to “obtain and display an inspection decal” issued by a “Trained Inspector” to verify compliance with the no-discharge law.¹⁰

Evidence showing enterococci contamination. As noted above, a concerned citizen hired BAL Laboratory, in Cranston, RI, to test enterococci at three locations in the Sakonnet Harbor, plus a control. Harbor East is shown in Figure 1, below, as Point 1; Pond Outfall is shown as Point 2; and Harbor West is shown as Point 3. The control, at South Shore Beach, is the town public beach; the few high hits are likely from large numbers of people at the beach with babies and children. Samples were collected virtually every week from the beginning of March 2019 through the end of August 2019. It is important to note that if reject water from the contaminated well is being expelled into the harbor, it would be at the Harbor West site.

Figure 1



Results of the enterococci monitoring are shown in Table 1, below. Results greater than 35 MPN/100mL are shown in **red**. Results greater than the single sample maximum of 104 are shown in **purple**.

⁶ <http://webserver.rilin.state.ri.us/Statutes/TITLE46/46-12/46-12-5.HTM>

⁷ <http://webserver.rilin.state.ri.us/Statutes/TITLE46/46-12/46-12-39.HTM>

⁸ https://risos-apa-production-public.s3.amazonaws.com/DEM/REG_10722_20190117114831.pdf

⁹ <http://www.dem.ri.gov/programs/water/shellfish/marine-pumpouts.php>

¹⁰ <http://www.dem.ri.gov/programs/benviron/water/shellfish/pump/pdfs/nda-factsheet.pdf>

Table 1
Sakonnet Harbor Enterococci Monitoring, March – August 2019
 (Results in MPN/100mL¹¹)

Date	Harbor East	Pond Outfall	Harbor West	South Shore Beach West (control)
3/4/19	10	74	31	<10
3/11/19	20	<10	<10	<10
3/18/19	<10	10	30	<10
3/25/19	<10	<10	<10	<10
4/1/19	41	250	Sample lost	<10
4/8/19	<10	<10	150	<10
4/15/19	<10	1100	<10	<10
4/22/19	10	10	20	<10
4/29/19	<10	<10	<10	<10
5/6/19	10	<10	<10	<10
5/13/19	<10	84	41	<10
5/20/19	<10	<10	20	<10
6/14/19	<10	<10	52	10
6/20/19	30	10	680	10
6/28/19	<10	10	<10	<10
7/1/19	10	<10	<10	<10
7/19/19	<10	120	41	<10
7/24/19	<10	430	270	<10
8/2/19	<10	<10	<10	<10
8/8/19	<10	<10	10	74
8/19/19	<10	<10	10	<10
8/30/19	31	10	10	75

Several bacteria species are used to indicate the presence of human sewage and associated pathogens. In Rhode Island, both fecal coliforms and enterococci are sampled to protect human health and the environment. EPA recommends enterococci as a proper measurement of indicators of fecal contamination in marine waters.¹² The Rhode Island Department of Health (RIHealth) adopted enterococci standards for licensed swimming beaches, and RIDEM adopted enterococci standards for contact recreation in all waters (both fresh and salt).

Aside from the evidence collected of enterococci contamination, residents claim that most boats in the Harbor this summer did not have the required inspection decal to verify compliance with the no-discharge program.

The weeks that have extremely large MPN/100mL results are likely deliberate dumping events, where either a boat is discharging sewage from its marine toilet, or where there is an unauthorized discharge from the Club or another entity on shore.

¹¹ MPN is the “most probable number” of organisms.

¹² <https://www.epa.gov/sites/production/files/2015-10/documents/rwqc2012.pdf>

Inspections and enforcement during the pandemic. On March 26, 2020, EPA issued a memo known as the “Temporary Enforcement Policy” saying that the pandemic may “constrain the ability of regulated entities to perform routine compliance monitoring, integrity testing, sampling, laboratory analysis, training, and reporting or certification.”¹³ That memo also stated that “states should take into account the safety and health of their inspectors and facility personnel and use discretion when making decisions to conduct routine inspections...”¹⁴

As of August 31, 2020, the Temporary Enforcement Policy was no longer in effect.¹⁵ Indeed, the original memo stated that “After this policy is no longer in effect, the EPA expects full compliance going forward.”¹⁶ Therefore, the pandemic should not be reason to ignore the discharges of raw sewage into Sakonnet Harbor, particularly in light of evidence that contact with sewage may result in transmission of the virus.

EPA Overfiling Is Necessary to Protect Public Health and the Environment. The RIDEM has effectively ignored the multiple discharge violations occurring in Sakonnet Harbor. While PEER does not know the precise entities discharging sewage, it is clear that sewage may be discharged either by boats, by the Sakonnet Point Club, or both. Meanwhile, the public and the environment are both exposed to this sewage on a regular basis. The RIDEM is a regulatory agency that is supposed to protect both residents and tourists from the harm associated with the types of violations seen in this case.¹⁷ It is also supposed to protect the shellfish that are exposed to these contaminants. However, this agency seems to have entirely forgotten that aspect of its statutory reason for existing. Since RIDEM will not investigate, EPA must step in and protect the public and environment from the damage caused by these polluters.

The CWA, 33 U.S.C. § 1319(a)(3), bestows upon the EPA the concurrent authority to overfile, or bring enforcement actions against violators when authorized state programs have failed to properly enforce these statutes. EPA regulations under this statute allow the EPA to withdraw state program authorization altogether when a state’s enforcement program fails to act on violations and to seek adequate enforcement penalties. 40 C.F.R. 271.22; 40 C.F.R. 123.63(3). Finally, and most importantly, the EPA has repeatedly made strong public policy pronouncements regarding the agency’s interest in consistency in enforcement, declaring that EPA will intervene in state enforcement cases when necessary to prevent a race to the bottom.

RIDEM has dragged its heels and refused to investigate complaints from concerned citizens, ultimately allowing violations of substantial gravity to go entirely unpenalized. Clearly, in this case the RIDEM cannot be viewed as meeting its delegated mandate to provide a credible deterrent against violations of federal environmental laws. PEER, therefore, formally requests that EPA immediately take over the inspection and enforcement against these unauthorized discharges and begin enforcement proceedings against the violations described above and any others that may be discovered.

PEER has in its possession the original laboratory data, and access to witnesses who have seen, heard, and smelled the discharge of sewage. These witnesses are afraid to come forward at this time, but should

¹³ <https://www.epa.gov/sites/production/files/2020-03/documents/oecamemooncovid19implications.pdf>

¹⁴ Id.

¹⁵ <https://www.epa.gov/enforcement/covid-19-enforcement-and-compliance-resources>

¹⁶ Supra at 13.

¹⁷ It is important to note that DEM's launching ramp does not have a boarding pier, so trailered boat owners and their parties are forced to enter the harbor water waist to shoulder deep in order to board their crafts.

an investigation by EPA be opened, they would be willing to talk to the investigator. We would also be happy to provide you with the laboratory results.

Thank you very much for your attention to this matter. Please do not hesitate to contact me with any questions.

Sincerely,

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cc: David Chopy, RIDEM