



ADVOCATES for the **West**
P.O. Box 1612 | Boise, ID 83701

August 15, 2016

Via Certified Mail, Return Receipt Requested

Gina McCarthy, Administrator
U.S. EPA
1200 Pennsylvania Ave. NW
Washington, DC 20460

Dennis McLerran, Regional Administrator
U.S. EPA Region 10
1200 Sixth Ave., Ste. 900
Seattle, WA 98101

RE: Notice of Intent to Sue EPA Under the Clean Water Act

Dear Administrators McCarthy and McLerran:

Columbia Riverkeeper, Idaho Rivers United, Snake River Waterkeeper, Pacific Coast Federation of Fishermen's Associations, and the Institute for Fisheries Resources provide notice of their intent to sue the United States Environmental Protection Agency ("EPA") under the Clean Water Act¹ for failing to establish a pollution budget, known as a total maximum daily load ("TMDL"), for temperature in the Columbia and Lower Snake Rivers in Washington and Oregon, a nondiscretionary duty under the Clean Water Act.²

Unless EPA remedies these violations, Columbia Riverkeeper, Idaho Rivers United, Snake River Waterkeeper, Pacific Coast Federation of Fishermen's Associations, and the Institute for Fisheries Resources intend to file suit in U.S. District Court under the citizen suit provision of the Clean Water Act following the expiration of the sixty-day notice period, seeking injunctive and declaratory relief as well as reasonable attorney fees and litigation expenses.

**THE COLUMBIA AND SNAKE RIVERS ARE OFTEN TOO HOT
FOR ENDANGERD SALMON AND STEELHEAD**

A comprehensive plan to control summer water temperatures throughout the Columbia and Lower Snake Rivers is a long-recognized, and increasingly pressing, need. During summer 2015, high water temperatures in the Columbia and Snake Rivers proved disastrous for salmon and provided a disturbing glimpse at the future of Columbia and Snake River fisheries. In 2015, more than 250,000 adult sockeye died in the Columbia and Snake Rivers because warm water prevented them from successfully migrating upstream. For endangered Snake River sockeye, the

¹ 33 U.S.C. § 1365(a)(2).

² 33 U.S.C. § 1313(d).

result was catastrophic: 96% of returning adult sockeye perished before passing Lower Granite Dam on the Snake River. Similar fish kills in the future could push endangered Snake River sockeye to the brink of extinction.

After the 2015 disaster, EPA noted: “The need to lower water temperatures becomes more critical as the Pacific Northwest Region continues to address and mitigate climate change.”³ And the independent federal scientific research group “The Fish Passage Center” concluded that “under a climate change scenario, the long-recognized and largely unaddressed problem of high water temperatures in the [Columbia and Snake rivers] becomes an ever-increasing threat to the survival of salmon.”⁴

The National Marine Fisheries Service has proposed some measures intended to address lethal temperatures like those experienced in 2015, but EPA criticized those plans as “limited to micro-scale temperature improvements at specific dams.”⁵ EPA called for strategies to “reduc[e] the overall river temperatures during the latter part of June and July to improve adult sockeye survival through the Lower Columbia and Lower Snake Rivers.”⁶ In addition to preventing massive sockeye salmon die-offs, EPA concluded that “maintaining 20°C or below temperatures in the Lower Columbia and Snake Rivers during the late June and July timeframe would be beneficial for adult summer Chinook and steelhead survival . . . and would also be beneficial to juvenile salmon and steelhead out migrating during this period.”⁷

Despite EPA’s calls for more to be done to maintain cooler temperatures and protect fish, the agency has failed to take action to develop and implement a temperature plan.

PERSONS GIVING NOTICE

Any correspondence related to this matter should be directed to these attorneys:

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³ U.S. EPA, *Comments on NOAA Fisheries’ 2015 Adult Sockeye Salmon Passage Draft Report* (May, 2016).

⁴ Fish Passage Center, *Review of Draft of NOAA Fisheries’ 2015 Sockeye Salmon Passage Report* (May, 2016).

⁵ U.S. EPA, *Comments on NOAA Fisheries’ 2015 Adult Sockeye Salmon Passage Draft Report* (May, 2016).

⁶ *Id.*

⁷ *Id.*

The full names, addresses, and telephone numbers of the parties providing this notice are:

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Columbia Riverkeeper, Idaho Rivers United, Snake River Waterkeeper, Pacific Coast Federation of Fishermen's Associations, and Institute for Fisheries Resources are conservation organizations representing thousands of members and supporters throughout the Pacific Northwest. These organizations and many of their supporters care deeply about the health of the Columbia and Snake Rivers and their iconic salmon runs. To that end, these organizations are active in public outreach and advocacy throughout the Pacific Northwest. This notice of intent to sue is part of their ongoing efforts to restore the water quality and fisheries of the Columbia and Snake River basins.

Columbia Riverkeeper and Snake River Waterkeeper are members of the Waterkeeper Alliance—the world's fastest growing environmental movement—uniting more than 200 Waterkeeper organizations worldwide. Columbia Riverkeeper's mission is to protect and restore the water quality of the Columbia River and all life connected to it, from the headwaters to the Pacific Ocean. Snake River Waterkeeper's mission is to protect, restore, and sustain the waters of the Snake Rivers.

Idaho Rivers United's mission is to protect and restore the rivers of Idaho. Since being founded in 1990, Idaho Rivers United has become a powerful force for safeguarding Idaho's

imperiled wild steelhead and salmon, protecting and enhancing stream flows, improving water quality, and defending and promoting the many benefits that flow from Idaho's rivers.

The Pacific Coast Federation of Fishermen's Associations and the Institute for Fisheries Resources represent working family fishermen and diverse commercial fishing associations striving to achieve sustainable fisheries. The Pacific Coast Federation of Fishermen's Associations and the Institute for Fisheries Resources have a history of effectively advocating for healthy salmon runs by addressing water quality, dams, water diversions, and forestry concerns in the Columbia River basin.

THE CLEAN WATER ACT

Congress passed the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters".⁸ To meet these goals, states establish water quality standards to protect specific uses of waterways.⁹ For instance, Washington established a water quality standard of 20°C in the Columbia River to protect the use of salmon and steelhead spawning, rearing, and migration.¹⁰

The Clean Water Act requires states to list water bodies that are not meeting water quality standards and, therefore, where uses are not being protected.¹¹ For instance, Washington listed most of the Columbia River as not meeting the 20°C water quality standard for temperature, meant to protect salmon and steelhead.¹²

When a state lists a waterway as not meeting a water quality standard, the state must write a plan to fix the water quality problem.¹³ That plan is called a "total maximum daily load" or TMDL.¹⁴ A TMDL works like a pollution budget, restricting each source of pollution to "a level necessary to [meet] the applicable water quality standards with seasonal variations and a margin of safety."¹⁵

Within 180 days of listing a waterway as not meeting a water quality standard, the state must submit its TMDL to EPA.¹⁶ EPA must decide whether the state's TMDL is adequate within 30 days.¹⁷ If the state's TMDL is inadequate, EPA has 30 additional days to write a

⁸ 33 U.S.C. § 1251(a).

⁹ 33 U.S.C. § 1313(a)-(c).

¹⁰ WAC 173-201A-602.

¹¹ 33 U.S.C. § 1313(d)(1).

¹² See Washington Department of Ecology, *2015 Water Quality Atlas*

(<https://fortress.wa.gov/ecy/waterqualityatlas/map.aspx?CustomMap=y&RT=0&Layers=23,29&Filters=n,n,n,n>).

¹³ See 33 U.S.C. § 1313(d)(1)(C).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 33 U.S.C. § 1313(d)(2).

¹⁷ *Id.*

substitute TMDL for the state.¹⁸ If a state “clearly and unambiguously” decides not to submit a required TMDL to EPA, it is as though the state submitted an inadequate TMDL, and EPA must write a substitute TMDL.¹⁹

EPA’S VIOLATIONS OF THE CLEAN WATER ACT

Washington listed most of the Columbia River as not meeting water quality standards for temperature.²⁰ Washington also listed most of the Snake River from the confluence with the Columbia River upstream to Clarkston, Washington, as not meeting water quality standards for temperature.²¹ Oregon listed the Columbia River as not meeting water quality standards for temperature from the mouth to river mile 306.1, where the Columbia turns north into Washington.²² EPA concluded that a “Columbia/Snake Mainstem Temperature TMDL is necessitated” by these water quality impairments.²³

On or about October 16, 2000, EPA, Oregon, and Washington signed a Memorandum of Agreement under which EPA committed to develop a “Columbia/Snake Mainstem Temperature TMDL.”²⁴ Subsequently, in 2001, the Oregon Department of Environmental Quality and the Washington Department of Ecology requested in writing that EPA establish and issue this TMDL in Oregon and Washington.²⁵ In drafts of the Columbia/Snake Rivers Temperature TMDL, EPA committed to “establishing the TMDL for waters within the states of Washington and Oregon.”²⁶

EPA prepared drafts of the Columbia/Snake Rivers Temperature TMDL, revised as recently as September 2003. However, EPA halted work on the draft TMDL in 2003 and never completed or issued any temperature TMDL for the Columbia or Lower Snake. Since 2003—as contemplated in the Memorandum of Agreement and subsequent letters to EPA—Oregon and Washington have not established, nor worked to complete, temperature TMDLs for the Columbia and Lower Snake Rivers.

¹⁸ *Id.*

¹⁹ See *San Francisco Baykeeper v. Whitman*, 297 F.3d 877, 883 (9th Cir. 2002); *Sierra Club v. McLerran*, No. 11-cv-1759-BJR, 2015 WL 1188522 (W.D. Wash. Mar. 16, 2015); *Alaska Ctr. for the Env’t v. Reilly*, 762 F.Supp. 142 (W.D. Wash 1991).

²⁰ See Washington Department of Ecology, *2015 Water Quality Atlas* (<https://fortress.wa.gov/ecy/waterqualityatlas/map.aspx?CustomMap=y&RT=0&Layers=23,29&Filters=n,n,n,n>). While Washington has not listed every inch of the Columbia and Snake Rivers as water quality limited for temperature, Washington acknowledged, in a September 2001 letter to EPA, that “much or all of the mainstem Columbia and Snake Rivers violate water quality standards for temperature” and that the entire lengths of the Columbia and Snake rivers should be addressed in a temperature TMDL.

²¹ See Washington Department of Ecology, *2015 Water Quality Atlas* (<https://fortress.wa.gov/ecy/waterqualityatlas/map.aspx?CustomMap=y&RT=0&Layers=23,29&Filters=n,n,n,n>)
²² Oregon Department of Environmental Quality, *All Category 5 Water Quality Limited Waters needing a TMDL* (2012) (online at: <http://www.deq.state.or.us/wq/assessment/rpt2010/results303d10.asp>).

²³ U.S. EPA, *Columbia/Snake Rivers Preliminary Draft Temperature TMDL*, p. vi (July, 2003).

²⁴ See U.S. EPA, *Memorandum of Agreement re Columbia/Snake Rivers Total Maximum Daily Load for Total Dissolved Gas and Temperature* (October 16, 2000).

²⁵ *Id.* at 4, 6.

²⁶ *Id.* at 4.

By entering into the Memorandum of Agreement in 2000 and requesting in writing in 2001 that that EPA issue and establish the TMDL within their jurisdictions, and by other acts and omissions over the last 16 years, Oregon and Washington “clearly and unambiguously”²⁷ expressed their intent not to prepare or submit TMDLs for temperature on the Columbia and Lower Snake to EPA. EPA is aware that the states do not intend to submit or implement temperature TMDLs for these waterways. Accordingly, under the “constructive submission” doctrine, EPA is required to issue a temperature TMDL for these waterways.²⁸ EPA, however, has failed to issue a temperature TMDL, in violation of the Clean Water Act and the Administrative Procedures Act.²⁹

INTENT TO FILE SUIT

EPA is violating the Clean Water Act and Administrative Procedures Act, as set forth above. The citizen suit provision of the Clean Water Act authorizes any person to bring suit in Federal District Court against EPA for failing to perform a non-discretionary act or duty.³⁰ Courts have jurisdiction to order EPA to perform such acts or duties and to award costs of litigation, including reasonable attorney and expert witness fees.³¹

Columbia Riverkeeper, Idaho Rivers United, Snake River Waterkeeper, Pacific Coast Federation of Fishermen’s Associations, and the Institute for Fisheries Resources anticipate filing suit sixty days from the date of this notice in Federal District Court, requesting declaratory and injunctive relief, and attorneys fees and litigation costs. If you wish to discuss these allegations, or potential settlement of this matter, please contact the undersigned attorneys.

Sincerely,



Bryan Hurlbutt
ADVOCATES FOR THE WEST



Miles Johnson
COLUMBIA RIVERKEEPER

²⁷ *San Francisco Baykeeper v. Whitman*, 297 F.3d 877, 883 (9th Cir. 2002).

²⁸ *See, e.g., Sierra Club v. McLerran*, No. 11-cv-1759-BJR, 2015 WL 1188522 (W.D. Wash. Mar. 16, 2015); *see also, e.g., Alaska Ctr. for the Env't v. Reilly*, 762 F.Supp. 142 (W.D. Wash 1991).

²⁹ *See* 5 U.S.C. § 706(1).

³⁰ 33 U.S.C. § 1365(a)(2).

³¹ 33 U.S.C. § 1365(a), (d).

Cc via email:

Maia Bellon, Director, Washington Department of Ecology

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