



ENVIRONMENTAL LAW & POLICY CENTER

Protecting the Midwest's Environment and Natural Heritage

January 9, 2017

Via Certified Mail

Gina McCarthy, Administrator
United States Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Notice of Intent to Sue Administrator of the Environmental Protection Agency for Failure to Perform Its Nondiscretionary Duty Under the Clean Water Act

Dear Administrator McCarthy:

The Environmental Law & Policy Center (“ELPC”) is writing to notify you of our intent to file suit against the Administrator of the U.S. Environmental Protection Agency (“U.S. EPA” or “Agency”) in U.S. District Court pursuant to section 505(a)(2) of the Clean Water Act (“CWA”), 33 U.S.C. § 1365(a)(2). The basis for this intent to sue is U.S. EPA’s failure to perform its nondiscretionary duty to act on the State of Ohio’s October 20, 2016, submission of a CWA impaired waters list under 33 U.S.C. § 1313(d) within thirty days.

I. Background

A. State Impaired Waters Lists

Under the Clean Water Act, each state must adopt water quality standards that “consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses,” in order “to protect the public health or welfare, enhance the quality of water and serve the purposes of” the Act. 33 U.S.C. § 1313(c)(2)(B). CWA section 303(d) mandates that the state must then “identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters.” 33 U.S.C. § 1313(d)(1)(A). The state must also “establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.” *Id.* The determination that a particular water is not meeting an applicable water quality standard is commonly referred to as an “impairment” finding, and the full ranking as an “impaired waters” list.

Each state must submit this list of impaired waters to U.S. EPA for approval, and the agency must “approve or disapprove” the list “not later than thirty days after the date of submission.” *Id.*

§ 1313(d)(2). U.S. EPA regulations require each state to prepare and submit its impaired waters list every two years. 40 C.F.R. § 130.7(d)(1).

B. CWA Citizen Suit Provision

CWA section 505(a) states that “any citizen may commence a civil action . . . (2) against the Administrator [of U.S. EPA] where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.” 33 U.S.C. § 1365(a). A plaintiff may not bring a non-discretionary duty suit under CWA section 505(a)(2) unless, at least 60 days prior, the plaintiff has given notice of the action to the Administrator of U.S. EPA. 33 U.S.C. § 1365(b)(2). The notice “shall identify the provision of the Act which requires such act or creates such duty, shall describe with reasonable specificity the action taken or not taken by the Administrator which is alleged to constitute a failure to perform such act or duty, and shall state the full name, address and telephone number of the person giving the notice.” 40 C.F.R. 135.3(b). The notice must also “state the name, address, and telephone number of the legal counsel, if any, representing the person giving the notice.” *Id.* § 135.3(c).

II. Legal Claim

The Ohio Environmental Protection Agency (“Ohio EPA”) submitted its list of impaired waters to U.S. EPA on behalf of the State of Ohio on October 20, 2016, as part of an Integrated Water Quality Monitoring and Assessment Report (“Integrated Report”).¹ The Integrated Report designated the Lake Erie Western Basin shoreline, Lake Erie Central Basin shoreline, and Lake Erie Island shoreline as impaired due to the impacts of blooms of toxic algae on several uses, including aquatic life and public drinking water supply use. Integrated Report at D-6.

Under 33 U.S.C. § 1313(d)(2), U.S. EPA had a duty to act on that submission by November 19, 2016, or (since that was a Saturday) at least by the next business day, November 21, 2016. The Agency did not do so, and has not yet taken any action to approve or disapprove Ohio’s impaired waters list as of the writing of this letter. CWA section 505(a)(2) authorizes a suit against U.S. EPA where the agency has thus failed to carry out its mandatory duty to approve or disapprove an impaired waters list within thirty days of submission. *Hayes v. Whitman*, 264 F.3d 1017, 1023 (10th Cir. 2001). Accordingly, ELPC is providing this letter as notice of its intent to bring suit against U.S. EPA for that failure under CWA section 505(a)(2).

III. Party Giving Notice

The party giving notice of this claim is:

Environmental Law & Policy Center
21 W. Broad St., Ste. 500
Columbus, OH 43215
(614) 670-5586

¹ See <http://www.epa.ohio.gov/dsw/tmdl/OhioIntegratedReport.aspx>.

We encourage you to contact us as soon as possible should you desire to discuss the allegations set forth in this letter. If this matter is not resolved to our satisfaction, we will file suit on or after the sixtieth day following the date of this letter.

Sincerely,



Madeline Fleisher
Staff Attorney
Environmental Law & Policy Center
21 W. Broad St., Ste. 500
Columbus, OH 43215
(614) 670-5586

Copies by certified mail to:

Hon. Loretta Lynch
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Craig Butler, Director
Ohio Environmental Protection Agency
P.O. Box 1049
Columbus, Ohio 43216-1049

Robert Kaplan
Acting Regional Administrator
U.S. Environmental Protection Agency, Region 5
77 West Jackson Boulevard
Mail Code R-19
Chicago, IL 60604-3507