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APPALACHIAN MOUNTAIN ADVOCATES

Great Horned Owl © Estate of Roger Tory Peterson

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November 7, 2014

By Certified Mail – Return Receipt Requested

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

AX 15-000-1509

The Honorable Shawn M. Garvin
Regional Administrator
U.S. Environmental Protection Agency Region III
1650 Arch Street
Philadelphia, PA 19103-2029

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U.S. ENVIRONMENTAL PROTECTION AGENCY

Re: 60-Day Notice of Intent to File Citizen Suit(s) Under Clean Water Act Section 505(a)(2) For EPA's Failure to Perform Nondiscretionary Duties Related to West Virginia's Total Maximum Daily Loads

Dear Ms. McCarthy and Mr. Garvin:

The Sierra Club, West Virginia Highlands Conservancy, the West Virginia Rivers Coalition and Ohio Valley Environmental Coalition (collectively "the Groups") in accordance with Section 505 of the Clean Water Act (the "Act" or the "CWA"), 33 U.S.C. § 1365 and 40 C.F.R. Part 135, hereby notify you that you have failed to perform acts and duties pursuant to Section 303 of the Act that are not discretionary. If you do not remedy this failure within the next sixty days, the Groups intend to file suit.

I. Background

Congress enacted the Clean Water Act in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 12519a). The goal of the Clean Water Act is to eliminate "the discharge of pollutants

into the navigable waters,” and in the interim, to attain “water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water.” 33 U.S.C. § 1251(a)(1) & (2). To achieve those ends, Section 303 of the Clean Water Act requires each State to establish and implement water quality standards, subject to review and approval by EPA. 33 U.S.C. §§ 1313(a)–(c), 1362(3). Water quality standards consist of the “designated uses of a state’s waters” and “the water quality criteria for such waters based upon such uses,” and “shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of” the Clean Water Act. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 130.2(d).

The CWA requires each State to “identify those waters within its boundaries for which the [technology-based] effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of [the CWA] are not stringent enough to implement any water quality standard applicable to such waters.” 33 U.S.C. § 1313(d)(1)(A). For the waters thus identified, “[e]ach State shall establish . . . the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation.” 33 U.S.C. § 1313(d)(1)(C). Pursuant to Section 1314(a)(2), EPA has identified “[a]ll pollutants” as being suitable for total maximum daily load (“TMDL”) calculation. 43 Fed. Reg. 60,665 (Dec. 28, 1978). The CWA requires that “TMDLs shall be established for all pollutants preventing or expected to prevent attainment of water quality standards. . . .” 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. § 130.7(c)(1)(ii).

Section 303(d) further provides that TMDLs “shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.” 33 U.S.C. § 1313(d)(1)(C). EPA regulations likewise provide that “TMDLs shall be established at levels necessary to attain and maintain the applicable narrative and numerical water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality. Determinations of TMDLs shall take into account critical conditions for stream flow, load, and water quality parameters.” 40 C.F.R. § 130.7(c)(1).

Although States have the primary responsibility to develop TMDLs, EPA retains a critical role in reviewing those submissions and developing its own TMDLs where state submissions are inadequate. 33 U.S.C. § 1313(d)(2). Submission of TMDLs by states triggers EPA’s duty to “either approve or disapprove such . . . load not later than thirty days after the date of submission.” *Id.* “If the Administrator disapproves such identification and load, he shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such water and upon such identification and establishment the State shall incorporate them into

its current plan under subsection (3) of this section.” *Id.* Pursuant to 40 C.F.R. § 130.7(d)(2), the Administrator has delegated her authorities and nondiscretionary duties under 33 U.S.C. § 1313(d)(2) to the Regional Administrators. The duties prescribed by 33 U.S.C. § 1313(d)(2) and 40 C.F.R. § 130.7(d)(2) will form the basis of the Groups’ citizen suit.

Since 1998, the State of West Virginia has identified more than 600 waters within its boundaries as biologically impaired because the narrative water quality standards are not being met in those waters. Specifically, 47 C.S.R. § 2-3.2.i prohibits the presence of wastes in State waters that cause or contribute to significant adverse impact to the chemical, physical, hydrologic, or biologic components of aquatic ecosystems. The State of West Virginia—through the West Virginia Department of Environmental Protection (“WVDEP”)—historically assessed the biological integrity of the State’s streams using a benthic macroinvertebrate index called the West Virginia Stream Condition Index (“WVSCI”). If the WVSCI revealed a score below a certain threshold, WVDEP would add the stream at issue to the list of impaired waters pursuant to Section 303(d).

During the TMDL process, West Virginia seeks to identify the stressor causing the biological impairment. The candidate stressors that WVDEP considers include: (1) metals contamination, (2) acidity, (3) high pH, (4) ionic toxicity, (5) organic enrichment, (6) embeddedness, (7) total suspended solids, (8) increased water temperature, (9) reduced dissolved oxygen, (10) algal growth, (11) ammonia toxicity, and (12) chemical spills. WVDEP develops TMDLs to address the identified stressor—or adopts TMDLs on surrogate pollutants—for all stressors but one. If WVDEP identifies ionic toxicity as the cause of the impairment, WVDEP refuses to develop a TMDL to address that stressor.

Indeed, between 2005 and 2012, WVDEP “deferred” developing a TMDL for biologically impaired streams suffering from ionic toxicity on at least 7 occasions and flatly refused to develop TMDLs for ionic toxicity on at least two occasions—leaving 179 waters in West Virginia impaired with no realistic hope of recovery. Tetra Tech, Inc., TMDLs for Selected Streams in the Upper Kanawha Watershed, West Virginia at 25 (2005); Tetra Tech, Inc., Total Maximum Daily Loads for Selected Streams in the Coal River Watershed, West Virginia at 35 (2005); Tetra Tech, Inc., Total Maximum Daily Loads for Selected Streams in the Gauley River Watershed, West Virginia at 37 (2008); Tetra Tech, Inc., Total Maximum Daily Loads for Selected Streams in the Upper Ohio South River Watershed, West Virginia at 17 (2009); Tetra Tech, Inc., Total Maximum Daily Loads for Selected Streams in the Dunkard Watershed, West Virginia at 15 (2009); Tetra Tech, Inc., Total Maximum Daily Loads for Selected Streams in the Lower Kanawha River Watershed, West Virginia at 22–23 (2012); Tetra Tech, Inc., Total Maximum Daily Loads for Selected Streams in the Elk River Watershed, West Virginia at 24 (2012); Tetra Tech, Inc., Total Maximum Daily Loads for Selected Streams in the Monongahela River Watershed, West Virginia at 17 23–24 (2014); Tetra Tech, Inc.,

Total Maximum Daily Loads for the West Fork River Watershed, West Virginia at App, K (2014). In 2014, however, WVDEP made clear its intention not to develop TMDLs to address ionic toxicity and not to adhere to its commitments to do so. Tetra Tech, Inc., Total Maximum Daily Loads for Selected Streams in the Monongahela River Watershed, West Virginia at 17 (2014) (“WVDEP has . . . suspended biological impairment TMDL development . . .”); Tetra Tech, Inc., Total Maximum Daily Loads for the West Fork River Watershed, West Virginia at 18 (2014) (same).

II. EPA Has A Nondiscretionary Duty to Disapprove West Virginia’s Actual Submission of No TMDLs for Biological Impairment Caused by Ionic Stress

EPA has a duty under the CWA to ensure that states do not thwart the purposes of Section 303 through inaction. Congress intended that TMDLs be established promptly, in matter of months or a few years, not decades. Idaho Sportsmen’s Coalition v. Browner, 951 F. Supp. 962, 967 (W.D. Wash. 1996). Accordingly, EPA must act when State inaction threatens to undermine the implementation of the CWA. As the Seventh Circuit explained in Scott v. City of Hammond, Ind.,

We think it unlikely that an important aspect of the federal scheme of water pollution control could be frustrated by the refusal of states to act. This is especially true in light of the short time limits both on a state’s action [with regard to TMDLs], and on the EPA’s required reaction to the state submission. . . . [W]e do not believe that Congress intended that the states by inaction could prevent the implementation of TMDL’s.

741 F.2d 992, 997 (7th Cir. 1984). Here, West Virginia’s inaction is preventing the implementation of TMDLs for ionic stress, leaving a vast swath of West Virginia’s streams impaired without tools for recovery.

When West Virginia informed EPA, as it did in its submission of the TMDLs for the Monongahela River Watershed on February 14, 2014 and in its submission of the TMDLs for the West Fork Watershed on June 26, 2014 (if not earlier), that it was not going to develop TMDLs for biological impairments, that constituted the actual submission of no TMDLs for the affected streams. Amer. Canoe Ass’n v. U.S. E.P.A., 54 F. Supp. 2d 621, 628 n. 18 (E.D. Va. 1999) (explaining that, where a state “communicate[s] expressly to EPA prior to a scheduled deadline that it would not or could not comply with the schedule,” it constitutes “an actual (rather than constructive) submission of ‘no TMDLs’, which . . . would trigger EPA’s responsibility to approve or disapprove the submission and promulgate TMDLs in the event of disapproval” (emphasis original)). WVDEP’s actual submission of no TMDLs for biological impairment triggered EPA’s nondiscretionary duties under 33 U.S.C. § 1313(d)(2) to disapprove of WVDEP’s submission and to develop its own TMDLs for biological

impairment for the relevant streams. Neither the Administrator of EPA nor the Regional Administrator of EPA Region III performed those duties within the statutorily prescribed timeframes. Accordingly, Plaintiffs intend to sue the Administrator and Regional Administrator for Region III pursuant to Section 505(a)(2) of the Clean Water Act if they do not perform those duties within 60 days of the postmark of this letter.

The streams for which EPA has failed to perform its duties to disapprove WVDEP's actual submission of no TMDL and to develop its own TMDLs include the following streams, which WVDEP has determined are biologically impaired due to ionic stress:

TABLE 1

Stream	Watershed	Year of Stressor Identification
Pointlick Fork of Campbells Creek	Upper Kanawha	2005
Rattlesnake Hollow of Campbells Creek	Upper Kanawha	2005
Wet Branch of Cabin Creek	Upper Kanawha	2005
Coal Fork of Cabin Creek	Upper Kanawha	2005
James Branch	Coal River	2005
Ellis Creek	Coal River	2005
Rockhouse Creek	Coal River	2005
Toney Fork	Coal River	2005
Buffalo Fork	Coal River	2005
Left Fork/Beech Creek	Coal River	2005
Seng Creek	Coal River	2005
Scrabble Creek	Gauley River	2008
Left Fork of Scrabble Creek	Gauley River	2008
Boardtree Branch	Gauley River	2008
Sugarcamp Branch	Gauley River	2008
Stillhouse Branch	Gauley River	2008
Robinson Fork	Gauley River	2008
Boggs Run	Upper Ohio River South	2009
UNT/Boggs Run RM 2.69	Upper Ohio River South	2009
Browns Run	Upper Ohio River South	2009
Graeb Hollow	Upper Ohio River South	2009
Short Creek	Upper Ohio River South	2009

Girty Run	Upper Ohio River South	2009
North Fork/Short Creek	Upper Ohio River South	2009
Huff Run	Upper Ohio River South	2009
UNT/Ohio River MP 79.4	Upper Ohio River South	2009
Miracle Run	Dunkard Creek	2009
Building Run	Dunkard Creek	2009
West Virginia Fork/Dunkard Creek	Dunkard Creek	2009
South Fork/West Virginia Fork/Dunkard Creek	Dunkard Creek	2009
Joplin Creek	Lower Kanawha	2012
Leatherwood Creek	Elk River	2012
Right Fork/Leatherwood Creek	Elk River	2012
Road Fork	Elk River	2012
Big Branch	Elk River	2012
Birch River	Elk River	2012
Jacks Run	Elk River	2012
Camp Run	Monongahela River	2014
Scotts Run	Monongahela River	2014
Wades Run	Monongahela River	2014
Guston Run	Monongahela River	2014
Dents Run	Monongahela River	2014
Flaggy Meadow Run	Monongahela River	2014
UNT/Dents Run RM 5.82	Monongahela River	2014
Hartman Run	Monongahela River	2014
Owl Creek	Monongahela River	2014
UNT/Camp Run RM 0.79	Monongahela River	2014
Crooked Run	Monongahela River	2014
Flaggy Meadow Run	Monongahela River	2014
UNT/Flaggy Meadow Run RM 2.15	Monongahela River	2014
Indian Creek	Monongahela River	2014
Little Indian Creek	Monongahela River	2014
Snider Run	Monongahela River	2014
UNT/Little Indian Creek	Monongahela River	2014
UNT/Indian Creek RM 3.19	Monongahela River	2014
UNT/Indian Creek RM 7.23	Monongahela River	2014
Paw Paw Creek	Monongahela River	2014
Sugar Run	Monongahela River	2014
Harvey Run	Monongahela River	2014

Buffalo Creek	Monongahela River	2014
Whetstone Run	Monongahela River	2014
Pyles Fork	Monongahela River	2014
Flat Run	Monongahela River	2014
Llewellyn Run	Monongahela River	2014
UNT/Monongahela River RM 128.55	Monongahela River	2014
West Run	Monongahela River	2014
Robinson Run	Monongahela River	2014
Crafts Run	Monongahela River	2014
UNT/Robinson Run RM 1.09	Monongahela River	2014
UNT/Robinson Run RM 4.09	Monongahela River	2014
UNT/Booths Creek RM 1.39	West Fork	2014
UNT Booths Creek RM 4.11	West Fork	2014
UNT/Booths Creek RM 4.81	West Fork	2014
Horners Run	West Fork	2014
Purdys Run	West Fork	2014
Coons Run	West Fork	2014
Camp Run	West Fork	2014
Bingamon Creek	West Fork	2014
Elklick Run	West Fork	2014
Cunningham Run	West Fork	2014
Glade Fork	West Fork	2014
Harris Fork	West Fork	2014
UNT/Harris Fork RM 0.65	West Fork	2014
UNT/West Fork River RM 11.44	West Fork	2014
Laurel Run	West Fork	2014
UNT/West Fork River RM 13.10	West Fork	2014
Mudlick Run	West Fork	2014
UNT/West Fork River RM 13.91	West Fork	2014
Browns Run	West Fork	2014
Shinns Run	West Fork	2014
UNT/Shinns Run RM 3.69	West Fork	2014
UNT/Shinns Run RM 4.15	West Fork	2014
UNT/Shinns Run RM 5.61	West Fork	2014
UNT/Shinns Run RM 5.97	West Fork	2014
Robinson Run	West Fork	2014
Tenmile Creek	West Fork	2014
Jack Run	West Fork	2014
Jones Creek	West Fork	2014
Little Tenmile Creek	West Fork	2014
Peters Run	West Fork	2014

UNT/Little Tenmile Creek RM 1.91	West Fork	2014
Bennett Run	West Fork	2014
Isaac Creek	West Fork	2014
Gregory Run	West Fork	2014
Katy Lick Run	West Fork	2014
Flag Run	West Fork	2014
UNT/Tenmile Creek RM 10.82	West Fork	2014
Rockcamp Run	West Fork	2014
UNT/Tenmile Creek RM 22.53	West Fork	2014
UNT/West Fork River RM 20.42	West Fork	2014
Simpson Creek	West Fork	2014
UNT/Simpson Creek RM 1.23	West Fork	2014
Jack Run	West Fork	2014
Smith Run	West Fork	2014
Barnett Run	West Fork	2014
Beards Run	West Fork	2014
Berry Run	West Fork	2014
Right Fork/Simpson Creek	West Fork	2014
UNT/Simpson Creek RM 21.92	West Fork	2014
Buck Run	West Fork	2014
Sand Lick Run	West Fork	2014
Gabe Fork	West Fork	2014
Bartlett Run	West Fork	2014
UNT/Simpson Creek RM 22.72	West Fork	2014
West Branch/Simpson Creek	West Fork	2014
UNT/West Branch RM 0.63/Simpson Creek	West Fork	2014
Stillhouse Run	West Fork	2014
UNT/West Branch RM 1.57/Simpson Creek	West Fork	2014
Camp Run	West Fork	2014
UNT/Simpson Creek RM 26.94	West Fork	2014
Lambert Run	West Fork	2014
UNT/Lambert Run RM 2.77	West Fork	2014
Jack Run	West Fork	2014
Fall Run	West Fork	2014
Crooked Run	West Fork	2014
Limestone Run	West Fork	2014
Stone Coal Run	West Fork	2014
Simpson Fork	West Fork	2014
Johnson Fork	West Fork	2014
Elk Creek	West Fork	2014
Murphy Run	West Fork	2014

Ann Moore Run	West Fork	2014
Nutter Run	West Fork	2014
Turkey Run	West Fork	2014
Hooppole Run	West Fork	2014
Brushy Fork	West Fork	2014
Coplin Run	West Fork	2014
Glade Run	West Fork	2014
Stonecoal Run	West Fork	2014
Gnatty Creek	West Fork	2014
Rooting Creek	West Fork	2014
Right Branch/Gnatty Creek	West Fork	2014
Charity Fork	West Fork	2014
Left Branch/Gnatty Creek	West Fork	2014
Stouts Run	West Fork	2014
Birds Run	West Fork	2014
Arnold Run	West Fork	2014
Isaacs Run	West Fork	2014
Stewart Run	West Fork	2014
UNT/Elk Creek RM 27.87	West Fork	2014
Davisson Run	West Fork	2014
Washburncamp Run	West Fork	2014
Browns Creek	West Fork	2014
Coburns Creek	West Fork	2014
Sycamore Creek	West Fork	2014
Lost Creek	West Fork	2014
UNT/Lost Creek RM 3.32	West Fork	2014
Bonds Run	West Fork	2014
Buffalo Creek	West Fork	2014
Duck Creek	West Fork	2014
Two Lick Creek	West Fork	2014
Hackers Creek	West Fork	2014
McKinney Run	West Fork	2014
Stony Run	West Fork	2014
Browns Run	West Fork	2014
Grass Run	West Fork	2014
Right Fork/Stonecoal Creek	West Fork	2014
UNT/Sycamore Creek RM 3.04	West Fork	2014
Washburn Run	West Fork	2014

The streams for which EPA has failed to perform its duties to disapprove WVDEP's submission of no TMDL and to develop its own TMDLs also include the following streams, listed as biologically impaired on WVDEP's 2012 Section 303(d) list:

Table 2

Stream	Watershed
Jennie Creek	Tug Fork
Marrowbone Creek	Tug Fork
Pigeon Creek (Mouth to RM 21.5)	Tug Fork
Pigeon Creek (RM 21.5 to 25)	Tug Fork
Pigeon Creek (RM 25 to 30.8)	Tug Fork
Pigeon Creek (RM 30.8 to HW)	Tug Fork
Ben Creek	Tug Fork
White Oak Hollow	Tug Fork
Elkhorn Creek	Tug Fork
Longbottom Creek (Mouth to RM 0.8)	Upper Kanawha
Longbottom Creek (RM 0.8 to RM 1.8)	Upper Kanawha
Tenmile Fork	Upper Kanawha
Coal River	Coal River
Little Marsh Fork (Mouth to RM 3.8)	Coal River
Little Marsh Fork (RM 3.8 to HW)	Coal River
Ewing Fork	Coal River
Wilson Branch	Lower New River
UNT/Little Creek RM 3.19	Monongahela River
Booths Creek	Monongahela River
Brand Run (Mouth to RM 1.8)	Monongahela River
Brand Run (RM 1.8 to HW)	Monongahela River
Little Creek	Monongahela River
Scratchers Run	Monongahela River
UNT/Crooked Run RM 2.27	Monongahela River
Mod Run	Monongahela River
Joes Run	Monongahela River
Owen Davy Fork	Monongahela River
Bartholomew Fork	Monongahela River
Hickman Run	Monongahela River
Deckers Creek (Mouth to RM 5.7)	Monongahela River
Deckers Creek (RM 5.7 to RM 8.9)	Monongahela River
Deckers Creek (RM 8.9 to RM 18.5)	Monongahela River
Deckers Creek (RM 18.5 to RM 20.5)	Monongahela River
Aaron Creek	Monongahela River
UNT/Deckers Creek RM 5.70	Monongahela River
Glady Run	Monongahela River
Three Fork Creek	Tygart Valley
Raccoon Creek	Tygart Valley

Gooney Otter Creek	Upper Guyandotte
Littles Creek	Upper Guyandotte
Guyandotte River (Lower)	Lower Guyandotte
Parsner Creek	Lower Guyandotte
Laurel Run	North Branch Potomac
South Fork/South Branch Potomac River	South Branch Potomac
Gravel Lick Run	South Branch Potomac
UNT/Warm Spring Run RM 7.96	Potomac Direct Drains
Brains Creek	Tygart Valley
UNT/UNT RM 0.56/Sandy Creek RM 10.47	Tygart Valley
UNT Booths Creek RM 7.43	Monongahela River
Prickett Creek	Monongahela River
Moody Run	Monongahela River
State Road Fork	Monongahela River
Warrior Fork	Monongahela River
Webster Run	Lower New River
Scheidler Run	Middle Ohio North
Left Fork/Slab Creek	Little Kanawha
Tanner Fork	Little Kanawha
Squealing Fork	Lower New
UNT/Sal Willis Branch RM 0.73	Lower New
Buckles Branch	Gauley River
UNT/Williams River RM 15.86	Gauley River
Pigeonroost Fork	Elk River
Laurel Creek	Elk River
Fork Creek	Coal River
UNT/Greens Run RM 6.88	Cheat
Smoky Hollow	Cheat
UNT/Beaver Creek RM 11.91	Cheat
Yellow Creek	Cheat
Freeland Run	Cheat
Tory Camp Run	Cheat
Capon Run	Shenandoah (Hardy)
Crab Run	Shenandoah (Hardy)
UNT/South Branch Potomac River RM 10.37	South Branch Potomac
UNT/South Branch Potomac River RM 21.86	South Branch Potomac
Buffalo Creek	South Branch Potomac
Dumpling Run	South Branch Potomac
Mayhew Run	South Branch Potomac

Anderson Run	South Branch Potomac
Mudlick Run	South Branch Potomac
UNT/Mudlick Run RM 2.88	South Branch Potomac
Dumpling Run	South Branch Potomac
UNT/South Branch Potomac River RM 40.44	South Branch Potomac
Hawes Run	South Branch Potomac
Miller Run	South Branch Potomac
UNT/South Branch Potomac River RM 59.19	South Branch Potomac
North Mill Creek	South Branch Potomac
Robinson Run	South Branch Potomac
South Fork/Lunice Creek	South Branch Potomac
Powers Hollow	South Branch Potomac
Jordan Run	South Branch Potomac
Mill Creek	South Branch Potomac
Judy Run	South Branch Potomac
Reeds Creek	South Branch Potomac
Deer Run	South Branch Potomac
East Dry Run	South Branch Potomac
Mission Hollow (Venable Branch)	Upper Kanawha
Lower Donnally Branch	Upper Kanawha
Big Ninemile Fork	Upper Kanawha
Georges Creek	Upper Kanawha
New West Hollow	Upper Kanawha
Toms Fork	Upper Kanawha
UNT/Tenmile Fork RM 1.22	Upper Kanawha
Kellys Creek	Upper Kanawha
Horsemill Branch	Upper Kanawha
Sugarcamp Branch	Upper Kanawha
Bufflick Branch	Upper Kanawha
Hurricane Fork	Upper Kanawha
Banner Hollow	Upper Kanawha
Sycamore Branch	Upper Kanawha
Cedar Creek	Upper Kanawha
Bishop Fork	Upper Kanawha
Mossy Creek	Upper Kanawha
North Sand Branch	Upper Kanawha
Maple Fork	Upper Kanawha
Hughes Creek	Upper Kanawha
Martin Hollow	Upper Kanawha

Barn Hollow	Upper Kanawha
Smithers Creek	Upper Kanawha
Bullpush Fork	Upper Kanawha
Dempsey Branch	Upper Kanawha
Mahan Run	Upper Ohio North
Holbert Run	Upper Ohio North
Laurel Hollow (Muchmores Run)	Upper Ohio North
Middle Run	Upper Ohio North
Marks Run	Upper Ohio North
Youghiogheny River	Youghiogheny
Fuquay Creek	Coal River
Ely Fork	Coal River
Slippery Gut Branch	Coal River
Spruce Fork	Coal River
Trace Fork	Coal River
Hopkins Fork	Coal River
Rock Creek	Coal River
Spanker Branch	Coal River
Wickwire Run	Tygart Valley
Squires Creek	Tygart Valley
UNT/Birds Creek RM 2.57	Tygart Valley
Little Sandy Creek	Tygart Valley
Sugar Creek	Tygart Valley
Long Run	Tygart Valley
Hackers Creek	Tygart Valley
Foxgrape Run	Tygart Valley
Big Run	Tygart Valley
Childers Run	Tygart Valley
Wash Run	Tygart Valley
Sawmill Run	Tygart Valley
Laurel Run/Buckhannon River	Tygart Valley
Hooppole Run	Tygart Valley
Three Forks Run	Tygart Valley
Pleasant Run	Tygart Valley
Rocky Run	Tygart Valley
Craven Run	Tygart Valley
Davis Lick	Tygart Valley
Laurel Run	Tygart Valley
Riffle Creek	Tygart Valley
Right Fork/Robinson Fork	Gauley
Big Ditch Run	Gauley

Tanyard Branch	Lower Guyandotte
Little Cabell Creek	Lower Guyandotte
Big Cabell Creek	Lower Guyandotte
Fudges Creek	Lower Guyandotte
Wire Branch	Lower Guyandotte
Mill Creek	Lower Guyandotte
Right Fork/Mill Creek	Lower Guyandotte
Johns Branch	Lower Guyandotte
Indian Fork	Lower Guyandotte
Charley Creek	Lower Guyandotte
Trace Creek	Lower Guyandotte
Trace Fork	Lower Guyandotte
Coon Creek	Lower Guyandotte
Straight Fork	Lower Guyandotte
Meadow Branch	Lower Guyandotte
Straight Fork	Lower Guyandotte
Valley Fork	Lower Guyandotte
Sugartree Fork	Lower Guyandotte
Big Creek	Lower Guyandotte
Left Fork/Mud River	Lower Guyandotte
Stinson Branch	Lower Guyandotte
Upton Branch	Lower Guyandotte
Ballard Fork	Lower Guyandotte
Davis Creek	Lower Guyandotte
Edens Branch	Lower Guyandotte
Smith Creek	Lower Guyandotte
Cavill Creek	Lower Guyandotte
Madison Creek	Lower Guyandotte
Twomile Creek	Lower Guyandotte
Fourmile Creek	Lower Guyandotte
Ninemile Creek	Lower Guyandotte
Tenmile Creek	Lower Guyandotte
Lick Branch	Lower Guyandotte
Aarons Creek	Lower Guyandotte
Laurel Creek	Lower Guyandotte
Dry Run	Lower Guyandotte
Short Bend Fork	Lower Guyandotte
Laurel Fork	Lower Guyandotte
West Fork/Big Harts Creek	Lower Guyandotte
Smokehouse Fork	Lower Guyandotte
Buck Fork	Lower Guyandotte

Bulwark Branch	Lower Guyandotte
Vickers Branch	Lower Guyandotte
UNT/Big Creek RM 3.28	Lower Guyandotte
Trace Fork	Lower Guyandotte
Hurricane Branch	Lower Guyandotte
Garrett Fork	Lower Guyandotte
Perrys Branch	Lower Guyandotte
South Fork/Crawley Creek	Lower Guyandotte
Fowler Branch	Lower Guyandotte
Mill Creek	Lower Guyandotte
Middle Island Creek	Middle Ohio North Watershed
McKim Creek	Middle Ohio North Watershed
Sugar Creek	Middle Ohio North Watershed
Sancho Creek	Middle Ohio North Watershed
Point Pleasant Creek	Middle Ohio North Watershed
Pursley Creek	Middle Ohio North Watershed
Peach Fork	Middle Ohio North Watershed
Gorrell Run	Middle Ohio North Watershed
Indian Creek	Middle Ohio North Watershed
Big Battle Run	Middle Ohio North Watershed
Wilhelm Run	Middle Ohio North Watershed
Right Fork/Arnold Creek	Middle Ohio North Watershed
Meathouse Fork	Middle Ohio North Watershed
Buckeye Run	Middle Ohio North Watershed
Cow Hollow Run	Middle Ohio North Watershed
Doolin Run	Middle Ohio North Watershed
Little Fishing Creek	Middle Ohio North Watershed
South Fork/Fishing Creek	Middle Ohio North Watershed
Buffalo Run	Middle Ohio North Watershed
Arches Fork	Middle Ohio North Watershed
Fallen Timber Run	Middle Ohio North Watershed
Price Run	Middle Ohio North Watershed
Proctor Creek	Middle Ohio North Watershed
Oldtown Creek	Middle Ohio South Watershed
Turkey Run	Middle Ohio South Watershed
Potter Creek	Middle Ohio South Watershed
UNT/Robinson Run RM 2.42	Middle Ohio South Watershed
Mill Run	Middle Ohio South Watershed
Tenmile Creek	Middle Ohio South Watershed
UNT/Tenmile Creek RM 5.33	Middle Ohio South Watershed
Sliding Hill Creek	Middle Ohio South Watershed

UNT/Sliding Hill Creek RM 1.25	Middle Ohio South Watershed
Little Broad Run	Middle Ohio South Watershed
Little Mill Creek	Middle Ohio South Watershed
Mill Creek	Middle Ohio South Watershed
Bar Run	Middle Ohio South Watershed
Cow Run	Middle Ohio South Watershed
Left Fork/Cow Run	Middle Ohio South Watershed
Parchment Creek	Middle Ohio South Watershed
Cox Fork	Middle Ohio South Watershed
Wolfe Creek	Middle Ohio South Watershed
Sycamore Creek	Middle Ohio South Watershed
Left Fork/Sycamore Creek	Middle Ohio South Watershed
Grasslick Creek	Middle Ohio South Watershed
Bear Fork	Middle Ohio South Watershed
Elk Fork	Middle Ohio South Watershed
Little Mill Creek	Middle Ohio South Watershed
Frozenscamp Creek	Middle Ohio South Watershed
Little Creek	Middle Ohio South Watershed
Buffalo Creek	Middle Ohio South Watershed
Spring Creek	Middle Ohio South Watershed
Cedar Run	Middle Ohio South Watershed
Sandy Creek	Middle Ohio South Watershed
Crooked Fork	Middle Ohio South Watershed
Trace Fork	Middle Ohio South Watershed
Beatty Run	Middle Ohio South Watershed
Right Fork/Sandy Creek	Middle Ohio South Watershed
Left Fork/Sandy Creek	Middle Ohio South Watershed
Copper Fork	Middle Ohio South Watershed
Turkey Fork	Middle Ohio South Watershed
Nessleroad Run	Middle Ohio South Watershed
Washington Run	Middle Ohio South Watershed
Pond Creek	Middle Ohio South Watershed
Jesse Run	Middle Ohio South Watershed
South Fork/Lee Creek	Middle Ohio South Watershed
North Fork/Lee Creek	Middle Ohio South Watershed
Gunners Run	Middle Ohio South Watershed
Sandy Creek	Middle Ohio South Watershed
Vaughts Run	Middle Ohio South Watershed
UNT/Sandy Creek RM 4.97	Middle Ohio South Watershed
Pond Run	Middle Ohio South Watershed
Little Pond Run	Middle Ohio South Watershed

Briscoe Run	Middle Ohio South Watershed
Big Run	Middle Ohio South Watershed
Plum Run	Middle Ohio South Watershed
Hogland Run	Middle Ohio South Watershed
Rattlesnake Run	Potomac Direct Drains
Rockymarsh Run	Potomac Direct Drains
UNT/Opequon Creek RM 10.21	Potomac Direct Drains
Roaring Run	Potomac Direct Drains
Middle Fork/Sleepy Creek	Potomac Direct Drains
Warm Spring Run	Potomac Direct Drains
Tug Fork	Tug Fork
Mill Creek	Tug Fork
Lost Creek	Tug Fork
Silver Creek	Tug Fork
Parsley Big Branch	Tug Fork
Sulphur Creek	Tug Fork
Greenbrier Fork	Tug Fork
Wolfpen Branch	Tug Fork
Mountain Fork	Tug Fork
Middle Fork/Big Creek	Tug Fork
Beech Fork	Tug Fork
Spice Creek	Tug Fork
Badway Branch	Tug Fork
Davy Branch	Tug Fork
Upper Shannon Branch	Tug Fork
Browns Creek	Tug Fork
Puncheoncamp Branch	Tug Fork
Rock Narrows Branch	Tug Fork
UNT/Stony Run RM 1.12	Greenbrier
Howard Creek	Greenbrier
Walker Creek	Little Kanawha
Goose Creek	Little Kanawha
South Fork/Hughes River	Little Kanawha
Indian Creek	Little Kanawha
Bone Creek	Little Kanawha
Middle Fork/South Fork/Hughes River	Little Kanawha
Beech Run	Little Kanawha
Laurel Run	Little Kanawha
Sang Run	Little Kanawha
Leading Creek	Little Kanawha
Rush Run	Little Kanawha

Right Fork/Steer Creek	Little Kanawha
Left Fork/Steer Creek	Little Kanawha
White Oak Run	Little Kanawha
Steer Run	Little Kanawha
Bender Run	Little Kanawha
Tanner Creek	Little Kanawha
Butchers Run	Little Kanawha
Sand Fork	Little Kanawha
Copen Run	Little Kanawha
Hamilton Branch	Lower New
Bowyer Creek	Lower New
UNT/Finchs Run RM 1.15	Monongahela River
UNT/Bethel Run RM 0.80	Monongahela River
Mahan Run	Monongahela River
Campbell Run	Monongahela River
UNT/Jumping Branch RM 2.48	Upper New
East River	Upper New
Miller Creek	Big Sandy
Cedar Run	Big Sandy
Whites Creek	Big Sandy
Gragston Creek	Big Sandy
Elijah Creek	Big Sandy
Gilkerson Branch	Big Sandy
Hurricane Creek	Big Sandy
Sugar Branch	Big Sandy
Tabor Creek	Big Sandy
Redhead Branch	Big Sandy
Hiett Run	Cacapon
UNT/Bearwallow Creek RM 0.98	Cacapon
UNT/Mill Branch RM 1.99	Cacapon
Upper Cove Run	Cacapon
Dawson Run	Cacapon
Little Cacapon River	Cacapon
Fourpole Creek	Lower Ohio
Sevenmile Creek	Lower Ohio
Ninemile Creek	Lower Ohio
Guyan Creek	Lower Ohio
Spurlock Creek	Lower Ohio
McCowan Branch	Lower Ohio
Rocky Fork	Lower Ohio
Mud Run	Lower Ohio

Sixteenmile Creek	Lower Ohio
Stonecoal Run	Lower Ohio
Crab Creek	Lower Ohio
Mud Run	Lower Ohio
Middle Fork/Crab Creek	Lower Ohio
Twelvepole Creek	Twelvepole Watershed
Krout Creek	Twelvepole Watershed
UNT/Twelvepole Creek RM 5.72	Twelvepole Watershed
Buffalo Creek	Twelvepole Watershed
Camp Creek	Twelvepole Watershed
Right Fork/Camp Creek	Twelvepole Watershed
Beech Fork	Twelvepole Watershed
Rubens Branch	Twelvepole Watershed
Long Branch	Twelvepole Watershed
Butler Branch	Twelvepole Watershed
Lynn Creek	Twelvepole Watershed
Left Fork/Wilson Creek	Twelvepole Watershed
Toms Creek	Twelvepole Watershed
West Fork/Twelvepole Creek	Twelvepole Watershed
Big Branch	Twelvepole Watershed
Trace Fork	Twelvepole Watershed
Billy Branch	Twelvepole Watershed
Wells Branch	Twelvepole Watershed
Moses Fork	Twelvepole Watershed
Right Fork/Moses Fork	Twelvepole Watershed
Breeden Creek	Twelvepole Watershed
Moses Fork	Twelvepole Watershed
East Fork/Twelvepole Creek	Twelvepole Watershed
Lynn Creek	Twelvepole Watershed
Cove Creek	Twelvepole Watershed
Kiah Creek	Twelvepole Watershed
Parker Branch	Twelvepole Watershed
Copley Trace Branch	Twelvepole Watershed
Jims Branch	Twelvepole Watershed
Maynard Branch	Twelvepole Watershed
Honey Branch	Twelvepole Watershed
Island Creek	Upper Guyandotte
Rockhouse Branch	Upper Guyandotte
Whitman Creek	Upper Guyandotte
Curry Branch	Upper Guyandotte
Mill Creek	Upper Guyandotte

Pine Creek	Upper Guyandotte
Right Fork/Pine Creek	Upper Guyandotte
Cow Creek	Upper Guyandotte
Lower Dempsey Branch	Upper Guyandotte
Dingess Run	Upper Guyandotte
Rum Creek	Upper Guyandotte
Right Hand Fork/Rum Creek	Upper Guyandotte
Burgess Branch	Upper Guyandotte
Camp Branch	Upper Guyandotte
Right Fork/Buffalo Creek	Upper Guyandotte
Perry Branch	Upper Guyandotte
Robinette Branch	Upper Guyandotte
Middle Fork/Buffalo Creek	Upper Guyandotte
Paynter Branch	Upper Guyandotte
Lefthand Fork/Rockhouse Creek	Upper Guyandotte
Right Fork/Sandlick Creek	Upper Guyandotte
Spice Creek	Upper Guyandotte
Stafford Branch	Upper Guyandotte
Browning Fork	Upper Guyandotte
Little Huff Creek	Upper Guyandotte
Little Cub Creek	Upper Guyandotte
Suke Creek	Upper Guyandotte
Long Branch	Upper Guyandotte
Chestnut Flats Branch	Upper Guyandotte
Cabin Branch	Upper Guyandotte
Tom Bailey Branch	Upper Guyandotte
Franks Fork	Upper Guyandotte
Indian Creek	Upper Guyandotte
Rockcastle Creek	Upper Guyandotte
Little Pinnacle Creek	Upper Guyandotte
Sugar Run	Upper Guyandotte
Marsh Fork	Upper Guyandotte
Mill Branch	Upper Guyandotte
Marsh Fork	Upper Guyandotte
Big Branch	Upper Guyandotte
Wiley Spring Branch	Upper Guyandotte
Mullens Branch	Upper Guyandotte
Tommy Creek	Upper Guyandotte
Fish Creek	Upper Ohio River South
Conner Run	Upper Ohio River South
Bark Camp Run	Upper Ohio River South

West Virginia Fork/Fish Creek	Upper Ohio River South
Church Fork	Upper Ohio River South
UNT/Wheeling Creek RM 25.77	Upper Ohio River South

III. EPA Has A Nondiscretionary Duty to Disapprove West Virginia’s Constructive Submission of No TMDLs for Biological Impairment Caused by Ionic Stress

Alternatively, if WVDEP’s statements in its 2014 submission of TMDLs for the Monongahela and West Fork watersheds regarding its suspension of the development of TMDLs for biologically impaired streams were not the actual submission of no TMDL for such streams, then WVDEP’s prolonged refusal to develop such TMDLs constitutes the constructive submission of no TMDLs for such streams. See, e.g., City of Hammond, Ind., 741 F.2d at 997. That constructive submission triggered your duties under 33 U.S.C. § 1313(d)(2) and 40 C.F.R. § 130.7(d)(2) to disapprove of West Virginia’s submission that no TMDLs are required for those streams and to develop TMDLs for those streams. The streams at issue are those identified in Tables 1 and 2 above. In the face of a constructive submission of no TMDLs for those streams, the failure of the Administrator and the Regional Administrator for Region III to perform their duties under 33 U.S.C. § 1313(d)(2) and 40 C.F.R. § 130.7(d)(2) constitutes an alternative basis for a citizen suit by the Groups under 33 U.S.C. § 1365(a)(2).

IV. EPA Arbitrarily and Capriciously Approved Six TMDLs Submitted by West Virginia

In addition to their claims that EPA has failed to perform the nondiscretionary duties described above, the Groups intend to intend to bring an action against the Administrator and the Regional Administrator challenging EPA’s approval of six (6) TMDLs, contending that the approval of those TMDLs was unlawful because EPA impermissibly allowed West Virginia to defer the development of TMDLs for streams that are biologically impaired because of ionic stress. The six (6) TMDLs that will be the subject of those claims are:

1. TMDLs for the Upper Ohio River South Watershed;
2. TMDLs for the Dunkard Creek Watershed;
3. TMDLs for the Lower Kanawha River Watershed;
4. TMDLs for the Elk River Watershed;
5. TMDLs for the Monongahela River Watershed; and
6. TMDLs for the West Fork Watershed.

The Groups intend to bring their claims involving those TMDLs in the same action as their nondiscretionary duty claims described above. EPA’s actions with regard to West Virginia’s TMDL program have left hundreds of streams in West Virginia subject to

continued pollution and degradation, and the time has come for the agency to ensure that those streams receive the full protections of the Clean Water Act. The Groups' claims regarding EPA's approval of the six TMDLs listed above will be brought under the Administrative Procedures Act, because EPA's action with regard to those TMDLs was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

V. Conclusion

As described above, the Administrator and Regional Administrator for Region III have failed to perform duties under the Clean Water Act that are not discretionary by failing to disapprove of West Virginia's actual and/or constructive submission of no TMDLs for biologically impaired streams and to develop TMDLs for those streams as required by 33 U.S.C. § 1313(d)(2) and 40 C.F.R. § 130.7(d)(2). Additionally, the Administrator and the Regional Administrator have unlawfully approved TMDLs submitted by West Virginia that fail to satisfy the statutory and regulatory requirements. If you fail to perform the nondiscretionary duties within sixty (60) days of the postmark of this letter or fail to rectify the unlawful approval of the six TMDLs described above, the Groups intend to file a citizen's suit under section 505(a)(2) of the Act to compel you to perform your mandatory duties and under the Administrative Procedures Act to have your approval of the six TMDLs set aside. The Groups would, however, be happy to meet with you or your staff to attempt to resolve these issues within the 60-day notice period. Please do not hesitate to contact us.

Sincerely,



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