



ENVIRONMENTAL LAW & POLICY CENTER
Protecting the Midwest's Environment and Natural Heritage

March 13, 2019

Via Certified Mail

ANDREW WHEELER, Administrator
United States Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

RE: 60-Day Notice of Intent to File A Citizen Suit Under Clean Water Act Section 505(a)(2) for the U.S. EPA's Failure to Approve or Disapprove of Indiana's 303(d) Impaired Waters List within 30 Days as Required under the Clean Water Act

Dear Administrator Wheeler:

The Environmental Law & Policy Center, Hoosier Environmental Council, and Alliance for the Great Lakes are 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 the United States District Court pursuant to Section 505 of the Clean Water Act, 33 U.S.C. § 1365, and 40 C.F.R. Part 135. The basis for this notice of intent to sue is the U.S. EPA's failure to perform its nondiscretionary duty to act on the State of Indiana's 2018 submission of its Section 303(d) impaired waters list within thirty days. The State of Indiana's 2018 impaired waters list was submitted to the U.S. EPA on August 17, 2018. If the U.S. EPA does not approve or disapprove of Indiana's Integrated Report and 303(d) Impaired Waters List, the Environmental Law & Policy Center, Hoosier Environmental Council, and Alliance for the Great Lakes intend to pursue declaratory and injunctive relief at the close of the 60 day notice period.

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). Section 303(d) requires 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

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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 the 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). Once a state’s 303(d) impaired waters list is approved by the U.S. EPA, that state then incurs an obligation to set total maximum daily loads at a level necessary to implement the applicable water quality standards.” 33 U.S.C. § 1313(d)(1)(C).

B. Indiana’s Impaired Waters

According to Indiana’s 2018 303(d) impaired waters list, 63% of assessed rivers and streams are impaired for human health and wildlife while 78% are impaired for recreational use. This translates to tens of thousands of miles of polluted waterways, which has implications for the safety of drinking water as well as the health of the Great Lakes ecosystem. The Great Lakes are critical to the regional economy but in recent years, they have been plagued by toxic algal blooms, driven by nutrient pollution.

Many of the streams and rivers that flow out of Indiana and into Lake Erie are listed as impaired due to nutrient pollution. For instance, Dosch Ditch (HUC code – 41000030707), a St. Joseph’s sub-watershed, has been on Indiana’s impaired waters list for excess nutrients since 2010. Dosch Ditch is part of the Western Lake Erie Basin, a watershed that drains into Lake Erie and extends into Indiana. The St. Joseph, St. Mary’s, Upper Maumee, and Auglaize River watersheds come together in Indiana to form the Maumee River, which then flows out of Indiana, through Ohio, and into Lake Erie, carrying nutrient pollution with it.

Impaired waters within those four watersheds and within Indiana thus contribute to the nutrient pollution problems within Lake Erie. Neither the Indiana Department of Environmental Management nor the U.S. EPA has properly addressed the impairments to Indiana waters or the state’s contributions to the nutrient pollution problem within the Great Lakes. As part of its 2018 Integrated Report, Indiana indicated that it was planning to do only three TMDLs in the next two years. None of these TMDLs include areas in the Western Lake Erie Basin and Indiana has given no indication that it intends to enact comprehensive mandatory controls to address nutrient pollution or other impairments in that region.

II. Legal Claim

The Indiana Department of Environmental Management submitted its list of impaired waters to the U.S. EPA on behalf of the State of Indiana on August 17, 2018 as part of an Integrated Water Quality Monitoring and Assessment Report (“Integrated Report”). See <https://www.in.gov/idem/nps/2639.htm>

Under 33 U.S.C. § 1313(d)(2), the U.S. EPA had a non-discretionary duty to act on that submission by Monday, September 16, 2018. The Agency did not do so, and has not yet taken

any action to approve or disapprove Indiana's impaired waters list as of the writing of this letter. This continues a pattern of inaction extending back to 2012 as the U.S. EPA has not made a decision approving or disapproving of any of Indiana's impaired waters lists since the 2012 state submission cycle.

Section 505(a)(2) of the Clean Water Act authorizes a suit against the U.S. EPA when the Agency has 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, the Environmental Law & Policy Center, Hoosier Environmental Council, and Alliance for the Great Lakes are providing this letter as notice of their intent to bring suit against the U.S. EPA for its failure to act under Section 505(a)(2) of the Clean Water Act.

III. Parties Giving Notice and Their Counsel

The parties giving notice of this claim are as follows:

Environmental Law & Policy Center
Hoosier Environmental Council
Alliance for the Great Lakes

Environmental Law & Policy Center, Hoosier Environmental Council and Alliance for the Great Lakes are represented by the legal counsel identified below:

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

IV. Conclusion

As discussed above, if the U.S. EPA does not approve or disapprove of Indiana's 303(d) Impaired Waters List within 60 days, the Environmental Law & Policy Center, Hoosier Environmental Council and Alliance for the Great Lakes intend to pursue a citizen suit under Section 505(a)(2) of the Clean Water Act, seeking declaratory and injunctive relief. Please let us know if the U.S. EPA has taken any steps to rectify the underlying cause of the violations described above, or if the U.S. EPA believes that anything in this letter is inaccurate. If the U.S. EPA does not notify us of any remedial actions or inaccuracies within the 60-day period, we will assume that no such actions have been taken, that the information in this letter is accurate, and that such violations are likely to continue. We would be pleased to meet with the U.S. EPA or its representatives within the 60-day notice period to attempt to resolve these issues.

Respectfully submitted,

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