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Reply to: Seattle Office

May 23, 2019

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Andrew Wheeler, Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

William Barr, Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Re: Notice of Intent to Sue for Failure to Establish TMDLs for Budd Inlet and Capitol Lake, Washington

Dear Mr. Wheeler and Mr. Barr:

This letter provides notice that Northwest Environmental Advocates (“NWEA”) intends to sue the U.S. Environmental Protection Agency (“EPA”) under Section 505(a)(2) of the Clean Water Act (“CWA”) for failure to establish Total Maximum Daily Loads (“TMDLs”) for Budd Inlet and Capitol Lake, Washington. The claims addressed in this notice letter arise under Section 303(d) of the CWA, 33 U.S.C. § 1313(d), which requires the State of Washington to submit, and EPA to approve or disapprove, TMDLs for all impaired waterbodies within the state’s regulatory jurisdiction. When Washington refuses to carry out its statutory obligations under Section 303(d)—as is the case for Budd Inlet and Capitol Lake—that section of the CWA also requires EPA to establish such TMDLs in the first instance. This is known as the “constructive submission” doctrine. *See, e.g., San Francisco Baykeeper v. Whitman*, 297 F.3d 877 (9th Cir. 2002); *Hayes v. Whitman*, 264 F.3d 1017 (10th Cir. 2001); *Columbia Riverkeeper v. Pruitt*, 327 F.Supp.3d 989 (W.D. Wash. 2018); *Sierra Club v. McLerran*, No. 11-cv-1759-BJR, 2015 WL 1188522 (W.D. Wash. 2015). The lack of TMDLs for these waterbodies is directly linked to Washington’s failure to adequately regulate the pollution sources causing their unsafe levels of pollution.

For many decades, the marine waters of Budd Inlet, in the southern portion of Puget Sound, have been known to be impaired by dangerously low levels of dissolved oxygen. For example, a fish kill in June 1981 of 40,000 Chinook salmon smolts was attributed to dissolved oxygen depletion. Likewise, Budd Inlet has also been known to be impaired by various other pollutants, including

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toxics, for many decades. Those problems have never been remedied. And today, inner Budd Inlet has 95 individual segment-parameter listings on Washington's 303(d) list¹, while outer Budd Inlet has a total of 19 segment-parameter listings.² In addition, 28 segment-parameters have been placed on the Category 4B list on the basis that other pollution controls will achieve water quality standards. It is unclear whether, upon review, those waters would remain in Category 4B or be moved to Category 5, the 303(d) list for which TMDLs are required.³

Similarly, Capitol Lake has been listed as impaired for total phosphorus since 1996 and bacteria indicating fecal contamination since 1998. Capitol Lake also suffers from large summer algae blooms, which contribute to dissolved oxygen impairments in the lake itself and Budd Inlet downstream. As with Budd Inlet, these problems have never been remedied and are unlikely to be remedied in the absence of TMDLs established under Section 303(d) of the CWA.

Water quality impairments in Budd Inlet and Capitol Lake have not only existed for many years and caused environmental harm for many years; they have also been studied intensively for many years. For example, in 1986, a study commissioned by Washington identified low dissolved oxygen in Budd Inlet as the cause of fish kills and water quality violations over a 15-year period, dating to approximately 1971. The purpose of this 32-year old study was to identify the cause of low dissolved oxygen and to identify what measures could be implemented to resolve the problem. The study was itself based on studies from 1984 and 1985, and concluded that nutrient removal was required to substantially reduce algae blooms. EPA itself was sufficiently concerned about Budd Inlet water quality to issue its own study and "action plan" in 1991 that concluded toxic contamination in the inlet posed hazards to the aquatic ecosystem and established an objective of reducing or eliminating eutrophication. Later, in 1992, Washington submitted to EPA proposed Budd Inlet TMDLs for total nitrogen, fecal coliform, and BOD-5. But EPA rejected those TMDLs in 1993, alleging they were "incomplete." Studies continued.

¹ Parameters listed as impaired for inner Budd Inlet are dissolved oxygen, bacteria, 2,3,7,8-TCDD (dioxin), anthracene, arsenic, benzo(a)anthracene, benzo(a)pyrene, benzo(b)fluoranthene, benzo(k)fluoranthene, chrysene, dibenzo(a,h)anthracene, indeno(1,2,3-c,d)pyrene, polychlorinated biphenyls (PCBs), bis(2-Ethylhexyl)phthalate, cadmium, chromium, copper, fluoranthene, fluorene, lead, mercury, high molecular weight Polycyclic Aromatic Hydrocarbons (HPAH), pyrene, silver, zinc, low molecular Weight Polycyclic Aromatic Hydrocarbons (LPAH), 2-methylnaphthalene, 4-methylphenol, acenaphthene, acenaphthylene, benzo(g,h,i)perylene, benzoic Acid, dibenzofuran, naphthalene, phenanthrene, 1,2-dichlorobenzene, di-n-butyl phthalate, pentachlorophenol, phenol, benzofluoranthenes, total (b+k+j), butyl benzyl phthalate, di-n-octyl phthalate, and sediment bioassay.

² Parameters listed for outer Budd Inlet are dissolved oxygen, bacteria, benzo(a)anthracene, benzo(a)pyrene, benzo(b)fluoranthene, benzo(k)fluoranthene, chrysene, polychlorinated biphenyls (PCBs), 2,3,7,8-TCDD (dioxin), and benzoic acid.

³ Parameters listed for inner Budd Inlet Category 4B segments are 2,4-dimethylphenol, 2-methylphenol, 4-methylphenol, pentachlorophenol, cadmium, chromium, copper, lead, phenol, zinc, sediment bioassay, anthracene, benzo(a)pyrene, chrysene, fluoranthene, fluorene, high molecular weight Polycyclic Aromatic Hydrocarbons (HPAH), pyrene, benzo(a)anthracene, low molecular Weight Polycyclic Aromatic Hydrocarbons (LPAH), 2-methylnaphthalene, acenaphthene, acenaphthylene, dibenzofuran, naphthalene, and phenanthrene.

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More recently, in 2002, the Washington Department of Ecology once again began developing TMDLs for Budd Inlet and associated waterbodies including the Deschutes River and Capitol Lake. But despite having started 16 years ago, neither the Budd Inlet nor the Capitol Lake components of that TMDL were ever completed and submitted to EPA, although the technical studies for violations of water quality standards in these waters were published in 2012 to address listings for fecal coliform, total phosphorus, and dissolved oxygen.

Since that time, Washington has continued to assert that it will complete TMDLs for Budd Inlet. But it has missed every self-imposed deadline for doing so, and its schedule continues to slip, indicating that Washington does not, in fact, have any firm plans for completing Budd Inlet TMDLs. As for Capitol Lake, Washington has not indicated that it has any plans to complete TMDLs for that waterbody anytime in the foreseeable future. In fact, the state has indicated that it will not even consider *whether* to issue Capitol Lake TMDLs until it fully implements TMDLs for the Deschutes River basin (which EPA has already largely disapproved) and future Budd Inlet TMDLs (which have yet to be completed and submitted). That, in turn, could take decades more.

Under the constructive submission doctrine, EPA must produce a TMDL under Section 303(d) of the CWA when the state has “clearly and unambiguously” abandoned its obligation to do so in the first instance. *San Francisco Baykeeper*, 297 F.3d at 882 (quoting *Hayes*, 264 F.3d at 1024). For example, a long period of state inaction in issuing a statutorily-required TMDL may represent a constructive submission of no TMDL, requiring EPA action. *See Scott v. City of Hammond*, 741 F.2d 992, 996 (7th Cir. 1984). As the Fourth Circuit described this test, the constructive submission theory does not apply when “a state (1) has produced at least some TMDLs *and* (2) has a credible plan in place to produce others.” *Ohio Valley Envtl. Coal., Inc. v. Pruitt*, 893 F.3d 225, 230 (4th Cir. 2018) (emphasis in original).

Here, Washington has clearly and unambiguously abandoned its obligation to produce TMDLs for Capitol Lake, as evidenced, in part, by its position that despite completing the technical analysis it will not even consider submitting TMDLs for that waterbody until it has fully implemented the largely disapproved Deschutes River TMDLs and future Budd Inlet TMDLs, which could take a half century (or more) to complete. In turn, Washington’s long delay and ever-slipping deadlines to produce Budd Inlet TMDLs have now ripened into a constructive submission of no TMDLs for that waterbody. Accordingly, we intend to sue EPA under Section 505(a)(2) of the CWA for failure to produce its own TMDLs for both waterbodies, covering all segment-parameter listings on Washington’s 303(d) list.

As required by 40 C.F.R. § 135.3(b), the following are the name, address, and telephone number of the party providing this notice:

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As required by 40 C.F.R. § 135.3(c), the following are the names, addresses, and telephone numbers of NWEA's legal counsel in this matter:

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NWEA is open to engaging in a constructive dialogue to obtain a workable solution in this matter. If EPA has a similar interest it should contact me as NWEA's counsel. Please expect NWEA to file suit upon the expiration of 60 days from the date of this notice.

Very truly yours,

BRICKLIN & NEWMAN, LLP



Bryan Telegin

cc: Client

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