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Western Environmental Law Center

June 14, 2019

Mr. Andrew Wheeler, Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Mr. Chris Hladick, Regional Administrator
Environmental Protection Agency Region 10
1200 6th Ave. Seattle, WA 98101

**Re: Notice of Intent to Sue for Failure to Perform Mandatory Duties Under
Section 303(d)(2) of the Clean Water Act**

Dear Mr. Wheeler and Mr. Hladick:

This letter provides notice that Northwest Environmental Advocates (“NWEA”) intends to file suit pursuant to section 505(a)(2) of the Clean Water Act (“CWA”), 33 U.S.C. § 1365(a) (2), against the U.S. Environmental Protection Agency (“EPA”), the EPA Administrator, and the EPA Regional Administrator for Region 10 for violating their mandatory duties following Washington’s submission of an inadequate list of impaired waters pursuant to section 303(d) of the CWA, 16 U.S.C. § 1313(d).

Legal Background

Section 303(d)(2) of the CWA requires States to “submit to the Administrator from time to time” a list of “waters identified and loads established under” subsections 303(d)(1)(A)-(D), including (among other components) a list of waters for which technology-based effluent limitations “are not stringent enough to implement any water quality standard applicable to such waters.” 33 U.S.C. § 1313(d)(2); *see also* 40 C.F.R. §§ 130.7(b); 130.10(b), (d). This list of waters is commonly known as a “303(d) list” or “impaired waters list.” EPA’s regulations require that each state submit its “list of waters, pollutants causing impairment, and the priority ranking including waters targeted for TMDL development within the next two years” to EPA every two years. 40 C.F.R. § 130.7(d)(1). These submissions are due “on April 1 of every even-numbered year.” *Id.*

Once a state's proposed 303(d) list is submitted, EPA must "either approve or disapprove such identification and load not later than thirty days after the date of submission[.]" 33 U.S.C. § 1313(d)(2). EPA may only approve a list it is based on "all existing and readily available water quality-related data and information" and is supported by descriptions of "the methodology used to develop the list" and "the data and information used to identify waters, including a description of the data and information used by the State" and the "rationale for any decision to not use any existing and readily available data and information." 40 C.F.R. § 130.7(d)(2). If the EPA Administrator disapproves a state's list of impaired waters, 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 waters[.]" 33 U.S.C. § 1313(d)(2); *see also* 40 C.F.R. § 130.7(d)(2). As the courts have routinely and repeatedly held, EPA is required to treat a state's failure to act pursuant to the timelines established in federal law as a constructive submission of an inadequate list. *Cf. Alaska Ctr. for the Env't v. Reilly*, 762 F. Supp. 1422 (W.D. Wash. 1991), *aff'd*, *Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981 (9th Cir. 1994).

Because the statute unambiguously requires EPA to take action following its disapproval of a state-submitted 303(d) list by a clearly ascertainable deadline, EPA's obligations to "identify such waters" and "establish such loads" within 30 days of submission is "an act or duty . . . which is not discretionary with the Administrator" under the CWA citizen suit provision, 33 U.S.C. § 1365(a)(2).

EPA's Failure to Perform its Nondiscretionary Duty

Since 2010, the State of Washington, through the Washington Department of Ecology, has only twice submitted a list of impaired waters to EPA for approval. On August 5, 2009, Ecology announced a "call for data" that was held open from August 5, 2009 to October 15, 2009. Ecology then prepared a draft list of impaired waters using data it had collected and received during the public process and based on Washington's listing methodology. On December 28, 2011, March 20, 2012, and again on June 8, 2012, Ecology provided its proposed list and additional information and materials to EPA.

On December 21, 2012, EPA approved the 303(d) list, with its marine-only additions, as the "2010 303(d) list."¹ EPA took no action on Ecology's failure to add to its 303(d) list based on new data and information pertaining to the status of fresh waters. EPA's approval action added 849 segment/parameters to Washington's 2010 303(d) list and removed 312 previously-listed segments. The Washington 2010 303(d) list represents the last time that Ecology or EPA updated its identification of impaired marine waters. The 2010 list is based on data obtained prior to October 15, 2009.

Next, on June 22, 2011, Ecology announced a "call for data" that was held open from June 22, 2011 to August 31, 2011. On September 28, 2015, Ecology submitted to EPA the initial

¹ Although Ecology had submitted the list as the "2012 303(d) list," EPA identified it as the 2010 303(d) list. *See* Letter from Daniel D. Opalski, Director, Office of Water and Watersheds, EPA, to Kelly Susewind, Ecology, Re: *Approval of Washington State 2010 303(d) List* (Dec. 21, 2012).

documents in support of the revised 303(d) list, and submitted additional materials on October 14, 2015; February 3, 2016; March 4, 16, 29, 2016; April 19, 2016; and June 3, 2016. On July 22, 2016, EPA approved the 303(d) list, with its freshwater-only additions, as the “2012 303(d) list, not as the 2014 list as Ecology had originally designated it, because the assessment includes data collected only through May 1, 2011.”² EPA approved the addition of 1,622 segment/parameters and the removal of 303 segments. In approving the 2012 List, EPA stated that it was “expressly taking no action at this time on the State’s marine waters.” EPA did, however, approve the removal of marine waters in its action on the 2012 list. Washington’s 2012 list represents that last time that Ecology or EPA updated the state’s 303(d) list for impaired fresh waters.

Ecology has not submitted another proposed 303(d) list to EPA since. As a result, Ecology has effectively not submitted the required list to EPA for the past six years, by failing to provide a list based on “all existing and readily available water quality-related data and information” in 2012, 2014, 2016, and 2018. As a result, EPA as required to act, within thirty days of the constructively-submitted inadequate list, by identifying the impaired waters and establishing the protective loads for such waters. 33 U.S.C. § 1313(d)(2); *see also* 40 C.F.R. § 130.7(d)(2). By failing to so EPA has failed to take an action mandated by the CWA.

Persons Giving Notice and Representing Attorneys

The name, address, and telephone number of the parties giving notice are:

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However, you are requested to contact NWEA through its undersigned attorneys as follows:

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² Letter from Daniel D. Opalski, Director, Office of Water and Watersheds, EPA, to Heather Bartlett, Ecology, Re: *Approval of Washington State 2012 303(d) List* (July 22, 2016).

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Conclusion

NWEA would prefer to resolve this dispute short of litigation and is willing to discuss a settlement framework that would resolve the claims alleged herein to the mutual benefit of all parties. If EPA is interested in discussing settlement, we encourage EPA to contact the undersigned counsel immediately. Unless EPA has taken final action that, in NWEA's view, avoids the need for litigation on the claims alleged herein, on or about the 60th day following the date of this Notice Letter, NWEA intends to file suit against EPA pursuant to the CWA's citizen suit provision, 33 U.S.C. § 1365(a)(2), in the U.S. District Court for the Western District of Washington.

Sincerely,



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