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November 21, 2018

Via Certified U.S. Mail

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

Mr. Chris Hladick
Regional Administrator
EPA 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 (CWA), 33 U.S.C. § 1313(c)(4), Following Partial Disapproval of Oregon’s 2012 § 303(d) List.

Dear Ms. McCarthy and Mr. McLerran:

This letter provides notice of Northwest Environmental Advocates’ (NWEA) intent 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 (collectively, “EPA”) for violating their mandatory duties following EPA’s partial disapproval of Oregon’s 2012 list of impaired waters pursuant to CWA § 303(d) (“2012 § 303(d) List”).

A. 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. Oregon typically submits its 303(d) list as part of an integrated report on state water quality that is intended to also satisfy the reporting obligations of CWA § 305(b).

Once a state’s proposed 303(d) list is submitted to EPA, the CWA requires EPA to “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). Per EPA regulations, such action is delegated to the Regional Administrator. 40 C.F.R. § 130.7(d)(2). The CWA provides that 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).

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).

B. Alleged Clean Water Act Violation: EPA’s Failure to Perform its Nondiscretionary Duty to Identify Waters and Establish TMDLs within 30 Days of its Partial Disapproval of Oregon’s 2012 § 303(d) List, as Required by CWA § 303(d)(2) and 40 C.F.R. § 130.7(d)(2).

In November 2014, the State of Oregon, acting by and through the Oregon Department of Environmental Quality (“ODEQ”), submitted to EPA for review and approval its “2012 Integrated Report Assessment Database and 303(d) List.”¹

¹ *See* ODEQ, Oregon’s 2012 Integrated Report, at <http://www.oregon.gov/deq/WQ/Pages/Assessment/2012report.aspx> (“DEQ submitted the 2012 Integrated Report and 303(d) list to the U.S. Environmental Protection Agency EPA in November 2014”).

(hereinafter, “Oregon’s 2012 § 303(d) List”). By letter dated December 21, 2016, EPA approved in part and disapproved in part Oregon’s 2012 § 303(d) List.²

EPA’s partial disapproval of Oregon’s 2012 § 303(d) List was based upon, *inter alia*, ODEQ’s improper delisting of eight water quality limited segments (“WQLS”); its failure “to assemble and evaluate all readily available data and information for water bodies of the state when developing” the List; and its improper categorization of numerous waters “in Category 4A being challenged in *Northwest Environmental Advocates (NWEA) v. United States EPA* (Civil No. 3:12-cv-01751-AC).” EPA Partial Disapproval at 1-2. As a result of the partial disapproval, EPA proposed to add a total of 1,055 WQLS to Oregon’s 2012 § 303(d) List, consisting of 8 WQLS that were improperly de-listed by ODEQ³; 332 WQLS proposed for listing based upon EPA’s review of Oregon’s LASAR database⁴; and 714 WQLS proposed for listing (i.e., re-categorization from Category 4A to Category 5) based upon the litigation in *Northwest Environmental Advocates (NWEA) v. United States EPA* (Civil No.: 3:12-cv-01751-AC).⁵

EPA then sought comment on its proposal to add a total of 1,055 WQLS to Oregon’s 2012 § 303(d) List. As EPA explained in its Partial Disapproval:

² See Letter from Daniel D. Opalski, Director, EPA Office of Water and Watersheds, to Ms. Wendy Wiles, Administrator, Environmental Solutions Division, Oregon Department of Environmental Quality, Re: Partial Approval/Partial Disapproval of Oregon’s Final 2012 303(d) List (Dec. 21, 2016) (“EPA Partial Disapproval”), available at https://www.epa.gov/sites/production/files/2016-12/documents/pa-pd_letter_oregon_2012.pdf.

³ These disapproved delistings EPA proposed to add to Oregon’s 2012 § 303(d) List are identified in Enclosure 3 to the EPA Partial Disapproval, available at https://www.epa.gov/sites/production/files/2016-12/documents/enc_3_epa_disapprovals_of_odeq_2012_delistings.pdf.

⁴ These EPA proposed additions are identified in Enclosure 4 to the EPA Partial Disapproval, available at https://www.epa.gov/sites/production/files/2016-12/enclosure_4_epa_proposed_additions.xlsx.

⁵ These waters, dubbed the “TMDL Litigation Waters”, are identified in Enclosure 7 to the EPA Partial Disapproval, available at https://www.epa.gov/sites/production/files/2016-12/enc_7_tmdl_litigation_waters.xlsx.

As required by EPA regulations at 40 CFR § 130.7(d)(2), if EPA disapproves listings EPA must identify waters not meeting the state's water quality standards and accept public comment on the proposed additions. The EPA will be accepting comments on our proposed additions from December 22, 2016 to February 6, 2017. Comments can be sent to Jill Fullagar at Fullagar.jill@epa.gov and should include the subject line "OR 2012 comment period." All decision documents and supporting information pertaining to this action are available on EPA's website at: <https://www.epa.gov/tmdl/partial-approvalpartialdisapproval-oregon-2012-303d-list>. After considering comments received from the public, the EPA will make a final decision regarding the addition of water quality limited segments to the final 2012 303(d) list.⁶

Even though the public comment period ended on February 6, 2017, and even though the CWA requires EPA to take final action to "identify such waters in such State and establish such loads for such waters" within thirty days of its disapproval, 33 U.S.C. § 1313(d)(2), EPA has not yet taken its final action. Instead, EPA's proposed addition of 1,055 WQLS remains "pending."⁷ Furthermore, EPA has not "establish[ed] such loads" for the 1,055 waters it proposes to list—that is, EPA has not established total maximum daily loads (TMDLs) "at a level necessary to implement the applicable

⁶ EPA Partial Disapproval at 2; *see also* EPA Partial Disapproval, Enclosure 1: Review of Oregon's 2012 Integrated Report, at 7 ("EPA will open a public comment period from December 22, 2016 to February 6, 2017 on these proposed additions to Oregon's 303(d) list and will, if appropriate, revise the list of added waters and pollutants following consideration of any comments received.").

⁷ *See* EPA Partial Approval and Partial Disapproval of Oregon 2012 303d List, at <https://www.epa.gov/tmdl/partial-approval-and-partial-disapproval-oregon-2012-303d-list> ("EPA is proposing the addition of a total of 1,055 water quality limited segments to Oregon's 303(d) list."); ODEQ, Oregon's 2012 Integrated Report and 303(d) List - Effective; EPA additions pending, at <https://www.oregon.gov/deq/wq/Pages/WQ-Assessment.aspx> ("EPA proposed adding other waters to Oregon's 303(d) list and is taking public comments on the proposed additions until Feb. 6, 2017. *See* EPA Action Oregon 2012 303(d) List for information on the proposed additions and how to provide comments to EPA.").

water quality standards” at issue for each water listed, as required by CWA § 303(d)(1)(C). 33 U.S.C. § 1313(d)(1)(C).⁸

The inclusion of waters on Oregon’s EPA-approved § 303(d) list has significant regulatory and environmental consequences; for example, inclusion on the list requires the development of a total maximum daily load (TMDL) under CWA § 303(d)(1)(C), and new discharges of pollutants are generally prohibited to waters listed as impaired for such pollutants absent an EPA-approved TMDL. EPA’s ongoing failure to finalize its proposal to add additional WQLS to Oregon’s 2012 § 303(d) List and its related failure to establish TMDLs for such EPA-listed waters harms NWEA and its members’ aesthetic, recreational, and other interests that are dependent in part upon the chemical, physical, and biological integrity of Oregon’s waters. That harm to NWEA’s members will continue unless and until EPA takes the final nondiscretionary duties required of it under CWA § 303(d)(2) because those waters will not receive the protections that would result from an inclusive and final EPA-approved § 303(d) List and properly established TMDLs.

C. Persons Giving Notice and Representing Attorneys

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

Northwest Environmental Advocates
P.O. Box 12187
Portland, OR 97212-0187
Telephone: (503) 295-0490

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

⁸ NWEA is aware that EPA presently anticipates making a final listing decision regarding Oregon’s 2012 303(d) list that will address the 1,055 waters EPA proposed for listing by the end of 2018. *See* Email correspondence from Thomas Glazer, EPA Office of General Counsel, to James Saul, Earthrise Law Center (Nov. 21, 2018). If EPA takes final action on its Dec. 21, 2016 proposal before the end the 60-day notice period, NWEA will consider the sufficiency of that action in its decision regarding the need to file suit. However, at this time, EPA’s failure to undertake its mandatory duty under CWA § 303(d)(2)—including to establish TMDLs for any EPA-listed waters—is ongoing, and NWEA contends it is likely to continue unless and until EPA is ordered by a court to fulfill its nondiscretionary duties.

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D. 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 District of Oregon. If suit is filed, NWEA will seek an order compelling EPA to perform its nondiscretionary duty by taking final action to "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). NWEA will also seek an order awarding NWEA its litigation costs pursuant to 33 U.S.C. § 1365(d) and other appropriate remedies allowed by law.

Sincerely,

EARTHRISE LAW CENTER



James N. Saul

Copies Sent via U.S. Mail To:

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