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*Via Certified U.S. Mail*

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

Mr. Chris Hladick, Regional Administrator  
U.S. EPA, Region 10  
1200 Sixth Ave.  
Mail Code: 21-B03  
Seattle, WA 98101

Mr. Stephen Sweeney  
Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Mail Code: 2355A  
Washington, DC 20460

Mr. Allyn Stern, Regional Counsel  
U.S. EPA, Region 10  
1200 Sixth Ave.  
Mail Code: 11-C07  
Seattle, WA 98101

**Re: Notice of Dispute of Non-Compliance with Settlement Agreement in *Northwest Environmental Advocates v. Browner* (W.D. Wash. Case No. C91-427) and Notice of Intent to Sue for Failure to Perform Mandatory Duties Under Section 303(d)(2) of the Clean Water Act**

Dear Messrs. Wheeler, Hladick, Sweeney, and Stern:

Pursuant to paragraph 15 of the Settlement Agreement executed on January 6, 1998 in *Northwest Environmental Advocates v. Browner* (W.D. Wash. Case No. C91-427), by this letter Northwest Environmental Advocates (NWEA) provides you with notice of a dispute over EPA's noncompliance with the terms of that Settlement Agreement. NWEA requests negotiations with EPA in an attempt to resolve the dispute, the grounds for which are detailed below, within 30 days of this notice.

In addition, by this letter NWEA gives you notice that it 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 EPA, the EPA Administrator, and the EPA Regional Administrator for Region 10, or alternatively file an amended or supplemental complaint in Case No. C91-427, for violating their mandatory duties under CWA section 303(d)(2), 33 U.S.C. § 1313(d)(2), following Washington's constructive submission of the total maximum daily loads ("TMDLs") identified below.

## **A. Legal Background**

Section 303(d)(2) of the CWA requires each state to prepare and “submit to the Administrator from time to time” a list of “waters identified and loads established under” subsections 303(d)(1)(A)-(D). 33 U.S.C. § 1313(d)(2). Waters identified under section 303(d)(1)(A) are those “for which the effluent limitations required by” sections 303(b)(1)(A) and (B) of the CWA “are not stringent enough to implement any water quality standard applicable to such waters.” *Id.* § 1313(d)(A)(A). This list of waters is commonly known as a “303(d) list” or “impaired waters list.”

Along with its 303(d) list, states must prepare and submit to the Administrator, in accordance with the state’s priority ranking, “the total maximum daily load” (TMDL) of pollutants contributing to the impairments of such waters, “established at a level necessary to implement the applicable water quality standard 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), *see also* 40 C.F.R. § 130.7(c)-(d).

Once a state submits a TMDL, EPA must “either approve or disapprove” it “not later than thirty days after the date of submission[.]” 33 U.S.C. § 1313(d)(2); *see also* 40 C.F.R. § 130.7(d)(2). EPA’s obligation to review and either approve or disapprove a state-submitted TMDL is a non-discretionary duty, *see San Francisco BayKeeper v. Whitman*, 297 F.3d 877, 880 (9th Cir. 2002), and the district courts have jurisdiction to “order the Administrator to perform such act or duty” under the CWA’s citizen suit provision. 33 U.S.C. § 1365(a)(2).

## **B. Brief History of Case No. C91-427**

*Northwest Environmental Advocates v. Browner* (W.D. Wash. Case No. C91-427) was filed on March 27, 1991 and amended on November 15, 1994. On January 6, 1998, NWEA, the Northwest Environmental Defense Center, and Carol Browner, in her official capacity as EPA Administrator, entered into a Settlement Agreement. The terms of the Settlement Agreement included a 15-year schedule of TMDL submissions by Washington with two interim deadlines for Washington, that EPA agreed to “backstop.” The Settlement Agreement also established a final deadline for completion of 1,566 TMDLs by June 30, 2013.

In 2009, Washington approached NWEA to renegotiate the settlement terms given mutual concerns about the efficacy of TMDLs and the agencies’ ability to meet the deadlines of the 1998 Settlement Agreement. On October 20, 2010, Washington sent EPA the results of its collaborative effort with NWEA. After the passage of nine months without a response from EPA along with EPA’s failure to meet the Settlement Agreement’s December 31, 2010 deadline to ensure the completion of 552 TMDLs, on July 19, 2011 NWEA provided notice of a dispute over performance. The negotiations between NWEA, EPA, and Washington that began shortly thereafter continued through at least March 2016, at which point they broke down over disagreements between EPA and NWEA.

### C. EPA's Non-Compliance with the Settlement Agreement in Case No. C91-427

In that Settlement Agreement, EPA made the following binding commitments regarding the completion of TMDLs for the State of Washington that it has since failed to complete:

- “EPA also commits that it will take all steps necessary to ensure that TMDLs for all WQLSs on the 1996 Section 303(d) list are completed by June 30, 2013, consistent with Paragraph 5 above, through establishment of TMDLs or approval of the TMDLs submitted by the State.” (Settlement Agreement ¶ 6)
- “[T]he State and /or EPA may substitute one or more . . . future-listed waters for one or more waters on the 1996 303(d) list. Any TMDL that is established for such future-listed waters shall be counted for purposes of determining whether EPA is meeting its commitments under this Settlement Agreement, provided that the substitution is between waters of comparable TMDL complexity.” (Settlement Agreement ¶ 7)

Although EPA made these commitments more than 20 years ago, and although the already generous deadline agreed to by NWEA and EPA for completion of all TMDLs for then-listed waters passed nearly six years ago, there remain hundreds of water quality-limited segment/parameters (WQLS) from Washington's 1996 303(d) list that are still impaired and still require a TMDL.<sup>1</sup> As of January 31, 2013, EPA has completed TMDLs for only 545 of 1,566 TMDLs required to be completed by the Settlement Agreement. To the extent EPA contends that it (or Washington) has failed to establish a TMDL for any WQLS on Washington's 1996 303(d) list because it has substituted a later-listed water pursuant to paragraph 7 of the Settlement Agreement, NWEA disputes that such substitution “is between waters of comparable TMDL complexity.”<sup>2</sup> EPA is therefore in breach of paragraphs 6 and 7 of the Settlement Agreement.

In addition, the Settlement Agreement provided for EPA to regularly report its progress to Plaintiffs, as follows.

- “EPA shall provide Plaintiffs with an initial progress report on or before January 31, 1999, and every two years thereafter until the termination of this Settlement Agreement, which report shall identify the following: (a) the TMDLs submitted by the State during the two-year period, the date of each submission, EPA action taken

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<sup>1</sup> As of January 31, 2013, the date of EPA's eighth and last progress report, EPA had approved a total of 545 waters that had been listed on the 1996 or any later 303(d) list. Because the waters on the current list are based on a different segment size than they were in when listed in 1996, EPA converts TMDLs to 1996-based segments for counting purposes. For this reason, and because EPA has failed to provide progress reports since January 31, 2013, we are unable to state with precision how many TMDLs have been completed and approved by EPA since January 31, 2013 that are consistent with EPA's obligations under the Settlement Agreement.

<sup>2</sup> As of January 31, 2013, the date of EPA's eight progress report, EPA had approved 234 TMDLs for which no showing was made of comparable complexity to waters listed on the 1996 303(d) list.

on each submission and the date of the action taken; (b) the TMDLs that EPA has established during the two-year reporting period; (c) all WQLSs that are on the 1996 Section 303(d) list that are not included on subsequent Section 303(d) lists because other pollution controls are stringent enough to implement applicable water quality standards[.]” (Settlement Agreement ¶ 9)

The Settlement Agreement has not been terminated; EPA has not fulfilled its obligations under it, and the parties have not filed a joint motion to dismiss NWEA’s claims 7 and 8 from the complaint. *See* Settlement Agreement ¶ 11 (termination provision). Therefore, EPA has a continuing obligation under that agreement to provide NWEA with biannual progress reports consistent with paragraph 9. NWEA last received a progress report from EPA on or about January 31, 2013. EPA is therefore in breach of paragraph 9 of the Settlement Agreement.

The dispute resolution provision of the Settlement Agreement states that in the event of an alleged breach, “the dissatisfied party shall provide the other party with written notice of the dispute and a request for negotiations. The parties shall meet and confer in order to attempt to resolve the dispute within 30 days of the written notice; or such time thereafter as is mutually agreed.” Settlement Agreement ¶ 15. This letter provides that notice, and NWEA requests that EPA confer with NWEA regarding the disputes set forth above within 30 days. If EPA is unable or unwilling to confer with NWEA, or if the parties are unable to resolve the dispute to NWEA’s satisfaction within 60 days of such conferral, then NWEA will reactivate the litigation in Case No. C91-427R.

**D. EPA’s Violations of its Mandatory Duty to either Approve or Disapprove Washington’s Constructively Submitted TMDLs under CWA § 303(d)(2)**

The Ninth Circuit has recognized the “constructive submission” theory, holding that EPA has a non-discretionary duty under Section 303(d)(2) to develop TMDLs itself where a state has “clearly and unambiguously decided not to submit any TMDLs.” *San Francisco BayKeeper*, 297 F.3d at 883 (citing *Hayes v. Whitman*, 264 F.3d 1017, 1024 (10th Cir. 2001)). Although the *San Francisco BayKeeper* court deferred making “a broad, generic determination of the point in time at which a state’s inaction may be deemed a constructive submission,” it suggested that the constructive submission theory may apply where a state has failed to “establish[] a schedule for completing its remaining TMDLs.” *Id.* at 883. Following that decision, one court within this District has eschewed a “narrow interpretation” of the constructive submission doctrine, explaining that “it would be absurd . . . to hold that a state could perpetually avoid” its TMDL obligations “under the guise of prioritization” because “the CWA does not give the EPA authority to approve an indefinite delay.” *Sierra Club v. McLerran*, No. 11-CV-1759-BJR, 2015 WL 1188522, at \*7, 10 (W.D. Wash. Mar. 16, 2015). That same Court, decrying Alaska’s 13-year delay in the development of TMDLs some two decades prior, explained that Congress “expressly stated that TMDLs were to be established for all waters designated as water quality limited segments” and it is the responsibility of the court “to ensure prompt and attentive adherence to the mandate of the CWA.” *Alaska Ctr. for the Env’t v. Reilly*, 796 F. Supp. 1374, 1379 (W.D. Wash. 1992), *aff’d sub nom. Alaska Ctr. for Env’t v. Browner*, 20 F.3d 981 (9th Cir. 1994) (internal citations omitted).

Here, Washington has constructively submitted to EPA a TMDL for each and every WQLS that has been on the State's 303(d) list since 1996 for which no TMDL has been completed or approved by EPA.<sup>3</sup> Those waters have been impaired for *at least* 23 years (many of those waters first appear on Washington's 303(d) lists prior to 1996), and yet Washington has no plan, and no schedule in place, for the development of TMDLs for such waters. With respect to each and every such constructively submitted TMDL, EPA has failed to complete its mandatory duty under Section 303(d)(2) to "either approve or disapprove" the TMDL. 33 U.S.C. § 1313(d)(2).

**E. Persons Giving Notice and Representing Attorneys**

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

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

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**F. 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, so that any discussions may be concluded within the time periods reflected in paragraph 15 of the Settlement Agreement. 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 90th 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

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<sup>3</sup> NWEA believes this to include approximately 545 WQLS, but the actual number of WQLS may differ due to EPA's post-1996 segmentation policies. *See* fn. 1, above. In any event, EPA possesses the records needed to precisely ascertain which waters have been continuously listed on Washington's 303(d) list since at least 1996 but still lack a TMDL, and for which pollutants or parameters.

Court for the Western District of Washington and/or move the court to reactivate litigation in Case No. C91-427R. If suit is filed or reactivated, NWEA will seek an order compelling EPA to perform its nondiscretionary duty by taking final action to “establish [TMDLs] . . . 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,



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