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Via Certified U.S. Mail

Michael S. Regan, Administrator
U.S. Environmental Protection Agency
Mail Code 1101A
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Michelle Pirzadeh, Acting Regional Administrator
U.S. Environmental Protection Agency Region 10
1200 Sixth Avenue, Suite 155
Seattle, WA 98101

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

Dear Mr. Regan and Ms. Pirzadeh:

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 under CWA section 303(d), 33 U.S.C. § 1313(d), relating to the development and implementation of total maximum daily loads (“TMDLs”) in the State of Oregon. The specific bases for NWEA’s claims are set forth 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), 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” and the waters are known as “water quality limited segments” or “WQLS.”

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. § 1365(a)(2). 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.* States must prepare TMDLs "in accordance with the priority ranking." 40 C.F.R. § 130.7(c)(1). Federal regulations provide that "schedules for submissions of TMDLs shall be determined by the [EPA] Regional Administrator and the State." 40 C.F.R. § 130.7(d)(1).

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. Oregon TMDL Program History

Oregon's TMDL program did not exist until the Northwest Environmental Defense Center ("NEDC") and EPA negotiated a consent decree in 1987 in which EPA was required to establish TMDLs for 11 WQLS within two years and to complete TMDLs at the rate of 20 percent annually, but in no event fewer than two per year, from subsequent 303(d) lists. In 1994, NWEA and NEDC filed suit to compel EPA to produce a complete list of WQLS for Oregon, a case resolved with a consent decree that resulted in Oregon's 1994/1996 303(d) list. NWEA and NEDC filed suit in 1996 to, once again, compel EPA to identify a complete list of WQLS in Oregon and to establish TMDLs for those waters (Case No. 00-679-HO, first filed in Western WA as No. C96-1438 WD). At the time of that suit, more than 900 WQLS needed TMDLs but EPA had approved only 14. Oregon then completed and EPA approved the 1998 303(d) list that identified a total of 1,158 WQLS in need of TMDLs. Pursuant to a new consent decree between NWEA, NEDC, and EPA, entered on October 17, 2000, EPA was required to ensure the completion of no fewer than 1,153 TMDLs by December 31, 2010.

Subsequent 303(d) lists prepared by Oregon and EPA in 2002, 2004/2006, 2010, and 2012 added at least 2,596 WQLS requiring TMDLs, nearly all of which still remain on Oregon's 303(d) list and therefore still require TMDLs.¹ Since the expiration of the TMDL schedule agreed upon in the October 17, 2000 consent decree some ten years ago, **no new TMDLs** have been established by Oregon or EPA that had not been originally completed by Oregon and

¹ In its action on Oregon's 2012 303(d) list, EPA added 714 WQLS for temperature back onto the list due to ongoing litigation that has now been resolved with a court-ordered schedule to complete those replacement TMDLs.

submitted to EPA and/or approved by EPA prior to December 31, 2010—with the sole exception of EPA’s 2020 draft TMDL for temperature in the Columbia River.²

Oregon submitted its most recently prepared 303(d) list—a list that included data only through December 31, 2017 but nonetheless was termed by Oregon a “2018/2020” list—to EPA on April 21, 2020. EPA approved the list on November 12, 2020, terming it a “2014-2020” list because Oregon had failed to submit lists in 2014, 2016, and 2018. This most recent list includes approximately 3,741 WQLS in need of TMDLs, 714 of which are under a separate court order for replacement, and includes thousands of WQLS first listed long ago that still require the development of TMDLs: 354 in 1998; 157 in 2002; 432 in 2004; 1,568 in 2010 (many of which were initially listed in previous years); and 439 in 2012. Of the total currently listed WQLS, Oregon has identified 1,213 as a “high” priority for TMDL development, the vast majority of which are the WQLS for which Oregon must issue replacement TMDLs along with many other segments that will be included in those replacement TMDLs. As a result, for example, only 12 of 354 WQLS that have been listed since 1998 are considered “high” priority for TMDL development.

C. EPA’s Failure to Perform its Nondiscretionary Duty to Either Approve or Disapprove Oregon’s Constructively Submitted TMDLs under CWA § 303(d)(2)

The Ninth Circuit has recognized the “constructive submission” theory, holding that where a state has “clearly and unambiguously decided not to submit any TMDLs,” EPA has a non-discretionary duty under section 303(d)(2) to develop TMDLs itself. *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,” the Ninth Circuit previously held that failing to develop TMDLs for 13 years was an undue delay. *Id.* at 883; *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).

Most recently, the Ninth Circuit noted the difference between affording less priority to certain TMDLs and declining to issue TMDLs at all. *Columbia Riverkeeper v. Wheeler*, 944 F.3d 1204 (9th Cir. 2019). There, the court held that EPA’s mandatory duty to act is triggered by a constructive submission “where a state fails to develop and issue a particular TMDL for a prolonged period of time and has failed to develop a schedule or credible plan for producing that

² TMDLs that were first completed prior to December 31, 2010 and subsequently revised include: 2012 revisions to the 2001 Tualatin subbasin TMDL for dissolved oxygen, algae, and pH approved by EPA in 2001 with revisions approved by EPA on December 14, 2012; the 2001 Western Hood subbasin TMDL for temperature that was revised by Oregon in 2018 and approved by EPA in 2018; the 2010 Upper Klamath and Lost River subbasin TMDLs for temperature, dissolved oxygen, pH, ammonia, and chlorophyll-a approved by EPA on September 30, 2019 (for temperature) and March 12, 2019 (for the other parameters); and the 2006 Willamette basin TMDL for mercury approved by EPA in 2006 and subsequently voluntarily remanded by EPA (2016), reissued by Oregon (2019), disapproved by EPA (2019), and reissued by EPA (2021).

TMDL.” *Id.* at 1211. The court made clear that the purpose of the CWA would be dramatically undermined should a state or the EPA avoid its statutory obligations by refusing to act. *Id.* at 1210.

NWEA alleges that the State of Oregon has constructively submitted to EPA a TMDL for each of the approximately 2,950 WQLS that are on the current 303(d) list that date to the State’s 2012 303(d) list, less the 714 that are under a separate court order for completion of replacement TMDLs. All of those waters have been identified as impaired for at least 9 years; some of them have been impaired for 23 years or more. Of these, Oregon has assigned a “high priority” to developing TMDLs for 1,213 WQLS, which includes the 714 WQLS under separate court order for replacement and includes approximately an additional 325 temperature WQLS that in all probability will be completed with those replacement TMDLs. The court schedule for EPA approval or disapproval of these replacement temperature TMDLs extends to May 29, 2028. In other words, DEQ does not intend to develop any TMDLs for medium priority WQLS until some years after 2028; all medium priority WQLS are in the MidCoast basin (TMDL development began not later than 2011) and Deschutes River basin (TMDL development began in 2000). Oregon has constructively submitted no TMDLs for the MidCoast and Deschutes River basins, a total of 72 “medium” priority WQLS and a total of 487 “low” priority WQLS.

The Willamette River basin is the 19th largest watershed by volume in the United States and is Oregon’s most populous and industrialized basin, home to a majority of Oregonians. Oregon has constructively submitted no TMDLs for 483 “low” priority WQLS in the Willamette River basin that represent impairments by all water quality parameters and pollutants other than temperature, indicator bacteria, and mercury.

Oregon has deemed no WQLS impaired by toxics, ammonia, and nutrients as either “high” or “medium” priority for TMDL development; all of these impairments are determined to be a “low” priority and will, therefore, be subject to TMDL development well after 2028, if ever, regardless of listing date. Oregon has constructively submitted no TMDLs for WQLS impaired by toxics, ammonia, and nutrients.

For each WQLS identified above, a constructive submission has occurred because Oregon has failed to “develop and issue” the required TMDL “for a prolonged period of time and has failed to develop a schedule or credible plan for producing that TMDL.” *Columbia Riverkeeper*, 944 F.3d at 1211. With respect to each of those constructively submitted TMDLs, 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), and NWEA intends to file suit to obtain a court order requiring EPA, its Administrator, and Regional Administrator for Region 10 to complete such mandatory duty for each such TMDL. *Id.* § 1365(a)(2).

D. 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

(503) 295-0490

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

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jsaul@lclark.edu

E. Conclusion

According to Oregon, 44 percent of Oregon's river miles are now considered impaired based on data collected through 2018. In 2012, only 33 percent of Oregon's river miles were considered impaired.

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).

Sincerely,



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Copies Sent via U.S. Mail to:

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