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February 11, 2015

Gina McCarthy, Administrator
U.S. Environmental Protection Agency
William Jefferson Clinton Building
Mail Code: 1101A
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dennis McLerran
Regional Administrator
U.S. EPA, Region 10
Mail Code: RA-210
1200 Sixth Avenue
Seattle, WA 98101

Re: Sixty-Day Notice of Intent to Sue for Failure to Perform Mandatory Duties Under Section 303(c)(4) of the Clean Water Act (CWA), 33 U.S.C. § 1313(c)(4), to Revise Oregon's Water Quality Criteria for Toxic Pollutants.

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) for violating its mandatory duty to promulgate replacement aquatic life toxics criteria for the State of Oregon, pursuant to CWA section 303(c)(4).

A. Background

In 1999, as required by section 303(c)(1) of the CWA, the Oregon Department of Environmental Quality (DEQ) reviewed certain of Oregon's water quality standards. As a result, DEQ made significant revisions to Oregon's aquatic life toxics criteria. Upon completing its review in 2003, DEQ submitted its water quality criteria recommendations to the Oregon Environmental Quality Commission (EQC) for official adoption. On May 20, 2004, EQC officially adopted DEQ's proposed revisions to Oregon's water quality standards. On July 8, 2004, acting pursuant to Section 303(c)(2)(A) of the CWA, DEQ submitted Oregon's new and revised water quality standards to EPA for review and approval. This sub-

mission represented the first action by Oregon to update its aquatic toxic criteria after more than 15 years of inaction. On April 7, 2006 NWEA filed suit seeking immediate EPA action to approve or disapprove these standards. On May 29, 2008, pursuant to a Consent Decree, EPA agreed to take action on the aquatic life criteria upon completion of biological opinions (BiOps) by the National Marine Fisheries Service (NMFS) and U.S. Fish & Wildlife Service (FWS) pursuant to Section 7 of the Endangered Species Act (ESA). On August 18, 2010, pursuant to a Stipulated Dismissal, NMFS and FWS agreed to complete the BiOps. NWEA granted numerous extensions to EPA, NMFS, and FWS to these deadlines.

EPA finally took official action on Oregon's new and revised aquatic life toxic criteria in 2013.¹ By letter dated January 31, 2013, EPA approved 38 criteria values associated with 14 toxic pollutants while simultaneously disapproving 45 criteria values associated with 16 toxic pollutants.² On December 12, 2013, in response to EPA's January 30, 2013 formal disapproval action, DEQ adopted revisions addressing 38 criteria values associated with 12 toxic pollutants.³ Unfortunately, however, those revisions failed to address seven disapproved criteria values associated with four toxic pollutants all of which pertain to jeopardy findings by NMFS under the ESA. The seven unaddressed toxic criteria values include the following: (1) freshwater acute and freshwater chronic criteria for aluminum; (2) freshwater acute and freshwater chronic criteria for ammonia; (3) freshwater acute and freshwater chronic criteria for copper; and (4) the freshwater acute criterion for cadmium. Oregon has acknowledged this deficiency, stating that it "expects to address the more substantive issues for these pollutants in a future rulemaking."⁴ But to the best of NWEA's knowledge, with the exception of ammonia,⁵ Oregon has no specific plan or timeline for doing so. EPA, likewise, has taken no further action to promulgate replacement criteria for

¹ See Letter from Daniel D. Opalski, Director, Office of Water and Watersheds, EPA Region 10, to Greg Aldrich, Administrator of Water Quality Division, DEQ (Jan. 31, 2013), regarding EPA's action on new and revised aquatic life water quality criteria for toxics in Oregon's water quality standards.

² *Id.*

³ Oregon Department of Environmental Quality, Corrections and Clarification of Toxics Water Quality Standards, December 11-12, 2013.

⁴ *Id.*; see also, Letter from Gregory K. Aldrich, Water Quality Division Administrator, Oregon DEQ, to Daniel D. Opalski, Region 10, re: EPA Action on Oregon's 2004 Submission of Revised State Water Quality Standards for Aquatic Life Toxic Pollutants (April 30, 2013) ("Addressing EPA's disapproval actions of Oregon's freshwater criteria for aluminum, ammonia, cadmium, and copper presents significant technical challenges for DEQ staff. . . . EPA did not provide Oregon with readily available alternative numeric values.")

⁵ Oregon adopted new criteria for ammonia on January 7, 2015. See DEQ, Water Quality Standards Revisions for Freshwater Ammonia 2014-2015, at <http://www.oregon.gov/deq/WQ/Pages/Standards/ammonia.aspx>. As both EPA and DEQ are well aware, NWEA has significant concerns regarding Oregon's new ammonia criteria, including whether they will resolve the concerns raised by NMFS in its BiOp dated August 14, 2012. Regardless, Oregon's recent actions do not obviate EPA's statutory duty to promulgate criteria as required by 33 U.S.C. §1313(c)(4).

the seven disapproved criteria values pursuant to Section 303(c)(4). 33 U.S.C. §§ 1313(c)(3), (4). Consequently, EPA has failed to comply with the CWA in addressing those seven delinquent toxic criteria values.

EPA's delay poses significant concerns for Oregon's waters and the species that depend on them. NWEA and its members are reasonably concerned with the deleterious effects of Oregon's long-deficient toxic criteria on aquatic life. According to NMFS, Oregon's 2004 proposed toxics criteria, and therefore its existing criteria, for these pollutants will jeopardize the continued existence of 18 ESA-listed species located within the waters of Oregon. Among this group of 18 species, 15 are classified as "threatened" and three are designated as "endangered." Moreover, these seven Oregon criteria will destroy or adversely modify 17 critical habitats in relation to that same group of 18 species.⁶ Based on NMFS's evaluation, Oregon's deficient toxics criteria are inadequate to support the CWA's declared policy of furthering the "protection and propagation of fish" in our nation's waters located within the state of Oregon. 33 U.S.C. § 1251(a)(2); *see also* 33 U.S.C. § 1313(c)(2)(A).

B. Alleged Clean Water Act Violation: EPA's Failure to Perform its Nondiscretionary Duty to Promptly Prepare and Publish Proposed Water Quality Standards for Oregon pursuant to 33 U.S.C. § 1313(c)(4).

NWEA alleges that EPA has failed to perform its nondiscretionary duty to promptly prepare and publish proposed regulations setting forth the following revised water quality criteria: (1) freshwater acute and freshwater chronic criteria for aluminum; (2) freshwater acute and freshwater chronic criteria for ammonia; (3) freshwater acute and freshwater chronic criteria for copper; and (4) freshwater acute criterion for cadmium.

Under Section 303(c)(3) of the CWA, a State has 90 days in which to adopt specified changes subsequent to receiving a formal disapproval notice regarding any revised or new water quality standards previously submitted to EPA for review. 33 U.S.C. § 1313(c)(3). If a state fails to adopt the specified changes within 90 days after notification, EPA has a "nondiscretionary duty"⁷ to "promulgate" replacement standards on behalf of the State, pursuant to section 303(c)(4). 33 U.S.C. § 1313(c)(3). Section 303(c)(4) expressly requires EPA to "promptly" prepare and publish replacement criteria for any revised or new water quality standards deemed by EPA to be inconsistent with the requirements of the CWA. 33 U.S.C. §§ 1313(c)(4), (c)(4)(A). Once the duty to act "promptly" under section 303(c)(4)

⁶ Jeopardy and Destruction or Adverse Modification of Critical Habitat Endangered Species Act Biological Opinion, August 14, 2012.

⁷ *Nw. Env'tl. Advocates v. U.S. Env'tl. Prot. Agency*, 268 F. Supp. 2d 1255, 1260 (D. Or. 2003).

has been triggered, various courts have held that delays of 7, 11, and 19 months by EPA constitute a violation of that mandatory duty.⁸

In this case, EPA has failed to perform its mandatory duty to “promptly” promulgate replacement toxics criteria for aluminum, cadmium, ammonia, and copper, as described above, pursuant to Section 303(c)(4). EPA’s nondiscretionary duty was triggered on May 1, 2013, 90 days after the date upon which EPA notified DEQ of its disapproval of Oregon’s criteria for those five toxic pollutants. 33 U.S.C. §§ 1313(c)(3), (4). As of today’s date, 20 months have passed since May 1, 2013; this delay constitutes a clear violation of EPA’s nondiscretionary duty to act “promptly” under section 303(c)(4).

As a result of EPA’s ongoing failure to comply with section 303(c)(4), NWEA intends to file suit against EPA pursuant to section 505(a)(2) of the CWA.

C. Persons Giving Notice and Representing Attorneys

The name, address, and telephone number of the party providing this notice is:

Northwest Environmental Advocates
P.O. Box 12187
Portland, OR 97212-0187
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The attorneys representing Northwest Environmental Advocates in this matter are:

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⁸ See *Idaho Conservation League v. Browner*, 968 F. Supp. 546, 549 (W.D. Wash. 1997) (holding that EPA did not act “promptly” in delaying 7 months); *Defenders of Wildlife v. Browner*, 909 F. Supp. 1342, 1350 (D. Ariz. 1995) (holding that EPA did not act “promptly” in delaying 11 and 19 months, respectively); *Raymond Proffitt Found. v. U.S. Env’tl. Prot. Agency*, 930 F. Supp. 1088, 1101 (E.D. Pa. 1996) (holding that EPA did not act “promptly” in delaying 19 months).

D. Conclusion

NWEA is open to resolving this case via settlement in an effort to facilitate a workable solution for EPA, Oregon, and NWEA's members. If EPA, likewise, has a similar interest in discussing this matter, it should immediately contact NWEA's undersigned counsel. However, please expect NWEA to file a lawsuit against EPA upon the expiration of 60 days after the date of this notice and understand that NWEA will not engage in a protracted negotiation over a matter that should have been resolved many years ago.

Sincerely,

EARTHRISE LAW CENTER



Allison LaPlante
James Saul

*Attorneys for Northwest Environmental
Advocates*

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