



Via Certified U.S. Mail

August 28, 2018

Administrator Andrew Wheeler
U.S. Environmental Protection Agency
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Regional Administrator Chris Hladick
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RE: 60-Day Notice of Intent to Sue: Violations of the Clean Water Act; Failure to Identify Oregon Waters Impaired by Ocean Acidification

Dear Mr. Wheeler and Mr. Hladick:

This letter serves as official notice of the Center for Biological Diversity's ("Center") 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 United States Environmental Protection Agency ("EPA") and its Administrators for failing to perform a non-discretionary action under the CWA. Specifically, the Center intends to sue EPA and its Administrators for violating its mandatory duty to identify impaired Oregon waters, including those impaired by ocean acidification, after EPA's partial disapproval of Oregon's 2012 303(d) list, as required by section 303(d)(2) of the CWA, 33 U.S.C. § 1313(d)(2).

Ocean acidification poses a serious threat to Oregon's water quality and vulnerable marine and estuarine organisms. Ocean acidification is defined as "a reduction in the pH of the ocean over an extended period . . . which is caused primarily by uptake of carbon dioxide from the atmosphere . . ."¹ Ocean acidification is impairing Oregon's coastal and estuarine waters. Oregon's seawaters are extremely vulnerable to ocean acidification and have experienced

¹ Intergovernmental Panel on Climate Change (IPCC), IPCC Workshop on Impacts of Ocean Acidification on Marine Biology and Ecosystems 37 (Christopher B. Field et al. eds., 2011).

conditions corrosive to sealife for more than a decade.² Oregon’s coastal and estuarine waters are becoming more acidic, which impairs organisms’ capacity to produce shells and skeletons, alters food webs, and affects the dynamic of coastal and estuarine ecosystems in Oregon.³ Beginning in 2008, Oregon shellfish hatcheries began to experience severe mass mortalities of oyster larvae as a result of ocean acidification.⁴ Ocean acidification is already having devastating consequences for Oregon’s fisheries and ecosystems.

A. Oregon’s 303(d) List

On June 10, 2009, the Center submitted comments and scientific information in requesting Oregon Department of Environmental Quality (“DEQ”) to identify include coastal waters as impaired due to ocean acidification on Oregon’s 2012 303(d) list. On December 6, 2010, May 2, 2011, April 18, 2012, June 20, 2012, and in 2014, the Center submitted additional information and comments on ocean acidification and its impact on Oregon’s marine waters. Despite these comments, DEQ did not list marine waters as impaired due to ocean acidification.⁵

DEQ submitted Oregon’s 2012 section 303(d) list of impaired waters to EPA on November 5, 2014.⁶ In 2016, EPA partially approved and partially disapproved Oregon’s 303(d) 2012 303(d) list.⁷ EPA disapproved DEQ’s submittal for the removal of eight water quality limited segments and for failing to list 332 impaired water bodies.⁸ EPA proposed to add these 332 segments to Oregon’s 2012 303(d) list because “EPA’s assessment of the data indicate[s] the segments are not attaining water quality standards.”⁹

² See Richard A. Feely, et al., *Scientific Summary of Ocean Acidification in Washington State Marine Waters* 1, 9 (Nov. 27, 2012), https://pmel.noaa.gov/co2/files/wa_shellfish_initiative_blue_ribbon_panel_oa_11-27-2012.pdf; ; Richard A. Feely et al., *Evidence for Upwelling of Corrosive ‘Acidified’ Water onto the Continental Shelf.*, *Science* 320, no. 5882 (2008): 1490–92, doi:10.1126/science.1155676; Richard A. Feely et al., *The Combined Effects of Acidification and Hypoxia on PH and Aragonite Saturation in the Coastal Waters of the California Current Ecosystem and the Northern Gulf of Mexico*, *Continental Shelf Research* 152, no. November 2017 (2018): 50–60, doi:10.1016/j.csr.2017.11.002; Richard A. Feely et al., *Chemical and Biological Impacts of Ocean Acidification along the West Coast of North America*, *Estuarine, Coastal and Shelf Science* 183 (2016): 260–70, doi:10.1016/j.ecss.2016.08.043.

³ See Richard A. Feely, et al., *Determination of the Anthropogenic Carbon Signal to the Total Change in Dissolved Carbon in the Coastal Upwelling Region Along the Washington-Oregon-California Continental Margin*, *American Geophysical Union, Ocean Sciences Meeting 2016* (Feb. 2016).

⁴ Alan Barton et al., *The Pacific Oyster, Crassostrea Gigas, Shows Negative Correlation to Naturally Elevated Carbon Dioxide Levels: Implications for near-Term Ocean Acidification Effects*, *Limnology and Oceanography* 57, no. 3 (2012): 698–710, doi:10.4319/lo.2012.57.3.0698; Alan Barton et al., *Impacts of Coastal Acidification on the Pacific Northwest Shellfish Industry and Adaptation Strategies Implemented in Response*, *Oceanography* 25, no. 2 (June 2015): 146–59, doi:10.5670/oceanog.2015.38.

⁵ See Wendy Wiles, *Enclosure 1: Review of Oregon’s 2012 Integrated Report*, United States Environmental Protection Agency Region 10 1, 10 (Dec. 21, 2016), https://www.epa.gov/sites/production/files/2016-12/documents/enclosure_1_oregon_2012_decision_document.pdf [hereinafter *Enclosure 1*].

⁶ Wendy Wiles, *Partial Approval/Partial Disapproval of Oregon’s Final 2012 303(d) List*, United States Environmental Protection Agency Region 10 1, 1 (Dec. 21, 2016), https://www.epa.gov/sites/production/files/2016-12/documents/pa-pd_letter_oregon_2012.pdf.

⁷ *Id.*

⁸ *Id.* at 1-2.

⁹ *Enclosure 1* at 7.

In its partial disapproval, EPA solicited for data and information on ocean acidification impairments of Oregon marine waters.¹⁰ Specifically, EPA described that numerous lab and field studies showed impacts to shellfish and pteropods under corrosive conditions, and EPA acknowledged that data showed corrosive conditions off the Oregon coast.¹¹ Specifically, “EPA reviewed NOAA data (Feely et al., 2014a; Feely et al., 2014b; Feely et al., 2015) and found the data demonstrate an aragonite saturation state of less than 1, which is corrosive to pteropods, in 73% of observations in Oregon state waters.” EPA noted that the “2014 Bednarsek study found that 24% of offshore pteropods and 53% of onshore pteropods (delineated by the 200 meter isobaths) had severe dissolution damage.” EPA acknowledged that the scientific information showed that aquatic life impairments occur at aragonite saturation states of less than 1.0; and that such conditions occur in Oregon state waters.

EPA stated it would act on marine waters impaired by ocean acidification once it considered the public comments.¹² On April 3, 2017, the Center submitted a public comment to EPA containing data and information on ocean acidification impacts in Oregon’s marine waters. In this comment, the Center urged Oregon to list several water bodies as threatened or impaired due to ocean acidification under its 303(d) list, and to obtain all readily available data on ocean acidification from the sources identified in the comment and analyze them for its water quality assessment. Despite the public comment period closing over a year ago and EPA issuing its disapproval over a year and a half ago, EPA has yet to identify Oregon’s marine waters impaired by ocean acidification.

To date, EPA has not finalized its rulemaking adding any additional impaired waters to Oregon’s 303(d) list, including the 332 impaired waters it proposed or any waters impaired by ocean acidification.

B. Legal Background

CWA section 303(d) and EPA regulations establish the procedures States must follow when developing their 303(d) lists. *See* 33 U.S.C. § 1313(d); 40 C.F.R. § 130.7. Section 303(d)(2) requires states to “submit to the Administrator from time to time . . . for his approval the waters identified” under subsections 303(d)(1)(A)-(D). 33 U.S.C. § 1313(d)(2); *see also* 40 C.F.R. §§ 130.7(b); 130.10(b), (d). This list is typically referred to as a “303(d) list.”

CWA section 303(d)(2) and EPA regulations establish the procedures EPA must follow when approving or disapproving States’ 303(d) lists. *See* 33 U.S.C. § 1313(d)(2), 40 C.F.R. § 130.7(d)(2). EPA must “either approve or disapprove [a 303(d) list] not later than thirty days after the date of submission” to EPA. 33 U.S.C. § 1313(d)(2); *see also* 40 C.F.R. § 130.7(d)(2). EPA regulations delegate this action to the Regional Administrator. 40 C.F.R. § 130.7(d)(2). If EPA disapproves a state’s list, it “*shall not later than thirty days after the date of such*

¹⁰ *Id.*; *see also* Wendy Wiles, *Enclosure 2: EPA Request for Public Comment on Ocean Acidification Impacts in Oregon Marine Waters*, United States Environmental Protection Agency Region 10 1 (Dec. 21, 2016), https://www.epa.gov/sites/production/files/2016-12/documents/enclosure_2_epa_request_for_oa_public_comment.pdf.

¹¹ *Id.*

¹² *Enclosure 1* at 10.

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) (emphasis added). As courts have made clear, “[i]f EPA disapproves a 303(d) List, then EPA itself must establish a list of waters within thirty days of disapproval.”¹³ Because CWA Section 303(d)(2) and EPA regulations explicitly require EPA to take action on its disapproval within 30 days, EPA’s obligation to identify impaired waters within 30 days of its disapproval of a State’s 303(d) list 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).¹⁴

C. Violation of the CWA

EPA’s failure to perform its non-discretionary duty under section 303(d)(2) to identify waters not meeting water quality standards within thirty days of its disapproval of Oregon’s 2012 303(d) list constitutes a violation of the CWA. To date, EPA has not taken final action on its proposal to add 332 impaired waters nor has it identified any waters impaired by ocean acidification for Oregon’s 2012 303(d) list. More than a year and a half have elapsed since EPA partially disapproved Oregon’s 2012 303(d) list, and EPA has failed to act within the 30-day time limit. EPA is in violation of section 303(d) of the CWA, 33 U.S.C. § 1313(d)(2), and the Administrative Procedure Act for unlawfully withholding and unreasonably delaying action. 5 U.S.C. § 706(1). EPA must take immediate action to remedy the violation discussed in this letter. If EPA does not take such action within 60 days, we will pursue litigation over this claim.

If you have any questions about this notice, please feel free to contact me.

Sincerely,

/s/ Miyoko Sakashita

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¹³ *Ohio Valley Envtl. Coalition, Inc. v. Pruitt*, 893 F.3d 225, 227 (4th Cir. 2018).

¹⁴ *See Alaska Ctr. for the Env’t v. Browner*, 20 F.3d 981, 983 (9th Cir. 1994).