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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

**Re: Notice of Intent to Sue for Failure to Perform Mandatory Duties Under Section 303(d) of the Clean Water Act Relating to Washington's Constructive Submission of a Total Maximum Daily Load for Nitrogen in Puget Sound**

Dear Mr. Regan:

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") and the EPA Administrator for violating their mandatory duties under CWA section 303(d), 33 U.S.C. § 1313(d), relating to the development of Total Maximum Daily Loads ("TMDLs") for nitrogen pollution leading to dissolved oxygen depletion in the Washington waters of Puget Sound. To date, only one of over 100 sewage treatment facilities discharging to Puget Sound and its tributaries has nutrient effluent limitations intended to protect marine waters.

As discussed below, on at least one documented occasion, June 20, 2019, Washington has constructively submitted a TMDL to address dissolved oxygen impairments in Puget Sound to EPA. More than thirty days have elapsed since that time, but EPA has yet to either approve or disapprove the proposed TMDL as required by section 303(d)(2) of the CWA, 33 U.S.C. § 1313(d)(2). That section provides, in part, that "[t]he Administrator shall either approve or disapprove [a TMDL] not later than thirty days after the date of submission." Thus, EPA is violating its mandatory duty under the CWA.

#### **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). These loads, known as TMDLs, must be “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).

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).

Recently the Ninth Circuit affirmed that:

[t]here is no dispute that under this scheme, a state has a nondiscretionary duty to submit to the EPA a TMDL for each of the waters identified on its § 303(d) list. Nor is it disputed that the EPA has a nondiscretionary duty to approve or disapprove this submission within 30 days. If the EPA disapproves the submission, it must develop and issue its own TMDL for the impaired water within 30 days. On its face, however, § 1313(d)(2) is silent as to what duties the EPA has when a state simply fails to submit a TMDL altogether.

In *San Francisco BayKeeper v. Whitman* (“BayKeeper”), we adopted the constructive submission doctrine to fill this statutory gap. 297 F.3d 877 (9th Cir. 2002). In *Baykeeper*, we acknowledged that where a state has “clearly and unambiguously” decided that it will not submit TMDLs for the entire state, that decision will be “construed as a constructive submission of no TMDLs, which in turn triggers the EPA’s nondiscretionary duty to act.” *Id.* at 883, 880.

*Columbia Riverkeeper v. Wheeler*, 944 F.3d 1204, 1208 (9th Cir. 2019). In *Columbia Riverkeeper*, the Ninth Circuit addressed delays in the context of individual TMDLs, noting the difference between affording less priority to the development of certain TMDLs and declining to issue those TMDLs at all. 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 TMDL.” *Id.* at 1211. Likewise, where a state has “clearly and unambiguously” decided not to submit a TMDL to EPA, including a failure over a long period of time, that action will be construed as a constructive submission of a TMDL, which in turn triggers EPA’s mandatory duty to act. *Id.* at 1208, 1210.

## **B. History of the Puget Sound Nitrogen TMDL**

Washington and EPA have been studying and modeling dissolved oxygen levels in Puget Sound since the late 1980s—a period of over thirty years. Based on this work, by 2001, Washington reported that the “South Puget Sound is sensitive to nutrient addition, confirming the potential for serious water quality degradation due to increased nutrient loads. Both point and nonpoint sources contribute significantly.” In 2007, TMDLs to address dissolved oxygen depletion in the South Puget Sound were slated for completion by 2010. By 2009, as it continued to build its water quality models, Washington planned to decide by the fall of 2010 whether it would do a TMDL or try a technology-based route based in state law that requires the use of “all known, available, and reasonable treatment,” or both. The model development was considered essential to the development of TMDLs. In 2011, using the model it developed as the basis of a future TMDL, Washington reported that sewage treatment plants dominate the anthropogenic nitrogen loading of Puget Sound, contributing 81 percent of the pollutant loading in the summer and 59 percent year-round.

In 2016, Washington’s continued development of the model for Puget Sound was described as supporting the development of a TMDL to address dissolved oxygen depletions, but by 2017, Washington had decided that it might develop “an alternative to a TMDL” in lieu of a TMDL. By July 2018, Washington had arrived at that “decision point” and determined that it would pursue a TMDL alternative in lieu of a TMDL, while noting a substantial risk was associated with the choice: “If a decision is made to not develop a TMDL, it is unclear how we use our NPDES permit authority to require dischargers to invest in advanced treatment to meet new effluent limits that do not have the force of a wasteload allocation.” Finally, on June 20, 2019, EPA and Washington signed an agreement—the Environmental Performance Partnership Agreement: State Fiscal Years 2020-2021, July 1, 2019 to June 30, 2021 (“2020–2021 PPA”)—that the state would not develop a TMDL for Puget Sound dissolved oxygen depletion but, rather, it would prepare a “TMDL alternative,” concluding that this alternative of “a Puget Sound Nutrient Management Plan [] will inform Ecology’s regulatory and non-regulatory implementation actions, similar to a TMDL.”

Most recently, in March 2021, EPA staff noted that the model development is well past the point of “diminishing returns” and that Puget Sound model has “more peer review and documentation than typical TMDL models.” Twenty-nine peer-reviewed papers and technical reports have been completed, dating back to 2009.

## **C. EPA’s Failure to Perform its Nondiscretionary Duty to Either Approve or Disapprove Washington’s Constructively Submitted TMDLs for Puget Sound Under CWA Section 303(d)**

Washington’s failure to have completed TMDLs for dissolved oxygen depletion in Puget Sound for over ten years, with no plan to do so despite the waters’ clear priority for both EPA and the state, constitutes a constructive submission of no TMDLs to EPA. In addition, in the June 20, 2019 PPA, and on information and belief on dates previous, Washington informed EPA of its clear and unambiguous decision to not develop and submit TMDLs to address dissolved oxygen depletion in Puget Sound, and EPA accepted that decision. Washington’s having made that clear

and unambiguous determination and indication to EPA has given rise to EPA's mandatory duty to disapprove the TMDL and issue a TMDL for Puget Sound itself, a mandatory duty it has failed to execute.

**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:

Allison LaPlante  
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**E. 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 under the CWA in federal court in the Western District of Washington.

Sincerely,



Allison LaPlante  
Earthrise Law Center  
Counsel for NWEA

cc: Michelle Pirzadeh, Acting Regional Administrator  
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