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April 16, 2024

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Michael S. Regan, Administrator
U.S. Environmental Protection Agency
USEPA Headquarters
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
Washington, D.C. 20460

Re: Notice of Violation and Intent to File Suit Under the Clean Water Act

Dear Administrator Regan:

I am writing on behalf of Ecological Rights Foundation (“EcoRights” or the “Noticing Party”) to give notice that the Noticing Party intends to file a civil action against the United States Environmental Protection Agency (hereinafter “EPA”) and yourself as Administrator of the EPA (together with EPA, “You”), for Your violations of the Clean Water Act (“CWA”) relating to Your failure to approve or disapprove of new or revised water quality standards submitted by the state of California within the time periods specified in CWA section 303(c)(3), 33 U.S.C. § 1313(c)(3).

CWA section 505(b) requires that sixty (60) days prior to the initiation of a civil action under CWA section 505(a)(2), 33 U.S.C. § 1365(a)(2), a citizen must give notice of his/her intent to file suit. Notice must be given to the EPA Administrator. *Id.* § 1365(b)(2).

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As required by the CWA, You are hereby placed on formal notice from the Noticing Party that, after the expiration of sixty (60) days from the date of this Notice of Violation and Intent To File Suit, the Noticing Party intends to file suit in federal court against You under CWA section 505(a)(2), 33 U.S.C. § 1365(a)(2), for violations of the CWA as set forth herein.

I. The Noticing Party

EcoRights is a non-profit public benefit corporation organized under the laws of California, with its main office at 2011 Sunset Ridge Rd., Blocksburg, CA 95514 (mailing address: P.O. Box 100, Blocksburg, CA 95514-0100). EcoRights' telephone number is (707) 845-8888. EcoRights' purpose is to educate the public about environmental practices that cause harm to human health, the environment, and other natural resources and to seek redress from those harms through litigation or alternative dispute resolution. EcoRights represents citizens in protecting public waterways from pollution and securing the multitude of benefits that flow from clean, vibrant waters: safe drinking water; abundant and diverse wildlife populations; healthy recreational opportunities; and economic prosperity from commercial fishing, tourism, and other commercial activities that depend on clean water. To further its goals, EcoRights actively seeks federal and state agency implementation of state and federal environmental and water quality laws, including water quality standards under the CWA, and, as necessary, directly initiates enforcement actions on behalf of itself and its members.

II. Violations of the Clean Water Act

A. Legal Background

In 1972, Congress enacted the CWA to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In so doing, Congress established a series of ambitious goals and policies designed to clean up the nation's waters. Among other things, Congress set a national goal of eliminating the discharge of any pollutants to navigable waters by 1985, and an interim goal of ensuring water quality which provides for the protection and propagation of fish, shellfish, and wildlife, and provides for recreation in and on the water where attainable, by 1983. *Id.* § 1251(a)(1)-(2). Congress also declared that it was national policy to prohibit the discharge of toxic pollutants in toxic amounts. *Id.* § 1251(a)(3).

To achieve these goals, the CWA contains numerous interrelated provisions designed to tackle the problem of water pollution from a variety of angles. Among other things, the CWA includes a water quality-based approach to protecting water quality. This approach focuses on the levels of pollutants in waterbodies and seeks to ensure that those levels do not exceed levels conducive to the use of those waters for various public purposes. Among other things, this approach relies on the establishment of "water quality standards" for waterbodies. Once established, water quality standards form the foundation for numerous other regulatory programs and requirements under the CWA.

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The term “water quality standards” is subject to definition within the CWA itself, EPA’s regulations, and relevant case law. Under CWA section 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A), water quality standards “shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses.” As stated in EPA’s regulations, “[a] water quality standard defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria that protect the designated uses.” 40 C.F.R. § 131.2. More specifically, EPA regulations define “water quality standards” as:

[P]rovisions of State or Federal law which consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses. Water quality standards are to protect the public health or welfare, enhance the quality of water and serve the purposes of the Act.

40 C.F.R. § 131.3(i).

In addition, water quality standards also include other components. These include “antidegradation policies,” which are policies designed, in part, to ensure that existing water uses, and the water quality necessary to protect those uses, is maintained. *See* 40 C.F.R. § 131.12(a)(1). In addition, water quality standards can also include “policies generally affecting their application and implementation, such as mixing zones, low flows and variances. Such policies are subject to EPA review and approval.” *Id.* § 131.13. Thus, water quality standards include, among other things, at least the following two components: (1) a set of uses for a particular waterbody that is designated by the regulator (referred to as “beneficial uses” in California, and referred to as “designated uses” under federal law); and (2) a set of water quality criteria to be used to determine whether the waters are clean enough to use for those beneficial uses (referred to in California as water quality “objectives,” and referred to as water quality “criteria” under federal law).

The CWA contains procedural requirements for establishing and updating water quality standards. *See generally* 33 U.S.C. § 1313. The CWA lays out a cooperative approach between the states and the federal government. *Id.* § 1313(c). Specifically, the CWA and EPA’s regulations require that the states adopt water quality standards for all intrastate navigable waters. *Id.* §§ 1313(a)(2) & (3); *see also* 40 C.F.R. § 131.10 (“Each State must specify appropriate water uses to be achieved and protected.”); *id.* § 131.11(a)(1) (“States must adopt those water quality criteria that protect the designated use.”). Once adopted, states are required to submit those water quality standards to EPA for review and approval. Specifically, pursuant to CWA section 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A): “Whenever the State revises or adopts a new [water quality] standard, such revised or new standard shall be submitted to the Administrator.”

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The CWA then places a mandatory duty on EPA to review and take action on the new or revised water quality standard. Specifically, pursuant to CWA section 303(c)(3), 33 U.S.C. § 1313(c)(3):

If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this chapter, such standard shall thereafter be the water quality standard for the applicable waters of that State. If the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this chapter, he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements.

(Emphasis added.) This imposes two deadlines on EPA. First, the Administrator has 60 days from the date of submission of the new or revised water quality standards to determine if the new or revised standard is consistent with the requirements of the CWA. If the Administrator determines that it is consistent with the requirements of the CWA, then the revised or new water quality standard takes effect for purposes of the CWA. Second, the Administrator has 90 days from the date of submission of the new or revised water quality standards to notify the submitting state of any determination that the new or revised standard does not meet the requirements of the CWA, specifying the changes needed to meet the CWA's requirements.

These are mandatory (non-discretionary) duties imposed on You by the CWA for purposes of CWA section 505(a)(2), 33 U.S.C. § 1365(a)(2).

B. Specific Violations

Here, You have violated these provisions by failing to approve or disapprove of new or revised water quality standards submitted by the state of California within the time periods specified in CWA section 303(c)(3), 33 U.S.C. § 1313(c)(3).

On December 12, 2018, the California State Water Resources Control Board ("State Board") adopted an amendment to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary ("Bay-Delta Plan"). *See* State Water Resources Control Board Resolution No. 2018-0059. These 2018 amendments to the Bay-Delta Plan were duly adopted by the State Board and, pursuant to California law, became legally binding provisions of California law effective upon approval by the California Office of Administrative Law. Among other things, these amendments established: (1) new water quality objectives for water flows on the Lower San Joaquin River and its three eastside tributaries (the Stanislaus River, Tuolumne River, and Merced River) necessary for the protection of fish and wildlife beneficial uses; and (2) revised water quality objectives related to salinity for the protection of agricultural beneficial uses in the southern Sacramento-San Joaquin Delta ("Delta").

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These two water quality objectives constitute “water quality standards” under the CWA. As noted above, under EPA’s regulations, water quality standards “consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses.” 40 C.F.R. § 131.3(i). As noted, the 2018 Bay-Delta Plan amendments adopted new water quality objectives related to flows for the protection of fish and wildlife, and related to salinity for the protection of agricultural beneficial uses. Under California law, the term “water quality objective” is synonymous with the term “water quality criteria” as used under federal law. Thus, these two water quality objectives constitute new or revised “water quality standards” under CWA section 303(c), 33 U.S.C. § 1313(c).

Shortly following their adoption on December 12, 2018, the State Board submitted the 2018 Bay-Delta Plan amendments to You for review and approval pursuant to CWA section 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A). Because these amendments contained new or revised water quality standards, You had a mandatory duty to either approve them within 60 days, or disapprove them within 90 days with notice to the State Board as to the changes deemed necessary to comply with the CWA. However, You have failed to take either action. It has now been approximately five years since California submitted the 2018 Bay-Delta Plan amendments to You for review. However, throughout this time, You have never approved or disapproved the new or revised water quality standards in the 2018 Bay-Delta Plan. Moreover, even if California had not submitted the 2018 Bay-Delta Plan amendments to You for review and approval, You would still have had a legal duty to either approve or disapprove of them within the time periods specified in CWA section 303(c)(3), 33 U.S.C. § 1313(c)(3). Again, You have failed to either approve or disapprove of the 2018 Bay-Delta Plan amendments within these time periods. For this reason, You have violated, and You remain in current violation, of Your mandatory duty to approve or disapprove of such new or revised water quality standards within the time periods specified in CWA section 303(c)(3), 33 U.S.C. § 1313(c)(3). This violation is actionable under CWA section 505(a)(2), 33 U.S.C. § 1365(a)(2).

III. Counsel

The Noticing Party has retained legal counsel to represent it in this matter. Please direct all communications to:

Christopher Sproul
Brian Orion
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San Francisco, CA 94121
(415) 533-3376
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IV. Remedies

Notice of Violation and Intent to File Suit

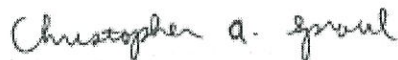
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The Noticing Party intends to seek declaratory and injunctive relief preventing further violations of the CWA pursuant to CWA Section 505(a) and (d), 33 U.S.C. §§ 1365(a) and (d), and such other relief as is permitted by law. In addition, the Noticing Party will seek to recover its attorneys, expert fees and costs pursuant to CWA Section 505(d), 33 U.S.C. § 1365(d).

The Noticing Party is interested in discussing effective remedies for the violations noted in this letter. If You wish to pursue such discussions in the absence of further litigation, we suggest that you initiate those discussions within the next 20 days so that they may be completed before the end of the 60-day notice period. Although the Noticing Party is always interested in avoiding unnecessary litigation, it does not intend to delay the filing of a complaint in federal court if discussions are continuing when the notice period ends.

Sincerely,



Christopher Sproul
Environmental Advocates
Counsel for the Noticing Party

cc: *Via Certified Mail, Return Receipt Requested*

Merrick Garland, U.S. Attorney General U.S. Department of Justice 950 Pennsylvania Avenue, N.W. Washington, D.C. 20530-0001	Martha Guzman, Regional Administrator U.S. EPA Region IX 75 Hawthorne Street San Francisco, California 94105
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