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# EARTHRISE

law center

James N. Saul  
Clinical Professor & Staff Attorney

Earthrise Law Center at Lewis & Clark Law School  
10015 SW Terwilliger Blvd.  
Portland, OR 97219-7799  
phone 503-768-6929  
fax 503-768-6642  
jsaul@lclark.edu  
earthriselaw.org

October 19, 2016

*Via Certified U.S. Mail*

Hon. Gina McCarthy  
Administrator  
Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

Mr. Dennis McLerran  
Regional Administrator  
EPA Region 10  
1200 6th Ave.  
Seattle, WA 98101

16 OCT 28 AM 10:43  
DEPT. OF JUSTICE - ENRD  
ENVIRONMENT DIVISION

**Re: Notice of Intent to Sue for Failure to Perform a Mandatory Duty Under Section 303(d)(2) of the Clean Water Act (CWA), 33 U.S.C. § 1313(c)(4), to Approve or Disapprove Oregon's 2012 § 303(d) List.**

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), the EPA Administrator, and the EPA Regional Administrator for Region 10 (collectively, "EPA") for violating their mandatory duty to review and either approve or disapprove Oregon's 2012 list of impaired waters pursuant to CWA § 303(d) ("2012 § 303(d) List").

## A. Legal Background

Section 303(d)(2) of the CWA requires States to “submit to the Administrator from time to time”<sup>1</sup> 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. Oregon typically submits its 303(d) list as part of an integrated report on state water quality that is intended to also satisfy the reporting obligations of CWA § 305(b).

The CWA requires EPA to “either approve or disapprove such identification and load not later than thirty days after the date of submission” to EPA. 33 U.S.C. § 1313(d)(2). Per EPA regulations, such action is delegated to the Regional Administrator. 40 C.F.R. § 130.7(d)(2). Because the statute unambiguously requires EPA to take action on the state submission by a clearly ascertainable deadline, EPA’s obligation to review and either approve or disapprove a State-submitted 303(d) list within 30 days of submission 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). *See, e.g., San Francisco Baykeeper, Inc. v. Browner*, 147 F. Supp. 2d 991, 995-96 (N.D. Cal. 2001), *aff’d sub nom. San Francisco BayKeeper v. Whitman*, 297 F.3d 877 (9th Cir. 2002); *Our Children's Earth Found. v. EPA*, 527 F.3d 842, 851 (9th Cir. 2008); *City of Dover v. EPA*, 36 F. Supp. 3d 103, 109 (D.D.C. 2014).

## B. Alleged Clean Water Act Violation: EPA’s Failure to Perform its Nondiscretionary Duty to Review and either Approve or Disapprove Oregon’s 2012 § 303(d) List by December 30, 2014, as Required by CWA § 303(d)(2) and 40 C.F.R. § 130.7(d)(2).

In November 2014, the State of Oregon, acting by and through the Oregon Department of Environmental Quality (“ODEQ”), submitted to EPA for review and approval its “2012 Integrated Report Assessment Database and 303(d) List.”<sup>2</sup> As of the

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<sup>1</sup> EPA regulations require biennial submission of state 303(d) lists, which are due on April 1 of each even-numbered year. 40 C.F.R. § 130.7(d)(1).

<sup>2</sup> *See* ODEQ, Oregon's 2012 Integrated Report, at <http://www.oregon.gov/deq/WQ/Pages/Assessment/2012report.aspx> (“DEQ submitted the 2012 Integrated Report and 303(d) list to the U.S. Environmental Protection Agency EPA in November 2014.”)

date of this Notice Letter nearly two years have passed, yet EPA has neither approved nor disapproved Oregon's 2012 § 303(d) List as the CWA requires. NWEA thus alleges that EPA has failed to perform its nondiscretionary duty to review and "either approve or disapprove" Oregon's 2012 § 303(d) List "not later than thirty days after the date of submission" (i.e., by December 30, 2014 at the latest). EPA's failure is ongoing, and is likely to continue unless and until EPA is ordered by a court to fulfill its nondiscretionary duty.

The inclusion or exclusion of waters from the EPA-approved § 303(d) list has significant regulatory and environmental consequences; for example, inclusion on the list requires the development of a total maximum daily load (TMDL) under CWA § 303(d)(1)(C), and new discharges of pollutants are generally prohibited to waters listed as impaired for such pollutants absent an EPA-approved TMDL. EPA's ongoing failure to review and either approve or disapprove Oregon's 2012 § 303(d) List harms NWEA and its members' aesthetic, recreational, and other interests that are dependent in part upon the chemical, physical, and biological integrity of Oregon's waters because those waters do not receive the CWA protections that would result from an inclusive and EPA-approved § 303(d) List.

On or about the 60<sup>th</sup> 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), in the U.S. District Court for the District of Oregon. NWEA will seek an order compelling EPA to perform its nondiscretionary duty by either approving or disapproving Oregon's 2012 § 303(d) list by a date certain; an order awarding NWEA its litigation costs pursuant to 33 U.S.C. § 1365(d); and other appropriate remedies.

**C. 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  
Telephone: (503) 295-0490

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The actual date of submission is unknown, so for purposes of this notice letter NWEA and NEDC assume that Oregon's 2012 § 303(d) List was submitted to EPA on November 30, 2014.

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

James N. Saul  
Assistant Clinical Professor and Staff Attorney  
Earthrise Law Center  
Lewis & Clark Law School  
10015 S.W. Terwilliger Blvd.  
Portland, OR 97219  
Tel. (503) 768-6929  
jsaul@lclark.edu

**D. 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, however, NWEA does not hear from EPA before the end of the 60-day notice period, or if meaningful progress towards settlement is not made during the 60-day notice period, NWEA will file a lawsuit against EPA on or about the 60<sup>th</sup> day after the date of this notice letter. If EPA is interested in discussing settlement, we encourage EPA to contact the undersigned counsel immediately.

Sincerely,

**EARTHRISE LAW CENTER**



James N. Saul

**Copies Sent via Certified Mail To:**

Hon. Loretta Lynch  
Attorney General of the United States  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

Dick Pederson, Director  
Oregon DEQ  
811 SW 6th Avenue  
Portland 97204-1390

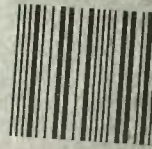
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Hon. Loretta Lynch  
Attorney General of the United States  
U.S. Dept. of Justice  
950 Pennsylvania Ave., NW  
Washington, DC 20530-0001

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