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March 7, 2016

Gina McCarthy
Administrator
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1200 Pennsylvania Ave. N.W.
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Shawn Garvin
Region III Administrator
U.S. Environmental Protection Agency
1650 Arch Street
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ENRD

16 APR -4 P12:35

DEPT. OF JUSTICE - ENRD
ENVIRONMENT DIVISION

Re: 60-Day Notice of Intent to File Citizens Suit under Clean Water Act Section 505(a) for Failure to Perform a Non-Discretionary Duty under Section 303(d) of the Act

Dear Ms. McCarthy and Mr. Garvin:

The Sierra Club, West Virginia Highlands Conservancy and West Virginia Rivers Coalition (collectively "Citizen Groups") in accordance with Section 505 of the Clean Water Act (the "Act" or "CWA"), 33 U.S.C. § 1365 and 40 C.F.R. Part 135, hereby notify you that you have failed to perform acts and duties pursuant to Section 303(d) of the Act that are is discretionary. If you do not remedy this failure within the next sixty days, the Citizen Groups intend to file suit.

I. The EPA Administrator Has Violated Her Non-Discretionary Duty to Approve or Deny West Virginia's 303(d) List within the Requisite 30-Day Period.

Section 303(d) of the CWA requires that "[e]ach State shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) [of the Act] are not stringent enough to implement any water quality standard applicable to such waters." 33 U.S.C. § 1313(d)(1)(A). Each state is then required to submit the list of identified waters (the "303(d) List") to the Administrator. The Administrator, "shall approve or disapprove such identification . . . not later than thirty days after the date of submission." 33 U.S.C. § 1313(d)(2). Pursuant to 40 C.F.R. § 130.7(d)(2), the Administrator has delegated her authorities and nondiscretionary duties under 33 U.S.C. § 1313(d)(2) to the Regional Administrators.

The West Virginia Department of Environmental Protection submitted its proposed 2014 303(d) List (titled the 2014 Integrated Water Quality Monitoring and Assessment Report) to EPA on April 13, 2015. Accordingly, the Administrator was required to approve or disapprove the list no later than May 6, 2015. Now, more than ten months after submission, EPA still has not taken the required action to approve or disapprove of the West Virginia 303(d) List. If EPA has not fulfilled its non-discretionary duty to approve or disapprove that list within 60-days of the postmark of this letter, we intend to file suit.

II. EPA Must Disapprove West Virginia's 303(d) List as Submitted.

A. *The WVDEP Has Repeatedly Refused to Follow EPA's Direction to Adopt a Genus-Level Assessment*

For more than five years, EPA has repeatedly instructed the WVDEP to adopt a genus level assessment of benthic macroinvertebrates for use in assembling the West Virginia 303(d) List. In its approval of the 2010 list, EPA instructed WVDEP to move "to a genus-level analysis for its 2012 section 303(d) List." The letter explained that WVDEP's prior assessment tool (WVSCI) was outdated and that EPA expected West Virginia to adopt an available and approved genus-level assessment protocol (GLIMPSS).

In its initial review of the 2012 list, EPA questioned WVDEP's refusal to adopt GLIMPSS: "It is not clear to EPA why DEP has declined to use GLIMPSS for its 2012 Section 303(d) list or how the draft 2012 Section 303(d) list addresses the concerns raised by EPA." EPA Comments on West Virginia's 2012 Draft Section 303(d) List (June 6, 2012)). EPA noted that GLIMPSS had been subject to peer review during 2012. *Id.* In its final authorization EPA noted that it would use WVSCI as the operative assessment methodology for the 2012, but warned that it was still recommending the use of GLIMPSS for future assessments. It cautioned that EPA's allowance of WVSCI for the 2012 list would not be an indication that the same methodology could be used in 2014. Letter from Shawn Garvin, EPA, to Randy Huffman, WVDEP, Encl. 2 (September 30, 2013) ("If a new methodology is not in place for the 2014 Section 303(d) list, EPA will reconsider the range of existing and readily available information, including available assessment methodologies at that time.").

EPA continued to question the WVDEP's refusal to adopt a genus level assessment in its written comments on drafts of the 2014 version of West Virginia's 303(d) List. In those July 2014 comments, EPA noted that WVDEP had the capacity to use genus level data in its assessment and directed the agency to "update biological assessment results using GLIMPSS for the final [303(d) List] submission to EPA." EPA's Comments on West Virginia's Draft 2014 Section 303(d) List (July 11, 2014). Despite this direction, the version of the Draft 2014 Section 303(d) List submitted to EPA as a final proposal on April 13, 2015, continued to rely on the outdated WVSCI metric, rather GLIMPSS. WVDEP, 2014 West Virginia Integrated Water Quality Monitoring and Assessment Report (hereinafter 2014 IR).

As an excuse for its inaction, the WVDEP has relied repeatedly on Senate Bill 562, which passed the West Virginia Legislature in 2012, and which called upon the agency to adopt new rules to interpret the narrative criterion for biological impairment. *See* 2012 IR at p. 9; 2014 IR at p. 13. However, EPA has twice rejected this excuse. In comments on both the 2012 and 2014 lists EPA explained that "GLIMPSS would achieve a level of protection commensurate with Senate Bill 562's objectives. . . ." EPA Comments on West Virginia's 2012 Draft Section 303(d) List (June 6, 2012); EPA's Comments on West Virginia's Draft 2014 Section 303(d) List (July 11, 2014).

It is clear that West Virginia will continue to delay without EPA intervention. Both the 2012 and 2014 IR's state that the WVDEP will seek legislative approval for a new assessment methodology. 2012 IR at 9; 2014 IR at 13. Yet, the WVDEP has not submitted any such proposal in prior legislative sessions, and there is no bill or other proposal pending in the current—2016—session for such purpose. Because the West Virginia Legislature meets for its regular session only in the spring of each year, this means that no proposal is likely to be approved until at 2017 at the earliest.

It is past time for EPA to take action on this issue and back up the warnings it has repeatedly sent to WVDEP. The state agency's reticence will not be solved by further pointed comments, or letters. EPA should therefore disapprove the West Virginia 303(d) List as submitted.

B. The WVDEP Has Violated Its Regulatory Obligations by Refusing to Evaluate Existing Benthic Assessment Data

In developing Section 303(d) lists, states are required to “assemble and evaluate all existing and readily available water quality-related data and information to develop [the 303(d) List]. 40 C.F.R. § 130.7(b)(5). West Virginia has been collecting genus level macroinvertebrate data since 1998. 2014 IR at 19. Moreover, West Virginia possesses a valid, peer-reviewed and calibrated methodology for analyzing this data. See Pond et al, *Calibration and Validation of a Regionally and Seasonally Stratified Macroinvertebrate Index for West Virginia Wadeable Streams, Environmental Monitoring and Assessment*, 185:1515-1540 (2013). West Virginia has even used this data for probabilistic analysis of stream condition by ecoregion. 2014 IR at 20. What West Virginia has thus far refused to do is assemble and evaluate this information for purposes of developing the 303(d) List. That is a violation of the state’s responsibility under the Clean Water Act and a clear ground for disapproval under Section 303(d)(2) of the Act. Indeed, the failure to assemble and evaluate existing water quality data was the reason given for EPA’s partial denial of West Virginia’s 2012 303(d) List. Letter from Shawn Garvin, EPA, to Randy Huffman, WVDEP, Encl. 2 (September 30, 2013).

Under 303(d)(2) EPA has a responsibility to promulgate its own list of impaired streams, after the denial of the state agency’s list. The use of genus-level data would significantly improve the accuracy and reliability of West Virginia’s 303(d) List. As EPA has previously explained to WVDEP:

GLIMPSS is a next generation index designed to provide higher resolution than the WVDEP’s existing family level WVSCI. In developing GLIMPSS, 41 different biological metrics were tested across seasonal and geographic strata, primarily to refine expectation criteria for aquatic life use attainment in WV. GLIMPSS responds favorably to various stressors, providing better diagnostic capabilities than WVSCI. The GLIMPSS is a more accurate index that directly measures specific aquatic life attainment in West Virginia streams as it accounts for natural variability driven by geographic location, seasonality and waterbody size. GLIMPSS was developed using nearly 400 reference sites as opposed to the 107 reference sites used for WVSCI. GLIMPSS is also better suited than WVSCI to detect biological changes due to climate change.

EPA’s Comments on West Virginia’s Draft 2014 Section 303(d) List (July 11, 2014). Indeed, using the GLIMPSS methodology reveals the biological impairment of 420 streams whose condition is not adequately assessed using the WVSCI method. EPA has a responsibility to ensure that water quality standards in West Virginia are protected, even if the state agency is recalcitrant. EPA must fulfill this obligation by denying West Virginia’s submission and promulgating its own list using GLIMPSS for assessment of the biological status of West Virginia streams.

III. Conclusion


As described above, the Administrator and the Regional Administrator for Region III have failed to perform duties under the Clean Water Act that are not discretionary by failing to approve or disapprove of WVDEP’s 2014 303(d) List within 30 days of its submission as required by 33 U.S.C. § 1313(d)(2) and 40 C.F.R. § 130.7(d)(2). If you fail to perform the nondiscretionary duties within sixty (60) days of the postmark of this letter, the Citizen Groups intend to file a citizen’s suit under section 505(a)(2) of the Act to compel you to perform your mandatory duties. The Citizen Groups would, however, be happy to meet with you or your staff to attempt to resolve these issues within the 60-day notice period. Please do not hesitate to contact us.

cc:

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Sincerely,



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