



December 18, 2015

Via Certified Mail
Return Receipt Requested

Gina McCarthy
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Dennis McLerran
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Re: Notice of Violation of Non-Discretionary Duty to Propound Washington State
Fish Consumption Rate Under 33 U.S.C. § 1313

Dear Ms. McCarthy and Mr. McLerran:

On behalf of Puget Soundkeeper Alliance, Spokane Riverkeeper, North Sound Baykeeper, Pacific Coast Federation of Fishermen's Associations, and the Institute for Fisheries Resources ("Waterkeepers Washington"),¹ we ask that you take immediate action to remedy ongoing violations of a non-discretionary duty under the Clean Water Act ("CWA"). As described fully below, the United States Environmental Protection Agency ("EPA") is in violation of Clean Water Act Section 303 (33 U.S.C. § 1313(c)(4)), due to its failure to promulgate human health criteria water quality standards based upon a protective fish consumption rate for Washington State after having "determine[d] that a revised or new standard is necessary to meet the requirements of [CWA section 303]." 80 Fed. Reg. 55,063, 55,066-67 (Sept. 14, 2015). This letter constitutes a 60-day notice of intent to file a citizen suit against EPA pursuant to Section 505 of the CWA, 33 U.S.C. § 1365.

As EPA has long recognized, Washington's human health criteria water quality standards—the amount of pollution a state deems tolerable—allow too much toxic pollution because the formula used to develop these standards assumes that people eat very little fish, a

¹ Puget Soundkeeper Alliance, Spokane Riverkeeper, and North Sound Baykeeper are members of the international Waterkeeper Alliance.

mere 6.5 grams per day. Yet surveys of tribes in Washington show fish consumption rates of 200, 300 and even over 500 grams per day, even with consumption suppressed due to severely reduced stocks of salmon, shellfish, and other fish relied upon by many people in Washington. Despite these facts, Washington has relied on a woefully under-protective fish consumption rate and accompanying human health criteria water quality standards for nearly two decades. By using a low fish consumption rate, Washington's human health criteria water quality standards, which are intended to protect public health and aquatic resources, fail to achieve these objectives.

On September 14, 2015, EPA determined under 33 U.S.C. § 1313(c)(4)(B) that Washington's water quality standards are not adequate. 80 Fed. Reg. at 55,066-67. At the same time, EPA issued its own proposed rule to replace the inadequate standards. *See generally id.* That triggered EPA's duty to finalize a protective rule within ninety days. 33 U.S.C. § 1313(c)(4). EPA has not finalized a rule. For the reasons explained below, EPA has violated its mandatory duty under the CWA, 33 U.S.C. § 1313(c)(4), by failing to promulgate human health criteria based on an accurate fish consumption rate for Washington that adequately protects designated uses, including for all high-consuming populations in the state such as members of tribes, Asian-Pacific Islanders, and subsistence individuals.

I. BACKGROUND

The CWA requires states to set water quality standards that are protective of the "fishable and swimmable" goals of the Act. *See* 33 U.S.C. § 1313. In particular, water quality standards are required to ensure that designated uses of waters are achieved and maintained. EPA is directed to review and approve or disapprove states' water quality standards, and if EPA disapproves a standard or determines a revised or new standard is necessary to meet the requirements of the CWA, EPA is required to step in and promptly promulgate the standards for the state, finalizing the revised standard within ninety days of the proposed rule. *See id.* § 1313(c)(4). EPA has repeatedly emphasized the necessity of setting fish consumption rates that protect the ability of people to eat normal, healthy amounts of fish (a designated use) without taking on a burden of toxic chemicals.

Despite EPA guidance and specific direction, Washington State has never properly adopted a fish consumption rate as part of its state water quality standards and instead relies on the outdated National Toxics Rule that provides for consumption of only 6.5 grams of fish or shellfish per day, about the amount that fits on a cracker, slightly less than ½ pound a month. In the Pacific Northwest, community surveys dating back a decade, repeatedly acknowledged and utilized by EPA in various guidance documents and directions to states, show that fish is consumed at a higher rate than many other parts of the nation, and certain populations consume fish at significantly higher rates than the general population.

Surveys of Native American tribes in Washington show consumption rates of 796 and 205-280 grams per day (“g/day”),² even with consumption suppressed due to severely reduced stocks and contamination of salmon, shellfish, and other fish relied upon by these tribes.³ A survey of Pacific-Asian communities in the Puget Sound region reflect consumption rates of 170 g/day. *See, e.g.*, Nat’l Environmental Justice Advisory Council Meeting (a Federal Advisory Committee to the U.S. Environmental Protection Agency), *Fish Consumption and Environmental Justice* (Dec. 2001 (rev’d Nov. 2002)) (“Environmental Justice Report”); EPA, *Guidance for Assessing Chemical Contaminant Data for Use in Fish Advisories, Vol. 2 Risk Assessment and Fish Consumption Limits, 3d ed.*, at 1-6 through 1-9 (Nov. 2000) (“Fish Advisories Guidance”). One recent EPA document noted survey data showing adult Suquamish tribal members have a fish consumption rate totaling 584.2 g/day. EPA, Record of Decision: Lower Duwamish Waterway Superfund Site App’x B at 33 & n.46 (Nov. 2014). EPA also highlighted that the Muckleshoot and Suquamish Tribes have raised the issue of their fish consumption rates being suppressed as a result of fishing conditions. *Id.* *See also*, Comment Letters from Confederated Tribes and Bands of the Yakama Nation, March 25, 2014 (noting Yakama has higher consumption rates and never “agreed” to 175 g/day); The Tulalip Tribes, March 28, 2014; Puyallup Tribe of Indians, April 9, 2014; Stillaguamish Tribe of Indians, April 2, 2014 (noting that consumption has been suppressed due to efforts to build up salmon runs decimated by non-Indian actions). The NWIFC has compiled a table of tribal fish consumption rates, showing some as high as 918 g/day as of 2013. NWIFC, Comments on the Draft Rule for WA Water Quality Standards at 28 (Mar. 23, 2015) *available at* <http://www.ecy.wa.gov/programs/wq/ruledev/wac173201A/comments/0060ss.pdf>.

² In 2008, a fish consumption rate of 586 g/day was established for native subsistence consumers on the Lower Elwha, related to the Rayonier cleanup near Port Angeles, Washington.

³ Failing to take into account suppression of consumption due to depletion and contamination factors also leads to a downward water- and fish-contamination spiral where consumers are not adequately protected so they eat less fish out of fear of the higher levels of contamination that have been allowed (based on suppressed instead of accurate consumption rates), which in turn affects future surveys. EPA recognized the importance of considering unsuppressed fish consumption rates in its proposed rule and considered those rates in Washington. 80 Fed. Reg. at 55,066 & 55,068.

II. THE EPA ADMINISTRATOR IS IN VIOLATION OF A NON-DISCRETIONARY DUTY BY FAILING TO PROMULGATE A FISH CONSUMPTION RATE FOR THE STATE OF WASHINGTON WITHIN NINETY DAYS OF ISSUING ITS PROPOSED RULE.

A. Legal Framework.

The CWA requires the development of water quality standards, which are narrative and/or numeric standards designed to protect designated uses of our nation's waters. In short, water quality standards are required to protect the integrity of our nation's waters for "fishing and swimming;" that is they are to protect the biological and human health needs associated with our waters. 33 U.S.C. §§ 1251 and 1313. The CWA provides for a dual state and federal effort in ensuring that those requirements of the law are timely and well met.

While a state is given the first opportunity to set water quality standards that meet those requirements, the law assigns EPA the critical role of oversight to ensure that states act promptly to develop and keep current protective water quality standards; EPA must quickly step in if the state does not. *Id.* § 1313(a) through (c). The CWA also requires that when EPA has determined a state's water quality standards do not meet the requirements of the CWA and that a new or revised standard is necessary to comply with the requirements of the CWA, EPA must promptly promulgate a new or revised standard and finalize that standard within 90 days of publishing the proposed standard unless the state steps in and corrects the problem. *See* 33 U.S.C. § 1313(c)(4). EPA has a duty to act under this provision.

B. Recent Timeline of Attempted Revisions to Washington's Water Quality Standards.

EPA has repeatedly informed Ecology that Washington's human health criteria water quality standards are inadequate. For the last five years, since 2010, on at least seven occasions, EPA has repeatedly informed Washington that Washington's fish consumption rate of 6.5 g/day is not accurate and that the human health water quality criteria based on that rate is not sufficiently protective of human health and designated uses. *See* Correspondence from EPA to Washington Department of Ecology from Nov. 10, 2010; Dec. 16, 2010; Jan. 17, 2012; Sept. 6, 2012; June 21, 2013; Apr. 8, 2014; and Dec. 18, 2014.

Despite EPA's repeated direction for Washington State to revise the state's inadequate standards, Washington State's attempts to revise its human health criteria water quality standards have been repeatedly and purposely delayed, unsupported by fact and law, discriminatory, and ultimately ineffective. On January 12, 2015, the Washington Department of Ecology released a proposed rule to revise Washington State's water quality standards. *See* Washington Dept. of Ecology, WAC 173-201A Proposed Revisions (Jan. 12, 2015) ("Ecology Proposed Rule"), *available at* <http://www.ecy.wa.gov/laws-rules/wac173201a/p1203.pdf>. The proposed rule was

inadequate and problematic. For example, it used an unacceptably high cancer risk rate of 1×10^{-5} (except for PCBs, for which Ecology used an even lower risk rate). Ecology Proposed Rule at 13 n.C, n.E. The rule also was riven with loopholes that would have undone any progress on protecting human health. *See id.* at 13-21 (proposing variances, compliance delays, and intake credits). EPA, along with tribes, conservation groups, commercial fishing groups, and public health advocates pointed out myriad unacceptable flaws in the proposal. A related bill to expand Ecology's authority to control pollution control in the state failed in the Legislature, and Ecology ultimately withdrew the proposal, with no replacement on the horizon, on August 4, 2015.

After this latest delayed and failed attempt by the state, EPA, as required by the Clean Water Act, finally stepped in and proposed its own human health criteria water quality standards on September 14, 2015. 80 Fed. Reg. 55,063. At that time, EPA found that

[b]ecause Washington's existing human health criteria, as promulgated by EPA in the NTR, are no longer protective of the applicable designated uses per the CWA and EPA's regulations at 40 CFR 131.11, EPA determines under CWA section 303(c)(4)(B) that new or revised WQS for the protection of human health are necessary to meet the requirements of the CWA for Washington.

Id. at 55,066. EPA initially set the comment deadline for its proposed rule as November 13, 2015, allowing EPA adequate time to finalize the rule within the time period dictated by the Clean Water Act. *Id.* However, EPA moved that deadline to December 28, 2015 and has not indicated when it will finalize the rule. 80 Fed. Reg. 65,980 (Oct. 28, 2015).

C. EPA's Violation.

EPA has a mandatory duty under 33 U.S.C. § 1313(c)(4) to finalize water quality standards for Washington after making a determination that "the Administrator determines that a revised or new standard is necessary." The timing of issuance of the new rule is not discretionary; EPA must finalize the rule within ninety days of its issuance of a proposed rule, which occurred on September 14, 2015. It has not done so. Ninety days from September 14, 2015 was December 14, 2015. By failing to promulgate human health criteria based on an accurate fish consumption rate for Washington that adequately protects designated uses, including for subsistence populations in the state, EPA is in violation of a statutory duty.

IDENTITY AND ADDRESSES OF WATERKEEPERS WASHINGTON

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CONCLUSION

EPA is in continuing violation of the Clean Water Act, 33 U.S.C. § 1313(c)(4). Waterkeepers Washington provide this Notice for the continuing violation outlined above, including if the violation continues subsequent to the date of this Notice. This Notice is given pursuant to 33 U.S.C. § 1365.

Waterkeepers Washington send this notice after years of attempts to persuade Washington State and EPA to protect people who eat fish by adopting accurate, protective human health criteria water quality standards. EPA's proposed rule is, in many ways, scientifically defensible and would represent a tremendous step forward for consumers of fish in Washington State, and Waterkeepers Washington seek to finalize and build on that effort. Waterkeepers Washington continue to believe that this issue should be resolved without the initiation of litigation and without devoting resources to court proceedings. We stand ready to work with you in good faith to resolve EPA's violations. However, unless this violation is cured

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within sixty days by the promulgation of a final rule incorporating an accurate fish consumption rate and protective standards into new human health criteria, we reserve the right to take appropriate legal action to compel EPA to comply with the CWA and to protect consumers of fish and shellfish in Washington State.

Please contact the undersigned should you have any questions.

Sincerely,

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cc: Maia Bellon, Director
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