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May 2, 2024

Via certified mail and electronic mail

Michael S. Regan, Administrator
U.S. Environmental Protection Agency
Office of the Administrator, Mail Code 1101A
1200 Pennsylvania Avenue NW
Washington, DC 20460
regan.michael@epa.gov

RE: Notice of Intent (NOI) to Sue for Violations of EPA’s Nondiscretionary Duty to Biennially Submit a National Water Quality Inventory to Congress

Dear Administrator Regan:

The Environmental Integrity Project writes on behalf of **Waterkeeper Alliance and the Center for Biological Diversity** to provide notice of our intent to sue the U.S. Environmental Protection Agency and you, in your official capacity as Administrator (collectively, “EPA” or “Agency”), for failure to perform nondiscretionary duties required by the Clean Water Act (“CWA” or “Act”), 33 U.S.C. §§ 1251 *et seq.* Specifically, EPA has failed to perform its mandatory duty under CWA Section 305(b)(2) to biennially submit state water quality reports and an analysis thereof (the “Section 305(b)(2) Analysis”) to Congress. 33 U.S.C. § 1315(b)(2).

The primary objective of the Clean Water Act is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). The Clean Water Act Section 305(b)(2) Analysis is intended to be a critical biennial “report card” on the progress of EPA and CWA-implementing states in restoring and maintaining our Nation’s waters, as well as an analysis of what is needed to move forward. Yet, the last time EPA submitted a Section 305(b)(2) Analysis to Congress (and thus to the public) was in 2017 – seven years ago. By failing to develop and submit to Congress updated reports in 2019, 2021 and again in 2023, EPA deprived Congress and the public of a key Clean Water Act tool.

This NOI serves to notify EPA that **Waterkeeper Alliance and the Center for Biological Diversity** intend to file suit against the Agency in the U.S. District Court for the District of Columbia for failure to perform this nondiscretionary duty at any time beginning 60 days after the postmarked date of this NOI. 33 U.S.C. § 1365(b)(2); 40 C.F.R. § 135.2(c). This NOI, as required, identifies the provision of the CWA which requires such act or creates such duty, describes with reasonable specificity the action taken or not taken by EPA which is alleged to constitute a failure to perform such act or duty, and states the full name, address and telephone number of the person giving the notice. 40 C.F.R. § 135.3(b).

I. EPA Has a Mandatory Duty to Biennially Submit State Water Quality Reports and an Analysis Thereof To Congress.

CWA Section 305(b)(1) requires that states biennially prepare and submit to EPA water quality reports describing “the water quality of all navigable waters in such State during the preceding year.” 33 U.S.C. § 1315(b)(1). This includes listing which waters are so impaired by pollution that they are unable to support aquatic life, unsafe for recreational uses like fishing, boating, and swimming, can no longer serve as a reliable source of drinking water without extensive treatment, or threaten commercial fisheries. *Id.* § 1315(b)(1)(A)-(B). States are also required to show which waters have plans to reduce pollution and to recommend what additional actions are necessary to clean up its polluted waters. *Id.* § 1315(b)(1)(C).

CWA Section 305(b)(2) then requires EPA to evaluate these state reports, stating that EPA must transmit to Congress not only these state reports but “an analysis thereof.” 33 U.S.C. § 1315(b)(2).

This analysis of the states’ Section 305(b)(1) reports should include a number of water quality issues that are important to the public and Congress.

First and foremost, the Section 305(b)(2) Analysis to Congress should address head-on the disturbing reality that, as state reports show and EIP documented in its *2022 Clean Water Act at 50* report, more than 50% of America’s assessed waterways are so impaired by pollution that they are unable to support their uses.¹

EPA’s Section 305(b)(2) Analysis should also discuss the accuracy of state Section 305(b)(1) reports and any inconsistencies in their methods, which has previously been a subject of concern by GAO.² The Section 305(b)(2) Analysis should also address the state reports’ comprehensiveness and which waters were not evaluated; the sources of pollutants that have the greatest impact on multi-state watersheds and water quality nationwide; whether states are making sufficient progress in cleaning up their waters; and, if states are not making such progress, why not. EPA could also discuss the specific issues that EPA has highlighted to states in its Section 305(b) guidance. For example, EPA’s March 29, 2023 guidance to states³ for Section 305(b) and 303(d) reports provides specific instructions for evaluating waters for climate change impacts, trash-related impairments, and nutrient-related impairments. The results of these evaluations, and even whether states are conducting them at all, are important information in any EPA analysis of the state Section 305(b)(1) reports. EPA’s Section 305(b)(2) Analysis could also include recommendations in order to further meet the CWA’s goals, including whether additional state oversight is needed and strategies to address challenges that are difficult or

¹ EIP, *The Clean Water Act at 50* at 1 (Mar. 17, 2022), <https://environmentalintegrity.org/reports/the-clean-water-act-at-50/>

² GAO, *Clean Water Act: Changes Needed If Key EPA Program Is to Help Fulfill the Nation's Water Quality Goals*, GAO-14-80 (Dec 05, 2013), <https://www.gao.gov/products/gao-14-80>

³ https://www.epa.gov/system/files/documents/2023-03/2024IRmemo_032923.pdf

impossible for each state to address in isolation.

In sum, the CWA intended EPA's Section 305(b)(2) Analysis to provide Congress and the public with a biennial assessment of how much has been accomplished by states and EPA to reduce pollution, how much remains to be done, and what strategies or actions are needed to restore polluted waterways to health.

Note that EPA's National Rivers and Streams Assessment, while highly important, is not a substitute for the Section 305(b)(2) report. The National Rivers and Streams Assessment, which EPA prepares pursuant to CWA Sections 104(a) and (b), 33 U.S.C. § 1251, applies 16 indicators of water quality to a statistical sampling of river and stream sites.⁴ It is not a full analysis of state-by-state water quality. Nor do EPA's ATTAINS database or its "How's my Waterway?" web pages offer the comprehensive summaries of state water quality required by the Section 305(b)(2) Analysis. Moreover, EPA actually stopped updating and pulled down its *Summary of State Information* webpage several years ago, which had provided the public and clean water advocates with a compilation of water quality data for each state. The Section 305(b)(2) Analysis to Congress is now needed more than ever.

The biennial transmission to Congress of both the state reports and EPA's CWA analysis are mandatory duties under the CWA. The law unequivocally states that EPA "shall transmit such State reports, together with an analysis thereof, to Congress on or before October 1, 1975, and October 1, 1976, and biennially thereafter." 33 U.S.C. § 1315(b)(2) (emphases added). By using the term "shall," Congress intended that CWA Section 305(b)(2)'s report requirement to be mandatory, rather than discretionary. *See, e.g., Murphy v. Smith*, 138 S. Ct. 784, 787 (2018) ("the word 'shall' usually creates a mandate, not a liberty"). In addition, Congress includes a date-certain deadline for the Section 305(b)(2) Report ("biennially thereafter"), which is necessary to find a nondiscretionary duty. *Alaska Community Action on Toxics v. EPA*, 943 F.Supp.2d 96, 106 (D.D.C. 2013) (citing *Sierra Club v. Jackson*, 724 F.Supp.2d 33, 39 n. 2 (D.D.C. 2010)).

II. Specific Activities Alleged to Constitute a CWA Violation

EPA has failed to meet its mandatory duty to submit a Section 305(b)(2) Report to Congress for the last five years.

The last publicly posted EPA Section 305(b)(2) Report to Congress (titled the "National Water Quality Inventory: Report to Congress") was submitted to Congress in August 2017.⁵ EPA was thus required by CWA Section 305(b)(2) to submit its next report by August **2019**. On November 1, 2023, EIP submitted a FOIA to EPA for all Section 305(b)(2) reports since 2017. On November 20, 2023, EPA responded that they had no documents.

Thus, EPA has failed to perform its mandatory duty to submit a CWA Section 305(b)(2) Report to Congress every day since September 1, 2019. This failure violates CWA Section 305(b)(2).

⁴ <https://riverstreamassessment.epa.gov/webreport/#introduction>

⁵ <https://www.epa.gov/waterdata/national-water-quality-inventory-report-congress>.

III. The Full Name and Address and Phone Number of the Person Giving the Notice

Pursuant to 40 C.F.R. § 135.3(b), the full name, address and telephone number of the persons giving the notice are listed below.

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IV. Conclusion

Despite the CWA's mandatory requirement that EPA biennially submit a Section 305(b)(2) Analysis to Congress, EPA has not submitted a Section 305(b)(2) Analysis to Congress since 2017. We intend to bring suit against EPA to compel compliance with CWA Section 305(b)(2).

If you have any questions regarding the allegations in this notice or would like to discuss this matter further, please contact Meg Parish at 720-841-0652 or mparish@environmentalintegrity.org.

Respectfully submitted,

s:/ Meg Parish

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