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April 30, 2013

Via Certified Mail, Return Receipt Requested

Bob Perciasepe
Acting Administrator and Deputy Administrator
United States Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dennis McLerran
Regional Administrator
U.S. EPA Region 10
1200 Sixth Avenue, Suite 900
Seattle, WA 98101

**Re: Notice of Intent to Sue EPA Under Clean Water Act for Failing
to Prepare and Promulgate Toxics Standards in Idaho**

Dear Acting Administrator Perciasepe & Regional Administrator McLerran:

I am writing on behalf of my client, Idaho Conservation League, to provide this notice of intent to sue the EPA Administrator for violations of the Clean Water Act and the Administrative Procedure Act. Specifically, EPA has failed to carry out its nondiscretionary duty under Section 303(c) of the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (CWA), to promptly prepare and promulgate certain water quality standards in Idaho and has unlawfully withheld or unreasonably delayed promulgating such standards under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* (APA).

As set forth in further detail below, Idaho submitted new and revised human health criteria for 88 toxic pollutants to EPA for approval on July 7, 2006 (Idaho Docket No. 58-0102-0503). On or about May 10, 2012, EPA issued a disapproval of Idaho's inadequate standards. Subsequently, Idaho failed to submit new standards within 90 days, triggering EPA's mandatory CWA duty to promptly prepare and promulgate substitute standards on or about August 9, 2012. As of the date of this letter, Idaho still has not submitted new standards to EPA, and EPA has not prepared substitute standards. EPA has thus unlawfully withheld or unreasonably delayed preparing and promulgating substitute standards in violation of the CWA and APA.

Unless EPA takes the steps necessary to remedy this violation, ICL intends to file suit in U.S. District Court under the citizen suit provision of the CWA, 33 U.S.C. § 1365(a)(2), and under the APA, immediately following the expiration of the required 60-day notice period, seeking injunctive and declaratory relief as well as attorney and expert fees.

PERSONS GIVING NOTICE

The full name, address, and telephone number of the party providing this notice is:

Idaho Conservation League
P.O. Box 844
Boise, ID 83701
208.345.6933

REPRESENTING ATTORNEY

The attorney representing ICL in this notice is:

Bryan Hurlbutt, Attorney/Water Fellow
Advocates for the West
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ICL'S COMMITMENT TO WATER QAULITY IN IDAHO

Idaho Conservation League (ICL) is a non-profit conservation organization incorporated in Idaho with its main office in Boise. ICL's mission is to protect and restore the clean water, wildlands, and wildlife of Idaho. ICL and its approximately 20,000 supporters are dedicated to protecting and conserving Idaho's natural resources, including its water resources. ICL, as an organization and on behalf of its staff and supporters, is greatly concerned with protecting and improving the quality of the surface waters of the State of Idaho. ICL and its supporters are active in public education, administration, and legislation of conservation issues in Idaho, including water quality.

ICL and its staff and supporters use and enjoy the waters of the State of Idaho for health, recreational, scientific, and aesthetic purposes. ICL and its staff and supporters derive health, recreation, scientific, and aesthetic benefits from drinking, fishing, boating, study, contemplation, photography, and other activities in and around the waters of the State. These interests of ICL and its staff and supporters are directly affected by EPA's failure to prepare and promulgate water quality standards for Idaho's waters. The interests of ICL and its staff and supporters have been, are being, and will continue to be irreparably injured by EPA's failure to fulfill its responsibilities under the CWA.

BACKGROUND

The Clean Water Act and EPA's Obligations in Developing Water Quality Standards

In 1972, Congress passed the Clean Water Act “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” through the reduction and eventual elimination of the discharge of pollutants into those waters. 33 U.S.C. § 1251(a). To meet these goals, Section 303(c) of the CWA requires the establishment of water quality standards.

Water quality standards are promulgated by the states and establish the desired condition of each waterway within the state’s regulatory jurisdiction. 33 U.S.C. § 1313(a). Water quality standards under the CWA are required to include three elements: (1) one or more designated “uses” of that waterway; (2) water quality “criteria” specifying the amount of various pollutants that may be present in those waters and still protect the designated uses, expressed in numerical concentration limits and narrative form; and (3) an antidegradation policy with implementation methods to protect all existing uses. 33 U.S.C. §§ 1313(c)(2) and (d)(4)(B); 40 C.F.R. Part 131, Subpart B.

CWA Section 303(c) directs that each state is to hold public hearings at least every three years for the purpose of reviewing water quality standards and, when appropriate, modifying and adopting standards. 33 U.S.C. § 1313(c)(1). Whenever a state revises or adopts a new standard pursuant to this review process, the state shall adopt criteria for certain toxic pollutants. 33 U.S.C. § 1313(c)(2)(B). These toxics criteria shall be specified numerical criteria, or where such numerical criteria are not available, shall be based on biological monitoring or assessment methods consistent with methods established by the EPA Administrator. *Id.*; 33 U.S.C. § 1314(a)(8).

When a state revises or adopts a new standard, the state must submit the revised or new standard to the EPA Administrator for review and approval or disapproval under the minimum standards set by the CWA. 33 U.S.C. § 1313(c)(2)(A). If EPA approves the state’s new or revised water quality standard, EPA must so notify the state within 60 days of submission. 33 U.S.C. § 1313(c)(3). If EPA disapproves of the standard, EPA must so notify the state within 90 days and must specify the required changes. *Id.* If the state fails to adopt those changes within an additional 90-day period, EPA “shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard” and “shall promulgate such standard”. 33 U.S.C. §§ 1313(c)(3) and (4)(A).

Idaho’s New and Revised Toxics Criteria Submitted to EPA for Approval in 2006

On July 7, 2006, Idaho submitted Docket No. 58-0102-0503 to EPA, seeking approval of 167 new and/or revised human health criteria for 88 toxic chemicals. These new and revised toxics criteria were developed pursuant to the CWA requirement calling for states to review their water quality standards at least every three years. The new and revised toxics criteria represented an important updating of Idaho’s toxics criteria, the bulk of which have not been updated since the early 1990s.

EPA's Disapproval of Idaho's Toxics Criteria

On July 7, 2008—two years after Idaho submitted the new and revised toxics criteria to EPA—ICL sent EPA a Notice of Intent to Sue for failing to approve or disapprove Idaho's toxics criteria within the mandatory 60 or 90 day timeframes imposed by CWA Section 303(c). Thereafter, ICL and EPA entered into a settlement agreement, which was subsequently modified, and which provided that EPA would approve or disapprove Idaho's toxics criteria by January 2, 2012. However, EPA failed to take action to approve or disapprove Idaho's toxics criteria within the extended settlement timeframe.

On January 3, 2012, ICL filed a Complaint in federal court in the District of Idaho against EPA for failing to perform its nondiscretionary duty under CWA Section 303(c) to approve or disapprove of Idaho's toxics criteria. Then, on May 10, 2012, EPA disapproved Idaho's toxics criteria. In light of EPA's disapproval, ICL dismissed its complaint.

In the disapproval, EPA explained that it was unable to ensure that Idaho's use of a fish consumption rate of 17.5 grams per day to develop the toxics criteria was consistent with the requirements of the CWA because EPA had identified several sources of information suggesting that fish consumption among some Idaho population groups is greater than 17.5 grams per day. EPA specified that to address the disapproval Idaho must evaluate local and regional fish consumption information to determine whether its statewide criteria are protective of human health. EPA explained that states are advised to develop criteria to protect highly exposed populations such as subsistence fishermen. EPA also identified multiple sources of information on fish consumption rates.

Idaho's & EPA's Failures to Timely Revise the Toxics Criteria

On August 6, 2012, Idaho responded to the disapproval by notifying EPA of its intent to conduct a rulemaking to address EPA's concerns. While Idaho has initiated the rulemaking process, the state plans to take an additional three years from now to prepare and submit revised toxics criteria to EPA. According to Idaho's Rulemaking Timeline for the toxics criteria dated February 7, 2013 (enclosed with this document)¹, a proposed rule will be released in summer 2015, and the rule will be presented to the state legislature during January through March 2016. Only after the Idaho legislature passes the rule, if it does pass the rule, would Idaho then submit the revised standards to EPA for approval. Thus, Idaho plans to take approximately 4 years from the date of EPA's disapproval to do what the CWA has given the state 90 days to do.

Despite Idaho's failure to submit revised standards within 90 days, and despite Idaho's lengthy timeline for developing revised standards, EPA has not prepared substitute standards.

¹ The Rulemaking Timeline is available at http://www.deq.idaho.gov/media/948487-58_0102_1201_rulemaking_timeline.pdf (last viewed Apr. 30, 2013).

EPA'S FAILURE TO PROMPTLY PREPARE AND PROMULGATE TOXICS CRITERIA IN VIOLATION OF THE CWA AND THE APA

EPA's CWA duty to "promptly" prepare, publish, and promulgate substitute standards was triggered on or about August 9, 2012, when Idaho failed to submit revisions of the toxics criteria within 90 days of EPA's May 10, 2012 disapproval. Almost nine months have already passed since EPA's duty was triggered, yet EPA has not prepared and promulgated substitute standards. EPA's failure is compounded by EPA's substantial earlier failure for over five and a half years to disapprove the toxics criteria. Now, instead of promptly devising revised standards, EPA is waiting for Idaho to revise the standards over the next 3 years. EPA has thus failed to fulfill its mandatory CWA duty to promptly promulgate substitute standards in violation of the CWA and APA.

Courts have drawn from the urgency suggested by the 60- and 90-day timeframes Congress set forth in Section 303(c) to find EPA violated the CWA and APA by failing to promulgate substitute standards in similar circumstances to those presented here. For example, in *ICL v. Browner*, 968 F.Supp. 546, 549 (W.D. Wash. 1997), the court held, after taking into account EPA's initial two-year delay when issuing the disapproval, that EPA's seven-month failure to promulgate substitute standards was a violation of EPA's mandatory CWA duty. The court ordered EPA to "promulgate water quality standards for Idaho in accordance with its . . . letter of disapproval" within sixty days. *Id.* Similarly, in *Defenders of Wildlife v. Browner*, 909 F.Supp 1342, 1344–50 (D. Ariz. 1995), the court also took into account EPA's earlier delay when issuing the disapproval and held that EPA's 11- and 19-month delays to promulgate substitute standards were unreasonable under the APA. The court rejected EPA's arguments that it was proper for EPA to wait for the state to revise the standards. *Id.* at 1346–49.

ICL believes EPA already has the information necessary to quickly propose and promulgate substitute standards, as required by the CWA. EPA's May 10, 2012 disapproval letter, and the accompanying Technical Support Document, identify relevant EPA guidance documents and studies related to evaluating fish consumption rates in Idaho. Nevertheless, EPA is not in the process of preparing substitute standards. EPA's plan is to wait for Idaho to finish its lengthy process to address the disapproval—a process scheduled to take at least an additional three years from now.

In the meantime, extremely weak toxic criteria derived using a fish consumption rate of 6.5 grams per day remain in place to protect human health in Idaho. These criteria are even less protective than those EPA disapproved in 2012 based on a fish consumption rate of 17.5 grams per day, and they are significantly less protective than would be standards based on EPA's recommended fish consumption rate of 142 grams per day for highly exposed subsistence fishermen.

ICL'S INTENT TO FILE SUIT IN FEDERAL COURT; POTENTIAL FOR SETTLEMENT

EPA is in violation of the CWA and the APA. ICL anticipates filing suit 60 days from the date of this notice letter in United States District Court under the citizen suit provision of the CWA, 33 U.S.C. § 1365(a)(2), and the APA, requesting injunctive and declaratory relief as well as attorney and expert fees, unless EPA takes appropriate action to remedy the violation. If EPA has any facts, documents, or other information which you believe might bear upon the alleged violation set forth in this letter, please provide those to us now in order to avoid unnecessary litigation.

In addition, ICL sends this notice letter in part to discuss potential settlement of this matter. To discuss settlement, please contact Justin Hayes at Idaho Conservation League or Bryan Hurlbutt at *Advocates for the West*.

Sincerely,

Bryan Hurlbutt
Advocates for the West

cc:

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