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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

NORTHWEST ENVIRONMENTAL
ADVOCATES, a non-profit organization,

Plaintiff,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY; MICHAEL
REGAN, in his official capacity as
Administrator of the Environmental
Protection Agency; and MICHELLE
PIRZADEH, in her official capacity as Acting
Regional Administrator Environmental
Protection Agency Region 10,

Defendants.

Case No: 3:21-cv-01136

COMPLAINT

(Pursuant to the Clean Water Act, 33 U.S.C. §
1365(a)(2), and the Administrative Procedure
Act, 5 U.S.C. §§ 702–706)

INTRODUCTION

1. Through this action, plaintiff Northwest Environmental Advocates (“NWEA”) challenges the failure of the defendants United States Environmental Protection Agency (“EPA”), EPA Administrator Michael Regan, and Acting EPA Regional Administrator Michelle Pirzadeh, to ensure the protection and restoration of fresh and marine waters of the State of Oregon in violation of the mandates of the Clean Water Act (“CWA” or “Act”), 33 U.S.C. §§ 1251 *et seq.*, and EPA’s implementing regulations.

2. In this action, NWEA seeks review of various actions and inactions taken by Defendants pursuant to Section 303(d) of the Act, 33 U.S.C. § 1313(d). That section, along with its federal implementing regulations, imposes upon EPA a series of mandatory duties that, as further described below, fall into two distinct but related regulatory programs: the “impaired waters” program that requires states—or, if they fail, EPA—to identify surface waters that do not meet applicable water quality standards; and the total maximum daily load or “TMDL” program that requires states—or again, if they fail, EPA—to develop science-based clean-up plans for those waters in a timely fashion.

3. The CWA and federal regulations require each state to review the status of all its waters every two years to determine which waterbodies, if any, are falling short of established goals that ensure those waterbodies are clean enough to support human and ecological uses, such as drinking, swimming, fishing, and wildlife habitat. The state must identify all such “impaired” waters or “water quality limited segments” (“WQLS”) and submit that list, along with a priority ranking for developing pollution clean-up plans called “Total Maximum Daily Loads” (“TMDLs”) that the state is required to develop for each impaired waterbody, to EPA for

approval. Additionally, this priority ranking must include a schedule for the impaired waters targeted for TMDLs in the coming two-year period.

4. EPA, in turn, must review the state's submission of its list of impaired waters and the state's priorities and determine whether the state has complied with the law. Where the state has fallen short, the CWA requires EPA to step in and establish a proper, timely, lawful list of impaired waters, and if necessary, develop the TMDL clean-up plans for those waterbodies. Here, EPA neglected its duties and failed to develop TMDL clean-up plans for a large number of Oregon waters that are impaired but remain in need of TMDLs—some dating since 1998.

5. On December 31, 2017, Oregon submitted its most recently prepared impaired waters list or "303(d) list" to EPA for approval. This list included data beginning from 1998 but did not include any data from 2014 & 2016, because Oregon failed to submit lists those years. On November 12, 2020, EPA approved this list, terming it a "2014-2020" list, effectively merging the four instances that Oregon should have submitted data into one large submission. Moreover, within this approved list includes over a thousand WQLS identified between the years 1998 and 2012 that still require the development of TMDLs and are the subject of this action.

6. Neither the Oregon Department of Environmental Quality ("DEQ") nor EPA has developed TMDLs in a timely fashion—indeed, since 2010, no new TMDLs have been established by Oregon or EPA that had not been originally completed by Oregon and submitted to EPA and/or approved by EPA prior to December 31, 2010, with the sole exception of EPA's 2020 draft TMDL for temperature in the Columbia River. This combination of a list of impaired waters needing TMDLs that is both inadequate and growing rapidly, and the corresponding lack of TMDLs, has resulted in a near collapse of the water pollution regulatory scheme in Oregon. Without the preparation of TMDLs and the resulting assignment of pollutant load reductions to

be achieved by various contributing sources, DEQ and EPA are unable to properly limit the discharge of pollutants to ensure the eventual attainment of Oregon water quality standards in waters with levels of pollutants unsafe for humans and ecological uses.

7. This serious deficiency in the State's water pollution regulatory scheme fails to protect the large number of endangered and threatened aquatic species that depend upon the quality of Oregon waters. In addition, this longstanding pollution threatens to sully the reputation of a state known nationwide for its clean water and its freshwater and marine recreational activities.

8. The Ninth Circuit has recognized the "constructive submission" theory, holding that "where a state has 'clearly and unambiguously' decided that it will not submit TMDLs for the entire state, that decision will be 'construed as a constructive submission of no TMDLs, which in turn triggers the EPA's nondiscretionary duty to act'" under the Clean Water Act. *Columbia Riverkeeper v. Wheeler*, 944 F.3d 1204, 1208 (9th Cir. 2019) (quoting *San Francisco BayKeeper v. Whitman*, 297 F.3d 877, 880, 883 (9th Cir. 2002)).

9. As detailed below, NWEA alleges that Oregon has effectively abandoned its TMDL program, thereby "constructively submitting" to EPA a host of TMDLs for waters that have been impaired for many years or even decades. NWEA further alleges that EPA violated the Clean Water Act by failing to disapprove of Oregon's constructively submitted TMDLs and failing to establish its own TMDLs for these waters. Additionally, or in the alternative, NWEA alleges that EPA's failure to review and disapprove Oregon's constructively submitted TMDLs, its failure to prepare TMDLs itself for Oregon's impaired waters, and its approval of Oregon's unlawful TMDL prioritization schedule violated the Administrative Procedure Act ("APA") and was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

JURISDICTION AND VENUE

10. This action arises under the citizen suit provision of the Clean Water Act, 33 U.S.C. § 1365(a)(2), and the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 702–706.

11. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and 33 U.S.C. § 1365(a) (CWA citizen suit jurisdiction). The requested relief is proper under 28 U.S.C. § 2201(a), 28 U.S.C. § 2202, 33 U.S.C. § 1365(a), and 5 U.S.C. §§ 705, 706 (APA relief pending review and scope of review).

12. As required by 33 U.S.C. § 1365(b)(1)(A), by letter dated April 3, 2021, NWEA provided EPA with written notice of NWEA’s intent to file suit regarding EPA’s Clean Water Act violations alleged below. A copy of that notice letter is attached here as Exhibit A, and is incorporated herein by reference.

13. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(e) because a substantial part of the events or omissions giving rise to the claims occurred in Oregon.

14. Pursuant to Local Rule 3-2(b), Divisional Venue is proper in this Court because a substantial part of the events and omissions giving rise to NWEA’s claims occurred in Multnomah County, and because NWEA resides in Multnomah County.

PARTIES

15. The plaintiff in this action is NORTHWEST ENVIRONMENTAL ADVOCATES. Established in 1969, NWEA is a regional non-profit environmental organization incorporated under the laws of Oregon in 1981 and organized under section 501(c)(3) of the Internal Revenue Code. NWEA’s principal place of business is in Portland, Oregon. NWEA’s mission is to work through advocacy and education to protect and restore water and air quality,

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