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March 7, 2023

The Honorable Michael S. Regan  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

MAR 21 2023

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The Honorable Adam C. Ortiz  
Regional Administrator  
U.S. Environmental Protection Agency Region III  
1650 Arch Street  
Philadelphia, PA 19103-2029

**Re: 60-Day Notice of Intent to File Citizen Suit Under the Clean Water Act  
Section 505(a)(2) for EPA's Unperformed Nondiscretionary Duties  
Related to West Virginia's Total Maximum Daily Loads**

Dear Administrator Regan and Regional Administrator Ortiz:

As the United States Court of Appeals for the Fourth Circuit observed in a 2018 decision, “West Virginia has long resisted the requirements of the Clean Water Act.” *Ohio Valley Env'tl. Coalition v. Pruitt*, 893 F.3d 225, 227 (4th Cir. 2018). Although that observation is true in a multitude of contexts, the Fourth Circuit made it in the context of the Clean Water Act's requirements for Total Maximum Daily Loads (“TMDLs”). The Clean Water Act imposes mandatory duties on the Environmental Protection Agency (“EPA”) related to TMDLs to ensure that states like West Virginia cannot thwart the purposes of the statute through inaction. In accordance with Section 505 of the Clean Water Act, 33 U.S.C. §1365 and 40 C.F.R. Part 135, the Sierra Club, the West Virginia Highlands Conservancy, Inc., and the West Virginia Rivers Coalition (collectively, “the Environmental Groups”) hereby notify you that, as Administrator and Regional Administrator for Region III of the U.S. Environmental Protection Agency (“EPA”), you have unperformed nondiscretionary duties pursuant to Section 303 of the Clean Water Act regarding your obligation to develop ionic toxicity TMDLs in the Lower Guyandotte River Watershed of West Virginia. If the EPA does not perform those duties within the next 60 days, the Environmental Groups intend to bring an action against EPA under 33 U.S.C. §1365(a)(2).

For years the Environmental Groups have worked to ensure that West Virginia's waters receive the full protections of Section 303 of the Clean Water Act. Sometimes that work has taken the form of litigation. For example, in 1995 the West Virginia Highlands Conservancy joined others in bringing litigation against EPA after West Virginia refused for more than a decade to develop a single TMDL, constructively submitting no TMDLs for the States' impaired waters. *Ohio Valley Env'tl. Coalition v. Browner*, Nos. 2:95-cv-0529, 2:96-cv-0091 (S.D.W. Va.). That litigation resulted in a Consent Decree under which EPA developed TMDLs for West Virginia streams from 1997 through 2003. The West Virginia Department of Environmental Protection ("WVDEP") began developing TMDLs thereafter in 2004, and by 2009 either WVDEP or EPA had developed all of the TMDLs required under the Consent Decree.

Unfortunately, West Virginia remains intransigent with respect to one particular form of stream impairment: ionic toxicity, or high conductivity that causes streams to fail to achieve compliance with West Virginia's narrative water criteria. WVDEP has never developed a single ionic toxicity TMDL, notwithstanding hundreds of streams in West Virginia impaired because of ionic toxicity or high conductivity.

That intransigence led to a second round of litigation in 2015, when the Environmental Groups brought another constructive submission action against EPA in federal court. As described more fully below, that litigation resulted in EPA assuring the United States Court of Appeals for the Fourth Circuit that it would hold West Virginia accountable for its commitment to develop ionic toxicity TMDLs according to an agreed schedule, with the first batch of such TMDLs due on December 31, 2021. But that date has come and gone, and West Virginia has once more refused to develop the required ionic toxicity TMDLs.

Now, as a result of West Virginia's continued abdication of its Clean Water Act responsibilities and EPA's actions and inactions with respect to West Virginia's refusal to develop ionic toxicity TMDLs—particularly for the Lower Guyandotte River Watershed—the Environmental Groups hereby notify you of their intent to file a citizen suit under Section 505 of the Clean Water Act, 33 U.S.C. §1365 and 40 C.F.R. Part 135. It is the Environmental Groups hope that a resolution to this problem can be reached without protracted litigation, and therefore invite continued dialogue with EPA after the receipt of this letter. However, the Environmental Groups remain prepared to seek judicial relief if necessary.

## **I. Background**

Congress enacted the Clean Water Act ("CWA") in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a). The express goal of the CWA is to eliminate "the discharge of pollutants into the navigable waters" and attain "water quality which provides for the protection and

propagation of fish, shellfish, and wildlife and provides for recreation of the water.” *Id.* at §1251(a)(1)–(2).

To achieve those national goals, Section 303 of the CWA requires states to establish and implement water quality standards, subject to review and approval by the EPA. *Id.* at §1313(a)–(c). Such “[w]ater quality standards consist of the ‘designated uses’ of a state’s waters and ‘water quality criteria’ necessary to support those designated uses.” *Pruitt*, 893 F.3d at 227 (quoting 33 U.S.C. §1313(c)(2)(A); 40 C.F.R. §130.2(d)).

Section 303 of the CWA instructs each state to “identify those waters within its boundaries for which” existing pollution controls are not sufficient to attain compliance with water quality standards. 33 U.S.C. §1313(d)(1)(A). States must list those identified waters as “impaired” on their “303(d) List.” 33 U.S.C. §1313(d). For waters identified on a state’s 303(d) List, the state must establish TMDLs for pollutants identified by the Administrator under Section 1314(a)(2). *Id.* at §1313(d)(1)(C). For purposes of Section 1314(a)(2) of the CWA, the Administrator has identified “[a]ll pollutants” as being suitable for TMDL calculations. 43 Fed. Reg. 60,665 (Dec. 28, 1978).

TMDLs must be established “at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.” 33 U.S.C. §1313(d)(1)(C). Likewise, EPA’s implementing regulations require TMDLs to be “established at levels necessary to attain and maintain the applicable narrative and numerical water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.” 40 C.F.R. §130.7(c)(1). Such TMDLs must “take into account critical conditions for stream flow, load, and water quality parameters.” *Id.*

Although states develop the necessary TMDLs, EPA retains a critical role in reviewing those submissions and developing its own TMDLs where state submissions are inadequate. 33 U.S.C. §1313(d)(2). Within thirty days of a state’s submission, the EPA must approve or disapprove the state’s submission. *Id.* If the EPA disapproves a state’s submission, the EPA itself must develop, submit for public comment, and finalize its own TMDLs within thirty days. *Id.* When the EPA develops its own TMDLs, “the State shall incorporate them into its current plan.” *Id.* The Administrator has delegated his authorities and nondiscretionary duties under Section 303 to the Regional Administrators. 40 C.F.R. §130.7(d)(2).

Since 1998, WVDEP and EPA have identified hundreds of waterbodies within West Virginia that are “biologically impaired” for failing to meet West Virginia’s narrative water quality criteria as applied to aquatic life. 47 C.S.R. §2-3.2.i. Those listings resulted from the assessment of the biological integrity of West Virginia streams using benthic

macroinvertebrate indices. If the index score calculated for a specific stream fell below a certain threshold, that stream would be added to West Virginia's 303(d) List.

When developing TMDLs for impaired waters, WVDEP seeks to identify the stressor causing the biological impairment. For many of the stressors identified by WVDEP (including total suspended solids, increased water temperature, dissolved oxygen, and organic enrichment, among others), WVDEP regularly develops surrogate TMDLs for pollutants with numeric criteria that might adequately address the stressor. However, for one particular identified stressor—ionic toxicity—WVDEP *has never developed a TMDL* for any stream. WVDEP refuses to develop TMDLs for ionic toxicity, despite determining that particular stressor causes the biological impairment in hundreds of streams. *See Memorandum of Agreement Between the West Virginia Department of Environmental Protection and the United States Environmental Protection Agency Regarding Submission of Total Maximum Daily Loads for Biologically Impaired Waters Pursuant to Section 303(d) of the Clean Water Act, 33 U.S.C. § 1313(d) at 2 (June 13, 2017) [hereinafter “MOA”]; id., Attachments C & D.*

In the face of WVDEP's stubborn intransigence, the Environmental Groups filed a citizen suit in 2015, “alleging that EPA had a nondiscretionary duty to promulgate TMDLs for these biologically impaired waters given that West Virginia had not done so and would not do so until 2020 at the earliest.” *Pruitt*, 893 F.3d at 228. In 2017, the U.S. District Court for the Southern District of West Virginia held that, under the “constructive submission” doctrine, because WVDEP had not submitted TMDLs for biologically impaired streams, EPA had the nondiscretionary duty to approve or disapprove WVDEP's “constructive submission” of no TMDLs. *Ohio Valley Environmental Coalition, Inc. v. Pruitt*, Civil Action No. 3:15-cv-0271, 2017 WL 600102, at \*11–18 (S.D. W. Va. Feb. 14, 2017).

In response to the district court's opinion, EPA took the unprecedented step of conditionally *approving* WVDEP's constructive submission of no TMDLs. U.S. Env'tl. Protection Agency, Decision and Rationale—Conditional Approval of Constructive Submission of No Total Maximum Daily Loads (TMDLs) for Certain West Virginia Waterbodies Listed for Biological Impairment at 1 (Jun. 13, 2017) [hereinafter “EPA's June 13, 2017 Decision”]. EPA did so on the basis of what it later described to the Fourth Circuit as a “credible plan,” under which WVDEP would develop the long overdue TMDLs by strict deadlines. *Pruitt*, 893 F.3d at 231 & n.3. In its decision and rationale, EPA conditioned its approval on WVDEP's adherence to the agreed schedule. EPA's June 13, 2017 Decision at 2. Specifically, WVDEP agreed (among other things) to establish TMDLs addressing ionic toxicity in 150 listed waters—52 of which are in the Lower Guyandotte River Watershed—**no later than December 31, 2021**, and the balance of the TMDLs on a rolling schedule to be completed by June 30, 2026. EPA's June 13, 2017 Decision at 5; MOA at 2. EPA's June 13, 2017 Decision expressly provided that if WVDEP failed to adhere to the agreed schedule, then “EPA's conditional approval **converts automatically . . . and without further administrative process to a disapproval** of the ‘constructive

submission' of 'no' TMDLs" for the waters at issue. EPA's June 13, 2017 Decision at 7 (emphasis added).

EPA appealed the district court's decision to the Fourth Circuit, arguing the district court misapplied the "constructive submission" doctrine. *Pruitt*, 893 F.3d at 229. On appeal, the Fourth Circuit relied on the MOA and EPA's June 13, 2017 Decision, and "credited EPA's assurances that it will make good-faith efforts . . . to ensure that West Virginia meets the target completion dates" in reaching its conclusion that WVDEP "ha[d] a credible plan in concert with EPA to produce ionic toxicity TMDLs." *Id.* at 231.

However, despite "EPA's assurances" that it would hold WVDEP to the schedule and the task of developing the long overdue TMDLs, WVDEP's deadline of December 31, 2021, has come and gone, and WVDEP has once more thumbed its nose at the Clean Water Act by failing to develop or submit a TMDL addressing ionic toxicity for streams in the Lower Guyandotte River Watershed.

On January 4, 2022—after the December 31, 2021 deadline passed—WVDEP did submit TMDLs to EPA for the Lower Guyandotte River Watershed. U.S. Env'tl. Prot. Agency, Region III, Decision Rationale: Total Maximum Daily Loads for the Lower Guyandotte River Watershed, West Virginia at 2 (Feb. 1, 2022) [hereinafter, "Lower Guyandotte Decision Document"]. However, in promulgating those TMDLs, WVDEP retreated to its well-worn (and unlawful) refrain that it had "suspended biological impairment TMDL development[.]" Tetra Tech, *USEPA Approved Report: Total Maximum Daily Loads for the Lower Guyandotte River Watershed, West Virginia* at viii, 25 (Feb. 2022) [hereinafter, "2022 Lower Guyandotte TMDLs"].

WVDEP's invocation of that refrain was particularly bold because it echoed the very statements that led the federal district court to conclude in 2017 that EPA had ignored West Virginia's constructive submission of no TMDLs. *Ohio Valley Environmental Coalition, Inc. v. Pruitt*, Civil Action No. 3:15-cv-0271, 2017 WL 600102, at \*11 (S.D. W. Va. Feb. 14, 2017). Moreover, under the terms of EPA's June 13, 2017 Decision, WVDEP was required to develop biological impairment TMDLs for the 52 streams in the Lower Guyandotte River Watershed by December 31, 2021. EPA's June 13, 2017 Decision at 5; MOA, Attachment C. But WVDEP did not do so, going so far as to expressly disclaim developing biological impairment TMDLs at all in the 2022 Lower Guyandotte Watershed TMDLs. 2022 Lower Guyandotte TMDLs at 25 ("This project does not include 'biological impairment' TMDLs.").

The biological impairment for 35 of the 52 streams with a December 31, 2021 deadline *may be* collaterally addressed by pollutant-specific TMDLs. *Compare* 2022 Lower Guyandotte TMDLs, tbl. 4-1 *with* MOA, Attachment C. But WVDEP's 2022 Lower Guyandotte River Watershed TMDLs expressly acknowledged that the biological impairment of eight of the 52 streams was unresolved by its 2022 action, and was silent as

to nine others.<sup>1</sup> West Virginia's express statements constitute an actual and/or constructive submission of no biological impairment TMDLs for streams in the Lower Guyandotte River Watershed.

Remarkably, and in deviation from the assurances EPA made to the Fourth Circuit, EPA *approved* WVDEP's January 2022 submission on February 2, 2022. EPA's approval expressly recognized that WVDEP had declined to develop any biological impairment TMDLs. Indeed, EPA acknowledged—without criticism—WVDEP's "explanation as to why it chose not to develop [biological impairment] TMDLs." Letter from Catherine A. Libertz, Director, Water Division, EPA Region III, to Kathryn Emery, Director, Div. of Water & Waste Management, WVDEP Re: Approval of Lower Guyandotte Watershed TMDLs (Feb. 2, 2022); Lower Guyandotte Decision Document at 5 n.3.

Because of WVDEP's refusal to honor its commitments to ionic toxicity TMDL development for streams in the Lower Guyandotte River Watershed, EPA now finds itself in an even worse legal position than it was when the federal district court held in 2017 that EPA had ignored a constructive submission of no TMDLs. As explained below, EPA now possesses unperformed, nondiscretionary duties arising from (1) the automatic conversion of EPA's June 13, 2017 Decision to a disapproval of WVDEP's constructive submission of no TMDLs, (2) West Virginia's *actual* submission of no TMDLs for streams impaired by ionic toxicity in the Lower Guyandotte Watershed, and (3) West Virginia's *constructive* submission of no TMDLs for streams impaired by ionic toxicity in the Lower Guyandotte Watershed.

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<sup>1</sup> 2022 Lower Guyandotte TMDLs, Appendix K. The eight streams with a December 31, 2021 deadline (whose biological impairment WVDEP expressly acknowledged was unresolved because it was caused by ionic stress) are the Lower Guyandotte River, Tanyard Branch, Ballard Fork, Perrys Branch, Trace Fork, South Fork of Crawley Creek, Davis Creek, and Fowler Branch. *Id.* The nine streams with a December 31, 2021 deadline entirely ignored by WVDEP in the 2022 Lower Guyandotte River Watershed TMDLs are Straight Fork, Meadow Branch, Big Creek, Upton Branch, Cavill Creek, Lick Branch, West Fork of Big Harts Creek, Vickers Branch, and Hurricane Branch. *Compare id. with* MOA, Attachment C.

The 2022 Lower Guyandotte River Watershed TMDLs also identified 16 additional streams as impaired due to ionic stress that were not among the streams with a December 31, 2021 deadline. *Compare id. with* MOA, Attachment C.

## **II. EPA Did Not Perform Its Nondiscretionary Duty to Develop Ionic Toxicity TMDLs When WVDEP Failed to Comply With the Agreed Schedule.**

This go-round, West Virginia’s “long resist[ance to] the requirements of the Clean Water Act”<sup>2</sup> has clear consequences. EPA’s June 13, 2017 Decision automatically converted to a disapproval of WVDEP’s constructive submission of no TMDLs upon WVDEP’s failure to adhere to the agreed upon schedule, thereby immediately triggering EPA’s nondiscretionary duty pursuant to Section 303(d) of the CWA to develop and submit for public comment its own ionic toxicity TMDLs for the Lower Guyandotte waters at issue.

Pursuant to Section 303(d) of the CWA, within 30 days of EPA’s disapproval of a state’s TMDL submission, EPA must “identify such waters in such State and establish such loads for such waters as [it] determines necessary to implement the water quality standards applicable to such waters . . . .” 33 U.S.C. §1313(d)(2). Here, more than 30 days have passed since WVDEP’s failure to meet the December 31, 2021 deadline and EPA’s conditional approval of WVDEP’s “constructive submission” of no TMDLs automatically converted to a disapproval for the identified streams in the Lower Guyandotte Watershed.<sup>3</sup> Accordingly, EPA has not performed its mandatory duty to develop its own TMDLs for those streams.<sup>4</sup>

As discussed above, EPA conditioned its approval of WVDEP’s “constructive submission” of no TMDLs upon WVDEP’s adherence to an agreed upon schedule, whereby WVDEP was required to submit ionic toxicity TMDLs for certain identified streams by December 31, 2021. Specifically, EPA’s June 13, 2017 Decision states:

EPA’s conditional approval is subject to WVDEP submitting TMDLs addressing causes of biological impairment, including ionic toxicity where applicable, for the 467 waterbodies described in Attachment 1 in accordance with the schedule provided as part of the MOA (Attachment 2). In the event WVDEP does not submit particular TMDLs in accordance with the MOA

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<sup>2</sup> *Pruitt*, 893 F.3d at 227.

<sup>3</sup> The December 31, 2021 deadline set forth in EPA’s June 13, 2017 Decision incorporates by reference Attachment C to the MOA, which lists the specific waters for which WVDEP was required to submit TMDLs by December 31, 2021. MOA, Attachment C.

<sup>4</sup> Fifty-two identified streams are in the Lower Guyandotte River Watershed and, thus, are implicated by EPA’s actions and inactions with regard to WVDEP’s 2022 Lower Guyandotte TMDLs. The Environmental Groups acknowledge that the biological impairment of 35 of those 52 streams *may be* resolved by pollutant-specific TMDLs based on numeric criterion, but nonetheless at least 17 of those 52 streams still lack any TMDL that would even arguably address their biological impairment.

schedule, EPA’s conditional approval will convert automatically by operation of the MOA into a disapproval of the “constructive submission” of “no” TMDLs addressing the causes of biological impairment for those particular waters.

EPA’s June 13, 2017 Decision at 2 (emphasis added). Pursuant to Attachment C, WVDEP was to submit biological impairment TMDLs for 52 identified streams in the Lower Guyandotte Watershed no later than December 31, 2021. MOA at 2, Attachment C.

WVDEP failed to submit the requisite biological impairment TMDLs by December 31, 2021. Accordingly, pursuant to the express provisions of EPA’s June 13, 2017 Decision, EPA’s conditional approval automatically converted to a disapproval of WVDEP’s “constructive submission” when that occurred, without the need for any additional administrative process. Since December 31, 2021, EPA has not developed any TMDLs for the identified streams as required by Section 303(d).<sup>5</sup> Because thirty days have passed since EPA’s conditional approval automatically converted to a disapproval and EPA has failed to develop its own TMDLs, EPA is currently in violation of Section 303(d) of the CWA.

The streams for which EPA has failed to perform its mandatory duty to develop its own TMDLs include at least the following streams:

	<b>TMDL Watershed</b>	<b>Stream Name</b>	<b>WV Stream Code</b>	<b>Date TMDL “Constructive Submission” Disapproved</b>
1	Lower Guyandotte	Wire Branch*	WVOGM-6-0.SA	December 31, 2021
2	Lower Guyandotte	Guyandotte River (Lower)	WVOG-lo	December 31, 2021
3	Lower Guyandotte	Parsner Creek*	WVOGM-38	December 31, 2021
4	Lower Guyandotte	Mill Creek*	WVOG-59	December 31, 2021
5	Lower Guyandotte	Tanyard Branch	WVOGM-1.5	December 31, 2021
6	Lower Guyandotte	Little Cabell Creek*	WVOGM-3	December 31, 2021

<sup>5</sup> EPA has, as discussed elsewhere in this letter, approved pollutant-specific TMDLs for 35 streams in the Lower Guyandotte River watershed that *may have* collaterally addressed biological impairment.



7	Lower Guyandotte	Big Cabell Creek*	WVOGM- 4	December 31, 2021
8	Lower Guyandotte	Fudges Creek*	WVOGM-6	December 31, 2021
9	Lower Guyandotte	Mill Creek*	WVOGM-8	December 31, 2021
10	Lower Guyandotte	Right Fork/Mill Creek*	WVOGM -8-C	December 31, 2021
11	Lower Guyandotte	Johns Branch*	WVOGM-11	December 31, 2021
12	Lower Guyandotte	Indian Fork*	WVOGM-12	December 31, 2021
13	Lower Guyandotte	Charley Creek*	WVOGM-14	December 31, 2021
14	Lower Guyandotte	Trace Creek*	WVOGM-19	December 31, 2021
15	Lower Guyandotte	Trace Fork*	WVOG-49-D	December 31, 2021
16	Lower Guyandotte	Coon Creek*	WVOGM-20-A	December 31, 2021
17	Lower Guyandotte	Straight Fork	WVOGM- 22- A	December 31, 2021
18	Lower Guyandotte	Meadow Branch	WVOGM-25-A	December 31, 2021
19	Lower Guyandotte	Straight Fork*	WVOGM -25-H	December 31, 2021
20	Lower Guyandotte	Valley Fork*	WVOGM -25- H-1	December 31, 2021
21	Lower Guyandotte	Sugartree Fork*	WVOGM -25-I	December 31, 2021
22	Lower Guyandotte	Big Creek	WVOGM-35	December 31, 2021
23	Lower Guyandotte	Left Fork/Mud River*	WVOGM-39	December 31, 2021
24	Lower Guyandotte	Stinson Branch*	W VOGM -39 -E	December 31, 2021
25	Lower Guyandotte	Upton Branch	WVOGM-40.3	December 31, 2021
26	Lower Guyandotte	Ballard Fork	WVOGM-49	December 31, 2021
27	Lower Guyandotte	Davis Creek	WVOG-3	December 31, 2021

28	Lower Guyandotte	Edens Branch*	WVOG-3-0.5A	December 31, 2021
29	Lower Guyandotte	Smith Creek*	WVOG-11	December 31, 2021
30	Lower Guyandotte	Cavill Creek	WVOG-12	December 31, 2021
31	Lower Guyandotte	Madison Creek*	WVOG-17	December 31, 2021
32	Lower Guyandotte	Twomile Creek*	WVOG-24	December 31, 2021
33	Lower Guyandotte	Fourmile Creek*	WVOG-27	December 31, 2021
34	Lower Guyandotte	Ninemile Creek*	WVOG-31	December 31, 2021
35	Lower Guyandotte	Tenmile Creek*	WVOG-32	December 31, 2021
36	Lower Guyandotte	Lick Branch	WVOG-34-A	December 31, 2021
37	Lower Guyandotte	Aarons Creek*	WVOG-35	December 31, 2021
38	Lower Guyandotte	Laurel Creek*	WVOG-38-D	December 31, 2021
39	Lower Guyandotte	Dry Run*	WVOG-41	December 31, 2021
40	Lower Guyandotte	Short Bend Fork*	WVOG-42-A	December 31, 2021
41	Lower Guyandotte	Laurel Fork*	WVOG-42-C	December 31, 2021
42	Lower Guyandotte	West Fork/Big Harts Creek	WVOG- 44-A	December 31, 2021
43	Lower Guyandotte	Smokehouse Fork*	WVOG-44-E	December 31, 2021
44	Lower Guyandotte	Buck Fork*	WVOG-44-G	December 31, 2021
45	Lower Guyandotte	Vickers Branch	WVOG-49-C	December 31, 2021
46	Lower Guyandotte	UNT/Big Creek RM 3.28*	WVOG-49-C.1	December 31, 2021
47	Lower Guyandotte	Trace Fork	WVOGM-20	December 31, 2021
48	Lower Guyandotte	Hurricane Branch	WVOG-49 -D-1	December 31, 2021

49	Lower Guyandotte	Garrett Fork*	WVOG-49-E	December 31, 2021
50	Lower Guyandotte	Perrys Branch	WVOG-49-E-1	December 31, 2021
51	Lower Guyandotte	South Fork/Crawley Creek	WVOG-51-G.5	December 31, 2021
52	Lower Guyandotte	Fowler Branch	WVOG-51.5	December 31, 2021

\* Biological impairment *may be* addressed by pollutant-specific TMDLs developed for numeric water quality criteria. *Compare* 2022 Lower Guyandotte TMDLs, tbl. 4-1 *with* MOA, Attachment C.

Because EPA’s duties to develop ionic toxicity TMDLs for the above listed streams remain unperformed, the Environmental Groups intend to file a citizen’s suit under Section 505(a)(2) of the CWA seeking to compel EPA to develop TMDLs for the streams in the Lower Guyandotte River watershed that are biologically impaired because of ionic toxicity.

**III. EPA Has Not Performed Its Nondiscretionary Duty to Disapprove West Virginia’s Actual Submission of No TMDLs for Biological Impairment Caused by Ionic Toxicity in 24 Streams in the Lower Guyandotte Watershed.**

EPA has a duty under the CWA to ensure that West Virginia does not thwart the purposes of Section 303 through inaction. Congress intended that TMDLs be established promptly, in a matter of months or a few years, not decades. *Idaho Sportsmen’s Coalition v. Browner*, 951 F.Supp. 962, 967 (W.D. Wash. 1996). Accordingly, EPA must act when state inaction threatens to undermine the implementation of the CWA. As the Seventh Circuit explained in *Scott v. City of Hammond, Ind.*,

We think it unlikely that an important aspect of the federal scheme of water pollution control could be frustrated by the refusal of states to act. This is especially true in light of the short time limits both on a state’s action [with regard to TMDLs], and on the EPA’s required reaction to the state submission . . . . [W]e do not believe that Congress intended that the states by inaction could prevent the implementation of TMDLs.

741 F.2d 992, 997 (7th Cir. 1984). Here, West Virginia’s inaction is preventing the implementation of TMDLs for ionic toxicity, leaving a vast swath of West Virginia’s streams impaired without tools for recovery.

When West Virginia informed EPA in its submission of TMDLs for the Lower Guyandotte River Watershed on January 4, 2022, that it was not going to develop TMDLs for biological impairment, it made an actual submission of no TMDLs for the affected streams. *Amer. Canoe Ass’n v. U.S. E.P.A.*, 54 F.Supp.2d 621, 628 n.18 (E.D. Va. 1999)

(explaining that, where a state “communicate[s] expressly to EPA prior to a scheduled deadline that it would not or could not comply with the schedule,” it constitutes “an *actual* (rather than constructive) submission of ‘no TMDLs’, which . . . would trigger EPA’s responsibility to approve or disapprove the submission and promulgate TMDLs in the event of disapproval” (emphasis original)). WVDEP’s actual submission of no TMDLs for biological impairment triggered EPA’s nondiscretionary duties under 33 U.S.C. §1313(d)(2) to disapprove of WVDEP’s submission and to develop its own TMDLs for biological impairment for the relevant streams. Neither the Administrator of EPA nor the Regional Administrator of EPA Region III performed those duties within the statutorily prescribed timeframes. Accordingly, because those duties remain unperformed, Plaintiffs intend to seek judicial relief pursuant to Section 505(a)(2) of the CWA.

The streams for which EPA has failed to perform its duties to disapprove WVDEP’s actual submission of no TMDL for ionic toxicity and to develop its own TMDLs for ionic toxicity include the following streams, which WVDEP has determined are biologically impaired due to ionic toxicity, yet refused to develop TMDLs as part of its Lower Guyandotte River Watershed submission<sup>6</sup>:

<b>Stream</b>	<b>Watershed</b>	<b>Listed Since</b>	<b>12/31/2021 Deadline?</b>
Guyandotte River (Lower)	Lower Guyandotte	Unknown	Yes
Mud River (WV-OGL-10_08)	Lower Guyandotte	2002	
Mud River (WV-OGL-10_05)	Lower Guyandotte	2002	
Mud River (WV-OGL-10_03)	Lower Guyandotte	2002	
Merrick Creek	Lower Guyandotte	2020	
Tanyard Branch	Lower Guyandotte	2008	Yes
Cyrus Creek	Lower Guyandotte	2020	
Sugartree Branch	Lower Guyandotte	2002	
Stanley Fork	Lower Guyandotte	2002	
Ballard Fork	Lower Guyandotte	2002	Yes
Limestone Branch	Lower Guyandotte	2020	
Ed Stone Branch	Lower Guyandotte	2002	
Perrys Branch	Lower Guyandotte	2002	Yes
Trace Fork	Lower Guyandotte	2006	Yes
Crawley Creek (WV-OGL-117_02)	Lower Guyandotte	2016	
Crawley Creek (WV-OGL-117_01)	Lower Guyandotte	2016	
South Fork/Crawley Creek	Lower Guyandotte	2002	Yes
Davis Creek	Lower Guyandotte	2002	Yes
Fowler Branch	Lower Guyandotte	2002	Yes

<sup>6</sup> These streams are identified in Appendix K to the Lower Guyandotte River Watershed TMDLs.

Godby Branch	Lower Guyandotte	2002	
Right Fork/Davis Creek	Lower Guyandotte	2020	
Rocky Branch	Lower Guyandotte	2020	
Big Ugly Creek	Lower Guyandotte	2020	
Rockhouse Fork	Lower Guyandotte	Unknown	

**IV. EPA Has Not Performed its Nondiscretionary Duty to Disapprove West Virginia’s Constructive Submission of No TMDLs for Biological Impairment Caused by Ionic Toxicity in the Lower Guyandotte Watershed.**

Alternatively, even if the terms of the MOA were no longer binding (which they are), or if EPA’s conditional approval otherwise did not automatically convert to a disapproval of WVDEP’s “constructive submission” of no TMDLs (which it did), or if WVDEP’s statements in its 2022 submission of TMDLs for the Lower Guyandotte River watershed regarding its suspension of the development of TMDLs for biologically impaired streams were not the actual submission of no TMDLs for such streams (which they were), then WVDEP’s prolonged refusal to develop such TMDLs constitutes the constructive submission of no TMDLs for any biologically impaired stream in the Lower Guyandotte River Watershed. *See, e.g., City of Hammond, Ind.*, 741 F.2d at 997. That constructive submission triggered EPA’s duties under 33 U.S.C. §1313(d)(2) and 40 C.F.R. §130.7(d)(2) to disapprove West Virginia’s submission that no TMDLs are required for those streams and to develop TMDLs for those streams. In the face of a constructive submission of no TMDLs for those streams, the failure of the Administrator and the Regional Administrator for Region III to perform their duties under 33 U.S.C. §1313(d)(2) and 40 C.F.R. §130.7(d)(2) constitutes an alternative basis for a citizen suit by the Environmental Groups under 33 U.S.C. §1365(a)(2).

As the Fourth Circuit warned in *Pruitt*, “continued intransigence [by West Virginia] could” amount to a constructive submission that triggers EPA’s duties under Section 303. 893 F.3d at 231. WVDEP’s most recent express refusal to issue ionic toxicity TMDLs constituted the requisite “continued intransigence,” such that a constructive submission has now occurred. EPA must intervene, or face further litigation under Section 505(a)(2) on West Virginia’s constructive submission of no TMDLs for streams in the Lower Guyandotte River watershed that are impaired because of ionic toxicity.

**V. Conclusion**

EPA’s actions and inactions with regard to West Virginia’s TMDL program have left many streams in West Virginia’s Lower Guyandotte River Watershed subject to continued pollution and degradation, and the time has come for the agency to ensure that those streams receive the full protections of the Clean Water Act. EPA assured the Fourth Circuit in 2018 that it would ensure West Virginia complied with the Clean Water Act

going forward. *Pruitt*, 893 F.3d at 231. And the Fourth Circuit relied on those assurances to conclude that West Virginia had a “credible plan” to develop the long-missing TMDLs. *Id.*

Unless EPA takes action within 60 days to remedy West Virginia’s decades-long failures to develop ionic toxicity TMDLs for the Lower Guyandotte River Watershed, the Environmental Groups will seek relief from the federal courts. The Environmental Groups remain optimistic that a resolution of these issues may be possible without protracted litigation, so please do not hesitate to contact us during the 60-day notice period to have a dialogue about these issues. But given the prolonged history of this controversy, the Environmental Groups are prepared to seek relief from the federal courts if that dialogue does not occur or does not resolve the controversy.

Sincerely,



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