October 12, 2017

Scott Pruitt, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, DC 20460

Ryan Zinke, Secretary
U.S. Department of the Interior
1849 C Street, N.W.
Washington DC 20240

Wilbur Ross, Secretary
U.S. Department of Commerce
1401 Constitution Ave., N.W.
Washington, DC 20230

Re: Sixty Day Notice Of Intent To Sue Over EPA's Postponement Of Compliance Dates For The 2015 Effluent Limitations Guidelines Covering Steam Electric Power Generating Point Sources

Dear Sirs:

On behalf of the Center for Biological Diversity (Center), this letter serves as a 60-day notice of intent to sue the Environmental Protection Agency (EPA) for violating the Endangered Species Act (ESA), 16 U.S.C. 1531, *et seq.*, in connection with its recently issued "ELG Delay Rule," which imposes a two-year delay on implementing the agency's 2015 Effluent Limitations Guidelines (ELGs).[1] The Center is a non-profit environmental organization dedicated to the protection of native species and their habitats through science, policy, and environmental law. The Center has more than 1.5 million members and online activists dedicated to the preservation of native wildlife and habitat.

As discussed below, power plant water pollution impairs our nation's waters and threatens public health and wildlife, including endangered and threatened species. The 2015 ELGs, *see* 80 Fed. Reg. 67,838 (Nov. 3, 2015), promulgated after years of painstaking work, was a significant step

[1] Postponement of Certain Compliance Dates for the ELGs and Standards For Steam Electric Power Generating Point Source Category, 82 Fed. Reg. 43,494 (Sept. 18, 2017).

forward in regulating toxic wastewater streams of mercury, arsenic, lead, cadmium, and selenium, among other pollutants.

By delaying implementation of vital portions of the 2015 ELGs for two years, thereby authorizing these pollutant discharges to continue, the newly issued ELG Delay Rule has caused the very adverse environmental impacts that warranted the 2015 ELGs – including concrete harms to ESA protected species – to continue unabated. Accordingly, before EPA could take this action, it was required, under Section 7 of the Endangered Species Act, 16 U.S.C. § 1536(a)(2), to consult with the U.S. Fish and Wildlife Service (FWS).[2] This consultation would have insured adverse impacts are minimized, and that the ELG Delay Rule would not jeopardize the continued existence of any listed species or adversely modify critical habitat. *Id.* EPA's argument – in response to comments on the ELG Delay Rule – that these steps were not required because this is a non-discretionary action is not only completely illogical, it is entirely unlawful, since, of course, EPA was under no legal obligation to delay implementation of the 2015 ELGS at all, let alone *required* to do so.

Accordingly, this letter serves as notice that unless, within the next sixty days, EPA will voluntarily vacate the ELG Delay Rule and enter consultation on the adverse impacts of the Rule on ESA protected species, the Center intends to take appropriate action to bring the agency into compliance with the ESA.

Background

A. EPA's 2015 ELGs

EPA proposed the ELG Rule in June, 2013, explaining that steam electric power plants "contribute 50-60 percent of all toxic pollutant discharged into surface waters by all industrial categories," and that these level of pollution will only further increase "as pollutants are increasingly captured by air pollution controls and transferred to wastewater discharges." Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, Proposed Rule, 78 Fed. Reg. 34,432 (2013) . As detailed by EPA in its Environmental Assessment (EA) on the ELG Rule and elsewhere, these pollutants, such as mercury and selenium, are damaging a variety of wildlife species inhabiting a wide range of water-based ecosystems across the United States, and pose concrete risks to human health.

EPA found that the proposed ELG Rule would reduce pollutant loadings from existing sources by over 95 percent for copper, lead, mercury, nickel, selenium, thallium, and zinc, and over 90 percent for arsenic and cadmium. Similarly, in issuing the Final 2015 ELGs, EPA found that the requirements would reduce the amount of pollutants that steam electric power plants are discharging by 1.4 billion pounds. 80 Fed. Reg. at 67,841. EPA found that these concrete environmental improvements would reduce harm to human health and wildlife, explaining the Rule would provide a "significant number of environmental and ecological improvements and reduced impacts to wildlife and humans from reductions in pollutant loadings . . . ." *Id.* at 67,873; *see also id.* at 67,874.

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[2] As appropriate, any such consultation must also include the National Marine Fisheries Service (NMFS) for any species under that agency's jurisdiction.

B. Administrator Pruitt's Proposed Delay Rule To Roll Back The Final ELG Rule

On April 24, 2017, in purported response to requests for "reconsideration," Administrator Pruitt announced he would "reconsider" the ELG Rule, and immediately purported to "stay" the rule pending reconsideration. 82 Fed. Reg. 19005. On June 6, 2017, Administrator Pruitt proposed the ELG Delay Rule, claiming compliance dates should be extended because he is reconsidering the Final ELG Rule, and has decided companies should not have to start working toward compliance until that reconsideration process is completed. 82 Fed. Reg. 26,017.

In public comments on that proposal, the Center explained that there is no lawful basis on which EPA could delay the 2015 ELG Rule simply to reconsider it. Rather, as we detailed, numerous precedents establish the agency may *not* temporarily suspend the Rule simply because it wants to take another look.

As we also explained, at bare minimum EPA could not finalize the ELG Delay Rule without first complying with the ESA and the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq.*. With respect to the ESA in particular, we explained that EPA must obtain a Biological Opinion (Bi-Op) from the FWS addressing whether the Delay Rule may jeopardize the continued existence of listed species or adversely modify critical habitat; the extent to which the Delay Rule will incidentally take listed species; and the specific measures EPA must carry out to minimize and mitigate those adverse effects. *See* 16 U.S.C. § 1536.

On September 18, 2017, EPA issued its final ELG Delay Rule, delaying the compliance dates for major portions of the 2015 ELGs by two years. 82 Fed. Reg. 43,494. Parroting the insufficient rationale put forward in support of the Proposed Rule, EPA stated that it is delaying the compliance dates for best available technology economically achievable (BACT) effluent limitations and pretreatment standards (PSES) for flue gas desulfurization (FGD) wastewater and bottom ash transport water for two years. *Id.* In particular, while making no substantive findings about changes needed to the 2015 ELGs, EPA decided it was appropriate to delay compliance simply to relieve industry of complying with the 2015 ELGs while EPA reconsiders them. *Id.* Moreover, EPA made it clear that the two-year delay in the ELG Delay Rule was only an *initial* delay, stating that it intends to "further postpone the compliance dates" if necessary to make sure industry need not comply until EPA has completed its process of reconsidering – and presumably eliminating or at least significantly weakening – the 2015 ELGs. *Id.* at 43,494 n.6.

In a separate "Response to Comments" document accompanying the ELG Delay Rule, EPA rejected the argument that it had any obligation to engage in ESA Section 7 consultation before issuing the Final Rule. According to EPA, it was "not required to consult on this action because the Agency lacks discretion to account for effects on species."

Discussion

Section 7 of the ESA mandates that:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical . . . .

16 U.S.C. § 1536(a)(2). Under the statute's joint implementing regulations from the FWS and NMFS, whenever a proposed action "may affect" listed species, the agency must initiate this consultation process, 50 C.F.R. § 402.14(a), which generally culminates in one or more Biological Opinions (Bi-Ops) that evaluate the impacts of the action on protected species, including both the "incidental take" of species that will occur, and the steps that must be taken to minimize and mitigate those adverse impacts. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14(g).

EPA does not appear to dispute that the ELG Delay Rule will have adverse impacts on protected species that should trigger the Section 7 consultation process. Indeed, such an argument would be impossible to reconcile with the myriad findings in the record concerning these impacts. To provide just a few examples:

- EPA's own EA explained that, as a result of the pollutants discharged from these power plants, aquatic species experience "acute effects (e.g., fish kills) and chronic effects (e.g., malformations, and metabolic, hormonal, and behavioral disorders)," as well as "reduced growth and reduced survival [and] changes to the local habitat." EA at 3-20.

- The same EA identified "138 threatened and endangered species whose habitats overlap with, or are located within, surface waters that exceeded" water quality standards, and explained that, "[b]ased on evidence in the literature, damage cases, other documented impacts, and modeled receiving water pollutant concentrations, it is clear that current wastewater discharge practices at steam electric power plants are impacting the surrounding aquatic and terrestrial environments . . . ." *Id.* at 9-1.

- In issuing the 2015 ELGs EPA explained that the agency "expects that once the rule is implemented the number of immediate receiving waterbodies with potential impacts to wildlife will begin to be reduced by more than half compared to baseline conditions . . . . ." Final ELG Rule at 67,874.

- EPA also explained that the ELGs "will improve aquatic and wildlife habitats in the immediate and downstream receiving waters from steam electric power plant discharges," and that "these water quality and habitat improvements will enhance efforts to protect threatened and endangered species." *Id.* at 67,874.

- The cost-benefit analysis that accompanied the Final Rule also explained that "[f]or threatened and endangered (T&E) species vulnerable to future extinction, [because] even minor changes to reproductive rates and small levels of mortality may represent a substantial portion of annual population growth," "steam electric power plant discharges may either lengthen recovery time, or hasten the demise of these species," and, consequently, the ELGS would positively affect the "recovery trajectory for 15 T&E species." Cost- Ben. Report at 2-7, 5-4.

Given that the record overwhelmingly shows implementation of the Final ELG Rule would *reduce* take and other adverse impacts on protected species from power plants discharges, it is simply indisputable that by *delaying* those increased protections through the ELG Delay Rule, EPA will adversely affect such species – thereby requiring Section 7 consultation. *Id.* [3]

The fact that, as of today, these plants are not *yet* required to reduce these discharges under the ELG Rule does not impact EPA' obligation to consult on the adverse impacts of the Delay Rule. In considering the effects of an action, the ESA's implementing regulations require an agency to consider those effects in the context of the "environmental baseline," which includes "the past and present impacts of all Federal, State or private actions and other human activities in the action area . . . ." 50 C.F.R. § 402.02; *Defenders of Wildlife v. Babbitt*, 130 F. Supp. 2d 121, 127 (D.D.C. 2001). The Final ELG Rule was thus an existing action that EPA was required to make part of the baseline for its analysis. *See, e.g., Natl Wildlife Fedn v. Natl Marine Fisheries Svc.,* 524 F.3d 917, 929-931 (9th Cir. 2007) (requiring agency evaluate the impacts of proposed dam management actions in light of the most environmentally protective status quo); *Am. Rivers, Inc. v. United States Army Corps of Eng'rs.*, 421 F.3d 618 (8th Cir. 2005) (same); *see also Center for Biological Diversity v. EPA*, No. 14-1036, _ F.3d _, 2017 U.S. App. LEXIS 11668 (June 30, 2017) (finding consultation required for pesticide registration).

[3] EPA must obtain one or more Bi-Ops that address the direct and indirect impacts on listed species from all the power plants covered by the Final ELG Rule, since the "action area" covered by the consultation must include "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." 50 C.F.R. § 402.02. The most appropriate way to comply with this obligation would be to obtain a programmatic Bi-Op, which is the approach the agency took in consulting on the impacts associated with its Cooling Water Intake Structures rulemaking. *See* Endangered Species Act Section 7 Consultation Programmatic Biological Opinion on the U.S. Environmental Protection Agency's Issuance and Implementation of the Final Regulations Section 316(b) of the Clean Water Act at 21-28 (May 19, 2014).

Finally, EPA cannot avoid its ESA Section 7 obligations on the grounds that its decisions concerning ELGs are somehow "non-discretionary," and thus exempt from these requirements, as EPA argues in its Response to Comments. As a threshold matter, as evidenced from the robust record underlying the 2015 ELGs, EPA exercised a great deal of discretion in crafting the ELGs and compliance deadlines to bring them into force. Establishing ELGs is thus a far cry from the ministerial actions that courts have deemed exempt from Section 7. *See, e.g., Natl Assn of Homebuilders v. EPA*, 551 U.S. 665 (2007).

Moreover, EPA's argument is particularly illogical in the context of the ELG Delay Rule, which delays ELG compliance deadlines by two years. EPA has never suggested, let alone argued, that in issuing the Delay Rule it was fulfilling a statutory requirement as to which it lacked all discretion. To the contrary, it seeks to justify the Delay Rule precisely on its "*inherent discretion* . . . to reconsider past policy decisions consistent with the CWA and other applicable law." 82 Fed. Reg. at 43,496 (emphasis added). Thus, since EPA maintains that the ELG Delay Rule is a lawful exercise of its broad *discretion*, it cannot justify its failure to engage in any Section 7 consultation on the argument that it lacked all discretion here. *See also id.* (claiming EPA is "afforded considerable discretion in deciding" whether to delay compliance dates); ("EPA has *discretion* in determining technological availability and economic achievability and is not constrained by the CWA to make the same policy decision as the former Administration, so long as its decision is reasonable") (emphasis added).

Conclusion

For the foregoing reasons, EPA must vacate the ELG Delay Rule and obtain one or more Bi-Ops from the FWS and NMFS before delaying any of the 2015 ELGs compliance dates. Unless EPA takes action within the next 60 days, the Center intends to take appropriate action to bring the agency into compliance with the ESA.

Thank you for your consideration.

Sincerely,

Howard M. Crystal
Senior Attorney

cc: FWS, NOAA