



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10

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OFFICE OF
WATER AND
WATERSHEDS

MAR 29 2019

The Honorable Ernie Stensgar
Chairman
Coeur d'Alene Tribe
850 A Street
PO Box 408
Plummer, Idaho 83851

Re: The U.S Environmental Protection Agency's Action on the Coeur d'Alene Tribe's Acute Mercury Criterion

Dear Chairman Stensgar:

Pursuant to section 303(c) of the Clean Water Act and 40 CFR Part 131, the U.S. Environmental Protection Agency is approving the aquatic life criterion for acute mercury that was part of the water quality standards submitted to the EPA by the Coeur d'Alene Tribe on June 4, 2010, with revisions provided on June 10, 2014. The EPA took an approval action on the majority of the Tribe's water quality standards on June 12, 2014.

The EPA deferred action on the Tribe's acute and chronic aquatic life criteria for mercury and the chronic criteria for arsenic and selenium, pending completion of consultation under section 7 of the Endangered Species Act with the U.S. Fish and Wildlife Service on similar criteria for these pollutants in Idaho relative to the threatened bull trout.

The FWS issued a biological opinion on the EPA's approval of Idaho's criteria on June 25, 2015, where it found that the EPA's approval of Idaho's acute mercury criterion, 2.1 $\mu\text{g/L}$, is not likely to adversely affect bull trout in Idaho. The FWS subsequently notified the EPA that based on its biological opinion in Idaho, it also finds that EPA approval of the criterion that the Tribe has adopted for acute mercury (1.4 $\mu\text{g/L}$), which is more stringent than the criterion adopted by Idaho, will not be likely to adversely affect bull trout in the Tribe's Reservation TAS Waters.

Today, the EPA is taking a CWA section 303(c) action on the Tribe's acute mercury criterion. The EPA is not taking an action at this time on the Tribe's aquatic life criteria for chronic mercury and arsenic, while we and the FWS continue to address the FWS's jeopardy determinations for bull trout for the same criteria in Idaho. The EPA is also not taking an action on the chronic selenium criterion at this time, pending a decision from the Tribe regarding adoption of a revised criterion such as the EPA's current recommended criterion under CWA section 304(a).

In accordance with the EPA's authority under CWA section 303(c) and the implementing regulations at 40 CFR Part 131, the EPA approves the Tribe's acute mercury aquatic life criterion of 1.4 $\mu\text{g/L}$ in section 7(10) and the conversion factor for the acute mercury criterion (i.e., for the CMC, or criterion maximum concentration) in section 7(11) of the Tribe's water

quality standards. The EPA's action is further described in the enclosed technical support document. The EPA's action applies to "Reservation TAS Waters" as defined in the Tribe's water quality standards, i.e., jurisdictional waters for which the Tribe is authorized for treatment in a similar manner as a state for purposes of administering a water quality standards program under section 518 of the CWA.

We appreciate the efforts your staff have dedicated to managing the water quality standards program and adopting criteria for the protection of aquatic life in Reservation TAS Waters. Please feel free to contact me at (206) 553-1855 or Maja Eberhardt, the EPA staff lead, at (206) 553-6265 or eberhardt.maja@epa.gov if you have any questions.

Sincerely,



Daniel D. Opalski
Director

Enclosure

cc: Mr. Philip Cernera, Coeur d'Alene Tribe
Mr. Scott Fields, Coeur d'Alene Tribe (by email)

Technical Support Document
U.S. Environmental Protection Agency Review of the Coeur d'Alene Tribe's
Water Quality Standards – Acute Mercury Aquatic Life Criterion

Requirements of the Clean Water Act and the EPA's Implementing Regulations

Under the CWA section 303(c), 33 U.S.C. 1313(c), and the EPA's implementing regulations at 40 CFR § 131.4, states and authorized tribes have the primary responsibility for establishing, reviewing, and revising water quality standards, which include the designated uses of a waterbody or waterbody segment and the water quality criteria necessary to protect those designated uses. Such criteria must be based on a sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use.

CWA section 303(c)(2)(B), 33 U.S.C. 1313(c)(2)(B), requires states and authorized tribes to establish water quality criteria for toxic pollutants listed pursuant to CWA section 307(a)(1), for which the EPA has published criteria recommendations under section 304(a), where the presence of these pollutants could reasonably be expected to interfere with the designated uses established by the state or authorized tribe. In establishing such criteria, states and authorized tribes should establish numeric criteria based on one of the following:

- (1) CWA 304(a) guidance;
- (2) CWA 304(a) guidance modified to reflect site-specific conditions; or,
- (3) Other scientifically defensible methods (40 CFR §131.11(b)(1)).

In addition, states and authorized tribes should establish narrative criteria where numeric criteria cannot be determined or to supplement numeric criteria (see 40 CFR §131.11(b)(2)).

CWA section 303(c) requires states and authorized tribes to submit new or revised water quality standards (WQS) to the EPA for review, and the EPA must ensure that those WQS are consistent with the CWA and the EPA's implementing regulations. In addition, in accordance with 40 CFR 131.5, the state or tribe must follow its own legal procedures for adopting such standards and submit certification by the state or tribe's attorney general, or other appropriate legal authority within the state or tribe, that the WQS were duly adopted pursuant to state or tribal law, 40 CFR 131.6(e).

General Recommended Approach for Deriving Aquatic Life Criteria

Under the EPA's CWA section 304(a) authority, the EPA develops and publishes methodologies and recommended water quality criteria to protect aquatic life and human health (referred to as 304(a) criteria recommendations), and periodically reviews and revises those methodologies and criteria. The methodologies and criteria are subject to public and expert scientific review before the EPA issues them as formal agency recommendations for states and tribes to consider when developing and adopting water quality criteria pursuant to CWA section 303(c).

To derive criteria for the protection of aquatic life, the EPA follows its *Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic Organisms and Their Uses* ("1985 Guidelines").¹ These guidelines describe an objective way to estimate the highest concentration of a substance in water that will not present a significant risk to the aquatic organisms in the water. Numeric criteria derived using the EPA's 1985 Guidelines are expressed as short-term (acute) and long-term (chronic) values. The combination of a criterion maximum concentration (CMC; a one-hour average value) and a criterion continuous concentration (CCC; a four-day average value) is intended to protect aquatic life from acute and chronic toxicity, respectively. Neither value is to be exceeded more than once in three years. When the EPA revises existing 304(a) criteria recommendations, it incorporates new data about species' chronic and acute sensitivity as well as new scientific knowledge about toxicity pathways.

National CWA Section 304(a) Recommended Acute Mercury Criterion

The EPA's current 304(a) recommendation for the acute mercury criterion is 1.4 µg/L.² This value was developed using the best available toxicity data and represents a concentration of dissolved divalent mercury that is not expected to result in unacceptable effects to aquatic organisms if the one-hour average concentration does not exceed this value more than once every three years on average. The 1995 acute mercury criterion recommendation was provided as a total mercury concentration in water, i.e., a value relevant to unfiltered water, of 1.7 µg/L. The EPA-recommended conversion factor of 0.85 was applied to establish the EPA's 304(a) criterion recommendation for dissolved mercury of 1.4 µg/L.

The Coeur d'Alene Tribe's Adoption of Aquatic Life Criteria and the EPA's Prior Action

The Tribe initiated a 45-day public comment opportunity on its proposed WQS for the Reservation TAS Waters on October 14, 2005 and held a public hearing on November 28, 2005. The comment period was extended an additional 45 days and ended January 13, 2006. Public comments were addressed and the WQS were adopted by the Coeur d'Alene Tribal Council on March 18, 2010 by CDA Resolution 84 (2010). The Tribe's submittal included certification that the WQS were adopted in accordance with all applicable laws. The Tribe submitted the WQS to the EPA for review and action under CWA section 303(c) on June 4, 2010. On June 5, 2014 by CDA Resolution 089 (2014), the Coeur d'Alene Tribal Council adopted non-substantive revisions to several provisions of the WQS that provided clarifications or corrected minor errors, but did not change the meaning or intent of the WQS and were not subject to public comment. The Tribe's submittal of the revised WQS also included certification that the WQS were adopted in accordance with all applicable laws. The Tribe submitted these revisions to the EPA for review and action under the CWA section 303(c) on June 10, 2014.

The EPA completed the review of the Tribe's WQS and provided a CWA section 303(c) action letter and technical support document to the Tribe on June 12, 2014. At that time, the EPA deferred action on four criteria and associated footnotes in the criteria table, which included the

¹ <https://www.epa.gov/wqc/guidelines-deriving-numerical-national-water-quality-criteria-protection-aquatic-organisms-and>

² U.S. EPA. 1996. *1995 Updates: Water Quality Criteria Documents for the Protections of Aquatic Life in Ambient Water*. U.S. Environmental Protection Agency, Office of Water, Washington, D.C. September 1996.

acute aquatic life criterion for mercury in section 7(10) and the conversion factor for the acute mercury criterion (i.e., for the CMC) in section 7(11). The EPA did not take an action on these criteria pending completion of Endangered Species Act (ESA) section 7 consultation between the EPA and the U.S. Fish and Wildlife Service on Idaho's aquatic life criteria, including mercury, as well as ESA consultation on the Coeur d'Alene Tribe's aquatic life criteria. The Idaho ESA consultation is being used as a basis for the Coeur d'Alene consultation. The FWS issued a biological opinion on the EPA's approval of Idaho's aquatic life criteria on June 25, 2015, which completed the ESA consultation on the EPA's approval of Idaho's criteria. The ESA consultation on the Coeur d'Alene Tribe's aquatic life criteria is currently ongoing.

In its 2015 biological opinion on the EPA's approval of Idaho's aquatic life criteria, the FWS concluded that Idaho's acute mercury criterion, 2.1 µg/L, is not likely to adversely affect bull trout in Idaho.³

The EPA's Action on the Coeur d'Alene Tribe's Acute Mercury Criterion

The EPA has completed its review of the Tribe's acute mercury criterion and finds that the criterion is consistent with the requirements of CWA section 303(c) and 40 CFR 131. The EPA hereby approves the aquatic life criterion for acute exposure to mercury of 1.4 µg/L in section 7(10) and the conversion factor for the mercury criterion maximum concentration (CMC) in section 7(11) of the Tribe's WQS.

The FWS found that the EPA's approval of Idaho's acute mercury criterion, 2.1 µg/L, is not likely to adversely affect bull trout in Idaho. The FWS subsequently notified the EPA that based on its biological opinion in Idaho, it also finds that EPA approval of the criterion that the Tribe has adopted for acute mercury (1.4 µg/L), which is more stringent than the criterion adopted by Idaho, will not be likely to adversely affect bull trout in the Tribe's Reservation TAS Waters. As a result, because the Tribe's acute mercury criterion is consistent with the CWA section 304(a) recommendations, the EPA has determined that it is protective of aquatic life in the Reservation TAS Waters, including the threatened bull trout.

³ FWS 2015. *Biological Opinion for the Idaho Water Quality Standards for Numeric Water Quality Criteria for Toxic Pollutants*, 01EIFW00-2014-F-0233. U.S. Fish and Wildlife Service, Portland, OR. June 25, 2015. Available online at: <https://www.deq.idaho.gov/media/60177187/usfws-biological-opinion-numeric-criteria-toxic-pollutants.pdf>