

# Activist Suit Could Test EPA Process For Judging State Water Quality Limits

Posted: January 12, 2011

A planned environmentalist lawsuit over EPA's alleged failure to properly review Oregon's landmark proposed revisions to narrative water quality criteria for toxics, citing violations of a number of federal statutes, could force the agency to speed up its reviews of state water quality criteria nationally, activist sources say.

While environmentalists are generally supportive of EPA's mandate last year that Oregon set stringent criteria to protect Native American populations that consume large amounts of fish, Northwest Environmental Advocates (NEA) charges EPA violated the Clean Water Act (CWA) and Endangered Species Act (ESA) when it failed to take other actions on the state's proposed criteria.

In its Dec. 21 notice of intent (NOI) to sue, NEA says EPA violated the CWA when it failed to take action on Oregon's revisions to narrative toxics criteria and removal of aquatic life criteria, failed to instruct the state how it should revise some criteria EPA rejected and failed to promulgate standards for Oregon. The NOI also says EPA failed to consult with other federal agencies on the impact Oregon's toxics criteria would have on protected species, as required by the ESA.

The suit comes as the Oregon Department of Environmental Quality (DEQ) is proposing new water quality criteria to incorporate stringent human health criteria that assumes, for the first time, a fish consumption rate of 175 grams per day (g/day) -- a requirement EPA imposed on DEQ when it rejected part of the state's suggested amendments to its water quality criteria for toxics in June 2010.

An NEA source says the fact that the state's toxics criteria is only being promulgated now -- having been first sent to EPA for revision in 2004 -- illustrates a need for the agency to be more vigilant in clamping down on toxics criteria in state water quality standards. The 1987 amendments to the CWA contain specific requirements for states to implement criteria for reducing toxics in waterways, and EPA should require triennial revisions to state water quality standards to achieve that goal, the source says.

The planned NEA suit could be the vehicle for spurring those necessary changes in the agency, the source says. "It sets us up to address the national problem with timeliness of criteria revisions," the source says. "In the 1987 amendments [to the CWA], Congress said you need to get a move on getting toxic criteria updated, and you need a mechanism in place to do that."

In a Jan. 6 statement, DEQ Director Dick Pedersen said the proposed toxics rule, which includes the 175 g/day fish consumption criteria, was "necessary to protect human health" and said the state proposed the rule with an eye towards practicality. "Reducing the level of these toxics in

our water makes for healthier, more livable communities and, as a result, a healthier economy,” Pedersen said. “It is important that any water quality rules are implementable, and we believe through working with a broad group of stakeholders we have a proposed rule package that achieves that end.”

### **Elevated Fish Consumption**

The 175 g/day fish consumption criteria was widely touted last summer as being the most stringent human health criteria in the country, and drew concerns from industry that the wording of the criteria could set the stage for EPA to impose equally restrictive criteria on other states.

The consumption criteria is intended to protect Native American populations that rely on fisheries for subsistence, and requires fish to exhibit levels of toxics that would allow people to eat 175 grams of wild fish per day without exhibiting an elevated risk of health effects. The default EPA fish consumption level is 17.5 g/day, making the state standard 10 times more stringent than the national standard.

But the NEA source says the state criteria include other “off-ramps” that allow industry to avoid taking action that would actually reduce the amount of toxics in the water, and therefore in the state's fish supply. For example, the state included a “background concentration” provision that allows point sources to discharge effluent with pollution concentrations up to 3 percent greater than the background level of pollution detected in their intake, regardless of whether the intake concentrations met the state water quality criteria. The rule also allows point sources to apply for variances from the water quality criteria in their permits and exempts stormwater entirely, the source says.

Those provisions undermine the fish consumption criteria to the point where point sources can be in compliance with the rule without making the toxics reductions necessary to meet the fish consumption criteria, the source says.

“We support the change in the fish consumption criteria, but we're not sure it's going to work,” the source says. “Clearly putting the fish consumption assumption in the calculus is important, but my quarrel is with the rest of the project, which lets point sources off the hook because they know it will be difficult and expensive to treat [discharges] to the criteria, but the state has an obligation to control [discharges].”

Oregon is accepting comments on the proposed criteria until Feb. 18. -- *John Heltman*