Endangered Species Act/Clean Water Act: Federal Court Addresses Challenge to U.S. Environmental Protection Agency Water Quality Criteria for Cadmium

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The United States District Court for the District of Arizona ("Court") addressed in an August 18th Order an alleged violation by the United States Environmental Protection Agency ("EPA") of the Endangered Species Act ("ESA"). See Case No. CV-22-00138-TUC-JCH.

The Center for Biological Diversity ("CBD") filed a Complaint for Declaratory Injunctive Relief ("Complaint") against EPA arguing that the agency had failed to consult under Section 7 of the ESA on the effects on wildlife of the federal agency's revisions to all aquatic life water quality for the heavy metal cadmium.

CBD stated that the alleged failure put at greater risks certain endangered species.

The Complaint challenged EPA's finalization in 2016 of a revised set of ambient water quality criteria ("WQC") relating to the effects of cadmium on aquatic organisms based on the agency's assessment of the metal's ecological effects. The organization alleged that those criteria are less protective of water quality than prior versions for chronic freshwater exposure. It further stated that at least 18 states, territories and/or tribes had adopted EPA's revised cadmium WQC.

WQC are ambient water quality conditions that are deemed protective of the uses established for a water body. The Clean Water Act requires that states adopt WQC protective of each waterbody's designated uses. WQC represents a judgment as to what levels, concentrations or conditions can support a desired use in the waterbody.

EPA develops WQC under Section 304(d) of the Clean Water Act. The WQCs that EPA develops are frequently used by the states in establishing or revising their water quality standards. However, states are free to adopt or develop their own WQC. Of course, they must be scientifically defensible.

CBD argued that EPA's revision of the cadmium WQC was undertaken without consulting with the United States Fish and Wildlife Service or the National Marine Fishery Service (collectively "Services") as required by Section 7 of the ESA.

The Complaint had alleged that:

. . . this is a clear violation of EPA's obligations to engage the Services in consultation to insure EPA's action "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."

The Complaint sought a declaration that EPA was in violation of Section 7 of the ESA for promulgating cadmium WQC in 2016 without consultation.

EPA had responded that the ESA only requires that it consult later, when states apply to adopt or modify EPA's recommended WQC.

The Court in the August 18th Order states that EPA's position is "defensible." However, it agrees with CBD that issuing recommended WQC is an "action" under the ESA.

As a result, the Court holds that consultation with the Services is required. EPA's 2016 chronic freshwater 304(a) cadmium WQC are vacated and remanded. The Order applies to both the chronic freshwater cadmium WQC and freshwater (acute) and marine acute and chronic WQC.

A copy of the Order can be downloaded here.