

Endangered Species Act/Clean Water Act: Federal Appellate Court Addresses Challenge to U.S. EPA Water Quality Criteria for Cadmium



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The Center for Biological Diversity (“CBD”) had filed a Complaint for Declaratory and Injunctive Relief (“Complaint”) in the United States District Court for the District of Arizona against the United States Environmental Protection Agency (“EPA”) alleging a violation of the Endangered Species Act (“ESA”). See Case No. 4:22-cv-00138-JCH.

The Complaint alleged that EPA failed to consult under Section 7 of the ESA on the effects to wildlife of the federal agency’s revisions to the Aquatic Life Water Quality Criteria for the heavy metal cadmium.

CBD stated that this alleged failure puts at greater risk certain endangered species.

CBD 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 upon the agency’s assessment of cadmium’s ecological effects. The organization alleged that those criteria are less protective of water quality than prior versions for chronic freshwater exposure. The organization further alleged that the criteria are less protective of water quality than prior versions for chronic freshwater exposure. At least 18 states, territories, and/or Tribes were alleged to have adopted EPA’s revised cadmium criteria.

WQC are ambient water quality conditions that are deemed protective of the uses established for a waterbody. The Clean Water Act requires that states adopt WQC protective of the designated uses. WQC represent 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 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 in 2016 was undertaken without consulting with the United States Fish and Wildlife Service or the National Marine Fisheries Service (collectively, “Services”) as required by Section 7 of the ESA.

The Complaint sought a declaration that EPA was in violation of Section 7 of the ESA for promulgating cadmium WQC in 2016 without consultation. The organization also sought an order remanding those criteria and vacating what it described as the “less protective chronic freshwater criterion” and any other appropriate relief.

The United States District Court had held that EPA's position is defensible. However, it agreed with CBD that issuing recommended WQC was an "action" under the ESA. As a result, the Court concluded that consultation with the Services is required. EPA's chronic freshwater 304(a) cadmium WQC were vacated and remanded.

The United States Court of Appeals ("9th Circuit") in a March 3rd Opinion upheld the decision that EPA violated the ESA in 2016 when it failed to assess harms to endangered species in shedding the WQC for cadmium. *See Center for Biological Diversity v. U.S. EPA*, No. 23-2946.

The 9th Circuit stated that under Section 7 of the ESA federal agencies must carry out consultations with either of the Services before taking agency action that may affect endangered species or their critical habitats. Further, it held that CBD had Article III standing to challenge EPA's alleged failure to consult with either of the Services under Section 7 of the ESA before promulgating its Clean Water Act Section 304(a) recommendation for cadmium.

As to standing, the 9th Circuit stated that:

- CBD members established an injury in fact because the record contained ample evidence that less-stringent state WQC harmed listed species by increasing pollution, and that such harms impair CBD's members' concrete interest in engaging in recreational educational activities involving these species.
- Injury is traceable to an action by the EPA because consultations between EPA and the government agencies regarding the § 304(a) recommendations likely would have resulted in stricter water quality standards.
- CBD's injury is redressable because consultation is likely to lead to stricter § 304(a) recommendations and at least one state is likely to adopt stricter WQC in response to stricter § 304(a) recommendations, which would likely impact CBD members' interest in various listed species.

The Court held as to the merits that Section 7 of the ESA requires agencies to consult with the Services before performing any "agency action" that "may affect" listed species or their critical habitats. Further, it noted that in researching, developing, and publishing nationwide recommendations for aquatic pollutant levels which would foreseeably be adopted wholesale by many states, EPA carried out and "agency actions" which "may affect" listed species. This was stated to require consultation with the referenced government agencies under Section 7.

A copy of the Opinion can be found [here](#).