



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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LEADING FILE

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James Steele Jr., Chairman
CSKT Tribal Council
Confederated Salish and Kootenai Tribes of the Flathead Reservation
P.O. Box 278
Pablo, MT 59855

Subject: EPA Approval of Confederated Salish and
Kootenai Tribes' Revised Water Quality Standards

Dear Chairman Steele:

The U.S. Environmental Protection Agency, Region 8 (EPA) has completed its review of the Confederated Salish and Kootenai Tribes' (CSKTs' or Tribes') revised water quality standards. The revised water quality standards were adopted by the Tribal Council on December 12, 2006. The revised water quality standards were submitted to EPA for review with a letter dated January 31, 2007. The submittal package included: 1) a statement from the Tribal Managing Attorney certifying that the revisions were duly made pursuant to Tribal law; 2) a Tribal Resolution (#07-58) authorizing the submittal to EPA for review; 3) Mixing Zone Implementation Procedures; 4) the CSKT Tribal Water Quality Management Ordinance (89B); 5) the Public Notice and Public Hearing Transcript; and 6) a Summary of Responses to Public Comments received during the public notification process. Receipt of these revised water quality standards on February 2, 2007 initiated EPA's review pursuant to Section 303(c) of the Clean Water Act (CWA) and the implementing federal water quality standards regulation at 40 CFR Part 131. EPA has completed its review, and this letter is to notify you of our action.

The revised water quality standards include a number of important amendments. These include numerous revisions to certain numeric water quality criteria consistent with EPA's current criteria recommendations; adoption of *Escherichia coli* (*E. coli*) as a bacteriological indicator, and numeric *E. coli* criteria for the protection of recreational water uses; a new Mixing Zone Policy and Implementation Procedures; and new Antidegradation Implementation Procedures. While EPA does not formally review and approve the Implementation Procedures for Mixing Zones and Antidegradation, these procedures do inform the Agency's decision on the Tribes' water quality standards. The Tribal Council and the Tribes' Natural Resources



Department are commended for making these important revisions to the Tribes' water quality standards. The adopted revisions clearly will assist in the protection of Reservation surface water quality.

Agency Review

The Clean Water Act, Section 303(c)(2), requires States and authorized Indian Tribes¹ to submit new or revised water quality standards to EPA for review. EPA is to review and approve or disapprove the submitted standards. Pursuant to CWA Section 303(c)(3), if EPA determines that any standard is not consistent with the applicable requirements of the Act, the Agency is to notify the State or authorized Tribe and specify the changes to meet such requirements. If such changes are not adopted by the State or authorized Tribe within ninety days after the date of notification, EPA is to promptly propose and promulgate such standard pursuant to CWA Section 303(c)(4). EPA's goal has been, and will continue to be, to work closely with States and authorized Tribes throughout the standards revision process as a means to avoid the need for a disapproval action, and where disapproval is unavoidable within the statutory deadlines, to explore with the State or authorized Tribe an acceptable resolution that will make federal promulgation unnecessary.

Today's Action

I am pleased to inform you that today EPA is approving revisions to the Tribes' water quality standards, Surface Water Quality Standards and Antidegradation Policy, adopted by the Tribal Council on December 12, 2006. EPA has concluded that the revisions are consistent with the requirements of the Clean Water Act and EPA's implementing regulation at 40 CFR Part 131. Accordingly, these revisions are approved.

Endangered Species Act Requirements

It is important to note that EPA's approval of the Tribes' water quality standards is considered a federal action which may be subject to the Section 7(a)(2) consultation requirements of the Endangered Species Act (ESA).² Section 7(a)(2) of the ESA states that "each federal agency ... shall ... 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 to be critical..."

EPA's approval of the water quality standards revisions, therefore, may be subject to the results of consultation with the U.S. Fish and Wildlife Service pursuant to Section 7(a)(2) of the

¹ CWA Section 518(e) specifically authorizes EPA to treat Indian tribes as States for purposes of CWA Section 303.

² Where EPA concludes that its approval action will have "no effect" on listed endangered or threatened species, or is otherwise not subject to ESA consultation, EPA can issue an unconditional approval.

ESA. Nevertheless, EPA also has a Clean Water Act obligation, as a separate matter, to complete its water quality standards action. Therefore, in approving the Tribes' water quality standards revisions today, EPA is completing its CWA Section 303(c) responsibilities. However, should the consultation process with the U.S. Fish and Wildlife Service identify information that supports a conclusion that one or more of these revisions is likely to jeopardize the continued existence of any endangered or threatened species, EPA will revisit and amend its approval decision for those revised or new water quality standards.

Pursuant to the *Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service and National Marine Fisheries Service Regarding Enhanced Coordination Under the Clean Water Act and Endangered Species Act* (66FR11202, February 22, 2001), EPA Headquarters and the Services have initiated a national consultation on all of EPA's published water quality criteria for the protection of aquatic organisms. As explained in the MOA, the national consultation provides Endangered Species Act Section 7 consultation coverage for any water quality criteria included in State or Tribal water quality standards, approved by EPA, that are identical to or more stringent than EPA's recommended CWA Section 304(a) criteria. EPA Region 8, therefore, will defer to the national consultation on questions of protectiveness for aquatic life criteria. In the unlikely event that the national consultation discovers EPA's published CWA Section 304(a) criteria (and by extension, the Tribes' standards) are likely to cause jeopardy to listed species or the adverse modification or destruction of designated critical habitat, EPA has retained its authority to revise its approval decision.

Today's action includes a finding that EPA's approval of certain elements of the revised water quality standards will have no effect on listed or proposed endangered or threatened species, or is otherwise not subject to ESA consultation. In addition, as discussed in more detail below, EPA has concluded that these revisions are consistent with the requirements of the CWA and EPA's implementing regulation. For these revisions, no consultation with the U.S. Fish and Wildlife Service is required. The discussion below, therefore, covers two categories of revisions: 1) revisions approved without condition, and 2) revisions approved subject to ESA consultation.

Approved Revisions

EPA has concluded that its approval of the following revisions will have no effect on listed or proposed endangered or threatened species, or is otherwise not subject to ESA consultation. Accordingly, the following revisions are approved without condition:

- All revisions to numeric criteria for the protection of human health.
- All revisions to numeric criteria for the protection of recreation uses (i.e., adoption of new *E. coli* criteria).
- All revisions addressing corrections to the water quality standards, such as updates to current reference material, corrections or revisions to definitions, correction of typographical errors, etc.

Approved Revisions Subject to ESA Consultation

The following revisions are approved for purposes of CWA Section 303(c), subject to the results of consultation under Section 7(a)(2) of the ESA:

- The revisions to the numeric standards for acute and chronic cadmium, and acute silver for the protection of aquatic life (these are the only aquatic life criteria revised in this current action by the Tribal Council).
- Revisions adopting a Mixing Zone Policy.

Basis for Approval

Below is a description of each of the revisions to the Tribes' water quality standards adopted by the Tribal Council on December 12, 2006, and the rationale for EPA's approval of each revision:

- Revisions to numeric criteria for the protection of human health and revisions to numeric criteria for the protection of aquatic life in CS&KT Tribal Numeric Chart, which lists the Tribes' numeric water quality standards.

A key EPA priority for the water quality standards program is that States and authorized Tribes review EPA's updated, national toxic pollutant criteria and revise their water quality standards, as appropriate, to be consistent with EPA's most recently published recommendations or defensible alternatives that would be protective of designated uses. In its December 12, 2006 action, the Tribal Council adopted changes to the human health-based numeric standards in CS&KT Tribal Numeric Chart that follow the recommendations in EPA's *National Recommended Water Quality Criteria: 2002* (EPA-822-R-02-047, November 2002). Further, the adopted revisions include updated values for fifteen human health criteria published by EPA in December 2003 (these updated criteria were incorporated into a revised *National Recommended Water Quality Criteria: 2004* made available in May, 2004). These values are the same as EPA's current CWA-based recommendations for protection of human health. In a number of cases, where the health-based values published under the authority of the federal Safe Drinking Water Act (SDWA) were more protective than the criteria listed in EPA's CWA-based *National Recommended Water Quality Criteria*, the Council adopted the more protective SDWA-based human health values. This is consistent with EPA Region 8's recommendation that States and authorized Tribes use the more protective of these two health-based criteria.

EPA views these as important revisions, bringing the human health-based numeric standards in CS&KT Tribal Numeric Chart in line with the current science on this topic. The revisions to the human health-based numeric standards in CS&KT Tribal Numeric Chart are consistent with the federal requirements at 40 CFR Section 131.11 and, accordingly, they are approved without condition.

- Revisions to numeric criteria for the protection of recreation uses (i.e., the new *E. coli* criteria applicable to the classifications in Sections 1.3.5 through 1.3.12).

EPA believes that, for fresh water, *E. coli* is the indicator best suited for use in determining the potential risk of contracting acute gastrointestinal illness from incidental ingestion of contaminated water during recreational activities. The revised numerical criterion of a geometric mean of *E. coli* not to exceed 126 organisms per 100 milliliters for primary contact recreation is consistent with EPA's recommendations³ and, therefore, is approved. In addition, the upper-bound numerical criterion, which 10% of the total samples may not exceed, is within an acceptable risk level for recreational uses, and therefore this criterion is approved as well. Further, the adopted *E. coli* criteria in Sections 1.3.5 and 1.3.6, applicable to the A-Closed and A-1 classifications, are acceptable as well. To address the higher levels of protection that are afforded within the A-Closed and A-1 use classifications, these *E. coli* criteria are more protective than those applied to recreational uses.

EPA views the change in the Tribes' bacteriological indicator, incorporating *E. coli* with the Tribes' existing fecal coliforms criteria, as an important revision, bringing the recreational use criteria in line with EPA's most current recommendations on this topic. Region 8 understands that the Tribes intend to transition to using only *E. coli* as recreational use criteria, and to phase out the use of fecal coliforms over time, in subsequent water quality standards updates. The adopted *E. coli* criteria are consistent with the federal recommendations at 40 CFR 131.11, and accordingly, they are approved without condition.

- Revisions addressing corrections to the water quality standards, such as updates to current reference material, corrections or revisions to definitions, correction of typographical errors, etc.

Revisions to the water quality standards adopted by the Tribal Council on December 12, 2006 include amendments that make corrections to the Tribes' water quality standards. These include changes such as: updates to current reference material, corrections or revisions to definitions, correction of typographical errors, etc. Such routine "housekeeping" revisions are needed to ensure the Tribes' water quality standards are correct and current. EPA has determined that these revisions are consistent with the federal requirements at 40 CFR Part 131, and accordingly, they are approved without condition.

- Revisions to the numeric standards for acute and chronic cadmium, and acute silver for the protection of aquatic life.

³ EPA's most recent recommendations on the use of *E. coli* as a bacteriological indicator for the protection of recreational uses are presented in a document entitled *Implementation Guidance for Ambient Water Quality Criteria for Bacteria*, March 2004. Although this is not a final document, it represents the Agency's current thinking on this subject, and Region 8 recommends its application in guiding development and implementation of bacterial indicator criteria.

The Tribal Council adopted revisions to the numeric criteria for the protection of aquatic life for acute and chronic cadmium, and acute silver to be consistent with the updated criteria in EPA's *National Recommended Water Quality Criteria* document. The adopted revisions are consistent with the federal requirements at 40 CFR Section 131.11. However, because these are aquatic life criteria, our approval is subject to the ongoing ESA consultation being carried out by EPA Headquarters on all of EPA's published aquatic life criteria. Accordingly, these revisions are approved subject to the results of the national consultation under Section 7(a)(2) of the ESA.

- Adoption of a Mixing Zone Policy.

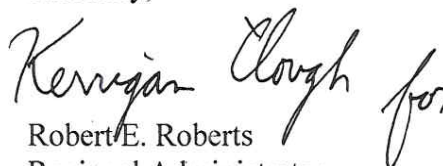
The Tribal Council also adopted revisions creating a Mixing Zone Policy. This policy, along with the accompanying Mixing Zone Implementation Procedures, aids the public in understanding the situations in which a mixing zone or dilution allowance may be authorized. The adopted revisions are consistent with EPA Region 8's Mixing Zone and Dilution Policy guidance and the federal requirements at 40 CFR Sections 131.11 and 131.13. However, because this revision could potentially affect endangered or threatened aquatic species, our approval is subject to ESA consultation with the U.S. Fish and Wildlife Service. Accordingly, this revision is approved subject to consultation under Section 7(a)(2) of the ESA.

Conclusion

The Tribal Council has adopted important revisions to the Tribes' water quality standards, and I commend the Council for its action. I also appreciate the cooperative and constructive manner in which the Tribes' Natural Resources Department staff has worked with my staff in developing its proposal for this triennial review of the water quality standards.

If you have questions concerning this letter, please call Carol Rushin, Assistant Regional Administrator, Office of Ecosystems Protection and Remediation at 303-312-6598, or have your staff contact George Parrish, of our Regional Water Quality Standards team, at 303-312-7027.

Sincerely,


Robert E. Roberts
Regional Administrator

cc: Paula Webster, Water Quality Specialist, CSKT Natural Resources Department
Mark Wilson, Field Supervisor, FWS Montana Field Office
Jennifer Wintersteen, MT Office, EPA Region VIII
Grace Robiou, OST, EPA Headquarters