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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, Washington 98101

Reply To
Attn Of: OW-134

JUN 25 1996

Wallace Cory
Idaho Division of Environmental Quality
1410 North Hilton
Boise, Idaho 83706

Re: EPA Approval/Disapproval Action on the Idaho 1994 Water Quality Standards and 1995 Revisions

Dear Mr. Cory:

The U.S. Environmental Protection Agency (EPA) has completed its review of the Idaho Water Quality Standards (WQS) adopted August 24, 1994 and the following revisions to those standards which were subsequently submitted to EPA for approval: chronic ammonia criteria for warm water and cold water biota (4/14/95), human health criteria for arsenic (4/10/95), the Kinross Delamar variance to aquatic life criteria for copper, cyanide and selenium (2/24/95). We understand that these submittals include all currently effective Idaho WQS which have been submitted to EPA for review, and that these submittals supercede all previous water quality standards in Idaho.

Based on our review, we are approving Idaho's 1994 water quality standards and subsequent submittals with the exceptions discussed below, subject, however, to successful conclusion of ESA consultation. While EPA has initiated informal consultation with the U.S. Fish & Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) pursuant to Section 7 of the ESA, that consultation has not been concluded. Our efforts to identify potential effects to threatened and endangered species from the standards, as required by the Section 7 of the ESA, has required more time than initially expected. We assure you that completing consultation as soon as possible and finalizing our approval action on the adopted Idaho water quality standards is a high priority for the Region.

We regret to inform you that we must disapprove certain provisions of Idaho's 1994 Water Quality Standards as described below. The majority of the provisions we are disapproving were identified and discussed in our October 25, 1995 letter to the Division of Environmental Quality (DEQ). The discussion below, in conjunction with the more detailed comments in the enclosure, identifies the basis for the disapproval issues as well as State actions that would achieve full compliance with the Clean Water Act requirements.

Agency Review:

EPA has reviewed those 1994 Water Quality Standards regulations which are subject to EPA review pursuant to Section 303(c) of the Clean Water Act and the implementing regulations at 40 CFR Part 131. This letter constitutes our official notification of the results of this review.

EPA has determined that several sections of the Idaho 1994 Water Quality Standards regulations do not meet Clean Water Act requirements and are therefore disapproved. Pursuant to Section 303(c)(3) of the Clean Water Act, the State has ninety days after the date of this notification to make the appropriate changes. If after ninety days the State has not made such changes, EPA shall promptly propose regulations setting forth a revised or new water quality standard.

It is our strong desire that DEQ will make the revisions to these disapproved regulations a high priority and resolve them quickly without the need for a federal promulgation. We stand ready to assist in developing the necessary revisions.

Key Approval Issues:

The following are key elements of the approved WQS.

Specific Designated Uses - Those water body segments designated in 16.01.02.120 - 16.01.02.160 of Idaho's 1994 Water Quality Standards which are not specifically disapproved below are approved.

Toxic Pollutant Criteria - All toxic substance criteria and correction factors (conversion factors) in 16.01.02.250.01.c., 16.01.02.250.02.a.iv., 16.01.02.250.03.a.i., 16.01.02.250.07.a. of the Idaho 1994 Water Quality Standards, which in effect are the National Toxic Criteria adopted by reference, are approved. The human health criteria for arsenic of 6.2 ug/l and 0.02 ug/l as established in 16.01.02.250.01.c., 16.01.02.250.02.a.iv. and 16.01.01.250.03.a.i. (in the 11/95 version of the standards) are approved.

Conventional Pollutant Criteria -

Dissolved oxygen criteria - The dissolved oxygen (DO) criteria for salmonid spawning use classification as established in 16.01.02.250.02.d.i. and expressed as intergravel DO and water-column DO are approved. While the intergravel DO criteria include both an acute and chronic value, the water column DO criteria do not. EPA recommends that the State establish a chronic water column DO criteria.

Dissolved oxygen criteria for lakes and reservoirs - The DO criteria for lakes and reservoirs as established in 16.01.02.250.02.b.i and 16.01.02.250.c.i. are approved. While these criteria exempt the bottom 20% of water depth, the bottom 7 meters, and the hypolimnion of stratified lakes from the DO criteria, the narrative criteria at 200.01.-08. can be used to protect and maintain the designated and existing use of lakes and reservoirs, including the

bottom of lakes and reservoirs and the hypolimnion of stratified lakes and reservoirs. However, EPA recommends that the State establish specific DO criteria appropriate for the bottom of lakes and reservoirs.

Bacteriological criteria - Fecal coliform concentrations established in 16.01.02.250.01.a. - b. for primary and secondary contact recreation use classification are approved consistent with EPA's 1976 RedBook recommendations; however, EPA strongly encourages DEQ to adopt the 1986 GoldBook recommended bacteriological criteria based on *E.coli* or enterococci.

Ph - Hydrogen Ion Concentrations established in 16.01.02.250.02.a.1. for aquatic life use classification are approved.

Total dissolved gas - The total concentration of dissolved gas as established in 16.01.02.250.02.a.ii. for aquatic life use classification is approved.

Total chlorine residual - The total chlorine residual concentrations established in 16.01.02.250.02.a.iii. for aquatic life use classification are approved.

Ammonia - The acute ammonia concentrations as established in 16.01.02.250.02.b.iii.1. for warm water biota and 16.01.02.250.02.b.iii.2. for cold water biota are approved. The chronic ammonia concentrations as established in 16.01.02.250.02.c.iii.1. for warm water biota and 16.01.02.250.02.c.iii.2. for cold water biota are approved.

Turbidity - the turbidity criteria as established in 16.01.02.250.02.c.iv for aquatic life use classification are approved.

General Surface Water Quality Criteria - The narrative criteria established in 16.01.02.200.01 - .08 are approved.

Water Quality Criteria for Use Classifications - All remaining criteria established in 16.01.02.250 not specifically approved above or disapproved below are approved. This includes all criteria established for the protection of water supply, agricultural, industrial, wildlife habitat and aesthetic uses.

Antidegradation - That part of the State's antidegradation policy contained in 16.01.02.051.01 through 16.01.02.051.02 is approved. Please note that 16.01.02.051.03, which describes protection for Outstanding Resource Waters is not being approved. The justification is explained below as well as in the enclosure. In addition, EPA has concerns related to the State's antidegradation policy implementation. These concerns are also discussed in the enclosure.

Variance Policy - That part of the State's variance policy contained in 16.01.02.260.01.a. through 16.01.02.260.01.c. of the Idaho 1994 Water Quality Standards is approved.

Mixing Zone Policy - That part of the State's mixing zone policy contained in 16.01.02.060.01.a. through 16.01.02.060.01.f. and h. of the Idaho 1994 Water Quality Standards is approved. Please note that 16.01.02.060.01.g. is not included in this approval. The justification for not including 16.01.02.060.01.g. is explained below.

Disapproval Issues Requiring Immediate State Action:

1. Unclassified Surface Waters Use Designation.
EPA disapproves the use designation for unclassified surface waters. Under Idaho's regulations, those water bodies lacking specific use designations ("undesigned") are protected by default, for only primary contact recreation. Classifying all undesigned waters as simply primary contact recreation is inconsistent with the uses specified in CWA §101(a)(2) and the requirements of CWA §303(b)(2) and 40 CFR 131.10.
2. Stream Segments with Specific Use Designations which are Inconsistent with Clean Water Act Requirements
EPA disapproves the classification of waters of the State listed in 16.01.02.102 through 16.01.02.160 of the Idaho 1994 Water Quality Standards which do not include uses specified in CWA §101(a)(2) and the requirements of CWA §303(b)(2) and 40 CFR 131.10. These waters are listed in the enclosure.
3. Temperature Criteria
EPA disapproves the temperature criteria in the specific water body segments identified in the enclosure. The temperature criteria do not provide for the protection of designated uses under the cold water biota and salmonid spawning use designations, as required by 40 CFR 131.11. Specifically, the temperature criteria are inadequate for bull trout, Kootenai River white sturgeon and five species of threatened and endangered freshwater aquatic snails.
4. Antidegradation Policy
EPA disapproves that part of the State's antidegradation policy which describes the protection afforded to Outstanding Resource Waters. The level of protection described in 16.01.02.051.03 is inconsistent with the antidegradation requirements in 40 CFR 131.12.(a)(3), because it furnishes protection to Outstanding Resource Waters only from nonpoint sources, not from point sources.
5. Mixing Zone Policy
EPA disapproves that part of the mixing zone policy established in 16.01.02.060.01.g. Although the principles identified in 16.01.02.060. a - h of the policy are adequate to ensure that designated uses of the receiving water are maintained, the language is non-binding. This language is inconsistent with CWA §303(c)(2)(A).
6. Private Waters Exclusion
EPA disapproves this provision to the extent that it excludes private waters which are waters of the United States.

Disapproval Issues Already Covered by the National Toxics Rule:

Because the State of Idaho continues to be covered under the federally promulgated National Toxics Rule (NTR) for toxics criteria, federal water quality criteria are already in place for the metals discussed below. Before EPA could withdraw the State from the NTR for these metals, the State would have to resolve the issues discussed below.

Kinross DeLamar Variance

EPA disapproves the variance for copper, cyanide and selenium in the Kinross DeLamar Variance as inconsistent with the federal water quality regulations at 40 CFR 131.13. The facility has not demonstrated that meeting the criteria is unattainable based on the State's variance policy. In addition, the variance for copper is less stringent than the technology based effluent limitation. CWA §301 requires, in part, that all facilities meet the applicable technology based effluent limitations required by 40 CFR Part 122.44.

Salmonid Spawning Criteria Implementation:

There is some ambiguity with respect to application of the salmonid spawning criteria. While the state's designated uses recognize salmonid spawning as a use to be protected, and the state's criteria include criteria for temperature, intergravel DO and water column DO that would protect salmonid spawning, the state does not clearly specify when these criteria apply to particular streams.

Different salmonid species spawn at different times in different streams. The listing provided in 16.01.02.250.02.d.iv. gives the spawning time periods for 17 individual salmonid species. According to the list, there is at least one salmonid which is spawning during any given month of the year. In the absence of an indication of which species spawn in which streams (we understand that the Division of Environmental Quality lacks the data at present), EPA interprets these criteria to apply year round to all streams designated for salmonid spawning. EPA will apply this interpretation in issuing NPDES permits for point sources affecting streams designated for salmonid spawning in 16.01.02.250.102-160 (including those water bodies which have salmonid spawning designated as a future use).

If we have misinterpreted these provisions, please notify us so that we can reconsider, in light of such clarification, whether these provisions still meet the requirements of the Clean Water Act.

Conclusion:

The issues outlined above and discussed in the enclosure identify areas where improvements to Idaho's 1994 Water Quality Standards are necessary in order that Idaho's waters be provided the level of protection required by the Clean Water Act. It is our sincere hope and expectation that these important issues will be resolved in the coming months so that federal promulgation of replacement water quality standards can be avoided. The Region looks forward to working with DEQ to resolve these issues as quickly as possible.

If you have any questions concerning this letter please call me at (206) 553- 0422 or have your staff contact Lisa Macchio, Water Quality Standards Coordinator, at (206) 553-1834.

Sincerely,



Philip G. Millam
Acting Director
Office of Water

Enclosure

cc: Larry Koenig, DEQ
Donna Rodman, DEQ
Mark Shumar, DEQ
Susan Martin, FWS
Elizabeth Gaar, NMFS
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, Washington 98101

Reply To
Attn Of: OW-134

MEMORANDUM

Subject: Enclosure for Approval/Disapproval Action on the Idaho 1994 Water Quality Standards

From: Lisa Macchio
Water Quality Standards Coordinator

To: Idaho Division of Environmental Quality

This enclosure discusses in detail the elements of the Idaho 1994 Water Quality Standards (WQS) which are disapproved per Section 303(c) of the Clean Water Act (the Act) and specifies changes which would meet the requirements of the Act.

1. Unclassified Surface Water Use Designation.
 - a. EPA's Action

EPA disapproves the use designation for unclassified surface waters as established in 16.01.02.101.01 of the Idaho 1994 WQS.

- b. Discussion

According to an EPA analysis there are approximately 106,000 stream miles within Idaho. Of that, approximately 8,100 stream miles have specific designated uses. Therefore, approximately ninety two percent (92%) (roughly 97,900 miles) of Idaho's waters are covered by the unclassified surface water use designation of primary contact recreation. Those water bodies which are not specifically designated in 16.01.02.102 through 16.01.02.160 of Idaho's 1994 WQS are therefore currently designated and protected for only primary contact recreation not aquatic life. Classifying these undesignated waters as primary contact recreation only is inconsistent with the goals specified in CWA §101(a)(2) and the requirements of CWA §303(b)(2).

The goals and requirements of the Act, are that wherever attainable, water quality shall provide for the protection and propagation of fish, shellfish, and wildlife and provide for recreation in and on the water. Where the State designates or has designated uses that do not include the uses specified in CWA 101(a)(2), the federal water quality standards regulation requires States to conduct and submit to EPA a use attainability analysis. See 40 CFR 131.10 and 131.6. Because Idaho has not submitted such use attainability analyses, EPA must disapprove the unclassified surface waters use designation.

c. Resolution

The State can either a) conduct and submit to EPA acceptable use attainability analyses to justify the existing classification for these water bodies, b) adopt a default designated use, with applicable and protective criteria, which is consistent with the Act ie., an aquatic life and recreation use or, c) specifically designate uses for each water body and/or water body segment(s) which are consistent with the Act.

2. Stream Segments with Specific Use Designations which are Inconsistent with Clean Water Act Requirements.

a. EPA's Action

EPA disapproves the classifications of waters of the State listed in 16.01.02.102 through 16.01.02.160 which do not include uses specified in CWA §101(a)(2).

b. Discussion

Of the 240 water body segments specifically designated in 16.01.02.102 through 16.01.02.160, 53 have use designations which are less than what is required by the Act. These designated uses are inconsistent with the goals of Section 101(a)(2) and the requirements of CWA § 303(b)(2)(a) of the Act.

The goals and requirements of the Act, are that wherever attainable, water quality shall provide for the protection and propagation of fish, shellfish, and wildlife and provide for recreation in and on the water. Where the State designates or has designated uses that do not include the uses specified in CWA § 101(a)(2) the federal water quality standards regulation requires that States conduct and submit to EPA a use attainability analysis.

The following 53 water body segments do meet these requirements:

Waterbody segments which do not provide for the protection of aquatic life and recreation in and on the water:

PB-140S, PB-340S, PB-450S, PB-451S, CB-1541, CB-170, CB-171, CB-1711, CB-1712, SB-421, SB-4211, SWB-282, USB-360, USB-411, USB-430, BB-310, BB-420, BB-430, BB-450B, BB-470.

Waterbody segments which do not provide for recreation in and on the water:

PB-220S, PB-11S, CB-1321, CB-1322, CB-210, SB-130, SB-140, SB-430, SWB-271 (ten mile creek), SWB-271 (five mile creek), USB-235, USB-236, USB-320, USB-730, USB-740, USB-800, USB-810.

Waterbody segments which do not provide for the protection of aquatic life:

PB-322S, CB-1421, CB-152, SWB-10, SWB-20, SWB-30, SWB-410, SWB-421, BB-480.

Waterbody segments which do not provide for the protection of aquatic life and recreation in and on the water below mining impact areas:

PB-121S, PB-142S, PB-143S, PB-145S, PB-147S, PB-148S

Waterbody segment which does not provide for the protection of recreation in and on the water below mining impact areas:

PB-146S

Because the State has not submitted such use attainability analyses, as required, for waters listed above, EPA must disapprove of the designated uses for the waters listed above.

c. **Resolution**

The State can either a) conduct and submit to EPA acceptable use attainability analyses to justify the existing classification for the above listed water bodies, or b) adopt designated uses for each water body which provides for the protection and propagation of aquatic life and recreation in and on the water where applicable.

3. Temperature Criteria.

a. **EPA's Action**

Bull Trout

The temperature criteria applicable to the cold water biota designation does not protect for all cold water biota species, specifically bull trout. EPA disapproves the temperature criteria in those waters of the State where bull trout exist.

Kootenai River White Sturgeon

EPA disapproves the temperature criteria in the segment of the Kootenai River from Shorty's Island to Bonners Ferry, as they not provide protection during spawning for Kootenai River white sturgeon.

Snake River Cold Water Aquatic Snails

EPA disapproves the temperature criteria/use designation in specific reaches of the Snake River, as they do not provide for the protection of five species of cold water aquatic snails.

b. Discussion

States are required to specify appropriate water uses to be achieved and protected under their standards. Accordingly, State's must adopt sound, scientifically defensible water quality criteria that will protect these uses.

The State's designated uses provide protection for a variety of aquatic species. These species have differing aquatic life stage requirements. Consequently, providing protection for a variety of species and their requirements can be accomplished a number of ways. More commonly, either criteria are set to protect the most sensitive species, or subcategories of uses are established with applicable criteria which address and protect the more sensitive species and/or life stages.

The U.S. Fish & Wildlife Service has determined that Bull trout, Kootenai River white sturgeon and five species of aquatic snails are threatened by extinction in Idaho. Temperatures in exceedance of applicable requirements, along with other habitat parameters, are acknowledged threats to each of these species. The scientific literature indicates that each of these species require lower temperatures than those currently afforded them under the State's designated uses.

Bull Trout

The most current scientific literature supports a temperature lower than 13°C for bull trout requirements (Oregon Department of Environmental Quality, 1994). A temperature in excess of about 15°C is limiting to bull trout distribution. Temperatures lower than 15°C are required for egg incubation (Pratt, 1992 and Rieman, 1993).

The current temperature criteria applicable to the cold water biota use classification (22°C or less with a maximum daily average of 19°C) does not provide an adequate level of protection for bull trout. The State's temperature criterion of 13°C or less for salmonid spawning is also inadequate for the protection of bull trout as this criterion is not necessarily applicable to all waters used by bull trout. Therefore, EPA must disapprove the temperature criteria in waters where bull trout are distributed.

Kootenai River White Sturgeon

Kootenai River white sturgeon are known to spawn from May to July, in a ten mile stretch of the Kootenai River which extends from Shorty's Island to Bonners Ferry (Apperson, 1991). This stretch of the river is currently designated cold water biota with salmonid spawning indicated as "protected for future use."

At this time, because the State has not defined how "protected for future use" applies EPA can only assume that the temperature criteria applicable for the cold water biota use applies year round. The State's cold water biota temperature criterion of 22°C or less with a maximum daily average of 19°C does not provide adequate protection for Kootenai River white sturgeon during spawning. The scientific literature indicates that spawning is found when water temperatures were 10 - 18°C, with most spawning occurring at 14°C (Parsley and Beckman, 1993). The required temperature range during spawning is lower than that which the water body is currently protected for. Therefore, EPA must disapprove the temperature criterion in the Kootenai River from Shorty's Island to Bonners Ferry.

Snake River Cold Water Aquatic Snails

Five species of threatened and endangered cold water aquatic snails reside in specific reaches of the Mid Snake River Basin. Currently their known habitat is designated and protected for salmonid spawning, and/or cold water biota or primary contact recreation. These use classifications do not carry sufficiently protective temperature criteria. According to the scientific literature, these snails are more than typically dependent on cold, well oxygenated, swift-flowing water for survival (USFWS, 1994). The temperature criteria associated with the salmonid spawning use (13°C or less with a maximum daily average not greater than 9°C) would provide sufficient cool water habitats for all five species of snail, but it must be applied year round (USFWS, 1994).

c. Resolution

Bull Trout

The State can either set the cold water biota temperature criteria to protect the most sensitive of the cold water biota species or establish a use designation with protective criteria specifically for bull trout.

Kootenai River White Sturgeon

The State should establish a seasonal use designation for the Kootenai River for Kootenai River white sturgeon spawning and apply protective criteria from May through July in the stretch from Shorty's Island to Bonners Ferry.

Snake River Cold Water Aquatic Snails

The State should establish a protective site-specific temperature criterion or designate segments of the Snake River where snails are distributed as protected for salmonid spawning year round.

4. Antidegradation.

a. EPA's Action

EPA recognizes that the State's antidegradation policy establishes the three levels or tiers of antidegradation protection as required by 40 CFR 131.12. Unfortunately, the highest, or Tier III, level of protection is inadequate because it does not provide protection from the impacts of point sources. Therefore EPA disapproves the Tier III level of antidegradation protection afforded to Outstanding Resource Waters.

Other portions of the Idaho 1994 WQS contain provisions relating to the implementation of Idaho's antidegradation policy. While the exact relationship of each of these provisions to the state's antidegradation policy is not completely clear, we are interpreting the point source requirements for Special Resource Waters, 16.01.02.400., to be intended to apply to Tier II, or high quality, waters in the absence of any other implementation procedures for point sources in Tier II waters.

b. Discussion

EPA's regulations at 40 CFR 131.12(a) describe the minimum requirements for an antidegradation policy. These regulations set out three levels of protection required for 1) existing uses, 2) high quality waters, that is, waters whose quality is better than "fishable/swimmable", and 3) outstanding national resource waters. The state's policy at 16.01.02.051, provides protection consistent with 131.12(a) for the first two Tiers, but is inconsistent for Tier III because it does not protect such waters from lower water quality caused by point sources. EPA understands that the State is currently proposing language to be adopted in the Idaho water quality standards to make them consistent with EPA's requirements

In the meanwhile, EPA reviewed the state's other provisions, to see if they provided implementation procedures which would in effect provide protection for Outstanding Resource Waters consistent with 131.12(a)(3). However, our understanding of the Special Resource Waters provisions is that they are not intended to serve this purpose, but rather to protect a different set of waters. Therefore, in issuing NPDES permits, EPA will interpret the provisions of 16.01.02.400 in light of the requirements of 16.01.02.051.02.

c. Resolution

The State should include language which provides a level of antidegradation protection to Tier III, ORWs, which is consistent with the requirements of the Clean Water Act. The State could accomplish this by adding language to 16.01.02.051.03 which would protect Outstanding Resource Waters from the impacts of point sources.

EPA recommends that the State clarify its implementation procedures through cross references and further detail to better explain how each of the three antidegradation levels of protection is implemented.

5. Mixing Zone Policy.

a. EPA's Action

EPA disapproves that part of the mixing zone policy established in 16.01.02.060.01.g. Although the principles identified in 16.01.02.060 a. - h. of the policy are adequate to ensure that designated uses of the receiving water are maintained, the language is non-binding. This language is inconsistent with CWA §303(c)(2)(A).

b. Discussion

When reviewing a State's mixing zone policy, EPA's primary concern is that the mixing zone not interfere with the designated or existing use of the receiving water or downstream waters. The principles identified in Idaho section 16.01.02.060.01.a-h. address many of the factors important for ensuring that the uses of the receiving water are maintained and protected. However, there are two problems with the language at 060.01. First, the language is non-binding on the State, and therefore none of the safeguards (e.g., stream width limitations, or 96 hour LC₅₀ cap) are assured when authorizing a mixing zone. Second, section 060.01.g. exempts water quality within a mixing zone from the narrative criteria at sections 200.01.-03. While brief exposure to water which exceeds a numerical criteria may not cause lethality or otherwise interfere with the designated uses, longer exposure may have that effect. Unless the mixing zone provision is itself written so that mixing zones will not result in undue exposure, narrative criteria are needed to ensure that designated and existing uses are protected notwithstanding the mixing zone. For example, Idaho's narrative criteria at 200.01 (Hazardous Materials) would ensure that a mixing zone does not extend to drinking water intakes, Idaho section 200.02 (Toxic Substances) would protect against lethality within a mixing zone, and Idaho section 200.03 (Deleterious Materials) would ensure the passage of fish and other aquatic life.

c. Resolution

There are a number of ways in which the State could modify section 16.01.02.060.01 to address the deficiencies. The key is that the revisions or additions ensure that designated and existing uses are protected and exposure considerations are addressed. EPA is willing to work with the State and provide feedback on any proposed revisions.

6. Private Waters Exclusion.

a. EPA's Action

EPA disapproves the language which excludes water quality standards from applying to private waters.

b. Discussion

Section 16.01.02.101.03. of the Idaho 1994 WQS specifies that private waters, unless designated in 16.01.02.110. through 16.01.02.160., (including lakes, ponds, pools, streams and springs) outside public lands but located wholly and entirely upon a person's land are not protected specifically or generally for any beneficial use. Under CWA § 303, States must adopt standards for all waters of the United States within the State. States, however, need not apply standards to any water body which is not a water of the United States. EPA has defined waters of the United States to include, among others, waters, rivers and streams the use, degradation, or destruction of which would affect or could affect interstate commerce. See 40 CFR 122.2 and 40 CFR 230.3(s). Such waters may include some on private land. Accordingly EPA is disapproving Idaho's Section 16.01.02.101.03. to the extent it exempts private waters which are waters of the United States.

c. Resolution

The State can either (a) delete 16.01.02.101.03. from its regulations; or (b) limit the exemption of water quality standards to private waters within Idaho (unless designated in 16.01.02.102 through 16.01.02.160.) which are not waters of the United States as defined in 40 CFR 122.2 and 40 CFR 230.3(s).

7. Kinross DeLamar Variance.

a. EPA's Action

EPA disapproves the variance for Kinross DeLamar Mining for discharges of copper, selenium and cyanide to Jordan Creek, SWB-233, as established in 16.01.02.260.02.a.

b. Discussion

The variance policy contained in the Idaho 1994 Water Quality Standards at 16.01.02.260 establishes the grounds and procedures for obtaining a variance. EPA has approved the grounds and procedures, however, according to the documentation provided to EPA by both DEQ and the facility, the discharger has not demonstrated that any of the grounds at 16.01.02.260, for a variance have been met. Specifically, the discharger has not demonstrated that meeting the standard is unattainable based on one or more of the following grounds:

Naturally occurring pollutant concentrations prevent the attainment of the standard, or,

Natural, ephemeral intermittent or low flow conditions or water levels prevent the attainment of the standard, or

Human caused conditions or sources of pollution prevent that attainment of the standard and cannot be remedied or would cause more environmental damage to correct that to leave in place, or,

Dams, diversions or other types of hydrologic modifications preclude the attainment of the standard, or,

Physical conditions related to natural features of the water body, unrelated to water quality, preclude attainment of the standard, or,

Controls more stringent than technology based effluent limitations would result in substantial and widespread economic and social impact.

Furthermore, the variance would result in an effluent limitation for copper which is less stringent than the CWA required technology-based effluent limitation of 0.30 mg/l daily average concentration and 0.15 mg/l monthly average concentration. Under CWA §301 and 40 CFR 131.10, technology-based requirements provide a minimum level of protection which must be achieved. In addition, this variance does not comply with the State's policy in this case because the proposed limits for copper would be less stringent than the technology-based limits and therefore, economic impact analysis would not apply.

Finally, for selenium and cyanide, EPA does not consider a statement from either the State or the facility that it would be too costly to meet the water quality based effluent limitations established under the NPDES permit to constitute a demonstration that the standard is unattainable. The issue is whether the incremental cost of attaining the standard would result in widespread and substantial economic impacts. Each analysis of economic impacts must demonstrate:

that the polluting entity would face substantial financial impacts due to the costs of the necessary pollution controls, and

that the affected community will bear significant adverse impacts if the entity is required to meet existing or proposed water quality standards.

EPA's Interim Economic Guidance for Water Quality Standards (March 1995) provides a framework when considering economics in revising a water quality standard. The guidance describes suggested measures and tests which are standard economic analytical tools to use to perform and prepare an appropriate analysis. States are free to provide other kinds of economic analyses to support their position and we would certainly welcome the development of a State version of an acceptable economic analysis.

c. Resolution

We strongly suggest that the State remove the Kinross DeLamar Variance from the Idaho Water Quality Standards until such time as the facility submits an appropriate and adequate level of analysis which would demonstrate that the grounds, according to the State's Variance Policy, for a variance have been met. If the State rejects this suggestion, EPA can either a) leave the State of Idaho under the National Toxics Rule for all toxics or b) remove all but Jordan Creek from under the National Toxics Rule for selenium, cyanide and copper until such time as can be demonstrated that either the State's criteria for these toxics is adequately protective of the uses for Jordan Creek, or the justification for the variance has been submitted to EPA and the variance is approved.

REFERENCES

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- Apperson, K.A. 1992. Kootenai River white sturgeon investigations and experimental culture. Annual Progress Report FY 1991. Idaho Department of Fish and Game and the Bonneville Power Administration. Contract No. DE-AI79-88BP93497; Project No. 88-65. Portland, OR.
- Oregon Department of Environmental Quality. 1994. Temperature, 1992-1994 Water Quality Standards Review, Issue Paper.
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