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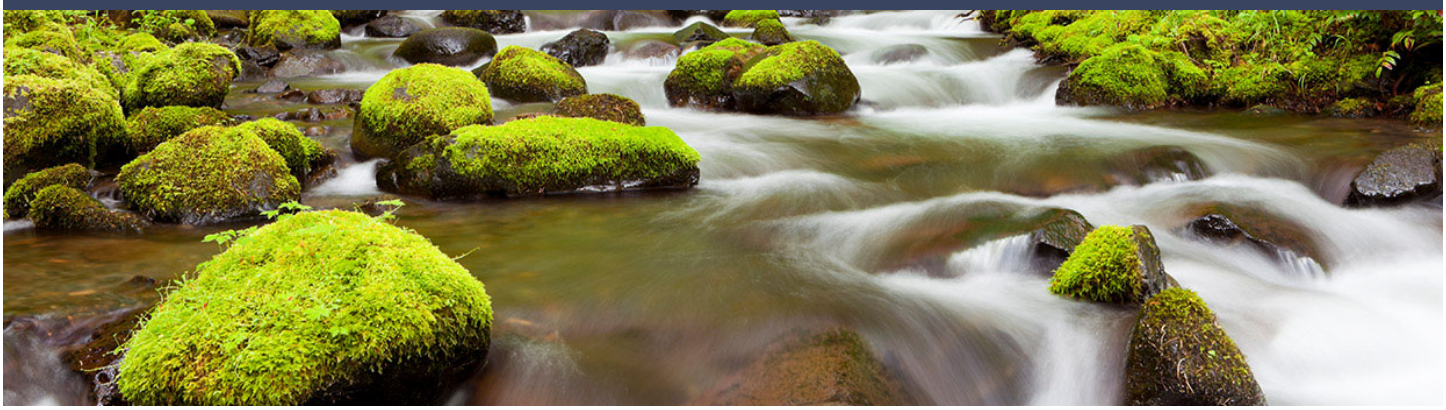

WATER QUALITY FOR FISH: OREGON SAYS WARM WATER 'TOP SOURCE OF POLLUTION,' EPA TO UPDATE WASHINGTON'S TOXIN CRITERIA

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The U.S. Environmental Protection Agency last week approved Oregon's water quality report on temperature in the state's waters. Also last week, a Washington federal court ordered the EPA to set in motion an update on that state's water quality criteria for 17 toxins known to harm salmon and steelhead, as well as Southern Resident killer whales that depend on them.

In the approved Oregon report, the state's Department of Environmental Quality said that warm water continues to be the "top source of pollution in Oregon's rivers and streams."

"This information is crucial for public awareness and understanding of the condition of our rivers and watersheds," said Connie Dou, DEQ's Water Assessments Manager. "Oregon has some of the most scenic and pristine water in the world. But we also face some clear challenges to protecting water quality for fish, drinking water and recreation."

The federal court order requiring the EPA to update Washington's criteria

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toxins is the result of district court Judge Marcia J. Pechman's earlier finding that EPA is compelled to address the Washington Department of Ecology's failure protect aquatic species from toxic pollution after the state had "unreasonably abandoned its role for years," according to Northwest Environmental Advocates, who brought the initial lawsuit against the EPA.

Under the federal Clean Water Act, states are charged with developing water quality standards by "setting [numeric or narrative] criteria necessary to protect the uses," quoting the Clean Water Act. However, while states are intended to play the lead role in developing the standards, the EPA serves as a "backstop" if a state fails to establish standards or does not update them every three years. In that case, the EPA is required to prepare proposed regulations or new water quality standards.

Pechman, a senior judge in the U.S. District Court of Western Washington, signed the order last week which may bring to an end a lawsuit first filed by NWEA in the court in 2013. EPA had denied a formal petition in 2017 that it had agreed to in 2013 and, so NWEA filed suit again in 2020. According to NWEA, its petition asked EPA to update Washington's nearly three decades-old water quality standards to protect aquatic life—such as Chinook salmon—from toxics.

"We are pleased that, after a decade and two lawsuits, we have successfully forced EPA to take responsibility for a key aspect of regulating toxic pollution in Washington State," said Nina Bell, NWEA executive director. "These water quality standards are the foundation for the entire Clean Water Act regulatory program that is supposed to protect threatened and endangered species such as salmon and steelhead."

NWEA is represented in this case by Lia Comerford of the Earthrise Law Center at Lewis & Clark Law School (Portland) and Bryan Telegin of Bricklin & Newman (Seattle).

"EPA simply had no leg to stand on," said Comerford. "The Clean Water Act requires that Washington State have water quality standards to protect fish and wildlife from toxics and neither the EPA nor the Washington Department of Ecology has chosen to meet that requirement."

Pechman ordered EPA to reverse in part its denial of NWEA's 2013 petition Sept. 1, 2022, which it did. It must grant the petition for nine toxins, including

arsenic, cadmium, copper, cyanide, mercury, selenium, nickel, acrolein and aluminum. She called on EPA to issue a Clean Water Act necessity determination for these toxins by June 1, 2023.

The judge also ordered EPA to defer for three years a decision for chromium III, DDT and its metabolites, endosulfan, endrin, tributyltin, zinc, lead and nonylphenol, and the federal agency will deny the petition for any remaining pollutants. EPA, which had agreed with the plaintiffs on the actions, responded to the judge's ruling the same day as her order with a changed petition.

The deferral, EPA said in its response, was "based on the need to allocate limited agency resources at this time to focus on other high-priority activities such as development of criteria recommendations for emerging contaminants including per- and poly-fluoroalkyl substances (PFAS)."

EPA's response is here.

Additionally, Ecology had already initiated a rulemaking process to update its criteria for most of these pollutants on April 14, 2022, and submitted to EPA its triennial review report for surface waters in the State. The triennial review report identified a list of aquatic life criteria for toxics, including priority pollutants that will be reviewed by Ecology to determine whether the criteria should be updated.

EPA said in its recent response to Pechman's order that under the Clean Water Act, Congress gave states primary responsibility for developing and adopting water quality standards for their waters and that it "remains EPA's strong preference to support states in their development of WQS to protect state waters rather than to promulgate federal WQS."

The agency added that its initial review "indicates that these nine pollutants may be present in Washington's waters. Additionally, Washington's aquatic life criteria for these nine pollutants are less stringent than EPA's national 304(a) recommended aquatic life criteria, and/or are less stringent than criteria in Oregon or Idaho that (NOAA Fisheries) or (the Fish and Wildlife Service) concluded would jeopardize an Oregon or Idaho threatened or endangered species that also resides in Washington.

"EPA anticipates further evaluating data from these and other sources by June 1, 2023, to assess whether new or revised criteria are necessary for Washington," it said.

The EPA further explained that there are two categories of water quality criteria: human health criteria and aquatic life criteria. Human health criteria protect designated uses such as public water supply, recreation, and fish and shellfish consumption. Aquatic life criteria protect designated uses such as supporting populations of fish, invertebrates, and other aquatic species.

Set standards also serve as the basis for establishing effluent discharge limitations for National Pollutant Discharge Elimination System permits, assessing and identifying impaired waters not meeting water quality standards and establishing total maximum daily loads (TMDLs) or restoration plans, to bring impaired waters into attainment of water quality standards for certain pollutants, the EPA response says.

Oregon Completes Integrated Report on water quality

Oregon DEQ's 2022 Integrated Report on state water quality was approved by the EPA last week. The report that is required every two years is an analysis of the condition of thousands of miles of Oregon waterways, DEQ says. The information is compiled in an integrated online map.

The top four impairments to water quality, DEQ says, are temperature, dissolved oxygen, degraded aquatic insects communities (biocriteria) and pathogens, such as E. coli.

DEQ says it pored through 7.6 million pieces of data from more than 3,000 monitoring stations state-wide, looking at water temperature, the presence of bacteria or other toxic contaminants, acidity, oxygen levels and other measurements of water quality.

A section of river is deemed impaired if it has too much of any of these criteria to fully protect aquatic life or drinking water, or allow for safe recreational use of fish consumption. It would then be placed on the federal 303(d) list and would be subject to additional environmental protections and clean-up plans.

In its studies, DEQ also determined that low oxygen, also known as marine hypoxia, is a potential concern along Oregon's coast. It said that its ability to assess ocean conditions is "insufficient" to identify that water as impaired. The state agency has convened a technical working group to study ocean conditions for future reports.

For background, see:

— CBB, July 19, 2021, "WASHINGTON ECOLOGY BEGINS REVIEW OF SURFACE WATER QUALITY STANDARDS," HTTPS://CBBULLETIN.COM/WASHINGTON-ECOLOGY-BEGINS-REVIEW-OF-SURFACE-WATER-QUALITY-STANDARDS/

— CBB, June 24, 2022, "WASHINGTON BEGINS PROCESS TO UPDATE RULES FOR PROTECTING SALMON, STEELHEAD, ORCAS FROM TOXIC CHEMICALS," HTTPS://CBBULLETIN.COM/WASHINGTON-BEGINS-PROCESS-TO-UPDATE-RULES-FOR-PROTECTING-SALMON-STEELHEAD-ORCAS-FROM-TOXIC-CHEMICALS/

— CBB, January 6, 2022. "COURT: EPA MUST DETERMINE SOON WHETHER FEDS SHOULD TAKE OVER DEVELOPING WASHINGTON'S WATER QUALITY STANDARDS FOR TOXINS," HTTPS://CBBULLETIN.COM/COURT-EPA-MUST-DETERMINE-SOON-WHETHER-FEDS-SHOULD-TAKE-OVER-DEVELOPING-WASHINGTONS-WATER-QUALITY-STANDARDS-FOR-TOXINS/

— CBB, December 9, 2021, "Lawsuit Says EPA, WDOE Moving Too Slow In Regulating Nitrogen Pollution From 94 Puget Sound Sewage Treatment Plants," https://cbbulletin.com/lawsuit-says-epa-wdoe-moving-too-slow-in-regulating-nitrogen-pollution-from-94-puget-sound-sewage-treatment-plants/

— CBB, August 26, 2021, "Group Sues EPA Over Discharge Permits For Puget Sound Sewage Treatment Plants, Says Improperly Discharging Nitrogen, Creating Dead Zones," https://cbbulletin.com/group-sues-epa-over-discharge-permits-for-puget-sound-sewage-treatment-plants-says-improperly-discharging-nitrogen-creating-dead-zones/

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