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CBD Threatens To Sue EPA Over 2016 Cadmium Water Quality Criteria

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The Center for Biological Diversity (CBD) is threatening to sue EPA over the agency's failure to conduct programmatic endangered species consultations before issuing revised water quality criteria for the heavy metal cadmium in 2016, saying the decision is harming endangered species nationwide.

"The Center and its members are harmed by EPA's continuing failure to take meaningful action to protect threatened and endangered species in setting water quality criteria for heavy metal pollution," the environmental group says in its recent [notice of intent to sue](#) the agency.

EPA water quality criteria are not binding, but states and tribes often use them to craft enforceable water quality standards that take into account waterbodies' uses and antidegradation requirements.

Environmental groups and California had urged EPA to conduct Endangered Species Act (ESA) consultations with the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) before finalizing changes to the cadmium criteria in 2016.

But EPA [rejected those calls](#), saying in a response to comments document issued alongside the final criteria that it "believes that national-level efforts to consult on potential future approvals of new and revised state cadmium criteria would be neither efficient, likely to ensure a consistent approach to evaluating the effects of pollutants on species, nor necessary to address the effects of action on species whose ranges cross state boundaries."

NMFS had argued in its comments on the proposed changes to the criteria that EPA's practice of only conducting ESA consultation when reviewing state-specific water criteria "results in a piecemeal approach when considering implications of such guidelines for broadly ranging species," and leaves the process "legally vulnerable." Environmentalists and the state of California in separate comments echoed those claims.

Cadmium is considered one of the most toxic metals to fish and causes a range of impacts, CBD says, adding that both FWS and NMFS have identified cadmium pollution as a threat to listed species under their jurisdiction with more than 25 species recovery plans referencing the metal.

EPA's 2016 criteria lowered slightly the level of cadmium for chronic and acute aquatic life exposures in marine/estuarine waters and acute freshwater exposure but increased the level for chronic freshwater exposure.

CBD in its notice says EPA's argument that it is not required to consult with NMFS and FWS because the cadmium water quality criteria do not impose any legally binding requirements "is irrelevant because the ESA's definition of agency action is substantively different from, and broader than, a final agency action under the Administrative Procedure Act." The only question that matters for the purposes of the ESA is whether an action will directly or indirectly affect listed species, something CBD says is a relatively low threshold.

Since the 2016 criteria were published, 18 states, territories and/or tribes have started to develop revised cadmium water quality standards and submit them for EPA approval. "In every single case, these entities proposed to use EPA's water quality criteria, and EPA universally approved that choice. In addition, when EPA promulgated cadmium water quality standards for the state of Oregon, it used its 2016 cadmium water quality criteria," CBD says.

EPA's issuance of the criteria, therefore, clearly results in modifications to water quality standards that may affect listed species, making the issuance of the criteria an agency action subject to ESA consultation, the notice says.

"As a result, programmatic consultation on the overarching *framework* established by EPA's cadmium criteria is necessary to ensure that the Services analyze the cumulative impact of EPA's decision and issue programmatic biological opinions establishing appropriate program-wide criteria that ensure protection of threatened and endangered species," CBD says.

CBD's Arguments

The group also rejects EPA's multi-pronged argument that programmatic consultation would not be helpful because it is more efficient for states to modify national recommendations as needed to address local concerns; nationwide consultation is unlikely to result in a consistent approach because EPA will need to consult again when states propose water quality standards to EPA for approval; and states can address concerns about trans-boundary movement of cadmium or organisms when they develop water quality standards.

"EPA's argument that programmatic consultation is unnecessary because of later ESA review is contrary to both the regulations and the case law," CBD says, adding that the agency's argument also wrongly ignores the purpose and function of programmatic consultation. "State-by-state reviews cannot and do not meaningfully address the cumulative impacts to listed species of EPA's criteria," the group says.

The agency's argument that it is inefficient to consult at both the programmatic level and the state level also misses the mark, CBD says. A protective nationwide cadmium standard that incorporates the needs of all listed species everywhere is what the ESA requires, in order to give the benefit of the doubt to the species, not the other way around, CBD says.

As for the protection of species that migrate, EPA promised in 2016 that these species would be addressed as part of state-by-state consultation, but this has not happened, CBD says, referencing EPA's approach to Virginia's water quality standards.

In 2018, EPA issued a biological evaluation (BE) for NMFS for the approval of Virginia's water quality standards that are identical to EPA's 2016 cadmium water quality criteria, CBD says. Virginia has several species that migrate through its waters, including sturgeon, sea turtles, and whales. A BE documents a federal agency's conclusions and rationale to support those conclusions about the effects of a proposed action on protected species or habitat.

In its BE, EPA rationalizes that for sea turtles and whales, cadmium exposure will be minimal in part because these species migrate and thus the time they are exposed to cadmium in Virginia's waters is short.

"EPA therefore concludes that its cadmium criteria will not adversely affect sea turtles or whales. Nowhere does EPA analyze what happens when species *are* exposed to cadmium throughout their migratory ranges," CBD says, adding that the agency's suggestion that it can protect migratory species through later consultation is therefore hollow. -

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