



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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OCT 30 2006

John Morales Jr., Chairman  
Fort Peck Executive Board  
Fort Peck Assiniboine and Sioux Tribes  
P.O. Box 1027  
Poplar, MT 59255

Subject: EPA Approval of Fort Peck Assiniboine and Sioux Tribes' Revised Water Quality Standards

Dear Mr. Morales:

The U.S. Environmental Protection Agency, Region 8 (EPA) has completed its review of Fort Peck Assiniboine and Sioux Tribes' Revised Water Quality Standards. The Revised Water Quality Standards were adopted by the Tribal Executive Board of the Fort Peck Tribes (Board) on August 15, 2006. The revised water quality standards were submitted to EPA for review with your letter dated August 20, 2006. The submittal package included: 1) a statement from the Attorney General's Office certifying that the revisions were duly made pursuant to Tribal law; 2) a Tribal Resolution (#844-2006-08) authorizing the submittal for review; and 3) a summary of the public notification process. Receipt of these revised water quality standards on August 24, 2006 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. The Board and the Tribes' Office of Environmental Protection 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 Tribes<sup>1</sup> 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, Fort Peck Tribes Revised Water Quality Standards, adopted by the Board on August 15, 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).<sup>2</sup> 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 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

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

<sup>2</sup> 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.

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) a revision 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 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 revision is 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, acute trivalent chromium, and acute and chronic hexachlorobutadiene for the protection of aquatic life (these are the only aquatic life criteria revised in this current action by the Board).

### **Basis for Approval**

Below is a description of each of the revisions to the Tribes' water quality standards, adopted by the Board on August 15, 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 Fort Peck Water Quality Criteria Table (FPWQCT), 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 August 15, 2006 action, the Board adopted changes to the human health-based numeric standards in FPWQCT 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 Board 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 FPWQCT in line with the current science on this topic. The revisions to the human health-based numeric standards in FPWQCT are consistent with the federal requirements at 40 CFR Section 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 Board on August 15, 2006 include amendments that make corrections to Fort Peck Tribes' Revised 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, acute trivalent chromium, and acute and chronic hexachlorobutadiene for the protection of aquatic life.

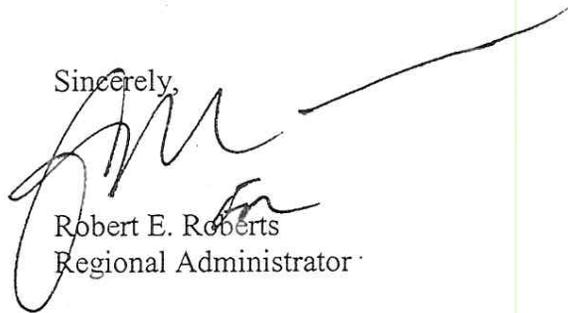
The Board, as well, adopted revisions to the numeric criteria for the protection of aquatic life for acute and chronic cadmium, acute trivalent chromium, and acute and chronic hexachlorobutadiene to be consistent with the updated criterion in EPA's *National Recommended Water Quality Criteria* document. 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.

### Conclusion

The Board has adopted important revisions to the Tribes' water quality standards, and I commend the Board for its action. I also appreciate the cooperative and constructive way in which the Office of Environmental Protection 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 Max Dodson, Assistant Regional Administrator, Office of Ecosystems Protection and Remediation at 303-312-6598, or have the Department staff contact George Parrish, of our Regional Water Quality Standards team, at 303-312-7027.

Sincerely,



Robert E. Roberts  
Regional Administrator

cc: Deb Madison, Manager, Fort Peck Office of Environmental Protection  
Mark Wilson, Field Supervisor, FWS Montana Field Office  
Grace Robiou, OST, EPA Headquarters