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Environmental Injustice Posed by Oregon's Water Quality Standards

In 2004, after nearly two decades of delay,[1] Oregon's Department of Environmental Quality (ODEQ) updated its water quality standards for toxic pollutants[2] by adopting most of the U.S. Environmental Protection Agency's (EPA) recommended criteria published pursuant to section 304(a) of the Clean Water Act (CWA).[3] In doing so, Oregon adopted the EPA's underlying assumption that the average person consumes 17.5 grams of fish per day.[4] Oregon's explicit choice to use this national average stands in stark contrast to an unprecedented amount of data gathered by the EPA and Columbia River Inter-Tribal Fish Commission (CRITFC)[5] demonstrating that Native American tribal members consume fish at a rate far exceeding the national aver-

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1 In its 1986-1988 triennial review, the ODEQ adopted Table 20, which established numeric criteria for toxic priority pollutants based on the EPA's national recommended criteria. Most of these criteria originated in 1980, *see* Water Quality Criteria Documents, 45 Fed. Reg. 79,318 (Nov. 28, 1980), and the state did not update its toxics standards during several subsequent reviews.

2 DEPARTMENT OF ENVIRONMENTAL QUALITY, WATER QUALITY CRITERIA SUMMARY, TABLE 20 (2004), *available at* http://www.deq.state.or.us/wq/wqrules/Div041/OAR340Div041Tbl20.pdf; *id*. at TABLE 33A, *available at* http://www.deq. state.or.us/wq/wqrules/Div041/OAR340Div041Tbl33A.pdf; *id*. at TABLE 33B, *available at* http://www.deq.state.or.us/wq/wqrules/Div041/OAR340Div041Tbl33B.pdf.

3 Federal Water Pollution Control Act, 33 U.S.C.A. §§ 1251-1387 (2005).

4 Memo from Stephanie Hallock, Director DEQ, to Environmental Quality Commission, April 29, 2004, *available at* http://www.deq.state.or.us/wq/standards/ToxicsEQCDocs/EQCStaffRptToxicsFinal.pdf.

5 The CRITFC member tribes are: the Confederated Tribes of the Warm Springs Reservation of Oregon, the Confederated Tribes and Bands of the Yakama Nation, the Confederated Tribes of the Umatilla Indian Reservation, and the Nez Perce Tribe. U.S. ENVIRONMENTAL PROTECTION AGENCY, COLUMBIA RIVER BASIN FISH CONTAMINANT SURVEY 1996-1998 E-1 (2002), http://yosemite.epa.gov/R10/OEA.NSF/webpage/Columbia+River+Basin+Fish+Contaminant+Survey (follow "*Entire Document*" hyperlink).

age.[6] High fish consumption levels translate directly into greater health risks when fish are contaminated with toxic residues, as they are in the Columbia River Basin. For example, tribal members who consume forty-eight fish meals per month have cancer risks up to fifty times higher than those present in members of the general public, who consume fish about once per month.[7] As a result, while Oregon's water quality standards subject its citizens to an added cancer risk of one cancer per 1,000,000 people exposed to a given toxic pollutant,[8] the standards allow cancer risks to tribal members that far exceed this level. To many people, it is obvious this is not just—but is it legal?

In Part I of this article, I explain how the establishment of state water quality standards provides a foundation to protect tribal members and others who consume fish at subsistence or near-subsistence levels. First, the CWA requires states to update their water quality standards every three years, paying particular attention to toxic criteria. Second, the legal definition of "water quality standard," which is frequently thought of only as a "safe" amount of pollutants, is actually quite broad, encompassing protection of uses that have been designated or have existed at any time since 1975, as well as the numeric and narrative criteria adopted to protect those uses. Because numeric criteria are not developed to protect frequent fish consumers, the gap-filling nature of designated and existing uses and of narrative criteria is particularly important in addressing environmental justice concerns when water quality standards are applied through regulatory programs. Third, in establishing water quality standards, states must choose the risk level they want to provide their citizens, factoring in both the amount of fish consumed by the general population and the quantity consumed by subsistence fish consumers. Although the EPA has developed, in response to two executive orders on environmental justice and children's health,

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[6] *Id.* At 4-58.

[7] The study showed fish consumption levels for CRITFC's member adults at: (1) a high rate of 389 grams per day (compared to 142.4 grams per day among adults in the general population), and (2) an average rate of 63.2 grams per day (compared to 7.5 grams per day in the general population). CRITFC member children with high consumption levels were found to consume 162 grams per day, or the equivalent of five meals each week. *Id.* at 4-59.

[8] MARTIN S. FITZPATRICK, OREGON ENVIRONMENTAL QUALITY COMMISSION, TOXIC COMPOUNDS CRITERIA ISSUE PAPER: 1999-2003 WATER QUALITY STANDARDS REVIEW 18 (2004), http://www.deq.state.or.us/wq/standards/ToxicsEQCDocs/AttachmentHToxicsCriteriaIssuePaperfinal.pdf.

a small body of work that urges use of these standards to protect the nation's most vulnerable populations, there has been no regulatory response to date.

In Part II, I review the EPA's regulations prohibiting unintentional or "disparate impact" discrimination pursuant to the Civil Rights Act of 1964, and explain why these regulations are not enforceable by third parties. Part III describes how Oregon adopted toxic criteria based on national average fish consumption levels, thus ignoring both its own technical advisory committee's recommendations and a comprehensive study demonstrating extremely high fish consumption levels among members of the four Columbia River tribes. Finally, I point out that the EPA has authority to: (1) disapprove, on several grounds, Oregon's toxic criteria because they fail to protect subsistence fish consumers, and (2) ensure Oregon's excellent, but oft-ignored, narrative criterion on toxics is fully implemented in order to protect these consumers.

I

Protections Afforded Frequent Fish Consumers by the CWA

Water quality standards comprise the foundation for the CWA's water quality-based approach in regulating sources of water pollution and protecting the nation's waters. These standards are known primarily for setting "safe" pollutant levels through state adoption of numeric criteria, which are most often (but not always) the same as the EPA's recommended criteria published pursuant to section 304 of the CWA.

However, a looming question is: For whom are these pollutant levels safe? Are they safe for people who eat more than the amount of fish upon which the numeric criteria are based? Are they safe for people who are exposed to more than the normal amount of toxins through employment conditions, living conditions, or methods of food preparation? Are they safe for children?

The legal definition of "water quality standard," which is much broader than the numeric criteria described above, can answer these and many other questions in a way that provides a measure of equal protection to all. Defined fully, water quality standards consist of (1) designated beneficial uses, (2) numeric and narra-

tive criteria that protect those uses, and (3) an anti-degradation policy that includes, among other provisions, a requirement that existing uses be protected.[9] But the law can only protect if properly implemented and enforced. Thus, solutions will remain elusive as long as the states and the EPA fail to adhere to the law while tolerating higher risk levels in those human subpopulations exposed to elevated levels of toxic contaminants.

A. Triennial Review of Water Quality Standards

The CWA requires states to review and improve their water quality standards every three years.[10] During each of these "triennial reviews," states must adopt specific numeric criteria for all toxic pollutants for which the EPA has published recommended criteria under CWA section 304(a).[11] For the remaining chemicals on the CWA's list of "priority pollutants,"[12] states must adopt criteria "based on biological monitoring or assessment methods."[13] In determining the criteria needed, the states must also review data on discharges and water quality to identify waters where toxic pollutants may be causing adverse effects or otherwise raising concerns.[14] For all pollutants, where waters are designated for multiple uses, state criteria must support the most sensitive use.[15]

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[9] 40 C.F.R. § 131.12(a) (2005).

[10] 33 U.S.C.A. § 1313(c)(1) (2005).

[11] 33 U.S.C.A. § 1313(c)(2)(B); 40 C.F.R. § 131.11(a)(2).

[12] *See* U.S.C.A. § 1317(a).

[13] 33 U.S.C.A. § 1313(c)(2)(B); *see* 40 C.F.R. § 131.11(b)(2). Of the 126 priority toxic pollutants identified by the EPA pursuant to 33 U.S.C.A. § 1317, at least eighteen have no published EPA-recommended criteria, and many do not have the full complement of six criteria (two of which are for human health) that are generally established for each pollutant. In addition to these section 1317 pollutants, there are many more toxic chemicals in U.S. waters that the EPA has not identified as "priority pollutants." 33 U.S.C.A. § 1313(a)(1) states that "[t]he Administrator may revise such list and the Administrator is authorized to add to or remove from such list any pollutant." By virtue of these chemicals not being listed, the EPA is not required to develop recommended criteria for them. 33 U.S.C.A. § 1314(a)(1).

[14] 40 C.F.R. § 131.11(a)(2).

[15] 40 C.F.R. § 131.11(a)(1). Despite the requirement that criteria protect the most sensitive designated use, states routinely adopt numeric criteria for toxic pollutants that insufficiently protect wildlife. Birds and mammals that consume large amounts of fish in proportion to their body weight are frequently at much greater risk than humans.

While the state acts initially, the burden shifts to the EPA[16] to determine whether the state standards meet CWA requirements.[17] Following its adoption of water quality standards, a state must submit them to the EPA for approval or disapproval.[18] The EPA has sixty days to approve or ninety days to disapprove the new or revised standards.[19] If the EPA disapproves the standards, it must provide the state with an explanation of what is necessary to meet the CWA's requirements and give the state ninety additional days in which to make the needed corrections.[20] If the state fails to take the necessary steps within this time frame, the EPA must "promptly" promulgate a federal standard for the state.[21]

B. Water Quality Standards Are More than Just "Safe" Levels

1. Protection of Designated and Existing Uses

States must adopt beneficial uses—such as transportation, drinking, swimming, and fish and wildlife habitat—into their water quality standards.[22] Thereafter, any legal requirement to meet the state's water quality standards (such as a discharge permit) must fully support such "designated uses."[23] A state may designate uses broadly, as in "aquatic uses," or with subcategories, such as "cool water fish."[24] Where subcategories are created, the EPA expects the state to tailor its protections to the more specific use.[25] Left unclear is what protections the EPA

16 In some instances, the EPA may also be under a mandatory duty to take action where the state fails to act. 33 U.S.C.A. § 1313(c)(4)(A).

17 Moreover, if the standards affect threatened or endangered species, section 7 of the Endangered Species Act (ESA) requires the EPA to pursue consultation with the U.S. Fish and Wildlife Service and/or National Marine Fisheries Service, and with American Indian tribes. 16 U.S.C.A. § 1536(a)(2). This consultation is likely to have the effect of providing considerably more protection to certain animal species than human subpopulations.

18 33 U.S.C.A. § 1313(c)(2)(A)(c)(3); 40 C.F.R. § 131.20(c).

19 33 U.S.C.A. § 1313(c)(3).

20 *Id*.

21 33 U.S.C.A. § 1313(c)(4).

22 *See* 33 U.S.C.A. § 1313(c)(2)(A).

23 *Id*.

24 *See* 40 C.F.R. § 131.10(a), (c).

25 40 C.F.R. § 131.10(c). Likewise, when numeric criteria are designed to protect specific designated uses, the time and place of those uses must be identified. Northwest Environmental Advocates v. U.S. EPA, 268 F. Supp. 2d 1255, 1266-67 (D. Or. 2003).

requires when states choose to designate their uses broadly and the designations encompass sensitive human populations and/or fish species.

In addition to designated uses, federal regulations require that water quality standards protect "existing uses" through state adoption of an antidegradation policy and corresponding implementation methods.[26] Existing uses are those uses that have been "actually attained" at any time since November 28, 1975, as well as the level of water quality necessary to protect them.[27] Every time a water quality standard is applied, the state should evaluate whether existing uses will be protected in the event that a state's designated uses fail to ensure full protection of those existing uses.

2. Protection Afforded by Narrative Criteria

In addition to numeric criteria and the protection of designated and existing uses, water quality standards contain another set of broad requirements: narrative criteria. Narrative criteria provide a mechanism to address any unanticipated water quality issues a state may encounter,[28] filling the gaps left where numeric criteria have not been updated, do not exist, or were not developed to protect a water body's most sensitive uses. Narrative criteria are especially important because numeric criteria "cannot reasonably be expected to anticipate all the water quality issues arising from every activity that can affect the State's hundreds of individual water bodies."[29]

Beneficial uses not likely to be adequately protected by numeric criteria include: (1) threatened and endangered species that cannot bear the risk levels upon which aquatic-use numeric criteria are based, (2) humans who consume greater than average amounts of fish, (3) children, (4) species, such as mink, that are particularly sensitive to certain toxic pollutants, (5) species that consume high levels of fish in proportion to their body weight, and (6) any uses affected by the additive or synergistic effects of exposure to multiple pollutants. In the absence of adequately protective numeric criteria, the narrative criteria, as with the des-

[26] 40 C.F.R. § 131.12(a), 131.3(e), 131.6(d).

[27] 40 C.F.R. § 131.12(a)(1).

[28] *Id*.

[29] PUD No. 1 of Jefferson County and City of Tacoma v. Washington Dep't of Ecology, et al. 511 U.S. 700, 717 (1994).

ignated and existing uses, are a legal basis upon which to provide these protections.

Each time a state applies water quality standards in its regulatory programs, it decides whether to interpret its narrative criteria (thereby providing protection lacking in its numeric criteria) or to ignore them. A key example is the states' development of CWA-mandated lists of impaired waters, in which water quality data are compared to water quality standards to identify where clean-up and pollution restrictions are needed.[30] States also should apply narrative criteria when they develop Total Maximum Daily Loads (TMDLs), which are clean-up plans for waters identified as impaired.[31] Likewise, the water quality-based effluent restrictions[32] on municipal and industrial point source dis-

[30] 33 U.S.C.A. § 1313(d)(1)(A) requires states, or the EPA if a state fails to act, to prepare a list of waters not meeting water quality standards.

[31] 33 U.S.C.A § 1313(d)(1)(C).

[32] The CWA contains numerous requirements for technology-based controls that are intended to reduce pollution regardless of the effect of the discharge on the receiving stream due to other sources, the size or flow of the stream, and other circumstances. *See, e.g.*, 33 U.S.C.A. § 1311(b). In addition to meeting technology-based effluent limitations, National Pollutant Discharge Elimination System (NPDES) permits must also contain "any more stringent limitation, including those necessary to meet water quality standards . . . or required to implement any applicable water quality standard established pursuant to this Act." 33 U.S.C.A. § 1311(b)(1)(C). Likewise, the Act requires that where a permitting authority determines that "discharges of pollutants from a point source . . . would interfere with the attainment or maintenance of [applicable] water quality [standards], . . . effluent limitations (including alternative effluent control strategies) for such point source . . . shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality." 33 U.S.C.A. § 1312(a).

> EPA regulations require that the effluent limitations incorporated in NPDES permits meet any additional standards and state requirements. *See* 40 C.F.R. § 122.44(d)(1). This section establishes the need for "any requirements in addition to or more stringent than promulgated effluent limitations guidelines or standards under [other sections of the CWA] necessary to: (1) Achieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality." 40 C.F.R. § 122.44(d)(1).
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> These required effluent limitations must control all pollutants or pollutant parameters (either conventional, nonconventional or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality. *Id.*
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> In order to determine whether a discharge causes or has the reasonable potential to cause or contribute to an in-stream excursion above either narrative or numeric criteria, "existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the

chargers require compliance with water quality standards.[33] Finally, narrative criteria can and should play a role when states issue certifications of compliance with water quality standards for activities requiring federal permits or licenses, such as dredging projects and dams.[34]

In light of the importance of such narrative criteria, particularly for toxic constituents, the CWA requires states to ensure that narrative criteria are given the full force and effect of law. Specifically, states are required to promulgate an implementation methodology to interpret and apply their narrative criteria for toxic pollutants.[35] Federal rules require that where a state uses narrative criteria for toxic pollutants, it is required to identify how it will apply those criteria to point source discharges of toxic pollutants into waters that violate water quality standards.[36]

The presence of an implementation methodology becomes even more significant given the EPA's finding that its recommended numeric criteria for CWA section 304(a) pollutants will often be insufficient to protect a state's beneficial uses.[37] The EPA has stated that:

> 1) its recommended criteria are not intended to provide protection for terrestrial and avian wildlife; 2) not all toxic pollutants have been designated as priority pollutants and even some priority pollutants have no recommended criteria developed; and, 3) its recommended criteria do not consider or reflect the synergistic and additive effects of multiple priority toxic pollutants.[38]

In the California Toxics Rule, the EPA further stated that "in some instances, the human health mercury criteria included in today's final rule may not protect some aquatic species or threatened or endangered species. In such instances, more stringent mercury limits may be determined and implemented through use of the State's *narrative* criterion."[39] In fact, the EPA

effluent . . . and where appropriate, the dilution of the effluent in the receiving water" must be accounted for. 40 C.F.R. § 122.44(d)(1)(ii).

[33] NPDES permits are issued pursuant to 33 U.S.C.A. § 1342.

[34] *See* 33 U.S.C.A. § 1341.

[35] 40 C.F.R. § 131.11(a)(2).

[36] *Id*.

[37] California Toxics Rule, 65 Fed. Reg. 31,682 (May 18, 2000) (to be codified at 40 C.F.R. pt. 131).

[38] U.S. ENVIRONMENTAL PROTECTION AGENCY, BIOLOGICAL EVALUATION FOR THE CALIFORNIA TOXICS RULE 5, 36-37 (1997).

[39] California Toxics Rule, 65 Fed. Reg. at 31,689 (emphasis added).

concluded that California's narrative criteria for toxics are the *only* way in which the health of many fish, birds, and mammals can be accounted for in that state's water quality standards.[40]

3. Criteria Must Protect the Most Sensitive Beneficial Use

When states adopt criteria, they are required to establish them in order to protect the most sensitive beneficial use.[41] For example, protection of aquatic life is clearly a more sensitive beneficial use than shipping. When it comes to categories within uses, it is much less clear what federal regulations require. Apparently, the EPA's general view is that so long as a use, such as protection of human health, is designated generally, it need only be protected generally.[42] However, where a state chooses to establish subcategories of uses (for example, different categories of fish such as "cool" and "cold" water), the state is obligated to provide full protection for each subcategory. The EPA has used the problem of states designating uses broadly to complain that its existing regulations do not allow it to force such states to be more specific.[43]

C. The EPA's Guidance on Choosing Risk Levels for Water Quality Standards

The EPA's published guidance for water quality standards explains that it develops its section 304(a) recommended criteria for human health by considering two pathways: ingestion of water and ingestion of fish and shellfish.[44] The guidance also provides ways for states to determine human health criteria that differ from the EPA's recommended criteria.[45] A pollutant's toxicity or cancer potency, exposure levels and routes, and the risk level the state seeks to establish all form the basis of an alternative human health criterion.[46] The EPA draws attention to the "serious concern" associated with human consumption of contaminated tissue, explaining that "the presence of even extremely

[40] *See* U.S. ENVIRONMENTAL PROTECTION AGENCY *supra* note 38, at 35.

[41] 40 C.F.R. § 131.11(a)(1).

[42] *See EPA Water Quality Standards Regulation*, 63 Fed. Reg. 36,742, 36,749-50 (July 7, 1998) (to be codified at 40 C.F.R. pt. 131).

[43] *See id*.

[44] WATER QUALITY STANDARDS HANDBOOK 3-4 (U.S. Environmental Protection Agency ed. 2d ed. 1994).

[45] *Id*. at 3-6–3-10.

[46] *Id*. at 3-8.

low ambient concentrations of bioaccumulative pollutants (sublethal to aquatic life) in surface waters can result in residue concentrations in fish tissue that can pose a human health risk."[47] The agency further identifies, as factors relevant to health risks, differences in fish species, types of fish tissue consumed, consumption rates and patterns, and food preparation methods. Even so, the EPA allows states to calculate criteria based on, for example, the assumption that people remove fatty tissues (which tend to bioaccumulate toxic contaminants) prior to consumption, an assumption that ignores significant cultural variations in food preparation.

Fish consumption levels can dramatically alter the calculation of what constitutes a "safe" level of toxic contamination. The EPA's initial guidance established four levels of fish and shellfish consumption, none of which approximates those found in the CRITFC study. The EPA's consumption levels ranged from 6.5 grams per day, considered an average amount of fish for consumers and non-consumers, to 180 grams per day, representing the "reasonable worst case."[48] According to the EPA, some states have used twenty and thirty-seven grams per day for some waters.[49] In any case, the EPA allows states to set their own risk levels so long as they explain the rationale for the risk levels they have chosen.[50] The EPA explains that it allows for exposure to carcinogenic pollutants at risk levels ranging from one cancer per 1,000,000 people exposed to one cancer per 10,000 people exposed "to protect average exposed individuals and more highly exposed populations."[51] Unfortunately, the EPA does not explain whether a state may provide a risk level higher than one in 10,000 to more highly exposed populations. However, according to the EPA, a state must include substantial support in its administrative record if it adopts criteria that provide less protection than a one in 100,000 risk level.[52]

While the EPA's guidance has generally been construed to mean states could adopt more protective criteria for people who consume fish at subsistence levels, the agency has indicated this may not be true. In 1998, the EPA engaged in an Advance No-

[47] *Id*. at 3-4.
[48] *Id*. at 3-5.
[49] *Id*.
[50] *Id*. at 3-15.
[51] *Id*.
[52] *Id*.

tice of Proposed Rulemaking (ANPRM) to explore issues concerning water quality standards.[53] In the ANPRM, the EPA indicated assent to states providing carcinogen protection to subpopulations at a risk level as high as one in 10,000, noting its Great Lakes Guidance allows that risk level for subpopulations in the Great Lakes Basin.[54] But the EPA questioned whether this rationale could correctly be applied to non-carcinogenic pollutants. Moreover, the ANPRM stated that the EPA "recognize[d] the need to address issues regarding different fish consumption patterns among subsistence, minority populations."[55]

While concluding that it would not be feasible for states to equalize the risks for all levels of fish consumption, the agency also concluded that "criteria should ensure adequate protection of all significant populations and subpopulations from reasonable risks."[56] The word "adequate" raises a red flag, as well it should, for the remainder of the ANPRM addresses environmental justice issues by discussing how states can be "encouraged" (but not required) to modify their numeric criteria to account for higher than average fish consumption levels by subpopulations.

Other EPA guidance documents point to the agency's belief that local fish consumption rates should be used to set water quality standards:

> EPA encourages states and tribes to use the revised methodology to develop or revise [criteria] to reflect local conditions appropriately. EPA believes that [criteria] inherently require several risk management decisions that are, in many cases, better made at the state and regional level (e.g., fish consumption rates, target risk levels).[57]

D. Executive Orders Related to Disparate Impacts

Two executive orders encourage the EPA to address more fully issues of environmental justice and children's health. But, as

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[53] EPA Water Quality Standards Regulation, 63 Fed. Reg. 36,742 (July 7, 1998) (to be codified at 40 C.F.R. pt. 131). The EPA did not undertake rulemaking on water-quality standards after publishing and taking public comment on the ANPRM.

[54] *Id*. at 36,774.

[55] *Id*. at 36,775.

[56] *Id*.

[57] Revised Methodology for Deriving Health-Based Ambient Water Quality Criteria (2000), http://www.epa.gov/waterscience/criteria/humanhealth/method/factsheet.html (last visited Sept. 30, 2005).

with all executive orders, they contain explicit clauses denying "any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person. . . ."[58] Therefore, while they may stimulate thought and action by the EPA, they are not enforceable by third parties.

1. Executive Order on Environmental Justice

Attention to environmental justice in the EPA was primarily triggered by President Clinton's executive order on that subject.[59] This order called for agency strategies to promote enforcement of statutes in areas with minority populations, ensure greater public participation, and improve research and data collection.[60] It specifically addressed concerns about subsistence fish consumption by encouraging federal agencies to collect and analyze consumption patterns, communicate risks to the public, and encourage public participation in regulatory actions.[61] However, the order's expectations concerning how agencies' regulatory actions could better address environmental injustice are vague; they include publishing guidance on methods of calculating human health risks that agencies "shall consider . . . in developing their policies and rules," and inviting the public to "submit recommendations to Federal agencies relating to the incorporation of environmental justice principles into Federal agency programs or policies."[62]

2. Executive Order to Protect Children's Health

In 1997, President Clinton signed an executive order to address

> [a] growing body of scientific knowledge [that] demonstrates that children may suffer disproportionately from environmental health risks . . . [which] arise because: children's neurological, immunological, digestive, and other bodily systems are still developing; children eat more food, drink more fluids, and breathe more air in proportion to their body weight than adults.[63]

Each federal agency was to make it "a high priority to identify and assess environmental health risks and safety risks that may

[58] *E.g.*, Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994).
[59] *See generally id.*
[60] *Id.* at 7630.
[61] *Id.* at 7631.
[62] *Id.* at 7632.
[63] Exec. Order No. 13,045 (Apr. 27, 1997).

disproportionately affect children" and to "ensure that its policies, programs, activities, and standards address disproportionate risks to children that result from environmental health risks or safety risks."[64]

In response to the order, the EPA developed its Policy on Evaluating Health Risks to Children, addressing the need to safeguard the health of infants and children because they are "among the nation's most fragile and vulnerable populations."[65] This policy calls for the EPA to consider risks to infants and children consistently and explicitly when generating risk assessments during decision-making processes, including setting standards to protect public health and the environment.[66]

The EPA's Children's Health Protection Advisory Committee (CHPAC) noted that water quality criteria are "one means by which the EPA can regulate the prevention of contaminated fish by mercury and ensure children's protection from hazardous levels of mercury."[67] The CHPAC recommended that the EPA prevent further contamination of fish by revising the mercury criteria.[68] However, despite the two executive orders' attention to toxic effects on children and subpopulations, neither the EPA nor the states use the risks to these populations as the basis for establishing water quality criteria.

II

Protection Against Environmental Injustice Under Title VI of the Civil Rights Act

A. Title VI of the Civil Rights Act and the EPA's Implementing Regulations

Title VI of the Civil Rights Act of 1964 was promulgated under the authority of the Constitution's Spending Clause, with explicit congressional intent to prevent recipients of federal funds from

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[64] *Id*.

[65] EPA Science Policy Council: Policy on Evaluating Health Risks to Children, http://bronze.nescaum.org/committees/aqph/memohlth.pdf (last visited Sept. 30, 2005).

[66] *Id*.

[67] J. Routt Reigart, Office of Children's Health Protection, Report of the Children's Health Protection Advisory Committee Regarding the Selection of Five Regulations for Re-Evaluation (1998), http://yosemite.epa.gov/ochp/ochpweb.nsf/content/whatwe_reg_rprt.htm.

[68] *Id*.

engaging in discrimination:[69] "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[70]

The Act does not address "disparate impact" discrimination, a facially neutral practice which has discriminatory effects on a protected class of people, but authorizes federal agencies to adopt regulations to effect the provisions of section 601.[71] In 1973, the EPA promulgated regulations to implement Title VI, revising them in 1984.[72] The regulations apply to recipients of EPA program funding such as states, which typically rely upon the EPA for assistance in developing their water quality standards.[73] The regulations specifically incorporate section 303 of the CWA, which includes the development of both water quality standards and TMDLs to implement those standards.[74]

The substantive portion of the EPA's implementing regulations prohibits any program or activity receiving EPA assistance from denying "a person any service, aid or other benefit that is different, or is provided differently from that provided to others under the program" or "[r]estrict[ing] a person in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, aid, or benefit provided by the program or activity."[75] The regulations further prohibit recipients of EPA funds from engaging in any disparate-impact discrimination.[76] In

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[69] 42 U.S.C.A. § 2000(d) (2005).

[70] *Id*.

[71] 42 U.S.C.A. § 2000(d-1) of the Act orders agencies to prepare regulations to implement 42 U.S.C.A. § 2000(d).

[72] Nondiscrimination in Programs Receiving Federal Assistance From the Environmental Protection Agency, 49 Fed. Reg. 1656 (Jan. 12, 1984) (to be codified at 40 C.F.R. pt. 7).

[73] 40 C.F.R. § 7.15. This applies to EPA assistance beginning February 13, 1984.

[74] The regulations include activities listed in Appendix A Catalogue of Federal Domestic Assistance under the 66.000 series. Item 21 of Appendix A lists section 303 of the CWA, which includes the development of standards, impaired waters lists, and TMDLs. *Id*.

[75] 40 C.F.R. § 7.35(a)(2)-(3).

[76] 40 C.F.R. § 7.35(b) states that:

> a recipient shall not use criteria or methods of administering its program or activity which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program or activity with respect to individuals of a particular race, color, national origin, or sex.

addition, the regulations require federally supported programs in which the recipient has previously discriminated to take affirmative action to remedy the injuries caused by the discrimination.[77]

B. Restrictions on Enforcement of the EPA's Implementing Regulations

Unfortunately, to the extent that the EPA's Title VI regulations are broader than permitted under Title VI, no private right of action exists to enforce them.[78] After the Supreme Court's decision in *Alexander v. Sandoval*,[79] it is highly likely that any agency disparate impact regulation exceeds the bounds of Title VI and the Constitution. Therefore, EPA regulations which prohibit disparate impact discrimination likely are not enforceable by a third party. To date, the EPA has not found a single violation of its Title VI implementation regulations.[80]

This should not come as a complete surprise if one reviews what the EPA is attempting to achieve through its programs to address environmental injustice. The EPA starts auspiciously

[77] 40 C.F.R. § 7.35(a)(7).

[78] Alexander v. Sandoval, 532 U.S. 275, 293 (2001). In *Sandoval*, the Court held that a private right of action is not available to enforce disparate-impact regulations promulgated under 42 U.S.C.A. § 2000(d-1)(2005).

[79] *Id*.

[80] In *Cannon v. University of Chicago*, 441 U.S. 677, 710-15 (1979), the U.S. Supreme Court stated that actions may not be brought against federal agencies for failing to enforce their own section 602 regulations. The Court based its statement upon evidence in the legislative history of Title VI that Congress had resisted the concept of private suits against the federal government. The Court thus described Title VI as embodying "a compromise aimed at protecting individual rights without subjecting the Government to suits." *Id*. at 715. Although potential plaintiffs lack a private right of action to make states and other recipients of EPA funds comply with Title VI regulations, they may be able to force the EPA to comply with Title VI by using the Constitution to challenge an act of discrimination by the EPA or a federal funding recipient. *Id*. at 715 n.51. The Supreme Court has consistently held that Title VI is coextensive with the Due Process and Equal Protection clauses of the Fourteenth Amendment, which apply to state and local governments, and Justice O'Connor recently reiterated that view in *Grutter v. Bollinger*. 539 U.S. 306, 343 (2003). Long ago, in *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), a companion case to *Brown v. Board of Education*, 347 U.S. 483 (1954), the Supreme Court held that the Equal Protection clause also applies to the federal government through the Due Process clause of the Fifth Amendment. The EPA or any "state actor," including those exercising any delegated authority beyond simple receipt of EPA funds, can be held accountable for any constitutional violation. However, official action is not unconstitutional solely because it results in a racially disproportionate impact; proof of racially discriminatory intent or purpose is required to show violation of the Equal Protection clause. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977).

enough, defining environmental justice as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."[81] Environmental justice is achieved, according to the EPA, "when everyone enjoys the same degree of protection from environmental and health hazards and equal access to the decision-making process to have a healthy environment in which to live, learn, and work."[82]

However, the EPA's lofty goals break down as soon as the agency sets forth its intentions for accomplishing them. The agency's focus rests not on the external pollution sources causing the problem in the first place, but on tribal responses. Listed in its reports generated in response to the Executive Order on Environmental Justice[83] of past, present, and future EPA, state, and tribal activities, are primarily more reports providing grants and training to groups and tribes creating internships and conducting outreach to affected communities. To date, the water quality-based program, administered by the EPA's Office of Wetlands, Oceans, and Watersheds (OWOW), has focused on providing tribes with grant money and training, establishing a national database on fish consumption advisories, and helping tribes establish fish consumption advisories and water quality standards for tribal waters.[84] This narrow focus ignores the broader concern of cleaning up polluted waters that are not on tribal lands; such an effort should start with states setting water quality standards that provide tribal members and other frequent fish consumers with equal protection from the risks of toxic chemicals.

The future looks just as dubious when it comes to integrating environmental justice concerns into the protections afforded by water quality standards and the TMDLs implementing those standards. Again, the EPA has lofty-sounding goals: the EPA's objectives for the near future are, for example, to (1) ensure low-income and minority populations are given adequate public notice of opportunities to participate in the "next round" of states'

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[81] U.S. EPA Environmental Justice Home Page, http://www.epa.gov/compliance/environmentaljustice/.

[82] *Id*.

[83] Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994).

[84] U.S. ENVIRONMENTAL PROTECTION AGENCY OFFICE OF WATER, FY2003 ENVIRONMENTAL JUSTICE PROGRESS REPORT 5-7, *available at* http://www.epa.gov/compliance/resources/reports/accomplishments/ej/ow-ej-progress-rpt-2004.pdf.

and tribes' triennial reviews, (2) assist tribal governments in adopting standards, and (3) develop fish-consumption advisories to "protect targeted communities."[85] Specific pollution clean-up goals also are adopted to protect human health by making fish and shellfish safe to eat. For example, the EPA has adopted a 2008 target to "improve the quality of water and sediments to allow increased consumption of safe fish in not less than 3 percent of the water miles/acres identified by states or tribes as having a fish consumption advisory in 2002."[86] Also by 2008, the EPA hopes that all states and tribes will have adopted the new fish tissue criterion for mercury, and that states and tribes will have adopted and applied national fish advisory guidance to their local waters.[87]

However, the EPA's targets and projects avoid the obvious: regulatory changes. The EPA's plans are silent on assuring that state water quality standards protect low-income and minority populations, or that states use the standards' gap-filling attributes in conjunction with implementation methods to achieve such protection. The EPA's targets and projects likewise are silent on any other regulatory actions that the EPA could take to ensure its clean-up objectives are met.

III

OREGON'S FAILURE TO PROVIDE EQUAL PROTECTION TO HUMAN SUBPOPULATIONS IN THE FACE OF SUBSTANTIAL DATA REQUIRES EPA ACTION

A. In Updating its Water Quality Standards for Toxic Pollutants, Oregon Ignored Evidence of Elevated Fish Consumption Rates

Oregon generally conducts its triennial reviews with the assistance of two advisory committees, a Technical Advisory Committee (TAC) and a Policy Advisory Committee (PAC). Initially, the ODEQ asked its TAC to review what could be done to address the results of the CRITFC study.[88] In its sole recommenda-

[85] U.S. ENVIRONMENTAL PROTECTION AGENCY OFFICE OF WATER, FISCAL YEAR 2004 & 2005, ACTION PLAN TO INTEGRATE ENVIRONMENTAL JUSTICE 8, http://www.epa.gov/compliance/resources/reports/actionplans/ej/ow-ej-actionplan2004.pdf.

[86] U.S. ENVIRONMENTAL PROTECTION AGENCY, 2003-2008 STRATEGIC PLAN: DIRECTION FOR THE FUTURE 34 (2003), http://epa.gov/ocfopage/plan/2003sp.pdf.

[87] *Id*. at 39.

[88] FITZPATRICK, *supra* note 8, at H-35.

tion on human health protection with any practical ramifications, the TAC proposed that the ODEQ use different fish consumption rates based on actual or predicted levels of consumption.[89] The TAC's recommendations were then forwarded to the PAC, an industry-dominated group. Apparently, no sector of industry was willing to support such an approach, perhaps because increasing fish consumption rate assumptions would have the direct effect of lowering the allowable levels of toxic pollutants in the environment. Indeed, the majority of PAC members seemed to take the position that the inequities inherent in developing water quality standards should be borne by the designated users, including consumers of contaminated fish, not by the pollution sources. The PAC rejected the TAC's proposal of a three-tiered fish consumption approach because, as the ODEQ later explained, it could "possibly lead to inequities . . . leading to situations where a source might have to comply with a criterion more strict than designated for its location in order for the water to meet a more strict criterion downstream."[90] The PAC's inability to agree on the TAC's recommendations left Oregon without the political consensus—or political cover—it needed to establish a higher level of protection than that provided by the EPA's recommended criteria. As a result, Oregon decided to wholly ignore the results of the CRITFC fish consumption survey, a study that was never questioned by the TAC, PAC, or ODEQ staff.

In describing the triennial review process, the ODEQ stated that "[i]nitially, the TAC indicated that the choice of which [technically defensible] rate to employ was a policy decision to be made based on which population or subpopulation Oregon wished to protect."[91] This finding was based on the TAC's conclusion that all of the following rates were scientifically defensible: (1) the EPA national average rate, (2) the ninety-ninth

[89] *Id*. at H-38–H-41.

[90] *Id*. at H-58. The concern about downstream criteria is odd because other Oregon criteria have this very same effect. For example, temperature, which is not applied equally throughout a river system but is based on compliance with that criterion at the point farthest downstream. Federal regulations actually require states, when designating uses and setting appropriate criteria, to "take into consideration the water quality standards of downstream waters and . . . ensure that . . . water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters." 40 C.F.R. § 131.10(b) (2005). It is, perhaps, a measure of the ODEQ's desperation to avoid the CRITFC study results that it was swayed by such a specious argument.

[91] FITZPATRICK, *supra* note 8, at H-36.

percentile national rate of 142.4 grams per day that the EPA offers "as a value that can be used if states desire to protect subsistence anglers," and (3) the fiftieth and ninety-ninth percentile rates from the CRITFC study (63.5 and 389 grams per day, respectively).[92] Left unaddressed was whether the TAC believed that doing *nothing,* as the ODEQ ultimately did with the CRITFC information, was scientifically defensible. One is left with the clear impression that the TAC did not.

Oregon attempted to explain its decision to ignore the legal and policy concerns raised by the TAC, the public, and the CRITFC data. In documents supporting the triennial review, the ODEQ recommended using the 17.5 grams per day national average fish consumption rate "until such time that sufficient information is available to completely apply the 2000 EPA Methodology in deriving criteria."[93] ODEQ said nothing about what was insufficient in this multimillion dollar study. The state also noted that its choice to use the national average rate was "consistent with the *lowest* fish consumption rate recommendation of both EPA and the TAC."[94] It offered three rationales for this approach: (1) the likelihood of EPA approval, (2) the avoidance of "equity issues raised by some PAC members over the use of TAC-recommended multiple fish consumption levels," and (3) the provision of "greater protection to subsistence fisher subpopulations within the State than currently exists."[95]

These are curious statements at best. First, if EPA approval were truly the primary goal of the triennial review process, the ODEQ presumably would have chosen a path consistent with the EPA's Title VI regulations, particularly given the fact that the EPA paid for the CRITFC study.

Second, by stressing the avoidance of equity issues, the ODEQ makes clear that the "equity issues" the state truly cares about are the negative effects on polluters of complying with requirements tailored to individual water bodies, not health effects on subsistence populations. In addition to being ironic, this concern is irrelevant because, by definition, the CWA's water quality-based provisions already create unequal conditions for point source polluters. By law, effluent limits are set on the basis of

[92] *Id*.
[93] *Id*. at H-76.
[94] *Id*. (emphasis added).
[95] *Id*.

stream size, status of the water body (e.g., impaired or not), and the pollution contributions of other regulated and unregulated sources.[96] Also, different designated uses in a water body can generate dissimilar effluent limits, such as the presence or absence of salmonid spawning. Since the criteria are intended to be tied to the foundation of water quality standards—the designated uses—the correct approach sets the criteria for toxics based on the needs of those uses. The ODEQ's statement that it wants to employ a one-size-fits-all approach to toxics merely clarifies for the record that it does not intend to protect all designated uses equally. Rather, it is placing a higher priority on treating all *dischargers* equally. That is not the proper goal for setting water quality standards, as the EPA recently clarified.[97]

The ODEQ's third purported justification for its decision to use the national average—that it "provides greater protection to subsistence fisher subpopulations within the State than currently exists"—is factually true, but wholly irrelevant.[98] Given that the EPA's national consumption rate increased, the ODEQ could not arbitrarily ignore it in favor of the now outdated 6.5-grams-per-day basis for previous criteria without risking certain EPA disapproval. Thus, it had to increase the rate to comply with EPA guidance. However, use of a higher rate for all Oregon citizens does not provide greater protection to subsistence fisher subpopulations and other frequent fish consumers; it merely continues the status quo of providing less protection for them in relation to the general population. In light of the CRITFC data, that lesser level of protection is shockingly low. The claim that use of the EPA's new national average suggests Oregon is attempting to protect subsistence fishing populations is simply disingenuous.

B. The EPA Has Authority to Remedy Oregon's Failure to Protect Frequent Fish Consumers

1. The EPA Should Disapprove Oregon's Toxic Criteria

If the EPA determines Oregon's water quality standards are inconsistent with CWA requirements, the agency has authority to disapprove Oregon's toxic criteria and can promulgate replace-

[96] *See supra*, note 32.

[97] *See* Water Quality Standards for Kentucky, 67 Fed. Reg. 68,971, 68,975 (Nov. 14, 2002).

[98] FITZPATRICK, *supra* note 8, at H-76.

ment criteria if the state fails to make the necessary changes.[99] The EPA can also make changes to Oregon's standards in the absence of a submittal from the state.[100] Finally, the EPA can take other actions—not directly related to changing the published criteria—that would remedy the failure of Oregon's toxics standards to protect low income, minority, and tribal populations.

For instance, the EPA can disapprove Oregon's water quality standards as inconsistent with EPA regulations promulgated under Title VI of Civil Rights Act. Oregon has received, and continues to receive, federal funds in support of both its overall water quality program (including development of water quality standards) and its triennial-review program.[101] Therefore, those programs must comply with the EPA's Title VI regulations.[102] As such, the ODEQ is not only prohibited from developing water quality standards that discriminate against subpopulations based on race, national origin, or gender, but it is affirmatively required to provide water quality standards that remedy past discrimination.[103] The prohibition against discrimination means the ODEQ must protect subpopulations from health risks created by toxic contaminants, and cannot seek to remedy unequal protection through fish consumption advisories that ask subpopulations to restrict their use of water for activities such as fishing.

The EPA can also disapprove Oregon's toxic criteria because they are inconsistent with both the state's antidegradation policy and with federal regulations requiring that existing uses be protected.[104] Likewise, where Oregon's toxic criteria likely fail to protect frequent fish consumers at a minimum risk level of one cancer per 10,000 exposed people, the EPA's disapproval could be based on Oregon's failure to protect designated uses adequately.[105] Finally, since as discussed below the EPA has discre-

[99] 33 U.S.C.A. § 1313(c)(4)(A) (2005).

[100] 33 U.S.C.A. § 1313(c)(4)(B).

[101] *See, e.g.*, PERFORMANCE PARTNERSHIP AGREEMENT BETWEEN THE OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY AND THE U.S. ENVIRONMENTAL PROTECTION AGENCY – REGION 10 FOR JULY 1, 2004 – JUNE 30, 2006 (2004), http://www.deq.state.or.us/about/ppa/ppa.pdf.

[102] 40 C.F.R. § 7.35(b).

[103] 40 C.F.R. § 7.35(a)(7).

[104] 33 U.S.C.A. § 1313(d)(4)(B).

[105] 33 U.S.C.A. § 1313(c)(4)(B); *See* DEQ WATER QUALITY STANDARDS TRIENNIAL REVIEW TOXICS TECHNICAL ADVISORY COMMITTEE, MEETING SUMMARY (2001), http://www.deq.state.or.us/wq/standards/TOXMeetSUM0901.pdf.

tion to set fish consumption levels at "lower yet adequate" levels in a TMDL, it follows that it also has discretion to override state criteria it deems inadequate.[106]

2. The EPA Has Authority to Use Oregon's Narrative Criterion for Toxics

One approach to filling the gaps created by Oregon's inadequate numeric criteria for toxics, apart from reviewing the numeric criteria themselves, is use of the state's narrative criteria. Oregon has an extensive and detailed narrative criterion for toxic pollutants that far exceeds the more typical state narrative pronouncement that toxics not be present in "toxic amounts":

> [T]oxic substances may not be introduced above natural background levels in waters of the state in amounts, concentrations, or combinations that may be harmful, may chemically change to harmful forms in the environment, or may accumulate in sediments or bioaccumulate in aquatic life or wildlife to levels that adversely affect public health, safety, or welfare or aquatic life, wildlife, or other designated beneficial uses.[107]

The ODEQ, however, has not created the required methodology for interpreting its narrative toxics criteria, either for point sources, as required by EPA regulations,[108] or for any other purpose. Without this implementation methodology, the narrative criteria are widely ignored when Oregon makes regulatory decisions where the criteria should be interpreted and applied, such as the development of TMDL clean-up plans, issuance of National Pollutant Discharge Elimination System (NPDES) discharge permits, and certification of certain federal actions (such as dredging and dam operations).[109]

The EPA has the authority, and a mandatory duty, to remedy Oregon's failure to adopt a narrative-criterion implementation

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[106] *See infra* p. 43 and note 113.

[107] OR. ADMIN. R. 340-041-0033(1) (2005). It is important to note that the language of the rule has been changed from "[t]oxic substances *may* not be introduced. . ." to "[t]oxic substances *shall* not be introduced. . ." (emphasis added). Although the language has been changed, it has not yet been approved or disapproved by the EPA. The original language of the rule, and a discussion thereof, is available at ODEQ WATER QUALITY DIVISION, ASSESSMENT METHODOLOGY FOR OREGON'S 2004 INTEGRATED REPORT ON WATER QUALITY STATUS 42-48 (2004), http://www.deq.state.or.us/wq/303dlist/docs/AssessmentMethodology2004.pdf.

[108] 40 C.F.R. § 131.11(a)(2).

[109] *See, e.g.*, Columbia Slough TMDL, http://www.epa.gov/waters/tmdldocs/ColSloughTMDL.pdf.

methodology that can be used to ensure the health of frequent fish consumers.[110] The state's failure in that regard has essentially rendered its narrative criteria meaningless.

A similar omission is Oregon's failure to comply with the requirement that states use biological monitoring or assessment methods to generate criteria addressing pollutants for which the EPA has no recommended numeric criteria.[111] ODEQ has failed to adopt numeric criteria since 1988, when Oregon last established any numeric criteria for priority toxic pollutants. The EPA can, using its authority to revise Oregon's standards to meet CWA requirements, promulgate criteria that will ensure regulation of pollutants for which there are no numeric criteria.[112] In doing so, the EPA could establish standards that reflect actual fish consumption rates.

The EPA has discretion to consider environmental justice issues when it implements water quality standards by establishing TMDLs; however, it is not required to do so.[113] Most TMDLs—as well as the CWA 303(d) list identifying impaired waters in need of TMDLs—are developed by states. As with water quality standards however, EPA approval or disapproval is required.[114] Given that the requirement for TMDLs is that they be "established at a level necessary to implement the applicable water quality standards," the EPA has broad discretion to determine that TMDLs allowing high risk levels for frequent fish consumers are inconsistent with state standards.[115] The EPA can require Oregon to interpret and apply its own narrative criteria on toxics, criteria which the EPA has implicitly sanctioned (but which Oregon has not done). The EPA could also require Oregon to ensure its TMDLs fully support designated uses, and determine that "full support" includes protecting frequent-fish consum-

110 33 U.S.C.A. § 1313(c)(4)(A); 40 C.F.R. § 131.11(a)(2).

111 33 U.S.C.A. § 1313(c)(2)(B).

112 33 U.S.C.A. § 1313(c)(4)(B).

113 *See* Dioxin/Organochlorine Ctr. v. Clarke, 57 F.3d 1517 (9th Cir. 1995). When the EPA set a TMDL for dioxin in the Columbia River Basin, environmental groups challenged EPA's use of the then-applicable 6.5 grams per day national average fish-consumption rate, arguing that EPA should have used 150 grams per day to protect tribal members. The Ninth Circuit upheld the EPA's choice of a "lower yet adequate" risk level because it concluded the federal agency was not required to protect subpopulations at the same risk level as the general public. *Id*. at 1524.

114 33 U.S.C.A. § 1313(d)(2).

115 33 U.S.C.A. §1313(d)(1)(c).

ers.[116] Finally, the EPA could require the state's TMDLs to treat frequent fish consumption as an "existing use" that, while not specifically designated, must be protected to meet the standards' antidegradation policy.[117]

The EPA also must take action where Oregon simply refuses to act.[118] The state's failure to adopt new mercury criteria demonstrates the lengths to which it will go to avoid protecting its citizens—particularly low income and minority populations. In its recent triennial review, Oregon initially proposed adopting the EPA's new recommended criterion for methylmercury (.3 mg/kg).[119] Unlike other criteria, which apply to ambient water, the methylmercury criterion applies directly to fish tissue.[120] Thus, this criterion is even more obviously linked to the national average fish consumption figure used to develop it. The EPA's notice of availability of the methylmercury criterion itself emphasizes the issue of using appropriate fish consumption levels: "[f]or exposure assessment, States and authorized Tribes are encouraged to use local studies on human fish and shellfish consumption that better reflect local intake patterns and choices." In the absence of local data, EPA recommends separate default fish consumption values for the general population, recreational fishers and subsistence fishers.[121]

Oregon proposed adopting neither of these approaches, simply disregarding its credible evidence on actual consumption levels in certain subpopulations. At the conclusion of its public process, the ODEQ opted to forgo adoption of *any* new criterion for mercury,[122] despite the pollutant's widespread presence in Oregon waters, state fish consumption advisories issued for mercury, and the ongoing development of TMDLs to address unsafe levels of mercury in Oregon fish.[123] Oregon's failure to conform to the

116 33 U.S.C.A. § 1313(d)(2).

117 40 C.F.R. § 131.12(a)(1).

118 *See* 33 U.S.C.A. § 1313(c)(3).

119 Hallock, *supra* note 4, at 5.

120 *See* Water Quality Criteria: Notice of Availability of Water Quality Criterion for the Protection of Human Health: Methylmercury, 66 Fed. Reg. 1344, 1345 (Jan. 8, 2001).

121 *Id*. at 1346.

122 Hallock, *supra* note 4, at 1, 5.

123 Had Oregon adopted the new-tissue criterion for methylmercury it would have had to face what it has ignored for so long, namely, a methodology with which to apply the criterion. Clearly, the EPA did not intend the criterion to be adopted by states and then ignored; in fact, the opposite is true because the EPA's availability

CWA requirement that any triennial review incorporate new or revised EPA criteria for toxic contaminants provides the EPA an easy rationale for promulgating federal mercury criteria for the state.

CONCLUSION

While a third-party challenge to Oregon's updated toxic criteria under EPA regulations implementing the Civil Rights Act appears to be precluded, a challenge to the EPA's approval of the standards based on their inconsistency with other federal guidance and regulations could be successful. Regardless, the EPA has multiple bases for disapproving Oregon's standards as insufficient to protect tribal members and others who consume fish in excess of national averages. The strength of the CRITFC data make this an excellent test case for either a third-party challenge or an EPA action.

notice discusses the criterion's role in permit approval and fish advisories. Water Quality Criteria: Notice of Availability of Water Quality Criterion for the Protection of Human Health: Methylmercury, 66 Fed. Reg. at 1349. The EPA's notice extensively discusses the various methods by which states can apply their tissue criterion to determine levels of methylmercury in fish and water. The EPA states that an implementation policy is necessary to establish sampling protocols and to attain the criterion, NPDES permitting and TMDL development, and source management and control strategies. *Id.* at 1357.