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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

**NORTHWEST ENVIRONMENTAL
ADVOCATES**, an Oregon non-profit
corporation, **IDAHO CONSERVATION
LEAGUE**, an Idaho non-profit corporation,

Plaintiffs,

v.

**THE NATIONAL MARINE FISHERIES
SERVICE**, a division of the United States
Department of Commerce, **THE UNITED
STATES FISH AND WILDLIFE SERVICE**,
a bureau of the United States Department of
the Interior, and **THE ENVIRONMENTAL
PROTECTION AGENCY**,

Defendants.

Case No. 1:13-cv-00263-DCN

**PLAINTIFFS' SEPARATE
STATEMENT OF UNDISPUTED
FACTS**

1. Mercury is a Clean Water Act-designated “priority pollutant” that is widespread and persistent in the environment. 40 C.F.R. Part 423, Appendix A. It enters the environment through many sources. *See* Guidance for Implementing the January 2001 Methylmercury Water Quality Criterion (2010) at 16.¹ Mercury occurs in the environment in several different chemical species, one of which is methylmercury. *Id.* at 15. Aquatic systems experience the greatest exposure to mercury due to bioaccumulation. *Id.* at 10.

2. Methylmercury is an organic and toxic form of mercury that readily bioaccumulates in living organisms. *Id.* at 1, 27, 165, 187. Transformed by microbes into methylmercury, it is retained in fish tissue and is the only form that biomagnifies in aquatic food webs. *Id.* at 15. In fish, mercury is almost exclusively found as methylmercury. *Id.* at 16. Bioaccumulation of methylmercury through diet is the primary route of exposure of toxic levels of mercury. For this reason, methylmercury is most accurately measured in tissue, not water, samples. *Id.* at 10; *see also* Water Quality Protection of Human Health: Methylmercury, EPA-823-R-01-001(January 2001)² at xiv. For example, Idaho’s mercury criterion for the protection of human health is measured as 0.3 milligrams per kilogram (mg/kg) of fish tissue. IDAPA 58.01.02.210.01.a.

3. Biomagnification of mercury occurs when the lowest level trophic species, such as phytoplankton, take up mercury from water and sediments. Draft Staff Report, Including Substitute Environmental Documentation for Part 2 of the Water Quality Control Board Plan for

¹ Available at: <https://www.epa.gov/sites/production/files/2019-02/documents/guidance-implement-methylmercury-2001.pdf> (last visited Oct. 7, 2020).

² Available at: <https://www.epa.gov/sites/production/files/2020-01/documents/methylmercury-criterion-2001.pdf> (last visited October 7, 2020).

Inland Surface Waters, Enclosed Bays, and Estuaries in California—Tribal and Subsistence Fishing Beneficial Uses and Mercury Provisions (January 3, 2017) at 43–44.³

4. Zooplankton consume phytoplankton, small fish and invertebrates consume the zooplankton, and larger fish, birds, and mammals consume the small and larger fish. Organisms that are the highest on the food web have the highest methylmercury concentrations. Where sediments have elevated mercury concentrations, benthic insects can create higher mercury burdens in fish and other wildlife. *Id.* at 44. Therefore, protection of those predators that are highest on the food web must drive the adoption of protective criteria. *Id.*

5. Birds and mammals that eat fish have more exposure to methylmercury than other animals in water ecosystems.⁴ Predators that eat these birds and mammals are also at risk. Methylmercury has been found in a wide range of fish-eating birds and mammals including kingfishers, bald eagles, mink, river otter, and osprey. Mercury Study Report to Congress, Volume VI: An Ecological Assessment for Anthropogenic Mercury Emissions in the United States, U.S. Environmental Protection Agency, EPA-452/R-97-008 (December 1997) (“Mercury Report to Congress”) at ES-3.⁵ Nationwide, there is a significant overlap between areas of high mercury deposition from airborne sources and these species. *Id.* at ES-2–ES-3. At unsafe levels of exposure, methylmercury’s harmful effects on these animals include: death, neurological disorders, organ damage, impaired immune response, impaired growth and development, reduced reproductive success, changes in respiration, increased susceptibility to pathogens, and

³ Available at:

https://www.waterboards.ca.gov/water_issues/programs/mercury/docs/staff_report/hg_staff_report.pdf (last visited October 7, 2020).

⁴ See <https://www.epa.gov/mercury/basic-information-about-mercury> (last visited October 7, 2020).

⁵ Available at: <https://www.epa.gov/sites/production/files/2015-09/documents/volume6.pdf> (last visited October 7, 2020).

change in behavior (e.g., migration, predator-prey interactions). *Id.* at 2-3. In mammals, fetuses are particularly sensitive to mercury, experiencing deleterious developmental effects when the mothers appear to be unaffected. *Id.* at 2-3, 2-12, Table 2-1.

6. At the population level, species may experience the following adverse impacts from mercury contamination: decreased genotypic and phenotypic diversity, decreased biomass, increase mortality rate, decreased fecundity rate, decreased recruitment of juveniles, increased frequency of disease, decreased yield, change in age/size class structure, and extinction. *Id.* at 2-12, Table 2-1.

7. In 2003, the Idaho Mining Association (IMA) petitioned the Idaho Department of Environmental Quality (IDEQ) to change Idaho's water quality standards for mercury. AR00009. In its petition, IMA proposed that IDEQ adopt "revised mercury criteria" for mercury consistent with EPA's 2002 Section 304(a) water quality criteria: a 1.4 µg/l acute aquatic life criterion; a 0.77 µg/l chronic aquatic life criterion; and the addition of a 0.3 mg/kg fish tissue methylmercury human health criterion. AR000010–11. Idaho's previously adopted criteria then in effect—approved by EPA in 1997—included a 2.1 µg/l acute aquatic mercury criterion and a 0.012 µg/l chronic aquatic mercury criterion. AR000005. IMA explained that its policies included "a commitment to ensure . . . that state water quality standards do not impose requirements more stringent than minimum federal requirements," and that the low levels for mercury criteria under Idaho's water quality standards imposed "onerous and expensive sampling procedures and analytical tests" to demonstrate compliance with permit limits. AR000010–11. On May 24, 2004, IMA amended its proposed changes by letter, requesting that IDEQ remove both aquatic criteria from the revision. AR000017–18, AR000007.

8. IDEQ initiated negotiated rulemaking to consider IMA's proposed revision along with other updates to Idaho's water quality criteria, and published its proposed rule in the Idaho Administrative Bulletin on August 4, 2004. AR000019, AR000069. That rule added a 0.3 mg/kg fish tissue mercury human health criterion but eliminated both the chronic and acute aquatic life criteria, replacing both with footnote "g." AR000071. Footnote "g" states: "No aquatic life criterion is adopted for inorganic mercury. However, the narrative criteria for toxics in Section 200 of these rules applies. The Department believes application of the human health criterion for methylmercury will be protective of aquatic life in most situations." AR000076.

9. On September 20, 2004, EPA submitted comments to IDEQ on the proposed rule. AR000412–433. EPA stated that IDEQ did not present evidence to support its assertion "in footnote (g) to the proposed revisions" that "the application of human health criterion for methyl mercury (a fish tissue based criter[ion]) will be protective of aquatic life in most situations." AR000416–417. EPA also stated that "the EPA's current recommended 304(a) chronic freshwater aquatic life criterion (0.77 µg/l) for mercury may not be appropriately protective in Idaho." AR000417. EPA explained that several species of fish, including rainbow trout, coho salmon, and bluegill, "may not be adequately protected" by EPA's recommended chronic criterion of 0.77 µg/l. *Id.*

10. EPA made two recommendations regarding Idaho's "revisions." AR000417–18. First, EPA stated that it "believes that a chronic aquatic life criterion value of 0.012 µg/l may be protective of aquatic species in Idaho," and therefore recommended that Idaho "retain the current chronic value of 0.012 µg/l until a chronic aquatic life mercury criterion that adequately protects aquatic species in Idaho is developed by the State of Idaho or by EPA." AR000417. Second, EPA encouraged Idaho to replace its current acute aquatic life criterion (2.1 µg/l) with EPA's

recommended 304(a) acute aquatic life criterion for mercury (1.4 µg/l). AR000417–18. EPA believed that retaining the 0.012 µg/l chronic value, and adopting the 1.4 µg/l acute value, would be a suitable approach “until a chronic life mercury criterion that is protective [of] species in Idaho is developed by the State of Idaho or by EPA.” AR000418.⁶

11. IDEQ sought and responded to comments—including comments from EPA—but did not incorporate EPA’s recommendations into the proposed rule. AR000006, AR000115, AR000120–172. The 2005 Idaho Legislature adopted the rule as final, and it became effective on April 6, 2005. AR000007. IDEQ sought and received the state certification as required under 33 C.F.R. § 131.6 for EPA approval of revised water quality standards. AR000405. On August 8, 2005, IDEQ submitted the rule, along with several additional revisions of Idaho’s water quality standards, to EPA for review and approval. AR000006.

12. On December 12, 2008, EPA sent to IDEQ a letter, “Re: EPA Disapproval of Idaho’s Removal of Mercury Acute and Chronic Freshwater Aquatic Life Criteria, Docket No. 58-0102-0302” (“Disapproval Letter”). AR000001. In its Disapproval Letter, EPA refers to Idaho’s removals of acute and chronic criteria for mercury as a “revision” and explains the removals as “inconsistent with CWA 303(c) and 40 CFR 131.11.” AR000004. EPA stated that it reviewed and disapproved Idaho’s removal of acute and chronic numeric freshwater aquatic life criteria for mercury “[p]ursuant to [EPA’s] authority under Section 303(c) of the Clean Water Act . . . and the implementing regulations at 40 CFR Part 131.” AR000001. EPA stated that it disapproved IDEQ’s “removal of acute and chronic numeric freshwater aquatic life criteria for

⁶ In EPA’s 2008 Disapproval Letter, the agency characterized its 2004 comments as including three recommendations. AR000002. Plaintiffs, however, can only discern the two recommendations described: EPA’s recommendations for chronic and acute criteria that EPA suggested IDEQ adopt as temporary values until a protective chronic aquatic life mercury criterion was developed by Idaho or EPA. *Compare* AR000418 *with* AR000002.

mercury . . . and the addition of footnote ‘g’,” having determined that those changes were “inconsistent with Clean Water Act Section 303(c) and 40 CFR 131.11.” *Id.* Specifically, EPA explained that IDEQ’s implementation guidance for the mercury criteria did “not contain definitive information on how the State would translate the fish tissue criterion developed to protect human health to a value which can be used to protect aquatic life.” AR000004.

13. EPA recommended four remedies to “assure compliance with the requirements of Section 303(c)”:

“There are several options Idaho could consider in establishing mercury criteria that are based on scientifically defensible methods and protect Idaho’s designated aquatic life uses including:

- 1) evaluate the protectiveness of EPA’s current recommended 304(a) numeric acute freshwater aquatic life criterion for mercury (1.4 µg/l);
- 2) evaluate the protectiveness of Idaho’s previous numeric chronic freshwater aquatic life criterion for mercury (0.012 µg/l);
- 3) evaluate development of Idaho-specific numeric acute and chronic freshwater aquatic life criteria for mercury; and
- 4) evaluate the use of a combination of protective numeric water column values and numeric wildlife criteria appropriate for Idaho species”

AR000004–05. EPA emphasized that it did not recommend using the 304(a) numeric chronic freshwater criterion for mercury (0.77 µg/l) in the above options, because that value “may not adequately protect such important fishes as the rainbow trout, coho salmon and bluegill, and there are several species of trout and salmon present in Idaho.” AR000005.

14. EPA also noted that “[u]ntil Idaho develops and adopts and EPA approves revisions to numeric acute and chronic aquatic life criteria for mercury,” the criteria in effect would be the previously adopted acute (2.1 µg/l) and chronic (0.012 µg/l) criteria that EPA approved in 1997. AR000005.

15. Irrespective of EPA’s 2008 statement that Idaho’s 1997-approved criteria would remain effective, Idaho appears to believe that it currently has no aquatic life criteria in effect. In May 2020, IDEQ published “WQS Triennial Review – Issue Paper: Data and Information Needs Necessary for the State of Idaho to Consider Adoption of EPA 304(a) Aquatic Life Criteria for Mercury.”⁷ In that document, IDEQ stated its view that “[I]DEQ does not have aquatic life criteria for mercury.” *Id.* at 1; *see also id.* at 2 (“Currently, Idaho has no aquatic life criterion in rule.”).

16. Nothing in the administrative record or publicly available shows that EPA or Idaho have promulgated aquatic life criteria for Idaho in the twelve years since EPA’s disapproval.

Dated this 9th day of October, 2020.

Respectfully submitted,

s/ Allison LaPlante

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⁷ Available at <https://www.deq.idaho.gov/media/60184283/issue-paper-idaho-consider-adoption-of-epa-304-a-aquatic-life-criteria-for-mercury.pdf> (last visited Oct. 7, 2020).

CERTIFICATE OF SERVICE

I, Allison LaPlante, hereby certify that, on October 9, 2020, I electronically filed the foregoing document in the above-captioned action with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to all counsel of record in this matter.

s/Allison LaPlante
Allison LaPlante
Counsel for Plaintiffs