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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION IX  
75 Hawthorne Street  
San Francisco, CA 94105-3901

OCT 23 2014

David Gaskin  
Deputy Administrator  
Division of Environmental Protection  
901 S. Stewart Street, Suite 4001  
Carson City, Nevada 89701

Dear Mr. Gaskin:

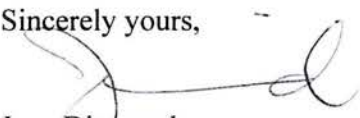
I am hereby transmitting to you EPA's decision to include Topaz Lake for mercury in fish tissue on Nevada's 2012 list of water quality limited segments still requiring a total maximum daily load (TMDL) pursuant to Clean Water Act section 303(d), and 40 CFR 130.7(d)(2).

On August 4, 2014, EPA approved the State's inclusion of all waters and pollutants on its 2012 303(d) list and disapproved the State's omission from the list of Topaz Lake for mercury in fish tissue that meets federal listing requirements.

EPA provided public notice and solicited public comment on its identification of Topaz Lake for mercury in fish tissue for inclusion on Nevada's list. Enclosed is a summary of comments received and EPA's response. Table 1 reflects EPA's decision to include Topaz Lake for mercury in fish tissue as a water body-pollutant combination added by EPA requiring a TMDL.

If you have questions on any aspect of this final listing decision, please call me at (415) 947-8707, or refer staff to David Guiliano at (415) 947-4133.

Sincerely yours,



Jane Diamond  
Director, Water Division

Enclosures

cc: Colleen Cripps, Ph.D., Administrator, NDEP  
Kathy Sertic, Bureau Chief, Water Quality Planning  
John Heggeness, Branch Supervisor, Water Quality Standards & Monitoring

## Enclosure

### **EPA Decision Concerning Nevada's 2012 Clean Water Act Section 303(d) List Responsiveness Summary and Addition of Topaz Lake for Mercury in Fish Tissue to Nevada's List of Water Quality Limited Segments Still Requiring a TMDL**

#### **Introduction**

On August 4, 2014, EPA took action on Nevada's 2012 Section 303(d) List, approving the State's inclusion of all waters and pollutants that the State identified as requiring a total maximum daily load (TMDL) and disapproving the State's omission of Topaz Lake, which exceeded federal criteria for mercury in fish tissue. Topaz Lake, which EPA added to the State's 2012 list of water quality limited segments requiring a TMDL, was identified in Table 1 of the enclosure to EPA's August 4, 2014 letter.

On August 4, 2014, EPA began the public comment period on its action to add Topaz Lake for mercury in fish tissue to the Nevada 2012 303(d) list. EPA solicited public comment and provided notice of availability by posting EPA's public notice document on the EPA Region IX website; additionally EPA's public notice document was sent to all recipients on NDEP's email list used to provide notice for Bureau of Water Quality Planning actions. EPA's comment period was for 40 days and closed on September 12, 2014.

Written comments were only received from Nevada Division of Environmental Protection (NDEP). EPA's responses to NDEP's comments are presented below.

#### **NDEP Comment:**

*"NDEP strongly opposes EPA's proposed action. Nevada has not adopted the EPA recommended fish tissue criterion and DEP is not required to use the recommended criterion to determine waterbody impairment."*

*"Nevada's 2012 Integrated Report as submitted to EPA in April 2014 meets all federal 303(d) listing requirements contained in 40 CFR 130.7. NDEP's 2012 303(d) List waters were determined by evaluation of State adopted and EPA approved numeric water quality standards established under section 303 of the Clean Water Act. Additionally, NDEP used health advisories issued by the Nevada State Health Division (NSHD) and Superfund designations to evaluate the narrative "free from" standards contained in Nevada Administrative Code 445A.121 to determine if waterbody uses were being met. The NSHD fish consumption advisories are based on the U.S. Food and Drug Administration fish tissue mercury action level of 1.0 mg methyl mercury/kg. NSHD has not issued a health advisory for Topaz Lake because the fish tissue concentrations of mercury are less than 1.0 mg/kg, and therefore NDEP did not include Topaz Lake on the 2012 303(d) List."*

*"Nevada is under no legal obligation to use the EPA recommended criterion for listing purposes. The methyl mercury fish tissue criterion Fact Sheet (January 2001) states: 'EPA's recommended human health water quality criteria are not regulation themselves, and do not*

*impose legally binding requirements." Further, EPA indicates the water quality criteria recommendations are intended as guidance to States in developing water quality standards (Federal Register Notice January 8, 2001). Nevada (or EPA acting for Nevada) has not officially adopted fish tissue criteria and EPA has no authority to impose the recommended criterion on Nevada."*

**EPA Response:**

As described below, EPA concludes that adding Topaz Lake for mercury in fish tissue to Nevada's list of waters for which a TMDL is required, meets the Federal criteria for listing under 40 CFR 130.7. EPA has determined that, for Topaz Lake, the 2012 Section 303(d) list submitted by Nevada does not implement the narrative water quality standard for toxicity established by NAC 445A.121. EPA does not agree that it improperly applied the water quality criterion for the protection of human health for methyl mercury.

**1. Use of the EPA 'recommended' criterion**

CWA section 303(c)(1) provides that states and authorized tribes review their water quality standards at least every three years. At such time, states and authorized tribes are to adopt numeric criteria for all toxic pollutants for which EPA has published criteria under CWA section 304(a), where the discharge or presence of these pollutants could reasonably interfere with designated uses, under the conditions set forth in CWA section 303(c)(2)(B).

Mercury and related compounds are identified as toxic pollutants in EPA regulations (40 CFR 401.15). EPA's water quality criterion for methyl mercury, published in January 2001 under CWA section 304(a), is expressed as a fish tissue concentration value set at 0.3 milligrams methyl mercury per kilogram of wet-weight fish tissue, or 0.3 mg/kg. As explained in Water Quality Criterion for the Protection of Human Health: Methylmercury. Final. EPA-823-R-01-001 (2001b), this criterion represents the concentration of methyl mercury in freshwater and estuarine fish and shellfish tissue that should not be exceeded based on a consumption rate of 0.0175 kg fish/day, and derived using inputs designed to protect consumers of fish and shellfish among the general population. See, e.g. EPA-823-R-01-001, at pp. xvi, 5-25, 5-49, and 7-1,

Under CWA section 303(c), states and authorized tribes must adopt water quality criteria that protect designated uses. Nevada's 2012 Water Quality Integrated Report states:

*"Fish consumption is not a beneficial use cited in NAC 445A.120, although, it is protected through the narrative standards, 445A.121:*

*(4) Waters must be free from high temperature, biocides, organisms pathogenic to human beings, toxic, corrosive or other deleterious substances attributable to domestic or industrial waste or other controllable sources at levels or combinations sufficient to be toxic to human, animal, plant or aquatic life or in amounts sufficient to interfere with any beneficial use of the water..." (See Nevada's 2012 Water Quality Integrated Report, pg. 26-27.)*

EPA recommended that the 2001 methyl mercury criterion be used in establishing or updating water quality standards for waters of the United States as part of the triennial review of standards to fulfill the requirements of CWA section 303(c)(2)(B) and 40 CFR part 131, and in issuing fish and shellfish consumption advisories. States and authorized tribes remain free to not use or to adjust EPA's recommended criterion, provided that their water quality criteria for methyl mercury protect the designated uses and are based on a scientifically defensible methodology, considering bioaccumulation and local or statewide fish consumption (EPA 2010).

EPA guidance on how states and authorized tribes may comply with CWA section 303(c)(2)(B) (EPA 1994) provides three options for compliance:

- Option 1: States and authorized tribes may adopt statewide or reservation-wide numeric chemical-specific criteria for all toxic pollutants for which EPA has issued CWA section 304(a) criteria guidance.
- Option 2: States and authorized tribes may adopt numeric chemical-specific criteria for those stream segments where the state or tribe determines that the priority toxic pollutants for which EPA has issued CWA section 304(a) criteria guidance are present and can reasonably be expected to interfere with designated uses (e.g., a designated use of "fishing" is interfered with by nonattainment of the mercury water quality criterion).
- Option 3: States or authorized tribes may adopt a chemical-specific translator procedure that can be used to develop numeric criteria as needed.

As part of the three year review of standards required by Clean Water Act section 303(c), EPA expects states and authorized tribes to include new or revised criteria for methyl mercury in their waters. (EPA 2010)

Nevada has not adopted EPA's recommended criterion of 0.3 mg methyl mercury/kg in fish tissue; nor has it adopted a scientifically defensible alternative methodology, considering bioaccumulation and local or statewide fish consumption, that EPA has approved as a water quality standard under CWA section 303. Accordingly, EPA used the narrative water quality standard for toxicity in NAC 445A.121 to determine if water quality standards are being implemented in Topaz Lake. After comparing (a) fish tissue concentration data for methyl mercury in fish taken from Topaz Lake with (b) the criterion for methyl mercury published under CWA section 304(a), EPA concludes that the narrative standard is not being met. Table 1, below, identifies the Smallmouth Bass in Topaz Lake which the average concentration of methyl mercury exceeds 0.3 mg/kg of fish tissue. Smallmouth Bass is a species classified as game fish pursuant to NAC 503.060.

## **2. NSHD fish consumption advisories based on the FDA fish tissue mercury action level**

Nevada's State Health Division (NSHD) issues consumption advisories based on the 1979 U.S. Food and Drug Administration (FDA) fish tissue mercury action level of 1.0 mg methyl mercury/kg wet weight fish tissue, developed for human consumption of commercial fish.

*"FDA based its action level on the lowest level at which adverse effects were found to occur in adults. ...FDA toxicologists are developing a more complete database for addressing low-level methyl mercury exposures from fish; however they consider the 1 ppm limit to provide an adequate margin of safety. This doesn't mean that it is safe to regularly and frequently eat fish that contain 1 ppm methyl mercury."* (FDA, 1995)

EPA and FDA have agreed that the use of FDA action levels for the purposes of making local advisory determinations is inappropriate.

*An FDA action level is "an administrative guideline or instruction to the agency field unit that defines the extent of contamination at which FDA may regard food as adulterated. An action level represents the limit at or above which FDA may take legal action to remove products from the marketplace."*

*The methodology used by FDA in establishing action levels or tolerances is to determine the health risks of chemical contaminants in fish and shellfish that are bought and sold in interstate commerce rather than in locally harvested fish and shellfish (Bolger et al., 1990). FDA action levels and tolerances are indicators of chemical residue levels in fish and shellfish that should not be exceeded for the general population who consume fish and shellfish typically purchased in supermarkets or fish markets that sell products that are harvested from a wide geographic area, including imported fish and shellfish products. However, the underlying assumptions used in the FDA methodology were never intended to be protective of recreational, tribal, ethnic, and subsistence fishers who typically consume larger quantities of fish than the general population and often harvest the fish and shellfish they consume from the same local waterbodies repeatedly over many years."* (EPA 2000).

The practice of using FDA action levels for the purposes of making local advisory determinations has been discouraged by EPA and FDA in favor of EPA's risk-based approach to derive local fish consumption advisories. (EPA 2000)

EPA does not agree that reliance on the FDA's 1979 fish tissue action level is sufficiently protective of consumers of fish from local water bodies.

**Final List of water body-pollutant combinations added to Nevada's list of water quality limited segments still requiring a TMDL**

Table 1, below, presents the final list of water body-pollutant combinations that EPA is adding to Nevada's list of water quality limited segments still requiring a TMDL pursuant to Clean Water Act, section 303(d) and 40 CFR 130.7(d)(2). Topaz Lake for mercury in fish tissue, identified in EPA's August 4, 2014 letter, remains on the list.

**Table 1: EPA's Addition to Nevada's 2012 Section 303(d) List of Water Quality Limited Segments Still Requiring Total Maximum Daily Loads for mercury in fish tissue**

| <b>Water Body Name</b> | <b>Water body ID</b> | <b>EPA Assessment Summary</b>   |
|------------------------|----------------------|---|
| Topaz Lake             | NV09-WR-02_00        | Average concentration exceeded 0.3 mg methyl mercury/kg fish tissue in Smallmouth bass. |

## References

### EPA's Partial Approval Partial Disapproval

EPA 2014. EPA's Partial Approval and Partial Disapproval Letter and Enclosure for Nevada's 2012 Section 303(d) List to John Heggeness, NDEP from Jane Diamond, Director, Water Division EPA Region 9. August 4, 2014.

### Submittal

Nevada Division of Environmental Protection, 2014. Transmittal of the 2012 Water Quality Integrated Report. Letter to Dave Guiliano, USEPA and supporting materials, including the Integrated Report, and responsiveness summary, dated April 7, 2014.

### Other Documents

40 CFR Part 130 Water Quality Planning and Management.

EPA 1978. December 28, 1978 Federal Register Notice, Total Maximum Daily Loads Under Clean Water Act, finalizing EPA's identification of pollutants suitable for TMDL calculations, 43 Fed. Reg. 60662.

EPA 1985. January 11, 1985 Federal Register Notice, 40 CFR Parts 35 and 130, Water Quality Planning and Management: Final Rule, 50 Fed. Reg. 1774.

EPA 1991. Guidance for Water Quality Based Decisions: The TMDL Process.  
EPA 440/4-91-001

EPA 1994. *Water Quality Standards Handbook: Second Edition*, (EPA-823-B-12-002; March 2012). <http://water.epa.gov/scitech/swguidance/standards/handbook/index.cfm>

EPA 2000. *Guidance for Assessing Chemical Contaminant Data for Use in Fish Advisories Volume 2: Risk Assessment and Fish Consumption Limits Third Edition*. EPA 823-B-00-008; November 2000.  
[http://water.epa.gov/scitech/swguidance/fishshellfish/techguidance/risk/upload/2009\\_04\\_23\\_fish\\_advice\\_volume2\\_v2cover.pdf](http://water.epa.gov/scitech/swguidance/fishshellfish/techguidance/risk/upload/2009_04_23_fish_advice_volume2_v2cover.pdf)

EPA, 2001a. 2002 Integrated Water Quality Monitoring and Assessment Report Guidance, Robert H. Wayland III, Director, Office of Wetlands, Oceans and Watersheds, November 19, 2001.

EPA. 2001b. Water Quality Criterion for the Protection of Human Health: Methylmercury. Final. EPA-823-R-01-001. January 2001.  
[http://water.epa.gov/scitech/swguidance/standards/criteria/aqlife/methylmercury/upload/2009\\_01\\_15\\_criteria\\_methylmercury\\_mercury-criterion.pdf](http://water.epa.gov/scitech/swguidance/standards/criteria/aqlife/methylmercury/upload/2009_01_15_criteria_methylmercury_mercury-criterion.pdf)



Enclosure to:  
Letter to David Gaskin, Deputy Administrator, Division of Environmental Protection  
October 2014

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EPA, 2001c. Human Health Criteria - Methylmercury Fish Tissue Criterion Fact Sheet; January 2001.

<http://water.epa.gov/scitech/swguidance/standards/criteria/aqlife/methylmercury/factsheet.cfm>

EPA, 2003. Guidance for 2004 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d) and 305(b) of the Clean Water Act; TMDL-01-03, Diane Regas, Director, Office of Wetlands, Oceans and Watersheds, July 21, 2003.

EPA, 2005. Guidance for 2006 Assessment, Listing, and Reporting Requirements Pursuant to Sections 303(d), 305(b), and 314 of the Clean Water Act. Diane Regas, Director, Office of Wetlands, Oceans and Watersheds, July 29, 2005.

EPA, 2006. Information Concerning 2008 Clean Water Act Sections 303(d), 305(b) and 314 Integrated Reporting and Listing Decisions. Diane Regas, Director, Office of Wetlands, Oceans and Watersheds, October 12, 2006.

EPA, 2009. Information Concerning 2010 Clean Water Act Sections 303(d), 305(b) and 314 Integrated Reporting and Listing Decisions. Suzanne Schwartz, Director, Office of Wetlands, Oceans and Watersheds, May 5, 2009.

EPA. 2010. Guidance for Implementing the January 2001 Methylmercury Water Quality Criterion. EPA 823-R-10-001. U.S. Environmental Protection Agency, Office of Water, Washington, DC.

FDA. 1995. FDA Fact Sheet "Mercury in Fish: Cause For Concern?" Revised May 1995.  
[http://www.fda.gov/OHRMS/DOCKETS/ac/02/briefing/3872\\_Advisory%207.pdf](http://www.fda.gov/OHRMS/DOCKETS/ac/02/briefing/3872_Advisory%207.pdf)

Nevada Department of Wildlife. Fishing in Nevada Webpage, accessed in July, 2014.  
<http://www.ndow.org/Fish/>