UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue, Suite 900
Seattle, WA 98101-3140

SEP 27 2016

OFFICE OF
WATER AND WATERSHEDS

Mr. Barry Burnell
Water Quality Program Administrator
Idaho Department of Environmental Quality
1410 North Hilton
Boise, Idaho 83706-1255

Re: Arsenic Human Health Water Quality Standards for Surface Waters in Idaho

Dear Mr. Burnell:

As a result of the U.S. Environmental Protection Agency's ("EPA's") recent disapproval action of Idaho's arsenic human health water quality criteria, pursuant to the Clean Water Act ("CWA"), and consistent with the terms of the enclosed settlement agreement, the EPA advises that, in taking any actions that implicate Idaho's arsenic human health water quality criteria, the Idaho Department of Environmental Quality ("DEQ") follow the EPA's commitment regarding the applicable arsenic criteria in Idaho for federal and/or state law purposes.

Specifically, until revised arsenic water quality criteria are in place, the EPA advises DEQ to use Idaho's CWA-effective narrative water quality criteria for toxics and translate the narrative criteria consistent with the most recently EPA-approved numeric criteria for arsenic in Idaho (a water column concentration of 0.02 µg/L to protect Idaho's domestic water supply use and 6.2 µg/L to protect Idaho's primary and secondary contact recreation uses). In addition, the EPA will include more stringent limits in National Pollutant Discharge Elimination System ("NPDES") permits, if necessary, to ensure compliance with downstream water quality standards in Idaho or another state, as well as other NPDES permit conditions deemed necessary. The EPA may include more frequent monitoring of the effluent and receiving water monitoring using a sufficiently sensitive analytical method and/or for any facility that cannot meet permit limits, a compliance schedule and, where appropriate, a requirement that the permittee conduct a treatability study. Furthermore, the EPA advises DEQ to use this same approach for the other CWA programs it administers, including the CWA 303(d) TMDL and listing and assessment programs.

Given that the potential time frame for adoption of replacement arsenic human health criteria may be as long as three years from now, it is important that the EPA provide clarity regarding arsenic criteria to apply to surface waters in Idaho during the interim timeframe. My NPDES and WQS staff are available to provide additional information to DEQ if needed.

Please feel free to contact me at (206) 553-1855 if you have questions or Lisa Macchio, Idaho Water Quality Standards Coordinator, at (206) 553-1834.

Sincerely,

Daniel D. Opalski, Director
Office of Water and Watersheds

Enclosure

cc: Mr. Don Essig, DEQ
Mr. Jason Pappani, DEQ
Ms. Mary Anne Nelson, DEQ
Ms. Nicole Deinarowicz, DEQ
Mr. Mark Shumar, DEQ
Mr. Doug Conde, DEQ

FINAL SETTLEMENT AGREEMENT

WHEREAS on June 25, 2015, Plaintiff Northwest Environmental Advocates ("NWEA") brought an action in the United States District Court for the District of Oregon (Case No. 3:15-cv-01151-HZ) pursuant to the judicial review provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. § 702 *et seq.*, challenging the United States Environmental Protection Agency's ("EPA") and the EPA Administrator's approval of Idaho's water quality criteria for arsenic, established by that State and submitted for EPA review under section 303 of the Clean Water Act ("CWA"), 33 U.S.C. § 1313.

WHEREAS States are required to adopt water quality criteria that protect the designated uses of a water body. 33 U.S.C. § 1313(c). Water quality criteria "must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use." 40 C.F.R. § 131.11(a)(1).

WHEREAS, to guide the States, EPA publishes national recommended water quality criteria "accurately reflecting the latest scientific knowledge" on health effects, biological effects, and pollutant characteristics. 33 U.S.C. § 1314(a). States may base their new or revised water quality criteria on this EPA guidance, or they may use other "scientifically defensible methods" of establishing their criteria. 40 C.F.R. § 131.11(b).

WHEREAS EPA's latest national recommended human health criteria for arsenic developed under 33 U.S.C. § 1314(a), published in 1992, are 0.018 μg/L for the consumption of water + organisms, and 0.14 μg/L for the consumption of organisms only.

WHEREAS the CWA requires States to review and, where necessary, revise their water quality standards, including numeric and narrative criteria, at least every three years. 33 U.S.C.

§ 1313(c)(1). Revised standards must be submitted to EPA for review, and only become effective for CWA purposes if and when EPA approves them. *Id.* § 1313(c)(1), (3); 40 C.F.R. § 131.5.

WHEREAS EPA must review the submitted standards to determine whether the criteria meet the requirements of the CWA. 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.5. Among other requirements, prior to approving a state water quality standard EPA must determine that the State has provided "[m]ethods used and analyses conducted to support [the] water quality standards revisions" and that the State's criteria are "based on sound scientific rationale[.]" 40 C.F.R. §§ 131.6(b), 131.5(a)(5).

WHEREAS on December 22, 1992, EPA promulgated the National Toxics Rule ("NTR"), which established numeric toxic criteria for Idaho. 33 U.S.C. § 1313(c)(2)(B); 40 C.F.R. § 131.36(b)(1). The NTR arsenic criteria for the protection of human health are 0.14 μg/L for consumption of fish only and 0.018 μg/L for consumption of both fish and water. The NTR criteria are identical to EPA's latest CWA section 304(a) recommended criteria for arsenic, published in 1992, which are based on a one in a million risk of cancer and a fish consumption rate of 6.5 grams/day.

WHEREAS on August 24, 1994, Idaho adopted its own water quality standards by incorporating the NTR into Idaho's rules by reference, except for Arsenic for which the state adopted 6.2 μg/L to protect consumption of organisms only and 0.02 μg/L to protect consumption of water and organisms. On June 25, 1996, EPA approved Idaho's standards for toxics and subsequently withdrew Idaho from the NTR, effective November 10, 1997. Withdrawal from Federal Regulations of Arsenic Human Health Water Quality Criteria Applicable to Idaho, 62 Fed. Reg. 52,926 (Oct. 9, 1997).

WHEREAS Idaho subsequently changed its arsenic human health criteria to 50 μg/L, which was at the time the arsenic Maximum Contaminant Level ("MCL") for drinking water under the Safe Drinking Water Act ("SDWA"). On April 23, 1999, Idaho submitted its revised arsenic criteria to EPA for approval; EPA did not act on that submission, which under EPA regulations applicable at the time made it applicable for CWA purposes. *See* 40 C.F.R. § 131.21(c)(1) (1999); EPA Review and Approval of State and Tribal Water Quality Standards, 65 Fed. Reg. 24,641, 24,642 (April 27, 2000).

WHEREAS on January 22, 2001, EPA finalized a rule that lowered the arsenic MCL from 50 μg/L to 10 μg/L under the SDWA.

WHEREAS, in 2010, Idaho again revised its CWA arsenic human health criteria by adopting EPA's 10 μg/L MCL under the SDWA as the criteria for both consumption of water and fish and consumption of fish only. Idaho Admin. Code § 58.01.02.210(b). Idaho submitted its revised arsenic criteria to EPA for approval on June 21, 2010.

WHEREAS, by letter dated July 7, 2010, EPA formally approved Idaho's June 21, 2010 revisions to its arsenic human health criteria pursuant to EPA's authorities and obligations under 33 U.S.C. § 1313(c)(2) and 40 C.F.R. § 131.5.

WHEREAS, EPA's guidance regarding the use of SDWA MCLs no longer recommends that States adopt SDWA MCLs as their human health water quality criteria for CWA purposes rather than EPA's recommended CWA criteria, especially where routes of human exposure other than drinking water—for example, consumption of fish—must be considered. *See, e.g.*, EPA, Notice of Availability of Water Quality Criteria Documents, 45 Fed. Reg. 79,318, 79,320 (Nov. 28, 1980); EPA Memorandum from Martha G. Prothro to Water Management Division Directors, Regions I-X (June 19, 1989), at 1; Revisions to the Methodology for Deriving

Ambient Water Quality Criteria for the Protection of Human Health. 65 Fed. Reg. 66,444 (Nov. 3, 2000).

WHEREAS, in December 2015 EPA published a draft Assessment Development Plan for the Integrated Risk Information System ("IRIS") Toxicological Review of Inorganic Arsenic, which set forth EPA's plan to complete the final *IRIS Toxicological Review of Inorganic Arsenic*, with an anticipated date of posting to the IRIS database in 2017. The results of this toxicological review could result in EPA's updating its CWA § 304(a) recommended criteria for arsenic.

WHEREAS, the Parties, through their authorized representatives and without any admission or final adjudication of any issues of fact or law or waiver of any factual or legal claim or defense with respect to Plaintiff's Complaint, have reached a settlement of the claim against EPA that they consider to be a fair, adequate, and equitable resolution of Plaintiff's claim.

WHEREAS the Parties agree that resolution of this matter without further litigation is in the best interest of the Parties and the public, and that entry of the Parties' Proposed Consent Decree in *Northwest Environmental Advocates v. Environmental Protection Agency*, Case No. 3:15-cv-01151-HZ, and execution of this Final Settlement Agreement are the most appropriate means of resolving this action.

NOW, THEREFORE, without the trial of any issue of fact or law, upon consent of the Parties, and upon consideration of the mutual promises contained herein, the Parties hereby agree as follows:

1. In reconsidering and taking new action on Idaho's 2010 submission of human health criteria for arsenic (10 μg/L), as required by Paragraphs 3 through 6 of the Parties' Proposed Consent Decree, EPA will consider the following:

a. EPA's policies on not using MCLs developed under the SDWA as water quality criteria to meet the requirements of the Clean Water Act, including but not limited to the following documents (attached hereto as Exhibits 1, 2, 3, and 4):

i. Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health (2000), EPA-822-B-00-004, October 2000);

ii. EPA, Notice of Availability of Water Quality Criteria Documents, 45 Fed. Reg. 79,318, 79,320 (Nov. 28, 1980);

iii. EPA Memorandum from Martha G. Prothro to Water Management Division Administrators Regions I-X, Re: Compliance with CWA Section 303(c)(2)(B) (June 19, 1989);

iv. Revisions to the Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health, 65 Fed. Reg. 66,444 (Nov. 3, 2000); and

b. EPA's Clean Water Act section 304(a) recommended criteria for arsenic, Water Quality Standards; Establishment of Numeric Criteria for Priority Toxic Pollutants; States' Compliance, 57 Fed. Reg. 60,848 (1992) (Dec. 22, 1992), and, as appropriate, any new proposed or finalized replacement 304(a) criteria published prior to the deadlines in Paragraphs 3 through 6 of the Parties' Proposed Consent Decree.

2. Paragraph 1 in no way limits the statutes, regulations, policies, studies, or other information EPA may consider in taking action on Idaho's submission.

3. If EPA disapproves Idaho's 2010 submission of human health criteria for arsenic, EPA will also take action on Idaho's 1999 submission of human health criteria for arsenic (50 μg/L).

4. If EPA's action on Idaho's current State criteria of 10 μg/L is to disapprove it, and EPA also disapproves Idaho's 1999 submission of human health criteria for arsenic (50 μg/L), then between the date of the disapproval and the date EPA either takes final rulemaking action or approves a replacement adopted by Idaho pursuant to Paragraphs 4 through 6 of the Proposed Consent Decree, EPA commits to take the following actions:

a. In issuing any National Pollutant Discharge Elimination System ("NPDES") permits in Idaho during the relevant time period, EPA will, pursuant to 33 U.S.C. § 1311(b)(1)(C), evaluate the need for and, if determined necessary, establish water quality-based effluent limitations based on applicable water quality standards, which include (1) the State of Idaho's EPA-approved designated uses, and (2) its EPA-approved narrative water quality criterion at IDAPA 58.01.02.200(02), which EPA intends to translate consistent with the most recent EPA-approved numeric criteria for arsenic in Idaho: 6.2 μg/L to protect consumption of organisms only and 0.02 μg/L to protect consumption of water and organisms. In addition, EPA will include more stringent limits if necessary to ensure compliance with downstream water quality standards in Idaho or another state, as well as other permit conditions, for example:

i. For any facility with detectable concentrations of arsenic in the effluent, more frequent monitoring of the effluent and receiving water monitoring using a sufficiently sensitive analytical method (current minimum level is 0.5 μg/L);

ii. For any facility that cannot meet permit limits, a compliance schedule consistent with 40 C.F.R. § 122.47 and Idaho's water quality standards, including, where appropriate, a requirement that the permittee conduct a treatability study.

b. Within fifteen (15) days of any action disapproving Idaho's current State criteria of 10 µg/L and Idaho's prior State criteria of 50 µg/L, EPA will send a letter to Idaho, advising Idaho that it should translate the EPA-approved narrative water quality criterion at IDAPA 58.01.01.200(02) in the same manner as described in paragraph 3(a) for the other CWA programs it currently administers, including the CWA section 303(d) program.

c. Within fifteen (15) days of any action disapproving Idaho's current State criteria of 10 µg/L and Idaho's prior State criteria of 50 µg/L, EPA will send a letter to the U.S. Forest Service and Bureau of Land Management's Idaho regional offices informing them of EPA's action and advising them that in taking any federal actions that implicate Idaho's water quality criteria for arsenic, the Forest Service and/or Bureau of Land Management should follow EPA's commitment regarding applicable criteria for federal and/or state law purposes set forth in Paragraph 3(a) above.

d. EPA will send copies of the letters referenced in Paragraphs 2(b) and (c) to NWEA within two (2) days of sending them to the Forest Service, Bureau of Land Management, and State of Idaho.

e. If the Idaho Department of Environmental Quality (DEQ) receives authorization to administer some or all of the NPDES program before the date EPA either takes final rulemaking action or approves a replacement criterion adopted by Idaho pursuant to Paragraphs 4 through 6 of the Proposed Consent Decree, EPA will advise Idaho DEQ that permit writers should translate the State's narrative criterion in a similar manner as EPA intends to pursuant to subsection a. of this Paragraph 3 above.

5. Irrespective of whether EPA disapproves Idaho's current State criteria of 10 µg/L and Idaho's prior State criteria of 50 µg/L, EPA commits to sending a letter to Idaho DEQ, no later than seven days after the Court enters the Consent Decree, that contains the following:

a. A recommendation that Idaho DEQ review Idaho's domestic water supply use designations and the Safe Drinking Water Identification System (SDWIS) database to ensure that all surface waters identified as drinking water sources for public water systems are protected for Idaho's domestic water supply use; and

b. To the extent the analysis in paragraph 5.a identifies surface water drinking water sources that may not be protected for Idaho's domestic supply use, a recommendation that Idaho DEQ update its use designations in its next triennial review process to ensure that all surface water sources supplying public water systems are protected by the state's use designations consistent with 40 CFR § 131.10 and EPA guidance.

c. A recommendation that Idaho ensure that it applies its antidegradation policy Tier I review consistent with Idaho's implementation methods at IDAPA 58.01.02.052.07 to protect the use of surface water for drinking in areas that are outside public water systems where available information identifies it is an existing use.

6. In the event that NWEA or EPA believes that any party to this Agreement has failed to comply with any term or condition of this Agreement, or in the event that there is any dispute or controversy about any part of this Agreement, the Parties shall use their best efforts to settle and resolve the controversy. To that end, the party raising the dispute shall commence an informal dispute resolution period to be no shorter than thirty (30) days, by giving written notice to the other party stating the nature of the matter to be resolved and the position of the party asserting the controversy. The Parties shall consult and negotiate with each other in good faith

and, recognizing their mutual interests in the ongoing integrity of this Agreement, attempt to reach a just and equitable solution satisfactory to all Parties. If, after implementation of the informal dispute resolution process in this Paragraph, NWEA contends that EPA has not performed the obligations established in Paragraphs 1 and 3-4 of this Agreement, NWEA's sole judicial remedy will be to challenge EPA's actions taken pursuant to Paragraphs 1 and 3-4 of the Agreement in a new action or actions.

7. Any notices required or provided for by this Agreement shall be in writing, effective upon receipt, and sent to the following:

For NWEA:

Allison LaPlante
Earthrise Law Center
Lewis & Clark Law School
10015 SW Terwilliger Blvd.
Portland, OR 97219
(503) 768-6823 (tel)
(503) 768-6671 (fax)
laplante@lclark.edu

For EPA:

Elizabeth B. Dawson
Environmental Defense Section
601 D St. NW
P.O. Box 7611
Washington, D.C. 20044-7611
(202) 514-8293 (tel)
(202) 514-8865 (fax)
elizabeth.dawson@usdoj.gov

8. The Parties agree that nothing in this Agreement shall be interpreted as, or shall constitute, a commitment or requirement that EPA take action in contravention of the APA or any other law or regulation.

9. The obligations imposed upon EPA under this Agreement can only be undertaken

using appropriated funds. No provision of this Agreement shall be interpreted as or constitute a commitment or requirement that EPA obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable provision of law.

10. This Agreement constitutes the entire agreement of the Parties with respect to the matters addressed herein, and no statements, agreements, or understandings, oral or written, which are not contained herein, shall be recognized or enforced. Except as expressly stated herein, and excluding the Parties' Proposed Consent Decree, this Agreement supersedes all prior agreements, negotiations, and discussions between the Parties with respect to the subject matters addressed herein.

11. This Agreement may be modified or amended only by written agreement signed by all Parties.

12. The terms of this Agreement shall become effective upon execution by all Parties.

13. The undersigned representatives of each party certify that they are fully authorized by the party they represent to agree to and bind them to the terms and conditions of this Agreement and do hereby agree to the terms herein.

14. The Parties agree that this Agreement was negotiated and entered into in good faith and that it constitutes a settlement of claims that were vigorously contested, denied, and disputed by the Parties. Nothing in this Agreement shall be interpreted as, or constitute, an admission of liability or fact or a waiver of any claims or defenses. NWEA reserves the right to challenge and/or appeal any decision or action by EPA, including any final action on Idaho's arsenic criteria, and the United States reserves all defenses to any such challenge and/or appeal.

15. Whenever possible, each provision of this Agreement shall be interpreted in such a manner as to be effective and valid.

For NWEA:

5/19/16

ALLISON M. LAPLANTE (OSB No. 023614)
Earthrise Law Center
Lewis & Clark Law School
10015 SW Terwilliger Blvd.
Portland, OR 97219
(503) 768-6823 (tel)
(503) 768-6671 (fax)
laplante@lclark.edu

Attorney for Plaintiff

For EPA:

JOHN C. CRUDEN
Assistant Attorney General
Environment & Natural Resources Division
United States Department of Justice

5/13/16

ELIZABETH B. DAWSON (OSB No. 116002)
Environmental Defense Section
601 D St. NW
P.O. Box 7611
Washington, D.C. 20044-7611
(202) 514-8293 (tel)
(202) 514-8865 (fax)
elizabeth.dawson@usdoj.gov

Attorneys for Defendants

For NWEA:

ALLISON M. LAPLANTE (OSB No. 023614)
Earthrise Law Center
Lewis & Clark Law School
10015 SW Terwilliger Blvd.
Portland, OR 97219
(503) 768-6823 (tel)
(503) 768-6671 (fax)
laplante@lclark.edu

Attorney for Plaintiff

For EPA:

JOHN C. CRUDEN
Assistant Attorney General
Environment & Natural Resources Division
United States Department of Justice

5/12/16

ELIZABETH B. DAWSON (OSB No. 116002)
Environmental Defense Section
601 D St. NW
P.O. Box 7611
Washington, D.C. 20044-7611
(202) 514-8293 (tel)
(202) 514-8865 (fax)
elizabeth.dawson@usdoj.gov

Attorneys for Defendants