



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET, SW
ATLANTA, GEORGIA 30303-3104

January 20, 2021

Mr. James (Jac) Capp
Chief
Watershed Protection Branch
Environmental Protection Division
Georgia Department of Natural Resources
2 Martin Luther King Jr. Drive
Suite 1152 East
Atlanta, Georgia 30334

Dear Mr. Capp:

The U.S. Environmental Protection Agency has completed its review of a portion of the amendments to Chapter 391-3-6-.03 of Georgia's Rules and Regulations for Water Quality Control. The revisions were adopted as a result of the Georgia Environmental Protection Division's (GAEPD) triennial review of water quality standards (WQS), as required under the provisions of section 303(c) of the Clean Water Act (CWA). The public comment period for the rulemaking began on April 6, 2018 and ended on May 25, 2018, and a public hearing was held on May 22, 2018. The revisions were adopted by the Board of Natural Resources on June 27, 2018 and became effective July 23, 2018. GAEPD submitted new and revised WQS to the EPA by letter dated December 4, 2018, which were received by the EPA on December 6, 2018. GAEPD's submittal included a certification letter dated October 26, 2018 signed by Christopher M. Carr, Georgia Attorney General, which stated that the revisions were duly adopted in accordance with state law. Today's letter addresses the Agency's review of the antidegradation rule, compliance schedule authorizing provision, various definitions, aquatic life cadmium criterion, and water use classifications. The remaining revisions adopted by the state as part of its triennial review are still under review by the EPA and will be addressed under separate cover.

As set forth in the enclosed decision document, titled *Decision Document of the United States Environmental Protection Agency Determination under Section 303(c) of the Clean Water Act Review of Georgia's Water Quality Regulations at Chapter 391-3-6-.03*, the EPA is approving the revisions to the antidegradation rule; revision to explicitly incorporate the use of schedules of compliance in National Pollutant Discharge Elimination System (NPDES) permits; the definitions for "natural conditions," "practicable alternatives," and "estuarine waters;" the aquatic life cadmium criteria; and the update of specific water use classifications for various waterbodies.

In addition to our review pursuant to section 303 of the CWA, section 7(a)(2) of the Endangered Species Act (ESA) requires federal agencies, in consultation with the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS), to ensure that their actions are not likely to jeopardize the continued existence of federally listed species or result in the destruction or adverse modification of designated critical habitat of such species. On August 26, 2019, FWS concurred with the EPA's determination that the revisions to Georgia's Water Quality Regulations contained in

Chapter 391-3-6-.03 either have no effect or may affect, but are unlikely to adversely affect, listed species or habitat. The EPA received a non-concurrence letter from NMFS on August 9, 2019. On September 17, 2019, the EPA sent a letter to NMFS requesting formal consultation on the freshwater and saltwater cadmium criteria. Now that the formal consultation has concluded with the issuance by NMFS of a Biological Opinion (BO), which is also enclosed for your reference, the following summarizes the conclusions contained therein, specific to the EPA's approval of the freshwater and saltwater cadmium criteria.

The formal consultation on the freshwater/saltwater cadmium criteria with NMFS was completed with a final BO on June 1, 2020. After reviewing the current status of the ESA-listed species affected by the EPA's proposed approval of Georgia's cadmium criteria, the environmental baseline within the action area, the effects of the proposed action, consequences of the proposed action, and cumulative effects, NMFS concluded in its BO that the proposed action is likely to adversely affect, but not likely to jeopardize, the continued existence of shortnose or Atlantic sturgeon.

To minimize such impacts, reasonable and prudent measures (RPMs) and terms and conditions to implement the measures must be provided. The measures are nondiscretionary and must be undertaken by the EPA to minimize the impacts of incidental take. The ESA requires that when a proposed agency action is found to be consistent with section 7(a)(2) of the ESA and the proposed action may incidentally take individuals of ESA-listed species, the NMFS will issue a statement that specifies the impact of any incidental taking of endangered or threatened species.

In accordance with the RPM 1, EPA is informing GAEPD of the prohibition of unauthorized take of ESA-listed species as reference, of NMFS' findings on the exposure of cadmium on ESA-listed shortnose and Atlantic sturgeon species, and of the conditions which may reinitiate consultation between EPA and NMFS.

In accordance with the terms and conditions to implement this RPM, the EPA is informing GAEPD of the following: (a) Unauthorized take of ESA-listed species is prohibited under section 9 of the ESA, and these prohibitions apply to all individuals, organizations, and agencies subject to United States jurisdiction. "Take" is defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Harm is further defined by regulation to include significant habitat modification or degradation that results in death or injury to ESA-listed species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering (b) Exposures to cadmium at or below the proposed criterion may adversely affect ESA-listed shortnose and Atlantic sturgeon species under NMFS' jurisdiction (c) The EPA is approving the cadmium criteria; however, if scientifically defensible data¹ becomes available suggesting that exposures to cadmium under the criteria, as implemented by GAEPD, result in surface water quality conditions that are found to be more harmful to shortnose or Atlantic sturgeon than anticipated, for example, through monitoring in receiving waters where discharges are considered to be compliant with the cadmium criteria, consultation will be reinitiated (d) As such, the EPA's approval does not foreclose either the formulation by NMFS, or the implementation by the EPA, of any alternatives that might be determined through reinitiated consultation to be needed to comply with section 7(a)(2) of the ESA.

The EPA encourages GAEPD to enlist NMFS' technical assistance as early as practicable in order to avoid prohibited take by any activities, authorizations, or decisions regarding potential cadmium sources

¹ Information and analyses that are consistent with the Service's Policy on Information Standards Under the Endangered Species Act (59 FR 34271)

or concentrations in waters where ESA-listed species under NMFS' jurisdiction occur. For example, NMFS could advise GAEPD on any ESA implications of 303(d)/305(b) monitoring and listing decisions affecting such waters.

In accordance with RPM 2 and for your reference, the EPA intends to implement the 2001 Memorandum of Agreement (MOA) among EPA and the Services² to the extent possible, with respect to sources that potentially discharge cadmium based on industrial class or, for urban areas, population size and land use. The provisions under the 2001 MOA allow for the Services review of draft state-issued permits for discharges that may affect ESA-listed sturgeon species for the purposes of technical assistance to ensure that permitted cadmium discharges minimize take. While not binding, the MOA establishes a framework for coordinating actions for activities under section 402 of the CWA. The EPA and NMFS expect to follow the nine coordination procedures regarding issuance of state permits specified in section IX.A. in a manner consistent with these statutory and regulatory procedures.

Additionally, the EPA will, when reviewing permits under its regular permit review practices and the 2007 NPDES MOA between the state of Georgia and the EPA Region 4³, review draft NPDES permits prepared by GAEPD for compliance with the approved cadmium criteria, including the use of sufficiently sensitive methodology in determining monitoring requirements and discharge limits. EPA expectations are as follows: (a) GAEPD will provide notice and copies of draft NPDES permits, public notice, fact sheet or rationale, and permit application to the Services, in accordance with the NPDES MOA section IV.D.4 and section IV.E.1 (b) The EPA will share with GAEPD information about permits that may raise issues regarding impacts to federally listed species or designated critical habitats pursuant to NPDES MOA section IV.E.1 (c) During the course of reviewing draft permits for facilities that discharge into streams with ESA-listed sturgeon or adjacent catchments, if the EPA determines that the effluent data submitted with the permit application has not met the requirements under 40 C.F.R. Part 136, the EPA will inform GAEPD and copy NMFS in accordance with NPDES MOA section IV.E.4 (d) NMFS may review the draft permit record; including supporting records/analytical results and let GAEPD or the EPA know if there are concerns about the effluent test and/or sampling methods as supported by the NPDES MOA section IV.E.2.

We would like to commend you and your staff for your continued efforts to protect and enhance Georgia's waters during this rulemaking and thank you for working with EPA as we reviewed and continue our review of the submittals. We appreciate Georgia's efforts throughout the WQS development process. If you have questions regarding this action by the EPA, please contact me at (404) 562-9345 or have a member of your staff contact Mr. Jamal Cooper at (404) 562-9314.

Sincerely,

Jeaneanne M. Gettle, Director
Water Division

Enclosures

² Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service and National Marine Fisheries Service Regarding Enhanced Coordination Under the Clean Water Act and Endangered Species Act. [EPA-823-R-02-003](#)

³ National Pollutant Discharge Elimination System Memorandum of Agreement between the State of Georgia and the United States Environmental Protection Agency Region 4. [State NPDES Memorandum for Georgia](#)

1. FWS concurrence letter
2. Georgia 2016-2018 Triennial Decision Document Part 1 FINAL
3. NMFS BO

cc: Dr. Elizabeth Booth, GAEPD

Dr. Patricia Shaw-Allen, NMFS