6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 131

[EPA-HQ-OW-2015-0174; FRL-9997-42-OW]

RIN 2040-AF94

Withdrawal of Certain Federal Water Quality Criteria Applicable to Washington

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) proposes to amend the federal regulations to withdraw certain human health criteria applicable to waters in Washington because Washington adopted, and the EPA approved, human health criteria that the EPA determined are protective of Washington's designated uses for its waters. The EPA is providing an opportunity for public comment on this proposed withdrawal of certain federally promulgated human health criteria. The withdrawal will enable Washington to implement its EPA-approved human health criteria, submitted on August 1, 2016, and approved on May 10, 2019, as applicable criteria for Clean Water Act (CWA or the Act) purposes.

DATES: Comments must be received on or before [**INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER**].

ADDRESSES: Submit your comments, identified by Docket ID No. **EPA-HQ-OW-2015-0174**, at https://www.regulations.gov. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. The EPA may publish any comment received to its public docket. Do not submit electronically any information you

consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit https://www2.epa.gov/dockets/commenting-epa-dockets.

The EPA is offering two public hearings so that interested parties may also provide oral comments on this proposed rulemaking. For more details on the public hearings and to register to attend the hearings, please visit https://www.epa.gov/wqs-tech/water-quality-standards-regulations-washington.

FOR FURTHER INFORMATION CONTACT: Erica Fleisig, Office of Water, Standards and Health Protection Division (4305T), Environmental Protection Agency, 1200 Pennsylvania Avenue, NW, Washington, DC 20460; telephone number: (202) 566-1057; email address: fleisig.erica@epa.gov.

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I. General Information

Does this action apply to me?

This proposed action is proposing to withdraw certain federal human health criteria that are no longer needed due to the EPA's approval of corresponding state human health criteria on May 10, 2019. Entities discharging in Washington waters, citizens, as well as the state of Washington may be interested in this rulemaking, as after the completion of this rulemaking Washington's EPA-approved human health criteria, rather than the federal human health criteria, will be the applicable water quality standards in Washington waters for CWA purposes. If you have questions regarding the applicability of this action to a particular entity, consult the person identified in the preceding FOR FURTHER INFORMATION CONTACT section.

II. Background

A. What are the applicable federal statutory and regulatory requirements?

Consistent with the CWA, the EPA's water quality standards (WQS) program assigns to states and authorized tribes the primary authority for adopting WQS.[1] After states adopt WQS, they must be submitted to the EPA for review and action in accordance with the CWA. The Act authorizes the EPA to promulgate federal WQS following the EPA's disapproval of state WQS or an Administrator's determination that new or revised WQS are "necessary to meet the requirements of the Act."[2]

On September 14, 2015, the EPA proposed a federal rule to establish updated human health criteria in Washington based on an Administrator's determination that new or revised WQS were necessary to meet the requirements of the Act. Specifically, in its 2015 proposed rulemaking, the EPA considered data representing regional and local fish consumption that

[1] 33 U.S.C. 1313(a), (c).
[2] 33 U.S.C. 1313(c)(4).

reflected consumption levels much higher than the National Toxics Rule (NTR) fish consumption rate of 6.5 grams/day, and accordingly "determined that the federal human health criteria in the NTR as applied to Washington no longer protect the relevant designated uses of Washington's waters."[3] To address the Administrator's determination pursuant to its section 303(c) authority, the EPA's proposed rulemaking established human health criteria using a fish consumption rate of 175 grams/day.[4] As explained in the EPA's May 10, 2019, letter, the EPA also used all of the inputs from the EPA's recently updated 2015 CWA section 304(a) recommendations to calculate the proposed federal criteria.[5]

Following the EPA's 2015 proposed rulemaking, on August 1, 2016, Washington submitted human health criteria for the EPA's review.[6] Washington's criteria were based on a fish consumption rate of 175 grams/day and incorporated most of the components of the EPA's updated 2015 CWA section 304(a) recommendations.[7] By using a fish consumption rate of 175 grams/day which is consistent with the EPA's proposed rulemaking, Washington's human health criteria addressed the basis for the EPA's 2015 Administrator's determination–that it is necessary to adopt new or revised human health criteria based on a higher fish consumption rate.

[3] *Revision of Certain Water Quality Standards Applicable to Washington*, 80 FR 55063, 55066 (September 14, 2015).
[4] *Id.* at 55066-55067.
[5] May 10, 2019. Letter and enclosed Technical Support Document from Chris Hladick, Regional Administrator, EPA Region 10 to Maia Bellon, Director, Department of Ecology, Re: The EPA's Reversal of the November 15, 2016 Clean Water Act Section 303(c) Partial Disapproval of Washington's Human Health Water Quality Criteria and Decision to Approve Washington's Criteria, at 7.
[6] Department of Ecology. *Washington State Water Quality Standards: Human health criteria and implementation tools, Overview of key decisions in rule amendment.* August 2016. Ecology Publication no. 16-10-025.
[7] *Id.*

For the reasons explained in the EPA's 2016 disapproval letter and final federal rule, the EPA partially disapproved certain human health criteria that Washington submitted to the EPA.[8] The EPA's final federal rule was issued concurrent with its partial disapproval letter.[9] In explaining the rationale underlying the partial disapproval of Washington's August 1, 2016, submittal, the EPA "agree[d] with Washington's decision to derive the human health criteria using a FCR of 175 g/day," noting that that value was consistent with the EPA's final federal rule,[10] however the EPA disagreed with the risk management decisions the State made during the development of its human health criteria and its decision not to incorporate all components of the updated 2015 CWA section 304(a) recommendations.[11]

Although the EPA promulgated human health criteria for Washington in the NTR, and subsequently in November 2016, the EPA prefers that states maintain primary responsibility and establish their own WQS. In response to a February 21, 2017, petition from several entities asking the EPA to reconsider the partial disapproval of Washington's August 2016 human health

[8] November 15, 2016. Letter (EPA Partial Disapproval Letter) and enclosed Technical Support Document (Partial Disapproval TSD) from Daniel D. Opalski, Director, Office of Water and Watersheds, EPA Region 10 to Maia Bellon, Director, Department of Ecology, Re: EPA's Partial Approval/Disapproval of Washington's Human Health Water Quality Criteria and Implementation Tools; 81 FR at 85417 ("Concurrent with this final rule, EPA is taking action under CWA 303(c) to approve in part, and disapprove in part, the human health criteria submitted by Washington.").

[9] *Revision of Certain Water Quality Standards Applicable to Washington*, 81 FR 85417 (November 28, 2016). Contrary to at least one comment letter EPA received prior to its May 10, 2019 Decision to Approve Washington's criteria, the EPA did not provide the State with 90 days to remedy the partial disapproval, as envisioned in section 303(c)(3) of the Act. *See* May 7, 2019 Letter from the Lower Elwha Klallam Tribe to Administrator Andrew Wheeler, EPA, Re: Washington State Water Quality Standards at 4.

[10] Partial Disapproval TSD at 16.

[11] May 10, 2019. Letter and enclosed Technical Support Document from Chris Hladick, Regional Administrator, EPA Region 10 to Maia Bellon, Director, Department of Ecology, Re: The EPA's Reversal of the November 15, 2016 Clean Water Act Section 303(c) Partial Disapproval of Washington's Human Health Water Quality Criteria and Decision to Approve Washington's Criteria, at 7-9.

criteria,[12] the EPA issued a letter on August 3, 2018 stating its intent to reconsider its partial disapproval of Washington's human health criteria and its subsequent promulgation of federal criteria.[13] After a thorough review of the State's 2016 submittal and applicable provisions of the CWA, implementing regulations and longstanding EPA guidance, on May 10, 2019, the EPA reconsidered its partial disapproval of Washington's human health criteria and approved all but two of the criteria that the EPA previously disapproved.[14]

As provided in 40 CFR 131.21(c), federally promulgated WQS that are more stringent than EPA-approved state WQS remain applicable for purposes of the CWA until the EPA withdraws the federal standards. Accordingly, the EPA is proposing to amend the federal regulations to withdraw those federally promulgated human health criteria for which the EPA has approved Washington's criteria and is providing an opportunity for public comment on this proposed action.

The EPA's proposal to withdraw federal criteria following approval of state criteria is consistent with the federal and state roles contemplated by the CWA. Consistent with the cooperative federalism structure of the CWA, once the EPA approves state WQS addressing the

[12] February 21, 2017. *Petition for Reconsideration of EPA's Partial Disapproval of Washington's August 1, 2016 submission on Human Health Water Quality Criteria and Implementation Tools, and Repeal of the Final Rule Revision of Certain Federal Water Quality Standards Applicable to Washington, 81 Fed. Reg 85,417 (Nov. 28, 2016)* submitted by Northwest Pulp & Paper Association, American Forest and Paper Association, Association of Washington Business, Greater Spokane Incorporated, Treated Wood Council, Western Wood Preservers Institute, Utility Water Act Group and Washington Farm Bureau.

[13] August 3, 2018. Letter from David P. Ross, Assistant Administrator, Office of Water, EPA to Penny Shamblin, Counsel for Utility Water Act Group, Re: Petition for Reconsideration of the Environmental Protection Agency's (EPA) Partial Disapproval of Washington's Human Health Water Quality Criteria and Implementation Tools submitted by the State of Washington on August 1, 2016, and Repeal of the Final Rule Revision of Certain Federal Water Quality Standards Applicable to Washington.

[14] May 10, 2019. Letter and enclosed Technical Support Document from Chris Hladick, Regional Administrator, EPA Region 10 to Maia Bellon, Director, Department of Ecology, Re: The EPA's Reversal of the November 15, 2016 Clean Water Act Section 303(c) Partial Disapproval of Washington's Human Health Water Quality Criteria and Decision to Approve Washington's Criteria.

same pollutants for which the EPA has promulgated federal WQS, it is incumbent on the EPA to withdraw the federal WQS to enable the EPA-approved state WQS to become the applicable WQS for CWA purposes. That is what the EPA is proposing to do in this proposed rulemaking. This proposal is consistent with the EPA's withdrawal of other federally promulgated WQS following the EPA's approval of state-adopted WQS.[15] Further, although the state of Washington opposes the EPA withdrawing the 2016 federal human health criteria, the State remains free to promulgate the federal standards into state law if it so chooses.[16]

Shortly before taking its action to approve Washington's human health criteria, the EPA received several letters expressing concerns about the EPA revising or repealing the federal criteria and the EPA's authority under the CWA to "propose new standards" for a state.[17] As described herein, the EPA reconsidered the human health criteria that Washington submitted to the EPA in 2016 and approved the majority of those criteria. In light of that approval, the EPA proposes to amend federal regulations to withdraw the federal criteria the EPA previously promulgated for Washington. Thus, in this proposed rulemaking, the EPA is not proposing to promulgate any new or revised federal criteria for Washington. The EPA's authority to

[15] See e.g., *Withdrawal of Certain Federal Water Quality Criteria Applicable to California: Lead, Chlorodibromomethane, and Dichlorobromomethane*, 83 FR 52163 (Oct. 16, 2018); *Water Quality Standards for the State of Florida's Lakes and Flowing Waters; Withdrawal*, 79 FR 57447 (Sept. 25, 2014); *Withdrawal of Certain Federal Water Quality Criteria Applicable to California, New Jersey and Puerto Rico*, 78 FR 20252 (Apr. 4, 2013).

[16] *See* May 7, 2019. Letter from Maia D. Bellon, Director, Washington Department of Ecology, to Hon. Andrew R. Wheeler, Administrator, EPA, Re: EPA's Intention to Reconsider Washington State's Water Quality Standards for Human Health Criteria.

[17] May 8, 2019. Letter from Bob Ferguson, Attorney General, Washington, to Hon. Andrew R. Wheeler, Administrator, EPA; *see also* May 7, 2019. Letter from Maia D. Bellon, Director, Washington Department of Ecology, to Hon. Andrew R. Wheeler, Administrator, EPA, Re: EPA's Intention to Reconsider Washington State's Water Quality Standards for Human Health Criteria; May 7, 2019. Letter from Frances G. Charles, Chairwoman, to Hon. Andrew R. Wheeler, Administrator, EPA, Re: Washington State Water Quality Standards (Human Health Criteria; May 3, 2019. Letter from Justin Parker, Executive Director, Northwest Indian Fisheries Commission, to Hon. Andrew R. Wheeler, Administrator, and Mr. David Ross, Assistant Administrator, Office of Water, EPA, Re: EPA Action Regarding Washington's Human Health Water Quality Criteria.

promulgate new or revised federal criteria is not at issue in this proposal to withdraw the federal criteria.

B. What are the applicable federal water quality criteria that the EPA is proposing to withdraw?

This action proposes to amend federal regulations to withdraw all federal human health criteria promulgated for Washington in November 2016 at 40 CFR 131.45,[18] with the exception of criteria for arsenic, methylmercury, and bis(2-chloro-1-methylethyl) ether. For arsenic, on May 10, 2019, the EPA reaffirmed its November 2016 disapproval of the two criteria Washington submitted for arsenic (water + organism and organism only), and therefore the federal arsenic criteria for Washington at 40 CFR 131.45 will remain in place.[19] For methylmercury and bis(2-chloro-1-methylethyl) ether, Washington did not submit criteria for those pollutants and therefore the federally promulgated criteria are the only criteria in effect for those pollutants in the State. Although the EPA is proposing to maintain the federally promulgated criteria for these pollutants, the EPA is also soliciting comment on whether to withdraw the federally promulgated criteria for methylmercury and bis(2-chloro-1-methylethyl) ether.

1. Washington human health criteria that the EPA approved on May 10, 2019

On May 10, 2019, the EPA revised its disapproval of 141 of Washington's human health criteria and approved those criteria. In addition, the EPA approved four criteria for two pollutants

[18] *Revision of Certain Water Quality Standards Applicable to Washington*, 81 FR 85417 (November 28, 2016).
[19] May 10, 2019. Letter and enclosed Technical Support Document from Chris Hladick, Regional Administrator, EPA Region 10 to Maia Bellon, Director, Department of Ecology, Re: The EPA's Reversal of the November 15, 2016 Clean Water Act Section 303(c) Partial Disapproval of Washington's Human Health Water Quality Criteria and Decision to Approve Washington's Criteria.

(thallium and 2,3,7,8-TCDD [dioxin]) that the EPA previously deferred action on in November 2016.[20]

Because Washington now has 145 additional human health criteria approved by the EPA for CWA purposes, the EPA has determined that the 141 corresponding federally promulgated human health criteria are no longer needed in Washington. As noted in the EPA's May 10, 2019, action, the EPA determined upon reconsideration that Washington's 2016 human health criteria are scientifically sound and protective of the applicable designated uses in the state.[21] More information on the EPA's action to approve Washington's human health criteria upon reconsideration, including the EPA's approval letter and associated Technical Support Document, can be accessed at https://www.epa.gov/wqs-tech/water-quality-standards-regulations-washington and in the docket for this proposed rulemaking.

As explained above, the EPA seeks public comment before withdrawing the federally promulgated criteria. Although the EPA has determined that these state criteria are scientifically sound and protective of the applicable designated uses for waters in the state and otherwise meet the requirements of the CWA and EPA's implementing regulations at 40 CFR 131, the EPA recognizes that many of Washington's human health criteria are less stringent than the EPA's federally promulgated criteria which are based on the EPA's CWA section 304(a) criteria (see Table 1). However, as explained in the EPA's May 10, 2019, approval and Technical Support

[20] May 10, 2019. Letter and enclosed Technical Support Document from Chris Hladick, Regional Administrator, EPA Region 10 to Maia Bellon, Director, Department of Ecology, Re: The EPA's Reversal of the November 15, 2016 Clean Water Act Section 303(c) Partial Disapproval of Washington's Human Health Water Quality Criteria and Decision to Approve Washington's Criteria.

[21] May 10, 2019. Letter and enclosed Technical Support Document from Chris Hladick, Regional Administrator, EPA Region 10 to Maia Bellon, Director, Department of Ecology, Re: The EPA's Reversal of the November 15, 2016 Clean Water Act Section 303(c) Partial Disapproval of Washington's Human Health Water Quality Criteria and Decision to Approve Washington's Criteria.

Document, the EPA's CWA section 304(a) criteria are national recommendations and states retain discretion to adopt different criteria, that may be less stringent, if the state's criteria are based on sound science and protect the designated use. In issuing the May 10, 2019, approval, the EPA determined that Washington's human health criteria meet the requirements of the CWA and the EPA's regulations because the State's inputs are based on sound science and the resulting criteria protect the designated uses.

Table 1—Comparison of Federally Promulgated Criteria and EPA–Approved Washington Criteria

			Washington's Criteria that EPA Approved on May 10, 2019		EPA Federally Promulgated Criteria at 40 CFR 131.45 that EPA is Proposing to Withdraw	
	Chemical	CAS Number	Water & Organisms (µg/L)	Organisms Only (µg/L)	Water & Organisms (µg/L)	Organisms Only (µg/L)
1	1,1,1-Trichloroethane	71556	47000	160000	20000	50000
2	1,1,2,2-Tetrachloroethane	79345	0.12	0.46	0.1	0.3
3	1,1,2-Trichloroethane	79005	0.44	1.8	0.35	0.90
4	1,1-Dichloroethylene	75354	1200	4100	700	4000
5	1,2,4-Trichlorobenzene	120821	0.12	0.14	0.036	0.037
6	1,2-Dichlorobenzene	95501	2000	2500	700	800
7	1,2-Dichloroethane	107062	9.3	120	8.9	73
8	1,2-Dichloropropane	78875	*	*	*	*
9	1,2-Diphenylhydrazine	122667	0.015	0.023	0.01	0.02
10	1,2-Trans-Dichloroethylene	156605	600	5800	200	1000
11	1,3-Dichlorobenzene	541731	13	16	2	2
12	1,3-Dichloropropene	542756	0.24	2.0	0.22	1.2
13	1,4-Dichlorobenzene	106467	460	580	200	200
14	2,3,7,8-TCDD (Dioxin)	1746016	0.000000064	0.000000064	0.000000013	0.000000014
15	2,4,6-Trichlorophenol	88062	*	*	*	*
16	2,4-Dichlorophenol	120832	25	34	10	10
17	2,4-Dimethylphenol	105679	*	*	*	*

			Washington's Criteria that EPA Approved on May 10, 2019		EPA Federally Promulgated Criteria at 40 CFR 131.45 that EPA is Proposing to Withdraw	
	Chemical	**CAS Number**	**Water & Organisms (µg/L)**	**Organisms Only (µg/L)**	**Water & Organisms (µg/L)**	**Organisms Only (µg/L)**
18	2,4-Dinitrophenol	51285	60	610	30	100
19	2,4-Dinitrotoluene	121142	*	*	*	*
20	2-Chloronaphthalene	91587	170	180	100	100
21	2-Chlorophenol	95578	*	*	*	*
22	2-Methyl-4,6-Dinitrophenol	534521	7.1	25	3	7
23	3,3'-Dichlorobenzidine	91941	*	*	*	*
24	3-Methyl-4-Chlorophenol	59507	*	*	*	*
25	4,4'-DDD	72548	0.000036	0.000036	0.0000079	0.0000079
26	4,4'-DDE	72559	0.000051	0.000051	0.00000088	0.00000088
27	4,4'-DDT	50293	0.000025	0.000025	0.0000012	0.0000012
28	Acenaphthene	83329	110	110	30	30
29	Acrolein	107028	*	*	*	*
30	Acrylonitrile	107131	*	*	*	*
31	Aldrin	309002	0.0000057	0.0000058	0.000000041	0.000000041
32	alpha-BHC	319846	0.0005	0.00056	0.000048	0.000048
33	alpha-Endosulfan	959988	9.7	10	6	7
34	Anthracene	120127	3100	4600	100	100
35	Antimony	7440360	12	180	6	90
36	Arsenic	7440382	Disapproved	Disapproved	N/A	N/A
37	Asbestos	1332214	*	*	*	*
38	Benzene	71432	*	*	*	*
39	Benzidine	92875	*	*	*	*
40	Benzo(a) Anthracene	56553	0.014	0.021	0.00016	0.00016
41	Benzo(a) Pyrene	50328	0.0014	0.0021	0.000016	0.000016
42	Benzo(b) Fluoranthene	205992	0.014	0.021	0.00016	0.00016
43	Benzo(k) Fluoranthene	207089	0.014	0.21	0.0016	0.0016
44	beta-BHC	319857	0.0018	0.002	0.0013	0.0014
45	beta-Endosulfan	33213659	*	*	*	*
46	Bis(2-Chloroethyl) Ether	111444	*	*	*	*
47	[a]Bis(2-Chloro-1-Methylethyl) Ether	108601	Not submitted	Not submitted	See explanation below	See explanation below

			Washington's Criteria that EPA Approved on May 10, 2019		EPA Federally Promulgated Criteria at 40 CFR 131.45 that EPA is Proposing to Withdraw	
	Chemical	**CAS Number**	**Water & Organisms (µg/L)**	**Organisms Only (µg/L)**	**Water & Organisms (µg/L)**	**Organisms Only (µg/L)**
48	Bis(2-Ethylhexyl) Phthalate	117817	0.23	0.25	0.045	0.046
49	Bromoform	75252	5.8	27	4.6	12
50	Butylbenzyl Phthalate	85687	0.56	0.58	0.013	0.013
51	Carbon Tetrachloride	56235	*	*	*	*
52	Chlordane	57749	0.000093	0.000093	0.000022	0.000022
53	Chlorobenzene	108907	380	890	100	200
54	Chlorodibromomethane	124481	0.65	3	0.60	2.2
55	Chloroform	67663	260	1200	100	600
56	Chrysene	218019	1.4	2.1	0.016	0.016
57	Copper	7440508	*	*	*	*
58	Cyanide	57125	19	270	9	100
59	Dibenzo(a,h) Anthracene	53703	0.0014	0.0021	0.000016	0.000016
60	Dichlorobromomethane	75274	0.77	3.6	0.73	2.8
61	Dieldrin	60571	0.0000061	0.0000061	0.000000070	0.000000070
62	Diethyl Phthalate	84662	4200	5000	200	200
63	Dimethyl Phthalate	131113	92000	130000	600	600
64	Di-n-Butyl Phthalate	84742	450	510	8	8
65	Endosulfan Sulfate	1031078	9.7	*	9	*
66	Endrin	72208	0.034	0.035	0.002	0.002
67	Endrin Aldehyde	7421934	*	*	*	*
68	Ethylbenzene	100414	200	270	29	31
69	Fluoranthene	206440	16	16	6	6
70	Fluorene	86737	420	610	10	10
71	Gamma-BHC; Lindane	58899	15	17	0.43	0.43
72	Heptachlor	76448	0.0000099	0.00001	0.00000034	0.00000034
73	Heptachlor Epoxide	1024573	0.0000074	0.0000074	0.0000024	0.0000024
74	Hexachlorobenzene	118741	0.000051	0.000052	0.0000050	0.0000050
75	Hexachlorobutadiene	87683	0.69	4.1	0.01	0.01
76	Hexachlorocyclopentadiene	77474	150	630	1	1
77	Hexachloroethane	67721	0.11	0.13	0.02	0.02
78	Indeno(1,2,3-cd) Pyrene	193395	0.014	0.021	0.00016	0.00016

			Washington's Criteria that EPA Approved on May 10, 2019		EPA Federally Promulgated Criteria at 40 CFR 131.45 that EPA is Proposing to Withdraw	
	Chemical	**CAS Number**	**Water & Organisms (µg/L)**	**Organisms Only (µg/L)**	**Water & Organisms (µg/L)**	**Organisms Only (µg/L)**
79	Isophorone	78591	*	*	*	*
80	Methyl Bromide	74839	520	*	300	*
81	Methylene Chloride	75092	16	250	10	100
82	Methylmercury	22967926	(Not submitted)	(Not submitted)	See explanation below	See explanation below
83	Nickel	7440020	150	190	80	100
84	Nitrobenzene	98953	55	320	30	100
85	N-Nitrosodimethylamine	62759	*	*	*	*
86	N-Nitrosodi-n-Propylamine	621647	*	*	*	*
87	N-Nitrosodiphenylamine	86306	*	*	*	*
88	Pentachlorophenol (PCP)	87865	0.046	0.1	0.002	0.002
89	Phenol	108952	18000	200000	9000	70000
90	Polychlorinated Biphenyls (PCBs)	PCB	0.00017	0.00017	0.000007	0.000007
91	Pyrene	129000	310	460	8	8
92	Selenium	7782492	120	480	60	200
93	Tetrachloroethylene	127184	4.9	7.1	2.4	2.9
94	Thallium	7440280	0.24	0.27	1.7	6.3
95	Toluene	108883	180	410	72	130
96	Toxaphene	8001352	*	*	*	*
97	Trichloroethylene	79016	0.38	0.86	0.3	0.7
98	Vinyl Chloride	75014	*	0.26	*	0.18
99	Zinc	7440666	2300	2900	1000	1000

[a] Bis(2-Chloro-1-Methylethyl) Ether was previously listed as Bis(2-Chloroisopropyl) Ether.

* EPA approved Washington's criteria for these pollutants in November 2016 and therefore did not promulgate corresponding federal criteria.

2. Methylmercury and bis(2-chloro-1-methylethyl) ether

Washington did not submit human health criteria for methylmercury or bis(2-chloro-1-methylethyl) ether in August 2016. For methylmercury, Washington explained in its August 2016 submittal documents that it "decided to defer state adoption of [human health criteria] for methylmercury at this time, and plans to schedule adoption of methylmercury criteria and develop a comprehensive implementation plan after the current rulemaking is completed and has received EPA Clean Water Act approval."[22] To date, the EPA is not aware of any efforts Washington has undertaken since 2016 to adopt methylmercury criteria or develop associated implementation materials, likely because the EPA promulgated a federal criterion. For bis(2-chloro-1-methylethyl) ether (which was previously named 'bis(2-chloroisopropyl) ether' in the NTR), Washington explained its position that "bis(2-chloroisopropyl) ether does not have a [CWA section] 304(a) national recommended criteria associated with it, thus the proposed criteria for this chemical were deleted from the [state's] final rule. Ecology has determined that the older NTR criteria for bis(2-chloroisopropyl) ether were incorrect, and were not developed for that particular priority pollutant. Ecology is adopting criteria only for the priority pollutants for which EPA has published 304(a) criteria documents."[23]

CWA section 303(c)(2)(B) requires states to adopt numeric criteria for all toxic pollutants listed pursuant to CWA section 307(a)(1) for which the EPA has published 304(a) criteria, as necessary to protect the states' designated uses. In 1992, the EPA promulgated the NTR at 40 CFR 131.36, establishing chemical-specific numeric criteria for 85 priority toxic pollutants for 14 states and territories (states), including Washington, that were not in compliance with the

[22] Department of Ecology. *Washington State Water Quality Standards: Human health criteria and implementation tools, Overview of key decisions in rule amendment.* August 2016. Ecology Publication no. 16-10-025. Page 80.
[23] *Id.*

requirements of CWA section 303(c)(2)(B). In the proposed NTR, the EPA provided states three options for demonstrating compliance with section 303(c)(2)(B).[24]

- Option 1: Adopt statewide numeric criteria in state WQS for all section 307(a) toxic pollutants for which the EPA has developed criteria guidance, regardless of whether the pollutants are known to be present.
- Option 2: Adopt chemical-specific numeric criteria for priority toxic pollutants that are the subject of the EPA's section 304(a) criteria guidance, where the state determines based on available information that the pollutants are present or discharged and can reasonably be expected to interfere with designated uses.
- Option 3: Adopt a procedure to be applied to a narrative WQS provision prohibiting toxicity in receiving waters. Such procedures would be used by the state in calculating derived numeric criteria which must be used for all purposes under section 303(c) of the CWA. At a minimum, such criteria need to be developed for section 307(a) toxic pollutants, as necessary to support designated uses, where these pollutants are discharged or present in the affected waters and could reasonably be expected to interfere with designated uses.

For the NTR in Washington, the EPA applied Option 1, explaining that Washington "has not adopted numeric criteria for any human health based criteria for priority pollutants, and EPA has reason to believe that at least some additional criteria are necessary to comply with section

[24] EPA. 1991. *Amendments to the Water Quality Standards Regulation to Establish the Numeric Criteria for Priority Toxic Pollutants Necessary to Bring All States Into Compliance With Section 303(c)(2)(B)*. 56 FR 58420, November 19, 1991. https://www.epa.gov/sites/production/files/2015-06/documents/ntr-proposal-1991.pdf.

303(c)(2)(B)."[25] The EPA further explained that it did not attempt "to determine the specific priority pollutants and water bodies that require criteria. However, EPA has determined that at least some Federal criteria are necessary to protect designated uses. This determination is supported by information in the record which demonstrates that priority toxic pollutants are discharged or present in surface waters at levels that can reasonably be expected to interfere with State designated uses. For some priority toxic pollutants, available data clearly demonstrate use impairment and the need for toxics criteria. For most priority toxic pollutants, however, available data on the discharge and presence of priority toxic pollutants are spatially and temporally limited. Nevertheless, EPA believes that the data for many of these pollutants are sufficient to satisfy the 'reasonable expectation' test established in section 303(c)(2](B)."[26]

In 2016, Washington explained in its submittal that it was following Option 1 outlined in the NTR by adopting human health criteria for all CWA section 307(a) priority toxic pollutants (except mercury/methylmercury) for which the EPA has developed national recommended CWA section 304(a) criteria, regardless of whether the pollutants are known to be present in the state.[27] The EPA followed this same approach in 2016 when promulgating federal human health criteria for Washington.[28] However, while Washington concluded in 2016 that it wanted to retain the 1992 federally promulgated NTR criteria for mercury and adopt methylmercury criteria in the future, the EPA determined that revised criteria for all priority pollutants were necessary in Washington and therefore promulgated a fish tissue methylmercury criterion (replacing the NTR

[25] *Id*.
[26] *Id*.
[27] Department of Ecology. *Washington State Water Quality Standards: Human health criteria and implementation tools, Overview of key decisions in rule amendment*. August 2016. Ecology Publication no. 16-10-025. Page 20.
[28] *Revision of Certain Water Quality Standards Applicable to Washington*, 81 FR 85417 (November 28, 2016).

water column mercury criteria) for Washington in 2016. Also, as explained in a memo to the file in the docket for the 2016 rulemaking, [29] the EPA disagreed with Washington's conclusion that bis(2-chloro-1-methylethyl) ether was not a CWA section 307(a) priority pollutant with associated CWA section 304(a) criteria, and therefore the EPA promulgated criteria for bis(2-chloro-1-methylethyl) ether at 40 CFR 131.45. Because the EPA followed the same Option 1 approach in 2016 as it used in the NTR and as Washington used for its submittal in 2016, the EPA did not specifically conduct a search for available information indicating that any of the priority pollutants, including methylmercury and bis(2-chloro-1-methylethyl) ether, are present or discharged in Washington and can reasonably be expected to interfere with Washington's designated uses.

However, as Washington noted in its 2016 submittal, mercury contamination is widespread across all 50 states, and Washington has listed waters as impaired and issued fish advisories due to mercury.[30] Additionally, Washington's 2016 cost-benefit analysis for its human health criteria rulemaking identified mercury as one of the five most detected chemicals in three discharger categories (wastewater treatment plants, pulp and paper mills, and resource extraction).[31] For its final rulemaking in 2016, the EPA identified reasonable potential for certain industrial dischargers in the state to cause or contribute to exceedances of the federally

[29] EPA. 2016. Bis chem CAS 108-60-1 Memo to File clean. https://www.regulations.gov/document?D=EPA-HQ-OW-2015-0174-0301.
[30] Department of Ecology. *Washington State Water Quality Standards: Human health criteria and implementation tools, Overview of key decisions in rule amendment*. August 2016. Ecology Publication no. 16-10-025. Page 80.
[31] Department of Ecology. *Final Cost-Benefit and Least-Burdensome Alternative Analyses*. July 2016. Ecology Publication no. 16-10-019. Page 27.

promulgated methylmercury criterion.[32] Therefore, the available evidence indicates that mercury is present and discharged in Washington and can reasonably be expected to interfere with Washington's designated uses.

The available data on bis(2-chloro-1-methylethyl) ether are more limited. The EPA did not identify reasonable potential for any dischargers in Washington to cause or contribute to exceedances of the federally promulgated criteria for bis(2-chloro-1-methylethyl) ether. Washington did not evaluate bis(2-chloro-1-methylethyl) ether in its cost-benefit analysis because it did not include this pollutant in the state rulemaking. Therefore, the EPA is not aware of evidence on whether bis(2-chloro-1-methylethyl) ether is present or discharged in Washington and can reasonably be expected to interfere with Washington's designated uses.

Given the information outlined above, the EPA proposes to retain (i.e., not withdraw) the methylmercury and bis(2-chloro-1-methylethyl) ether human health criteria promulgated for Washington at 40 CFR 131.45 (81 FR 85417, November 28, 2016). This is consistent with the Option 1 approach and will ensure that Washington has CWA-effective human health criteria for these two pollutants that may be present in Washington's waters. The EPA specifically solicits any additional information on whether mercury/methylmercury and/or bis(2-chloro-1-methylethyl) ether are present or discharged in Washington and can reasonably be expected to interfere with Washington's designated uses. Based on the public comments received, the EPA may consider withdrawing the federally promulgated criteria for one or both of these pollutants. If the EPA withdraws the federal criteria for methylmercury and/or bis(2-chloro-1-methylethyl)

[32] Abt Associates. *Economic Analysis for Water Quality Standards Applicable to the State of Washington*. October 21, 2016. https://www.regulations.gov/document?D=EPA-HQ-OW-2015-0174-0300.

ether, there would be no applicable numeric criteria for CWA purposes. Washington may, at any time adopt and submit to the EPA human health criteria for either pollutant, consistent with CWA section 303(c) and the EPA's implementing regulations at 40 CFR part 131.

III. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

It has been determined that this proposed rule is not a "significant regulatory action" under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is, therefore, not subject to review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011). The proposed rule does not establish any requirements directly applicable to regulated entities or other sources of toxic pollutants.

B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This action is expected to be an Executive Order 13771 deregulatory action.

C. Paperwork Reduction Act (PRA)

This action does not impose any new information-collection burden under the Paperwork Reduction Act (PRA) because it is administratively withdrawing federal requirements that are no longer needed in Washington. It does not include any information collection, reporting, or recordkeeping requirements. The Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations 40 CFR part 131 and has assigned OMB control number 2040–0286.

D. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (RFA). This action will not impose any requirements on small entities. Small entities, such as small businesses or small governmental jurisdictions, are not directly regulated by this rule.

E. Unfunded Mandates Reform Act (UMRA)

This action contains no unfunded federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. As this action proposes to withdraw certain federally promulgated criteria, the action imposes no enforceable duty on any state, local, or tribal governments, or the private sector.

F. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. This rule imposes no regulatory requirements or costs on any state or local governments. Thus, Executive Order 13132 does not apply to this action.

G. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This action may have tribal implications. However, it will neither impose substantial direct compliance costs on federally recognized tribal governments, nor preempt tribal law. In the state of Washington, there are 29 federally recognized Indian tribes.

The EPA initiated consultation with federally recognized tribal officials under the EPA's Policy on Consultation and Coordination with Indian tribes early in the process of developing

this proposed rule to allow meaningful and timely input into its development. The EPA initially offered tribal consultation on this rule making on May 21, 2019. EPA staff then offered two informational calls for tribal staff on June 4 and 5, 2019, to assist tribes with the consultation process, including the tribes' decisions on whether to accept the offer to consult. Many tribes have expressed dissatisfaction that EPA did not offer consultation prior to its May 10, 2019, decision and have questioned how meaningful the EPA's offer for consultation is on this rule making as a result. To the extent tribes have been interested in consulting on this rulemaking, they have emphasized the importance of consultation occurring prior to publication of a proposed rule. A number of tribes expressed the need for more time prior to the proposed rule publication to conduct consultation, for more information provided in advance to prepare for and engage in consultation and for the actual EPA decision-maker to be present.

Input received from tribes during consultation, meetings and through letters received thus far, indicates tribes are opposed to this proposed action. Tribes have raised health, economic and implementation concerns, as well as the EPA's trust responsibility, treaty obligations and consultation practices. While the EPA acknowledges it may not satisfy the tribal consultation expectations of each tribe, the EPA will continue to offer the opportunity to consult up to the point of finalizing this rule and will evaluate the input received before making a final decision.

H. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks

This rule is not subject to Executive Order 13045, because it is not economically significant as defined in Executive Order 12866, and because the environmental health or safety risks addressed by this action do not present a disproportionate risk to children.

I. Executive Order 13211: Actions that Significantly Affect Energy Supply, Distribution, or Use

This action is not a "significant energy action" because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

J. National Technology Transfer and Advancement Act of 1995

This proposed rulemaking does not involve technical standards.

K. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States. The EPA concludes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low income populations and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). The EPA has previously determined that Washington's adopted and EPA-approved criteria are protective of human health.

List of Subjects in 40 CFR Part 131

Environmental protection, Indians-lands, Intergovernmental relations, Reporting and recordkeeping requirements, Water pollution control.

Dated: July 23, 2019.

Andrew R. Wheeler,

Administrator.

For the reasons set forth in the preamble, the EPA proposes to amend 40 CFR part 131 as follows:

PART 131—WATER QUALITY STANDARDS

1. The authority citation for part 131 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

Subpart D—Federally Promulgated Water Quality Standards

2. Amend § 131.45 by revising paragraph (b) to read as follows:

§ 131.45 Revision of certain Federal water quality criteria applicable to Washington.

* * * * *

(b) *Criteria for priority toxic pollutants in Washington.* The applicable human health criteria are shown in Table 1 to paragraph (b)..

TABLE 1 TO PARAGRAPH (b)—HUMAN HEALTH CRITERIA FOR WASHINGTON

A		B					C	
Chemical	**CAS No.**	**Cancer Slope factor, CSF (per mg/kg·d)**	**Relative source contribution, RSC (-)**	**Reference dose, RfD (mg/kg·d)**	**Bio-accumulation factor (L/kg tissue)**	**Bio-concentration factor (L/kg tissue)**	**Water & organisms (µg/L)**	**Organisms only (µg/L)**
		(B1)	(B2)	(B3)	(B4)	(B5)	(C1)	(C2)
1. Arsenic**	7440382	1.75	-	-	-	44	[a]0.018	[a]0.14
2. Bis(2-Chloro-1-Methylethyl) Ether*	108601	-	0.50	0.04	10	-	400	900
3. Methylmercury	22967926	-	2.7E-05	0.0001	-	-	-	[b]0.03 (mg/kg)

[a] This criterion refers to the inorganic form of arsenic only.
[b] This criterion is expressed as the fish tissue concentration of methylmercury (mg methylmercury/kg fish). See *Water Quality Criterion for the Protection of Human Health: Methylmercury* (EPA-823-R-01-001, January 3, 2001) for how this value is calculated using the criterion equation in the EPA's 2000 Human Health Methodology rearranged to solve for a protective concentration in fish tissue rather than in water.
* Bis(2-Chloro-1-Methylethyl) Ether was previously listed as Bis(2-Chloroisopropyl) Ether.
** These criteria were promulgated for Washington in the National Toxics Rule at 40 CFR 131.36, and are moved into 40 CFR 131.45 to have one comprehensive human health criteria rule for Washington.

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