



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF WATER

August 30, 2022

Nina Bell, J.D., Executive Director
Northwest Environmental Advocates
P.O. Box 12187
Portland, OR 97212-0187

Re: Revised Response to Petition for Rulemaking on Water Quality Criteria for Toxics in the State of Washington

Dear Ms. Bell:

The U.S. Environmental Protection Agency (EPA) is issuing a revised response to your Administrative Procedure Act (APA) rulemaking petition dated October 28, 2013. In considering your petition, the agency also considered your follow up letters dated August 31, 2015, February 9, 2016, and February 21, 2017. The October 2013 petition requested that EPA use its federal rulemaking authority under Clean Water Act (CWA) Section 303(c)(4)(B) to update water quality criteria for toxics to protect human health and aquatic life in Washington. Specifically, your petition requested that EPA update Washington's human health and aquatic life criteria as necessary to meet the requirements of CWA Section 303(c)(2)(B).

EPA provided an interim response on May 4, 2016, notifying Northwest Environmental Advocates (NWEA) of the steps that EPA was taking towards addressing Washington's human health criteria and asking a series of follow up questions regarding Washington's aquatic life criteria. On November 15, 2016, EPA approved 45 updated human health criteria submitted by Washington and concurrently finalized a federal rule promulgating an additional 144 human health criteria for Washington. 81 FR 85417 (Nov. 28, 2016).¹ In a letter dated February 21, 2017, NWEA provided a response to EPA's interim letter.

On May 31, 2017, EPA denied NWEA's petition, explaining that it was declining to undertake the evaluation to determine whether new or revised criteria are necessary to meet CWA requirements.² EPA's response described the actions it had taken related to Washington's human health criteria and its reasons for denying the petition for Washington's aquatic life criteria. Specifically, in declining to

¹ EPA is currently working to reinstate protective and science-based human health criteria in Washington that EPA withdrew in June 2020. See 87 FR 19046 (Apr. 1, 2022).

² "Re: Final Response to Petition for Rulemaking on Water Quality Standards for Toxics in the State of Washington." Letter from Michael H. Shapiro, Acting Assistant Administrator for the Office of Water, to Nina Bell, Executive Director Northwest Environmental Advocates (May 31, 2017), at 6.

undertake the time and resource-intensive evaluation to determine whether new or revised aquatic criteria were in fact necessary, EPA stated that federal rulemaking authority was not the most effective or practical means of addressing the concerns raised in the petition and that it was exercising its discretion to allocate agency resources to other regional and national water quality efforts.³ EPA specifically noted its strong preference to support states in their development of water quality standards (WQS) to protect state waters, rather than to promulgate federal WQS to protect a state's waters.⁴

In 2020, NWEA filed a complaint in the Western District of Washington challenging EPA's denial of its October 28, 2013, petition regarding Washington's aquatic life criteria. In the ensuing litigation, the District Court ultimately found that EPA's denial of NWEA's petition was arbitrary and capricious, vacated that denial, and ordered EPA to make a necessity determination within 180 days of the court's order. *Nw. Env'tl. Advocates v. EPA*, No. 2:20-cv-1362-MJP (W.D. Wash.), Dkt. No. 57. EPA filed a notice of appeal, and while that appeal was pending, the parties jointly moved the court to indicate whether, upon remand by the Ninth Circuit Court of Appeals, it would modify its order to remand the petition to EPA for a new decision on the petition. *Id.* at Dkt. Nos. 64, 79. The parties submitted a proposed modified order regarding EPA's new decision on the petition. *Id.* at Dkt. No. 79. On August 2, 2022, the District Court granted the parties' motion and indicated that, upon remand, the court would enter the parties' joint proposed order. *Id.* at Dkt. No. 81. On August 18, 2022, the Ninth Circuit remanded the case to the District Court, *id.* at Dkt. No. 82, and the District Court's modified order is yet to be entered.

EPA is providing a revised response to NWEA's APA rulemaking petition in three parts in accordance with the terms of the proposed modified order, *see id.* at Dkt. No. 79, and supported by the rationale explained in the following sections below.

1. EPA is granting the petition for the following nine pollutants: acrolein, aluminum, arsenic, cadmium, copper, cyanide, mercury, nickel, and selenium.
2. EPA is deferring a response to the petition for three years for the following eight pollutants: chromium III, DDT and its metabolites, endosulfan, endrin, lead, nonylphenol, tributyltin, and zinc.
3. EPA is denying the petition for any remaining pollutants covered by the petition that are not listed in numbers 1 and 2 above.

Statutory and Regulatory Background

CWA Section 101(a)(2) (33 U.S.C. 1251(a)(2)) establishes as a national goal "water quality which provides for the protection and propagation of fish, shellfish, and wildlife, and recreation in and on the water, wherever attainable." CWA Section 303(c) (33 U.S.C. 1313(c)) directs states to adopt WQS for their waters subject to the CWA.

CWA Section 303(c)(2)(A) and EPA's implementing regulations at 40 CFR Part 131 require, among other things, that a state's WQS specify appropriate designated uses of the waters, and water quality criteria that protect those uses. EPA's regulations at 40 CFR 131.11(a)(1) provide that "[s]uch criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use. For waters with multiple use designations, the criteria shall support the most sensitive use." There are two primary categories of water quality criteria: human health criteria and aquatic life criteria. Human health criteria protect designated uses such as public water supply,

³ *Id.*

⁴ *Id.* at 1.

recreation, and fish and shellfish consumption. Aquatic life criteria protect designated uses such as supporting populations of fish, invertebrates, and other aquatic species.

WQS serve as the basis for deriving effluent discharge limitations in CWA Section 402 National Pollutant Discharge Elimination System permits, assessing and identifying “impaired” waters not meeting applicable WQS under CWA Section 303(d) and 40 CFR 130.7, and establishing total maximum daily loads, or restoration plans, to bring “impaired” waters into attainment of WQS for particular pollutants. WQS also factor into CWA Section 404 “dredge and fill” permits and state certifications of federal licenses or permits under CWA Section 401.

Under the CWA, Congress gave states primary responsibility for developing and adopting WQS for their waters. It remains EPA’s strong preference to support states in their development of WQS to protect state waters rather than to promulgate federal WQS.

Under CWA Section 304(a) (33 U.S.C. 1314(a)), EPA periodically publishes criteria recommendations for states to consider when adopting water quality criteria for particular pollutants to protect CWA Section 101(a)(2) uses. Where EPA has published recommended criteria, states should establish numeric water quality criteria based on EPA’s CWA Section 304(a) criteria, Section 304(a) criteria modified to reflect site-specific conditions, or other scientifically defensible methods (40 CFR 131.11(b)(1)). Criteria must be sufficient to protect the designated use and be based on sound scientific rationale (40 CFR 131.11(a)(1)).

CWA Section 303(c)(2)(B) requires states to adopt numeric criteria for all toxic pollutants listed pursuant to CWA Section 307(a)(1) (33 U.S.C. 1317(a)(1)) for which EPA has published 304(a) criteria, where the discharge or presence of those pollutants could reasonably be expected to interfere with a state’s designated uses. From the list of toxic pollutants identified pursuant to CWA Section 307(a)(1), EPA developed the Priority Pollutant List, which describes the toxic pollutants by their individual chemical names.⁵

Pursuant to CWA Section 303(c), when a state adopts a revised or new standard, it must submit such standard to EPA for EPA’s review and approval or disapproval. 33 U.S.C. 1313(c)(1)-(3); 40 CFR 131.20(c). When EPA approves a revised or new standard, that standard becomes the applicable standard for purposes of the CWA. 33 U.S.C. 1313(c)(3); 40 CFR 131.21. When EPA disapproves a revised or new standard, EPA must specify the changes needed, and if the state does not make such changes within 90 days, EPA must “promptly” propose such standard. 33 U.S.C. 1313(c)(4). EPA must then promulgate such standard within 90 days of proposal unless the state has adopted, and EPA has approved, a revised or new standard by that date.

CWA Section 303(c)(4)(B) provides one additional circumstance, other than disapproval of a state’s WQS, where EPA is to establish WQS: if “the Administrator determines” that new or revised standards are “necessary to meet the requirements” of the CWA. After making a necessity determination under this provision, EPA must “promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved,” and following such a proposal must promulgate federal standards within 90 days, unless the state submits and EPA approves new or revised corresponding state standards in that time.

⁵ <https://www.epa.gov/eg/toxic-and-priority-pollutants-under-clean-water-act>

Rationale for Granting the Petition for Nine Specified Pollutants

EPA is granting the petition for the following nine pollutants – acrolein, aluminum, arsenic, cadmium, copper, cyanide, mercury, nickel, and selenium – based on the potential on-the-ground environmental impact of discharges of these pollutants into Washington waters and an initial review of readily available data. By granting the petition for these nine pollutants, EPA is agreeing to evaluate whether new or revised criteria are in fact necessary for these pollutants. EPA will issue a necessity determination for these pollutants by June 1, 2023.

For the nine specified pollutants, EPA conducted an initial review of available information, such as:

- EPA’s Toxics Release Inventory,⁶
- EPA’s national 304(a) recommended aquatic life criteria values,⁷
- Washington’s 303(d)/305(b) list,⁸
- Washington’s permit and effluent review associated with its 2016 human health criteria revisions,⁹
- Recent ESA consultations with the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (FWS).

EPA’s initial review indicates that these nine pollutants may be present in Washington’s waters. Additionally, Washington’s aquatic life criteria for these nine pollutants are less stringent than EPA’s national 304(a) recommended aquatic life criteria, and/or are less stringent than criteria in Oregon or Idaho that NMFS or FWS concluded would jeopardize an Oregon or Idaho threatened or endangered species that also resides in Washington. EPA anticipates further evaluating data from these and other sources by June 1, 2023, to assess whether new or revised criteria are necessary for Washington.

Rationale for Deferring Response for Eight Specified Pollutants

EPA is deferring a response to the petition for three years for eight pollutants – chromium III, DDT and its metabolites, endosulfan, endrin, lead, nonylphenol, tributyltin, and zinc – based on the need to allocate limited agency resources at this time to focus on other high-priority activities such as development of criteria recommendations for emerging contaminants including per- and poly-fluoroalkyl substances (PFAS). Additionally, as noted below, the Washington Department of Ecology (Ecology) has initiated a rulemaking process to update its criteria for most of these eight pollutants.

On April 14, 2022, Ecology submitted to EPA its triennial review report for Chapter 173-201A of the Washington Administrative Code (WAC) for the WQS for surface waters in the State.¹⁰ The triennial review report identified a list of aquatic life criteria for toxics, including priority pollutants, that will be reviewed by Ecology to determine whether the criteria should be updated. Additionally, on June 23, 2022, Ecology announced its plans to move forward with a rulemaking to amend WAC 173-201A-240,

⁶ US EPA 2022. TRI Explorer (2020 National Analysis Dataset (October 2021, released October 2021)) [Internet database]. Retrieved from <https://enviro.epa.gov/triexplorer/>, (January 28, 2022).

⁷ <https://www.epa.gov/wqc/national-recommended-water-quality-criteria-aquatic-life-criteria-table>

⁸ <https://apps.ecology.wa.gov/ApprovedWQA/ApprovedPages/ApprovedSearch.aspx>

⁹ Ecology 2016. Final Cost-Benefit and Least Burdensome Alternative Analyses. Chapter 173-201A WQC Water Quality Standards for Surface Waters of the State of Washington. Publication no. 16-10-019, at 25-27.

¹⁰ <https://apps.ecology.wa.gov/publications/documents/2210002.pdf>

toxic substances, specifically aquatic life criteria.¹¹ As part of the rulemaking process to revise aquatic life criteria for toxics, Ecology plans to:

- Review all of Washington's current aquatic life toxics criteria to ensure they are consistent with nationally recommended water quality criteria issued by EPA.
- Evaluate pollutant protection levels for endangered species in Washington waters.
- Evaluate new scientific data, methods, and modeling tools to update protection levels necessary for aquatic life in Washington's surface waters.
- Consider adding new toxic substances to the WQS that EPA has recommended or that the State of Washington designates as high priority for the protection of aquatic life.

EPA prefers that the state retain the lead role afforded to it by the CWA in establishing WQS for its waters and EPA looks forward to continuing to work with the State of Washington on the aquatic life criteria applicable to Washington waters. By deferring response on these eight pollutants, EPA is able to direct its limited resources to evaluating the pollutants for which it is granting the petition while affording Washington time to evaluate, based on its own expertise about its waters and species, whether to adopt new or revised criteria for these pollutants.

Rationale for Denying Petition for All Remaining Pollutants

EPA is denying the petition for any remaining pollutants covered by the petition that are not previously listed in this letter.¹² As explained above, the agency is granting the petition with respect to nine pollutants based on the potential on-the-ground environmental impact of discharges of these pollutants into Washington waters and initial review of available data. If, upon completing its review with respect to these nine pollutants, EPA determines that new or revised criteria are necessary, the agency is required to propose such criteria itself, and to finalize such criteria unless Washington submits and EPA approves new or revised state criteria. In granting the petition for these nine pollutants, EPA is also committing its resources to the forthcoming necessity determination and potential rulemaking process. Proposing and finalizing a rule setting forth new or revised criteria for these nine pollutants represents a significant investment of time and agency resources. Additionally, evaluating whether to grant or deny the petition for the deferred pollutants listed above is an additional resource commitment over the next three years.

Further, unlike the nine pollutants for which EPA is granting this petition, EPA does not have readily available data, including information regarding on-the-ground environmental impact, for any other pollutant covered by this petition that would suggest EPA should focus its resources on evaluating whether new or revised criteria are necessary for any of those other pollutants. EPA lacks evidence that these other pollutants may be present in Washington's waters and/or lacks evidence that Washington's aquatic life criteria for these other pollutants are at levels that could reasonably be expected to interfere with Washington's designated uses.

Given the considerations above, for the remaining pollutants covered by the petition, EPA is exercising its discretion to allocate its resources in a manner that supports other regional and state activities to accomplish our mutual goals of protecting human health and the environment because those efforts will

¹¹ Chapter 173-201A WAC (Aquatic Life Toxics Criteria). <https://ecology.wa.gov/Regulations-Permits/Laws-rules-rulemaking/Rulemaking/WAC-173-201A-Aquatic-Life-Toxics-Criteria>

¹² NWEA's petition requested that EPA "update the State of Washington's water quality standards for the protection of . . . aquatic life from toxic contaminants" and "determine that the State of Washington has failed to adopt such . . . aquatic life criteria as are required by Section 303(c)(2)(B) in each triennial review of its water quality standards conducted since 1992."

more effectively advance the water quality objective of the CWA under EPA's Section 303(c) authority rather than devoting limited agency resources to evaluating these remaining pollutants for Washington.

With respect to Washington's human health criteria, which were included in NWEA's October 28, 2013, APA petition, EPA, with support from Ecology, has been engaging in ongoing efforts to promulgate revised, scientifically defensible human health criteria for Washington. EPA signed the proposed rule on March 28, 2022, (87 FR 19046) and expects to finalize the rule by December 28, 2022. EPA has taken three actions that together ensure that Washington has numeric human health criteria for all priority pollutants for which 304(a) recommendations are available, consistent with CWA Section 303(c)(2)(B). These actions are:

- The November 15, 2016, approval of certain human health criteria submitted by Washington;
- The 2016 federal rule that remains in place for three pollutants; and
- The forthcoming rule, Restoring Protective Human Health Criteria in Washington.

The combination of EPA's federal rules and EPA's action on the State's submittal will establish human health criteria at levels consistent with the best available science, including local and regional information, as well as EPA's applicable policies, guidance, and legal requirements, to protect Washington fish consumers from exposure to toxic pollutants.

Conclusion

In accordance with the proposed modified court order, EPA has revised its response to NWEA's petition. EPA is granting the petition by agreeing to evaluate whether new or revised criteria are necessary for nine pollutants (acrolein, aluminum, arsenic, cadmium, copper, cyanide, mercury, nickel, and selenium), deferring a decision on the petition for eight pollutants (chromium III, DDT and its metabolites, endosulfan, endrin, lead, nonylphenol, tributyltin, and zinc), and denying the petition for all remaining pollutants based on the aforementioned rationales.

If you have any questions concerning this letter, please contact either me or Dan Opalski, Region 10 Director of the Water Division, at (206) 553-1855.

Sincerely,



Radhika Fox
Assistant Administrator

cc: Laura Watson, Washington Department of Ecology
Vince McGowan, Washington Department of Ecology
Melissa Gildersleeve, Washington Department of Ecology