



PREPROPOSAL STATEMENT OF INQUIRY

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(Implements RCW 34.05.310)
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WSR 22-14-001

Agency: Department of Ecology AO #22-04

Subject of possible rule making: The Washington State Department of Ecology is considering revising chapter 173-201A WAC, Water Quality Standards for Surface Waters of the State of Washington. We are considering the following revisions in this rulemaking:

- Amending WAC 173-201A-240, Toxic substances, specifically aquatic life criteria, including, but not limited to, Table 240 and footnotes
- Minor, non-substantive edits to rule language in WAC 173-201A-240 to correct typographical, calculation, and formatting errors

We may amend other sections of Chapter 173-201A WAC as necessary to support any revisions to the sections noted above.

We are considering revisions to aquatic life toxics criteria to provide additional water quality protection for organisms that live in water. We will:

- Review all of Washington's current aquatic life toxics criteria to ensure they are consistent with nationally recommended water quality criteria issued by the Environmental Protection Agency (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 water quality standards that EPA has recommended or that the state of Washington designates as high priority for the protection of aquatic life

Statutes authorizing the agency to adopt rules on this subject: RCW 90.48.035 Water Pollution Control - Rule-making authority; and

40 CFR 131.20 Water Quality Standards - State review and revision of water quality standards, requires states and tribes (with primacy for clean water actions) to periodically review and update the water quality standards

Reasons why rules on this subject may be needed and what they might accomplish:

A. History of Aquatic Life Toxics Criteria

Under Clean Water Act (CWA) regulations, any revisions to states' surface water quality standards must be approved by EPA and may be subject to review of potential impacts to endangered species. The last major update to Washington's aquatic life toxics criteria was in 1992 in response to impending federal promulgation, called the National Toxics Rule, for states that had insufficient protections for certain toxic substances. Ecology opted to adopt the majority of aquatic life toxics criteria that were recommended by EPA prior to this promulgation, and EPA approved updates to some of Washington's aquatic life toxics criteria in 1993. The majority of Washington's aquatic life toxics criteria have not been updated since 1992 or prior. Since the National Toxics Rule of 1992, EPA has added additional toxic substances to their list of recommended criteria and provided several updates to previously established criteria. In this rulemaking, we are prepared to evaluate the current science for each of Washington's aquatic life toxic criteria and any new aquatic life criteria for toxic substances in this rulemaking.

B. Litigation

On December 29, 2021, the U.S. District Court ruled that EPA would be required to determine within 180 days if Washington's current aquatic life toxics criteria are consistent with the Clean Water Act or if they need to be revised (NWEA vs. EPA, 2021, Case No. C20-1362 MJP). If they are determined to be inadequate, the CWA requires EPA to promulgate new regulations for Washington, unless the state adopts them in the meantime.

Although litigation between EPA and Northwest Environmental Advocates (NWEA) continues, we are proceeding with the original plan to update the aquatic life toxics criteria after completing the human health toxics criteria updates and the recently completed Salmon Spawning Habitat Protection Rule. Our preference is to do a state-specific evaluation of EPA's aquatic life toxics criteria recommendations and avoid federal promulgation of these criteria for Washington.

C. Triennial Review

During the last public review of Ecology's draft workplan in 2021, we received overwhelming support from commenters for updating rules for aquatic life toxics criteria based on new information and approaches to aquatic life protection. We considered and received feedback on several approaches to rulemaking during our 2021 Triennial Review Process. The different approaches to revising the aquatic life toxics criteria include:

- Updating different classes (such as metals and organics) of toxic substances in staggered rulemakings
- Rulemakings for different groups of toxic substances based on highest priority
- A review and update of all necessary criteria in a single rulemaking.

We received public support for updates to aquatic life toxics in a single rulemaking and a strategy that involves two rulemakings based on different chemical classes.

D. Approach to this Rulemaking

We have decided to proceed with updating all necessary aquatic life toxics criteria in a single rulemaking. This decision is influenced in part by ongoing litigation for EPA to evaluate and potentially promulgate aquatic life toxics criteria. We anticipate that a single rulemaking of all aquatic life toxics criteria will be more efficient than multiple rulemakings. Stakeholders, tribes, and other interested parties will be able to engage in the full scope of aquatic life toxic criteria considerations within one rulemaking, without Ecology placing one toxic substance or group of substances at a higher priority than others.

In this rulemaking, we will compare EPA's nationally recommended aquatic life toxics criteria against Washington's current criteria to determine if updates are needed. We will also consider any draft EPA criteria that may not be finalized before the rule proposal phase of this rulemaking. Furthermore, we will evaluate previous Endangered Species Act (ESA) consultations and associated National Oceanic and Atmospheric Administration and US Fish and Wildlife Service Biological Opinions from other Pacific Northwest states (such as Idaho and Oregon) to anticipate whether EPA national recommendations will meet ESA protection requirements.

Previous ESA consultation reports for criteria in other states have indicated that EPA's recommendations for some aquatic life toxics may not adequately protect ESA listed species. If particular toxics are not deemed "approvable" through ESA consultation, we will evaluate new scientific data, alternative methods to calculate criteria, and the new modeling tools as remedies to providing full protection to aquatic life species, including endangered species.

E. Rulemaking Scope

We have identified several aquatic life toxics criteria that should be reviewed based on EPA's updates to nationally recommended criteria. For several toxic substances, EPA recommended 304(a) criteria are more stringent than Ecology's aquatic life toxics criteria. We will need to evaluate EPA recommendations and make a decision on whether to adopt them or conduct a state-specific modification of the criteria.

Table 1 shown below lists Washington's aquatic life toxic criteria and those criteria that should be evaluated based on more recent EPA updates. Table 2 below lists potential criteria that are not included in Washington's water quality

standards for aquatic life toxics but are recommended by EPA. Ecology may choose to update criteria regardless of EPA recommendations based on new data and/or the need to adopt more protective values for endangered species.

Table 1. Washington's current list and adoption year of aquatic life toxics criteria compared with EPA's last updates.

| Washington's Aquatic Life Toxics Criteria | | |
|---|---------------------|------------------------------|
| Toxic Substance | Year Adopted | Year EPA Last Updated |
| 4,4'-DDT (and metabolites) | 1988* | 1980 |
| Aldrin | 1988* | 1980 |
| Ammonia | 2003 | 2013 |
| Arsenic | 1992 | 1995 |
| Cadmium | 1992 | 2016 |
| Chlordane | 1988* | 1980 |
| Chloride (dissolved) | 1992 | 1988 |
| Chlorine (total) | 1988 | 1986 |
| Chlorpyrifos | 1988* | 1986 |
| Chromium III | 1992 | 1995 |
| Chromium VI | 1992 | 1995 |
| Copper | 1992 | 2007 |
| Cyanide | 1988* | 1985 |
| Dieldrin | 1988* | 1995 |
| Endosulfan | 1988* | 1980 |
| Endrin | 1988* | 1995 |
| Heptachlor | 1988* | 1980 |
| Hexachlorocyclohexane (gamma-BHC; Lindane) | 1988* | 1995 |
| Lead | 1992 | 1984 |
| Mercury | 1992 | 1995 |
| Nickel | 1992 | 1995 |
| Parathion | 1988* | 1995 |
| Pentachlorophenol (PCP) | 1992 | 1995 |
| Polychlorinated Biphenyls (PCBs) | 1988* | 1986 |
| Selenium | 1992 | 2016 |
| Silver | 1992 | 1980 |
| Toxaphene | 1988* | 1986 |
| Zinc | 1992 | 1995 |
| *Record of identical criteria in 1988 standards but not in 1981. Criteria may have been incorporated between 1982 and 1988. | | |

Table 2. Toxic substances listed in EPA national recommended criteria that are not currently adopted by Washington.

| Toxic Substance | Year Last Updated |
|------------------------|--------------------------|
| Acrolein | 2009 |
| Aluminum | 2018 |
| Boron | 1986 |
| Carbaryl | 2012 |
| Demeton | 1985 |
| Diazinon | 2005 |
| Guthion | 1986 |
| Heptachlor Epoxide | 1981 |
| Iron | 1986 |

| | |
|----------------------------------|--------------|
| Malathion | 1986 |
| Methoxychlor | 1986 |
| Mirex | 1986 |
| Nonylphenol | 2005 |
| Perfluorooctanoic Acid (PFOA) | 2022 (draft) |
| Perfluorooctane Sulfonate (PFOS) | 2022 (draft) |
| Sulfide-hydrogen sulfide | 1986 |
| Tributyltin | 2004 |

Identify other federal and state agencies that regulate this subject and the process coordinating the rule with these agencies: We will work with tribes to discuss, and seek input on, rulemaking activities. Other coordinating federal and state agencies include the United States Environmental Protection Agency, National Oceanic and Atmospheric Administration, United States Fish and Wildlife Service, and Washington Department of Fish and Wildlife.

Process for developing new rule (check all that apply):

- Negotiated rule making
- Pilot rule making
- Agency study
- Other (describe) Ecology will follow the standard process for the adoption of rules under the Administrative Procedure Act (Chapter 34.05 RCW).

Interested parties can participate in the decision to adopt the new rule and formulation of the proposed rule before publication by contacting:

| | |
|--|----------------|
| | (If necessary) |
| Name: Marla Koberstein | Name: |
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| Web site: Ecology.wa.gov/Regulations-Permits/Laws-rules-rulemaking/Rulemaking/WAC-173-201A-Aquatic-Life-Toxics-Criteria | Web site: |
| Other: Sign up to receive email notices: https://public.govdelivery.com/accounts/WAECY/subscriber/new?topic_id=WAECY_61 | Other: |

Additional comments: Interested parties can stay informed about the rulemaking and public involvement opportunities as described above. Ecology will extend an offer for government-to-government consultation with tribal governments during each phase of rule development.

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|---|---|
| Date: 6/22/22 | Signature: |
| Name: Vincent McGowan, PE |  |
| Title: Water Quality Program Manager | |