



PROPOSED RULE MAKING

CR-102 (July 2022) (Implements RCW 34.05.320) Do NOT use for expedited rule making

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DATE: February 15, 2024
TIME: 7:35 AM

WSR 24-05-043

Agency: Department of Ecology AO # AO 22-04i

Original Notice

Supplemental Notice to WSR 22-14-001

Continuance of WSR _____

Preproposal Statement of Inquiry was filed as WSR _____ ; or

Expedited Rule Making--Proposed notice was filed as WSR _____ ; or

Proposal is exempt under RCW 34.05.310(4) or 34.05.330(1); or

Proposal is exempt under RCW _____.

Title of rule and other identifying information: (describe subject)

The Washington State Department of Ecology is proposing amendments to chapter 173-201A WAC, Water Quality Standards for Surface Waters of the State of Washington. We propose the following revisions in this rulemaking:

- Amending WAC 173-201A-240, Toxic substances, specifically updating aquatic life toxics criteria in Table 240 and footnotes.
- Minor, non-substantive edits to rule language in WAC 173-201A-240 to correct typographical, calculation, and formatting errors, and to cite federal regulations for human health criteria where they apply for Clean Water Act purposes.

For more information on this rulemaking, please visit: <https://ecology.wa.gov/regulations-permits/laws-rules-rulemaking/rulemaking/wac-173-201a-aquatic-life-toxics-criteria>

Hearing location(s):

Date:	Time:	Location: (be specific)	Comment:
April 4, 2024	1:30 p.m.	Webinar	<p>Presentation, question and answer session followed by the hearing.</p> <p>We are also holding this hearing via webinar. This is an online meeting that you can attend from any computer using internet access.</p> <p>Join online and see instructions: https://waecy-wa.gov.zoom.us/meeting/register/tZlvdeigqDsvE9K0JMbUp6w5Kt0WFhGN5egU</p> <p>For audio call US Toll number 1 253 205 0468 and enter access code 862 2186 0596. Or to receive a free call back, provide your phone number when you join the event.</p>
April 10, 2024	5:30 p.m.	Webinar	<p>Presentation, question and answer session followed by the hearing.</p> <p>We are also holding this hearing via webinar. This is an online meeting that you can attend from any computer using internet access.</p>

Join online and see instructions: <https://waecy-wa.gov.zoom.us/meeting/register/tZMpfu2gqj8iG9fkV1RVT5tELvDX7eLhmrc->

For audio call US Toll number 1 253 205 0468 and enter access code 874 9484 4813. Or to receive a free call back, provide your phone number when you join the event.

Date of intended adoption: July 10, 2024 (Note: This is **NOT** the **effective** date)

<p>Submit written comments to: Name: Marla Koberstein Address: Send US mail to: Department of Ecology Water Quality Program PO Box 47696, Olympia, WA 98504-7696</p> <p>Or Send parcel delivery services to: Department of Ecology Water Quality Program PO Box 47696, Olympia, WA 98504-7696</p> <p>Email: Submit comments by mail, online, or at the hearing(s). Fax: N/A</p> <p>Other: Online https://wq.ecology.commentinput.com?id=apZ8BGx2sQ By (date) <u>April 17, 2024</u></p>	<p>Assistance for persons with disabilities: Contact Ecology ADA Coordinator Phone: 360-407-6831</p> <p>Fax: N/A TTY: People with speech disability may call TTY at 877-833-6341. People with impaired hearing may call Washington Relay Service at 711 Email: ecyADACoordinator@ecy.wa.gov</p> <p>Other: N/A By (date) <u>April 1, 2024</u></p>
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Purpose of the proposal and its anticipated effects, including any changes in existing rules:

Aquatic life toxics criteria
We are proposing revisions to aquatic life toxics criteria to provide additional water quality protection for organisms that live in water.

We reviewed 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). This process included an evaluation of pollutant protection levels for endangered species and their populations in Washington waters since this rule update will require Endangered Species Act review.

We evaluated current scientific data, methods, and modeling tools to update protection levels necessary for aquatic life in Washington’s surface waters. We have also added new toxic substances into the water quality standards that EPA has recommended or that the state of Washington designates as high priority for the protection of aquatic life.

The lists below show existing criteria that we updated, and new criteria we are proposing that are not currently included in Washington’s water quality standards for aquatic life toxics.

Existing criteria revised

- Aldrin (freshwater and saltwater acute)
- Arsenic (freshwater acute and chronic and saltwater acute and chronic)
- Cadmium (freshwater acute and chronic and saltwater acute and chronic)
- Chromium III (freshwater acute and chronic)

- Chromium VI (freshwater acute and chronic)
- Copper (freshwater acute and chronic)
- Cyanide (freshwater acute and chronic)
- Dieldrin (freshwater acute and chronic)
- Endrin (freshwater acute and chronic)
- gamma-BHC (freshwater acute)
- Mercury (freshwater acute)
- Nickel (freshwater acute and chronic)
- Pentachlorophenol (freshwater acute and chronic and saltwater chronic)
- Selenium (freshwater acute and chronic)
- Silver (freshwater and saltwater acute)
- Zinc (freshwater acute and chronic)

Proposed new criteria

- 6PPD-quinone (freshwater acute)
- Aluminum (freshwater acute and chronic)
- Acrolein (freshwater acute and chronic)
- Carbaryl (freshwater acute and chronic and saltwater acute)
- Demeton (freshwater and saltwater chronic)
- Diazinon (freshwater acute and chronic and saltwater acute and chronic)
- Guthion (freshwater and saltwater chronic)
- Malathion (freshwater and saltwater chronic)
- Methoxychlor (freshwater and saltwater chronic)
- Mirex (freshwater and saltwater chronic)
- Nonylphenol (freshwater acute and chronic and saltwater acute and chronic)
- PFOS (freshwater acute and chronic and saltwater acute)
- PFOA (freshwater acute and chronic and saltwater acute)
- Silver (freshwater and saltwater chronic)
- Tributyltin (freshwater acute and chronic and saltwater acute and chronic)

Minor Non-Substantive Edits

We are adding a footnote in the surface water quality standards that cite the federal regulations for EPA promulgated human health criteria where they are the applicable criteria for Clean Water Act programs in Washington.

A. Reasons supporting proposal: *History of Aquatic Life Toxics Criteria*

We submitted freshwater and marine aquatic life criteria for 26 toxic chemicals in 1988, and EPA approved these criteria in 1988. EPA determined that additional aquatic life criteria were needed to comply with CWA Section 303(c)(2)(B) and promulgated aquatic life criteria for Washington in the 1992 National Toxics Rule for acute and chronic freshwater and marine arsenic and selenium criteria, chronic marine copper criteria, and chronic marine cyanide criteria. Following EPA's promulgation of the 1992 National Toxics Rule, we submitted updates to toxic chemicals in 1993, 1998, and 2007, leading to Washington's withdraw from the National Toxics Rule for aquatic life toxics criteria. Washington's last update to aquatic life criteria for toxic chemicals was in 2007.

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 evaluated 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.

The settlement agreement requires EPA to evaluate 17 pollutants for consistency with the Clean Water Act, including nine pollutants by June of 2023 and the last eight pollutants by June of 2026. EPA has determined that new and revised aquatic life criteria are necessary to protect against adverse aquatic life impacts related to the following nine pollutants: acrolein, aluminum, arsenic, cadmium, copper, cyanide, mercury, nickel, and selenium. This Determination is made in accordance with a court order directing EPA to determine whether new or revised aquatic life criteria for these nine pollutants are necessary to meet the requirements of the CWA. *Nw. Env'tl. Advocates v. EPA*, No. 2:20-cv-1362-MJP, Dkt. 84 (W.D. Wash.).

C. Triennial Review

During the last public review of Ecology's draft water quality standards workplan in 2021, known as the Triennial Review, 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. 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 compared EPA's nationally recommended aquatic life toxics criteria against Washington's current criteria to determine if updates are needed. We also considered draft EPA criteria that were finalized before the rule proposal phase of this rulemaking. Furthermore, we evaluated previous Endangered Species Act (ESA) consultations and associated National Marine Fisheries Service (NMFS) and US Fish and Wildlife Service (USFWS) 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 evaluated 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 and their populations.

E. Rulemaking Scope

We have identified several aquatic life toxics criteria that we 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 or have yet to be incorporated into Washington's surface water quality standards. We evaluated EPA recommendations using information from Endangered Species Act consultation. If no endangered species protection concerns were present, then we proposed EPA recommendations. For those toxics with endangered species protection concerns, we proposed state-specific criteria.

In some cases, we updated criteria regardless of EPA recommendations based on new data and/or the need to adopt more protective values for endangered species and their populations.

1. Other background information and issues related to this rulemaking.

Updating the aquatic life toxics criteria is a high priority for Ecology. Updating the aquatic life toxics criteria was included in the Five-Year Work Plan developed as part of the 2010 Triennial Review. More recently, updates to aquatic life toxics criteria were outlined in our performance partnership agreement (PPA) with EPA in 2021 and in our most recent triennial review submitted to EPA in April 2022.

Since the 2010 triennial review, we have focused our toxics expertise on updating human health criteria. The decision to prioritize human health criteria updates ahead of aquatic life toxics criteria was made, in part, because of significant delays in the several Endangered Species Act (ESA) consultations for EPA's nationally recommended aquatic life toxics criteria. We decided it was in the state's best interest to wait for the outcomes of ESA consultations and subsequent EPA determinations of adjacent state aquatic life toxics criteria before investing resources to update our aquatic life toxics criteria.

EPA Region 10 states have submitted updates to their aquatic life toxics criteria over the past few decades, but EPA's required ESA consultations with the National Oceanographic and Atmospheric Administration National Marine Fisheries Service (NMFS) and the U.S Fish and Wildlife Service (USFWS) have been significantly delayed for several states (e.g., Oregon and Idaho). EPA consideration of Oregon's aquatic life toxics criteria adopted in 2004 was significantly delayed as the federal agencies worked through ESA Section 7 consultation. In 2013, EPA disapproved a number of aquatic life criteria that the Oregon Environmental Quality Commission (ODEQ) adopted in 2004. Since 2013, ODEQ adopted, and EPA approved, revisions to several of the disapproved criteria. EPA's approvals of Idaho's aquatic life criteria likewise have been stalled, leaving the state-adopted criteria unusable for CWA actions.

In the 2010 triennial review, Ecology decided it would be most beneficial for our state to wait until final ESA consultations and subsequent EPA approvals had been completed for the adjacent states before moving forward with adopting aquatic life toxics criteria in order to increase the likelihood they would meet ESA considerations and be approved by EPA. Given the probability of a delay in federal approval, Ecology decided to move forward with developing human health toxics criteria as a higher priority, to be followed by aquatic life toxics criteria when there was more certainty that EPA-recommended criteria would make it through ESA consultation.

Statutory authority for adoption: RCW 90.48.035 provides clear and direct authority to Ecology to revise the Surface Water Quality Standards (SWQS). Additionally, 40 CFR 131.20 requires states and tribes with Federal Clean Water Act authority to periodically review and update the SWQS

Statute being implemented: Chapter 90.48 RCW - Water Pollution Control t

Is rule necessary because of a:

Federal Law?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Federal Court Decision?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
State Court Decision?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No

If yes, CITATION: 40 CFR 131.20

Agency comments or recommendations, if any, as to statutory language, implementation, enforcement, and fiscal matters: For more information, see the Technical Support Document, Ecology Publication 24-10-007, the draft Rule Implementation Plan, Ecology Publication 24-10-008, and the Preliminary Regulatory Analyses, Ecology Publication 24-10-009, available on our rulemaking webpage.

Type of proponent: Private Public Governmental
Name of proponent: (person or organization) Department of Ecology

Name of agency personnel responsible for:

	Name	Office Location	Phone
Drafting:	Bryson Finch	Lacey – Headquarters	360-999-9610
Implementation:	Melissa Gildersleeve	Lacey – Headquarters	360-522-6441
Enforcement:	Vincent McGowan	Lacey – Headquarters	360-407-6405

Is a school district fiscal impact statement required under [RCW 28A.305.135](#)? Yes No
If yes, insert statement here:

The public may obtain a copy of the school district fiscal impact statement by contacting:

Name:
Address:
Phone:
Fax:
TTY:
Email:
Other:

Is a cost-benefit analysis required under [RCW 34.05.328](#)?

Yes: A preliminary cost-benefit analysis may be obtained by contacting:

Name: Marla Koberstein
Address: Department of Ecology
Water Quality Program
PO Box 47696, Olympia, WA 98504-7696
Phone: 360-628-6376
Fax: N/A
TTY: People with speech disability may call TTY at 877-833-6341. People with impaired hearing may call Washington Relay Service at 711
Email: marla.koberstein@ecy.wa.gov
Other:

No: Please explain:

Regulatory Fairness Act and Small Business Economic Impact Statement

Note: The [Governor's Office for Regulatory Innovation and Assistance \(ORIA\)](#) provides support in completing this part.

(1) Identification of exemptions:

This rule proposal, or portions of the proposal, **may be exempt** from requirements of the Regulatory Fairness Act (see [chapter 19.85 RCW](#)). For additional information on exemptions, consult the [exemption guide published by ORIA](#). Please check the box for any applicable exemption(s):

This rule proposal, or portions of the proposal, is exempt under [RCW 19.85.061](#) because this rule making is being adopted solely to conform and/or comply with federal statute or regulations. Please cite the specific federal statute or regulation this rule is being adopted to conform or comply with, and describe the consequences to the state if the rule is not adopted.

Citation and description:

This rule proposal, or portions of the proposal, is exempt because the agency has completed the pilot rule process defined by [RCW 34.05.313](#) before filing the notice of this proposed rule.

This rule proposal, or portions of the proposal, is exempt under the provisions of [RCW 15.65.570\(2\)](#) because it was adopted by a referendum.

This rule proposal, or portions of the proposal, is exempt under [RCW 19.85.025\(3\)](#). Check all that apply:

- | | |
|---|--|
| <input type="checkbox"/> RCW 34.05.310 (4)(b)
(Internal government operations) | <input type="checkbox"/> RCW 34.05.310 (4)(e)
(Dictated by statute) |
| <input checked="" type="checkbox"/> RCW 34.05.310 (4)(c)
(Incorporation by reference) | <input type="checkbox"/> RCW 34.05.310 (4)(f)
(Set or adjust fees) |
| <input checked="" type="checkbox"/> RCW 34.05.310 (4)(d)
(Correct or clarify language) | <input type="checkbox"/> RCW 34.05.310 (4)(g)
((i) Relating to agency hearings; or (ii) process requirements for applying to an agency for a license or permit) |

This rule proposal, or portions of the proposal, is exempt under [RCW 19.85.025\(4\)](#) (does not affect small businesses).

This rule proposal, or portions of the proposal, is exempt under RCW _____.

Explanation of how the above exemption(s) applies to the proposed rule:

(2) Scope of exemptions: *Check one.*

The rule proposal is fully exempt (*skip section 3*). Exemptions identified above apply to all portions of the rule proposal.

The rule proposal is partially exempt (*complete section 3*). The exemptions identified above apply to portions of the rule proposal, but less than the entire rule proposal. Provide details here (consider using [this template from ORIA](#)): Ecology baselines are typically complex, consisting of multiple requirements fully or partially specified by existing rules, statutes, or federal laws. Where the proposed rule differs from this baseline of existing requirements, it is typically subject to (i.e., not exempt from) analysis required under the Regulatory Fairness Act (RFA; Chapter 19.85 RCW) based on meeting criteria referenced in RCW 19.85.025(3) as defined by the Administrative Procedure Act in RCW 34.05.310. The Small Business Economic Impact Statement (SBEIS) below includes a summary of the baseline for this rulemaking, and whether or how the proposed rule differs from the baseline.

The rule proposal is not exempt (*complete section 3*). No exemptions were identified above.

(3) Small business economic impact statement: *Complete this section if any portion is not exempt.*

If any portion of the proposed rule is **not exempt**, does it impose more-than-minor costs (as defined by RCW 19.85.020(2)) on businesses?

No Briefly summarize the agency's minor cost analysis and how the agency determined the proposed rule did not impose more-than-minor costs. _____

Yes Calculations show the rule proposal likely imposes more-than-minor cost to businesses and a small business economic impact statement is required. Insert the required small business economic impact statement here:

This Small Business Economic Impact Statement (SBEIS) presents the:

- Compliance requirements of the proposed rule.
- Results of the analysis of relative compliance cost burden.
- Consideration of lost sales or revenue.
- Cost-mitigating action taken by Ecology, if required.
- Small business and local government consultation.
- Industries likely impacted by the proposed rule.
- Expected net impact on jobs statewide.

A small business is defined by the Regulatory Fairness Act (chapter 19.85 RCW) as having 50 or fewer employees. Estimated costs are determined as compared to the existing regulatory environment—the regulations in the absence of the rule. The SBEIS only considers costs to “businesses in an industry” in Washington State. This means that impacts, for this document, are not evaluated for government agencies.

The existing regulatory environment is called the “baseline” in this document. It includes only existing laws and rules at federal and state levels.

This information is excerpted from Ecology’s complete set of regulatory analyses for this rulemaking. For complete discussion of the likely costs, benefits, minimum compliance burden, and relative burden on small businesses, see the associated Regulatory Analyses document (**Ecology publication no. 24-10-009, February 2024**)

COMPLIANCE REQUIREMENTS OF THE PROPOSED RULE, INCLUDING PROFESSIONAL SERVICES

The baseline for our analyses generally consists of existing laws and rules. This is what allows us to make a consistent comparison between the state of the world with and without the proposed rule amendments. Should Ecology not adopt the proposed rulemaking, standards for aquatic life criteria and their administration are determined as described within the remainder of this chapter.

Existing Aquatic Life Toxics Criteria

State Criteria

As listed in 173-201A-240 WAC, Table 240 and relevant footnotes.

National EPA Recommended Water Quality Criteria

The Environmental Protection Agency (EPA) periodically updates their recommended water quality criteria based on new information for each toxic chemical. Aquatic life criteria for toxic chemicals are considered by the EPA to be the highest concentration of specific pollutants or parameters in water that are not expected to pose a significant risk to the majority of species in a given environment or a narrative description of the desired conditions of a water body being “free from” certain negative conditions. **Not moving forward with this rulemaking would subject Ecology to The Environmental Protection Agency’s (EPA) promulgation of their federal criteria.**

Clean Water Act

Section 303(c)(2)(A)

Water Pollution Control Act

RCW 90.48.010 & RCW 90.48.035

Permitting Guidelines

Permitting guidelines help permit writers determine how to approach different permit scenarios . They assist permit writers in how to think through meeting water quality criteria for protection of aquatic life to permittee-specific requirements. While not a legal requirement, guidance informs how aquatic life criteria might impact permittees who discharge effluent to water bodies. Therefore, in describing the baseline for this analysis of the rule amendments, it is necessary to consider the permitting guidelines in the baseline and amended scenarios, as they will contribute to the cost and benefit estimates and discussion of impacts.

Ecology uses the Water Quality Program Permit Writer’s Manual (Ecology, 2018) for technical guidance when developing wastewater discharge permits. A general overview of the permitting process for all dischargers includes:

- Ecology receiving the permit application.
- Review of the application for completeness and accuracy.
- Derivation of applicable technology-based effluent limits.
- Determination of whether effluent will cause, or have reasonable potential to cause or contribute to, violation of water quality standards.
- If yes, derivation of water quality-based effluent limits.
- Determination of monitoring requirements and other special conditions.
- Review process for the draft or proposed permit.
- Issuance of the final permit decision.

To evaluate the effect of effluent toxic pollutants on a receiving water, the permit writer uses the water quality criteria and standards, the criteria for mixing zones, and an analysis of the concentrations of specific pollutants or effects of pollutants within or at the edge of the mixing zone or the assigned dilution factor. The requirement for imposing effluent limitations for the protection of water quality does not require a demonstration of impact beyond any doubt but only that there is a determination of reasonable potential determined by a rational and scientific process.

Defining water quality impacts and developing effluent limits is usually more complex for toxic pollutants than for the other pollutants. The aquatic life toxic criteria are given at two levels (acute and chronic), each of which contains three components (magnitude, duration, and frequency). The analysis to predict water quality impacts and thus to define effluent limits must be

conducted for both acute and chronic criteria to define the most limiting criteria. Many of the criteria for toxic pollutants depend on variable receiving water conditions. Permit writers calculate effluent limits to protect receiving water quality during critical (worst-case) conditions.

Impaired Waterbody Listing and Cleanup Plan

The federal Clean Water Act's section 303(d) established a process to identify and clean up polluted waters. Every two years, all states are required to perform a water quality assessment of surface waters in the state, including all the rivers, lakes, and marine waters where data are available. Ecology compiles its own water quality data and federal data and invites other groups to submit water quality data they have collected. All data submitted must be collected using appropriate scientific methods. The assessed waters are placed in categories that describe the status of water quality. Once the assessment is complete, the public is given a chance to review it and give comments. The final assessment is formally submitted to the EPA for approval.

Waters with beneficial uses – such as for drinking, recreation, aquatic habitat, and industrial use – that are impaired by pollutants are placed in the polluted water category in the water quality assessment 303(d) list. These water bodies fall short of state surface water quality standards and are not expected to improve within the next two years. The 303(d) list, so called because the processes for developing the list and addressing the polluted waters on the list are described in section 303(d) of the federal CWA comprises waters in the polluted water category.

Ecology's assessment of which waters to place on the 303(d) list is guided by federal laws, state water quality standards, and the Policy on the Washington State Water Quality Assessment (WQP Policy 1-11; March 2023). This policy describes how the standards are applied, requirements for the data used, and how to prioritize Total Maximum Daily Loads (TMDL), among other issues. In addition, even before a TMDL is completed, the inclusion of a water body on the 303(d) list can reduce the amount of pollutants allowed to be released under permits issued by Ecology.

Waters placed on the 303(d) list require the preparation of a water cleanup plan (TMDL) or other approved water quality improvement project. The improvement plan identifies how much pollution needs to be reduced or eliminated to achieve clean water and allocates that amount of required pollution reduction among the existing sources.

Past or existing compliance behavior

The baseline includes past or existing compliance behavior. This includes behavior undertaken in response to federal and state laws, rules, permits, guidance, and policies. This also includes business decisions in response to regulatory, economic, or environmental changes. Such behavior might include, but is not limited to, existing treatment technologies, production processes, and effluent volumes. Including these behaviors in the baseline is necessary to assess the incremental impacts of the proposed rule over existing requirements

Discharger and Total Maximum Daily Load growth trajectories

The amended rule applies to existing and future dischargers, on existing and future impaired water bodies, and water bodies with TMDLs and without TMDLs, so the baseline must also account for attributes and behaviors of future dischargers and future TMDLs.

The baseline forecast of future growth in the number, locations, and types of TMDLs is based on past TMDL behavior and planned structuring of TMDL planning. We forecast expected types of TMDLs based on prospective new locations, and how they fit into the framework for planning and completing TMDLs.

The baseline forecast of future dischargers is based on attributes of existing dischargers. The forecast assumes that future discharger contaminants and concentrations are the same as in existing dischargers. This means unexpected changes in technology over time (e.g., using different inputs or technologies) that reduces pollutants in effluent would reduce the actual impacts of the proposed rule

Existing allowance for compliance schedules

The baseline includes existing compliance schedules. A compliance schedule is an enforceable tool used as part of a permit, order, or directive to achieve compliance with applicable effluent standards and limitations, water quality standards, or other legally applicable requirements. Compliance schedules include a sequence of interim requirements such as actions, operations, or milestone events to achieve the stated goals. Compliance schedules are a broadly used tool for achieving compliance with state and federal regulations; compliance schedules under the Clean Water Act are defined federally at CWA 502(17) and 40 CFR Section 122.2

Proposed rule amendments

The proposed rule amendments would:

- Amend WAC 173-201A-240, Toxic substances, specifically aquatic life criteria, including, but not limited to, Table 240 and footnotes

Revisions to existing aquatic life criteria

- o Arsenic (all)

- o Cadmium (all)
- o Chromium III (freshwater acute and chronic)
- o Chromium VI (freshwater acute and chronic)
- o Copper (freshwater acute and chronic)
- o Cyanide (freshwater acute and chronic)
- o Dieldrin (freshwater acute and chronic)
- o Endrin (freshwater acute and chronic)
- o gamma-BHC (freshwater acute)
- o Mercury (freshwater acute)
- o Nickel (freshwater acute and chronic)
- o Pentachlorophenol (freshwater acute and chronic and saltwater chronic)
- o Selenium (freshwater acute and chronic)
- o Silver (freshwater and saltwater acute)
- o Zinc (freshwater acute and chronic)
- o Aldrin (freshwater and saltwater acute)

New criteria

- o 6PPD-quinone (freshwater acute)
- o Aluminum (freshwater acute and chronic)
- o Acrolein (freshwater acute and chronic)
- o Carbaryl (freshwater acute and chronic and saltwater acute)
- o Demeton (freshwater and saltwater chronic)
- o Diazinon (all)
- o Guthion (freshwater and saltwater chronic)
- o Malathion (freshwater and saltwater chronic)
- o Methoxychlor (freshwater and saltwater chronic)
- o Mirex (freshwater and saltwater chronic)
- o Nonylphenol (all)
- o PFOS (freshwater acute and chronic and saltwater acute)
- o PFOA (freshwater acute and chronic and saltwater acute)
- o Silver (freshwater and saltwater chronic)
- o Tributyltin (all)
- Make Minor, non-substantive edits to rule language in WAC 173-201A-240 to correct typographical, calculation, and formatting errors

Note that since the EPA criteria recommendations are in this rulemaking’s baseline, the analytical scope of this regulatory analysis is reduced to new or existing aquatic life criteria that:

- 1.) Differ from WAC 173-201A-240 (Table 240) and
- 2.) Differ from EPA guidance or EPA derivation methods (due to ESA concerns, new science, and/or having no EPA recommendation)

Applying this filter (see Table 16 in Appendix B for illustration and additional information), this analysis includes the following:

Analytical Scope

- o Arsenic (all)
- o Cadmium (fresh water acute and chronic)
- o Copper
- o Chromium VI (fresh water acute and chronic)
- o Nickel (fresh water acute and chronic)
- o Silver (fresh water acute and chronic)
- o Zinc (fresh water acute and chronic)
- o 6PPD-quinone (freshwater acute)
- o Cyanide (freshwater acute and chronic)
- o Pentachlorophenol (all)
- o PFOS (freshwater acute and chronic and saltwater acute)
- o PFOA (freshwater acute and chronic and saltwater acute)
- o Minor, non-substantive edits to rule language in WAC 173-201A-240 to correct typographical, calculation, and formatting errors associated with the list above.

COSTS OF COMPLIANCE: EQUIPMENT, SUPPLIES, LABOR, AND PROFESSIONAL SERVICES

Costs would originate from permit holders (in most cases, facilities) that change behavior to comply with new or revised permit conditions based on the proposed rule. However, many permit holders do not process the materials or operate equipment that would lead to any change in permit limits based on the new criteria, or already report effluent numbers low enough to comply with the proposed rule. Therefore, costs are not created by all permits and all criteria.

Estimated costs are generated by potential increases in level 1, 2, and 3 exceedances and the corrective actions required by them for existing criteria (with copper and zinc accounting for all of the level 2 and 3 exceedances), and increased monitoring and lab costs for new criteria. For additional context, level 1 violation would lead to the equivalent of minor adjustments like sweeping and moving materials away from drains to come into compliance (labor costs). Level 2 violation might lead to installing berms, removing materials suspected of contributing to pollutants, and coating various pipes and surfaces (equipment, supply, and labor costs). At a minimum, a level 2 violation would necessitate development and implementation of a source control plan. Level 3 violation requires facility improvements likely to include water treatment filters, catch basins, and other engineering solutions (equipment, supply, labor, and professional services costs). Due to project complexity and data availability, compliance costs below reflect combined labor, professional services, and supplies where applicable.

Estimated Present Value of Total Cost

Action Level	Low-Cost Estimate	High-Cost Estimate
1	\$ 12,304	\$ 24,608
2	\$ 173,531	\$ 173,531
3	\$ 14,250,000	\$ 42,750,000
Lab Costs	\$ 3,128,218	\$ 9,428,912
Total	\$ 17,564,053	\$ 52,377,051

COMPARISON OF COMPLIANCE COST FOR SMALL VERSUS LARGE BUSINESSES

We calculated the estimated per-business costs to comply with the proposed rule amendments, based on the costs estimated in Chapter 3 of this document. In this section, we estimate compliance costs per employee.

The average affected small business likely to be covered by the proposed rule amendments employs about 20 people. The largest ten percent of affected businesses employ an average of 4,638 people. These estimates were generated by cross referencing permit addresses with Dun and Bradstreet data on global employment.¹ Based on cost estimates in Chapter 3, we estimated the following compliance costs per employee.

Compliance costs per employee

Type of cost (or total cost)	Small Businesses	Largest 10% of Businesses
Average employment	20	4,638
Compliance costs per entity (low)	\$ 8,005	\$ 89,947
Compliance costs per entity (high)	\$ 23,897	\$ 268,593
Cost per employee (low)	\$ 410	\$ 19
Cost per employee (high)	\$ 1,223	\$ 58

We conclude that the proposed rule amendments are likely to have disproportionate impacts on small businesses, and therefore Ecology must include elements in the proposed rule amendments to mitigate this disproportion, as far as is legal and feasible.

MITIGATION OF DISPROPORTIONATE IMPACT

The RFA (19.85.030(2) RCW) states that:

“Based upon the extent of disproportionate impact on small business identified in the statement prepared under RCW 19.85.040, the agency shall, where legal and feasible in meeting the stated objectives of the statutes upon which the rule is based, reduce the costs imposed by the rule on small businesses. The agency must consider, without limitation, each of the following methods of reducing the impact of the proposed rule on small businesses:

- a) Reducing, modifying, or eliminating substantive regulatory requirements;
- b) Simplifying, reducing, or eliminating recordkeeping and reporting requirements;
- c) Reducing the frequency of inspections;
- d) Delaying compliance timetables;
- e) Reducing or modifying fine schedules for noncompliance; or
- f) Any other mitigation techniques including those suggested by small businesses or small business advocates.”

We considered all of the above options, the goals and objectives of the authorizing statutes (see Chapter 6), and the scope of this rulemaking. We limited compliance cost-reduction methods to those that:

- Are legal and feasible.
- Meet the goals and objectives of the authorizing statute.
- Are within the scope of this rulemaking.

Modifying regulatory requirements, changing reporting requirements, reducing the frequency of inspections, delaying compliance timetables, or modifying fine schedules would not meet statutory objectives or are not feasible and within the

¹ <https://www.dnb.com/>

scope of this rulemaking. This rulemaking was initiated specifically to amend WAC 173-201A-240 aquatic life toxics criteria (and make necessary supporting changes), while not amending other aspects of requirements and implementation of broader surface water quality standards.

It was not feasible in the proposed rule amendments to directly mitigate disproportionate impacts to small businesses, however, multiple elements of the baseline rule already in place serve to mitigate compliance costs for small businesses :

- WAC 173-224-090 may reduce fees for all small businesses holding or applying for a state waste discharge or NPDES permit issued by Ecology.
- WAC 173-224-090 allows small businesses to receive a fee reduction of fifty percent, but not less than the minimum permit fee of \$150, if they are determined to be eligible under the following criteria:
 1. Be a corporation, partnership, sole proprietorship, or other legal entity formed for the purpose of making a profit;
 2. Be independently owned and operated from all other businesses (i.e., not a subsidiary of a parent company);
 3. Have annual sales of \$1,000,000 or less of the goods or services produced using the processes regulated by the waste discharge or individual stormwater discharge permit (we identified 605 small business permittees in Washington that meet this definition); and
 4. Have an original annual permit fee assessment totaling \$500 or greater.
- In addition to the small business fee reduction, any small business with annual gross revenue totaling \$100,000 or less from goods and services produced using the processes regulated by the discharge permit may apply for an extreme hardship fee reduction. If the permit holder is determined eligible, the annual permit fee is reduced to the minimum annual permit fee of \$150.

SMALL BUSINESS AND LOCAL GOVERNMENT CONSULTATION

We involved small businesses, local governments, and tribes in its development of the proposed rule amendments, using:

- Public webinars in October 2022, April 2023, and October 2023.
- Tribal webinars in April 2023 and October 2023.

NAICS CODES OF INDUSTRIES IMPACTED BY THE PROPOSED RULE

Businesses that hold permits potentially affected by the proposed rule fall within the following industry categories. Note that associated NAICS codes and definitions are discussed further at <https://www.census.gov/naics/>.

Industries and their associated NAICS codes that are impacted by the rule

NAICS Code	Description
111x	Crop Production
112x	Animal Production and Aquaculture
113x	Forestry and Logging
114x	Fishing, Hunting and Trapping
221x	Utilities
236x	Construction of Buildings
237x	Heavy and Civil Engineering Construction
238x	Specialty Trade Contractors
311x	Food Manufacturing
312x	Beverage and Tobacco Product Manufacturing
314x	Textile Product Mills
321x	Wood Product Manufacturing
322x	Paper Manufacturing
324x	Petroleum and Coal Products Manufacturing
325x	Chemical Manufacturing
326x	Plastics and Rubber Products Manufacturing
327x	Nonmetallic Mineral Product Manufacturing
331x	Primary Metal Manufacturing
332x	Fabricated Metal Product Manufacturing
333x	Machinery Manufacturing
334x	Computer and Electronic Product Manufacturing
335x	Electrical Equipment, appliance, and Component Manufacturing
336x	Transportation Equipment Manufacturing
337x	Furniture and Related Product Manufacturing
339x	Miscellaneous Manufacturing
423x	Merchant Wholesalers, Durable Goods
424x	Merchant Wholesalers, Nondurable Goods
441x	Motor Vehicle and Parts Dealers
444x	Building Material and Garden Equipment and Supplies Dealers
445x	Food and Beverage Retailers
455x	General Merchandise Retailers
457x	Gasoline Stations and Fuel Dealers
458x	Clothing, Clothing Accessories, Shoe, and Jewelry Retailers
459x	Sporting Goods, Hobby, Musical Instrument, Book, and Miscellaneous Retailers
481x	Air Transportation

482x	Rail Transportation
484x	Truck Transportation
485x	Transit and Ground Passenger Transportation
488x	Support Activities for Transportation
492x	Couriers and Messengers
493x	Warehousing and Storage
522x	Credit Intermediation and Related Activities
524x	Insurance Carriers and Related Activities
531x	Real Estate
532x	Rental and Leasing Services
533x	Lessors of Nonfinancial Intangible Assets (except Copyrighted Works)
541x	Professional, Scientific, and Technical Services
561x	Administrative and Support Services
562x	Waste Management and Remediation Services
621x	Ambulatory Health Care Services
624x	Social Assistance
713x	Amusement, Gambling, and Recreation Industries
722x	Food Services and Drinking Places
811x	Repair and Maintenance
928x	National Security and International Affairs

CONSIDERATION OF LOST SALES OR REVENUE, IMPACT ON JOBS

Businesses that would incur costs could experience reduced sales or revenues if the proposed rule amendments significantly affect the prices of the goods they sell. The degree to which this could happen is strongly related to each business’s production and pricing model (whether additional lump-sum costs would significantly affect marginal costs), as well as the specific attributes of the markets in which they sell goods, including the degree of influence each firm has on market prices, as well as the relative responsiveness of market demand to price changes. Finally, overall shifts in economic activity in the state, including competition within markets and attributes of the labor market simultaneously adjust in response to changes in compliance costs. Similarly, employment within directly impacted industries, other industries in Washington, the labor market within and outside of the state, and in the state as a whole would also adjust in response to a change in costs.

We used the REMI E3+ model for Washington State to estimate the impact of the proposed rule amendments on directly affected markets, accounting for dynamic adjustments throughout the economy. The model accounts for variables including but not limited to: inter-industry impacts; price, wage, interstate and international trade, and population or labor market changes; and dynamic adjustment of all economic variables over time.

The results of the REMI E3+ model shows that the rule would impact a variety of industries, costing the Washington economy an estimated range between \$23 million to \$69 million in annual output at its peak (total amount of goods and services produced by Washington businesses) across all sectors. For reference, in the first quarter of 2023, Washington state’s annual GDP was estimated at \$761 billion. In percentage terms, this impact amounts to 0.003% and .009% of GDP for low and high estimates respectively.

Output losses are projected to begin in 2025 following the proposed rule implementation and increase as permits become renewed. These amount to a loss of roughly \$1 million in the low-cost and high-cost scenario in the first year of the rule and increase to \$23 million and \$69 million for the low- and high-cost scenarios, respectively by 2030. Output losses slowly decrease after 2030, and by 2045 the output loss is projected to have declined under the low and high-cost scenarios to \$1 million and \$2 million, respectively.

Retail trade, and construction is impacted the most among all industries, accounting for 13% each of the total output loss in high and low scenarios, followed by wholesale trade, real estate, and state and local government. Note that it is not unusual for the construction and retail industries to have high projected impacts from a rule as they are often quite sensitive to any changes to the market in REMI models. The rule also impacts a breadth of affected industries, many of which indirectly support retail and construction activities.

Modeled economic impacts to output

Industry	2030 (low)	2030 (high)	2045 (low)	2045 (high)
Whole state	-23	-69	-1	-2
Retail trade	-3	-9	0	0
Construction	-3	-9	0	0
Wholesale trade	-2	-7	0	0
Real estate	-2	-7	0	0
State and Local Government	-1	-3	0	0

The proposed rule would result in transfers of money within and between industries, as compared to the baseline. The modeled impacts on employment are the result of these transfers and the way in which REMI projects these transfers to be utilized within the broader economy as well as changes to prices and other economic variables across all industries in the state. REMI results project an immediate state-wide loss of 1 full-time equivalent positions (FTEs) under the low-cost scenario and 4 in the high-cost scenario in the year 2025. This loss increases over the next two years, peaking in 2030 with a

projected loss of 113 and 337 FTEs, under the low-cost and high-cost scenarios, respectively. The statewide loss in FTEs is lessened after 2030 such that in 2045 the statewide projected loss is reduced to 2 FTEs in the low-cost scenario, and 6 FTEs in the high-cost scenario in 2045.

Industries that are most impacted are listed below. The construction sector is projected to be the most heavily impacted industry, accounting for about 17% of the FTE loss from this rule statewide in 2030. Closely related to sensitivities in economic output discussed above, it is not unusual for the construction industry to have high projected job impacts from a rule as the construction industry is often quite sensitive to any changes in the market in REMI models. The next 4 sectors most heavily impacted in terms of projected job loss are retail trade, state and local government, wholesale trade and real estate. While some of these sectors may not be as directly impacted from the rulemaking as others, note that the REMI model is sensitive to reductions in population growth compared to baseline, potentially leading to lower demand for retail goods, public services, and housing.

Impacts on Jobs

Industry	2030 Jobs Impact (low)	2030 Jobs Impact (high)	2045 Jobs Impact (low)	2045 Jobs Impact (high)
Whole state	-113	-337	-2	-6
Construction	-20	-60	0	1
Retail trade	-13	-39	0	0
State and local government	-6	-19	0	-1
Wholesale trade	-6	-17	0	0
Real estate	-6	-17	0	0

The public may obtain a copy of the small business economic impact statement or the detailed cost calculations by contacting:

Name: Marla Koberstein

Address: Department of Ecology
 Water Quality Program
 PO Box 47696, Olympia, WA 98504-7696

Phone: 360-628-6376

Fax: N/A

TTY: People with speech disability may call TTY at 877-833-6341. People with impaired hearing may call Washington Relay Service at 711. To request ADA accommodation for disabilities, or printed materials in a format for the visually impaired, call Ecology at 360-407-7668 or visit <https://ecology.wa.gov/accessibility>.

Email: marla.koberstein@ecy.wa.gov

Other:

<p>Date: February 15, 2024</p> <hr/> <p>Name: Heather Bartlett</p> <hr/> <p>Title: Deputy Director</p>	<p>Signature:</p> 
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