

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 131****[FRL-5903-4]****Withdrawal From Federal Regulations of Arsenic Human Health Water Quality Criteria Applicable to Idaho****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rule.

SUMMARY: This rule amends the federal regulations by withdrawing the federal human health water quality criteria for arsenic applicable to Idaho. Idaho adopted human health criteria for arsenic and EPA subsequently approved those criteria. On November 29, 1996, EPA published a proposed rule and provided an opportunity for public comment on the withdrawal of the federal criteria for arsenic. EPA received one comment, which supported the withdrawal action.

EFFECTIVE DATE: November 10, 1997.

ADDRESSES: The administrative record for this action is available for review and copying at the U.S. EPA Region 10, Office of Water, 1200 Sixth Avenue, Seattle, Washington 98101, between 8:00 a.m. and 4:30 p.m.

FOR FURTHER INFORMATION CONTACT: Fred Leutner at EPA Headquarters, Office of Water, 401 M Street, SW, Washington, D.C. 20460 (202-260-1542) or Lisa Macchio in EPA's Region 10 at 206-553-1834.

SUPPLEMENTARY INFORMATION:

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A. Potentially Affected Entities

Citizens concerned with water quality in Idaho may be interested in this rulemaking. Entities discharging pollutants to waters of the United States in Idaho could be affected by this rulemaking since human health criteria are used in determining national pollutant discharge elimination system (NPDES) permit limits. Categories and entities which may ultimately be affected include:

Category	Examples of potentially affected entities
Industry	Industries discharging pollutants to surface waters in Idaho.

Category	Examples of potentially affected entities
Municipalities	Publicly-owned treatment works discharging pollutants to surface waters in Idaho.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. This table lists the types of entities that EPA is now aware could potentially be affected by this action. Other types of entities not listed in the table could also potentially be affected by this action. To determine whether your facility is affected by this action, you should carefully examine the applicability criteria in § 131.36 of Title 40 of the Code of Federal Regulations (CFR). If you have any questions regarding the applicability of this action to a particular entity, consult the person listed in **FOR FURTHER INFORMATION CONTACT** section.

B. Background

In 1992, EPA promulgated a final rule (known as the National Toxics Rule) to establish numeric water quality criteria for 12 States and 2 Territories (hereafter "States") that had failed to comply fully with section 303(c)(2)(C) of the Clean Water Act (57 FR 60848). The criteria, codified at 40 CFR 131.36, became the applicable water quality standards in those 14 jurisdictions for all purposes and programs under the Clean Water Act effective February 5, 1993.

When a State adopts criteria that meet the requirements of the Clean Water Act, EPA withdraws its criteria. If the State's criteria are no less stringent than the federal regulations, EPA will withdraw its criteria without notice and comment rulemaking since additional comment on the criteria is unnecessary. If a State's criteria are less stringent than the federal regulations, EPA will withdraw its criteria only after notice and opportunity for public comment on that decision (see 57 FR 60860).

On August 24, 1994, Idaho adopted revisions to its surface water quality standards (Title 1, Chapter 2, section 250 of the Idaho Administrative Code), regarding surface water quality criteria for toxic pollutants. For all pollutants except arsenic, Idaho adopted by reference EPA's criteria. EPA Region 10 approved Idaho's criteria and recommended to the Administrator that she withdraw the federal human health criteria applicable to Idaho. In a separate final action published in the **Federal Register** on November 29, 1996, EPA withdrew without public comment those human health criteria applicable

to Idaho for which the State has adopted criteria identical to the federal criteria (see 61 FR 60616).

Idaho adopted human health criteria for arsenic (0.020 µg/l for the consumption of water and organisms and 6.2 µg/l for the consumption of organisms); these criteria are less stringent than the federal regulations (0.018 µg/l for the consumption of water and organisms and 0.14 µg/l for the consumption of organisms). Idaho's criteria for arsenic differ from the federal criteria because the State used a bioconcentration factor (BCF) to derive its criteria that is different from the BCF used by EPA. Idaho selected a BCF that the State believes more accurately reflects the species of fish present in State's surface waters. EPA had indicated in the preamble to the National Toxic Rule that states may select fish species in developing BCF values that would better reflect species found in State waters (see 57 FR 60888). Having reviewed Idaho's submission, EPA concluded that the State's choice of a BCF to calculate the arsenic criteria was appropriate and the State's arsenic criteria met the requirements of the Clean Water Act.

Because the State's arsenic criteria are less stringent than the federal criteria, EPA proposed to withdraw the human health criteria for arsenic applicable to Idaho and solicited public comment on that proposal (61 FR 60672; November 29, 1996). EPA received one comment on the proposed rule. The commenter agreed with the appropriateness of Idaho's ambient water quality criteria for arsenic for the protection of human health.

C. Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), EPA must determine whether a regulatory action is "significant" and therefore subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines a "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

This withdrawal of the arsenic human health criteria imposes no additional regulatory requirements. Therefore, it has been determined that this rule is not a "significant regulatory action" under the terms of Executive Order 12866 and is not subject to OMB review.

D. Unfunded Mandates Reform Act

This action will not result in the annual expenditure of \$100 million or more for State, local, and tribal governments, in the aggregate, or to the private sector, and is not a Federal mandate, as defined by the Unfunded Mandates Reform Act of 1995 (UMRA) (P.L. 104-4), nor does it uniquely affect small governments in any way. As such, the requirements of sections 202, 203, and 205 of Title II of the UMRA do not apply to this action.

E. Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA) (5 USC 601 *et seq.*), whenever a federal agency is required to publish a general notice of rulemaking or promulgates a final rule, the agency is generally required to prepare an analysis describing the economic impact of the regulatory action on small entities. However, under section 605(b) of the RFA, if the head of the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities, the agency is not required to prepare an RFA analysis. Today's final rule establishes no requirements applicable to small entities, and so is not susceptible to a regulatory flexibility analysis.

This rule amends the National Toxics Rule (NTR), codified at 40 CFR 131.36, which promulgated federal water quality criteria to bring several states into compliance with Clean Water Act requirements. The NTR did not itself establish any requirements that are

applicable to small entities. The NTR criteria are implemented through various state water quality control programs, including the NPDES permit program that limits the discharge of contaminants into navigable waters. The NPDES permit process is implemented by an authorized State, or absent an approved state program, by EPA (the permit authority). Authorized states and EPA have considerable discretion in carrying out the permit program to meet water quality standards. Accordingly, while a permitting authority's implementation of federally-promulgated water quality criteria may ultimately affect small entities by changing their permit limits, the criteria themselves do not apply to any discharger, including small entities.

Since the NTR, as explained above, does not itself establish any requirements that are applicable to small entities, certainly withdrawing federal water quality criteria from the NTR would not establish any requirements applicable to small entities. Moreover, even if the State criteria that replace the federal criteria are more stringent than the federal criteria, the State criteria themselves would not affect small entities. As explained previously, the permit authority implements the criteria through its permitting program where it will have a number of discretionary choices in developing permit limits.

For these reasons, the Administrator is certifying that this rule will not have a significant impact on a substantial number of small entities. Therefore the Agency has not prepared a regulatory flexibility analysis.

F. Paperwork Reduction Act

This final rule does not impose any requirement subject to the Paperwork Reduction Act.

G. Submission to Congress and the General Accounting Office

Under 5 U.S.C. 801(a)(1)(A) as added by the Small Business Regulatory

Enforcement Fairness Act of 1996, EPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the General Accounting Office prior to publication of the rule in today's **Federal Register**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 131

Environmental protection, Water pollution control, Water quality standards.

Dated: October 2, 1997.

Carol M. Browner,
Administrator.

For the reasons set out in the preamble, title 40, chapter I, part 131 of the Code of Federal Regulations is amended 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.*

§ 131.36 [Amended]

2. Section 131.36(d)(13)(i) is amended by removing the following uses classifications: "16.01.2100.01.b. Domestic Water Supplies", "16.01.2100.03.a. Primary Contact Recreation", and "16.01.2100.03.b. Secondary Contact Recreation".

3. Section 131.36(d)(13)(ii) is amended by removing the following use classifications and corresponding applicable criteria: "01.b", "03.a", "03.b".

4. Section 131.36(d)(13)(ii) is amended in "02.a", "02.b.", "02.cc" use classification, under the listing of applicable criteria, by removing "Column D2".

5. Section 131.36(d)(13)(iii) is removed in its entirety.

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