

**ENVIRONMENTAL PROTECTION
AGENCY****40 CFR Part 131**

[FRL-5903-7]

**Withdrawal From Federal Regulations
of Nineteen Acute Aquatic Life Water
Quality Criteria Applicable to Alaska****AGENCY:** Environmental Protection
Agency.**ACTION:** Final rule.

SUMMARY: In 1992, EPA promulgated federal regulations establishing water quality criteria for toxic pollutants for several states, including Alaska (40 CFR 131.36). Among the criteria promulgated for Alaska were acute aquatic life criteria for 24 pollutants. Recently, Alaska has clarified that certain criteria they have previously adopted are no less stringent than the acute aquatic life water quality criteria in the federal regulations. Based on the state's clarification, EPA is amending the federal regulations to withdraw acute aquatic life criteria for 19 pollutants applicable to waters of Alaska. EPA is withdrawing these criteria without a notice and comment rulemaking because the State's acute aquatic life criteria are no less stringent than the federal criteria. Federal aquatic life criteria for 5 pollutants continue to apply to Alaska as well as federal human health criteria for carcinogens.

DATES: This amendment is effective October 10, 1997.**ADDRESSES:** The administrative record for consideration of Alaska's acute aquatic life criteria is available for public inspection at EPA Region 10, Office of Water, 1200 Sixth Avenue, Seattle, Washington, 98101, during normal business hours of 8 a.m. to 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 Sally Brough in EPA's Region 10 at 206-553-1295.**SUPPLEMENTARY INFORMATION:**

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A. Potentially Affected Entities

Citizens concerned with water quality in Alaska may be interested in this rulemaking. Entities discharging toxic pollutants to waters of the United States in Alaska could be affected by this rulemaking since acute aquatic life 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 Alaska.
Municipalities.	Publicly-owned treatment works discharging pollutants to surface waters in Alaska.

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 or NTR. The NTR established numeric water quality criteria for 12 States and 2 Territories (hereafter "States") that had failed to comply fully with section 303(c)(2)(B) of the Clean Water Act ("CWA") (57 FR 60848). The criteria, codified at 40 CFR 131.36, became applicable water quality standards in those 14 jurisdictions for all purposes and programs under the CWA effective February 5, 1993.

When a State adopts criteria that meet the requirements of the CWA, EPA's policy is to withdraw the federal criteria. If the State's criteria are no less stringent than the federal regulations, EPA has determined that additional comment on the criteria is unnecessary and constitutes good cause for issuing a final rule without notice and comment. For the same reason, EPA has determined that good cause exists to waive the requirement for a 30-day period before the amendment becomes effective and therefore, the amendment

will be immediately effective. EPA has determined that both of these circumstances apply in this case.

**C. Basis for Partial Withdrawal of
Criteria**

Water quality criteria applicable in Alaska were included in the NTR due to ambiguity about whether the State had adopted by reference acute aquatic life criteria cited in EPA's Quality Criteria for Water July 1976, 45 FR 79318 (Nov. 28, 1980), 49 FR 5831 (Feb. 15, 1984), and 50 FR 30784 (July 29, 1985). EPA included Alaska in the NTR for acute aquatic life criteria based on statements in two state documents (the State's Water Quality Standards Workbook published in July 1991 and an August 30, 1991 letter from the Alaska Department of Environmental Conservation (ADEC) to EPA Region 10), indicating that Alaska had adopted only chronic criteria. In a December 19, 1996 letter, ADEC clarified for EPA that Alaska had adopted both acute and chronic aquatic life criteria for toxic pollutants by reference in 1987. ADEC indicated that the statements in the two 1991 non-regulatory documents indicating the state had adopted only chronic aquatic life criteria were misstatements. Alaska explained that the adoption by reference of EPA criteria, in Note 5 to Alaska's water quality standards table at 18 AAC 70.020(b), implicitly includes both acute and chronic aquatic life criteria. EPA Region 10 had approved the 1987 changes to the Alaska water quality standards, including the adoption of toxic criteria by reference found in Note 5, by letter dated April 6, 1987. Today's action is based on Alaska's explanation of what aquatic life water quality criteria are included in its water quality standards.

D. Related Issues**1. Metals Expressed as Total
Recoverable**

The December 19, 1996 letter from ADEC to EPA also clarified that Alaska's metals criteria are to be measured as total recoverable metal. This approach is available to states implementing their own criteria. The NTR as amended (60 FR 22229, May 4, 1995) expresses aquatic life metals criteria for metals as dissolved metal with the exception of Fresh Water acute and chronic criteria for selenium.

As noted above, Alaska adopted metals criteria by referencing EPA's criteria at 45 FR 79318 (Nov. 28, 1980) and 50 FR 30784 (July 29, 1985). In the 1980 FR notice, EPA established water quality criteria for metals as measured

with the total recoverable method. In the 1985 FR notice, EPA published water quality criteria for metals as measured with the acid soluble method, but acknowledged that a final approved acid soluble method was unavailable and recommended the continued use of the total recoverable method. This statement apparently caused confusion over what sample preparation method Alaska should use to implement EPA's 1985 metals criteria it had adopted by reference.

The December 19, 1996 ADEC letter acknowledges that Alaska's aquatic life criteria for metals are indeed expressed as total recoverable criteria. ADEC has indicated it will consistently apply aquatic life criteria for metals as total recoverable to water quality actions and

decisions in Alaska, including NPDES permits, section 303(d) lists, and TMDL development.

2. Specified Criteria

Alaska has identified in the table below, the acute aquatic life criteria that were adopted by reference that are no less stringent than the Federal criteria in the NTR. A comparison of the criteria found in the NTR and in the EPA documents which Alaska adopted by reference raised questions regarding the stringency comparison for lead, lindane/gamma BHC, endosulfan, and heptachlor. In the case of lead, the freshwater (FW) hardness equation in the NTR is different from the hardness equation adopted by Alaska. The NTR lists FW and saltwater (SW) acute aquatic life criteria for gamma BHC

while Alaska adopted criteria for lindane. Alaska adopted FW and SW aquatic life criteria for endosulfan by citing EPA's 1980 **Federal Register** notice. However, the NTR acknowledges the separate toxicity of the alpha and beta isomers of endosulfan. Similarly, Alaska adopted FW and SW criteria for heptachlor while the NTR contains separate criteria for heptachlor and heptachlor epoxide (a breakdown product of heptachlor). The following table shows the acute aquatic life criteria, adopted by Alaska, for which EPA is withdrawing Alaska from the NTR. Footnotes 1 and 2 explain EPA Region 10's determinations for lead and lindane. Footnotes 3 and 4 explain how Alaska interprets their criteria for endosulfan and heptachlor.

ALASKA ACUTE AQUATIC LIFE CRITERIA (IN $\mu\text{g/l}$), ADOPTED IN NOTE 5 OF THE ALASKA WATER QUALITY STANDARDS 18 AAC 70.020(b)
[December, 1996]

Compound	Fresh water acute ($\mu\text{g/l}$)	Salt water acute ($\mu\text{g/l}$)
1. Arsenic (TR)	360	69
2. Cadmium (TR)	$*e^{(1.128[\ln(H)]-3.828)}$	43
3. Chromium III (TR)	$*e^{(0.819[\ln(H)]+3.688)}$
4. Chromium VI (TR)	16	1100
5. Copper (TR)	$*e^{(0.9422[\ln(H)]-1.464)}$	2.9
6. Lead (TR) ¹	$*e^{(1.266[\ln(H)]-1.416)}$	140
7. Mercury (TR)	2.4	2.1
8. Silver (TR)	$*e^{(1.72[\ln(H)]-6.52)}$	2.3
9. Cyanide	22	1.0
10. Aldrin	3.0	1.3
11. Lindane/Gamma-BHC ²	2.0	0.16
12. Chlordane	2.4	0.09
13. DDT, 4,4'-	1.1	0.13
14. Dieldrin	2.5	0.71
15. Endosulfan ³	0.22	0.034
16. Endrin	0.18	0.037
17. Heptachlor ⁴	0.52	0.053
18. Toxaphene	0.070

TR Total Recoverable method for measuring metal concentrations.

*Hardness dependent metals—numeric criteria are calculated using the equations in the above table where H = ambient hardness. For example, the numeric criteria using 100 mg/l of hardness are: cadmium = 3.9 $\mu\text{g/l}$, chromium III = 1700 $\mu\text{g/l}$, copper = 18 $\mu\text{g/l}$, lead = 83 $\mu\text{g/l}$, and silver = 4.1 $\mu\text{g/l}$.

¹Alaska adopted the 1985 federal criteria document for lead which contains a hardness based equation to calculate the numeric criterion using ambient hardness. The NTR hardness equation for FW acute aquatic life for lead is different than the 1985 equation. However, the calculated numeric values for any specific ambient hardness, using the two different equations, are within a few $\mu\text{g/l}$ of each other. Since the calculated values from the two equations are so close, EPA has determined by letter written on Sept. 18, 1996, to the ADEC that the 1985 equation is functionally equivalent to the NTR equation for purposes of NTR removal.

²Alaska adopted acute aquatic life criteria for hexachlorocyclohexane (Lindane and a mixture of BHC isomers) from the 1980 FEDERAL REGISTER (45 FR 79335). The NTR only includes gamma BHC. Lindane and gamma-BHC have the same Chemical Abstract Service (CAS) numbers and are the same compounds. Therefore, Alaska's Lindane criteria apply to gamma BHC. EPA has determined that Alaska can be removed from the NTR for gamma BHC (EPA letter dated September 18, 1996).

³Alaska adopted the endosulfan criteria by reference from the 1980 FR (45 FR 79334). The NTR has criteria for the two endosulfan isomers, alpha and beta endosulfan. Alaska interprets its endosulfan criteria in this table to apply to the summation of both alpha and beta isomers of endosulfan.

⁴Alaska adopted heptachlor criteria from the 1980 FR (45 FR 79335). The NTR includes criteria for heptachlor and heptachlor epoxide (a breakdown product of heptachlor). Alaska interprets its heptachlor criteria in this table to apply as a summation of both heptachlor and heptachlor epoxide.

Alaska has not requested removal from the NTR for the following acute aquatic life criteria: freshwater (FW) and saltwater (SW) nickel, FW and SW selenium, FW and SW zinc, FW and SW pentachlorophenol, and FW toxaphene.

The acute aquatic life criteria adopted by reference by Alaska for these five pollutants are less stringent than the Federal criteria. The NTR criteria for these five pollutants continue to apply in Alaska.

E. 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.

The withdrawal of certain federal acute aquatic life criteria applicable to Alaska 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.

F. Unfunded Mandates Reform Act

Today's 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) (Pub. 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.

G. Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA) (5 USC 601 et seq.), whenever a federal agency promulgates a final rule after being required to publish a general notice of proposed rulemaking under section 553 of the Administrative Procedures Act (APA), the agency generally must prepare a final regulatory flexibility analysis describing the economic impact of the regulatory action on small entities. EPA has not prepared a final regulatory flexibility analysis for this action because the Agency was not required to publish a general notice of proposed rulemaking for this rule.

As explained above, section 553 of the APA provides that, when an agency for good cause finds that notice and public procedure are impracticable, unnecessary and contrary to the public interest, an agency may first issue a rule without providing notice and an opportunity for public comment. EPA has determined that there is good cause for making today's rule final without notice and opportunity for comment for the reasons spelled out above. In these circumstances, the RFA does not require preparation of a final regulatory flexibility analysis. Today's final rule establishes no requirements applicable to small entities.

H. Paperwork Reduction Act

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

I. Submission to Congress and the General Accounting Office

Under 5 U.S.C. 801(a)(1)(A) as amended 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 6, 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)(12)(ii) is amended in use classifications, (1)(A)i, (1)(A)iii, (1)(B)i, (1)(B)ii, and (1)(C) under the listing of applicable criteria, by replacing "all" with "#9, 10, 13, 53, and 126" for Column B1.

3. Section 131.36(d)(12)(ii) is amended in use classifications, (2)(A)i, (2)(B)i, (2)(B)ii, (2)(C), and (2)(D) under the listing of applicable criteria, by replacing "all" with "# 9, 10, 13, and 53" for column C1.

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