

Subject Matter Code: C-20 Scope Prty Toxic Poll. List

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Comment ID: CTR-025-001b

Comment Author: Metro. Water Dist. of So. Cal.

Document Type: Water District

State of Origin: CA

Represented Org:

Document Date: 09/26/97

Subject Matter Code: C-20 Scope Prty Toxic Poll. List

References:

Attachments? Y

CROSS REFERENCES C-16

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Comment: Proposed California Toxic Rule

The Metropolitan Water District of Southern California (Metropolitan) appreciates this opportunity to comment on the U.S. Environmental Protection Agency's (U.S.EPA) proposed California Toxics Rule(CTR). Metropolitan, through its 27 member agencies, supplies nearly 60% of the drinking water used by approximately 16 million people living in the six-county region of Southern California. Our sources of supply are surface waters from Northern California and the Colorado River.

The water quality criteria proposed in the CTR are of critical importance to Metropolitan and other drinking water suppliers. These criteria create the basis for source water protection activities which are the first line of defense for ensuring a safe drinking water supply. Further, the criteria help protect aquatic species, including the unique aquatic resources of the Bay-Delta. The health of the Bay-Delta ecosystem and waters tributary to the Delta is linked to the amount of water available for export and thus directly affects water supply reliability of the exporting water agencies such as Metropolitan. Lastly, the CTR criteria affect the ability of water suppliers to operate and maintain their facilities.

Metropolitan recognizes that the CTR is only required to address the Clean Water Act's "priority pollutants". We note, however, that many of the drinking water contaminants regulated under the Federal and/or California Safe Drinking Water Acts (SDWA) are not among the priority pollutants. Table 1 lists the drinking water chemical constituents regulated under the California SDWA which are not priority pollutants. (The California SDWA regulates a broader set of contaminants than the Federal SDWA and provides the appropriate regulatory comparison since the CTR pertains solely to California.) Drinking water beneficial, uses cannot be fully protected without water quality criteria for all California SDWA regulated contaminants. Metropolitan requests that U.S. EPA consider including human health criteria for the contaminants listed in Table 1 as part of the CTR.

Response to: CTR-025-001b

The scope of today's rule is to establish numeric criteria to bring California into compliance with CWA Section 303(c)(2)(B). Section 303(c)(2)(B) requires adoption of numeric criteria for priority toxic pollutants contained in CWA Section 307(a) for which EPA has issued Section 304(a) criteria guidance the discharge or presence of which could reasonably be expected to interfere with the designated uses of state waters. The promulgation of pollutants that are not identified as priority toxic pollutants (i.e, those pollutants that are not contained in the CWA Section 307(a) list) are outside of the scope of today's rule.

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Comment ID: CTR-026-008  
Comment Author: Cal. Department of Fish & Game  
Document Type: State Government  
State of Origin: CA  
Represented Org:  
Document Date: 09/25/97  
Subject Matter Code: C-20 Scope Prty Toxic Poll. List  
References:  
Attachments? N  
CROSS REFERENCES

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Comment: 8. ADDITIONAL CRITERIA

The proposed rule would establish freshwater aquatic organism acute criteria for 24 constituents, freshwater aquatic organism chronic criteria for 28 constituents, saltwater aquatic organism acute criteria for 23 constituents, and saltwater aquatic organism chronic criteria for 27 constituents. The DFG agrees that establishment of criteria for these constituents will go a long way towards protecting fish and wildlife resources. However, we also believe that criteria for additional constituents would further strengthen the proposed rule. To this end, the DFG recommends that acute and chronic toxicity criteria be established for chlorine and ammonia. As a starting point, the EPA 1986 Gold Book has fresh and saltwater criteria guidance developed for both constituents. With respect to acute and chronic toxicity, the CTR should develop criteria similar to that which exists in the California Ocean Plan. From an overall toxicity standpoint, setting acute and chronic criteria would better address the additive or synergistic effects that individual constituent criteria fail to take into account.

Response to: CTR-026-008

The scope of today's rule is to establish numeric criteria to bring California into compliance with CWA Section 303(c)(2)(B). Section 303(c)(2)(B) requires adoption of numeric criteria for priority toxic pollutants contained in CWA Section 307(a) for which EPA has issued Section 304(a) criteria guidance and where those pollutants could reasonably be expected to interfere with the designated uses of state waters. Neither ammonia nor chlorine are identified as priority toxic pollutants in CWA Section 307(a) and are thus outside of the scope of today's rule. This is consistent with EPA's action in the National Toxics Rule 57 FR 60848 (Dec 22, 1992). See p. 60852, col. 2; 60856-60859.

EPA, however, recognizes the detrimental impacts of ammonia, chlorine, and other toxins on aquatic ecosystems, and encourages states, including California, to adopt criteria for these and other pollutants so that the designated uses of state waters can be fully protected (the CWA and Water Quality Standards Regulation requires states to adopt water quality standards, which includes water quality criteria, sufficient to protect the designated uses of their waters). States may also use their narrative criteria to prevent toxic effects caused by pollutants, such as ammonia and chlorine, in instances where a state does not have numeric criteria in place or to supplement their numeric criteria.

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Comment ID: CTR-058-009  
Comment Author: Western States Petroleum Assoc  
Document Type: Trade Org./Assoc.  
State of Origin: CA

Represented Org:  
Document Date: 09/26/97  
Subject Matter Code: C-20 Scope Prty Toxic Poll. List  
References:

Attachments? Y

#### CROSS REFERENCES

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Comment: MTBE. WSPA supports EPA's decision not to set criteria based on secondary or organo-leptic considerations and to remain focused on setting criteria to protect human health and aquatic life.

Given the controversy surrounding use of MTBE, particularly in California, WSPA supports an open, objective and comprehensive scientific discussion of the issues and possible solutions. In fact, WSPA is supporting (with EPA and API) a detailed study of ambient aquatic toxicity data on MTBE in surface waters, with a goal to agree on appropriate water quality criteria to protect aquatic life. It is appropriate to allow this study to run its course, at which time EPA and the states can examine the data and set criteria based on sound science.

Other stakeholders may raise concerns about the carcinogenicity of MTBE. However, EPA (the agency charged with deciding whether MTBE is a carcinogen) has not taken an official position on this issue. The data which suggest that it might be (e.g., Belpoggi et al.) provide, at best, only weak evidence and are highly controversial from a methodological standpoint. It is imperative that EPA carefully review the evidence and decide the matter in an appropriate forum. Certainly, this rulemaking is not the appropriate forum.

In the interim, water quality officials are already well-empowered to address concerns of taste and odor when needed. Establishing an MTBE criterion in this rulemaking will not enhance protection of drinking water supplies.

Response to: CTR-058-009

The scope of today's rule is to establish numeric criteria to bring California into compliance with CWA Section 303(c)(2)(B). Section 303(c)(2)(B) requires adoption of numeric criteria for priority toxic pollutants contained in CWA Section 307(a) for which EPA has issued Section 304(a) criteria guidance and the discharge or presence of which could reasonably be expected to interfere with the designated uses of state waters. MTBE is not identified as a priority toxic pollutant in CWA Section 307(a) and is thus outside of the scope of today's rule. Additionally, EPA acknowledges the support for the Agency in not promulgating criteria that are based on organoleptic considerations. This is consistent with the NTR. See 57 FR 60873.

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Comment ID: CTR-061-006  
Comment Author: G. Fred Lee & Associates  
Document Type: Academia  
State of Origin: CA  
Represented Org:  
Document Date: 09/25/97  
Subject Matter Code: C-20 Scope Prty Toxic Poll. List  
References:

Attachments? Y

**CROSS REFERENCES**

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Comment: Page 42162, second column, near the top, does not provide a reliable discussion about how the Priority Pollutant list was developed. It was a court-ordered consent decree that was not internally peer-reviewed by the US EPA, or reviewed by the technical community or the public concerned with these issues. The Priority Pollutant list as promulgated and implemented has proven to be a significant detriment to proper water pollution control efforts in the US since it focuses resources on a number of chemicals that have limited significance to public health and the environment and allows regulatory agencies, dischargers, etc. to ignore the vast arena of hazardous or detrimental chemicals that exist in various types of wastes and point and non-point source stormwater runoff that can and, in some instances, do cause real water quality impacts.

Response to: CTR-061-006

EPA believes that the derivation of the Section 307(a) priority toxic pollutant list is outside of the scope of today's rule. Additionally, EPA disagrees that the current Section 307(a) list of priority toxic pollutants is a detriment to water pollution control. The Agency believes that the establishment of criteria for priority toxics pollutants represents significant progress in controlling the discharge of toxins to the nation's waters and will result in many improvements in protecting water resources and in achieving the fishable/swimmable goals of the Clean Water Act. EPA maintains that the control of toxic pollutants in ambient waters is fundamental in a number of Clean Water Act programs, including permitting programs, protection of contaminant levels in fish and shellfish, improvements in marine, coastal, and inland surface water quality, contamination of sediments, pollution prevention, and in ecological protection.

While EPA agrees that there may be other chemicals that adversely impact environmental protection, EPA notes that states do have the authority to develop and adopt criteria for pollutants that are not contained on the 307(a) list in order to protect the designated uses of their waters. The Water Quality Standards Regulation (see 40 CFR 131) requires all states, including California, to adopt criteria that will provide sufficient coverage to protect the designated uses of their waters. Furthermore, where a state has not adopted sufficient coverage of numeric criteria to protect the designated uses, the state may utilize its narrative criteria to derive criteria for pollutants to supplement the numeric criteria.

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Comment ID: CTR-065-006b

Comment Author: Environmental Health Coalition

Document Type: Environmental Group

State of Origin: CA

Represented Org:

Document Date: 09/26/97

Subject Matter Code: C-20 Scope Prty Toxic Poll. List

References:

Attachments? N

**CROSS REFERENCES P**

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Comment: TOXICITY TESTING

EHC strongly supports inclusion of acute and chronic toxicity tests. However, it is very important that

chlorine and ammonia be added to the list of constituents.

Response to: CTR-065-006b

The scope of today's rule is to establish numeric criteria to bring California into compliance with CWA Section 303(c)(2)(B). Section 303(c)(2)(B) requires adoption of numeric criteria for priority toxic pollutants contained in CWA Section 307(a) for which EPA has issued Section 304(a) criteria guidance and where those pollutants could reasonably be expected to interfere with the designated uses of state waters. Neither ammonia nor chlorine are identified as priority toxic pollutants in CWA Section 307(a) and are thus outside of the scope of today's rule. This is consistent with EPA's action in the National Toxics Rule 57 FR 60848 (Dec 22, 1992). See p. 60852, col. 2; 60856-60859.

EPA, however, recognizes the detrimental impacts of ammonia, chlorine, and other toxins on aquatic ecosystems, and encourages states, including California, to adopt criteria for these and other pollutants so that the designated uses of state waters can be fully protected (the CWA and Water Quality Standards Regulation requires states to adopt water quality standards, which includes water quality criteria, sufficient to protect the designated uses of their waters). States may also use their narrative criteria to prevent toxic effects caused by pollutants, such as ammonia and chlorine, in instances where a state does not have numeric criteria in place or to supplement their numeric criteria.

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Comment ID: CTR-090-005

Comment Author: C&C of SF, Public Util. Commis.

Document Type: Local Government

State of Origin: CA

Represented Org:

Document Date: 09/25/97

Subject Matter Code: C-20 Scope Prty Toxic Poll. List

References: Letter CTR-090 incorporates by reference letters CTR-035 and CTR-054

Attachments? Y

CROSS REFERENCES

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Comment: Major Concerns About the Proposed Criteria and Rule

1. The Proposal is Based on Poor Data and Will Not Result in Better Water Quality for California. We stated that our own attainability analysis and that of BADA show that San Francisco, will be impacted by this rule. Unfortunately, due to the short time for review, the poor quality of data and basis for statements and assumptions in the proposal and the problem with detection limits we cannot specifically say what will be the cost to San Francisco. One analysis tells us it could be \$2.3 million per year annualized costs and another analysis tells us it could be much more. We strongly recommend major revision to the proposal and the economic analysis before final promulgation for the following reasons:

The criteria includes many toxicants which are not known to cause problems in the waters; many are banned substances. On the other hand, substances which are known to be problems and which are being released in large amounts are not included in the proposed criteria;

Response to: CTR-090-005

EPA believes that the derivation of the Section 307(a) priority toxic pollutant list is outside of the scope

of today's rule. Furthermore, EPA disagrees that the criteria promulgated in today's rule are not to known to cause problems in ambient waters. See response to CTR-061-006. The criteria are based on laboratory studies showing harm to human health or aquatic life. Further, because permit limits are incorporated into NPDES permits only for constituents having a reasonable potential to exceed water quality standards, a discharger does not receive a limit in its permit unless the discharge contains the pollutant. Thus existence of criteria does not translate into unnecessary permit limits.

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Comment ID: CTR-090-016

Comment Author: C&C of SF, Public Utl. Commis.

Document Type: Local Government

State of Origin: CA

Represented Org:

Document Date: 09/25/97

Subject Matter Code: C-20 Scope Prty Toxic Poll. List

References: Letter CTR-090 incorporates by reference letters CTR-035 and CTR-054

Attachments? Y

CROSS REFERENCES

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Comment: Outdated priority pollutant list - p 42162. B. Statutory and Regulatory Background (paragraphs 3,4) - As noted in the preamble, the 1978 priority pollutant list has not been updated since January 1981. This has several important implications for this rule-making:

1. The absence of criteria for significant toxicants - Chemical usage changes over time. New chemical intermediates and products are continually being developed and brought to market. Pesticides, in particular, have a relatively short commercial existence. Of the approximately eighteen pesticides and metabolites on the priority pollutant list, all but two are now banned or significantly restricted. Newer, or otherwise non-listed, pesticides are not covered by the CTR even though there is evidence of their presence in surface waters and adverse impacts. The Pollutant Policy Document (SWRCB, May 1990 final draft) noted that the San Joaquin drains an agricultural area which may receive as much as 23 million kilograms of pesticides annually. In the river, it noted that, "Consistently detected are 2,4-D, atrazine, simazine, dacthal and diazinon." Yet this proposed rule contains criteria for none of these pesticides. Of particular importance is diazinon. Approximately 2,000,000 pounds are sold annually in California with about half going to agriculture and half to residential users. Monitoring by Alameda County has tied it to toxicity in some county creeks. Diazinon appears in all of Palo Alto's creeks at levels that -may be of concern (Fish and Game recommends 80 ppt to protect aquatic life and Palo Alto has detected it at up to 400 ppt.).

Although this pesticide is subject to hydrolysis and eventually breaks down, the process may take four to six months. More significantly, the U.S. Geological Survey has tracked pulses of this pesticide down the San Joaquin and Sacramento and into San Francisco Bay. During the USGS study, water samples from the San Joaquin were toxic for 12 consecutive days to the water flea, *Ceriodaphnia dubia*. (USGS, Water Fact Sheet, Diazinon Concentrations in the Sacramento and San Joaquin Rivers and San Francisco Bay, California, February 1993, K. Kuivila, 1993). The USGS report noted that other pesticides (chlorpyrifos, methidathion, and carbaryl) were also routinely detected in the samples and may have contributed to the toxicity. These other pesticides also do not have EPA criteria.

The Central Valley Regional Water Quality Control Board has detected diazinon, chlorpyrifos, fonofos, and carbaryl at concentrations toxic to *Ceriodaphnia*. In fact, the principal conclusion of their two and

half year study was that a 43 mile stretch of the San Joaquin River was toxic to Ceriodaphnia about half the time (Insecticide Concentrations and Invertebrate Bioassay Mortality in Agricultural Return Water from the San Joaquin Basin, CVRWQCB, December 1995). Other chemicals, methyl tertiary butyl ether (WBE), for example, a fuel additive, and related compounds are now showing up in California drinking water supply reservoirs and appear to be persistent

These unregulated toxicants are may be a significant water quality problem in California surface waters yet EPA has not found it appropriate to issue criteria for them. The excuse for inaction for all of these constituents cannot be that they have only recently appeared or have not been evaluated. Although MTBE is relatively new, in 1973, the National Academy of Sciences issued a guideline for diazinon of 9 ppt for the protection of aquatic life. More recently the California Department of Pesticide Regulation proposed quantitative response limits (QRLS) for diazinon, chlorpyrifos, and methidathion.

The CALFED program is proposing to spend a billion dollars over the next 20 years for water course and riparian habitat enhancements in the Delta. This effort will be undermined unless steps are taken to reduce toxicity from agricultural drainage.

The Clean Water Act in Section 303(c)(4) allows the Administrator to issue a standard in any case where it is necessary to meet the requirements of the Act. If there ever was an obvious, overwhelming need for standards, this is it. EPA needs to work with the State and agricultural interests to develop effective programs to control the release of pesticides to the inland surface waters and Bays and Estuaries of California

Response to: CTR-090-016

See response to CTR-090-005.

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Comment ID: CTR-090-017

Comment Author: C&C of SF, Public Util. Commis.

Document Type: Local Government

State of Origin: CA

Represented Org:

Document Date: 09/25/97

Subject Matter Code: C-20 Scope Prty Toxic Poll. List

References: Letter CTR-090 incorporates by reference letters CTR-035 and CTR-054

Attachments? Y

**CROSS REFERENCES**

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Comment: 2. Criteria for no longer relevant toxicants - Listing chemicals which no longer have relevance to water quality is not as serious as omitting chemicals which are important. Listing irrelevant toxicants does, however, waste resources since these chemicals are routinely placed in NPDES permits with both effluent limits and mandated monitoring regardless of whether they have ever been detected. The result is permits with impressive lists of priority pollutants which give the false impression that they are comprehensive and therefore protective of the receiving waters.

For each chemical included in this rule-making EPA should demonstrate that the chemical is present either in effluents or receiving waters at concentrations which cause or have the reasonable Potential to cause, or contribute to an excursion above any criteria published by EPA under Section 304. The

adoption of irrelevant criteria is not "necessary to support such, designated uses," 303(c)(2)(B), and therefore can be omitted.

The information on which toxicants are present should be readily available since EPA receives the NPDES monitoring reports and state water quality assessments. By limiting the rule-making to real constituents of concern, we can - begin to focus on those toxic chemicals which are damaging the biota or threatening human health.

Response to: CTR-090-017

See response to CTR-090-005.

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Comment ID: CTR-095-001a  
Comment Author: M. Ruth Uiswander  
Document Type: Citizen  
State of Origin: CA  
Represented Org:  
Document Date: 10/02/97  
Subject Matter Code: C-20 Scope Prty Toxic Poll. List  
References:  
Attachments? N  
CROSS REFERENCES C-17a; C-21; C-14

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Comment: In regard to the numeric water quality standards criteria for California surface water, they have been revealed by environmental groups to be insufficiently protective and environmentally unjust. The proposed new rules assume fish ingestion of 6.5 grams per day. In reality, consumption of fish in some communities can be as high as 1 pound per day. This level of consumption is especially likely among subsistence fishers.

Please prevent toxic pollution in California's bays by making more protective standards that consider all toxic pollutants and consider the fish consumption habits of subsistence anglers.

Response to: CTR-095-001a

See response to CTR-061-006. With respect to fish consumption see responses to CTR-002-002a and CTR-002-005a (Category C-14; Fish or Water Consumption).

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Comment ID: CTR-100-001  
Comment Author: Michael A. McBride  
Document Type: Citizen  
State of Origin: CA  
Represented Org:  
Document Date: 10/04/97  
Subject Matter Code: C-20 Scope Prty Toxic Poll. List  
References:  
Attachments? N  
CROSS REFERENCES

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Comment: Great progress has been made in the last twenty years to clean our polluted streams, rivers and oceans. Please keep the pressure on the polluters by creating more protective standards that consider all toxic pollutants of concern. Thank you for your time and please let me know your thoughts.

Response to: CTR-100-001

See response to CTR-061-006.

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Comment ID: CTR-101-001b  
Comment Author: Cheesemans' Ecology/Brd Safari  
Document Type: Environmental Group  
State of Origin: CA  
Represented Org:  
Document Date: 10/06/97  
Subject Matter Code: C-20 Scope Prty Toxic Poll. List  
References:  
Attachments? N  
CROSS REFERENCES C-14

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Comment: We would like to thank the EPA for accepting comments on its proposed numeric water quality standards criteria for California surface water. We urge the prevention of toxic pollution in California's bays by creating more protective standards that consider all toxic pollutants of concern and that address the consumption habits of subsistence fishers, as well as "average" fish consumers.

Response to: CTR-101-001b

See response to CTR-061-006. With respect to fish consumption, see response to CTR-109-001a (Category C-14; Fish or Water Consumption).

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Comment ID: CTR-105-001a  
Comment Author: Heather Catherine Park Tausig  
Document Type: Citizen  
State of Origin: CA  
Represented Org:  
Document Date: 10/13/97  
Subject Matter Code: C-20 Scope Prty Toxic Poll. List  
References:  
Attachments? N  
CROSS REFERENCES C-14

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Comment: I understand that the EPA is currently accepting comments on its proposed numeric water quality standards criteria for California surface water. I am writing to urge the EPA support the prevention of toxic pollution in California's bays by creating more protective standards that consider all toxic pollutants of concern and that address the consumption habits of subsistence fishers, as well as "average" fish consumers.

Response to: CTR-105-001a

See response to CTR-061-006. With respect to fish consumption, see response to CTR-109-001a (Category C-14; Fish or Water Consumption).

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Comment ID: CTR-109-001b  
Comment Author: Maggie Miller  
Document Type: Citizen  
State of Origin: CA  
Represented Org:  
Document Date: 12/01/97  
Subject Matter Code: C-20 Scope Prty Toxic Poll. List  
References:  
Attachments? N  
CROSS REFERENCES C-14

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Comment: The new water quality standards the EPA is proposing for California surface waters disturbs me greatly. There are several problems with the proposed rules. First, in establishing standards for mercury, dioxin, PCBs, and other contaminants, the proposed new rules assume fish consumption at 6.5 grams per day yet consumption of fish in certain communities can be as high as one pound per day, over 60 times more than estimated by the EPA. Please don't underestimate fish consumption by people of different races and cultures.

Please prevent the toxic pollution of California waters by creating more protective standards that consider all toxic pollutants and all consumers of fish. Thank you.

Response to: CTR-109-001b

See response to CTR-061-006. With respect to fish consumption, see response to CTR-109-001a (Category C-14; Fish or Water Consumption).

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Comment ID: CTRH-001-016  
Comment Author: Greg Karras  
Document Type: Public Hearing  
State of Origin: CA  
Represented Org: Comm. for Better Environ.  
Document Date: 09/17/97  
Subject Matter Code: C-20 Scope Prty Toxic Poll. List  
References:  
Attachments? N  
CROSS REFERENCES

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Comment: As you know -- you should know -- EPA approved methyl tert-butyl ether, MTBE, a gasoline additive, creating the fastest-growing chemical market in the world, without any analysis of water quality effects. In addition to evidence of widespread groundwater and drinking water contamination, MTBE has been found many of our state's surface waters.

Will EPA not propose a criterion for MTBE? Why did they not propose one in this rule?

Response to: CTRH-001-016

See response to CTR-058-009.

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Subject Matter Code: C-21 Legal Concerns

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Comment ID: CTR-002-005b  
Comment Author: Comm. for a Better Environment  
Document Type: Environmental Group  
State of Origin: CA  
Represented Org:  
Document Date: 09/24/97  
Subject Matter Code: C-21 Legal Concerns  
References:  
Attachments? Y  
CROSS REFERENCES C-14

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Comment: C. Criteria for the pollutants of most concern do not provide equal protection for people of color and are not supportable by science.

EPA cannot show that its weaker proposed criteria will protect fishing and aquatic life from dioxin-like compounds, mercury, and copper. Further, EPA's proposal to allow greater health risks for subsistence fishers fails to provide equal protection under the law and is contrary to the President's Executive Order on Environmental Justice.

The proposed criteria provide unequal protection for people of color who fish for food. EPA admits in the proposal that: "There may be subpopulations within a state, such as subsistence anglers who as a result of greater exposure to a contaminant, are at greater risk than the hypothetical 70 kilogram person eating 6.5 grams per day of maximally contaminated fish.. ." Indeed, ample data show that some people exercise their fishing rights to "use" Bay waters by eating up to a pound (450 grams) per day of fish from San Francisco Bay, and most of them are people of color.(\*8) EPA's discussion then goes on to admit that it is proposing to provide less protection for these subsistence anglers: "[I]ndividuals that ingest ten times more of a carcinogenic pollutant than is assumed in derivation of the criteria at a [one excess cancer in a million] risk level will be protected to a [one in 100,000] level, which EPA has historically considered to be adequately protective." However, people who eat a pound per day eat seventy times more, and pages 8- 11 and 8-12 of EPA's economic analysis admit people eat 16 times more, than the 6.5 grams (1/70th of a pound) of Bay fish per day assumed in EPA's criteria. EPA's own calculations show present cancer threats of nearly 1 in 1,000 for some Bay anglers at these higher consumption levels. Thus, EPA itself predicts that its proposal will result in lesser, inadequate protection for people of color who rely on Bay-caught fish for food.

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(\*8) Previously unpublished data from a 1993-4 survey of 500 anglers using South and Central San Francisco Bay by Communities for a Better Environment-SAFER!; Save San Francisco Bay Association, 1995 (excerpt); West, 1992; West et al., 1992; Peterson et al., 1994; and USEPA, 1994.(excerpt of a draft report discussing and citing work by EPA, Wolfe and Walker (1987), Svensson (1991) and others. Includes analysis of the evidence..

Response to: CTR-002-005b

See response to CTR-002-005a (Category C-14; Fish and Water Consumption).

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Comment ID: CTR-002-009  
Comment Author: Comm. for a Better Environment  
Document Type: Environmental Group  
State of Origin: CA  
Represented Org:  
Document Date: 09/24/97  
Subject Matter Code: C-21 Legal Concerns  
References:  
Attachments? Y  
CROSS REFERENCES

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Comment: D. EPA's proposals fail to meet federal laws and regulations.

Proposed criteria would revise water quality standards contrary to law and regulations. Pursuant to 40 CFR section 131.22(c) revised water quality criteria must protect existing uses under 40 CFR section 131.12 (a)(1), and shall support the most sensitive designated use of Bay waters based on sound scientific rationale, under 40 CFR section 131.11(a)(1). However, EPA criteria for pollutants shown in Table 2 above do not meet these tests, as shown by sections II A, B, and C of these comments.

Inappropriate rejection of scientifically sound criteria for 16 dioxin compounds accumulation, and mercury and copper field data results in criteria which allow pollutant levels shown to threaten or harm aquatic life and the fishing public. Human health criteria do not protect people who eat up to a pound of Bay fish per day because EPA assumes people eat only 6.5 grams of these fish per day. In this crucial analysis, protecting the most sensitive use must mean protecting people who eat as much as a pound of fish per day (seventy times more than 6.5 grams), and more often than not are people of color fishing for food as well as recreation.(\*8) The criteria do not protect designated uses of Bay waters for fishing and propagation of aquatic life- based on sound science.

Even if EPA argues that some of the pollutants for which it proposes weaker criteria attain levels necessary to achieve water quality standards and protect fishing, aquatic life and wildlife, under 40 CFR 131.12(a)(2) EPA cannot allow water quality to be degraded because this is not "necessary to accommodate important economic or social development." At EPA's request, CBE has supplied evidence showing that long-term economic benefits to the manufacturing base resulted from pollution prevention measures driven by the implementation of state criteria more stringent than EPA's proposal with zero dilution effluent limits. The economy of this area, Silicon Valley, grew substantially at the same time and this growth was led by the industries involved in this effort. Although we are concerned that EPA seems to have arbitrarily rejected evidence that the most "stringent" criteria implementation resulted in economic benefit rather than cost, we trust EPA will agree there is no evidence that weakening these criteria is needed for economic or social reasons.

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(\*8) Previously unpublished data from a 1993-4 survey of 500 anglers using South and Central San Francisco Bay by Conunities for a Better Environment-SAFER!; Save San Francisco Bay Association, 1995 (excerpt); West, 1992; West et al., 1992; Peterson et al., 1994; and USEPA, 1994.(excerpt of a draft report discussing and citing work by EPA, Wolfe and Walker (1987), Svensson (1991) and others. Includes analysis of the evidence..

Response to: CTR-002-009

EPA disagrees with this comment. The CTR criteria are based on sound science and are protective of the most sensitive uses of waters in California, in compliance with 40 CFR 131.11(a)(1) and 131.22(c). The criteria are based on the uses which the State itself has designated: the CTR does not adopt or modify any use designations. The scientific bases for the CTR criteria are set forth in The California Toxics Rule Administrative Record Matrix.

As to some of the CTR criteria which this commenter claims will allow increases in pollution of San Francisco Bay, this commenter's concerns are no longer applicable. EPA's decision to not promulgate final CTR criteria for those waters where there are EPA-approved San Francisco Basin Plan criteria in effect addresses those CTR criteria which this commenter compares unfavorably to existing Bay Basin Plan criteria. (See response to CTR-016-001.)

As to those CTR criteria which the commenter compares unfavorably with ISWP and EBEP criteria, see response to CTR-002-003.

The commenter's implication that adoption of the CTR violates anti-degradation provisions in EPA's regulations is misplaced. In the first place, it is not appropriate to compare CTR criteria with California's ISWP and EBEP criteria for purposes of determining whether degradation of water quality may result from adoption of the CTR. The California criteria do not exist for purposes of making such a comparison, since the ISWP and EBEP were rescinded in 1994. Secondly, the adoption of criteria sufficient to protect designated uses is not an action which in and of itself results in any change in water quality. The implementation of such criteria may raise anti-degradation issues in specific instances in the future, but this rulemaking does not.

With respect to the commenter's concern about certain people eating more fish than 6.5 grams/day, see response to CTR-002-005a (Category C-14; Fish and Water Consumption).

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Comment ID: CTR-005-006a  
Comment Author: Novato Sanitary District  
Document Type: Sewer Authority  
State of Origin: CA  
Represented Org:  
Document Date: 09/23/97  
Subject Matter Code: C-21 Legal Concerns  
References:  
Attachments? Y  
CROSS REFERENCES S; R

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Comment: 5. The proposed rule is inconsistent with applicable Federal law and regulations. In proposing a single set of criteria for all estuaries, the rule is inconsistent with the Clean Water Act and EPA's water quality standards regulations. The Clean Water Act requires that water quality standards be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and also taking into consideration their use and value for navigation (See CWA section 303(c)(2)(A)). Consistent with this, EPA regulations require that water quality standards be based on identification of where toxic pollutants may be adversely affecting water quality or the attainment of the designated water use or where the levels of toxic pollutants are at a level to warrant concern. For those identified waters, states must adopt criteria for such toxic pollutants applicable to sufficient to protect the designated use"(See 40 CFR 131.1 1 (a)(2)).

Clearly the intent of both the Act and EPA regulations is that water quality standards be tailored to the characteristics of the waters in question. In failing to properly evaluate the rule's economic impacts and in failing to adequately consider regulatory alternatives, the rule is inconsistent with Presidential Executive Order 12866 and the Unfunded Mandates Reform Act. In failing to properly consider the impacts on small entities, the rule is inconsistent with the Regulatory Flexibility Act.

Response to: CTR-005-006a

See responses to CTR-036-005, CTR 035-012a, and CTR 005-007a.

With respect to EPA's compliance with E.O. 12866, the Unfunded Mandates Reform Act, and the Regulatory Flexibility Act, see the preamble to the final rule, EPA's economic analysis conducted pursuant to the order, and the record for the rule. EPA notes that the water quality criteria only have an impact when the permit authority finds that a discharge has the reasonable potential to violate water quality standards. EPA based its economic analysis on two scenarios, a high end scenario and a low end scenario. The high end established baseline concentrations as being equal to existing permit limits, whether or not the pollutant was detected in the effluent. This provides an upper bound because most facilities typically discharge below their permit limit. The low end scenario is based on actual data about what pollutants are present in the effluent and the actual concentrations of the dischargers in the effluent.

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Comment ID: CTR-005-008b  
Comment Author: Novato Sanitary District  
Document Type: Sewer Authority  
State of Origin: CA  
Represented Org:  
Document Date: 09/23/97  
Subject Matter Code: C-21 Legal Concerns  
References:  
Attachments? Y  
CROSS REFERENCES C-24

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Comment: 7. Separate, scientifically defensible, reasonably achievable aquatic life criteria for copper should be adopted for San Pablo Bay in the vicinity of the District's discharge, or alternatively EPA should state in the Preamble that the Regional Board should: (1) allow a dilution credit for the District based on modeling studies; and (2) apply metals translator determined based on EPA procedures from the results of the Regional Monitoring Program. To comply with the Clean Water Act and EPA regulations, EPA should consider specific water bodies. To fulfill the spirit of Presidential Executive Order 12866 and the requirements of the Unfunded Mandates Reform Act and the Regulatory Flexibility Act, EPA should evaluate regulatory alternatives based on an analysis of costs and benefits. Based on the analysis of costs and benefits performed by the District (see Attachment 1), EPA should either adopt the criteria that is currently achieved, or alternatively specify implementation criteria that will allow the current discharge to continue. The District has performed dilution studies (see Attachment 2) and performed reasonable potential analyses using dilution and metals translators (see Attachments 3 and 4). These show that with the use of these implementation provisions, the proposed criteria can be achieved in-stream. Without EPA specifying that dilution studies and metals translators should be utilized in the District's case, it is possible that the CTR could impose enormous costs on the District (and the small entities it serves) without providing any environmental benefit. In that case, the CTR would be

inconsistent with the Clean Water Act, EPA regulations, Presidential Executive Order 12866, the Unfunded Mandates Reform Act and the Regulatory Flexibility Act.

Response to: CTR-005-008b

See response to CTR-005-008a (Category C-24; Site-Specific Criteria).

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Comment ID: CTR-007-004

Comment Author: Port of San Diego

Document Type: Port Authority

State of Origin: CA

Represented Org:

Document Date: 09/24/97

Subject Matter Code: C-21 Legal Concerns

References:

Attachments? N

CROSS REFERENCES

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Comment: 3. The District requests that in the Final CTR, a provision be placed in the rule that grants a waiver to the water quality criteria or that the approach is shifted to a risk based approach where an agency or responsible party engages in cleanup or remediation activities.

Response to: CTR-007-004

EPA disagrees with this comment. The CTR does not include implementation provisions because this rule's intent is to implement section 303(c)(2)(B) of the CWA for California. EPA believes that implementation of these provisions is appropriately left to the state. To the extent that this commenter is proposing implementation provisions that are consistent with CWA requirements, such provisions may be considered by the State for inclusion in its implementation plan. 40 CFR 131.11. See also response to CTR 042-007a. Further, designation of uses is primarily left to the states. In this rule, EPA is simply establishing criteria necessary to protect the designated uses. Use designation may consider economics. If a state wishes to designate a use that is not a CWA section 101(a) use, the state must conduct a use attainability analysis to determine that the use is not attainable.

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Comment ID: CTR-010-003

Comment Author: Save San Francisco Bay Assoc.

Document Type: Environmental Group

State of Origin: CA

Represented Org:

Document Date: 09/24/97

Subject Matter Code: C-21 Legal Concerns

References:

Attachments? Y

CROSS REFERENCES

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Comment: EPA's proposal also does not comply with the federal Clean Water Act and is certain to stir up

a hornet's nest of protest if moved forward. The proposals also restrict the ability of the public and concerned agencies from involvement in ensuring standards are complied with. U.S. environmental policy is often hamstrung by the short-term, corporate bottom line influence to the detriment of the vast majority. Ultimately such short-sightedness will result in not only a continued worsening quality of life for the general public, but also in a loss of economic competitiveness to those industries and countries able to profit from pollution prevention.

Though the mission of the U.S. EPA is to protect the environment, the California Toxics Rule harms the environment. The proposed criteria should be revised before being adopted. We would welcome the opportunity to discuss these issues with you, along with other concerned parties. We would also appreciate a response to this letter.

Response to: CTR-010-003

EPA disagrees with this comment.

First, concerning the ability of the public and concerned agencies to be involved in ensuring that standards are complied with, EPA reaffirms that the CTR is an adoption of criteria, and it does not include implementation provisions. The State is responsible for the application of CTR criteria to point and non-point sources. The State is currently developing a plan for implementation of the CTR criteria, following its own public participation requirements (Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California, September 11, 1997). Furthermore, as the State applies CTR criteria in specific actions that it will take in the future, such as issuing discharge permits, the public can pursue applicable participation opportunities as they arise. The commenter has not explained how the rule will impair the ability of the public and concerned agencies to ensure standards are complied with.

Secondly, EPA cannot respond specifically to the comment regarding the influence of "the short-term, corporate bottom line" on federal environmental policy, as there is no support for this conclusory statement. Although Executive Order 12866 and the Unfunded Mandates Reform Act require EPA to estimate the costs of certain rules (rules deemed "significant under the E.O., and rules that require "Federal mandates" that may result in expenditures in excess of 100 million/year under UMRA, the E.O. and UMRA do not override applicable law. Under the CWA, economics or cost benefit analysis is not a basis for adopting water quality criteria. See CWA section 303(c), 40 CFR 131.11. See response to CTR-042-007a. For a discussion of the Regulatory Flexibility Act, see the preamble to the final rule. The CTR fully complies with all of these requirements.

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Comment ID: CTR-020-002  
Comment Author: City of Stockton  
Document Type: Local Government  
State of Origin: CA  
Represented Org:  
Document Date: 09/24/97  
Subject Matter Code: C-21 Legal Concerns  
References:  
Attachments? Y  
CROSS REFERENCES

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## Comment: 1. General Comments

### A. Applicability of the Rule is Overly Broad

The CTR applies the various water quality criteria to "all waters of the United States" regardless of the actual aquatic life or beneficial uses present. EPA specifically disclaimed any need to individually assess hydrologic unit needs as mandated by the Porter-Cologne Act and the court decision overturning the Inland Surface Waters Plan ("ISWP"). In effect, this means that the CTR will be applied in an overly broad manner, particularly with respect to storm water discharges, as the criteria designed for high quality warm and cold water fisheries will be applied to storm water ditches which the Agency may classify as intermittent streams pursuant to the Regional Water Quality Control Board's (the "Regional Board") "tributary policy" (i.e., tributaries are presumed to contain the same uses as designated main streams). Such water bodies are dry other than during precipitation events and cannot maintain sensitive aquatic life uses. These water bodies have not been classified for specific use protection, and approved Basin Plans allow consideration of site-specific factors in determining actual use protection needs.

EPA's Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic Organisms and their Uses (1985) ("National Guidelines") specify that criteria must be applied in the manner in which they were derived to provide reasonable and appropriate protection. Federal water quality regulations (40 CFR Part 131) also specify that water quality criteria must be necessary to protect the beneficial uses. Thus, EPA lacks authority to establish water quality criteria that are more restrictive than necessary to ensure that actual uses will be protected. The Agency's attempt to apply stringent water quality criteria to water bodies that either have no reasonable likelihood of maintaining sensitive aquatic life or have not been classified by the state to protect such uses is arbitrary and capricious. In addition, application of stringent human health ingestion-based and fish tissue criteria to receiving waters that lack a potable water supply use or that cannot support a game fishery is clearly not consistent with the National Guidelines and is unnecessarily restrictive. Similarly, pursuant to the Porter-Cologne Act and applicable case law, EPA may not enact requirements that would otherwise be unlawful under California law.

As the Porter-Cologne Act would not allow such action (i.e., overly broad use designations) on the part of the State's Water Quality Control Boards, EPA needs to restrict the application of the CTR to circumstances where the water quality criteria are reasonably applicable. Thus, the proposed criteria for aquatic life should only be applied to perennial streams and not to intermittent watercourses that primarily exist during rainfall events. Human health criteria that include a water ingestion component should only be applied to water bodies that have a demonstrated capability to provide potable water, and application of the criteria should be at the water intake (which would allow for loss of pollutant in the environment and documented pollutant reduction achieved by the water treatment facility). Applying the ingestion-based criteria at appropriate water intake points will help to avoid the assumption that surface waters are consumed without treatment, as such an assumption is not lawful under the Safe Drinking Water Act.

Response to: CTR-020-002

EPA disagrees with this comment. EPA must adopt criteria in accordance with the requirements of the CWA. As a federal agency, EPA is not subject to the requirements of the Porter-Cologne Act, which is State law, nor to the State court decision which overturned the ISWP and EBEP.

Regarding the failure to individually assess the needs of hydrologic units, such an undertaking would amount to adoption of site-specific criteria. It is beyond the scope of the CTR to adopt site-specific

criteria for individual pollutants and/or water bodies, based on localized information and data. As explained in the preamble to the proposed CTR, and further discussed in the response to CTR-003-006, et al., EPA will work with the State to approve acceptable State-adopted criteria (including site-specific criteria) and to stay the CTR where such State criteria are in effect.

EPA further disagrees that the CTR criteria will be applied "in an overly broad manner," based on EPA's failure to consider the actual uses of specific water bodies. The CTR does not modify or adopt any uses for any waters. Rather, the CTR adopts criteria for waters of the United States in California to protect aquatic life and human health uses already designated by the State. It is not arbitrary or capricious for EPA to rely on uses designated by the State in accordance with its own laws. Commenters may seek to have the State modify or eliminate uses for particular water bodies; however, EPA cautions that the State is subject to the requirements of 40 CFR 131.10 if it undertakes to do so.

Finally, EPA disagrees that it lacks authority "to establish water quality criteria that are more restrictive than necessary to ensure that actual uses will be protected." (Emphasis added.) The term "actual uses" is an undefined term, but the commenter clearly uses it to describe uses that differ from designated uses. EPA has the authority as well as the legal obligation to adopt criteria which protect the designated uses, however, even if such uses require a greater level of protection than existing uses. 40 CFR 131.5(a)(2); 131.6(c); 131.11(a). If an existing use (as defined in CWA regulations) is less sensitive than the designated use, then the appropriate initial response is not to adopt less stringent criteria to protect the less sensitive use. That would not be allowed unless the designated use itself had been modified. The State may undertake to modify designated uses, including, in some instances, downgrading some uses, in accordance with 40 CFR 131.10, but no such action has been taken which would affect the adoption of the final CTR.

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Comment ID: CTR-031-003a

Comment Author: Fresno Metro. Flood Ctrl Dist.

Document Type: Flood Ctrl. District

State of Origin: CA

Represented Org:

Document Date: 09/25/97

Subject Matter Code: C-21 Legal Concerns

References: Letter CTR-031 incorporates by reference letter CTR-027

Attachments? N

CROSS REFERENCES I-03

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Comment: If the proposed rule is carefully and sufficiently modified to affirm a commitment by EPA to effect only its Congressional authorization as established by CWA section 402(p), then EPA's failure to assess municipal storm water dischargers' ability to attain the proposed standards and associated economic and environmental impacts may be set aside at this time. However, if EPA persists in maintaining the CTR as drafted in this regard, the ambiguities presented in the preamble demand serious consideration and analyses as follows.

a. Many of the criteria are not attainable or scientifically valid with regard to municipal storm water dischargers, nor is the proposed approach consistent with an appropriate delegation of authority to the State.

i. Attainability of Standards

The statutory premise of the CWA is to provide water quality for protection and propagation of aquatic life, wildlife, and recreation wherever attainable. The CWA therefore establishes a reality test in that objectives must be attainable.

The proposed CTR criteria can not be attained by municipal storm water dischargers. The District treats through detention and retention all but 1% of its urban runoff on an annual average basis. Nonetheless, its urban runoff discharges, after detention, would exceed proposed dissolved copper, lead, and zinc criteria. Concentrations would need to be reduced by 67%-95% to meet the proposed chronic criteria. No storm water best management practices, including conventional end-of-pipe storm water treatment facilities (i.e., detention systems), are believed to be able to achieve these levels of reductions for these constituents.

Response to: CTR-031-003a

EPA disagrees with this comment. There is no authority for revising the proposed CTR criteria based on the considerations cited in this comment. Water quality criteria adopted pursuant to CWA section 303 must be based on sound science and must protect the designated uses of the water bodies to which they apply. 40 CFR 131.11. There is no provision for EPA to consider the attainability or the scientific validity of the criteria with regard to specific dischargers or class of dischargers in adopting ambient water quality criteria in the CTR. Attainability issues may be considered in accordance with CWA section 303 in designating or modifying uses for those water bodies; however, the CTR does not undertake to modify or adopt any uses for waters in California. Scientific validity of criteria is based on ambient conditions, not on dischargers. The scientific bases for the CTR criteria are set forth in The California Toxics Rule Administrative Record Matrix.

In raising the question of storm water dischargers' ability to attain CTR standards, this comment apparently relies on language in CWA section 402(p) which requires storm water dischargers to reduce pollutants only to the maximum extent practicable (MEP). MEP, however, is a point source permitting standard; it does not apply to the adoption of ambient water quality criteria. Moreover, EPA has interpreted the MEP standard as applying only to technology-based permit requirements. It does not affect the requirement of CWA section 301(b)(1)(C) that CWA permits include limitations necessary to meet water quality standards. Memorandum from E. Donald Elliot, Assistant Administrator and General Counsel, to Nancy J. Marvel, Region 9, dated January 9, 1991.

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Comment ID: CTR-034-010b

Comment Author: SCAP

Document Type: Trade Org./Assoc.

State of Origin: CA

Represented Org:

Document Date: 09/25/97

Subject Matter Code: C-21 Legal Concerns

References: Letter CTR-034 incorporates by reference letter CTR-035

Attachments? N

CROSS REFERENCES C-28

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Comment: \* SCAP recommends that EPA defer adoption of criteria contained in the draft CTR which are typically below detection limits. While we understand EPA's rationale for setting criteria that may

not be detectable based on EPA's determination of the criteria needed to adequately protect aquatic life and human health, we believe that EPA has not fulfilled its duties under the Clean Water Act, Unfunded Mandates Act, and E.O. 12866. In accordance with federal water quality standards regulations, EPA is required to review water quality data and information on discharges to specific water bodies where toxic pollutants may be adversely affecting water quality or the attainment of the designated water use or where the levels of toxic pollutants are at a level to warrant concern and must adopt criteria for such toxic pollutants applicable to the water body sufficient to protect the designated use (see 40 CFR section 131.11). Thus, if the pollutant has not been detected, there is no basis for determining whether the chemical is adversely affecting water quality or the attainment of designated uses.

Further, EPA cannot make an accurate determination of the costs and benefits of promulgating CTR criteria for those criteria that are below detection levels. It is quite likely that detection limits for some substances will improve in the near future, and dischargers previously projecting full attainment will no longer be able to comply. For instance, a SCAP member agency was issued an NPDES permit in the early 1990s containing effluent limits for a number of toxic pollutants. In this agency's case, lindane was not being detected at the time of permit issuance (and the detection level was higher than the permit limit). Yet, in the following years, the detection level dropped and this agency began to experience exceedences of the permit limit. Lindane cannot be readily controlled at the source by normal industrial waste source control methods because it is in widespread use by consumers. Therefore, the only reliable option for the POTW to come into compliance may be to add end-of-pipe treatment, a very expensive proposition. This scenario is likely to happen again with many of the criteria being proposed in the CTR. The potential compliance costs could be high, yet the Economic Analysis for the draft CTR could not estimate such costs. For all of the above reasons, EPA should defer adoption of these criteria until they can be detected and EPA can more fully determine the potential economic impacts of promulgation of the CTR. Instead, we recommend that a watershed approach be used to address these pollutants (see below).

Response to: CTR-034-010b

EPA disagrees with the commenter that it should defer promulgating water quality criteria below detection limits or that such promulgation is in any way inconsistent with the CWA, UMRA, or E.O. 12866. EPA's water quality standards regulation at 40 CFR 131.11 requires that criteria be adopted by the States at concentrations necessary to protect the designated use. Given this requirement, consideration of analytical detectability is not an appropriate factor to consider when calculating water quality criteria to protect designated uses since they are not related to actual environmental impacts. As EPA stated in the preamble to the National Toxics Rule, 57 FR 60876, col. 1, this has been the Agency's longstanding position. See also 57 FR 60870. EPA's criteria are based on scientific information about a pollutant's toxic effects, without regard to analytical methods or techniques. The criteria are based on the concentrations that either cause toxic effects to aquatic life or to human health. EPA's criteria development methods for aquatic life are generally based on laboratory analyses with sensitive aquatic life. The results from these tests are analyzed by mathematical procedures outlined in EPA's criteria guidelines. EPA's human health criteria are developed from protocols generally using toxicity studies on laboratory animals such as mice and rats. Thus, because the criteria are based on data showing toxic effects, EPA does not believe that the analytical detection limit should determine the basis for the criteria.

The water quality standards established in this rule are not self implementing; they will be applied by the State in developing total maximum daily loads, wasteload allocations to point sources, (which may be used to develop NPDES permit limits) and load allocations to nonpoint sources. The sensitivity of analytical methods is relevant for determining compliance with water-quality based permit limits. The permit authority, here the State of California, establishes the analytical methodology to be used for

determining compliance with the permit limit. EPA has issued guidance on how constituents with water quality criteria below the sensitivity of official analytical methods (i.e., those listed in 40 CFR Part 136) are established in permits. See Strategy for the Regulation of Discharges of PHDDs and PHDFs from Pulp and Paper Mills to Waters of the United States, memorandum from the Assistant Administrator for Water to the Regional Water Management Division Directors and NPDES State Directors, May 21, 1990. This guidance presents a model for addressing toxic pollutants which have criteria recommendations less than current detection limits and it is applicable to other criteria as well. The guidance explains that standard analytical methods may be used for determining compliance with permit limits but not for establishing water quality criteria or permit limits. Also, EPA's Great Lakes Guidance Procedure 8 specifies that where the water quality-based effluent limit is lower than the pollutant's quantification level, the quantification level is the method for determining compliance with the limit. This approach is mandated by the CWA, which requires that permit contain WQBELs as necessary to achieve standards. (CWA section 301). Neither EPA nor the States are authorized to set WQBELs at higher levels simply because of technical difficulties in measuring compliance. See *NRDC v. EPA*, 859 F.2d 156, 208 (D.C. Cir. 1988) ("Congress did not intend to tie compliance with water quality-based effluent limitations to the capabilities of any given level of technology.") It should also be noted that by the time criteria are converted into permit limitations after calculating total maximum daily loads, waste load allocations and load allocations, the actual permit limit may be in the range of standard analytical methods cited by EPA in 40 CFR Part 136.

EPA also establishes water quality criteria for many chemicals of concern because they biomagnify in the tissue and organs of fish (e.g., mercury and PCBs) to levels that can adversely effect aquatic life, wildlife and human health. Fish tissue information can be used to determine if the water body is attaining water quality standards even when the water quality criteria and instream pollutant concentrations are below detectable levels. For chemicals that are not highly bioaccumulative but have criteria below detectable levels, fate and transport (mass balance) models can be used to predict instream pollutant concentrations and attainment of water quality criteria and designated uses. This information with other field observed data showing stress or adverse effects on the biological community serve as an earlier warning to the public that water quality is being degraded and steps must be taken if the designated use for the water body is to be protected and maintained.

The decision to maintain a designated use or to downgrade the water body to a lower use designation is a place-based decision that must rest solely in the hands of the local community, elected officials and other stakeholders that use the water resource affected by such decisions. Therefore, the importance of adopting statewide numeric water quality criteria to protect designated uses (e.g., fishable, swimmable) is not predicated on costs or benefits but on the public's "right-to-know" and participate in decision-making affecting their water resources. Congress understood this and in CWA sections 303 and 304 preserved the public's right-to-know about the condition and safety of the waters they use for food, drinking, recreation and commerce. See responses to CTR-036-005 and CTR-O42-007a.

With respect to EPA's compliance with UMRA and E.O. 12866, see the preamble to the final rule and EPA's Regulatory Impact Analysis conducted for the rule. Although analytical detection limits may improve in the future, EPA has reasonably estimated the costs of the rule in the regulatory impact analysis based on the best available data about how permit limits might change under the final rule. EPA evaluated the costs of attaining permit limits derived from CTR criteria but maintains that the costs associated with attaining effluent limits that are less than detectable levels are speculative and EPA's methods may tend to overstate costs. Nevertheless, EPA estimated costs under a high scenario using assumptions about how much pollutant reduction would be required even when it had "no" effluent data indicating the presence of the pollutant in the discharge or that the control strategy was actually necessary.

EPA's estimates of costs include control technology costs for pollutant reduction that would be required to reduce pollutant levels to the MDL as well as pollutant minimization programs to reduce the pollutant level to below the MDL. EPA's estimates reflect the goal of reducing all potential sources of the pollutant necessary to maintain the final effluent quality discharged to the receiving water to a level at or below the permit limit. The costs for pollutant minimization programs include both capital and O&M costs to find sources and implement reduction control strategies. EPA estimated these costs both for direct municipal and industrial dischargers as well as for indirect discharges to publicly owned treatment works (POTWs). Thus, EPA accounted for all anticipated costs to the extent feasible, even in situations where potential "hidden" pollutant loads may exist below detectable levels.

The issue of potential hidden loads raised by commenters on the CTR is not new. In 1994, EPA evaluated a sample of nine POTWs in the Great Lakes Basin using super-clean and high-resolution analytical methods (many of which were experimental) to determine whether, in fact, there was a substantial hidden pollutant load of bioaccumulative chemicals of concern (BCC). This study was undertaken because the regulated community in the basin raised concerns regarding the potential presence of mercury and other BCCs just below current Part 136 methods and the associated costs to remove these potential hidden loads. EPA assumed BCCs to be ubiquitous in the Great Lakes Basin at major POTWs because of the historical widespread use of these chemicals and well documented problems in the basin. Therefore, EPA concentrated its sampling efforts on POTWs which have less control of the potential sources of BCCs being discharged to their collection system than industrial dischargers.

In this study, EPA found the infrequent presence of BCCs (38 detections in 477 observations, approximately 8%) in POTW effluents. Of BCC's detected, mercury was detected at each of the POTWs (either as total mercury or methyl mercury). The concentrations of mercury found in POTW effluents were above EPA's most stringent ambient water quality criterion for the Great Lakes Basin in five of the nine samples taken. Where effluent concentrations exceeded the ambient criterion, however, they did so by small amounts, indicating that pollutant minimization programs (PMPs) would more than likely control mercury discharges to the levels required to comply with permit limits. The results of the study, when extrapolated to the universe of 316 POTWs in the Great Lakes Basin, indicates that the median concentration of mercury in all effluents is 0.99 ppt, the 75th percentile is 5.14 ppt, and the 95th percentile is 55.0 ppt.

These results indicate substantial compliance with permit limits significantly more stringent than those expected from CTR-based criteria and would not indicate substantial additional costs if the facilities were required to demonstrate compliance through analytical methods with lower MDLs. Furthermore, the study demonstrates that hidden pollutant loads do not exist at the levels once thought even for highly contaminated areas. This information is important when evaluating the economic analysis for the CTR because it indicates that the estimated costs at the high end of the cost range for the CTR, which accounts for controlling hidden pollutant loads where no effluent data exists may never materialize should analytical methods improve in the future.

EPA has also identified a number of locations where pollutant minimization programs have either been highly effective in reducing pollutant loads or have been implemented but have had inadequate time to determine results. For example, the Inland Empire Utilities Agency, serving the Chino Basin with three POTWs, has successfully reduced lindane in its effluents to permit limits through education of health authorities and pest service providers on effective alternatives to lindane-based products for lice and flea control. A similar program is being implemented at a facility in Arizona. The Western Lake Superior Sanitary District's (WLSSD) efforts to reduce mercury levels in their effluent include diverting

incinerator scrubber water; implementing external source identification studies and subsequent control programs at a pulp and paper mill, dental facilities, and medical facilities and laboratories; and conducting extensive public education and outreach, including mercury collection under a bounty program. As of 1996, WLSSD had successfully reduced mercury concentrations at their waste water treatment plant by more than 74% from 1990 dry sludge levels (from 4.50 ppm to 1.15 ppm) and by more than 97% from 1990 effluent levels (from 0.58 ppb to 0.015 ppb). The following are some additional examples of pollution prevention activities undertaken by facilities in the State of California:

- \* Replaced a sewer running through an arsenic-contaminated Superfund site (City of Palo Alto, California Regional Water Quality Control Plant).
- \* Allowed diversion of residential graywater containing mercury for use as on-site irrigation (City of Palo Alto, California Regional Water Quality Control Plant).
- \* Developed BMPs with medical facilities/offices about the use of mercury, handling of mercury-containing wastes, management of mercury-containing reagents, prevention and response for mercury spills, nonmercury analytical methodologies, and nonmercury-containing equipment (City of Palo Alto, California Regional Water Quality Control Plant).
- \* Educated pharmacists on mercury-containing products (City of Palo Alto, California Regional Water Quality Control Plant).
- \* Developed BMPs addressing mercury-containing equipment and reagent handling in laboratories (City of Palo Alto, California Regional Water Quality Control Plant).
- \* Published and distributed a BMP booklet to local pottery studios, schools, and art supply stores (City of Palo Alto, California Regional Water Quality Control Plant).
- \* Reduced the local discharge limit for nickel (applicable primarily to metal finishers) (City of Palo Alto, California Regional Water Quality Control Plant).
- \* Educated photo processors and medical and dental offices processing x-rays on silver use and disposal (City of Palo Alto, California Regional Water Quality Control Plant).

As a final point, EPA does not wish to delay or defer any further having ambient criteria for toxics as required under section 303(c)(2)(B) of the CWA. California is the only state in the nation without such numeric limits and it is important in order to meet the requirements of the CWA to bring California into compliance with the CWA by promulgation of this rule.

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Comment ID: CTR-035-012a  
Comment Author: Tri-TAC/CASA  
Document Type: Trade Org./Assoc.  
State of Origin: CA  
Represented Org:  
Document Date: 09/25/97  
Subject Matter Code: C-21 Legal Concerns  
References:  
Attachments? N

Comment: 1. Comments on Proposed Rule A. General Comments p. 42166-67 --Legal Basis

EPA argues that:

EPA does not believe that it is necessary to support the criteria proposed today on a pollutant-specific, water body-by-water-body basis. For EPA to undertake an effort to conduct research and studies of each stream segment or water body across the State of California to demonstrate that for each toxic pollutant for which EPA has issued CWA section 304(a) criteria guidance there is a 'discharge or presence' of that pollutant which could reasonably 'be expected to interfere with' the designated use would impose an enormous administrative burden and would be contrary to the statutory directive for swift action manifested by the 1987 addition of section 303(c)(2)(B) to the CWA.

Contrary to EPA's argument, we believe that the requirement in Section 303 of the CWA that States adopt water quality standards where there is a discharge or presence of toxic pollutants in the affected waters which could reasonably be expected to interfere with designated uses, applies to EPA. EPA's claim that such a review would impose an "enormous administrative burden" is not compelling, since States, in their adoption of water quality standards, must perform this pollutant specific review of each stream segment under the express terms of Section 303(c)(2)(B). EPA's own regulations require that, in promulgating water quality standards for a State, EPA is subject to "the same policies, procedures, analyses, and public participation requirements established for States in these regulations" (40 CFR section 131.22). The regulations require States to "review water quality data and information on discharges to specific water bodies where toxic pollutants may be adversely affecting water quality or the attainment of the designated water use or where the levels of toxic pollutants are at a level to warrant concern and must adopt criteria for such toxic pollutants applicable to the water body sufficient to protect the designated use"(40 CFR section 131.11)(emphasis added). Thus, the regulations regarding the adoption of water quality standards do not suggest that States adopt uniform water quality standards for every water body merely because there may be a large amount of work required to determine the appropriate water quality standards for each water body. We especially believe this issue to be pertinent to pollutants for which the proposed CTR criteria are below detection levels. We therefore recommend that EPA defer the adoption of criteria for constituents which are below detection limits until such time as data are available demonstrating that particular toxic pollutants are being discharged to specific water bodies at levels to warrant concern. The pollutants in this category include the following: aldrin, alpha-BHC, beta-BHC, chlordane, 4,4'-DDD, 4,4'-DDT, 4,4'-DDE, dieldrin, 2,3,7,8-TCDD (dioxin), endosulfan I, endosulfan II, endrin, endrin aldehyde, heptachlor, heptachlor epoxide, toxaphene, PCB-1016, PCB-1221, PCB-1232, PCB-1242, PCB-1248, PCB-1254, PCB-1260, hexachlorobenzene, n-nitrosodi-n-propylamine, pentachlorophenol, benzo(a)anthracene, benzo(a)pyrene, benzo(b)fluoranthene, benzo(k)fluoranthene, chrysene, dibenzo(a,h)anthracene, and indeno(1,2,3-cd)pyrene. EPA, upon determining that promulgation of a 303(c)(2)(B) criterion is necessary, should promulgate the criterion on a water body-specific basis. Also, EPA would need to conduct an economic impact analysis at that time. Finally, as with the CTR, EPA must pursue adoption of these criteria through a rulemaking process, allowing opportunities for public review and comment in accordance with the Clean Water Act and Administrative Procedures Act.

Response to: CTR-035-012a

EPA disagrees with the commenter. See response to CTR-036-005. In addition to the response outlined above, the commenter cites EPA regulations at 40 CFR 131.11 and 131.22 arguing that the regulation

constrains how EPA may implement CWA section 303(c)(2)(B) . The regulation cited by the commenter with respect to toxics control, 131.11, however, was part of the 1983 water quality standards regulations (48 Fed. Reg. 51400, Nov. 8, 1983), which preceded by several years enactment of CWA section 303(c)(2)(B) as part of the 1987 Amendments to the CWA. EPA did not amend the regulations after enactment of section 303(c)(2)(B), but instead issued guidance interpreting how the provision could be implemented by states consistently with the statute. Availability of the guidance was published in the Federal Register at 54 Fed. Reg. 346 (Jan. 5, 1989) and discussed at length in the preamble to the final National Toxics Rule at 57 Fed. Reg. 60848, 60853 (Dec. 22, 1992). In this guidance, EPA stated that states could implement CWA section 303(c)(2)(B) in three different ways, as specified by its 1989 Program Guidance for Implementing Section 303(c)(2)(B):

Option 1. Adopt statewide numeric criteria in State Water Quality Standards for all section 307(a) toxic pollutants for which EPA has developed criteria guidance, regardless of whether the pollutants are known to be present.

Option 2. Adopt chemical-specific numeric criteria for priority toxic pollutants that are the subject of EPA section 304(a) criteria guidance, where the State determines based on available information that the pollutants are present or discharged and can reasonably be expected to interfere with designated uses.

Option 3. Adopt a procedure to be applied to a narrative water quality standard provision prohibiting toxicity in the receiving waters. Such procedures would be used by the State in calculating derived numeric criteria which must be used for all purposes under section 303(c) of the CWA.

In this rule, EPA has adopted the first approach. In addition, EPA has gathered information on the presence of toxic pollutants in the waters of the State to the extent possible, but does not believe it is necessary to demonstrate impairment of the water before applying ambient criteria to the water for the reasons stated in See response to CTR-036-005. However, because EPA has chosen an approach consistent to the guidance it gave the states, EPA has applied the same requirement of scientific defensibility it would require of states, and because EPA has allowed for public comment on the rule, EPA has applied the same policies, procedure, analyses and public participation requirements it established for States in Part 131.

Finally, with respect to detection levels, see responses to CTR-034-010b; CTR-005-009; CTR011-002; CTR-013-004; CTR-020-020; CTR-021-005b; CTR-027-004; CTR-030-009; CTR033-003a; CTR-034-010a; CTR-035-005; CTR-035-012b.

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Comment ID: CTR-036-005

Comment Author: County of Orange

Document Type: Local Government

State of Origin: CA

Represented Org:

Document Date: 09/25/97

Subject Matter Code: C-21 Legal Concerns

References: Letter CTR-036 incorporates by reference letters CTR-013, CTR-018, CTR-031, CTR-034 and CTR-040

Attachments? N

CROSS REFERENCES

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## Comment: Authority for EPA to Adopt Statewide Criteria

Contrary to what EPA asserts, it cannot promulgate statewide water quality criteria for priority toxic pollutants without considering whether the discharge or presence of such pollutants will interfere with the specific designated uses of those California waters that are covered by the criteria. Under Section 303(c)(4)(B) of the CWA, EPA is permitted to "promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved in any case where [EPA] determines that a revised or new standard is necessary to meet the requirements of [the CWA]." 33 U.S.C. section 1313(c)(4)(B). However, a water quality standard consists of both "the designated uses of the navigable waters involved" and the "water quality criteria for such waters based upon such uses." 33 U.S.C. section 1313(c)(2)(A).

Here, EPA has proposed water quality criteria for California waters, not water quality standards. More importantly, EPA has failed to develop such criteria "based upon" the designated uses of these waters. EPA has not determined whether these criteria pollutants are present in all California waters. EPA attempts to argue that there is evidence in the record indicating the presence of priority toxic pollutants throughout the waters of the States, yet EPA admits that the evidence is "not necessarily complete (62 Fed. Reg. 42160, 72167) nor has EPA determined whether the discharge or presence of these pollutants "could reasonably be expected to interfere with" the designated uses of such waters, as is required under CWA Section 303(c)(2)(B). See 33 U.S.C. section 1313(c)(2)(B).

EPA argues that it would be an "enormous administrative burden" for it to determine on a "water body-by-water body basis" whether the discharge or presence of the priority toxic pollutants could reasonably be expected to interfere with the designated use of affected waters. [62 Fed. Reg. 42160, 42166]. EPA further asserts that interpreting Sections 303(c)(2)(B) and (c)(4) to require it to perform "such a cumbersome pollutant specific effort on each stream bed" in California would render Section 303(c) meaningless [Id. at 42167]. Finally, EPA claims that based on the statutory language, purpose and legislative history of Section 303(c), it is empowered to act swiftly and promptly when it determines that new or revised standards are necessary to comply with the CWA, and thus it may disregard the strictures of CWA Section 303(c)(2)(B). Id.

Unfortunately, these arguments ignore the plain meaning of Section 303(c). EPA must (1) promulgate water quality standards, not water quality criteria, when it determines that such standards are necessary to meet the requirements of the CWA, and (2) develop these water quality standards taking into account the designated uses of the waters to which such standards are being applied. 33 U.S.C. sections 1313(c)(2), (4).

Moreover, the call to prompt action contained in section 3043(c)(4) cannot be read in a way that transforms the remaining provisions of Section 303(c) into mere surplusage. Despite EPA's assertion that the "numerous deadlines" imposed by Section 303(c) require it to ignore the demands of Section 303(c)(2)(B), there in fact is no specific time frame within which EPA must promulgate a new or revised water quality standard when it acts pursuant to section 303(c)(4). Thus, the requirements that EPA act "promptly" govern the manner, not the time frame, in which it must act.

Nor can the legislative history of Section 303(c) be used to ignore the express language and plain meaning of section 303(c)(2)(B). When a statute is plain and unambiguous on its face there is no need to look to legislative history as a guide to its meaning [ *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978)]. The requirement of Section 303(c)(2)(B) to determine whether the "discharge or presence" of priority toxic pollutants "could reasonably be expected to interfere with" the designated uses of affected waters is not ambiguous, even juxtaposed with the requirement that EPA act "promptly". Congress may

have wanted EPA to act promptly, but it equally wanted EPA to act within the constraints of Section 303(c).

In short, Congress's supposed quest for swift action is not enough to ignore the plain language of Section 303(c). Legislative history may be considered where the plain meaning of statute produces an absurd result, but it may not be considered where it merely produces a "cumbersome" one.

Response to: CTR-036-005

EPA disagrees with the comment. EPA interprets section 303(c)(4)(B) to give EPA authority to act if the State fails to act by promulgate ambient water quality criteria pursuant to section 303(c)(2)(B) for water bodies with either human health or aquatic life uses designated by the state for pollutants for which EPA has issued national section 304(a) recommended criteria guidance. As EPA has reiterated throughout the rulemaking record, EPA's strong preference would have been for the state to take the lead in promulgating these criteria. Pursuant to section 303(c)(4)(B), the State's failure to take such action after its standards were invalidated in state court constitutes a failure to meet the requirements of the Act under CWA section 303(c)(2)(B). Further, EPA is acting consistent with its authority because as explained below, the criteria in the rule are ambient criteria that define attainment of the designated uses, and they will result in additional controls on dischargers only where necessary to protect the designated uses.

EPA disagrees with the comment that it has somehow violated the CWA by promulgating water quality criteria instead of "water quality standards." EPA's regulations explain that there are three components to water quality standards, designated uses; water quality criteria to protect those uses, and an antidegradation policy. See 40 CFR Part 131.6. In the rule, EPA is promulgating one component of water quality standards because this is what the state has failed to do. The CWA's reference to water quality standards, a broader authority encompassing designated uses, criteria to protect those uses and an antidegradation policy, does not preclude EPA from issuing one component of standards, water quality criteria.

EPA disagrees that it has failed to develop such criteria "based upon" the designated uses of such waters. The criteria in the rule are based on protection of human health (either through ingestion of drinking water or drinking water and organisms) or aquatic life (saltwater or freshwater) which relate directly to the uses designated by the State of California for the waterbody. The State has designated the waters covered by this rule for a number of uses related to recreation, drinking water and aquatic life. The State always retains the discretion to change the designated uses of the State, as long as it meets the criteria set forth in 40 CFR 131.10. These criteria define what is necessary to protect the designated use. In essence, EPA's interpretation of section 303(c)(2)(B) of the CWA means that if the discharge or presence of the pollutant exceeds the criteria values, the discharge or presence of the pollutant would interfere with the designated uses of the waterbody.

As these are ambient criteria, they do not in and of themselves require control of a discharge. The ambient criteria are implemented in two ways -- to point sources through NPDES permits for direct dischargers (that may be based on wasteload allocations in impaired waters) or pretreatment standards for indirect discharges (both of which are enforceable limits) and through load allocations for non-point sources (which are not enforceable under the Clean Water Act, but which represent the portion of a receiving waters receiving capacity attributable to a non-point source that would attain applicable water quality standards). Under the NPDES regulations, the ambient criteria promulgated in the rule are applied in NPDES permits as effluent limitation control only if the uncontrolled discharge of a particular pollutant has a "reasonable potential" to exceed applicable water quality criteria. EPA defines

"reasonable potential" in its regulations as where a discharge is projected or calculated to cause an excursion above a water quality standard based on a number of factors including, as a minimum, the four factors listed in 40 CFR 122.44(d)(1)(ii). Absent that determination, the criteria in and of themselves have no impact. Thus, EPA's promulgation of criteria for all water bodies in California that currently have no numeric criteria for toxic pollutants criteria for protecting the designated use ensures a safety net that does not impose any needless burden or costs on any dischargers. (EPA made this point in describing its guidance implementing section 303(c)(2)(B), 57 Fed. Reg. 60853 col. 1 (Dec. 22, 1992)). If EPA were to interpret section 303(c)(2)(B) to compel it to prove conclusively that all of the priority pollutants are present in all California waters, this would impose a huge resource burden on EPA with no substantive benefit in terms of environmental protection. In fact, if EPA were not to have perfect information upon which to base a determination that current discharges are impairing designated uses, EPA might overlook a waterbody that needs criteria as a basis for controlling discharges. In essence, establishment of these ambient criteria is necessary to establish the benchmark against which the permit authority can make the reasonable potential determination. The commenter's argument that EPA needs to do a more site specific evaluation of whether the discharge of the pollutant "could reasonably interfere" ignores that criteria are not only used to remediate where there is impairment but to prevent it from happening in the first place.

The comment further criticizes EPA's interpretation of the statutory language calling for the states to act within three years of the Act (which was enacted in 1987) coupled with that language in CWA section 303(c)(4) stating that EPA is to act "promptly" does not support EPA's approach to cover all waterbodies. EPA, however, believes that the time frames envisioned by Congress, to put in place ambient criteria for toxic pollutants where EPA had issued recommend criteria under section 304(a) of the CWA for those pollutants, are reasonably considered when interpreting what Congress intended EPA to do. Congress, by linking section 303(c)(2)(B) to the triennial review period, gave states a chance to comply with section 303(c)(2)(B) on their own. To interpret the combination of subsections (c)(2)(B) and (c)(4) as requiring monitoring and analysis to demonstrate impairment before establishing ambient standards would be counter to Congress' goal of putting in place the ambient standards as the foundation for toxics control. Another reason EPA believes that its approach is appropriate is that section 303 establishes a regime whereby EPA's role is one of overseer of the national program, with states taking the primary role for standards. The State of California is better positioned to make local site-specific determinations than is EPA and EPA believes that it is more appropriate to issue state-wide criteria and then to allow the State if it so chooses to establish and submit for approval water quality standards that are based on site-specific considerations. Finally the reference in section 303(c)(2)(B) to section 304(a) criteria suggests that section 304(a) serve as "default" criteria, that once EPA had issued its national section 304(a) criteria recommendations, states were to adopt numeric criteria for those pollutants based on the 304(a) criteria, unless they had other scientifically defensible criteria. Here, California is the only state without such numeric criteria. EPA also notes that this rule follows the approach EPA took nationally in promulgating the National Toxics Rule for states that had failed to comply with CWA section 303(c)(2)(B). 57 Fed. Reg. (Dec. 22, 1992). EPA incorporates the rationale for EPA's action used in the NTR as expressed in the preamble into this final rule.

As the Supreme Court has stated, if a statute is silent or ambiguous on a specific question, a reviewing court must defer to any reasonable construction of that statute by the administering agency. *Chevron, U.S.A. v. NRDC*, 467 U.S. 837, 843 (1984). Under *Chevron*, a reviewing court must determine "whether the agency's answer [to the ambiguous question] is based on a permissible construction of the statute." *Id.* The agency's construction need not be the one the court itself would adopt or the one the court feels would best implement congressional policy. It need only be a reasonable construction of the statutory question at issue. *Id.* At 844-45. Here, to recognize Congress' desire for timely establishment of numeric criteria for toxics and recognizing that these criteria do not have a regulatory impact unless

reasonable potential for exceeding the criteria is found in a permit-specific context, EPA believes that its approach to implementing section 303(c)(2)(B) is a reasonable construction of the statute.

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Comment ID: CTR-038-006a  
Comment Author: Sonoma County Water Agency  
Document Type: Sewer Authority  
State of Origin: CA  
Represented Org:  
Document Date: 09/25/97  
Subject Matter Code: C-21 Legal Concerns  
References:  
Attachments? Y  
CROSS REFERENCES E-01c; R; S

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Comment: 5. The proposed rule is inconsistent with applicable Federal law and regulations. In proposing a single set of criteria for all estuaries, the rule is inconsistent with the Clean Water Act and EPA's water quality standards regulations. The Clean Water Act requires that water quality standards be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, and recreational purposes (see CWA section 303(c)(2)(A)). Consistent with this, EPA regulations require that water quality standards be based on identification of "specific water bodies where toxic pollutants may be adversely affecting water quality or the attainment of the designated water use or where the levels of toxic pollutants are at a level to warrant concern..." For those identified waters, "states must adopt criteria for such toxic pollutants applicable to the water body sufficient to protect the designated use" (See 40 CFR 131.11(a)(2)). Clearly the intent of both the Clean Water Act and EPA regulations is that water quality standards be tailored to the characteristics of the waters in question. In failing to properly evaluate the rule's economic impacts and in failing to adequately consider regulatory alternatives, the rule is inconsistent with Presidential Executive Order 12866 and the Unfunded Mandates Reform Act. Moreover, in failing to properly consider the impacts on small entities, such as the District and the small communities it serves, the rule is inconsistent with the Regulatory Flexibility Act.

Response to: CTR-038-006a

EPA disagrees with the comment. See responses to CTR-035-012a and CTR-036-005. For a discussion of how the rule complies with the E.O. 12866, the Unfunded Mandates Reform Act and the Regulatory Flexibility Act, see the preamble to the final rule.

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Comment ID: CTR-040-011  
Comment Author: County of Sacramento Water Div  
Document Type: Storm Water Auth.  
State of Origin: CA  
Represented Org:  
Document Date: 09/25/97  
Subject Matter Code: C-21 Legal Concerns  
References: Letter CTR-040 incorporates by reference letter CTR-027  
Attachments? Y  
CROSS REFERENCES

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Comment: MAJOR CONCERNS

We do, however, have fundamental concerns with the Rule as it is presently proposed and its supporting economic analysis. We believe the Rule can be modified in a manner that will be responsive to our concerns while at the same time being consistent with applicable Federal law and regulations. Our major concerns are presented here and are followed by our recommended modifications.

III. Concern: The proposed Rule violates applicable Federal law and regulations

\* In proposing a single set of criteria for all fresh waters, the Rule is inconsistent with the CWA and EPA's water quality standard regulations because it has not been determined that these criteria are necessary to avoid interference with designated uses (See Attachment B). The CWA requires that standards be established taking into consideration their use and value, and EPA regulations require consideration of specific water bodies where toxics may be adversely affecting water quality or uses.

Response to: CTR-040-011

EPA disagrees with the comment. See responses to CTR-035-012a and CTR-036-005.

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Comment ID: CTR-040-016b

Comment Author: County of Sacramento Water Div

Document Type: Storm Water Auth.

State of Origin: CA

Represented Org:

Document Date: 09/25/97

Subject Matter Code: C-21 Legal Concerns

References: Letter CTR-040 incorporates by reference letter CTR-027

Attachments? Y

CROSS REFERENCES C-24d

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Comment: RECOMMENDED MODIFICATIONS

To address our concerns, we recommend the following modifications which do not undermine the toxic pollutant control actions envisioned in EPA's economic analysis (e.g., BMPs for stormwater and source control). In fact, some of these recommendations would provide incentives for greater movement toward achieving the water quality criteria than would occur under the Rule as it is currently proposed.

III. Recommendation: Adopt separate, scientifically defensible, reasonably achievable aquatic life criteria for effluent-dominated/effluent-dependent streams.

Available discharge data for effluent-dominated streams in Sacramento indicate that a number of the proposed criteria are not presently being achieved and cannot be achieved with implementation of BMPs or other reasonable controls (See Attachment A). This is also true for many municipal stormwater programs in California.

\* The application of the proposed statewide criteria to effluent-dominated waters would force the Sacramento Stormwater Management Program, and other stormwater programs, to remove these discharges, essentially drying up the waters for most of the year. The costs would be significant and the

benefits assessed in EPA's economic analysis (enhanced fishing, passive benefits, and reduced cancer risk) would be zero. The removal of these discharges would likely be detrimental rather than beneficial. The effluent-dependent aquatic and riparian habitat, which previously supported aquatic life and wildlife, would no longer exist.

\* Effluent-dominated and effluent-dependent water bodies, which are common in California, require separate and distinct water quality criteria. Such a move is common sense and would be in accordance with the spirit (if not the letter) of Presidential Executive Order 12866 and the Unfunded Mandates Reform Act.

\* Additionally, the CWA requires that water quality standards be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and also taking into consideration their use and value for navigation (See CWA section 303(c)(2)(A)). Consistent with this statutory mandate, EPA regulations require that water quality standards be based on identification of specific water bodies where toxic pollutants may be adversely affecting water quality or the attainment of the designated water use, or where the levels of toxic pollutants are at a level to warrant concern and must adopt criteria for such toxic pollutants applicable to the water body sufficient to protect the designated use. Clearly the intent of both the CWA and EPA regulations is that water quality standards be tailored to the characteristics of the waters in question, rather than based on the "one-size-fits-all" approach used in the proposed Rule. This is not the cumbersome task suggested by the Preamble, at least with respect to developing criteria appropriate for effluent-dependent waters. But, even if it were a cumbersome task, the difficulty of complying with the law is not an excuse for noncompliance.

\* EPA could fulfill its obligation under the CWA and EPA regulations with respect to effluent-dominated waters simply by proposing criteria for these waters that are generally achievable by present stormwater discharges. Then, using the more stringent statewide criteria as a tracer, control measures and BMPs could be implemented to reduce the discharge of problematic pollutants to the MEP.

Response to: CTR-040-016b

EPA disagrees with this comment. Adoption of aquatic life criteria for effluent-dominated and effluent-dependent waters, based on local information and data, is beyond the scope of the CTR. EPA supports State adoption of such site-specific criteria, however, and intends to stay the CTR after approving any such State-adopted criteria (see response to CTR-003-006, et al.), but EPA cannot undertake to adopt such criteria itself. Even if EPA were to include site-specific criteria in the CTR, such criteria could not be based on considerations as to whether or not they were "reasonably achievable" by dischargers, as proposed in this comment. Water quality criteria must be based on sound scientific rationale and must protect designated uses. Their attainability is not a basis for selecting appropriate criteria. 40 CFR 131.11(a).

The costs (reasonableness) of attainability, which cannot justify adopting criteria that do not protect uses already designated, may be taken into consideration in the designation or modification of uses for individual waterbodies. 40 CFR 131.10. For this reason, EPA believes that this commenter's concerns are misplaced. The suggestion that EPA adopt "separate and distinct water quality criteria" for effluent-dominated and effluent-dependent waters, "tailored to the characteristics of the waters in question," and "reasonably achievable" by dischargers, could be best addressed, initially, through adoption or modification of designated uses. This is also beyond the scope of the CTR, the purpose of which is to adopt numeric toxic pollutant criteria for those waters in California, with designated uses already in place, where there are currently no criteria for these pollutants in effect. The CTR does not

undertake to designate any uses for waters in California or modify any uses already designated by the State.

Also, See responses to CTR-035-012a and CTR-036-005. For a discussion of how the rule complies with the E.O. 12866, the Unfunded Mandates Reform Act and the Regulatory Flexibility Act, see the preamble to the final rule.

See also response to CTR-040-016a.

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Comment ID: CTR-041-014

Comment Author: Sacramento Reg Cnty Sanit Dist

Document Type: Sewer Authority

State of Origin: CA

Represented Org:

Document Date: 09/25/97

Subject Matter Code: C-21 Legal Concerns

References:

Attachments? N

CROSS REFERENCES

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Comment: 1. The California Toxics Rule is inconsistent with the Clean Water Act and EPA's water quality standards regulations.

a. EPA Failed to Adopt Criteria on a Case-by-Case, Pollutant-by-Pollutant Basis.

Section 303 of the Clean Water Act (CWA) requires that whenever a State adopts water quality standards, it "shall adopt criteria for all toxic pollutants listed pursuant to section 1317(a)(1) of this title for which criteria have been published under section 1314(a) of this title, the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses." 33 U.S.C. section 1313(c)(2)(B). In other words, criteria only need to be developed where there is a "discharge or presence" of toxic pollutants in the affected waters, which could reasonably be expected to interfere with those designated uses" adopted by the State.(\*1) Thus, a water body and pollutant specific determination must be made before criteria are adopted as part of a water quality standard.

In its Preamble to the CTR, EPA stated that:

EPA does not believe that it is necessary to support the criteria proposed today on a pollutant specific, water body-by-water-body basis. For EPA to undertake an effort to conduct research and studies of each stream segment or water body across the State of California to demonstrate that for each toxic pollutant for which EPA has issued CWA 304(a) criteria guidance there is a "discharge or presence" of that pollutant which could reasonably "be expected to interfere with" the designated use would impose an enormous administrative burden and would be contrary to the statutory directive for swift action manifested by the 1987 addition of section 303(c)(2)(B) of the CWA. 62 Fed. Reg. 42166.

...Thus, to interpret CWA section 303(c)(2)(B) and (c)(4) to require such a cumbersome pollutant specific effort on each stream segment would essentially render section 303(c)(2)(B) meaningless. The provision and its legislative background indicate that the Administrator's determination to invoke her

303(c)(4)(B) authority can be met by a generic finding of inaction by the State without the need to develop pollutant specific data for individual stream segments.

This determination is supported by information in the rulemaking record showing the discharge or presence of priority toxic pollutants throughout the State. While this data is not necessarily complete, it constitutes a strong record supporting the need for numeric criteria for priority toxic pollutants with section 304(a) criteria guidance where the State does not have numeric criteria. 62 Fed. Reg. 42167.

Thus, EPA basically states that it is not necessary for it to make the statutorily-required findings of "discharge or presence" or reasonable expectation of interference with designated uses because it would be a great administrative burden and because swift action is required.

EPA supports its contention that swift action is required by citing the statutory framework and purpose of section 303, and the CWA's legislative history. "In adding section 303(c)(2)(B) to the CWA, Congress understood the existing requirements in section 303(c)(1) for triennial water quality standards review and submissions and in section 303(c)(4)(B) for promulgation. CWA section 303(c) includes numerous deadlines and section 303(c)(4) directs the Administrator to 'act promptly' where the Administrator determines that a revised or new standard is necessary to meet the requirements of the Act. Congress, by linking section 303(c)(2)(B) to the section 303(c)(1) three-year review period, gave States a last chance to correct this deficiency on their own. The legislative history of the provision demonstrates that chief Senate sponsors, including Senators Stafford, Chaffee and others wanted the provision to eliminate State and EPA delays and force quick action." 62 Fed. Reg. 42,167. Thus, EPA rests its entire argument regarding the need for swift action on the existence of the word "promptly" in the section of the statute related to the Administrator's duty to promulgate standards in the absence of approved State standards. It is unclear how EPA can argue that it has acted "promptly" thus far to adopt these new standards since it has been over three years since the State standards were overturned. Arguably, the additional extra time it would have taken to make the statutorily required findings would not have been substantial, and would probably result in less impact on dischargers.

EPA's other argument that such a "cumbersome pollutant specific effort on each stream segment" would "impose an enormous administrative burden" is not compelling. States, in their adoption of water quality standards, must perform this "cumbersome pollutant specific effort on each stream segment" under the express terms of section 303 (c)(2)(B). Therefore, it logically follows that EPA, in promulgating the standards for California, stands in the State's shoes and should be subject to the same requirements imposed upon the State. (\*2) Furthermore, EPA's reasoning that it is not required to do something merely because it is "cumbersome" may be subject to a legal challenge that such a determination is "arbitrary and capricious" under the Administrative Procedures Act (5 U.S.C. section 701 et seq.).

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(\*1) See also 40 C.F.R. part 131.11 (a)(2) ("States must review water quality data and information on discharges to identify specific water bodies where toxic pollutants may be, adversely affecting water quality or the attainment of the designated water use or where the levels of toxic pollutants are at a level to warrant concern and must adopt criteria for such toxic pollutants applicable to the water body sufficient to protect the designated use.")

(\*2) See accord 40 C.F.R. 131.24(c) regarding EPA promulgation of water quality standards ("In promulgating water quality standards, the Administrator is subject to the same policies, procedures, analyses, and public participation requirement established for States. . .").

Response to: CTR-041-014

EPA disagrees with the comment. See responses to CTR-035-012a and CTR-036-005.

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Comment ID: CTR-042-007a  
Comment Author: Cal. Dept. of Transportation  
SDocument Type: State Government  
State of Origin: CA  
Represented Org:  
Document Date: 09/26/97  
Subject Matter Code: C-21 Legal Concerns  
References:  
Attachments? Y  
CROSS REFERENCES E-01c; S

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Comment: 7. The CTR may violate the Administrative Procedures Act, the and Executive Order (E.O.) Unfunded Mandates Reform Act No. 12866.

In the Preamble to the CTR, EPA repeatedly claims that the CTR will not result in expenditures of more than \$100 million per year and, therefore, the statutory requirements of the UMRA and E.O. 12866 are not triggered.(\*1) Caltrans' annual costs alone and only in Los Angeles will exceed the \$100 million annual figure, even assuming the lowest level of treatment. Therefore, EPA's cost assumptions are challengeable as being arbitrary and capricious and in violation of the Administrative Procedures Act.(\*2)

Request: Caltrans requests that EPA reconsider its cost estimates based on the comments received during the public comment period.

Caltrans would like to thank EPA for the opportunity to provide comments on this proposed regulation. It is hoped that EPA will consider and address Caltrans' comments in the final version of the CTR. Should you have any questions concerning our comments on the CTR, please feel free to address these questions to Marcia Arrant at (916) 657-5381.

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(\*1) See CTR, 62 Fed. Reg. at 42,188, and at 42,191 ("EPA has determined that this rule does not contain a federal mandate that may result in expenditures by State, local and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year.")

(\*2) See American Iron and Steel Institute v. EPA, 1997 WL 297251 (D.C. Cir., 1497)(the court found that EPA had arbitrarily failed to adequately address cost-justification for its elimination of mixing zones. EPA had estimated the total cost of elimination mixing zones for bioaccumulative chemicals of concern (BCCS) from all dischargers to the Great Lakes at \$200,000, without even acknowledging a comment estimating the cost to one town for removal of mercury from its sewage discharge would be approximately \$300,000).

Response to: CTR-042-007a

For a discussion of how the rule complies with the E.O. 12866, the Unfunded Mandates Reform Act, see the preamble to the final rule, and EPA's economic analysis for the final rule. For an evaluation of Caltrans' analysis of costs associated with storm water discharges, see response to CTR-040-004 (Category J; Stormwater Economics).

The commenter cited the decision reviewing EPA's Great Lakes' Initiative with respect to eliminating mixing zones for bioaccumulative pollutants of concern. EPA views this decision as remanding the matter to the agency for a failure to respond adequately to a comment as required under the Administrative Procedure Act. The decision did not address or reverse EPA's longstanding interpretation of the CWA that its ambient based water quality criteria must be set at levels necessary to protect the designated use (either aquatic life or human health, or both). The elimination of the mixing zone in the GLI was not a water quality criterion. It was a specific requirement that would have imposed criteria as end-of-pipe effluent limitations for bioaccumulative pollutants where feasible. EPA's current regulations at 40 CFR.131.11 state that criteria must be based on sound scientific rationale and must containsufficient parameters to protect the designated use. Further, such criteria shall be based on EPA's section 304(a) criteria recommendations, EPA's 304(a) criteria recommendations modified to reflect site-specific conditions, or other scientifically defensible methods. From the outset of the water quality standards program, EPA has explained that while economic factors may be considered in designating uses, scientific and technical factors must justify criteria to meet those uses. 44 Fed. Reg. 25,223, -24, 25 (April 30, 1979). When criteria cannot be attained due to economic factors, the state may consider whether a change or "downgrade" the use designation for the waterbody would be appropriate. Id. at 25,224. See. e.g., Mississippi Comm. on Natural Resources v. Costle, 625 F.2d 1269, 1277 (5th Cir. 1980), where the Court addressed whether EPA's action disapproving the state's water quality criterion for dissolved oxygen was arbitrary and capricious because EPA failed to consider economic factors. In affirming EPA's disapproval, the Court stated that

Nevertheless, we are convinced that EPA's construction is correct. See *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, at 134-35. Congress itself separated use and criteria and stated that 'the water quality criteria for such waters [shall be] based on such uses. 33 U.S.C. Section 1313(c)(2)(1976). The statute requires EPA to develop criteria 'reflecting the latest scientific knowledge.'" Id. Section 1314(a)(1)(emphasis added). "The interpretation that criteria were based exclusively on scientific data predates the 1972 amendments. Water Quality Criteria vii (1968). Furthermore, when Congress wanted economics to be considered, it explicitly required it. See Sections 1311(b)(2)(A), 1312(b), 1314(b)(1976).

EPA reiterated this interpretation of the CWA and its implementing regulations in discussing section 304(a) recommended criteria guidance stating that they "are based solely on data and scientific judgments on the relationship between pollutant concentrations and environmental and human health effects" and "do not reflect consideration of economic impacts or the technological feasibility of meeting the chemical concentrations in ambient water." 63 FR 36,742, 36,762 col. 3 (July 7, 1998).

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Comment ID: CTR-043-005a  
Comment Author: City of Vacaville  
Document Type: Local Government  
State of Origin: CA  
Represented Org:  
Document Date: 09/26/97  
Subject Matter Code: C-21 Legal Concerns  
References:  
Attachments? Y  
CROSS REFERENCES E-01c; R; S

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Comment: 5. The proposed rule is inconsistent with applicable Federal law and regulations.

In proposing a single set of criteria for all estuaries, the rule is inconsistent with the Clean Water Act and EPA's water quality standards regulations. The Clean Water Act requires that water quality standards be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes (see CWA section 303(c)(2)(A)). Consistent with this, EPA regulations require that water quality standards be based on identification of "specific water bodies where toxic pollutants may be adversely affecting water quality or the attainment of the designated water use or where the levels of toxic pollutants are at a level to warrant concern..." For those identified waters,"states must adopt criteria for such toxic pollutants applicable to the water body sufficient to protect the designated use"(See 40 CFR 131.1 I (a)(2)). Clearly the intent of both the Act and EPA regulations is that water quality standards be tailored to the characteristics of the waters in question. In failing to properly evaluate the rule's economic impacts and in failing to adequately consider regulatory alternatives, the rule is inconsistent with Presidential Executive Order 12866 and the Unfunded Mandates Reform Act. Moreover, in failing to properly consider the impacts on small entities, the rule is inconsistent with the Regulatory Flexibility Act.

Response to: CTR-043-005a

See responses to CTR-035-012a and CTR-036-005. For a discussion of how the rule complies with the E.O. 12866, the Unfunded Mandates Reform Act, see the preamble to the final rule, and EPA's economic analysis for the final rule.

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Comment ID: CTR-044-006a  
Comment Author: City of Woodland  
Document Type: Local Government  
State of Origin: CA  
Represented Org:  
Document Date: 09/26/97  
Subject Matter Code: C-21 Legal Concerns  
References:  
Attachments? Y  
CROSS REFERENCES E-01c; R; S

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Comment: We have reviewed the proposed CTR and offer the following comments:

5. The proposed rule is inconsistent with applicable Federal law and regulations.

In proposing a single set of criteria for all estuaries, the rule is inconsistent with the Clean Water Act and EPA's water quality standards regulations. The Clean Water Act requires that water quality standards be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes (see CWA section 303(c)(2)(A)). Consistent with this, EPA regulations require that water quality standards be based on identification of "specific water bodies where toxic pollutants may be adversely affecting water quality or the attainment of the designated water use or where the levels of toxic pollutants are at a level to warrant concern..." For those identified waters, "states must adopt criteria for such toxic pollutants applicable to the water body sufficient to protect the designated use"(See 40 CFR 131.11 (a)(2)) (see Exhibit G). Clearly the intent of both the Act and EPA regulations is that water quality standards be tailored to the characteristics of the waters in question. In

failing to properly evaluate the rule's economic impacts and in failing to adequately consider regulatory alternatives, the rule is inconsistent with Presidential Executive Order 12866 and the Unfunded Mandates Reform Act (Id.). Moreover, in failing to properly consider the impacts on small entities, such as the City, the rule is inconsistent with the Regulatory Flexibility Act (Id.).

Response to: CTR-044-006a

See responses to CTR-035-012a and CTR-036-005. For a discussion of how the rule complies with the E.O. 12866, the Unfunded Mandates Reform Act, see the preamble to the final rule.

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Comment ID: CTR-044-044

Comment Author: City of Woodland

Document Type: Local Government

State of Origin: CA

Represented Org:

Document Date: 09/26/97

Subject Matter Code: C-21 Legal Concerns

References: Letter CTR-040 incorporates by reference letter CTR-027

Attachments? Y

CROSS REFERENCES

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Comment: LEGAL ANALYSIS OF THE PROPOSED CALIFORNIA TOXICS RULE

1. The California Toxics Rule is inconsistent with the Clean Water Act and EPA's water quality standards regulations.

a. EPA Failed to Adopt Criteria on a Case-by-Case, Pollutant-by-Pollutant Basis.

Section 303 of the Clean Water Act (CWA) requires that whenever a State adopts water quality standards, it "shall adopt criteria for all toxic pollutants listed pursuant to section 1317(a)(1) of this title for which criteria have been published under section 1314(a) of this title, the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses." 33 U.S.C. section 1313(c)(2)(B). In other words, criteria only need to be developed where there is a "discharge or presence" of toxic pollutants in the affected waters, which could "reasonably be expected to interfere with those designated uses" adopted by the State.\*1) Thus, a water body and pollutant specific determination must be made before criteria are adopted as part of a water quality standard.

In its Preamble to the CTR, EPA stated that:

EPA does-not believe that it is necessary to support the criteria proposed today on a pollutant specific, water body-by-water-body basis. For EPA to undertake an effort to conduct research and studies of each stream segment or water body across the State of California to demonstrate that for each toxic pollutant for which EPA has issued CWA 304(a) criteria guidance there is a "discharge or presence" of that pollutant which could reasonably "be expected to interfere with" the designated use would impose an enormous administrative burden and would be contrary to the statutory directive for swift action manifested by the 1987 addition of section 303(c)(2)(B) of the CWA. 62 Fed. Reg. 42166.

Thus, to interpret CWA section 303(c)(2)(B) and (c)(4) to require such a cumbersome pollutant specific effort on each stream segment would essentially render section 303(c)(2)(B) meaningless. The provision and its legislative background indicate that the Administrator's determination to invoke her 303(c)(4)(B) authority can be met by a generic finding of inaction by the State without the need to develop pollutant specific data for individual stream segments. This determination is supported by information in the rulemaking record showing the discharge or presence of priority toxic pollutants throughout the State. While this data is not necessarily complete, it constitutes a strong record supporting the need for numeric criteria for priority toxic pollutants with section 304(a) criteria guidance where the State does not have numeric criteria. 62 Fed. Reg. 42167.

Thus, EPA basically states that it is not necessary for it to make the statutorily-required findings of "discharge or presence" or reasonable expectation of interference with designated uses because it would be a great administrative burden and because swift action is required.

EPA supports its contention that swift action is required by citing the statutory framework and purpose of section 303, and the CWA's legislative history. "In adding section 303(c)(2)(B) to the CWA, Congress understood the existing requirements in section 303(c)(1) for triennial water quality standards review and submissions and in section 303(c)(4)(B) for promulgation. CWA section 303(c) includes numerous deadlines and section 303(c)(4) directs the Administrator to act promptly where the Administrator determines that a revised or new standard is necessary to meet the requirements of the Act. Congress, by linking section 303(c)(2)(B) to the section 303(c)(1) three-year review period, gave States a last chance to correct this deficiency on their own. The legislative history of the provision demonstrates that chief Senate sponsors, including Senators Stafford, Chaffee and others wanted the provision to eliminate State and EPA delays and force quick action." 62 Fed. Reg. 42,167. Thus, EPA rests its entire argument regarding the need for swift action on the existence of the word "promptly" in the section of the statute related to the Administrator's duty to promulgate standards in the absence of approved State standards. It is unclear how EPA can argue that it has acted "promptly" thus far to adopt these new standards since it has been over three years since the State standards were overturned. Arguably, the additional extra time it would have taken to make the statutorily required findings would not have been substantial, and would probably result in less impact on dischargers.

EPA's other argument that such a "cumbersome pollutant specific effort on each stream segment" would "impose an enormous administrative burden" is not compelling. States, in their adoption of water quality standards, must perform this "cumbersome pollutant specific effort on each stream segment" under the express terms of section 303 (c)(2)(B). Therefore, it logically follows that EPA, in promulgating the standards for California, stands in the State's shoes and should be subject to the same requirements imposed upon the State. (\*2) Furthermore, EPA's reasoning that it is not required to do something merely because it is "cumbersome" may be subject to a legal challenge that such a determination is "arbitrary and capricious" under the Administrative Procedures Act (5 U.S.C. section 701 et seq.).

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(\*1) See also 40 C.F.R. section 131.11 (a)(2) ("States must review water quality data and information on discharges to identify specific water bodies where toxic pollutants may be, adversely affecting water quality or the attainment of the designated water use or where the levels of toxic pollutants are at a level to warrant concern and must adopt criteria for such toxic pollutants applicable to the water body sufficient to protect the designated use.")

(\*2) See accord 40 C.F.R. 131.241(c) regarding EPA promulgation of water quality standards ("In promulgating water quality standards, the Administrator is subject to the same policies, procedures, analyses, and public participation requirement established for States. . .").

Response to: CTR-044-044

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Comment ID: CTR-050-001

Comment Author: Sonnenschein Nath & Rosenthal

Document Type: Trade Org./Assoc.

State of Origin: CA

Represented Org: American Petrol

Document Date: 09/26/97

Subject Matter Code: C-21 Legal Concerns

References:

Attachments? N

**CROSS REFERENCES**

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Comment: On behalf of the American Petroleum Institute (API), we are submitting the following comments on U.S. EPA's proposal to establish water quality criteria for toxic pollutants for the State of California (62 Fed. Reg. at 42160, Aug. 5, 1997). API is a national trade association representing 300 companies with operations in all facets of the petroleum industry

(exploration, production, refining, and marketing. API has member companies in California as well as member companies in the Midwestern states currently implementing the Great Lakes Initiative. API member companies have experience with many of aspects of the proposed rule which are quite similar to the Great Lakes Initiative.

Many of API's members own and operate facilities in the State of California that discharge wastewater pursuant to NPDES permits. Those facilities will likely be issued new permit limits based on the criteria set forth in the EPA rule, once that rule is issued in final form. Therefore, API has a strong interest in the EPA proposal. Based on its review, API believes that the proposal has substantial legal flaws. Those flaws are described below.

1. EPA is Not Authorized to Impose the Proposed Criteria on a State-wide Basis.

EPA has proposed to impose the new criteria on all-waters in the State of California. EPA claims that it has the authority to impose state-wide criteria because the State's water quality control plans, which contain water quality criteria, have been invalidated by a court. Therefore, according to EPA, the State has not met its obligations under section 303(c)(2)(B) of the Clean Water Act, which requires the State to issue water quality criteria for toxics, "the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses." Because the State has not taken that action, EPA claims that it must promulgate standards for the State, under section 303(c)(4)(B) of the Act, which requires EPA to act when it determines that "a revised or new standard is necessary to meet the requirements of the Act." (62 Fed. Reg. at 42165).

EPA's position that it may impose state-wide criteria is squarely inconsistent with the plain language and intent of the Clean Water Act. First, Section 303(c)(2)(b) requires that the state must establish criteria for toxics, the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the state as necessary to support such designated uses by requiring that criteria be established for certain toxics, i.e., those which interfere with the designated uses of specified waters, i.e., affected waters, it is clear that Congress intended that criteria be set on a

pollutant specific and stream-specific basis, not according to state geographic boundaries. Uses are designated for particular water bodies. Thus, EPA's position that it need not make any specific findings at all nullifies the clear statutory language of section 303(c)(2)(b) and violates a cardinal principle of statutory construction that each and every word of a provision be given effect.

Response to: CTR-050-001

See responses to CTR-035-012a and CTR-036-005. Further, EPA's interpretation does give effect to each word in CWA section 303(c)(2)(B) because the phrase "discharge or presence of which in the affected waters could reasonably be expect to interfere with those designated uses adopted by the State, as necessary to support such designated uses" reasonably could be interpreted to mean that if the pollutant were discharged, it could interfere with the designated uses. As explained in the above cited comment responses, this is a reasonable interpretation of the CWA given the time frames set forth by Congress and given the practical reality that no water quality based effluent limit must be included in a particular permit unless the State makes a "reasonable potential" determination for a given discharge.

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Comment ID: CTR-050-002

Comment Author: Sonnenschein Nath & Rosenthal

Document Type: Trade Org./Assoc.

State of Origin: CA

Represented Org: American Petrol

Document Date: 09/26/97

Subject Matter Code: C-21 Legal Concerns

References:

Attachments? N

**CROSS REFERENCES**

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Comment: On behalf of the American Petroleum Institute (API), we are submitting the following comments on U.S. EPA's proposal to establish water quality criteria for toxic pollutants for the State of California (62 Fed. Reg. at 42160, Aug. 5, 1997). API is a national trade association representing 300 companies with operations in all facets of the petroleum industry

(exploration, production, refining, and marketing. API has member companies in California as well as member companies in the Midwestern states currently implementing the Great Lakes Initiative. API member companies have experience with many of aspects of the proposed rule which are quite similar to the Great Lakes Initiative.

Many of API's members own and operate facilities in the State of California that discharge wastewater pursuant to NPDES permits. Those facilities will likely be issued new permit limits based on the criteria set forth in the EPA rule, once that rule is issued in final form. Therefore, API has a strong interest in the EPA proposal. Based on its review, API believes that the proposal has substantial legal flaws. Those flaws are described below.

Second, EPA concedes that it has not made the factual findings to support state-wide application of the proposed standards, i.e., that a particular standard for a particular pollutant on a particular stream is "necessary to meet the requirements of the Act." (62 Fed. Reg. at 42166-42167) In fact, EPA states that its data concerning "discharge or presence" of toxics is "not necessarily complete." (62 Fed. Reg. at 42167) Perhaps, it is this acknowledged lack of supporting data that compels EPA to ignore the language

of section 303(c)(2)(b), which so plainly contradicts the concept of a state-wide applicability of toxic criteria.

Response to: CTR-050-002

See responses to CTR-035-012a and CTR-036-005.

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Comment ID: CTR-050-003

Comment Author: Sonnenschein Nath & Rosenthal

Document Type: Trade Org./Assoc.

State of Origin: CA

Represented Org: American Petrol

Document Date: 09/26/97

Subject Matter Code: C-21 Legal Concerns

References:

Attachments? N

**CROSS REFERENCES**

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Comment: On behalf of the American Petroleum Institute (API), we are submitting the following comments on U.S. EPA's proposal to establish water quality criteria for toxic pollutants for the State of California (62 Fed. Reg. at 42160, Aug. 5, 1997). API is a national trade association representing 300 companies with operations in all facets of the petroleum industry

(exploration, production, refining, and marketing. API has member companies in California as well as member companies in the Midwestern states currently implementing the Great Lakes Initiative. API member companies have experience with many of aspects of the proposed rule which are quite similar to the Great Lakes Initiative.

Many of API's members own and operate facilities in the State of California that discharge wastewater pursuant to NPDES permits. Those facilities will likely be issued new permit limits based on the criteria set forth in the EPA rule, once that rule is issued in final form. Therefore, API has a strong interest in the EPA proposal. Based on its review, API believes that the proposal has substantial legal flaws. Those flaws are described below.

Third, EPA's claim that it does not have to make pollutant and stream-specific determinations because Congress wanted it to take "quick action" (62 Fed. Reg. at 42167), is not supported by the pertinent statutory provisions which contain no deadlines at all. Section 303(c)(4)(B) merely directs the Agency to act to promptly" and has no explicit connection to section 303(c)(2)(B), which contains the State's obligations to issue criteria for toxicities.

If Congress had wanted to establish a connection between the two statutory provisions, and authorize EPA to take "quick action" to issue state-wide criteria if the State has not acted, Congress could easily have inserted appropriate language in either section 303(c)(2)(B), section 303(c)(4)(B), or both. Congress did not insert such language. Thus, Congress did not authorize the Agency to make an "end run" around the explicit provisions of the statute by issuing state-wide criteria without stream-specific or pollutant-specific findings that such criteria are necessary.

Response to: CTR-050-003

See responses to CTR-035-012a and CTR-036-005.

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Comment ID: CTR-050-004

Comment Author: Sonnenschein Nath & Rosenthal

Document Type: Trade Org./Assoc.

State of Origin: CA

Represented Org: American Petrol

Document Date: 09/26/97

Subject Matter Code: C-21 Legal Concerns

References:

Attachments? N

**CROSS REFERENCES**

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Comment: On behalf of the American Petroleum Institute (API), we are submitting the following comments on U.S. EPA's proposal to establish water quality criteria for toxic pollutants for the State of California (62 Fed. Reg. at 42160, Aug. 5, 1997). API is a national trade association representing 300 companies with operations in all facets of the petroleum industry

(exploration, production, refining, and marketing. API has member companies in California as well as member companies in the Midwestern states currently implementing the Great Lakes Initiative. API member companies have experience with many of aspects of the proposed rule which are quite similar to the Great Lakes Initiative.

Many of API's members own and operate facilities in the State of California that discharge wastewater pursuant to NPDES permits. Those facilities will likely be issued new permit limits based on the criteria set forth in the EPA rule, once that rule is issued in final form. Therefore, API has a strong interest in the EPA proposal. Based on its review, API believes that the proposal has substantial legal flaws. Those flaws are described below.

Finally, EPA imposition of state-wide standards is not "necessary to meet the requirements of the Act," as required by Section 303(c)(4)(B). In discussing the potential economic impacts of the proposal, EPA points out that if it did not issue a rule, the State could use its narrative water quality criteria to impose permit limits for toxicities. (62 Fed. Reg. at 42187) EPA fails to recognize that if the state were allowed to use its criteria in this manner, there would be no need for EPA to usurp state authority and federally impose statewide criteria.

For the reasons cited above, EPA's action to propose toxic criteria in the State of California is without legal authority and should be withdrawn.

Response to: CTR-050-004

See responses to CTR-035-012a and CTR-036-005. EPA is promulgating numeric criteria here even though the state could use its narrative to develop water quality based effluent limits in order to meet the requirements of CWA section 303(c)(2)(B). Section 303(c)(2)(B) of the CWA was enacted in 1987 in response to Congress' impatience with the progress in implementation of water quality controls for toxic pollutants for which EPA has national section 304(a) recommended criteria guidance. In enacting section 303(c)(2)(B), Congress required states to adopt numeric criteria. In light of California's failure to have such criteria, EPA's promulgation is implementing Congressional intent.

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Comment ID: CTR-050-007a  
Comment Author: Sonnenschein Nath & Rosenthal  
Document Type: Trade Org./Assoc.  
State of Origin: CA  
Represented Org: American Petrol  
Document Date: 09/26/97  
Subject Matter Code: C-21 Legal Concerns  
References:  
Attachments? N  
CROSS REFERENCES E-01c; R; S

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Comment: IV. EPA Has Not Complied With Applicable Regulatory Review Requirements. There are several significant statutes and executive orders that require EPA to undertake analyses of the costs and benefits of its regulations, and to submit the regulations and analyses to other governmental bodies, including the Office of Management and Budget (OMB) and Congress. Those authorities include the Regulatory Flexibility Act, the Small Business Regulatory Enforcement and Fairness Act (SBREFA), the Unfunded Mandates Reform Act, the Congressional Review Act, and Executive Order 12866 (Regulatory Planning and Review). EPA apparently believes that it does not need to comply with any of those requirements for this rulemaking. (62 Fed. Reg. at 42188-42191). API believes that EPA is required to meet those obligations for the proposed criteria, and that the Agency's rationale for avoiding this responsibility has no legal basis.

EPA supports its decision not to comply with the regulatory review statutes by stating that the proposed criteria "by themselves, do not directly impose economic impacts." (62 Fed. Reg. at 42188). EPA admits that when those criteria are combined with the designated uses that have been adopted by the State, and implemented in permit limits, "there may be a cost to some dischargers." (62 Fed. Reg. at 42188) could be substantial; the Agency itself estimates that the compliance cost could be between \$15 and \$87 million per year. (62 Fed. Reg. at 42189). (That does not include indirect costs to the economy, which would surely put this rule above the \$100 million impact threshold specified in several of the regulatory review statutes listed above.) EPA cannot ignore those costs by creating its own interpretation of those statutes in which only "direct" impacts need be considered. There is no support in the statutory language or legislative history for such a reading, and EPA has cited no such support in its Federal Register notice.

There is another problem with EPA's rationale for avoiding regulatory review: if EPA were right that "indirect" impacts do not trigger those reviews, the impacts of this rulemaking are not really "indirect." Those impacts emerge clearly once the proposed criteria are combined with the State's designated uses. Those designations have already been established, so there is nothing uncertain or indefinite about that aspect of the water quality standards. Then, once the standards are completed, the State must implement those standards through permit limits. While there are some decisions that the State must make in determining the proper permit limits, which can influence the size of the compliance costs, EPA can readily determine a range of possible costs. In fact, the Agency has already done so, resulting in the \$15 - \$87 million cost range discussed above. While those costs may not be fixed with certainty, they are certainly "direct economic impacts". Therefore, even if the Agency were correct in looking at only "direct" impacts, this rulemaking poses such impacts, and EPA must comply with the statutory requirements to conduct and submit cost and benefit analyses of its proposed criteria.

## V. CONCLUSION

As explained above, EPA's proposal to issue water quality criteria for toxicities in the State of California suffers from serious legal flaws. API urges the Agency to reconsider its intended course of action in light of the issues raised in these and other public comments. If you have any questions regarding these comments, or would like any additional information, please call Theresa Pugh at 202/682-8036.

Response to: CTR-050-007a

EPA disagrees with the comment. EPA has explained its compliance with E.O. 12866, the Regulatory Flexibility Act (as amended), and the Unfunded Mandates Reform Act in the preamble to the final rule.

With respect to the Regulatory Flexibility Act (RFA), and as stated in the preamble to the proposed and final rules, the RFA requires agencies to assess the economic impact of a rule only on small entities that are subject to the requirements of the rule. Today's rule does not impose any impacts on small entities.

The Regulatory Flexibility Act generally requires federal agencies to prepare a regulatory flexibility analysis (RFA) that describes the impact of a rule on small entities (small businesses, small organizations and small governmental jurisdictions) whenever an agency promulgates a final rule under section 553 of the Administrative Procedure Act, 5 U.S.C. Section 553. 5 U.S.C. Section 604. Under section 605(b) of the Regulatory Flexibility Act, however, if the head of an agency certifies that a rule will not have a significant economic impact on a substantial number of small entities, the statute does not require the agency to prepare an RFA. Pursuant to section 605(b), the Administrator is today certifying that this rule will not have a significant economic impact on a substantial number of small entities for the reasons explained below. Consequently, EPA has not prepared an RFA.

The RFA requires analysis of the economic impact of a rule only on the small entities subject to the rules' requirements. See *United States Distribution Companies v. FERC*, 88 F.3d 1105, 1170 (D.C. Cir. 1996). ("[N]o [regulatory flexibility] analysis is necessary when an agency determines that the rule will not have a significant economic impact on a substantial number of small entities that are subject to the requirements of the rule," *United Distribution* at 1170, quoting *Mid-Tex Elec. Co-op v. FERC*, 773 F.2d 327, 342 (D.C. Cir. 1985) (emphasis added by United Distribution court).) Thus, the RFA requires that any regulatory flexibility analysis prepared for a final rule must include estimates of "the number of small entities to which a rule will apply." 5 U.S.C. Section 604(a)(3). The analysis must also include a description of the recordkeeping, reporting and compliance requirements of the rule, including an estimate of the classes of small entities "which will be subject to the requirements." 5 U.S.C. Section 604(a)(4). In light of these provisions, courts have consistently interpreted the RFA to impose no obligation on an agency to conduct a small entity impact analysis on entities it does not regulate. *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 467 & n.18 (D.C. Cir. 1998).

The U.S. Court of Appeals for the District of Columbia Circuit recently reaffirmed its conclusion that the RFA does not require an agency to prepare an assessment of the economic impact of a rule on small entities that are not directly affected by a rule. *American Trucking Association, Inc. v. U.S. Environmental Protection Agency*, (D.C. Cir. 1999). In that case, the court determined that EPA was not required to prepare a regulatory flexibility analysis of the economic impact of a rule on small entities when it promulgated air quality standards under the Clean Air Act. There, EPA had certified that the rule would not have a significant impact on small entities because the air standard did not directly impose requirements on small entities and consequently they were not subject to the rule. Under the Clean Air Act, states regulate small entities through state implementation plans that they are required to develop under the Act. States have broad discretion in determining how to achieve compliance with the standards and may choose to avoid imposing any of the burden of complying with the standards on small entities.

The CTR presents a situation very similar to that described in the American Trucking case. It establishes no requirements that are directly applicable to small entities, and so the agency is not required to conduct a regulatory flexibility analysis under the RFA. (See *United States Distribution Companies v. FERC*, 88 F.3d 1105, 1170 (D.C. Cir. 1996). The Agency is therefore certifying that today's rule will not have a significant economic impact on a substantial number of small entities, within the meaning of the RFA.

Under the CWA water quality standards program, states must adopt water quality standards for their waters that must be submitted to EPA for approval. If the Agency disapproves a state standard and the state does not adopt appropriate revisions to address EPA's disapproval, EPA must promulgate standards consistent with the statutory requirements. EPA has authority to promulgate criteria or standards in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of the Act. These state standards (or EPA-promulgated standards) are implemented through various water quality control programs including the National Pollutant Discharge Elimination System (NPDES) program that limits discharges to navigable waters except in compliance with an EPA permit or permit issued under an approved state program. The CWA requires that all NPDES permits must include any limits on discharges that are necessary to meet state water quality standards.

Thus, under the CWA, EPA's promulgation of water quality criteria or standards establishes standards that the state, in turn, implements through the NPDES permit process. The state has considerable discretion in deciding how to meet the water quality standards and in developing discharge limits as needed to meet the standards. In circumstances where there is more than one discharger to a water body that is subject to water quality standards or criteria, a state also has discretion in deciding on the appropriate limits for the different dischargers. While the state's implementation of federally-promulgated water quality criteria or standards may result indirectly in new or revised discharge limits for small entities, the criteria or standards themselves do not apply to any discharger, including small entities.

EPA recognizes that it has undertaken an economic analysis pursuant to E.O. 12866 for this rule. This analysis, however, makes numerous assumptions and does not necessarily predict how the state will implement the criteria. Thus, the economic analysis represents EPA's best estimate of the implementation costs of the rule given the broad flexibility the state has in implementing the criteria.

The CTR, as explained above, does not itself establish any requirements that are applicable to small entities. As a result of EPA's action here, the State of California will need to ensure that permits it issues comply with the water quality standards established by the criteria in today's rule. In so doing, the State will have a number of discretionary choices associated with permit writing. While California's implementation of today's rule may ultimately result in some new or revised permit conditions for some dischargers, including small entities, EPA's action today does not impose any of these as yet unknown requirements on small entities.

Although the statute does not require EPA to prepare a regulatory flexibility analysis when it promulgates water quality criteria which will establish water quality standards for California, EPA has prepared an assessment of potential economic impact. This evaluation focuses on State and local implementation procedures related to the NPDES permit program. This evaluation is included in a document entitled, *Implementation Analysis of Ambient Water Quality Criteria for Priority Toxic Pollutants in California* which is part of the administrative record for this rulemaking. This document looks at the many implementation procedures of the NPDES permit program that the State implements to control pollutants from point source discharges. The procedures discussed in the document include: methods to calculate water quality-based effluent limits; mixing zones; site-specific translators for

metals criteria; compliance schedules; effluent trading; water-effect ratios; variances; designated use reclassification; and site-specific criteria. Each of these implementation procedures may have an effect on how water quality standards, based on the criteria in today's rule, will impact NPDES permit holders. Many of these procedures will lessen impacts on regulated entities.

The document also looks at implementation procedures used in the pretreatment program to control pollutant discharges from dischargers that do not discharge directly but introduce pollutants to publicly owned treatment works (POTWs). These dischargers include retail, commercial, and small industrial facilities that discharge to publicly owned treatment works (POTWs). Local entities have significant flexibility to implement their pretreatment programs. These procedures include: methods to calculate local limits (allocation of pollutants); methods of pollution prevention for various specific sources; pretreatment pollutant trading; methods of low cost pollutant reductions; technical assistance to move toward or achieve zero-discharge; cost accounting to drive down levels of discharges; and a few of the regulatory relief options discussed in the direct discharger section, e.g., compliance schedules.

The discussion illustrates the significant amount of flexibility available to the State and local agencies when implementing the NPDES permit program and pretreatment program and emphasizes that appropriate use of the available implementation tools can greatly affect the impact to many direct and indirect dischargers.

EPA recognizes that it has undertaken an economic analysis pursuant to E.O. 12866 for this rule. This analysis, however, makes numerous assumptions and does not necessarily predict how the state will implement the criteria. Thus, the economic analysis represents EPA's best estimate of the costs of the rule given the broad flexibility the state has in implementing the criteria.

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Comment ID: CTR-052-021a  
Comment Author: East Bay Dischargers Authority  
Document Type: Sewer Authority  
State of Origin: CA  
Represented Org:  
Document Date: 09/26/97  
Subject Matter Code: C-21 Legal Concerns  
References: Letter CTR-052 incorporates by reference letters CTR-035 and CTR-054  
Attachments? Y  
CROSS REFERENCES E-01c; R; S

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Comment: C. RECOMMENDATIONS FOR MODIFICATIONS TO THE CTR AND EA

EPA should revise the proposed rule and economics analysis such that they are consistent with applicable Federal law and regulations. In proposing a single set of criteria for all estuaries, the rule is inconsistent with the Clean Water Act and EPA's water quality standards regulations. In failing to properly evaluate the rule's economic impacts and in failing to adequately consider alternative criteria for San Francisco Bay Area waters, the rule is inconsistent with Presidential Executive Order 12866 and the Unfunded Mandates Reform Act. In failing to properly consider the impacts on small entities, the rule is inconsistent with the Regulatory Flexibility Act. Specific citations for these inconsistencies are contained in comments from BADA and CASA/Tri-TAC.

Response to: CTR-052-021a

See responses to CTR-035-012a and CTR-036-005. EPA has explained its compliance with E.O. 12866, the Regulatory Flexibility Act (as amended), and the Unfunded mandates Reform Act in the preamble to the final rule.

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Comment ID: CTR-054-014  
Comment Author: Bay Area Dischargers Assoc.  
Document Type: Sewer Authority  
State of Origin: CA  
Represented Org:  
Document Date: 09/25/97  
Subject Matter Code: C-21 Legal Concerns  
References:  
Attachments? Y  
CROSS REFERENCES

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Comment: The proposed rule is inconsistent with applicable Federal law and regulations. In proposing a single set of criteria for all estuaries, the rule is inconsistent with the Clean Water Act and EPA's water quality standards regulations (see Attachment 4). In failing to properly evaluate the rule's economic impacts and in failing to adequately consider alternative criteria for San Francisco Bay Area waters, the rule is inconsistent with Presidential Executive Order 12866 and the Unfunded Mandates Reform Act. In failing to properly consider the impacts on small entities (Id.), the rule is inconsistent with the Regulatory Flexibility Act (Id.).

Response to: CTR-054-014

See responses to CTR-035-012a and CTR-036-005. EPA has explained its compliance with E.O. 12866, the Regulatory Flexibility Act (as amended), and the Unfunded mandates Reform Act in the preamble to the final rule.

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Comment ID: CTR-054-048  
Comment Author: Bay Area Dischargers Associati  
Document Type: Sewer Authority  
State of Origin: CA  
Represented Org:  
Document Date: 09/25/97  
Subject Matter Code: C-21 Legal Concerns  
References: Letter CTR-040 incorporates by reference letter CTR-027  
Attachments? Y  
CROSS REFERENCES

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Comment: LEGAL ANALYSIS OF THE PROPOSED CALIFORNIA TOXICS RULE

1. The California Toxics Rule is inconsistent with the Clean Water Act and EPA's water quality standards regulations.
  - a. EPA Failed to Adopt Criteria on a Case-by-Case, Pollutant-by-Pollutant Basis.

Section 303 of the Clean Water Act (CWA) requires that whenever a State adopts water quality standards, it "shall adopt criteria for all toxic pollutants listed pursuant to section 1317(a)(1) of this title for which criteria have been published under section 1314(a) of this title, the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses." 33 U.S.C. section 1313(c)(2)(B). In other words, criteria only need to be developed where there is a "discharge or presence" of toxic pollutants in the affected waters, which could "reasonably be expected to interfere with those designated uses" adopted by the State.\*1) Thus, a water body and pollutant specific determination must be made before criteria are adopted as part of a water quality standard.

In its Preamble to the CTR, EPA stated that:

EPA does not believe that it is necessary to support the criteria proposed today on a pollutant specific, water body-by-water-body basis. For EPA to undertake an effort to conduct research and studies of each stream segment or water body across the State of California to demonstrate that for each toxic pollutant for which EPA has issued CWA 304(a) criteria guidance there is a "discharge or presence" of that pollutant which could reasonably "be expected to interfere with" the designated use would impose an enormous administrative burden and would be contrary to the statutory directive for swift action manifested by the 1987 addition of section 303(c)(2)(B) of the CWA. 62 Fed. Reg. 42166.

Thus, to interpret CWA section 303(c)(2)(B) and (c)(4) to require such a cumbersome pollutant specific effort on each stream segment would essentially render section 303(c)(2)(B) meaningless. The provision and its legislative background indicate that the Administrator's determination to invoke her 303(c)(4)(B) authority can be met by a generic finding of inaction by the State without the need to develop pollutant specific data for individual stream segments. This determination is supported by information in the rulemaking record showing the discharge or presence of priority toxic pollutants throughout the State. While this data is not necessarily complete, it constitutes a strong record supporting the need for numeric criteria for priority toxic pollutants with section 304(a) criteria guidance where the State does not have numeric criteria. 62 Fed. Reg. 42167.

Thus, EPA basically states that it is not necessary for it to make the statutorily-required findings of "discharge or presence" or reasonable expectation of interference with designated uses because it would be a great administrative burden and because swift action is required.

EPA supports its contention that swift action is required by citing the statutory framework and purpose of section 303, and the CWA's legislative history. "In adding section 303(c)(2)(B) to the CWA, Congress understood the existing requirements in section 303(c)(1) for triennial water quality standards review and submissions and in section 303(c)(4)(B) for promulgation. CWA section 303(c) includes numerous deadlines and section 303(c)(4) directs the Administrator to act promptly where the Administrator determines that a revised or new standard is necessary to meet the requirements of the Act. Congress, by linking section 303(c)(2)(B) to the section 303(c)(1) three-year review period, gave States a last chance to correct this deficiency on their own. The legislative history of the provision demonstrates that chief Senate sponsors, including Senators Stafford, Chaffee and others wanted the provision to eliminate State and EPA delays and force quick action." 62 Fed. Reg. 42,167. Thus, EPA rests its entire argument regarding the need for swift action on the existence of the word "promptly" in the section of the statute related to the Administrator's duty to promulgate standards in the absence of approved State standards. It is unclear how EPA can argue that it has acted "promptly" thus far to adopt these new standards since it has been over three years since the State standards were overturned. Arguably, the additional extra time it would have taken to make the statutorily required findings would not have been substantial, and would

probably result in less impact on dischargers.

EPA's other argument that such a "cumbersome pollutant specific effort on each stream segment" would "impose an enormous administrative burden" is not compelling. States, in their adoption of water quality standards, must perform this "cumbersome pollutant specific effort on each stream segment" under the express terms of section 303 (c)(2)(B). Therefore, it logically follows that EPA, in promulgating the standards for California, stands in the State's shoes and should be subject to the same requirements imposed upon the State. (\*2) Furthermore, EPA's reasoning that it is not required to do something merely because it is "cumbersome" may be subject to a legal challenge that such a determination is "arbitrary and capricious" under the Administrative Procedures Act (5 U.S.C. section 701 et seq.).

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(\*1) See also 40 C.F.R. section 131.11 (a)(2) ("States must review water quality data and information on discharges to identify specific water bodies where toxic pollutants may be, adversely affecting water quality or the attainment of the designated water use or where the levels of toxic pollutants are at a level to warrant concern and must adopt criteria for such toxic pollutants applicable to the water body sufficient to protect the designated use.")

(\*2) See accord 40 C.F.R. 131.241(c) regarding EPA promulgation of water quality standards ("In promulgating water quality standards, the Administrator is subject to the same policies, procedures, analyses, and public participation requirement established for States. . .").

Response to: CTR-054-048

EPA disagrees with the comment. See responses to CTR-035-012a and CTR-036-005.

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Comment ID: CTR-055-002a  
Comment Author: USS-POSCO Industries  
Document Type: Specific Industry  
State of Origin: CA  
Represented Org:  
Document Date: 09/26/97  
Subject Matter Code: C-21 Legal Concerns  
References:  
Attachments? Y  
CROSS REFERENCES T

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Comment: Waste Load Allocation (WLA) is a flawed concept and UPI requests the EPA promulgate conditions for exemption as part of the requirement for compliance with such allocations.

The implementation of CWA Section 303(c)(2)(B) as discussed beginning on page 42184 causes numerous obstacles, both financial and technological, to facilities such as UPI. Our facility will be subject to water quality-based effluent limitations (WQBELs). Therefore, total maximum daily loads (TMDL) and WLAs will be utilized as future discharge permit criteria.

State Task Force recommendations also recognize that the TMDL process can be significantly labor and data intensive. UPI concurs that the TMDL process is significantly labor and data intensive. During the five year period from 1989 through 1993 UPI spent close to a million dollars (\$1,000,000) on the studies of point source wasteload performance at its facility. The study was initiated to verify the efficacy of our

waste water treatment system in removing chemical process constituents that were added to the water from the river (Delta) during use of the water as process water. Chain-of-custody and laboratory results for this study were documented in our required monthly self monitoring reports to the RWQCB.

The above study of efficacy of wastewater treatment prior to discharge is summarized in the following attached tables which show averages for three month periods over five full years.

Table 9. Summary of Discharge 001 Gross Mass Loading, lb/day Table 10. Summary of Discharge 001 Net Mass Loading, lb/day Table 11. Summary of Discharge 001 Net Concentrations, ug/l

Each table is shown in two sections. Section A shows the tabulation of results for cadmium (Cd), total chromium (Cr, total), hexavalent chromium (CrE+6), copper (Cu), total iron (Fe, total), dissolved iron (Fe, dissolved), lead (Pb), nickel (Ni) and zinc (Zn). Section B shows the tabulation of results for arsenic (As), mercury (Hg), selenium (Se), silver (Ag), tin (Sn), cyanide, phenolics, polyaromatic hydrocarbons (PAHs), naphthalene, and tetrachloroethylene. All analyses were done using approved standard procedures to determine the total concentration of each chemical. All results that were reported at minimum detection level (MDL) are included in the averages at one half of the reported MDL.

The attached tables illustrate the following: The gross lb/day discharge loadings (Table 9) show certain trends of improvement, eg, CrE+6, for which the process sources had been controlled. Note that since completion of the study compliance samples for CrE+6 during the most recent two year period have been reported at less than MDL. Other decreases, such as shown for Cd, Hg and Pb, are the result of improved analytical test procedures.

The net discharge lb/day loadings (Table 10) and net discharge ug/l concentrations (Table 11) show many results that are at or below zero discharge for many constituents. Other net discharge ug/l concentrations are significantly below the applicable MDLs, which also indicates that the net concentration is essentially zero. This indicates that chemical control for most chemicals is essentially 100% complete and that no process constituents are contained in the permitted discharge, except as noted below.

Exceptions to the above are Cr, Sn, and phenolics for which the net results are significantly above zero.

The above study shows the substantial effort and expenditure that was required to verify performance with respect to chemicals of concern (COCs) for a specific source category (and for several additional chemicals that were added to the COC list). The list of COCs is being expanded to 126 in the proposed regulations, more than six times as large a list as was evaluated in our performance study.

While the use of the Waste Load Allocation (WLA) principle may sound good, it is only good if properly administered. Two criterion should be considered to make the use of WLAs practicable and administratively feasible for both the agencies and the dischargers.:

\* The COCs applicable to WLA discharge compliance should be identified by the Administrator for each source category, per Title 33, Section 1316(b)(1).

\* Each NPDES Permit Applicant shall analyze and report on chemical listed on the standard permit application every five years to verify which if any discharge chemicals are subject to WLA discharge compliances.

For the above reasons, UPI requests the EPA add the following to the end of Section 131.38(e)(1) of part

131 of Title 40:

"New and existing point source dischargers shall be considered to be in compliance with such WQBELs except for (i) any WQBEL constituent that is identified for the source category pursuant to Section 1316(b)(1) of Title 33, or (ii) any WQBEL constituent which may cause an increase in the receiving water due to such discharge as determined from information contained in the standard required permit application."

Response to: CTR-055-002a

EPA disagrees with this comment. See response to CTR-055-002b (Category T; State Implementation Policy).

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Comment ID: CTR-065-003b  
Comment Author: Environmental Health Coalition  
Document Type: Environmental Group  
State of Origin: CA  
Represented Org:  
Document Date: 09/26/97  
Subject Matter Code: C-21 Legal Concerns  
References:  
Attachments? N  
CROSS REFERENCES C-14

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Comment: HUMAN HEALTH CRITERIA

EHC is very concerned about the use of 6.5 grams per day of fish tissue as a basis upon which to derive human health criteria. This is not adequate to protect the many thousands of subsistence fishers of California coastal waters. We trust EPA is not in the business of protecting "most of the people, most of the time" as is the indicated goal for marine organisms elsewhere in the CTR (see comments below).

We refer you to a study conducted by the Save San Francisco Bay Association that concluded that fishers of San Francisco Bay consumed 81 grams per day in the week prior to the survey with consumption rates as high as 450 grams/day... This element of the CTR must be recalculated at a higher rate of consumption and with a healthy safety margin to accommodate for synergistic and cumulative effects. Further, the Save San Francisco study showed that heads and skin were frequently consumed, the health criteria must reflect these actual eating patterns and practices as well and reflect the cultural diversity of users of the Bays. Since many subsistence fishers are people of color, adoption of this rule could violate the President's Order on Environmental Justice by exposing these populations to increased and undue environmental health risks.

Response to: CTR-065-003b

See response to CTR-065-003a (Category C-14; Fish and Water Consumption).

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Comment ID: CTR-095-001c  
Comment Author: M. Ruth Uiswander

Document Type: Citizen  
State of Origin: CA  
Represented Org:  
Document Date: 10/02/97  
Subject Matter Code: C-21 Legal Concerns  
References:  
Attachments? N  
CROSS REFERENCES C-20; C-17a; C-14

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Comment: In regard to the numeric water quality standards criteria for California surface water, they have been revealed by environmental groups to be insufficiently protective and environmentally unjust. The proposed new rules assume fish ingestion of 6.5 grams per day. In reality, consumption of fish in some communities can be as high as 1 pound per day. This level of consumption is especially likely among subsistence fishers.

Please prevent toxic pollution in California's bays by making more protective standards that consider all toxic pollutants and consider the fish consumption habits of subsistence anglers.

Response to: CTR-095-001c

See responses to CTR-002-002a, CTR-002-005a, and CTR-058-001 (Subject Matter Code C-13, Risk Level).

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Comment ID: CTR-099-004  
Comment Author: Emil A. Lawton, Ph.D.  
Document Type: Citizen  
State of Origin: CA  
Represented Org:  
Document Date: 10/03/97  
Subject Matter Code: C-21 Legal Concerns  
References:  
Attachments? N  
CROSS REFERENCES

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Comment: Finally, the timing must be strictly political, since 17 years of delay is unconscionable. Since you advisors must have found it difficult to understand the scientific literature, may I recommend a scientifically accurate book that is accessible to the non-scientist that may explain the dangers and the need for bold action by the EPA. It is Living Downstream - An Ecologist Looks at Cancer and the Environment by Sandra Steingraber, Addison Wesley, NY, 1997.

Response to: CTR-099-004

EPA disagrees with this comment. EPA began work on the CTR in 1994, and only after the State rescinded its ISWP and EBEP. The complexities of this rulemaking have prolonged the CTR process, but EPA is pleased to now be issuing final water quality criteria for toxic pollutants in the State of California.

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Comment ID: CTR-105-002b  
Comment Author: Heather Catherine Park Tausig  
Document Type: Citizen  
State of Origin: CA  
Represented Org:  
Document Date: 10/13/97  
Subject Matter Code: C-21 Legal Concerns  
References:  
Attachments? N  
CROSS REFERENCES C-17a

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Comment: The maximum levels proposed for mercury, dioxin, and thirteen other pollutants have been identified by respected environmental advocacy groups as (1) insufficiently protective, and (2) environmentally unjust, potentially increasing the cancer risks for subsistence fishers, who are, in large part, people of color.

The standards must be established at a level that makes California waters truly "fishable," and not just "fishable if you don't object to cancer."

Thank you for your consideration.

Response to: CTR-105-002b

See response to CTRH-001-010.

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Comment ID: CTRH-001-010  
Comment Author: Greg Karras  
Document Type: Public Hearing  
State of Origin: CA  
Represented Org: Comm. for Better Environ.  
Document Date: 09/17/97  
Subject Matter Code: C-21 Legal Concerns  
References:  
Attachments? N  
CROSS REFERENCES

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Comment: MR. KARRAS: I'm Greg Karras, K-A-R-R-A-S. I'm with Communities for a Better Environment; I'm a senior scientist.

CBE is a multiracial environmental health and justice organization with 20,000 California members, most of them in the Bay Area. We work with communities imperiled by urban pollution. I represent people who depend upon the environmental health of San Francisco Bay, including people who fish the bay for food.

CBE has worked to clean up the bay for years. We helped EPA establish the first National Estuary Conference and served on the management committee of the San Francisco Estuary Project and signed its consensus plan to protect and restore the bay. We participated in the development of every numeric toxins standard promulgated for the bay, with the possible exception of one adopted by EPA for selenium

in 1992.

We used these standards to leverage toxic prevention that cut toxics of the bay by tons, while netting economic benefits to the manufacturing base and jobs at more than a hundred Bay Area industrial plants. We submitted these data for your work on this proposed rule and we've done a preliminary analysis of the proposal that resulted.

It looks to us as a preliminary matter that EPA's proposed rule today could reverse a decade of environmental policy progress in San Francisco Bay and represent the biggest step backward ever taken for the bay's toxics policies in 25 years under the Clean Water Act. This conclusion is alarming, and this conclusion is surprising.

We hope to find out that we're wrong about that preliminary conclusion. Accordingly, before we make a final judgment, which I understand we need to make by next Friday to submit written comments, I ask that you give CBE and our members, which are the public, important information by answering now or as soon as possible some of our most pressing questions.

On environmental justice, EPA says in its preamble to the proposal that it is EPA's intention to calculate cancer criteria in a way that will provide less protection from cancer for people who rely on locally caught fish for food than it does the average person.

EPA then goes on to say this might still provide adequate protection. However, low-income people of color who fish San Francisco Bay for food are eating up to 60 times more contaminated fish than the state health advisory says is quote, unquote, safe.

And I also note that in Exhibit 8A of your economic analysis, EPA, you say that the hazard from peaks in the mercury and from dioxin in fish consumed in San Francisco Bay exceeds what you consider to be a significant level.

So our first question is simply is EPA proposing to provide the poor --

I should mention, we know from surveys done by several entities in the bay that the vast majority of people who fish the bay and use it for food, rely on it for food, most of them are low-income people and we can determine for sure that the majority are people of color.

So the question is, is EPA proposing to provide poor people and people of color unequal protection under the law?

Response to: CTRH-001-010

See responses to CTR-002-002a and CTR-002-005a (Category C-14; Fish Consumption).

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Comment ID: CTRH-001-017  
Comment Author: Greg Karras  
Document Type: Public Hearing  
State of Origin: CA  
Represented Org: Comm. for Better Environ.  
Document Date: 09/17/97

Subject Matter Code: C-21 Legal Concerns

References:

Attachments? N

CROSS REFERENCES

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Comment: Finally, this is a daytime hearing. I think the record will show that the vast majority of people who attended this hearing are environmental professionals, and the vast majority of those are people who represent regulated interests and the discharge interests.

The people who are most directly impacted in terms of their health, their livelihood, their ability to work when they're sick, their ability to raise children who don't have slow learning, their rights to fish a clean bay, are not here.

My final question --

And I think it's obvious why many of them are not here. Many of these folks are lower-income people of color, immigrant people, people who are working people, who have the kinds of jobs where it's very difficult for them to ask the boss for time off to attend a hearing of EPA to address fish contamination held at 1:00 p.m. on a Wednesday in the middle of the week.

Will EPA hold a public hearing in the evening on a fishing pier on San Francisco Bay before your proposal is adopted?

Those conclude my questions.

I, again, am serious about getting answers to these now, today, in this hearing or as soon as possible, so that we could make sure that we are as correct as possible in our comments which we will be submitting into the record in writing.

Thank you.

Response to: CTRH-001-017

EPA was unable to hold a public hearing in the evening on the rule. EPA operates during normal business hours. Nevertheless, EPA's intent here is not discriminatory, but rather an administrative necessity in terms of its own staffing, and support mechanisms for its operations. As always, people may submit written comments to EPA if they cannot attend a public hearing.

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