

Subject Matter Code: C-24 Site Specific Criteria

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Subject Matter Code: C-24 Site Specific Criteria

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Attachments? Y

CROSS REFERENCES

Comment: II. THE EPA PROPOSALS WILL NOT PROTECT FISHING AND OTHER USES OF SAN FRANCISCO BAY WATERS OR PROVIDE EQUAL PROTECTION FOR PEOPLE OF COLOR.

A. The criteria allow more pollution than prior technically-based criteria.

The proposed criteria would replace criteria found to be scientifically sound by the State Water Resources Control Board staff, adopted by the state, and approved by EPA, for San Francisco Bay in the 1991 California Bays and Estuaries Plan>(*10) the 1986 San Francisco Bay Basin Plan>(*11) and the Basin Plan amendment adopting the 1992 Site Specific Copper Objective for San Francisco Bay.(*12) Table I compares the lowest concentration criteria for the 64 toxic pollutants identified by the San Francisco Estuary Project as "pollutants of concern" for the Bay.(*13) The EPA criteria proposal:

*weakens environmental health protection for 37 of these 64 toxic pollutants (58%). It allows greater ambient water concentrations for 30 pollutants, includes new extremely liberal criteria for 4 of the 64 pollutants, and fails to replace previous state criteria for 3 pollutants,

*makes no change for 24 of these 64 pollutants (37%). It includes equivalent criteria for 6 pollutants, and includes no criteria for 18 pollutants which had no state-adopted criteria.

*improves criteria for only 3 of the 64 pollutants (5%). It includes new restrictive criteria for 2 pollutants, and proposes a criterion allowing 200,000 instead of 300,000 ug/L toluene.

The magnitude of increased pollutant concentrations allowed in Bay waters by EPA'S proposal is estimated in Table 2. The first column in this table lists all the toxic pollutants for which EPA proposes more liberal criteria than those adopted by California for the Bay. Footnotes to this column further describe these pollutants. For example: dioxin includes 17 dioxin-like compounds included in the state criterion and current permit limits; and PAH includes the sum of 13 polycyclic aromatic hydrocarbons included in the state's PAH criterion and 8 of these compounds for which EPA proposes criteria.

The second column in Table 2 shows the lowest concentration criteria adopted by California for these pollutants in the Bay, with footnotes indicating the source of these criteria and whether they address human health or aquatic life. The third column shows the corresponding lowest concentration criteria for these pollutants proposed by EPA. Where the EPA-proposed criteria are expressed differently from the state criteria for a pollutant, calculations that more accurately compare the criteria are shown in footnote j to this column. These calculations fall into three general cases:

*Dioxin comparisons - California's dioxin criterion applies to 17 internationally recognized dioxin-like compounds, while EPA's proposal applies to I only, 2,3,7,8-TCDD. EPA'S chief dioxin scientist and other international experts estimate that the other dioxins account for about 90% of environmental dioxin toxicity>(*14) Thus, EPA's criteria value was multiplied by 10 to estimate the toxicity from California criteria dioxins at EPA's 2,3,7,8-TCDD value of 1,4 pg/IOOL. New data may change the 90% estimate, but not the finding that EPA's proposal is weaker.

*PAH comparisons - California's PAH criterion sums the amounts of 13 compounds, while EPA proposes individual criteria for only 8 of these 13 compounds. EPA criteria values for these 8 compounds were summed for comparison to California's 13-compound criterion. This approach underestimates the amount of PAH allowed by EPA's criteria by assuming a value of zero for each of the 5 compounds which lack EPA-proposed criteria.

*Total versus dissolved metals comparisons - California metals criteria are expressed as total metal while EPA's proposals are often expressed as dissolved metal. Ultra-clean measurements of Bay waters in 1989>(*15) and 1995 (arsenic and chromium)(*3) indicate that total concentrations are often much greater than dissolved concentrations for the same metal, For example, in 5% of Bay samples total copper is at least 3.5 times dissolved copper. At these times dissolved copper levels equal to EPA's 3.1 ug/L criterion correspond to total copper levels of 10.8 ug/L or greater. Ratios for other metals based on this 5% (95th percentile) analysis, which is used by EPA to prevent excursions above criteria more than once in 3 years, are shown in footnote (*j). Analysis of additional data may alter these ratios, but will not change the conclusion that EPA'S proposed dissolved criteria will allow greater water concentrations than total metal criteria.

The estimated magnitude of increased pollutant concentrations allowed in Bay waters by EPA's proposed criteria is shown in the right-hand column of Table 2. EPA's proposal allows 430 million percent more PAH, 23,600% more lead, 3,900% more 1,4-dichlorobenzene, 910% more silver, 900% more dioxin, 630% more chlordane, 340% more DDT, 325% more mercury, 140% more PCBs and 120% more copper in the Bay as compared to state-adopted criteria, based on these estimates. Review of Table 2 also shows that allowable Bay water concentrations would double or more for 18 toxic pollutants in all.

In sum, comparison with the state criteria that would be replaced indicates that EPA's proposed criteria allow increased toxic pollution of San Francisco Bay by at least 37 toxic pollutants representing 58% of the pollutants of concern identified by the San Francisco Estuary Project, allow pollution to increase by about 1,000% or more for extremely toxic pollutants such as dioxin and PAH, and allow pollution to double or worse for 18 toxics including nearly all pollutants known to be of greatest concern in the Bay.

None of the state criteria which the EPA proposals are compared to were set aside because they are scientifically invalid, Rather, some of these criteria, which were adopted in the 1991 Bays and Estuaries Plan, were set aside by a state court on procedural grounds only>(*12) and still form the basis for permit limits written by the state for the Bay.(*21) EPA's proposed criteria allow toxic pollutant concentrations greater than those found by the state to be scientifically appropriate for protection of aquatic life and public health.

(*3) San Francisco Estuary Institute, 1997. Regional monitoring program for trace substances 1995 annual report. Excerpts including pages 105, 3, and A-17 through A-24 showing the percentage of sediment bioassays (larval bivalve and Eohaustorius tests) that were toxic (less than 80% of control value) at RMP stations from 1991-1996, sampling stations, and dissolved and total metal, and PAH

concentrations in San Francisco Bay waters.

(*10) California State Water Resources Control Board, 1991. California Enclosed Bays and Estuaries Plan; water quality control plan for enclosed bays and estuaries in California. 91-13WQ. April, 1991. Excerpt including adopted water quality criteria and definition of terms.

(*11) California Regional Water Quality Control Board, San Francisco Bay Region, 1986. Water Quality Control Plan, San Francisco Bay Region (2). December, 1986. Excerpt including adopted water quality criteria (objectives) for toxic pollutants in the Bay, and segmentation scheme.

(*12) California Regional Water Quality Control Board, San Francisco Bay Region, 1992. Resolution No. 92-128, adopting an amendment to the water quality control plan and requesting approval from the State Water Resources Control Board. October 21, 1992; and State Water Resources Control Board Workshop Session, April 6 and 7, 1994. Consolidation of the amendments to the water quality control plan for the San Francisco Bay basin regarding a site-specific water quality objective and plan of implementation for copper and addressing nickel. Excerpts including site specific water quality criterion for total copper in San Francisco Bay, and showing that the State Water Resources Control Board staff found "the technical aspects of the site-specific copper objective are valid."

(*13) San Francisco Estuary Project, 1992. State of the estuary, a report on conditions and problems in the San Francisco Bay/Sacramento-San Joaquin Delta estuary. Prepared under cooperative agreement #CE-009486-02 with the U.S. Environmental Protection Agency, by the Association of Bay Area Governments, Oakland, CA. June, 1992. Excerpt including Table 18 (page 163): Pollutants of concern in the Bay/Delta estuary.

(*14) Presentation by Dr. William Farland, EPA, at the May 7, 1997 Workshop on dioxins held by the Regional Water Quality Control Board, San Francisco Bay Region in the Hearing Room of the 'BART headquarters building, Oakland, CA. Excerpt from the RWQCB's tape of the workshop discussing toxicity equivalents data from mechanistic, laboratory and field analyses.

(*15) Flegal et al., 1990. Trace element cycles in the San Francisco Bay estuary: results from a preliminary study in 1989-1990. Final report to the State Water Resources Control Board. Institute of Marine Sciences, U.C. Santa Cruz. Excerpt showing dissolved and total metal concentrations measured in San Francisco Bay waters.

(*21) California State Water Resources Control Board, 1997. Staff technical report, Division of Water Quality, Petitions of CBE, San Francisco BayKeeper, and Tosco Corporation for review of Order No. 95-138 of the San Francisco Bay Regional Water Quality Control Board. Office of Chief Counsel [OCC File Nos. A-983 and A-983(A)].

Response to: CTR-002-003

Overall, EPA disagrees with this comment, which alleges that the CTR "weakens environmental health" for 37 of 64 "pollutants of concern."

Much of the premise for this comment is flawed, because it compares CTR ambient criteria with State and San Francisco Bay Regional Board criteria which are not in effect. The 1991 California Enclosed Bays and Estuaries Plan (EBEP) was rescinded by the State Water Resources Control Board. [Note: California's 1991 Inland Surface Water Plan (ISWP) was rescinded at the same time. Since this comment does not compare CTR criteria to ISWP criteria, however, this response does not address the ISWP.] The State Board returned the 1992 site-specific copper objective for San Francisco Bay to the Regional Board, and it has never taken effect. EPA is now promulgating the CTR to put criteria in place in California where currently there are no applicable EPA-approved criteria in effect, including where criteria were affected by these State actions. The CTR criteria do not revise or replace those State

criteria, because those criteria simply do not exist for CWA purposes.

The commenter also compares CTR criteria to criteria in the 1986 San Francisco Bay Basin Plan. For waters where the criteria that were included in the 1986 amendments to the Water Quality Control Plan for the San Francisco Bay Region (the Basin Plan) and were approved by EPA are still in effect under the 1995 Basin Plan amendments, EPA is not promulgating CTR criteria. The 1986 criteria will therefore remain in effect for those waters. (See response to CTR-016-001.) For those criteria, the commenter's concerns have been addressed.

Another flaw in this comment is that CTR criteria are evaluated for 64 "pollutants of concern" which were identified by the San Francisco Estuary Project. While most of these pollutants are priority pollutants subject to the requirements of CWA section 303(c)(2)(B), 17 are not. The CTR is limited to the promulgation of numeric water quality criteria for priority pollutants, to fully implement section 303(c)(2)(B) in California. It is beyond the scope of the CTR to include other pollutants, even if they are pollutants of concern for the Bay. The commenter may seek to have the State, through its Regional Board, address the possibility of adopting or revising criteria for those non-priority pollutants through its triennial review process, but that approach would not affect the CTR.

With those general observations, EPA responds as follows to the following specific concerns included in this comment:

A. The CTR allows "greater ambient water concentrations" for 30 pollutants

The commenter's discussion of this concern is confusing because only 24 specific pollutants are identified by the commenter (in its Table 2) for this concern, and footnotes for 6 of these indicate that these 6 actually represent enough additional pollutants to make the total number of individual pollutants greater than 30. EPA is responding, therefore, based on the 24 pollutants identified in Table 2.

EPA is "promulgating around" several of these pollutants for those waters of San Francisco Bay where State-adopted, EPA-approved criteria from the 1986 Basin Plan remain in effect, as discussed above. For those waters of San Francisco Bay where EPA is promulgating these 24 criteria, however, EPA agrees that 10 of the 24 CTR criteria in Table 2 (all of the Table 2 criteria, with the exception of nine metals, DDT, endrin, endosulfan, PAHs and dioxins, which are discussed below) would allow greater ambient concentrations than the EBEP criteria would have allowed if it was presently in effect. These CTR criteria, however, are based on sound science, which supports a finding that these criteria are fully protective of the designated uses listed in the CTR. For some criteria, the CTR criteria are based on additional scientific data developed not only since those State criteria were first proposed, but in some cases since the National Toxics Rule (NTR) was adopted by EPA in 1992. The new data further supports the conclusion that the CTR criteria are fully protective of designated uses listed in the CTR. The scientific bases for all of the CTR criteria are set forth in the California Toxics Rule Administrative Record Matrix. See also, National Recommended Water Quality Criteria, 63 Fed.Reg. 68354, December 10, 1998, as corrected, 64 Fed.Reg. 19781, April 22, 1999.

EPA disagrees with the commenter's contention that the CTR will allow increased concentrations of metals in San Francisco Bay. First, EPA notes that the CTR does not include criteria for most metals in much of the San Francisco Bay. Most of the metals criteria in the 1986 Basin Plan (which includes all of the commenter's nine metals, except copper), that were approved by EPA, remain in effect, therefore ambient concentrations for those metals criteria are not affected by the CTR. EPA is, however, promulgating metals criteria for the South Bay (below Dumbarton Bridge) and a saltwater aquatic life copper criterion for waters of the Bay with salinities greater than 5 ppt, because there are no comparable

Basin Plan criteria for those pollutants presently in effect. Since the CTR does include these metals criteria for these waters of San Francisco Bay, EPA has considered the commenter's comparison of ambient concentrations for pollutants in the Bay, which the commenter predicts will result from application of the different metals criteria, and EPA disagrees with those comparisons.

The commenter has compared CTR metals criteria, which are expressed as dissolved metals, with EBEP and copper site-specific criteria, which were expressed as total recoverable metals, by performing a calculation (the "5% analysis") on the CTR metals criteria prior to comparing them with EBEP metals criteria. This is not a recognized basis for comparison between dissolved and total recoverable metals criteria, however, and it is not adequately explained or supported. EPA therefore cannot accept the results of this analysis, which yields greatly exaggerated concentrations of the CTR metals criteria. EPA does not propose an alternative basis for a general comparison between dissolved and total recoverable metals, because the relationship between the two forms of metal varies depending on site-specific and time-specific conditions (which the State must address through the use of translators when implementing the criteria). Instead, EPA relies on sound scientific information which supports the conclusion that the CTR dissolved metals criteria are themselves protective of the designated uses that they are adopted to protect (see the California Toxics Rule Administrative Record Matrix). See also, National Recommended Water Quality Criteria, 63 Fed.Reg. 68354, December 10, 1998, as corrected, 64 Fed.Reg. 19781, April 22, 1999.

EPA also disagrees with the commenter's comparison between CTR criteria and four other EBEP criteria. The commenter compared sums of individual CTR criteria concentrations and compared them with "single" EBEP criteria. The four single EBEP criteria, however, represent four pollutant groups that the State created by combining individual pollutants into groups under the four pollutant names. (The EBEP groups are "DDT", "Endrin", "Endosulfan" and "PAHs".) The CTR, on the other hand, includes individual pollutants without grouping them. The commenter added the concentrations for individual CTR criteria for each of the 4 EBEP criteria groups and compared the sums with the single concentrations for each of the 4 EBEP criteria. This approach resulted in some very questionable comparisons.

For the DDT group, the CTR human health criteria for DDT, DDE and DDD are 0.59 ng/L, 0.59 ng/L and 0.83 ng/L, respectively. The sum of these criteria would be 2.01 (rounded to 2) ng/L, not 2.6 ng/L as the commenter contends. For the PAH group, the sum of the CTR's eight individual criteria would be 392 ng/L, not 135,000,000 ng/L as the commenter contends. For the Endrin group, the commenter has ignored applicable CTR aquatic life criteria. These aquatic life criteria are significantly more stringent than the CTR human health criteria which the commenter used as the sole basis for comparison. Had the commenter compared the EBEP human health criterion for Endrin to the sum of the appropriate CTR criteria for Endrin and Endrin Aldehyde (using the CTR's chronic saltwater aquatic life number for Endrin and the human health fish consumption number for Endrin Aldehyde), the figures would have shown the CTR to be equivalent to the EBEP criterion, not less stringent.

Notwithstanding these errors, the commenter's approach is simply not a basis for revising the CTR criteria for pollutants in these four groups. As stated above, the comparisons are made to State criteria which are no longer in effect. The CTR is promulgated to put criteria in place where there presently are no State-adopted EPA-approved criteria in effect. The CTR is promulgated to meet the requirements of CWA section 303(c)(2)(B), which requires adoption of numeric criteria only for those toxic pollutants listed pursuant to section 307(a)(1) for which EPA has already adopted section 304(a) criteria. EPA has adopted section 304(a) criteria for the individual pollutants, not for the pollutant groups. As stated in the preamble to the proposed CTR and in response to CTR-016-002, EPA will work with the State to approve acceptable State-adopted criteria and intends to stay the CTR when EPA approves such criteria.

The commenter includes a further concern regarding polynuclear aromatic hydrocarbons (PAHs), which is one of these four pollutant groups. The commenter alleges that the CTR includes criteria for eight of the 13 PAHs which are included in the single EBEP criterion for PAHs, and omits the other five. This is not entirely correct. (Even if it were correct, it would not alter the fact that comparing the sum of eight PAHs to a single PAH criterion is invalid.) Of the five pollutants which the commenter alleges are omitted from the CTR, two are, in fact, included in the CTR, but under slightly different names. (Benzo(a)Anthracene (CAS number 56553) and benzo(b)Flouranthene (CAS number 205992) replace the EBEP's 1,2-benzanthracene and 3,4-benzoflouranthene, respectively. The CTR and the EBEP used different naming conventions, but the pollutants are the same chemicals.) It is true, however, that the CTR does not include numeric criteria for three of the 13 PAHs. As discussed in part C and D, below, acenaphthylene, phenanthrene and benz(ghi)perylene are no longer considered carcinogens, and EPA has not developed criteria levels for these toxic pollutants as non-carcinogens. In the absence of such guidance, numeric criteria for these three pollutants are not included in the CTR. [Note: benzo(ghi)Perylene (CAS number 191242) also is the same as one of the EBEP's PAHs (1,12-benzoperylene), but with a different name.] The CTR is consistent with the NTR (40 CFR 131.36 (b)(1)) in regard to all of the PAHs.

It should be further noted that for much of San Francisco Bay, the applicable Basin Plan includes a single criterion for PAHs comparable to the EBEP PAHs criterion, which EPA has previously approved. To the extent that the Basin Plan criterion may be more stringent than the CTR objectives for individual PAHs, it would take precedence over the CTR criteria as a basis for controlling PAHs in the part of the Bay where it applies.

The remaining pollutant among the 24 is "dioxin". The commenter has multiplied the single CTR dioxin criterion by 10 before comparing it with the single EBEP dioxin criterion. The commenter multiplied the CTR criterion for 2,3,7,8-TCDD "to account for...16 other dioxins" before comparing it with the EBEP criterion for "TCDD equivalents". The commenter then concluded that EPA was allowing a 900% increase in "dioxin". EPA disagrees with the 900% figure, because the relationship between this figure and the 16 other dioxins is unexplained. EPA does agree that the CTR could allow for greater concentrations of all dioxins and dioxin-like compounds in San Francisco Bay than the EBEP's dioxin criterion might have allowed, but does not agree that this is inevitable.

The EBEP's single dioxin criterion ("TCDD Equivalents") represented the sum of 17 dioxins and dioxin-like compounds. The CTR, on the other hand, includes a single dioxin criterion for a single dioxin compound (2,3,7,8-TCDD). The numeric values for the two criteria (the ambient concentration limits allowed by the two criteria) are the same.

EPA notes that 2,3,7,8-TCDD is the only EBEP dioxin compound included on the CWA section 307(a)(1) list. It is also the only 307(a)(1)-listed dioxin for which there is a CWA section 304(a) criterion. The CTR is promulgated to meet the requirements of CWA section 303(c)(2)(B), which requires adoption of numeric criteria only for those toxic pollutants listed pursuant to section 307(a)(1) for which EPA has already adopted section 304(a) criteria. EPA is therefore not required to include criteria for any dioxin compound other than 2,3,7,8-TCDD in the CTR. For California waters, if designated or beneficial uses may be impaired by the discharge of other dioxin or dioxin-like compounds, numeric water quality-based effluent limits may be included in NPDES permits through the use of the narrative criterion. EPA strongly encourages the State to adopt either the same national/international convention of toxicity equivalence (TEQ) to account for the presence of other dioxins, furans and other dioxin-like compounds, which the State adopted in its EBEP, or a more recent, comprehensive convention. EPA believes that the State should apply this recognized method for regulating dioxin compounds and believes that this would

address the commenter's concerns.

The EBEP relied on the TEQ convention's nationally/internationally consistent set of toxicity equivalence factors (TEFs) as multipliers for the 17 dioxins, to convert them to the single TCDD Equivalents criterion. Thus, the EBEP's TCDD Equivalents criterion results from the same calculations that EPA believes should be applied to the CTR's 2,3,7,8-TCDD criterion.

If the State of California did not apply the TEQ convention to the CTR criterion to account for the presence of other dioxins, furans and other dioxin-like compounds, it is possible that, under the CTR, the total concentrations of alldioxin and dioxin-like compounds in the Bay could allowably exceed the EBEP concentration limit even though 2,3,7,8-TCDD by itself does not exceed that limit. For this reason, EPA strongly encourages the State to limit these other compounds through the application of TEQ.

If the TEQ convention were adopted, and TEF applied to the CTR criterion, the commenter's comparison between the CTR and the EBEP numbers could reasonably conclude that there was no difference between the two. (Alternatively, the commenter might have concluded that the CTR was more inclusive than the EBEP. The commenter refers to 17 dioxin compounds which are included in the EBEP's criterion for TCDD equivalents. The CTR's 2,3,7,8-TCDD criterion is intended to include all dioxins and dioxin-like compounds for which there are TEFs, which are far more than 17.) As long as California applies the national/international TEQ/TEF conventions to implementation of the 2,3,7,8-TCDD criterion in the CTR, as it applied them to implementation of the TCDD Equivalents criterion in the EBEP, then greater concentrations of dioxins will not be allowed to be discharged under the CTR.

B. The CTR includes "new, extremely liberal criteria" for 4 pollutants

This part of the comment is very vague. It appears from the context of this concern, however, that "extremely liberal" means something less than "allows greater ambient water concentrations", for which the preceding group of criteria is criticized. For these four pollutants, the commenter does not allege that the CTR criteria are unprotective of the designated uses. In fact, the CTR criteria for these pollutants (acenaphthene, ethylbenzene, antimony and hexachlorobutadiene) are based on recent, sound science which supports the determination that the criteria are protective of the designated uses (see the California Toxics Rule Administrative Record Matrix). See also, National Recommended Water Quality Criteria, 63 Fed.Reg. 68354, December 10, 1998, as corrected, 64 Fed.Reg. 19781, April 22, 1999.

C. The CTR "fails to replace previous state criteria" for 3 pollutants

Of these 3 criteria, one (tributyltin) is not a priority pollutant. This pollutant, as discussed above, is therefore beyond the scope of the CTR, regardless of whether the State had previously adopted statewide criteria for it.

For the other two pollutants (acenaphthylene and phenanthrene), both EPA and the State have previously included human health criteria based on carcinogenicity in proposed or final water quality standards. EPA included such criteria in the 1991 proposed NTR (56 Fed.Reg. 58442-58443), and California adopted them in the 1991 EBEP (EBEP, Table 2 and Appendix 1). However, in the 1992 final NTR, EPA deleted these criteria, having found that there was inadequate toxicity data to assess their carcinogenic potential and that any criteria for these pollutants should therefore be based on

non-carcinogenic effects. Since there were no reference doses to calculate non-carcinogenic criteria for these pollutants, no numeric criteria were included for them in the final NTR. (57 Fed.Reg. 60868, 60887.) There has been no change from this position since 1992, and they are therefore not included in the CTR.

D. The CTR "includes no criteria for 18 pollutants which had no state-adopted criteria"

Of these 18 pollutants, identified in Table 2 of this comment, only two are priority pollutants. The other 16 are beyond the scope of the CTR.

Of the two pollutants which are priority pollutants, benz(ghi)perylene was withdrawn from the final NTR and is therefore not included in the CTR for the same reasons discussed in Part C, above, for acenaphthylene and phenanthrene. For naphthalene, EPA has not published 304(a) criteria. CWA section 303(c)(2)(B), which the CTR is implementing in California, requires that numeric water quality criteria be adopted only for those priority pollutants for which 304(a) criteria have been published, therefore naphthalene is beyond the scope of the CTR.

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CROSS REFERENCES

Comment: 6) In the forward to the rule the suggestion is made that no new SSOs will be approved by USEPA after the rule is promulgated due to lack of resources and the level of effort necessary for such action. Although we appreciate your candor, we do not believe that that is an appropriate response given the potential waste of public and private funds to comply with inappropriate standards.

Response to: CTR-003-006

EPA disagrees with this comment. We believe that the commenter misunderstood the cautionary language that was part of the proposed rule. The CTR does not preclude state adoption of criteria after the CTR has been promulgated. As EPA stated in the preamble to the proposed CTR, when the State has completed its own process, and EPA approves the State's new or revised criteria, EPA intends to stay the CTR. Similarly, if the State adopts site-specific criteria (including site-specific Basin Plan criteria adopted by Regional Boards which have completed the State review and adoption process), and EPA has approved them based on their individual merits, EPA intends to stay that portion of the CTR that applies more general criteria to the specific site. Each individual stay on a site-specific basis would require federal rulemaking on a case-by-case basis, and generally require more detailed effort on the Agency's part than a statewide stay.

Moreover, it is possible that State-adopted criteria could become effective for CWA purposes within the State even prior to EPA approval or rulemaking, although this would change if a rule that EPA has

recently proposed is promulgated as proposed. The "Alaska Rule," 64 Fed.Reg. 37072, July 9,1999. Until the Alaska Rule goes final, the State could adopt new or revised standards which are more stringent than the CTR, and those standards would be effective for CWA purposes within the state without any EPA action. Moreover, prior to a final Alaska Rule, the State could adopt statewide standards, and if EPA approved those standards and stayed the CTR based on them, then subsequent site-specific criteria would apply within the State when adopted by the State without requiring additional EPA approval or rulemaking. If the Alaska Rule becomes final as proposed, however, regardless of whether the CTR has been stayed, only state-adopted criteria which are more stringent than the otherwise applicable standards could be applied within the State, prior to EPA approval of those standards.

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Comment: Available Regulatory Relief under the California Toxics Rule

The Preamble to the California Toxics Rule (CTR), and the rules accompanying Economic Analysis (EA), place a great deal of emphasis on the ability of dischargers to use alternative regulatory approaches to comply with CTR criteria if the cost of treatment technology was prohibitively expensive. For example, the EA assumes that, if the estimated annualized cost for removing a pollutant exceeded a cost trigger,(*1) "dischargers would explore the use of alternative regulatory approaches to comply with CTR-based effluent limits." EA at. pg. 4 (emphasis added). Based on this assumption, no treatment cost was estimated for the facility. (*2)

The types of alternative regulatory approaches assumed available for dischargers in California include phased total maximum daily loads (TMDLs), water quality standard variances, site-specific criteria, change in designated use, and alternative mixing zones. EA at pg. 4-5. The following sections will discuss each of EPA's proposed methods for regulatory relief and explain whether or not these methods can truly be used to provide relief from the CTR-based permit limits as anticipated by EPA. It should be noted that the actual language of the rule itself does not mention any of the methods of regulatory relief. Therefore, this analysis will be based solely upon the language contained in the Preamble to the CTR.

Site-Specific Criteria

Another one of the avenues of potential regulatory relief discussed in the Preamble to the CTR is the adoption of site-specific water quality criteria. The Preamble provides that the "State has the discretion to develop site-specific criteria when appropriate e.g., when statewide criteria appear over or under protective of designated uses. The Preamble goes on to explain the site-specific criteria adoption process as follows:

Periodically, the State through its RWQCBs will adopt site-specific criteria for priority toxic pollutants

within respective Basin Plans. These criteria are intended to be effective throughout the Basin or throughout a designated water body. Under California law, these criteria must be publicly reviewed and approved by the RWQCB, the SWRCB, and the State's Office of Administrative Law (OAL). Once this adoption process is complete, the criteria become State law. These criteria must be submitted to the EPA Regional Administrator for review and approval under CWA section 303. These criteria are usually submitted to EPA as part of a RWQCB Basin Plan Amendment, after the Amendment has been adopted under the State's process and has become State law. CTR Preamble at pg. 42165.

The Preamble explains that the State of California has recently reviewed and updated all of its RWQCB Basin Plans. All of these Basin Plans, some of which contain site-specific criteria, have completed the State review and adoption process and have been submitted to EPA for review and approval. The key to whether or not these site-specific criteria will provide regulatory relief is when the EPA approval/disapproval occurs. Three different timing scenarios and results are possible:

1. If EPA approves any State-adopted site-specific criteria before promulgation of the final CTR is published, then the EPA Administrator may make a finding, in that final rule that it will be unnecessary to promulgate criteria for the approved site-specific pollutants and associated water bodies.
2. If EPA disapproves any State-adopted site-specific criteria, the proposed statewide criteria contained in the CTR would apply for those pollutants and associated water bodies instead of the site-specific criteria.
3. However, if EPA promulgates statewide federal criteria as proposed in the CTR, prior to a decision on any State-adopted site-specific criteria, the more stringent of the two criteria would be used for water quality programs. Both federal and State water quality programs must be satisfied, and applications of the more stringent of the two criteria would satisfy both. CTR preamble at pg. 42165.

Thus, the only way less stringent site specific criteria can be used for regulatory relief is if those criteria are approved by EPA prior to the publication of the final CTR. Otherwise, either the CTR or the more stringent of the two (CTR vs. site-specific) criteria apply.

One final note regarding site-specific criteria is that the Preamble to the CTR restricts the ability to use native aquatic life as a way to set site-specific criteria. Instead of allowing a discharger to substitute local species from the receiving waters into which it discharges, the Preamble only allows a discharger to supplement the eight specified families of aquatic life required for criteria development with the addition of native species.^(*9) It is doubtful whether this requirement will aid dischargers who are seeking regulatory relief.

(*1) This cost trigger is \$200 per toxic pounds-equivalent for a facility under the low-end scenario, and \$500 per toxic pounds-equivalent for a category of dischargers under the high-end scenario, See EA at pg. 4.

(*2) In addition, pollutant load I reductions would not be calculated or credited for any pollutant for which an alternative regulatory approach was pursued. Id.

(*9) "A minimum data set of eight specified families is required for criteria development (details are given in the 1985 Guidelines, page 22). If the eight specific families are intended to be representative of a wide spectrum of aquatic life. For this reason it is not necessary that the specific organisms tested be actually present in the water body. States may develop site-specific criteria using native species, provided that the broad spectrum represented by the eight families is maintained. All aquatic organisms and their common uses are meant to be considered, but not necessarily protected, if relevant data are

available." CTR Preamble at pg. 42168.

Response to: CTR-004-008

EPA disagrees with this comment. Regarding this commenter's discussion as to how the CTR may relate to State-adopted site-specific criteria, See response to CTR-016-002.

EPA disagrees with the part of this comment which suggests that the preamble to the proposed CTR restricts the use of native aquatic species in setting site-specific criteria. The commenter correctly quotes the preamble to the proposed CTR, however it appears that there must be a misunderstanding on the commenter's part regarding the quoted language. The commenter mistakenly assumes that native species may only be used to "supplement", rather than to "substitute" for species identified by EPA. It has been EPA's consistent position, however, that states may use native species rather than species identified by EPA, provided they do so within the framework of EPA's guidance (which requires the use of a broad spectrum of species, represented by eight families of species), in setting ambient water quality criteria. See Water Quality Standards Handbook: Second Edition (U.S. EPA-823-B-94-005a, August 1994), Chapter 3 (esp section 3.7); "Summary of Revisions to Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic Organisms and Their Uses" (50 Fed.Reg. 30792, July 29, 1985).

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

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-005-008a

EPA disagrees with the commenter's request that EPA either adopt site-specific copper criteria for San Pablo Bay or state in the preamble that the Regional Board should allow dilution credit and application of a metal translator for the commenter's discharge.

In support of its request for the adoption of "scientifically defensible, reasonably achievable aquatic life criteria for copper" (emphasis added), the commenter has submitted its own analysis of costs and benefits. EPA has conducted an analysis of costs and benefits for this rule pursuant to Executive Order 12866 (see discussion in preamble to final rule); however, the criteria themselves are not based on economic considerations. In accordance with 40 CFR 131.11, criteria must be based on sound scientific rationale and must protect the designated use. 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. Economic factors may be considered in designating uses (40 CFR 131.10); however, they may not be used to justify criteria which are not protective of those uses.

That being said, it should nevertheless be understood that EPA does support State adoption of site-specific criteria. As explained in the preamble to the proposed CTR, and further discussed in the response to CTR-016-002, EPA will work with the State to approve acceptable State-adopted criteria (including site-specific criteria) and intends to stay the CTR when EPA has approved such State criteria. In the meantime, in the absence of such criteria for aquatic life for copper in waters of San Francisco Bay, with salinity greater than 5 ppt, EPA is promulgating criteria based on EPA's section 304(a) national marine water copper aquatic life criterion, which is consistent with the requirements of the CWA. (40 CFR Section 131.11(b).) See also responses to CTR-016-001 and -002.

Regarding the suggestion that EPA specify the use of dilution and metals translators for this discharger, EPA disagrees. With the exception of compliance schedules, the CTR does not include implementation provisions; the CTR is promulgated to add numeric criteria for toxic pollutants where they did not exist. The State may address these issues in a separate implementation plan, which it is currently developing. ("Policy for implementation of Toxics Standards for Inland surface Waters, Enclosed Bays and Estuaries of California", released for public comment, September 11, 1997.)

Finally, regarding the commenter's assertion that the CTR could be inconsistent with Executive Order 12866, the Regulatory Flexibility Act and the Unfunded Mandates Reform Act see the discussion of EPA's compliance with these requirements in the preamble to the final rule.

Comment ID: CTR-008-002
Comment Author: San Luis&Delta-Mendota
Document Type: Water District
State of Origin: CA
Represented Org:
Document Date: 09/15/97
Subject Matter Code: C-24 Site Specific Criteria
References:
Attachments? N

CROSS REFERENCES

Comment: The San Luis & Delta-Mendota Water Authority has entered into a Use Agreement with the Bureau of Reclamation for discharge of drainage water through a portion of the San Luis Drain to the San Joaquin River. A consensus letter to the Central Valley Regional Water Quality Control Board signed November 3, 1995, discussed the selenium water quality objectives in the San Joaquin River, Mud Slough, Salt Slough and wetland channels. The letter states "Please note that the parties have not reached a consensus on the appropriate long-term water quality objectives. However, the parties have committed to participate in a cooperative review process by which to evaluate any new scientific information relative to the subject." This letter was signed by the San Luis & Delta-Mendota Water Authority, the U.S. Bureau of Reclamation, the U.S. Environmental Protection Agency, and the U.S. Fish and Wildlife Service.

The proposed California Toxics Rule should not be adopted without adequately addressing the difference for high-sulfate waters. The Rule should also not be adopted if it undercuts EPA's commitment to the cooperative review of appropriate long-term standards in the San Joaquin River Basin.

Response to: CTR-008-002

EPA disagrees with this comment. Concerning future review of standards in the San Joaquin River Basin, that course of action is in no way precluded by the CTR. As explained in the preamble to the proposed CTR, and further discussed in the response to CTR-016-002, 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. In the case of the San Joaquin River basin, EPA is committed to cooperative review of site-specific standards. Moreover, where site-specific criteria have already been adopted by the State in accordance with State law, but not yet acted upon by EPA, and those criteria are more stringent than applicable CTR criteria, those are the controlling criteria for CWA purposes within the State even without a stay of the applicable CTR criteria and are thus implementable by the State. (This would not be affected by the "Alaska Rule" which EPA proposed July 9, 1999, 64 Fed.Reg. 37072. See p. 37076.) This is the case with the selenium criterion adopted by the Central Valley Regional Board for Mud and Salt Sloughs and some adjacent basin waters in the Board's 1996 Basin Plan amendment. Since the State must use the most stringent criteria in effect for its water quality programs, the State may use this site-specific selenium criterion notwithstanding the CTR selenium criterion, thus the commenter's concerns should have no practical effect.

EPA has reviewed the information provided concerning the effect of high-sulfate waters on the toxicity of selenium to the extent it applies in the referenced waters. EPA concludes, based on information provided by the U.S. Fish and Wildlife Service (FWS), that this comment provides no basis for changing the numeric selenium criteria contained in the CTR. The letter of October 10, 1997, from Wayne S. White, Field Supervisor, FWS, to Diane Frankel, EPA, responds to the information provided with this comment. (The FWS letter is itself included as a comment on the proposed CTR in the administrative record.) In summary, the FWS letter says that most of the references relied on by this commenter suffer from an inability to transfer laboratory results to the field. They are based on the real but simplified interference between selenate and sulfate. They use relatively high levels of sulfate which are not unrealistic in themselves; however, the reduction in selenium bioaccumulation from selenate that they measure is not elimination of bioaccumulation from that form of selenium. Also, the results apply only to the selenate form of selenium. The other forms of selenium are far more bioaccumulative than selenate, are free of any interference from sulfate and, over time, come to dominate the bioaccumulation process.

Comment ID: CTR-009-003
Comment Author: City of Thousand Oaks
Document Type: Local Government
State of Origin: CA
Represented Org:
Document Date: 09/22/97
Subject Matter Code: C-24 Site Specific Criteria
References:
Attachments? Y
CROSS REFERENCES

Comment: The City is concerned that any site specific objectives have to be implemented through federal rulemaking. The EPA was quite explicit in advising both the State and the regulated community not to expect prompt response from EPA on such requests. The State has a number of watershed projects underway in conjunction with EPA. The expressed lack of potential to ever see the implementation of site-specific requirements based upon the most representative and expansive scientific database for a given watershed have a chilling effect on these efforts. This would be extremely unfortunate because EPA's goal of "place-based" management approaches will suffer a significant set-back in California. Millions of dollars spent on good science to develop the most cost-effective local water quality solutions, may be for naught. This is an unintended negative outcome that the Agency surely does not desire. The City recommends that the final CTR Rule explicitly provide that site specific objectives and requirements for criteria included in the rule can be accomplished through Basin Plan Amendments approved by SWRCB and EPA. Given the sheer size and diversity of California's watersheds and receiving waters, the most effective way to implement appropriate water quality controls is through watershed-specific characterizations implemented by the Regional Boards. Without the ability to affect site-specific objectives in this manner, its tool is undermined if not negated.

Response to: CTR-009-003

EPA disagrees with this comment. We believe that the commenter misunderstood the cautionary language that was part of the proposed rule. The CTR does not preclude state adoption of criteria after the CTR has been promulgated. As EPA stated in the preamble to the proposed CTR, when the State has completed its own process, and EPA approves the State's new or revised criteria, EPA intends to stay the CTR. Similarly, if the State adopts site-specific criteria (including site-specific Basin Plan criteria adopted by Regional Boards which have completed the State review and adoption process), and EPA has approved them based on their individual merits, EPA intends to stay that portion of the CTR that applies more general criteria to the specific site. Each individual stay on a site-specific basis would require federal rulemaking on a case-by-case basis, and generally require more detailed effort on the Agency's part than a statewide stay.

Moreover, it is possible that State-adopted criteria could become effective for CWA purposes within the State even prior to EPA approval or rulemaking, although this would change if a rule that EPA has recently proposed is promulgated as proposed. The "Alaska Rule," 64 Fed.Reg. 37072, July 9,1999. Until the Alaska Rule goes final, the State could adopt new or revised standards which are more stringent than the CTR, and those standards would be effective for CWA purposes within the state without any EPA action. Moreover, prior to a final Alaska Rule, the State could adopt statewide standards, and if EPA approved those standards and stayed the CTR based on them, then subsequent site-specific criteria would apply within the State when adopted by the State without requiring additional EPA approval or

rulemaking. If the Alaska Rule becomes final as proposed, however, regardless of whether the CTR has been stayed, only state-adopted criteria which are more stringent than the otherwise applicable standards could be applied within the State, prior to EPA approval of those standards.

EPA further disagrees with any suggestion that the State itself could, in the future, modify CTR criteria. State adoption of site-specific criteria (including site-specific criteria adopted by the Regional Board which have completed the State adoption process) is a separate State action, under State law, which does not modify federal criteria. It would be up to EPA to modify the CTR to "make way" for the State's criteria, once those criteria have been approved by EPA. As discussed above, if the State were to adopt criteria that were more stringent than applicable CTR criteria, those criteria could be effective for CWA purposes within the State under State law, prior to EPA approval of such criteria or modification of the CTR.

Comment ID: CTR-009-006a
Comment Author: City of Thousand Oaks
Document Type: Local Government
State of Origin: CA
Represented Org:
Document Date: 09/22/97
Subject Matter Code: C-24 Site Specific Criteria
References:
Attachments? Y
CROSS REFERENCES G-02

Comment: With respect to the provisions in the proposed rule regarding compliance schedules and site-specific objective development and approval/implementation, the City requests verification that these, and all provisions, in the proposed rule apply only to those constituents for which this rule proposes criteria.

Response to: CTR-009-006a

EPA agrees with this comment. The implementation measures contained in the CTR apply to the criteria contained in the rule.

Comment ID: CTR-010-001
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-24 Site Specific Criteria
References:
Attachments? Y
CROSS REFERENCES

Comment: EPA's proposed California Toxics Rule is extremely disturbing because it significantly

weakens standards for numerous pollutants of concern in San Francisco Bay. Standards for more than half of the pollutants of concern identified by the S.F. Estuary Project will be weakened, including dioxin, PCB, mercury, PAHs, and chlordane. These pollutants were found in elevated levels in Bay fish by the S.F. Regional Water Board's study on contaminants in fish and resulted in the fish consumption advisory put out by Cal-EPA. Research conducted by Save S.F. Bay Association found people eating two to three times the amount of Bay fish considered safe. EPA's proposal will make this situation much worse and result in higher exposure levels to thousands of people. Moreover, pollution levels for a number of other pollutants will significantly increase, such as lead, copper, zinc, fluoranthene, and many others.

Response to: CTR-010-001

EPA disagrees with this comment. See response to CTR-002-003, which responds in detail to specific concerns regarding pollutant increases in San Francisco Bay, CTR-016-002, which discusses San Francisco Bay Basin Plan criteria which will not be superceded by the final CTR, and CTR-002-002a, which responds to specific concerns regarding fish consumption.

Comment ID: CTR-011-001b

Comment Author: City of Simi Valley

Document Type: Local Government

State of Origin: CA

Represented Org:

Document Date: 09/24/97

Subject Matter Code: C-24 Site Specific Criteria

References: Letter CTR-011 incorporates by reference letters CTR-027 and CTR-034

Attachments? Y

CROSS REFERENCES C-13

E-01d

Comment: The City of Simi Valley discharges approximately 10 million gallons per day (mgd) of tertiarytreated wastewater (as well as municipal storm water) to the Arroyo Simi, an effluent dependent water body. Through much of the year, Arroyo Simi is dry several miles downstream from the City. The Arroyo Simi Characterization Report, completed by the City in 1995, concluded that the arroyo does not support a significant fishery, and observed only arroyo chub, mosquito fish and blunt-nosed minnow in the stream. Although designated as a potential municipal water supply in the Basin Plan, the arroyo waters are not used for municipal purposes. Effluent monitoring are limited, but available data indicate that the City's discharge may have a reasonable potential to exceed the proposed aquatic life criteria for several metals and the proposed human health criteria for several carcinogens.

Since Simi Valley is largely a residential community with supporting commercial development and little industry, and since the City already has an effective pretreatment program, it is unlikely that pollution prevention efforts would effectively reduce the problematic constituents. More likely, the City would be faced with end-of-pipe treatment controls such as lime precipitation and carbon adsorption to achieve the proposed criteria. The costs would undoubtedly be significant and the benefits relatively minor.

Under these circumstances, it appears reasonable to adopt criteria for Arroyo Simi, and similar effluent dependent waters, that are reasonably achievable without costly end-of-pipe controls and that reflect the actual use of the water (i.e., generally such waters are used for fishing or drinking). One way to address

this issue, consistent with the requirements of the Clean Water Act, would be to adopt specific human health criteria for Arroyo Simi and other effluent dependent streams based on a cancer risk coefficient of 10E-5 or in some cases 10E-4. Based on the limited data collected by the City, risk levels of 10E-4 would have to be adopted for dioxins, aldrin, alpha-BHC and 4,4,-DDD (see Table 1). Risk levels of 10E-5 would be sufficient for chloroform and endoslfan 11 (Id.).

Response to: CTR-011-001b

EPA disagrees that it must or should establish separate criteria for effluent dependent waters in this rule. In establishing water quality criteria for California, EPA is implementing section 303(c)(2)(B) of the CWA which requires adoption of criteria for all toxic pollutants for which EPA has issued criteria guidance and for which the discharge of such pollutants could reasonably be expected to interfere with the designated uses adopted by the state. EPA based the criteria contained in the CTR on its most recent national criteria guidance, which are designed to derive criteria that will be protective of aquatic life and human health. As long as a waterbody currently has a designated use for the protection of aquatic life and/or human health, application of the national 304(a) criteria are appropriate for fulfilling section 303(c)(2)(B). The CTR itself does not adopt uses or modify any uses previously adopted by the State. EPA presumes that the State has designated appropriate uses for its waters. Proposals to revise State-adopted uses must be brought to the State pursuant to its procedures for review of its water quality standards.

That being said, it should nevertheless be understood that EPA does support State adoption of site-specific criteria. As explained in the preamble to the proposed CTR, and further discussed in response to CTR-016-002, EPA will work with the State to approve acceptable State-adopted criteria (including site-specific criteria) and to stay the CTR where EPA has approved such State criteria.

With respect to risk level applicable to human health criteria when, as here, EPA establishes a water quality standard, EPA intends in its discretion to use a risk level of 1×10^{-6} , although the State may in its discretion choose another risk level for protection of human health, if the State has appropriately consulted the public. As discussed in responses to CTR-011-0001a and CTR-058-001 (Category C-13; Risk Level), EPA follows the risk-level policies of the affected state, when promulgating criteria as regulations.

Comment ID: CTR-016-001
Comment Author: San Francisco Bay RWQCB
Document Type: State Government
State of Origin: CA
Represented Org:
Document Date: 09/25/97
Subject Matter Code: C-24 Site Specific Criteria
References:
Attachments? Y
CROSS REFERENCES

Comment: Existing State Standards for the San Francisco Bay Region Previously Approved by US EPA

US EPA has asked people commenting on the proposed California Toxics Rule to identify any state-adopted numerical objectives that are still in effect following the decision in the Water Quality

Control Cases, Judicial Council Coordination Proceeding No. JC2610. The San Francisco Bay Regional Board was not a party to that lawsuit. Accordingly, there are several numerical objectives for toxic substances contained in the Water Quality Control Plan for the San Francisco Bay Region (Basin Plan) that remain valid following the court ruling. They were adopted after a full public review process in 1986 and subsequently approved by US EPA in 1987. These objectives are contained in Tables 3-3 and 3-4 of the Basin Plan and are reproduced in an attachment to this letter.

Staff have reviewed these objectives and have determined that many are identical to those proposed in the California Toxics Rule except that the Region's existing standards are expressed as total recoverable and not in the dissolved form. Of those objectives that are not identical, ambient levels of arsenic, lead, and zinc are so far below both existing and proposed standards that the Regional Board does not consider modifying the values a priority. Levels of copper, nickel, mercury, and PAHs, however, are of greater concern in the Region.

In reviewing both the proposed and past US EPA criteria, we have consistently found that site-specific objectives are preferable to more generalized objectives for the complex, dynamic hydrogeological and biogeochemical systems in the San Francisco Bay Estuary. Generalized national criteria development processes seek to minimize the uncertainty of laboratory-based predictions (as in the selection of dissolved criteria) yet do not attempt to reduce any of the environmental uncertainties that arise when laboratory results are extrapolated to extremely complex and variable field conditions. As a result, some of the proposed national criteria are seriously under protective of beneficial uses in San Francisco Bay, while others are overprotective and will ultimately cause compliance problems for dischargers under the existing implementation policies contained in our Basin Plan.

As you are aware, the Regional Board has been working to develop objectives appropriate for San Francisco Bay for copper and nickel since 1988 and is in the process of conducting similar technical analyses for mercury, dioxins, and PAHS. Our technical assessment of the proposed selenium, mercury, and dioxin criteria is presented in greater detail below. The goal of this undertaking is to develop site-specific objectives and pollutant-specific implementation policies for San Francisco Bay.

Because EPA's proposed criteria do not consistently incorporate the most current environmental information, and, in particular do not reflect the complex conditions in the Estuary, we feel it is more appropriate to retain the existing numerical objectives in the Basin Plan and to update them through our regional planning process.

Accordingly, we ask that EPA revise the proposed rule and exclude the existing fresh and salt water pollutant objectives listed in the attachment for waters within the San Francisco Bay Region (as defined in the California Water Code). This exclusion would amend the table on "Water and use classification and Applicable Criteria" to read:

All waters within the San Francisco Bay Region that include a MUN use designation:

- * -assigned all criteria in Columns B1 and B2-for all pollutants except for arsenic, chromium (VI), copper, mercury, nickel, silver, and zinc
- * -and all criteria in Columns C1 and C2-for all pollutants except for arsenic, cadmium, chromium (VI), lead, mercury, nickel, silver, and zinc
- * -and Column D-1-all pollutants

and

All waters within the San Francisco Bay Region that do not include a MUN use designation:

- * assigned all criteria in Columns B1 and B2-for all pollutants except for arsenic, chromium (VI), copper, mercury, nickel, silver, and zinc
- * and all criteria in Columns C1 and C2-for all pollutants except for arsenic, cadmium, chromium (VI), lead, mercury, nickel, silver, and zinc
- * and Column D-2 - all pollutants

It should be noted that this recommended action will result in two saltwater standards for PAHs; one will be a 24-hour average value of 15.0 ppb (the existing objective), the other will be the chronic human health-based federal standard.

Response to: CTR-016-001

EPA has reviewed this comment, as well as the Water Quality Control Plan for the San Francisco Bay Region (Basin Plan), and its amendments, including the 1995 Basin Plan, which the comment addresses. As EPA explained in the preamble to the proposed CTR, EPA intended to amend the text of the final rule to provide that CTR criteria would not apply where there is a site-specific State criterion in effect, approved by EPA, which the State or others identify in comments on the proposed CTR. (62 Fed.Reg. 42165.) This comment has identified such criteria. Based on our review, and discussions with the San Francisco Bay RWQCB, we have determined that those standards for the San Francisco Bay Region for priority toxic substances contained in Tables 3-3 and 3-4 of the 1995 Basin Plan (Tables III-2A and B of the 1986 Basin Plan), are the same as those adopted by the State in 1986 and approved by EPA in 1987, and they remain in effect for those waters of San Francisco Bay where they are presently in effect following final promulgation of the CTR. EPA believes that these are still appropriate criteria values. CTR criteria will therefore not apply to those parameters and waters covered by these San Francisco Bay Region Basin Plan WQS. National Toxics Rule (NTR) criteria for cyanide (40 CFR 131.36(d)(10)) will also continue to apply since the CTR does not supercede the NTR, as it applies in California.

EPA furthermore disagrees that CTR should exclude any of the pollutants proposed in this comment for all waters of San Francisco Bay that have the listed use designations. There are waters of San Francisco Bay (waters of the South Bay below Dumbarton Bridge) for which the criteria addressed in this comment are simply not in effect under the 1995 Basin Plan. CTR criteria are therefore adopted for these waters, and there is no conflict among criteria, since the CTR is filling a gap, not superceding State criteria.

The CTR also applies to any estuarine waters of San Francisco Bay which became subject to different criteria in 1995 when the San Francisco Regional Board eliminated the previously-approved geographic boundary between waters subject to freshwater and saltwater criteria and instead adopted methods for determining, on a salinity basis, where freshwater and saltwater criteria would be applied in San Francisco Bay. Because EPA has not approved the 1995 Basin Plan amendments, and since the 1986 Basin Plan criteria which EPA did approve no longer apply to those waters, EPA adopting CTR criteria for those waters is necessary to implement CWA section 303(c)(2)(B). It is expected, however, that few permits will be affected by this application of CTR criteria.

EPA disagrees that the CTR should exclude all of the pollutant criteria as proposed in this comment. It is beyond the scope of this rule to pick and choose among the CTR criteria which shall apply to waters of

San Francisco Bay on any basis other than whether or not they are subject to an EPA-approved State-adopted criterion, as described above. (For example, under the 1995 Basin Plan, there is currently no criterion for copper in waters of San Francisco Bay with salinity greater than 5 ppt, and EPA therefore will adopt CTR saltwater copper criteria for those San Francisco Bay waters.) Thus, regarding the various pollutants specifically addressed by this commenter, EPA will identify, in the footnotes to section 131.38(b)(1), those criteria which do not supercede EPA-approved San Francisco Bay Region Basin Plan criteria which are presently in effect.

Comment ID: CTR-016-002

Comment Author: San Francisco Bay RWQCB

Document Type: State Government

State of Origin: CA

Represented Org:

Document Date: 09/25/97

Subject Matter Code: C-24 Site Specific Criteria

References:

Attachments? Y

CROSS REFERENCES

Comment: Development of New Standards by Regional Boards - Clarification of Federal Rulemaking

It is very clear in the proposed rule that it is EPA's intention to promulgate federal standards only where there is an absence of state standards, and that when the state has completed its own process, that EPA intends to stay the proposed rule. At the same time, however, the proposed rule contains the following cautionary language:

"If this proposed rule is still in effect, as with the State adoption of site-specific criteria, EPA would have to undertake rulemaking to make necessary changes to this rule EPA, however, cautions California and the public that promulgation of this federal rule removes most of the flexibility available to the State for modifying its standards on a discharger-specific or stream-specific basis. For example, variances and site-specific criteria development are actions sometimes adopted by states. These are optional policies under terms of the federal water quality standards regulation. Except for the water-effect ratio procedure for certain metals, EPA has not incorporated either optional policy, in general, in this proposed rulemaking, that is, EPA has not generally authorized State modifications of federal water quality standards. Each of these types of modifications will, in general, require federal rulemaking on a case-by-case basis to change the federal rule. Because of the time consuming nature of reviewing such requests, limited federal resources, and the need for the Agency to move into other priority program areas in establishing environmental controls, EPA alerts California and the public that a prompt Agency response is unlikely. The best course of action, if such provisions are desired, is for the State to adopt its own standards and take advantage, if it so chooses, of the flexibility offered by these optional provisions."

We interpret this language to mean that EPA is not authorizing a modification of the federal standards as part of this rulemaking (except through use of WERs). However, this language suggests that EPA also believes itself to be unable to state standards developed by Regional Boards in a timely manner. We must point out that the site-specific objectives setting process carried out by the Regional Boards in the State of California is not a "modification" of federal standards, but a complete, state standard setting process. Furthermore, the Regional Boards are required and authorized under the CWA and state law to

review and, as appropriate, consider modification of the promulgated standards as they apply to specific water bodies within each region as part of the triennial review process. In both cases, we feel very strongly that EPA is obligated to review state standards developed at the regional level in a timely manner. We also believe that EPA's intent to stay federal standards when the statewide objective setting process is complete should apply equally to state standards adopted by the Regional Boards.

Accordingly, we are asking that EPA specifically clarify its intent with respect to state standards developed by Regional Boards. In addition, we strongly recommend that EPA revise the proposed rulemaking to include a description of conditions under which EPA may initiate a stay of federal standards as part of this rulemaking, thereby alleviating the administrative burden of conducting federal rulemaking changes every time a new state standard is developed and approved.

Response to: CTR-016-002

EPA disagrees with this comment. We believe that the commenter misunderstood the cautionary language that was part of the proposed rule. The CTR does not preclude state adoption of criteria after the CTR has been promulgated. As EPA stated in the preamble to the proposed CTR, when the State has completed its own process, and EPA approves the State's new or revised criteria, EPA intends to stay the CTR. Similarly, if the State adopts site-specific criteria (including site-specific Basin Plan criteria adopted by Regional Boards which have completed the State review and adoption process), and EPA has approved them based on their individual merits, EPA intends to stay that portion of the CTR that applies more general criteria to the specific site. Each individual stay on a site-specific basis would require federal rulemaking on a case-by-case basis, and generally require more detailed effort on the Agency's part than a statewide stay.

Moreover, it is possible that State-adopted criteria could become effective for CWA purposes within the State even prior to EPA approval or rulemaking, although this would change if a rule that EPA has recently proposed is promulgated as proposed. The "Alaska Rule," 64 Fed.Reg. 37072, July 9, 1999. Until the Alaska Rule goes final, the State could adopt new or revised standards which are more stringent than the CTR, and those standards would be effective for CWA purposes within the state without any EPA action. Moreover, prior to a final Alaska Rule, the State could adopt statewide standards, and if EPA approved those standards and stayed the CTR based on them, then subsequent site-specific criteria would apply within the State when adopted by the State without requiring additional EPA approval or rulemaking. If the Alaska Rule becomes final as proposed, however, regardless of whether the CTR has been stayed, only state-adopted criteria which are more stringent than the otherwise applicable standards could be applied within the State, prior to EPA approval of those standards.

EPA notes that State-adopted criteria (including site-specific criteria) which are less stringent than CTR criteria may be approved by EPA and result in a stay of the CTR if such criteria are based on sound scientific rationale which ensures that designated uses will be protected.

EPA also disagrees with the suggestion that EPA include provisions in this CTR rule to allow EPA to use direct final rulemaking if it stays the CTR, or site-specific portions of the CTR, in the future. Since EPA cannot at this time predict what State criteria would replace CTR criteria when such stays are issued, EPA cannot predict whether such federal rulemakings might appropriately be adopted as direct final rules. Whether EPA meets the criteria for using direct final rulemaking in this context is a decision EPA will make when it undertakes such rulemaking.

Comment ID: CTR-017-001
Comment Author: Santa Ana River Discharger Ass
Document Type: Sewer Authority
State of Origin: CA
Represented Org:
Document Date: 09/25/97
Subject Matter Code: C-24 Site Specific Criteria
References:
Attachments? Y
CROSS REFERENCES

Comment: Thank you for the opportunity to provide comments on the recently promulgated California Toxics Rule. The members of the Santa Ana River Dischargers Association (SARDA) are especially appreciative of EPA's effort to review the site-specific water quality objectives (SSOs) proposed for our watershed.

The SSOs for cadmium, copper, lead and ammonia were developed jointly by state and federal regulators in 1992-93. During this period, the Regional Water Quality Control Board - Santa Ana Region held several public hearings to review the merits of the proposed SSOs. As part of the formal procedures to amend the Santa Ana River Basin Plan, the Regional Board received several documents providing scientific evidence that the SSOs would fully protect all designated beneficial uses including aquatic life.

EPA has received several copies of the final report for the Santa Ana River Use-Attainability Analysis. As direct participants in the design and methodology of the study, EPA received draft and final versions of all work papers and reports. In addition, another complete copy of the documents were submitted to the agency as part of the administrative record supporting the State Board decision to approve basin plan amendments adopting the SSOs.

Because the previous copies were submitted nearly four years ago, we believe it would be helpful to submit a new copy for the record. It is our sincere hope that these documents will facilitate EPA's review of the proposed SSOs.

Enclosed are the respective volumes which comprise the UAA Final Report. There are many other pages of written materials supporting the adoption of site-specific water quality objectives previously submitted to EPA and included in the State of California's formal administrative record on the basin plan amendments. If EPA desires additional copies of any of the other documents, SARDA would be pleased to re-submit them as well.

The SSOs proposed for the Santa Ana River are nearly identical to the water quality objectives EPA set forth in the California Toxics Rule. We in SARDA were pleased that EPA's scientists concur in the conclusion that water quality objectives based on dissolved metal concentrations would fully protect the Santa Ana River. If anything, it appears that the SSOs proposed within the UAA Final Report were conservative. Since then, EPA has sponsored new scientific research which corroborates the original UAA recommendations.

Because the California Toxics Rule uses the same approach as the UAA in setting water quality objectives for cadmium and copper, SARDA strongly supports the CTR objectives for those metals. We also agree with EPA's written statements acknowledging the binding character of organic carbon and the role it plays in rendering heavy metals non-toxic. We enthusiastically endorse the agency's decision to

include Water Effects Ratio as a formal factor to be considered when formulating water quality objectives. It will do much to adjust national criteria to local conditions.

Unlike copper and cadmium, the SSO for lead was based on EPA's "Most-Sensitive Species Methods." As such, SARDA believes that it is more appropriate to adopt the UAA-SSO rather than the CTR formula when setting water quality objectives for lead in the Santa Ana River. Therefore, we urge the agency to join the State Water Resources Control Board in approving the SSO for lead.

Since the UAA was completed, and the basin plan amended, the SARDA agencies have diligently implemented the final recommendations. When chlorine and ammonia were found to be contributing to toxicity in the river, dischargers constructed new facilities to significantly reduce the concentration of these pollutants. Today, SARDA members routinely pass their whole effluent toxicity tests. Annual instream bioassessments, conducted voluntarily by SARDA, consistently demonstrate that our effluent quality fully supports the designated beneficial use.

SARDA is also pleased to report that the concentrations of heavy metals remain well below permitted levels and are often significantly less than historical averages. The fear that SSOs would license widespread increases in pollution never came to pass.

We believe the Santa Ana River UAA was successful in developing more appropriate site-specific objectives as a result of EPA's direct participation in designing, conducting and reviewing the scientific inquiry. The other SARDA agencies join me in thanking EPA's staff for the considerable time and expertise they contributed to this extraordinary effort.

If EPA requires any additional materials, or wishes to discuss the documentation submitted in support of the proposed SSOs, please call me at (909) 797-5119. All of the SARDA agencies are prepared to assist in any way we can. Thank you again for the opportunity to comment on the California Toxics Rule.

Sincerely,

Chairman Santa Ana River Dischargers Association

Response to: CTR-017-001

EPA is pleased to hear the story of success in reducing the toxicity in the Santa Ana River. EPA also appreciates the strong support for the CTR criteria for cadmium and copper, which, as the commenter points out, are nearly identical to the SSOs adopted by the State for the Santa Ana River.

Concerning the site-specific criterion for lead in the Santa Ana River that has been adopted by the State, EPA appreciates the commenter's support of the site-specific criterion over the CTR criterion for protection of fresh water aquatic life. However, EPA has not yet approved this site-specific criterion, and in the absence of EPA-approved State-adopted site-specific criteria, EPA must promulgate CTR criteria to meet the requirements of CWA section 303(c)(2)(B). Nevertheless, where site-specific criteria have already been adopted by the State in accordance with State law, but not yet acted upon by EPA, and those criteria are more stringent than applicable CTR criteria, those are the controlling criteria for CWA purposes within the State even without a stay of the applicable CTR criteria and are thus implementable by the State. (This would not be affected by the "Alaska Rule" which EPA proposed July 9, 1999, 64 Fed.Reg. 37072. See p. 37076.) This is the case with the site-specific criterion for lead adopted by the State for the Santa Ana River. Since the State must use the most stringent criteria in effect for its water quality programs, the State may use this site-specific lead criterion notwithstanding the CTR fresh water

aquatic life criterion for lead, thus the commenter's concerns should have no practical effect.

Comment ID: CTR-020-003

Comment Author: City of Stockton

Document Type: Local Government

State of Origin: CA

Represented Org:

Document Date: 09/24/97

Subject Matter Code: C-24 Site Specific Criteria

References:

Attachments? Y

CROSS REFERENCES

Comment: B. Site-Specific Modifications

EPA has indicated that it will not allow the state to approve site-specific modifications of the federal criteria regardless of the merit of the situation. The only notable exception is EPA's indication that amendment of these criteria may only be accomplished by a petition for rulemaking which amends the CTR. EPA's self-imposed limitation on CTR modification exacerbates the overly broad nature of the rule and arbitrarily inflicts wasteful expenditures of local resources on meeting objectives that have no actual environmental or public health need. The Agency is authorizing limited waivers to criteria compliance where it can be demonstrated that factors listed in 40 C.F.R. section 131.10(g) apply (e.g., natural conditions prevent attainment of uses). However, these waivers are very limited in scope, are rarely approved, and are not expected to provide relief to the typical circumstances that justify less restrictive criteria (e.g., exposure and organism sensitive assumptions are not relevant, warranting criteria recalculation).

The failure of EPA to build appropriate flexibility into the CTR is contrary to Presidential directives contained in the "Reinventing Environmental Regulation" issued in March 1995. By arbitrarily restricting the ability to modify criteria site-specifically (as outlined in detail in EPA's Water Quality Standards Handbook), EPA will maximize the economic impacts of this rulemaking rather than minimize the costs as required by applicable Executive Office directives and underlying regulatory provisions.

There is no legal or technical basis for restricting the modification of the Section 304(a) criteria. EPA has often referred to the ability to modify federal criteria as the means for ensuring that the criteria are appropriately applied. Similar to the "upset defense" that EPA was directed to include in nationwide effluent guidance to ensure that those requirements were not applied to inappropriate operational conditions, the Agency must grant the State of California the ability to modify the criteria for cause so that the criteria are not applied inappropriately. If this authority is not included in the rule, application of the CTR will clearly be overly broad and will exceed EPA's authority to establish appropriate water quality criteria.

Response to: CTR-020-003

EPA disagrees with this comment. We believe that the commenter misunderstood the cautionary language that was part of the proposed rule. The CTR does not preclude state adoption of criteria after the CTR has been promulgated. As EPA stated in the preamble to the proposed CTR, when the State has completed its own process, and EPA approves the State's new or revised criteria, EPA intends to stay the

CTR. Similarly, if the State adopts site-specific criteria (including site-specific Basin Plan criteria adopted by Regional Boards which have completed the State review and adoption process), and EPA has approved them based on their individual merits, EPA intends to stay that portion of the CTR that applies more general criteria to the specific site. Each individual stay on a site-specific basis would require federal rulemaking on a case-by-case basis, and generally require more detailed effort on the Agency's part than a statewide stay.

Moreover, it is possible that State-adopted criteria could become effective for CWA purposes within the State even prior to EPA approval or rulemaking, although this would change if a rule that EPA has recently proposed is promulgated as proposed. The "Alaska Rule," 64 Fed.Reg. 37072, July 9,1999. Until the Alaska Rule goes final, the State could adopt new or revised standards which are more stringent than the CTR, and those standards would be effective for CWA purposes within the state without any EPA action. Moreover, prior to a final Alaska Rule, the State could adopt statewide standards, and if EPA approved those standards and stayed the CTR based on them, then subsequent site-specific criteria would apply within the State when adopted by the State without requiring additional EPA approval or rulemaking. If the Alaska Rule becomes final as proposed, however, regardless of whether the CTR has been stayed, only state-adopted criteria which are more stringent than the otherwise applicable standards could be applied within the State, prior to EPA approval of those standards.

EPA further disagrees with any suggestion that the State itself could, in the future, modify CTR criteria. State adoption of site-specific criteria (including site-specific criteria adopted by the Regional Board which have completed the State adoption process) is a separate State action, under State law, which does not modify federal criteria. It would be up to EPA to modify the CTR to "make way" for the State's criteria, once those criteria have been approved by EPA. As discussed above, if the State were to adopt criteria that were more stringent than applicable CTR criteria, those criteria could be effective for CWA purposes within the State under State law, prior to EPA approval of such criteria or modification of the CTR.

With respect to EPA's compliance with applicable Executive Office directives see the preamble to the final rule.

Comment ID: CTR-021-007
Comment Author: LeBoeuf, Lamb, Green & MacRae
Document Type: Local Government
State of Origin: CA
Represented Org: City of Sunnyvale
Document Date: 09/25/97
Subject Matter Code: C-24 Site Specific Criteria
References: Letter CTR-021 incorporates by reference letter CTR-035
Attachments? Y
CROSS REFERENCES

Comment: It is with a sense of reluctance that Sunnyvale joins in CASA/Tri-TAC's adverse comments on the CTR and the EA, and Sunnyvale does so in a spirit of constructive criticism and with an expectation that the Agency will make the necessary adjustments in its approach towards the CTR before the final rule is promulgated. In addition, in the same spirit and with the same expectation, Sunnyvale would like to make the following points on its own behalf:

4. Need for Expedited Approval of Site-Specific objectives. Sunnyvale is dismayed by the seemingly intransigent position taken by EPA in the preamble to the CTR to the effect that EPA is unlikely to act expeditiously to stay the application of CTR-based criteria with regard to water bodies in California which are covered by future site-specific objectives adopted by California water pollution control agencies and approved by EPA once the CTR becomes a final rule. The Agency's position is inconsistent with its otherwise reasonable and laudable support for local water quality planning efforts. It seems to Sunnyvale that EPA should reward a local planning effort which has complied with all EPA guidance and has produced site-specific water quality objectives which are more appropriate to the affected water body than the state and nationwide criteria in the CTR. What is the reason for EPA's attitude?

EPA has in the past threatened to delay approving state adopted site-specific objectives once a federal promulgation is in place. These threats are generally made when EPA is attempting to urge a state or states to develop state criteria in order to avoid a federal promulgation. However, the principal policy reason to take this position disappears as soon as the statutorily-required criteria have been put in place by EPA. Thereafter, EPA should show support for California's efforts to make appropriate adjustments in EPA's CTR criteria, especially where the adverse impacts of the CTR are being mitigated by the regulatory relief afforded by the State's efforts.

If EPA is concerned about the resources required to go through notice-and-comment rulemaking before it can stay the effect of the CTR, then Sunnyvale urges EPA to seek means to simplify and streamline the EPA rulemaking process. We urge the Agency to apply the lessons learned in the Agency's implementation of the air program in this situation. A proposal by EPA in the final CTR to go directly to final rulemaking to stay the effect of particular CTR criteria would be justified where, in the future, the State and the Agency have complied with the exhaustive EPA guidance on development of scientifically-justifiable site specific water quality objectives. A simple notice of final rulemaking should be amply sufficient to comply with the requirements of the Administrative Procedures Act. We urge the Agency to use the creative resources of the office of General Counsel to explore the merits of this suggestion.

Unless EPA is able to act expeditiously to approve newly-developed site specific criteria, the Agency could be the bottleneck in implementing some highly desirable place-based watershed management planning. Please reconsider your position in this matter in the final rulemaking on the CTR.

Response to: CTR-021-007

EPA disagrees with this comment. We believe that the commenter misunderstood the cautionary language that was part of the proposed rule. The CTR does not preclude state adoption of criteria after the CTR has been promulgated. As EPA stated in the preamble to the proposed CTR, when the State has completed its own process, and EPA approves the State's new or revised criteria, EPA intends to stay the CTR. Similarly, if the State adopts site-specific criteria (including site-specific Basin Plan criteria adopted by Regional Boards which have completed the State review and adoption process), and EPA has approved them based on their individual merits, EPA intends to stay that portion of the CTR that applies more general criteria to the specific site. Each individual stay on a site-specific basis would require federal rulemaking on a case-by-case basis, and generally require more detailed effort on the Agency's part than a statewide stay.

Moreover, it is possible that State-adopted criteria could become effective for CWA purposes within the State even prior to EPA approval or rulemaking, although this would change if a rule that EPA has recently proposed is promulgated as proposed. The "Alaska Rule," 64 Fed.Reg. 37072, July 9,1999. Until the Alaska Rule goes final, the State could adopt new or revised standards which are more stringent

than the CTR, and those standards would be effective for CWA purposes within the state without any EPA action. Moreover, prior to a final Alaska Rule, the State could adopt statewide standards, and if EPA approved those standards and stayed the CTR based on them, then subsequent site-specific criteria would apply within the State when adopted by the State without requiring additional EPA approval or rulemaking. If the Alaska Rule becomes final as proposed, however, regardless of whether the CTR has been stayed, only state-adopted criteria which are more stringent than the otherwise applicable standards could be applied within the State, prior to EPA approval of those standards.

EPA also disagrees with the suggestion that EPA include provisions in this CTR rule to allow EPA to use direct final rulemaking if it stays the CTR, or site-specific portions of the CTR, in the future. Since EPA cannot at this time predict what State criteria would replace CTR criteria when such stays are issued, EPA cannot predict whether such federal rulemakings might appropriately be adopted as direct final rules. Whether EPA meets the criteria for using direct final rulemaking in this context is a decision EPA will make when it undertakes such rulemaking.

Comment ID: CTR-026-006
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-24 Site Specific Criteria
References:
Attachments? N
CROSS REFERENCES

Comment: 6. SITE SPECIFIC CRITERIA

The DFG does not object to the development of site-specific criteria provided that they are developed utilizing sound scientific methodologies. The proposed rule indicates that EPA will be reviewing several of the existing site-specific criteria already established in various Basin Plans throughout the State to determine consistency with the proposed rule. The DFG is very interested in participating in the development of site-specific criteria and request that we be included in reviewing any new site-specific proposals or revisiting existing criteria, if that is deemed necessary.

Response to: CTR-026-006

EPA has reviewed and approved some site-specific criteria already established in various Basin Plans throughout the State. The relationship between the CTR and site-specific criteria for the Sacramento River; the San Joaquin River; and the Grassland Water District, San Luis National Wildlife Refuge, and Los Banos State Wildlife Refuge are described in the preamble to the proposed CTR. (62 Fed.Reg. 42165-42166.) For the San Francisco Bay Region, see the response to CTR-016-001. EPA has not acted on any State-adopted site-specific criteria since the proposed CTR was published.

The comment author suggests that the California DFG participate in the development of any new and revised site-specific criteria. We agree with that comment and assume that California's normal process will provide for that participation.

Comment ID: CTR-032-002e
Comment Author: Las Gallinas Val. Sanitary Dist
Document Type: Sewer Authority
State of Origin: CA
Represented Org:
Document Date: 09/25/97
Subject Matter Code: C-24 Site Specific Criteria
References: Letter CTR-032 incorporates by reference letter CTR-035
Attachments? N
CROSS REFERENCES G-01; C-22; G-09; C-24a; K; G-04; G-05; G-02

Comment: Regulatory Flexibility and Relief

The District supports EPA's use of "sound science" and current data in developing the proposed criteria in the California Toxics Rule (CTR). The District strongly supports language in the Preamble that references and endorses recommendations of the State Task Forces including use in permitting of:

* reasonable potential analyses * dissolved metals criteria * translators * water effects ratios * site specific objectives * innovative TMDL processes such as effluent trading * performance based interim limits * chronic and acute mixing zones, and * compliance schedules in NPDES permits.

Response to: CTR-032-002e

EPA appreciates this comment which provides general support for the CTR process and for EPA's ongoing efforts to support State water quality standards development.

Comment ID: CTR-032-006b
Comment Author: Las Gallinas Val. Sanitary Dist
Document Type: Sewer Authority
State of Origin: CA
Represented Org:
Document Date: 09/25/97
Subject Matter Code: C-24 Site Specific Criteria
References: Letter CTR-032 incorporates by reference letter CTR-035
Attachments? N
CROSS REFERENCES C-01a

Comment: Mercury Criteria

The District supports the proposed revised human health criteria for mercury based on updated IRIS information. The District also supports EPA's decision (CTR P. 42180) not to apply the bioaccumulation factor (BAF) developed for the Great Lakes Initiative to the CTR mercury criteria. We agree that mercury methylation rates vary widely and are not well understood, particularly for amalgam related mercury. We believe that adoption of a national BAF under consideration as part of the "Mercury Study Report to Congress: SAB Review Draft" is inappropriate for California, particularly for the complex San Francisco Bay system. CDA recommends that EPA direct the State to develop a site specific objective

(SSO) for mercury for San Francisco Bay based on a site specific BAF and data on natural cleanup processes and methylation processes. The proposed CTR criteria should serve as interim criteria until the SSO is developed and adopted.

Response to: CTR-032-006b

EPA appreciates the support by this commenter of the human health criteria for mercury contained in the CTR. To the extent that this commenter goes further and comments on the criteria that might result in the future from EPA's Report to Congress on Mercury (December, 1997), EPA disagrees. EPA does not find it appropriate at this time to direct the State to develop site-specific criteria for mercury for San Francisco Bay (or any other specific waterbody), especially if the purpose is to forestall the application of national criteria that are not yet even defined. That decision is wholly within State authority, however; should they choose to develop site-specific criteria, these criteria would be subject to EPA review and approval based on their individual scientific validity.

Comment ID: CTR-035-014
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-24 Site Specific Criteria
References:
Attachments? N
CROSS REFERENCES

Comment: B. Criteria

pp. 42165-42166 -- Site-Specific Criteria We support the process described in the Preamble, whereby the State through its Regional Water Quality Control Boards (RWQCBs) may adopt site-specific criteria as amendments to Basin Plans, which are then subject to approval by the State Water Resources Control Board (SWRCB) and the State's Office of Administrative Law. We strongly urge EPA to make timely determinations for all site-specific criteria currently under review to ensure that appropriate action is taken by EPA before the CTR becomes a final regulation, as well as to conduct timely reviews for those site-specific criteria that may be submitted for approval in the future. We suggest that it is possible to simplify the regulatory process for staying the effect of the final CTR as regards any pollutant for which a site-specific objective has been developed by the State and approved by EPA. If EPA were to state in the final rule that it proposes to approve without further notice and comment any site-specific objective which has gone through the State and EPA approval process, we see no need for additional notice and comment before EPA publishes notice of final rulemaking to modify the CTR. This process is similar to the so-called "parallel processing" procedure used by EPA's air program with respect to the approval of amendments to State Implementation Plans.

We do, however, object to the statement in the Preamble regarding the adoption of site-specific criteria after the CTR becomes final:

However, if EPA promulgates statewide federal criteria as proposed in this rule, prior to a decision on any State-adopted site-specific criteria, the more stringent of the two criteria would be used for water

quality program. Both federal and State water quality programs must be satisfied, and application of the more stringent of the two criteria would satisfy both.

Based on EPA's own guidance, we do not believe that it is necessary for EPA to select the more stringent of the two criteria, if the site-specific criteria is less stringent but has been developed in a scientifically defensible manner (EPA, 1994b). In addition, this policy directly contradicts the assumption made in the draft Economic Analysis that an "alternative regulatory approach" would be pursued, including the use of site-specific criteria. A discharger would not pursue the development of site-specific criteria as a regulatory relief option, as was assumed in the Economic Analysis for the CTR, if EPA's policy is to approve only more stringent site-specific criteria. EPA's policy would expressly prohibit site-specific objectives from providing any relief from compliance costs. We therefore recommend that EPA include a policy in the CTR indicating that the Agency will approve site-specific criteria submitted by the State that are scientifically defensible, even if they are less stringent than CTR criteria, particularly if they are necessary to avoid excessive compliance costs.

Response to: CTR-035-014

EPA disagrees with this comment. We believe that the commenter misunderstood the cautionary language that was part of the proposed rule. The CTR does not preclude state adoption of criteria after the CTR has been promulgated. As EPA stated in the preamble to the proposed CTR, when the State has completed its own process, and EPA approves the State's new or revised criteria, EPA intends to stay the CTR. Similarly, if the State adopts site-specific criteria (including site-specific Basin Plan criteria adopted by Regional Boards which have completed the State review and adoption process), and EPA has approved them based on their individual merits, EPA intends to stay that portion of the CTR that applies more general criteria to the specific site. Each individual stay on a site-specific basis would require federal rulemaking on a case-by-case basis, and generally require more detailed effort on the Agency's part than a statewide stay.

Moreover, it is possible that State-adopted criteria could become effective for CWA purposes within the State even prior to EPA approval or rulemaking, although this would change if a rule that EPA has recently proposed is promulgated as proposed. The "Alaska Rule," 64 Fed.Reg. 37072, July 9, 1999. Until the Alaska Rule goes final, the State could adopt new or revised standards which are more stringent than the CTR, and those standards would be effective for CWA purposes within the state without any EPA action. Moreover, prior to a final Alaska Rule, the State could adopt statewide standards, and if EPA approved those standards and stayed the CTR based on them, then subsequent site-specific criteria would apply within the State when adopted by the State without requiring additional EPA approval or rulemaking. If the Alaska Rule becomes final as proposed, however, regardless of whether the CTR has been stayed, only state-adopted criteria which are more stringent than the otherwise applicable standards could be applied within the State, prior to EPA approval of those standards.

EPA further disagrees with any suggestion that the State itself could, in the future, modify CTR criteria. State adoption of site-specific criteria (including site-specific criteria adopted by the Regional Board which have completed the State adoption process) is a separate State action, under State law, which does not modify federal criteria. It would be up to EPA to modify the CTR to "make way" for the State's criteria, once those criteria have been approved by EPA. As discussed above, if the State were to adopt criteria that were more stringent than applicable CTR criteria, those criteria could be effective for CWA purposes within the State under State law, prior to EPA approval of such criteria or modification of the CTR.

EPA notes that State-adopted criteria (including site-specific criteria) which are less stringent than CTR

criteria may be approved by EPA and result in a stay of the CTR if such criteria are based on sound scientific rationale which ensures that designated uses will be protected.

EPA also disagrees with the suggestion that EPA include provisions in this CTR rule to allow EPA to use direct final rulemaking if it stays the CTR, or site-specific portions of the CTR, in the future. Since EPA cannot at this time predict what State criteria would replace CTR criteria when such stays are issued, EPA cannot predict whether such federal rulemakings might appropriately be adopted as direct final rules. Whether EPA meets the criteria for using direct final rulemaking in this context is a decision EPA will make when it undertakes such rulemaking.

This commenter also urged EPA to act, prior to finalizing the CTR, to approve or disapprove any State-adopted site-specific criteria which had been submitted to EPA but EPA had not yet acted upon. This has not been possible, due to the focus of resources on the CTR itself. However, EPA reiterates that any criterion adopted by the State, and currently in effect under State law, which is more stringent than the comparable CTR criterion, could be used for water quality programs within the State without any stay of the CTR.

Comment ID: CTR-037-001a

Comment Author: Hampton Roads Sanitation Dist.

Document Type: Sewer Authority

State of Origin: VA

Represented Org:

Document Date: 09/25/97

Subject Matter Code: C-24 Site Specific Criteria

References:

Attachments? N

CROSS REFERENCES G-01

Comment: 1. The rule proposes that the more stringent of site-specific and national criteria be used in determining reasonable potential to exceed water quality standards and in development of limits where site-specific criteria have not yet been established. This proposal ignores the scientific basis of a site-specific criterion and that such a criterion is specifically more relevant and appropriate than a national criterion if derived correctly. EPA has acknowledged that national criteria can be more stringent than necessary to protect designated uses because they are designed to protect a wide variety of surface waters, and that a site-specific criterion can be sufficiently protective while being less stringent than a national criterion (Water Effect Ratio Guidance, 1994). This rule is arbitrarily dismissing the use of site-specific criteria which may be more technically defensible than national criteria, while being protective.

Response to: CTR-037-001a

EPA disagrees with this comment. EPA notes that State-adopted criteria (including site-specific criteria) which are less stringent than CTR criteria may be approved by EPA and result in a stay of the CTR if such criteria are based on sound scientific rationale which ensures that designated uses will be protected. The CTR does not preclude state adoption of criteria, including criteria which may be less stringent than CTR criteria. State-adopted criteria (including site-specific criteria) which are less stringent than CTR criteria may be approved by EPA and result in a stay of the CTR if such criteria are based on sound scientific rationale which ensures that designated uses will be protected.

To the extent that this commenter is concerned that the CTR criteria supercede existing State-adopted site-specific criteria which are less stringent than CTR criteria and have not been approved by EPA, EPA agrees that this is the effect of adoption of the CTR, but disagrees that this provides a basis for "promulgating around" such unapproved site-specific criteria. Because EPA has not completed its evaluation of these criteria and EPA needs to have criteria in place to implement section 303(c)(2)(B), EPA has chosen to put in place criteria based on EPA's national section 304(a) criteria recommendations to most efficiently ensure protection for all California waters. EPA will then complete its review of site-specific criteria. To do otherwise would risk that coverage did not occur for some waters should EPA not find the site-specific value to be scientifically defensible. However, as stated in the preamble to the proposed CTR, EPA will make a determination on all State-adopted site-specific criteria which have been submitted to EPA for review. When EPA approves any new or revised State criteria, EPA intends to stay the CTR. It was not possible for EPA to make determinations on pending site-specific criteria prior to the final CTR.

Comment ID: CTR-038-007
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-24 Site Specific Criteria
References:
Attachments? Y
CROSS REFERENCES

Comment: 6. Separate, site-specific human health criteria for carcinogens should be adopted for Schell Slough based on a 10 (-4) risk level and for Second Napa Slough based on a 10 (-5) risk level. Based on effluent sampling performed by the District, the District would be unable to comply with criteria for numerous carcinogens based on a 10 (-6) risk level (alpha-BHC, gamma-BHC, bromodichloromethane, indeno(1,2,3-cd)pyrene, chlordane, and 4,4'-DDT) without costly end-of-pipe controls. These controls would not produce a commensurate environmental benefit. At a 10 (-4) risk level, the District's discharge would not cause an in-stream exceedance of these criteria in Schell Slough, and at a 10 (-5) risk level, the discharge would not cause an in-stream exceedance in Second Napa Slough. The District does not believe these sloughs are heavily fished and therefore criteria based on 10 (-4) and 10 (-5) risk levels would likely provide greater protection than indicated by the risk levels. The District notes that none of these constituents were identified in EPA's economic analysis as significant contributors to baseline cancer risks for recreational anglers consuming San Francisco Bay fish (see Exhibit 8-7 in EPA's economic analysis).

Response to: CTR-038-007

EPA disagrees that it must or should establish separate, site-specific criteria in this rule for receiving waters where dischargers may be unable to meet the CTR criteria. In accordance with 40 CFR 131.11, criteria must be based on sound scientific rationale and must protect the designated use. 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. Economic factors may be considered in designating uses (40 CFR 131.10); however, they may not be used to justify criteria which are not protective of those uses. The CTR itself does not adopt uses or

modify any uses previously adopted by the State. EPA presumes that the State has designated appropriate uses for its waters. Proposals to revise State-adopted uses must be brought to the State pursuant to its procedures for review of its water quality standards.

That being said, it should nevertheless be understood that EPA does support State adoption of site-specific criteria. As explained in the preamble to the proposed CTR, and further discussed in response to CTR-016-002, EPA will work with the State to approve acceptable State-adopted criteria (including site-specific criteria) and to stay the CTR where EPA has approved such State criteria.

With respect to risk level applicable to human health criteria when, as here, EPA establishes a water quality standard, EPA intends in its discretion to use a risk level of 1×10^{-6} , although the State may in its discretion choose another risk level for protection of human health, if the State has appropriately consulted the public. As discussed in responses to CTR-011-0001a and CTR-058-001 (Category C-13; Risk Level), EPA follows the risk-level policies of the affected state, when promulgating criteria as regulations.

The comment that the carcinogens that are asserted to be compliance problems are not identified in EPA's economic analysis as a significant contributor to baseline cancer risks for recreational anglers consuming San Francisco Bay fish may merely reflect a lack of information on these pollutants in sample locations that were selected for the benefits analysis. The fact that no baseline risks were found for the purposes of the analysis does not necessarily mean that the risk from these pollutants do not exist anywhere in the Bay or should not be prevented.

Comment ID: CTR-038-008a
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-24 Site Specific Criteria
References:
Attachments? Y
CROSS REFERENCES E-01c; R; S; T

Comment: 7. Separate, sites-specific aquatic life criteria for copper and human health criteria for mercury should be adopted for Schell Slough, or alternatively EPA should specify implementation procedures for these criteria that will preclude unreasonable controls such as end-of-pipe treatment. 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 assessment of costs and benefits described in "3" above, EPA should either adopt the criteria that is currently achieved, or alternatively specify implementation procedures that would allow the current discharge to continue (e.g., allowable Mixing zones and averaging periods and, for copper, a translator and water-effect ratio). Again, the District is amenable to continuing to address these constituents through pollution prevention measures and to assessing the actual impacts of these constituents in Schell Slough. Without EPA specifying such implementation procedures in the CTR, it is possible that the CTR could impose significant costs on the District (and the other small communities its serves) without providing a commensurate 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-038-008a

EPA disagrees with this commenter's suggestion that separate, site-specific criteria for copper and mercury be adopted for Schell Slough, based on considerations of costs and benefits. EPA has conducted an analysis of costs and benefits for this rule pursuant to Executive Order 12866; however, the criteria themselves are not based on economic considerations. In accordance with 40 CFR 131.11, criteria must be based on sound scientific rationale and must protect the designated use. 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. Economic factors may be considered in designating uses (40 CFR 131.10); however, they may not be used to justify criteria which are not protective of those uses.

That being said, it should nevertheless be understood that EPA does support the State's adoption of site-specific criteria. As explained in the preamble to the proposed CTR, and further discussed in response to CTR-016-002, EPA will work with the State to approve acceptable State-adopted criteria (including site-specific criteria) and to stay the CTR when EPA has approved such State criteria.

This commenter further suggests that EPA specify implementation procedures for certain criteria as an alternative to the proposed site-specific criteria. The CTR was not intended to include implementation provisions. The CTR is promulgated to add numeric criteria for priority toxic pollutants where they did not exist. To the extent that this commenter is proposing implementation provisions that are not inconsistent with CWA requirements, such provisions may be considered by the State for inclusion in its implementation plan (Draft Policy for Implementation of Toxics Standards for Inland Surface Waters and Enclosed Bays and Estuaries of California, September 11, 1997).

Finally, regarding the commenter's assertion that the CTR could be inconsistent with Executive Order 12866, the Regulatory Flexibility Act and the Unfunded Mandates Reform Act without further revision (such as suggested by the commenter), see the discussion of EPA's compliance with these requirements in the preamble to the final rule.

Comment ID: CTR-039-001
Comment Author: San Francisco BayKeeper
Document Type: Environmental Group
State of Origin: CA
Represented Org:
Document Date: 09/25/97
Subject Matter Code: C-24 Site Specific Criteria
References:
Attachments? N
CROSS REFERENCES

Comment: As EPA notes in the preamble to the rule, "adoption of water quality standards is primarily the responsibility of the states." 62 Fed. Reg. at 42166. In exercising that responsibility, the States have considerable discretion in applying the scientific and technical data available to them. A pervasive concern with the proposed rule is a lack of consistency by EPA in according appropriate deference to the

State of California's prior decisions, already approved by EPA. Where convenient, the proposed rule relies on the State's previous efforts, including for example the State's preference that health risks be based upon a 10⁻⁶ risk level and the novel notion of interim permit limits. However, as regards the rule's most important feature and indeed the only *raison d'etre* for the rule - the numeric criteria - EPA almost completely abandons the State's prior technical determinations on the numeric criteria appropriate for California where the State's prior decision was more protective of the environment and human health than the currently proposed criteria. This is true for EPA's decision to go from total recoverable metals criteria to dissolved metals criteria, a proposal that is inconsistent with the State's prior approved decision and which will result in significant increases in total pollutants allowed to be discharged into San Francisco Bay and elsewhere in the State. The State's prior decisions also were abandoned for dioxin and mercury, including failing to consider all of the dioxin congeners, failing to consider the bioaccumulation of mercury (a well-documented characteristic of that potent toxic pollutant) and failing to consider the higher rates of fish consumption found in California and in discrete populations of subsistence and recreational anglers.

Response to: CTR-039-001

EPA disagrees with the suggestion that EPA should have deferred to the State's prior WQS decisions, previously approved by EPA. To the extent that the commenter is referring to criteria in the Inland Surface Waters Plan (ISWP) and the Enclosed Bays and Estuaries Plan (EBEP), EPA responds that those were considered along with all of the other scientific information that makes up the record for this rule. However, those statewide plans are no longer in effect, and EPA is not bound by them. EPA adopts criteria based on sound scientific rationale, which protect the designated uses of waters of the United States in California. Additional scientific information has become available for some pollutants since California adopted the ISWP and EBEP in 1991, which forms the basis for adopting CTR criteria which differ from some of the criteria previously adopted for the same waterbodies.

EPA further disagrees with passing statements in this comment criticizing EPA's use of dissolved rather than total recoverable metals, failure to consider all dioxin congeners, failure to consider bioaccumulation of mercury and failure to consider higher rates of fish consumption in California. For a detailed discussion of the points made regarding dioxin, see response to CTR-002-003 and CTR-002-006. Regarding EPA's use of dissolved rather than total recoverable metals see response to CTR-026-004. Regarding bioaccumulative properties of mercury, see CTR-002-007b. Regarding rates of fish consumption, see response to CTR-002-002a and the preamble of the final rule.

To the extent that this comment is referring to site-specific criteria for San Francisco Bay, EPA is revising the final CTR to ensure that EPA-approved State-adopted site-specific criteria shall remain in effect and not be superseded by CTR criteria for the same pollutants for those waters of the Bay where such site-specific criteria are currently in effect. See response to CTR-016-001.

Comment ID: CTR-039-009
Comment Author: San Francisco BayKeeper
Document Type: Environmental Group
State of Origin: CA
Represented Org:
Document Date: 09/25/97
Subject Matter Code: C-24 Site Specific Criteria
References:

Attachments? N

CROSS REFERENCES

Comment: VII. EPA CAN ADJUST ITS PROPOSED RULE TO REFLECT REGIONAL CONDITIONS AND PROTECT USES IN SPECIFIC REGIONS

As EPA notes in the preamble, when it considered the State's 1991 criteria, it approved the proposed criteria for selenium for everywhere in the State except San Francisco Bay and the Delta. 62 Fed. Reg. at 42164. There is no reason that EPA cannot adjust its proposed rule to reflect the available scientific data that may only be available in certain regions of the State, including for example, data relating to mercury bioaccumulation in San Francisco Bay fish. The concept of treating dischargers from different areas fairly should not be applied so as to punish those regional ecosystems where agencies have been more proactive in collecting necessary data. Rather, dischargers should be treated equally stringently where data from one region indicates that uses are threatened by a particular pollutant throughout the State.

CONCLUSION

In conclusion, BayKeeper is very concerned with the proposed rule. The State obviously must have numeric criteria for toxic pollutants. Great strides have been made, especially in the San Francisco Bay area, to reduce the mass of toxic pollutants entering the Bay. The proposed criteria likely will bring to a halt the most innovative programs to reduce toxic pollution. Instead of promoting innovation and driving dischargers' ability to achieve, some day, the penultimate goal of the Clean Water Act to eliminate all discharges of pollution to the Nation's waters, the proposed rule will only perpetuate mediocre toxic pollution control efforts and fail to reverse the ecological damage from toxic contamination, including dangerous levels of contaminants in fish already observed in Bay fish and the continuing decline of aquatic ecosystems around the State.

BayKeeper appreciates this opportunity to express our views on the proposed rule. If you have any questions, please feel free to call me at 1-800--KEEP-BAY.

Response to: CTR-039-009

EPA disagrees with this comment. In 1991, when EPA took action on the first phase of the Enclosed Bays and Estuaries Plan (EBEP), EPA did not disapprove the salt water aquatic life criterion for selenium. Instead, EPA made it clear that use of that criterion in permits issued for the San Francisco Bay and Delta would be unacceptable. This was consistent with the EBEP provision which stated that more stringent objectives and control measures could be applied by the Regional Boards in some estuarine waters. (Letter of November 6, 1991, to W. Don Maughan, Chairman, State Water Resources Control Board, from Daniel W. McGovern Regional Administrator, EPA Region IX.) In December 1992, EPA adopted freshwater aquatic life criterion for the San Francisco Bay Estuary as part of the National Toxics Rule (NTR) because the San Francisco Bay Regional board had not itself specified that it would apply the freshwater criterion, consistent with EPA's November 6, 1991 letter. (57 Fed. Reg. 60898.) This was not the promulgation of a site-specific criterion for the San Francisco Bay and Delta, however. Although the freshwater criterion was the same as the freshwater selenium criterion in the Inland Surface Water Plan (ISWP), it was also EPA's national fresh water selenium criterion. As explained in the Preamble to the final NTR (Id.), EPA simply was unable to adopt site-specific criteria as part of the NTR. The same is true of the CTR.

As noted in footnotes to the CTR selenium criterion, the CTR does not supercede that provision of the NTR (40 CFR 131.36(d)(10)).

Regarding general concerns included in this comment regarding the effect of the CTR on criteria developed for San Francisco Bay, see responses to CTR-016-001 and CTR-002-003.

Comment ID: CTR-040-050

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-24 Site Specific Criteria

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

Attachments? Y

CROSS REFERENCES

Comment: The Preamble to the California Toxics Rule (CTR), and the rules accompanying Economic Analysis (EA), place a great deal of emphasis on the ability of dischargers to use alternative regulatory approaches to comply with CTR criteria if the cost of treatment technology was prohibitively expensive. For example, the EA assumes that, if the estimated annualized cost for removing a pollutant exceeded a cost trigger>(*1) "dischargers would explore the use of alternative regulatory approaches to comply with CTR-based effluent limits." EA at.pg. 4 (emphasis added). Based on this assumption, no treatment cost was estimated for the facility.(*2)

The types of alternative regulatory approaches assumed available for dischargers in California include phased total maximum daily loads (TMDLs), water quality standard variances, site-specific criteria, change in designated use, and alternative mixing zones. EA at pg. 4-5. The following sections will discuss each of EPA's proposed methods for regulatory relief and explain whether or not these methods can truly be used to provide relief from the CTR-based permit limits as anticipated by EPA. It should be noted that the actual language of the rule itself does not mention any of the methods of regulatory relief. Therefore, this analysis will be based solely upon the language contained in the Preamble to the CTR.

Site Specific Criteria

Another one of the avenues of potential regulatory relief discussed in the Preamble to the CTR is the adoption of site-specific water quality criteria. The Preamble, provides that the "State has the discretion to develop site-specific criteria when appropriate e.g., when statewide criteria appear over- or under-protective of designated uses. The Preamble goes on to explain the site-specific criteria adoption process as follows:

Periodically, the State through its RWQCBs will adopt site-specific criteria for priority toxic pollutants within respective Basin Plans. These criteria are intended to be effective throughout the Basin or throughout a designated water body. Under California law, these criteria must be publicly reviewed and approved by the RWQCB, the SWRCB, and the State's Office of Administrative Law (OAL). Once this adoption process is complete, the criteria become State law. These criteria must be submitted to the EPA Regional Administrator for review and approval under CWA section 303. These criteria are usually submitted to EPA as part of a RWQCB Basin Plan Amendment, after the Amendment has been adopted

under the State's process and has become State law. CTR Preamble at pg. 42165.

The Preamble explains that the State of California has recently reviewed and updated all of its RWQCB Basin Plans. All of these Basin Plans, some of which contain site-specific criteria, have completed the State review and adoption process and have been submitted to EPA for review and approval. The key to whether or not these site-specific criteria will provide regulatory relief is when the EPA approval/disapproval occurs. Three different timing scenarios and results are possible:

1. If EPA approves any State-adopted site-specific criteria before promulgation of the final CTR is published, then the EPA Administrator may make a finding in that final rule that it will be unnecessary to promulgate criteria for the approved site-specific pollutants and associated water bodies.
2. EPA disapproves any State-adopted site-specific criteria, the proposed statewide criteria contained in the CTR would apply for those pollutants and associated water bodies instead of the site-specific criteria.
3. However, if EPA promulgates statewide federal criteria as proposed in the CTR, prior to a decision on any State-adopted site-specific criteria, the more stringent of the two criteria would be used for water quality programs. Both federal and State water quality programs must be satisfied, and application of the more stringent of the two criteria would satisfy both. CTR Preamble at pg. 42165.

Thus, the only way less stringent site specific criteria can be used for regulatory relief is if those criteria are approved by EPA prior to the publication of the final CTR. otherwise, either the CTR or the more stringent of the two (CTR vs. site-specific) criteria apply.

One final note regarding site-specific criteria is that the Preamble to the CTR restricts the ability to use native aquatic life as a way to set site-specific criteria. Instead of allowing a discharger to substitute local species from the receiving waters into which it discharges, the Preamble only allows a discharger to supplement the eight specified families of aquatic life required for criteria development with the addition of native species.(*9) It is doubtful whether this requirement will aid dischargers who are seeking regulatory relief.

(*1) This coat trigger is \$200 per toxic pounds-equivalent for a facility under the low-end scenario, and \$500 per toxic pounds-equivalent for a category of dischargers under the high-end scenario. See EA at pg. 4.

(*2) In addition, pollutant load reductions were not calculated or credited for any pollutant for which an alternative regulatory approach was pursued. Id.

(*9) "A minimum data set of eight specified facilities is required for criteria development (details are given in the 1985 Guidelines, page 22). The eight specific families are intended to be representative of a wide spectrum of aquatic life. For this reason it is not necessary that the specific organisms tested be actually present in the water body. States may develop site-specific criteria using native species, provided that the broad spectrum represented by the eight families is maintained. All aquatic organisms and their common uses are meant to be considered, but not necessarily protected, if relevant data are available." CTR Preamble at pg. 42168.

Response to: CTR-040-050

EPA disagrees with this comment. See response to CTR-004-008.

Comment ID: CTR-041-046
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-24 Site Specific Criteria
References:
Attachments? N
CROSS REFERENCES

Comment: The Preamble to the California Toxics Rule (CTR), and the rules accompanying Economic Analysis (EA), place a great deal of emphasis on the ability of dischargers to use alternative regulatory approaches to comply with CTR criteria if the cost of treatment technology was prohibitively expensive. For example, the EA assumes that, if the estimated annualized cost for removing a pollutant exceeded a cost trigger,(*1) "dischargers would explore the use of alternative regulatory approaches to comply with CTR-based effluent limits." EA at.pg. 4(emphasis added). Based on this assumption, no treatment cost was estimated for the facility.(*2)

The types of alternative regulatory approaches assumed available for dischargers in California include phased total maximum daily loads (TMDLs), water quality standard variances, site-specific criteria, change in designated use, and alternative mixing zones. EA at pg. 4-5. The following sections will discuss each of EPA's proposed methods for regulatory relief and explain whether or not these methods can truly be used to provide relief from the CTR-based permit limits as anticipated by EPA. It should be noted that the actual language of the rule itself does not mention any of the methods of regulatory relief. Therefore, this analysis will be based solely upon the language contained in the Preamble to the CTR.

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Another one of the avenues of potential regulatory relief discussed in the Preamble to the CTR is the adoption of site-specific water quality criteria. The Preamble, provides that the "State has the discretion to develop site-specific criteria when appropriate e.g., when statewide criteria appear over- or under-protective of designated uses. The Preamble goes on to explain the site-specific criteria adoption process as follows:

Periodically, the State through its RWQCBs will adopt site-specific criteria for priority toxic pollutants within respective Basin Plans. These criteria are intended to be effective throughout the Basin or throughout a designated water body. Under California law, these criteria must be publicly reviewed and approved by the RWQCB, the SWRCB, and the State's Office of Administrative Law (OAL). Once this adoption process is complete, the criteria become State law. These criteria must be submitted to the EPA Regional Administrator for review and approval under CWA section 303. These criteria are usually submitted to EPA as part of a RWQCB Basin Plan Amendment, after the Amendment has been adopted under the State's process and has become State law. CTR Preamble at pg. 42165.

The Preamble explains that the State of California has recently reviewed and updated all of its RWQCB Basin Plans. All of these Basin Plans, some of which contain site-specific criteria, have completed the State review and adoption process and have been submitted to EPA for review and approval. The key to whether or not these site-specific criteria will provide regulatory relief is when the EPA approval/disapproval occurs. Three different timing scenarios and results are possible:

1. If EPA approves any State-adopted site-specific criteria before promulgation of the final CTR is published, then the EPA Administrator may make a finding in that final rule that it will be unnecessary to promulgate criteria for the approved site-specific pollutants and associated water bodies. 2. EPA disapproves any State-adopted site-specific criteria, the proposed statewide criteria contained in the CTR would apply for those pollutants and associated water bodies instead of the site-specific criteria. 3. However, if EPA promulgates statewide federal criteria as proposed in the CTR, prior to a decision on any State-adopted site-specific criteria, the more stringent of the two criteria would be used for water quality programs. Both federal and State water quality programs must be satisfied, and application of the more stringent of the two criteria would satisfy both. CTR Preamble at pg. 42165.

Thus, the only way less stringent site specific criteria can be used for regulatory relief is if those criteria are approved by EPA prior to the publication of the final CTR. Otherwise, either the CTR or the more stringent of the two (CTR vs. site-specific) criteria apply.

One final note regarding site-specific criteria is that the Preamble to the CTR restricts the ability to use native aquatic life as a way to set site-specific criteria. Instead of allowing a discharger to substitute local species from the receiving waters into which it discharges, the Preamble only allows a discharger to supplement the eight specified families of aquatic life required for criteria development with the addition of native species.(*9) It is doubtful whether this requirement will aid dischargers who are seeking regulatory relief.

(*1) This coat trigger is \$200 per toxic pounds-equivalent for a facility under the low-end scenario, and \$500 per toxic pounds-equivalent for a category of dischargers under the high-end scenario. See EA at pg. 4.

(*2) In addition, pollutant load reductions were not calculated or credited for any pollutant for which an alternative regulatory approach was pursued. Id.

(*9) "A minimum data set of eight specified facilities is required for criteria development (details are given in the 1985 Guidelines, page 22). The eight specific families are intended to be representative of a wide spectrum of aquatic life. For this reason it is not necessary that the specific organisms tested be actually present in the water body. States may develop site-specific criteria using native species, provided that the broad spectrum represented by the eight families is maintained. All aquatic organisms and their common uses are meant to be considered, but not necessarily protected, if relevant data are available." CTR Preamble at pg. 42168.

Response to: CTR-041-046

EPA disagrees with this comment. See response to CTR-004-008.

Comment ID: CTR-043-006a
Comment Author: City of Vacaville
Document Type: Local Government
State of Origin: CA
Represented Org:
Document Date: 09/26/97
Subject Matter Code: C-24 Site Specific Criteria
References:

Attachments? Y

CROSS REFERENCES C-13

Comment: 6. EPA should adopt separate, site-specific human health criteria for Old Alamo Creek based on a 10 (-4) risk level. As previously indicated the City would have to construct costly end-of-pipe controls to comply with the human health criteria for several carcinogens. The subject criteria are based on a cancer risk level of 10 (-6). These controls would not produce a commensurate environmental benefit. At a 10 (-4) risk level, the City's discharge would not cause an in-stream exceedance of these criteria. The City does not believe Old Alamo Creek is heavily fished and therefore criteria based on a 10 (-4) risk level would likely provide greater protection than indicated by the risk level. The City notes that none of these carcinogens were identified in EPA's economic analysis as a significant contributor to baseline cancer risks for recreational anglers consuming freshwater fish in California (see Exhibit 8-9 in EPA's economic analysis).

Response to: CTR-043-006a

EPA disagrees with this commenter's suggestion that separate, site-specific human health criteria be adopted for Old Alamo Creek, based on considerations of costs and benefits. EPA has conducted an analysis of costs and benefits for this rule pursuant to Executive Order 12866 (see discussion in preamble to final rule); however, the criteria themselves are not based on economic considerations. In accordance with 40 CFR 131.11, criteria must be based on sound scientific rationale and must protect the designated use. 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. Economic factors may be considered in designating uses (40 CFR 131.10); however, they may not be used to justify criteria which are not protective of those uses.

That being said, it should nevertheless be understood that EPA does support the State's adoption of site-specific criteria. As explained in the preamble to the proposed CTR, and further discussed in response to CTR-016-002, EPA will work with the State to approve acceptable State-adopted criteria (including site-specific criteria) and to stay the CTR when EPA has approved such State criteria.

With respect to risk level applicable to human health criteria when, as here, EPA establishes a water quality standard, EPA intends in its discretion to use a risk level of 1×10^{-6} , although the State may in its discretion choose another risk level for protection of human health, if the State has appropriately consulted the public. As discussed in responses to CTR-011-001a and CTR-058-001 (Category C-13; Risk Level), EPA follows the risk-level policies of the affected state, when promulgating criteria as regulations.

See also response to CTR-043-006b.

Comment ID: CTR-044-007b

Comment Author: City of Woodland

Document Type: Local Government

State of Origin: CA

Represented Org:

Document Date: 09/26/97

Subject Matter Code: C-24 Site Specific Criteria

References:

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

6. EPA should adopt separate, site-specific human health criteria for Tule Canal based on a 10 (-4) risk level. Based on effluent sampling, the City would have to construct costly end-of-pipe controls to comply with criteria for aldrin (and perhaps other carcinogens) based on a 10 (-6) risk level. These controls would not produce a commensurate environmental benefit. At a 10 (-4) risk level, the City's discharge would not cause an in-stream exceedance of these criteria in Tule Canal. The City does not believe Tule Canal is heavily fished and therefore criteria based on a 10 (-4) risk level would likely provide greater protection than indicated by the risk level. The City notes that aldrin was not identified in EPA's economic analysis as a significant contributor to baseline cancer risks for recreational anglers consuming freshwater fish in California (see Exhibit 8-9 in EPA's economic analysis).

Response to: CTR-044-007b

EPA disagrees with this commenter's suggestion that separate, site-specific human health criteria be adopted for Tule Canal, based on considerations of costs and benefits. EPA has conducted an analysis of costs and benefits for this rule pursuant to Executive Order 12866 (see discussion in preamble to final rule); however, the criteria themselves are not based on economic considerations. In accordance with 40 CFR 131.11, criteria must be based on sound scientific rationale and must protect the designated use. 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. Economic factors may be considered in designating uses (40 CFR 131.10); however, they may not be used to justify criteria which are not protective of those uses.

That being said, it should nevertheless be understood that EPA does support the State's adoption of site-specific criteria. As explained in the preamble to the proposed CTR, and further discussed in response to CTR-016-002, EPA will work with the State to approve acceptable State-adopted criteria (including site-specific criteria) and to stay the CTR when EPA has approved such State criteria.

With respect to risk level applicable to human health criteria when, as here, EPA establishes a water quality standard, EPA intends in its discretion to use a risk level of 1×10^{-6} , although the State may in its discretion choose another risk level for protection of human health, if the State has appropriately consulted the public. As discussed in responses to CTR-011-001a and CTR-058-001 (Category C-13; Risk Level), EPA follows the risk-level policies of the affected state, when promulgating criteria as regulations.

See also response to CTR-044-007a.

Comment ID: CTR-044-041
Comment Author: City of Woodland
Document Type: Local Government
State of Origin: CA
Represented Org:
Document Date: 09/26/97

Subject Matter Code: C-24 Site Specific Criteria

References:

Attachments? N

CROSS REFERENCES

Comment: The Preamble to the California Toxics Rule (CTR), and the rules accompanying Economic Analysis (EA), place a great deal of emphasis on the ability of dischargers to use alternative regulatory approaches to comply with CTR criteria if the cost of treatment technology was prohibitively expensive. For example, the EA assumes that, if the estimated annualized cost for removing a pollutant exceeded a cost trigger,(*1) "dischargers would explore the use of alternative regulatory approaches to comply with CTR-based effluent limits." EA at.pg. 4(emphasis added). Based on this assumption, no treatment cost was estimated for the facility.(*2)

The types of alternative regulatory approaches assumed available for dischargers in California include phased total maximum daily loads (TMDLs), water quality standard variances, site-specific criteria, change in designated use, and alternative mixing zones. EA at pg. 4-5. The following sections will discuss each of EPA's proposed methods for regulatory relief and explain whether or not these methods can truly be used to provide relief from the CTR-based permit limits as anticipated by EPA. It should be noted that the actual language of the rule itself does not mention any of the methods of regulatory relief. Therefore, this analysis will be based solely upon the language contained in the Preamble to the CTR.

Site Specific Criteria

Another one of the avenues of potential regulatory relief discussed in the Preamble to the CTR is the adoption of site-specific water quality criteria. The Preamble, provides that the "State has the discretion to develop site-specific criteria when appropriate e.g., when statewide criteria appear over- or under-protective of designated uses. The Preamble goes on to explain the site-specific criteria adoption process as follows:

Periodically, the State through its RWQCBs will adopt site-specific criteria for priority toxic pollutants within respective Basin Plans. These criteria are intended to be effective throughout the Basin or throughout a designated water body. Under California law, these criteria must be publicly reviewed and approved by the RWQCB, the SWRCB, and the State's Office of Administrative Law (OAL). Once this adoption process is complete, the criteria become State law. These criteria must be submitted to the EPA Regional Administrator for review and approval under CWA section 303. These criteria are usually submitted to EPA as part of a RWQCB Basin Plan Amendment, after the Amendment has been adopted under the State's process and has become State law. CTR Preamble at pg. 42165.

The Preamble explains that the State of California has recently reviewed and updated all of its RWQCB Basin Plans. All of these Basin Plans, some of which contain site-specific criteria, have completed the State review and adoption process and have been submitted to EPA for review and approval. The key to whether or not these site-specific criteria will provide regulatory relief is when the EPA approval/disapproval occurs. Three different timing scenarios and results are possible:

1. If EPA approves any State-adopted site-specific criteria before promulgation of the final CTR is published, then the EPA Administrator may make a finding in that final rule that it will be unnecessary to promulgate criteria for the approved site-specific pollutants and associated water bodies.
2. EPA disapproves any State-adopted site-specific criteria, the proposed statewide criteria contained in the CTR would apply for those pollutants and associated water bodies instead of the site-specific criteria.
- 3.

However, if EPA promulgates statewide federal criteria as proposed in the CTR, prior to a decision on any State-adopted site-specific criteria, the more stringent of the two criteria would be used for water quality programs. Both federal and State water quality programs must be satisfied, and application of the more stringent of the two criteria would satisfy both. CTR Preamble at pg. 42165.

Thus, the only way less stringent site specific criteria can be used for regulatory relief is if those criteria are approved by EPA prior to the publication of the final CTR. Otherwise, either the CTR or the more stringent of the two (CTR vs. site-specific) criteria apply.

One final note regarding site-specific criteria is that the Preamble to the CTR restricts the ability to use native aquatic life as a way to set site-specific criteria. Instead of allowing a discharger to substitute local species from the receiving waters into which it discharges, the Preamble only allows a discharger to supplement the eight specified families of aquatic life required for criteria development with the addition of native species.(*9) It is doubtful whether this requirement will aid dischargers who are seeking regulatory relief.

(*1) This cost trigger is \$200 per toxic pounds-equivalent for a facility under the low-end scenario, and \$500 per toxic pounds-equivalent for a category of dischargers under the high-end scenario. See EA at pg. 4.

(*2) In addition, pollutant load reductions were not calculated or credited for any pollutant for which an alternative regulatory approach was pursued. Id.

(*9) "A minimum data set of eight specified families is required for criteria development (details are given in the 1985 Guidelines, page 22). The eight specific families are intended to be representative of a wide spectrum of aquatic life. For this reason it is not necessary that the specific organisms tested be actually present in the water body. States may develop site-specific criteria using native species, provided that the broad spectrum represented by the eight families is maintained. All aquatic organisms and their common uses are meant to be considered, but not necessarily protected, if relevant data are available." CTR Preamble at pg. 42168.

Response to: CTR-044-041

Comment ID: CTR-050-005a
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-24 Site Specific Criteria
References:
Attachments? N
CROSS REFERENCES G-07

Comment: II. EPA Should Allow Variances and Site-Specific modifications.

Beyond the issue of whether EPA has the authority to issue the proposed rule, there are other significant problems with the proposal. For example, the Agency has made the inexplicable decision not to include provisions that would allow for issuance of variances or site-specific modifications to the criteria. This is

despite the Agency's recognition that a variance procedure is an "important procedure to assist the State in effectively implementing water quality standards." (62 Fed. Reg. at 42185). EPA gives absolutely no explanation for its decision not to allow use of this procedure. Moreover, the Agency concedes that "promulgation of this federal rule removes most of the flexibility available to the State for modifying its standards on a discharger-specific or stream-specific basis. " Instead, an applicant would have to ask EPA to begin a "federal rulemaking on a case-by-case basis to change the federal rule." (62 Fed. Reg. at 42186) EPA makes it quite clear that applicants should not expect any relief from that avenue, because the Agency simply has more important things to do:

Because of the time consuming nature of reviewing such requests, limited federal resources, and the need for the Agency to move into other priority program areas in establishing environmental controls, EPA alerts California and the public that a prompt Agency response is unlikely.

Despite this cavalier dismissal of the need for actually acting on variance and site criteria applications, the Agency does not hesitate to mention those mechanisms in its economic analysis as being available to moderate the impact of the proposed rule. The Agency specifically mentions variances and site-specific criteria when it states that "these implementation procedures can have an effect on how water quality standards, based on today's proposed rule, will impact NPDES permit holders." (62 Fed. Reg. at 42192). In fact, that statement is clearly false, given EPA's decision not to include variance or site-specific criteria procedures in the proposed rule. The Agency should reconsider that decision and insert those provisions.

Response to: CTR-050-005a

EPA disagrees with this comment. We believe that the commenter misunderstood the cautionary language that was part of the proposed rule. The CTR does not preclude the issuance of variances from CTR criteria or future state adoption of site-specific criteria.

Variances would modify applicable CTR criteria for individual dischargers. Site-specific criteria would modify CTR criteria for individual waterbodies. Since the State lacks authority to modify federally promulgated CTR criteria itself (See response to CTR-035-014), EPA must approve individual variances and site-specific criteria and stay the applicable CTR criteria to allow these State modification actions to take effect under the CWA. (As stated in the preamble to the proposed CTR, the State must also adopt a variance policy, and EPA must approve the policy, before the State may issue variances to individual dischargers.) EPA stated in the proposed CTR preamble that when the State has completed its own process for modifying criteria, and EPA approves the State's new or revised criteria, EPA does intend to stay the CTR.

Because there is uncertainty as to how the State will implement CTR criteria in individual permits, EPA's economic analysis of the CTR included a wide range of estimated costs and benefits. The analysis was not based on any certainty that variances and site-specific modifications of criteria would be available to every permittee; on the other hand, the analysis assumed that the State was likely to choose implementation provisions that provide some degree of flexibility or relief to point source dischargers. For a discussion of the approach taken in the economics analysis, see the preamble to the final rule.

Comment ID: CTR-051-001

Comment Author: Cal. RWQCB Central Valley Reg.

Document Type: State Government

State of Origin: CA
Represented Org:
Document Date: 09/26/97
Subject Matter Code: C-24 Site Specific Criteria
References:
Attachments? N

CROSS REFERENCES

Comment: We have reviewed the proposed California Toxics Rule. We have comments about several of the proposed provisions in the Toxics Rule. Many of our concerns are similar to those detailed in the September 25 letter from the Saa, Francisco Bay Regional Water Quality Control Board.

Site Specific Objectives

We are concerned that the language in the proposed Toxics Rule would hamper future Regional Board efforts to establish site specific objectives. EPA cautions California and the public that promulgation of this federal rule removes most of the flexibility available to the State for modifying its standards on a discharger-specific or stream-specific basis. Also, EPA states that they may be unable to review state developed standards in a timely manner. However, the Regional Boards are required and authorized under the Clean Water Act and state law to review and, as appropriate, consider modification of promulgated standards as they apply to specific water bodies within each region as part of the triennial review process. We suggest that the language in the proposed Toxics Rule be amended to encourage, rather than discourage, development of site specific objectives.

Response to: CTR-051-001

EPA disagrees with this comment. We believe that the commenter misunderstood the cautionary language that was part of the proposed rule. The CTR does not preclude state adoption of criteria after the CTR has been promulgated. As EPA stated in the preamble to the proposed CTR, when the State has completed its own process, and EPA approves the State's new or revised criteria, EPA intends to stay the CTR. Similarly, if the State adopts site-specific criteria (including site-specific Basin Plan criteria adopted by Regional Boards which have completed the State review and adoption process), and EPA has approved them based on their individual merits, EPA intends to stay that portion of the CTR that applies more general criteria to the specific site. Each individual stay on a site-specific basis would require federal rulemaking on a case-by-case basis, and generally require more detailed effort on the Agency's part than a statewide stay.

Moreover, it is possible that State-adopted criteria could become effective for CWA purposes within the State even prior to EPA approval or rulemaking, although this would change if a rule that EPA has recently proposed is promulgated as proposed. The "Alaska Rule," 64 Fed.Reg. 37072, July 9, 1999. Until the Alaska Rule goes final, the State could adopt new or revised standards which are more stringent than the CTR, and those standards would be effective for CWA purposes within the state without any EPA action. Moreover, prior to a final Alaska Rule, the State could adopt statewide standards, and if EPA approved those standards and stayed the CTR based on them, then subsequent site-specific criteria would apply within the State when adopted by the State without requiring additional EPA approval or rulemaking. If the Alaska Rule becomes final as proposed, however, regardless of whether the CTR has been stayed, only state-adopted criteria which are more stringent than the otherwise applicable standards could be applied within the State, prior to EPA approval of those standards.

Comment ID: CTR-052-008

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-24 Site Specific Criteria

References: Letter CTR-052 incorporates by reference letters CTR-035 and CTR-054

Attachments? Y

CROSS REFERENCES

Comment: EPA should have considered the CTR specifically as it applies to San Francisco Bay. As noted previously, implementation of the CTR and full compliance by Bay Area POTWs will result in a reduction of between 1-10% of the toxic load on San Francisco Bay. Since 90-99% of the toxic load will still be present from such sources as non-point, riverine, agricultural drainage, acid mines, atmospheric deposition, etc., it is reasonable to conclude that full compliance by POTWs will result in no significant improvement to the Bay. In other words, the benefits will actually approach zero. Annual costs for Bay Area POTWs will range from \$130,000,000 to \$185,000,000 or more. Such an expenditure for essentially no benefit is clearly not in the best interests of the public or the environment. It is, therefore, reasonable to conclude that in its current form, the CTR should exempt San Francisco Bay, or at least exempt POTWs discharging to the Bay. EPA should acknowledge that Bay Area POTWs have had NPDES permits with effluent limitations for toxic pollutants for many years. Exempting POTWs from the CTR would not have any impact on current standards.

Response to: CTR-052-008

EPA disagrees with this comment. EPA did consider the CTR specifically as it applies to San Francisco Bay, and has modified the CTR accordingly. (See response to CTR-016-001.)

EPA acknowledges that a number of Bay Area POTWs have NPDES permits with effluent limitations for toxic pollutants; however, that information does not serve as justification for exempting the Bay, or certain dischargers to the Bay, from the CTR, where it applies. Water quality standards are developed to protect the designated uses of the waters of the United States, and the standards contained in the CTR are EPA's view of the standards necessary to protect designated uses.. The CTR applies to all sources of toxics discharged to water of the Bay (except where EPA-approved San Francisco Bay Basin Plan criteria apply), not merely to publicly owned treatment works (POTWs). These ambient WQS can also assist in the reduction of pollution from non-point sources, through the TMDL process.

For a discussion of EPA's economic analysis for the CTR in general, see the preamble to the final rule.

Comment ID: CTR-052-017

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-24 Site Specific Criteria

References: Letter CTR-052 incorporates by reference letters CTR-035 and CTR-054

Attachments? Y

CROSS REFERENCES

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

Specify in the Preamble that EPA would support a scientifically defensible, reasonably achievable site specific objective (SSO) for copper for San Francisco Bay. The analysis by Larry Walker used data from the San Francisco Bay Regional Monitoring Plan and concludes that a translator of 1.6 should be used to result in a total recoverable concentration of 5.0 ug/L. Note that this value compares favorably with the existing SSO of 4.9 ug/L. Most of the copper attainability issues, including the Authority's, would be resolved by this approach.

Response to: CTR-052-017

EPA disagrees that EPA should specifically express support for a "scientifically defensible, reasonably achievable" (emphasis added) site-specific criterion for copper in San Francisco Bay, using a translator of 1.6. This comment confuses the adoption of appropriate copper criteria with the approval of a translator to implement such criteria. Translators are implementation mechanisms which are not included in the CTR, but may be adopted by the State.

Regarding the achievability of any criterion for any particular discharger, 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. In accordance with 40 CFR 131.11, criteria must be based on sound scientific rationale and must protect the designated use. Economic factors may be considered in designating uses (40 CFR 131.10); however, they may not be used to justify criteria which are not protective of those uses.

That being said, it should nevertheless be understood that EPA supports State adoption of site-specific criteria. As explained in the preamble to the proposed CTR, and further discussed in the response to CTR-016-002, EPA will work with the State to approve acceptable State-adopted criteria (including site-specific criteria) and intends to stay the CTR where such State criteria are in effect. In the meantime, in the absence of such criteria for aquatic life for copper in waters of San Francisco Bay, with salinity greater than 5 ppt, EPA is promulgating criteria based on EPA's section 304(a) national marine water copper aquatic life criterion, which is consistent with the requirements of the CWA. (40 CFR Section 131.11(b).) See also responses to CTR-016-001 and CTR-016-002.

Comment ID: CTR-053-006

Comment Author: Heal the Bay

Document Type: Environmental Group

State of Origin: CA

Represented Org:

Document Date: 09/26/97

Subject Matter Code: C-24 Site Specific Criteria

References: Letter CTR-053 incorporates by reference letter 6 and the comments on Dioxin, copper, and the compliance schedule from letter CTR-002

Attachments? N

CROSS REFERENCES

Comment: Heal the Bay expects EPA to continue their participation and leadership in this process, and to be supportive of any State effort to adopt more stringent numeric criteria for specific pollutants. Thank you for your consideration of these comments.

Response to: CTR-053-006

EPA appreciates this comment which provides general support for the CTR process and for EPA's ongoing efforts to support State water quality standards development.

Comment ID: CTR-054-008b
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-24 Site Specific Criteria
References:
Attachments? Y
CROSS REFERENCES C-02b; E-01c; R; S

Comment: Separate, scientifically defensible, reasonably achievable aquatic life criteria for copper should be adopted for San Francisco Bay, or alternatively EPA should specify in the Preamble implementation policies for copper that will result in reasonable control measures actions. To comply with the Clean Water Act and EPA regulations, EPA is required to consider specific water bodies. To fulfill the spirit of Presidential Executive Order 12866 and the requirements of the Unfunded Mandates Reform Act, EPA is required to evaluate regulatory alternatives based on an analysis of costs and benefits. Based on BADA's analysis of costs and benefits, EPA should either adopt copper criteria that are reasonably achievable or alternatively specify implementation policies that will avoid costly end-of-pipe controls. Potential implementation measures that could be specified include use of the following in calculating effluent limitations: actual dilution based on modeling studies; copper translators; probability of compliance less than 99.9%; and water-effect ratios determined for different segments of the Bay. Unless EPA specifies these or similar implementation policies in the rule, it is possible that the CTR could result in significant costs (\$12 million per year to \$78 million per year) while resulting in minor environmental benefit (a 1% reduction in copper loading to the Bay). In that case, the CTR would violate the Clean Water Act, EPA regulations, Presidential Executive Order 12866, the Unfunded Mandates Reform Act and the Regulatory Flexibility Act. (see the discussion under Item 11 below.)

Response to: CTR-054-008b

EPA disagrees with the commenter's request that EPA either adopt site-specific copper criteria for San Francisco Bay or, in the CTR preamble, specify the use of certain implementation policies for copper.

In support of its request for the adoption of "scientifically defensible, reasonably achievable aquatic life criteria for copper" (emphasis added), the commenter cites its own analysis of costs and benefits. EPA has conducted an analysis of costs and benefits for this rule pursuant to Executive Order 12866 (see discussion in preamble to final rule); however, the criteria themselves are not based on economic

considerations. In accordance with 40 CFR 131.11, criteria must be based on sound scientific rationale and must protect the designated use. 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. Economic factors may be considered in designating uses (40 CFR 131.10); however, they may not be used to justify criteria which are not protective of those uses.

That being said, it should nevertheless be understood that EPA supports the adoption of site-specific criteria by the State. As explained in the preamble to the proposed CTR, and further discussed in the response to CTR-016-002, EPA will work with the State to approve acceptable State-adopted criteria (including site-specific criteria) and intends to stay the CTR when EPA has approved such State criteria. In the meantime, in the absence of such criteria for aquatic life for copper in waters of San Francisco Bay, with salinity greater than 5 ppt, EPA is promulgating criteria based on EPA's section 304(a) national marine water copper aquatic life criterion, which is consistent with the requirements of the CWA. (40 CFR Section 131.11(b).) See also responses to CTR-016-001 and CTR 016 -002.

Regarding the suggestion that EPA specify the use of dilution, metals translators and water effect ratios, or similar implementation provisions, EPA disagrees. With the exception of compliance schedules, the CTR does not include implementation provisions; the CTR is promulgated to add numeric criteria for toxic pollutants where they did not exist. The State may address these issues in a separate implementation plan, which it is currently developing. ("Policy for implementation of Toxics Standards for Inland surface Waters, Enclosed Bays and Estuaries of California", released for public comment, September 11, 1997.)

Finally, regarding the commenter's assertion that the CTR could be inconsistent with Executive Order 12866, the Regulatory Flexibility Act and the Unfunded Mandates Reform Act without further revision (such as suggested by the commenter), see the discussion of EPA's compliance with these requirements in the preamble to the final rule.

See also response to CTR-054-008c.

Comment ID: CTR-054-045
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-24 Site Specific Criteria
References:
Attachments? N
CROSS REFERENCES

Comment: The Preamble to the California Toxics Rule (CTR), and the rules accompanying Economic Analysis (EA), place a great deal of emphasis on the ability of dischargers to use alternative regulatory approaches to comply with CTR criteria if the cost of treatment technology was prohibitively expensive. For example, the EA assumes that, if the estimated annualized cost for removing a pollutant exceeded a cost trigger,(*1) "dischargers would explore the use of alternative regulatory approaches to comply with CTR-based effluent limits." EA at.pg. 4(emphasis added). Based on this assumption, no treatment cost was estimated for the facility.(*2)

The types of alternative regulatory approaches assumed available for dischargers in California include phased total maximum daily loads (TMDLs), water quality standard variances, site-specific criteria, change in designated use, and alternative mixing zones. EA at pg. 4-5. The following sections will discuss each of EPA's proposed methods for regulatory relief and explain whether or not these methods can truly be used to provide relief from the CTR-based permit limits as anticipated by EPA. It should be noted that the actual language of the rule itself does not mention any of the methods of regulatory relief. Therefore, this analysis will be based solely upon the language contained in the Preamble to the CTR.

Site Specific Criteria

Another one of the avenues of potential regulatory relief discussed in the Preamble to the CTR is the adoption of site-specific water quality criteria. The Preamble, provides that the "State has the discretion to develop site-specific criteria when appropriate e.g., when statewide criteria appear over- or under-protective of designated uses. The Preamble goes on to explain the site-specific criteria adoption process as follows:

Periodically, the State through its RWQCBs will adopt site-specific criteria for priority toxic pollutants within respective Basin Plans. These criteria are intended to be effective throughout the Basin or throughout a designated water body. Under California law, these criteria must be publicly reviewed and approved by the RWQCB, the SWRCB, and the State's Office of Administrative Law (OAL). Once this adoption process is complete, the criteria become State law. These criteria must be submitted to the EPA Regional Administrator for review and approval under CWA section 303. These criteria are usually submitted to EPA as part of a RWQCB Basin Plan Amendment, after the Amendment has been adopted under the State's process and has become State law. CTR Preamble at pg. 42165.

The Preamble explains that the State of California has recently reviewed and updated all of its RWQCB Basin Plans. All of these Basin Plans, some of which contain site-specific criteria, have completed the State review and adoption process and have been submitted to EPA for review and approval. The key to whether or not these site-specific criteria will provide regulatory relief is when the EPA approval/disapproval occurs. Three different timing scenarios and results are possible:

1. If EPA approves any State-adopted site-specific criteria before promulgation of the final CTR is published, then the EPA Administrator may make a finding in that final rule that it will be unnecessary to promulgate criteria for the approved site-specific pollutants and associated water bodies.
2. EPA disapproves any State-adopted site-specific criteria, the proposed statewide criteria contained in the CTR would apply for those pollutants and associated water bodies instead of the site-specific criteria.
3. However, if EPA promulgates statewide federal criteria as proposed in the CTR, prior to a decision on any State-adopted site-specific criteria, the more stringent of the two criteria would be used for water quality programs. Both federal and State water quality programs must be satisfied, and application of the more stringent of the two criteria would satisfy both. CTR Preamble at pg. 42165.

Thus, the only way less stringent site specific criteria can be used for regulatory relief is if those criteria are approved by EPA prior to the publication of the final CTR. Otherwise, either the CTR or the more stringent of the two (CTR vs. site-specific) criteria apply.

One final note regarding site-specific criteria is that the Preamble to the CTR restricts the ability to use native aquatic life as a way to set site-specific criteria. Instead of allowing a discharger to substitute local species from the receiving waters into which it discharges, the Preamble only allows a discharger to supplement the eight specified families of aquatic life required for criteria development with the addition

of native species.(*9) It is doubtful whether this requirement will aid dischargers who are seeking regulatory relief.

(*1) This coat trigger is \$200 per toxic pounds-equivalent for a facility under the low-end scenario, and \$500 per toxic pounds-equivalent for a category of dischargers under the high-end scenario. See EA at pg. 4.

(*2) In addition, pollutant load reductions were not calculated or credited for any pollutant for which an alternative regulatory approach was pursued. Id.

(*9) "A minimum data set of eight specified facilities is required for criteria development (details are given in the 1985 Guidelines, page 22). The eight specific families are intended to be representative of a wide spectrum of aquatic life. For this reason it is not necessary that the specific organisms tested be actually present in the water body. States may develop site-specific criteria using native species, provided that the broad spectrum represented by the eight families is maintained. All aquatic organisms and their common uses are meant to be considered, but not necessarily protected, if relevant data are available." CTR Preamble at pg. 42168.

Response to: CTR-054-045

Comment ID: CTR-056-015b

Comment Author: East Bay Municipal Util. Dist.

Document Type: Sewer Authority

State of Origin: CA

Represented Org:

Document Date: 09/22/97

Subject Matter Code: C-24 Site Specific Criteria

References: Letter CTR-056 incorporates by reference letter CTR-054

Attachments? N

CROSS REFERENCES I-01

Comment: Third, regarding the criteria being proposed for adoption in the draft CTR, EBMUD recommends that EPA should:

* Should clearly recognize within the CTR that the existing, approved Basin Plan for the San Francisco Bay includes requirements specifically designed to address wet weather overflows and grants provisions for exemptions where an inordinate burden would be placed on the discharger relative to the beneficial uses protected. It should also be acknowledged through inclusion in the CTR that the requirements and applicable exemptions previously justified and approved by EPA and the State should not be affected by the proposed rule.

Response to: CTR-056-015b

EPA disagrees that the CTR must specifically acknowledge implementation provisions in the San Francisco Bay Basin Plan which are designed to address wet weather overflows. EPA also disagrees with any suggestion that such provisions be included in the CTR itself. The CTR is promulgated to add numeric criteria for priority toxic pollutants where they did not exist. The CTR does not modify existing Basin Plan implementation provisions, which remain in effect if they were duly adopted under State law,

although the application of Basin Plan compliance schedule provisions may be affected by the compliance schedule provisions in the CTR. (EPA notes, however, that wet weather implementation provisions, which were adopted in the San Francisco Bay Regional Board 1995 Basin Plan amendments, have not been approved by EPA.) Although the State cannot use implementation provisions such as variances to modify federal standards, EPA intends to stay applicable CTR criteria if the State adopts its own criteria and EPA has approved them. (See response to CTR-016-002.) EPA is also working with the State and other stakeholders to address issues related to water quality-based permitting in municipal stormwater permits.

See also the response to CTR-016-001.

Comment ID: CTR-057-010c
Comment Author: City of Los Angeles
Document Type: Local Government
State of Origin: CA
Represented Org:
Document Date: 09/26/97
Subject Matter Code: C-24 Site Specific Criteria
References:
Attachments? N
CROSS REFERENCES K-01
G-07

Comment: Implementation

Although the proposed Rule discusses implementation issues such as TMDLs, variances, SSOs, and interim permits, it lacks evidence of support for any of these provisions. We believe that this will have the effect of reducing the State's confidence or perceived authority in granting any of these provisions to individual POTWs. For example, Page 42186 of the CTR lists six criteria that must be used by the State to determine the non-attainability of a water quality standard; we are doubtful that any of these criteria would be strictly applicable to our facilities with respect to lindane and DDT. We believe CTR variance criteria should include economic considerations for specific discharger implementation efforts. Unless the EPA provides more support for these provisions, we fear that the State will either not grant us a legitimate variance or will waiver in its commitment to act at all.

Response to: CTR-057-010c

EPA disagrees that the CTR should revise the variance criteria or provide more support for implementation provisions. The CTR is promulgated to add numeric criteria for toxic pollutants in waters of the U.S. in California where they did not exist. The CTR does not modify existing requirements of 40 CFR Part 131, which applies nationally. Those requirements limit the use of variances to six grounds (the six "criteria" referred to by the commenter), which are merely reiterated in the Preamble to the proposed CTR. (62 Fed.Reg. 42186.) The CTR also does not include its own variance provisions. However, the CTR does not modify existing State implementation provisions (including those in Basin Plans), which remain in effect if they were duly adopted under State law (although the application of Basin Plan compliance schedule provisions may be affected by the compliance schedule provisions in the CTR).

Given the scope of the CTR, the economic considerations proposed by the commenter are not relevant. Under the CWA, EPA cannot base numeric values for ambient water quality criteria on economic considerations, therefore EPA cannot "include economic considerations for specific discharger implementation efforts" in this rule. The State may address the implementation issues identified by the commenter, taking economic considerations into account as consistent with the CWA, in the separate implementation plan, which it is currently developing. EPA notes, however, that use of State implementation provisions such as SSOs and variances would require federal rulemaking to modify CTR criteria affected by such actions. See also the responses to CTR-016-002, and CTR-056-015b.

Comment ID: CTR-057-011

Comment Author: City of Los Angeles

Document Type: Local Government

State of Origin: CA

Represented Org:

Document Date: 09/26/97

Subject Matter Code: C-24 Site Specific Criteria

References:

Attachments? N

CROSS REFERENCES

Comment: Similarly, the proposed Rule provides little support with respect to site-specific objectives. It is not clear, for instance, if a POTW could apply for an SSO once the Rule has been promulgated. The State's Site-Specific Objectives Task Force was adamant that SSOs should be an integral part of a priority-pollutant control plan, yet this philosophy is nowhere in evidence in the CTR. In view of this, we believe that the proposed Rule should specify EPA's intentions to review State-approved SSOs without setting deadlines for SSO submittals. This would allow SSOs to be triggered as needed by events not experienced or anticipated at the present time. We therefore recommend that the EPA add statements into the CTR that provide needed direction for the States in issuing decisions dealing with this any similar implementation options.

Response to: CTR-057-011

EPA disagrees with this comment. We believe that the commenter misunderstood the cautionary language that was part of the proposed rule. The CTR does not preclude state adoption of criteria after the CTR has been promulgated. As EPA stated in the preamble to the proposed CTR, when the State has completed its own process, and EPA approves the State's new or revised criteria, EPA intends to stay the CTR. Similarly, if the State adopts site-specific criteria (including site-specific Basin Plan criteria adopted by Regional Boards which have completed the State review and adoption process), and EPA has approved them based on their individual merits, EPA intends to stay that portion of the CTR that applies more general criteria to the specific site. Each individual stay on a site-specific basis would require federal rulemaking on a case-by-case basis, and generally require more detailed effort on the Agency's part than a statewide stay.

Moreover, it is possible that State-adopted criteria could become effective for CWA purposes within the State even prior to EPA approval or rulemaking, although this would change if a rule that EPA has recently proposed is promulgated as proposed. The "Alaska Rule," 64 Fed.Reg. 37072, July 9, 1999. Until the Alaska Rule goes final, the State could adopt new or revised standards which are more stringent than the CTR, and those standards would be effective for CWA purposes within the state without any

EPA action. Moreover, prior to a final Alaska Rule, the State could adopt statewide standards, and if EPA approved those standards and stayed the CTR based on them, then subsequent site-specific criteria would apply within the State when adopted by the State without requiring additional EPA approval or rulemaking. If the Alaska Rule becomes final as proposed, however, regardless of whether the CTR has been stayed, only state-adopted criteria which are more stringent than the otherwise applicable standards could be applied within the State, prior to EPA approval of those standards.

Comment ID: CTR-060-006

Comment Author: San Diego Gas and Electric

Document Type: Electric Utility

State of Origin: CA

Represented Org:

Document Date: 09/26/97

Subject Matter Code: C-24 Site Specific Criteria

References:

Attachments? N

CROSS REFERENCES

Comment: PROVISIONS SDG&E DOES NOT SUPPORT

As described in the following comments SDG&E does not support the following provisions:

Site specific water quality criteria

The preamble states that, "EPA ... cautions California and the public that promulgation of this federal rule removes most of the flexibility available to the State for modifying its standards on a discharger specific or stream-specific basis" and that, "EPA has not incorporated either ... [variance or site-specific criteria development procedures] in this proposed rulemaking, that EPA has not generally authorized State modifications of federal water quality standards" determining that "these types of modifications will, in general, require federal rulemaking on a case by case basis..." (see 62 Fed. Reg. at 42186, Cols. 2 and 3). Otherwise, the federal criteria must be used over a state approved site-specific criteria where it is the more stringent and promulgated before state approval. (see 62 Fed. Reg. at 42165, Col. 3).

However, EPA clarifies that the proposal criteria are not based on a "pollutant-specific, waterbody-by-water body" evaluations. (see 62 Fed. Reg. at 42166, Col. 3 and at 42617, Col. 1). Analysis was conducted, generally speaking, utilizing eight specific families to represent a wide spectrum of aquatic life and which are not necessarily present in water bodies subject to the proposed criteria. (see 62 Fed. Reg. at 42168, Col. 2). Indeed, EPA acknowledges that the proposed criteria rely upon "several individual factors which make the criteria somewhat overprotective or underprotective." (see 62 Fed. Reg. at 42168, Col. 1).

The proposed rule should incorporate policy and procedures by which site-specific criteria approved by the state (after rule promulgation) may be approved by EPA, though the criteria may be less stringent than in the proposed rule. In addition, the proposed rule should not preclude California from adopting water quality criteria utilizing pollutant-specific, water-body specific or other scientifically sound factors which are less stringent than those in the proposed rule (e.g., beyond WERs) which will prevail when the proposed rule is stayed and ultimately extinguished. Otherwise discharges may be subject to unnecessarily stringent and overprotective effluent limits combined with the application of the

anti-backsliding rule.

Response to: CTR-060-006

EPA disagrees with this comment. We believe that the commenter misunderstood the cautionary language that was part of the proposed rule. The CTR does not preclude state adoption of criteria after the CTR has been promulgated. As EPA stated in the preamble to the proposed CTR, when the State has completed its own process, and EPA approves the State's new or revised criteria, EPA intends to stay the CTR. Similarly, if the State adopts site-specific criteria (including site-specific Basin Plan criteria adopted by Regional Boards which have completed the State review and adoption process), and EPA has approved them based on their individual merits, EPA intends to stay that portion of the CTR that applies more general criteria to the specific site. Each individual stay on a site-specific basis would require federal rulemaking on a case-by-case basis, and generally require more detailed effort on the Agency's part than a statewide stay.

Moreover, it is possible that State-adopted criteria could become effective for CWA purposes within the State even prior to EPA approval or rulemaking, although this would change if a rule that EPA has recently proposed is promulgated as proposed. The "Alaska Rule," 64 Fed.Reg. 37072, July 9, 1999. Until the Alaska Rule goes final, the State could adopt new or revised standards which are more stringent than the CTR, and those standards would be effective for CWA purposes within the state without any EPA action. Moreover, prior to a final Alaska Rule, the State could adopt statewide standards, and if EPA approved those standards and stayed the CTR based on them, then subsequent site-specific criteria would apply within the State when adopted by the State without requiring additional EPA approval or rulemaking. If the Alaska Rule becomes final as proposed, however, regardless of whether the CTR has been stayed, only state-adopted criteria which are more stringent than the otherwise applicable standards could be applied within the State, prior to EPA approval of those standards.

EPA notes that State-adopted criteria (including site-specific criteria) which are less stringent than CTR criteria may be approved by EPA and result in a stay of the CTR if such criteria are based on sound scientific rationale which ensures that designated uses will be protected.

Comment ID: CTR-086-004e

Comment Author: EOA, Inc.

Document Type: Trade Org./Assoc.

State of Origin: CA

Represented Org: California Dent

Document Date: 09/26/97

Subject Matter Code: C-24 Site Specific Criteria

References: Letter CTR-086 incorporates by reference letter CTR-035

Attachments? N

CROSS REFERENCES G-01; C-22; G-09; C-24a; K-03; G-04; G-05; G-02

Comment: Regulatory Flexibility and Relief

CDA supports language in the CTR Preamble that references and endorses recommendations of the State Task Forces including in part the use of.

* reasonable potential analyses * dissolved metals criteria * translators * water effects ratios * site

specific objectives * innovative TMDL processes such as effluent trading * performance based interim limits * chronic and acute mixing zones, and * compliance schedules in NPDES permits.

Response to: CTR-086-004e

EPA appreciates this commenter's support for EPA's ongoing efforts to support State water quality standards development.

Comment ID: CTR-090-018

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-24 Site Specific Criteria

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

Attachments? Y

CROSS REFERENCES

Comment: Site-specific criteria - p 42165. State-Adopted Site-Specific Criteria with EPA Approval - This section requests information on previously adopted site-specific criteria. The Basin Plan for the San Francisco Bay Area includes such criteria in narrative form in Chapter 4 (page 4-15, Wet Weather Overflows) in order to implement the Combined Sewer Overflow Control Policy (50 FR 18688).

Response to: CTR-090-018

EPA disagrees with any suggestion that narrative wet weather overflow provisions in the San Francisco Bay Basin Plan be addressed by the CTR. The CTR is promulgated to add numeric criteria for priority toxic pollutants where they did not exist. The CTR does not modify existing Basin Plan implementation provisions, or other narrative Basin Plan provisions, which remain in effect if they were duly adopted under State law. (EPA notes, however, that such provisions, which were adopted in the San Francisco Bay Regional Board 1995 Basin Plan amendments, have not been approved by EPA.)

In inviting commenters to identify existing State site-specific criteria (page 42165 of the preamble to the proposed CTR, 62 Fed.Reg.42160) EPA intended to seek identification only of numeric site-specific criteria. EPA regrets any misunderstanding which omission of the term "numeric" may have caused, but believes that the preamble to the proposed rule clearly explained the scope of the CTR, such that it would be clear that the CTR would not withhold promulgation of numeric criteria in favor of State narrative provisions, nor would the CTR incorporate existing State narrative criteria provisions.

Comment ID: CTR-092-010

Comment Author: City of San Jose, California

Document Type: Local Government

State of Origin: CA

Represented Org:

Document Date: 09/26/97

Subject Matter Code: C-24 Site Specific Criteria

References: Letter CTR-092 incorporates by reference letter CTR-035

Attachments? Y

CROSS REFERENCES

Comment: State Adoption of Site Specific Criteria

The preamble recognizes that the State has the discretion to develop site-specific criteria when appropriate for example, when statewide criteria appear over or underprotective of designated uses. Under California law, site specific criteria are adopted as amendments to regional Basin Plans, which are then reviewed by the State Water Resources Control Board (SWRCB) and the Office of Administrative Law. These criteria are then submitted to the, EPA Regional Administrator for review and approval under Clean Water Act Section 303. The City recommends that EPA formally adopt a policy in the CTR to continue and support this regulatory process, specifically during the interim period as the State develops its statewide water quality framework. The City also requests that EPA Region IX conduct prompt reviews of all currently submitted site-specific data, together with timely reviews of site-specific data submitted with these comments and any site-specific data submitted in the future. The City has attached its recently completed site-specific water quality investigation for copper in South San Francisco Bay for formal review by Region IX and inclusion in the record of this rulemaking (Attachment 3).

The City also urges EPA to revise language in the preamble limiting the use of the site-specific criteria process after federal promulgation and prior to a decision on any State adopted site-specific criteria. We also urge EPA to revise the statement that the more stringent of the two criteria would be used for water quality programs, in the event of two promulgations. Such language severely limits this regulatory approach, and State flexibility in the development of scientifically defensible site-specific criteria. The City reiterates its recommendation that EPA develop a viable policy which supports site-specific criteria development, that ensures EPA's continued review and oversight process, and that emphasizes scientific defensibility and not the stringency of the value produced.

Response to: CTR-092-010

OEPA disagrees with this comment. We believe that the commenter misunderstood the cautionary language that was part of the proposed rule. The CTR does not preclude state adoption of criteria after the CTR has been promulgated. As EPA stated in the preamble to the proposed CTR, when the State has completed its own process, and EPA approves the State's new or revised criteria, EPA intends to stay the CTR. Similarly, if the State adopts site-specific criteria (including site-specific Basin Plan criteria adopted by Regional Boards which have completed the State review and adoption process), and EPA has approved them based on their individual merits, EPA intends to stay that portion of the CTR that applies more general criteria to the specific site. Each individual stay on a site-specific basis would require federal rulemaking on a case-by-case basis, and generally require more detailed effort on the Agency's part than a statewide stay.

Moreover, it is possible that State-adopted criteria could become effective for CWA purposes within the State even prior to EPA approval or rulemaking, although this would change if a rule that EPA has recently proposed is promulgated as proposed. The "Alaska Rule," 64 Fed.Reg. 37072, July 9, 1999. Until the Alaska Rule goes final, the State could adopt new or revised standards which are more stringent than the CTR, and those standards would be effective for CWA purposes within the state without any EPA action. Moreover, prior to a final Alaska Rule, the State could adopt statewide standards, and if EPA approved those standards and stayed the CTR based on them, then subsequent site-specific criteria

would apply within the State when adopted by the State without requiring additional EPA approval or rulemaking. If the Alaska Rule becomes final as proposed, however, regardless of whether the CTR has been stayed, only state-adopted criteria which are more stringent than the otherwise applicable standards could be applied within the State, prior to EPA approval of those standards.

EPA notes that State-adopted criteria (including site-specific criteria) which are less stringent than CTR criteria may be approved by EPA and result in a stay of the CTR if such criteria are based on sound scientific rationale which ensures that designated uses will be protected.

This commenter also urged EPA to act, prior to finalizing the CTR, to approve or disapprove any State-adopted site-specific criteria which had been submitted to EPA but EPA had not yet acted upon. This has not been possible, due to the focus of resources on the CTR itself. However, in the final CTR, EPA has made revisions to ensure that EPA-approved State-adopted site-specific criteria shall remain in effect and not be superseded by CTR criteria for the same pollutants for those waters of the Bay where such site-specific criteria are currently in effect. See response to CTR-016-001.

Comment ID: CTRH-001-047
Comment Author: Michael Lozeau
Document Type: Public Hearing
State of Origin: CA
Represented Org: S.F. Bay/Delta Keeper
Document Date: 09/17/97
Subject Matter Code: C-24 Site Specific Criteria
References:
Attachments? N
CROSS REFERENCES

Comment: MR. LOZEAU: I'm Michael Lozeau. I'm the executive director of San Francisco Baykeeper and Deltakeeper.

I've done a preliminary review of the rule. But with that in mind, I'm just going to list all our current concerns. I'll start with the simplest perhaps and work my way towards the more complicated ones.

The first thing I noticed in the rule is there's some deference to regional boards, regional board standards that have been issued and approved by EPA. But there's no full listing in the proposed rule, and there's a suggestion that the burden is on the board to come forward and remind EPA of the standards it's already looked at and approved.

I would urge EPA to be proactive about that, so that representatives from regional boards, from all nine regional boards, don't have to make sure that they remind you of the standards that already exist before you perhaps wipe them out with this new rule, especially in the Bay Area where we have a number of standards which have been applied and do exist, which I think would be more appropriate certainly for the Bay Area than a statewide standard.

Response to: CTRH-001-047

EPA believes that it has addressed this comment, particularly with regards to San Francisco Bay. (See responses to CTR-016-001 and CTR 016-002.) EPA approved, State-adopted site-specific criteria for

waterbodies other than San Francisco Bay were not identified in response to the proposed rule, and EPA was unable to obtain a comprehensive listing of such other criteria. For these reasons, EPA has not "promulgated around" any site-specific criteria other than those in San Francisco Bay identified in the final CTR and those discussed in the preamble to the proposed CTR (62 Fed.Reg. 42165-42166), which are also identified in the final CTR. This is consistent with the approach set forth in the Preamble to the proposed CTR. (62 Fed.Reg. 42165.)
