



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 131

[EPA-HQ-OW-2015-0804; FRL-10013-01-OW]

RIN 2040-AG00

Withdrawal of Certain Federal Water Quality Criteria Applicable to Maine.

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The United States Environmental Protection Agency (EPA or Agency) proposes to amend the federal regulations to withdraw human health criteria (HHC) for toxic pollutants applicable to waters in the State of Maine. EPA proposes to take this action because Maine adopted, and EPA approved, HHC that the Agency determined are protective of the designated uses for these waters. EPA is providing an opportunity for public comment on this proposed withdrawal of federally promulgated HHC. The withdrawal would enable Maine to implement its EPA-approved HHC, submitted on April 24, 2020, and approved on June 23, 2020, as applicable criteria for Clean Water Act (CWA or the Act) purposes.

DATES: Comments must be received on or before **[INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: You may send comments, identified by Docket ID No. **EPA-HQ-OW-2015-0804**, by any of the following methods:

- Federal eRulemaking Portal: <https://www.regulations.gov/> (our preferred method). Follow the online instructions for submitting comments at <https://www.regulations.gov>.

- Mail: U.S. Environmental Protection Agency, EPA Docket Center, Office of Water Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- Hand Delivery or Courier (by scheduled appointment only): EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue, NW, Washington, DC 20004. The Docket Center's hours of operations are 8:30 a.m. to 4:30 p.m., Monday through Friday (except Federal Holidays).

Instructions: All submissions received must include the Docket ID No. for this rulemaking.

Comments received may be posted without change to <https://www.regulations.gov/>, including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the "Public Participation" heading of the SUPPLEMENTARY INFORMATION section of this document. Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room are closed to the public, with limited exceptions, to reduce the risk of transmitting COVID-19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via https://www.regulations.gov, as there may be a delay in processing mail and faxes. Hand deliveries and couriers may be received by scheduled appointment only. For further information on EPA Docket Center services and the current status, please visit us online at <https://www.epa.gov/dockets>.

EPA is offering two virtual public hearings so that interested parties may also provide oral comments on this proposed rulemaking. For more details on the public hearings and to register to attend the hearings, please visit <https://www.epa.gov/wqs-tech/water-quality-standards-regulations-maine>. Refer to the SUPPLEMENTARY INFORMATION section below for additional information.

FOR FURTHER INFORMATION CONTACT: Jennifer Brundage, Office of Water,

Standards and Health Protection Division (4305T), Environmental Protection Agency, 1200 Pennsylvania Avenue, NW, Washington, DC 20460; telephone number: (202) 566-1265; email address: brundage.jennifer@epa.gov.

SUPPLEMENTARY INFORMATION: This proposed rule is organized as follows:

- I. Public Participation
 - A. Written Comments
 - B. Virtual Public Hearing
- II. General Information

Does this action apply to me?
- III. Background
 - A. What are the applicable federal statutory and regulatory requirements?
 - B. What are the applicable federal water quality criteria that EPA is proposing to withdraw?
- IV. Statutory and Executive Order Reviews
 - A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review
 - B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs
 - C. Paperwork Reduction Act (PRA)
 - D. Regulatory Flexibility Act (RFA)
 - E. Unfunded Mandates Reform Act (UMRA)
 - F. Executive Order 13132: Federalism
 - G. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

- H. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks
- I. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use
- J. National Technology Transfer and Advancement Act
- K. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

I. Public Participation

A. Written Comments

Submit your comments, identified by Docket ID No. **EPA-HQ-OW-2015-0804**, at <https://www.regulations.gov> (our preferred method), or the other methods identified in the ADDRESSES section. Once submitted, comments cannot be edited or removed from the docket. EPA may publish any comment received to its public docket. Do not submit to EPA's docket at <https://www.regulations.gov> any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>.

EPA is temporarily suspending its Docket Center and Reading Room for public visitors, with limited exceptions, to reduce the risk of transmitting COVID-19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via <https://www.regulations.gov/> as there may be a delay in processing mail and faxes. Hand deliveries or couriers will be received by scheduled appointment only. For further information and updates on EPA Docket Center services, please visit us online at <https://www.epa.gov/dockets>.

EPA continues to carefully and continuously monitor information from the Centers for Disease Control and Prevention (CDC), local area health departments, and our Federal partners so that we can respond rapidly as conditions change regarding COVID-19.

B. Virtual Public Hearing

To register to speak at the virtual hearing, please visit <https://www.epa.gov/wqs-tech/water-quality-standards-regulations-maine> or contact Jennifer Brundage via telephone at (202) 566-1265 or via e-mail at brundage.jennifer@epa.gov.

Each commenter will have three minutes to provide oral testimony. EPA recommends submitting the text of your oral comments as written comments to the rulemaking docket. EPA may ask clarifying questions during the oral presentations but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral comments and supporting information presented at the public hearing.

Please note that any updates made to any aspect of the hearing will be posted online at <https://www.regulations.gov>. While EPA expects the hearing to go forward as set forth above, please monitor our website or contact Jennifer Brundage via telephone at (202) 566-1265 or via

e-mail at brundage.jennifer@epa.gov to determine if there are any updates. EPA does not intend to publish a document in the Federal Register announcing updates.

II. General Information

Does this action apply to me?

This proposed action would serve to withdraw federal HHC that are no longer needed due to EPA's June 23, 2020, approval of corresponding State HHC. Entities discharging in Maine waters may be indirectly affected by this rulemaking. Citizens concerned with water quality in Maine, including members of the federally recognized Indian tribes in Maine, may also be interested in this rulemaking. The State of Maine may be interested in this rulemaking, as after the completion of this rulemaking, Maine's EPA-approved HHC, rather than the federal HHC, will be the applicable water quality standards (WQS) in Maine waters for CWA purposes. If you have questions regarding the applicability of this action to a particular entity, consult the person identified in the preceding FOR FURTHER INFORMATION CONTACT section.

III. Background

A. What are the applicable federal statutory and regulatory requirements?

Consistent with the CWA, EPA's WQS program assigns to states and authorized tribes the primary authority for adopting WQS.¹ After states adopt WQS, they must be submitted to EPA for review and action in accordance with the CWA. The Act authorizes EPA to promulgate federal WQS following EPA's disapproval of state WQS or an Administrator's determination that new or revised WQS are "necessary to meet the requirements of the Act."²

B. What are the applicable federal water quality criteria that EPA is proposing to withdraw?

¹ 33 U.S.C. 1313(a), (c).

² 33 U.S.C. 1313(c)(4).

On December 19, 2016, EPA promulgated federal HHC for 96 toxic pollutants for waters in Indian lands in Maine based on the Agency's 2015 disapproval of corresponding state-established HHC and an Administrator's determination that new or revised WQS were necessary to meet the requirements of the Act. 81 FR 92466 (December 19, 2016). EPA also promulgated a phenol criterion to protect human health from consumption of water plus organisms for waters outside of Indian lands in Maine after disapproving the State's phenol criterion in 2015 because it contained a mathematical error.

EPA's 2015 disapproval of the State's HHC for waters in Indian lands was based on its decision that they were inadequate to protect the sustenance fishing designated uses that EPA interpreted and approved for waters in Indian lands in the same 2015 action. On May 27, 2020, after a thorough review of the applicable provisions of the CWA, implementing regulations and longstanding EPA guidance, EPA withdrew its 2015 interpretation and improper approvals of the alleged sustenance fishing designated uses and corresponding disapprovals of Maine's HHC that flowed from the flawed designated use determinations.³ Also on that date, EPA approved Maine's general fishing designated use for waters in Indian lands without the interpretation that it means "sustenance fishing."⁴

On April 24, 2020, the Maine Department of Environmental Protection (DEP) submitted new and revised WQS in accordance with section 303(c) of the CWA. The new and revised provisions included HHC. On June 23, 2020, EPA approved the State's new and revised HHC as

³ Letter from Dennis Deziel, Regional Administrator, EPA Region 1, to Gerald D. Reid, Commissioner, Maine Department of Environmental Protection, "Re: Withdrawal of Certain of EPA's February 2, 2015 Decisions Concerning Water Quality Standards for Waters in Indian Lands" (May 27, 2020).

⁴ In 2019, Maine adopted, and EPA approved, a sustenance fishing designated use (SFDU) subcategory of its general fishing designated use for certain identified waters where sustenance fishing or increased fish consumption is or may be occurring.

consistent with the requirements of the CWA and applicable federal regulations.⁵ There are two sets of HHC in the State’s newly approved criteria. One set protects the statewide general “fishing” designated use, and the other set protects the State’s new “sustenance fishing” designated use subcategory that applies to specifically identified waters where sustenance fishing is or may be occurring. Between these two sets of HHC, all of the waters covered by EPA’s promulgated federal HHC for toxic pollutants in 2016 are addressed. The new and revised HHC also address all the toxic pollutants for which EPA promulgated federal HHC in 2016. All of EPA’s prior decisions and action letters related to these Agency actions are available in docket ID EPA-HQ-OW-2015-0804 at <https://www.regulations.gov>.

As provided in 40 CFR 131.21(c), federally promulgated WQS that are more stringent than EPA-approved state WQS remain applicable for purposes of the CWA until EPA withdraws the federal standards. EPA’s 2016 federally promulgated HHC are as stringent as or more stringent than the State’s newly approved HHC. Accordingly, EPA is proposing to amend the federal regulations to withdraw those federally promulgated HHC for which the Agency has approved Maine’s corresponding HHC and is providing an opportunity for public comment on this proposed action.

EPA additionally hereby withdraws its 2016 CWA section 303(c)(4)(B) determination (“Administrator’s Determination”) that new or revised WQS are necessary to meet the requirements of the Act. 81 FR 23239, 23243 (April 20, 2016) (“Accordingly, for the waters in Maine where there is a sustenance fishing designated use and Maine’s existing HHC are in effect, EPA hereby determines under CWA section 303(c)(4)(B) that new or revised WQS for

⁵ Letter from Ken Moraff, Water Division Director, EPA Region 1, to Gerald D. Reid, Commissioner, Maine Department of Environmental Protection, “Re: Review and Action on Maine Water Quality Standards, 06-096 Chapter 584” (June 23, 2020).

the protection of human health are necessary to meet the requirements of the CWA for such waters.”). As EPA stated in its Response to Comments document supporting its withdrawal and revision of its 2015 decisions, the Administrator’s Determination was rendered inoperative when EPA withdrew the 2015 sustenance fishing designated use approvals, as the determination was specifically linked to waters covered by and relied entirely on those now-withdrawn designated use approvals.⁶ Because the Administrator’s Determination is now a nullity, EPA withdraws it as a matter of administrative clarity.

EPA’s proposal to withdraw federally promulgated HHC following approval of state corresponding HHC is consistent with the federal and state roles contemplated by the CWA. Consistent with the cooperative federalism structure of the CWA, once EPA approves state WQS addressing the same pollutants for which EPA has promulgated federal WQS, it is incumbent on EPA to withdraw the federal WQS to enable EPA-approved state WQS to become the applicable WQS for CWA purposes. That is what EPA is proposing to do in this proposed rulemaking. This proposal is consistent with EPA’s withdrawal of other federally promulgated WQS following the Agency’s approval of state-adopted WQS.⁷

This action proposes to amend federal regulations to withdraw all federal HHC for waters in Indian lands and the phenol criterion for waters outside of Indian lands promulgated for Maine in December 2016 at 40 CFR 131.43. All other federally promulgated criteria at 40 CFR 131.43 will remain in effect.

⁶ Attachment B, Letter from Dennis Deziel, Regional Administrator, EPA Region 1, to Gerald D. Reid, Commissioner, Maine Department of Environmental Protection, “Re: Withdrawal of Certain of EPA’s February 2, 2015 Decisions Concerning Water Quality Standards for Waters in Indian Lands” (May 27, 2020).

⁷ See e.g., *Withdrawal of Certain Federal Water Quality Criteria Applicable to California: Lead, Chlorodibromomethane, and Dichlorobromomethane*, 83 FR 52163 (October 16, 2018); *Water Quality Standards for the State of Florida’s Lakes and Flowing Waters; Withdrawal*, 79 FR 57447 (September 25, 2014); *Withdrawal of Certain Federal Water Quality Criteria Applicable to California, New Jersey and Puerto Rico*, 78 FR 20252 (April 4, 2013).

IV. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at

<http://www2.epa.gov/laws-regulations/laws-and-executive-orders>.

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This action is not expected to be a regulatory action under Executive Order 13771 because this action is not significant under Executive Order 12866.

C. Paperwork Reduction Act (PRA)

This action does not impose any new information-collection burden under the PRA because it is proposing to administratively withdraw federal requirements that are no longer needed in Maine. It does not include any information collection, reporting, or recordkeeping requirements. The OMB has previously approved the information collection requirements contained in the existing regulations 40 CFR part 131 and has assigned OMB control number 2040-0049.

D. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. Small entities, such as small businesses or small governmental jurisdictions, are not directly regulated by this rule.

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in unfunded federal mandates under the provisions of Title II of the UMRA of 1995, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. As this action proposes to withdraw certain federally promulgated criteria, the action imposes no enforceable duty on any state, local, or tribal governments, or the private sector.

F. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. This rule imposes no regulatory requirements or costs on any state or local governments. Thus, Executive Order 13132 does not apply to this action.

G. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This action has tribal implications. However, it will neither impose substantial direct compliance costs on federally recognized tribal governments, nor preempt tribal law. In the State of Maine, there are four federally recognized Indian tribes represented by five tribal governments. As a result of the unique jurisdictional provisions of the Maine Indian Claims Settlement Act, the state has jurisdiction for setting WQS for all waters in Indian lands in Maine. This rule will have no effect on that jurisdictional arrangement. This rule would affect federally recognized Indian tribes in Maine because it changes the water quality standards applicable to all waters in Indian lands.

EPA initiated consultation with federally recognized tribal officials under EPA's Policy on Consultation and Coordination with Indian tribes early in the process of developing this proposed rule to allow meaningful and timely input into its development. A summary of that

consultation is provided in “Summary of Tribal Consultations Regarding Water Quality Standards Decisions on Remand Applicable to Waters in Indian Lands within Maine,” which is available in the docket for this rulemaking.

H. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks

This rule is not subject to Executive Order 13045, because it is not economically significant as defined in Executive Order 12866, and because the environmental health or safety risks addressed by this action do not present a disproportionate risk to children.

I. Executive Order 13211: Actions that Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

J. National Technology Transfer and Advancement Act

This proposed rulemaking does not involve technical standards.

K. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

EPA concludes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low income populations and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). EPA has previously determined that Maine’s state-adopted and EPA-approved criteria are protective of human health.

List of Subjects in 40 CFR Part 131

Environmental protection, Indians-lands, Intergovernmental relations, Reporting and recordkeeping requirements, Water pollution control.

Andrew Wheeler,
Administrator.

For the reasons set forth in the preamble, EPA proposes to amend 40 CFR part 131 as follows:

PART 131—WATER QUALITY STANDARDS

1. The authority citation for part 131 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

Subpart D—Federally Promulgated Water Quality Standards

§ 131.43 [Amended]

2. Amend § 131.43 by removing paragraphs (a) and (j) and re-designating paragraphs (b) through (i) as paragraphs (a) through (h).

[FR Doc. 2020-18081 Filed: 9/2/2020 8:45 am; Publication Date: 9/3/2020]