



Concise Explanatory Statement WAC 173-201A-240 Toxic Substances – Human Health Criteria

Summary of Rulemaking and Response to Comments

Washington State Department of Ecology
Olympia, Washington

November 2024, Publication 24-10-064

Publication Information

This document is available on the Department of Ecology's website at:
<https://apps.ecology.wa.gov/publications/summarypages/2410064.html>

Contact Information

Water Quality Program

P.O. Box 47600

Olympia, WA 98504-7600

Phone: 360-407-6600

Website: [Washington State Department of Ecology](http://www.ecology.wa.gov)¹

ADA Accessibility

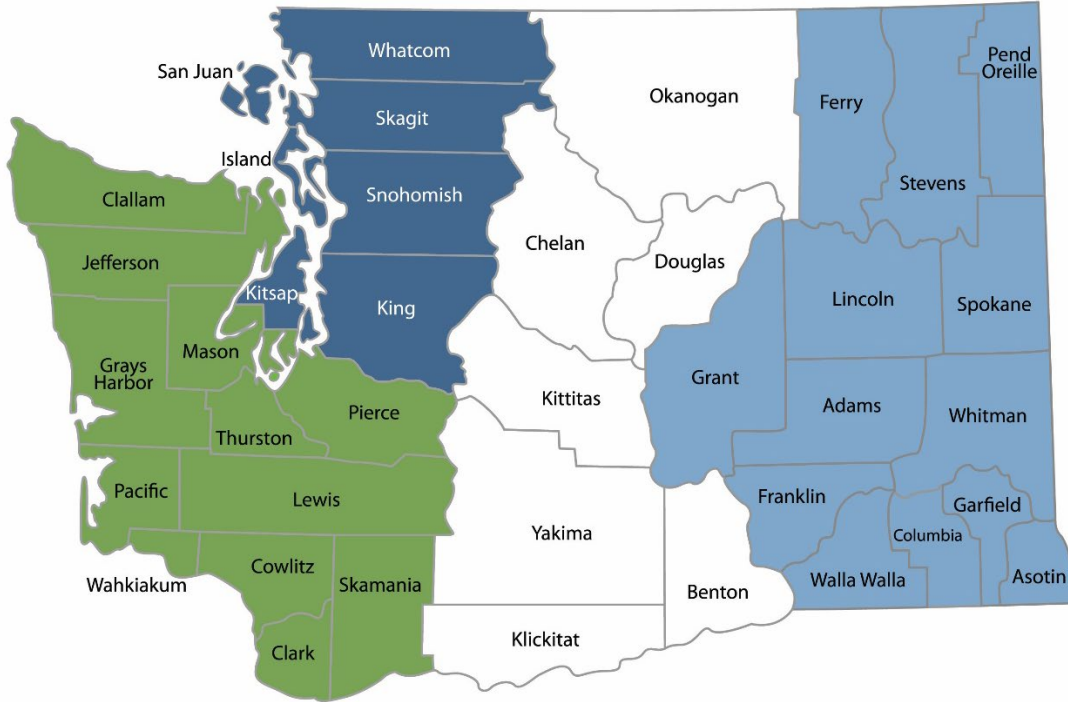
The Department of Ecology is committed to providing people with disabilities access to information and services by meeting or exceeding the requirements of the Americans with Disabilities Act (ADA), Section 504 and 508 of the Rehabilitation Act, and Washington State Policy #188.

To request an ADA accommodation, contact Ecology by phone at 360-407-6600 or email at swqs@ecy.wa.gov. For Washington Relay Service or TTY call 711 or 877-833-6341. Visit Ecology's website for more information.

¹ <http://www.ecology.wa.gov/contact>

Department of Ecology's Regional Offices

Map of Counties Served



Southwest Region 360-407-6300	Northwest Region 206-594-0000	Central Region 509-575-2490	Eastern Region 509-329-3400
---	---	---------------------------------------	---------------------------------------

Region	Counties served	Mailing Address	Phone
Southwest	Clallam, Clark, Cowlitz, Grays Harbor, Jefferson, Mason, Lewis, Pacific, Pierce, Skamania, Thurston, Wahkiakum	PO Box 47775 Olympia, WA 98504	360-407-6300
Northwest	Island, King, Kitsap, San Juan, Skagit, Snohomish, Whatcom	PO Box 330316 Shoreline, WA 98133	206-594-0000
Central	Benton, Chelan, Douglas, Kittitas, Klickitat, Okanogan, Yakima	1250 W Alder St Union Gap, WA 98903	509-575-2490
Eastern	Adams, Asotin, Columbia, Ferry, Franklin, Garfield, Grant, Lincoln, Pend Oreille, Spokane, Stevens, Walla Walla, Whitman	4601 N Monroe Spokane, WA 99205	509-329-3400
Headquarters	Across Washington	PO Box 46700 Olympia, WA 98504	360-407-6000

Concise Explanatory Statement

WAC 173-201A-240 Toxic Substances – Human Health Criteria

Water Quality Program
Washington State Department of Ecology
Olympia, WA

November 2024 | Publication 24-10-064



DEPARTMENT OF
ECOLOGY
State of Washington

This page is purposely left blank

Table of Contents

Introduction.....	8
Reasons for Adopting the Rule	9
Differences Between the Proposed Rule and Adopted Rule.....	10
List of Commenters and Response to Comments.....	12
Organization of comments and responses	12
List of commenters	12
Comments and Responses	14
1. Comments generally supportive of this rulemaking	14
Batts, David	14
Columbia River Inter-Tribal Fish Commission	14
Columbia Riverkeeper	15
Confederated Tribes and Bands of the Yakama Nation.....	16
Confederated Tribes of the Umatilla Indian Reservation	16
Lower Elwha Klallam Tribe, Port Gamble S’Klallam Tribe, and Puyallup Tribe of Indians	17
Makah Indian Tribe.....	19
Northwest Indian Fisheries Commission	19
Quinault Indian Nation	20
Washington Conservation Action and Puget Soundkeeper	21
2. Comments generally unsupportive of this rulemaking.....	22
Association of Washington Business.....	22
City of Spokane	23
City of Tacoma	24
Western States Petroleum Association	24
3. Comments on costs and compliance concerns.....	26
Association of Washington Business.....	26
City of Spokane	27
City of Tacoma	29
Washington States Petroleum Association	29
4. Comments on the rulemaking process.....	31
Association of Washington Business.....	31
5. Comments on environmental impacts and the State Environmental Policy Act (SEPA).....	34
Association of Washington Business.....	34
City of Tacoma	34
Makah Indian Tribe.....	35
6. Comments on Environmental Justice	36
Association of Washington Business.....	36
City of Tacoma	36
Quinault Indian Nation	38
Washington Conservation Action and Puget Soundkeeper	38
7. Comments related to errors found in the rule proposal or clarifications	40
U.S. EPA, Region 10	40
8. Comments related to updating the human health criteria or associated footnotes.....	43
Association of Washington Business.....	43
Batts, David	44

Byrne, James	44
Loehr, Lincoln	45
Lower Elwha Klallam Tribe, Port Gamble S’Klallam Tribe, and Puyallup Tribe of Indians	45
Washington Conservation Action and Puget Soundkeeper	46
9. Comments unrelated to this rulemaking	47
Weiskotten, Bruce	47
Appendix A: Citation List.....	48

Introduction

The purpose of a Concise Explanatory Statement is to:

- Meet the Administrative Procedure Act (APA) requirements for agencies to prepare a Concise Explanatory Statement (RCW 34.05.325).
- Provide reasons for adopting the rule.
- Describe any differences between the proposed rule and the adopted rule.
- Provide Ecology’s response to public comments.

This Concise Explanatory Statement provides information on The Washington State Department of Ecology’s (Ecology) rule adoption for:

Title:	Water Quality Standards for Surface Waters of the State of Washington
WAC Chapter(s):	173-201A
Adopted date:	Nov. 27, 2024
Effective date:	Dec. 28, 2024

To see more information related to this rulemaking or other Ecology rulemakings please visit our website: <https://ecology.wa.gov/About-us/How-we-operate/Laws-rules-rulemaking>.

Reasons for Adopting the Rule

Washington adopted major revisions to the state water quality standards human health criteria in 2016 and submitted the adopted rule to the Environmental Protection Agency (EPA) for review and approval. After review, the EPA disapproved some of Washington's adopted human health criteria on the basis that some criteria did not adequately protect designated uses or were not scientifically defensible. Following that action, EPA then promulgated human health criteria for Washington under 40 Code of Federal Regulations (CFR) § 131.45, Revision of certain Federal water quality criteria applicable to Washington.

However, between 2016 and 2022, the human health criteria in effect for Washington have changed from the federal criteria to the state criteria, then back again to the federal criteria following challenges from businesses and from Ecology. This series of reversals has created uncertainty for the regulatory community and those who rely on clean water.

Since 2016, Ecology has sought to provide durability in the standards that the state is required to implement in Clean Water Act regulatory programs, which include water quality permits, assessing impaired waters, and developing water clean up plans. In addition, we have received ongoing questions and confusion regarding which criteria apply to Washington's waters and how to find the federal criteria that apply. This rule fixes that issue. Ecology is also adopting this rule in response to requests from Tribes and the public to prioritize adopting the federal human health criteria for Washington into state rule.

Washington state law gives Ecology authority and responsibility to protect the quality of Washington waters and implement federal Clean Water Act programs. This authority and responsibility, with regard to water quality standards, can be found in the Revised Code of Washington (RCW) Water Pollution Control Act: RCW 90.48.030, RCW 90.48.035, and RCW 90.48.260(1).

Differences Between the Proposed Rule and Adopted Rule

RCW 34.05.325(6)(a)(ii) requires Ecology to describe the differences between the text of the proposed rule as published in the Washington State Register and the text of the rule as adopted, other than editing changes, stating the reasons for the differences.

There are some differences between the proposed rule filed on September 17, 2024, and the adopted rule filed on November 27, 2024. Ecology made these changes for all or some of the following reasons:

- In response to comments we received.
- To ensure clarity and consistency.
- To meet the intent of the authorizing statute.

The following content describes the changes and Ecology’s reasons for making them.

We incorrectly transcribed the existing federal criteria for Washington in our draft rule for the following pollutants. We have corrected the criteria so they correctly reflect the federal criteria for Washington under 40 CFR § 131.45, Revision of certain Federal water quality criteria applicable to Washington.

1,3-Dichloropropene

- Water & Organisms: ~~0.24~~ 0.22 µg/L
- Organisms Only: ~~2.0~~ 1.2 µg/L

Butylbenzyl Phthalate

- Water & Organisms: ~~0.000022~~ 0.013 µg/L
- Organisms Only: ~~0.000022~~ 0.013 µg/L

Chlorodibromomethane

- Water & Organisms: ~~0.060~~ 0.60 µg/L

Hexachloroethane

- Water & Organisms: ~~0.20~~ 0.02 µg/L
- Organisms Only: ~~0.20~~ 0.02 µg/L

We have removed the following footnotes

- We removed footnote D since this footnote references mercury criteria which is now reflected as methylmercury, and so is no longer relevant
- We have removed footnote F for Vinyl Chloride because this footnote incorrectly listed the cancer slope factor to derive the “Water & Organism” criterion, and is not needed.

Other changes:

We have corrected the CAS number for Bis(2-Chloro-1- Methylethyl) Ether in the adopted rule language.

List of Commenters and Response to Comments

Organization of comments and responses

We accepted comments on the proposed rule from September 17, 2024, to October 25, 2024. During this 39-day comment period, we accepted comments by mail, through our online comment form, and verbally at a public hearing that was held via webinar.

Comments are organized by the following topics, and then by commenter in alphabetical order.

1. Comments generally supportive of this rulemaking
2. Comments generally unsupportive of this rulemaking
3. Comments on costs and compliance concerns
4. Comments on the rulemaking process
5. Comments on environmental impacts and the State Environmental Policy Act (SEPA)
6. Comments on Environmental Justice
7. Comments related to errors found in the rule proposal
8. Comments related to updating the human health criteria and associated footnotes
9. Comments unrelated to this rulemaking

We received 18 comment submissions on this rulemaking. Some of the comment submissions covered multiple topics. We have listed comments by individual commenter, giving a verbatim excerpt of the comment followed by a response. You can see the original comments we received on our [online public comments website](#).² Comments are available through this page until two years after the rule adoption date. We did not receive oral testimony on this rulemaking.

List of commenters

Commenters are listed in Table 1 below in alphabetical order by individual's last name or by affiliation. Comment topics are identified by the section and comment number as they are listed in the following section, Comments and Ecology Responses.

Commenter Name or Affiliation	Comment code
Association of Washington Business	2.1, 2.2, 3.1, 4.1, 4.2, 4.3, 4.4, 5.1, 6.1, 8.1
Batts, David	1.1, 8.2
Byrne, James	8.3
City of Spokane	2.3, 3.2, 3.3

² <https://wq.ecology.commentinput.com/comment/extra?id=PYcJ7i5sk>

Commenter Name or Affiliation	Comment code
City of Tacoma	2.4, 3.4, 5.2, 6.2
Columbia River Inter-Tribal Fish Commission	1.2
Columbia Riverkeeper	1.3
Confederated Tribes and Bands of the Yakama Nation	1.4
Confederated Tribes of the Umatilla Indian Reservation	1.5
Loehr, Lincoln	8.4
Lower Elwha Klallam Tribe, Port Gamble S'Klallam Tribe, and Puyallup Tribe of Indians	1.6, 8.5
Makah Indian Tribe	1.9
Northwest Indian Fisheries Commission	1.10
Quinault Indian Nation	1.11, 1.12
U.S. EPA, Region 10	6.4
Washington Conservation Action and Puget Soundkeeper (comment submitted together)	1.13, 6.5
Western States Petroleum Association	2.5
Weiskotten, Bruce	9.1

Comments and Responses

1. Comments generally supportive of this rulemaking

Batts, David

Comment 1.1

I am in favor of the proposed rule content...with the following additional notes:

I maintain that human health criteria should be based on and reflect what's acceptably low toxicity - usually considered to be the cancer risk level of one case in a million, although some other biological effects (e.g., teratogenicity) may be relevant for some pollutants; and accurate consumption rates must factor into establishment of those criteria. Effluent treatability and economics may factor in how the Department of Ecology addresses criteria exceedances, but should not be factors in determination of safe concentrations.

Response to comment 1.1

Thank you for your comment. The Clean Water Act and federal regulations require that water quality criteria must reflect sound science and be set to protect designated uses of a waterbody, such as for swimming and eating fish. While the state is also required to analyze economic impacts to the regulated community when updating the water quality standards, criteria values are exclusively developed to protect designated uses.

If a state adopts water quality criteria that are not shown to protect designated uses, EPA may disapprove and set protective values for the state.

Columbia River Inter-Tribal Fish Commission

Comment 1.2

[Columbia River Inter-Tribal Fish Commission] CRITFC supports Washington's formal adoption of the existing federal human health criteria for state water quality standards. This action will continue to protect people, particularly those who eat fish and shellfish and drink untreated water, from experiencing long-term health effects of pollution in rivers, lakes, and marine water in Washington.

The Washington Department of Ecology is proposing to formally adopt the existing federal water pollution limits intended to protect human health. These standards are calculated using a tribal-based fish consumption rate of 175 g/day and a cancer risk level equal to one-in-one-million, consistent with Oregon's human health criteria parameters. We appreciate that Ecology initiated this rulemaking at the rule proposal phase and support its adoption in November 2024.

Response to comment 1.2

Thank you for your comment.

Comments generally supportive of this rulemaking

Columbia Riverkeeper

Comment 1.3

For the following reasons, Columbia Riverkeeper supports Ecology's proposal to adopt the EPA's federal water quality human health criteria.

In the Columbia River Basin, contaminants like cancer-causing polychlorinated biphenyls (PCBs) are a large concern. In addition to being a toxin, PCBs are bioaccumulative in both humans and other species. Resident salmon and steelhead that live their entire lives in the Columbia River are generally more exposed to contaminants than those salmon and steelhead that live part of their lives in the ocean. The risk associated with consuming Columbia River salmon depends largely on the amount that you eat. For Tribal communities that eat more locally-caught fish than other populations and those that rely on subsistence fishing, this puts them at a higher risk. Adopting these federal standards, calculated using a science-backed, Tribal-based fish consumption rate of 175 g/day and a cancer risk level equal to one-in-one-million, is a necessary step to protect both the most vulnerable populations and all people consuming locally-caught fish and shellfish from Washington waters.

Further, this change will better streamline regulatory processes and provide more clarity. With the adoption of the federal standards, Washington and EPA requirements will be aligned. This adoption minimizes the possibility of confusion over the governing standards and will hopefully result in reduced pollution in the years to come.

In conclusion, Columbia Riverkeeper strongly supports the State of Washington swiftly adopting the federal standards for water quality human health criteria. Instating protective human health criteria is long overdue. Failure to adopt human health criteria based on an accurate fish consumption rate is a failure to promulgate water quality standards that are compliant with the Clean Water Act. If finalized, these laws will lead to less toxic pollution for Washington's water bodies and fish.

Response to comment 1.3

Thank you for your comment. We would also like to note that Washington's 2016 state-adopted human health criteria for PCB's are based on a fish consumption rate of 175 grams per day, which is consistent with the federally promulgated criteria for PCBs. The discrepancy in Washington's 2016 state-adopted human health criteria for PCB's and EPA's promulgated criteria for Washington is based on the difference in the cancer risk level used by the state (i.e., 2.3×10^{-5}) and EPA (i.e., 1×10^{-6}).

Comments generally supportive of this rulemaking

Confederated Tribes and Bands of the Yakama Nation

Comment 1.4

Yakama Nation supports Washington's efforts to enhance the protection of people who consume fish and shellfish and drink untreated water from Washington's surface waters through the proposed adoption of the Human Health Criteria pollution limits on toxic substances. These pollution limits are calculated using a tribal-based fish consumption rate of 175 grams per day (g/d) and a cancer risk level equal to one-in-one-million. While this is more protective than the former consumption rate of 6.5 g/day, it is also a compromise because it is far less than what tribal members consume. We appreciate that Ecology initiated this rulemaking and support its adoption in November 2024.

Response to comment 1.4

Thank you for your comment. We would like to note that Washington's 2016 state-adopted human health criteria are based on a fish consumption rate of 175 grams per day, which is consistent with the federally promulgated criteria (except for arsenic, which EPA promulgated from the 1992 National Toxics Rule). That said, Ecology will provide future opportunities for Tribes to provide feedback on the water quality standards during our Triennial Review process. We expect to begin the next Triennial Review in early 2025. During this review, we welcome feedback on projects that Ecology should take on between 2025 and 2027. This process will also include an evaluation of our current water quality criteria compared to the criteria EPA has recommended for the protection of aquatic life and human health in surface waters as required by Section 304(a) of the Clean Water Act.

We also welcome information from Tribes related to the protection of Tribal Reserved Rights during Ecology's Triennial Review.

Confederated Tribes of the Umatilla Indian Reservation

Comment 1.5

The [Confederated Tribes of the Umatilla Indian Reservation Department of Natural Resources] CTUIR DNR supports the formal adoption by Washington of the existing Federal Human Health Criteria for State Water Quality Standards. WDOE's proposed criteria and standards to protect human health would use a Fish Consumption Rate (FCR) of 175 grams/day, based on tribal fish consumption patterns and studies, and a cancer risk level of one-in-one-million (10⁻⁶), both of which would be consistent with Oregon's criteria and standards.

As we have noted for decades, throughout this process and that in Oregon and other states, 175 grams/day is a compromise figure—the bare-minimum that should be considered for purposes of standard-setting. In reality there are significant numbers of tribal people who may consume substantially more than that amount. Furthermore, and more broadly, for the CTUIR and its members, toxic contaminants in fish from human-generated toxic substances in water profoundly endanger tribal members and tribal communities and represent an unacceptable, critical infringement of our rights under the Treaty of 1855.

Comments generally supportive of this rulemaking

... Finally, the CTUIR DNR appreciates that WDOE is “starting this rulemaking at the rule proposal phase, which opens the formal public comment period . . . because this proposed rule adopts, without change, federal regulations.” Litigation has stalled and complicated efforts to better protect State water quality through improved, more rigorous standards, and adopting this rule as soon as possible is appropriate.

Response to comment 1.5

Thank you for your comments. Ecology will provide future opportunities for Tribes to provide feedback on the water quality standards during our Triennial Review process. We expect to begin the next Triennial Review in early 2025. During this review, we welcome feedback on projects that Ecology should take on between 2025 and 2027. This process will also include an evaluation of our current water quality criteria compared to the criteria EPA has recommended for the protection of aquatic life and human health in surface waters as required by Section 304(a) of the Clean Water Act.

We also welcome information from Tribes related to the protection of Tribal Reserved Rights during Ecology’s Triennial Review.

Lower Elwha Klallam Tribe, Port Gamble S’Klallam Tribe, and Puyallup Tribe of Indians

Comment 1.6

Protective toxics criteria are essential to the health of our Tribes’ members and their ability to safely engage in Treaty-protected fishing activities of the utmost cultural, spiritual, and economic importance. As Ecology is aware, the Tribes fought for protective HHC for Washington waters for decades, and for many years, Ecology and the Tribes were at odds over the HHC. In recent years, however, the Tribes have been heartened by Ecology’s persistent commitment to implement and defend the more protective federal HHC, including its efforts to uphold the federal HHC in two separate federal court lawsuits. At this point though, the Tribes believe that the best approach is for the State to adopt the federal standards into its own administrative code, which will allow the State to continue to protect the health and safety of Washingtonians now and in the future. As Ecology indicates in its notice of proposed rulemaking, adopting the current federal human health criteria into state law will “provide durability and regulatory certainty.” The Tribes support these goals. The back and forth of litigation and the political whims of changing administrations is disruptive to the agency and its efforts to implement the HHC, harmful to Washington’s citizenry which benefits from protective water quality standards, and resource intensive for the State and the Tribes. The Tribes appreciate Ecology’s efforts to bring certainty and finality to this long chapter.

As Ecology indicates, “[t]he state-adopted human health criteria that were disapproved by EPA are not being implemented in state regulatory programs” and instead Ecology has been implementing the federally promulgated criteria, so there will be no changes to what is currently occurring in terms of regulation as a result of this rule and no environmental or economic impacts from the proposed rule. Nonetheless, it is confusing for the disapproved state standards to still be in the WAC and for the applicable standards to exist only in federal

Comments generally supportive of this rulemaking

regulations at 40 C.F.R. § 131.45. The proposed rule will improve transparency and reduce uncertainty for members of the public attempting to understand what HHC apply in Washington waters. It will also make clear once and for all that the State of Washington will not go back to the less protective 2016 state human health criteria that EPA disapproved.

Comment 1.7

The Tribes also support Ecology's adoption of the federal HHC into state law because the federal HHC addressed the problem caused by Ecology's prior use of bioconcentration factors (BCFs) instead of EPA's default recommended bioaccumulation factors (BAFs) or state-specific BAFs to calculate the HHC, which was "inconsistent with sound scientific rationale on the bioaccumulation of pollutants." 87 Fed. Reg. at 19,052-53; 87 Fed. Reg. at 69,186. While we appreciate that in some cases the use of BCFs may be necessary to provide an approximation of pollutant uptake in aquatic organisms, Ecology had the data needed to develop State-specific BAFs (if it chose to do so) and EPA's updated national recommend default BAFs available to it. Instead, in 2016, Ecology chose outdated, unprotective BCFs developed prior to the national recommended BAFs. The result was HHC that would allow pollutant concentrations in fish at levels that would be far from protective of fish consumers' health, even the health of those who consume extremely small amounts of fish. See, e.g., Attachment D at 22-23. The Tribes agreed with EPA that Washington's justifications for its use of BCFs were not "risk management" decisions, and that while states have latitude to make risk management decisions in developing WQS, that discretion does not allow states to make decisions that are not consistent with EPA's regulations, including the requirement that criteria be based on sound scientific rationale. See also Attachment D at 20-21; Attachment E. Because the federal HHC address these serious concerns, the Tribes support Ecology's proposed rule to remove the problematic disapproved state standards and adopt the federal HHC in their place.

Comment 1.8

Finally, the Tribes support Ecology's rule because it will formally adopt the federal HHC for PCBs into state code. In 2016, all the HHC that Ecology submitted to EPA for approval employed a cancer risk level (CRL) of one in a million (1×10^{-6}), except for the criteria for PCBs. For that single pollutant, Ecology used a CRL of 2.3×10^{-5} (approximately 1 in 43,478). The Tribes will not mince words on this. It was obvious that Ecology took pains to ensure the final PCB criteria it adopted was no more stringent than the earlier National Toxic Rule's PCB criteria of $0.00017 \mu\text{g/L}$. See 87 Fed. Reg. at 19,054. To accomplish this (and still apply the 175 g/day FCR and other required inputs), rather than treat the CRL as an input to the HHC equation, the State instead calculated the CRL after selecting the final result it—or industrial dischargers—wanted (i.e., $0.00017 \mu\text{g/L}$). *Id.* at 19,053-54. This is how the State arrived at the previously unheard of CRL of 2.3×10^{-5} . *Id.* In other words, the State reverse-engineered the CRL, and the State's PCB criteria therefore lacked scientific integrity. EPA's rejection of that results-oriented approach and determination that new PCB criteria were necessary was compelled by the Clean Water Act. 33 U.S.C. §1313(c)(4)(B); 40 C.F.R. §§ 131.11(a), 131.22(b); Final Rule RTC, AR-1112, 25-26, 49, 50. The Tribes therefore support Ecology's proposal to adopt the federal criteria for PCBs, which rely on a CRL of one in a million, into state code.

Comments generally supportive of this rulemaking

Response to Comments 1.6, 1.7 and 1.8

Thank you for your comments.

Makah Indian Tribe

Comment 1.9

The Makah Tribe has been an active participant in developing the Tribal consumption rate and human health criteria for more than a decade. We pushed hard for standards like those that were eventually imposed by the United States in 2016.

We are pleased that since 2016, Ecology has moved to supporting and implementing more stringent criteria. Over the past years, the Tribe has worked with Ecology and the Attorney General's Office to fight attempted rollbacks of water quality standards and support reestablishing those standards. While this has been a successful effort, it is also a tremendous waste of resources and delay in moving toward lower pollution and less contaminated seafood.

We support adopting the standards in State law, so that State and Federal standards are consistent and there is less opportunity for wasteful process going back and forth between federal administrations.

As highlighted above, safe and healthy waters are vital to the livelihoods of our tribal members. We recognize that by implementing this rule the State will be in compliance with federal criteria. These standards are based on sound science and protect the designated uses of Washington's waters. Implementing more stringent water quality standards prioritizes the fishing communities in Washington and protects generations to come.

The State of Washington is bound to comply with the Treaty of Neah Bay as supreme federal law, has a government-to-government relationship with the Tribe, and has consultation obligations pursuant to the Centennial Accords and other commitments. However, we suggest that the rules be adopted solely based on the State's obligations under the Clean Water Act, without reliance on the Tribe's Treaty rights or other legal rights and privileges. The Clean Water Act independently requires protection of subsistence fishers, including Tribal members.

Response to Comment 1.9

Thank you for your comment.

Northwest Indian Fisheries Commission

Comment 1.10

[T]he NWIFC and its member tribes have long advocated for these changes and we support this efficient and targeted rule-making process Ecology has undertaken as part of the work necessary to incorporate these criteria into the state's own standards.

We support Ecology's use of the 175 grams per day consumption rate and the 70-year life expectancy to calculate the criteria for these toxins. By adopting these criteria, Ecology is

Comments generally supportive of this rulemaking

integrating best available science and is responding to greater protection for tribal and non-tribal communities that consume large amounts of finfish and shellfish from a plethora of toxic pollutants that are, unfortunately, ubiquitous in many of the waterways where tribal treaty resources are harvested. Additionally, updating the criteria removes any potential confusion caused to those unaware that state criteria has been superseded by more stringent federal criteria.

Response to comment 1.10

Thank you for your comments.

Quinault Indian Nation

Comment 1.11

The Nation believes that formally adopting the federal HHC into state rule is important for several reasons. First, the federal HHC are designed to protect human health, particularly for those who consume fish and shellfish, from the harmful effects of toxic substances in the State's waters. Due to toxic contamination, Washington's waters are blanketed by fish advisories warning the public not to eat—or to severely reduce consumption of—fish from the State's waters in order to avoid cancer and other diseases. For there to be any hope of improving the condition of these waters and mitigating the risk of harm to Washington's fish-eating residents, it is critical that state rule set strict parameters with respect to the water pollution limits. For example, the Polychlorinated Biphenyls (PCB) criteria set forth in the federal HHC proposed for adoption into state rule are significantly more protective of people who eat large quantities of fish and shellfish, such as the Nation's Members, than the previous state rule criteria. PCBs are toxic chemicals known to cause cancer and have serious health consequences for human immune, reproductive, nervous and endocrine systems. PCBs are found throughout Puget Sound, and fish consumption is the major pathway for human exposure to PCBs, which bioaccumulate in fish tissue. For example, Puget Sound Chinook salmon fillets have been found to be almost three times more contaminated with PCBs than fillets of Chinook salmon from other Pacific west coast areas. Adopting the federal water pollution limits into state law will help to ensure that the Nation's Members—and all other people consuming fish from Washington's waters—remain able to safely consume fish and shellfish.

Comment 1.12

Another reason the State should adopt the federal HHC into state rule is that aligning the state and federal standards will streamline regulatory processes and provide greater clarity for permitted dischargers. Over the last approximately eight years, there have been a number of shifts in the application of federal water pollution laws to Washington State. In 2016, EPA published the final rule for HHC applicable to Washington, which EPA indicated was to ensure that the criteria were set at levels adequate to protect Washington residents, including tribes, from exposure to toxic pollutants. The final rule both approved certain HHC submitted by the State and disapproved certain HHC submitted by the State, thereby promulgating federal replacement criteria for the disapproved HHC. In 2019, upon petition by certain industry actors, the EPA agreed to reconsider the rule and entirely reversed course—

Comments generally supportive of this rulemaking

approving all but two of Washington’s original criteria. Then again, in April 2022, EPA again changed positions, determining that revised HHC were necessary for Washington and proposing new standards for Washington waters to replace the criteria submitted by Washington in 2016 and approved by EPA in 2019. In short, these changes have been confusing, based on inconsistent logic, and subject to a number of challenges. Aligning the federal and state HHC by adopting the federal water pollution criteria into state rule will help promote more effective implementation of water quality protections and reduce the potential for confusion and conflicting requirements. It will also provide long-term stability and regulatory certainty for these critical health protections and will help ensure that the Nation’s waters are protected from the adverse impacts of pollution for years to come.

Response to comments 1.11 and 1.12

Thank you for your comment.

Washington Conservation Action and Puget Soundkeeper

Comment 1.13

We agree that adopting the federal human health criteria into state rule provides regulatory certainty for Clean Water Act programs already in place in Washington and appreciate that Ecology is taking this step.

Response to comment 1.13

Thank you for your comment.

2. Comments generally unresponsive of this rulemaking

Association of Washington Business

Comment 2.1

Ecology has already incorporated EPA’s HHWQC by reference, so this rulemaking is unnecessary.

Ecology states in the subject CR 102 that this rulemaking is exempt from significant legislative rulemaking requirements because it is merely incorporating federal standards by reference. Ecology did not take this approach in a recent rulemaking to issue Aquatic Life Toxic Criteria adopted certified on September 11, 2024. In that rulemaking Ecology added to Table 240 in WAC 173-201A-240 footnote H, which provides: “Human health criteria applicable for Clean Water Act purposes in the state of Washington are contained in 40 C.F.R. 131.45 and effective as of December 19, 2022 (87 FR 69183).” Ecology added footnote H to each of the human health criteria that was disapproved and replaced by the EPA rule. Ecology has failed to explain why this rulemaking is necessary where the state water quality standards already acknowledge EPA criteria by reference.

Ecology’s opaque reference to “durability and regulatory certainty” suggests that Ecology’s true motivation may be to attempt to moot a pending federal case challenging EPA’s water quality standards. If that is Ecology’s purpose, it is improper.

Response to Comment 2.1

Ecology is conducting this rulemaking in response to the uncertainty created at the federal level as to which human health criteria are in effect for Washington. Between 2016 and 2022, the human health criteria in place for Washington changed three times – a result of two subsequent reversals of EPA’s actions on Washington’s state-adopted human health criteria. This uncertainty creates significant challenges to implementing our Clean Water Act work, and uncertainty for the regulated community and for communities that rely on clean water. One of the goals of this rulemaking is to restore certainty for the state to implement human health criteria through its Clean Water Act programs.

Ecology also initiated this rulemaking in response to formal comments from Tribes and the public during the Aquatic Life Toxics Criteria rulemaking that Ecology should adopt the federal criteria for Washington into state rule, rather than just reference them through a footnote. We received comments that the reference to the federal criteria for Washington through the added footnote did not resolve the durability issue nor did it provide clarity by removing criteria not in effect.

Finally, the recently adopted Aquatic Life Toxic Criteria were required to go through the full rulemaking process under the Administrative Procedure Act (RCW 34.05) because it included material changes to criteria. This is not the case for the HHC which is merely adopting federal criteria set specifically for Washington State and already in use for Clean Water Act programs.

Comments generally unresponsive of this rulemaking

Comment 2.2

Ecology has attempted no reasoned explanation for preferring the federal criteria to Ecology's own 2016 criteria.

Response to comment 2.2

Ecology must implement the human health criteria that are promulgated and/or approved by EPA for application in Clean Water Act programs, including permits issued to point sources discharging to waters of the United States. Ecology does not have discretion to implement in Clean Water Act programs the human health criteria Ecology adopted in 2016 that were disapproved by EPA. Ecology does have the discretion to adopt federally promulgated regulations without change into state law. Ecology is exercising that discretion through this rulemaking for two reasons: (1) To provide clarity by removing criteria not in effect and replacing those criteria with the criteria applicable for Clean Water Act program actions; and (2) To restore regulatory certainty for Ecology, for Washington's regulated community, and for communities in Washington that rely on clean water.

City of Spokane

Comment 2.3

Of particular concern in this rulemaking is the [Human Health Water Quality Criteria (HHWQC)] for Total Polychlorinated Biphenyls (PCBs). We believe the 2016 HHWQC adopted by Washington State strikes a more appropriate balance of managing discharges and still protecting human health within the State. On December 27, 2015, the Washington State Department of Ecology (Ecology) explained, in detail, the science and policy supporting the State's current HHWQC for PCBs of 170 ppq. EPA promulgated a PCB HHWQS for Washington of 7 ppq on December 28, 2015, which superseded the State's HHWQC of 170 ppq. EPA then reconsidered and approved the State's PCB HHWQS of 170 ppq on May 10, 2019. EPA then reinstated the 7 ppq standard for PCBs on, November 18, 2022. Against this backdrop, it is obvious that at the federal level there is uncertainty about what the right PCB standard should be for Washington State.

Response to 2.3

Ecology must comply with the human health criteria that are approved by EPA for application in Clean Water Act programs, including for water quality permits. Ecology does not have the discretion to implement state-adopted human health criteria that were disapproved by EPA, including the criteria for polychlorinated biphenyls (PCBs). The series of reversals related to EPA's promulgation of human health criteria for Washington has created uncertainty for Ecology, for the regulated community, and for communities that rely on clean water. One of the goals of this rulemaking is to restore certainty for Ecology, the regulated community, and communities that rely on clean water regarding implementation of human health criteria through Washington Clean Water Act program actions.

Comments generally unresponsive of this rulemaking

City of Tacoma

Comment 2.4

The City of Tacoma respectfully requests that Ecology withdraw the proposed rule and only proceed with this action under the significant legislative rulemaking requirements under RCW 34.05.328.

Response to comment 2.4

Thank you for your comment. The State Administrative Procedure Act (Revised Code of Washington [RCW] 34.05) notes the procedures established for “significant legislative rules” does not apply to “[r]ules adopting or incorporating by reference without material change federal statutes or regulations...if the material adopted or incorporated regulates the same subject matter and conduct as the adopting or incorporating rule” (RCW 34.05.328(5)(b)(iii)). This rulemaking establishes standards that we are already required to implement in Clean Water Act programs, including for water quality permits. Ecology followed the Administrative Procedure Act for rulemakings that meet the conditions of this exception. These federal criteria are already in place and being implemented in Washington as required under the Clean Water Act.

Western States Petroleum Association

Comment 2.5

On November 15, 2022, USEPA announced a final rule to reestablish federal HHC for water bodies in the State of Washington. Subsequently, litigation has been ongoing regarding the USEPA’s 2022 revisions to Washington’s HHC. The central issue involves the USEPA’s reinterpretation of the Clean Water Act (CWA), and its subsequent rulemaking, which legal experts have argued overreaches USEPA’s statutory authority and imposes unrealistic standards based on speculative assumptions about fish consumption rates and pollutant exposure.

While Ecology has consistently implemented the federal criteria, per USEPA directives, the ongoing legal battle places the regulatory framework under significant scrutiny. The outcome of the litigation could result in substantial changes to the current criteria, potentially invalidating or altering the standards that Ecology is preparing to adopt. Implementing rules now, while key aspects of USEPA’s rulemaking are in dispute, risks introducing regulatory uncertainty that could burden both Ecology and the regulated community with potential revisions in the near future.

One of Ecology’s stated objectives in adopting the federal HHC into state law is to provide “durability and regulatory certainty” for these pollution limits. We strongly agree that regulatory certainty is critical for businesses and communities alike. However, proceeding with rule adoption under the cloud of ongoing litigation undermines this goal. If the federal courts overturn or modify USEPA’s rule, Ecology will face the difficult and costly task of revisiting and potentially rewriting the state standards.

WSPA suggests that it may be prudent for Ecology to wait until these federal legal challenges are resolved before finalizing any changes to state water quality standards.

Response to comment 2.5

Thank you for your comment. Ecology disagrees with the suggestion that it would be prudent to wait for the legal challenges to EPA's 2022 rulemaking to be resolved before finalizing this rulemaking. Since 2022, following the second reversal of EPA's action on Washington's human health criteria, we have heard from Tribes and the public that Ecology should prioritize a rulemaking to adopt into state rule the federal human health criteria for Washington. We began a rulemaking in September 2024 as the earliest time we could file a notice of proposed rule for updates to WAC 173-201A-240, following our completion of the Aquatic Life Toxics Criteria rulemaking that updated the same section of the water quality standards. Ecology cannot speculate on the outcome of current litigation, but we can prioritize actions that will introduce certainty for the protection of human health in our water quality standards.

Further, the federal human health criteria for Washington in 40 CFR §131.45 covers 146 criteria for 75 pollutants and applies statewide. The legal challenge to EPA's 2022 rulemaking focuses primarily, if not exclusively, on the human health criteria for Polychlorinated Biphenols (PCBs), which is just one of the many human health criteria that we are adopting into state law to provide certainty for our regulated community in the wake of the series of reversals by EPA on those criteria.

3. Comments on costs and compliance concerns

Association of Washington Business

Comment 3.1

The proposed criteria are unmeasurable, unattainable, and therefore unreasonable.

The 7 ppq PCB criterion is so small that modern technology cannot even reliably detect or measure the pollutant at that concentration. EPA’s most recently approved, state-of-the-art method for measuring PCBs to determine compliance with an NPDES permit “has an average analytical quantitation limit for each PCB congener of approximately 2,000 [ppq], which is a substantial improvement over the current regulatory method,” but “well above” EPA’s criterion. 87 Fed. Reg. at 69,195–96 (describing Method 1628). The “current regulatory method” can reliably quantify PCB concentrations only at 500,000 ppq and greater. See 40 C.F.R. § 136.3. Even extremely sensitive analytical methods (which are not approved by EPA to measure NPDES compliance) come nowhere close to reliably measuring 7 ppq—at best, at 1,000 ppq (Method 8082A) or 100 ppq (Method 1668C).

Even if the measurement methods were up to the task, 7 ppq is not achievable. As the City of Spokane explained, “[t]he City does not believe 7 ppq will ever be realistically achieved in the Spokane River or in other water bodies across the State” because “PCBs continue to be introduced into the environment under the Toxic Substances Control Act” at a concentration limit “7 billion times less restrictive than the proposed WQS.” Spokane Letter 2 (emphasis added). And in a public presentation to stakeholders, Washington’s Department of Ecology has effectively recognized the same: no existing technology can achieve 7 ppq PCBs.

Workshop on PCB Variances for Spokane River Dischargers 83 (Nov. 14, 2019), https://www.ezview.wa.gov/Portals/_1962/Documents/SpokaneRiverCleanWater/VarianceWorkshopshopAll.pdf.

Commentators incorporate by reference comments submitted in response to EPA’s 2021 proposed rule. See Attachment D at 56-60.

Response to comment 3.1

Under the federal Clean Water Act, water quality criteria must be based on sound science and are set to protect the designated uses of a waterbody, such as swimming and consuming fish. Water quality criteria can’t be adjusted based on what is measurable or attainable. That said, the EPA has stated that when human health criteria are set below a detectable limit, a discharger is considered in compliance with the numeric effluent limits in their permits when recording a nondetectable measurement using an acceptable compliance detection method. Further, other tools are available to address cases where those criteria are not measurable or immediately achievable, such as water quality variances and compliance schedules.

Ecology is committed to our continued work with the City of Spokane and other dischargers to the Spokane River to find a path forward to comply with the water quality standards. Without this rulemaking, the limits for PCBs for all Clean Water Act programs remain at 7 ppq.

We acknowledge the comments incorporated by reference. However, Ecology is adopting without change federally promulgated human health criteria for Washington. We are not considering recalculating the human health criteria at this time.

Ecology will provide future opportunities for the public and Tribes to provide feedback on the water quality standards during our Triennial Review process. We expect to begin the next Triennial Review in early 2025. During this review, we welcome feedback on projects that Ecology should undertake between 2025 and 2027. This process will also include an evaluation of our current water quality criteria compared to the criteria EPA has recommended for the protection of aquatic life and human health in surface waters as required by Section 304(a) of the Clean Water Act.

City of Spokane

Comment 3.2

The HHWQC for PCBs of 7 ppq is not achievable nor feasible with any currently available treatment technology. The City has one of the most advanced treatment systems in the state and nation; our current advanced tertiary membrane system is very effective at removing PCBs. However, even with PCB removal rates greater than 99%, meeting the 7 ppq standard has not been possible. One issue is that available testing methodology simply is not accurate enough to quantify PCBs at these extremely low levels. It is imprudent to promulgate HHWQC that cannot reliably be measured. Adopting criteria with no clear path to compliance is a recipe for failure for regulators and the regulated community alike.

The City continues to see the use of permitting tools such as HHWQC variances as potential options to address the challenges with treating PCBs. The City duly completed a variance application for PCBs in early 2019, at the request of Ecology. Ecology underwent rulemaking to pursue the use of variances in the Spokane River watershed, but paused the rulemaking before finalizing a decision, creating further uncertainty for the City and its ratepayers. Given Ecology's reluctance to take action on the City's prior application for a variance, the City is left with few options. Ecology should decide how it intends to move forward with variances on the Spokane River, prior to codifying the proposed updates to the HHWQC. Regardless of what happens with this rulemaking, with a PCB TMDL being finalized soon for the Spokane River by the EPA (with wasteload allocations currently set at 1.3 pg/L), the City will need a path forward to address these unachievable standards.

Response to Comment 3.2

Under the federal Clean Water Act, water quality criteria must be based on sound science and are set to protect the designated uses of a waterbody, such as swimming and consuming fish. Water quality criteria can't be adjusted based on what is measurable or attainable. That said, other tools are available to address cases where those criteria are not measurable or immediately achievable, such as water quality variances and compliance schedules.

Ecology paused the five Spokane River discharger NPDES applications for variances for the 7 parts per quadrillion (ppq) PCB criteria (water and organism and organism only criteria) following EPA's 2020 action that reversed their disapproval of the 2016 state-adopted criteria

of 170 ppq for PCBs. This reversal, which was in effect between 2020 and 2022, put into place for permits the PCB limit of 170 ppq.

The need for a variance is dependent on compliance with numeric effluent limits. The EPA has stated that when human health criteria are set below a detectable limit, a discharger is considered in compliance with the numeric effluent limits in their permits when recording a nondetectable measurement using an acceptable compliance detection method.

Ecology is committed to our continued work with the City of Spokane and other dischargers to the Spokane River to find a path forward to comply with the water quality standards. Currently, the water quality permits for the five Spokane River dischargers have been appealed, and the EPA is finalizing the PCB TMDL for the Spokane River. We remain committed to working with the City of Spokane as these issues come to resolution. Without this rulemaking, the limits for PCBs for all Clean Water Act programs remain at 7 ppq.

Comment 3.3

The City does not believe 7 ppq for PCBs will be realistically achieved in the Spokane River or in other water bodies across the State in the foreseeable future. PCBs continue to be introduced into the environment under the Toxic Substances Control Act (TSCA). TSCA currently allows up to 50 ppm of PCBs to be contained in products. This is 7 billion times less restrictive than the proposed HHWQC. Additionally, the State of Washington's Model Toxics Control ACT (MTCA) regulates cleanup sites at much less stringent levels than the current or proposed PCB WQC. The PCB cleanup level for groundwater is 100 ppt and for unrestricted land use soils is 1 ppm (WAC 173-340-900); 14 thousand and 140 million times less restrictive than the proposed HHWQC of 7 ppq, respectively. These inconsistencies within EPA and Ecology regulations need to be resolved before promulgating a new HHWQC for PCBs.

Response to comment 3.3

Under the federal Clean Water Act, water quality criteria must be based on sound science and are set to protect the designated uses of a waterbody, such as swimming and consuming fish. Water quality criteria can't be adjusted based on what is measurable or attainable. That said, the EPA has stated that when human health criteria are set below a detectable limit, a discharger is considered in compliance with the numeric effluent limits in their permits when recording a nondetectable measurement using an acceptable compliance detection method. Further, other tools are available to address cases where those criteria are not measurable or immediately achievable, such as water quality variances and compliance schedules.

We understand the confusion that can arise with different levels of protection against the harms of toxic substances through different programs, and for different targets (such as water, contaminated soil, or consumer products). Surface water quality standards are set specifically to protect human health and aquatic life. Human health criteria, specifically, are set to protect people who eat fish or shellfish, or drink untreated water, from the harmful effects of toxic substances and account for exposure to a chemical over a lifetime (i.e., 70 years). Limits for human health criteria are commonly more stringent than for example, soil cleanup levels, because of the direct path of exposure (eating or drinking).

Comments on costs and compliance concerns

We also agree that the continued presence of PCBs in consumer products is an ongoing issue. To that end, in 2023, we petitioned EPA to lower the allowable PCB limits in consumer products. That petition was denied, but we continue to seek solutions to reduce the introduction of these dangerous chemicals in the environment.

City of Tacoma

Comment 3.4

The lack of cost-benefit analysis is especially problematic for Ecology's proposed polychlorinated biphenyl (PCB) criterion, as most wastewater treatment plants (WWTPs) and receiving waters in Washington exceed the EPA criterion. It appears that compliance with the proposed PCB criterion will potentially require adoption of tertiary wastewater treatment systems. However, it is doubtful that current technology even exists to achieve said standard. Ecology cannot adopt this standard without an implementation plan that allows it to assess the cost and impact of additional treatment on overburdened communities. Additionally, there is a need for integrated planning to understand the scope and timing of implementing tertiary treatment and how it may or may not address multiple regulatory requirements, including nutrients and emerging contaminants of concern. Moving to this level of treatment will require significant investments in capital and operating expenses with corresponding impacts on higher utility rates as well as impacts on the ability of our wastewater utility to maintain and expand wastewater treatment within our service area.

Response to comment 3.4

Thank you for your comment. Without this rulemaking, permitted dischargers in Washington still must comply with the human health criteria that are approved by EPA. Those criteria include those that are currently required by EPA under 40 CFR §131.45, Revision of certain Federal water quality criteria applicable to Washington. Without this rulemaking, those criteria remain in force. Since we are adopting without any changes the federal human health criteria for Washington that are already in effect for Clean Water Act regulatory programs such as NPDES permits, this rulemaking is exempt from completing analyses required under the Regulatory Fairness Act (Revised Code of Washington [RCW] 19.85), including a cost-benefit analysis.

Ecology is committed to continuing our work with permitted dischargers in implementing the criteria that were in effect from 2016-2020 and have been in effect again since 2022.

Washington States Petroleum Association

Comment 3.5

WSPA believes that any regulatory change must be both based in sound science and be achievable in practice. As highlighted by the recent challenges, the HHC revisions (particularly the fish consumption rate and exposure assumptions) create standards that experts in the field believe are unattainable given the current technological and economic landscape. These standards could have far-reaching implications, especially for industries that are vital to the state's economy, such as energy, manufacturing, and agriculture. WSPA

remains committed to supporting robust, science-based environmental protections that strike the right balance between human health and economic sustainability.

Response to comment 3.5

We appreciate the concerns shared by the commenter. We would like to note that even Washington's disapproved 2016 state-adopted human health criteria for PCB's is based on a fish consumption rate of 175 grams per day, which is consistent with the federally promulgated criteria for PCBs.

Under the federal Clean Water Act, water quality criteria must be based on sound science and are set to protect the designated uses of a waterbody, such as swimming and consuming fish. Water quality criteria can't be adjusted based on what is measurable or attainable. That said, the EPA has stated that when human health criteria are set below a detectable limit, a discharger is considered in compliance with the numeric effluent limits in their permits when recording a nondetectable measurement using an acceptable compliance detection method. Further, other tools are available to address cases where those criteria are not measurable or achievable, such as water quality variances and compliance schedules.

Ecology is committed to continuing our work with permitted dischargers in implementing the criteria that have been in effect from 2016-2020 and again since 2022.

4. Comments on the rulemaking process

Association of Washington Business

Comment 4.1

In 2016, Ecology made a risk management decision to derive human health criteria for carcinogens based on a risk factor of 1×10^{-6} for all parameters except Polychlorinated Biphenyls (PCBs) which was set at a specific level of 4×10^{-5} . See WAC 173-201A-240, Table 240, footnotes B and E. It is the prerogative of the State to make these risk management decisions. Ecology's proposed rulemaking to supplant its prior risk management decision with EPA's uniform risk factor of 1×10^{-6} is a substantive change to the state water quality standards and goes beyond incorporating or adopting a federal standard by reference. This action is subject to significant legislative rulemaking requirements.

Under section 34.05.328(5)(c)(iii), a "significant legislative rule" is defined as follows.

A "significant legislative rule" is a rule other than a procedural or interpretive rule that (A) adopts substantive provisions of law pursuant to delegated legislative authority, the violation of which subjects a violator of such rule to a penalty or sanction; (B) establishes, alters, or revokes any qualification or standard for the issuance, suspension, or revocation of a license or permit; or (C) adopts a new, or makes significant amendments to, a policy or regulatory program.

Given that the rule adopts substantive provisions of law, revokes and then establishes standards that would be used for permits and reflects new and significant amendments to Ecology's water quality standards, the proposed rule is a significant legislative rule. The State's last official regulatory word on human health criteria was the 2016 rule. Here, Ecology purports to remove those standards and adopt new ones without any explanation of the reasons for changing its view about each of the inputs and resulting criteria from the conclusions it reached in 2016. It is not enough to say the State is compelled to adopt EPA's standards without change—that is not correct. The State could adopt different standards and submit them for EPA approval, and EPA must approve them if they are based on sound science and adequately protect the designated uses, based on the record, even if they differ from the federal rule.

Response to comment 4.1

The State Administrative Procedure Act states that the procedures established for "significant legislative rules" does not apply to "[r]ules adopting or incorporating by reference without material change federal statutes or regulations...if the material adopted or incorporated regulates the same subject matter and conduct as the adopting or incorporating rule" (RCW 34.05.328(5)(b)(iii)). This rulemaking does not establish standards that we are not already required to implement in Clean Water Act programs, such as for water quality permits. Ecology followed the Administrative Procedure Act for rulemakings that meet the conditions of this exception.

Since 2017, Ecology has been clear in the agency's dissatisfaction with EPA's decision to reconsider their disapproval of Washington's human health criteria through formal public comments to EPA. We have committed to working with the regulated community to

implement the criteria put in place for Washington by EPA in 2016, implemented those criteria from 2016-2020, and have once again been implementing those criteria since 2022.

Ecology agrees that the state is not compelled to adopt the federal human health criteria for Washington. However, Washington is compelled to implement only those water quality standards that have been approved by EPA. Given the uncertainty caused by multiple changes to the federal human health criteria in force for Washington, Ecology is undertaking this rulemaking now to instill certainty and clarity back into these water quality protections.

Comment 4.2

[T]he EPA criteria are subject to ongoing litigation, and if the EPA criteria were to be vacated or remanded, there would be no legal basis for this proceeding under RCW 34.05.310(4)(c).

Response to Comment 4.2

Ecology cannot speculate on the outcome of current litigation. At the time of filing both the notice of rule proposal (CR-102) and notice of rule adoption (CR-103), the human health criteria under 40 CFR §131.45, Revision of certain Federal water quality criteria applicable to Washington, are still in effect. As such, Ecology has a legal basis to adopt rulemakings following the procedures under the Administrative Procedure Act at RCW 34.05.310(4)(c) and 34.05.328(5)(b)(iii).

Comment 4.3

Ecology may not finalize an Environmental Justice Assessment or conduct SEPA review without undertaking a cost-benefit analysis and an implementation plan.

Ecology has failed to conduct the requisite cost-benefit analysis required by RCW 34.05.328 (10(d) and (3) of the State APA. A responsible consideration of the rule's costs would reveal a significant burden on the regulated community that is not justified by any corresponding public benefit. This is particularly the case for the PCB criterion that Ecology proposes to adopt as a state standard. Most wastewater treatment plants and receiving waters in Washington exceed the PCB criterion. There is no evidence that any current technology exists that can achieve the EPA PCB criterion. The level of treatment required as a result of this rule is likely to result in substantial new construction of costly wastewater treatment facilities and significant increases in wastewater utility costs and corresponding utility rates and The commentators have previously submitted information on the high cost of treatment to attain the EPA human health criteria, see, e.g., Attachment C, yet neither EPA nor Ecology has quantified and justified the costs of the criteria that Ecology proposes to adopt.

Response to Comment 4.3

Under the Administrative Procedure Act at 34.05.328(5)(b)(iii), Ecology is exempt from conducting a cost-benefit analysis and other analyses required by the Regulatory Fairness Act (RCW 19.85), because we are adopting without change federal statutes or regulations.

Under the federal Clean Water Act, water quality criteria must be based on sound science and are set to protect the designated uses of a waterbody, such as swimming and consuming fish.

Comments on the rulemaking process

Water quality criteria can't be adjusted based on what is measurable or attainable. That said, the EPA has stated that when human health criteria are set below a detectable limit, a discharger is considered in compliance with the numeric effluent limits in their permits when recording a nondetectable measurement using an acceptable compliance detection method.

Further, other tools are available to address cases where those criteria are not measurable or immediately achievable, such as water quality variances and compliance schedules.

Comment 4.4

Likewise, neither EPA nor Ecology has provided an implementation plan for the proposed criteria. Ecology cannot reasonably adopt this standard without an implementation plan that allows it to mitigate the cost and impact of additional treatment on burdened communities.

Response to comment 4.4

Ecology has published a [rule implementation plan](#)³ with the rule adoption.

Also, these criteria are already in place under federal rules and being implemented in Washington. Ecology is committed to continuing our work with the regulated community in implementing the criteria that were in effect from 2016-2020 and have been in effect again since 2022.

³ <https://apps.ecology.wa.gov/publications/summarypages/2410064.html>

5. Comments on environmental impacts and the State Environmental Policy Act (SEPA)

Association of Washington Business

Comment 5.1

Ecology is also constrained in conducting review under the State Environmental Policy Act (SEPA) without an implementation plan. The SEPA checklist published with the proposed rule is illusory without an implementation plan. Ecology has no basis for determining the absence of significant environmental and human health impact without some understanding of how it will be implemented and the resulting costs and benefits.

Response to comment 5.1

We disagree. The SEPA checklist and determination is provided for the public to review during the public comment period. We have provided a [final rule implementation plan](#) with our notice of rule adoption consistent with the timing for doing so in RCW 34.05.328.

The Environmental Checklist requires Ecology to assess the potential negative environmental impacts of a proposed actions. We have indicated in the SEPA Checklist and Determination of Non-significance that we do not anticipate negative environmental impacts with this action because we would adopt into state rule federal human health criteria that we are already required to implement in our Clean Water Act programs.

The intent of the implementation plan is to describe how the agency intends to:

- (a) Implement and enforce the rule, including a description of the resources the agency intends to use;
- (b) Inform and educate affected persons about the rule;
- (c) Promote and assist voluntary compliance; and
- (d) Evaluate whether the rule achieves the purpose for which it was adopted, including, to the maximum extent practicable, the use of interim milestones to assess progress and the use of objectively measurable outcomes.

City of Tacoma

Comment 5.2

It is also certain that advanced treatment will require additional energy consumption, additional use of chemicals, generate excess residual biosolids, and result in increased Greenhouse Gas emissions known to impact climate change. Ecology has previously recognized the potential environmental impacts of requiring WWTPs to adopt additional treatment technology, including the likelihood that tertiary treatment will not only generate more effluent sludge that will require disposal, but will also require two to three times the amount of electrical energy currently used in WWTPs. Yet, Ecology has not evaluated the potential impact of its proposed human health water quality criteria on greenhouse gas emissions or community health.

Response to comment 5.2

Ecology evaluated environmental impacts of this rulemaking through [the State Environmental Policy Act \(SEPA\) Environmental Checklist](#)⁴ issued on Sept. 17, 2024. Without this rulemaking, permitted dischargers in Washington still must comply with the human health criteria that are approved and/or adopted by EPA. Those criteria include those that are currently in force by EPA under 40 CFR §131.45, Revision of certain Federal water quality criteria applicable to Washington. Without this rulemaking, those criteria remain in force. Therefore, through our evaluation, we did not identify new environmental impacts of this rulemaking.

Makah Indian Tribe

Comment 5.3

The MTC agrees with the SEPA determination of non-significance as this proposed rule reflects existing federal standards. Any purported economic impacts asserted by dischargers are not effects under SEPA, both because SEPA is focused on environmental impacts, and because there is no deviation from the baseline legal requirements imposed by the existing standards.

Response to comment 5.3

Thank you for your comment.

⁴ <https://apps.ecology.wa.gov/separ/Main/SEPA/Record.aspx?SEPANumber=202404074>

6. Comments on Environmental Justice

Association of Washington Business

Comment 6.1

Ecology cannot evaluate environmental justice without an assessment of where the necessary treatment facilities would be located and the impact of building new wastewater treatment plants on the affected communities. For example, the criteria Ecology proposes to adopt may limit the ability of wastewater treatment plants to accept additional influent. In that event, communities may not be able to meet their obligations under the Growth Management Act and may face adverse effects on the availability of affordable housing and their ability to address homelessness. It is also probable that advanced treatment will require additional treatment plant footprints, additional energy consumption, and additional use of chemicals. Ecology has not evaluated the potential impact on greenhouse gas emissions or community health from the addition of new treatment facilities.

Response to comment 6.1

Thank you for your comment. Ecology is limited to analyzing the impacts of this rulemaking, which adopts federal human health criteria for Washington that are already in effect. Ecology remains committed to our continued work with the regulated community on compliance with their permits and water quality standards.

City of Tacoma

Comment 6.2

[I]t is further problematic that Ecology has failed to provide an environmental justice assessment to inform and support its consideration of overburdened communities and vulnerable populations and to assist the agency with the equitable distribution of environmental benefits, the reduction of environmental harms, and the identification and reduction of environmental and health disparities. RCW 70A.0.060(1)(a). By increasing compliance costs to WWTPs, the proposed human health water quality criteria will have a profound impact on utility rates and housing affordability; these consequences will create environmental justice disparities. The level of treatment required for compliance is likely to require substantial new construction of wastewater treatment facilities. Ecology cannot evaluate environmental justice without an assessment of where those facilities would be located and the impact of building new WWTPs. The EPA criteria may also limit the ability of WWTPs to accept additional influent. In that event, communities may not be able to meet their obligations under the Growth Management Act and may face adverse impacts on housing, affordable housing, low-income housing, and the ability to address homelessness. It is also important for environmental justice to be assessed in a coordinated manner with efforts to address nutrients and contaminants of emerging concern.

Response to comment 6.2

Thank you for your comment. This rulemaking does not introduce any change to criteria that are already in effect for Washington, and therefore it does not change any cost to comply.

We have completed an [Environmental Justice Assessment](#)⁵ as required under the Healthy Environment for All (HEAL) Act. We posted a notice of Ecology's initiation of the Environmental Justice Assessment on the [Office of Financial Management's Environmental Justice Assessment Notices webpage](#)⁶ on September 17, 2024, and notified subscribers to Ecology's Environmental Justice email distribution list, in addition to other interested parties identified through this rulemaking and the previous human health criteria rulemaking that Ecology completed in 2016.

Ecology is limited to analyzing the impacts of this rulemaking, which adopts federal human health criteria for Washington that are already in effect. While this rulemaking does not introduce any change to criteria that we are already required to implement, we did contact environmental justice communities identified through the environmental justice assessment, and provided opportunities for those communities to talk to Ecology about the rulemaking.

Comment 6.3

Any increased costs incurred by municipal utilities to comply with an Ecology rulemaking will be paid by their respective customers in the form of increased wastewater rates. There are many WWTPs that do not currently have the advanced treatment that will likely be necessary for compliance with the proposed PCB criterion available at their plant, and do not have the current infrastructure to add the treatment technology without passing on significant costs to the customers they serve unless there is state or federal funding available. These rate increases and resulting increase in housing costs will inevitably have the greatest impact on vulnerable communities that likely already struggle with utility costs and housing affordability.

Response to comment 6.3

We recognize that operating wastewater treatment plants is a costly service that is needed to protect human health and the environment. We understand that there are significant challenges to providing these essential services to all communities, including those of varying economic means.

This rulemaking does not change the criteria that are already in effect for our Clean Water Act Programs, and therefore does not result in any increased costs of compliance, rate increases, or increases in housing costs that may impact overburdened communities or vulnerable populations.

Ecology also notes that a nondetect sampling result collected using the accepted compliance detection method for PCBs (Method 608) demonstrates compliance with the PCB effluent limit in a discharge permit regardless of whether that limit is 7 ppq or 170 ppq. Ecology

⁵ <https://apps.ecology.wa.gov/publications/summarypages/2410064.html>

⁶ <https://ofm.wa.gov/budget/budget-related-information/environmental-justice-and-heal-act/environmental-justice-assessment-notice>

further notes that the PCB pollutant minimization requirements Ecology has imposed on dischargers through discharge permits were imposed alongside PCB effluent limits of 170 ppq.

Quinault Indian Nation

Comment 6.4

Finally, the Nation wishes to note its appreciation for Ecology's commitment to conduct an Environmental Justice Assessment as part of this rulemaking process. Ensuring that all communities, including tribal nations, have access to clean and healthy water is a fundamental principle of environmental justice.

Response to 6.4

Thank you for your comment.

Washington Conservation Action and Puget Soundkeeper

Comment 6.5

[W]e encourage Ecology to use the Environmental Justice Assessment that is required under the HEAL Act for this rulemaking as a tool to gather and incorporate input from the communities who these pollution limits are designed to protect. The EJ Assessment should have a clear nexus to the outcome of the rulemaking process that is shared with the communities engaged. It is important that EJ Assessments are not simply a box checked, but a meaningful opportunity for communities to engage in decisions that affect their health and wellbeing.

Communities cannot participate in processes that they do not know about. As Ecology conducts EJ Assessments, both in this rulemaking and future rulemakings, it is critical that you test methods of outreach to determine how to reach diverse audiences that are not typically engaged with Ecology's work.

Response to 6.5

Thank you for your comment. We have completed an [Environmental Justice Assessment](#)⁷ as required under the Healthy Environment for All (HEAL) Act. We posted a notice of Ecology's initiation of the Environmental Justice Assessment on the [Office of Financial Management's Environmental Justice Assessment Notices webpage](#)⁸ on September 17, 2024, and notified subscribers to Ecology's Environmental Justice email distribution list, in addition to other interested parties identified through this rulemaking and the previous human health criteria rulemaking that completed in 2016.

⁷ <https://apps.ecology.wa.gov/publications/summarypages/2410064.html>

⁸ <https://ofm.wa.gov/budget/budget-related-information/environmental-justice-and-heal-act/environmental-justice-assessment-notice>

Comments on Environmental Justice

While this rulemaking does not introduce any change to criteria that we are already required to implement, we did contact environmental justice communities identified through the environmental justice assessment, and provided opportunities for those communities to talk to Ecology about the rulemaking.

We will continue to prioritize our work with environmental justice communities with future rulemakings on the water quality standards and are open to new outreach methods to broaden the communities we are able to reach.

7. Comments related to errors found in the rule proposal or clarifications

U.S. EPA, Region 10

Comment 7.1

Since Ecology is proposing to adopt arsenic and methylmercury criteria equal to the federally promulgated HHC, footnotes A and D are no longer needed. To avoid having duplicative HHC in state and federal regulations, the EPA may withdraw the federal rule at 40 C.F.R. 131.45. As such, the references in proposed footnotes A and D to the federal rule may become obsolete. For clarity, the EPA recommends removing these footnotes from the state's rule.

Response to comment 7.1

We agree that footnote D for mercury is no longer needed in the rule language because EPA promulgated federal criteria for methylmercury and removed criteria for mercury.

However, we have kept footnote A in the rule language because we want to still provide context for when and how the arsenic criteria was calculated, given that these criteria were promulgated as part of the National Toxics Rule adopted on December 22, 1992 (see Federal Register (FR) 57 FR 60848).

Comment 7.2

The state's proposed rule includes a "Water & Organisms" criterion of 0.24 µg/L and "Organisms Only" criterion of 2.0 µg/L for 1,3-Dichloropropene.

If Ecology's intent is to adopt the federal HHC that EPA promulgated for Washington, the EPA recommends revising the "Water & Organisms" criterion to 0.22 µg/L and "Organisms Only" criterion to 1.2 µg/L.

Response to comment 7.2

Thank you for the comment. We have corrected this transcription error in the adopted rule language.

Comment 7.3

The state's proposed rule includes an incorrect CAS registry number for Bis(2-Chloro-1-Methylethyl) Ether. The EPA recommends revising the rule to include the correct CAS registry number for Bis(2-Chloro-1-Methylethyl) Ether of 108601.

Response to comment 7.3

Thank you for your comment. We have corrected the CAS number for Bis(2-Chloro-1-Methylethyl) Ether in the adopted rule language.

Comment 7.4

The state's proposed rule includes a "Water & Organisms" criterion of 0.000022 µg/L and "Organisms Only" criterion of 0.000022 µg/L for Butylbenzyl Phthalate.

If Ecology's intent is to adopt the federal HHC that EPA promulgated for Washington, the EPA recommends revising the "Water & Organisms" criterion to 0.013 µg/L and "Organisms Only" criterion to 0.013 µg/L.

Response to comment 7.4

Thank you for the comment. We have corrected this transcription error in the adopted rule language.

Comment 7.5

The state's proposed rule includes a "Water & Organisms" criterion of 0.060 µg/L for chlorodibromomethane.

If Ecology's intent is to adopt the federal HHC that EPA promulgated for Washington, the EPA recommends revising the "Water & Organisms" criterion to 0.60 µg/L.

Response to comment 7.5

Thank you for the comment. We have corrected this transcription error in the adopted rule language.

Comment 7.6

The state's proposed rule includes a "Water & Organisms" criterion of 0.20 µg/L and "Organisms Only" criterion of 0.20 µg/L for hexachloroethane.

If Ecology's intent is to adopt the federal HHC that EPA promulgated for Washington, the EPA recommends revising the "Water & Organisms" criterion to 0.02 µg/L and "Organisms Only" criterion to 0.02 µg/L.

Response to comment 7.6

Thank you for the comment. We have corrected this transcription error in the adopted rule language.

Comment 7.7

The state's proposed rule removed footnote F applicable to vinyl chloride.

F. This criterion was derived using the cancer slope factor of 1.4 (linearized multistage model with a twofold increase to 1.4 per mg/kg-day to account for continuous lifetime exposure from birth).

Though the footnote is not relevant to the "Organisms Only" criterion for vinyl chloride which Ecology is proposing to adopt and was developed using a cancer slope factor of 1.5 per

Comments related to errors found in the rule proposal or clarifications

mg/kg-day, the footnote may still be relevant to the state's "Water and Organisms" criterion which is not being revised.

The state's "Water & Organisms" criterion for vinyl chloride was approved by the EPA in 2016. Since this footnote describes the cancer slope factor used by Ecology to derive the "Water & Organisms" criterion for vinyl chloride, the EPA is flagging this footnote for Ecology's awareness in case it was inadvertently removed from the application to the "Water and Organisms" criterion.

Response to comment 7.7

Thank you for the comment. We have reviewed the footnote and found it does not reflect the correct cancer slope factor that Ecology used to derive the "Water & Organisms" criterion for vinyl chloride, which was approved by the EPA. The footnote incorrectly states that a cancer slope factor of 1.4 was used. Rather, Ecology used a cancer slope factor of 1.5 to derive this criterion. We are removing this footnote since the cancer slope factor does not vary from that which EPA used for the "Organism Only" criterion.

Comment 7.8

The significant figures in the state's proposed rule differ from the federal criteria for several pollutants. If Ecology's intent is to adopt the federal HHC that EPA promulgated for Washington, the EPA recommends revising the following values to the same significant figures as the federal criteria indicated in the table [in the comment letter].

Response to comment 7.8

Thank you for your comment. Ecology will ensure the significant figures match the federal criteria.

Comment 7.9

The state's proposed rule includes several revisions to aquatic life criteria and previously approved human health criteria. These amendments appear to be changes related only to the significant figures for criteria that were adopted on August 14, 2024 (for aquatic life criteria that are not yet EPA-approved), or August 1, 2016 (for previously approved human health criteria). The EPA recommends providing a rationale or basis for the amendments.

Response to comment 7.9

In EPA's National Recommended Water Quality Criteria document from 2006 (USEPA, 2006), it is recommended that final dissolved metals' criteria for aquatic life are rounded to two significant figures. This served as the basis for our decision to include two significant figures. The number of significant figures represented in numeric criteria is an artifact of the accuracy and precision with which the quantity (i.e., concentrations tested) was measured and data were rounded off. We have modified the rule language to reflect EPA's promulgation of HHC and have changed aquatic life significant figures where appropriate.

United States Environmental Protection Agency (USEPA). 2006. National Recommended Water Quality Criteria. Office of Water.

8. Comments related to updating the human health criteria or associated footnotes

Association of Washington Business

Comment 8.1

The proposed criteria are based on an unreasonable fish consumption rate.

The EPA criteria that Ecology proposes to adopt as a State standard are based on a fish consumption rate (FCR) of 175 g/day—far in excess of EPA’s default national FCR of 22 g/day and higher even than EPA’s recommended 142 g/day rate for subsistence fishers. See EPA, “Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health” (“2000 Methodology”), 2000 Methodology at 1-5. The 175 g/day FCR rests on unreasonable assumptions based on a cherry-picked and outdated survey of tribal members in the Columbia River Basin. A Fish Consumption Survey of the Umatilla, Nez Perce, Yakama, and Warm Springs Tribes of the Columbia River Basin 69 (Columbia River Inter-Tribal Fish Commission 1994), tinyurl.com/53c9x9ar. The study reported on “rates of consumption represent fish obtained *from all sources*,” including grocery stores—in other words, fish not even exposed to Washington waters and thus unaffected by the proposed criteria. (emphasis added). And the FCR fails to account for the fact that anadromous fish species that spend most of their lives in ocean waters far from the shore (e.g., many species of salmon) have lower degrees of exposure to pollutants in inland waters than fish and shellfish found exclusively inland.

Ecology should set state standards based on contemporary and accurate data about fish consumption from Washington waters and should take into variations in where fish species live and the variation in fish consumption over a lifetime. See National Health and Nutrition Examination Survey 21–22 (Apr. 2014) (adjusting risk to account for the reality that people do not eat the same amount of fish every day over a lifetime).

Response to comment 8.1

Both the 2016-disapproved state-adopted human health criteria and the federally promulgated human health criteria for Washington (except for arsenic, which EPA promulgated from the 1992 National Toxics Rule) are based on a fish consumption rate of 175 grams per day. Ecology is not considering recalculating the human health criteria at this time.

Since Washington has a strong tradition of fish and shellfish harvest and consumption from local waters, and within-state survey information indicates that different groups of people harvest fish both recreationally and for subsistence (Ecology, 2013), Ecology based the fish consumption rate used to calculate the 2016 adopted HHC on “highly exposed populations,” which include, among other groups, the following: tribes, Asian Pacific Islanders (API), recreational and subsistence fishers, immigrant populations. A fish consumption rate of 175 g/day is representative of average FCRs (“all fish and shellfish,” including all salmon, restaurant, locally caught, imported, and from other sources) for highly exposed populations that consume both fish and shellfish from Puget Sound waters.

Ecology will provide future opportunities for the public and Tribes to provide feedback on the water quality standards during our Triennial Review process. We expect to begin the next

Comments related to updating the human health criteria or associated footnotes

Triennial Review in early 2025. During this review, we welcome feedback on projects that Ecology should undertake between 2025 and 2027. This process will also include an evaluation of our current water quality criteria compared to the criteria EPA has recommended for the protection of aquatic life and human health in surface waters as required by Section 304(a) of the Clean Water Act.

Ecology, 2013. Washington Department of Ecology. [Fish Consumption Rates Technical Support Document](#)⁹ – Chapter 6.4.

Batts, David

Comment 8.2

With regard to arsenic, noting the criteria are for inorganic only: A cursory survey of a number of papers on arsenic in seafood finds repeated assertions that organic arsenic is non-toxic, or so low in toxicity as to not be a human health issue. Taylor et al. (2017) suggest both that that's not entirely the case, and that there are large data gaps regarding organic arsenic toxicity. Clearly not enough time to bear on the current Rule update, but it appears that in the long run HHC for organic arsenic may be warranted as well.

Response to comment 8.2

Thank you for your comment. In this rulemaking, we are limited to updating the human health criteria in WAC 173-201A-240 to only those criteria that EPA has put in place for Washington under 40 CFR §131.45.

Ecology will provide future opportunities for the public and Tribes to provide feedback on the water quality standards during our Triennial Review process. We expect to begin the next Triennial Review in early 2025. During this review, we welcome feedback on projects that Ecology should undertake between 2025 and 2027. This process will also include an evaluation of our current water quality criteria compared to the criteria EPA has recommended for the protection of aquatic life and human health in surface waters as required by Section 304(a) of the Clean Water Act.

Byrne, James

Comment 8.3

Drinking water criteria should be the same as for human health. All waters of the state should be as clean as possible.

⁹ <https://fortress.wa.gov/ecy/publications/publications/1209058.pdf>

Response to comment 8.3

Thank you for your comment. In this rulemaking, we are limited to updating the human health criteria in WAC 173-201A-240 to only those criteria that EPA has put in place for Washington under 40 CFR §131.45.

We agree all water should be as clean as possible. Drinking water values are developed under the Safe Drinking Water Act and the requirements to develop those standards have different regulatory inputs and risk considerations.

Loehr, Lincoln

Comment 8.4

The arsenic human health criteria from the 1992 National Toxics Rule pose a number of problems. I had commented to EPA during that rule making that inorganic arsenic is the carcinogen of concern but most of the arsenic in fish tissues is in an organic form and not a problem. EPA responded that they agreed with my comment, and solved it by putting in a footnote that it pertains to inorganic arsenic only.

The percentage of inorganic arsenic to total arsenic in fish and shellfish tissues is around 1%. The EPA needed to adjust the criteria but did not. The criterion for marine waters is .14 ppb, or about 1/10th the background concentration in the world's oceans.

The latest EPA action on arsenic human health criteria is the California Toxics Rule, and a footnote should be added to show that action.

Response to Comment 8.4

Thank you for your comment. In this rulemaking, we are limited to updating the human health criteria in WAC 173-201A-240 to only those criteria that EPA has put in place for Washington under 40 CFR §131.45. That includes the arsenic criteria that EPA promulgated as part of the National Toxics Rule. The footnote indicating that the arsenic human health criteria is for inorganic arsenic only is included in the final rule language.

Ecology will provide future opportunities for the public and Tribes to provide feedback on the water quality standards during our Triennial Review process. We expect to begin the next Triennial Review in early 2025. During this review, we welcome feedback on projects that Ecology should take on between 2025 and 2027. This process will also include an evaluation of our current water quality criteria compared to the criteria EPA has recommended for the protection of aquatic life and human health in surface waters as required by Section 304(a) of the Clean Water Act.

Lower Elwha Klallam Tribe, Port Gamble S’Klallam Tribe, and Puyallup Tribe of Indians

Comment 8.5

The Tribes, of course, continue to believe that the federal standards that Ecology proposes to adopt into state law are not as stringent as could be supported by EPA’s administrative record

and studies contained therein. Specifically, numerous tribal and other fish consumption surveys show much higher levels of fish consumption than the 175 g/day fish consumption rate (FCR) that both Ecology and EPA have used for all HHC since 2016. Tribal members in Washington routinely eat large amounts of fish and shellfish. Washington State Dept of Ecology Fish Consumption Rate Technical Support Document (DOE FCR TSD) at 46-63, available at <https://www.regulations.gov/document/EPA-HQ-OW-2015-0174-0194>. (summarizing surveys of contemporary tribal fish consumption). For instance, the survey completed by the Suquamish Tribe reflects a FCR of 284 grams/day (g/day) (or 10 ounces/day) for the 75th percentile, 489 g/day (or 17 ounces/day) for the 90th percentile, and 797 g/day (or 28 ounces/day) for the 95th percentile tribal member. Id. at 59-62 (WSDOE's statistical analysis of Suquamish survey); Fish Consumption Survey of the Suquamish Indian Tribe of the Port Madison Indian Reservation, Puget Sound Region (August 2000), available at <https://www.regulations.gov/document/EPA-HQ-OW-2015-0174-0410>. Not accounting for salmon or other finfish consumption, the Port Gamble S'Klallam Tribe's members consume 499 g/day (or 17.6 ounces/day) of shellfish (i.e., geoduck, littleneck clams, oysters, and crab).

Response to comment 8.5

Thank you for your comment. Ecology will provide future opportunities for Tribes to provide feedback on the water quality standards during our Triennial Review process. We expect to begin the next Triennial Review in early 2025. During this review, we welcome feedback on projects that Ecology should undertake between 2025 and 2027. This process will also include an evaluation of our current water quality criteria compared to the criteria EPA has recommended for the protection of aquatic life and human health in surface waters as required by Section 304(a) of the Clean Water Act.

We also welcome information from Tribes related to the protection of Tribal Reserved Rights during Ecology's Triennial Review.

Washington Conservation Action and Puget Soundkeeper

Comment 8.6

Since this proposal maintains the pollution limits currently in place, we encourage Ecology to proactively seek opportunities to establish even more protective criteria in the future in consultation with Tribes, affected communities, and the public.

Response to comments 8.6

Thank you for your comments. Ecology will provide future opportunities for the public and Tribes to provide feedback on the water quality standards during our Triennial Review process. We expect to begin the next Triennial Review in early 2025. During this review, we welcome feedback on projects that Ecology should undertake between 2025 and 2027. This process will also include an evaluation of our current water quality criteria compared to the criteria EPA has recommended for the protection of aquatic life and human health in surface waters as required by Section 304(a) of the Clean Water Act.

9. Comments unrelated to this rulemaking

Weiskotten, Bruce

Comment 9.1

What plans, if any, does the DOE have for identifying and managing PFAS, microplastics and the more than 600 chemicals approved by the FDA for which we have no laboratory assay? How does the DOE plan to monitor and manage such chemicals when we have no ability to detect them? Does the DOE have any case studies of the effects of PFAS or GRAS (Generally Recognized As Safe) chemicals on fish, amphibians and shellfish? Does DOE have any way to monitor levels of such GRAS chemicals in surface water?

Response to comment 9.1

Thank you for your comment. Ecology is committed to establishing water quality standards that are protective of aquatic life and human health, and continually works to identify pollutants of concern and methods to manage pollution sources. While these pollutants are not the subject of this rulemaking, since neither Ecology nor EPA has promulgated human health criteria for Washington for PFAS or microplastics, we encourage you to participate in our Triennial Review, a public planning process for water quality standards.

We expect to begin the next Triennial Review in early 2025. During this review, we welcome feedback on projects that Ecology should undertake between 2025 and 2027. This process will also include an evaluation of our current water quality criteria compared to the criteria EPA has recommended for the protection of aquatic life and human health in surface waters as required by Section 304(a) of the Clean Water Act.

Appendix A: Citation List

Chapter 173 – 201A WAC

Water Quality Standards for Surface Waters of the State of Washington Human Health Criteria

AO # 24– 11

This citation list contains references for data, factual information, studies, or reports on which the agency relied in the adoption for this rule making (RCW 34.05.370(f)).

At the end of each citation is a number in brackets identifying which of the citation categories below the sources of information belongs. (RCW 34.05.272).

Table 1 Citation Categories

Citation Categories	
1	Peer review is overseen by an independent third party.
2	Review is by staff internal to Department of Ecology.
3	Review is by persons that are external to and selected by the Department of Ecology.
4	Documented open public review process that is not limited to invited organizations or individuals.
5	Federal and state statutes.
6	Court and hearings board decisions.
7	Federal and state administrative rules and regulations.
8	Policy and regulatory documents adopted by local governments.
9	Data from primary research, monitoring activities, or other sources, but that has not been incorporated as part of documents reviewed under other processes.
10	Records of best professional judgment of Department of Ecology employees or other individuals.
11	Sources of information that do not fit into one of the other categories listed.

Revision of certain Federal water quality criteria applicable to Washington. 40 C.F.R §131.45 (Nov. 18, 2022). <https://www.ecfr.gov/current/title-40/chapter-I/subchapter-D/part-131/subpart-D/section-131.45> [5]