

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 131

[FRL-5196-2]

Stay of Federal Water Quality Criteria for Metals

AGENCY: Environmental Protection Agency (EPA).

ACTION: Administrative stay.

SUMMARY: In December 1992, EPA promulgated water quality criteria for toxic pollutants in order to protect human health and aquatic life in fourteen states that had not adopted the necessary toxics criteria as required by the Clean Water Act. Some of the criteria are for protection of aquatic life from the effects of metals in the water. After EPA promulgated the rule, EPA issued a new policy for setting water quality criteria for metals. In order to allow permitting authorities in the states covered by the rule the flexibility to follow EPA's new policy, the Agency is staying the effectiveness of specific metals criteria promulgated in the rule. The stay will remain in effect until EPA promulgates new metals criteria for the states covered by the rule.

EFFECTIVE DATE: This stay is effective April 14, 1995.

FOR FURTHER INFORMATION CONTACT: Tim Kasten, Office of Science and Technology, Office of Water (4304), USEPA, 401 M Street SW., Washington, D.C. 20460, (202) 260-5994.

SUPPLEMENTARY INFORMATION:

Background

In the National Toxics Rule ("NTR"), EPA promulgated numeric water quality criteria for toxic pollutants for fourteen states and jurisdictions that had not adopted sufficient criteria ("NTR states"). 57 FR 60848 (December 22, 1992). That action brought those states into compliance with section 303(c)(2)(B) of the Clean Water Act ("CWA") which requires states to adopt criteria for all toxic pollutants the discharge or presence of which could interfere with state designated uses of waters, and for which EPA had published criteria.

Among the criteria that EPA promulgated for the NTR states were aquatic life water quality criteria for metals ("metals criteria"). Aquatic life water quality criteria are estimates of the highest concentration of a substance that may be present in water while maintaining the protection of aquatic life from acute or chronic effects. A central issue in establishing and

implementing metals criteria is how to accurately determine the fraction of the total metal that is biologically available and toxic.

At the time that EPA promulgated the NTR, the Agency's policy was to express metals criteria using total recoverable metal concentrations ("total recoverable metal"). While metals criteria could be implemented by measuring either total recoverable metal or dissolved metal, total recoverable metal measurement, being more conservative, provided a greater level of protection than dissolved metal measurement. Because the NTR was to cover a substantial number of water bodies, EPA chose the simplest, most protective approach, and the one reflected in its criteria documents to implement the metals criteria, and promulgated metals criteria based on total recoverable metal.

After promulgation of the NTR, the Agency continued to address the issue of how best to express metals criteria. EPA held a meeting with invited experts in January 1993 in Annapolis, Maryland to further elicit comment on the use of total recoverable metal versus dissolved metal in developing national metals criteria. The Agency solicited comments on the recommendations made by presenters at the meeting in the **Federal Register** on July 9, 1993 (58 FR 32131). Subsequently, EPA determined that dissolved metal approximates the biologically available fraction of waterborne metals for aquatic organisms better than total recoverable metal. On October 1, 1993, the Agency issued guidance on the interpretation and implementation of metals criteria providing that "[i]t is now the policy of the Office of Water that the use of dissolved metal to set and measure compliance with water quality standards is the recommended approach * * *". *Office of Water Policy and Technical Guidance on Interpretation and Implementation of Aquatic Life Metals Criteria*.

A number of parties brought lawsuits challenging the NTR metals criteria. The Plaintiffs in those lawsuits wanted the permitting authorities in the NTR states to use criteria based on dissolved metal. EPA has concluded that it is in the public interest to revise the metals criteria promulgated in the NTR to reflect the new metals policy. In settlement of the litigation, EPA has agreed to stay the numeric aquatic life water quality criteria (expressed as total recoverable metal) for: arsenic, cadmium, chromium (III), chromium (VI), copper, lead, mercury (acute only), nickel, selenium (saltwater only), silver, and zinc. This stay will be in effect until EPA takes action to amend the NTR by

promulgating new metals criteria based on dissolved metal.

Effective Date of the Stay

Pursuant to section 705 of the Administrative Procedure Act (APA) (5 U.S.C. 705), "when an agency finds that justice so requires, it may postpone the effective date of actions taken by it, pending judicial review." EPA has determined that this stay is necessary pending resolution of the litigation. Consequently, EPA finds issuance of this stay is in the interests of justice.

In addition, under section 553 of the APA (5 U.S.C. 553), when an Agency finds good cause to exist, it may issue a rule without first providing notice and comment and make the rule immediately effective. EPA believes that it has good cause both to issue this stay without notice and comment and to make the stay immediately effective.

A stay of the metals criteria is central to the settlement of the pending litigation, and it is in the public interest to avoid costly and potentially protracted litigation by issuing a stay. Further, the stay relieves a burden on the regulated community. The stay will avoid potential harm to dischargers in the NTR states for which National Pollutant Discharge Elimination System permits are being issued pursuant to section 402 of the Clean Water Act by allowing permitting authorities to establish permit limits based on dissolved metal concentrations consistent with current Agency policy. It is not in the public interest to require permitting authorities in the NTR states to impose effluent limitations based on total recoverable metal ambient water quality criteria which EPA now considers to be more stringent than may be necessary to protect designated uses.

EPA considers staying the metals criteria to be in the public interest as noted above, and therefore good cause exists to issue the stay without notice and comment and to make the stay immediately effective.

Regulatory Assessment Requirements

A. Executive Order 12866

Under Executive Order 12866 (56 FR 51735, October 4, 1993), the Agency must determine whether the regulatory action is "significant" and therefore subject to all the requirements of the Executive Order (i.e., Regulatory Impact Analysis and review by the Office of Management and Budget). Under section 3(f), the order defines "significant" as those actions likely to lead to a rule: (1) Having an annual effect on the economy of \$100 million or more, or adversely and materially