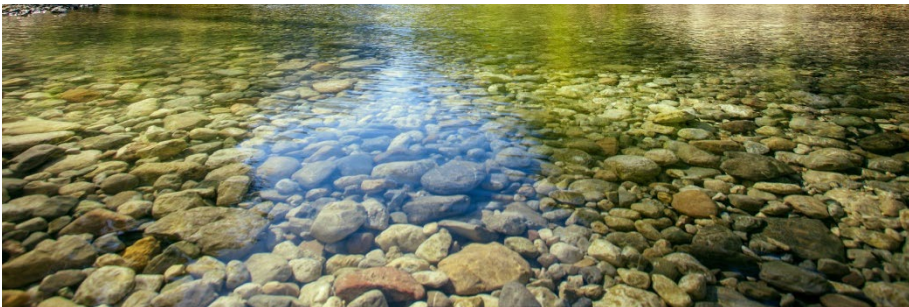


## Not So Cooperative Federalism? Washington Sues EPA Over Reversal in Long-Running Human Health Criteria Saga



On June 6, Washington filed a [lawsuit](#) challenging EPA's May 10, 2019, decision to reverse its 2016 disapproval of Washington's proposed Human Health Criteria (HHC) under the Clean Water Act (CWA). The lawsuit represents the next chapter in the long-running saga of Washington's HHC. The respective positions of Washington and the federal government have shifted over time, with Washington now advocating against criteria it once promoted. The potential impact of this dispute on Washington businesses is significant.

### Implications of Human Health Criteria

The CWA [requires](#) states to, among other things, adopt and periodically review and revise water quality criteria designed to protect human health, known as HHC. EPA approval is necessary for all HHC adoptions and modifications. If a state fails to promulgate satisfactory HHC, EPA is to step in and promulgate HHC for the state.

Changes to a state's HHC have significant implications for businesses. National Pollutant Discharge Elimination System (NPDES) permit limits, including industrial and construction stormwater discharge permit limits, National Pre-Treatment Program limits for discharging into publicly owned treatment works, state-level nonpoint source controls, and other regulatory programs under the CWA are designed to meet existing HHC. HHC also can

June 20, 2019

#### AUTHORS

Casey Clausen

Associate  
+1.206.315.4808  
[cclausen@bdlaw.com](mailto:cclausen@bdlaw.com)



Erika Holsman

Associate  
+1.206.315.4815  
[eholsman@bdlaw.com](mailto:eholsman@bdlaw.com)



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play a central role in shaping the extent of required cleanup efforts under federal and state environmental cleanup statutes.

## Evolution of Washington's Human Health Criteria

The development of Washington's HHC has seen the state and EPA shuffle positions. EPA now favors Washington's less restrictive proposed 2016 criteria. Washington no longer stands by those proposed criteria and is now defending more restrictive federal standards subsequently imposed by EPA.

- ◆ **1972:** CWA is enacted, with a mandate for all states to implement HHC, among other requirements. Washington did not do so.
- ◆ **1992:** EPA promulgates the [National Toxics Rule](#) (NTR), setting HHC for Washington based on a fish consumption rate (FCR) of 6.5 grams per day and a cancer risk level (i.e., the level of cancer risk that is deemed acceptable) of  $10^{-6}$  (one in one million).
- ◆ **December 2010:** EPA advises Washington's Department of Ecology that it needs to enact more stringent HHC.
- ◆ **June 2015:** Pursuant to its statutory mandate under Section 304(a) of the CWA, EPA issues updated water quality criteria [recommendations](#). The updated 304(a) recommendations are based on a default FCR of 22 g/day.
- ◆ **September 2015:** EPA [proposes revised](#) HHCs for Washington based on a FCR of 175 g/day and a  $10^{-6}$  cancer risk level. The 175 g/day FCR is based on the consumption of Washington's "highly exposed populations".
- ◆ **August 2016:** Washington [enacts its own HHC](#) and submits the same to EPA for approval. Washington's proposed HHC are also based on a FCR of 175 g/day and  $10^{-6}$  cancer risk level except in the case of polychlorinated biphenyls (PCBs) (Washington used its Department of Health cancer risk level of  $4 \times 10^{-5}$  for PCBs then adjusted that cancer risk level to  $2.3 \times 10^{-5}$  so that the criteria was equivalent to the NTR criteria for PCBs).
- ◆ **November 15, 2016:** EPA [approves 45 of Washington's proposed HHC and disapproves 143 of Washington's proposed HHC](#). Concurrently, on November 28, 2018, EPA issues a [rule](#) setting HHC in lieu of the 143 HHC it disapproved. The federal standards are more restrictive than those disapproved by EPA.
- ◆ **February 2017:** A number of industry groups [petition](#) the EPA to reconsider its rejection of 143 of Washington's proposed HHC.
- ◆ **August 3, 2018:** EPA issues a [letter](#) announcing it will reconsider the 2016 partial disapproval.
- ◆ **August 7, 2018:** Washington's Department of Ecology Director Maia Bellon [informs](#) EPA that Washington opposes reconsideration.
- ◆ **May 10, 2019:** by letter, EPA [reverses](#) its disapproval of 141 of the 143 proposed HHC, and instead affirmatively approves the same.
- ◆ **June 6, 2019:** *Washington v. EPA lawsuit* is filed.

**Washington no longer stands by the 2016 proposed criteria favored by EPA.**

## Revisiting Obama Era Rules

The Trump administration is utilizing a variety of procedural approaches to reversing the previous administration's environmental rules. With respect to Washington's HHC, EPA is taking a two-step approach. The first step, the May 10 reversal letter, serves as EPA's approval of nearly all of the proposed HHC previously disapproved by the EPA in 2016. There is still the matter, however, of the federal criteria promulgated for the HHC disapproved by EPA. Under 40 C.F.R. § 131.21(c), the more restrictive federal standards remain the law until withdrawn by EPA. EPA must accomplish that withdrawal by rulemaking. In its May 10 reversal letter, EPA announced its intention to initiate a rulemaking to withdraw the federal criteria. Once that rulemaking is complete, the now approved 2016 Washington HHC will become the applicable criteria. But Washington will be free, as EPA observed, to re-promulgate the more restrictive federal criteria as its own.

## Reinvigorated Federalism?

A main reason that the Obama era EPA had disapproved Washington's proposed HHC in 2016 was that the state did not incorporate all of EPA's 2015 updated 304(a) recommendations. Washington's proposed HHC were developed over the course of several years based on EPA's prior 304(a) recommendations, not the 2015 updated 304(a) recommendations. Applying all of the 2015 updated 304(a) recommendations, the Obama era EPA calculated more stringent requirements for a majority of the chemicals. On reconsideration, the agency determined that it should have been more deferential to the state, noting in the May 10 reversal letter that the 2015 304(a) recommendations "are recommendations, not national mandates." The agency further explained that "the issuance of new 304(a) recommendations that reflect 'the latest scientific information' does not immediately render the EPA's prior 304(a) recommendations or the underlying science unsound or indefensible." A takeaway from EPA's reversal on Washington's HHC is that the agency is signaling an increased interest in treating "states as the primary authority in setting water quality standards."

## Tribal Fishing Rights

One of the most significant departures from the prior administration is the current administration's approach to tribal populations. In several states, including Washington, the Obama administration required tribal populations to be treated as the target general population, not "highly exposed populations," for purposes of deriving protective criteria. This approach resulted in more restrictive criteria since agency guidance calls for a more stringent  $10^{-6}$  cancer risk level for the general population while allowing for a less stringent cancer risk level of  $10^{-4}$  for "highly exposed populations." EPA disapproved of Washington's proposed 2016 PCB criteria in part because they did not track this approach. The Trump administration has now rejected the Obama administration's approach as inconsistent with the CWA and applicable guidance. EPA's interpretation of the applicable guidance is now that tribes are "highly exposed populations," not the target general population. This approach supports less restrictive criteria. EPA's change of policy on this issue was also central to its [recent decision](#) to approve Idaho's HHC.

## Another Lawsuit Against the Trump Administration

Washington has been active in challenging the Trump administration's reconsideration of Obama administration rules and was quick to once again do so here. The Trump administration will likely argue

that the suit is premature since the May 10 reversal letter does not itself change the operative HHC. EPA will need to initiate a rulemaking to formally withdraw the federal standards. In its complaint, Washington attempts to sidestep this by arguing that EPA has pre-determined the outcome of the rulemaking.

Washington also challenges EPA's authority to, in effect, retroactively approve Washington's less restrictive proposed HHC. It argues that existing HHC can only be revised if EPA approves a state submission of new or revised HHC or EPA makes a "necessity determination" that more restrictive HHC are required, neither of which took place here.

## Takeaways

Washington's HHC have significant implications for businesses and the applicable standards do not appear likely to be settled anytime soon. Aside from Washington's litigation, a number of other items bear tracking. Sometime in the near future EPA will initiate rulemaking to withdraw the federally promulgated criteria. The current administration's positions in Washington are also guideposts for how it may view other states' water quality standards. EPA has signaled a commitment to deferring to states on setting water quality standards.

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