

DELAWARE RIVER BASIN COMMISSION

PROPOSED

PUBLIC NOTICE OF PROPOSED RULEMAKING AND PUBLIC HEARING

Proposed Amendments to the Water Quality Regulations, Water Code and Comprehensive Plan to Revise the Human Health Water Quality Criteria for PCBs in the Delaware Estuary, to Apply the PCB Human Health Water Quality Criterion to Delaware Bay, and to Provide for the Use of Compliance Schedules to Implement Stream Quality Objectives Established by the Commission

The Delaware River Basin Commission ("DRBC" or "Commission") is a federal interstate compact agency charged with managing the water resources of the Delaware River Basin without regard to political boundaries. Its commissioners are the governors of the four Basin states - New Jersey, New York, Pennsylvania and Delaware - and a federal representative, the North Atlantic Division Commander of the U.S. Army Corps of Engineers. The Commission is not subject to the requirements of the Delaware Administrative Procedures Act. This notice is published by the Commission for information purposes.

Summary: The Commission will hold a **public hearing** to receive comments on proposed amendments to the Commission's Water Quality Regulations, Water Code and Comprehensive Plan to revise the human health water quality criteria for polychlorinated biphenyls (PCBs) in the Delaware Estuary (DRBC Water Quality Management Zones 2 through 5), extend application of the DRBC's PCB human health water quality criterion to Delaware Bay (DRBC Water Quality Zone 6) and provide for the use of compliance schedules where implementation of a stream quality objective established by the Commission requires a reduction of the pollutant concentration or loading of a discharge to Basin waters.

Background: The current DRBC water quality criteria for PCBs in the Delaware Estuary were established in 1996. They pre-date the collection of site-specific bioaccumulation data for the Delaware Estuary and Bay and site-specific fish-consumption data for Zones 2 through 4 that are relevant to the development of human health water quality criteria. They are also inconsistent with current U.S. Environmental Protection Agency (EPA) guidance for the development of such criteria, and they vary by water quality zone. One consequence of the current varied criteria is that in order to ensure that the current water quality criterion of 7.9 picograms per liter in the downstream portion of Zone 5 can be achieved, the allowable PCB loading to Zones 2 and 3, where the applicable criterion currently is 44.4 picograms per liter, must be even lower than would be required if the proposed uniform criterion were in place. DRBC currently has no PCB water quality criteria for the Delaware Bay, a shared interstate water for which the states of New Jersey and Delaware have established a criterion of 64 picograms per liter.

By Resolution No. 2003-11 on March 19, 2003 the Commission directed its executive director to initiate rulemaking on a proposal to revise the Commission's human health water quality criteria, including those for PCBs, to reflect site-specific data on fish consumption, site-specific bioaccumulation factors, and current EPA guidance on development of human health criteria. Rulemaking was delayed, however, pending the completion of an effort by the Commission's Toxics Advisory Committee (TAC) to revise the criterion for PCBs and a separate effort to develop recommendations for achieving reductions in PCB loadings to the river that could be issued in conjunction with the criterion.

Rigorously applying the most current available data and methodology, including site-specific data on fish consumption, site-specific bioaccumulation factors, and the current EPA methodology for the development of human health criteria for toxic pollutants (see EPA-822-B-00-004, October 2000), the TAC in July 2005 completed development of a revised human health water quality criterion for PCBs for the Delaware Estuary and Bay of 16 picograms per liter. Accordingly, by Resolution No. 2005-19 on December 7, 2005, the Commission directed the executive director to proceed with rulemaking to establish the new criterion in DRBC Water Quality Zones 2 through 6.

Elevated levels of PCBs in the tissues of fish caught in the Delaware Estuary and Bay currently prevent the attainment of the designated uses "maintenance and propagation of resident fish and other aquatic life" (Zone 2, Zone 5 below River Mile 70 and Zone 6), "passage of anadromous fish" (Zones 2 through 6), and "maintenance of resident fish and other aquatic life" (Zones 3, 4 and 5 above River Mile 70). (See DRBC Water Quality Regulations

(WQR), Art. 3, sec's 3.30.2 B.2, 3.30.3 B.2, 3.30.4 B.2, 3.30.5 B.2 and 3.30.6 B.2 for Zones 2 through 6, respectively). These uses are commonly referred to collectively as "fishable" and are deemed to include human consumption of resident fish. Accordingly, these waters are listed by the bordering states as impaired under Section 303(d) of the Clean Water Act (CWA), which requires that a total maximum daily load (TMDL) be established for them. A TMDL expresses the maximum amount of a pollutant that a water body can receive and still attain water quality standards. Once the load is calculated, it is allocated to all sources in the watershed - point and nonpoint - which may not discharge loads in excess of the share allocated to them in order to achieve and maintain the water quality standards. EPA established TMDLs for PCBs in December of 2003 for the Delaware Estuary and in December of 2006 for the Delaware Bay ("Stage 1 TMDLs"). It is anticipated that EPA will establish revised TMDLs ("Stage 2 TMDLs") for the Delaware Estuary and Bay to attain the revised PCB human health water quality criterion if approved.

When the Commission directed the executive director in 2005 to initiate rulemaking on updated PCB criteria, in accordance with a recommendation of the TAC, it also asked her to work with state regulatory agencies and EPA (collectively, "co-regulators") to develop recommendations for implementing criteria for bioaccumulative toxic pollutants such as PCBs that would be "consistent with the existing Clean Water Act National Pollutant Discharge Elimination System (NPDES) framework while . . . reflecting principles of adaptive management" and to solicit public comment on these recommendations (DRBC Resolution No. 2005-19 par's. 3-4). It is expected that Stage 2 TMDLs issued by EPA will include as an appendix a TMDL implementation plan developed by DRBC and its co-regulators. The implementation plan, which will take the form of a guidance document, will explain how the load allocations assigned by the TMDL to nonpoint sources and the wasteload allocations assigned to point sources can be achieved consistent with the Clean Water Act and principles of adaptive management.

According to the 2003 and 2006 TMDLs, actual loadings of PCBs to the Delaware Estuary and Bay respectively are in some cases orders of magnitude above those needed to allow attainment of the designated use. The EPA's 2003 Delaware Estuary TMDL report projects that "due to the scope and complexity of the problem that has been defined through these TMDLs, achieving the estuary water quality standards for PCBs will take decades." (EPA 2003, Executive Summary, p. xiii). As required by Section 4.30.9 of the DRBC Water Quality Regulations, adopted by DRBC Resolution No. 2005-9 on May 18, 2005, the largest point source dischargers of PCBs to the Delaware Estuary and Bay have already undertaken pollutant minimization plans designed to locate the sources of PCBs entering their wastewater and stormwater systems and contain or remove them. The TMDL implementation plan developed by the co-regulators recognizes that many point source dischargers already have reduced their PCB loadings in an effort to meet their TMDL wasteload allocations assigned by the Stage 1 TMDLs. Some point source dischargers are expected to achieve their required reductions soon; however, others will require an extended period of time, including in some instances decades, to achieve the PCB loading reductions needed to meet their assigned wasteload allocations. The implementation plan developed by the co-regulators will accommodate these dischargers through the use of compliance schedules consistent with the Clean Water Act and applicable regulations. It is understood that those dischargers who cannot achieve their wasteload allocations within a single five-year permit cycle notwithstanding good faith efforts to do so as soon as possible will be given additional time, even if this requires compliance schedules extending well beyond a single five-year permit cycle.

Subjects on Which Comment is Expressly Solicited

Public comment is solicited on all aspects of the proposed rule. Without limiting the foregoing, the Commission has identified certain subject matters on which it expressly seeks comment. First, comments are solicited on the assumptions applied in developing the criterion, including the appropriate cancer risk level. (See Resolution No. 2005-19, par. 2). In accordance with current DRBC regulations, that level is 10⁻⁶, or one additional cancer in every one million humans exposed for 70 years. (See DRBC WQR, §3.10.3 D.4). The assumptions applied in developing the revised PCB criterion of 16 picograms per liter are set forth in a basis and background document that is available on the DRBC website, DRBC.net. The second area on which the Commission expressly seeks comment is best approaches for implementing water quality criteria for bioaccumulative pollutants consistent with the NPDES framework and principles of adaptive management. (See Resolution No. 2005-19, par. 4). The third is the implementation plan developed by the co-regulators, which is posted on the Commission's website, DRBC.net.

Dates: Two **informational meetings** will be held in late September, 2009 on the proposed revised human health water quality criterion for PCBs and accompanying implementation plan. The exact locations and dates will

be posted on the Commission's website, DRBC.net, on or before August 17, 2009.

The **public hearing** will be held at 1:30 p.m. on Thursday, October 8, 2009 at the Commission's office building located at 25 State Police Drive, West Trenton, NJ. As Internet mapping tools are inaccurate for this location, please use the driving directions posted on the Commission's website. The hearing will continue until all those wishing to testify have had an opportunity to do so. Persons wishing to testify at the hearing are asked to register in advance by phoning Ms. Paula Schmitt at 609-883-9500, ext. 224.

Written comments will be accepted and must be received by 5:00 p.m. on Monday, October 19, 2009. Written comments may be submitted as follows: if by email, to paula.schmitt@drbc.state.nj.us; if by fax, to Commission Secretary at 609-883-9522; if by U.S. Mail, to Commission Secretary, DRBC, P.O. Box 7360, West Trenton, NJ 08628-0360. In all cases, please include the commenter's name, address and affiliation, if any, in the comment document and "PCB Rulemaking" in the subject line.

Further Information: The basis and background document and the co-regulators' implementation plan for the proposed criterion will be available on the DRBC website, DRBC.net, on or before August 17, 2009. The dates, times and locations for the informational meetings to take place in late September will be posted on the website by the same date.

Please contact Commission Secretary Pamela M. Bush, 609-883-9500 ext. 203 with questions about the proposed rule or the rulemaking process.

PAMELA M. BUSH, ESQ.
Commission Secretary

Text of proposed amendments:

It is proposed to amend the Comprehensive Plan, Articles 3 and 4 of the Water Quality Regulations (WQR) and Article 3 of the Water Code (WC) as set forth below. Editor's instructions are denoted by underscore thus. Deleted text is denoted by brackets [thus] and added text is denoted by boldface thus.

Amend Section 3.10.3 D. of Article 3 of the WQR and WC as follows:

3.10.3 Stream Quality Objectives

* * * *

D. Human Health Objectives for Toxic Pollutants. It is the policy of the Commission to designate numerical stream quality objectives for the protection of human health for the Delaware River Estuary (Zones 2 through 5) which correspond to the designated uses of each zone. **It is also the policy of the Commission to designate a stream quality objective for the protection of human health from carcinogenic effects for PCBs in Delaware Bay (Zone 6).**

Stream quality objectives for protection from both carcinogenic and systemic effects are herein established on a pollutant-specific basis for:

* * *

Other toxic substances for which any of the three Estuary states have adopted criteria or standards may also be considered for the development of stream quality objectives.

* * *

6. A rate of ingestion of water of 2.0 liters per day is assumed in calculating objectives for river zones where the

designated uses include public water supplies after reasonable treatment. [A] **For toxic pollutants other than PCBs, a rate of ingestion of fish of 6.5 grams per day (equivalent to consuming a ½ pound portion every 35 days) is assumed in calculating freshwater stream quality objectives for human health[. A]; and a rate of ingestion of fish of 37 grams per day (equivalent to consuming a ½ pound portion every 6 days) is assumed in calculating marine stream quality objectives for human health. For PCBs in Zones 2 through 6, a rate of ingestion of fish of 17.5 grams per day (equivalent to consuming a ½ pound portion every 13 days) is assumed in calculating both freshwater and marine stream quality objectives.**

* * *

Amend Table 6 of Section 3.30 of Article 3 of the WQR and WC as follows:

For the parameter "PCBs (Total)", in the column headed "Freshwater Objectives (ug/l): Fish & Water Ingestion," remove the number "0.0000444" and insert "**0.000016**"; in the column headed "Freshwater Objectives (ug/l): Fish Ingestion Only," remove the number "0.0000448" and insert "**0.000016**"; and in the column headed "Marine Objectives (ug/l): Fish Ingestion Only," remove the number "0.0000079" and insert "**0.000016**".

Amend Section 3.30.6 C. of Article 3 of the WQR and WC by the addition of a new subsection 3.30.6 C.11. as follows:

3.30.6 Zone 6

* * * *

C. Stream Quality Objectives.

* * *

11. Toxic Pollutants. The applicable marine stream quality objective for PCBs for the protection of human health from carcinogenic effects is 0.000016 ug/l.

* * *

Amend Section 4.20.2 of Article 4 of the WQR as follows:

4.20.2 Additional Specifications. [The Standards have set limits for most of the significant and commonly used indicators which are pertinent to water quality management in the Basin. When a need arises, or upon application to the Commission, additional indicators and limits will be defined.]

Redesignate subsection 4.20.2 A. of Article 4 of the WQR as 4.20.2 B. and insert new language at Section 4.20.2 A. as follows:

A. Schedules of Compliance. Where implementation of a stream quality objective established by the Commission requires a reduction of the pollutant concentration or loading of a discharge to Basin waters, the Commission and/or environmental agency of the signatory party may establish a schedule of compliance ("compliance schedule") subject to the following:

1. Where the U.S. Environmental Protection Agency (EPA) or a state agency authorized by EPA to issue NPDES permits under the Clean Water Act issues a NPDES permit governing the discharge, then the compliance schedule shall be consistent with the Clean Water Act and applicable federal regulations; and

2. in all other instances, the compliance schedule issued by the Commission or the environmental agency of the signatory party shall obligate the discharger to attain as soon as reasonably

possible in the judgment of the agency issuing such schedule the concentration or loading required to implement the stream quality objective.

B[A]. Background, Total Dissolved Solids. The following background levels of total dissolved solids shall be utilized for the specified zones of the Delaware River:

* * *

13 DE Reg. 154 (08/01/09) (Prop.)