



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10**

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WATER
DIVISION

MAY 20 2019

The Honorable Brian Cladoosby, Chairman
Swinomish Indian Tribal Community
11404 Moorage Way
La Conner, WA 98257

**Re: The EPA's Action on Certain Provisions of the Swinomish Indian Tribal Community's 2019
Surface Water Quality Standards**

Dear Chairman Cladoosby:

The U.S. Environmental Protection Agency has completed its Clean Water Act (CWA) review of certain water quality standards (WQS) and other provisions that the Swinomish Tribe submitted to the EPA on April 30, 2019. Under CWA section 303, 33 U.S.C. § 1313, states and tribes that are authorized for treatment in a manner similar to a state for the purpose of administering a WQS program must submit new and revised WQS to the EPA for review and approval or disapproval. The Tribe submitted initial WQS to EPA for CWA review and action on February 8, 2017. Following a public notice and comment process, the Tribe revised its WQS and the Swinomish Senate readopted the entire WQS into law on April 8, 2019, as revised. The EPA is acting on the 2019 submittal at this time. The EPA's decision is summarized in the enclosed Technical Support Document.

On August 25, 2017, the EPA approved certain provisions of the February 8, 2017 submittal related to the Tribe's water contact bacteria criteria, including provisions establishing the uses that involve water contact and the recreational criteria that support those uses. The 2019 WQS did not include any new or revised water contact standards and recreational criteria, so the EPA's prior approval remains unchanged and these previously approved water quality standards remain in effect under the CWA.

Today's action addresses the remainder of the April 30, 2019 submittal, with the exception of aquatic life criteria and other provisions related to the protection of aquatic life that are the subject of the EPA's consultation with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service pursuant to Section 7 of the Endangered Species Act (ESA). Upon completion of ESA consultation, the EPA will take a separate action consistent with CWA section 303(c) on the criteria and provisions related to aquatic life.

Summary of the EPA's Action

- I. The EPA is taking action in accordance with its authority under CWA section 303(c), 33 U.S.C. §1313(c), to approve the new and revised water quality standards listed below:

- Section 19-06.010, Title
- Section 19-06.020, Purpose
- Section 19-06.030, Findings, paragraphs (G) and (M)
- Section 19-06.040, Authority
- Section 19-06.050, Jurisdiction
- Section 19-06.060, Applicability and Use
- Section 19-06.080, Definitions, except those previously approved

Subchapter I – Designated Uses and Water Quality Criteria

- Section 19-06.090, Basis for Uses and Criteria
- Section 19-06.100, General Conditions Applicable to All Regulated Surface Waters
- Section 19-06.110, General Use Designations
- Section 19-06.120, Fresh Water Designated Uses and Water Quality Criteria and related tables, including part or all of paragraphs (A), (B), (C)(1), (D)(1), (D)(2), (E), (F), (G), and Tables 1, 3, and 7
- Section 19-06.130, Marine Water Designated Uses and Criteria and related tables, including part or all of paragraphs (A), (B), (C)(1), (D)(1), (D)(2), (E), (F), and Tables 2, 9, and 13
- Section 19-06.140, Criteria for Toxic Pollutants, including part or all of paragraphs (A), (B), (E), and Table 15
- Section 19-06.150, Narrative Criteria Applicable to All Regulated Surface Waters, except paragraphs (B)(4) and (B)(5)
- Section 19-06.160, Site-Specific Criteria and Criteria Based on Natural Conditions
- Section 19-06.170, Modifications of Use Designations and Water Quality Criteria
- Section 19-06.180, Triennial Review

Subchapter II – Antidegradation Policy

- Section 19-06.190, Purpose
- Section 19-06.200, Tier I – Protection of Existing and Designated Uses
- Section 19-06.210, Tier II – Protection of Waters of Higher Quality than the Standard
- Section 19-06.220, Tier III – Protection of Outstanding Tribal Resource Waters
- Section 19-06.230, Thermal Discharges

- Section 19-06.240, Mixing Zones

Subchapter IV – Public Involvement, Implementation, and Enforcement

- Section 19-06.350, Compliance Schedules and Interim Criteria for Existing Activities
- Section 19-06.360, Variances.

II. The EPA is taking no action on the following provisions because they are not WQS subject to review and action under Section 303(c) of the CWA:

Section 19-06.030, Findings, except paragraphs (G) and (M)
Section 19-06.070, Construction

Subchapter I – Designated Uses and Water Quality Criteria

Section 19-06.120, Fresh Water Designated Uses and Water Quality Criteria, paragraphs (D)(3), (D)(4) and (E)(3)(b) - (d)
Section 19-06.130, Marine Water Designated Uses and Criteria and related tables, paragraphs (D)(3), (D)(4), and (E)(3)(b) - (d)
Section 19-06.140, Criteria for Toxic Pollutants, paragraphs (C), (D), and (F)
Section 19-06.150, Narrative Criteria Applicable to All Regulated Surface Waters, paragraphs (B)(4) and (B)(5)

Subchapter III – Water Quality Certification

Section 19-06.250, Certification Authority
Section 19-06.260, Certification and Permits Required
Section 19-06.270, Certification Fees
Section 19-06.280, Application for Certification
Section 19-06.290, Initial Review; Public Notice and Comment
Section 19-06.300, Department Decision
Section 19-06.310, Modification, Suspension, or Revocation of Certification

Subchapter IV – Public Involvement, Implementation, and Enforcement

Section 19-06.320, Public Information
Section 19-06.330, Public Participation and Responsiveness
Section 19-06.340, Implementation
Section 19-06.370, Analytic Methods
Section 19-06.380, Enforcement
Section 19-06.390, Penalties
Section 19-06.400, Remediation
Section 19-06.410, Damages

Subchapter V – Hearings, Appeals, Computation of Time, and Law Applicable

Section 19-06.420, Request for Planning Commission Hearing
Section 19-06.430, Hearings before the Planning Commission
Section 19-06.440, Appeals of Planning Commission Decisions
Section 19-06.450, Appeals of Senate Decisions
Section 19-06.460, Time, Notice of Decision, and Finality
Section 19-06.470, Tribal Administrative Remedies and Tribal Court
Section 19-06.480, Sovereign Immunity

Subchapter VI – Effective Date, Repealer, and Severability

Section 19-06.490, Effective Date

Section 19-06.500, Repealer

Section 19-06.510, Severability.

The EPA appreciates our work together and we remain committed to providing technical assistance to the Tribe. If you have any questions concerning this letter, please contact me at (206) 553-1855 or Hanh Shaw, Standards and Assessment Section Manager, at (206) 553-0171 or shaw.hanh@epa.gov.

Sincerely,



Daniel D. Opalski

Director

Enclosure

cc: Mr. Todd Mitchell, Environmental Director, Swinomish Department of Environmental Protection
(by email)

Technical Support Document
The EPA’s Action on Human Health Criteria and Other Water Quality
Standards of the Swinomish Indian Tribal Community

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I. Introduction

This Technical Support Document (TSD) provides the basis for the EPA's decisions under section 303(c) of the Clean Water Act (CWA), and the federal water quality standards regulations at 40 CFR 131, to approve certain water quality standards (WQS) that the Swinomish Indian Tribal Community (Tribe) submitted to the EPA on April 30, 2019.

The Tribe was approved for treatment in a manner similar to a state (TAS) status for administering WQS on April 18, 2008. The Tribe initiated a public process for its proposed water quality standards on November 23, 2016 by publishing notice of the 45-day public comment period in the La Conner Weekly News and on the Tribe's website, and by holding a public hearing on January 9, 2017. The Tribe revised the proposed WQS in response to public comments, and the Swinomish Senate adopted the final WQS into law on February 7, 2017. On February 7, 2017, the Tribe submitted the WQS to the EPA for review and action in accordance with section 303(c) of the CWA. The Tribe's WQS submittal included a letter from Emily Haley, Tribal Attorney, certifying that the WQS were adopted in accordance with all applicable laws.

The Tribe initiated a public process for review and adoption of new fecal coliform criteria on October 25, 2018, and held a public hearing on December 13, 2018. The Tribe initiated an additional public process on February 28, 2019 to propose clarifying revisions and corrections to the WQS, and held a public hearing on March 28, 2019. The Tribe modified its WQS revisions in response to comments, and the Swinomish Senate re-adopted the WQS, including the new and revised provisions, on April 8, 2019. On April 30, 2019, the Tribe submitted the WQS to the EPA for review under CWA 303(c). The Tribe's submittal included a letter from Emily Haley, Tribal Attorney, certifying that the new and revised provisions were adopted in accordance with all applicable Tribal laws. The EPA is acting on the 2019 WQS as described below.

On August 25, 2017, the EPA took CWA action on part of the February 8, 2017, submittal when it approved the water quality standards related to water contact designated uses and criteria that support those uses.¹ The 2019 WQS did not include any new or revised water contact standards and recreational criteria, and therefore the EPA's prior approval remains unchanged and these previously approved water quality standards remain in effect under the CWA. Specifically, the EPA approved the following provisions in 2017:

19-06.080, Definitions – three definitions related to water contact bacteria criteria

Subchapter I – Designated Uses and Water Quality Criteria

19-06.120, Fresh Water Designated Uses and Water Quality Criteria and related tables – the designated uses of primary contact and spiritual and cultural use and the

¹ Letter from Michael Lidgard, Acting Director of US EPA Region 10 Office of Water and Watersheds, to Brian Cladoosby, Swinomish Indian Tribal Community, re: Approval Action of Water Quality Standards for Primary Contact and Spiritual & Cultural Uses, Water Contact Bacteria Criteria in Fresh and marine Waters, and Relevant Definitions. Enclosure, Technical Support Document: The EPA's Approval of the Swinomish Tribe's Water Quality Standards for Primary Contact and Spiritual & Cultural Uses, Water Contact Bacteria Criteria in Fresh and Marine Water, and Relevant Definitions Submitted February 8, 2017. Letter and enclosure dated August 25, 2017. Available online at <https://www.epa.gov/sites/production/files/2017-09/documents/swinomish-letter-8252017.pdf>.

applicability of these uses to fresh waters identified in Table 1; the bacteria criteria that support these uses specified in Table 8; and the application of these criteria to the primary contact use and the spiritual and cultural uses in Table 3.

19-06.130, Marine Water Designated Uses and Criteria – the designated uses of primary contact and spiritual and cultural use and the applicability of these uses to marine waters identified in Table 2; the bacteria criteria that support these uses specified in Table 14; and the application of these criteria to the primary contact use and the spiritual and cultural uses in Table 9.

The EPA approved the use classifications insofar as they relate to water contact bacteria criteria in fresh and marine water. The above-listed approved WQS are currently in effect under the CWA and are not part of this action.

II. Clean Water Act Requirements for Water Quality Standards

Under section 303(c) of the CWA and federal implementing regulations at 40 CFR 131.4, states and authorized tribes² have the primary responsibility for reviewing, establishing, and revising WQS, which consist of the designated uses of a waterbody or waterbody segment, the water quality criteria necessary to protect those designated uses, and an antidegradation policy. This statutory framework allows states and authorized tribes to work with local communities to adopt appropriate designated uses (as required in 40 CFR 131.10(a)) and to adopt criteria to protect those designated uses (as required in 40 CFR 131.11(a)).

In adopting or revising WQS, states and authorized tribes are required to provide for public participation (40 CFR 131.20). Each state and authorized tribe must follow applicable legal procedures for revising and adopting such standards (40 CFR 131.5(a)(6)) and submit certification by the state's or tribe's attorney general, or other appropriate legal authority within the state/authorized tribe, that the WQS were duly adopted pursuant state/tribal law (40 CFR 131.6(e)). The EPA's review authority and the minimum legal requirements for WQS submittals by states and authorized tribes are described in 40 CFR 131.5 and 131.6.

States and authorized tribes are required by 40 CFR 131.11(a) to adopt water quality criteria that protect the designated uses. In establishing such criteria, states and authorized tribes should establish numeric values based on one of the following:

- (1) CWA 304(a) guidance;
- (2) CWA 304(a) guidance modified to reflect site-specific conditions; or,
- (3) Other scientifically defensible methods (40 CFR 131.11(b)(1)).

In addition, states and authorized tribes should establish narrative criteria where numeric criteria cannot be determined or to supplement numeric criteria (40 CFR 131.11(b)(2)).

² The term "authorized tribe" means a tribe eligible under CWA section 518(e) and 40 CFR 131.8 for treatment in a manner similar to a state (TAS) for the purpose of administering a water quality standards program. The EPA approved the Swinomish Tribe's TAS application on April 18, 2008.

Section 303(c) of the CWA also requires states and authorized tribes to submit new or revised WQS to the EPA for review and action. The EPA is required to review these new or revised WQS to ensure that they are consistent with the CWA and EPA's implementing regulations. The EPA considers four questions (described below) when evaluating whether a particular provision is a new or revised WQS. If all four questions are answered "yes" then the provision would likely constitute a new or revised WQS that the EPA has the authority and duty to approve or disapprove under CWA section 303(c)(3).³

- 1) Is it a legally binding provision adopted or established pursuant to state or tribal law?
- 2) Does the provision address designated uses, water quality criteria (narrative or numeric) to protect designated uses, and/or antidegradation requirements for waters of the United States?
- 3) Does the provision express or establish the desired condition (e.g., uses, criteria) or instream level of protection (e.g., antidegradation requirements) for waters of the United States immediately or mandate how it will be expressed or established for such waters in the future?
- 4) Does the provision establish a new WQS or revise an existing WQS?

Under CWA section 303(c)(3) and 40 CFR 131.21, the EPA must review and take an approval or disapproval action on any new or revised WQS adopted by a state or authorized tribe. The EPA reviews the state or tribal WQS to ensure, consistent with CWA section 303(c) and 40 CFR 131, that the use designations, water quality criteria, antidegradation policy and adopted implementation procedures, and general policies (e.g., WQS variances and mixing zone policies) meet the minimum requirements of the CWA.

Pursuant to CWA section 303(c)(3) and 40 CFR 131.21, a state or tribal WQS, once approved by the EPA, shall thereafter be the WQS for the applicable waters of that state or tribe. In the event the EPA disapproves a state's or authorized tribe's WQS, pursuant to CWA section 303(c)(3), the EPA is required to specify the changes that are needed to assure compliance with the requirements of the CWA and federal WQS regulations.

III. The EPA's Action on New and Revised Water Quality Standards

The EPA has completed its review and is acting on the Tribe's April 30, 2019 submittal, as described below. The parts of the 2019 submittal that are excluded from this action include the WQS that the EPA approved on August 25, 2017, and the provisions related to the protection of aquatic life, including acute and chronic aquatic life criteria, for which the EPA is currently developing a Biological Evaluation to initiate ESA consultation with the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS). The EPA expects to act on the provisions related to aquatic life following the completion of ESA consultation.

This action applies only to water bodies under the jurisdiction of the Swinomish Tribe and does not apply to other waters in Washington, and nothing in this letter and TSD shall constitute an approval or disapproval of a WQS that applies to waters within the State's jurisdiction.

³ What is a New or Revised Water Quality Standard Under CWA 303(c)(3)? Frequently Asked Questions, EPA (Oct. 2012). Available at <https://www.epa.gov/sites/production/files/2014-11/documents/cwa303faq.pdf>.

Listing of the Water Quality Standards that the EPA is Approving

As explained in the technical justification below, the EPA is approving the following WQS contained in the Tribe's February 8, 2017 and April 30, 2019, submittals:

- 19-06.010, Title
- 19-06.020, Purpose
- 19-06.030, Findings, paragraphs (G) and (M)
- 19-06.040, Authority
- 19-06.050, Jurisdiction
- 19-06.060, Applicability and Use
- 19-06.080, Definitions, except (20), (38) and (46), which were previously approved

Subchapter I – Designated Uses and Water Quality Criteria

- 19-06.090, Basis for Uses and Criteria
- 19-06.100, General Conditions Applicable to All Regulated Surface Waters
- 19-06.110, General Use Designations
- 19-06.120, Fresh Water Designated Uses and Water Quality Criteria and related tables, except as approved previously, undergoing ESA consultation, or not requiring action. Approval includes part or all of paragraphs (A), (B), (C)(1), (D)(1), (D)(2), (E), (F), (G), and Tables 1, 3, and 7
- 19-06.130, Marine Water Designated Uses and Criteria and related tables, except as approved previously, undergoing ESA consultation, or not requiring action. Approval includes part or all of paragraphs (A), (B), (C)(1), (D)(1), (D)(2), (E), (F), and Tables 2, 9, and 13
- 19-06.140, Criteria for Toxic Pollutants, except as undergoing ESA consultation-. Approvals include part of all of paragraphs (A), (B), (E), and Table 15.
- 19-06.150, Narrative Criteria Applicable to All Regulated Surface Waters, except paragraphs (B)(4) and (5)
- 19-06.160, Site-Specific Criteria and Criteria Based on Natural Conditions
- 19-06.170, Modifications of Use Designations and Water Quality Criteria
- 19-06.180, Triennial Review

Subchapter II – Antidegradation Policy

- 19-06.190, Purpose
- 19-06.200, Tier I – Protection of Existing and Designated Uses
- 19-06.210, Tier II – Protection of Waters of Higher Quality than the Standard
- 19-06.220, Tier III – Protection of Outstanding Tribal Resource Waters
- 19-06.230, Thermal Discharges

- 19-06.240, Mixing Zones

Subchapter IV – Public Involvement, Implementation, and Enforcement

- 19-06.350, Compliance Schedules and Interim Criteria for Existing Activities
- 19-06.360, Variances.

Listing of Provisions That Are Not Water Quality Standards

The EPA is not acting on the following provisions because the EPA has determined the provisions are not WQS subject to EPA review under section 303(c)(3):

- 19-06.030, Findings, except paragraphs (G) and (M)
- 19-06.070, Construction

Subchapter I – Designated Uses and Water Quality Criteria

- 19-06.120, Fresh Water Designated Uses and Water Quality Criteria, paragraphs (D)(3), (D)(4), and (E)(3)(b) - (d)
- 19-06.130, Marine Water Designated Uses and Criteria and related tables, paragraphs (D)(3), (D)(4), and (E)(3)(b) - (d)
- 19-06.140, Criteria for Toxic Pollutants, paragraphs (C), (D), and (F)
- 19-06.150, Narrative Criteria Applicable to All Regulated Surface Waters, paragraphs (B)(4) and (B)(5)

Subchapter III – Water Quality Certification

- 19-06.250, Certification Authority
- 19-06.260, Certification and Permits Required
- 19-06.270, Certification Fees
- 19-06.280, Application for Certification
- 19-06.290, Initial Review; Public Notice and Comment
- 19-06.300, Department Decision
- 19-06.310, Modification, Suspension, or Revocation of Certification

Subchapter IV – Public Involvement, Implementation, and Enforcement

- 19-06.320, Public Information
- 19-06.330, Public Participation and Responsiveness
- 19-06.340, Implementation
- 19-06.370, Analytic Methods
- 19-06.380, Enforcement
- 19-06.390, Penalties
- 19-06.400, Remediation
- 19-06.410, Damages

Subchapter V – Hearings, Appeals, Computation of Time, and Law Applicable

- 19-06.420, Request for Planning Commission Hearing
- 19-06.430, Hearings before the Planning Commission
- 19-06.440, Appeals of Planning Commission Decisions
- 19-06.450, Appeals of Senate Decisions
- 19-06.460, Time, Notice of Decision, and Finality
- 19-06.470, Tribal Administrative Remedies and Tribal Court
- 19-06.480, Sovereign Immunity

Subchapter VI – Effective Date, Repealer, and Severability

19-06.490, Effective Date

19-06.500, Repealer

19-06.510, Severability.

A. Framework for Water Quality Standards, Sections 19-06.010 to 19-06.070

In accordance with its CWA authority, 33 U.S.C. § 1313(c)(3) and 40 CFR 131, the EPA approves the following sections of the Swinomish WQS:

19-06.010, Title

19-06.020, Purpose

19-06.030, Findings, paragraphs (G) and (M)

19-06.040, Authority

19-06.050, Jurisdiction

19-06.060, Applicability and Use

The EPA is taking no action on Section 19-06.030 paragraphs (A) through (F), (H) through (L), and (N) through (X) and on Section 19-06.070 because these provisions are not water quality standards that the EPA has the duty or authority to approve under section 303(c) of the CWA.

The provisions that the EPA is approving in Sections 19-06.010 to 19-06.060 provide broad objectives for water uses and water quality protection, jurisdictional context and legal framework for the WQS, and general requirements and context for application of the WQS. In addition, paragraph 19-06.030(G) pertains to the Tribe's authority under the CWA to adopt WQS, and paragraph 19-06.030(M) provides a broad statement of the Tribe's uses of its waters.

The EPA is taking no action on the remainder of Section 19-06.030 Findings and on Section 19-06.070 Construction. Sections 10-06.030 (A) through (F), (H) through (L), and (N) through (X) provide information regarding Tribal values and environmental, social, and health conditions that constitute the basis for regulating water quality, and Section 19-06.070 Construction addresses how the Tribe construes its code. These provisions are not WQS because they do not address designated uses, water quality criteria and/or antidegradation requirements; and/or do not express or establish the desired condition or instream level of protection for Tribal waters.

B. Definitions, Section 19-06.080

In accordance with its CWA authority, 33 U.S.C. § 1313(c)(3) and 40 CFR 131, the EPA approves the definitions for the following terms in Section 19-06.080:

- | | |
|---|--------------------------------------|
| (1) 1-DADMax or 1-day maximum temperature | (6) Background conditions |
| (2) 7-DADMax or 7-day average of daily maximum temperatures | (7) Best Available Science or BAS |
| (3) Acute toxicity | (8) Best management practices or BMP |
| (4) AKART | (9) Brackish water |
| (5) Aquatic life uses | (10) Carcinogen |
| | (11) Chronic toxicity |
| | (12) Clean Water Act or CWA or Act |

- | | |
|---|---------------------------------------|
| (13) Constructed wetlands | (34) Person |
| (14) Created wetlands | (35) Point source |
| (15) Criteria | (36) Pollutant |
| (16) Department | (37) Pollution |
| (17) Designated use | (39) Puget Sound Protocols |
| (18) Director | (40) Regulated Surface Waters |
| (19) Discharge | (41) Receiving waters |
| (21) EPA | (42) Regional Administrator |
| (22) Existing use | (43) Reservation |
| (23) Fecal coliform | (44) Reservation waters |
| (24) Fish and shellfish harvesting use | (45) Senate |
| (25) Geometric mean | (47) Standards |
| (26) Groundwater | (48) Threatened or endangered species |
| (27) Hardness | (49) Toxic pollutant |
| (28) Impair and its derivatives, e.g. impairment and impaired | (50) Toxicity test |
| (29) Mixing zone | (51) Tribe |
| (30) Natural conditions | (52) Turbidity |
| (31) Nonpoint source | (53) Water quality |
| (32) National Pollutant Discharge Elimination System or NPDES | (54) Water supply uses |
| (33) Permit or license | (55) Wetlands |
| | (56) Wildlife habitat use |
| | (57) Zone of Initial Dilution or ZID. |

The definitions provide clarity and explain terms used in the Tribe’s WQS, and therefore provide information needed for the application and implementation of the WQS. The definitions are consistent with general scientific and technical concepts, definitions in the CWA and/or EPA’s implementation regulations, EPA guidance, or otherwise appropriately convey the interpretation of a term. Accordingly, the EPA determines that the definitions are consistent with the CWA and applicable EPA regulations.

C. Subchapter I – Designated Uses and Water Quality Criteria, Sections 19-06.090 to 19-06.180

In accordance with its CWA authority, 33 U.S.C. § 1313(c)(3) and 40 CFR 131, the EPA approves the designated uses and water quality criteria in Sections 19-06.090 to 19-06.180, except for certain provisions related to protection of aquatic life that will be addressed by the EPA following ESA section 7 consultation with NMFS and FWS.

CWA sections 101(a)(2) and 303(c)(2) provide requirements for establishing designated uses for a state or authorized tribe’s waters and for adopting water quality criteria that “protect the designated use.” *See also* 40 CFR 131.10 and 11. Water quality criteria represent the conditions (e.g., concentrations of particular chemicals, levels of certain parameters) sufficient to restore and maintain the chemical, physical, and biological integrity of water bodies and protect applicable designated uses. The Swinomish Tribe’s WQS provide use designations and the criteria to protect such designated uses in Sections 19-06.090 to 19-06.180 and Tables 1 through 15.

1. Basis for Uses and Criteria, Section 19-06.090

In accordance with its CWA authority, 33 U.S.C. § 1313(c)(3) and 40 CFR 131, the EPA approves Section 19-06.090.

Section 19-06.090 provides contextual information and general water quality goals for Regulated Surface Waters, including the CWA section 101(a)(2) goals that, wherever attainable, uses and criteria provide water quality for the protection and propagation of fish, shellfish, and wildlife, and recreation in and on the water.

2. General Conditions Applicable to All Regulated Surface Waters, Section 19-06.100

In accordance with its CWA authority, 33 U.S.C. § 1313(c)(3) and 40 CFR 131, the EPA approves Section 19-06.100.

Section 19-06.100 provides general narrative criteria and requirements applicable to the designated uses and to supplement the numeric criteria. Paragraphs (A) and (B) require pollutants to be maintained at levels that will protect the designated uses and that will specifically protect the most sensitive use. These provisions are consistent with 40 CFR 131.11(a)(1).

Paragraphs (C) and (D) require that the quality of Regulated Surface Waters must be sufficient to meet criteria of downstream waters, and that the most stringent criteria apply at the boundary of two waters. These provisions are consistent with 40 CFR 131.10(b) and 40 CFR 131.11(a).⁴

Paragraph (E) provides the basis for classifying waters as marine or fresh waters, and for applying criteria to brackish waters of intermediate salinity. This provision ensures that designated uses are protected in waters that are not clearly classified as marine or fresh waters and is consistent with water quality regulations issued by EPA.⁵

3. General Use Designations, Section 19-06.110

In accordance with its CWA authority, 33 U.S.C. § 1313(c)(3) and 40 CFR 131, the EPA approves Section 19-06.110.

Pursuant to the CWA and the EPA's regulation at 40 CFR 131.10(a), states and authorized tribes are responsible for specifying appropriate designated uses to be achieved and protected. Section 19-06.110 applies the salmon and trout fish uses to tributaries of waters with those uses as identified in Table 1, which is consistent with CWA section 101(a)(2) and 303(c)(2).

4. Fresh Water Designated Uses and Water Quality Criteria, Section 19-06.120

In accordance with its CWA authority, 33 U.S.C. § 1313(c)(3) and 40 CFR 131, the EPA approves certain of the freshwater designated uses and water quality criteria in Section

⁴ See also Protection of Downstream Waters in Water Quality Standards, Frequently Asked Questions, EPA-820-F-14-001 (Jun. 2014). Available at <https://www.epa.gov/sites/production/files/2018-10/documents/protection-downstream-wqs-faqs.pdf>

⁵ National Toxics Rule, 40 CFR 131.36(c)(3)(iii) and 57 FR 60871 (Dec. 22, 1992); California Toxics Rule at 40 CFR 131.38(c)(3)(iii) and 65 FR 31701-31702.

19-06.120, as described below. The EPA is taking no action on the provisions at Section 19-06.120(D)(3), (D)(4), and (E)(3)(b)-(d) because they are not water quality standards that the EPA has the duty or authority to review under to CWA section 303(c).

Section 19-06.120 designates uses for fresh waters and provides criteria to protect those uses. The EPA is approving those uses and criteria that were not previously approved as part of the recreational criteria approval, and that are not the subject of ESA section 7 consultation with NMFS and FWS.

Paragraph (A) and Table 1 establish the designated uses for Tribal fresh waters. The EPA's August 25, 2017 action previously approved paragraph (A) and Table 1 for the use classifications in the Tribe's WQS insofar as they relate to water contact bacteria criteria in fresh waters. The designation of the remaining uses listed in Table 1 is consistent with CWA sections 101(a)(2) and 303(c)(2). Accordingly, the EPA now approves the remaining use classifications in paragraph A and Table 1 in the Tribe's WQS establishing freshwater uses and applying such uses to the identified waterbodies.

Paragraph (B) and Table 3 specify which criteria apply to the various fresh water uses identified in Table 1, consistent with CWA sections 101(a)(2) and 303(c)(2) and 40 CFR 131.6. The EPA's August 25, 2017 action previously approved paragraph (B) as it relates to water contact bacteria criteria in fresh waters, and the EPA now approves paragraph (B) as it relates to the remaining uses and criteria in fresh waters. The EPA's August 25, 2017 action also previously approved application of the water contact bacteria criteria to the primary contact use and the spiritual & cultural use in Table 3, and the EPA now approves Table 3 as it relates to the remaining uses and criteria in fresh waters, except that the EPA is not acting on the application of the narrative criteria in Table 3 (i.e., aesthetic quality and biological criteria) to the aquatic life use. In addition, the EPA is not acting on the aquatic life criteria (i.e., the criteria for temperature, dissolved oxygen, turbidity, pH, and the acute and chronic criteria for toxic pollutants) as described below, and on their application to the designated uses identified in Table 3. As noted above, the EPA expects to act on the aquatic life criteria once it completes ESA consultation.

Paragraph (C) identifies aquatic life uses in fresh waters and specifies criteria to protect those uses. The EPA approves paragraph 19-06.120(C)(1), which identifies the aquatic life uses for Regulated Surface Waters and is consistent with CWA sections 101(a)(2) and 303(c)(2). The EPA is deferring action on paragraphs 19-06.120(C)(2) and Tables 4, 5, and 6, which provide temperature, dissolved oxygen, and pH criteria to protect the aquatic life uses, but expects to act following completion of ESA section 7 consultation on the EPA's action with NMFS and FWS.

Paragraph (D) specifies criteria to protect the fish and shellfish harvesting use in fresh waters. Paragraph (D)(1) provides a narrative statement of the application of the narrative and toxics criteria that are specified in Table 3 to the fish and shellfish harvesting use. The EPA approves paragraph (D)(1), which is consistent with CWA sections 101(a)(2) and 303(c)(2) and 40 CFR 131.6. The EPA is deferring action on the aquatic life criteria and their application to designated uses in Table 3, as described above.

Paragraph (D)(2) applies the bacteria criteria provided in Table 7 to the fish and shellfish harvesting use in fresh waters. These criteria are based on recommendations provided by the National Shellfish Sanitation Program (NSSP).⁶ The provision specifies numeric criteria for total and fecal coliform levels, providing the option to use either indicator; test methods that may be used and numeric criteria relevant to each method; and sampling frequency requirements that correspond to NSSP recommendations for shellfish areas in Remote Status locations. The EPA approves paragraph (D)(2) and Table 7, which provide criteria for bacteria indicators that are based on scientifically defensible methods as developed by the NSSP for protection of human health, consistent with 40 CFR 131.11.

Paragraph (D)(3) acknowledges the authority and the circumstances under which the Swinomish Department of Environmental Protection may adopt more stringent criteria in the future, and paragraph (D)(4) is a general statement regarding the criteria. The EPA is taking no action on these provisions because they are not WQS that the EPA has the duty or authority to review under CWA section 303(c). Although the provisions address water quality criteria, they do not express or establish the desired condition or instream level of protection immediately or mandate how it will be expressed or established in the future. The EPA notes that any future criteria derived using this provision must be submitted to the EPA for review and approval under CWA section 303(c) before they are effective for CWA purposes.

Paragraph (E) specifies criteria for protection of the water contact use in fresh waters. The EPA approved paragraphs (E)(1) and (E)(3)(a) as part of its August 25, 2017 action insofar as they relate to water contact bacteria criteria in fresh waters. Paragraph (E)(2) provides a narrative statement applying the narrative and toxics criteria that are specified in Table 3 to waters designated for water contact use. The EPA now approves paragraph (E)(2), and paragraphs (E)(1) and (E)(3)(a) as they relate to the remaining criteria in fresh waters, which are consistent with CWA sections 101(a)(2) and 303(c)(2) and 40 CFR 131.11(a).

Paragraphs (E)(3)(b), (c), and (d) acknowledge the authority and procedures to adopt more stringent criteria or a different bacteria indicator. The EPA is not acting on these provisions because they are not WQS that the EPA has the duty or authority to review under CWA section 303(c). Although the provisions discuss water quality criteria, they do not express or establish the desired condition or instream level of protection immediately or mandate how it will be expressed or established in the future. The EPA notes that any future criteria derived using these provisions must be submitted to the EPA for review and approval under CWA section 303(c) before they are effective for CWA purposes.

Paragraph (F) specifies criteria for protection of the water supply use in fresh waters. Paragraph (F)(1) identifies the domestic water supply use category in fresh waters. Paragraph (F)(2) provides a narrative statement of the application of the narrative and toxics criteria that are specified in Table 3 to the domestic water supply use. The EPA approves paragraph (F), which is consistent with CWA sections 101(a)(2) and 303(c)(2) and 40 CFR 131.11(a). The EPA is deferring action on the aquatic life criteria and their application to this designated use in Table 3, as described above.

⁶ National Shellfish Sanitation Program (NSSP) Guide for the Control of Molluscan Shellfish: 2017 Revision. Available at: <https://www.fda.gov/food/federalstate-food-programs/national-shellfish-sanitation-program-nssp>.

Paragraph (G) provides additional uses that apply to fresh waters. Paragraph (G)(1) identifies designated uses that include aesthetic value; spiritual and cultural uses; wildlife habitat; wetlands; and commerce, navigation, and boating. Paragraph (G)(2) provides a narrative statement of the application of the narrative and toxics criteria that are specified in Table 3 to these uses. The EPA approves paragraph (G), which is consistent with CWA sections 101(a)(2) and 303(c)(2) and 40 CFR 131.11(a). The EPA is deferring action on the aquatic life criteria and their application to these designated uses in Table 3, as described above.

5. Marine Water Designated Uses and Criteria, Section 19-06.130

In accordance with its CWA authority, 33 U.S.C. § 1313(c)(3) and 40 CFR 131, the EPA approves certain of the marine water designated uses and water quality criteria in Section 19-06.130, as described below. The EPA is taking no action on the provisions at Section 19-06.130(D)(3), (D)(4), and (E)(3)(b)-(d) because they are not water quality standards that the EPA has the duty or authority to review under CWA section 303(c).

Section 19-06.130 designates uses for marine waters and provides criteria to protect those uses. The EPA is approving those uses and criteria that were not previously approved as part of the recreational criteria approval, and that are not the subject of ESA section 7 consultation with NMFS and FWS.

Paragraph (A) and Table 2 establish the designated uses for Tribal marine waters. The EPA's August 25, 2017 action previously approved paragraph (A) and Table 2 for the use classifications in the Tribe's WQS insofar as they relate to water contact bacteria criteria in marine waters. The designation of the remaining uses listed in Table 2 is consistent with CWA sections 101(a)(2) and 303(c)(2). Accordingly, the EPA now approves the remaining use classifications in paragraph A and Table 2 in the Tribe's WQS establishing freshwater uses and applying such uses to the identified waterbodies.

Paragraph (B) and Table 9 specify which criteria apply to the various marine water uses identified in Table 2, consistent with CWA sections 101(a)(2) and 303(c)(2) and 40 CFR 131.6. The EPA's August 25, 2017 action previously approved paragraph (B) as it relates to water contact bacteria criteria in marine waters, and the EPA now approves paragraph (B) as it relates to the remaining uses and criteria in marine waters. The EPA's August 25, 2017 action also previously approved application of the water contact bacteria criteria to the primary contact use and the spiritual & cultural use in Table 9, and the EPA now approves Table 9 as it relates to the remaining uses and criteria in marine waters, except that the EPA is not acting on the application of the narrative criteria in Table 9 (i.e., aesthetic quality and biological criteria) to the aquatic life use. In addition, the EPA is not acting on the aquatic life criteria (i.e., the criteria for temperature, dissolved oxygen, turbidity, pH, and the acute and chronic criteria for toxic pollutants) as described below, and on their application to the designated uses identified in Table 9.

As noted above, the EPA expects to act on the aquatic life criteria once it completes ESA consultation. In addition, the Tribe withdrew the entry for total dissolved gas in Table 9 from its WQS submittal on May 6, 2019 and requested that the EPA not act on this entry. The Tribe

indicated that the entry was included in error. Accordingly, the EPA is not taking an action on this entry because it is no longer before us for 303(c) review purposes.

Paragraph (C) identifies aquatic life uses in marine waters and specifies criteria to protect those uses. The EPA approves paragraphs 19-06.130(C)(1), which identifies the aquatic life uses for Regulated Surface Waters and is consistent with CWA sections 101(a)(2) and 303(c)(2). The EPA is deferring action on paragraphs 19-06.130(C)(2) and Tables 10, 11, and 12, which provide temperature, dissolved oxygen, and pH criteria to protect the aquatic life uses, but expects to act following completion of ESA section 7 consultation with NMFS and FWS.

Paragraph (D) specifies criteria to protect the fish and shellfish harvesting use in marine waters. Paragraph (D)(1) provides a narrative statement of the application of the narrative and toxics criteria that are specified in Table 9 to the fish and shellfish harvesting use. The EPA approves paragraph (D)(1), which is consistent with CWA sections 101(a)(2) and 303(c)(2) and 40 CFR 131.6. The EPA is deferring action on the aquatic life criteria and their application to designated uses in Table 9, as described above.

Paragraph (D)(2) applies the bacteria criteria provided in Table 13 to the fish and shellfish harvesting use in marine waters. These criteria are based on recommendations provided by the NSSP.⁷ The provision specifies numeric criteria for total and fecal coliform levels, providing the option to use either indicator; test methods that may be used and numeric criteria relevant to each method; and sampling frequency requirements that correspond to NSSP recommendations for shellfish areas in Remote Status locations. The EPA approves paragraph (D)(2) and Table 13, which provide criteria for bacteria indicators that are based on scientifically defensible methods as developed by the NSSP for protection of human health, consistent with 40 CFR 131.11.

Paragraph (D)(3) acknowledges the authority and the circumstances under which the Swinomish Department of Environmental Protection may adopt more stringent criteria in the future, and paragraph (D)(4) is a general statement regarding the criteria. The EPA is taking no action on these provisions because they are not WQS that the EPA has the duty or authority to review under CWA section 303(c). Although the provisions address water quality criteria, they do not express or establish the desired condition or instream level of protection immediately or mandate how it will be expressed or established in the future. The EPA notes that any future criteria derived using this provision must be submitted to the EPA for review and approval under CWA section 303(c) before they are effective for CWA purposes.

Paragraph (E) specifies criteria for protection of the water contact use in marine waters. The EPA approved paragraphs (E)(1) and (E)(3)(a) and Table 14 as part of its August 25, 2017 action insofar as they relate to water contact bacteria criteria in fresh waters. Paragraph (E)(2) provides a narrative statement applying the narrative and toxics criteria that are specified in Table 9 to waters designated for water contact use. The EPA now approves paragraph (E)(2), and paragraphs (E)(1) and (E)(3)(a) as they relate to the remaining criteria in fresh waters, which are consistent with CWA sections 101(a)(2) and 303(c)(2) and 40 CFR 131.11(a).

⁷ National Shellfish Sanitation Program (NSSP) Guide for the Control of Molluscan Shellfish: 2017 Revision. Available at: <https://www.fda.gov/food/federalstate-food-programs/national-shellfish-sanitation-program-nssp>.

Paragraphs (E)(3)(b), (c), and (d) acknowledge the authority and procedures to adopt more stringent criteria or a different bacteria indicator. The EPA is not acting on these provisions because they are not WQS that the EPA has the duty or authority to review under CWA section 303(c). Although the provisions discuss water quality criteria, they do not express or establish the desired condition or instream level of protection immediately or mandate how it will be expressed or established in the future. The EPA notes that any future criteria derived using these provisions must be submitted to the EPA for review and approval under CWA section 303(c) before they are effective for CWA purposes.

Paragraph (F) provides additional uses that apply to marine waters. Paragraph (F)(1) identifies designated uses that include aesthetic value; spiritual and cultural uses; wildlife habitat; wetlands; commerce, navigation, and boating; and seafood processing. Paragraph (F)(2) provides a narrative statement of the application of the narrative and toxics criteria that are specified in Table 9 to these uses. The EPA approves paragraph (F), which is consistent with CWA sections 101(a)(2) and 303(c)(2) and 40 CFR 131.11(a). The EPA is deferring action on the aquatic life criteria and their application to these designated uses in Table 9, as described above.

6. Criteria for Toxic Pollutants, Section 19-06.140

In accordance with its CWA authority, 33 U.S.C. § 1313(c)(3) and 40 CFR 131, the EPA approves Section 19-06.140 and the human health criteria in Table 15, except as described below. The EPA is deferring action on the aquatic life criteria in Table 15, relevant footnotes, and paragraph (G) in Section 19-06.140 but will act on these criteria and provisions following completion of ESA section 7 consultation with NMFS and FWS. The EPA is taking no action on the provisions at Section 19-06.140(C) and (D) because they are not water quality standards that the EPA has the duty or authority to approve pursuant to CWA section 303(c).

Paragraph 19-06.140(A) specifies that the toxics criteria in Table 15 are intended to protect aquatic life and human health; requires the most sensitive use to be protected, i.e., the lowest criterion will be used for regulatory purposes; and identifies the concentration units for the criteria values. The EPA approves this provision, which provides clarifying information for the toxics criteria in Table 15 and requirements regarding their application to protect designated uses.

Paragraph 19-06.140(B) is a narrative criterion that prohibits release of toxic substances to regulated waters in toxic amounts. It protects all uses of Reservation waters from impairment due to toxic pollutants, including pollutants for which no numeric criteria have been established and toxicity that may result from the cumulative effects of multiple pollutants. The narrative toxics criterion supplements the numeric toxics criteria in Table 15. The EPA approves the narrative toxics criterion as consistent with 40 CFR 131.11.

Paragraphs 19-06.140(C) and (D) provide requirements for implementation of the toxics criteria and future adoption of additional numeric criteria, but this language does not itself describe the desired condition or instream level of protection for the Tribe's waters. Therefore, paragraphs 19-06.140(C) and (D) are not WQS that the EPA has the duty or authority to review under Section 303(c) of the CWA. The EPA notes that any future criteria derived using these

provisions must be submitted to the EPA for review and approval under CWA section 303(c) before they are effective for CWA purposes.

Paragraph 19-06.140(E) requires human health criteria to be derived using a cancer risk level of 10^{-6} for carcinogenic substances. This language provides information about how the human health criteria in Table 15 were derived, and provides a requirement for the excess cancer risk level when deriving future human health criteria. The EPA approves paragraph 19-06.140(E), which is consistent with the EPA's 2000 human health methodology.⁸

Paragraph 19-06.140(F) notes that the human health criteria were derived using a fish consumption rate of 384 grams/day and a drinking water intake rate of 2.4 liters per day. This language provides explanatory information for how the Tribe derived the human health criteria in Table 15 (which the EPA is acting on below), but the language does not itself describe the desired condition or instream level of protection for the Tribe's waters. Therefore, paragraph 19-06.140(F) is not a WQS that the EPA has a duty or the authority to review under Section 303(c) of the CWA.

Paragraphs 19-06.140(G) is related to the aquatic life criteria. The EPA will take an action on these provisions in connection with a future action on the aquatic life criteria.

D. Water Quality Criteria for Toxic Pollutants, Table 15

In accordance with its CWA authority, 33 U.S.C. § 1313(c)(3) and 40 CFR 131, the EPA approves the numeric criteria for toxic pollutants for the protection of human health in Table 15 and footnotes that provide additional information and requirements.

1. Derivation of the Human Health Criteria in Table 15

The input parameters that the Tribe used to derive the human health criteria are generally consistent with the EPA's 2000 Human Health Methodology and the EPA's 2015 CWA section 304(a) human health criteria recommendations,⁹ with the exceptions noted below in the EPA's action on the criteria. The Tribe used the input values described below to derive human health criteria that are scientifically sound and protective of the Tribe's designated uses for fish and shellfish harvesting, domestic water supply, seafood processing, and spiritual and cultural use.

In general, the Tribe used the following input parameters:

- **A fish consumption rate (FCR)** of 384 grams per day. This value is based on a fish consumption study of its local members completed by the Swinomish Tribe, which provides relevant local and regional fish consumption data.
- **Toxicity factors** (reference doses for non-carcinogens and cancer slope factors for carcinogens) consistent with the EPA's 2015 recommendations.

⁸ USEPA. October 2000. Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health. U.S. Environmental Protection Agency, Office of Water, Washington, D.C. EPA-822-B-00-004, available at <https://nepis.epa.gov/Exe/ZyPDF.cgi/20003D2R.PDF?Dockey=20003D2R.PDF>.

⁹ <https://www.epa.gov/sites/production/files/2015-10/documents/human-health-2015-update-factsheet.pdf>.

- **Bioaccumulation factors (BAFs)** consistent with the EPA’s 2015 recommendations using the trophic level-specific fish consumption rates¹⁰ established in the Swinomish Tribe’s fish consumption study.
- A **cancer risk level** of 10^{-6} for carcinogens, consistent with the EPA’s 2000 Human Health Methodology.
- A **relative source contribution (RSC)** consistent with the EPA’s 2015 recommendations for non-carcinogens, adjusted to account for inclusion of marine fish, in addition to nearshore and inland fish and shellfish, in the FCR. An RSC of 0.5 was used in most cases.
- A **drinking water intake rate** of 2.4 liters per day consistent with the EPA’s 2015 recommendations.
- A **body weight** input of 80 kg, consistent with the EPA’s 2015 recommendations.

2. Evaluation and Rationale for Approval of the Human Health Criteria

The EPA’s regulations at 40 CFR 131.11(a) provide that new or revised criteria “must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect designated uses.” If these requirements are met, states and authorized tribes are able to develop criteria that may be more or less stringent than those recommended by the EPA.

The EPA evaluated the Tribe’s human health criteria, based on the input values described above, as follows:

- First, the EPA acknowledged the Tribe’s decision to ensure water quality sufficient to support fish and shellfish harvesting and ceremonial and cultural uses in fresh and marine waters, and domestic water supply in one fresh water body. Designation of uses is a matter of tribal policy and within the Tribe’s authority under the CWA, within the broad framework established in sections 101(a)(2) and 303(c) of the CWA.
- Second, the EPA evaluated the assumptions and methodology the Tribe used in deriving criteria to protect its water quality goals, including the derivation of the FCR and other inputs to the human health criteria equation used to protect the Tribe’s fish and shellfish harvesting, ceremonial and cultural, and domestic water supply uses, and compared the Tribe’s fish consumption study results to other regional studies.

The EPA’s 2000 Human Health Methodology recognizes the variability of FCRs among population groups and by geographic region. In employing the 2000 Methodology to derive criteria, the EPA urges states and tribes to use fish intake levels derived from local or regional data instead of the national default FCR and to ensure the fish intake level selected is protective of highly exposed subpopulations. The 2000 Methodology includes a four-preference hierarchy concerning the use of FCR data: (1) use of local data; (2) use of data reflecting similar

¹⁰ Specific consumption rates were: Trophic Level 2: 136 grams/day (66% of shellfish as bivalves (clams, oysters, etc.); Trophic Level 3: 18 grams/day (10% of finfish as herring, sole, flounder, etc); Trophic Level 4: 230 grams/day (90% of finfish as salmon, trout, halibut, etc. and 33% of shellfish as crab)

geography/population groups; (3) use of data from national surveys; and (4) use of the EPA's default intake rate.

The Tribe obtained local and relevant FCR data by conducting a fish consumption survey of tribal members from 2004 to 2006. The purpose of the study was to estimate FCRs for tribal members engaging in traditional life ways. The study sample included tribal members practicing traditional lifestyles to the maximum degree practicable and additional tribal members selected to reflect age and gender demographics of the tribal population as a whole. The statistical distribution of Swinomish FCRs represented by the study would thus likely fall somewhere between the distributions of current FCRs for all tribal members and heritage or historic FCRs. Trophic levels were determined for the various species of fish and shellfish identified in the fish consumption data. Use of these trophic level designations and Swinomish FCRs for specific trophic level groups were used in calculations for the Tribe's HHC, consistent with the EPA's methodology. The tribal FCR includes estuarine and freshwater fish and shellfish (e.g., bivalves and crab). The tribal FCR also includes salmon and marine species that may be optionally included in the FCR.¹¹ The EPA recommends that if marine and anadromous fish consumption is included in the FCR, RSC values be increased in order to avoid accounting for marine and anadromous fish consumption in both the RSC and the FCR. The approach used in the EPA's federal rulemaking to establish the State of Washington's HHC was employed in the Swinomish FCR.¹² This resulted in use of RSC values ranging from 0.5 to 0.8 rather than the default range of 0.2 to 0.8.

The Swinomish Tribe utilized the 95th percentile of their study's FCR distribution, 384 g/day, to derive tribal HHC. This FCR falls within the range of FCRs reported for other tribes from the Salish Sea, including the Tulalip, Suquamish, and Squaxin Island Tribes. The 95th percentile of FCRs for these tribes were 268, 797, and 280 g/day, respectively, for total fish consumption. The Swinomish study's 95th percentile FCR is also similar to the 99th percentile of *A Fish Consumption Survey of the Umatilla, Nez Perce, Yakama, and Warm Springs Tribes of the Columbia River Basin* (Columbia River Inter-Tribal Fish Commission, 1994), which is 389 g/day.

All of the FCRs identified in the previous paragraph are plausible given daily caloric needs, the caloric content of fish, and subsistence resource use.

Region 10 tribal HHC often utilize FCRs greater than those of the general population because:

- Tribes have higher FCRs than the general population.
- Tribes desire to utilize FCRs that are concordant with treaty guaranteed fishing rights.
- Consistent with the discretion afforded to states and tribes under EPA's guidance and section 510 of the CWA, tribes often elect to target and protect the higher fish consumers within the population.

¹¹ <https://www.epa.gov/sites/production/files/2015-12/documents/hh-fish-consumption-faqs.pdf>

¹² <https://www.federalregister.gov/documents/2016/11/28/2016-28424/revision-of-certain-federal-water-quality-criteria-applicable-to-washington> (SEE: C. Washington-Specific Human Health Criteria Inputs, C. Relative Source Contribution Term).

The EPA has also determined that the Tribe's decisions to either incorporate the EPA's 2015 CWA section 304(a) recommendations into derivation of its human health criteria, or provide an adequate justification for selecting alternative values (i.e., use of a local FCR that is consistent with local consumption rates) are based on a sound scientific rationale. The EPA determined that the FCR and other variables used in developing the criteria resulted in human health criteria that are sufficiently protective of the Tribe's designated uses indicated in Tables 3 and 9 of the WQS, with the additional information provided below for certain criteria.

The Tribe adopted human health criteria for barium, copper, iron, manganese, and nitrate for consumption of water and aquatic organisms. These criteria serve to protect drinking water sources. The Tribe also adopted a manganese criterion for consumption of organisms only. The Tribe based its criteria for these pollutants on the EPA's 304(a) recommended human health criteria (which were not updated in 2015 for these pollutants) instead of using the above inputs to derive human health criteria.

Therefore, in accordance with the CWA, 33 U.S.C. § 1313(c)(3) and 40 CFR 131, the EPA approves the Tribe's human health toxics criteria listed in Table 15.

a. Human Health Criteria for Arsenic

The EPA acknowledges the uncertainty surrounding the toxicological assessment for arsenic with respect to human health effects. The EPA's current plan for addressing arsenic issues is described in the *Assessment Development Plan for the Integrated Risk Information System (IRIS) Toxicological Review of Inorganic Arsenic* (EPA/630/R-14/101, November 2015). Despite this scientific uncertainty, because the Tribe relied on the existing cancer slope factor (CSF) in the IRIS database that the EPA used to calculate its existing 304(a) recommendations for arsenic, the EPA is approving the Tribe's arsenic criteria. As new information becomes available from IRIS, the EPA encourages the Tribe to consider revisions, if necessary, to incorporate the latest science for arsenic.

b. Human Health Criteria for 2,3,7,8-TCDD (Dioxin) and Thallium

The EPA's national recommended 304(a) HHC for thallium (published in 2003) are based on an IRIS RfD from 1990. The EPA's national recommended HHC for dioxin (published in 2002) are based on a cancer slope factor from 1988. The existing national recommended 304(a) HHC for both thallium and dioxin are derived using a FCR of 17.5 g/day. The EPA did not update the 304(a) national recommended criteria for these two pollutants in 2015 because further analysis was necessary to develop scientifically sound recommendations.¹³

For thallium and dioxin, the Tribe used the EPA's existing 304(a) recommendations along with the Tribe's selected FCR of 384 g/day and the EPA-recommended drinking water intake rate of

¹³ USEPA. 2015. EPA Response to Scientific Views from the Public on Draft Updated National Recommended Water Quality Criteria for the Protection of Human Health. U.S. Environmental Protection Agency, Office of Water, Washington, D.C. <https://www.epa.gov/sites/production/files/2015-10/documents/epa-response-to-public-comments-to-human-health-final-criteria.pdf>.

1.4 L/day, and adopted the criteria provided in Table 15 of the WQS. The RSC value was adjusted to 0.5 as described above.

Under the CWA, the EPA has an obligation to act on the Tribe's HHC for thallium and dioxin. Because the Tribe used existing EPA data on the toxicity of thallium and dioxin from the EPA's IRIS values used for the 304(a) recommendations, along with the Tribe's selected FCR and drinking water intake rate, the EPA is approving these HHC. As new information becomes available from IRIS, the EPA encourages the Tribe to consider revisions, if necessary, to incorporate the latest science for dioxin and thallium.

3. Human Health Criteria Footnotes in Table 15

In accordance with its CWA authority, 33 U.S.C. § 1313(c)(3) and 40 CFR 131, the EPA approves footnotes c, d, h (the second sentence only), and i to Table 15 as described below. The EPA is deferring action on footnotes relating to aquatic life criteria, but will act on these criteria and provisions following completion of ESA section 7 consultation with NMFS and FWS. The EPA is taking no action on footnotes m, s, and t because they are not water quality standards that the EPA has the duty or authority to approve pursuant to CWA section 303(c).

The EPA approves footnotes c, d, and i, and part of footnote h. Footnotes c and d clarify the terms "water and organisms" and "organisms only" that are used in the headers for the human health criteria in Table 15. These footnotes are consistent with EPA recommendations for HHC under CWA section 304(a).

Footnote i defines the asbestos criterion units and specifies the fiber lengths to which the criterion applies. This footnote provides additional detail regarding the criterion that is consistent with the EPA's maximum contaminant level for drinking water.

Footnote h provides information related to derivation of the arsenic criteria for aquatic life (first sentence) and human health (second sentence). The EPA is deferring action on the first sentence of footnote h, pending completion of ESA consultation on the aquatic life criteria to which the sentence applies. The EPA approves the second sentence of footnote h, "The human health criteria refer to the inorganic form only," which provides information about the application of the human health criteria for arsenic in Table 15.

The EPA is taking no action on footnotes m, s, and t because they are not WQS that the EPA has the duty or authority to review under CWA section 303(c). Footnote m requires analysis of fish tissue if total mercury levels in water exceed 0.012 µg/L more than once in 3 years and provides the FDA action level for methylmercury in fish tissue as a benchmark for further action by the Tribe to protect designated uses, including aquatic life and human health. This footnote addresses implementation and compliance with the criteria, not the criteria themselves.

Footnote s provides a reference to the EPA's implementation guidance for the methylmercury criterion and states the calculation used to derive the methylmercury criterion. The footnote provides implementation guidance and clarifies derivation of the Tribe's criteria for methylmercury.

Footnote t provides information regarding the use of bioconcentration factors in deriving certain human health criteria. It clarifies derivation of the Tribe's criteria for these pollutants and is not a WQS that the EPA has the duty or authority to review under 303(c) of the CWA.

E. Narrative Criteria, Section 19-06.150

In accordance with its CWA authority, 33 U.S.C. § 1313(c)(3) and 40 CFR 131, the EPA approves Section 19-06.150, paragraphs (A), (B)(1), (B)(2), (B)(3), (C), (D), (E), and (F), which are consistent with 40 CFR 131.11(a) and (b)(2). The EPA is taking no action on paragraphs 19-06.150(B)(4) and (B)(5) because they are not WQS that the EPA has the duty or authority to review under section 303(c) of the CWA.

The regulations at 40 CFR 131.11(a) require states and authorized tribes to adopt water quality criteria that contain sufficient parameters or constituents to protect designated uses. In accordance with 40 CFR 131.11(b)(2), in adopting water quality criteria, states and tribes should “establish narrative criteria or criteria based on biomonitoring methods where numeric criteria cannot be established or to supplement numeric criteria.” The narrative criteria in Section 19-06.150 are consistent with the regulations at 40 CFR 131.11.

Section 19-06.150 provides narrative criteria that apply to Regulated Surface Waters. Paragraph (A) provides narrative criteria to protect the aesthetic quality of the Regulated Surface Waters. Paragraph (A) prohibits or limits the following substances and conditions: (1) floating solids, oil and grease; (2) color; (3) odor and taste; (4) nuisance conditions; (5) turbidity; and (6) bottom deposits.

Paragraph (B) provides narrative criteria to protect the integrity of biological communities in Regulated Surface Waters. Paragraph (B) includes narrative criteria that (1) mandate water quality sufficient to support biota and resident aquatic communities; (2) require maintaining riparian habitat in order to maintain or enhance stream temperatures; and (3) prohibit discharge of toxic substances from any source at concentrations and in combinations that may have a deleterious effect on aquatic communities. Paragraphs (B)(4) and (5) provide requirements for biological assessment methods to determine the condition of aquatic communities in Regulated Surface Waters, which are implementation procedures for the narrative criteria.

Paragraph (C) provides wetlands criteria, including designated uses for wetlands; a narrative criterion that requires maintaining biological, physical, and hydrological conditions in wetlands in a natural state; application of numeric criteria to wetlands; and antidegradation requirements. Paragraph (C) additionally provides a narrative statement of the application of the narrative and toxics criteria that are specified in Tables 3 and 9 to wetlands.

Paragraph (D) provides a narrative for protection of wildlife that use Regulated Surface Waters.

Paragraph (E) requires maintaining instream flows at levels that support existing and designated uses.

F. Site-Specific Criteria and Criteria Based on Natural Conditions, Section 19-06.160

In accordance with its CWA authority, 33 U.S.C. § 1313(c)(3) and 40 CFR 131, the EPA approves Section 19-06.160, which is consistent with 40 CFR 131.11(a) and (b), and 40 CFR 131.20.

Paragraph 19-06.160(A) authorizes development of site-specific criteria where needed to protect existing or designated uses or to increase the technical accuracy of the criteria. Paragraph (A)(1) authorizes the adoption of water quality criteria based on natural conditions at a site.

Paragraph (A)(2) requires site-specific criteria, including criteria based on natural conditions, to be scientifically justifiable and to be developed consistent with certain EPA guidance. By reference to paragraph 19-06.170(B), paragraph 19-06.160(B) provides procedural requirements for adoption of revised WQS, including requirements for public participation and submittal to the EPA for 303(c) action.

Site-specific criteria may be adopted by a state or authorized tribe to account for local environmental conditions of a water or water segment. The regulation at 40 CFR 131.11(b)(1) requires states and tribes to adopt numeric water quality criteria that are based on (i) EPA criteria guidance; (ii) EPA criteria guidance modified to reflect site-specific conditions; or (iii) other scientifically defensible methods. Criteria, including site-specific criteria, must be based on sound scientific rationale and must be sufficient to protect the designated uses (40 CFR 131.6(c) and 131.11(a)). In addition, procedural requirements are specified in 40 CFR 131.20 for adopting site-specific criteria, including public participation and EPA review.

Site-specific criteria may include criteria based on natural conditions. The WQS regulations do not provide specific requirements for establishing such criteria. However, all criteria, including natural conditions-based criteria, must be established based on sound scientific rationale and assure protection of designated uses [40 CFR 131.11(a)(1)].

G. Modifications of Use Designations and Water Quality Criteria, Section 19-06.170 and Triennial Review, Section 19-06.180

In accordance with its CWA authority, 33 U.S.C. § 1313(c)(3) and 40 CFR 131, the EPA approves Sections 19-06.170 and 19-06.180, which are consistent with CWA section 303(c) and with 40 CFR 131.4 and 131.20, including requirements for triennial review, public participation, and EPA review and approval of revised WQS.

Section 19-06.170 authorizes future revisions of WQS, including designated uses and water quality criteria and provides procedural requirements for revising the WQS. Section 19-06.180 provides authorization and procedural requirements for triennial review and revision of the WQS.

Under Section 303(c) of the CWA and the EPA's implementing regulation at 40 CFR 131.4, states and authorized tribes are responsible for reviewing, revising, and adopting WQS and submitting such WQS to the EPA for review and approval or disapproval. CWA section 303(c)(1) and 40 CFR 131.20 require that states and authorized tribes, from time to time, but at least once every three years, hold public hearings to review applicable WQS and, as appropriate,

modify and adopt WQS. During such review cycles, states and tribes, with input from the public, identify additions and/or revisions that are necessary or appropriate to ensure that their WQS meet the requirements of the CWA and the needs of the state or tribe. WQS revisions may include additions of and revisions to designated uses, water quality criteria, antidegradation policies and adopted implementation procedures, or other general policies.

H. Subchapter II – Antidegradation Policy, Sections 19-06.190 to 19-06.230

In accordance with its CWA authority, 33 U.S.C. § 1313(c)(3) and 40 CFR 131, the EPA approves the Tribe’s antidegradation policy, Sections 19-06.190 through 19-06.230, which is consistent with CWA section 303(c) and with 40 CFR 131.12.

Sections 19-06.190 through 19-06.130 comprise the Tribe’s antidegradation policy, a core component of state and tribal WQS that is addressed in the Section 101 goals of the CWA and at 40 CFR 131.12. Appendix A of the Tribe’s WQS provides methods for implementing the Tribe’s antidegradation policy, and Appendix B provides an antidegradation review worksheet that supports the implementation procedures in Appendix A.

The EPA’s water quality standards regulation at 40 CFR 131.12(a) requires states and authorized tribes to adopt an antidegradation policy and to identify methods for implementing that policy. Both the policy and the implementation methods must be consistent with 40 CFR 131.12. In summary, the state or tribe’s policy must provide protection for existing uses, hereafter referred to as “Tier 1” (40 CFR 131.12(a)(1)); the policy must require the maintenance and protection of high quality waters (“Tier 2”) unless the state or tribe finds “that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located,” a process hereby referred to as “Tier 2 review” (40 CFR 131.12(a)(2)); and the policy must provide for the maintenance and protection of water quality in Outstanding National Resource Waters (ONRWs), identified by the state or tribe, hereby referred to as “Tier 3” (40 CFR 131.12(a)(3)).

While the antidegradation policy must be adopted in a binding form, the antidegradation implementation methods may be either binding in regulation or in guidance outside of regulation (68 FR 58775 (October 10, 2003)). The Tribe has included antidegradation implementation methods as part of the regulation in Appendix A, with an Antidegradation Review Worksheet provided in Appendix B. The EPA’s review of the implementation procedures is limited to ensuring that procedures are included that describe how the Tribe will implement the required elements of the antidegradation review and that the implementation procedures are consistent with the Tribe’s antidegradation policy and 40 CFR 131.12.

Section 19-06.190 provides a general purpose summary and contextual information regarding the antidegradation policy. This statement is consistent with 40 CFR 131.12.

Section 19-06.200 addresses Tier 1 antidegradation requirements for Regulated Surface Waters. Paragraph (A) provides a prohibition against degradation of water quality that would impair existing and designated uses. This statement is consistent with 40 CFR 131.12(a)(1) as it applies to existing uses and adds antidegradation protections for designated uses. Including antidegradation requirements for designated uses in paragraph 19-06.200(A) provides greater

protections than specified in 40 CFR 131.12(a)(1) to the extent that any of the designated uses are not also existing uses. Paragraph 19-06.200(C) prohibits degradation of water quality by human actions where waters do not meet water quality criteria under natural conditions. This paragraph provides Tier 1 antidegradation requirements for waters where natural conditions prevent attainment of water quality criteria and is consistent with 40 CFR 131.12(a)(1).

Paragraph 19-06.200(B) provides authority to develop site-specific criteria where the natural condition does not meet water quality criteria and existing and designated uses are attained. This paragraph does not constitute an antidegradation requirement but authorizes the development of site-specific criteria according to Section 19-06.160 where natural conditions limit water quality as an alternative or supplemental approach to antidegradation review. This procedure would be expected to meet 40 CFR 131.11 requirements as the Tribe's natural conditions criteria, Section 19-06.160, would be used; see Section F, above.

Section 19-06.210 addresses Tier 2 antidegradation requirements for Regulated Surface Waters. Section 19-06.210 provides for the protection of high quality waters consistent with 40 CFR 131.12(a)(2), which provides in part, "Where the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located." The goals and requirements in Section 19-06.210 are consistent with 40 CFR 131.12(a)(2), including requirements for intergovernmental coordination and public participation; ensuring that existing uses are fully protected; ensuring that the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control will be achieved; and procedures for determining the necessity of lowering water quality, including an analysis of alternatives. Paragraph 19-06.210(2) requires protection of designated uses as well as existing uses. Paragraph 19-06.210(3) additionally requires protection of threatened and endangered species, and those eligible for listing.

Section 19-06.220 addresses Tier 3 antidegradation requirements for Regulated Surface Waters. Paragraph (A) authorizes the Swinomish Department of Environmental Protection to designate ecologically, culturally, or otherwise valuable waters as Outstanding Tribal Resource Waters and requires the quality of these waters to be protected. Paragraph (B) provides criteria to be used to consider waters for designation as Outstanding Tribal Resource Waters. Paragraph (C) authorizes the development of site-specific criteria to protect these waters. Paragraph (D) provides additional controls that may be considered to provide adequate protection of Outstanding Tribal Resource Waters.

40 CFR 131.12(a)(3) states, "Where high quality waters constitute an outstanding National resource, ... that water quality shall be maintained and protected." Paragraph 19-06.220(A) authorizes designation of waters as Outstanding Tribal Resource Waters (OTRWs) and requires the quality of these waters to be maintained and protected, consistent with 40 CFR 131.12(a)(3).

Paragraph 19-06.220(B) requires waters with specific characteristics to be considered for designation as an OTRW, where the water quality shall be maintained and protected. These requirements are consistent with 40 CFR 131.12(a)(3).

Paragraph 19-06.220(C) provides authority to develop site-specific criteria for OTRWs to facilitate maintaining and protecting the quality of these waters. Site-specific criteria would be subject to requirements for criteria development provided in 40 CFR 131.11. States and tribes must adopt criteria that are at least as stringent as needed to meet requirements of 40 CFR 131.11, and under Section 510 of the CWA, state and tribal WQS may be more stringent than the EPA's minimum requirements. Adoption of site-specific criteria provides a mechanism for protecting water quality of OTRWs, as required in paragraph 19-06.220(A).

Paragraph 19-06.220(D) provides authorization for the Tribe to implement various requirements to protect OTRWs, including requirements that address point and non-point sources, flow regimes, protection of instream habitats, and land use practices that may affect the OTRWs. This antidegradation implementation provision is consistent with requirements in 40 CFR 131.12.

Section 19-06.230 requires antidegradation implementation for discharges with a thermal component to be consistent with CWA section 316. This requirement is consistent with 40 CFR 131.12 (a)(4).

Appendix A of the Swinomish Tribal Code at 19-06 provides antidegradation implementation procedures for the antidegradation policy provided in Sections 19-06.200 through 19-06.230. The EPA reviewed the Tribe's antidegradation implementation methods for consistency with 40 CFR 131.12 in the following areas:

- Applicability, both with regard to the activities and waters covered by the methods as a whole, and with regard to when a particular Tier of antidegradation is applicable
- A Tier 1 method for implementing existing use protection
- Methods to implement the various components of Tier 2, (including a method for identifying where Tier 2 applies, a method for determining if lowering of water quality is necessary, a method for determining if the activity that would lower water quality would provide important social or economic development, a method for conducting public participation and intergovernmental review, a method for assuring that the highest statutory and regulatory requirements for point sources and cost-effective and reasonable best management practices for nonpoint source control are achieved, assurance that the water quality will be adequate to protect existing uses, and assurance that water quality will not be lowered below applicable water quality criteria)
- Methods to implement Tier 3 (including a method for designating OTRWs, which the Tribe includes in 19-06.220(A) and (B), and a method for ensuring that the water quality of OTRWs will be maintained and protected).

The EPA has concluded that the Tribe's antidegradation implementation methods address each area identified above and do so in a way that is consistent with 40 CFR 131.12.¹⁴ The EPA also

¹⁴ As interpreted by EPA in the following documents: Water Quality Standards Regulatory Revisions, Final Rule, 80 FR 51020, Aug. 21, 2015; Water Quality Standards Regulation, Final Rule, 48 FR 51400, 51403, Nov. 8, 1983;

notes that Appendix A, paragraph (B)(3), “Determination of Significant Degradation,” of the Tribe’s antidegradation implementation methods is consistent with considerations provided in the preamble to the Federal Register notice of the EPA’s 2015 Water Quality Standards Regulatory Revisions, and to court rulings on the subject of allowing de minimis degradation without a full Tier 2 review.¹⁵

I. Mixing Zones (Section 19-06.240)

In accordance with its CWA authority, 33 U.S.C. § 1313(c)(3) and 40 CFR 131, the EPA approves Section 19-06.240, which is consistent with 40 CFR 131.13 and EPA guidance regarding mixing zones.

Section 19-06.240 authorizes the inclusion of mixing zones in CWA section 402 and 404 permits for discharges to marine waters and mandates conditions that the effluent and mixing zone must meet to protect the uses of the receiving waters.

As specified in 40 CFR 131.13, states and authorized tribes may adopt certain policies into their WQS that generally affect how their WQS are applied or implemented. Examples include general policies regarding mixing zones and WQS variances. If a state or authorized tribe chooses to adopt a general policy, such policies are subject to EPA review and approval or disapproval under section 303(c) of the CWA if they constitute new or revised WQS.

Mixing zones are areas where pollutant concentrations are allowed to exceed otherwise applicable water quality criteria, as established in a CWA section 402 NPDES permit or a Section 404 dredge or fill material discharge permit. The EPA’s WQS regulation does not specify a requirement for a mixing zone authorizing provision; however, similar to water quality criteria, a mixing zone policy must ensure that mixing zones will be based on sound scientific rationale and contain sufficient parameters to protect designated uses. Key aspects of the EPA’s guidance to ensure that mixing zones, where authorized, are consistent with use protection include location considerations to protect critical resource areas; size considerations; and

Proposed Water Quality Guidance for Great Lakes System, 58 FR 20802, 20902-20906, April 16, 1993; Memorandum from Tudor T. Davies, Director EPA Office of Science and Technology to EPA Water Management Division Directors, Regions I-X, Subject: Interpretation of Federal Antidegradation Regulatory Requirement, February 22, 1994; 63 FR 36,785-87; Water Quality Standards Handbook: Second Edition, Section 4, EPA-823-B-94-005a, August 1994; Great Lakes System: Supplementary Information Document (SID), EPA-820-B-95-001, March 1995, pp. 205-213; Water Quality Standards Regulation, Advance Notice of Proposed Rulemaking, 63 FR 36742, 36779-36787, July 7, 1998; Tier 2 Antidegradation Reviews and Significance Thresholds, Ephraim S. King, Director, EPA, Office of Science and Technology, to Water Management Division Directors Regions 1-10, EPA, August 10, 2005; Denise Keehner, Director EPA’s Standards and Health Protection Division to Derek Smithee, Oklahoma Water Resources Board, September 5, 2008; Antidegradation Requirements for High Quality Waters and Reissuance of NPDES Permits that Do Not Authorize New or Increased Discharges, Ellen Gilinsky, Senior Policy Advisor in EPA’s Office of Water, to EPA Region 10 Office of Water and Watersheds, July 7, 2011.

¹⁵ Water Quality Standards Regulatory Revisions, Final Rule, 80 FR 51034-35, Aug. 21, 2015. See *Ohio Valley Environmental Coalition v. Horinko*, 279 F. Supp. 2d 732, 769 (W.Va. 2003) and *Kentucky Waterways Alliance v. Johnson*, 540 F.3d 466, 483 (6th Cir. 2008).

stipulations on in-zone water quality that include provisions to protect aquatic life and human health.¹⁶

Paragraph 19-06.240(A) authorizes inclusion of mixing zones in 402 and 404 permits for discharges to marine waters, contingent on authorization by the Swinomish Department of Environmental Protection, and incorporates procedures and guidelines in the EPA's Water Quality Standards Handbook and the Technical Support Document for Water Quality Based Toxics Control by reference.

Paragraph 19-06.240(B) provides a series of requirements that mixing zones must meet to ensure protection of human health, aquatic life, and other designated and existing uses of the receiving waters, specifically including the protection of threatened and endangered species and their habitat. Paragraph (B)(7) prohibits mixing zones in fresh waters and for bioaccumulative pollutants.

Paragraph 19-06.240(C) provides requirements regarding the size and configuration of any mixing zone. This section also authorizes a zone of initial dilution (ZID), subject to approval by the Tribe, and stipulates size limits for the ZID.

J. Subchapter III – Water Quality Certification, Sections 19-06.250 to 19-06.310

Sections 19-06.250 to 19-06.310 address requirements and procedures related to water quality certifications. The EPA is taking no action on these sections because they are not WQS that the EPA has the duty or authority to review under section 303(c) of the CWA. The EPA is not taking an action on following sections:

Subchapter III – Water Quality Certification

19-06.250 Certification Authority

19-06.260 Certification and Permits Required

19-06.270 Certification Fees

19-06.280 Application for Certification

19-06.290 Initial Review; Public Notice and Comment

19-06.300 Department Decision

19-06.310 Modification, Suspension, or Revocation of Certification.

K. Subchapter IV – Public Involvement, Implementation, and Enforcement, Sections 19-06.320 to 19-06.410

1. Compliance Schedules (Section 19-06.350)

In accordance with its CWA authority, 33 U.S.C. § 1313(c)(3) and 40 CFR 131, the EPA approves Section 19-06.350, which is consistent with 40 CFR 131.15, sufficient to protect designated uses, and meets the intent of CWA 301(b)(1)(C). The compliance schedule

¹⁶ *Water Quality Standards Handbook: Second Edition*, <https://www.epa.gov/wqs-tech/water-quality-standards-handbook>; *Technical Support Document for Water Quality-based Toxics Control*, EPA/505/2-90-001, March 1991; EPA's *Advance Notice of Proposed Rulemaking*, 63 Fed. Reg. 36787, July 7, 1998.

authorizing provision is also consistent with federal regulations at 40 CFR 122.47, which require compliance “as soon as possible.”

A compliance schedule refers to an enforceable sequence of interim requirements in a NPDES permit that leads to compliance with water quality based-effluent limitations¹⁷ contained in a NPDES permit. Compliance schedules provide a method by which dischargers are given a limited time period to comply with its NPDES permit limits, generally due to technological or financial inability to comply immediately. A compliance schedule may only be included in a NPDES permit if a state or tribe has included an authorizing provision in its WQS or implementing regulations.

Section 19-06.350 provides authorization to include compliance schedules in NPDES permits; as part of water quality certifications, which would include CWA 401 certifications; and for other tribal activities that implement the WQS. This section requires compliance schedules to be developed such that compliance with WQS is reached in the shortest practicable time, and that compliance schedules are only applied to existing activities, not new activities.

2. Variances (Section 19-06.360)

In accordance with its CWA authority, 33 U.S.C. § 1313(c)(3) and 40 CFR 131, the EPA approves Section 19-06.360, which is consistent with 40 CFR 131.13 and 40 CFR 131.14.

Section 19-06.360 authorizes the adoption of variances for facilities or for reaches of Regulated Surface Waters and mandates procedures for adoption of variances and conditions that the variances must meet.

As specified in 40 CFR 131.13, states and authorized tribes may adopt certain policies into their WQS that generally affect how their WQS are applied or implemented. Examples include general policies affecting mixing zones and WQS variances. If a state or tribe chooses to adopt a general policy, such policies are subject to EPA review and approval or disapproval under Section 303(c) of the CWA if they constitute new or revised WQS. 40 CFR 131.14 specifies the federal requirements for WQS variances.

A variance is intended to serve as a mechanism to provide time for states, tribes, and stakeholders to implement actions to improve water quality over an identified period of time when and where the designated use currently in place is not being met. When utilizing a variance, the state or tribe retains the designated use that is currently in place as a long-term goal.

Paragraph 19-06.360 (A) provides general authorization for the Swinomish Tribe to adopt variances and requires that variances are consistent with federal law and meet certain conditions. Paragraph (B) limits the length of a variance to a maximum of 5 years, allows one subsequent variance with a maximum length of 5 years, and requires that each variance is formally adopted into tribal law, including public participation and intergovernmental review. The EPA understands intergovernmental review to include review and approval of any variance renewal

¹⁷ A water quality based effluent limit is an effluent limitation that is derived from, and complies with, a state’s or tribe’s water quality criteria.

by EPA under CWA section 303(c), as specified in 40 CFR 131.14(b)(1)(v). Paragraph 19-06.360 (C) clarifies that the variance is a formal WQS that is subject to EPA approval under CWA section 303(c).

3. WQS Adoption, Implementation, and Enforcement Procedures (Sections 19-06.320 to 19-06.340 and 19-06.370 to 19-06.410)

The EPA is taking no action on these sections because they are not WQS that the EPA has the duty or authority to review under section 303(c) of the CWA.

Sections 19-06.320 to 19-06.340 provide procedures to be followed for adoption of new and revised WQS, which are consistent with EPA regulations at 40 CFR 131.20(b) and 40 CFR 25. Sections 19-06.370 to 19-06.410 mandate the development of a surface water quality monitoring plan and provide objectives for the monitoring plan to meet, and requirements for laboratory methods to be used for monitoring and other activities that implement the WQS and enforce their implementation. The EPA is not taking an action on following sections:

Subchapter IV – Public Involvement, Implementation, and Enforcement

19-06.320 Public Information

19-06.330 Public Participation and Responsiveness.

19-06.340 Implementation

19-06.370 Analytic Methods

19-06.380 Enforcement

19-06.390 Penalties

19-06.400 Remediation

19-06.410 Damages.

L. Subchapters V and VI, WQS Enforcement Provisions

The EPA is taking no action on Subchapters V and VI because they are not WQS that the EPA has the duty or authority to review under section 303(c) of the CWA.

Subchapter V addresses enforcement procedures for the water quality standards, including provisions related to hearings, appeals, and related provisions. Subchapter VI addresses the effective date of the WQS and provides a repealer and severability clauses. The EPA is not taking an action on following sections:

Subchapter V – Hearings, Appeals, Computation of Time, and Law Applicable

19-06.420 Request for Planning Commission Hearing

19-06.430 Hearings before the Planning Commission

19-06.440 Appeals of Planning Commission Decisions

19-06.450 Appeals of Senate Decisions

19-06.460 Time, Notice of Decision, and Finality

19-06.470 Tribal Administrative Remedies and Tribal Court

19-06.480 Sovereign Immunity

Subchapter VI – Effective Date, Repealer, and Severability

19-06.490 Effective Date

19-06.500 Repealer

19-06.510 Severability.