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February 13, 2015

Via Courier

Pam Castañeda
Administrator
New Mexico Environment Department
Water Quality Control Commission
1190 S. St. Francis Drive, S-2100
Santa Fe, NM 87502

Re: WQCC No. 14-05(R) In the Matter of the Triennial Review of Standards for Interstate and Intrastate Surface Waters, 20.6.4 NMAC: SJWC's Notice of Filing Rebuttal Technical Testimony of Charles L. Nylander

Dear Ms. Casteñeda:

Please find enclosed an original and 6 copies of the above-referenced document. Also enclosed are 10 additional copies provided on CD. Please give one endorsed copy to our courier for return to our office.

Thank you so much for your assistance. If you have any questions or need further information, please do not hesitate to call.

Very truly yours,

Trish Berry

Trish Berry
Assistant

TB/

Enclosure

STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION

IN THE MATTER OF THE TRIENNIAL REVIEW OF STANDARDS FOR INTERSTATE AND INTRASTATE SURFACE WATERS, 20.6.4 NMAC

WQCC NO. 14-05(R)

SAN JUAN WATER COMMISSION'S NOTICE OF FILING REBUTTAL TECHNICAL TESTIMONY

COMES NOW San Juan Water Commission ("SJWC"), by and through its counsel of record, Taylor & McCaleb, P.A., and in accordance with the Scheduling Order and Order Modifying Scheduling Order filed herein, hereby files this Notice of Filing Rebuttal Technical Testimony. A copy of the rebuttal technical testimony of SJWC's expert witness, Charles Nylander, is attached hereto as Exhibit "SJWC D."

SJWC reserves the right to call any person as a surrebuttal witness and to present any surrebuttal exhibit in response to other pre-filed written rebuttal technical testimony or to public comment presented in the public hearing.

Respectfully submitted,

TAYLOR & McCALEB, P.A.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of SJWC's Notice of Filing Rebuttal Technical Testimony was served on the following persons by U.S. mail this 13th day of February, 2015:

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REBUTTAL TECHNICAL TESTIMONY

OF

CHARLES L. NYLANDER

FOR

THE 2014 TRIENNIAL REVIEW

February 13, 2015

Submitted by:

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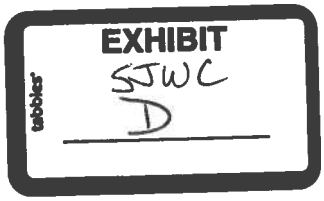

STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION

IN THE MATTER OF THE TRIENNIAL REVIEW OF STANDARDS FOR INTERSTATE AND INTRASTATE SURFACE WATERS, 20.6.4 NMAC **WQCC NO. 14-05(R)**

REBUTTAL TECHNICAL TESTIMONY OF CHARLES L. NYLANDER

Introduction

I previously provided written direct testimony on behalf of the San Juan Water Commission ("SJWC") that addressed SJWC's concerns, objections to and/or support for various proposals set forth in the petitions filed by the New Mexico Environment Department ("NMED"), Freeport-McMoRan Chino Mines Company, Peabody Energy, and Amigos Bravos. On behalf of SJWC, I have reviewed the direct technical testimony and exhibits submitted by these participants, as well as direct technical testimony and exhibits submitted by Chevron Mining, Inc. and Los Alamos National Security, LLC and the United States Department of Energy. Following is my rebuttal technical testimony, which addresses SJWC's support, concerns, or objections regarding various issues raised in the direct technical testimony filed by other Triennial Review participants.

1. 20.6.4.10 and 20.6.4.12 NMAC: NMED's Temporary Standards Proposal

A. Rebuttal to NMED's Direct Technical Testimony

(i) 20.6.4.10(F) NMAC

As explained in my direct technical testimony, SJWC believes that if the Water Quality Control Commission ("WQCC") desires to adopt a temporary water quality standards concept, the WQCC should do so via its statutory authority to grant variances. *See* NMSA 1978, § 74-6-4(H). Additionally, any proposal for a temporary

WQS concept should better comport with the U.S. Environmental Protection Agency's ("EPA") proposed rule-making and guidance for WQS variances, and not be encumbered with unnecessarily burdensome work plan requirements, as currently proposed by NMED.

In support of NMED's proposal, NMED's technical witness Kristine Pintado states:

> In this provision, the temporary standard is an interim water quality *criterion* that is only applied for a limited duration while incremental improvements are made to achieve the original WQS. The temporary standard encourages maintenance of the original criterion as a goal instead of removing or putting in place a criterion that represents a lesser goal. The temporary WQS may apply to a specified water body, or portion thereof, and to a specified criterion or pollutant.

SWQB Ex. 13 at 8-89 to 9-89 (emphasis added). In this quotation, and in other parts of her testimony, Ms. Pintado clarifies that NMED has limited its temporary WQS proposal to criteria only, whereas EPA has clarified that a temporary standard also may apply to designated uses:

> A water quality standards variance (WQS variance) is a time-limited *use* and *criterion* for a specified pollutant(s), permittee(s), and/or water body or waterbody segment(s) that reflect the highest attainable condition during the specified time period."

SJWC Ex. C-3 at 54532 (emphasis added); *EPA Water Quality Standards Handbook*, § 5.3 (2014) (attached hereto as Exhibit "SJWC D-1"). Further, according to EPA, because a WQS variance for a use and criterion is temporary, the underlying designated use and criterion still represent the long-term goal and remain in effect for Section 303(d) listing and total maximum daily load development, regardless of whether

the variance is for a single discharger, multiple dischargers, or a waterbody/waterbody segment. *See* Ex. SJWC D-1. SJWC therefore recommends that any temporary standards provision adopted by the WQCC comport with EPA guidance and apply to both designated uses and criteria.

Ms. Pintado goes on to state:

> The proposed new provision in 20.6.4.10.F NMAC allows for a temporary standard that provides interim adjustments to *criteria* without downgrading the original designated use. As compared to other processes in the state's WQS, such as the site-specific criteria process described in the water quality standards under 20.6.4.10.D NMAC which changes the criteria, or the use attainability analysis ("UAA") process in 20.6.4.15 NMAC which changes the designated use, the central principle of the temporary standard is that the underlying designated use and criteria are not changed, modified or replaced. The designated use remains in place while providing a defined period of time to document and evaluate improvements aimed towards achieving the original water quality standard.

SWQB Ex. 13 at 16-89 to 17-89 (emphasis added). I previously addressed the problem with NMED's narrow applicability approach when compared to EPA's WQS variance concept. EPA's approach allows variance from both a designated use and criteria, while still maintaining the original use and criteria for all other regulatory applications. EPA simply requests that a State note any variances that result in temporary uses and criteria for a specific water body or waterbodies with a footnote or text in their published WQS, while still retaining the original uses and criteria. It would appear that NMED has focused on temporary standards for criteria only to avoid its original public discussion draft proposal, which required a UAA. That original proposal drew objection from SJWC and others and ultimately was modified by NMED. However, as previously stated, any

temporary standard (variance) provision should apply to both designated uses and criteria. The burden of justifying a WQS variance will remain with the State, Tribe, or other petitioner. So long as the required demonstration is not a UAA or UAA-equivalent, the temporary standard (variance) will still be a valuable WQS tool.

Next, Ms. Pintado states:

> The need for a temporary standard is apparent in the state's application of the general narrative nutrient criteria in subsection E of 20.6.4.13 NMAC. Aquatic ecosystems are very sensitive to nutrient pollutant concentrations, which can result in excessive algae growth, impairments for dissolved oxygen, toxic algae blooms and loss of aquatic life . . . . However, while nutrient levels based on least-impacted, natural streams are scientifically well-based and environmentally protective these levels are also very low. The control and removal of nutrients in wastewater to protect such levels requires the most advanced treatment currently available, and in some cases is beyond capabilities of currently known technology. Based on recent experiences in western states such as Utah, Montana and Colorado, it is reasonable to expect that immediate implementation of nutrient controls to such levels is likely to cause significant economic impacts in New Mexico. Under such a scenario, the state currently has no provision in the standards to allow flexibility while progress is being made toward achieving the water quality based effluent limits ("WQBELs") required in permits or Total Maximum Daily Loads ("TMDLs") for nutrient controls, or for other new and more stringent water quality standards as a result of recent recommendations from the EPA, such as for ammonia or selenium.

SWQB Ex. 13 at 18-89 to 19-89. With this testimony, Ms. Pintado has provided key insight into NMED's rationale both for temporary standards (variances) and for limiting its proposal only to criteria, such as for nutrients, ammonia, or selenium. While SJWC acknowledges and supports the need for WQS flexibility in addressing nutrients, ammonia, selenium, and other pollutants, criteria for any of these pollutants are established to protect the underlying designated use for a water body. It is axiomatic

that, if a criterion is not or cannot be met in a water body, then the designated use is not fully protected and most likely is deemed non-attainable. Thus, if a temporary standard (variance) is applicable to a criterion, it logically also must apply to the designated use associated with the criterion. For example, if excessive nutrients result in loss of aquatic life, then the designated aquatic life use is not or cannot be met for the water body. Obviously, then, a temporary standard (variance) should apply to the designated use protected by the criterion at issue.

Although EPA's proposed rule-making for a WQS variance requires a "demonstration" justifying the need for a WQS variance, EPA avoids requiring or even referencing performance of a UAA or UAA-equivalent. Nevertheless, Ms. Pintado contends:

- "[F]or a petitioner to justify a temporary standard that is adopted by the State for an interim period, the federal WQS regulations under 40 CFR § 131.10(g) requires 'factor demonstration' as the basis";
- "The EPA requires a temporary standard provision to be consistent with the substantive requirements of 40 CFR Part 131"; and
- "The legal basis for granting a temporary WQS is that the state has fulfilled the substantive regulatory requirements for a use attainability demonstration under one or more of the 40 CFR § 131.10(g) factors."

SWQB Ex. 13 at 17-89, 19-29, 21-89. I disagree. The language quoted by Ms. Pintado is vague and subject to interpretation and specifically does *not* require a UAA. Nor does EPA's 2013 proposed regulatory language require a UAA. SWQB Ex. 23 at 54545. Instead, assuming a petitioner is requesting a temporary standard (variance) from a use specified in section 101(a)(2) of the Clean Water Act ("CWA") or a subcategory of such use, EPA merely requires a satisfactory demonstration that attaining the designated use

and criterion is not feasible during the term of the variance. The reasons for non-attainability may include one or more of the factors listed in 40 CFR § 131.10(g). Again, because a UAA demonstration is not required, SJWC recommends that any temporary standards (variance) concept adopted by the WQCC not include a UAA or UAA-equivalent requirement. Otherwise, the provision may prove useless—a petitioner likely would be better off performing a UAA and seeking the down-grading of a designated use and criteria.

The following changes to NMED's proposal would comply with federal regulations and EPA's interpretation of those regulations and provide a more useful tool for both the regulated community and the State:

F. Temporary Standards Variance.

(1) Any person may petition the commission to adopt a temporary standard variance applicable to all or part of a surface water of the state as provided for in this section. The commission may adopt a proposed temporary standard variance if the petitioner demonstrates that:

(a) attainment of the associated designated use may not be feasible in the short term due to one or more of the factors listed in 40 CFR 131.10(g) as demonstrated by the petition and supporting ~~work plan requirements in paragraph (4), (5) and (6) below~~ documentation, as required below;

(b) the proposed temporary standard variance represents the highest degree of protection feasible in the short term, limits the further degradation of water quality to the minimum necessary to achieve the original standard by the expiration date of the temporary standard variance, and adoption will not cause the further impairment or loss of an existing use;

(c) for point sources, existing or proposed discharge control technologies will comply with applicable technology-based limitations and feasible technological controls and other management alternatives, such as a pollution prevention program; and

(d) for restoration activities, nonpoint source or other control technologies shall limit downstream impacts, and if applicable, existing or proposed discharge control technologies shall be in place consistent with subparagraph (c).

(2) A temporary standard variance shall apply to specific designated uses, pollutant(s), or permittee(s), and to specific water body segment(s). The adoption of a temporary standard variance does not exempt dischargers from complying with all other applicable water quality standards or control technologies.

(3) ~~Designated uses shall not be modified on a temporary basis.~~ Designated use attainment as reported in the CWA Section 305(b)/303(d) Integrated Report shall be based on the original standard and not on a temporary standard variance.

(4) A petition for a temporary standard variance shall:

(a) identify the currently applicable standard(s), the proposed temporary standard variance, the permittee(s), and the surface water(s) of the state to which the temporary standard variance would apply;

(b) demonstrate that the proposed temporary standard variance meets the requirements of this subsection;

(c) ~~present a work plan and timetable~~ demonstrate the need for a temporary standard variance and specify the proposed actions and proposed expiration date for achieving compliance with the original standard;

(d) include any other information necessary to support the petition.

~~(5) As a condition of a petition for a temporary standard, in addition to meeting the requirements in this Subsection, the petitioner shall prepare a supporting work plan in accordance with subparagraph (6) to conduct the analysis required in this Subsection, and submit the work plan to the department for review and comment. Upon revision of the work plan based on input from the department, the petitioner shall conduct the analyses in accordance with the work plan. The department or petitioner may petition the commission to adopt a temporary standard if the conclusions of the analysis support such action.~~

~~(6) The work plan to support a temporary standard petition shall identify the factor(s) listed in 40 CFR 131.10(g) affecting attainment of the standard that will be analyzed and the timeline for specific actions to be taken to achieve the uses attainable over the term of the temporary standard, including baseline water quality, and any investigations, projects, facility modifications, monitoring, or other measures necessary to achieve compliance with the original standard. The work plan shall include provisions for review of progress in accordance with subparagraph (9), public notice and consultation with appropriate state and federal agencies.~~

(7) The commission may condition the approval of a temporary standard variance by requiring additional monitoring, relevant analyses, the completion of specific projects, submittal of information, or any other actions.

(8) Temporary standard variances may be implemented only after appropriate public participation, commission approval and adoption pursuant to this Subsection for all state purposes, and EPA Clean Water Act Section 303 (c) approval for any federal action.

(9) All temporary standard variances are subject to a required review during each succeeding review of water quality standards conducted in accordance with Subsection A of 20.6.4.10 NMAC. The purpose of the review is to determine progress consistent with the original conditions of the petition for the duration of the temporary standard variance. If sufficient progress has not been made the commission may revoke approval of the temporary standard variance or provide additional conditions to the approval of the temporary standard variance.

(10) The commission may consider a petition to extend a temporary standard variance. The effective period of a temporary standard variance shall be extended only if demonstrated to the ~~department~~ commission that the factors precluding attainment of the underlying standard still apply, that the petitioner is meeting conditions required for approval of the temporary standard variance, and that reasonable progress towards meeting the underlying standard is being achieved.

(11) A temporary standard variance shall expire no later than the date specified in the approval of the temporary standard variance. Upon expiration of a temporary standard variance, the original standard becomes applicable.

(12) Temporary standard variances shall be identified in 20.6.4.97 – 899 NMAC as appropriate for the surface water(s) affected.

(ii) 20.6.4.12(H) NMAC

Ms. Pintado goes on to state: "To be enforceable, the temporary WQS and requirements may also be placed into an NPDES discharge permit by the EPA. Therefore, the proposal includes the addition of a new subsection H to 20.6.4.12 NMAC to allow the EPA to incorporate and enforce the temporary standard into the permit." SWQB Ex. 13 at 10-89. I agree with that general proposition. EPA acknowledges that a WQS variance should serve as a basis of a water quality-based effluent limit ("WQBEL") in an NPDES permit for the period the variance is in effect. *See EPA Water Quality Standards Handbook*, § 5.3 (Ex. SJWC D-1); Ex. SJWC C-3. SJWC proposes

that NMED's language for subsection 20.6.4.12(H) NMAC be revised as follows to more closely comport with EPA's position:

> **H.** It shall be a policy of the commission to allow a temporary standard variance approved and adopted pursuant to Subsection F of 20.6.4.10 NMAC to be used in development of water quality-based effluent limitations (WQBELs), and the WQBELs and any relevant variance conditions be included in the applicable NPDES permit(s) as enforceable limits and conditions. The temporary standard variance and any schedule of actions may be included at the earliest practical time, and shall specify milestone dates so as to measure progress towards meeting the original standard.

NMED's proposal for this subsection demonstrates a desire to ensure that temporary standards (variances) are enforceable under state law (through subsection 20.6.4.12(H)) and federal law (through an enforceable NPDES permit). NMED's temporary standards proposals, if adopted by the WQCC, will be water quality standards subject to state enforcement with penalties, and also will be enforceable federal NPDES permit conditions subject to penalties. As such, they prove SJWC's position that temporary water quality standards will, in fact, be variances under NMSA 1978, Section 74-6-4(H) because they will be enforceable regulations.

Finally, I note that NMED has not proposed a new definition for "temporary standard" in the 20.6.4.7 NMAC definitions. The WQCC should consider adopting the following EPA definition of "water quality standards variances" proposed in 2013:

> **"Temporary standard variance"** means "a time-limited designated use and criterion for a specified pollutant(s), permittee(s), and/or water body or waterbody segment(s) that reflect the highest attainable condition during the specified time period."

SWQB Ex. 23 at 54544 to -45.

B. Rebuttal to Amigos Bravos' Direct Technical Testimony

Amigos Bravos has provided direct technical testimony regarding NMED's proposals for 20.6.4.10(F) and 20.6.4.12(H) NMAC through its witness, Rachel Conn. Ms. Conn's comments on these proposals are provided on pages 6 through 11 of her direct technical testimony. In general, Ms. Conn's testimony repeats the same four primary arguments contained in Amigos Bravos' September 30, 2014, Proposed Changes and Statement of Basis, although her direct technical testimony states that it supersedes the original Amigos Bravos filing. Conn Direct at 6 n.4. My previously filed direct technical testimony addressed and rebutted Ms. Conn's four arguments. However, I add the following additional rebuttal.

Ms. Conn states that "NMED's proposal would allow polluters to petition the WQCC to weaken the standards for receiving waters that are already impaired and not meeting water quality standards . . . . This would result in increased discharges of pollution into already impaired waters." Conn Direct at 6. Ms. Conn's position is inaccurate because point source discharges regulated through an NPDES permit may indeed be in full compliance with a permit even though the receiving water may not meet the WQCC-adopted designated use and/or criteria for that water body. Water quality impairment may be the result of natural watershed conditions, various non-point source discharges (whether identified or not), point source discharges, or a combination of all of these factors. In the future, NMED itself may petition the WQCC for a temporary standard in order to implement a watershed-scale project to improve water quality. In such case, certainly NMED would not be labeled a "polluter." Furthermore, in some cases WQCC-adopted designated uses and criteria may indeed be

unattainable. The concept of temporary standards or variances is simply one of many practical tools EPA and more than 33 states use to provide time to allow adaptive management techniques to improve and/or restore water quality. There is nothing about the concept that results in "increased discharges of pollution," as alleged by Ms. Conn.

Next, Ms. Conn states that "Amigos Bravos is unaware of any New Mexico facility denied a CWA NPDES permit to discharge because it could not meet effluent limits." Conn Direct at 7. However, NMED's temporary standards proposal is not focused on effluent limits. Rather, NMED's proposal applies to surface water standards. Numerous stream segments in New Mexico are not meeting water quality standards, and some of those waters may serve as a receiving water for a specific NPDES discharger. One can assume that such discharger has implemented all of the applicable technology-based effluent requirements of the Clean Water Act (*e.g.*, sections 301 and 306), or has an NPDES permit compliance schedule that requires achieving those requirements, yet the water quality standards still are not being met. In such case, the water body can serve as an ideal example for application of the temporary standards (variance) concept so that advances in technology may evolve and other watershed adaptive management applications can be put in place in an effort to achieve the original uses for that water body.

Ms. Conn's second argument (at 7) also is incorrect. If a temporary standard or variance is adopted for a water body or waterbody segment, the interim water quality standards apply for the duration of the variance and should be used in developing WQBELs for existing NPDES discharges. It is my further understanding that any new

NPDES permittee discharging into a water body with interim standards would have to meet the applicable technology-based effluent requirements of the CWA, with permit effluent limitations based on the underlying original water quality standards.

Similarly, Ms. Conn's third argument (at 7) also is incorrect. NMED's proposal would not condone the discharge of increased concentrations of pollutants that are causing water quality impairment. Although the water quality uses and criteria for a stream segment may temporarily be replaced with interim standards that are less stringent, a temporary standard would not allow increased pollutant concentrations because any permitted point source discharge would still have to meet all applicable technology-based effluent requirements.

Ms. Conn's fourth argument (at 8) is not only incorrect, but also inflammatory. In New Mexico, all point source discharges to surface waters are permitted with NPDES permits, and those discharges are all "legal" (whether or not they are in full compliance with their permit conditions at any specific time). There is no actual or intended reward to polluters arising from the application of the proposed concept of temporary standards.

For these reasons, as well as the reasons set forth in my direct technical testimony, the WQCC should reject Amigos Bravos' position on NMED's temporary standards proposal.

2. 20.6.4.97 NMAC: NMED's Ephemeral Waters Proposal

NMED proposes adding approximately 30 stream segments to the list of ephemeral waters set out in 20.6.4.97(C) NMAC based on UAA reports prepared pursuant to 20.6.4.15(C) NMAC and NMED's Hydrology Protocol for the Determination of Uses Supported by Ephemeral, Intermittent, and Perennial Waters ("Hydrology

Protocol"). If approved, these waters would be the first to be expressly designated as ephemeral in 20.6.4.97(C) NMAC out of tens of thousands of miles of ephemeral watercourses in the state. NMED witnesses James Hogan, Kristine Pintado, Jodey Kougioulis, Deborah Sarabia, and Bryan Dail all have submitted direct technical testimony referencing the addition of specific ephemeral waters to 20.6.4.97 NMAC. As previously stated in my direct technical testimony, SJWC has no objection to the designation of the proposed stream segments as ephemeral waters, but requests that the WQCC reflect on the practicality of this regulatory approach and the transactional costs associated with the adoption of the underlying WQCC-approved standards at 20.6.4.98 NMAC, 20.6.4.11(H) NMAC, pertinent and related definitions contained in 20.6.4.7 NMAC, and UAA provisions articulated in 20.6.4.15 NMAC.

During the 2009 Triennial Review, NMED proposed, and the WQCC adopted, amendments to the surface water quality standards that, by default, upgraded the designated uses for all unclassified non-perennial waters in New Mexico, which prior to 2009 were: livestock watering, wildlife habitat, secondary contact recreation, and limited aquatic life. Before the WQCC's 2009 upgrade, these designated uses had all been approved by EPA as meeting the Clean Water Act. Nevertheless, the WQCC significantly upgraded the designated uses for an estimated 100,000+ miles of ephemeral and intermittent watercourses to livestock watering, wildlife habitat, *marginal warm water aquatic life*, and *primary contact recreation*.

To this point, in testimony regarding support for the addition of five new ephemeral waters to 20.6.4.97 NMAC, Ms. Pintado states:

- "In previous Triennial Reviews and interim revisions, the SWQB has clarified the presumption of CWA Section 101(a)(2) uses for all surface water of the state, including those not classified or specifically described in segments under 20.6.4.101 through .899 NMAC"; and

- "The CWA Section 101(a)(2) and 20.6.4.6 NMAC state that, wherever attainable, water quality shall provide for the protection and propagation of fish, shellfish and wildlife, and for recreation in and on the water. Together with federal regulation under 40 C.F.R. § 131.10(j) these regulations effectively establish the '*rebuttable presumption*' that designated CWA Section 101(a)(2) uses are attainable unless demonstrated otherwise under the provisions of 20.6.4.15 NMAC and 40 C.F.R. § 131.10(g)."

SWQB Ex. 13 at 37-89, 39-89 (emphasis added). NMED witness Jodey Kougioulis makes the same statement and also provides testimony regarding the "rebuttable presumption" that includes reference to 20.6.4.11 NMAC proposed by NMED and adopted by the WQCC during the 2009 Triennial Review:

> **H. Unclassified Waters of the State:** Unclassified waters of the state are those surface waters of the state not identified in 20.6.4101 through 20.6.4.899 NMAC. An unclassified surface water of the state is *presumed* to support the uses specified in Section 101(a)(2) of the federal Clean Water Act. As such, it is subject to 20.6.4.98 NMAC if non-perennial or subject to 20.6.4.99 NMAC if perennial. The commission may include an ephemeral unclassified surface water of the state under 20.6.4.97 NMAC only if a use attainability analysis demonstrates pursuant to 20.6.4.15 NMAC that attainment of CWA §101(a)(2) uses in not feasible.

SWQB Ex. 39 at 3-14, 7-14 (emphasis added). This testimony attests to the significant burden that has been self-imposed on New Mexico by the adoption of the "rebuttable presumption" concept via related standards adopted by the WQCC during the 2009 Triennial Review. My direct technical testimony already addressed the problems associated with this "rebuttable presumption" approach in New Mexico. The following

testimony is offered to further acquaint the WQCC with the history of this concept and its spuriousness.

The Federal Water Pollution Control Act Amendments (33 U.S.C. §1251, *et seq.*), a/k/a the Clean Water Act, which was adopted by the U.S. Congress in 1972 (Pub. L. 92-500), included in Title I a declaration of goals and policy, some of which are often cited in relation to the "rebuttable presumption" concept. The declaration of goals and policy begins with Section 101(a), which states in part:

> The *objective* of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this *objective* it is hereby declared that, consistent with the provisions of this chapter---
>
> (1) it is the national *goal* that the discharge of pollutants into the navigable waters be eliminated by 1985;
>
> (2) it is the national *goal* that *wherever attainable*, an *interim goal* of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;
>
> (3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited . . . .

Ex. SJWC D-2 (emphasis added). During the past 43 years, these objectives, goals, and policy statements have been interpreted and re-interpreted by EPA and the States to the point where they are now conceived as "mandates," and the intent of Congress has been long forgotten. However, one should stop to consider the plain dictionary definition of words like "goal" and "objective" and their use by Congress in the CWA goals that have long since passed their proposed attainment dates. For example, the Random House dictionary defines a "goal" as "the result or achievement toward which an effort is directed; aim; end" and provides synonyms like "target, purpose, object,

objective, intent, intention." The same dictionary defines "objective" as "something that one's efforts are intended to attain or accomplish; purpose; goal . . . ."

With these definitions in mind, how could anyone misinterpret the CWA goals, interim goals, and objectives as mandates? More importantly, why would anyone pretend that goals and objectives, which by dictionary definition one *strives* to meet, are presumed to be attained unless demonstrated to the contrary by evidence and data (*i.e.*, the "rebuttable presumption" concept)? New Mexico has adopted the rebuttable presumption concept with no real concern for practicality, fairness, or the very real transactional cost consequences resulting from it. The effort required to perform UAAs in an attempt to add 30 stream segments to the list of ephemeral waters in 20.6.4.97(C) NMAC proves this point.

From 1972 forward, CWA Section 101(a)(2) interim goals were deemed by EPA to be satisfied if States adopted WQS that included designated uses for recreation and protection of fish and/or aquatic life and wildlife. Since 1972, versions of the New Mexico WQS adopted by the WQCC have subdivided designated uses, with the purpose of addressing the CWA 101(a)(2) interim goals, by adopting two subcategories of recreational use (primary contact and secondary contact) and several subcategories of fishery use (high quality cold water fishery, cold water fishery, warm water fishery, etc.). Over the years, the wildlife and livestock watering use was separated into two distinct uses, and wildlife watering eventually was changed to wildlife habitat. The WQCC also eventually changed fishery subcategories to aquatic life uses. EPA approved these many versions of the WQS.

NMED witness James Hogan contends that "EPA considers Secondary Contact and Limited Aquatic Life as not meeting the uses specified in Section 101(a)(2) of the CWA. SWQB's testimony provides this required review and where necessary proposed amendments to the standards. Pursuant to 40 CFR 131.10(k), these changes in designation do not require a UAA." SWQB Ex. 1 at 10-13. Mr. Hogan is referring to NMED's proposed changes of use for nine segments from secondary contact to primary contact, and he provides no evidence for his contention that EPA considers secondary contact and limited aquatic life uses to "not meet[]" Section 101(a)(2). In fact, prior to the 2009 Triennial Review, EPA had historically approved the designated uses of secondary contact and limited aquatic life as meeting the requirements of the CWA. Why then the "sea change" regarding what qualifies as a CWA interim goals-meeting use?

Consider EPA's position in its *Water Quality Standards Handbook*, § 2.1, concerning designation of uses:

> A water quality standard defines the water quality *goals* of a water body or portion thereof, in part, by designating the use or uses to be made of the water. States adopt water quality standards to protect public health or welfare, enhance the quality of water, and serve the purpose of the Clean Water Act. "Serve the purposes of the Act" (as defined in section 101(a)(2), and 303(c) of the Act) means that water standards should:
>
> - provide, wherever attainable, water quality for the protection and propagation of fish, shellfish, and wildlife, and recreation in and on the water ("fishable/swimmable"), and
>
> - consider the use and value of State waters for public water supplies, propagation of fish and wildlife,

recreation, agriculture and industrial purposes, and navigation.

These sections of the Act describe various uses of waters that are considered desirable and should be protected. The States must take these uses into consideration when classifying State waters and are free to add use classifications. Consistent with the requirements of the Act and Water Quality Standards Regulations, States are free to develop and adopt any use classification system they see as appropriate, except that waste transport and assimilation is not an acceptable use in any case (see 40 CFR 131.10(a)). Among the uses specified in the Clean Water Act, *there is no hierarchy*. EPA's Water Quality Standards Regulation emphasizes the uses specified in section 101(a)(2) of the Act (first bullet above). To be consistent with the 101(a)(2) interim goal of the Act, States must provide water quality for the *protection and propagation of fish, shellfish, and wildlife, and provide for recreation in and on the water* ("fishable/ swimmable") where attainable (see 40 CFR 131.10(j)).

Ex. SJWC D-1 (first emphasis added; second emphasis in original). In 2009, the New Mexico WQS were consistent with the Section 101(a)(2) interim goals of the Act, in that waters of the state were assigned an aquatic life use, recreation use, and wildlife use. At the beginning of the Triennial Review in 2009, ephemeral waters of the state had assigned designated uses of livestock watering, wildlife habitat, secondary contact, and limited aquatic life and met the interim goals of the Act, as approved by EPA prior to 2009. However, in 2009 NMED proposed adopting the "rebuttable presumption" concept and consolidating all ephemeral and intermittent waters into a new subsection (20.6.4.98 NMAC) that applied to all unclassified non-perennial waters of the state, except those waters included under 20.6.4.97 NMAC. The designated uses for all ephemeral and intermittent waters were thus upgraded to: livestock watering, wildlife habitat, marginal warm water aquatic life, and primary contact. Applicable to 100,000+

miles of unclassified ephemeral and intermittent waters, these designated uses presume that ephemeral waters can support primary contact recreation and warm water aquatic life. In order to show these uses are not attainable, one must perform a UAA, with the significant associated transactional costs of the UAA planning, implementation, review, and approval process.

Despite Mr. Hogan's testimony, his SWQB Exhibit 5 suggests that the adoption of the "rebuttable presumption" concept during the last Triennial Review was an unnecessary NMED initiative. SWQB Exhibit 5 is a December 4, 2013, letter from EPA to NMED with recommendations for the 2014 Triennial Review in which Mr. Russell Nelson, Regional Standards Coordinator, Region VI, states:

> New Mexico's shift to a presumption of CWA §101(a)(2) uses for all unclassified waters of the state led to the development of §§20.6.497-99 NMAC which serve as default use categories for those waters. To manage assessments of these unclassified waters, the state expanded and refined §20.6.4.15 NMAC, develop (*sic*) the *Hydrology Protocol* and other related supporting methodologies.

SWQB Ex. 5 at 6. The unintended consequences of presuming attainment of the CWA § 101(a)(2) interim goals for *all* waters in New Mexico are significant. For example, consider page 4 of SWQB Exhibit 5, wherein Mr. Nelson, in a discussion of wetland water quality standards, provides another recommendation:

> The development of designated functional uses specific to wetlands is essential because CWA §101(a)(2) uses are presumed to be supported in all unclassified waters of the state, which includes wetlands. The state's standards specify that unclassified waters are subject to §20.6.4.98 NMAC if non-perennial or subject to §20.6.4.99 NMAC if perennial. This is significant because the uses described in §§20.6.4.98 and 99 NMAC and associated criteria are intended for lotic waters and are not appropriate and cannot

> be supported in the majority of wetlands. There are two problems here; 1) Which use applies to what wetland, and 2) If the CWA §101(a)(2) uses that apply to these waters are not supported, they should be included on the state's §303(d) list. Given these regulatory requirements, the Region strongly recommends that the state develop and adopt functional uses appropriate for wetlands supported by numeric or narrative criteria.

Thus, adoption of the "rebuttable presumption" has placed a significant burden on the State with respect to wetlands. This and other unintended consequences counsel rejection of the "rebuttable presumption" concept going forward.

EPA's 2013 proposed rulemaking provides EPA's justification for the "rebuttable presumption" concept, citing to 40 CFR §§ 131.2, 131.5(a)(4), 131.6(a), (f), and 131.10(g), (j), (k). Ex. SJWC C-3 at 54522 (background statements & n.7). Ms. Pintado and Ms. Kougioulis also cite to some of these same regulations. SWQB Ex. 13 at 39-89; SWQB Ex. 39 at 7-14. I disagree that these citations create a "rebuttable presumption" regarding § 101(a)(2) uses, especially for waters that already have an assigned designated use that meets the § 101(a)(2) interim goals. The interim goal language of CWA § 101(a)(2) includes the qualifier "wherever attainable." There is no inference of a "rebuttable presumption" in this section of the CWA. Nor does 40 CFR § 131.10(j) provide for a "rebuttable presumption":

> A State must conduct a use attainability analysis as described in § 131.3(g) whenever:
>
> (1) The State designates or has designated uses that do not include the uses specified in section 101(a)(2) of the Act, or
>
> (2) The State wishes to remove a designated use that is specified in section 101(a)(2) of the Act or to adopt

> subcategories of uses specified in section 101(a)(2) of the Act which require less stringent criteria.

Ex. SJWC D-3. This regulation only specifies the conditions when a UAA is required.

Again, prior to 2009, the designated uses of secondary contact recreation and limited aquatic life for ephemeral waters complied with the § 101(a)(2) interim goals, as documented by EPA approval. By adopting the "rebuttable presumption" concept, the WQCC has burdened the State with the need to perform a UAA to downgrade any use on any segment of more than 100,000 miles of unclassified ephemeral and intermittent waters. Proof is amply provided by the proposal to list multiple stream segments as ephemeral waters during this Triennial Review.

Five Chino Mine stream segments are proposed for listing in 20.6.4.97(C) NMAC as ephemeral waters. SWQB Ex. 13 at 38-89. Ms. Pintado's testimony describes the cumulative, significant transactional costs expended in preparing the UAA's supporting the proposed listings. SWQB Ex. 13 at 39-89 through 47-89. For example, Chino Mines submitted a draft work plan for a UAA study in May 2011. SWQB Ex. 13 at 41-89; SWQB Ex. 32. In June 2011, NMED provided comments on the proposed work plan, which was provisionally approved pending Chino Mines' implementation of NMED's recommendations. SWQB Ex. 13 at 39-89; SWQB Ex. 33. Chino Mines then conducted the Hydrology Protocol and submitted a draft report with preliminary results to NMED in February 2012. NMED reviewed the draft report and requested additional information. SWQB Ex. 13 at 39-89; SWQB Ex. 34. "Additionally, field reconnaissance was conducted in September and November, 2012, and in March 2013, by staff of NMED's Ground Water Quality Bureau and NMED's Silver City field office." SWQB Ex.

13 at 39-89. NMED posted the draft Hydrology Protocol UAA report for 30-day public review on January 15, 2013. *Id.* at 44-89. In response to public comments and NMED recommendations, Chino Mines revised the UAA. *Id.* The report, along with all comments, was submitted to EPA for technical approval on June 28, 2013. *Id.* EPA provided comments one year later on June 26, 2014. *Id.* EPA's most significant comments concerned whether the UAA report adequately addressed the past history of the site. *Id.* at 44-89 to 45-89. According to Ms. Pintado, EPA requested more detail. *Id.* at 45-89. NMED discussed EPA's comments with Chino Mines on August 21, 2014, and they agreed it was appropriate to revise the report to address EPA's concerns. *Id.* at 46-89. A revised UAA report was submitted to NMED in October 2014. *Id.*; SWQB Ex. 31. In accordance with the UAA process (20.6.4.15 NMAC), NMED determined that the five stream segments were indeed ephemeral and should be listed at 20.6.4.97(C) NMAC. SWQB Ex. 13 at 47-89. If approved by the WQCC during this Triennial Review, the SWQB will submit supporting documentation to EPA for final approval. *Id.*

Thus, the process for listing five water segments as ephemeral waters in 20.6.4.97(C) NMAC will have taken more than four years. The transactional costs associated with this new requirement, which results from the "rebuttable presumption" adopted in 2009, obviously are significant, in terms of both time and money. I conservatively estimate the financial costs to exceed $200,000, especially when factoring in the costs incurred by Chino Mines, NMED, and EPA.

The twenty ephemeral waters listed in Ms. Kougioulis' testimony also were the subject of UAAs, which were conducted by the NMED using the Hydrology Protocol. SWQB Ex. 39 at 8-14. NMED was assisted by its contractor, Daniel B. Stephens and

Associates ("DBSA"). The UAAs were performed beginning in 2012, and the draft UAA report was submitted for public comment on July 27, 2012. *Id.* at 12-14. EPA provided technical approval of the UAA documentation on January 30, 2013. *Id.* at 13-14. Personal communication with DBSA personnel indicates that its services cost approximately $25,000. The transactional costs incurred by NMED in performing the UAAs and developing the final report for public comment are unknown at this time. However, given the disparate locations of the 20 water segments studied, and the time involved in report writing, public participation activities and communications with EPA, the costs could exceed $100,000.

In my opinion, this magnitude of costs (in terms of both time and money) is absurd for both citizens and state government, especially when the costs are incurred solely to demonstrate that ephemeral waters cannot sustain primary contact and marginal warm water aquatic life uses and criteria. The economy of New Mexico is too poor and fragile to afford such an onerous regulatory approach to WQS. SJWC therefore recommends that, given the new proof of the adverse impact of the 2009 adoption of the "rebuttable presumption," the WQCC take whatever steps are necessary to reverse course and abandon the rebuttable presumption concept.

3. 20.6.4.100-20.6.4.899 NMAC: NMED's Primary Contact Proposal

In her direct testimony, Ms. Pintado describes and supports NMED's proposal to change the recreation designated use of nine classified water segments from secondary contact to primary contact. The nine segments are 20.6.4.103, 20.6.4.116, 20.6.4.124, 20.6.4.204, 20.6.4.206, 20.6.4.207, 20.6.4.213, 20.6.4.219, and 20.6.4.308 NMAC. I previously submitted direct technical testimony regarding these proposed changes.

Ms. Pintado begins her direct technical testimony regarding the basis for these proposed amendments on page 77-89 of SWQB Ex. 13, where she addresses the water segment defined in 20.6.4.103 NMAC. Ms. Pintado provides a similar basis for the change of the designated use from secondary contact to primary contact for the other eight water segments.

A. <u>20.6.4.103 NMAC</u>

Ms. Pintado provides the following basis for changing the recreation use for this water segment from secondary contact to primary contact:

> For this segment and several others discussed later in this testimony, the SWQB has no record of a UAA approved by the WQCC and the EPA to support secondary contact use, which EPA considers not to meet the 101(a)(2) use. Also, the latest EPA guidance for recreational contact and CWA Section 101(a) goals finalized during 2012 (77 FR71191) provides new recommendations for recreational criteria based on several recent health studies and new science. SWQB Exhibit 37 . . . . However, the new EPA recommendations do not address secondary contact recreation criteria and do not allow for the levels of contact in the same manner as the previous guidance (EPA, 1986). SWQB Exhibit 38.
>
> Finally, even though swimming in this area is considered "at your risk" and depends on the fluctuating river level, this portion of the Rio Grande is accessible and primary contact recreation has been observed. Therefore, primary contact recreation is likely an existing use as defined under subparagraph 20.6.4.7 (E)(3) NMAC, and the designated use for secondary contact is upgraded to the primary contact use with the applicable criteria set forth in subsection D of 20.6.4.900 NMAC.

SWQB Ex. 13 at 77-89 to 78-89. I disagree with the assertion that a UAA must support the existing designated use of secondary contact. In my direct technical testimony, I addressed NMED's assertion that, according to EPA, secondary contact does not meet

CWA § 101(a)(2) goals. The secondary contact use for 20.6.4.103 NMAC has been in place for decades and repeatedly has been approved by EPA. Secondary contact recreation most certainly meets the § 101(a)(2) goals, even if EPA recently has re-interpreted the CWA with the intent to require the highest attainable use, as proposed in pending EPA rulemaking. *See* Ex. SJWC C-3.

40 CFR § 131.20(a) regarding review and revision of water quality standards states in part:

> [U]ses specified in section 101(a)(2) of the Act shall be re-examined every three years to determine if any new information has become available. If such new information indicates that the uses specified in section 101(a)(2) of the Act are attainable, the State shall revise its standards accordingly.

Ex. SJWC D-3. The recent EPA guidance for recreational contact cited by Ms. Pintado only addresses primary contact recreation, and it should have no bearing on the WQS for secondary contact recreation. EPA's altered guidance for primary contact does not require an upgrade of the existing secondary contact use and associated criteria. Further, accessibility of a portion of a water body does not mean primary contact recreation is "likely an existing use," as claimed by Ms. Pintado. In fact, there is no documentation of the asserted primary contact. Federal regulations require new and substantive information to upgrade a designated use. Because NMED has provided no significant factual information justifying the upgrade to primary contact, the WQCC should reject NMED's proposal. The secondary contact use should continue where primary contact recreation is at the public's own risk and should not be condoned or encouraged (*e.g.*, swimming in arroyos and flood channels during runoff events).

B. **20.6.4.116 NMAC**

The WQCC should reject NMED's proposal to upgrade the recreation use for this segment from secondary contact to primary contact for the same reasons explained in my rebuttal testimony concerning 20.6.4.103 NMAC. NMED has not provided any substantive information justifying an upgrade in use to primary contact. Ms. Pintado states that "the SWQB has no evidence that this use is not attainable and information indicates that primary contact use may be an existing use." SWQB Ex. 13 at 79-89. This statement is vague, uses double negative wording to support the proposed upgrade, and is not substantive. These perennial tributaries are located in a rural area without point source discharges. Nonpoint discharges in the watershed are not controlled by best management practices, and secondary contact uses likely are more prevalent (*e.g.*, fishing, rafting, and wading). Absent more substantial justification, NMED's proposal should be rejected. The primary contact designated use should not be applied where such use is not condoned.

C. **20.6.4.124 NMAC**

The WQCC should reject NMED's proposal to upgrade the recreation use for this segment from secondary contact to primary contact for the same reasons explained in my rebuttal testimony concerning 20.6.4.103 NMAC. NMED has not provided any substantive information justifying an upgrade in use to primary contact. Ms. Pintado states that "the SWQB has no evidence that this use is not attainable and information indicates that primary contact use may be an existing use." SWQB Ex. 13 at 79-89 to 80-89. This statement is vague, uses double negative wording to support the proposed upgrade, and is not substantive. This perennial tributary is located in a rural area

without point source discharges. Nonpoint discharges in the watershed are not controlled by best management practices, and secondary contact uses likely are more prevalent (*e.g.*, fishing). Absent more substantial justification, NMED's proposal should be rejected. The primary contact designated use should not be applied where such use is not condoned.

D. 20.6.4.204 NMAC

The WQCC should reject NMED's proposal to upgrade the recreation use for this segment from secondary contact to primary contact for the same reasons explained in my rebuttal testimony concerning 20.6.4.103 NMAC. NMED has not provided any substantive information justifying an upgrade in use to primary contact. Ms. Pintado states that "the SWQB has no evidence that this use is not attainable and information indicates that primary contact use may be an existing use." SWQB Ex. 13 at 80-89. This statement is vague, uses double negative wording to support the proposed upgrade, and is not substantive. Absent more substantial justification, NMED's proposal should be rejected.

E. 20.6.4.206 NMAC

The WQCC should reject NMED's proposal to upgrade the recreation use for this segment from secondary contact to primary contact for the same reasons explained in my rebuttal testimony concerning 20.6.4.103 NMAC. NMED has not provided any substantive information justifying an upgrade in use to primary contact. Ms. Pintado states that "the SWQB has no evidence that this use is not attainable and information indicates that primary contact use may be an existing use." SWQB Ex. 13 at 80-89. This statement is vague, uses double negative wording to support the proposed

upgrade, and is not substantive. Absent more substantial justification, NMED's proposal should be rejected.

F. 20.6.4.207 NMAC

The WQCC should reject NMED's proposal to upgrade the recreation use for this segment from secondary contact to primary contact for the same reasons explained in my rebuttal testimony concerning 20.6.4.103 NMAC. NMED has not provided any substantive information justifying an upgrade in use to primary contact. Ms. Pintado states that "the SWQB has no evidence that this use is not attainable and information indicates that primary contact use may be an existing use." SWQB Ex. 13 at 81-89. This statement is vague, uses double negative wording to support the proposed upgrade, and is not substantive. Absent more substantial justification, NMED's proposal should be rejected.

G. 20.6.4.213 NMAC

The WQCC should reject NMED's proposal to upgrade the recreation use for this segment from secondary contact to primary contact for the same reasons explained in my rebuttal testimony concerning 20.6.4.103 NMAC. NMED has not provided any substantive information justifying an upgrade in use to primary contact. Ms. Pintado states that "the SWQB has no evidence that this use is not attainable and information indicates that primary contact use may be an existing use." SWQB Ex. 13 at 81-89. This statement is vague, uses double negative wording to support the proposed upgrade, and is not substantive. This lake is located in a rural area without point source discharges. Nonpoint discharges in the watershed are not controlled by best management practices, and secondary contact uses likely are more prevalent (*e.g.*,

fishing, boating and bird watching). Absent more substantial justification, NMED's proposal should be rejected.

H. 20.6.4.219 NMAC

The WQCC should reject NMED's proposal to upgrade the recreation use for this segment from secondary contact to primary contact for the same reasons explained in my rebuttal testimony concerning 20.6.4.103 NMAC. NMED has not provided any substantive information justifying an upgrade in use to primary contact. Ms. Pintado states that "the SWQB has no evidence that this use is not attainable." SWQB Ex. 13 at 81-89. This statement is vague, uses double negative wording to support the proposed upgrade, and is not substantive. Nonpoint discharges in the watershed are not controlled by best management practices, and secondary contact uses likely are more prevalent (*e.g.*, fishing, boating). Ms. Pintado states that a website mentions scuba for game fishing, and that the lake is a public park. However, absent more substantial justification, NMED's proposal should be rejected. The primary contact designated use should not be applied where such use is not condoned.

I. 20.6.4.308 NMAC

The WQCC should reject NMED's proposal to upgrade the recreation use for this segment from secondary contact to primary contact for the same reasons explained in my rebuttal testimony concerning 20.6.4.103 NMAC. NMED has not provided any substantive information justifying an upgrade in use to primary contact. Ms. Pintado states that "the SWQB has no evidence that this use is not attainable." SWQB Ex. 13 at 82-89. This statement is vague, uses double negative wording to support the proposed upgrade, and is not substantive. This lake is located in a rural area without point source

discharges. Nonpoint discharges in the watershed are not controlled by best management practices, and secondary contact uses likely are more prevalent (*e.g.*, fishing, boating). Absent more substantial justification, NMED's proposal should be rejected. The primary contact designated use should not be applied where such use is not condoned.

Ms. Pintado concludes her testimony regarding these proposed recreation use upgrades for nine classified segments in her technical testimony on page 87-89. Ms. Pintado assumes that secondary contact recreation does not meet the interim goals of the CWA because EPA recently has voiced that position. For the reasons stated, I believe otherwise.

Ms. Pintado also states that the proposed use upgrade is consistent with 40 CFR § 131.20 regarding WQS revisions based on "new" information. However, Ms. Pintado's testimony provides scant new information, and instead relies on vague and suggestive information. It simply does not meet the requirements of Section 131.20.

Next, Ms. Pintado states that the proposed upgrades are consistent with new EPA guidance regarding bacterial criteria for primary contact use. SWQB Ex. 13 at 87-89; SWQB Ex. 37. However, the cited EPA publication does not address secondary contact use, and it provides no requirement or rationale for upgrading designated recreation uses. SWQB Ex. 37.

Finally, on page 88-89, Ms. Pintado restates the assertion that WQS regulations effectively establish a "rebuttable presumption" that the CWA 101(a)(2) uses are attainable and must be assigned to a water body, unless a State affirmatively demonstrates with a UAA that the use is not attainable. She goes on to state that there

are no UAAs to support the secondary contact use and criteria for the nine segments discussed previously. All of these statements are symptomatic of the "rebuttable presumption house of cards" previously disputed in my testimony.

EPA long has approved New Mexico's secondary contact uses, and there is no clear evidence that EPA's newest interpretation of CWA goals require the WQCC to adopt primary contact uses or perform UAAs in support of the secondary use designations.

This concludes my rebuttal technical testimony on behalf of SJWC.

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Contaminants of Emerging Concern
Drinking Water
Monitoring & Assessment
Research & Risk Assessment
Surface Water Standards & Guidance
Wastewater Technology
Water Infrastructure
What You Can Do

Water Quality Standards Handbook - Chapter 2: Designation of Uses (40 CFR 131.10)

Table of Contents

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2.1 Use Classification - 40 CFR 131.10(a)

A water quality standard defines the water quality goals of a water body or portion thereof, in part, by designating the use or uses to be made of the water. States adopt water quality standards to protect public health or welfare, enhance the quality of water, and serve the purposes of the Clean Water Act. "Serve the purposes of the Act" (as defined in sections 101(a)(2), and 303(c) of the Act) means that water quality standards should:

- provide, wherever attainable, water quality for the protection and propagation of fish, shellfish, and wildlife, and recreation in and on the water ("fishable/swimmable"), and
- consider the use and value of State waters for public water supplies, propagation of fish and wildlife, recreation, agriculture and industrial purposes, and navigation.

These sections of the Act describe various uses of waters that are considered desirable and should be protected. The States must take these uses into consideration when classifying State waters and are free to add use classifications. Consistent with the requirements of the Act and Water Quality Standards

Updated Information

Use Classification

- 2002 Symposium on Designated Uses - This website links to proceedings from these discussions, which highlighted a desire for clear guidance on designating uses and using subcategories and other use refinements to ensure adequate designation.
- Coordinating CSO Long-Term Planning with Water Quality Reviews (2001) (PDF) (79 pp, 498K) - This document provides guidance on how states and tribes should

EXHIBIT SJWC D-1

Regulation, States are free to develop and adopt any use classification system they see as appropriate, except that waste transport and assimilation is not an acceptable use in any case (see 40 CFR 131.10(a)). Among the uses listed in the Clean Water Act, there is no hierarchy. EPA's Water Quality Standards Regulation emphasizes the uses specified in section 101(a)(2) of the Act (first bullet, above). To be consistent with the 101(a)(2) interim goal of the Act, States must provide water quality for the *protection and propagation of fish, shellfish, and wildlife, and provide for recreation in and on the water* ("fishable/swimmable") where attainable (see 40 CFR 131.10(j)).

Designated Uses: 40 CFR 131.3(f)

Uses specified in Water Quality Standards for each water body or segment whether or not they are being attained.

—2.1.1 Public Water Supplies

This use includes waters that are the source for drinking water supplies and often includes waters for food processing. Waters for drinking water may require treatment prior to distribution in public water systems.

—2.1.2 Protection and Propagation of Fish, Shellfish, and Wildlife

This classification is often divided into several more specific subcategories, including coldwater fish, warmwater fish, and shellfish. For example, some coastal States have a use specifically for oyster propagation. The use may also include protection of aquatic flora. Many States differentiate between self-supporting fish populations and stocked fisheries. Wildlife protection should include waterfowl, shore birds, and other water-oriented wildlife.

To more fully protect aquatic habitats and provide more comprehensive assessments of aquatic life use attainment/non-attainment, it is EPA's policy that States should designate aquatic life uses that appropriately address biological integrity and adopt biological criteria necessary to protect those uses (see Appendix R).

Types of Uses: CWA §303(c)(2)(A)

- Public water supplies
- Protection and propagation of fish, shellfish, and wildlife
- Recreation
- Agriculture
- Industry
- Navigation
- Coral reef preservation
- Marinas
- Groundwater recharge
- Aquifer protection
- Hydroelectric power

implement the CSO control policy and other wet weather water pollution control programs to attain water quality standards.

Federal Rules involving designated uses

- Water Quality Standards for Puerto Rico (2004) - This federal register notice promulgated primary contact recreation uses and associated water quality criteria for six water bodies.
- Water Quality Standards for Kansas (2003) - This federal register notice promulgated primary and secondary contact recreation uses and aquatic life uses for a large number of water bodies to replace previously disapproved uses.
- Proposed Water Quality Standards for Alabama (2002) - This federal register notice proposed fish and wildlife use for a single stream segment to ensure protection of aquatic life and recreation in and on the water.
- Advanced Notice of Proposed Rulemaking for Water Quality Standards (1998) | Print Version (PDF) (66 pp, 474K) - See pages 36748 to 36762 for an overview of designated uses policy and EPA's thinking on program development in 1998.
- Water Quality Standards for Idaho (1997) - This federal register notice promulgated use designations for five water bodies as well as a variance procedure.

—2.1.3 Recreation

Recreational uses have traditionally been divided into primary contact and secondary contact recreation. The primary contact recreation classification protects people from illness due to activities involving the potential for ingestion of, or immersion in, water. Primary contact recreation usually includes swimming, water-skiing, skin-diving, surfing, and other activities likely to result in immersion. The secondary contact recreation classification is protective when immersion is unlikely. Examples are boating, wading, and rowing. These two broad uses can be logically subdivided into an almost infinite number of subcategories (*e.g.*, wading, fishing, sailing, powerboating, rafting). Often fishing is considered in the recreational use categories.

Recreation in and on the water, on the other hand, may not be attainable in certain waters, such as wetlands, that do not have sufficient water, at least seasonally. However, States are encouraged to recognize and protect recreational

uses that do not directly involve contact with water, including hiking, camping, and bird watching.

A number of acceptable State options may be considered for designation of recreational uses.

Option 1

Designate primary contact recreational uses for all waters of the State, and set bacteriological criteria sufficient to support primary contact recreation. This option fully conforms with the requirement in section 131.6 of the Water Quality Standards Regulation to designate uses consistent with the provisions of sections 101(a)(2) and 303(c)(2) of the CWA. States are not required to conduct use attainability analyses (for recreation) when primary contact recreational uses are designated for all waters of the State.

Option 2

Designate either primary contact recreational uses or secondary contact recreational uses for all waters of the State and, where secondary contact recreation is designated, set bacteriological criteria sufficient to support primary contact recreation. EPA believes that a secondary contact recreational use (with criteria sufficient to support primary contact recreation) is consistent with the CWA section 101(a)(2) goal. The rationale for this option is discussed in the preamble to the Water Quality Standards Regulation, which states: " . . . even though it may not make sense to encourage use of a stream for swimming because of the flow, depth or the velocity of the water, the States and EPA must recognize that swimming and/or wading may occur anyway. In order to protect public health, States must set criteria to reflect recreational uses if it appears that recreation will in fact occur in the stream." Under this option, future revisions to the bacteriological criterion for specific stream segments would be subject to the downgrading provisions of the Federal Water Quality Standards Regulation (40 CFR 131.10).

Option 3

Designate either primary contact recreation, secondary contact recreation (with bacteriological criteria sufficient to support primary contact recreation), or conduct use attainability analyses demonstrating that recreational uses consistent with the CWA section 101(a)(2) goal are not attainable for all waters of the State. Such use attainability analyses are required by section 13 1.10 of the Water Quality Standards Regulation, which also specifies six factors that may be used by States in demonstrating that attaining a use is not feasible. Physical factors, which are important in determining attainability of aquatic life uses, may not be used as the basis for not designating a recreational use consistent with the CWA section 101(a)(2) goal. This precludes States from using 40 CFR 131.1O(g) factor 2 (pertaining to low-flows) and factor 5 (pertaining to physical factors in general). The basis for this policy is that the States and EPA have an obligation to do as much as possible to protect the health of the public. In certain instances, people will use whatever water bodies are available for recreation, regardless of the physical conditions. In conducting use attainability analyses (UAAs) where available data are scarce or nonexistent, sanitary surveys are useful in determining the sources of bacterial water quality indicators. Information on land use is also useful in predicting bacteria levels and sources.

Other Options

- States may apply bacteriological criteria sufficient to support primary contact recreation with a rebuttable presumption that the indicators show the presence of human fecal pollution. Rebuttal of this presumption, however, must be based on a sanitary survey that demonstrates a lack of contamination from human sources. The basis for this option is the absence of data demonstrating a relationship between high densities of bacteriological water quality indicators and increased risk of swimming-associated illness in animal-contaminated waters. Maine is an example of a State that has successfully implemented this option.
- Where States adopt a standards package that does not support the swimmable goal and does not contain a UAA to justify the omission, EPA may conditionally approve the package provided that (1) the State commits, in writing, to a schedule for rapid completion of the UAAs, generally within 90 days (see conditional approval guidance in section 6.2 of this Handbook); a (2) the omission may be considered a minor deficiency (*i.e.*, after consultation with the State, EPA determines that there is no basis for concluding that the UAAs would support upgrading the use of the water body). Otherwise, failure to support the swimmable goal is a major deficiency and must be disapproved to allow prompt Federal promulgation action.
- States may conduct basinwide use attainability analyses if the circumstances relating to the segments in question are sufficiently similar to make the results of the basinwide analyses reasonably applicable to each segment.

States may add other recreation classifications as they see fit. For example, one State protects "consumptive recreation" (*i.e.*, "human consumption of aquatic life, semi-aquatic life, or terrestrial wildlife that depend on surface

waters for survival and well-being"). States also may adopt seasonal recreational uses (see section 2.6, this Handbook).

—2.1.4 Agriculture and Industry

The agricultural use classification defines waters that are suitable for irrigation of crops, consumption by livestock, support of vegetation for range grazing, and other uses in support of farming and ranching and protects livestock and crops from injury due to irrigation and other exposures.

The industrial use classification includes industrial cooling and process water supplies. This classification protects industrial equipment from damage from cooling and/or process waters. Specific criteria would depend on the industry involved.

The *Report of the Committee on Water Quality Criteria*, the "Green Book" (FWPCA, 1968) and *Water Quality Criteria 1972*, the "Blue Book" (NAS/NAE, 1973) provide information for certain parameters on protecting agricultural and industrial uses, although section 304(a)(1) criteria for protecting these uses have not been specifically developed for numerous other parameters, including toxics.

Where criteria have not been specifically developed for agricultural and industrial uses, the criteria developed for human health and aquatic life are usually sufficiently stringent to protect these uses. States also may establish criteria specifically designed to protect these uses.

—2.1.5 Navigation

This use classification is designed to protect ships and their crews and to maintain water quality so as not to restrict or prevent navigation.

—2.1.6 Other Uses

States may adopt other uses they consider to be necessary. Some examples include coral reef preservation, marinas, groundwater recharge, aquifer protection, and hydroelectric power. States also may establish criteria specifically designed to protect these uses.

⇧Top of Page

2.2 Consider Downstream Uses - 40 CFR 131.10(b)

When designating uses, States should consider extraterritorial effects of their standards. For example, once States revise or adopt standards, upstream jurisdictions will be required, when revising their standards and issuing permits, to provide for attainment and maintenance of the downstream standards.

Updated Information

- EPA Response to Sierra Club Petition Regarding Defined Portions of the Mississippi and Missouri Rivers (2004) - This EPA response evaluated current WQS and existing scientific knowledge at the time for each pollutant and designated use at issue within the petition area. It also provided EPA's current perspective on downstream use protection and identified a path forward for better understanding the science of numeric nutrient criteria in large rivers.

Despite the regulatory requirement that States ensure downstream standards are met when designating and setting criteria for waters, occasionally downstream standards are not met owing to an upstream pollutant source. The Clean Water Act offers three solutions to such problems.

First, the opportunity for public participation for new or revised water quality standards provides potentially affected parties an approach to avoiding conflicts of water quality standards. States and Tribes are encouraged to keep other States informed of their water quality standards efforts and to invite comment on standards for common water bodies.

Second, permit limits under the National Pollutant Discharge Elimination System (NPDES) program (see section 402 of the Act) are required to be developed such that applicable water quality standards are achieved. The permit issuance process also includes opportunity for public participation and, thus, provides a second opportunity to consider and resolve potential problems regarding extraterritorial effects of water quality standards. In a decision in *Arkansas v. Oklahoma* (112 section 1046, February 26, 1992) the U.S. Supreme Court held that the Clean Water Act clearly authorized EPA to require that point sources in upstream States not violate water quality standards in downstream States, and that EPA's interpretation of those standards should govern.

Third, NPDES permits issued by EPA are subject to certification under the requirements of section 401 of the Act.

Water Quality Standards Handbook - Chapter 5: General Policies (40 CFR 131.13)

EPA-820-B-14-004
September 2014

Table of Contents

Introduction

As specified in 40 CFR 131.13, states and authorized tribes may, at their discretion, adopt certain policies into their water quality standards (WQS) that generally affect how their WQS are applied or implemented. Examples of such general policies include those affecting mixing zones, critical low flows, and WQS variances. [1/] As the regulation indicates, states and tribes are not required to adopt general policies. However, 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 Clean Water Act (CWA) if they constitute new or revised WQS (see Chapter 1 of this Handbook). This chapter provides an overview of three types of general WQS policies. In particular, Section 5.1 of this chapter discusses mixing zones, Section 5.2 discusses critical low flows, and Section 5.3 discusses variances.

5.1 Mixing Zones

A mixing zone is a limited area or volume of water where initial dilution of a discharge takes place and where certain numeric water quality criteria may be exceeded. The CWA does not require that all criteria be met at the exact point where pollutants are discharged into a receiving water prior to the mixing of such pollutants with the receiving water. Sometimes it is possible to expose aquatic organisms to a pollutant concentration above a criterion for a short duration within a limited, clearly defined area of a waterbody while still maintaining the designated use of the waterbody as a whole. Where this is the case, a state or authorized tribe may find it appropriate to allow ambient concentrations of a pollutant above the criterion in small areas near point-source outfalls (i.e., mixing zones).

Mixing zones do not constitute new state or tribal criteria or changes to the state- or tribe-adopted and EPA-approved criteria. Therefore, the narrative and/or numeric criteria for the waterbody are still the applicable criteria within the boundaries of the mixing zone. A mixing zone simply authorizes an applicable criterion to be exceeded within a defined area of the waterbody while still protecting the designated use of the waterbody as a whole. Since 1983, the guidance in this Handbook has described mixing zones as areas where criteria may be exceeded rather than areas where criteria do not apply.

By authorizing a mixing zone, states and tribes allow some portion of the waterbody to mix with and dilute particular wastewater discharges before evaluating whether the waterbody as a whole is meeting its criteria. In addition to the WQS regulation at 40 CFR 131.13 described above, the use of dilution is supported by the National Pollutant Discharge Elimination System (NPDES) permitting regulation at 40 CFR 122.44(d)(1)(ii), which requires the permitting authority to consider, where appropriate, "the dilution of the effluent in the receiving water" when determining whether a discharge causes, has the reasonable potential to cause, or contributes to an instream excursion above a criterion. Depending on the state or tribal WQS and implementation policies, a consideration of dilution could be expressed in the form of a

5.3 Variances from Water Quality Standards

A WQS variance is a time-limited designated use and water quality criterion for a specific pollutant(s) or water quality parameter(s) that reflect the highest attainable condition during the term of the WQS variance. A WQS variance may apply to an NPDES-permitted discharger or waterbody/waterbody segment(s). The regulation at 40 CFR 131.13 provides that states and authorized tribes may adopt into their WQS general variance policies that describe how they intend to apply and implement variances. Although such variance policies require EPA review and approval, states and tribes are not required to adopt variance policies in order to adopt individual variances. Nevertheless, as opposed to individual mixing zones (discussed in Section 5.1 of this chapter), the individual variances themselves must be adopted into WQS (or other legally binding state or tribal requirements) and approved by the EPA before they can be effective for CWA purposes.

Although the legal authority to adopt a WQS variance is the same as a revision to a designated use, the purpose of a variance is different from that of a designated use revision (described in Chapter 2 of this Handbook). 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. As first articulated in 1977 in *Decision of the General Counsel on Matters of Law Pursuant to 40 CFR Section 125.36(m). No. 58*, a state or tribe may adopt a WQS variance if the state or tribe can satisfy the same substantive and procedural requirements as a designated use removal, which are described in 40 CFR 131.10(g).

A variance is also different from a permit compliance schedule. While both tools can provide time to meet regulatory requirements, which tool is appropriate depends upon the circumstances. Variances can be appropriate to address situations where it is known that the designated use and criterion are unattainable today (or for a limited period of time), but feasible progress could be made toward attaining the designated use and criterion. A permit compliance schedule, on the other hand, may be appropriate when the designated use is attainable, but the discharger needs additional time to modify or upgrade treatment facilities in order to meet its WQBEL such that a schedule and resulting milestones will lead to compliance "as soon as possible" with the WQBEL based on the currently applicable WQS. See CWA Section 502(17) for a definition of "schedules of compliance" and 40 CFR 122.47.

A variance may be appropriate where a state or tribe determines that the designated use cannot be attained for a period of time because the discharger cannot immediately meet a WQBEL, which is written to meet a particular WQS, or a waterbody/waterbody segment cannot immediately meet the criteria to protect the designated use. Under such circumstances, the variance provides a targeted, time-limited revision to the WQS that reflects the highest attainable condition. These new time-limited WQS then serve as the basis for pollution control requirements during the term of the variance. For WQS variances that apply to aquatic life, wildlife, and recreational uses (i.e., the Section 101(a)(2) uses), this means that attainment of the designated use is infeasible under at least one of the six factors at 131.10(g) for at least the term of the variance.

The practical effect of the variance is an NPDES permit containing a WQBEL that complies with a less stringent criterion than would otherwise be in effect in the absence of the variance. However, the underlying designated use and criteria remain in effect for Section 303(d) listing and total maximum daily load development regardless of whether the variance is for a single discharger, multiple dischargers, or a waterbody/waterbody segment. At the end of the variance term, the discharger's WQBEL must ensure compliance with the underlying designated use and criterion or the state or tribe must obtain a new variance. To obtain a new variance, the state or tribe must again demonstrate that the designated use is not attainable at the point of discharge and again submit the variance to the EPA for review and approval or disapproval.

In many cases, a WQS variance is an environmentally useful tool because a variance exists only for a defined term and retains designated use protection for all pollutants and sources, with the sole exception of those specified in the variance. Even the discharger with a variance for a particular pollutant is required to meet applicable criteria for all other pollutants. Thus, a variance can result in water quality improvements over time and, in some cases, full attainment of designated uses by maintaining existing water quality protections while allowing time for advances in treatment technologies, control practices, or other changes in circumstances.

States and tribes typically adopt a WQS variance for an individual discharger for a specific pollutant in a specific waterbody. However, where multiple dischargers have similar attainment challenges, a state or tribe may streamline its variance process by adopting a multiple-discharger WQS variance. Such a variance applies to several dischargers but may be supported by a single technical rationale justifying the need for the variance. The EPA has previously published information on both individual- and multiple-discharger variances at 40 CFR Part 132. For additional information on variances, also see *Discharger-Specific Variances on a Broader Scale: Developing Credible Rationales for Variances that*

Apply to Mu[illegible] Dischargers (2013).

[1/] Throughout this document, the term "states" means the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands. The term "authorized tribe" or "tribe" means an Indian tribe authorized for treatment in a manner similar to a state under CWA Section 518 for purposes of Section 303(c) WQS.

[2/] Lethality is a function of the magnitude of a pollutant concentration and the duration an organism is exposed to that concentration. Section 4.3.3 of the TSD (1991) describes various methods for preventing lethality to organisms passing through a mixing zone.

[3/] Acutely toxic conditions are those that are lethal to aquatic organisms that may pass through the mixing zone. The underlying assumption for allowing a mixing zone is that pollutant concentrations in excess of acute and chronic criteria, but below acutely toxic concentrations, may exist in small areas without causing adverse effects to the designated use of the waterbody as a whole.

[4/] The 1996 memorandum *EPA Guidance on Application of State Mixing Zone Policies in EPA-issued NPDES Permits* describes the circumstances under which the EPA may include a mixing zone in an NPDES permit when the EPA is the permitting authority.

[5/] However, note that some chemicals of relatively low toxicity such as zinc will bioconcentrate in fish without harmful effects resulting from human consumption.

[6/] In some EPA documents such as those cited, critical low flow is also called "design flow" or "stream design flow." These terms are different from a facility or effluent design flow.

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 26. Water Pollution Prevention and Control (Refs & Annos)
Subchapter I. Research and Related Programs (Refs & Annos)

→→ § 1251. Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter--

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

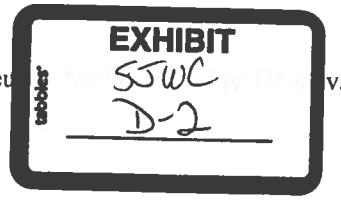
(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.



(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

(c) Congressional policy toward Presidential activities with foreign countries

It is further the policy of Congress that the President, acting through the Secretary of State and such national and international organizations as he determines appropriate, shall take such action as may be necessary to insure that to the fullest extent possible all foreign countries shall take meaningful action for the prevention, reduction, and elimination of pollution in their waters and in international waters and for the achievement of goals regarding the elimination of discharge of pollutants and the improvement of water quality to at least the same extent as the United States does under its laws.

(d) Administrator of Environmental Protection Agency to administer chapter

Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called "Administrator") shall administer this chapter.

(e) Public participation in development, revision, and enforcement of any regulation, etc.

Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

(f) Procedures utilized for implementing chapter

It is the national policy that to the maximum extent possible the procedures utilized for implementing this chapter shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.

(g) Authority of States over water

It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall

not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

CREDIT(S)

(June 30, 1948, c. 758, Title I, § 101, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 816; amended Dec. 27, 1977, Pub.L. 95-217, §§ 5(a), 26(b), 91 Stat. 1567, 1575; Feb. 4, 1987, Pub.L. 100-4, Title III, § 316(b), 101 Stat. 60.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1972 Acts. Senate Report No. 92-414 and Senate Conference Report No. 92-1236, see 1972 U.S. Code Cong. and Adm. News, p. 3668.

1977 Acts. Senate Report No. 95-370 and House Conference Report No. 95-830, see 1977 U.S. Code Cong. and Adm. News, p. 4326.

1987 Acts. Section-by-Section Analysis, see 1987 U.S. Code Cong. and Adm. News, p. 5.

Codifications

The Federal Water Pollution Control Act, comprising this chapter, was originally enacted by Act June 30, 1948, c. 758, 62 Stat. 1155, and amended by Acts July 17, 1952, c. 927, 66 Stat. 755; July 9, 1956, c. 518, 70 Stat. 498; June 25, 1959, Pub.L. 86-70, 73 Stat. 141; July 12, 1960, Pub.L. 86-624, 74 Stat. 411; July 20, 1961, Pub.L. 87-88, 75 Stat. 204; Oct. 2, 1965, Pub.L. 89-234, 79 Stat. 903; Nov. 3, 1966, Pub.L. 89-753, 80 Stat. 1246; Apr. 3, 1970, Pub.L. 91-224, 84 Stat. 91; Dec. 31, 1970, Pub.L. 91-611, 84 Stat. 1818; July 9, 1971, Pub.L. 92-50, 85 Stat. 124; Oct. 13, 1971, Pub.L. 92-137, 85 Stat. 379; Mar. 1, 1972, Pub.L. 92-240, 86 Stat. 47, and was formerly classified first to section 466 et seq. of this title and later to section 1151 et seq. of this title. The Act is shown herein, however, as having been added by Pub.L. 92-500 without reference to such intervening amendments because of the extensive amendment, reorganization, and expansion of the Act's provisions by Pub.L. 92-500.

(c) Relationship to Federal activities—Each department, agency or instrumentality of the executive, legislative and judicial branches of the Federal Government having jurisdiction over any property or facility or engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants shall comply with all Federal, State, interstate and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner and extent as any non-governmental entity in accordance with section 313 of the CWA.

§ 130.15 Processing application for Indian tribes.

The Regional Administrator shall process an application of an Indian Tribe submitted under §130.6(d) in a timely manner. He shall promptly notify the Indian Tribe of receipt of the application.

[54 FR 14360, Apr. 11, 1989, as amended at 59 FR 13818, Mar. 23, 1994]

PART 131—WATER QUALITY STANDARDS

Subpart A—General Provisions

Sec.

Subpart B—Establishment of Water Quality Standards

Subpart C—Procedures for Review and Revision of Water Quality Standards

Subpart D—Federally Promulgated Water Quality Standards

AUTHORITY: 33 U.S.C. 1251 *et seq.*

SOURCE: 48 FR 51405, Nov. 8, 1983, unless otherwise noted.

Subpart A—General Provisions

§ 131.1 Scope.

This part describes the requirements and procedures for developing, reviewing, revising, and approving water quality standards by the States as authorized by section 303(c) of the Clean Water Act. Additional specific procedures for developing, reviewing, revising, and approving water quality standards for Great Lakes States or Great Lakes Tribes (as defined in 40 CFR 132.2) to conform to section 118 of the Clean Water Act and 40 CFR part 132, are provided in 40 CFR part 132.

[60 FR 15386, Mar. 23, 1995]

§ 131.2 Purpose.

A water quality standard defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses. States adopt water quality standards to protect public health or welfare, enhance the quality of water and serve the purposes of the Clean

Water Act (the Act). "Serve the purposes of the Act" (as defined in sections 101(a)(2) and 303(c) of the Act) means that water quality standards should, wherever attainable, provide water quality for the protection and propagation of fish, shellfish and wildlife and for recreation in and on the water and take into consideration their use and value of public water supplies, propagation of fish, shellfish, and wildlife, recreation in and on the water, and agricultural, industrial, and other purposes including navigation.

Such standards serve the dual purposes of establishing the water quality goals for a specific water body and serve as the regulatory basis for the establishment of water-quality-based treatment controls and strategies beyond the technology-based levels of treatment required by sections 301(b) and 306 of the Act.

§ 131.3 Definitions.

(a) *The Act* means the Clean Water Act (Pub. L. 92–500, as amended (33 U.S.C. 1251 *et seq.*)).

(b) *Criteria* are elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use. When criteria are met, water quality will generally protect the designated use.

(c) *Section 304(a) criteria* are developed by EPA under authority of section 304(a) of the Act based on the latest scientific information on the relationship that the effect of a constituent concentration has on particular aquatic species and/or human health. This information is issued periodically to the States as guidance for use in developing criteria.

(d) *Toxic pollutants* are those pollutants listed by the Administrator under section 307(a) of the Act.

(e) *Existing uses* are those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards.

(f) *Designated uses* are those uses specified in water quality standards for each water body or segment whether or not they are being attained.

(g) *Use attainability analysis* is a structured scientific assessment of the factors affecting the attainment of the use which may include physical, chemical, biological, and economic factors as described in § 131.10(g).

(h) *Water quality limited segment* means any segment where it is known that water quality does not meet applicable water quality standards, and/or is not expected to meet applicable water quality standards, even after the application of the technology-bases effluent limitations required by sections 301(b) and 306 of the Act.

(i) *Water quality standards* are provisions of State or Federal law which consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses. Water quality standards are to protect the public health or welfare, enhance the quality of water and serve the purposes of the Act.

(j) *States* include: The 50 States, the District of Columbia, Guam, the Commonwealth of Puerto Rico, Virgin Islands, American Samoa, the Trust Territory of the Pacific Islands, the Commonwealth of the Northern Mariana Islands, and Indian Tribes that EPA determines to be eligible for purposes of water quality standards program.

(k) *Federal Indian Reservation, Indian Reservation,* or *Reservation* means all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation."

(l) *Indian Tribe* or *Tribe* means any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation.

[48 FR 51405, Nov. 8, 1983, as amended at 56 FR 64893, Dec. 12, 1991; 59 FR 64344, Dec. 14, 1994]

§ 131.4 State authority.

(a) States (as defined in § 131.3) are responsible for reviewing, establishing, and revising water quality standards. As recognized by section 510 of the Clean Water Act, States may develop water quality standards more stringent

than required by this regulation. Consistent with section 101(g) and 518(a) of the Clean Water Act, water quality standards shall not be construed to supersede or abrogate rights to quantities of water.

(b) States (as defined in § 131.3) may issue certifications pursuant to the requirements of Clean Water Act section 401. Revisions adopted by States shall be applicable for use in issuing State certifications consistent with the provisions of § 131.21(c).

(c) Where EPA determines that a Tribe is eligible to the same extent as a State for purposes of water quality standards, the Tribe likewise is eligible to the same extent as a State for purposes of certifications conducted under Clean Water Act section 401.

[56 FR 64893, Dec. 12, 1991, as amended at 59 FR 64344, Dec. 14, 1994]

§ 131.5 EPA authority.

(a) Under section 303(c) of the Act, EPA is to review and to approve or disapprove State-adopted water quality standards. The review involves a determination of:

(1) Whether the State has adopted water uses which are consistent with the requirements of the Clean Water Act;

(2) Whether the State has adopted criteria that protect the designated water uses;

(3) Whether the State has followed its legal procedures for revising or adopting standards;

(4) Whether the State standards which do not include the uses specified in section 101(a)(2) of the Act are based upon appropriate technical and scientific data and analyses, and

(5) Whether the State submission meets the requirements included in § 131.6 of this part and, for Great Lakes States or Great Lakes Tribes (as defined in 40 CFR 132.2) to conform to section 118 of the Act, the requirements of 40 CFR part 132.

(b) If EPA determines that the State's or Tribe's water quality standards are consistent with the factors listed in paragraphs (a)(1) through (a)(5) of this section, EPA approves the standards. EPA must disapprove the State's or Tribe's water quality standards and promulgate Federal standards under section 303(c)(4), and for Great Lakes States or Great Lakes Tribes under section 118(c)(2)(C) of the Act, if State or Tribal adopted standards are not consistent with the factors listed in paragraphs (a)(1) through (a)(5) of this section. EPA may also promulgate a new or revised standard when necessary to meet the requirements of the Act.

(c) Section 401 of the Clean Water Act authorizes EPA to issue certifications pursuant to the requirements of section 401 in any case where a State or interstate agency has no authority for issuing such certifications.

[48 FR 51405, Nov. 8, 1983, as amended at 56 FR 64894, Dec. 12, 1991; 60 FR 15387, Mar. 23, 1995]

§ 131.6 Minimum requirements for water quality standards submission.

The following elements must be included in each State's water quality standards submitted to EPA for review:

(a) Use designations consistent with the provisions of sections 101(a)(2) and 303(c)(2) of the Act.

(b) Methods used and analyses conducted to support water quality standards revisions.

(c) Water quality criteria sufficient to protect the designated uses.

(d) An antidegradation policy consistent with § 131.12.

(e) Certification by the State Attorney General or other appropriate legal authority within the State that the water quality standards were duly adopted pursuant to State law.

(f) General information which will aid the Agency in determining the adequacy of the scientific basis of the standards which do not include the uses specified in section 101(a)(2) of the Act as well as information on general policies applicable to State standards which may affect their application and implementation.

§ 131.7 Dispute resolution mechanism.

(a) Where disputes between States and Indian Tribes arise as a result of differing water quality standards on common bodies of water, the lead EPA Regional Administrator, as determined based upon OMB circular A–105, shall

be responsible for acting in accordance with the provisions of this section.

(b) The Regional Administrator shall attempt to resolve such disputes where:

(1) The difference in water quality standards results in unreasonable consequences;

(2) The dispute is between a State (as defined in §131.3(j) but exclusive of all Indian Tribes) and a Tribe which EPA has determined is eligible to the same extent as a State for purposes of water quality standards;

(3) A reasonable effort to resolve the dispute without EPA involvement has been made;

(4) The requested relief is consistent with the provisions of the Clean Water Act and other relevant law;

(5) The differing State and Tribal water quality standards have been adopted pursuant to State and Tribal law and approved by EPA; and

(6) A valid written request has been submitted by either the Tribe or the State.

(c) Either a State or a Tribe may request EPA to resolve any dispute which satisfies the criteria of paragraph (b) of this section. Written requests for EPA involvement should be submitted to the lead Regional Administrator and must include:

(1) A concise statement of the unreasonable consequences that are alleged to have arisen because of differing water quality standards;

(2) A concise description of the actions which have been taken to resolve the dispute without EPA involvement;

(3) A concise indication of the water quality standards provision which has resulted in the alleged unreasonable consequences;

(4) Factual data to support the alleged unreasonable consequences; and

(5) A statement of the relief sought from the alleged unreasonable consequences.

(d) Where, in the Regional Administrator's judgment, EPA involvement is appropriate based on the factors of paragraph (b) of this section, the Regional Administrator shall, within 30 days, notify the parties in writing that he/she is initiating an EPA dispute resolution action and solicit their written response. The Regional Administrator shall also make reasonable efforts to ensure that other interested individuals or groups have notice of this action. Such efforts shall include but not be limited to the following:

(1) Written notice to responsible Tribal and State Agencies, and other affected Federal agencies,

(2) Notice to the specific individual or entity that is alleging that an unreasonable consequence is resulting from differing standards having been adopted on a common body of water,

(3) Public notice in local newspapers, radio, and television, as appropriate,

(4) Publication in trade journal newsletters, and

(5) Other means as appropriate.

(e) If in accordance with applicable State and Tribal law an Indian Tribe and State have entered into an agreement that resolves the dispute or establishes a mechanism for resolving a dispute, EPA shall defer to this agreement where it is consistent with the Clean Water Act and where it has been approved by EPA.

(f) EPA dispute resolution actions shall be consistent with one or a combination of the following options:

(1) *Mediation.* The Regional Administrator may appoint a mediator to mediate the dispute. Mediators shall be EPA employees, employees from other Federal agencies, or other individuals with appropriate qualifications.

(i) Where the State and Tribe agree to participate in the dispute resolution process, mediation with the intent to establish Tribal-State agreements, consistent with Clean Water Act section 518(d), shall normally be pursued as a first effort.

(ii) Mediators shall act as neutral facilitators whose function is to encourage communication and negotiation between all parties to the dispute.

(iii) Mediators may establish advisory panels, to consist in part of representatives from the affected parties, to study the problem and recommend an appropriate solution.

(iv) The procedure and schedule for mediation of individual disputes shall be determined by the mediator in consultation with the parties.

(v) If formal public hearings are held in connection with the actions taken

under this paragraph, Agency requirements at 40 CFR 25.5 shall be followed.

(2) *Arbitration.* Where the parties to the dispute agree to participate in the dispute resolution process, the Regional Administrator may appoint an arbitrator or arbitration panel to arbitrate the dispute. Arbitrators and panel members shall be EPA employees, employees from other Federal agencies, or other individuals with appropriate qualifications. The Regional administrator shall select as arbitrators and arbitration panel members individuals who are agreeable to all parties, are knowledgeable concerning the requirements of the water quality standards program, have a basic understanding of the political and economic interests of Tribes and States involved, and are expected to fulfill the duties fairly and impartially.

(i) The arbitrator or arbitration panel shall conduct one or more private or public meetings with the parties and actively solicit information pertaining to the effects of differing water quality permit requirements on upstream and downstream dischargers, comparative risks to public health and the environment, economic impacts, present and historical water uses, the quality of the waters subject to such standards, and other factors relevant to the dispute, such as whether proposed water quality criteria are more stringent than necessary to support designated uses, more stringent than natural background water quality or whether designated uses are reasonable given natural background water quality.

(ii) Following consideration of relevant factors as defined in paragraph (f)(2)(i) of this section, the arbitrator or arbitration panel shall have the authority and responsibility to provide all parties and the Regional Administrator with a written recommendation for resolution of the dispute. Arbitration panel recommendations shall, in general, be reached by majority vote. However, where the parties agree to binding arbitration, or where required by the Regional Administrator, recommendations of such arbitration panels may be unanimous decisions. Where binding or non-binding arbitration panels cannot reach a unanimous recommendation after a reasonable period of time, the Regional Administrator may direct the panel to issue a non-binding decision by majority vote.

(iii) The arbitrator or arbitration panel members may consult with EPA's Office of General Counsel on legal issues, but otherwise shall have no *ex parte* communications pertaining to the dispute. Federal employees who are arbitrators or arbitration panel members shall be neutral and shall not be predisposed for or against the position of any disputing party based on any Federal Trust responsibilities which their employers may have with respect to the Tribe. In addition, arbitrators or arbitration panel members who are Federal employees shall act independently from the normal hierarchy within their agency.

(iv) The parties are not obligated to abide by the arbitrator's or arbitration panel's recommendation unless they voluntarily entered into a binding agreement to do so.

(v) If a party to the dispute believes that the arbitrator or arbitration panel has recommended an action contrary to or inconsistent with the Clean Water Act, the party may appeal the arbitrator's recommendation to the Regional Administrator. The request for appeal must be in writing and must include a description of the statutory basis for altering the arbitrator's recommendation.

(vi) The procedure and schedule for arbitration of individual disputes shall be determined by the arbitrator or arbitration panel in consultation with parties.

(vii) If formal public hearings are held in connection with the actions taken under this paragraph, Agency requirements at 40 CFR 25.5 shall be followed.

(3) *Dispute resolution default procedure.* Where one or more parties (as defined in paragraph (g) of this section) refuse to participate in either the mediation or arbitration dispute resolution processes, the Regional Administrator may appoint a single official or panel to review available information pertaining to the dispute and to issue a written recommendation for resolving the dispute. Review officials shall be EPA employees, employees from other

Federal agencies, or other individuals with appropriate qualifications. Review panels shall include appropriate members to be selected by the Regional Administrator in consultation with the participating parties. Recommendations of such review officials or panels shall, to the extent possible given the lack of participation by one or more parties, be reached in a manner identical to that for arbitration of disputes specified in paragraphs (f)(2)(i) through (f)(2)(vii) of this section.

(g) *Definitions.* For the purposes of this section:

(1) *Dispute Resolution Mechanism* means the EPA mechanism established pursuant to the requirements of Clean Water Act section 518(e) for resolving unreasonable consequences that arise as a result of differing water quality standards that may be set by States and Indian Tribes located on common bodies of water.

(2) *Parties* to a State-Tribal dispute include the State and the Tribe and may, at the discretion of the Regional Administrator, include an NPDES permittee, citizen, citizen group, or other affected entity.

[56 FR 64894, Dec. 12, 1991, as amended at 59 FR 64344, Dec. 14, 1994]

§ 131.8 Requirements for Indian Tribes to administer a water quality standards program.

(a) The Regional Administrator, as determined based on OMB Circular A-105, may accept and approve a tribal application for purposes of administering a water quality standards program if the Tribe meets the following criteria:

(1) The Indian Tribe is recognized by the Secretary of the Interior and meets the definitions in § 131.3 (k) and (l),

(2) The Indian Tribe has a governing body carrying out substantial governmental duties and powers,

(3) The water quality standards program to be administered by the Indian Tribe pertains to the management and protection of water resources which are within the borders of the Indian reservation and held by the Indian Tribe, within the borders of the Indian reservation and held by the United States in trust for Indians, within the borders of the Indian reservation and held by a member of the Indian Tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of the Indian reservation, and

(4) The Indian Tribe is reasonably expected to be capable, in the Regional Administrator's judgment, of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the Act and applicable regulations.

(b) Requests by Indian Tribes for administration of a water quality standards program should be submitted to the lead EPA Regional Administrator. The application shall include the following information:

(1) A statement that the Tribe is recognized by the Secretary of the Interior.

(2) A descriptive statement demonstrating that the Tribal governing body is currently carrying out substantial governmental duties and powers over a defined area. The statement should:

(i) Describe the form of the Tribal government;

(ii) Describe the types of governmental functions currently performed by the Tribal governing body such as, but not limited to, the exercise of police powers affecting (or relating to) the health, safety, and welfare of the affected population, taxation, and the exercise of the power of eminent domain; and

(iii) Identify the source of the Tribal government's authority to carry out the governmental functions currently being performed.

(3) A descriptive statement of the Indian Tribe's authority to regulate water quality. The statement should include:

(i) A map or legal description of the area over which the Indian Tribe asserts authority to regulate surface water quality;

(ii) A statement by the Tribe's legal counsel (or equivalent official) which describes the basis for the Tribes assertion of authority and which may include a copy of documents such as Tribal constitutions, by-laws, charters, executive orders, codes, ordinances, and/or resolutions which support the Tribe's assertion of authority; and

(iii) An identification of the surface waters for which the Tribe proposes to establish water quality standards.

(4) A narrative statement describing the capability of the Indian Tribe to administer an effective water quality standards program. The narrative statement should include:

(i) A description of the Indian Tribe's previous management experience which may include the administration of programs and services authorized by the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 *et seq.*), the Indian Mineral Development Act (25 U.S.C. 2101 *et seq.*), or the Indian Sanitation Facility Construction Activity Act (42 U.S.C. 2004a);

(ii) A list of existing environmental or public health programs administered by the Tribal governing body and copies of related Tribal laws, policies, and regulations;

(iii) A description of the entity (or entities) which exercise the executive, legislative, and judicial functions of the Tribal government;

(iv) A description of the existing, or proposed, agency of the Indian Tribe which will assume primary responsibility for establishing, reviewing, implementing and revising water quality standards;

(v) A description of the technical and administrative capabilities of the staff to administer and manage an effective water quality standards program or a plan which proposes how the Tribe will acquire additional administrative and technical expertise. The plan must address how the Tribe will obtain the funds to acquire the administrative and technical expertise.

(5) Additional documentation required by the Regional Administrator which, in the judgment of the Regional Administrator, is necessary to support a Tribal application.

(6) Where the Tribe has previously qualified for eligibility or "treatment as a state" under a Clean Water Act or Safe Drinking Water Act program, the Tribe need only provide the required information which has not been submitted in a previous application.

(c) Procedure for processing an Indian Tribe's application.

(1) The Regional Administrator shall process an application of an Indian Tribe submitted pursuant to §131.8(b) in a timely manner. He shall promptly notify the Indian Tribe of receipt of the application.

(2) Within 30 days after receipt of the Indian Tribe's application the Regional Administrator shall provide appropriate notice. Notice shall:

(i) Include information on the substance and basis of the Tribe's assertion of authority to regulate the quality of reservation waters; and

(ii) Be provided to all appropriate governmental entities.

(3) The Regional Administrator shall provide 30 days for comments to be submitted on the Tribal application. Comments shall be limited to the Tribe's assertion of authority.

(4) If a Tribe's asserted authority is subject to a competing or conflicting claim, the Regional Administrator, after due consideration, and in consideration of other comments received, shall determine whether the Tribe has adequately demonstrated that it meets the requirements of §131.8(a)(3).

(5) Where the Regional Administrator determines that a Tribe meets the requirements of this section, he shall promptly provide written notification to the Indian Tribe that the Tribe is authorized to administer the Water Quality Standards program.

[56 FR 64895, Dec. 12, 1991, as amended at 59 FR 64344, Dec. 14, 1994]

Subpart B—Establishment of Water Quality Standards

§ 131.10 Designation of uses.

(a) Each State must specify appropriate water uses to be achieved and protected. The classification of the waters of the State must take into consideration the use and value of water for public water supplies, protection and propagation of fish, shellfish and wildlife, recreation in and on the water, agricultural, industrial, and other purposes including navigation. In no case shall a State adopt waste transport or waste assimilation as a designated use for any waters of the United States.

(b) In designating uses of a water body and the appropriate criteria for those uses, the State shall take into

consideration the water quality standards of downstream waters and shall ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters.

(c) States may adopt sub-categories of a use and set the appropriate criteria to reflect varying needs of such sub-categories of uses, for instance, to differentiate between cold water and warm water fisheries.

(d) At a minimum, uses are deemed attainable if they can be achieved by the imposition of effluent limits required under sections 301(b) and 306 of the Act and cost-effective and reasonable best management practices for nonpoint source control.

(e) Prior to adding or removing any use, or establishing sub-categories of a use, the State shall provide notice and an opportunity for a public hearing under § 131.20(b) of this regulation.

(f) States may adopt seasonal uses as an alternative to reclassifying a water body or segment thereof to uses requiring less stringent water quality criteria. If seasonal uses are adopted, water quality criteria should be adjusted to reflect the seasonal uses, however, such criteria shall not preclude the attainment and maintenance of a more protective use in another season.

(g) States may remove a designated use which is *not* an existing use, as defined in § 131.3, or establish sub-categories of a use if the State can demonstrate that attaining the designated use is not feasible because:

(1) Naturally occurring pollutant concentrations prevent the attainment of the use; or

(2) Natural, ephemeral, intermittent or low flow conditions or water levels prevent the attainment of the use, unless these conditions may be compensated for by the discharge of sufficient volume of effluent discharges without violating State water conservation requirements to enable uses to be met; or

(3) Human caused conditions or sources of pollution prevent the attainment of the use and cannot be remedied or would cause more environmental damage to correct than to leave in place; or

(4) Dams, diversions or other types of hydrologic modifications preclude the attainment of the use, and it is not feasible to restore the water body to its original condition or to operate such modification in a way that would result in the attainment of the use; or

(5) Physical conditions related to the natural features of the water body, such as the lack of a proper substrate, cover, flow, depth, pools, riffles, and the like, unrelated to water quality, preclude attainment of aquatic life protection uses; or

(6) Controls more stringent than those required by sections 301(b) and 306 of the Act would result in substantial and widespread economic and social impact.

(h) States may not remove designated uses if:

(1) They are existing uses, as defined in § 131.3, unless a use requiring more stringent criteria is added; or

(2) Such uses will be attained by implementing effluent limits required under sections 301(b) and 306 of the Act and by implementing cost-effective and reasonable best management practices for nonpoint source control.

(i) Where existing water quality standards specify designated uses less than those which are presently being attained, the State shall revise its standards to reflect the uses actually being attained.

(j) A State must conduct a use attainability analysis as described in § 131.3(g) whenever:

(1) The State designates or has designated uses that do not include the uses specified in section 101(a)(2) of the Act, or

(2) The State wishes to remove a designated use that is specified in section 101(a)(2) of the Act or to adopt subcategories of uses specified in section 101(a)(2) of the Act which require less stringent criteria.

(k) A State is not required to conduct a use attainability analysis under this regulation whenever designating uses which include those specified in section 101(a)(2) of the Act.

§ 131.11 Criteria.

(a) *Inclusion of pollutants:* (1) States must adopt those water quality criteria that protect the designated use.

Such criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use. For waters with multiple use designations, the criteria shall support the most sensitive use.

(2) *Toxic pollutants.* States must review water quality data and information on discharges to identify specific water bodies where toxic pollutants may be adversely affecting water quality or the attainment of the designated water use or where the levels of toxic pollutants are at a level to warrant concern and must adopt criteria for such toxic pollutants applicable to the water body sufficient to protect the designated use. Where a State adopts narrative criteria for toxic pollutants to protect designated uses, the State must provide information identifying the method by which the State intends to regulate point source discharges of toxic pollutants on water quality limited segments based on such narrative criteria. Such information may be included as part of the standards or may be included in documents generated by the State in response to the Water Quality Planning and Management Regulations (40 CFR part 35).

(b) Form of criteria: In establishing criteria, States should:

(1) Establish numerical values based on:

(i) 304(a) Guidance; or

(ii) 304(a) Guidance modified to reflect site-specific conditions; or

(iii) Other scientifically defensible methods;

(2) Establish narrative criteria or criteria based upon biomonitoring methods where numerical criteria cannot be established or to supplement numerical criteria.

§ 131.12 Antidegradation policy.

(a) The State shall develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy pursuant to this subpart. The antidegradation policy and implementation methods shall, at a minimum, be consistent with the following:

(1) Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.

(2) 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. In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully. Further, the State shall assure that there shall be achieved 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.

(3) Where high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected.

(4) In those cases where potential water quality impairment associated with a thermal discharge is involved, the antidegradation policy and implementing method shall be consistent with section 316 of the Act.

§ 131.13 General policies.

States may, at their discretion, include in their State standards, policies generally affecting their application and implementation, such as mixing zones, low flows and variances. Such policies are subject to EPA review and approval.

Subpart C—Procedures for Review and Revision of Water Quality Standards

§ 131.20 State review and revision of water quality standards.

(a) *State review.* The State shall from time to time, but at least once every three years, hold public hearings for

the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Any water body segment with water quality standards that do not include the uses specified in section 101(a)(2) of the Act shall be re-examined every three years to determine if any new information has become available. If such new information indicates that the uses specified in section 101(a)(2) of the Act are attainable, the State shall revise its standards accordingly. Procedures States establish for identifying and reviewing water bodies for review should be incorporated into their Continuing Planning Process.

(b) *Public participation.* The State shall hold a public hearing for the purpose of reviewing water quality standards, in accordance with provisions of State law, EPA's water quality management regulation (40 CFR 130.3(b)(6)) and public participation regulation (40 CFR part 25). The proposed water quality standards revision and supporting analyses shall be made available to the public prior to the hearing.

(c) *Submittal to EPA.* The State shall submit the results of the review, any supporting analysis for the use attainability analysis, the methodologies used for site-specific criteria development, any general policies applicable to water quality standards and any revisions of the standards to the Regional Administrator for review and approval, within 30 days of the final State action to adopt and certify the revised standard, or if no revisions are made as a result of the review, within 30 days of the completion of the review.

§ 131.21 EPA review and approval of water quality standards.

(a) After the State submits its officially adopted revisions, the Regional Administrator shall either:

(1) Notify the State within 60 days that the revisions are approved, or

(2) Notify the State within 90 days that the revisions are disapproved. Such notification of disapproval shall specify the changes needed to assure compliance with the requirements of the Act and this regulation, and shall explain why the State standard is not in compliance with such requirements. Any new or revised State standard must be accompanied by some type of supporting analysis.

(b) The Regional Administrator's approval or disapproval of a State water quality standard shall be based on the requirements of the Act as described in §§ 131.5 and 131.6, and, with respect to Great Lakes States or Tribes (as defined in 40 CFR 132.2), 40 CFR part 132.

(c) *How do I determine which water quality standards are applicable for purposes of the Act?* You may determine which water quality standards are applicable water quality standards for purposes of the Act from the following table:

If—	Then—	Unless or until—	In which case—
(1) A State or authorized Tribe has adopted a water quality standard that is effective under State or Tribal law and has been submitted to EPA before May 30, 2000...	...the State or Tribe's water quality standard is the applicable water quality standard for purposes of the Act...	...EPA has promulgated a more stringent water quality standard for the State or Tribe that is in effect...	...the EPA-promulgated water quality standard is the applicable water quality standard for purposes of the Act until EPA withdraws the Federal water quality standard.
(2) A State or authorized Tribe adopts a water quality standard that goes into effect under State or Tribal law on or *after* May 30, 2000...	...once EPA approves that water quality standard, it becomes the applicable water quality standard for purposes of the Act...	...EPA has promulgated a more stringent water quality standard for the State or Tribe that is in effect...	...the EPA promulgated water quality standard is the applicable water quality standard for purposes of the Act until EPA withdraws the Federal water quality standard.

(d) *When do I use the applicable water quality standards identified in paragraph (c) above?* Applicable water quality standards for purposes of the Act are the minimum standards which must be used when the CWA and regulations implementing the CWA refer to water

quality standards, for example, in identifying impaired waters and calculating TMDLs under section 303(d), developing NPDES permit limitations under section 301(b)(1)(C), evaluating proposed discharges of dredged or fill material under section 404, and in issuing certifications under section 401 of the Act.

(e) *For how long does an applicable water quality standard for purposes of the Act remain the applicable water quality standard for purposes of the Act?* A State or authorized Tribe's applicable water quality standard for purposes of the Act remains the applicable standard until EPA approves a change, deletion, or addition to that water quality standard, or until EPA promulgates a more stringent water quality standard.

(f) *How can I find out what the applicable standards are for purposes of the Act?* In each Regional office, EPA maintains a docket system for the States and authorized Tribes in that Region, available to the public, identifying the applicable water quality standards for purposes of the Act.

[48 FR 51405, Nov. 8, 1983, as amended at 60 FR 15387, Mar. 23, 1995; 65 FR 24653, Apr. 27, 2000]

§ 131.22 EPA promulgation of water quality standards.

(a) If the State does not adopt the changes specified by the Regional Administrator within 90 days after notification of the Regional Administrator's disapproval, the Administrator shall promptly propose and promulgate such standard.

(b) The Administrator may also propose and promulgate a regulation, applicable to one or more States, setting forth a new or revised standard upon determining such a standard is necessary to meet the requirements of the Act.

(c) In promulgating water quality standards, the Administrator is subject to the same policies, procedures, analyses, and public participation requirements established for States in these regulations.

Subpart D—Federally Promulgated Water Quality Standards

§ 131.31 Arizona.

(a) [Reserved]

(b) The following waters have, in addition to the uses designated by the State, the designated use of fish consumption as defined in R18–11–101 (which is available from the Arizona Department of Environmental Quality, Water Quality Division, 3033 North Central Ave., Phoenix, AZ 85012):

COLORADO MAIN STEM RIVER BASIN:
- Hualapai Wash

MIDDLE GILA RIVER BASIN:
- Agua Fria River (Camelback Road to Avondale WWTP)
- Galena Gulch
- Gila River (Felix Road to the Salt River)
- Queen Creek (Headwaters to the Superior WWTP)
- Queen Creek (Below Potts Canyon)

SAN PEDRO RIVER BASIN:
- Copper Creek

SANTA CRUZ RIVER BASIN:
- Agua Caliente Wash
- Nogales Wash
- Sonoita Creek (Above the town of Patagonia)
- Tanque Verde Creek
- Tinaja Wash
- Davidson Canyon

UPPER GILA RIVER BASIN
- Chase Creek

(c) To implement the requirements of R18–11–108.A.5 with respect to effects of mercury on wildlife, EPA (or the State with the approval of EPA) shall implement a monitoring program to assess attainment of the water quality standard.

(Sec. 303, Federal Water Pollution Control Act, as amended, 33 U.S.C. 1313, 86 Stat. 816 *et seq.*, Pub. L. 92–500; Clean Water Act, Pub. L. 92–500, as amended; 33 U.S.C. 1251 *et seq.*)

[41 FR 25000, June 22, 1976; 41 FR 48737, Nov. 5, 1976. Redesignated and amended at 42 FR 56740, Oct. 28, 1977. Further redesignated and amended at 48 FR 51408, Nov. 8, 1983; 61 FR 20693, May 7, 1996; 68 FR 62744, Nov. 6, 2003]

§ 131.32 [Reserved]

§ 131.33 Idaho.

(a) *Temperature criteria for bull trout.* (1) Except for those streams or portions