

**Supplemental Information for
Water Quality Standards Regulatory Clarifications Proposed Rule**

NOTE: THE FOLLOWING REGULATORY TEXT IS A COMPARISON OF THE PROPOSED RULE LANGUAGE AND THE EXISTING RULE LANGUAGE. STRIKEOUTS INDICATE TEXT PROPOSED TO BE DELETED AND UNDERLINES INDICATE TEXT PROPOSED TO BE ADDED.

THE TEXT BELOW SHOWS ONLY THE PROVISIONS AFFECTED BY THE REVISIONS IN THE PROPOSED RULE. IT DOES NOT REPRESENT THE ENTIRETY OF THE PART 131 REGULATIONS.

For the reasons stated in the preamble, the EPA proposes to amend 40 CFR part 131 as follows:

PART 131—WATER QUALITY STANDARDS

- 1. The authority citation for part 131 continues to read as follows:

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

Subpart A-General Provisions

- 2. Amend § 131.2 by revising the first sentence to read as follows:

§ 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 that~~ to protect the designated uses. * * *

- 3. Amend § 131.3 by revising paragraphs (h) and (j), and adding paragraph (m) to read as follows:

§ 131.3 Definitions.

* * * * *

(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-based effluent limitations required by sections 301(b) and 306 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 the water quality standards program.

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(m) Highest attainable use is the aquatic life, wildlife, and/or recreation use that is both closest to the uses specified in section 101(a)(2) of the Act and attainable, as determined using best available data and information through a use attainability analysis defined in § 131.3(g).

4. Amend § 131.5 by:
 - a. Revising paragraphs (a)(1) and (a)(2);
 - b. Redesignating paragraphs (a)(3) through (a)(5) as (a)(4) through (a)(6) and adding a new paragraph (a)(3); and
 - c. Revising paragraph (b).

The revisions and additions read as follows:

§ 131.5 EPA authority.

(a) * * *

(1) Whether the State has adopted designated 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 based on sound scientific rationale;

(3) Whether the State has adopted an antidegradation policy consistent with § 131.12(a), and if the State has chosen to adopt implementation methods, whether those implementation methods are consistent with § 131.12;

* * * * *

(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~~6) 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~~6) of this section. EPA may also promulgate a new or revised standard when necessary to meet the requirements of the Act.

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Subpart B—Establishment of Water Quality Standards

5. Amend § 131.10 by revising paragraphs (g) introductory text and paragraphs, (j), and (k) to read as follows:

§ 131.10 Designation of uses.

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(g) Pursuant to § 131.10(j), States may designate or remove a ~~designated~~ use or a sub-category of a use as long as the action does ~~which is not~~ remove protection for an existing use, ~~as defined in §131.3, or establish sub-categories of a use if~~ and the State can

demonstrate that attaining the use is not feasible because: of one of the six factors in this paragraph. If a State adopts new or revised water quality standards based on a use attainability analysis, the State shall also adopt the highest attainable use and the criteria to protect that use. To meet this requirement, States may, at their discretion, utilize their current use categories or subcategories, develop new use categories or subcategories, or adopt another use which may include a location-specific use.

* * * * *

(j) A State must conduct a use attainability analysis as described in § 131.3(g), and § 131.10(g), whenever:

(1) The State designates or has designated uses for a water body for the first time 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, to remove a sub-category of such a use, or to ~~adopt~~ designate a sub- ~~categories~~ of such a uses specified in section 101(a)(2) of the Act which requires criteria less stringent-~~criteria~~ than previously applicable.

(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~~:

(1) The State designates or has designated uses for a water body for the first time that include the uses specified in section 101(a)(2) of the Act, or

(2) The State wishes to remove a designated use that is not specified in section 101(a)(2) of the Act, or designate a sub-category of a use specified in section 101(a)(2) of the Act which requires criteria at least as stringent as previously applicable.

6. Amend § 131.11 by revising paragraphs (a)(2) and (b) introductory text to read as follows:

A. § 131.11-*Criteria*.

(a) * * *

(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~~130).

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

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7. Amend § 131.12 by revising the section heading and paragraphs (a) introductory text and (a)(2), and adding paragraph (b) to read as follows:

§ 131.12 Antidegradation Policy and Implementation Methods.

(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:

* * * * *

(2) Where the quality of the waters exceed levels necessary to support the protection and 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 ensure water quality adequate to protect existing uses fully. Further, the state shall assure ensure 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.

* * * * *

(b) The State shall develop and make available to the public statewide methods for implementing the antidegradation policy adopted pursuant to paragraph (a) of this section. A State's antidegradation implementation methods shall be designed to achieve antidegradation protection consistent with paragraph (a) of this section. Such methods must ensure that:

(1) High quality waters are identified on a parameter-by-parameter basis or on a water body-by-water body basis at the State's discretion, but must not exclude any water body

from high quality water protection solely because not all of the uses specified in CWA section 101(a)(2) are attained; and

(2) The State will only make a finding that lowering high water quality is necessary, pursuant to paragraph (a)(2) of this section, after conducting an alternatives analysis that evaluates a range of non-degrading and minimally degrading practicable alternatives that have the potential to prevent or minimize the degradation associated with the proposed activity. If the State can identify any-practicable alternatives, the State must choose one of those alternatives to implement when authorizing a lowering of high water quality.

8. Add § 131.14 to subpart B to read as follows:

§ 131.14 Water quality standards variances.

States may, at their discretion, grant variances subject to the provisions of this section and public participation requirements at § 131.20(b). A water quality standards variance (WQS variance) is 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. WQS variances are water quality standards subject to EPA review and approval or disapproval and must be consistent with this section. Any such WQS variances adopted after *[effective date of the final rule]* must be consistent with this regulatory section.

(a) *Applicability:*

(1) All applicable WQS not specifically addressed by the WQS variance remain applicable.

(2) (i) Where a state adopts a WQS variance, the State regulations must continue to reflect the underlying designated use and criterion unless the

State adopts and EPA approves a revision to the underlying designated use and criterion consistent with § 131.10 or § 131.11.

(ii) The interim requirements specified in the WQS variance are in effect during the term of the WQS variance and apply for CWA section 402 permitting purposes and in issuing certifications under section 401 of the Act for the permittee(s), pollutant(s), and/or water body or waterbody segment(s) covered by the WQS variance. For these limited purposes, the interim requirements will be the standards applicable for purposes of the CWA under 40 CFR 131.21(c)-(e).

(3) A WQS variance shall not be granted if the designated use and criterion addressed by the proposed WQS variance can be achieved by implementing technology-based effluent limits required under sections 301(b) and 306 of the Act.

(b) Submission Requirements:

(1) A WQS variance must specify the following:

(i) Identifying information: A WQS variance must identify the pollutant(s), permittee(s), and/or the water body or waterbody segment(s) to which the WQS variance applies.

(ii) WQS that apply during a variance for CWA section 402 permitting purposes and in issuing certifications under section 401 of the Act: A WQS variance must specify:

(A) The highest attainable interim use and interim numeric criterion, or

- (B) An interim numeric effluent condition that reflects the highest attainable condition for a specific permittee(s) during the term of the variance. Neither (A) nor (B) of this paragraph shall result in any lowering of the currently attained water quality unless a time-limited lowering of water quality is necessary during the term of a variance for restoration activities, consistent with paragraph (b)(2)(ii) of this section.
- (iii) Date the WQS variance will expire: States must include an expiration date for all WQS variances, consistent with paragraph (b)(2) of this section. WQS variances must be as short as possible but expire no later than 10 years after state adoption.
- (2) The State must submit a demonstration justifying the need for a WQS variance. For a WQS variance to a use specified in section 101(a)(2) of the Act or a sub-category of such a use, the State must submit a demonstration that attaining the designated use and criterion is not feasible during the term of the WQS variance because:
- (i) One of the factors listed in § 131.10(g) applies, or
- (ii) Actions necessary to facilitate restoration through dam removal or other significant wetland or stream reconfiguration activities preclude attainment of the designated use and criterion while the actions are being implemented.
- (3) For a waterbody variance, the state must identify and document any cost-effective and reasonable best management practices for nonpoint source

controls related to the pollutant(s) and location(s) specified in the WQS variance that could be implemented to make progress towards attaining the designated use and criterion. A State must provide public notice and comment for any such documentation.

- (c) Implementing variances in NPDES permits: Consistent with paragraph (a)(2)(ii) of this section, a WQS variance serves as the basis of a water quality-based effluent limit included in a NPDES permit for the period the variance is in effect. Any limitations required to implement the WQS variance shall be included as conditions of the NPDES permit for the permittee(s) subject to the WQS variance.
- (d) WQS variance renewals: EPA may approve a WQS variance renewal if the State meets the requirements of this section and provides documentation of the actions taken to meet the requirements of the previous WQS variance. For a waterbody WQS variance renewal, the state must also provide documentation of whether and to what extent BMPs have been implemented to address the pollutant(s) subject to the WQS variance and the water quality progress achieved during the WQS variance period. Renewal of a WQS variance may be disapproved if the applicant did not comply with the conditions of the original WQS variance, or otherwise does not meet the requirements of this section.

9. Add § 131.15 to subpart B to read as follows:

§ 131.15 Compliance schedule authorizing provisions.

A State may, at its discretion and consistent with state law, authorize schedules of compliance for water quality-based effluent limits (WQBELs) in NPDES permits by including a compliance schedule authorizing provision in its water quality standards or

implementing regulations. Any such provision is a water quality standard subject to EPA review and approval and must be consistent with sections 502(17) and 301(b)(1)(C) of the Act. Individual compliance schedules issued pursuant to such authorizing provisions are not themselves water quality standards. Individual compliance schedules must be consistent with CWA section 502(17), the state's EPA-approved compliance schedule authorizing provision, and the requirements of §§ 122.2 and 122.47.

B. Subpart C-Procedures for Review and Revision of Water Quality Standards

10. Amend § 131.20 by revising paragraphs (a) and (b) to read as follows:

§ 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 3 years, hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards: in particular, ~~A~~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 3 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. Similarly, a State shall re-examine its water quality criteria to determine if any criteria should be revised in light of any new or updated CWA section 304(a) criteria recommendations to assure that designated uses continue to be protected. 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 hearings for the purpose of reviewing or revising water quality standards, in accordance with provisions of State law;

~~EPA's water quality management regulation (40 CFR 130.3(b)(6))~~ and EPA's 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.

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11. Amend § 131.22 by revising paragraph (b) to read as follows:

§ 131.22 EPA promulgation of water quality standards.

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(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. To constitute an

Administrator's determination, such determination must:

(1) Be signed by the Administrator or his or her duly authorized delegate, and

(2) Contain a statement that the document constitutes an Administrator's determination under section 303(c)(4)(B) of the Act.

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C. Subpart D-Federally Promulgated Water Quality Standards

12. Amend § 131.34 by revising paragraph (c) to read as follows:

§ 131.34 Kansas.

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(c) Water quality standard variances. The Regional Administrator, EPA Region 7, is authorized to grant variances from the water quality standards in paragraphs (a) and (b) of this section where the requirements of ~~this paragraph (c)~~ §131.14 are met.

13. Amend § 131.40 by revising paragraph (c) to read as follows:

§ 131.40 Puerto Rico.

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(c) *Water quality standard variances.* The Regional Administrator, EPA Region 2, is authorized to grant variances from the water quality standards in paragraphs (a) and (b) of this section where the requirements of ~~this paragraph (c)~~ [§131.14](#) are met.