

# **Listening Session:**

## *Proposed Rulemaking to Revise the Water Quality Standards Regulation*

Prepared by EPA Office of Water  
Office of Science and Technology  
August 2010

# Purpose

- **Provide information** to the public about EPA's proposed rulemaking under development.
- **Provide opportunity** for the public to express views on the provisions EPA is considering.

# Rulemaking Schedule

- Conduct pre-proposal outreach and consultation – August 2010
- Publish proposed rule – Summer 2011
- Continue outreach and consultation
- Publish final rule – *(date to be determined)*

# Outline of Briefing

- What are water quality standards (WQS)?
- Why revise the WQS regulation?
- What issues is EPA considering?
  - A. Antidegradation
  - B. Administrator's determination
  - C. Uses
  - D. Variances
  - E. Triennial reviews
  - F. Reflect Court Decisions
    1. WQS definition
    2. Compliance schedules
    3. Records of public participation

# What Are Water Quality Standards?

Water quality standards are:

- Legally binding provisions of law that describe the desired condition of a waterbody or the level of protection.
- The foundation of the water quality-based control program mandated by the Clean Water Act (CWA).

Water quality standards consist of:

- Designated uses of the water body (e.g., recreation, water supply, aquatic life, agriculture).
- Water quality criteria to protect designated uses (numeric pollutant concentrations and narrative requirements).
- An antidegradation policy to maintain and protect existing uses and high quality waters.
- General policies addressing implementation issues.

# Who Sets Standards?

- Under the CWA, states and authorized tribes establish standards.
- States and tribes must hold public hearings to review their standards every 3 years and revise them as necessary.
- EPA must approve the standards in order for them to be in effect under the CWA.
- When deemed necessary, EPA can impose federal standards.

# What Does the WQS Regulation Do?

Adds detail to the CWA provisions for standards:

- Defines when and how designated uses may be revised.
- Requires criteria to protect uses.
- Requires degradation of water quality to be prevented, except under certain circumstances.
- Requires states/tribes to review their WQS every three years and engage the public in any revisions to WQS.
- Specifies roles of states, tribes, and EPA, and administrative procedures.

# Why Revise the WQS Regulation?

- The core requirements of the regulation have been in place since 1983.
- The regulation has provided a solid foundation for water quality-based controls.
- The intent of the changes EPA is considering is to add or modify provisions to address the targeted areas described later in this briefing.
- The regulation provides limited guidance on recurring issues; EPA tends to “lead by its practice” in individual WQS actions which has resulted in:
  - Some unresolved issues that constantly recur with different fact patterns; and
  - Some resolved issues not being codified for future use.



# How Did EPA Develop the Targeted Areas?

- Reviewed recurring issues
- Reviewed evolving case law
- Reviewed the 1998 advance notice of proposed rulemaking (“ANPRM”)
- Consulted with a number of state WQS managers
- Consulted with front-line EPA experts in Regional offices
- Narrowed focus to areas where regulation changes seemed most appropriate

# Targeted Areas EPA Is Considering

- A. Antidegradation:** Require implementation methods to be adopted in rule and specify minimum requirements.
- B. Administrator's determination:** Clarify what constitutes an Administrator's determination under 303(c)(4)(B).
- C. Uses:** Clarify EPA's minimum expectations for designated uses.
- D. Variances:** Establish a regulatory structure and transparency for use of variances.
- E. Triennial Reviews:** Strengthen the triennial review requirements.
- F. Reflect Court Decisions:** Define a WQS, address compliance schedule authorizing provisions, and revise WQS submittal requirements.

# A. Antidegradation

- Current regulation:
  - Specifies that states and tribes must adopt specific antidegradation policies, and must identify implementation methods.
- Issues:
  - Confusion concerning what implementation methods must include.
  - Uncertainty about the role of implementation methods and EPA's oversight authority.
- Possible changes:
  - Require antidegradation implementation methods to meet certain minimum requirements and to be adopted into states' and tribes' WQS and thus submitted to EPA for review and approval or disapproval.

# B. Administrator's Determination

- Current regulation:
  - EPA Administrator may determine that a revised or new standard is necessary to meet the requirements of the CWA.
  - This determination then obliges EPA to promptly propose and finalize federal standards, unless the state or tribe revises its standards beforehand.
- Issue:
  - Regulation does not specify the process by which the Administrator utilizes the authority to determine if a state or tribe needs new or revised WQS.
- Possible change:
  - Clarify that an Administrator's determination must be signed by the Administrator (or designee) and include a statement that the document is a determination under 303(c)(4)(B).

# C. Uses

- Current regulation:
  - Section 101(a)(2) of the CWA establishes a national goal for water quality: “protection and propagation of fish, shellfish, and wildlife, and recreation in and on the water,” wherever attainable.
  - A “use attainability analysis” is required to justify removing a designated use that is specified in 101(a)(2).
  - EPA’s longstanding interpretation is that 101(a)(2) uses are attainable unless otherwise demonstrated.
- Issue:
  - Regulation does not specify what uses, if any, must replace a 101(a)(2) use that is removed, after an appropriate UAA.
- Possible changes:
  - Clarify that 1) the CWA goal uses are attainable unless otherwise demonstrated, and 2) where a use specified in 101(a)(2) is deemed unattainable, the Highest Attainable Use (HAU) closest to the goal must be adopted.

# D. Variances

- Current regulation:
  - States and tribes may adopt variances to WQS.
- Issue:
  - Confusion concerning how to use variances.
- Possible change:
  - Establish regulatory expectations for variances to support consistent, appropriate, transparent and enforceable implementation.

# E. Triennial Reviews

- Current regulation:
  - States and authorized tribes must hold a public hearing for the purpose of reviewing their WQS every three years and revise or adopt standards as appropriate.
- Issues:
  - Regulation does not require that states and tribes solicit public comments when determining the scope of their review.
  - Regulation does not explicitly require periodic evaluation of whether criteria still protect the use.
- Possible changes:
  - Clarify that states/tribes must solicit and consider public input in determining the scope of a triennial review.
  - Require that states/tribes evaluate whether water quality criteria are still protective of designated uses, taking into consideration any new information (e.g. EPA recommendations).

# F. Reflect Court Decisions

- Definition of WQS (Florida Impaired Waters Rule)
  - Revise the definition of “water quality standards” at 40 CFR 131.3 to more clearly define types of state/tribal provisions that need to be submitted to EPA for review and action.
- Compliance schedule authorizing provisions (Starkist)
  - Specify that compliance schedule authorizing provisions must be adopted as part of a state or tribe’s water quality standards, and therefore be submitted to EPA for review and action.
- Submittal of public comments (Albuquerque v. Browner)
  - Clarify that state or tribal records of public participation and comment response related to State or Tribal review and revision of WQS must be submitted to EPA.



# For More Information

- For updates about this rulemaking:
  - [http://water.epa.gov/lawsregs/lawsguidance/wqs\\_index.cfm](http://water.epa.gov/lawsregs/lawsguidance/wqs_index.cfm)
- For more information about these listening sessions, and for instructions on providing written comments:
  - [http://water.epa.gov/lawsregs/lawsguidance/wqs\\_listening.cfm](http://water.epa.gov/lawsregs/lawsguidance/wqs_listening.cfm)
- For further information about water quality standards under the Clean Water Act:
  - <http://water.epa.gov/scitech/swguidance/waterquality/standards/>
  - <http://water.epa.gov/scitech/swguidance/waterquality/standards/handbook/index.cfm>

# We Now Invite Your Questions and Comments

- At the direction of the Operator, please feel free to:
    - Ask clarifying questions (up to 1 minute per person, please)
    - Provide your views on the areas EPA is considering revising (up to 3 minutes per person, please).
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|----------------------------------|------------------------------------|
| A. Antidegradation               | E. Triennial reviews               |
| B. Administrator's determination | F. Reflect Court Decisions         |
| C. Uses                          | 1. WQS definition                  |
| D. Variances                     | 2. Compliance schedules            |
|                                  | 3. Records of public participation |
|                                  | G. General views                   |

# Written Comments

- If you were unable to make a comment during the listening session, or otherwise have comments on the regulatory changes EPA is considering, you may provide them to EPA by September 3, 2010, in one of the following ways:
  - Send your comments by email to [SHPDcomments@epa.gov](mailto:SHPDcomments@epa.gov)
  - Mail your comments to:  
Thomas J. Gardner  
Office of Science and Technology (Mail Code 4305T)  
Office of Water  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460
- The full contents of your letter, or your email including your email address, will be entered into the EPA Docket for this action, EPA-HQ-OW-2010-0606, and available to the public at <http://www.regulations.gov/>