



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

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SEP 29 2008

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Jim Ruby, Executive Secretary
Environmental Quality Council

Ref: 8EPR-EP

Mr. Dennis M. Boal, Chair
Wyoming Environmental Quality Council
Herschler Building, Room 1714
122 W. 25th Street
Cheyenne, Wyoming 82002

Subject: EPA Action on Revisions to the *Water Quality Rules and Regulations - Chapter 1, Wyoming Surface Water Quality Standards*

Dear Mr. Boal:

The purpose of this letter is to notify you of the status of the U.S. Environmental Protection Agency Region 8 (EPA) review of the recent revisions to the *Water Quality Rules and Regulations - Chapter 1, Wyoming Surface Water Quality Standards*. These revisions were adopted by the Wyoming Environmental Quality Council (Council) on February 16, 2007 and submitted to EPA for review with a letter dated July 27, 2007 from John Corra, Director of the Department of Environmental Quality (DEQ). The submittal package included a statement of principal reasons and the adopted version of Chapter 1, Table A and Table B, and Implementation Policies. However, the submittal package was not complete until September 19, 2007 when EPA received certification from the Attorney General that the regulations were duly adopted pursuant to State law. Receipt of the Attorney General certification on September 19, 2007 initiated EPA's review pursuant to Section 303(c) of the Clean Water Act (CWA or the Act) and the implementing federal water quality standards regulation (40 CFR Part 131).

EPA's review of these revisions is complete, with the exception of the following new provisions of Chapter 1, which relate to the implementation of requirements for effluent dependent waters designated for the 2D and 3D use classifications:

- Section 2(b)(xiii), the definition of "effluent dependent water;"
- Section 2(b)(xxxviii), the definition of "net environmental benefit;"
- Section 4(b)(v), the Class 2D use subcategory;
- Section 4(c)(iv), the Class 3D use subcategory;
- The provisions of Sections 4(e), 18, 22(b), and 24 that relate specifically to the Class 2D and/or 3D use classifications;
- The human health criteria provisions for Class 2D uses in Section 18;
- Revisions to Sections 25(d), 33(b), and 34(b);

- Section 36, entitled “Effluent Dependent Criteria”; and
- The provisions of Appendix A(b)(ii)(3) that relate specifically to the Class 2D and 3D use classifications.

EPA’s review of these new provisions, and the supporting information outlining the implementation of these provisions provided in the document, *Implementation Policies for Antidegradation, Mixing Zones, Turbidity, Use Attainability Analysis*, is nearing completion. We estimate that our review of the provisions which relate to the requirements for implementation of the Class 2D and 3D use classifications will be complete in 30 days. Therefore, the actions EPA is taking today on the remainder of the revisions to Wyoming water quality standards do not address the above provisions.

The Region commends the Environmental Quality Council and the Department of Environmental Quality for adopting significant improvements to the State’s water quality standards. The principal revisions include:

- a change in the primary bacterial indicator organism, from fecal coliform to *E. coli*, for protection of recreational uses and the creation of subcategories of recreational uses;
- updates to the numeric criteria in Appendix B to be consistent with EPA’s 304(a) recommendations;
- development of site-specific criteria for chloride and selenium; and
- modifications to the statewide numeric criteria for chloride and aluminum.

Clean Water Act Review Requirements

The Clean Water Act, Section 303(c)(2), requires States and authorized Indian Tribes¹ to submit new or revised water quality standards to EPA for review. EPA is to review and approve or disapprove the submitted standards. Pursuant to CWA Section 303(c)(3), if EPA determines that any standard is not consistent with the applicable requirements of the Act, the Agency shall, not later than the ninetieth day after the date of submission, notify the State or authorized Tribe and specify the changes to meet the requirements. If such changes are not adopted by the State or authorized Tribe within ninety days after the date of notification, EPA shall promulgate the needed standard pursuant to CWA Section 303(c)(4).² The Region’s goal has been, and will continue to be, to work closely with States and authorized Tribes throughout the standards revision process as a means to avoid the need for such disapproval and promulgation actions.

¹ CWA Section 518(e) specifically authorizes EPA to treat Indian tribes as States for purposes of CWA Section 303.

² Although the provisions of CWA Section 303(c) state that EPA shall promulgate standards that replace disapproved state-adopted standards, pursuant to EPA’s Alaska Rule (40 CFR § 131.21(c)), new or revised state standards submitted to EPA after May 30, 2000 are not effective for CWA purposes until approved by EPA. See 65 FR 24641-24653. Where EPA disapproves a state’s action to revise a CWA-effective standard which the Agency has determined is consistent with all CWA requirements, no further federal action is required under CWA Section 303(c) authorities.

Today's Action

I am pleased to inform you that today, with certain exceptions, EPA is approving most revisions to the *Water Quality Rules and Regulations - Chapter 1, Wyoming Surface Water Quality Standards*. Other than the provisions listed above that relate to the State's implementation of the 2D and 3D use classifications, the exceptions are provisions that: (1) change the designated use of a large number of waters statewide from primary contact recreation to secondary contact recreation without the required Use Attainability Analysis (UAA); (2) allow for temporary or permanent variances from the new *E. coli* standard outside the water quality standards-setting process; (3) include typographical errors in the thallium and toxaphene human health criteria that make them less stringent than EPA's recommended 304(a) criteria; and (4) EPA has determined are not water quality standards. The enclosure contains the detailed rationale for today's action.

Endangered Species Act Requirements

It is important to note that EPA's approval of Wyoming's water quality standards is considered a federal action which may be subject to the Section 7(a)(2) consultation requirements of the Endangered Species Act (ESA).³ Section 7(a)(2) of the ESA states that "each federal agency ... shall ...insure that any action authorized, funded or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined to be critical..."

EPA's approval of the water quality standards revisions, therefore, may be subject to the results of consultation with the U.S. Fish and Wildlife Service pursuant to Section 7(a)(2) of the ESA. Nevertheless, EPA also has a CWA obligation, as a separate matter, to complete its water quality standards action. Therefore, in approving the State's water quality standards today, EPA is completing its CWA Section 303(c) responsibilities. However, should the consultation process with the U.S. Fish and Wildlife Service identify information that supports a conclusion that one or more of these revisions is likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of critical habitat, EPA will revisit and amend its approval decision for those new or revised water quality standards.

New and Revised Water Quality Standards

The new or revised provisions fall into one of the following categories: (1) standards approved without condition; (2) standards approved subject to ESA consultation; (3) disapproved standards; and (4) provisions for which EPA is taking no action.

³ Where EPA concludes that its approval will have no effect on listed endangered or threatened species, or is otherwise not subject to ESA consultation, EPA can issue an unconditional approval.

Standards Approved Without Condition

- Definitions (Section 2(b))
- Class 4C Waters (Section 4(d)(iii))
- Class 2C Human Health Criteria (Section 18)
- Change to *E. coli* as the bacterial indicator for recreational uses (Section 27(a) and (c))
- Creation of secondary contact recreational use (Section 27(b) and Section 4(e))
- Seasonal recreational uses (Section 27(b))
- Authority to establish site-specific criteria (Sections 33(c))
- Surface Water Classifications (Appendix A(b)(ii)(3)(A))
- Human Health Priority Pollutants (Appendix B)
- Human Health Non-Priority Pollutants (Appendix B)
- Site-Specific Criteria (Appendix B)

Standards Approved Subject to ESA Consultation

- Flow Conditions (Section 11(a)(i))
- Ammonia (Section 21(a)(i))
- Clarification of which Classes of waters are subject to the Appendix B aquatic life criteria (Section 21(b))
- Radioactive Material (Section 22(b))
- Dissolved Oxygen (Section 24)
- Aquatic Life Priority Pollutants (Appendix B)
- Aquatic Life Non-Priority Pollutants (Appendix B)
- Ammonia Table (Appendix C)
- Cadmium Hardness Equations (Appendix F)
- Hardness Cap Policy (Appendix F)

Disapproved Standards

- Elements of Section 27(a)
- Section 27(d)
- Thallium and Toxaphene human health criteria

EPA is disapproving four of the State's revised provisions: (1) elements of Section 27(a) that change the designated use of a large number of waters statewide from primary contact recreation to secondary contact recreation without the required Use Attainability Analysis (UAA); (2) Section 27(d) which allows temporary or permanent variances from the new *E. coli* standard outside the water quality standards-setting process; and (3 and 4) typographical errors in the thallium and toxaphene human health criteria listed in Appendix B of Chapter 1, "Water Quality Criteria," that make these criteria less stringent than EPA's recommended 304(a) criteria.

In anticipation of this disapproval action, EPA and DEQ have been in discussion on the general matter of available options for addressing and resolving the UAA and variance issues.

The options discussed to date are identified in the enclosure of this letter. The Region will continue to work with the State to explore options that meet the State's needs and are consistent with the Act.

Pursuant to 40 CFR § 131.21(c), new or revised state standards submitted to EPA after May 30, 2000 are not effective for CWA purposes until approved by EPA.⁴ Therefore, disapproval does not change applicable standards and is not subject to ESA consultation. For a more detailed discussion of the options available to the State to address EPA's disapproval of the four revised standards, please refer to the discussion of "Disapproved Standards" in the enclosure to this letter, which also includes information regarding the potential for EPA promulgation of replacement federal standards for each disapproved standard.

Provisions For Which EPA Is Taking No Action

Other than the provisions listed above that relate to the State's implementation of the 2D and 3D use classifications, there are several provisions that EPA is not acting on today because EPA has determined they are not water quality standards requiring EPA review and approval under CWA Section 303(c). These provisions are listed in the enclosure and include minor revisions such as correction of references, addition of references, and deletion of duplicate provisions.

Indian Country

The water quality standards approvals in today's letter apply only to water bodies in the State of Wyoming, and do not apply to waters that are within Indian country, as defined in 18 U.S.C. Section 1151. "Indian country" also includes any land held in trust by the United States for an Indian tribe and any other areas defined as "Indian country" within the meaning of 18 U.S.C. 1151. Today's letter is not intended as an action to approve or disapprove water quality standards applying to waters within Indian country. EPA, or authorized Indian tribes, as appropriate, will retain responsibilities for water quality standards for waters within Indian country.

Conclusion

EPA Region 8 commends the Council and the Department for the significant improvements to Wyoming's water quality standards. I will keep you apprised on our progress in completing the remainder of our review. If you have questions concerning this letter, the most knowledgeable person on my staff is Fritz Wagener, who can be reached at 303-312-6219.

⁴ See EPA's Alaska Rule (65 FR 24641-24653).

Sincerely,

A handwritten signature in blue ink that reads "Carol L. Campbell". The signature is fluid and cursive, with a long horizontal stroke at the end.

Carol L. Campbell
Assistant Regional Administrator
Office of Ecosystems Protection and Remediation

Enclosure

cc: John Corra, Director, Wyoming Department of Environmental Quality
John Wagner, Administrator, Water Quality Division, Wyoming Department of
Environmental Quality
Brian Kelly, Field Supervisor, Wyoming Field Office, U.S. Fish and Wildlife Service
Amy Newman, Office of Science and Technology, EPA Headquarters