



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

1595 Wynkoop Street
DENVER, CO 80202-1129
Phone 800-227-8917
<http://www.epa.gov/region08>

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L. David Glatt, Chief
Environmental Health Section
North Dakota Department of Health
Gold Seal Center
918 East Divide Avenue
Bismarck, ND 58501-1947

Subject: EPA Action on Revisions to *Standards of Quality for Waters Of The State*

Dear Mr. Glatt:

The U.S. Environmental Protection Agency (EPA) has completed its review of the final revisions to *Standards of Quality for Waters of the State* adopted by the North Dakota State Health Council (Council) on August 8, 2006. These revisions were certified by the North Dakota Attorney General with an opinion dated June 29, 2006. Receipt of the revised standards on October 5, 2006 initiated EPA's review pursuant to Section 303(c) of the Clean Water Act (CWA or the Act). EPA has completed its review, and this letter is to notify you of our action.

The Region commends the North Dakota Department of Health (Department) for the revisions adopted. Especially commendable were the revisions to update the water quality criteria for the protection of human health. These revisions addressed a wide range of parameters and included, for example, the adoption of new bacteriological criteria for the protection of recreation uses (using the indicator organism *Escherichia coli*). Collectively, the revisions represent significant improvements to the State's water quality standards. Considerable progress was made as a result of this rulemaking action and we want to thank the Department and Council for developing and adopting the new and revised water quality standards.

CLEAN WATER ACT REVIEW REQUIREMENTS

Clean Water Act (CWA) Section 303(c)(2) requires States and authorized Indian Tribes 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). 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.

TODAY'S ACTION

I am pleased to inform you that the Region is approving, with certain exceptions, the revisions to *Standards of Quality for Waters of the State* adopted by the North Dakota State Health Council on August 8, 2006. The exceptions include certain revisions that the Region is not acting upon today. Enclosure 1 presents a summary of the adopted revisions and a rationale for EPA's action. The revisions fall into three categories: (1) revisions approved without condition, (2) those that are approved, subject to ESA consultation, and (3) revisions that EPA is not acting upon today.

Approved Without Condition: The revisions in this category include, for example, all revisions to the numeric water quality criteria for the protection of water supply uses or human health. For these revisions, EPA has concluded that its approval action will have no effect on listed or proposed endangered or threatened species, or is otherwise not subject to ESA consultation.

Approved, Subject to ESA Consultation: All revisions to water quality criteria for the protection of aquatic life are approved for purposes of CWA Section 303(c), subject to the results of consultation under Section 7(a)(2) of the ESA. Should the consultation process with the U.S. Fish and Wildlife Service identify information that supports a conclusion that one or more of the revisions in this category are likely to jeopardize the continued existence of any listed endangered or threatened species, or result in the destruction or adverse modification of designated critical habitat of such species, the Region will revisit and revise, as necessary, its approval decision for the identified water quality standards.

Revisions Where EPA is Taking No Action: The Region is not acting on the revisions to the technology-based requirements found in Section 33-16-02.1-11. These provisions are not water quality standards and are not subject to EPA review under CWA Section 303(c).

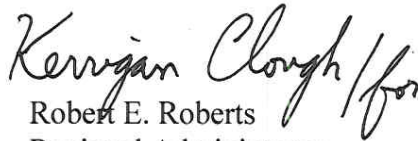
INDIAN COUNTRY

The water quality standards approvals in today's letter apply only to waterbodies in the State of North Dakota, 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 congratulates the Department and Council for the significant improvements to *Standards of Quality for Waters of the State*. The Region looks forward to working with the Department to make additional improvements to the State's water quality standards. If you have questions concerning this letter, please call me or Carol Rushin, Assistant Regional Administrator, Office of Ecosystems Protection and Remediation at 303-312-6598, or have your staff contact David Moon at 303-312-6833 or Bill Wuerthele, Regional Water Quality Standards Coordinator, at 303-312-6943.

Sincerely,


Robert E. Roberts
Regional Administrator

Enclosure

RATIONALE FOR EPA'S ACTION ON THE 2006 REVISIONS TO THE NORTH DAKOTA WATER QUALITY STANDARDS

Today's EPA action letter addresses the revisions to *Standards of Quality for Waters of the State* adopted by the North Dakota State Health Council on August 8, 2006. This enclosure provides a summary of the revisions and a rationale for the action taken by EPA.

It is important to note that EPA approval of new or revised State 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).¹ 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 Clean Water Act obligation, as a separate matter, to complete its water quality standards approval action. Therefore, in approving the water quality standards revisions 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, EPA will revisit and amend its approval decision for those revised or new water quality standards.

The discussion below covers three categories of revisions: (1) revisions approved without condition, (2) revisions that are approved for purposes of CWA Section 303(c), subject to ESA consultation, and (3) revisions that EPA is not acting upon today.

I. REVISIONS APPROVED WITHOUT CONDITION

EPA has concluded that approval of certain revisions either will have no effect on listed or proposed endangered or threatened species, or is otherwise not subject to ESA consultation. With the exception of revisions approved subject to ESA consultation, and revisions that EPA is not acting upon today, all other revisions fall into this category. Major revisions in this category are discussed below.

¹ Where EPA concludes that an approval action will have no effect on endangered or threatened species, or is otherwise not subject to ESA consultation, EPA can issue an unconditional approval.

Water Quality Criteria for Water Supply and Human Health Protection

The revisions included a large number of updates to the numeric water quality criteria for the protection of water supply uses or human health. For example, revisions were adopted to the criteria for chlorides, sulfates, barium, fecal coliform, *E. coli*, nitrates, phenols, mercury, and a large number of the human health values listed in Table 2. Many of the new or revised water quality criteria are based on ambient water quality criteria recommendations issued by EPA pursuant to Clean Water Act Section 304(a). For example, new criteria for the protection of recreation uses were adopted, using *Escherichia coli* as the indicator organism. These new criteria are based on CWA Section 304(a) criteria recommendations published by EPA. In addition, some of the new or revised water quality criteria are based on numeric standards included in drinking water regulations published by EPA pursuant to Safe Drinking Water Act requirements (i.e., maximum contaminant levels or MCLs). All such revisions are consistent with federal requirements at 40 CFR Section 131.11 because the adopted numeric standards describe water quality levels that will protect the assigned classifications. Accordingly, all revisions to the numeric water quality criteria for the protection of water supply uses or human health are approved.

Stream and Lake Classifications

Clarifying revisions were made to the descriptions of stream and lake classifications found in Section 33-16-02.1-09. For streams, although some classification descriptions were revised, no revisions to the classifications for individual waters (Appendix I) were adopted. For lakes, although revisions to classification descriptions were adopted, and the classifications for certain individual waters (Appendix II) were revised, these revisions did not alter the level of protection afforded, because the same water quality requirements apply to all lake classifications. The Region has reviewed the adopted revisions to stream and lake classifications, including the revisions to classification descriptions, and determined that they are appropriate and consistent with federal requirements at 40 CFR 131.10. Accordingly, all such revisions are approved.

Definitions

Revisions were adopted to the definitions found in Section 33-16-02.1-04 of *Standards of Quality for Waters Of The State*. These revisions were adopted to clarify the meaning of terms used in the regulation, but do not alter the level of protection required. The Region has reviewed the adopted revisions, and determined that they are appropriate. Accordingly, all revisions to definitions are approved.

II. REVISIONS APPROVED, SUBJECT TO ESA CONSULTATION

All revisions to water quality criteria for the protection of aquatic life are approved for purposes of CWA Section 303(c), subject to the results of consultation under Section 7(a)(2) of the ESA. In some cases the Region is deferring to the national consultation¹ that has been initiated by EPA Headquarters and the Services on EPA's published water quality criteria for the protection of aquatic organisms. The national consultation provides Endangered Species Act Section 7(a)(2) consultation coverage for any aquatic life criteria included in State water quality standards, approved by EPA, that are identical to, or more stringent than, EPA's recommended Section 304(a) criteria. Should the consultation process with the U.S. Fish and Wildlife Service identify information that supports a conclusion that one or more of the revisions in this category are likely to jeopardize the continued existence of any listed endangered or threatened species, or result in the destruction or adverse modification of designated critical habitat of such species, EPA will revisit and revise, as necessary, its approval decision for the identified water quality standards. The discussion below identifies major revisions in this category and the basis for EPA's approval action.

Approvals Subject to ESA Consultation, Where the Region is Deferring to the National Consultation

The Region is approving certain revisions to the water quality criteria for the protection of aquatic life as subject to ESA consultation, while also deferring to the national consultation process that has been initiated by EPA Headquarters. Revisions in this category are identified below:

- Aluminum, Diazinon, and Nonylphenol. New aquatic life criteria were adopted for these parameters, consistent with the CWA Section 304(a) criteria recommendations published by EPA.
- Dieldrin, Cadmium, Copper, and Silver. Revised aquatic life criteria were adopted for these parameters, consistent with the CWA Section 304(a) criteria recommendations published by EPA.

The Region has determined that all revisions in this category are consistent with the federal requirements in EPA's water quality standards regulation (40 CFR Part 131) because the adopted numeric standards describe a level of water quality that will protect the aquatic life classifications. The Region approves all revisions to aquatic life numeric standards, subject to ESA consultation. The Region defers to the national consultation for each of the revisions in this category.

¹ See the *Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service and National Marine Fisheries Service Regarding Enhanced Coordination Under the Clean Water Act and Endangered Species Act* (66 Federal Register 11202, February 22, 2001).

Approvals Subject to ESA Consultation, Where the Region is Not Deferring to the National Consultation

The Region is approving certain revisions to the water quality criteria for the protection of aquatic life as subject to ESA consultation, but is not deferring to the national consultation process that has been initiated by EPA Headquarters. Revisions in this category are identified below:

- Revisions to the pH and dissolved oxygen criteria for the protection of aquatic life.
- Adoption of new site-specific criteria to protect the cold water fishery in Lake Sakakawea.

The Region has determined that all revisions in this category are consistent with the federal requirements in EPA's water quality standards regulation (40 CFR Part 131) because the adopted numeric standards describe a level of water quality that will protect the aquatic life classifications. The Region approves all revisions in this category, subject to ESA consultation.

III. REVISIONS WHERE THE REGION IS TAKING NO ACTION

The Region is not acting on the revisions to the technology-based requirements found in Section 33-16-02.1-11. The principal revision to this section was to delete the North Dakota secondary treatment requirements for municipal discharges. The Region notes that the federal secondary treatment requirements are not affected by this change. Because the provisions in Section 33-16-02.1-11 are not water quality standards, they are not subject to EPA review under CWA Section 303(c). Accordingly, the Region takes no action on these revisions today.

