The Western Coalition of Arid States
W E S T C A S

December 31, 2013

Water Docket
Environmental Protection Agency
Mail Code 2822T,
1200 Pennsylvania Ave. NW.
Washington, DC 20460.
Submitted via email: *ow-docket@epa.gov.*

Attention: Docket ID No. EPA–HQ–OW–2010–0606

The Western Coalition of Arid States (WESTCAS) has reviewed the Environmental Protection Agency Proposed Rule on **Water Quality Standards Regulatory Clarifications** announced in the Federal Register (Vol. 78, No. 171, pages 54518 - 54546) on September 4, 2013. WESTCAS appreciates the opportunity to provide comments on the proposed rule on behalf of its members.

WESTCAS is a coalition of approximately 125 water and wastewater districts, cities, towns, and professional organizations focused on water quality and water quantity issues in the States of Arizona, California, Colorado, Idaho, Nevada, New Mexico, Oregon, and Texas. Our mission is to work with Federal, State, and Regional water quality and quantity agencies to promote scientifically-sound laws, regulations, appropriations, and policies that protect public health and the environment in the arid West.

WESTCAS is pleased to submit the following comments on the **Water Quality Standards Regulatory Clarifications.**

Comment 1: Clean Water Act 101(a)(2) Uses

In the preamble to the proposed rule, EPA asserts that the phrase "uses specified in section 101(a)(2) of the Act" includes "the protection of human health when consuming fish, shellfish, and other aquatic life." This appears to be based on the common practice of referring to the 101(a)(2) uses as the "fishable/swimmable" uses. However, section

101(a)(2) does not contain the word "fishable" or otherwise refer in any way to the consumption of fish. Instead, it establishes the national objective to achieve "whenever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and for recreation in and on the water." Therefore, there is no basis to include fish consumption as a consideration under Section 101(a)(2) of the Act. EPA should remove references to the protection of human health when consuming fish, shellfish, and other aquatic life as "uses specified in section 101(a)(2) of the Act" from the preamble to the final rule.

Comment 2: Highest Attainable Use

EPA is proposing to amend paragraph (g) of §131.10 to provide that when a state or tribe adopts new or revised water quality standards based on a Use Attainability Analysis (UAA), the state or tribe must adopt the highest attainable use. States and tribes must also adopt criteria, as specified in §131.11(a), to protect that use. Specifically, the proposed rule would add a definition of HAU (Highest Attainable Use) at §131.3 (m). The definition of the HAU as "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)."

WESTCAS continues to have concerns the HAU of ephemeral streams that predominate in the Arid West are not the uses specified in section 101(a)(2) of the Act. Requiring a UAA process to determine the HAU places an undue burden with respect to cost to show what is patently obvious – that an ephemeral stream does not support aquatic life, wildlife or recreation.

WESTCAS suggests that EPA broaden the process for defining the HAU to allow states the flexibility to use *alternative methods* in evaluating use attainability and criteria to support the uses, such as the information provided in the Arid West Water Quality Research Project.

The Arid states are made up **mostly** of with ephemeral and intermittent streams. WESTCAS continues to impress upon EPA that the information contained in the Arid West Water

Quality Research Project remains as important today as when the research project was completed. Because Congress *established* that project and *contributed $5 million dollars* to the work it must be allowed to be utilized. A few examples of application would be:

1. Western States should have the ability to have UAAs for a *class* of streams in a geographic region in lieu of having to conduct an individual UAA on each stream; all ephemeral streams in a geographic location or which are determined to be essentially identical. Watersheds which have similar characteristics and are all deemed to have a designated use should be grouped together.

2. Arid West UAAs should be allowed to be expedited reports where conditions in ephemeral streams reference much of the information in a comparable stream segment to the information already obtained for another similar stream condition, rather than collecting a lot of new characterization data.

3. The highest attainable use may not be a 101 Use. The regulations should explicitly recognize that the highest attainable use may not be either fishable or swimmable. The Arid states have many of these streams.

4. States need flexibility to develop expedited UAAs which can be done less expensively for ephemeral and intermittent streams and constructed water conveyances. The Arid western states have many streams which are only active during spring run-off or during high rain storms; otherwise they remain dry.

In 1997 WESTCAS provided comments regarding these issues. "Constructed water conveyance systems are of great concern in the arid West. They are critical to the transport of water to the towns, cities and farms of the West. They are also critical to reuse of effluent. Proposal of unreasonable standards…will create an economic burden that will prevent the beneficial use of these systems for water transport and effluent reuse". Today these comments still remain true. Water becomes even scarcer and the critical need for reuse and moving water is still necessary.

If EPA changes this Clean Water Act mandate by creating a presumption that the § 101(a)(2) uses are attainable this will then create significant burden on municipalities, industries, and other land owners across the United States. By doing so, states will be required to adopt standards, TMDLs and permit limits based on a presumption. This then leads to permitees being required to develop UAAs in order to establish a site specific standard for which there are many instances where those waters clearly have no capability to meet the fishable/swimmable uses and never will have that capability. Very often evaluating for a UAA is a huge waste of time and money and requires a permitee to continue to try to meet standards that *cannot be met*.

The proposed rule must allow for states to develop and use guidance documents which are appropriate for the regions and areas where streams are located. Limiting the definition strictly to a regulatory approach will continue the existing problems with the current system. EPA has consistently expressed that states should have flexibility to address their state needs: "It is the intent of EPA that a state or tribe should have the flexibility to choose its preferred approach." However WESTCAS is concerned that this statement does not go far enough in describing what a "preferred approach" can actually include.

While the proposed rule has provided example approaches, but also says it does not intend states and tribes to be limited to only these approaches. In the past, WESTCAS has submitted comments to EPA regarding the challenges the Arid Western states face with setting water quality standards using the same methods as states in less arid sections of the country. The Arid states have intricate and complex water conveyances for moving water, ephemeral and intermittent streams, and effluent dependent waters.

Comment 3: Administrative signature

The EPA is proposing to amend paragraph (b) of § 131.22 to add a requirement that an Administrator's determination must be signed by the Administrator or his or her duly authorized delegate, and must include a statement that the document is a determination for purposes of section 303(c)(4)(B) of the Act.

WESTCAS supports this proposed change to the regulation. WESTCAS members have experienced circumstances as described by EPA in its examples whereby a memorandum or letter which was meant to provide feedback or clarity has been used by states to provide a rationale that EPA "required" certain actions which in fact were not a "regulation" per se. This has caused confusion and tension between stakeholders/permitees and State and EPA regulators. Time and funding has been tied up in courts while interpretations are sorted out when in fact a well-meaning EPA representative was writing a memorandum to "assist" rather than "make a determination". This proposed change should make these circumstances more clear.

Comment 4: Requirements for Triennial Reviews

Following is a summary of WESTCAS concerns with respect to the proposed revisions to 40 CFR Part 131.20 (a). Also presented are recommendations that would address the WESTCAS concerns.

EPA is proposing to amend paragraph 131.20(a) to explicitly require a state (or tribe) to do an assessment during its triennial review to determine if any of its water quality standards should be revised based on new criteria guidance issued by EPA pursuant to Section 304(a) of the Clean Water Act (CWA).

WESTCAS is concerned about the potential that this revision to the regulation will provide an incentive for EPA, through either is regional offices or headquarters, to usurp the primacy of states and tribes with respect to the establishment of water quality standards. There are two primary factors that form the basis for this concern:

1. There is the potential that the 304(a) documents will be treated as requirements rather than guidance.

2. The criteria guidance documents do not adequately acknowledge, or provide mechanisms for, the need to adapt the results presented in the documents based on site-specific differences with respect to the composition of the aquatic

ecosystem, flow regime, exposure duration and frequency, or other relevant characteristics. Such adjustments are especially necessary in the Arid West where so many waterways have ephemeral, intermittent, or effluent-dominated flow; and waters frequently have a high dissolved mineral content. Following are a more detailed description of the concerns and recommended revisions to the proposed rule.

The CWA clearly and unambiguously contemplates that surface water quality standards will be established in the first instance by states, not EPA. EPA is to provide a review function and to conduct research into technical issues associated with setting standards. It is to take a direct role only if states fail to adopt approvable standards. Having EPA review each state's program every three years, however, is a far different from requiring that such programs be identical or even similar in every state. Where Congress desired state conformity, it has proven itself quite capable of saying so directly (for example, in requiring development of uniform standards for the Great Lakes).

Any action that moves in the direction of requiring uniform national standards is contrary to the language and intent of the CWA. At most, EPA should provide basic research and/or guidance consisting of a compendium of workable options developed by states throughout the years. The balance between achieving consistency with guidance and preserving state primacy should fall on the side of preserving state flexibility in conformance with the legislative intent. As set out in Section 303of the CWA, the states are assigned the role of establishing the water quality standards and EPA is assigned the role of reviewing each state's standards to confirm that the standards are consistent with the applicable requirements of the CWA.

Characteristics of waters across the US vary widely with respect to ecological, physical, and hydrological conditions. As noted in Comment 1, this is particularly true when comparing conditions is the arid and semi-arid regions of the nation to conditions in the more water-rich regions. Watersheds in the West are typified by hot, highly mineralized waters with poor habitat and severe flow regimes. For example, in the arid Southwest, seasonal rain can result in rapid but short-lived flow in ephemeral streams. The quality of this water often is

relatively poor (at a minimum, turbidity and sedimentation are high) due to natural conditions.

Existing criteria guidance documents do not adequately recognize the need to adapt standards to reflect these realities. These documents should be modified to reflect the reality that ephemeral, intermittent, and effluent-dominated streams are, in many ways, fundamentally different from other types of streams: and, thus, appropriate adjustments should be made when establishing water quality standards.

EPA should assist in or support the development of methods to determine scientifically defensible, site-appropriate water quality standards for the ephemeral, intermittent, and effluent-dependent waters of the West, such as the Arid West Water Quality Research Project. EPA is uniquely positioned to conduct or oversee the relevant scientific studies. It is not just their responsibility to provide appropriate guidance for protecting the ecosystems of perennial waters. In a large part of the nation the majority of waters are not comparable to perennial waters. EPA has a responsibility to provide appropriate objectives for these waters, too, taking into consideration the natural setting and the cost-effectiveness of proposed regulations.

WESTCAS offers the following recommendations:

1. It is reasonable for EPA to consider information in the 304(a) criteria guidance documents as one factor when evaluating state water quality standards. However, the guidance documents should be modified in the following respects:

    - It should be clearly stated that they constitute guidance and not requirements.

    - It should be explicitly stated that the establishment of standards for parameters addressed by 304 (a) documents should take into consideration the differing ecological, physical, and hydrological characteristics of different

water bodies and the effects of those differing characteristics on the anticipated and practical uses of those waters.

2. The third sentence in 40 CFR Part 131.20 (a) [the proposed amendment to this section] should be revised as follows, "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 taking into consideration the appropriate adaptation of such recommendations based on the relevant ecological, physical, and hydrological characteristics of the water subject to the criteria, to assure that designated uses (continue to be) are protected. [note: parentheses indicate deletions; underline indicates additions]

3. EPA should develop protocols for adapting criteria recommendations to be appropriate for arid and semi-arid waters.

Comment 5: Provisions Authorizing the Use of Permit-Based Compliance Schedule

EPA is proposing to add a new section (131.15) to the regulations. The new section addresses the incorporation of compliance schedules in permits issued pursuant to the National Pollutant Discharge Elimination System (NPDES). EPA's stated purpose for the new section 131.15 is to "clarify that a permitting authority may only issue compliance schedules …if the state or tribe has authorized issuance of such compliance schedules pursuant to state or tribal law in its water quality standards or implementing regulations." [FR vol.78, No. 171, Page 54537, September 4, 2013].

WESTCAS has concluded that this addition to the regulations is unnecessary and could be applied in ways that would unduly restrict a state's authority and capability in this respect.

The role, and requirements, with respect to the States' authority to establish compliance schedules in permits issued pursuant to NPDES are already well-documented in the CWA and in other EPA regulations. The understanding that the role of compliance schedules as part of the permitting program has been accepted since the adoption of the Federal Water Pollution Control Act Amendments of 1972.

- Section 303(e)(3)(A) of the CWA clearly states that schedules of compliance are provided for in a State's Continuing Planning Process as part of the State's program to establish effluent limitations. Nothing in the parts of Section 303 of the CWA that discuss water quality standards references compliance schedules.

- EPA regulations in 40 CFR Part 122 ("EPA Administered Permit Programs: The National Pollutant Discharge Elimination System") address compliance schedules as elements of the NPDES program. Section 122.47 describes when compliance schedules are appropriate and provisions to be included in a permit that includes a compliance schedule.

- EPA regulations in 40 CFR Part 123 ("State Program Requirements") discusses the requirements that a State must meet in order to be delegated the authority to issue permits pursuant to the NPDES system. One of these requirements, as set forth in Section 123.25 (a)(18), is that the State must have the legal authority to establish schedules of compliance. It should, therefore, be concluded that all States that have been delegated NPDES authority have already been determined to have the authority to establish schedules of compliance.

Finally, this addition to the state water quality standard regulations is not necessary to insure compliance with EPA regulations regarding compliance schedules. EPA has the authority to review and approve or disapprove individual NPDES permits containing compliance schedules.

If a State is required to include the authorization to issue compliance schedules in its water quality standards regulations, an EPA regional office could interpret this provision to include a requirement to include in the regulations not just a statement of authority but also the provisions that are included in the compliance schedule in the permit (time period, specific interim deadlines, etc.) Such requirements would severely limit a State's ability to structure a permit that is appropriate for the specific condition as they relate to that individual permit.

WESTCAS recommends that the new proposed Section 131.15 not be included in the revisions to the Part 131 regulations. It is unnecessary and could restrict a State's ability to effectively and efficiently administer its discharge permit program.

Comment 6: Variances

EPA's proposed rule requires in Section 131.14(b)(1)(ii)(B) that a variance must specify "[a]n interim numeric effluent condition that reflects the highest attainable condition." We appreciate the EPA's intent to reduce barriers to states' use of variances as an alternative to permanent use downgrades. However, we are concerned that the promulgation of a rule may unintentionally limit the ability of states to use variances. Several states have recently developed variance guidance, which could be called into question or limited by EPA's proposed rule. Therefore, instead of promulgating a rule, we believe the EPA should provide guidance on the use of variances to preserve flexibility for states to address site-specific issues.

If EPA moves forward with variance provisions in the final rule, additional clarification of the relationship between variances and waste load allocations in TMDLs is needed. EPA's proposal provides simply that WQS variances apply for "CWA section 402 permitting purposes." By omission, this may imply that effluent limitations derived from TMDLs under CWA section 303(d) are not included. In particular, 40 CFR 122.44(d)(vii) requires states to ensure that "effluent limits . . . are consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA pursuant to 40 CFR 130.7." For these purposes, if there is a variance adopted applicable to the discharger, the wasteload allocation should not be considered to be "available" for the discharge, and therefore the state is not obligated to impose effluent limitations that are consistent with the wasteload allocation. In addition, 40 CFR 122.4(i) prohibits issuance of a permit to a new source or a new discharger if the discharge from its construction or operation will cause or contribute to the violation of water quality standards." For purposes of 40 CFR 122.4(i), the water quality standards applicable to the discharger should be considered to be the variance, not the underlying standards. EPA should explicitly clarify this in the regulation and preamble.

WESTCAS members are located within states that have been successfully implementing temporary modifications and ambient-based criteria for many years. These are two alternatives to variances or permanent use downgrades that were recognized in EPA's Advance Notice of Proposed Rulemaking, 63 Fed. Reg. 36742 (July 7, 1998). EPA's current proposal does not include clarifications regarding either temporary modifications or ambient-based criteria. We support EPA's decision not to include temporary modifications or ambient-based criteria in its proposal, since clarification of these regulatory options is not necessary to facilitate their continued use.

WESTCAS does not agree that a variance should be restricted to requiring a numeric condition during the term of the variance. In some circumstances, a narrative effluent condition may reflect the highest attainable condition and result in greater protection for the water body than a numeric effluent condition. Therefore, WESTCAS recommends that the word "numeric" be deleted from this section.

Comment 7: Antidegradation

EPA stated that its intent in promulgating the draft rule revisions is to provide "improved regulatory clarity and more effective program implementation." 78 Fed. Reg. 54518, 54521 (Sept. 4, 2013). However, EPA's proposed revisions to the antidegradation rule are not a "clarification" as was the stated intent of EPA's draft rule. Instead, the EPA proposal is a radical revision of the current antidegradation rule and reverses established law regarding antidegradation requirements.

In particular, EPA proposes restrictions on the waterbody-by-waterbody approach to identifying high quality waters. EPA proposes that a waterbody may not be excluded from high quality water protection "solely" because it is impaired for one of the uses specified in CWA section 101(a)(2). This is at odds with the court's ruling in Kentucky Waterways Alliance v. Johnson, 540 F.3d 466 (6th Cir. 2008). That decision upheld regulations that allowed a waterbody to be excluded from protection if the waterbody is impaired for either aquatic life or recreation uses.

EPA's inclusion of language that calls into question the Kentucky Waterways holding is very likely to prompt litigation. Litigation is also likely because of the EPA's inclusion of a term that a waterbody may not be excluded "solely" because it does not attain all of the 101(a)(2) uses. This introduces further ambiguity and unnecessarily casts doubt on established legal precedent.

States have implemented antidegradation programs for many years. EPA's proposal is an unnecessary intrusion on state implementation and a reversal of current law, which will not provide any actual or perceived environmental benefit. WESTCAS recommends that the proposal be revised as follows:

"§ 131.12 Antidegradation Policy and Implementation Methods

(b)(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…."

Comment 8: Non-Point Source Controls

The proposed rule includes two instances that would impose a new requirement for review of best management practices for nonpoint source controls. First, EPA proposes to amend Section 131.12 to require the state's antidegradation implementation to ensure that "all cost-effective and reasonable best management practices for nonpoint source control" will be achieved. Second, EPA proposes in Section 131.14 that adoption of waterbody variances require identification and documentation of best management practices for nonpoint source control. Further, EPA proposes to require documentation of the implementation of BMPs to renew a waterbody variance.

The Clean Water Act does not include any provision to require or enforce best management practices for nonpoint source controls. EPA's proposal could be misinterpreted to impose such a requirement. Therefore, WESTCAS recommends that the proposal be modified as follows:

- § 131.12 Antidegradation Policy and Implementation Methods.

  (a)(2) . . . Further, the state shall 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.

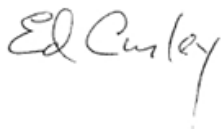
- § 131.14 Water quality standards variances.

  Strike out all of 131.14(b)(3).

- (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.

EPA's consideration of these comments is appreciated.

Sincerely,



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