



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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OFFICE OF
WATER AND
WATERSHEDS

AUG 23 2018

Mr. Barry Burnell
Administrator
Water Quality Programs
Idaho Department of Environmental Quality
1410 North Hilton
Boise, Idaho 83706-1255

Re: Approval of New Water Quality Standards: Designation and Attainability of Beneficial Uses,
Docket 58-0102-1501

Dear Mr. Burnell:

The Environmental Protection Agency has completed its review of Idaho's new water quality standards that address the designation and attainability of beneficial uses (Idaho rule docket 58-0102-1501). The Idaho Department of Environmental Quality adopted these WQS into the State's regulations at 58.01.02.102.01 and 58.01.02.102.02, and added a corresponding new definition for Use Attainability Analysis at 58.01.02.010.107. The purpose of DEQ's rulemaking was to add regulatory language pertaining to the designation and attainability of beneficial uses consistent with the federal regulations at 40 CFR 131.10. In addition, DEQ indicated that the rulemaking was necessary in order for the state to develop and issue guidance related to UAAs.

In accordance with the EPA's authority under section 303(c) of the Clean Water Act and implementing regulations at 40 CFR Part 131, the EPA approves Idaho's new WQS related to designation and attainability of beneficial uses.

Background

Under the CWA section 303(c), 33 U.S.C. 1313(c), and the EPA's implementing regulations at 40 CFR 131.4, states have the primary responsibility for reviewing, establishing, and revising WQS, which include the designated uses of a waterbody or waterbody segment and the water quality criteria necessary to protect those designated uses. At least once every three years, states are required to review their applicable WQS and, as appropriate, modify those standards and/or adopt new standards. 40 CFR 131.20. The CWA section 303(c) also requires states to submit new or revised WQS to the EPA for review, as the EPA must ensure that any revisions to WQS are consistent with the CWA and the EPA's implementing regulations. In addition, in accordance with 40 CFR 131.5, the state must follow its own legal procedures for adopting such standards and submit certification by the state's attorney general, or other appropriate legal authority within the state, that the WQS were duly adopted pursuant to state law, 40 CFR 131.6(e).

As specified in the EPA's regulations at 40 CFR 131.10, a UAA¹ is required when a state or authorized tribe designates uses that do not include the uses specified in section 101(a)(2) of the CWA or when designating sub-categories of these uses that require less stringent criteria than previously applicable. In 2015, the EPA amended §131.10(g) in order to provide that where a state or authorized tribe removes or revises a use specified in CWA section 101(a)(2) (or a subcategory of such a use) that is not attainable, the highest attainable use shall be adopted in its place.² The EPA also amended §131.10(g), §131.10(j), and §131.10(k) to clarify when a UAA is and is not needed. The EPA defined the term "non-101(a)(2) use" and amended §131.10(a) to clarify that for non-101(a)(2) uses, while a UAA is not required, the state/authorized tribe must submit documentation justifying how its consideration of the use and value of water for those uses listed in §131.10(a) appropriately supports the state/tribal action.

A UAA is required in order to revise or remove a designated beneficial use consistent with the CWA section 101(a)(2) that is not an existing use on a waterbody. According to the EPA's regulations at 40 CFR 131.10, a designated use may be changed or removed if it is demonstrated that attaining the designated use is not feasible due to one of six factors specified at 40 CFR 131.10(g)(1)-(6).

States and authorized tribes must hold public hearings for the purpose of reviewing the applicable WQS at least once every three years and when revising WQS. States and authorized tribes must also re-examine waters that do not include the uses specified in section 101(a)(2) of the CWA to determine if new information has become available. If new information indicates that the uses specified in the CWA section 101(a)(2) are attainable, then the state must revise its WQS accordingly to designate such uses.

Idaho's Rulemaking

Idaho's submission of new WQS addresses the designation and attainability of beneficial uses. DEQ provided an opportunity for public comment and the EPA provided comments on August 28, 2015. The new WQS were approved by the Idaho Legislature and became final and effective on March 25, 2016. The WQS were certified by the Idaho Attorney General as duly adopted pursuant to state law on December 13, 2016. By letter dated December 30, 2016, DEQ submitted the new WQS to the EPA for review and approval.

DEQ embarked on this rulemaking after the Idaho Office of Performance Evaluations completed an internal audit as DEQ had received multiple inquiries about conducting UAAs. OPE developed a report³ and recommended that Idaho provide more assistance to stakeholders via guidance. DEQ agreed that a UAA guidance document may be helpful. However, prior to developing guidance, DEQ believed it was necessary to add authorizing language into the state's WQS. This rule language accomplishes that task and provides a basis for the state to now finalize its guidance regarding the application of the rule's UAA provisions.

The State of Idaho has adopted the following revisions to Idaho's WQS:⁴

- A definition for Use Attainability Analysis at IDAPA 58.01.02.010.107.

¹ A UAA is a structured scientific assessment of the factors affecting the attainment of uses specified in section 101(a)(2) of the Clean Water Act. More information on UAAs can be found at: <https://www.epa.gov/wqs-tech/use-attainability-analysis-uaa>.

² <https://www.epa.gov/wqs-tech/final-rulemaking-update-national-water-quality-standards-regulation>

³ *Challenges and Approaches to Meeting Water Quality Standards*. Office of Performance Evaluations, Idaho Legislature. July 2014. <https://legislature.idaho.gov/wp-content/uploads/OPE/Reports/r1403.pdf>

⁴ More information on DEQ's rulemaking can be found at: <http://www.deq.idaho.gov/58-0102-1501>

- Procedures for Designation of Beneficial Uses at IDAPA 58.01.02.102.01.
- Procedures for Revision of Beneficial Uses at IDAPA 58.01.02.102.02.

EPA Action and Rationale

In accordance with its CWA authority, 33 U.S.C. § 1313(c)(3) and 40 CFR Part 131, the EPA approves DEQ's new language at IDAPA 58.01.02.010.107, 58.01.02.102.01, and 58.01.02.102.02.

DEQ's WQS revisions are consistent with the federal regulations at 40 CFR 131.10. The EPA's approval action is limited to the new regulatory language in Idaho's WQS addressing designation and attainability of beneficial uses; individual use designations or revisions resulting from application of the new regulatory language must be submitted to the EPA for review under the CWA section 303(c). Additionally, the EPA's action applies only to water bodies in the State of Idaho, and does not apply to waters that are within Indian Country, as defined in 18 U.S.C. § 1151.

Definition for Use Attainability Analysis at IDAPA 58.01.02.010.107.

The EPA is approving Idaho's new definition for UAA because it provides the meaning of the term used in Idaho's WQS and is consistent with the federal definition at 40 CFR 131.3(g).

Procedures for Designation of Beneficial Uses at IDAPA 58.01.02.102.01.

This section describes how new uses will be designated for a waterbody or waterbody segment. DEQ describes that use designations made for a waterbody or waterbody segment are made regardless of attainment or full support at the time of designation. DEQ lists appropriate considerations at 58.01.02.102.01(a) for how the state will designate beneficial uses. These considerations include existing uses, downstream waters, and subcategories of beneficial uses, among others. The EPA has determined that these considerations are consistent with 40 CFR 131.10(a)-(g).

In addition, DEQ states at 58.01.02.102.01(b) that in no case shall waste transport or waste assimilation be a designated beneficial use, consistent with 40 CFR 131.10(a).

Therefore, the EPA is approving Idaho's procedures for designation of beneficial uses in Idaho waters at IDAPA 58.01.02.102.01 as consistent with the federal regulations at 40 CFR 131.10.

Regarding 58.01.02.102.01(a)(iv), the EPA notes that a UAA will be required, pursuant to 40 CFR 131.10(j), if it is determined that a CWA Section 101(a)(2) beneficial use is not attainable based on economic factors.

Procedures for Revision of Beneficial Uses at IDAPA 58.01.02.102.02.

This section describes how the state can modify uses that have already been designated for a waterbody or waterbody segment. At 58.01.02.102.02(a), DEQ describes that designated beneficial uses shall be reviewed and revised if it is demonstrated that attaining the designated beneficial use is not feasible consistent with one of the factors at 40 CFR 131.10(g).

At 58.01.02.102.02(b), DEQ states that designated beneficial uses may not be removed in certain situations such as if the uses are existing uses and if such uses will be attained by implementing technology-based effluent limits. This language is consistent with 40 CFR 131.10(h).

The language at 58.01.02.102.02(c) provides that where existing WQS specify uses less than those which are presently being attained, the state shall revise its standards to reflect uses actually being attained. This language is consistent with 40 CFR 131.10(h)(i).

The language at 58.01.02.102.02(d) defines a UAA consistent with the federal definition described above and describes when a UAA is to be conducted – when DEQ designates uses that do not include 101(a)(2) uses and when DEQ removes a use that is a 101(a)(2) use; removes a subcategory of such uses; or designates subcategories of such uses which require less stringent criteria than previously applicable. This language is consistent with 40 CFR 131.10(j).

Lastly, at 58.01.02.102.02(e), DEQ describes when a UAA is not required – when DEQ designates uses that include 101(a)(2) uses and when DEQ removes a use that does not include 101(a)(2) uses. This language is consistent with 40 CFR 131.10(k).

Therefore, the EPA is approving Idaho's procedures for revision of beneficial uses in Idaho waters at IDAPA 58.01.02.102.02 as consistent with the federal regulations at 40 CFR 131.10.

Highest Attainable Use Requirement

The EPA's regulations at 131.10(g) specify, "[i]f a State adopts a new or revised water quality standard based on a required use attainability analysis, the State shall also adopt the highest attainable use, as defined in § 131.3(m)." 40 CFR 131.3(m) defines 'Highest Attainable Use' (HAU) as "the modified aquatic life, wildlife, or recreation use that is both closest to the uses specified in section 101(a)(2) of the Act and attainable, based on the evaluation of the factor(s) in § 131.10(g) that preclude(s) attainment of the use and any other information or analyses that were used to evaluate attainability."

Idaho's new regulations addressing the revisions of beneficial uses do not specify this requirement to adopt the HAU. The EPA understands that Idaho intends to address this requirement in its upcoming supplementary guidance on developing UAAs. The EPA supports DEQ's commitment to develop this guidance document, and continues to offer its support in reviewing any drafts. However, regardless of any supplementary guidance, any new or revised use designations that Idaho adopts based on a required UAA must be consistent with the HAU, as specified in the federal regulations. The EPA encourages DEQ to incorporate the HAU requirement into its use regulations during its next triennial review.

The EPA appreciates DEQ's commitment to update Idaho's WQS and supports DEQ's ongoing efforts to provide additional clarity related to use attainability analyses and revising Idaho's designated uses. If you have any questions or comments, please contact me at (206) 553-1855 or contact Matthew Szlag, Water Quality Standards Coordinator, at (907) 271-1208.

Sincerely,



Daniel D. Opalski, Director
Office of Water and Watersheds

cc: Mr. Don Essig, Idaho DEQ
Mr. Brian Reese, Idaho DEQ
Mr. Jason Pappani, Idaho DEQ