

January 2, 2013

Water Docket
U.S. Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Docket ID No. EPA-HQ-OW-2010-0606, Water Quality Standards Regulatory
Clarifications

To whom it may concern:

The New England Interstate Water Pollution Control Commission (NEIWPCC), on behalf of its member states (Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont), appreciates the opportunity to submit comments regarding EPA's *Water Quality Standards Regulatory Clarifications*. In response to information provided in the federal register notice and EPA's listening sessions, we respectfully request that EPA consider the following comments:

Administrator's Determinations

EPA is proposing to amend section 131.22 to clarify what is and what is not a formal "Administrator's Determination" that a state must adopt new or revised water quality standards. Such determination triggers a requirement that EPA promulgate standards for the state unless the state expeditiously proposes and adopts such standard. Past misinterpretations of EPA statements as "Administrator's Determinations" have led to unnecessary requirements for EPA promulgation.

The NEIWPCC states strongly support the proposed change, which will allow states and EPA to freely correspond about needed changes in the state's water quality standards (WQS) without fear that an EPA statement could result in an unnecessary federal promulgation.

Designated Uses

The proposed rule would require that where a state adopts Water Quality Standards (WQS) based on a Use Attainability Analysis (UAA), it must adopt the highest attainable use (HAU), also adopting criteria to protect that use as specified in 131.11(a). EPA is proposing to define 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).” The NEIWPCC states suggest that instead of using the phrase “closest to the uses,” a phrase such as “most similar to the uses” may better capture the intent of adopting a use with a similar function as the 101(a)(2) use. Also, in the proposed amendment to §131.10(j) a state must conduct a UAA when “the State designates uses for a waterbody for the first time.” The NEIWPCC states are seeking clarification on what is meant by the phrase “for a waterbody for the first time.”

Furthermore, the NEIWPCC states are very concerned that the development of new use categories and associated water quality criteria could become burdensome. States will have difficulty performing UAAs if they essentially will be required to develop unique water quality criteria for each use change. How specific must state classification systems for designated uses be? The NEIWPCC states request that no UAA be required when an existing use is refined, that is, replaced by a more specific version of the use by final rule.

Triennial Reviews

EPA is proposing to amend §131.20(a) to clarify that states shall re-examine water quality criteria during triennial reviews to determine if any criteria should be revised in light of any new or updated CWA section 304(a) criteria recommendations. This process should ensure that state water quality criteria reflect current science such that designated uses continue to be protected.

NEIWPCC states request that EPA further amend §131.20(a) to clarify that any updates to states’ criteria will be made at the states’ discretion. The states are also seeking clarity on whether water quality variances must be reviewed during the triennial review in addition to the variance review at the end of the variance term.

Antidegradation Implementation

EPA is proposing to amend several provisions of §131.12 related to implementing the antidegradation requirements and seeks comment on whether EPA should require that state and tribal antidegradation implementation methods be included in state and tribal regulations. The NEIWPCC states strongly oppose this requirement because it would not add protection and could remove the flexibility of an approach that allows states to focus on aspects of protection that are most needed.

Beyond this, a proposed amendment requires that states conduct an alternatives analysis to support state decision-making for authorizing limited degradation of high quality water. Regarding this proposed amendment, there appears to be a discrepancy in the language describing alternatives analyses. In Section III.E.2 it is stated that the Tier 2 review calls for states to investigate whether allowing lower water quality is necessary to accomplish the proposed activity, typically by examining alternative ways of accomplishing the activity through an alternatives analysis. However, Section III.E.4.c.ii says that the state will determine whether the lowering of water quality that would result from a proposed activity is necessary to accommodate important economic or social development in the area in which the waters are located through an alternatives analysis and a social and/or economic analysis. The NEIWPCC states are seeking clarity on which evaluation EPA is proposing that states follow when looking at lowering water quality under the alternatives analysis: “as necessary to accommodate

important economic or social development,” or “as necessary to accomplish the proposed activity?”

Finally, the NEIWPCC states are concerned about changes to 40 CFR 131.12(b)(2) which require alternatives analyses for all activities affecting Tier 2 waters. In theory, any activity in the watershed of a Tier 2 waterbody has some potential to degrade water quality, however, in many cases; the impacts of these activities will result in de minimus changes to water quality. Performing alternatives analyses for these activities would strain limited state resources. Therefore, the NEIWPCC states recommend that the federal regulation not require alternatives analysis for those activities that would have de minimus impacts on water quality. This approach would be consistent with the antidegradation implementation methods already adopted by some states.

Variations

EPA is proposing to add more specificity in regulation regarding variations by addressing variance applicability, submission requirements, implementation, duration, and renewal. First, the NEIWPCC states are requesting that EPA provide clarification regarding the state authorization for variations. Specifically, will states need to add authorizing language for variations into their state water quality standards? If so, the NEIWPCC states oppose this revision, as this measure would add significant complexity to obtaining variations and prevent states from acquiring variations through the permitting process. Also, while EPA has expressed that variations are being underutilized, there is some concern on the part of the NEIWPCC states that EPA’s proposed changes will lead to permittees wanting to over-utilize this approach. In these times of strained resources, it may be challenging for states to respond to these increased requests.

Thank you for your consideration of these comments. Please do not hesitate to contact me or Susy King of my staff if you have any questions or concerns.

Sincerely,

A handwritten signature in black ink, appearing to read "Ronald F. Poltak", written in a cursive style.

Ronald F. Poltak
Executive Director

Cc: NEIWPCC Executive Committee
NEIWPCC Water Quality Standards Workgroup
Ellen Weitzler, EPA Region 1
Wayne Jackson, EPA Region 2