

BEFORE THE ILLINOIS POLLUTION CONTROL

BOARD IN THE MATTER OF:)
)
REGULATORY RELIEF MECHANISMS:) PCB R18-018
PROPOSED NEW 35 ILL. ADM. CODE) Rulemaking- Procedural
PART 104, SUBPART E)

**NOTICE OF
FILING**

To:

Don Brown, Clerk of the Board Illinois Pollution Control Board James R. Thompson Center, Suite 11-500 100 W. Randolph Street Chicago, IL 60601 don.brown@illinois.gov (via electronic mail)	Attached Service List
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PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Pollution Control Board the Illinois EPA's Reply to Comments Filed on December 5, 2017, a copy of which is herewith served upon you.

Dated: December 19, 2017

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION
AGENCY

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Electronic Filing: Received, Clerk's Office 12/19/2017, P.C. #18

IN THE MATTER OF:)
)
REGULATORY RELIEF MECHANISMS) R18-18
PROPOSED NEW 35 ILL. ADD. CODE) (Rulemaking-Procedural)
PART 104, SUBPART E)

**ILLINOIS EPA'S REPLY TO COMMENTS TO FILED WITH THE BOARD
ON DECEMBER 5, 2017**

The Illinois Environmental Protection Agency ("Illinois EPA" or "Agency"), by and through its attorneys, hereby submits its reply to comments filed with the Board by various parties on December 5th, 2017. The Agency responds as follows:

Illinois Chapter of Sierra Club, Natural Resources Defense Council, Prairie Rivers Network, Openlands, Friends of the Chicago River, Recovery on Water and Little Village Environmental Justice Organization (Environmental Groups)

Environmental Groups Comment I: General Requirements of the Law

Environmental Groups summarize when time-limited water quality standards are allowed and that time-limited water quality standards must be approved by USEPA and reviewed at least every five years. *See* Environmental Groups' Post Hearing Comments at 2. In addition, the Environmental Groups provide an example of how the federal rules might work. *Id* at 2 and 3.

The Agency agrees that states must demonstrate that the use and criterion are not feasible to attain on the basis of one of the factors listed in 40 CFR 131.10(g) or on the basis of the new restoration-related factor in 131.14(b)(2)(i)(A)(2). *See* 40 CFR 131.14(b)(2)(i) and 80 FR 51037 (Attachment A of Agency's August 9, 2017 Statement of Reasons) "Controls more stringent than those required by section 301(b) and 306 of the Clean Water Act would result in substantial and widespread economic and social impact" is one of the six factors listed in 40 CFR 131.10(g). *See* 40 CFR 131.10(g)(6).

A time-limited water quality must include a quantifiable expression of the highest attainable condition of the watershed, water body, or waterbody segment applicable throughout the term of the time-limited water quality standard. *See* 40 CFR 131.14(b)(1)(ii)

and 80 FR 51037 (Attachment A of Agency's August 9, 2017 Statement of Reasons)

The Agency agrees that a petitioner for a time-limited water quality standard must demonstrate that that term is only as long as necessary to achieve the highest attainable condition. *See* 40 CFR 131.14(b)(2)(ii).

Finally, the Agency also agrees that states and authorized tribes must specify, in the time-limited water quality standard, the reevaluation frequency and how they plan to obtain public input on the reevaluation. *See* 40 CFR 131.14(b)(1)(v) and 80 FR 51038 (Attachment A of Agency's August 9, 2017 Statement of Reasons).

Environmental Groups Comment II: The rule would benefit from addition of a provision clarifying certain time restraints.

The Environmental Groups proposed an additional provision clarifying certain time limits. *See* Environmental Groups' Post Hearing Comments at 4. In response to the Environmental Groups proposed additional provision, the Agency agrees with the intent but not with the language itself. The Agency agrees that the term of the time-limited water quality standard will be only as long as necessary to achieve the highest attainable condition (40 CFR 131.14(b)(2)(ii)).

Environmental Group Comment III: It must be assured that petitions for time-limited water quality standards do not serve as a method to delay implementation of water quality standards through the filing of petitions filed largely for purposes of delay.

The Environmental Groups request assurance that petitions for time-limited water quality standards do not serve as a method to delay implementation of water quality standards through the filing of petitions filed largely for purposes of delay. *See* Environmental Groups' Post Hearing Comments at 4 and 5. The Agency agrees with the Environmental Groups that petitions for time-limited water quality standards should not serve as a method to delay implementation of water quality standards through the filing of petitions filed largely for purposes of delay.

Metropolitan Water Reclamation District of Greater Chicago (MWRD)

MWRD Comment 1: Substantial Compliance

The Agency agrees that the substantial compliance evaluation should not be a review of the merits of the time-limited water quality standard petition. Instead, the evaluation should be for the purpose of determining the responsiveness and adequacy of the petition's content in addressing the time-limited water quality standard petition requirements set forth in the Board's rules, Section 38.5 of the Act, and 40 CFR 131.14. The intent of the substantial compliance review is to provide some direction and guidance to petitioners as to how their petitions might be improved and an opportunity to timely do so. For clarification, the Agency is modifying Section 104.515(b) as follows:

“Substantial Compliance” means compliance with substantial or essential content requirements of the 40 CFR 131.14, Section 38.5 of the Act, and Section 104.530.

MWRD Comment 2: 104.520(b)(1)(C) Rejoin

The Agency disagrees with the change from “rejoin” to “reactivate”. *See* MWRD's Post Hearing Comments at page 1. The Agency would ask the Board to adopt the language proposed by the Agency in Section 104.520(C) in its November 14, 2017 filing.

MWRD Comment 3: 104.520(b)(1)(C)

The Agency agrees with the modification provided in MWRD comment 3. *See* MWRD's Post Hearing Comments at pages 1 and 2. However, there appears to be a typo in the language provided by MWRD. The sentence should read:

“A petitioner's decision to withdraw from a collectively filed petition and file its own individual petition or rejoin a previously filed time-limited water quality standard petition does not invalidate *an* otherwise valid stay granted under Section 104.525.

MWRD Comments 4 and 5: 104.530(d)

With respect to MWRD comments 4 and 5, the Agency proposes the following language for Section 104.530(d):

“For multiple discharger, watershed, water body, or waterbody segment time-limited water quality standards, discharger specific information must be provided individually. All remaining information required under this Section may be filed individually or collectively.”

Illinois Environmental Regulatory Group (IERG)

The Roles of the Various Participants

Agency as a Petitioner

IERG requests an explicit acknowledgement that the Agency is not precluded from acting as the petitioner or co-petitioner itself. *See* IERG’s Post Hearing Comments at 4. Pursuant to 38.5(b)(1) of the Act, a time-limited water quality standard may be sought by persons who file with the Board a petition for a time-limited water quality standard under Section 38.5 of the Act. 415 ILCS 5/38.5(b)(1). “Person” means any individual, partnership, co-partnership, firm, company, limited liability company, corporation, association, joint stock company, trust, estate, political subdivision, state agency, or any other legal entity, or legal representative, agent or assigns. 415 ILCS 5/3.315.

As a state agency, the Illinois EPA is authorized to file with the Board a petition for a time-limited water quality standard under Section 38.5 of the Act. However, the rules as drafted were not intended to take into consideration the Agency as a petitioner or co-petitioner. The Agency may, in the future, propose rules outlining a streamlined process for the Agency to act as a petitioner or co-petitioner when filing a time-limited water quality standard with the Board.

Gathering of Necessary Information

IERG raises concerns that too much burden is being placed on the petitioner to gather

information, organize, and put together what is needed for a time-limited water quality standard petition. *See* IERG's Post Hearing Comments at 2 -5. The Agency disagrees with this comment. The time-limited water quality standard is being filed by the petitioner, therefore, the petitioner should be required to gather the necessary information to demonstrate the need for a time-limited water quality standard. The proposed rules outline the necessary petition content requirements. If a petitioner is having difficulty gathering the pertinent information, there are many avenues that may be perused to gather it, such as through the Freedom of Information Act. Also, there is no need to have a provision in the rules directing the Agency to provide information. If the Agency has any relevant and readily available information, it will assist the Board and petitioners in getting that information in the record. Therefore, the Agency would ask the Board to disregard this comment.

104.530(a)(10) Petition Content

IERG suggests that language in proposed Section 104.530(a)(10) be revised to keep with the intended scope of this particular petition content requirement. *See* IERG's Post Hearing Comments at 5. To address IERG's concern and to maintain consistency with language in 104.530(a)(6), the Agency recommends 104.530(a)(10) be revised as follow:

“an identification and description of any process, activity, or source that contributes to the present or anticipated failure to meet the water quality standard, including the material used in that process or activity.

Federal Role in Process

IERG suggests that the proposed rules expressly provide for the ability of the Agency to file motions for extensions, as necessary, when USEPA's feedback is delayed. *See* IERG Post Hearing Comment at 6. This proposed Subpart is to be read in conjunction with Part 101 of the Board rules. *See* Proposed rules 104.500(c). Section 522 of the Board rules provides language regarding motions for extension of time. *See* 35 Ill. Adm. Code 522. Therefore, the Agency believes additional language expressly providing for the ability of the Agency to file motions for extensions as necessary, when USEPA's feedback is delayed, is not needed.

Substantial Compliance

The Agency agrees with the reasons articulated in IERG's statement regarding substantial compliance. *See* IERG's Post Hearing Comments at 6-7. The Agency has attempted to clarify the definition of "substantial compliance." *See* the Agency's reply to MWRD on substantial compliance at page 3 above.

Substantial Compliance Determinations

IERG suggests that the proposed rules clearly state that the Board will accept a petitions factual contentions as true when making the Board's determination on substantial compliance. *See* IERG's Post Hearing Comments at 7. In response, the Agency recommends that the Board consider all available information in the administrative record when making a substantial compliance determination.

Reevaluation

IERG is recommending a specific requirement be added that the Board will take final action to complete the reevaluation by the deadline established.¹ *See* IERG's Post Hearing Comments at 8. The Agency agrees with IERG's suggestion that the dates established in either the Board's Section 104.565(d)(7) order, or establishing the various timeframes for filing a proposed reevaluation, public comments, Agency recommendation, etc., be explicitly tied to the Board taking final action by that certain date as required by federal rules.

Best Management Practices

The Agency agrees with the proposed definition of Best Management Practices. *See* IERG's Post Hearing Comments at 9.

¹To clarify, federal regulations require that the State perform a reevaluation of the highest attainable condition no less frequently than *every five years after* USEPA approval of the time-limited water quality standard and the result of the reevaluation be submitted to USEPA within 30 days of completion of the reevaluation. 40 CFR 131.14(b)(1)(v).

Midwest Generation

Midwest Generation Comment A: The Board's "Substantial Compliance" Review Determines the Adequacy of the WLWQS Petition's Content – Not the Merits of the Requested TLWQS Relief.

The Agency has attempted to clarify the definition of "substantial compliance." *See* the Agency's reply to MWRD on substantial compliance at page 3 above.

Midwest Generation Comment B: The Board Should Clarify that a Section 104.545 Board Order Granting a TLWQS is not Final Until the USEPA Issues its Decision on the TLWQS

Midwest Generation is asking the Board to "clarify that a Section 104.545 Board order granting a TLWQS is not final until the USEPA issues its decision on the TLWQS." *See* Midwest Generation's Post Hearing Comments at 4. The Agency first would like to make clear that a Section 104.545 substantial compliance assessment is a Board conducted assessment of whether any petition filed for a time-limited water quality standard, subject to the stay or not, is in compliance with substantial or essential content requirements of the 40 CFR 131.14, Section 38.5 of the Act, and Section 104.530. The Section 104.545 substantial compliance assessment is not a Section 104.565 final Board opinion and order which adopts the time-limited water quality standard.

Also, if a petition is deemed in substantial compliance, the Agency will then file a recommendation with the Board. If the petition is found deficient, the Board will identify deficiencies in the petition that must be corrected for the petition to be in substantial compliance. If the effectiveness of the water quality standard is stayed pursuant to Section 104.525 and the Board determines in an interim order that the petition is not in substantial compliance, the petitioner will be required to file an amended petition by deadlines adopted the Board pursuant to Section 104.540. After the deadline passes, the Board must determine in a final order whether the amended petition is in substantial compliance. Any participant may file a motion for reconsideration pursuant to 35 Ill. Adm. Code 101.520² of a final Board order

² Section 101.520 Motion for Reconsideration:

determining whether the amended petition is in substantial compliance.

As to Midwest generation's request for the Board to designate a Section 104.545 order as an "interim order" rather than a "final order" (*See* page 5 of Midwest Generation's Post Hearing Comments), the Agency disagrees. The Agency would like to maintain the ability for all participants to file a Section 101.520 motion for reconsideration after the Board makes a final substantial compliance determination, especially if the effectiveness of water quality standard is being stayed for a petitioner.

For example, if the effectiveness of a water quality standard is stayed for a petitioner, such as Midwest Generation, and the Board determines that Midwest Generation's petition is not in substantial compliance, Midwest Generation must then file an amended petition/petitions by the established deadline and the Board must then determine if the amended petition is in substantial compliance for Midwest Generation to maintain the stay of the effectiveness of the water quality standard. After the deadline, if the Board determines in a final order that Midwest Generation's petition is not in substantial compliance, Midwest Generation, along with any other participant, may file a motion for reconsideration with the Board within 35 after the Board's final order.

Finally, the Agency believes by allowing all participants to file a Section 101.520 motion for reconsideration after the Board makes a final substantial compliance determination, the federal requirement of allowing for meaning public input will have been met. (*See* 40 CFR 131.20(b) and 80 FR 51042 (2015))

Midwest Generation is also asking the Board to: 1) Specify that the Section 104.565

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- a) Any motion for reconsideration or modification of a Board order must be filed within 35 days after the receipt of the order. (*See* Section 101.902.)
 - b) Any response to a motion for reconsideration or modification must be filed within 14 days after the filing of the motion.
 - c) A timely-filed motion for reconsideration or modification stays the effect of the order until final disposition of the motion in accordance with Section 101.300(d)(2).

Board opinion and order is an “interim order” or 2) At a minimum, clarify in the rules that the Section 104.565 Board order and opinion is a “final order.” (See Midwest Generation’s Post Hearing Comments at 6). In response, the Agency: 1) Disagrees with the request making the Section 104.565 Board order and opinion an “interim order” and 2) Agrees with Midwest Generation and asks the Board to clarify where necessary that it is a “final order.”

Under section 303(c) of the Clean Water Act, USEPA is to review or disapprove State-adopted water quality standards. See 40 CFR 131.5. A time-limited water quality standard (water quality standard variance) is a water quality standard subject to USEPA review and approval or disapproval. See 40 CFR 131.14. When considering whether a specific provision constitutes a new or revised water quality standard, USEPA looks to see if it is a legally binding provision adopted or established pursuant to state law, among other things. See What is a New or Revised Water Quality Standard Under 303(c)(3)? Frequently Asked Questions October 2012 (Attachment A). If it is not a legally binding provision adopted or established pursuant to state law, USEPA considers the provision likely not to be a new or revised water quality standard that USEPA has the authority and duty to approve or disapprove under section 303(c)(3) of the Clean Water Act. *Id.* Only a final Board order (rather than an interim Board order) “terminates the proceeding leaving nothing further to litigate or decide and that is subject to judicial review.” See 35 Ill. Adm. Code 101.202.

Therefore, to comply with federal requirements that all time-limited water quality standards are subject to USEPA review and approval before becoming effective for Clean Water Act purposes, the Agency asks the Board to: 1) Disregard the request making the Section 104.565 Board order and opinion an “interim order” and 2) Asks the Board to clarify where necessary that it is a “final order.”

Midwest Generation Comment C: The Proposed TLWQS Rules Require Further Revision to Avoid Unnecessary Delays

The Agency believes it addressed Midwest Generations comment regarding further revisions to avoid unnecessary delays above. See Agency reply above at pages 3 and 4.

Midwest Generation Comment D: The Board Should Include an Example of When an Extension of a Section 104.540 Deadline Should be Granted.

The Agency believes the Agency's November 14, 2017 proposed language in the Section 104.540 Board Note addresses all possible situations of when an extension of a Section 104.540 deadline should be granted. Therefore, an example of when an extension of a Section 104.540 deadline should be granted is not necessary.

Midwest Generation Comment E: The Board Should Allow Stays to Continue while a USEPA TLWQS Disapproval Decision is Being Appealed or if Petitioners File a Good Faith Petition to Modify under Section 104.570(c).

Midwest Generation requests that the Board should allow for stays to continue while USEPA disapproval decision is being appealed or if Petitioner files a good faith petition to modify under Section 104.570(c). (See Midwest Generation's Post Hearing Comments at 8-10). The Agency disagrees with this request. Section 104.525 is drawn directly from 38.5(h) of the Act. The Act explicitly states that a stay shall continue until the Board adopts the time-limited water quality standard and USEPA either approves or disapproves the time-limited water quality standard for failure to comply with 40 CFR 131.14. 415 ILCS 5/38.5(h)(2)(B)(i) and (ii) and 5/38.5(h)(4)(B)(i) and (ii). Therefore, based on the clear and explicit language of the Statute, the Agency asks the Board to disregard Midwest Generation's request for the Board to allow Stays to Continue while a USEPA TLWQS disapproval Decision is Being Appealed or if Petitioners file a Good Faith Petition to Modify under Section 104.570(c).

Midwest Generation Comment F: As Proposed by the Agency, Section 104.525 Needs Additional Safeguards to Assure Timely USEPA Participation Concerning a Proposed TLWQS.

Midwest Generation proposes that "following the comment period outlined in Section 104.555(g) of the Proposed Rules, if the Board intends to grant the TLWQS petition, it should first issue a tentative order and opinion and submit to the U.S.EPA for review and comment."³

³ As time-limited water quality standards are alternative water quality standards subject to USEPA review and approval (See 40 CFR 131.50), the Board is "adopting" a time-limited water quality standard, rather than "granting" regulatory relief.

See Midwest Generation's Post Hearing Comments at 10. The Agency asks the Board to disregard this comment for the reasons specified above in the Agency's reply on page 4 regarding Midwest Generations request that the Board consider a Section 104.565 as an "interim order."

To address this issue of assuring early USEPA involvement, the Agency included provisions in both Sections 104.550 and 104.555. Concurrently with the filing of the Agency's recommendation, the Agency must transmit a copy of its recommendation, including a copy of the time-limited water quality standard petition to USEPA. See the Agency's November 14, 2017 proposed rules at Section 104.550(d). This will assure USEPA has a copy and time to review the time-limited water quality standard petition as well as the Agency's recommendation prior to the public hearing held pursuant to Section 104.555.

Further to assure USEPA participation, after the hearing, the Agency is required to notify USEPA of the availability of the hearing transcript and must inform USEPA of the comment deadline. This will provide USEPA with a formal opportunity for early comment and discussion prior to review of any Board adopted time-limited water quality standard. See the Agency's November 14, 2017 proposed rules at Section 104.555(h).

Midwest Generation Comment G: The Comment Period Allowed on Petitions to Modify a TLWQS Disapproved by the USEPA Should be Within the Board's Discretion.

Midwest Generation suggests that the comment period allowed on petitions to modify a time-limited water quality standard should be within the Board's discretion. See Midwest Generation's Post Hearing Comments at 11. To address Midwest Generation's concern, the Agency proposes to reduce the Section 104.570(c)(3) comment period to 14 days. The proposed language reads as follows:

"The Board will accept public comments for at least 14 days after a petition to modify if filed."

Midwest Generation Comment H: The Board Should Clear Up Ambiguities in Section 104.525(b)((2)-(3)).”

To address Midwest Generation’s concern (*See* Midwest Generation’s Post Hearing Comments at 11), the Agency proposes the following modification to 104.525(b)(3):

“if the person fails to file an amended petition to address the Board’s non-substantial compliance determination under Section 104.545 by the deadline established under Section 104.540, the Board will dismiss the original petition and stay continues until all rights to judicial review are exhausted.”

Dated: December 19, 2017

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION
AGENCY

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Attachment A

WHAT IS A NEW OR REVISED WATER QUALITY STANDARD UNDER CWA 303(c)(3)?
FREQUENTLY ASKED QUESTIONS
OCTOBER 2012

DISCLAIMER

These Frequently Asked Questions (FAQs) do not impose legally binding requirements on EPA, states, or the regulated community, nor do they confer legal rights or impose legal obligations upon any member of the public. The CWA provisions and EPA regulations described in this document contain legally binding requirements. These FAQs do not constitute a regulation, nor do they change or substitute for any CWA provision or EPA regulations.

The general description provided here may not apply to a particular situation based upon the circumstances. Interested parties are free to raise questions and objections about the substance of these FAQs and the appropriateness of their application to a particular situation. EPA retains the discretion to adopt approaches on a case-by-case basis that differ from those described in these FAQs where appropriate. These FAQs are a living document and may be revised periodically without public notice. EPA welcomes public input on these FAQs at any time.

1. Why is EPA issuing these FAQs?

Determining which provisions constitute new or revised water quality standards (WQS) that EPA has the authority and duty to approve or disapprove under the Clean Water Act (CWA) section 303(c)(3) has increasingly become an issue as state and tribal¹ water programs are becoming more integrated with implementation policies and processes.

To date, EPA has evaluated each situation on a case-by-case basis. These FAQs consolidate EPA's plain language interpretation (informed by the CWA, EPA's implementing regulations at 40 CFR part 131, and relevant case law) of what constitutes a new or revised WQS that the Agency has the CWA section 303(c)(3) authority and duty to approve or disapprove.

2. How is evaluating whether a provision is a new or revised WQS different from determining whether a state or tribe's new or revised WQS are approvable?

There are two decisions EPA must make before approving or disapproving a state or tribe's new or revised WQS. First, EPA must determine whether the provision constitutes a new or revised WQS that EPA has the CWA section 303(c)(3) authority and duty to approve or disapprove. If it does, EPA must then determine whether the provision is approvable. This FAQ document only addresses EPA's position with regard to the first decision².

¹ "Tribal" and "tribes" refers to tribes authorized for treatment in the same manner as a state (TAS) under section 518(e) of the Clean Water Act (CWA) for purposes of CWA section 303(c) water quality standards (WQS).

² These FAQs in no way affect EPA's authority to approve or disapprove a state or tribe's continuing planning process (CPP) under CWA 303(e).

3. What is the basis for the information in these FAQs?

EPA's understanding of what constitutes a new or revised WQS under CWA section 303(c)(3) derives from the CWA itself, EPA's implementing regulations, and case law. The CWA requires EPA to approve or disapprove new or revised WQS and specifies that state WQS must consist of designated uses and criteria to protect such uses. In the 1987 amendments to the CWA, Congress recognized that antidegradation is a part of water quality standards (see section 303(d)(4)(B)).

EPA's regulation at 40 CFR § 131.3(i) provides that WQS "are provisions of State or Federal law" that consist of designated uses and water quality criteria. EPA's regulations at § 131.5 provide specificity as to what EPA's review under section 303(c) of the Act involves, at § 131.6 the minimum requirements for WQS submissions, and at § 131.13 that general policies states choose to include in their WQS are subject to EPA review and approval. 40 CFR §§ 131.5(a)(5), 131.6(d), and 131.12 further reinforce that antidegradation requirements are WQS.

In addition, case law relating to what constitutes a new or revised WQS has been established in (1) the Supreme Court's 1994 decision in *PUD No. 1 of Jefferson County v. Washington Dept of Ecology*, 511 U.S.700 (1994), which acknowledged that antidegradation requirements are part of WQS, and (2) the U.S. Court of Appeals for the Eleventh Circuit's 2004 decision, *Florida Public Interest Research Group Citizen Lobby, Inc., et al. v. EPA*, 386 F.3d 1070 (11th Cir. 2004), and subsequent EPA action on the Florida Impaired Waters Rule (IWR). The Court's decision in the Florida IWR case established that EPA has a mandatory duty to approve or disapprove a new or revised WQS even if the state did not submit such new or revised WQS to EPA for review. Thus, EPA's position is that its authority and duty to evaluate whether a provision is a new or revised WQS is not dependent upon whether the provision was submitted to EPA for review. In addition, in its decision following a 2004 remand in the IWR litigation, EPA determined that specific water quality criteria provisions in the IWR were new or revised WQS because they were legally binding provisions that define, change, or establish magnitude, duration or frequency of water quality criteria. EPA's current practice is to consider all the salient points from the CWA, regulations, and case law when evaluating whether a provision is a new or revised WQS.

4. What does EPA consider when evaluating whether a specific provision constitutes a new or revised WQS?

EPA considers four questions when evaluating whether a provision constitutes a new or revised WQS. If ALL four questions are answered "yes," then the provision would likely constitute a new or revised WQS that EPA has the authority and duty to approve or disapprove under CWA section 303(c)(3). If any of the four questions are answered "no," then the provision would likely not be a new or revised WQS that EPA has the authority and duty to approve or disapprove under CWA section 303(c)(3).

1. Is it a legally binding provision adopted or established pursuant to state or tribal law? This consideration stems from the use of the terms "adopt," "law," "regulations", and "promulgate" in CWA section 303(a)-(c), and from EPA's regulations at 40 CFR 131.3(i), which specify that

WQS "are provisions of state or federal law."³ EPA considers documents incorporated by reference into state or tribal law to be legally binding provisions adopted or established pursuant to state or tribal law⁴.

AND

2. Does the provision address designated uses, water quality criteria (narrative or numeric) to protect designated uses, and/or antidegradation requirements for waters of the United States? The CWA, EPA's implementing regulation, and case law have broadly established three core components of WQS - designated uses, water quality criteria, and antidegradation requirements. Therefore, this consideration explicitly specifies that for a provision to be a WQS, it must include or address at least one of these three core components.

AND

3. Does the provision express or establish the desired condition (e.g., uses, criteria) or instream level of protection (e.g., antidegradation requirements) for waters of the United States immediately or mandate how it will be expressed or established for such waters in the future? This consideration recognizes that if a provision meets the above two considerations and expresses the desired condition or level of protection for waters of the United States, it may be a new or revised WQS that EPA has the authority and duty to approve or disapprove under CWA section 303(c)(3), regardless of whether that expression applies immediately or will be applied in the future. EPA action on provisions that may not apply immediately will ensure that EPA is able to provide input as early as possible in the state's or tribe's WQS development process, thus enabling the states, tribes, and EPA to carry out their functions under the CWA in the most efficient, expedient manner possible.

AND

4. Does the provision establish a new WQS or revise an existing WQS? While a provision may meet the first three considerations, the EPA's authority and duty to review and approve or disapprove such provisions under section 303(c)(3) are limited to those WQS that are new or revised. A provision that establishes a new⁵ WQS or has the effect of changing an existing WQS would meet this consideration. In contrast, a provision that simply implements a WQS without revising it would not constitute a new or revised standard.

5. Does EPA consider general policies under 40 CFR § 131.13 to be WQS?

EPA's regulation at 40 CFR § 131.13 provides that states and tribes may, at their discretion, "include in their state standards, policies generally affecting their application and implementation, such as mixing zones, low flows and variances." 40 CFR § 131.13 also states that "Such policies are subject to EPA review and approval." EPA has the CWA section 303(c)(3) authority and duty to approve or disapprove general policies such as mixing zones as long as those policies themselves constitute new or revised WQS based on the four considerations above.

³ These FAQs deal with what constitutes new or revised WQS adopted by states or authorized tribes. It does not discuss whether or how provisions of federal law may constitute WQS. If EPA promulgates federal WQS for state or tribal waters, EPA adheres to the same four considerations in promulgating such new or revised WQS.

⁴ A provision in a document incorporated by reference must meet all 4 considerations to be a new or revised WQS.

⁵ A provision that EPA has never approved as a WQS would be considered "new." It must also meet the other three considerations to be a new or revised WQS.

6. Does EPA have the authority and duty to approve or disapprove non-substantive revisions to WQS?

EPA considers non-substantive edits to existing WQS to constitute new or revised WQS that EPA has the authority and duty to approve or disapprove under CWA section 303(c)(3). While such revisions do not substantively change the meaning or intent of the existing WQS, EPA believes that it is reasonable to treat such non-substantive changes in this manner to ensure public transparency as to which provisions are effective for purposes of the CWA. EPA notes that the scope of its action in reviewing and approving or disapproving such non-substantive changes would extend only as far as the actual non-substantive changes themselves. In other words, EPA's action on non-substantive changes to previously approved WQS would not constitute an action on the underlying previously approved WQS. Any challenge to EPA's prior approval of the underlying WQS would be subject to any applicable statute of limitations and prior judicial decisions.

7. Does EPA have any CWA authority over provisions that do not constitute new or revised WQS?

In cases where the Agency believes that an existing state or tribal WQS (i.e., a provision that meets the first three considerations but is not new or revised) is inconsistent with the CWA, or that the existing WQS lack what is necessary to be consistent with the CWA, the Administrator may determine "that a revised or new standard is necessary to meet the requirements" of the CWA under CWA section 303(c)(4)(B). An Administrator's determination triggers a duty on the part of EPA to propose and promulgate such WQS unless the state or tribe adopts and EPA approves WQS addressing EPA's determination.

In addition, the CWA and its regulations grant EPA authority over state and tribal implementation of WQS through its oversight or implementation of the NPDES and 303(d)/TMDL programs. For example, revisions to NPDES state/tribal programs are subject to EPA approval under 40 C.F.R. § 123.62, and EPA may object to state/tribal draft or proposed NPDES permits for point source discharges if the limits in those permits would not achieve applicable WQS. Similarly, EPA may add waters to a state's or tribe's list of water quality-limited waters if the state/tribe did not assess waters in a manner consistent with the applicable WQS.

State and tribal law may include provisions that do not meet the four considerations described in these FAQs, such as those guiding implementation of their CWA programs (e.g., NPDES or CWA section 303(d) assessment provisions). If such provisions do not meet the four considerations, and therefore EPA does not approve or disapprove them under Section 303(c)(3), the status of such provisions would be determined under the applicable requirements of the other CWA programs the provisions are intended to implement.

CERTIFICATE OF SERVICE

I, Sara G. Terranova, Assistant Counsel for the Illinois EPA, herein certifies that I have served a copy of the foregoing Notice of Filing and the Illinois EPA's Reply to Comments filed on December 5, upon persons listed on the Service List by electronic filing with the Illinois Pollution Control Board on December 19, 2017.

Dated: December 19, 2017

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