

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.