



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 8

1595 Wynkoop Street  
DENVER, CO 80202-1129  
Phone 800-227-8917  
www.epa.gov/region08

AUG - 7 2014

Ref: EPR-EP

Mr. L. David Glatt, Chief  
Environmental Health Section  
North Dakota Department of Health  
918 East Divide Avenue  
Bismarck, North Dakota 58501-1947

Re: EPA Action on Revisions to *Standards of  
Quality for Waters of the State*

Dear Mr. Glatt:

The U.S. Environmental Protection Agency Region 8 completed its review of North Dakota's new and revised water quality standards. The North Dakota State Health Council (Council) adopted these revisions on February 11, 2014, and submitted them to the EPA for review with a letter dated April 14, 2014, from the North Dakota Department of Health (Department). The submittal package included: (1) a copy of the notice of proposed amendments; (2) the state's response to comments; (3) revised *Standards of Quality for Waters of the State* (33-16-02.1); and (4) a letter certifying that the amendments were adopted in accordance with state law. Receipt of the submittal package on April 14, 2014, initiated the EPA's review pursuant to Section 303(c) of the Clean Water Act (CWA or the Act) and the implementing federal water quality standards regulation (40 CFR Part 131).

We commend the Department and Council for the improvements to North Dakota's water quality standards. Commendable revisions include the adoption of new aquatic life criteria for acrolein and carbaryl and upgrading the lake classifications that apply to two reservoirs.

#### **Clean Water Act Review Requirements**

The CWA § 303(c)(2), requires states and authorized Indian tribes<sup>1</sup> to submit new or revised water quality standards to the EPA for review. The EPA is required to review and approve, or disapprove, the submitted standards. Pursuant to CWA § 303(c)(3), if the EPA determines that any standard is not consistent with the applicable requirements of the Act, the Agency shall, not later than the ninetieth day after the date of submission, notify the state or authorized tribe and specify the changes to meet the requirements. If such changes are not adopted by the state or authorized tribe within ninety days after the date of notification, the EPA is to propose and promulgate such standard pursuant to CWA § 303(c)(4). The Region's goal has been, and will continue to be, to work closely with states and authorized tribes throughout the standards revision process so that submitted revisions can be approved by the EPA.

---

<sup>1</sup> CWA Section 518(e) specifically authorizes EPA to treat eligible Indian tribes in the same manner as states for purposes of CWA Section 303. See also 40 CFR Section 131.8.



Printed on Recycled Paper

Pursuant to the EPA's Alaska Rule (40 CFR § 131.21(c)), new or revised state standards submitted to the EPA after May 30, 2000, are not effective for CWA purposes until approved by the EPA.

### **Today's Action**

Today the EPA is approving the revisions to the state water quality standards. The rationale for the EPA's action is summarized below and discussed in detail in the enclosure.

### **Endangered Species Act Requirements**

The EPA's approval of North Dakota's water quality standards is considered a federal action which may be subject to the Section 7(a)(2) consultation requirements of the Endangered Species Act (ESA). Section 7(a)(2) of the ESA states that "each federal agency ... shall ...insure that any action authorized, funded or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined to be critical..." The EPA initiated consultation under ESA § 7(a)(2) with the U.S. Fish and Wildlife Service (Service) regarding our approval of the new or revised water quality standards summarized in category 2 below and discussed in the enclosure. The EPA also has a CWA obligation, as a separate matter, to complete its water quality standards action. Therefore, in acting on the state's water quality standards today, EPA is completing its CWA § 303(c) responsibilities. However, because ESA consultation on the EPA's approval of these standards is ongoing, the EPA's approval is made subject to the outcome of the ESA consultation process. Should the consultation process with the Service identify information regarding impacts on listed species or designated critical habitat that supports amending the EPA's approval, the EPA will, as appropriate, revisit and amend its approval decision for those new or revised water quality standards.

### **Summary of the EPA's Decision**

The new or revised provisions include the following:

**1) Water Quality Standards Approved Without Condition**

Several clarifying additions, edits, and format modifications to existing rule.

**2) Water Quality Standards Approved Subject to ESA Consultation**

- The addition of new water quality criteria for carbaryl and acrolein for the protection of aquatic life;
- New and revised lake classifications in 33-16-02.1, Appendix II (Lake and Reservoir Classifications); and
- Reverting language in 33-16-02.1-09(3)(e)(1).

**3) Provisions the EPA is Not Acting on Today**

Lake improvement or maintenance program guidelines (33-16-02.1-09(3)(e)(2)).

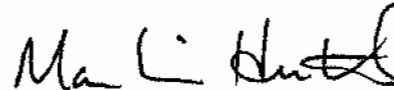
## Indian Country

The water quality standards approvals in today's letter apply only to water bodies in the state of North Dakota, and do not apply to waters that are within Indian country, as defined in 18 U.S.C. § 1151. Today's letter is not intended as an action to approve or disapprove water quality standards applying to waters within Indian country. The EPA, or authorized Indian tribes, as appropriate, will retain responsibilities for water quality standards for waters within Indian country.

## Conclusion

The EPA Region 8 thanks the Department and Council for their efforts to review and revise North Dakota's water quality standards. The recent revisions clarify North Dakota's existing regulations and improve the State's water quality program. The EPA looks forward to working with the Department to make additional improvements to the State's water quality standards. If you have any questions, please call Lareina Guenzel on my staff at (303) 312-6610.

Sincerely,

A handwritten signature in black ink, appearing to read "Martin Hestmark".

Martin Hestmark  
Assistant Regional Administrator  
Office of Ecosystems Protection  
and Remediation

Enclosure

cc: Mr. Peter Wax  
Division of Water Quality, North Dakota Department of Health

## **Rationale for the EPA's Action on North Dakota's New/Revised Surface Water Quality Standards**

Today's EPA action letter addresses the revisions to North Dakota's water quality standards adopted by the State Health Council on February 11, 2014. This enclosure provides a summary of the revisions and a rationale for the action taken by the EPA. The discussion below covers the following categories of revisions: (1) revisions that are approved for purposes of CWA § 303(c) without condition, (2) revisions that are approved for purposes of CWA § 303(c), subject to ESA consultation, and (3) provisions that the EPA is not acting on today.

### **1) WATER QUALITY STANDARDS APPROVED WITHOUT CONDITION**

#### Non-Substantive Changes to Existing Water Quality Standards

The EPA considers non-substantive edits to existing water quality standards to constitute new or revised water quality standards.<sup>2</sup> North Dakota adopted several revisions that would be included in this category. For example, the definition of recreation was updated to include the "primary recreational waters", several CAS registry numbers were updated and the hardness dependent criteria are now presented as full equations, rather than just the slope and intercept values. While these revisions do not substantively change the meaning or intent of the existing water quality standards, the 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. Accordingly, all non-substantive revisions to Chapter 33-16-02.1 are approved.

### **2) WATER QUALITY STANDARDS APPROVED SUBJECT TO ESA CONSULTATION**

#### Aquatic Life Criteria (33-16-02.1 Table 2)

North Dakota adopted the EPA recommended carbaryl (77 Fed. Reg. 30280-30282, May 22, 2012) and acrolein (74 Fed. Reg. 46587-46588, September 10, 2009) water quality criteria for the protection of aquatic life. The EPA has determined that the revised criteria are consistent with EPA guidance and the federal requirement to adopt water quality criteria that protect designated uses. See 40 CFR § 131.11(a)(1). Accordingly, the EPA approves these revisions subject to ESA consultation.

#### Lakes and Reservoir Classification (Appendix II)

The Council added two previously unclassified reservoirs to Appendix II: South Buffalo Gap Dam with Class 4 (marginal fishery); and Harmon Lake with Class 3 (warm water fishery). For lakes that are not currently listed in Appendix II, Class 4 applies by default. Therefore, the revised classifications will result in equivalent protection for aquatic life in South Buffalo Gap Dam and potentially more stringent protection of aquatic life in Harmon Lake. The Department also upgraded the classification of Round Lake from Class 3 to Class 2 (cool water fishery), which results in more stringent dissolved oxygen

---

<sup>2</sup> See EPA's October 2012 *What is a New or Revised Water Quality Standard Under CWA 303(c)(3)?-- Frequently Asked Questions* available at <http://water.epa.gov/scitech/swguidance/standards/cwa303faq.cfm>.

criteria. The EPA has determined the revisions to Appendix II accurately reflect the existing aquatic life uses of these water bodies. Accordingly, the EPA approves these revisions subject to ESA consultation.

#### 33-16-02.1-09(3)(e)(1)

In its action letter dated September 16, 2010, the EPA disapproved revisions to 33-16-02.1-09(3)(e)(1). North Dakota returned the provision to its previously approved language so that Class I stream criteria continue to apply to all reservoirs, which are the water quality standards that are currently in effect for CWA purposes. The EPA approves this revision subject to ESA consultation and the disapproval is resolved.

### **3) PROVISIONS THE EPA IS NOT ACTING ON TODAY**

#### Lake Improvement or Maintenance Program Guidelines (33-16-02.1-09(e)(2))

The existing nutrient goals (nitrate = 0.25 mg/L and phosphate = 0.02 mg/L) were deleted and replaced with a chlorophyll *a* goal of 20 µg/L in the revised water quality standards. Consistent with the “goals” language included in the provision, the State considers the parameters identified for lake improvement or maintenance program to be nonbinding “guidelines.” The State currently relies on the state-wide narrative water quality standards when assessing aquatic life use attainment in lakes and reservoirs.<sup>3</sup> The EPA is not acting on the revised lake improvement or maintenance program guidelines today because the EPA determined they are not water quality standards requiring Agency review and approval under CWA § 303(c).<sup>4</sup>

---

<sup>3</sup> The 2012 Integrated Report contains the North Dakota Surface Water Assessment Methodology available at: [http://www.ndhealth.gov/WQ/SW/Z7\\_Publications/IntegratedReports/Final\\_2012\\_IntegratedReport\\_20121029.pdf](http://www.ndhealth.gov/WQ/SW/Z7_Publications/IntegratedReports/Final_2012_IntegratedReport_20121029.pdf)

<sup>4</sup> See EPA’s October 2012 *What is a New or Revised Water Quality Standard Under CWA 303(c)(3)?-- Frequently Asked Questions* available at <http://water.epa.gov/scitech/swguidance/standards/cwa303faq.cfm>.

