

Water Quality Standards Litigation

Internal deliberative pre-decisional - FOR USE BY 2024 PRESIDENT-ELECT TRANSITION TEAM MEMBERS ONLY

ISSUE SUMMARY:

States, territories, and authorized Tribes establish water quality standards (WQS) for surface waters under the Clean Water Act (CWA) Section 303(c) to protect aquatic life, aquatic-dependent wildlife, and human health effects related to swimming, fishing, boating, or use as a source of drinking water or irrigation. The EPA Administrator (or delegated authority) reviews new or revised WQS for consistency with the requirements of the CWA and its implementing regulations, and either approves or disapproves the submission. The EPA Administrator also has authority to establish federal WQS if they (or authorized delegate) determine that new or revised WQS are necessary to meet the requirements of the CWA. Citizens may challenge EPA's actions or inactions. Listed below are several federal WQS rules currently in process and active litigation related to recent rules.

KEY POINTS:

WQS are comprised of designated uses (e.g., swimming and fishing) and criteria to protect those uses, as well as antidegradation policies and procedures. Criteria are expressions of water quality attributes and can be expressed as a narrative statement or as specific numeric levels. WQS are not directly enforceable but provide the foundation for a wide range of CWA programs. Under CWA Section 303(c)(3), the EPA has 60 days to review and approve, and 90 days to review and disapprove a state or Tribal WQS submission. If the EPA disapproves, states/Tribes have 90 days to remedy the disapproval. If the state/Tribe does not remedy the disapproval, the EPA must "promptly propose" (see CWA Section 303(c)(4)) a WQS that meets the requirements of the CWA. The EPA has 90 days after proposal to promulgate a final rule. If a state later remedies the disapproval that necessitated the federal rule, the EPA typically withdraws the federal rule.

ONGOING/UPCOMING REVIEWS FOR FY2024:

Rulemaking:

- **Final California Statewide Aquatic Life/Wildlife Criterion for Selenium:** In November 2018, the EPA proposed a selenium water quality criterion applicable to certain fresh waters of California to protect aquatic life and aquatic-dependent wildlife. The EPA is under a consent decree to finalize this rule within six months of completing Endangered Species Act (ESA) consultation. Completion of ESA consultation occurred in August 2024.
- **Tribal Baseline Water Quality Standards:** In April 2023, the EPA proposed "baseline" WQS for Indian reservations that do not have CWA-effective WQS in place. Refer to Federal Baseline WQS & Tribal Reserved Rights Final Rules Transition Briefing Paper for more details. The EPA intends to publish a final rule in the fall of 2024.
- **Florida Human Health Criteria:** In November 2023, the EPA proposed new and revised human health water quality criteria for certain pollutants in Florida to reflect the latest science to protect human health. The rule will improve the quality of the water for fishing and for use as drinking water sources. The EPA intends to publish the final rule by the end of 2024.
- **Delaware Dissolved Oxygen Criteria:** In December 2023, the EPA proposed a revised aquatic life designated use and dissolved oxygen water quality criteria in portions of the Delaware River to ensure protection of all life stages of oxygen-sensitive species, including two species of sturgeon that are listed as endangered under the ESA. The EPA is currently subject to a mandatory duty lawsuit regarding EPA's failure to publish a final rule within 90 days of proposal.
- **Idaho Mercury Criteria:** In April 2024, the EPA proposed a mercury water quality criterion for fresh waters in Idaho to protect aquatic life. The EPA is under a court order to promulgate this criterion for Idaho. If ESA consultation is needed on EPA's proposal, the court order directs the EPA to initiate such consultation by

January 9, 2025. The EPA is then obligated to finalize the rule within 8 months of completing any necessary ESA consultation.

- **Alaska Human Health Criteria:** In June 2024, the EPA issued an Administrator’s Determination finding that updated human health criteria are necessary to protect fish consumers in Alaska. The EPA intends to publish a proposed rule by the end of 2024.
- **Federal Recreational Water Quality Criteria Applicable to Certain Waters in New York:** The EPA may need to propose bacterial pathogens water quality criteria to protect swimmers in certain marine waters in the vicinity of New York City. In 2016, the EPA approved New York’s action to designate these waters for primary contact recreation (e.g., swimming), and in 2018, the EPA disapproved the criteria New York promulgated because they do not protect primary contact recreation. There is ongoing litigation in which NYC-area environmental groups are seeking to force the EPA to promulgate protective criteria for New York to remedy the disapproval. There is currently no date targeted for such a promulgation.

Ongoing WQS litigation and Court-ordered deadlines:

- **Washington Human Health Criteria:** In December 2023 a coalition of industry groups challenged EPA’s November 2022 promulgation of human health criteria for Washington. These federal criteria replaced the State of Washington’s criteria, which EPA determined were not based on sound science, as required by the CWA and EPA’s regulations. This action follows several prior EPA and State actions: in 2016 EPA partially disapproved Washington’s criteria and promulgated federal criteria, and in 2019 and 2020 EPA approved the State’s prior criteria and withdrew the federal criteria.
- **Washington Aquatic Life Criteria Litigation:** In August 2022, the District Court for the Western District of Washington vacated EPA’s denial of a petition “to update the State of Washington’s water quality standards for the protection of . . . aquatic life from toxic contaminants.” Pursuant to the court’s order, EPA issued a new decision on a group of pollutants from Plaintiff’s petition. The EPA granted the petition for nine pollutants (acrolein, aluminum, arsenic, cadmium, copper, cyanide, mercury, nickel, and selenium) and in May 2023 issued an Administrator’s Determination finding that Washington needs new or revised aquatic life criteria for those pollutants. Washington adopted new or revised aquatic life criteria for all pollutants covered in the Determination except for mercury; EPA is in the process of evaluating that submittal and considering ESA consultation options. There is an active litigant who has submitted a Freedom of Information Act (FOIA) request to the EPA on the status of its efforts to backstop Washington with respect to mercury. Pursuant to the court’s order, EPA is required to issue a new decision on the Plaintiff’s petition with respect to an additional set of pollutants by August 2025.
- **Tribal Reserved Rights:** On May 28, 2024, a coalition of eight states filed a complaint against the EPA in the U.S. District Court for the District of North Dakota challenging the EPA’s final rule. On June 14, 2024, four additional states joined as Plaintiffs, and the 12 Plaintiff states filed a motion requesting that the court stay the rule or enjoin the EPA from enforcing the rule against Plaintiff states pending the outcome of the litigation. In their motion, Plaintiffs argue, in pertinent part, that the EPA lacked statutory authority under the CWA to promulgate the final rule, as the CWA does not explicitly require states to consider Tribal reserved rights in establishing WQS. The Plaintiffs’ motion is fully briefed, and the parties are awaiting a decision from the court. Plaintiffs’ initial merits brief is due November 4, and the EPA’s initial merits brief is due January 3, 2025.

KEY EXTERNAL STAKEHOLDERS:

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| <input type="checkbox"/> Congress | <input checked="" type="checkbox"/> Industry | <input checked="" type="checkbox"/> States | <input checked="" type="checkbox"/> Tribes | <input type="checkbox"/> Media | <input checked="" type="checkbox"/> Other Federal Agency |
| <input checked="" type="checkbox"/> NGO | <input type="checkbox"/> Local Governments | <input checked="" type="checkbox"/> Public | | | |

MOVING FORWARD:

The program anticipates additional petitions for the EPA to promulgate new or revised state WQS, as well as litigation related to its rulemaking activity and actions to approve or disapprove WQS under Section 303(c) of the CWA. The EPA will continue to use an internal decision-making framework to review and evaluate petitions for the potential to improve environmental conditions, as well as the resource implications for any such rules.