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*Via email to: [ow-docket@epa.gov](mailto:ow-docket@epa.gov)*

**Re: Water Quality Standards Regulatory Clarifications; Proposed Rule: Docket ID No. EPA-HQ-OW-2010-0606**

Dear Acting Assistant Administrator Stoner:

The Kentucky Division of Water (KDOW) is pleased to provide the U.S. Environmental Protection Agency (EPA) with comments on the proposed Water Quality Standards Regulatory Clarifications 78 Fed. Reg. 54518 (Sept. 4, 2013).

The Commonwealth of Kentucky would be directly impacted by the proposed changes to the federal water quality standards (WQS) regulation. The KDOW is the agency in Kentucky with delegated authority to implement the Clean Water Act, including the development and implementation of state water quality standards. The KDOW is concerned that several aspects of this proposed rule will be difficult or impossible for States to implement as written. The proposed WQS regulation could detrimentally impact the States, requiring substantially greater State resources to implement redirecting resources away from water quality improvements toward increased administrative activities. These effects of the proposed WQS regulation are contrary to the purported benefits of the proposed rule changes. The KDOW is also concerned that EPA has not adequately calculated both the direct and indirect costs of implementing this rule. KDOW also believes the proposed regulation inappropriately expands the water quality

standards program oversight by EPA to substantially overseeing States' implementation of their water quality standards programs.

The preamble to the proposed WQS regulation, as well as EPA's public position in webinars and presentations on the proposed WQS regulation, paints a benign picture of the proposed rule as regulatory clarifications meant to improve implementation of the water quality standards program [78 FR 54521]. However, the proposed rule is in fact an alarming expansion of EPA's authority which usurps the inherent authority of States that is recognized, preserved, and protected by the Clean Water Act, to develop and implement their own water quality standards. The proposed WQS regulation establishes greater authority and oversight by EPA of States' water quality standards programs, including implementation of water quality standards and non-water quality standards programs. The proposed WQS regulation simultaneously reduces EPA's potential for litigation challenge regarding its approval of State water quality standards while establishing a low bar for potential litigants to challenge State decisions. It very much appears as if EPA is attempting to bring all State decision-making pursuant to State authority granted by the Act under the rubric of the "water quality standards program" and thus broaden greatly EPA's control of that decision-making.

The proposed WQS regulation incorporates into the water quality standards review process issues such as antidegradation policy implementation, implementation of water quality standard variances, and the implementation of compliance schedules as a means to expand EPA's oversight and control of state decision making. In addition, EPA's analysis of the economic burden of the proposed WQS regulation on States is greatly underestimated. The proposal would impose considerable additional new burdens on States' financial and personnel resources. EPA should be aware of and sensitive to this fact that in the present budgetary climate, states cannot afford to take on additional and unnecessary burdens in their implementation of the Clean Water Act; For example, at a minimum in order to conduct additional analyses required for the triennial review KDOW would need to add additional personnel to the water quality standards program and the KPDES permitting program. EPA should reconsider the proposed WQS regulation before going forward, being careful to evaluate whether the proposed WQS regulation is necessary and whether EPA has authority under the Act to specify how states will develop and implement water quality standards, and which Clean Water Act tools actually constitute water quality standards.

KDOW notes that "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." Clean Water Act §101(b). To that end, "States . . . are responsible for reviewing, establishing, and revising water quality standards." 40 CFR §131.4(a). "Water quality standards" are provisions of State *or* Federal law [not both] which consist of a designated use or uses for waters and water quality criteria to protect the use or uses. 40 CFR §131.3(i). CWA §303(d)(4)(b) requires in pertinent part only that "for waters . . . where the quality of such waters equals or exceeds levels necessary to protect the designated use for such waters or otherwise required by applicable water quality standards . . . any water quality standard established . . . may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section." By its proposed 'clarifications' EPA seeks to expand its antidegradation 'policy' to the

point it swallows whole the primary responsibilities and rights of States to establish water quality standards for State waters. This is not the intention of the Act.

KDOW and EPA have long experience with antidegradation policy. Following nearly fourteen years of litigation, Kentucky's waterbody-by-waterbody approach to antidegradation review was approved by the United States Court of Appeals for the Sixth Circuit in *Kentucky Waterways Alliance v. Johnson*, 540 F.3d 466 (6<sup>th</sup> Cir. 2008). EPA was aware of how Kentucky implemented antidegradation review on a waterbody-by-waterbody basis, approved the state's antidegradation provisions, and vigorously defended the decision. As the court noted, quoting EPA's own language in its *Advanced Notice of Proposed Rulemaking*, 63 FR 36742 (July 7, 1998 [63 FR at 36783]) the waterbody-by-waterbody approach "allows States and Tribes to focus limited resources on protecting higher-value State or Tribal Waters." *Id.* at 477. This is still true, and EPA again approved amendments to Kentucky's Antidegradation Policy Implementation regulation in November, 2010, which continues to be conducted successfully on a waterbody-by-waterbody approach. The proposed WQS regulation contradicts EPA's long history of approving and successfully defending the waterbody-by-waterbody approach and begs the question why would EPA seek to make such a change when it approved the waterbody-by-waterbody approach to antidegradation as recently as 2010. The proposed WQS regulation contradicts the ruling of the Sixth Circuit Court and the precedent of EPA's approval of Kentucky's Antidegradation Policy Implementation Methodology as well as EPA's previously published position regarding the waterbody-by-waterbody approach.

EPA has not identified any circumstances that create an urgent need for the proposed substantial expansion of the Water Quality Standards Regulatory Program. The existing federal regulations have been in effect since 1983. In KDOW's experience, EPA has not been reticent about using its authority to review and approve Kentucky's water quality standards to ensure that Kentucky's water quality criteria, designated uses, and its antidegradation methodologies are sufficiently protective of Kentucky waters. Therefore, there does not appear to be sufficient reason for EPA to revise its water quality standards at this time.

**1) Purpose:**

KDOW finds the proposed wording changes at §131.2 be unnecessary.

EPA proposes to change §131.2:

"A water quality standard defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria ~~necessary~~ that ~~to~~ protect the designated uses."

The proposed wording changes at §131.2 also connote a more prescriptive approach by EPA to States in developing their water quality standards, similar to the proposal to replace "assure" in § 131.12(a)(2) with "ensure." States as regulators and permitting authorities seek to protect water quality while accommodating all the goals of the Clean Water Act; States do not have the ability to serve as guarantors of water quality.

## 2) *EPA Authority*

KDOW firmly believes water quality standards must be based on sound scientific rationale and appreciates EPA recognition of this important tenet of water quality standards. However, the phrase “based on sound scientific rationale” added at §131.5(a)(2) should be removed as this language creates a new and subjective standard of review. According to EPA (78 FR 54537) the phrase “based on sound scientific rationale” was added to improve consistency with §131.11. Therefore, KDOW recommends the following revision:

“§131.5(a)(2) Whether the State has adopted criteria that protect the designated water uses consistent with §131.11 ~~based on sound scientific rationale.~~”

Currently, at §131.5(a)(4), EPA is authorized to determine whether State standards *which do not include* 101(a)(2) uses, “are based upon appropriate technical and scientific data and analyses.” And, at §131.6(f) States are required to submit “General information which will aid [EPA] in determining the adequacy of the scientific basis of the standards *which do not include* the uses specified in section 101 (a)(2) of the Act.” In addition, at §131.6 (b) States are required only to identify in their water quality standards submissions to EPA the methods used and analyses conducted to support revisions to WQS. By its proposed additional language at §131.5(a)(2) it appears EPA is seeking to expand its criteria review authority. Such expansion is unnecessary and would increase the burden on States in reviewing and submitting revised water quality criteria.

KDOW respectfully suggests that EPA strike §131.5(a)(3):

“~~§131.5(a)(3) Whether the State has adopted an antidegradation policy consistent with §131.12(a), and if the State has chosen to adopt implementation methods, with those implementation methods are consistent with §131.12.~~”

## 3) *Designation of Uses*

EPA’s current antidegradation policy at §131.12(a)(1) requires existing uses and water quality necessary to protect existing uses shall be maintained and protected. §131.12(a)(2), regarding high quality waters, provides that water quality may be degraded only if necessary to accommodate important economic or social development, and existing uses shall be protected. EPA proposes to add a requirement that a State, if seeking to remove a use through a Use Attainability Analysis (UAA), must also adopt the Highest Attainable Use (HAU) and criteria to protect the HAU. KDOW supports the concept of evaluating and adopting WQS that include attainable uses and reflect achievable water quality conditions in the course of developing a use attainability analysis (UAA). However, KDOW has several concerns with the introduction of the concept of “highest attainable use” (HAU).

The concept of HAU goes beyond protecting existing uses. HAU is an entirely new policy for which there is no support in the Act. The proposed changes introducing this concept impose new and increasingly burdensome responsibilities on States. States must not only conduct a 'structured scientific assessment' of factors affecting attainment of designated uses, but must conduct another 'structured scientific assessment' to determine the HAU. Additionally, the proposed HAU would further burden states to develop separate criteria for each HAU. The concept and the proposed language also include inherent ambiguities. For example, what constitutes "closest to" 101(a)(2) uses, and who determines what is the "best available data"? EPA's statements regarding HAUs also assume a hierarchical relationship among uses, which in some cases may be accurate, but frequently, uses are simply different. Finally, although it is not discussed in EPA's proposal, where a HAU is established for a waterbody pursuant to a use attainability analysis, a high quality antidegradation review analysis could be required thereafter for that newly established use for proposed new or expanded discharges even though the waterbody is partially impaired for the full use, further adding to the burden on the State. Assuming EPA proceeds with the proposal, EPA should clarify that high quality antidegradation review is not required in states that apply antidegradation review on a waterbody-by-waterbody basis with respect to a "highest attainable use" and the supporting criteria that are established after a UAA or variance.

EPA's goals would be better served by deleting the term "highest" and focusing more appropriately on the desired outcome of the UAA process: designation of appropriate uses that are attainable and protective water quality conditions. KDOW's suggests §131.3(m) be stricken:

~~"§131.3(m) *Highest attainable use* is 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 proposed amendments in §131.12(a)(2) are to change "assure" to "ensure" with respect to a state's obligation to protect existing uses fully in any instance in which a state allows lower water quality to occur in a high quality water following antidegradation review. The word "ensure," means to insure or make certain that some event will occur. The word "assure" means to inform positively to dispel doubt, but does not mean that one is guaranteeing an outcome. The proposed change may be subtle, but it is not without significance in that it connotes the State as insurer of adequate water quality thereby establishing a standard of review that is not attainable: that the State is guaranteeing an outcome. KDOW believes such a change is not necessary or prudent. Adding a requirement to ensure an outcome with respect to authorizing a lowering of water quality following antidegradation review imposes an arguably unattainable standard of review. The proposal also imposes an unacceptable burden on States by increasing the level of review and requiring a guarantee that allowing lowering of water quality will protect existing uses fully. No State can guarantee such an outcome but a State can do its utmost

to be reasonably assured of that outcome. KDOW's suggests striking the proposed revision of §131.12(a)(2) to change "assure" to "ensure."

The proposed WQS regulation at §131.12(b) requires the State to develop and make available to the public, methods for implementation of the State's antidegradation policy. Such a requirement would inappropriately expand EPA's review authority with regard to antidegradation implementation. Antidegradation implementation is not a water quality standard, and therefore is not subject to review by EPA under the authority provided it in §303(c) of the Act. EPA may review a State's antidegradation policy for consistency with EPA's antidegradation policy, but EPA may not review State's implementation for consistency with EPA's view on implementation. See §131.6(f) regarding State WQS submissions: "(f) State shall submit: General information . . . on general policies applicable to State standards which may affect their application and implementation." Antidegradation implementation is at the State's discretion; it is reviewable only for consistency with EPA antidegradation policy. (*N.B.* EPA does not itself appear to have an antidegradation implementation policy. To Kentucky's knowledge, EPA has not addressed antidegradation in any of its CWA §402 general permits for federal facilities, tribes and direct implementation states.)

KDOW appreciates EPA's goal of better permitting practices for antidegradation. KDOW agrees that transparency regarding States' implementation methods is important, and should help to further the goal of protecting existing water quality where it exceeds the State's water quality standards. However, KDOW does not support a requirement that those implementation methodologies be adopted into state law. While this is the desired option for many states, including Kentucky, it is not mandated by the Act, nor is it necessarily conducive to enhanced water quality management. Many states use the flexibility that comes with not adopting their methods into rule to refine and improve their methodology more regularly. While KDOW continues to be a strong advocate of transparency and clarity, this goal does not necessarily require rulemaking.

KDOW believes that the proposal at §131.12(b) is unnecessary. §131.20(b) already requires that States hold a public hearing for reviewing water quality standards "in accordance with state law," as do EPA's water quality management regulations at 40 CFR Part 122, and EPA's public participation regulations at 40 CFR Part 25. Therefore, KDOW suggests that EPA strike §131.12(b). If EPA determines to adopt this language, KDOW's suggested revision to §131.12(b) is as follows:

"(b)The State shall develop and make available to the public statewide methods for implementing the antidegradation policy adopted pursuant to paragraph (a) of this section. A State's antidegradation implementation methods shall be designed to achieve be consistent with the antidegradation-protection policy stated in consistent with paragraph (a) of this section. ~~Such methods must ensure that:~~"

The proposed WQS regulation amends §131.12(b)(1) to require that States that identify high quality waters on a waterbody-by-waterbody basis, such as Kentucky, must not exclude a waterbody from “high quality water protection” “solely because not all of the uses specified in CWA Section 101(a)(2) are attained.” In the preamble, EPA provides an example of a waterbody that may be impaired for primary contact recreation, but not aquatic life, as one that should be subject to high quality water antidegradation review. This proposed amendment seems to eliminate the waterbody-by-waterbody option for States and effectively mandate that States adopt a parameter-by-parameter approach to Tier II review, the “solely because not all of the uses specified in CWA Section 101(a)(2) are attained” language notwithstanding. This proposal is contrary to the ruling in *Kentucky Waterways Alliance v. Johnson*, 540 F.3d 466 (6<sup>th</sup> Cir. 2008). In that case, following nearly fourteen years of litigation, Kentucky’s use of a waterbody-by-waterbody approach to antidegradation review was approved by the Sixth Circuit Court of Appeals. As the court noted, the waterbody-by-waterbody approach “allows States and Tribes to focus limited resources on protecting higher-value State or Tribal Waters.” *Id.* at 477, echoing EPA’s language recognizing the advantages of the waterbody-by-waterbody approach to identification of high quality waters in its *Advanced Notice of Proposed Rulemaking*, 63 FR 36742, 36783 (July 7, 1998). EPA again approved amendments to Kentucky’s Antidegradation Policy Implementation regulation in November, 20010. Kentucky’s approach to antidegradation, which unlike many states is has codified it antidegradation implementation policy in regulation, continues to be conducted successfully on a waterbody-by-waterbody approach.

This change would overstep EPA’s authority provided by §303(c) of the Act and contradicts previously litigated and resolved issues. Identification of high quality/Tier 2 waters is a State primacy decision and KDOW appreciates the preamble language clarifying this fact [78 FR 54527]. KDOW believes that the incorporation of the 303(d) list into the States’ decision-making is within the States’ authority. As the courts have concluded that the water body-by-water body approach is acceptable, the mechanism by which water bodies receive this level of protection should be at the State’s discretion.

EPA’s proposed rule conflicts not only with Kentucky’s approved implementation procedures but would also be an improper intrusion on the rights of States to develop water quality standards based upon evaluation of uses, in particular where a waterbody is not of sufficient quality to meet all uses. The amendments would essentially deprive states of the waterbody-by-waterbody option and effectively mandate States to adopt the parameter-by-parameter approach for all non-impaired uses. As EPA has recognized in its previously published statements, and in court documents, this would substantially increase the resource burden on states by requiring antidegradation review on waters that are impaired for one or possibly even multiple uses. This approach contradicts a long history of EPA approving and successfully defending the waterbody-by-waterbody approach. It is beyond KDOW’s comprehension that EPA would seek to re-open this issue which has been settled by the courts. In addition, requiring States to identify high quality waters use-by-use would additionally negate any resource advantage of the waterbody-by-waterbody approach and would serve to seriously tax States’ limited resources. This proposal appears obtuse to the resource demands on the States in a

budgetary climate that has a poor prognosis for additional resources for States to implement the Act.

The phrase “solely because not all of the uses specified” are attained in §131.12(b)(1) is ambiguous and it is not clear how this would be interpreted. If EPA determines to pursue this rule and retain this language, the likely result will be increased litigation with regard to issuance of NPDES permits in a State implementing a waterbody-by-waterbody approach. In addition, the proposed language is not merely clarification of existing requirements; intended or otherwise the proposed language would impose new duties and obligations on some States increasing the number of waterbodies subject to Tier II review.

KDOW suggests that EPA strike §131.12(b)(1). If EPA determines to adopt this language, KDOW’s suggests the following revision :

“§131.12(b)(1) High quality waters are identified on a parameter-by-parameter basis or on a water body-by-water body basis at the State’s discretion, ~~but must not exclude any water body from high quality water protection solely because not all of the uses specified in CWA section 101(a)(2) are attained~~”

If EPA adopts the provisions regarding high quality water classifications as proposed at §131.12(b)(1), at a minimum it should clarify that previously approved state antidegradation policies remain in effect and do not need to be amended.

In addition to the expansion of the number of waterbodies that will be subject to review under EPA’s proposal in States that utilize a waterbody-by-waterbody approach, EPA’s proposed revisions of the procedures and standards for conducting antidegradation reviews would substantially increase the burden on states in conducting such reviews. EPA proposes to amend the Water Quality Standards Rule at §131.12(b)(2) to state:

“The State **will only make a finding** that lowering high water quality is necessary, pursuant to paragraph (a)(2) of this section, after conducting an alternatives analysis that evaluates a range of non-degrading and minimally degrading **practicable** alternatives that have the potential to prevent or minimize the degradation associated with the proposed activity. If the State can identify any **practicable alternatives**, the State **must choose one** of those alternatives to implement when authorizing a lowering of high water quality. (emphasis added)”

KDOW agrees alternatives to eliminate and minimize water quality impacts to Tier 2 waters are appropriate and agrees an “alternatives analysis” is a key component of antidegradation implementation. However, KDOW has a number of concerns regarding this proposed language. First, the enabling provision of the CWA at §303(c) requires only that, for waters that equal or exceed the quality necessary to meet designated uses, a water quality standard for such waters may be revised only if such revision is consistent

with “the antidegradation policy established under” §303(c). That policy is set out at 40 CFR § 131.12 and requires only that (1) existing uses be protected, and (2) before the State may authorize a discharge that will lower water quality, an “alternatives analysis” must be conducted. By its proposed language EPA is ranging far afield of policy and well into implementation – EPA’s language seeks to dictate to States *how* an alternatives analysis shall be conducted, and which alternative States shall choose. It is not in EPA’s purview to review implementation of standards; the Act does not provide EPA authority to prescribe how States will implement their water quality standards. The proposed language goes well beyond consideration of wastewater options or no-discharge considerations. The proposed language would result in States making business and process decisions for an applicant. It should not be the State’s burden to perform an alternatives analysis on a potentially unlimited number of scenarios.

KDOW is concerned the final rule language will prohibit States’ consideration of cost-effectiveness as a factor in the alternative selection when reviewing antidegradation alternatives analyses. While there may be situations where a less-degrading treatment technology or other alternative may exist for a proposed discharge, States must be able to determine whether additional water quality benefit is sufficient to justify the additional expense or whether pursuing more holistic approaches would lead to as great or greater water quality improvements.

Specifically, EPA’s proposal to mandate that states conduct “an alternatives analysis that evaluates a range of non-degrading and minimally degrading practicable alternatives that have the potential to prevent or minimize the degradation” under §131.12(b)(2) intrudes on the States’ flexibility to establish their own policies and procedures for antidegradation reviews. EPA authority to mandate implementation also has no basis in “standards” established under §303(c) of the Act. Nevertheless, EPA’s proposal goes even further to require states to “choose” one of the non-degrading or minimally degrading alternatives before allowing any lowering of high quality water. Typically, the applicant for a discharge permit conducts the alternatives analysis and presents the analysis and data to the State, including the selection of the proposed alternative. The State then reviews the analysis and the proposed alternative and either approves the analysis and alternative selection or finds the analysis and conclusion deficient.

The proposed §131.12(b)(2) creates a situation that establishes a seemingly unattainable standard of review for States, thus providing potential litigants a very low bar for challenges to State permitting decisions. The preamble [78 FR 54529] specifies that the alternatives analysis could include “no discharge, pollution prevention measures, process changes, and reduction in the scale of the project.” The alternatives outlined in the preamble go well beyond evaluation of whether more effective wastewater options are technically and affordably available. As such, a potential challenger to a proposed permit may successfully contend that nearly any alternative should be considered, and as the standard of review of such considerations is not well defined the proposed addition to the regulation creates an uncertain decision process for States.

Similarly, the term 'practicable' as used in §131.12(b)(2), is ambiguous and has the potential to lead to excessive litigation. "Practicable alternative" is not defined in the proposed regulation. However, EPA indicates in the preamble [78 FR 54528] that the term means "the alternatives considered must be available for the proposed activity, technologically possible, able to be done or put into practice successfully at the site in question, and economically viable." This view of "practicable alternative" also goes well beyond consideration of wastewater options to considerations most States are not equipped or authorized to make and beyond the intent of the Act. Likewise, it is not clear what would be the standard for an "economically viable alternative." As proposed, §131.12(b)(2) places the onus on States to conduct the alternatives analysis as well as the selection of alternatives, while the ambiguities in terms of "practicable alternative" and "economically viable" put an ever greater resource demand on States to conduct Tier II reviews and present a low bar for anyone opposing a permit to challenge a State's Tier II determination. The proposal would engender even more involvement of EPA in State decision-making regarding wastewater planning, infrastructure, etc.

KDOW believes antidegradation review appropriately includes consideration by the State of whether alternate wastewater options that will limit the lowering of water quality are available to the permit applicant, are affordable, and have been appropriately considered for the proposed discharge. States do not have the expertise or resources to make such determinations on the potentially unlimited number of scenarios, nor has EPA taken any of this resource demand on states into consideration in its cost/benefits analysis. Again, the applicant for a discharge permit, not the State, typically conducts the alternatives analysis and presents the analysis and data to the State, including the selection of the proposed alternative. The State then reviews the analysis and the proposed alternative and either approve the analysis and alternative selection or find the analysis and conclusion deficient. To place the onus of the alternatives analysis and alternative selection on States not only creates considerable resource demands on States, it puts States in the position of making policy, local development, and resources decisions that many States, Kentucky included, may not be authorized to make, or which are otherwise not advisable. In practice, most States review the alternatives analyses submitted by the applicants who seek permits to discharge to Tier 2 waters. Additionally, some States, such as Kentucky, have processes that sequence the components of an alternatives analysis that may be constrained by the current proposed language.

KDOW suggests that)(2) be stricken in its entirety as EPA is not authorized to mandate how water quality standards are implemented.

~~"(2) The State will only make a finding that lowering high water quality is necessary, pursuant to paragraph (a)(2) of this section, after conducting an alternatives analysis that evaluates a range of non-degrading and minimally degrading practicable alternatives that have the potential to prevent or minimize the degradation associated with the proposed activity. If the State can identify any practicable alternatives, the State must choose one of those alternatives to implement when authorizing a lowering of high water quality."~~

Kentucky is also concerned the antidegradation implementation language in §131.12 does not provide for *de minimis* exemptions from antidegradation review for projects that consume only an insignificant increment of the assimilative capacity of a waterbody. In *Kentucky Waterways Alliance v. Johnson*, 540 F.3d 466 (6th Cir., 2008) the Sixth Circuit Court of Appeals affirmed the use of *de minimis* exemptions and EPA and the KDOW made great efforts to ensure the appropriate adoption of the *de minimis* exemption in Kentucky's Antidegradation Policy Implementation Methodology regulation (401 KAR 10:030). EPA should consider authorizing in the final rule *de minimis* exemptions from antidegradation review for projects that consume only an insignificant increment of the assimilative capacity of a waterbody.

#### 4) *Water quality standard variances*

KDOW supports EPA's efforts to recognize the availability of water quality standard variances in the proposed §131.14. EPA has long recognized that states have the discretion to grant variances to water quality standards. However, 40 CFR §131.13 properly requires only that state variance *policies* are subject to EPA review and approval. Once a State's variance policy in the State's water quality standards is approved by EPA States have the discretion to issue variances as appropriate and consistent with that approved policy. KDOW is concerned that the proposed WQS regulation at §131.14 would expand EPA's authority beyond approving a States' variance policy in its water quality standards to approving how a States' variance policy is implemented, generally and specifically. The newly-proposed §131.14 appears to seek control of State implementation of variance policies and to make such implementation virtually impossible due to a labyrinthine series of demonstrations, documentation, and justifications. These requirements are not authorized by the Act and would usurp States' implementation authority. Variances are a matter of State discretion; EPA is also wrong in its effort to create a mandate for individual variances to be approved by EPA in advance for permit-specific variances. In accordance with State/EPA MOAs, the NPDES permitting process allows EPA appropriate opportunity to review and object to any permit which includes a water quality standard variance if EPA believes such variance is not consistent with a State's approved variance policy.

In addition, the proposed WQS variance regulation requires States to establish an interim highest attainable designated use, as well as supporting interim numeric water quality criteria, thereby disallowing narrative interim variance criteria, despite that States may establish narrative water quality criteria in compliance with the Act and implementing regulations. As a variance is intended to lead to meeting designated uses and is time-limited, requiring the States to develop an interim highest attainable use and corresponding numeric criteria places an unnecessary burden on States. In the case of a variance in water quality standards for a specific permitted discharge, the permit will require technologies identified in the permit that will minimize lowering of water quality must be utilized. Therefore, interim highest attainable use and corresponding interim numeric criteria are not necessary.

Variances are not widely used with the exception of some success in certain states. A

significant reason for lack of widespread use has been the concern that each variance must be adopted as an independent water quality standard. This restriction has made the use of variances to water quality standards a cumbersome tool, at best. The WQS regulation should allow sufficient flexibility for States to have available a streamlined variance process. KDOW believes EPA's expectation that each variance granted by a State will be reviewed in the course of each triennial review and again at the termination of the variance is unrealistic and unnecessary and would place an undue burden on States. KDOW does not agree that two separate reviews of a variance one at the triennial review pursuant to 40 CFR §131.20, and a second at the end of the variance term, are necessary. Examination of the variance at the end of its term is reasonable and necessary to determine whether the variance should be renewed or terminated. However, an in-depth review of every variance at each triennial review places an unnecessary burden on States. The concept of a triennial review of variances stems from EPA's interpretation that a variance constitutes a change in use (§131.20) and unmet uses must be reviewed at each triennial review. KDOW recommends that the final WQS regulation specifically state that review of a variance is required only at the end of its term.

KDOW's suggests the following revisions to §131.14:

§ 131.14 Water quality standards variances.

States may, at their discretion, grant variances subject to the provisions of this section and public participation requirements at § 131.20(b). A water quality standards variance (WQS variance) is a time-limited designated use and criterion for a specified pollutant(s), permittee(s), and/or water body or waterbody segment(s) that reflect the highest attainable condition during the specified time period. ~~WQS variances are water quality standards subject to EPA review and approval or disapproval and must be consistent with this section. Any such WQS variances adopted after [effective date of the final rule] must be consistent with this regulatory section.~~

(a) Applicability:

(1) All applicable WQS not specifically addressed by the WQS variance remain applicable.

(2) (i) Where a state adopts a WQS variance, the State regulations must continue to reflect the underlying designated use and criterion unless the State adopts and EPA approves a revision to the underlying designated use and criterion consistent with § 131.10 or § 131.11.

(ii) The interim requirements specified in the WQS variance are in effect during the term of the WQS variance and apply for CWA section 402 permitting purposes and in issuing certifications under section 401 of the Act for the permittee(s), pollutant(s), and/or water body or waterbody segment(s) covered by the WQS variance. For these limited purposes, the

interim requirements will be the standards applicable for purposes of the CWA under 40 CFR 131.21(c)-(e).

(3) A WQS variance shall not be granted if the designated use and criterion addressed by the proposed WQS variance can be achieved by implementing technology-based effluent limits required under sections 301(b) and 306 of the Act.

(b) ~~Submission Requirements: Minimum requirements of a WQS variance:~~

(1) A WQS variance must specify the following:

(i) Identifying information: A WQS variance must identify the pollutant(s), permittee(s), and/or the water body or waterbody segment(s) to which the WQS variance applies.

~~(ii) WQS that apply during a variance for CWA section 402 permitting purposes and in issuing certifications under section 401 of the Act: A WQS variance must specify: (A) The highest attainable interim use and interim numeric criterion, or August 2013 EPA 820-F-13-027 (B) An interim numeric effluent condition that reflects the highest attainable condition for a specific permittee(s) during the term of the variance. Neither (A) nor (B) of this paragraph shall result in any lowering of the currently attained water quality unless a time-limited lowering of water quality is necessary during the term of a variance for restoration activities, consistent with paragraph (b)(2)(ii) of this section.~~

~~(iii) Date Length of the term of the WQS variance will expire: States must include an expiration date the length of the term for all WQS variances, consistent with paragraph (b)(2) of this section. WQS variances must be as short as possible but expire no later have a length of term no longer than the time required for the waterbody to attain its use than 10 years after state adoption.~~

~~(2) The State must submit a demonstration justifying the need for a WQS variance. For a WQS variance to a use specified in section 101(a)(2) of the Act or a sub-category of such a use, the State must submit a demonstration that attaining the designated use and criterion is not feasible during the term of the WQS variance because:~~

~~(i) One of the factors listed in § 131.10(g) applies, or~~

~~(ii) Actions necessary to facilitate restoration through dam removal or other significant wetland or stream reconfiguration activities preclude attainment of the designated use and criterion while the actions are being~~

implemented.

(3) For a waterbody variance, the state must identify and document any cost-effective and reasonable best management practices for nonpoint source controls related to the pollutant(s) and location(s) specified in the WQS variance that could be implemented to make progress towards attaining the designated use and criterion. A State must provide public notice and comment for any such documentation.

(c) Implementing variances in NPDES permits: Consistent with paragraph (a)(2)(ii) of this section, a WQS variance serves as the basis of a water quality-based effluent limit included in a NPDES permit for the period the variance is in effect. Any limitations required to implement the WQS variance shall be included as conditions of the NPDES permit for the permittee(s) subject to the WQS variance.

(d) WQS variance renewals: The State must document whether and to what extent BMPs have been implemented to address the pollutant(s) subject to the WQS variance and the water quality progress achieved during the WQS variance period. ~~EPA may approve a WQS variance renewal if the State meets the requirements of this section and provides documentation of the actions taken to meet the requirements of the previous WQS variance. For a waterbody WQS variance renewal, the state must also provide documentation of whether and to what extent BMPs have been implemented to address the pollutant(s) subject to the WQS variance and the water quality progress achieved during the WQS variance period. Renewal of a WQS variance may be disapproved if the applicant did not comply with the conditions of the original WQS variance, or otherwise does not meet the requirements of this section.~~

## 5) *Compliance schedules §131.15*

KDOW believes compliance schedules are necessary tools of the Act and supports EPA's recognition of the important role of compliance schedules in the permitting process. However, the proposed WQS regulation at §131.14 is once more attempting to control States' authority and discretion to implement their water quality standards. A compliance schedule is not a water quality standard governed by 40 CFR Part 131 but is, rather, a tool for implementing the National Pollutant Discharge Elimination System permitting program set out in 40 CFR Part 122. Calling a permitting tool a "water quality standard" does not make it so. It very much appears as if EPA is attempting to bring all State decision-making pursuant to State authority granted by the Act under the rubric of "water quality standards" thus broadening greatly EPA's control of States' decision-making. KDOW respectfully suggests that EPA strike §131.15.

~~"§131.15 Compliance schedule authorizing provisions:~~

~~A State may, at its discretion and consistent with state law, authorize~~

~~schedules of compliance for water quality based effluent limits (WQBELs) in NPDES permits by including a compliance schedule authorizing provision in its water quality standards or implementing regulations. Any such provision is a water quality standard subject to EPA review and approval and must be consistent with sections 502(17) and 301(b)(1)(C) of the Act. Individual compliance schedules issued pursuant to such authorizing provisions are not themselves water quality standards. Individual compliance schedules must be consistent with CWA section 502(17), the state's EPA-approved compliance schedule authorizing provision, and the requirements of §§ 122.2 and 122.47."~~

**6) *Procedures for Review and Revision of Water Quality Standards at §131.20***

KDOW sees no use for adding the phrase "in particular" in the proposed WQS regulation at §131.20(a); currently the regulation requires such water body segments "shall be re-examined every 3 years."

The proposed WQS regulation also adds: "Similarly, a State shall re-examine its water quality criteria to determine if any criteria should be revised in light of any new or updated CWA section 304(a) criteria recommendations to assure that designated uses continue to be protected." §131.20 requires States to review every three (3) years designated uses for waterbodies that do not include the uses specified §101(a)(2) of the Act. The proposal at §131.20(a) adds a new duty and burden on States to review their water quality standards criteria also, and it is reasonable to presume that EPA would require states to document such review and compare the review to EPA-issued §304(a) criteria recommendations. KDOW is concerned that EPA will interpret this language to require States to revise criteria for which EPA has issued §304(a) criteria recommendations for which the State has determined is not necessary.

**7) *Final Administrator Determinations" at §131.22***

The additional language in the proposed WQS regulation at §131.22 appears to be an effort to insulate EPA from claims it has established a new water quality standard through guidance or other writing without going through the regulations promulgation process required by the Administrative Procedures Act. KDOW has no issue with the signatory and statement requirements, so long as EPA does not require States to 'comply' with guidance or other un-promulgated water quality standard, or else resign themselves to EPA objection to permits that don't adopt the water quality standard recommended in such guidance, similar to the conductivity criterion in EPA's "final guidance": "*Improving EPA Review of Appalachian Surface Coal Mining Operations Under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order,*" issued July 21, 2011.

**8) *Economic analysis***

KDOW is concerned EPA's economic analysis has not accounted for all costs that States

will bear in implementing the proposed rule. Examples of such costs include those associated with triennial reviews of water quality criteria, determining [highest] attainable uses, costs associated with conducting additional Tier II antidegradation review, costs associated with developing interim numeric criteria, and additional hours required to do state-specific cost-benefit analyses. KDOW therefore recommends that EPA work with ACWA and States to review the economic analysis and update it to reflect costs EPA did not consider.

Federal and state financial support for water quality protection is likely, at best, to remain constant and at worst diminish considerably over the next few years. At all government levels, competing priorities are a significant challenge to generating additional resources to continue meeting existing expectations and to support new additional requirements. Like EPA, States must navigate through complex technical, economic, political, and social frameworks as they carry out water quality programs. The proposed WQS regulation places considerable additional burden on States.

KDOW would like to thank EPA for the opportunity to comment on the proposed rulemaking, and we appreciate your consideration of our recommendations. KDOW encourages EPA to continue discussions with its State co-regulators, and remain ready to answer questions regarding these comments. Please do not hesitate to contact me at (502) 564-3410 ext. 4012 or at [Peter.Goodmann@ky.gov](mailto:Peter.Goodmann@ky.gov) if you have any questions or wish to discuss these issues in more detail.

Sincerely,



Peter T. Goodman, Acting Director  
Division of Water

c: R. Bruce Scott, Commissioner  
Mary Stephens, OGC  
James Giattina, EPA Region IV  
Alexandra Dunn, ACWA