January 2, 2014

Ms. Nancy Stoner
Acting Assistant Administrator for Water
United States Environmental Protection Agency
Office of Water
William Jefferson Clinton Building
1200 Pennsylvania Ave NW, MC 4101M
Washington, DC 20460

Via email to: 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 Association of Clean Water Administrators (ACWA) is pleased to provide the U.S. Environmental Protection Agency (EPA) with comments on the proposed national rulemaking to clarify the federal water quality standards (WQS) regulation (78 Fed. Reg. 54518, Sept. 4, 2013). ACWA is the independent, nonpartisan, national organization of state and interstate (hereinafter states) water program directors, responsible for the daily implementation of the Clean Water Act's (hereinafter the Act or CWA) water quality programs, including the WQS programs for which states are responsible under the Act.

States are directly impacted by the proposed changes to the federal WQS regulation. During the public comment period, state and interstate managers attended EPA Office of Water (OW) informational webinars on the proposed rulemaking, as well as a 1.5 day Workshop to discuss, with OW's Office of Science and Technology, key elements of the proposed rule. ACWA appreciates EPA's willingness to discuss this proposal with its state co-regulators. These discussions have helped states better understand the Agency's concerns and the rationale behind various proposed provisions. While some state concerns have been alleviated by these discussions, and EPA is likely to be able to improve understanding in the final rule, states are concerned that some aspects of this proposed rule will be very difficult to implement as written, could detrimentally impact the proposed benefits, and in some cases, redirect resources away from water quality improvements towards administrative activities. States are also

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concerned that EPA has not adequately considered both the direct and indirect costs of implementing this rule.

In this letter, ACWA provides several recommendations that states believe, if adopted, will improve the rule and help reduce unintended consequences. We would like to note that the feedback and comments below are not necessarily shared by every state surface water program, and we strongly encourage EPA to carefully consider the individual state/interstate comments that it receives. ACWA looks forward to continued dialogue with the Agency on this "regulation to regulate states."

I. Designation of Uses

1) "Highest" attainable use may be a misnomer in some instances

EPA proposes to include the concept of "highest attainable use" (HAU).[1] While ACWA 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), ACWA considers the use of the term "highest" to be an inaccurate portrayal of use decisions.[2]

EPA's preamble provides examples related to aquatic life uses and notes circumstances where a state or tribe may be able to demonstrate that a use supporting a particular class of aquatic life is not attainable.[3] EPA further notes that in such a situation EPA's expectation is that the aquatic life use not be removed altogether if some intermediate aquatic life use is attainable.[4] ACWA generally agrees with these statements, but we are concerned that these examples oversimplify the use designation decisions confronted by states.

EPA's statements regarding HAUs assume a hierarchal relationship among uses, which in some cases may be accurate, but frequently, uses merely may be different. For example, some states have aquatic life uses for different temperature and dissolved oxygen criteria that are tailored to the needs of different aquatic communities and life stages. In this system, one use is no more protective than another use, rather, they each are tailored to protect cold water communities with the water quality conditions suitable for each. As such, these uses are appropriately all considered to be uses specified in section 101(a)(2) of the Act, although their criteria may differ. Similarly, a waterbody that is appropriately designated a warm water fishery is and should be fully considered a use specified in

[1] 78 Fed. Reg. 54518 at p. 28, col. 1.
[2] At least one state supports the language on the highest attainable use because it clarifies and strengthens their ability to protect water quality where a use cannot be attained.
[3] *See* 78 Fed. Reg. 54518 at p. 8.
[4] *Id.* at p. 7, col. 2.

section 101(a)(2) of the Act. Designating it otherwise (with expectations for colder temperatures) would be inappropriate.

A similar situation may arise where a state takes a uniform approach to protecting, for example, lakes, wetlands, run of river reservoirs, and impoundments, but later has sufficient data to differentiate the water quality needs among these different waterbody types and can tailor standards to those specific waterbody needs and functions. This does not assign or prescribe a level or hierarchy based on value or importance of one need or function over another, but simply acknowledges a difference in what is needed to protect each aspect of the resource. 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 reflect attainable goals and protective water quality conditions.

Suggested revision:
§ 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).~~

§ 131.10(g) Pursuant to § 131.10(j), States may designate or remove a use or a subcategory of a use as long as the action does *not* remove protection for an existing use, and the State can demonstrate that attaining the designated use is not feasible because of one of the six factors in this paragraph. If a State adopts new or revised WQS based on a use attainability analysis, the State shall ensure those standards include and/or protect ~~also adopt the highest~~ attainable uses and the criteria to protect those uses. To meet this requirement, States may, at their discretion, utilize their current use categories or subcategories, develop new use categories or subcategories, or adopt another use which may include a location-specific use.

2) Level of specificity expected with implementing the highest attainable use concept

EPA dedicates a significant amount of the preamble discussion to states' ability to use their own classification system in implementing the concept of ensuring attainable uses are designated. However, as EPA acknowledges, states' use classification systems range from highly specific to more general in nature.[5] For states with broad use categories it is unclear what use an analysis of HAU will compel the state to adopt. If a waterbody cannot meet a currently designated use specified in section 101(a)(2) of the Act, but potentially could attain something better than the alternative category, what is the effective requirement? As written, it seems UAAs effectively will need to identify the

[5] *Id.* at p. 7, col. 1.

HAU subcategory that could be supported and, for every pollutant, develop the criteria that would protect that new use.

ACWA is concerned if the resulting requirements for states in implementing these provisions have the effect of requiring states to develop many new use categories as well as associated water quality criteria. The proposed text is unclear regarding how this concept should be implemented. As EPA is aware, development of water quality criteria is an extraordinarily resource-intensive effort, and for most states, the implicit requirement to develop "special" water quality criteria for each use change will effectively prevent states from conducting UAAs in all but the direst of circumstances.

At a minimum, EPA should:

- clarify in any final rule the expectations for states in terms of what would be required to adopt an attainable use. These expectations should address commonly encountered situations such as adoption of a mid-range aquatic life use or other designation that is degraded from a "101(a)(2)" use, but where partial support is attainable.
- clarify that the requirement to identify the [highest] attainable use is solely tied to the UAA process and therefore is not an independent requirement outside of the UAA process.
- develop estimated cost burdens for states to implement this requirement to assist states in their allocation of resources and to assist EPA in evaluating the cost-effectiveness of the regulations in achieving CWA 101(a) goals.

3) Clarification on uses specified in section 101(a)(2) of the Act

Given the proposed clarifications and requirements that relate to uses specified in section 101(a)(2) of the Act, EPA should clarify in any final rule that uses specified in section 101(a)(2) of the Act are those uses adopted by states that require full protection of aquatic life and recreation. EPA should further explain that those uses protected by EPA's recommended 304(a) criteria (or other criteria demonstrated to be fully protective of those uses) are considered uses specified by section 101(a)(2) of the Act.

Suggested revision:
§ 131.3(m) *Uses specified in section 101(a)(2) of the Act* include those uses designated by a state that meet the stated objective for "protection and propagation of fish, shellfish, and wildlife" and provide for "recreation in and on the water." Uses that are consistent with this definition and are protected by section 304(a) criteria or other criteria demonstrated to be fully protective of those uses shall be considered uses specified in section 101(a)(2) of the Act.

4) ***Revisions to clarify when a UAA is and is not required***

ACWA supports EPA's proposed clarifications regarding specifying that a UAA is only required when demonstrating that a use specified in section 101(a)(2) of the Act is not attainable. States have observed that this interpretation has not been consistent among EPA actions on state WQS in the past and this revision will assist in providing clarity to the states and others interested in state revisions to WQS and provide needed consistency in EPA actions.

This revision could be further improved by also clarifying in any final rule that replacing a use specified in section 101(a)(2) of the Act with a more specific version of that use is considered a refinement of a use and does not require a UAA. An example of such an action is replacing a general aquatic life use with a use that is specific to an aquatic life community or life stage (e.g., cold water fishery use or use targeting fish spawning). EPA should provide guidance or clarification on what information is needed for such an action.

II. Antidegradation Policy and Implementation Methods

1) Identifying high quality waters is a state-specific process

Identification of high quality/Tier 2 waters is a state primacy decision, as is the methodology chosen by the state as recognized by EPA in the preamble.[6] We support state WQS program decisions in this regard, provided they operate within the framework of the Act – and believe that the incorporation of the 303(d) list into that decision-making is within that state authority. If the water body-by-water body approach is acceptable, the mechanism by which high quality water bodies receive this level of protection should be at a state's discretion.

Suggested 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~~;

Another option would be to include language in the final rule preamble clarifying that the proposed rulemaking does not preclude a state's discretion to leave a waterbody off the Tier 2 list if one or more of its uses is not met.

2) The scope of implementation methods should be defined

EPA needs to clarify in the rules the scope of implementation methods that are envisioned. ACWA assumes, given the text of the proposed rule, that EPA is targeting

[6] *Id.* at p. 11, col. 1

the application of antidegradation policies during permit reviews. Since EPA has no guidance or concepts on how antidegradation policies are applied outside of permitting, neither EPA, the public, nor States will have understanding on how to review, approve, develop, or comment upon other implementation methods. Until such time as programmatic understanding is developed for programs outside of permitting, EPA should clarify the scope of implementation methods.

3) Implementation methods for antidegradation should not be required to be adopted into state Water Quality Standards

ACWA appreciates EPA's desire to achieve the goal of better permitting practices for antidegradation. We also agree that public transparency regarding states' implementation methods is important, and should help to further the goal of protecting existing water quality where it is better than that required by a state's WQS. However, we do not support a requirement that those implementation methodologies be adopted into state WQS. While this is the desired option for many states, it is not mandated by the Act, nor is it necessarily conducive to enhanced water quality management. For example, there are states that use the flexibility that comes with not adopting their methods into rule to refine and improve their methodology more regularly. Therefore, while we continue to be strong advocates of transparency and clarity, this does not necessarily require rulemaking. Along these lines, ACWA suggests the following revisions.

Suggested revisions:
§ 131.12(b) The State shall ~~develop~~ describe and make available to the public methods for implementing the statewide antidegradation policy adopted pursuant to paragraph (a) of this section. A State's antidegradation implementation methods ~~shall be designed to~~ achieve antidegradation protection consistent with paragraph (a) of this section~~.~~ if/when such methods ~~must~~ ensure that: [end of suggested revision]

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

4) Considerations for analysis of alternatives

ACWA understands that the concept of an "alternatives analysis" is a key component of antidegradation implementation, and appreciates the proposed rule's language to clarify expectations with regard to an antidegradation alternatives analysis (as broadly defined to include no discharge alternatives, not just a range of treatment technologies). However, we are concerned that the proposed language may not clearly communicate EPA's intent.

We agree that alternatives to eliminate and minimize water quality impacts to Tier 2 waters are appropriate. However, the proposed language, as written, may be interpreted

too narrowly, restricting the states' ability to effectively and efficiently satisfy this requirement. For example, the proposed language has the state "conducting" an alternatives analysis when in practice, most states review the alternatives analyses submitted by the applicants who seek permits to impact Tier 2 waters. Additionally, states may have processes that sequence the components of an alternatives analysis that may be constrained by the current proposal. The language below helps clarify EPA's intent and allows states necessary flexibility needed for efficient and effective implementation of the rule.

ACWA also wants to be certain that the final rule language allows states, when reviewing antidegradation alternatives analyses, to consider cost-effectiveness as an important factor in the alternative selection. Requiring a discharger to expend funds up to or near the thresholds expressed in EPA's Interim Economic Guidance for Water Quality Standards for a minor improvement in surface water quality is a concerning policy. While there may be situations in which a less-degrading treatment technology or other alternative exists for a proposed discharge, it may provide less additional water quality benefit for the additional expense than would pursuing more holistic approaches to water quality improvements. That is, resources could be spent to achieve a marginally better quality effluent at a single discharge point or to install nonpoint source controls throughout the watershed to achieve an overall water quality improvement. While we are not suggesting that EPA should mandate consideration of nonpoint source controls, EPA should also recognize that the level of detail and scope of alternatives considered should be commensurate with the level of risk posed by a discharge. For example, a small domestic wastewater facility that is not expected to have significant impacts on water quality should have the flexibility to perform a minimal alternatives analysis.

Suggested revision:
§ 131.12(b)(2) The State ~~will only~~ may make a finding that lowering high water quality is necessary, pursuant to paragraph (a)(2) of this section, after ~~conducting~~ an ~~alternatives~~ analysis has been conducted that evaluates a range of non-degrading and ~~minimally~~ less degrading practicable alternatives that have the potential to prevent or minimize the degradation associated with the proposed activity. ~~If the State can identify any~~ When practicable alternatives are identified, ~~the State must choose~~ one of those alternatives must be ~~to~~ implemented when authorizing a lowering of high water quality.

III. Water Quality Standards Variances

ACWA supports the proposed regulatory text addressing the issue of variances, as long as the regulation allows sufficient flexibility to have a streamlined variance process. Variances, though not widely used nationally, have been used with 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 WQS. That perceived restriction made

the use of variances unattractive in states that have protracted WQS approval processes. However, there are now examples of processes that are streamlined and allow for the adoption of a variance for a "class" or type of facility or pollutant. The streamlined process is attractive to a growing number of states as WQS become more complex and stringent.

To provide more detail on specific provisions of the proposed regulation regarding variances, ACWA offers the following comments:

1) Clarity needed on the level of review EPA expects in a state's triennial review and at the term of the variance

There is confusion as to the purpose of two separate reviews of variances – one at the triennial review pursuant to 40 CFR § 131.20, and a second at the end of the variance term. Examination of the variance at the end of its term is reasonable and necessary to determine whether the variance needs to be renewed or terminated. However, an in depth review at each triennial review is unnecessary. 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. ACWA recommends three approaches, in order of preference:

a. Specifically state in the final rule that variances do not need to be evaluated at each triennial review. Variance reviews would only take place at the term of the variance;

b. Specifically state in the final rule that variances would require review at the term of the variance minus a specific period of time to give the states and EPA time to determine if a renewal was necessary and to implement the renewal prior to the variance reaching its term; or

c. A highly streamlined review simply addressing the requirement in § 131.20 of whether "any new information has become available" that would alter the variance if EPA believes § 131.20 establishes the requirement to review a variance at each triennial review. This is especially true for variances known to be long term in nature such as restoration variances or those based on TMDL schedules that can be decades long.

2) 10 year variance term necessitates streamlined renewal process

The original concept of variances is that they are for a short period of time while new technology is developed or a permittee accumulates enough capital to be able to implement appropriate technology. While these types of variances still have utility, new issues have emerged that will necessarily require longer term variances – longer than the 10 years in the proposed rule. Examples include restoration variances, TMDLs for

persistent pollutants like PCBs or mercury, or strict nutrient criteria that drive extremely low permit limits for small and low income communities. Therefore, a streamlined renewal process needs to be embraced in the final rule if the term is limited to 10 years. *See also, 4, below regarding 10 year variance term.*

3) Modification of language on variance 'expiration'

In the context of the variance provision, the term "expiration" should be modified to express the concept that the variance has a specific term. This proposed language better comports with the concept of variance *renewal*. *Expiration* implies the variance ends and there is no option for renewal. No renewal implies the entire variance process must be restarted at the end of the variance term which could result in an unnecessarily time consuming process under some states' standards adoption processes. The phrase *length of the term of a variance* does not preclude renewal while also acknowledging a variance is limited in time.

Suggested revision:
§ 131.14(b)(1)(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 term of no longer than "X" ~~10~~ years after state adoption."

4) Considerations on variance term of 10 years

We strongly support the language in § 131.14(b)(1)(ii)(B) that allows for an NPDES permit effluent limitation to be used to express the highest attainable condition for a permittee. However, tying the variance to a permit limit may present complications, such as a permit being administratively extended beyond the term of the variance as per 40 CFR § 122.6. Since NPDES permits typically have a term of 5 years, it might be wise to allow variance terms to run 12-14 years (in lieu of the proposed 10 year term) to allow for possible administrative glitches that would result in an administrative extension. Another option would be to acknowledge that variances based on establishment of effluent limitations in a permit are limited by the term of the permit, instead of the variance. This could allow the variance to continue if a permit was administratively extended.

5) Clarification on Pollution Minimization Programs (PMP)

The preamble uses the specific terminology "Pollutant Minimization Program (PMP)" when discussing requirements for variances. The preamble states a PMP is **required** when utilizing an effluent limitation to express the highest attainable condition for a waterbody receiving a variance.[7] However, the PMP is never mentioned in the rule. If

[7] *Id.* at p. 18, col. 2.

EPA has a specific concept of what constitutes a PMP, the PMP requirement should be included in the rule language, and the term "Pollutant Minimization Plan" should be defined in 40 CFR § 131.3.

IV. State Review and Revision of Water Quality Standards

ACWA is supportive of the regulatory language addressing state review and revision to WQS at 40 CFR § 131.20, as long as the regulation does not require that every waterbody and water quality standard has to be addressed in every 3-year review. We agree that public participation and transparency in the WQS review and adoption processes play a very important role in protecting the nation's waters, and that all public comments should be addressed in each review. However, as resources decline and water quality issues rise, flexibility in how a state prioritizes review of its waters is critical.

It is also important that EPA clarifies what is required for a state to determine that criteria should or should not be revised in light of any new 304(a) criteria recommendations. It should not mean that a state needs to adopt or even take to rulemaking every recommendation. It should rather be considered sufficient if a state takes into consideration a new 304(a) criterion recommendation using its best information and/or judgment. For example, consider EPA's national recommendation for aquatic life mercury criteria and the hurdle they face with ESA consultation in the Pacific Northwest. A state may, upon consideration, decide it is best to not adopt an EPA 304(a) recommendation, and EPA may even concur.

Finally, both state and federal agencies face hurdles in getting through their administrative and legal processes, and delays by EPA in approving or disapproving water quality standard submissions adds to the hurdles states face in accomplishing timely and comprehensive review of their standards.

V. EPA Promulgation of Water Quality Standards (Administrator's Determination)

ACWA supports the proposed language on EPA promulgation of WQS at 40 CFR § 131.22(b). This language will empower EPA regional offices to have more productive conversations with states and will help advance the sharing and utilization of technical and scientific knowledge. The current fear of communications being misconstrued as constituting an Administrator's determination that a new or revised water quality standard is necessary to meet the requirements of the Act leads to isolation of states and EPA, and does not foster improvements to water quality. We expect such a clarification to allow states to communicate more openly and work more efficiently towards the goals of the Act.

VI. Compliance Schedule Authorization Provisions

ACWA supports the proposed language at 40 CFR Part 131.15 on compliance schedule authorizing provisions in that it helps to ensure a state's authorization of a permittee's compliance schedule as legally binding and allowable under the Act. Compliance schedules, like variances, are important tools for achieving the goals of the Act as they set forth attainable goals which dischargers can reasonably reach in a limited amount of time.

VII. Economic Analysis

Financial support for traditional water quality protection is likely, at best, to remain constant over the next few years. At both the federal and state levels, competing priorities make gathering additional resources to continue meeting existing expectations and to support new requirements a challenge. Like EPA, states must navigate through complex technical, economic, political, and social frameworks as they carry out water quality programs.

ACWA is concerned that 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 adopting revised variance provisions, triennial reviews of water quality criteria, determining [highest] attainable uses, and additional hours required to do state-specific cost-benefit analyses. We are also concerned that benefits are not adequately quantified. ACWA therefore recommends that EPA work with states to review the economic analysis and update it to reflect costs EPA did not consider.

We thank EPA for the opportunity to comment on the proposed rulemaking and appreciate the Agency's consideration of our recommendations, as well as the separate comments that will be filed by individual states. We encourage EPA to continue dialogue with its state co-regulators on the proposed rule, and we remain ready to answer questions regarding these comments. Please contact ACWA's Executive Director Alexandra Dunn at 202-756-0600 or adunn@acwa-us.org with any such questions or to plan further discussion.

Sincerely,

Shellie Chard-McClary
ACWA President
Water Quality Division Director
Oklahoma Department of Environmental Quality

Cc: Dr. Elizabeth Southerland, Director, Office of Science and Technology, Office of Water