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In-Depth Presentation: Designated Uses

WQS Regulatory Revisions Final Rule

Prepared by EPA Office of Water
Office of Science and Technology
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Logistics

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Purpose and Disclaimer

- Provide in-depth information about the designated uses requirements in EPA's Water Quality Standards Regulatory Revisions final rule.
- Provide an opportunity to ask clarifying questions about the designated uses requirements in the final rule.
- This webinar **does not**:
 - Impose any binding requirements
 - Determine the obligations of the regulated community
 - Change or substitute for any statutory provision or regulation requirement
 - Represent, change or substitute for any Agency policy or guidance
 - Control in any case of conflict between this discussion and statute, regulation, policy or guidance

Outline

- Why revise the designated uses provisions?
- Background
- When is a use attainability analysis (UAA) required and not required?
- What is the highest attainable use (HAU) requirement?

Why Revise the Designated Use Provisions?

- Designated uses drive water quality management decisions. Therefore, accurate designated uses are essential to restoring and protecting water quality to meet the goals and objectives of the Clean Water Act;
- The revisions improve the process by which states and authorized tribes designate and revise uses to better help restore and maintain resilient water quality and robust aquatic ecosystems; and
- The revisions also reduce potential confusion and conflicting interpretations of the regulatory requirements for establishing designated uses that can hinder environmental progress.

Background: Designated Uses and the Clean Water Act

- The Clean Water Act (CWA or the Act) discusses uses in two provisions of the Act.
 - ***CWA section 101(a)(2)***: national goal that, wherever attainable, water quality provides for the protection and propagation of fish, shellfish and wildlife, and recreation in and on the water.
 - ***CWA section 303(c)(2)(A)***: water quality standards “shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and...navigation.”

Background: EPA's Distinguishing Terminology

- “Uses specified in section 101(a)(2) of the Act” - uses that provide for the protection and propagation of fish, shellfish, and wildlife, and recreation in and on the water, as well as for the protection of human health when consuming fish, shellfish, and other aquatic life (e.g. recreation use, aquatic life use).
- Subcategories of uses specified in section 101(a)(2) of the Act - any use that reflects the subdivision of uses specified in CWA section 101(a)(2) for the purpose of reducing variability (e.g., primary contact recreation and secondary contact recreation, warm water aquatic life and cold water aquatic life and limited warm water aquatic life).
- “Non-101(a)(2) use” - a use not related to the protection or propagation of fish, shellfish, wildlife or recreation in or on the water. These uses include those listed in CWA section 303(c)(2)(A) but not in CWA section 101(a)(2) (e.g., public water supply, agriculture, industrial and navigation).

Background: Designating Uses

Since 1983:

- Uses specified in CWA section 101(a)(2) are presumed attainable unless a state or authorized tribe demonstrates otherwise through a use attainability analysis.
- States and authorized tribes have the primary role in designating uses and in weighing evidence regarding their attainability.

Background: Uses Attainability Analysis (UAA)

- UAAs are prospective analyses.

- UAAs involve:
 - Identifying the current and expected conditions for a water body;
 - Evaluating the effectiveness of best management practices (BMPs) and associated water quality improvements;
 - Examining the efficacy of treatment technology from engineering studies; and
 - Using water quality models, loading calculations, and other predictive tools.

Background: Designating Uses

- Designated uses cannot be removed if:
 - They are existing uses, unless a use requiring more stringent criteria is added.
 - The uses can be attained by the imposition of technology based effluent limitations and cost-effective and reasonable BMPs for nonpoint source control.

When is a Use Attainability Analysis Required in the Use Designation Process?

40 CFR 131.10(j): A State must conduct a use attainability analysis whenever:

- 1) The State designates for the first time, or has previously designated for a water body, uses that do not include the uses specified in section 101(a)(2) of the Act; or
- 2) The State wishes to remove a designated use that is specified in section 101(a)(2) of the Act, to remove a sub-category of such a use, or to designate a sub-category of such a use that requires criteria less stringent than previously applicable.

When is a Use Attainability Analysis **NOT** Required in the Use Designation Process?

40 CFR 131.10(k): A State is not required to conduct a use attainability analysis whenever:

- 1) The State designates for the first time, or has previously designated for a water body, uses that include the uses specified in 101(a)(2) of the Act; or
- 2) The State designates a sub-category of a use specified in section 101(a)(2) of the Act that requires criteria at least as stringent as previously applicable; or
- 3) The State wishes to remove or revise a designated use that is a non-101(a)(2) use.

What about Non-101(a)(2) Uses?

- 131.10(a), consistent with CWA 303(c)(2)(A), requires states and authorized tribes to take into consideration certain uses when adopting designated uses.
- EPA added language to 131.10(a) to specify how to document this consideration.
- UAAs and the factors at 131.10(g) are specialized requirements for the uses specified in section 101(a)(2) of the Act.
- UAAs are not required to remove or revise non-101(a)(2) uses but states and authorized tribes must submit documentation justifying how their consideration of the use and value of such uses supports the state's or authorized tribe's action.
- A UAA may satisfy this requirement for a use and value demonstration.

Use and Value Demonstration

- Non-101(a)(2) use revisions must still meet the relevant 131.10 provisions.
- Suite of factors to include/consider in the demonstration:
 - Relevant descriptive information
 - Attainability information
 - Value and/or benefits associated with either retaining or removing the use
 - Impacts of the use removal on other designated uses

Questions?

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- **Reminder:** Following today’s webinar, you may continue to submit your questions by emailing them to WQSRegulatoryClarifications@epa.gov and we will address as many as time allows during Thursday’s question and answer session webinar.

Designated Uses Question and Answer Session Webinar

Thursday, **October 22, 2015**, 1:00–2:00 PM Eastern

Highest Attainable Use (HAU) = Fundamental Concept

- Adopting a use that is less than the highest attainable use (HAU) could result in the adoption of water quality criteria that inappropriately lower water quality and could adversely affect aquatic ecosystems and the health of the public recreating in and on such waters.

Highest Attainable Use Determination via UAA

- 40 CFR 131.10(g): “If a State adopts a new or revised water quality standard based on a required use attainability analysis, the State shall also adopt the highest attainable use, as defined in § 131.3(m).”

- 40 CFR 131.3(m):
 - “*Highest attainable use* is the modified aquatic life, wildlife, or recreation use that is both closest to the uses specified in section 101(a)(2) of the Act and attainable, based on the evaluation of the factor(s) in § 131.10(g) that preclude(s) attainment of the use and any other information or analyses that were used to evaluate attainability.”

 - 40 CFR 131.3(m): “There is no required highest attainable use where the State demonstrates the relevant use specified in section 101(a)(2) of the Act and sub-categories of such a use are not attainable.”

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 - 40 CFR 131.3(m): “There is no required highest attainable use where the State demonstrates the relevant use specified in section 101(a)(2) of the Act and sub-categories of such a use are not attainable.”

Highest attainable use is modified aquatic life, wildlife or recreation use

- States and authorized tribes are not required to determine whether one broad use category is better than another.
- When adopting the HAU, the state or authorized tribe adopts a different use within the same broad CWA 101(a)(2) use category if any such use is attainable.
- Example:
 - State or authorized tribe removes a warm water aquatic life use;
 - HAU is a modified version of the warm water aquatic life use, such as a “limited warm water aquatic life use.”

HAU is the attainable use that results from the process of determining what is not attainable

- The HAU adoption is “based on the evaluation of the factor(s) in §131.10(g) that preclude(s) attainment of the use and any other information or analyses that were used to evaluate attainability.”

- Example:
 - State or authorized tribe demonstrates that a use cannot be attained due to substantial and widespread economic and social impacts (§131.10(g)(6));

 - State or authorized tribe determines the HAU by considering the use that is attainable without such substantial and widespread impact.

Flexibility in Approaches for Articulating the HAU

- States and authorized tribes are not limited to these approaches, but can:
 - 1) Use a refined designated use structure that is already adopted into state or tribal regulation; or
 - 2) Revise the current designated use structure to include more refined uses and/or sub-categories of uses; or
 - 3) Designate a location-specific use and adopt criteria to protect that use; or
 - 4) Adopt a broad use and the best pollutant/parameter levels attainable so the HAU is whatever use is attained at these levels.

Criteria to Protect the Designated Use

- EPA's 1983 regulation requires states and authorized tribes to adopt water quality criteria that protect designated uses.
- Therefore, states and authorized tribes must adopt criteria to protect the highest attainable use.
- See EPA's regulation at §§ 131.5(a)(2), 131.6(c), and 131.11(a)

Final Messages

- UAAs are specialized requirements for removing or revising uses specified in section 101(a)(2) of the Act and subcategories of such uses.
- There is nothing wrong with revising or removing a designated use after conducting a credible UAA. A UAA may bring more or less protective criteria.
- UAAs can be simple or complex depending on the site specific situation.
- When adopting a new or revised water quality standard based on a required UAA, states and tribes shall adopt the Highest Attainable Use.
- States and tribes should engage early and often with EPA when adopting new or revised designated uses.

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