



## **Tri-TAC**

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**California Association of Sanitation Agencies**

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September 10, 2010

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U.S. Environmental Protection Agency  
1200 Pennsylvania Ave., N.W.  
Washington, DC 20460

ATTN: Thomas Gardner

**Docket No. EPA-HQ-OW-2010-0606 – Stakeholder Input,  
Revisions to Water Quality Standards Regulation**

Dear Mr. Gardner:

Tri-TAC and the California Association of Sanitation Agencies (CASA) are pleased to submit comments to the U.S. Environmental Protection Agency (USEPA) in accordance with the July 30, 2010 Federal Register Notice (Notice) requesting stakeholder input in relation to potential revisions to the Water Quality Standards regulations ((WQS regulations). Tri-TAC and CASA represent municipal wastewater collection, treatment, and water recycling agencies that serve most of the sewered population in California. By way of background, Tri-TAC is a technical advisory group for publicly owned treatment works (POTWs) in California jointly sponsored by CASA, the California Water Environment Association (CWEA), and the League of California Cities. CASA is a statewide organization representing over 110 local public agencies providing wastewater services.

In the Notice, USEPA posed a list of six topics within the current WQS regulations for which changes are being considered. Tri-TAC and CASA believe the existing regulations provide an overall framework that, in general, worked fairly well at first, but has gradually become overly rigid and difficult to use. Therefore, we agree that certain aspects of WQS regulations could benefit from an update, though in our view most of the changes needed differ from those outlined in the Notice. Overall, we believe more flexibility is needed to adapt water quality standards to conditions that are applicable today, rather than keeping them frozen in time from when they were originally established, which often dates back to the 1970s. In recent times, state water quality programs have been dominated by complex requirements to produce state Section 303(d) lists on a frequent basis, and Total Maximum Daily Loads (TMDLs) at an accelerated rate, and this can be expected to continue for the foreseeable future. During the listing and/or TMDL development process, issues relating to standard-setting often arise. Sometimes these can be addressed using existing tools under the current regulatory framework. In many cases, however, it is very difficult to make changes to designated beneficial uses or water quality criteria due to the very limited circumstances under which standards can be modified. The reason for this problem is a “disconnect” between conditions in the 1970s, when uses first were designated, and current conditions. For example, in a watershed that has transitioned from agricultural to suburban or urban development, the “existing” agricultural beneficial use designation may no longer be valid or necessary, yet it may be impossible to remove the use because it has been deemed to be an “existing” use. Another issue is the very conservative approach to granting variances, even though variances are temporary in nature and do not involve a change to water quality standards, such as removal or downgrading of uses. USEPA should develop a separate set of guidelines for granting variances, while also allowing states to adopt their own approaches and rules in accordance with state needs.

Regarding the six topics identified in the Notice, this letter provides Tri-TAC and CASA’s input regarding the following topics: A. Antidegradation Implementation Methods, C. Designated Uses, D. Variances, and E. Triennial Reviews.

#### **Antidegradation Implementation Methods**

The current WQS regulation specifies that states and tribes must identify the methods to implement the antidegradation policies that they are required to adopt in their water quality standards. The regulation, however, does not specify what implementation methods must be included in the policies. The Notice indicates that USEPA is considering modifying the WQS regulations to specify that antidegradation implementation plans must meet specific minimum requirements and must be adopted into state and tribal water quality standards, which would require USEPA review and approval. There is no demonstrated need to establish prescriptive minimum federal antidegradation implementation requirements. As with other aspects of the WQS

regulations, the federal rules set forth the required elements of antidegradation policies and leave implementation to the states and tribes, which should continue to have discretion over implementation methods. Setting minimum antidegradation implementation requirements is unnecessary and would reduce local flexibility needed to address unique watershed conditions. The State of California, for instance, has had an antidegradation policy in place since before the passage of the Clean Water Act (CWA). The policy, and the associated implementation guidance, have functioned well and are not in need of change. The USEPA can best assist states and tribes by providing guidance in this area.

Although Tri-TAC and CASA oppose modification of current WQS regulations to incorporate prescriptive implementation methods for antidegradation policies, if USEPA elects to do so, allowing states and tribes to set *de minimus* levels and allowing the use of variances are two necessary elements of any implementation plan. The regulation should explicitly require states and tribes to assess and apply *de minimus* levels to exempt insignificant new or increased discharges from antidegradation review. This is particularly crucial given the time-consuming, resource-intensive nature of the technical and economic analysis involved in a full antidegradation review. Moreover, variances are essential tools that allow states and tribes to properly and effectively apply their WQS, and must also be included in the revised regulation.

### **Designated Uses**

Appropriate designated use classification remains a critical issue for municipal wastewater treatment plants. Section 101(a)(2) of the CWA establishes a goal, wherever attainable, of water quality that provides for the protection and propagation of fish, shellfish, wildlife, and recreation in and on the water (i.e., “fishable/swimmable” designated uses). The Notice indicates that USEPA may clarify the WQS regulations to presume that these CWA goal uses are attainable unless otherwise demonstrated. Tri-TAC and CASA believe that USEPA should clarify that the rebuttable presumption of fishable/swimmable designated uses does not restrict the discretion that states have to determine that fishable/swimmable uses are not, in fact, attainable in a particular case. While fishable/swimmable uses are goals of the CWA, the CWA explicitly states that this goal applies “whenever attainable,” not that it is necessarily applied everywhere. Currently, states often require permit-holders requesting modifications to beneficial use designations to overcome the presumptive applicability of uses with an overwhelmingly large amount of scientific evidence “proving” that there will never be an impact due to a single parameter in a complex, dynamic system or that future attainment of an assumed use is not possible. Tri-TAC and CASA request that the WQS regulations be modified to state that designated uses in all waters, including main stem rivers and their tributaries, are to be based on sound science, not generic presumptions, and must recognize that the resources of all stakeholders are limited. The burden of proof must be commensurate

with the reality of use and should be shared more equally among USEPA, the states and tribes, and permit-holders.

Additionally, although not acknowledged in the Notice, the process to redefine or subcategorize beneficial uses needs improvement. Specifically, general use categories such as aquatic life or agriculture are often overly broad as compared to the real uses for specific water bodies. At a minimum the USEPA should derive alternative criteria for water body types such as open conveyance channels, stormwater channels, effluent dependent water bodies, intermittent streams, and highly ionic streams. In addition, the current regulatory language in 40 Code of Federal Regulations (C.F.R.) section 131.10(c) provides authorization for the adoption of subcategories and appropriate criteria to reflect those refined uses. The adoption of subcategories should not require a full use attainability analysis (UAA) and should not require a demonstration of one of the factors required for downgrading a use, but should be allowed as a clarification to reflect the actual uses of the waterbody. Even though refined designated uses may be less inclusive than broad use designations, USEPA should not consider the adoption of more refined use descriptions to be a change in use subject to the use attainability requirements. We believe that this approach is consistent with previous and existing USEPA policy. This is an integral measure to ensure that the WQS regulations are interpreted properly, especially given that numerous states have inappropriately designated all unassessed waters as fishable/swimmable or municipal and domestic drinking water supply, and then requires a UAA to later remove these broad designations. Therefore, we recommend that the language of 40 C.F.R. sections 131.10(g) and (j) be modified to remove references to the need for a UAA prior to the establishment of refined use subcategories.

Lastly, the Notice indicates that USEPA is considering clarifying that the highest attainable use(s) closest to a section 101(a)(2) goal use must be adopted if a CWA section 101(a)(2) goal use is unattainable. If USEPA were to mandate national consistency for designated use determinations, individual state's decision-making authority would be compromised. This is contrary to the original Congressional intent of this CWA. *See accord Miss. Comm'n on Nat'l Res. V. Costle*, 625 F.2d 1269, 1272 (5th Cir. 1980) *citing* H.Rep. 215, 89<sup>th</sup> cong., 1<sup>st</sup> Sess., USCCAN 3313, 3320-23 ("Concerned that federal promulgation would discourage state plans for water quality and 'would place in the hands of a single Federal official the power to establish zoning measures over to [stet] control the use of land within watershed areas' throughout the nation, Congress gave states primary authority to set water quality standards."). Furthermore, it is not always clear what the "highest attainable use" would be, so it is imperative that this concept be clarified. For example, sometimes water quality data are insufficient to derive criteria for an alternative use. For these reasons, Tri-TAC and CASA recommend that individual states continue to be provided the authority to determine the appropriate alternative use designations, since they are most familiar with local situations and this will allow for the flexibility necessary to appropriately define a

use for a waterbody. *See id.* at 1275 (“The varied topographies and climates in the country call for varied water quality solutions.”).

### *Variances*

The current WQS regulations allow states and tribes to adopt variances as policies for implementing their water quality standards. The Notice states that USEPA may establish regulatory requirements for variances to ensure their proper use. Tri-TAC and CASA are not aware of abuses in the variance process that would necessitate additional regulation; indeed, in California, variances have very rarely been allowed or used. Instead of proposing additional requirements regarding variances, USEPA should consider ways to streamline the process for obtaining variances, while ensuring that water quality protection safeguards remain in place. For example, USEPA should reduce the level of information that must be provided to demonstrate the need for a variance. USEPA should also consider allowing states flexibility in determining the length of time variances can apply, since this might range from as little as one year to as much as 10 to 15 years, depending on the reason for the variance and steps identified to bring the water body into compliance with water quality standards. USEPA should encourage the use of multiple discharger variances, such as have been used in Ohio to address mercury discharges.

### *Triennial Reviews*

Under current federal regulation, states and tribes are required to review their water quality standards at least every three years, and modify standards or adopt new standards as appropriate. Tri-TAC and CASA agree with USEPA’s proposal to clarify that states and tribes must solicit and consider public comments in determining the scope of each triennial review. Furthermore, Tri-TAC and CASA believe that it is appropriate during the triennial reviews to evaluate whether existing water quality criteria continue to be protective of or are more stringent than necessary to protect designated and existing uses. This evaluation should be conducted as part of a comprehensive review that carefully examines, based on sound science, whether existing criteria are either inadequate or overly conservative. Unnecessarily stringent water quality standards can result in scarce public resources being directed toward efforts that produce little or no benefit. Such resources are better used on efforts that will produce actual water quality improvements. If water quality standards are to be based on a solid technical foundation, considering watershed, ecosystem, and site-specific factors, then it is essential that states review their water quality criteria and designated uses holistically.

Thomas Gardner  
Re: Docket No. EPA-HQ-OW-2010-0606  
September 10, 2010  
Page 6

Thank you for the opportunity to provide input on these important issues. If you have any questions or require additional information, please contact Ms. Shannon Grund by phone at (562) 908-4288, extension 2843, or by email at [sgrund@lacs.org](mailto:sgrund@lacs.org).

Sincerely,



Ben Horenstein, Chair  
Tri-TAC



Roberta L. Larson  
Director, Legal and Regulatory Affairs  
CASA

RLL/mb  
BH/mb

cc: USEPA Region IX, Doug Eberhardt  
SWRCB, Ken Harris