

Bryan W. Shaw, Ph.D., *Chairman*
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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

January 2, 2014

U.S. Environmental Protection Agency
Water Docket Mail Code 2822T
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460
Attn: Docket ID No. EPA-HQ-OW-2010-0606

Re: Public Comment; Proposed Revisions to Water Quality Standards Regulation, 40 CFR §131, Docket ID Number EPA-HQ-OW-2010-0606, *Federal Register*, Vol. 78, No. 171, September 4, 2013

Dear Sir or Madam:

The Texas Commission on Environmental Quality (TCEQ) is providing comments on the proposed revisions to the federal Water Quality Standards (WQS) Rule. Regarding the proposed revisions, TCEQ would like to emphasize the importance of applying the resulting regulations with reasonable flexibility, in order to accommodate the various approaches that have proven effective in each state's and tribe's water quality management program. Concerns and suggestions regarding the key revisions are attached.

In general, the TCEQ's comments express concern with three of the six key areas in EPA's proposed regulation: state triennial review of WQS; antidegradation implementation; and WQS variances. The TCEQ is concerned that the proposed changes could interfere with the effectiveness of the existing TCEQ water quality management processes.

TCEQ appreciates the opportunity to comment on EPA's proposed revisions to the existing federal WQS rule. We urge EPA to consider our comments and to continue discussions with the states to ensure that any newly adopted provisions afford states maximum flexibility to ensure existing state water quality management programs are not negatively impacted. If you have comments or questions concerning the enclosed comments, please contact Kelly Holligan, Director, Water Quality Planning Division at (512) 239-2369 or by e-mail at Kelly.Holligan@tceq.texas.gov.

Sincerely,

A handwritten signature in black ink that reads "Zak Covar" with a large flourish underneath. Below the signature, the word "for" is written in a smaller, cursive script.

Zak Covar
Executive Director

Enclosure

COMMENTS BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY ON THE U.S. ENVIRONMENTAL PROTECTION AGENCY

Water Quality Standards Regulatory Clarifications; Proposed Rule, 40 CFR Part 131, (Federal Register, Vol. 78, No. 171, September 4, 2013, Pages 54518-54546, Docket ID Number EPA-HQ-OW-2010-0606)

The Texas Commission on Environmental Quality (TCEQ) provides the following comments on the key areas identified in the Environmental Protection Agency's (EPA's) proposed changes to the federal water quality standards (WQS) regulations.

1. Administrator's Determination That New or Revised WQS Are Necessary.

The TCEQ supports proposed §131.22(b)(1) and (2) which clearly provides that in order to constitute an Administrator's determination regarding the necessity for new or revised WQS, it must 1) be signed by the Administrator or his/her authorized delegate and 2) contain a statement that the document is a determination for the purposes of Section 303(c)(4)(B) of the Clean Water Act (CWA). This revision should result in a more transparent process and avoid unnecessary regulatory activity.

2. Designated Uses.

The TCEQ requests that EPA continue to provide states with the flexibility to apply the most appropriate and scientifically defensible approach for the conditions within each state.

3. Requirements of State Triennial Reviews of WQS.

The TCEQ does not support proposed changes to §131.20 which would mandate, as part of state triennial reviews, consideration of water quality criteria developed under CWA Section 304(a). More specifically, the proposed rule would require states to evaluate whether their existing water quality criteria continue to be protective of designated uses for any new or updated CWA Section 304(a) recommendations by EPA. This unnecessarily broad proposed requirement emphasizes specific guidance developed at the national level and does not take into account that the guidance does not apply in all instances.

Importantly, the TCEQ already considers CWA Section 304(a) recommendations and other scientifically defensible data in its triennial review of WQS. Consideration of only the CWA Section 304(a) recommendations may not be appropriate for developing criteria for adoption into the Texas Surface Water Quality Standards (TSWQS). EPA should continue to provide states the flexibility to continue broad consideration of all available information that is scientifically defensible. Such consideration of available data and information already includes reviews of recommended national criteria and guidance, and is performed in accordance with

current regulations stated in 40 Code of Federal Regulations (CFR) Section 131.20(a).

4. Antidegradation Implementation.

The TCEQ strongly opposes the additional requirements to the antidegradation policy and implementation methods in proposed 40 CFR §131.12. The TCEQ has already included an antidegradation policy and implementation framework in its TSWQS, as well as more detailed implementation methods in the TCEQ's *Procedures to Implement the Texas Surface Water Quality Standards (Implementation Procedures)*. The framework for implementing antidegradation in the TSWQS and in the TCEQ *Implementation Procedures* was developed over the course of multiple triennial revision cycles, with substantial input from advisory groups and public comment, and with EPA Region 6 approval.

In the preamble to the proposed revisions to §131.12(b), EPA solicits comment on whether antidegradation implementation procedures should be incorporated into state water quality standards. TCEQ does not support this proposed change because TCEQ's antidegradation procedures include descriptions, discussions, and examples that would be inappropriate for adoption in rule format. Importantly, TCEQ *Implementation Procedures* are subject to stakeholder input and public comment.

Further, EPA has recently indicated that some of the existing TSWQS provisions that address permitting of wastewater discharges or assessing standards attainment are procedural in nature, and these provisions are therefore not approved as part of the state's water quality standards. For EPA to require antidegradation procedures in state water quality standards would be contradictory to this EPA position.

5. Water Quality Standards Variances.

TCEQ strongly opposes EPA's proposed provisions for a water quality standards variance (WQS variance). In proposed 40 CFR § 131.14, EPA defines a WQS variance as a "time limited designated use and criterion for a specified pollutant(s), permittee(s), and/or water body or water body segment(s) that reflect the highest attainable condition during the specified time period." With this definition, EPA appears to be trying to blend a WQS variance for an individual permit with a WQS variance for an entire water body.

The difference between these two types of variances is discussed in the preamble, but not sufficiently addressed in the proposed regulation. Because of fundamental differences in applying these two types of variances, TCEQ already has separate variance provisions in its TSWQS for individual permits (termed "temporary variances") versus water body variances (termed "temporary standards").

A variance for an individual permit is usually intended to allow a temporary period to review water quality standards (three years, for example, in the TSWQS). It is appropriately applied when a calculated water quality-based effluent limit (WQBEL)

(at critical condition flows and maximum allowable discharge) is not reasonably achievable and when preliminary evidence indicates that the water quality standard should be reviewed. In practice, it is more similar to a permitting compliance period than to a water body variance. Like a permitting compliance period, a variance for an individual permit should not constitute a new temporary designated use or instream criterion.

EPA further states in proposed 40 CFR § 131.14 that “WQS variances are water quality standards subject to EPA review and approval or disapproval and must be consistent with this section.” EPA should not adopt any rule language that could be interpreted to require states to individually adopt permit variances in their water quality standards before the applicable permit could be issued. The proposed language could be construed as such a requirement and should be deleted.

6. Provisions Authorizing the Use of Permit-Based Compliance Schedule.

The EPA proposes to add a new regulatory provision at 40 CFR § 131.15. The preamble indicates that the provision is being added to be consistent with the decision of the EPA Administrator in *In the Matter of Star-Kist Caribe, Inc.* (1990 WL 324290 (EPA), 1990 EPA App. LEXIS 45, 3 EAD 172 (April 16, 1990)). EPA indicates in its proposal that new § 131.15 will clarify that a permitting authority may only issue compliance schedules for water quality-based effluent limits (WQBELs) in NPDES permits if the state’s or tribe’s regulations contain a provision authorizing the use of permit-based compliance schedules. EPA considers a provision authorizing the use of permit-based compliance schedules to be a WQS subject to EPA’s approval. However, EPA also describes in its discussion as well as the proposed rule how a compliance schedule is a permitting tool and is not itself considered a WQS.

The TSWQS already contain a provision in 30 Texas Administrative Code § 307.2(f) which authorizes the use of compliance schedules in TPDES permits. Therefore, it is the TCEQ’s position that the agency’s regulations are consistent with EPA’s proposed provision. The TCEQ requests that EPA continue to provide states and tribes with the flexibility to use compliance schedules as a permitting tool which provides a permittee additional time to comply with WQBELs.

TCEQ objects to the last sentence in the proposed new §131.15 which states “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.” This sentence could be construed to require that the provision in the water quality standards not only allows compliance schedules, but also requires the specifics of how the compliance schedules will be implemented in permits. EPA should remove this sentence so States and tribes will be afforded the flexibility to use the compliance schedule as a permitting tool to address case-by-case circumstances.