

Publication of final rule in Federal Register: August 21, 2015

Effective date: October 20, 2015

Major portions of 40 Code of Federal Regulations (CFR) Part 131 - Water Quality Standards (WQS) that were revised:

- §131.10, Designated uses of waters
- §131.12, Antidegradation provisions
- §131.14, WQS variances
- §131.15, Permit compliance schedule authorizing provisions
- §131.20, Triennial reviews of state and authorized tribal WQS
- §131.22, Administrator’s determination that new or revised WQS are necessary

Rule Element	Summary of Previous Rule	Why Changes Were Necessary	Summary of Final Rule Language
Designated Uses	<ul style="list-style-type: none"> • Established the framework specifying that existing uses must be maintained and protected. <ul style="list-style-type: none"> ○ The framework allowed for the modification or removal of a use through a Use Attainability Analysis (UAA) demonstration. • The previous rule established factors affecting feasibility of attainment. These factors, described in §131.10(g), included: <ul style="list-style-type: none"> ○ Naturally occurring conditions ○ Hydro-modification ○ Human caused conditions that cannot be remedied ○ Physical conditions unrelated to water quality but preclude attainment of use ○ Widespread economic and social impacts. 	<ul style="list-style-type: none"> • Additional clarity was needed to: <ul style="list-style-type: none"> ○ Clearly articulate that attainable uses should be retained, even when modifying or removing a use. ○ Identify the uses that were attainable when conducting UAAs. ○ Better define the separate provisions describing the removal of a use through the UAA process, and situations when UAAs were not required. 	<ul style="list-style-type: none"> • Retains the factors from §131.10(g) affecting feasibility of attainment included in the old rule. • Adds requirement to include adoption of the highest attainable use when adopting new or modified designated uses. • Defines the highest attainable use as the use closest to “fishable / swimmable”, as specified goals in §101(a)(2) of the CWA. • Amends language to clarify when a UAA is/is not required, particularly when a use is a non-§101(a)(2) use, (for example navigation uses).

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Antidegradation Provisions	<p>Established minimum requirements for state antidegradation policies in water quality standards.</p> <p>Required states to establish a policy framework and identify implementing methods that protect:</p> <ul style="list-style-type: none"> • Existing instream uses and water quality sufficient to maintain such uses in all waters. • Existing water quality in high quality waters. • Outstanding National Resource Waters, as designated by the state. <p>Required state antidegradation policy and implementing methods addressing thermal discharges to be consistent with §316 of the CWA.</p>	<ul style="list-style-type: none"> • Clarity was needed to specify: <ul style="list-style-type: none"> ○ How states identify high quality waters ○ How states evaluate whether a lowering of high quality water is necessary to accomplish an activity. • Revisions were needed to: <ul style="list-style-type: none"> ○ Increase transparency ○ Increase opportunities for public involvement when implementing antidegradation policies, including determinations. ○ Promote consistency in state and authorized tribal antidegradation implementation. 	<ul style="list-style-type: none"> • Requires implementation methods to be consistent with adopted antidegradation policies, and to make these implementation methods available for public review. <ul style="list-style-type: none"> ○ Removed proposed requirement to adopt implementation methods. • Adds provisions to identify high quality waters for protections on a parameter by parameter or water body by waterbody basis. <ul style="list-style-type: none"> ○ Precludes the exclusion of waterbodies from such protections if fishable/swimmable uses are not currently attained (i.e. waterbody is on 303d List). ○ Adds requirement for states and authorized tribes to provide an opportunity for public involvement when evaluating factors considered when assigning protections, and when making antidegradation determinations. • Requires an analysis of alternatives to be conducted prior to allowing degradation of water quality to accommodate important economic or social development. • When finding degradation is necessary, a practicable alternative is required if one was identified during analysis of alternatives. <ul style="list-style-type: none"> ○ Defines “practicable” as technologically possible, able to be put into practice, and economically viable.

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WQS Variances	<p>Detailed requirements for variances were not specified in the previous rule.</p> <p>However, variances were allowed at the discretion of states and authorized tribes as a general policy affecting application and implementation of standards (such as mixing zones and critical conditions).</p>	<ul style="list-style-type: none"> • Clarity was needed to reduce uncertainty, since the previous regulation did not explicitly address variances. • A clear mechanism was needed to provide a transparent process to ensure incremental progress toward attaining designated uses, when applicable WQS are not attainable in the near-term, but may be attainable in the future. 	<ul style="list-style-type: none"> • Establishes a regulatory framework for WQS variances at §131.14. <ul style="list-style-type: none"> ○ Includes a definition of WQS variance ○ Explicitly authorizes states/authorized tribes to adopt WQS variances ○ WQS variances are standards subject to EPA review and approval ○ WQS variances can apply to a single discharger, multiple dischargers, or to a water body/waterbody segment ○ Term of WQS variance is as “as long as necessary to achieve the highest attainable condition”, with re-evaluation at 5 years. • Requires the underlying designated use and criterion in standards to apply to: <ul style="list-style-type: none"> ○ All other permittees not addressed in the WQS variance ○ The identification of impaired waters ○ The establishment of Total Maximum Daily Loads. • Requires specific information to be adopted in state standards as part of any WQS variance. Specific information includes: <ul style="list-style-type: none"> ○ The highest attainable condition ○ The specific pollutant, water body, and or discharger ○ Any interim requirements. • Requires the submission of demonstrations justifying the need for a variance to fishable/swimmable uses.

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			<ul style="list-style-type: none"> Requires the inclusion of pollutant control technologies, including those activities specified as part of a Pollution Minimization Program.
Compliance Schedules	<p>Compliance schedules were not part of the WQS rules in 40 CFR, Part 131. Provisions were included in 40 CFR, Part 122 regarding EPA Administered Permit Programs: The National Pollution Discharge Elimination System (NPDES).</p>	<ul style="list-style-type: none"> Revisions were needed to provide a regulatory framework to ensure compliance schedules are legal under the CWA, and authorized as part of the water quality standards programs. Clarity was needed address uncertainty and reduce legal challenges to permits with compliance schedules. 	<ul style="list-style-type: none"> Requires that provisions authorizing permit compliance schedules must be adopted in WQS, prior to use in NPDES permits. Includes authorizing language that is consistent with other portions of the CWA that already define schedules of compliance, and establish effluent limits consistent with schedules of compliance.
Triennial Reviews	<ul style="list-style-type: none"> Established the framework for triennial reviews of water quality standards and submission of those standards to EPA. Required states to review standards from time to time, but at least once every three years to determine if any new information has become available. Also required states to hold public hearings for the purpose of reviewing applicable water quality standards. In §131.11 of the rule, §304(a) criteria are identified as guidance for states to use when developing criteria. However, the rule did not specifically require states to consider and adopt §304(a) criteria recommendations, or provide justifications for when these criteria were not adopted. 	<ul style="list-style-type: none"> Revisions were needed to ensure: <ul style="list-style-type: none"> State/tribes review existing criteria (not just designated uses) during triennial reviews and encourage states to consider the latest science as reflected in new or updated §304(a) criteria. Public transparency in how states/tribes consider the latest science as reflected in the CWA section §304(a) criteria recommendations. 	<ul style="list-style-type: none"> Adds requirement to provide rationales for not adopting EPA’s §304(a) criteria recommendations published since the previous triennial revision. Preamble of final rule specifies that “states must provide an explanation for why they did not adopt new or revised criteria for parameters for which EPA has published new or updated CWA section §304(a) criteria recommendations since May 30, 2000”.

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	<p><i>Note: §304(a) of the Clean Water Act requires EPA to develop and publish criteria that is reflective of the latest scientific information.</i></p>		
Administrator's Determination	<ul style="list-style-type: none"> • Rule authorized EPA to review and approve state adopted standards, and to promulgate standards when necessary to meet requirements of the Clean Water Act (CWA). • The previous rule lacked provisions to clearly identify when a determination to promulgate standards had been made by the Administrator. 	<ul style="list-style-type: none"> • Clarifications were needed to ensure the public could readily distinguish determinations from routine EPA communications such as policy memos. • Revisions would allow EPA to identify and communicate mission critical areas of state/tribal WQS that should be updated to meet the requirements of the Clean Water Act, rather than focusing on whether such communication is an official "Administrator's Determination." • Confusion regarding what constituted a determination had resulted in recurring litigation. 	<ul style="list-style-type: none"> • Adds a requirement that an Administrator's determination must be signed by the Administrator or his or her designee, and must include a statement that the document is a determination for purposes of section §303(c)(4)(B) of the CWA, (relating to promulgation of WQS deemed necessary to meet requirements of the CWA). <ul style="list-style-type: none"> ○ Revisions from proposed language clarified that Administrator's Determinations are restricted to meet the requirements of the act in accordance with §303(c)(4)(B), as opposed to state-submitted WQS revisions specified in §303(c)(4)(A). • Clarifies that Administrator's authority to promulgate WQS applies to all "navigable waters", which is consistent with other portions of the CWA, specifically §303(c)(4).
Designated Uses	<ul style="list-style-type: none"> • Established the framework specifying that existing uses must be maintained and protected. <ul style="list-style-type: none"> ○ The framework allowed for the modification or removal of a use through a Use Attainability Analysis (UAA) demonstration. • The previous rule established factors affecting feasibility of attainment. These factors, described in §131.10(g), included: <ul style="list-style-type: none"> ○ Naturally occurring conditions ○ Hydro-modification 	<ul style="list-style-type: none"> • Additional clarity was needed to: <ul style="list-style-type: none"> ○ Clearly articulate that attainable uses should be retained, even when modifying or removing a use. ○ Identify the uses that were attainable when conducting UAAs. ○ Better define the separate provisions describing the removal of a use through the UAA process, and situations when UAAs were not required. 	<ul style="list-style-type: none"> • Retains the factors from §131.10(g) affecting feasibility of attainment included in the old rule. • Adds requirement to include adoption of the highest attainable use when adopting new or modified designated uses. • Defines the highest attainable use as the use closest to "fishable / swimmable", as specified goals in §101(a)(2) of the CWA. • Amends language to clarify when a UAA is/is not required, particularly when a use is a non-§101(a)(2) use, (for example navigation uses).

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	<ul style="list-style-type: none"> ○ Human caused conditions that cannot be remedied ○ Physical conditions unrelated to water quality but preclude attainment of use ○ Widespread economic and social impacts. 		

Highest Attainable Use: The modified aquatic life, wildlife, or recreation use that is both closest to the uses specified in section 101(a)(2) of the CWA 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. There is no required highest attainable use where the State demonstrates the relevant use specified in section 101(a)(2) of the CWA and sub-categories of such a use are not attainable.

Practicable: In the context of analyses of alternatives to be considered when applying antidegradation protections, means technologically possible, able to be put into practice, and economically viable.

Water Quality Standards Variance: A time-limited designated use and criterion for a specific pollutant(s) or water quality parameter(s) that reflect the highest attainable condition during the term of the WQS variance.

Pollutant Minimization Program: In the context of pollution control activities to achieve the highest attainable condition as part of a WQS variance, is a structured set of activities to improve processes and pollutant controls that will prevent and reduce pollutant loadings.

Non-101(a)(2) Use: Any use unrelated to the protection and propagation of fish, shellfish, wildlife or recreation in or on the water.