

US EPA ARCHIVE DOCUMENT

## Comparison of Final and Proposed Rule

**Supplemental Information for  
Water Quality Standards Regulatory Revisions Final Rule**

**Comparison of Final Rule Language and Proposed Rule Language**

**NOTE: THE FOLLOWING REGULATORY TEXT IS A COMPARISON OF THE PROPOSED RULE LANGUAGE AND THE FINAL RULE LANGUAGE. STRIKEOUTS INDICATE DELETION OF PROPOSED TEXT AND UNDERLINES INDICATE ADDITION OF FINAL RULE TEXT.**

**THE TEXT BELOW SHOWS ONLY THE PROVISIONS AFFECTED BY THE REVISIONS IN THIS RULEMAKING. IT DOES NOT REPRESENT THE ENTIRETY OF THE PART 131 REGULATION.**

**PART 131—WATER QUALITY STANDARDS**

**§ 131.2 Purpose.**

A water quality standard defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria that protect the designated uses. \* \* \*

\* \* \* \* \*

**§ 131.3 Definitions.**

\* \* \* \* \*

(h) *Water quality limited segment* means any segment where it is known that water quality does not meet applicable water quality standards, and/or is not expected to meet applicable water quality standards, even after the application of the technology-based effluent limitations required by sections 301(b) and 306 of the Act.

\* \* \* \* \*

(j) *States* include: The 50 States, the District of Columbia, Guam, the Commonwealth of Puerto Rico, Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, and Indian Tribes that EPA determines to be eligible for purposes of water quality standards program.

\* \* \* \* \*

(m) *Highest attainable use* is the modified 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) 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 Act and sub-categories of such a use are not attainable.

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(n) Practicable, in the context of § 131.12(a)(2)(ii), means technologically possible, able to be put into practice, and economically viable.

(o) A water quality standards variance (WQS variance) is 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.

(p) Pollutant Minimization Program, in the context § 131.14, is a structured set of activities to improve processes and pollutant controls that will prevent and reduce pollutant loadings.

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

### § 131.5 EPA authority.

(a) \* \* \*

(1) Whether the State has adopted designated water uses ~~which~~ that are consistent with the requirements of the Clean Water Act;

(2) Whether the State has adopted criteria that protect the designated water uses based on sound scientific rationale based on sound scientific rationale consistent with § 131.11;

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

(4) Whether any State adopted WQS variance is consistent with § 131.14;

(5) Whether any State adopted provision authorizing the use of schedules of compliance for water quality-based effluent limits in NPDES permits is consistent with § 131.15;

~~(4)~~ Whether the State has followed ~~its~~ applicable legal procedures for revising or adopting standards;

~~(5)~~ Whether the State standards which do not include the uses specified in section 101(a)(2) of the Act are based upon appropriate technical and scientific data and analyses, and

~~(6)~~ Whether the State submission meets the requirements included in § 131.6 of this part and, for Great Lakes States or Great Lakes Tribes (as defined in 40 CFR 132.2) to conform to section 118 of the Act, the requirements of 40 CFR part 132.

(b) If EPA determines that the State's or Tribe's water quality standards are consistent with the factors listed in paragraphs (a)(1) through (a)~~(6)~~ of this section, EPA approves the standards. EPA must disapprove the State's or Tribe's water quality standards and promulgate Federal standards under section 303(c)(4), and for Great Lakes States or Great Lakes Tribes under section 118(c)(2)(C) of the Act, if State or Tribal adopted standards are not consistent with the factors listed in paragraphs (a)(1) through (a)~~(6)~~ of this section. EPA may also promulgate a new or revised standard when necessary to meet the requirements of the Act.

\* \* \* \* \*

### § 131.10 Designation of uses.

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(a) Each State must specify appropriate water uses to be achieved and protected. The classification of the waters of the State must take into consideration the use and value of water for public water supplies, protection and propagation of fish, shellfish and wildlife, recreation in and on the water, agricultural, industrial, and other purposes including navigation. If adopting new or revised designated uses other than the uses specified in section 101(a)(2) of the Act, or removing designated uses, States must submit documentation justifying how their consideration of the use and value of water for those uses listed in this paragraph appropriately supports the State's action. A use attainability analysis may be used to satisfy this requirement. In no case shall a State adopt waste transport or waste assimilation as a designated use for any waters of the United States.

\* \* \* \* \*

~~(e) Prior to adding or removing any use, or establishing sub-categories of a use, the State shall provide notice and an opportunity for a public hearing under § 131.20(b) of this regulation.~~  
[Removed and Reserved]

\* \* \* \* \*

(g) ~~Pursuant to § 131.10(j),~~ States may designate a use, or remove a use ~~or a sub-category of a use as long as the action does not remove protection for that is not~~ an existing use, ~~and if~~ the State ~~can demonstrate~~ conducts a use attainability analysis as specified in § 131.10(j) that demonstrates attaining the use is not feasible because of one of the six factors in this paragraph. If a State adopts a new or revised water quality ~~standards standard~~ based on a required use attainability analysis, the State shall also adopt the highest attainable use, as defined in § 131.3(m). ~~and the criteria to protect that use. 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.~~

\* \* \* \* \*

(j) A State must conduct a use attainability analysis as described in § 131.3(g), and § 131.10(g), whenever:

(1) The State designates for the first time, or has previously designated ~~uses~~ for a water body ~~for the first time,~~ 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 ~~which that~~ requires criteria less stringent than previously applicable.

(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 ~~uses~~ for a water body ~~for the first time,~~ uses that include the uses specified in section 101(a)(2) of the Act, or

(2) The State ~~wishes to remove a designated use that is not specified in section 101(a)(2) of the Act, or designate~~ designates a sub-category of a use specified in section 101(a)(2) of the Act ~~which that~~ requires criteria at least as stringent as previously applicable, or

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(3) The State wishes to remove or revise a designated use that is a non-101(a)(2) use. In this instance, as required by § 131.10(a), the State must submit documentation justifying how its consideration of the use and value of water for those uses listed in § 131.10(a) appropriately supports the State's action, which may be satisfied through a use attainability analysis.

### § 131.11 Criteria.

(a) \* \* \*

(2) *Toxic pollutants.* States must review water quality data and information on discharges to identify specific water bodies where toxic pollutants may be adversely affecting water quality or the attainment of the designated water use or where the levels of toxic pollutants are at a level to warrant concern and must adopt criteria for such toxic pollutants applicable to the water body sufficient to protect the designated use. Where a State adopts narrative criteria for toxic pollutants to protect designated uses, the State must provide information identifying the method by which the State intends to regulate point source discharges of toxic pollutants on water quality limited segments based on such narrative criteria. Such information may be included as part of the standards or may be included in documents generated by the State in response to the Water Quality Planning and Management Regulations (40 CFR part 130).

(b) *Form of criteria:* In establishing criteria, States should:

\* \* \* \* \*

### § 131.12 Antidegradation ~~Policy~~ policy and ~~Implementation~~ implementation ~~Methods~~ methods.

(a) The State shall develop and adopt a statewide antidegradation policy. The antidegradation policy shall, at a minimum, be consistent with the following:

\* \* \* \* \*

(2) Where the quality of the waters ~~exceed~~ exceeds levels necessary to support the protection and propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the State shall ~~ensure~~ assure water quality adequate to protect existing uses fully. Further, the ~~s~~State shall ~~ensure~~ assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control.

(i) The State may identify waters for the protections describe in (a)(2) of this section on a parameter-by-parameter basis or on a water body-by-water body basis. Where the State identifies waters for antidegradation protection on a water body-by-water body basis, the State shall provide an opportunity for public involvement in any decisions about whether the protections described in (a)(2) of this section will be afforded to a water body, and the factors considered when making those decisions. Further, the State shall not exclude a water body from the protections described in (a)(2) of this section solely because water quality does not exceed levels necessary to support all of the uses specified in section 101(a)(2) of the Act.

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(ii) Before allowing any lowering of high water quality, pursuant to (a)(2) of this section, the State shall find, after an analysis of alternatives, that such a lowering is necessary to accommodate important economic or social development in the area in which the waters are located. The analysis of alternatives shall evaluate a range of practicable alternatives that would prevent or lessen the degradation associated with the proposed activity. When the analysis of alternatives identifies one or more practicable alternatives, the State shall only find that a lowering is necessary if one such alternative is selected for implementation.

\* \* \* \* \*

(b) The State shall develop ~~and make available to the public statewide~~ methods for implementing the antidegradation policy that are, at a minimum, consistent with the State's policy and with adopted pursuant to paragraph (a) of this section. The State shall provide an opportunity for public involvement during the development and any subsequent revisions of the implementation methods, and shall make the methods available to the public. A State's antidegradation implementation methods shall be designed to achieve antidegradation protection consistent with paragraph (a) of this section. Such methods must ensure that:

~~(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; and~~

~~(2) The State will only make a finding that lowering high water quality is necessary, pursuant to paragraph (a)(2) of this section, after conducting an alternatives analysis that evaluates a range of non-degrading and minimally degrading practicable alternatives that have the potential to prevent or minimize the degradation associated with the proposed activity. If the State can identify any practicable alternatives, the State must choose one of those alternatives to implement when authorizing a lowering of high water quality.~~

#### § 131.14 Water quality standards variances.

States may ~~at their discretion, grant~~ adopt WQS variances as defined in § 131.3(o). Such a WQS variance is subject to the provisions of this section and public participation requirements at § 131.20(b). A ~~water quality standards variance (WQS variance) is a time limited designated use and criterion for a specified pollutant(s), permittee(s), and/or water body or waterbody segment(s) that reflect the highest attainable condition during the specified time period. WQS variances are~~ water quality standards standard subject to EPA review and approval or disapproval. ~~and must be consistent with this section. Any such WQS variances adopted after [effective date of the final rule] must be consistent with this regulatory section.~~

(a) *Applicability:*

(1) All applicable WQS not specifically addressed by the WQS variance remain applicable. A WQS variance may be adopted for a permittee(s) or water body/waterbody segment(s) specified in the WQS variance.

(2) (i) Where a state-State adopts a WQS variance, the State regulations must continue to reflect retain, in its standards, the underlying designated use and criterion addressed by the WQS variance, unless the State adopts and EPA approves a revision to the underlying designated use and criterion consistent with

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§ 131.10 ~~or~~ and § 131.11. All other applicable standards not specifically addressed by the WQS variance remain applicable.

~~(3) (ii) The interim requirements specified in the A~~ WQS variance are in effect during the term of the WQS variance and apply for CWA section 402 permitting purposes and in, once adopted by the State and approved by EPA, shall be the applicable standard for purposes of the Act under 40 CFR 131.21(d)-(e), for the purposes of developing NPDES permit limits and requirements under 301(b)(1)(C), where appropriate consistent with (a)(1) of this section. States and other certifying entities may also use an approved WQS variance when issuing certifications under section 401 of the Act. ~~for the permittee(s), pollutant(s), and/or water body or waterbody segment(s) covered by the WQS variance. For these limited purposes, the interim requirements will be the standards applicable for purposes of the CWA under 40 CFR 131.21(e)-(e).~~

~~(4)(3) A WQS variance shall~~ State may not ~~be granted~~ adopt WQS variances if the designated use and criterion addressed by the ~~proposed~~ WQS variance can be achieved by implementing technology-based effluent limits required under sections 301(b) and 306 of the Act.

(b) ~~Submission~~ Requirements for Submission to EPA:

(1) A WQS variance must specify the following include:

(i) ~~Identifying information: A WQS variance must identify~~ Identification of the pollutant(s), ~~permittee(s), and/or~~ water quality parameter(s), and the water body ~~or~~/waterbody segment(s) to which the WQS variance applies. Discharger(s)-specific WQS variances must also identify the permittee(s) subject to the WQS variance.

(ii) ~~WQS that apply during a variance for CWA section 402 permitting purposes and in issuing certifications under section 401 of the Act: A WQS variance must specify:~~ The requirements that apply throughout the term of the WQS variance. The requirements shall represent the highest attainable condition of the water body or waterbody segment applicable throughout the term of the WQS variance based on the documentation required in (b)(2) of this section. The requirements shall not result in any lowering of the currently attained ambient water quality, unless a WQS variance is necessary for restoration activities, consistent with paragraph (b)(2)(i)(A)(2) of this section. The State must specify the highest attainable condition of the water body or waterbody segment as a quantifiable expression that is one of the following:

~~(A) The highest attainable interim use and interim numeric criterion, or~~ For discharger(s)-specific WQS variances:

(1) The highest attainable interim criterion, or

(2) The interim effluent condition that reflects the greatest pollutant reduction achievable, or

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(3) If no additional feasible pollutant control technology can be identified, the interim criterion or interim effluent condition that reflects the greatest pollutant reduction achievable with the pollutant control technologies installed at the time the State adopts the WQS variance, and the adoption and implementation of a Pollutant Minimization Program.

~~(B) An interim numeric effluent condition that reflects the highest attainable condition for a specific permittee(s) during the term of the variance. Neither (A) nor (B) of this paragraph shall result in any lowering of the currently attained water quality unless a time limited lowering of water quality is necessary during the term of a variance for restoration activities, consistent with paragraph (b)(2)(ii) of this section.~~  
For WQS variances applicable to a water body or waterbody segment:

(1) The highest attainable interim use and interim criterion, or

(2) If no additional feasible pollutant control technology can be identified, the interim use and interim criterion that reflects the greatest pollutant reduction achievable with the pollutant control technologies installed at the time the State adopts the WQS variance, and the adoption and implementation of a Pollutant Minimization Program.

(iii) A statement providing that the requirements of the WQS variance are either the highest attainable condition identified at the time of the adoption of the WQS variance, or the highest attainable condition later identified during any reevaluation consistent with (b)(1)(v) of this section, whichever is more stringent.

~~(iii) Date the WQS variance will expire: States must include an expiration date for all WQS variances, consistent with paragraph (b)(2) of this section. WQS variances~~  
The term of the WQS variance, expressed as an interval of time from the date of EPA approval or a specific date. The term of the WQS variance must only be as long as necessary to achieve the highest attainable condition short as possible but expire no later than 10 years after state adoption and consistent with the demonstration provided in paragraph (b)(2) of this section. The State may adopt a subsequent WQS variance consistent with this section.

(v) For a WQS variance with a term greater than five years, a specified frequency to reevaluate the highest attainable condition using all existing and readily available information and a provision specifying how the State intends to obtain public input on the reevaluation. Such reevaluations must occur no less frequently than every five years after EPA approval of the WQS variance and the results of such reevaluation must be submitted to EPA within 30 days of completion of the reevaluation.



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(vi) A provision that the WQS variance will no longer be the applicable water quality standard for purposes of the Act if the State does not conduct a reevaluation consistent with the frequency specified in the WQS variance or the results are not submitted to EPA as required by (b)(1)(v) of this section.

(2) The supporting documentation must include:

(i) ~~The State must submit a demonstration justifying~~ Documentation demonstrating the need for a WQS variance.

~~(2)(A)~~ For a WQS variance to a use specified in section 101(a)(2) of the Act or a sub-category of such use, the State must ~~submit a demonstration demonstrate~~ that attaining the designated use and criterion is not feasible during the term of the WQS variance because:

~~(i)(1)~~ One of the factors listed in § 131.10(g) ~~applies is met~~, or

~~(ii)(2)~~ Actions necessary to facilitate ~~lake, wetland, or stream~~ restoration through dam removal or other significant ~~wetland or stream~~ reconfiguration activities preclude attainment of the designated use and criterion while the actions are being implemented.

~~(3)(B)~~ For a WQS variance to a non-101(a)(2) use, the State must submit documentation justifying how its consideration of the use and value of the water for those uses listed in § 131.10(a) appropriately supports the WQS variance and term. A demonstration consistent with (b)(2)(i)(A) of this section may be used to satisfy this requirement.

(ii) Documentation demonstrating that the term of the WQS variance is only as long as necessary to achieve the highest attainable condition. Such documentation must justify the term of the WQS variance by describing the pollutant control activities to achieve the highest attainable condition, including those activities identified through a Pollutant Minimization Program, which serve as milestones for the WQS variance.

(iii) In addition to (i) and (ii) of this section, for a WQS variance that applies to a water body or waterbody segment:

~~(3)(A)~~ Identification and documentation of ~~For a waterbody variance, the state must identify and document~~ any cost-effective and reasonable best management practices for nonpoint source controls related to the pollutant(s) or water quality parameter(s) and ~~location(s)~~ water body or waterbody segment(s) specified in the WQS variance that could be implemented to make progress towards attaining the underlying designated use and criterion. A State must provide public notice and comment for any such documentation.

(B) Any subsequent WQS variance for a water body or waterbody segment must include documentation of whether and to what extent best management practices for nonpoint source controls were implemented to address the pollutant(s) or water quality parameter(s) subject to the WQS variance and the water quality progress achieved.

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(c) *Implementing WQS variances in NPDES permits:* ~~Consistent with paragraph (a)(2)(ii) of this section, a~~ WQS variance serves as the basis of a water quality-based effluent limit included in a applicable water quality standard for implementing NPDES permit permitting requirements pursuant to § 122.44(d) for the period term of the WQS variance is in effect. Any limitations ~~required and requirements necessary~~ to implement the WQS variance shall be included as enforceable conditions of the NPDES permit for the permittee(s) subject to the WQS variance.

~~(d) *WQS variance renewals:* EPA may approve a WQS variance renewal if the State meets the requirements of this section and provides documentation of the actions taken to meet the requirements of the previous WQS variance. For a waterbody WQS variance renewal, the state must also provide documentation of whether and to what extent BMPs have been implemented to address the pollutant(s) subject to the WQS variance and the water quality progress achieved during the WQS variance period. Renewal of a WQS variance may be disapproved if the applicant did not comply with the conditions of the original WQS variance, or otherwise does not meet the requirements of this section.~~

**§ 131.15 Compliance schedule authorizing provisions. Authorizing the use of schedules of compliance for water quality-based effluent limits in NPDES permits.**

~~A~~ If a State ~~may, at its discretion and consistent with state law, intends to~~ authorize the use of schedules of compliance for water quality-based effluent limits (WQBELs) in NPDES permits, the State must adopt by including a permit compliance schedule authorizing provision, in its water quality standards or implementing regulations. ~~Any s~~ Such authorizing provision is a water quality standard subject to EPA review and approval under section 303 of the Act and must be consistent with sections 502(17) and 301(b)(1)(C) of the Act. ~~Individual compliance schedules issued pursuant to such authorizing provisions are not themselves water quality standards. 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.~~

**§ 131.20 State review and revision of water quality standards.**

(a) *State review.* The State shall from time to time, but at least once every 3 years, hold public hearings for the purpose of reviewing applicable water quality standards adopted pursuant to §§ 131.10—131.15 and Federally promulgated water quality standards and, as appropriate, modifying and adopting standards; ~~in particular,~~ The State shall also re-examine any water body waterbody segment with water quality standards that do not include the uses specified in section 101(a)(2) of the Act ~~shall be re-examined~~ every 3 years to determine if any new information has become available. If such new information indicates that the uses specified in section 101(a)(2) of the Act are attainable, the State shall revise its standards accordingly. ~~Similarly, a State shall re-examine its water quality criteria to determine if any criteria should be revised in light of any new or updated CWA section 304(a) criteria recommendations to assure that designated uses continue to be protected.~~ Procedures States establish for identifying and reviewing water bodies for review should be incorporated into their Continuing Planning Process. In addition, if a State

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does not adopt new or revised criteria for parameters for which EPA has published new or updated CWA section 304(a) criteria recommendations, then the State shall provide an explanation when it submits the results of its triennial review to the Regional Administrator consistent with CWA section 303(c)(1) and the requirements of § 131.20(c).

(b) *Public participation.* The State shall hold one or more public hearings for the purpose of reviewing ~~or~~ water quality standards as well as when revising water quality standards, in accordance with provisions of State law and EPA's public participation regulation (40 CFR part 25). The proposed water quality standards revision and supporting analyses shall be made available to the public prior to the hearing.

\* \* \* \* \*

**§ 131.22 EPA promulgation of water quality standards.**

\* \* \* \* \*

(b) The Administrator may also propose and promulgate a regulation, applicable to one or more States-navigable waters, setting forth a new or revised standard upon determining such a standard is necessary to meet the requirements of the Act. To constitute an Administrator's determination that a new or revised standard is necessary to meet the requirements of the Act, such determination must:

(1) Be signed by the Administrator or his or her duly authorized delegate, and

(2) Contain a statement that the document constitutes an Administrator's determination under section 303(c)(4)(B) of the Act.

\* \* \* \* \*

**§ 131.34 Kansas.**

\* \* \* \* \*

(c) *Water quality standard variances.* The Regional Administrator, EPA Region 7, is authorized to grant variances from the water quality standards in paragraphs (a) and (b) of this section where the requirements of § 131.14 are met.

**§ 131.40 Puerto Rico.**

\* \* \* \* \*

(c) *Water quality standard variances.* The Regional Administrator, EPA Region 2, is authorized to grant variances from the water quality standards in paragraphs (a) and (b) of this section where the requirements of § 131.14 are met.