

ABSTRACT

Why the Use Designation Process is not working in California **Thomas R. Grovhoug, Vice President, Larry Walker Associates**

The water quality control planning process in the State of California has not been utilized to exercise the flexibility provided under the Clean Water Act and USEPA regulations to de-designate uses or to designate subcategories of uses. This has created problems in the implementation of the NPDES permitting program and the 303(d) listing effort.

In California, most designated uses were adopted in the original water quality control plans (in California known as “Basin Plans”) developed under the 1972 Clean Water Act, typically in the 1975 time frame. The multiple uses which were designated in these Basin Plans ranged from “fishable” (warm and cold water habitat, commercial and sportfishing) and “swimmable” (water contact recreation) to a variety of other uses. Some of these uses were related to the “fishable” use (e.g. spawning, migration, estuarine habitat) and others related to other uses (municipal, agricultural or industrial supply, groundwater recharge, navigation, rare and endangered species habitat, non-water contact recreation, etc.). These uses have been broadly defined and are not directly related to numeric or narrative criteria, creating a problem in (a) the definition of existing uses, (b) the derivation of use subcategories, and (c) the application of use attainability procedures. The problem is best exemplified by the lack of activity in California in any of these areas.

We believe that policy statements are needed from the federal level to clarify how States (e.g. California) can and should adjust their existing planning procedures to accommodate flexibilities afforded under the use designation process. Specific direction in the following areas would be beneficial:

- (1) Clarification regarding the determination whether a use has been realized since 1975. We believe that the federal definition of water quality standards (uses plus criteria) points to the use of reliable and consistent criteria attainment as the fundamental basis for the existing use determination. In simple terms, we believe that water quality data and supporting information should be used, where available, to assess whether a use (i.e. an aquatic habitat which consistently meets USEPA criteria for numerous constituents) has existed in a water body since 1975. For instance, using the new federal mercury criterion as an example, we believe that the evaluation of existing fishing uses should include an assessment whether fish in a water body (e.g. largemouth bass) have consistently achieved the mercury tissue criterion level since 1975. If such consistent attainment has not occurred, we believe that the specific fishing use is not an existing use. In California, such an evaluation of criteria attainment is not presently used in this determination. [this addresses Question #1 in the Symposium announcement]
- (2) Clarification is also needed regarding the use of subcategories in the use designation arena. Following up on the example cited above, federal policy statements are needed to advise states that, where uses are not deemed to be

existing, the use of subcategories which link to criteria attainment is encouraged. We believe specific direction is needed to state that use subcategories may be stated in terms of the ability to achieve specific criteria, e.g. to acknowledge that an existing use subcategory may be fishing where largemouth bass of a specific size have a median tissue content of mercury of “X” or which only attains the criteria value at a frequency of “Y”. We believe this would more accurately reflect the nexus between criteria and uses which is lacking in California. This would then allow the use attainability procedures to function as intended in the USEPA regulations [Questions # 4 and #6]

- (3) The need for federal policy guidance in the use designation area is best seen in the ephemeral or effluent dominated water bodies of California. Currently in California, no distinction is made between these limited use water bodies and pristine mountain streams. Federal policy guidance is needed to reinforce the ability and intent under the Clean Water Act to exercise flexibility in the area of use designation. For instance, States should be encouraged to explore use of different assumptions regarding fish consumption rates or cancer risk levels when assigning criteria to address fishing uses in limited access or limited habitat water bodies. Similar guidance would be helpful to address criteria for municipal drinking water uses in water bodies which cannot reasonably support such a use. We have seen situations in California where USEPA human health criteria to protect drinking water uses were applied to streams that will never be allowed such use by the State health agency. We believe that guidance in the use designation area will provide flexibility to State NPDES permit writers who presently believe that they are compelled to adopt water quality based effluent limits to protect uses that will never exist.[Question #7]
- (4) Finally, we wish to convey our position regarding the economic analyses to be performed under the use attainability procedures. The POTW community in California has vigorously opposed the economic approach which USEPA has published as guidance. Our fundamental opposition to the USEPA approach is based on its lack of consideration of environmental benefit or cost effectiveness. The USEPA economic guidance document focuses on the “affordability” of control measures, and neglects the necessary analysis of costs and benefits of control measures in reaching a determination of “substantial and widespread impacts”. California public agencies remain in solid opposition to that approach and seek reconsideration under this new effort to address use designation and use attainability procedures.[Question #11]