REGFORM
REGULATORY ENVIRONMENTAL GROUP FOR MISSOURI

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Water Docket
US Environmental Protection Agency
Mail Code: 2822T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Attention: Docket No. EPA-HQ-OW-2010-0606

Re: Comments Submitted on behalf of the Regulatory Environmental Group for Missouri (REGFORM) regarding the EPA proposed rule, "Water Quality Standards Regulatory Clarifications," published in the Federal Register 78 FR 54517, September 4, 2013.

The Regulatory Environmental Group for Missouri (REGFORM) is pleased to submit these comments on EPA's above referenced proposed rule. REGFORM, a nonprofit organization created in 1993, is committed to the development of environmental regulations, policies, and laws that are grounded in sound science and designed to produce demonstrated environmental improvements commensurate with the cost of compliance. We advocate on behalf of our Missouri members to develop regulations and policies that protect the State's remarkable natural resources and environment – but without unduly burdening the regulated community – which has invested tremendous financial and human resources to create thousands of jobs and provide economic opportunity in our communities.

REGFORM's member companies own and operate facilities located on and near waters of the United States. Many of these facilities hold individual and/or general National Pollution Discharge Elimination System (NPDES) permits for the direct and indirect discharge into those waters. Accordingly, REGFORM has a direct interest in the matters addressed in the September 4, 2013 proposed water quality standards rulemaking.

COMMENTS

1. General Comments

REGFORM has two general comments:

A. "Regulatory Clarifications."

EPA is proposing significant substantive changes, usurping traditional State authority and increasing the stringency of the Clean Water Act – all under the title: "Regulatory Clarifications." We believe the title inappropriately masks the true nature of the proposal and likely discouraged many individuals and groups from reading the proposed rule at all because it was entitled, "Clarifications." In addition, we believe Congress fully intended to create a federal/state partnership in which States retain primary responsibility to determine and plan the designated use(s) of its water resources. This proposal is a direct assault on that congressional intent.

Recommendation: Withdraw the proposed rule and rename the action to accurately reflect the effort being undertaken.

B. Administrative Procedures Act (APA).

EPA's failure to provide copies of comment letters in the docket constitutes non-compliance with APA. The September 4, 2013, proposed WQS rulemaking assigned docket identification number EPA–HQ–OW–2010–0606, which is the same docket ID No. used by EPA three years ago for the July 30, 2010 stakeholder input – revisions to water quality standards regulation Federal Register. As such, all previous comments should have been provided to the public in an appropriate reference format. In addition, no public comments were made available from EPA's 1998 Advance Notice of Proposed Rulemaking (ANPRM) (63 FR 36742, July 7, 1998) in which EPA by their own account received over 3,200 specific written comments from over 150 comment letters. REGFORM searched for comments from the 1998 ANPRM and in eight hours was not able to locate a single previous comment. The public should not be required to make a formal request to the Docket for information that could easily be referenced by EPA.

It is hypocritical that EPA uses the word "transparent" in the rulemaking yet fails to be transparent itself. Such tactics make it appear that EPA has purposely not included previous public comments in their possession in order to minimize stakeholder input and public comments to this proposed rulemaking.

Recommendation: Withdraw the proposed rule and resubmit with appropriate access to all previous comments.

2. Rebuttable Presumption.

For the first time in the more than 40-year history of the Clean Water Act (CWA) and its implementing regulations, EPA is proposing to create by rule a "rebuttable presumption" that all waters of the United States are presumed to be "fishable and swimmable" (currently only a "goal" of the CWA) unless proven otherwise by performing an extensive scientific investigation called a Use Attainability Analysis. EPA's attempt to re-write the CWA under the guise of "clarifying" regulations borders on duplicitous and clearly runs afoul of the plain language of the CWA.

The CWA specifically used the word "goal" and the phrase "wherever attainable" to qualify the designated uses supportable under section 101(a)(2). EPA's attempt to codify a "rebuttable presumption" of attainability ignores the clear and unambiguous language of the CWA. Simply put, EPA was not afforded congressional deference in this matter nor allowed to either "clarify" or "gap-fill" such vast changes to the very core of the CWA .

If Congress had intended to create a "rebuttable presumption," it would have been easy to do. Instead, the CWA allows States to make these determinations on the basis of site-specific information including the water body's ability to be so designated. Furthermore, had Congress believed in 1972 that all waters were "fishable and swimmable" unless proven otherwise, the very first round of State water designations, which were due 180 days after passage of the 1972 Act, would have been classified as "fishable and swimmable," [or] been required to undergo further assessment to prove that they were not.[1] Then, had a State failed to designate a particular water body as "fishable and swimmable," or prove that it should not be so classified, the EPA would have been required to make the designation itself.[2] This was never done, of course, because EPA had no such authority under the CWA and still does not.

To assume such authority is not only outside the scope of the CWA but violates the principles of federalism imbedded in the CWA that continues to empower the individual States and Tribes to make all use designations for their waters.[3]

Recommendation: The proposed requirement to adopt a "rebuttable presumption" should not be incorporated into the Final Rule.

3. Part 131 Purpose Section.

EPA proposes to change the wording of the Purpose Section of §131.2 by replacing the words "necessary to" with the word "that", and also add the word "designated." Currently the regulation's first sentence reads in part "… by setting criteria necessary to protect the uses." However, this proposed revision would read, "... by setting criteria that protect the designated uses." [emphasis added].

[1] CWA section 303(a)(3)(A)
[2] CWA section 303(a)(3)(C)
[3] CWA section 303(c)(2)(A)

While these changes seem minimal, in reality they allow EPA to go far beyond "clarification." This is best illustrated by example. EPA under this revision could adopt a pollutant criterion at a level of "zero" and claim it is "protecting the designated use," even though in most situations, treatment to "zero" will likely not be necessary to protect the designated use. In other words, removal of the words "necessary to" from the Purpose Section of the water quality standards regulation would create a situation that allows a criteria to be adopted at an unnecessarily stringent level, with minimal scientific justification, and perhaps below any naturally occurring background levels.

Recommendation: EPA should not remove the words "necessary to" from the Purpose Section of this regulation as such language goes well beyond mere clarification.

4. Highest Attainable Use.

EPA's proposed rule adds a new definition at §131.3(m) that defines a new term "Highest Attainable Use" and proposes that the Highest Attainable Use be adopted when a State or Tribe adopts or revises its water quality standards based on a Use Attainability Analysis. This proposal will require States to expend limited resources to rebut the presumption (though in practice, we fear States will largely acquiesce and subject many waters to the Highest Attainable Use designations regardless of the actual circumstances of individual water bodies).). Adopting the highest attainable use designation could then subject permit holders for that body of water to discharge limits at or below background levels in the receiving waters

This EPA proposal usurps the authority specifically granted by Congress to States and Tribes to fashion standards "taking into consideration" designated uses under Clean Water Action section 303(c)(2)(A). Indeed, EPA's proposal at 78 Fed. Reg. 54523 readily concedes that Congress explicitly gave States and Tribes the primary authority to craft standards consistent with the CWA. Nothing, however, in the text of the CWA *mandates* a Highest Attainable Use under *all* circumstances as EPA's proposal would now for the first time require. Congress specifically gave States and Tribes – not EPA – the primary role in establishing categories of designated uses and assigning those uses to specific water bodies. EPA does not have the authority to rewrite the Clean Water Act to require a Highest Attainable Use analysis, and the agency cannot by regulation ignore the plain language and intent of Congress.

Recommendation: The proposed requirement to adopt the Highest Attainable Use should not be incorporated in the Final Rule.

5. Antidegradation Policy.

The rulemaking proposes to make several substantial changes to antidegradation regulations. One such change creates an entirely new regulation at §131.12(b)(2). Here, again, EPA attempts to require States and Tribes to undertake obligations that Congress did not mandate under the plain language of the CWA – actions which exceed

EPA's statutory authority. Simply put, there is nothing in the CWA that compels States to implement antidegradation policies in any precise way as EPA is now proposing; moreover, EPA does NOT have the authority to either approve or disapprove State antidegradation policies.

EPA's attempt to describe current antidegradation policies as "ineffective" rings hollow. States and Tribes have made tremendous progress over the past 30 years and this "one-size-fits-all" proposal belies current progress and the need for States and Tribes to be creative and flexible in establishing implementation policies. States and Tribes should be able to "test drive" procedures and policies prior to making a leap to regulation.

Recommendation: The proposed requirement to adopt new antidegradation language should not be incorporated into the Final Rule.

6. Definition of "fishable and swimmable.

The readability and clarity of Part 131 would be greatly improved if the regulation were revised to replace nearly all references to section 101(a)(2) with the statement "fishable and swimmable." Moreover, as part of the suggested revision, two new definitions at §131.3 should be added. A new definition for the word "fishable" and a separate new definition for the word "swimmable." Among other things, each of the new definitions should include language explaining how the definition relates to and is derived from Clean Water Act section 101(a)(2).

Recommendation: The proposed rule should add separate definitions for "fishable" and "swimmable" as derived from the CWA section 101(a)(2) and replace most Part 131 references to "section 101(a)(2)" with the statement "fishable and swimmable."

7. Variances.

We appreciate EPA's recognition of the value of variances, but we strongly oppose the codification of these new proposed requirements as a "clarification." Moreover, locking too much detail into this rule precludes State and Tribe innovation and flexibility. Variances by nature are unique applications to site specific conditions and have historically been codified into the both state and tribal regulatory processes.

Recommendation: The proposed requirement to adopt new variance language should not be incorporated into the Final Rule.

8. Part 131 Door Opening.

The WQS rulemaking proposed by EPA would make substantial changes to existing water quality standards regulations. By proceeding in this fashion, the EPA has opened the door to provide comments on Part 131 as a whole as all provisions of Part 131 are impacted through the rulemaking.

Several water quality standards regulations currently codified at 40 CFR §131.10 are unlawful and are an incorrect interpretation of the Clean Water Act and therefore should be revised or deleted. Among other sections affected, §131.10(j)(1) establishes a national policy that at a minimum, all waters of the United States must be fishable and swimmable unless a structured scientific assessment, approved by the EPA, proves otherwise. The Clean Water Act does not include such a minimum use classification. There are several arguments that support this position, including the following presented below.

The relevant language of the Clean Water Act section 101(a) provides:

> (a) The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter - (CWA section 101(a) emphasis added)
>
> (a)(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983 (CWA section 101(a)(2) emphasis added)

First, the plain language of the above-cited law establishes that EPA pursue the "goal" of section 101(a)(2) while being consistent with all the provisions of this chapter of the Clean Water Act. EPA must, therefore, pursue section 101(a)(2)'s goal by complying with the express directive of section 303(c)(2)(A) which requires States to make use designations. Accordingly, section 101(a) must be read together in harmony with section 303(c)(2)(A) so that neither section is rendered a nullity and so that both sections are given full effect. Consequently, it is not permissible for the EPA to ignore section 303(c)(2)(A) and make a minimum use designation for a water body, as done in §131.10(j)(1), since that authority is only afforded to the States.

Second, Congress clearly indicated that the national goal of fishable and swimmable be achieved "wherever attainable." Congress therefore acknowledged that the goal might not be attainable in every water body of the State. Congress did not create a minimum use presumption of attainability and place the burden on State's to prove otherwise.

Third, EPA's overreaching proposal reflects the agency's intent to entirely rewrite the WQS through veiled "clarifications" that impact the entire regulation. In doing so,

Part 131, as a whole, is subject to comment. Nothing in the plain and unambiguous language of the Clean Water Act entitles the agency to create a minimum use presumption of attainability. Accordingly, anything to the contrary schemed by the agency, whether now proposed or currently existing, cannot withstand scrutiny and is not supported by the plain language of the Congress. As part of this rulemaking EPA should therefore delete §131.10(j)(1) from Part 131 water quality standards.

In closing, REGFORM genuinely appreciates the opportunity to comment to EPA on this important issue. While we have made numerous comments on individual issues, we also respectfully request that due to the significant impact of the stated "Clarifications" on existing state and tribal implementations of the Clean Water Act it is our position that the proposed rule does not achieve its stated purpose and should be withdrawn.

Sincerely,

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cc: REGFORM members