



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10**

1200 Sixth Avenue, Suite 155
Seattle, WA 98101-3188

WATER DIVISION

October 13, 2020

Ms. Laura Watson
Director
Washington State Department of Ecology
PO Box 47600
Olympia, Washington 98504-7600

Re: EPA's Action on Revisions to the Washington State Department of Ecology's Surface Water Quality Standards for Shellfish Harvesting Bacteria Criteria

Dear Ms. Watson:

On February 10, 2014, the Northwest Environmental Advocates filed a complaint in U.S. District Court for the Western District of Washington (Case No. 2:14-cv-0196-RSM) challenging, in part, the U.S. Environmental Protection Agency's February 11, 2008 determinations that certain provisions submitted by Washington were not water quality standards. On October 17, 2018, the Court issued an Order Granting a Stay (Dkt. 95) pending EPA's reconsideration of its prior determinations that the provisions were not water quality standards. The Order required EPA to complete its reconsideration by October 17, 2021, by making approval or disapproval decisions, or a final determination that such provisions are not water quality standards.

EPA has completed the review and reconsideration of two of the water quality standards provisions subject to the Court Order at Chapter 173-201A of the Washington Administrative Code, which were submitted to EPA by the Washington Department of Ecology in 2003. Under the CWA Section 303(c), 33 U.S.C. § 1313(c), states must submit new and revised water quality standards to EPA for review and action, and EPA must ensure that those water quality standards are consistent with the CWA and EPA's implementing regulations. EPA's action is outlined below and further described in the enclosed Technical Support Document.

EPA's action applies only to waters in the State of Washington and does not apply to waters that are within Indian Country, as defined in 18 U.S.C. § 1151. In addition, nothing in this action shall constitute an approval or disapproval of a water quality standard that applies to waters within Indian Country. EPA, or authorized Indian Tribes, as appropriate, will retain responsibilities for water quality standards for waters within Indian Country.

Summary of EPA's Action

- I. Pursuant to EPA's authority under section 303(c)(3) of the CWA, 33 U.S.C. § 1313(c)(3), and 40 CFR Part 131, EPA is disapproving revisions to the following section of Chapter 173-201A WAC.
 - WAC 173-201A-210(2)(b)(i): Shellfish harvesting bacteria criteria (unconditional shellfish harvest).

II. Pursuant to EPA's authority under section 303(c)(3) of the CWA, 33 U.S.C. § 1313(c)(3), and 40 CFR Part 131, EPA is approving certain revisions and is not taking action on other revisions to the following section of Chapter 173-201A WAC.

- WAC 173-201A-210(2)(b)(ii): Shellfish harvesting bacteria criteria (averaging of bacteria sample data).

EPA appreciates Ecology's commitment and ongoing work to update Washington's water quality standards. We also appreciate the collaboration by your staff to address the complexities associated with criteria revisions. If you have any questions regarding this letter, please contact me at (206) 553-1855 or Lindsay Guzzo, EPA staff lead, at (206) 553-0268 or Guzzo.Lindsay@epa.gov.

Sincerely,

Daniel D. Opalski
Director

Enclosure: Technical Support Document

cc: Mr. Vince McGowan, Water Quality Program Manager, Ecology
Ms. Melissa Gildersleeve, Water Quality Management Section Manager, Ecology
Mr. Chad Brown, Water Quality Management Unit Supervisor, Ecology

Technical Support Document

EPA's Action on
the Revisions to Chapter 173-201A of the
Washington Administrative Code Regarding
Shellfish Harvesting Bacteria Criteria

October 13, 2020

I. Clean Water Act Requirements for Water Quality Standards

The objective of the Clean Water Act (CWA) is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters with an interim goal, where attainable, to achieve water quality that provides for the protection and propagation of fish, shellfish, and wildlife and recreation in and on the water. Under section 303(c) of the CWA and federal implementing regulations at 40 CFR § 131.4, states (and authorized tribes) have the primary responsibility for reviewing, establishing, and revising water quality standards (WQS). These standards include the designated uses of a waterbody or waterbody segment, the water quality criteria that protect those designated uses, and an antidegradation policy. This statutory and regulatory framework allows states to work with local communities to adopt appropriate designated uses (as required at 40 CFR § 131.10(a)) and to adopt criteria to protect those designated uses (as required at 40 CFR § 131.11(a)).

States are required to hold public hearings for the purpose of reviewing applicable WQS periodically but at least once every three years and, as appropriate, modify and adopt these standards (40 CFR § 131.20). Each state must follow applicable legal procedures for revising or adopting such standards (40 CFR § 131.5(a)(6)) and submit certification by the state's attorney general, or other appropriate legal authority within the state, that the WQS were duly adopted pursuant to state law (40 CFR § 131.6(e)). The U.S. Environmental Protection Agency's (EPA) review authority and the minimum requirements for state WQS submittals are described at 40 CFR § 131.5 and 131.6, respectively.

States are required by 40 CFR § 131.11(a) to adopt water quality criteria that protect their designated uses. In adopting such criteria, states should establish numeric values based on one of the following:

- (1) CWA section 304(a) guidance;
- (2) CWA section 304(a) guidance modified to reflect site-specific conditions; or,
- (3) Other scientifically defensible methods (40 CFR § 131.11(b)(1)).

In addition, states should establish narrative criteria where numeric criteria cannot be established or to supplement numeric criteria (see 40 CFR § 131.11(b)(2)).

Section 303(c) of the CWA requires states to submit new or revised WQS to EPA for review and action. EPA is required to review these changes to ensure revisions to WQS are consistent with the CWA and EPA's implementing regulations.

EPA considers four questions (described below) when evaluating whether a particular provision is a new or revised WQS. If all four questions are answered "yes" then the provision would likely constitute a new or revised WQS that EPA has the authority and duty to approve or disapprove under CWA § 303(c)(3).¹

¹ *What is a New or Revised Water Quality Standard under 303(c)(3)? Frequently Asked Questions*, EPA No. 820F12017 (Oct. 2012). Available at <https://www.epa.gov/sites/production/files/2014-11/documents/cwa303faq.pdf>

1. Is it a legally binding provision adopted or established pursuant to state or tribal law?
2. Does the provision address designated uses, water quality criteria (narrative or numeric) to protect designated uses, and/or antidegradation requirements for waters of the United States?
3. Does the provision express or establish the desired condition (e.g., uses, criteria) or instream level of protection (e.g., antidegradation requirements) for waters of the United States immediately or mandate how it will be expressed or established for such waters in the future?
4. Does the provision establish a new WQS or revise an existing WQS?

Furthermore, § 303(c)(3) of the CWA and the federal WQS regulation at 40 CFR § 131.21(a)(2) state, in part, that when EPA disapproves a state's WQS, EPA shall specify the changes that are needed to assure compliance with the requirements of the CWA and federal WQS regulations.

Finally, EPA considers non-substantive edits to existing WQS to constitute new or revised WQS that EPA has the authority to approve or disapprove under § 303(c)(3). While these edits and changes do not substantively change the meaning or intent of the existing WQS, EPA believes it is reasonable to treat such edits and changes in this manner to ensure public transparency as to which provisions are applicable for CWA purposes. EPA notes that the scope of its review and action on non-substantive edits or editorial changes extend only to the edits or changes themselves. EPA is not re-opening or reconsidering the underlying WQS which are the subject of the non-substantive edits or editorial changes.

II. Background

On February 10, 2014, the Northwest Environmental Advocates filed a complaint in U.S. District Court for the Western District of Washington (Case No. 2:14-cv-0196-RSM) challenging, in part, EPA's February 11, 2008 determinations that certain provisions submitted by Washington were not water quality standards. On October 17, 2018, the Court issued an Order Granting a Stay (Dkt. 95) pending EPA's reconsideration of its prior determinations that the provisions were not water quality standards. The Order required EPA to complete its reconsideration by October 17, 2021, by making approval or disapproval decisions, or a final determination that such provisions are not water quality standards.

This Technical Support Document constitutes EPA's reconsideration and action on two of the provisions subject to the Court Order.

III. EPA's Action Upon Reconsideration of Water Quality Standards

In its February 11, 2008 action, EPA concluded that WAC 173-201A-210(2)(b)(i) and (ii) were not WQS. In October 2012, EPA issued additional information addressing the questions it considers when determining whether a submitted provision constitutes a new or revised WQS.² On reconsideration, EPA has determined that all of WAC 173-201A-210(2)(b)(i) and parts of

² *What is a New or Revised Water Quality Standard under 303(c)(3)? Frequently Asked Questions*, EPA No. 820F12017 (Oct. 2012). Available at <https://www.epa.gov/sites/production/files/2014-11/documents/cwa303faq.pdf>

WAC 173-201A-210(2)(b)(ii) are WQS that EPA has the CWA section 303(c)(3) authority and duty to approve or disapprove.

EPA's action and rationale on reconsideration of the provisions submitted by Ecology are provided below. The underlined text indicates the new and/or revised language from Ecology's 2006 WQS submittal, and strikeout text indicates Ecology's previous text, which had been replaced by the new or revised text.

Today's action applies only to waters within the jurisdiction of the state of Washington and does not apply to waters that are within Indian Country, as defined in 18 U.S.C. § 1151. Nothing in this decision document shall constitute an approval or disapproval of a WQS that applies to waters within Indian Country. EPA, or authorized Indian Tribes, as appropriate, retain the authority to establish WQS for waters within Indian Country.

Shellfish harvesting bacteria criteria (unconditional shellfish harvest) – WAC 173-201A-210(2)(b)(i)

(i) Shellfish growing areas approved for unconditional harvest by the state department of health are fully supporting the shellfish harvest goals of this chapter, even when comparison with the criteria contained in this chapter suggest otherwise.

EPA Action and Rationale: In accordance with its CWA authority, 33 U.S.C. § 1313(c)(3) and 40 CFR § 131, EPA disapproves the provision at WAC 173-201A-210(2)(b)(i). This provision authorizes the Washington Department of Health (DOH) to make harvesting determinations that supersede otherwise applicable numeric criteria in Washington's WQS. In the 2003 Concise Explanatory Statement and Responsiveness Summary, Ecology stated: "Ecology incorporated language that allows determinations on the health of shellfish beds made by the Department of Health to override direct comparisons with the state water quality standards for shellfish protection." Ecology has provided no scientific supporting information or explanation to justify how the DOH decision determining the unconditional shellfish harvesting areas are protective of the designated use.

Remedy to Address the Disapproval: The effect of EPA's disapproval is that the provision at WAC 173-201A-210(2)(b)(i) does not become an applicable water quality standard for CWA purposes. Because Washington has existing shellfish protection provisions for bacteria in place at WAC 173-201A-210(2)(b), EPA is not specifying changes that the state must adopt to meet the requirements of the CWA section 303(c)(3), 33 U.S.C. § 1313(c)(3). EPA recommends, however, that Ecology removes the disapproved provision from its regulations to avoid confusion.

Shellfish harvesting bacteria criteria (averaging of bacteria sample data) – WAC 173-201A-210(2)(b)(ii)

(ii) When averaging bacteria sample data for comparison to the geometric mean criteria, it is preferable to average by season and include five or more data collection events within each period. Averaging of data collected beyond a thirty-day period, or beyond a specific discharge event under investigation, shall not be is not permitted when such averaging would skew the

data set so as to mask noncompliance periods. The period of averaging should not exceed twelve months, and should have sample collection dates well distributed throughout the reporting period.

EPA Action and Rationale: EPA is taking no action on the first sentence of WAC 173-201A-210 (2)(b)(ii) as it is not a WQS under section 303(c) of the CWA. The first sentence simply establishes a non-binding preference for averaging by season and relates to data sufficiency for assessing compliance with the criteria. In accordance with its CWA authority, 33 U.S.C. § 1313(c)(3) and 40 CFR 131, EPA approves the changes and additions in the last two sentences at WAC 173-201A-210(2)(b)(ii) which establish a maximum averaging period of twelve months. This twelve month averaging period is based on scientifically defensible methods for protection of human health as developed by the U.S. Food and Drug Administration's (FDA) 2017 update to the National Shellfish Sanitation Program's (NSSP) [Guide for the Control of Molluscan Shellfish](#).

The NSSP is the federal/state cooperative program recognized by the FDA and the Interstate Shellfish Sanitation Conference for the sanitary control of shellfish produced and sold for human consumption. The purpose of the NSSP is to promote and improve the sanitation of shellfish (oysters, clams, mussels and whole or roe-on scallops) moving in interstate commerce through federal/state cooperation and uniformity of state shellfish programs.

The NSSP Guide for the Control of Molluscan Shellfish consists of a Model Ordinance, supporting guidance documents, recommended forms, and other related materials associated with the Program. The Model Ordinance includes guidelines to ensure that the shellfish produced in states in compliance with the guidelines are safe and sanitary. The Model Ordinance provides readily adoptable standards and administrative practices necessary for the sanitary control of molluscan shellfish.³

³ National Shellfish Sanitation Program (NSSP). Guide for the Control of Molluscan Shellfish. Revision 2017. Available at <https://www.fda.gov/media/117080/download>