

II. Background

A. What Are the Statutory and Regulatory Requirements Relevant to This Action?

Section 303(c) of the Clean Water Act (CWA), 33 U.S.C. 1313(c), requires States and authorized Tribes to adopt water quality standards for waters of the United States within their applicable jurisdictions. Section 303(c) and EPA's implementing regulations at 40 CFR part 131 require State water quality standards to include the designated use or uses to be made of the water, the criteria necessary to protect those uses, and an antidegradation policy. States are also required to review their water quality standards at least once every three years and, if appropriate, revise or adopt new standards. 33 U.S.C. 1313(c)(1). States are required to submit the results of these reviews to EPA for approval. 33 U.S.C. 1313(c)(2)(A). Section 303(c)(4) of the CWA requires EPA to promulgate water quality standards when necessary to replace disapproved State water quality standards.

Section 101(a)(2) of the CWA establishes as a national goal "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and * * * recreation in and on the water," wherever attainable. This national goal is commonly referred to as the "fishable/swimmable" goals of the CWA. (Hereafter, the fishable/swimmable goals are referred to as CWA section 101(a) goal uses.) Section 303(c)(2)(A) requires State water quality standards to "protect the public health or welfare, enhance the quality of water and serve the purposes of this [Act]." Further, States are required to take into consideration the waters' use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also to take into consideration their use and value for navigation. 33 U.S.C. 1313(c)(2)(A). States are free to designate more specific uses (e.g., cold water aquatic life), or to designate uses not mentioned in the CWA, with the exception of waste transport or waste assimilation, which is not an acceptable use. 40 CFR 131.10(a). EPA's regulations at 40 CFR 131.10 describe the process States must follow and the analyses States must conduct prior to designating any uses that do not include the 101(a) goal uses.

B. What Actions Have Kansas and EPA Taken Leading to Today's Action?

On October 31, 1994, Kansas submitted a complete set of water

quality standards to EPA for review and approval. As part of this submission, it also submitted the *Kansas Surface Water Register*, which contains the listing of all streams, lakes, and wetlands classified under the State's water quality standards, individual water body locational data and all designated uses for each stream segment, wetland, and lake. The 1994 *Kansas Surface Water Register*, adopted by reference at K.A.R. 28-16-28d(c)(2) [subsequently renumbered as K.A.R. 28-16-28d(d)(2)], divided each stream segment in the State's 1985 water quality standards into multiple parts and contained use designations for each newly identified segment. This greatly expanded the number of stream segments with water body-specific use designations.

In a February 19, 1998, letter from EPA Region 7 to the Secretary of the Kansas Department of Health and Environment (KDHE), EPA reviewed and approved in part and disapproved in part all of the State's new or revised standards. As part of that action, EPA disapproved the absence of a primary contact recreation use designation for more than 1,400 water bodies and the lack of an aquatic life use designation for one of those water bodies. The vast majority of those waters were designated for secondary contact recreation, *i.e.*, wading, by operation of the State's provision that provided a default secondary contact recreation use for waters that had no other recreation use designation. The State had provided no documentation indicating that a primary contact recreation use was not attainable, even though such documentation is required under 40 CFR 131.10(g) and (j). EPA therefore disapproved those use designations as being inconsistent with EPA's regulations.

As a part of this action, EPA also disapproved the following provisions of Kansas' 1994 water quality standards:

- The State's antidegradation policy regarding protection of Outstanding National Resource Waters (also commonly referred to as Tier 3 waters);
- Provisions governing discharges from waste stabilization ponds;
- Disinfection requirements;
- Provisions addressing the adoption of water quality criteria for the protection of the State's domestic water supply use;
- Several water quality criteria;
- The State's water quality standards implementation procedures;
- The State's antidegradation implementation procedures;
- The State's water quality standards provisions for assumed stream design

flows in applying water quality criteria; and

- Provisions relating to waters with effluent-created habitat.

In June 1999, Kansas completed a triennial review of its water quality standards. The State adopted new and revised water quality standards on June 29, 1999, which became effective under State law on June 30, 1999. Kansas submitted these standards for EPA review and approval on August 10, 1999, as required under CWA section 303(c)(2)(A). In its submission, KDHE corrected several provisions disapproved by EPA in its February 1998 disapproval letter to make them consistent with the CWA. In addition, Kansas revised use designations for several water bodies and corrected errors in its 1994 submission. On January 19, 2000, EPA approved these corrections and revised use designations. EPA also identified, in its January 2000 letter, one stream segment in Kansas that is located wholly within Indian country, over which Kansas had not demonstrated jurisdiction for CWA purposes.

On July 3, 2000, EPA proposed to promulgate Federal water quality standards for the disapproved items not resolved by the State's 1999 revisions (see section III, below). EPA ultimately proposed to promulgate primary contact recreation use designations for 1,456 stream segments and lakes. EPA also proposed to promulgate the State's expected aquatic life use designation for one of those stream segments.

III. What Federal Water Quality Standards Did EPA Propose in July 2000?

On July 3, 2000, EPA proposed water quality standards for the State of Kansas. 65 FR 41216 (July 3, 2000). Specifically, EPA proposed: (1) An aquatic life use for one stream segment and a primary contact recreation use for 1,292 stream segments and 164 lakes; (2) a provision stating that all discharges to stream segments for which continuous flow is sustained primarily through the discharge of treated effluent shall protect the State's designated uses; (3) use of specific design flows (7Q10, 4B3), or other scientifically defensible design flows recommended by EPA to implement the State's chronic aquatic life criteria, and use of specific design flows (1Q10, 1B3), or other scientifically defensible design flows recommended by EPA to implement the State's acute aquatic life criteria; and (4) implementation procedures for the State's antidegradation policy to determine whether to allow a lowering of surface water quality by point sources