

of pollution where nonpoint sources also contribute the pollutant of concern to that body of water.

Under its discretionary authority at CWA section 303(c)(4)(B) to address State water quality standards that the Administrator determines are inconsistent with the Clean Water Act, EPA also proposed two other water quality standards: numeric human health criteria for alpha- and beta-endosulfan, and a provision stating that water quality standards in Kansas apply to all privately owned surface waters in Kansas that are waters of the United States.

On October 13, 2000, KDHE submitted revised water quality standards to EPA for its review and approval. This submission contained, among other things, new or revised water quality standards addressing alpha-endosulfan and beta-endosulfan water quality criteria covered by EPA's July 2000 proposal. EPA approved these provisions by letter dated February 2, 2001, thereby removing the need for Federal water quality standards for this issue.

On September 9, 2001, the KDHE submitted revised water quality standards to EPA for its review and approval. This submission contained new or revised water quality standards addressing the following matters covered by EPA's July 2000 proposal: effluent-created habitat, stream design flow, procedures for implementing the State's antidegradation policy, and the applicability of water quality standards to publicly held and privately held classified ponds. Consequently, these new and revised State water quality standards addressed all but one of the remaining issues identified in EPA's 1998 disapproval decision.

In addition, as part of this submission the State removed its provision applying a default use designation of secondary contact recreation and adopted a provision that made use designations subject to the results of use attainability analyses. As a result of this action, all but two of the waters contained in EPA's proposal—which previously had been subject to the State's default secondary contact recreation use—were temporarily no longer subject to any recreation use designation. Under the new provision, which EPA approved, all use designations are to be based on a use attainability analysis conducted by or approved by the State.

By letter dated November 9, 2001, EPA approved the State's September 9, 2001, submission. EPA's approval of new or revised standards in 2000 and 2001 eliminated the need for a Federal promulgation regarding the previously

disapproved provisions with the exception of EPA's disapproval of use designations for 1,456 water bodies.

On December 10, 2002, Kansas submitted to EPA the results of its triennial review and supporting analyses. Part of these revisions included use changes and use attainability analyses for waters subject to EPA's July 2000 proposal. As discussed in section IV.C., this submission and several additional actions have reduced the number of water bodies that are subject to EPA's final action today.

#### **IV. What Federal Water Quality Standards Is EPA Promulgating Today?**

In today's action, EPA is promulgating a primary contact recreation use designation for 1,056 waters, an expected aquatic life use for one of these waters, and a secondary contact recreation use designation for 230 waters, thereby addressing the last remaining matter subject to EPA's 1998 disapproval decision. Today's action is taking place pursuant to a 90-day schedule ordered by the U.S. District Court for the District of Kansas in *Kansas Natural Resource Council, et al. v. Whitman*, No. 00-2555-GTV (March 31, 2003). The court's decision and the basis for EPA's decisions are described below.

##### **A. Background**

As described in the previous section, CWA section 101(a)(2) 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 (*i.e.*, the "fishable/swimmable" goal). 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]." EPA's regulations at 40 CFR part 131 interpret and implement these CWA provisions by requiring that water quality standards provide for CWA section 101(a) goal uses unless those uses have been shown to be unattainable, effectively creating a rebuttable presumption of attainability, *i.e.*, that a default designation of CWA section 101(a) goal uses should apply. The mechanism in EPA's regulations used to rebut this presumption is a use attainability analysis.

Under 40 CFR 131.10(j), States are required to conduct a use attainability analysis (UAA) whenever the State designates or has designated uses that do not include the CWA section 101(a) goal uses, when the State wishes to remove CWA section 101(a) goal uses,

or when it adopts subcategories of uses that require less stringent criteria. Uses are considered by EPA to be attainable, at a minimum, if the uses can be achieved (1) when effluent limitations under section 301(b)(1)(A) and (B) and section 306 are imposed on point source dischargers, and (2) when cost-effective and reasonable best management practices are imposed on nonpoint source dischargers. See 40 CFR 131.10(d). EPA's regulations at 40 CFR 131.10 list grounds upon which to base a finding that attaining the designated use is not feasible, as long as the designated use is not an existing use. Existing uses are defined by EPA's regulations as "those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards." 40 CFR 131.3(e). A UAA is defined in 40 CFR 131.3(g) as a "structured scientific assessment of the factors affecting the attainment of the use which may include physical, chemical, biological, and economic factors." In a UAA, the physical, chemical and biological factors affecting the attainment of a use are evaluated through a water body survey and assessment. Guidance on water body surveys and assessment techniques is contained in the *Technical Support Manual, Volumes I-III: Water Body Surveys and Assessments for Conducting Use Attainability Analyses*. Additional guidance is provided in the *Water Quality Standards Handbook: Second Edition* (EPA-823-B-94-005, August 1994). Guidance on economic factors affecting the attainment of a use is contained in the *Interim Economic Guidance for Water Quality Standards: Workbook* (EPA-823-B-95-002, March 1995).

EPA regulations effectively establish a "rebuttable presumption" that CWA section 101(a) goal uses are attainable and therefore should apply to a water body unless it is affirmatively demonstrated that such uses are not attainable. EPA adopted this approach in order to help achieve the national goal articulated by Congress that, "wherever attainable," water quality should provide for the "protection and propagation of fish, shellfish and wildlife" and for "recreation in and on the water." 33 U.S.C. 1251(a)(2). While facilitating achievement of Congress' goals, the "rebuttable presumption" approach preserves States' paramount role in establishing water quality standards by weighing any available evidence regarding the attainable uses of a particular water body. The rebuttable presumption approach does not restrict