

the States' discretion to determine that CWA section 101(a) goal uses are not, in fact, attainable in a particular case. Rather, if the water quality goals articulated by Congress are not to be met in a particular water body, the regulations simply require that such a determination be based upon a "structured scientific assessment" of use attainability. See 40 CFR 131.3(g) (defining use attainability analysis).

EPA believes that the rebuttable presumption policy reflected in these regulations is an essential foundation for effective implementation of the CWA as a whole. The "use" of a water body is the most fundamental articulation of its role in the aquatic and human environments, and the water quality protections established by the CWA follow from the water's designated use. If a use lower than a CWA section 101(a) goal use is designated based on inadequate information or superficial analysis, water quality-based protections that might have made it possible for the water to achieve the goals articulated by Congress in CWA section 101(a) may not be put in place.

EPA seeks, through its oversight under section 303(c) of the Act, to ensure that any State's decision to forgo protection of a water body's potential to support CWA section 101(a) goal uses results from an appropriately "structured" scientific analysis of use attainment. Where EPA concludes that the State failed to adequately justify a use designation lower than a CWA section 101(a) goal use designation, EPA disapproves the use designation. In some cases, the State may decide to revise its use classifications to create additional designated uses that are also protective of the CWA section 101(a) goal uses. In other cases, the State may decide to conduct a more thorough analysis of use attainability sufficient to rebut the fishable/swimmable presumption reflected in the regulations. Where a State does neither, however, federally promulgated CWA section 101(a) goal uses will ensure the water quality goals of the Act are recognized.

In the July 2000 proposal, EPA requested data and information that could further support or refute the attainability of EPA's proposed designated uses. EPA evaluated all data and information submitted by commenters. For EPA's specific responses to comments received, see the Response to Comments document contained in the administrative record to this rulemaking. A general discussion of EPA's evaluation of this data and information is described in section IV.B.3.

In response to EPA's request for comments on EPA's proposed designated uses, EPA received several comments questioning EPA's use of the rebuttable presumption for assigning designated uses. Specifically, several commenters asserted that sufficient information exists in the administrative record to confirm that, as a class, the undesignated waters would not be expected to sustain either primary contact recreation or aquatic life uses and, as such, that this information refutes EPA's presumption that primary contact recreation and aquatic life uses are appropriate. EPA disagrees that information of such a general nature constitutes the type of structured scientific assessment required by EPA's regulations to rebut the presumption. EPA believes that use attainability analyses should be based on data applicable to individual waters. Indeed, numerous commenters asserted that use designation decisions should be made on a case-by-case basis, taking into account local considerations. A UAA is a mechanism to accomplish this. Where water body-specific data and information have been submitted by the State, provided by commenters, or collected by EPA, EPA has considered that data and information to determine whether those waters should be excluded from today's rulemaking. See section IV.B. for a further discussion of EPA's analysis of this data and information.

Other commenters asserted that the use of the "rebuttable presumption" approach EPA employed to propose use designations is contrary to law. EPA disagrees. As described above, EPA believes that using the "rebuttable presumption" approach is supported by sections 101(a) and 303(c) of the Clean Water Act. Further, EPA's longstanding interpretation, as reflected in its 1983 regulations, is that the purposes of the Act are better served by requiring a justification for designating uses less than fishable/swimmable rather than demanding an affirmative showing of attainability before requiring a fishable/swimmable use designation. See 40 CFR 131.10. Moreover, the court order resulting in today's action, *Kansas Natural Resource Council, et al. v. Whitman*, No. 00-2555-GTV (D. Kansas, March 31, 2003), specifically considered EPA's rebuttable presumption approach and held that EPA must employ the concept in its promulgation of water quality standards for the State of Kansas. The court recognized that, for many of these waters, the order's 90-day schedule could result in water bodies being given a primary contact recreation

designation when a subsequently performed use attainability analysis might rebut such a designation. However, the court stated, "Unless and until unattainability is demonstrated as specified by the regulations, the purpose of the Clean Water Act is best served by protecting the waters as if they are fishable/swimmable."

Lastly, several commenters suggested that under EPA's rebuttable presumption approach, secondary contact recreation is an appropriate presumption since it is one of the goal uses of the Clean Water Act. While EPA agrees that secondary contact recreation is indeed one of the Clean Water Act's goals, EPA disagrees that it supplants primary contact recreation for purposes of the rebuttable presumption. Section 101(a)(2) specifically calls for the protection of recreation in and on the water. In other words, the statute contemplates that both recreation uses will be protected wherever attainable. Within the Kansas Surface Water Quality Standards, the primary contact recreation use is the only designated use that will assure protection of both of these Clean Water Act goals.

#### *B. EPA's Analysis of Information Received for Specific Stream Segments and Lakes*

When promulgating replacement Federal water quality standards, EPA follows the same rebuttable presumption approach that applies under the regulation to State decision-making. 40 CFR 131.22(c). EPA does not believe it is appropriate to alter the current approach for establishing use designations under 40 CFR part 131 merely because the forum for decision-making has changed from the State to the Federal level. Attaining the goals articulated by Congress is no less important when EPA, as opposed to a State, is making use designation determinations. Moreover, EPA believes that failure to apply the rebuttable presumption in the Federal context could undermine how that presumption currently applies to State decision-making under the Federal regulations. If the presumption did not apply equally in the State and Federal decision-making process, a State could effectively shift the burden of demonstrating attainability simply by failing to adequately justify its use designation and thereby triggering a Federal rulemaking proceeding. This result would be contrary to the statute's expectation that States retain primary responsibility for making water quality standards decisions.

At the time of the July 2000 proposal, EPA solicited public comment and