

information to indicate that Whiskey Creek contains aquatic life conditions other than common habitat types and indigenous biota, EPA believes that an expected aquatic life use designation is appropriate for aquatic life in Whiskey Creek. Therefore, EPA has designated Whiskey Creek for expected aquatic life. This water is identified in 131.34(a) in today's rule. Once the State adopts and EPA approves an appropriate designation for this water body, EPA will initiate a withdrawal of the use designation promulgated for this water body.

D. Effect of Today's Rulemaking on the State's Water Quality Programs

EPA's approach in this rulemaking does not undermine the State's primary role in designating uses for waters in Kansas. EPA prefers that States establish their own regulations. Consequently, on March 26, 2001, EPA embarked on a process with the State of Kansas to resolve the remaining issues identified in EPA's 1998 disapproval decision and obviate the need for EPA rulemaking. EPA Region 7 and the State of Kansas entered into a Memorandum of Understanding (MOU) establishing a schedule to resolve the outstanding disapproved portions of the 1994 Kansas Surface Water Quality Standards. The MOU included a schedule by which the State would conduct use attainability analyses for a total of 1,456 waters not designated for primary contact recreation uses in its 1994 revisions. The Kansas legislature later passed a law requiring KDHE to develop recreation UAAs for all State waters on a regular schedule by October 2005. KSA-82a-2004. The schedule established by the Kansas legislature superseded the one established by the MOU. However, today's rulemaking by EPA does not supersede or moot any of the requirements for KDHE to conduct UAAs contained in the statute. Indeed, EPA fully expects the State to continue to develop UAAs on the schedules set forth in State law and to adopt new or revised use designations when appropriate.

If the State's forthcoming UAAs indicate that primary contact recreation uses are not attainable for waters designated for that use in today's rule and EPA approves the new use designations adopted by the State, EPA will initiate withdrawal of the use designations promulgated today for such waters. For over 350 waters in today's rule, the uses being promulgated today are consistent with analyses provided to EPA by the State. For these waters, the State need not conduct any further analyses and can simply adopt

the use designations for the specific waters identified in today's rule. Once the designated uses are adopted by the State for specific waters and are submitted to and approved by EPA, EPA will initiate withdrawal of its rulemaking for those waters.

Consequently, due to the schedule by which the State is expected to complete UAAs for the remaining waters in today's rule and the discretion the State is afforded by the Clean Water Act and its implementing regulations, EPA does not anticipate that today's regulation will have a significant effect on the State's water quality program and potentially affected entities.

Further, water quality standards do not directly affect any entity. It is only through the implementation of these water quality standards through such mechanisms as NPDES permits that these water quality standards will have any direct effect. The State has flexibility in how it implements these water quality standards. EPA has included a variance provision in today's final rule, 40 CFR 131.34(c), authorizing the Regional Administrator to grant variances based upon a permittee's demonstration, consistent with the Federal regulations, that the use is not attainable. Variances are particularly suitable for instances where the cause of nonattainment is discharger-specific and it appears that the designated use in question will eventually be attainable or be demonstrated to be unattainable. See section VI.C. Additionally, the State will use these water quality standards in identifying impaired waters and establishing Total Maximum Daily Loads (TMDLs). Where the State identifies waters subject to this rulemaking as impaired, the State has discretion in scheduling the water for TMDL development. Further discussion is contained in Section VI.D.

The designation of uses in this rule is not intended to apply to waters within Indian country. The 1999 *Kansas Surface Water Register* included some stream segments that may be located wholly or partly in Indian Country. EPA approval of designated uses for waters in Kansas has never been intended to apply to any waters located within Indian Country because EPA has not analyzed or approved the State's authority to adopt water quality standards for waters in Indian Country. EPA has recommended that the State clarify this matter by amending the *Kansas Surface Water Register* to specify that the State's water quality standards do not apply to any portions of waters located in Indian Country. EPA is working with Tribes in Region 7 to identify those Tribes that may

consider seeking authorization to administer the water quality standards program under the CWA. This effort is part of a national effort to ensure there are water quality standards for Indian Country waters.

V. Economic Analysis

This final rule will have no direct impact on any entity because the rule simply establishes water quality standards (e.g., use designations) which by themselves do not impose any costs. These standards, however, may serve as a basis for development of NPDES permit limits. In Kansas, the State is the NPDES permitting authority and retains considerable discretion in implementing standards. Thus, until the State implements these water quality standards, there will be no effect on any entity. Nonetheless, EPA prepared a preliminary analysis to evaluate potential costs to NPDES dischargers in Kansas associated with future State implementation of EPA's Federal standards.

Any NPDES-permitted facility that discharges to water bodies affected by this rule could potentially incur costs to comply with the rule's provisions. The types of affected facilities may include industrial facilities and publicly owned treatment works (POTWs). EPA did not consider the potential costs for nonpoint sources, such as agricultural and forestry-related nonpoint sources, although EPA recognizes that the State may decide to impose controls on these sources to achieve water quality standards. As a technical matter, nonpoint source discharges are difficult to model and evaluate for potential costs because they are intermittent, highly variable, and occur under different hydrologic or climatic conditions than continuous discharges from industrial and municipal facilities, which are evaluated under critical low flow or drought conditions. Thus, the evaluation of nonpoint sources and their effects on the environment is highly site-specific and data sensitive. In addition, EPA did not address the potential monetary benefits of this rule for Kansas.

A. Identifying Affected Facilities

To identify facilities potentially affected by the primary or secondary contact recreation uses promulgated in today's rule, EPA used an inventory of affected facilities submitted by the KDHE in its comments on the proposed rule. This list identifies 416 facilities—14 majors and 402 minors. Of the stream segments and lakes included in the rule, one stream segment is also lacking an aquatic life support use (Whiskey