

In adopting recreation uses, the State may wish to consider additional categories of recreation uses. For example, Kansas could establish more than one category of primary contact recreation to differentiate between waters where recreation is known to occur and waters where recreation is not known to occur but may be attained based on water quality, flow, and depth characteristics.

EPA cautions the State that it must conduct a use attainability analyses as described in 40 CFR 131.10(g) when adopting water quality standards that result in uses that are not specified in section 101(a)(2) of the CWA, or that result in subcategories of uses specified in section 101(a)(2) that require less stringent criteria. See 40 CFR 131.10(j).

#### B. Site-Specific Criteria

The State may also develop data that indicate that a site-specific water quality criterion for a particular pollutant is appropriate, and then take action to adopt such a criterion into its water quality standards. Site specific criteria are allowed by regulation and are subject to EPA review and approval. 40 CFR 131.11 requires States to adopt criteria that protect designated uses, that are based on sound scientific rationale, and that contain sufficient parameters or constituents to protect the designated use. In adopting water quality criteria, States should establish numerical values based on EPA's recommended 304(a) criteria guidance, 304(a) criteria guidance modified to reflect site specific conditions, or other scientifically defensible methods, or should establish narrative criteria where numerical criteria cannot be determined or where necessary to supplement narrative criteria.

EPA does not currently have specific guidance for States and authorized Tribes on developing site-specific criteria for the protection of recreation uses. This does not preclude the State from developing its own scientifically defensible methods. With regard to site-specific criteria for the protection of aquatic life, EPA guidance recommends three procedures States and authorized Tribes can consider using: The Recalculation Procedure, the Water-Effect Ratio Procedure and the Resident Species Procedure. These procedures can be found in the *Water Quality Standards Handbook* (EPA-823-B940005a, 1994). EPA also recognizes there may be naturally occurring concentrations of pollutants that may exceed the national criteria recommendations published under section 304(a) of the CWA, and has issued policy guidance on establishing

site-specific aquatic life criteria equal to natural background. (Memo from Tudor T. Davies, Director, Office of Science and Technology to the Regional Water Management Division Directors, and State and Tribal Water Quality Management Program Directors, dated November 5, 1997.)

#### C. Variances

A water quality standards variance is a mechanism that can temporarily modify water quality standards. Today's rule contains a Federal variance procedure for the designated uses being promulgated today. However, the procedures described later in this section can also be used by the State to develop variances for State-adopted water quality standards.

EPA believes variances are particularly suitable when the cause of nonattainment is discharger-specific and it appears that the designated use in question will eventually be attained or demonstrated to be unattainable. EPA has approved the granting of water quality standards variances by States in circumstances that would otherwise justify changing a use designation on the grounds of unattainability (*i.e.*, one or more of the six circumstances contained in 40 CFR 131.10(g) is met). In contrast to a change in standards that removes a use designation for a water body, a water quality standards variance applies only to the discharger to whom it is granted and only to the pollutant parameter(s) upon which the finding of unattainability is based, and only for a limited period of time. The underlying standard remains in effect for all other CWA purposes.

For example, if the State or a permittee demonstrates that the primary contact recreation use can not be attained pursuant to 40 CFR 131.10(g) because of high levels of fecal coliforms from a wastewater treatment facility, but where the treatment technology, when upgraded, may allow the designated use to be attained, a temporary variance may be appropriate. The variance would allow the discharger's permit to include limits based on relaxed criteria for fecal coliform until the new technology is put in place and it is determined whether the underlying designated use is attainable. The practical effect of such a variance is to allow a permit to be written using less stringent criteria, while encouraging ultimate attainment of the underlying standard. A water quality standards variance provides a mechanism for ensuring compliance with sections 301(b)(1)(C) and 402(a)(1) of the CWA, while granting temporary relief to point source dischargers.

While 40 CFR 131.13 allows States to adopt variance procedures for State-adopted water quality standards, such State procedures may not be used to grant variances for Federally adopted standards. EPA believes that it is appropriate to provide comparable Federal procedures where, as here, EPA adopts use designations which rely, at least in part, on a rebuttable presumption that fishable/swimmable uses are attainable or adopts more stringent criteria for the State's use designations. Through today's rule, the Region 7 Regional Administrator may grant water quality standards variances where a permittee submits data indicating that an EPA-designated use is unattainable for any of the reasons in 40 CFR 131.10(g). Therefore, today's rule includes procedures that will apply to the designated uses being promulgated today at § 131.34(a) and (b).

Today's rule spells out the process for applying for and granting such variances. Authorizing the Regional Administrator to grant variances should expedite the processing of variance requests. Today's regulation specifies that EPA will use informal adjudication processes in reviewing and granting variance requests. That process is contained in § 131.34(c) of today's rule. Because water quality standards variances are considered revisions to water quality standards, the rule provides that the Regional Administrator will provide public notice of the proposed variance and provide an opportunity for public comment. EPA understands that variance-related issues can often arise in the context of permit issuance. EPA Region 7 will seek to work closely with the State permitting authorities to ensure that variance requests will be considered in tandem with the State NPDES permitting process.

The variance procedure promulgated today requires an applicant for a water quality standards variance to submit a request to the Regional Administrator (or his/her delegatee) with supporting information. Under this rule, as in the national program, the burden is on the applicant to demonstrate to EPA's satisfaction that the designated use is unattainable for one of the reasons specified in 40 CFR 131.10(g). (These reasons are restated in § 131.34(c)(3) of today's rule.) A variance may not be granted if the use can be attained, at a minimum, by all dischargers implementing effluent limitations required under sections 301(b) and 306 of the CWA and the applicant implementing reasonable best management practices for nonpoint source control.