

Under today's rule, a variance may not exceed three years or the term of the NPDES permit, whichever is less. A variance may be renewed if the permittee again demonstrates that the use in question is still not attainable. Renewal of the variance may be denied if EPA finds that the conditions of 40 CFR 131.34(c)(3) are not met.

EPA solicited comment on the need for a variance process for EPA-promulgated use designations, the appropriateness of the particular procedures proposed, and whether the proposed procedures are sufficiently detailed. EPA received one comment asserting that this process is likely to be cumbersome, expensive, and time consuming. EPA disagrees and believes, as described earlier, that authorizing the Regional Administrator to grant variance requests should expedite the processing of variance requests. EPA will seek to work closely with the State permitting authorities to ensure that variance requests are considered in tandem with the State NPDES permitting process to prevent any unreasonable delay.

D. Total Maximum Daily Loads (TMDLs)

A Total Maximum Daily Load is a tool created by the Clean Water Act that expresses the total amount of a given pollutant that a particular water body may receive and still achieve applicable water quality standards. Section 303(d) of the CWA and its implementing regulations at 40 CFR part 130 establish the requirements for TMDLs. The TMDL process can broaden the opportunity for public participation, expedite water quality-based NPDES permitting, and lead to technically sound and legally defensible decisions for attaining and maintaining water quality standards. In addition, the TMDL process provides a mechanism for integrating the management of both point and nonpoint pollution sources that together may contribute to a water body's impairment. (See *Guidance for Water Quality-based Decisions*; The TMDL Process, EPA 440-4-91-001, April 1991.)

EPA recognizes that the waters designated today for primary or secondary contact recreation will be subject to water quality criteria for fecal coliforms that had not previously been in place for these waters. The currently effective water quality criterion for fecal coliform adopted by Kansas for the protection of primary contact recreation is a geometric mean of 200 organisms per 100 milliliters from April 1 through October 31, and 2,000 organisms per 100 milliliters from November 1 through March 31. The currently effective water

quality criterion for the protection of secondary contact recreation is 2,000 organisms per 100 milliliters all year. EPA further recognizes that because fecal coliform criteria will apply to these waters where previously there was no applicable fecal coliform water quality criteria, it is possible that the State might identify some of the waters as impaired in its CWA section 303(d) list(s) and, therefore, schedule them for TMDL development. This is particularly an issue for streams, because the State's UAAs to date indicate that most of the lakes at issue are appropriately designated for primary contact recreation, but that many of the streams it examined should not be so designated.

As discussed elsewhere in today's notice, EPA strongly encourages the State of Kansas to determine the appropriate uses for all of the waters subject to today's promulgation. Kansas is required by State law to perform use attainability analyses for all water bodies in its *Surface Water Register* by October 31, 2005. EPA expects that Kansas will be able to show that secondary contact recreation is indeed the appropriate use designation for many of the streams subject to today's rule. If, for example, EPA approves the State's adoption of a secondary contact recreation use designation for a water body, and withdraws that water body from the Federal regulation, the State's use designation will be the applicable use for that water body for all CWA purposes, including section 303(d) attainment and listing decisions. In that event, Kansas would be required to list waters included in today's rule under CWA section 303(d) only if data and information show that it exceeds the water quality criterion for fecal coliform for the protection of secondary contact recreation uses.

Similarly, even for waters that are designated for primary contact recreation at the time Kansas assembles its CWA section 303(d) list(s), EPA notes that Kansas need not include a water on its list(s) if it lacks data and information to determine whether the primary contact recreation use is being protected, or if the data and information it has is insufficient to make that determination. See 40 CFR 130.7(b)(5); *2002 Integrated Water Quality Monitoring and Assessment Report Guidance*, at 5 (November 19, 2001). While EPA expects Kansas to follow the requirements, if any, of its assessment and listing methodology, EPA also recognizes that it is possible that at the time Kansas compiles its 2004 CWA section 303(d) list, it will not have data or information indicating impairment

for many of the waters designated today for primary contact recreation. Therefore, it is possible that many of these waters will not appear on Kansas' next CWA section 303(d) list.

Even if Kansas does list waters subject to today's rule on its CWA section 303(d) list(s) because data or information indicate that water quality standards are not been achieved, EPA also recognizes that this listing decision does not mean that a TMDL will immediately be developed. Rather, CWA section 303(d)(1) specifically provides States with the discretion to establish a priority ranking for TMDL development for listed waters, and then to establish TMDLs in accordance with that ranking. In view of the fact that by October 31, 2005, Kansas is required by State law to perform use attainability analyses for each water subject to today's rule, EPA believes it would be reasonable for the State to assign a low priority ranking to those waters. If Kansas submits and EPA approves new or revised use designations for a water, and if that use is being protected, then the water would not need to appear on subsequent State CWA section 303(d) lists and no TMDL would be required under section 303(d).

Consequently, because of the State's schedule to conduct additional UAAs and the discretion afforded the State in prioritizing TMDL development, EPA does not believe that TMDLs are likely to be developed for many of these waters in the near future. Finally, EPA notes that even if Kansas establishes a TMDL for a water designated today for primary or secondary contact recreation, the question of implementing the TMDL with respect to nonpoint sources is entirely a matter of State law.

VII. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether the regulatory action is "significant" and therefore subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Executive Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities;