

restore the water body to its original condition or to operate such modification in a way which would result in the attainment of the use; (v) Physical conditions related to the natural features of the water body, such as the lack of a proper substrate, cover, flow, depth, pools, riffles, and the like unrelated to water quality, preclude attainment of aquatic life protection uses; or (vi) Controls more stringent than those required by sections 301(b) and 306 of the CWA would result in substantial and widespread economic and social impact.

A UAA is defined in 40 CFR 131.3(g) as a "structured scientific assessment of the factors affecting the attainment of a use which may include physical, chemical, biological, and economic factors" (see §§ 131.3 and 131.10). 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 survey and assessment techniques is contained in the *Technical Support Manual, Volumes I-III: Water Body Surveys and Assessments for Conducting Use Attainability Analyses*. Volume I provides information on water bodies in general; Volume II contains information on estuarine systems; and Volume III contains information on lake systems (Volumes I-II, November 1983; Volume III, November 1984). 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). In developing today's proposal, EPA followed the same procedures set out for States in 40 CFR part 131 and EPA's implementing policies, procedures, and guidance.

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

evidence regarding the attainable uses of a particular water body. The rebuttable presumption approach does not restrict the discretion that States have to determine that fishable/swimmable 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 credible "structured scientific assessment" of use attainability.

EPA's approach in this rulemaking does not undermine the Commonwealth's primary role in designating uses and setting criteria for waters in Puerto Rico. If the Commonwealth reclassifies the Subject Waterbodies to a swimmable designated use or adopts criteria sufficient to protect a swimmable use prior to EPA's finalizing this rule, EPA would expect to approve the Commonwealth's action and not finalize this rule. Alternatively, if the Commonwealth completes a sound analysis of use attainability, taking into account appropriate biological, chemical and physical factors, and concludes that the swimmable use is not attainable for these water bodies, EPA would expect to approve the Commonwealth's action, if it meets all requirements of EPA's regulations at 40 CFR part 131, and not finalize this rule. If the Commonwealth submits an adequate analysis which concludes that the swimmable use is not attainable after EPA takes final action, EPA would expect to initiate a rulemaking to rescind the rule. EPA encourages the Commonwealth to continue evaluating the appropriate use designation for these water bodies.

B. Current Puerto Rico Water Quality Standards

Puerto Rico's water quality standards regulation (PRWQSR) at Article 2 establishes a classification system containing the designated uses for water bodies in the Commonwealth. Puerto Rico has applied these use designations to all coastal, estuarine, and surface waters of the Commonwealth.

The current use designation adopted by the Commonwealth for the Subject Waterbodies is Class SC. Coastal waters designated as Class SC are "intended for uses where the human body may come into indirect contact with the water (such as fishing, boating, etc.) and for use in propagation and preservation of desirable species, including threatened or endangered species." (PRWQSR, at Article 3.2.3.)

EPA's regulations at 40 CFR part 131 require that waters designated for a use less protective than a fishable/

swimmable use be supported by a use attainability analysis, because neither the best usage or conditions related to the best usage for these waters include the fishable/swimmable uses, nor do all the criteria necessary to protect those uses apply. "Fishing" and "propagation and preservation of desirable species" are included as a condition of the best usage. As such, Class SC includes the "fishable" use established as a goal in the Clean Water Act. However, primary contact recreation and the criteria necessary to protect this use are not included for Class SC. Puerto Rico uses fecal coliform and enterococci bacteria criteria to protect for the primary contact recreation use. Class SC includes bacteria criteria sufficient to protect secondary contact recreation. However, these criteria do not provide protection from pathogens associated with fecal contamination during direct contact with the water and, therefore, do not protect for the swimming use.

Section 3.2.3 of the PRWQSR contains the use classifications and associated use-specific criteria for Class SC waters for dissolved oxygen, fecal coliforms, pH, color, turbidity, taste and odor producing substances, sulfates, and surfactants as MBAS (methylene blue active substances). With the exception of the criteria for fecal coliforms, which are not fully protective of the primary contact recreation use, these criteria for Class SC waters have been found to be protective of CWA section 101(a) uses and have been previously approved by EPA. These criteria are intended to protect aquatic life and/or general aesthetic conditions in these waters.

Water Quality Criteria for bacteria is the only parameter that is specifically intended to protect the primary contact recreation use. Water quality criteria for bacteria are intended to protect bathers from gastrointestinal illness in recreational waters. The water quality criteria establish levels of indicator bacteria that demonstrate the presence of fecal contamination. These levels should not be exceeded in order to protect bathers in fresh and marine recreational waters. The inclusion of primary contact recreation as a use for Class SC waters and the application of the indicator bacteria criteria described above would result in the Class SC waters being fully "swimmable." The remainder of the criteria that Puerto Rico applies to its coastal waters are sufficient to protect other CWA section 101(a) uses, such as aquatic life protection and human health protection from the consumption of fish based on the level of toxic pollutants in the water and in the fish tissue.