

Section 3.1 of the PRWQSR contains narrative water quality criteria and numeric criteria for substances in toxic concentrations including inorganic substances, pesticides, non-pesticide organic substances, carbon tetrachloride, volatile organic substances, and semi-volatile organic substances. The criteria in section 3.1 are applicable to all waters of Puerto Rico, including those waters classified as Class SC. These criteria are protective of all applicable uses, and have been approved by EPA.

The Puerto Rico Environmental Quality Board (EQB) applies the Class SC designation for the bay components of the Subject Waterbodies from the zone subject to the ebb and flow of tides (mean sea level) to 10.3 nautical miles seaward, and from 500m from the shoreline to 10.3 nautical miles seaward for the coastal ring. However, as discussed below, it is clear that State jurisdiction under the CWA is limited to "navigable waters" of the United States, including territorial seas which extend only three miles seaward. Accordingly, in this proposal, the new use designation for coastal waters is limited to the territorial seas.

Section 303(c)(2)(A) of the CWA provides that States are to adopt water quality standards for "navigable waters." Under section 303(c)(3) (which provides for EPA review of State water quality standards), if EPA approves the State's water quality standards, they become the standards for the applicable waters of the State. Where the Administrator proposes and promulgates water quality standards, section 303(c)(4) provides that the State water quality standards shall apply to "navigable waters."

Section 502(7) of the CWA defines "navigable waters" as waters of the United States, including the "territorial seas." Section 502(8) defines "territorial seas" to mean "the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles." The "contiguous zone" and "ocean" are defined separately (*see* sections 502(9) and (10)).

The CWA also includes two other definitions (for "effluent limitations" and "discharge of a pollutant") that distinguish navigable waters from the contiguous zone and the ocean. These definitions also indicate that navigable waters are not meant to include the contiguous zone and the ocean. EPA has a long standing interpretation of the statute that does not include the

contiguous zone and ocean in the definition of navigable waters which is reflected in its regulations (40 CFR 122.2). The CWA authorizes each State that elects to administer its own NPDES permit program for discharges into navigable waters within its jurisdiction, to submit its program for EPA review (*see* section 402(b)). If EPA approves the State program, EPA suspends its issuance of permits under section 402(a), but only as to those navigable waters subject to the State program (*see* section 402(c)(1)). While the CWA definition of navigable waters includes the territorial sea, it does not include the contiguous zone or the ocean, both of which are defined as regions beyond the territorial sea. Read together, these provisions plainly indicate that Congress intended the State NPDES program jurisdiction to be limited to navigable waters including the territorial sea. States cannot assume NPDES permitting authority beyond the three-mile limit of the territorial sea.

Two decisions in the Ninth Circuit Court have addressed these jurisdictional issues. In *Pacific Legal Foundation et al. v Costle*, 586 F.2d 657 (9th Cir. 1978) *rev'd on other grounds*, 445 U.S. 198., the Court held that only the Administrator has authority to issue NPDES permits for waters beyond the territorial seas, and that the contiguous zone and the ocean clearly extend beyond the outer limits of the "navigable waters" which mark the extent of the power of the States to administer their own permit programs. The Court noted that "had Congress intended the power of the States to extend beyond the territorial seas," it easily could have so provided." *Id.* at 656. Further, citing the definition of "discharge of a pollutant," which distinguishes discharges to navigable waters from discharges to the contiguous zone or the ocean, the Court concluded that "it is apparent that 'ocean' and 'contiguous zone' waters are not included within the scope of 'navigable waters' \* \* \* *Id.*

In *Natural Resources Defense Council v. EPA*, 863 F.2d 1420, (9th Cir. 1988), the Court held that "navigable waters" include only those waters landward from the territorial sea. *Id.* at 1435. In this case, Florida argued that it had jurisdiction to apply water quality standards more than three miles from the coast. The State contended that its maritime boundaries extended three maritime leagues (approximately 10.3 miles). Florida maintained that EPA must assure that discharges under EPA's general permit would comply with the State's water quality standards out to 10.3 miles. The Court disagreed, finding

that the State's jurisdiction is limited to the territorial seas. The Court noted that it is "difficult to ignore the express language of the Clean Water Act's definition of territorial seas." And, further, that "if there were any doubt that Congress intended to create a uniform three-mile boundary in the (CWA), the legislative history \* \* \* indicates Congress consciously defined the term 'territorial seas' to make clear the jurisdiction limits of this particular legislation and its relationship to other statutes." *Id.* at 1436. For these reasons, EPA is proposing the new use designation for coastal waters limited to the territorial seas.

EPA is proposing to include primary contact recreation as a specified designated use for the Subject Waterbodies. In developing today's proposal, EPA evaluated the PRWQSR to determine which bacteria criteria would protect for the "swimmable" use, and would therefore ensure achievement of the CWA section 101(a)(2) goals. As a result, EPA is proposing the bacteriological criteria associated with Class SB (primary contact recreation) for fecal coliform and enterococci set out at Section 3.2.2 of the PRWQSR for the Subject Waterbodies because these criteria are protective of primary contact recreation. The proposed water quality standards for these water bodies, if ultimately promulgated, will be the basis for establishing NPDES permit limits by EPA Region 2.

### C. Factual Background

#### 1. Summary of Commonwealth and EPA Administrative Actions

In August 1990, the Commonwealth of Puerto Rico adopted revisions to the PRWQSR. These were sent to EPA on September 21, 1990, with the caveat from the Chairman of the EQB that the transmittal may not be the final submittal, since EQB was going to have public hearings on November 1, 1990. Because of this caveat, and because the requisite certification from the Commonwealth's Secretary of Justice was not submitted with the revisions as required by 40 CFR 131.6(e), EPA did not act on these revisions immediately.

From 1991 to 1993, EPA Region 2 worked with EQB on a series of draft revisions to the PRWQSR. These drafts were never adopted by Puerto Rico. In 1992, EPA included Puerto Rico in the National Toxics Rule, in large part because EPA did not consider the 1990 revisions to be officially adopted.

The requisite certification from the Commonwealth's Secretary of Justice was ultimately submitted to EPA on