Water Quality Standards Backlog & Promulgations
Briefing for Wayne Nastri
September 23, 2003

Conclusions
- R9 committed to maintaining low backlog
- promulgation is last resort
- R9 has significant investment in CTR and TAS

EPA'S ROLE IN ESTABLISHMENT OF WATER QUALITY STANDARDS (WQS)

- EPA (HQ) publishes national water quality criteria *guidance*; however, States have the primary responsibility for establishing *enforceable water quality standards* (WQS)[1].

- Federally recognized tribes may be approved for "treatment as a state" (TAS) for purposes of establishing water quality standards if they have appropriate authority and capability to regulate the quality of reservation waters.

- States and tribes must submit new/revised WQS to EPA (Region 9) for review.

- State/tribal WQS become effective for Clean Water Act (CWA) purposes upon EPA approval.

- If EPA disapproves state/tribal WQS, and state/tribe fails to make requisite changes within 90 days, EPA must "promptly" propose new or revised WQS for the waters involved.

- EPA must promulgate such new or revised WQS within 90 days of proposal, unless the state/tribe adopts approvable new or revised WQS before then.

- Authority to approve/disapprove state/tribal WQS has been delegated to Regional Offices; however, authority for promulgations rests with the Administrator.

- Since disapproval puts us on path to potential promulgation, Region must coordinate closely with HQ on decisions to disapprove WQS.

- The Administrator must also propose and promulgate new or revised WQS any time she determines that such WQS are necessary to meet the requirements of the CWA.

- The WQS backlog is a FIMFIA material weakness??????????????????????????
  [CHECK WITH TERRY ON THIS. I HAVE NO INFO RE: FMFIA]

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[1] WQS consist of designated uses of a water body (e.g., protection of aquatic life, human contact recreation, drinking water), numeric or narrative criteria to protect those uses, and an antidegradation policy.

OPTIONS FOR ESTABLISHMENT OF TRIBAL WATER QUALITY STANDARDS

- TAS: Tribe obtains TAS, develops WQS, and submits for EPA approval as above. In FY04, we expect that TAS will be approved for Navajo, Hopi, and Hualapai, and we expect to approve their WQS soon after TAS approval. We expect to receive but not approve TAS applications from Yurok and possibly Karuk (?) [NOTE THAT THESE ARE KLAMATH TRIBES, SINCE YOU REFER TO THEM AS SUCH IN NEXT BULLET] in FY04. [MIGHT BE HELPFUL TO SAY SOMETHING ABOUT WHY APPROVAL IS NOT EXPECTED IN '04 -- I.E., IS THIS JUST A TIMING ISSUE (EXPECT TO RECEIVE TOO LATE IN '04 TO APPROVE BEFORE END OF YEAR?), OR ARE THERE JURISDICTIONAL PROBLEMS? BASED ON NEXT SENTENCE, IT APPEARS TAS APPROVAL IS EXPECTED TO EVENTUALLY HAPPEN. ANY IDEA WHEN?] We will work with the Yurok and Karuk on the technical aspects of their draft WQS to be able to approve them quickly after TAS approval.

- Federal Promulgation of National Standards for Tribal Lands: HQ is developing an ANPRM to solicit comments on possible federal promulgation. The ANPRM can result either in promulgation of national "core standards" for Tribal waters generally or specific standards for individual Tribal waters. [OR NO ACTION AT ALL] Concurrent with TAS review, we plan to recommend to HQ that specific standards for the tribes on the Klamath be included in any federal promulgation resulting from the ANPRM process. Estimated effort for R9 is 3 years and 2 FTE.

- Federal Promulgation of Standards for a Specific Tribe: R9 could ask the Administrator to promulgate WQS or a specific tribe in a stand-alone action. OMB approval would also be required and the Administration is not prone to support this type of action. Estimated R9 support to pursue this option for tribes on the Klamath is 3 years and 2 FTE, if HQ agreed to pursue this option. Currently, we prefer to pursue the TAS and National Standards options for establishing WQS for tribes on the Klamath.

NATIONAL WQS BACKLOG (see attached bar graphs)

- Outstanding Disapprovals
  - Definition: State/tribal submissions for which (a) the Region has disapproved portion(s) in writing; (b) state/tribe has not made the necessary changes to meet CWA requirements w/in 90 days; and (c) EPA has not published proposed new or revised WQS.
  - National Total: 27
  - Region 9 Status: We disapproved 3 provisions of CA Regional Board 5's WQS. Two provisions had been received in 1 submission, the other in a separate submission; however, they were counted on the national backlog report as 1 outstanding disapproval.

- Standards Submissions without EPA Action
    - Definition: New or revised WQS that states/tribes have submitted to EPA, but for which EPA has not issued a letter approving w/in 60 days, or disapproving w/in 90 days.
    - National Total: 41
    - Region 9 Status: National backlog report shows 3 for Region 9; however, we approved 1 since report was last updated, so we now have 2. Remaining 2 are for reserved actions, which are lower priority.
- Approvals Subject to ESA Consultation (lower priority)
    - States/tribes for which EPA has issued WQS approval letter subject to completion of consultation under ESA §7, and FWS and/or NMFS has not yet completed consultation.
    - National Total: 57
    - Region 9 Status: We have approved 5 WQS submissions subject to completion of ESA consultation.

<u>REGION 9'S WQS BACKLOG</u>

- OUTSTANDING DISAPPROVALS
    - **Dissolved Oxygen (DO) Objectives for Sacramento/San Joaquin Delta**
        - Submitted to EPA June 1995; disapproved May 2000
        - **Relative Priority**: In July 2003, OST identified resolution of this disapproval as the highest WQS backlog priority for Region 9; WQS Branch management indicated that HQ might be able to provide funding to support the necessary studies.
        - **Reason for disapproval**: Rearrangement of the objective's text resulted in entire Delta having no chronic DO objective, and certain poorly defined Delta waters having no DO objectives at all. State did not demonstrate that existing uses and water quality will be protected, as required under federal and State antidegradation policies.
        - **Resolution Efforts:** RB5 initially committed to amend Basin Plan to resolve disapproval by restoring previous text. After 2 years of no action, RB5 indicated it would, instead, propose entirely new Delta DO objectives

in 2003, consistent with EPA criteria guidance. In mid-2003, RB5 staff began backing away from that commitment, and indicated preference for EPA to promulgate. After discussion, RB5 staff (1) recommitted to propose to amend Basin Plan to partially resolve disapproval (but not until 2005), and (2) committed to prepare scope/cost estimate of studies needed to evaluate Delta DO conditions and develop new objectives consistent with EPA guidance.

- **Current Status**: RB5 staff have not yet provided scope/cost estimate for needed studies, and have verbally indicated they are reconsidering that commitment, and still prefer EPA promulgation.

- **Options**

  - Continue to encourage RB5 to amend Basin Plan. (RB5 unlikely to do this on its own due to resource constraints and political concerns.)

  - Promulgate DO criteria for the Delta, using national criteria guidance.

- **Recommendation**: Request HQ promulgation based on national criteria guidance; provide funding for Delta DO study to address antidegradation. Estimated time to complete: 3-4 years.

◦ **Tributary Rule**

- Submitted to EPA June 1995; disapproved May 2000

- **Relative Priority:** We recommended resolution of this disapproval be one of the highest priorities for the 2002 triennial review of the Sacramento/San Joaquin Basin Plan. OST has not weighed in on priority, since, at time of backlog update, State was on track to resolve.

- **Reason for Disapproval**: The disapproved provision creates uncertainty regarding what uses apply to any given water body, and implies that applicable uses can be determined in a manner not consistent with federal WQS regulatory requirements.

- **Resolution Efforts**: RB5 adopted a Basin Plan amendment to resolve this disapproval in September 2002. The amendment would clarify the intent of the ~~tributary rule~~ Basin Plan language regarding designation of uses such that its consistency with CWA regulatory requirements would no longer be in question. The amendment was submitted to the State Board for approval, but was withdrawn in July 2003 pending resolution of ~~an appeal~~ litigation regarding the Vacaville NPDES permit, which the State

anticipates may ~~have some bearing on the tributary rule.~~ lead to the need to revise the amendment.

- **Current Status:** We have reached a common understanding of the intent and current implementation of the tributary rule with RB5 and State Board staff that is consistent with CWA regulatory requirements. This understanding was reflected in the amendment adopted by the Regional Board, which we were prepared to approve had it been submitted to us. The amendment remains withdrawn from State Board consideration, pending resolution of the Vacaville permit appeal. No anticipated date for its re-submittal has been provided.

- **Options**

  - Await State action, i.e., resolution of Vacaville ~~permit appeal~~ litigation and re-submittal of amendment to State Board for approval or State adoption of a new amendment.

  - Promulgate WQS use designation regulations for the Sacramento/San Joaquin Basin.

- **Recommendation**: Await State action; in meantime, encourage RB5 and/or State Board to issue a public statement or staff guidance clarifying the intent of the current tributary rule language. Continue to encourage RB5 and State Board to amend the Basin Plan to resolve the disapproval.

◦ **Misrepresentation of federal antidegradation policy**

- Submitted to EPA June 1990; disapproved May 2000

- **Relative Priority**: We recommended resolution of this disapproval be one of the highest priorities for the 2002 triennial review of the Sacramento/San Joaquin Basin Plan. OST has not weighed in on priority, since, at time of backlog update, State was on track to resolve.

- **Reason for Disapproval**: The provision provides an incomplete and misleading interpretation of the federal antidegradation policy.

- **Resolution Efforts:** RB5 staff adopted a Basin Plan amendment to delete the inaccurate text in September 2002. The amendment is scheduled for consideration by the State Board on September 16, 2003. If approved by the State Board (which is expected), it will likely be submitted to EPA for approval within approximatly 6 months.

- **Current Status**: The inaccurate provision, while misleading, does not alter the effectiveness of the federal antidegradation policy. The State has

interpreted its own antidegradation policy as incorporating the federal policy.

- **Recommendation**: No action needed, assuming State Board approves the amendment at its September 16, 2003 meeting.

- STANDARDS SUBMISSIONS WITHOUT EPA APPROVAL

  - CA Regional Board 5
    - Submitted June 23, 1997
    - Partial approval 5/24/00; action reserved on omission of any recreational uses for 43 wetland water supply channels which are known to support secondary contact recreation, and may support some primary contact recreation.
    - Regional Board staff committed to provide information (consistent with a use attainability analysis) from administrative record to justify the omission, but have failed to do so, and have informed us this issue is a low priority they do not have adequate resources to address.
    - OST identified resolution of this reserved action as the second highest WQS backlog priority for Region 9.
    - Options: promulgate recreational uses for the wetland channels. Consider providing funding to assist RB in conducting UAA's, as appropriate.

  - CA Regional Board 8 (pre-Alaska)
    - Submitted 1994
    - Partial approval 5/30/00; action reserved on site-specific objectives for cadmium, copper, lead, and un-ionized ammonia for middle Santa Ana River; acute WARM basinwide objectives for ammonia; and exceptions to MUN use.
    - Regional Board included these issues as priorities in the triennial review workplan adopted last year. [DOUG: SEE EXERPT FROM RB8'S TRIENNIAL REVIEW WORKPLAN]
    - OST identified
    - Recommendation: Await Regional Board action [?] [DOUG -- YOU SHOULD DISCUSS THIS WITH SUSAN HATFIELD FOR MORE DETAILS. IT APPEARS THE RB IS PRETTY COMMITTED TO AMENDING THE BASIN PLAN RE: THE METALS AND MUN ISSUES, BUT THE TRIENNIAL REVIEW LANGUAGE RE: AMMONIA IS A BIT WISHY-WASHY – NOT CLEAR IF THERE IS A FIRM RB COMMITMENT TO RESOLVE THE AMMONIA ISSUES.]

- APPROVALS SUBJECT TO ESA CONSULTATION

  - CA State Board State Implementation Plan (approved May 2001)
  - CA Regional Board 4 (approved February 2002)
  - CA Regional Board 5 (approved May 2000)

- CA Regional Board 8 (approved May 2000)
- White Mountain Apache (new WQS, approved September 2001)
- Arizona (approved October 2002)

ANTICIPATED REGION 9 PROMULGATIONS RE: CTR
[See Diane's briefing paper]

- Mercury and Cadmium
  - HQ and R9 staff are preparing a draft rule and are seeking HQ management approval to proceed with promulgation.
  - If HQ proceeds with promulgation, R9 (at CA's request) will request that the action be expanded to remove footnotes in the original CTR pertaining to RB2 and RB5. Removing the footnotes will result in CTR applying throughout the state.
  - Resource estimate = ????????????????

- Selenium
  - EPA has committed to amend CTR to address deficiencies in the selenium criterion related to threatened and endangered species.
  - Technical work by USGS to resolve scientific disagreements between EPA and FWS is on hold pending additional resources.
  - Resource estimate = ?????????????????????????

RECENT LAWSUITS RE: WQS APPROVAL/DISAPPROVAL