WATER QUALITY STANDARDS

ISSUE SUMMARY:

States, Territories, and authorized Tribes establish water quality standards (WQS) for surface waters under the Clean Water Act (CWA) Section 303 to protect aquatic life, other wildlife, and human health effects related to swimming, fishing, boating, or use as a source of drinking water or irrigation. The EPA Administrator (or delegated authority) reviews new or revised WQS for consistency with the requirements of the Act and its implementing regulations, and either approves within 60 days of submission or disapproves within 90 days of submission. The EPA Administrator also has authority to establish federal WQS if he/she (or authorized delegate) determines that they are necessary to meet the requirements of the Act. Citizens may challenge EPA actions or inaction. There are several ongoing legal cases arising from EPA approval and disapproval actions. These challenges are related to the type and degree of aquatic life and human health protections that must be provided under the CWA. There are several federal WQS rules currently in process.

UPCOMING MILESTONES:

- **Oregon Aluminum:** EPA is under a consent decree to finalize an aluminum criteria rule for fresh waters in Oregon by December 31, 2020.
- **New York Bacterial Pathogens:** EPA is aiming to propose federal criteria by February 12, 2021.
- **Maine Human Health Criteria:** EPA is planning to take final action on its proposal to withdraw federal criteria by approximately January/February 2021.
- **California Selenium:** EPA is planning to promulgate a final rule by approximately October 2021.

BACKGROUND:

WQS are ~~principally~~ comprised of designated uses (e.g., swimming and fishing) and criteria to protect those uses, as well as antidegradation policies and procedures. Criteria are expressions of water quality attributes and can be expressed as a narrative statement or as specific numeric levels ~~to be avoided~~. WQS form a legal basis for controlling pollutants entering the waters of the United States. Under CWA Section 303(c)(3), EPA has 60 days to review and approve, and 90 days to review and disapprove a state or tribal WQS submission.[1] If EPA disapproves, states/tribes have 90 days to remedy the disapproval. If the state/tribe does not remedy the disapproval, EPA must "promptly propose" (see CWA Section 303(c)(4)) a federal WQS that meets the requirements of the CWA. EPA has 90 days after proposal to promulgate a final rule. If a state remedies the disapproval that necessitated the federal rule, EPA typically withdraws the federal rule. If EPA approves a WQS related to aquatic life or other wildlife protection, or if EPA promulgates criteria for protecting aquatic life or other wildlife, the Agency is also obligated to consult with relevant federal agencies to ensure appropriate protection under the Endangered Species Act (ESA). Federal WQS rulemakings currently in process include:

- **Federal Aluminum Aquatic Life Criteria Applicable to Fresh Waters in Oregon:** EPA is under a consent decree to promulgate a final rule by December 31, 2020, to establish criteria for fresh waters in Oregon to protect aquatic life from harmful levels of aluminum. EPA disapproved Oregon's freshwater aluminum criteria in 2013, and then a litigant sued EPA to promulgate a federal rule that meets the requirements of the CWA. Oregon does not

[1] In practice, these deadlines are frequently exceeded, leaving the Agency vulnerable to legal challenges. EPA has acted on time with respect to the 60/90 day approval/disapproval decisions 50 percent and 45 percent of the time over the past 5 and 10 year period, respectively. Actions that languish for greater periods of time are more likely to elicit challenge. To address these implementation deficiencies, the Assistance Administrator for the Office of Water issued a policy directive on XXXXXXX to the Regional Administrators requiring compliance with CWA statutory deadlines or proactive management plans to be developed in the limited circumstances where compliance is not feasible. Statutory deadline compliance has improved significantly since issuance of the policy directive.

intend to initiate state rulemaking to adopt their own aluminum criteria before promulgation of the federal criteria.

- **Federal Recreational Water Quality Criteria Applicable to Certain Waters in New York:** EPA is moving to propose federal criteria for bacterial pathogens to protect for swimming in certain marine waters in the vicinity of New York City with a target date of February 12, 2021. In 2016, EPA approved New York's action to designate these waters for primary contact recreation (e.g., swimming), and in 2018 EPA disapproved the criteria New York promulgated because they do not protect primary contact recreation. New York subsequently insisted that their use changes did not, in fact, establish primary contact recreation as the designated use for these waters, but has not submitted anything to EPA to justify this position. There is ongoing litigation in which NYC-area environmental groups are seeking to force EPA to promulgate protective federal criteria for New York.

- **Withdrawal of Certain Federal Water Quality Criteria Applicable to Maine:** On December 19, 2016, EPA published final [HYPERLINK "https://www.epa.gov/wqs-tech/proposed-rule-maine-water-quality-standards"] jurisdiction after disapproving certain state criteria in 2015 because EPA determined at that time that they did not sufficiently protect some designated uses. EPA approved State-adopted human health criteria (HHC) on June 23, 2020 and has proposed withdrawing its federal HHC. EPA anticipates issuing a final rule in January/February 2021.

- **Final California Statewide Aquatic Life/Wildlife Criteria for Selenium**: EPA is under a consent decree to promulgate a final rule to establish federal criteria to protect aquatic life and aquatic-dependent wildlife from harmful exposure to selenium within six months of completing ESA consultation with the U.S. Fish and Wildlife Service and the U.S. National Marine Fisheries Service (collectively, the Services). EPA intends to transmit a Biological Evaluation to the Services in February/March 2021, with a target date of October 2021 for the final rule. California does not intend to initiate state rulemaking to adopt its ~~their~~ own selenium criteria before the federal criteria are promulgated.

KEY EXTERNAL STAKEHOLDERS:

☒ Congress ☒ Industry ☒States ☒ Tribes ☐ Media ☒ Other Federal Agency
☒ NGO ☐ Local Governments ☐ Other (name of stakeholder) _____

Ongoing WQS litigation:

- **Missouri Lakes Numeric Nutrient Criteria Litigation:** On December 3, 2019, EPA was challenged on its approval of the State's nutrient water quality criteria for lakes as arbitrary and capricious, arguing the criteria do not protect recreational and drinking water supply uses, among other claims. EPA is in the process of defending the approval action.
- **Montana Nutrient Variance Litigation:** In 2019, EPA partially lost a challenge to its 2017 approval of WQS variances in Montana that allow for dischargers to meet less stringent permit limits than would otherwise be necessary to meet the state's criteria for nutrients. EPA is currently appealing this decision. Separately, the same plaintiff is challenging EPA's 2020 approval of a provision that allows the State to rescind its nutrient criteria by operation of law because the variances are not in effect. EPA is in the process of defending this action.
- **Idaho Multi-Claim Litigation:** After years of protracted litigation on CWA and ESA-related complaints, a single claim of failure to propose and promulgate federal criteria in response to EPA's 2008 disapproval of Idaho's revised mercury criteria to protect aquatic life remains active in this case. Idaho has in place separate mercury

criteria to protect human health, which is thought to be a more sensitive endpoint than aquatic life. EPA is in the process of defending its inaction.

- **Washington HHC:** The State of Washington challenged EPA's 2019 reconsideration of a 2016 partial disapproval decision, EPA's subsequent approval of Washington's water quality standards, and EPA's withdrawal of the federal water quality standards it promulgated in response to its partial disapproval. Parties have completed briefing the initial complaint and are awaiting a decision.
- **Oregon ESA/CWA Litigation:** In 2018, an environmental group brought suit against both EPA and the U.S. Fish and Wildlife Service (FWS) alleging that EPA's 2013 and 2014 approvals of water quality criteria for arsenic, selenium, and zinc and that FWS's Biological Opinion violated the APA. The litigant also alleges that EPA violated the ESA~~ndangered Species Act~~. The agencies are in the process of defending their actions.
- **Washington Aquatic Life Criteria Petition Denial Litigation:** On September 16, 2020, a litigant challenged EPA's denial of a petition for EPA "to update the State of Washington's water quality standards for the protection of … aquatic life from toxic contaminants" arguing, among other things, that the denial was not based on sound scientific rationale.

MOVING FORWARD:

- **Oregon Aluminum:** Finalize federal criteria rule by December 31, 2020.
- **California Selenium Statewide:** Transmit a Biological Evaluation to the Services in February/March 2021. Finalize federal criteria rule by approximately October 2021.
- **Idaho Multi-Claim Litigation (remaining mercury claim):** November 13, 2020 (EPA's cross-motion for summary judgment); December 18, 2020 (EPA's reply brief).
- **Oregon ESA/CWA Litigation:** December 11, 2020 (EPA's cross-motion for summary judgment); January 29, 2021 (Plaintiff's reply brief); March 10, 2021 (EPA's reply brief).
- **Missouri Lakes Numeric Nutrient Criteria Litigation:** November 10, 2020 (EPA's Opposition Brief and Cross-Motion for Summary Judgment); November 30, 2020 (MCE's Reply and Opposition to Cross Motion); January 15, 2021 (EPA's Reply Brief).

LEAD OFFICE/REGION: OW OTHER KEY OFFICES/REGIONS: OGC, REGIONS