



## UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

JUN 3 2019

OFFICE OF WATER

### MEMORANDUM

**SUBJECT:** Policy for the EPA's Review and Action on Clean Water Act Program Submittals

**FROM:** David P. Ross  
Assistant Administrator

A handwritten signature in blue ink that reads "D. Ross".

**TO:** Regional Administrators, Regions 1-10

The purpose of this memorandum is to institute a policy to ensure that the Environmental Protection Agency (EPA or the Agency) reviews and formally acts upon all state and tribal Clean Water Act (CWA or the Act) program submittals in accordance with the Agency's statutory obligations and timelines. This policy applies to the EPA's review of all CWA program submittals.

### **Background**

The CWA is built upon a foundation of cooperative federalism within which states and tribes are encouraged to take the lead regulatory role, and the EPA provides oversight to ensure state and tribal activities comply with the Act. The CWA establishes an overall objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In order to meet that goal, the Act establishes a holistic framework for addressing pollution in the Nation's waters through grant programs, watershed-based planning, and collaborative partnerships between states, tribes and the federal government, while establishing a more prescriptive regulatory program for addressing the discharge of pollutants into navigable waters, defined by the CWA as "waters of the United States." Congress provided a major role for the states in that framework, balancing the traditional power of states to regulate land and water resources within their borders with the need for national water quality regulation: "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, reservation, and enhancement) of land and water resources . . ." *Id.* § 1251(b)).

The CWA allows states and tribes to establish regulatory programs and seek the EPA's approval to implement portions of the CWA within their borders. States and authorized tribes, for example, may establish water quality standards that apply to waters within their boundaries, develop discharge permit programs for point sources, and implement non-point source programs to control urban and rural runoff. All state and tribal programs must comply with the Act, and to demonstrate compliance, states and tribes are required to submit information to the EPA for oversight review and approval. Three of the most common CWA program submittals—new or revised water quality standards, biannual lists of waters determined to be impaired, and total maximum daily loads (TMDLs)—are discussed in detail below. However, this policy applies to the EPA's review and action on all CWA program submittals, including but not limited to CWA program modifications and transfers, individual and general permits proposed for issuance to regulated entities, and tribal treatment as state applications.

Water quality standards enacted by an authorized state or tribe must comply with the CWA and must be submitted to the EPA for review and approval before they can be used for CWA implementation or enforcement.<sup>1</sup> When a state or tribe submits a water quality standard for the EPA's review, the CWA requires the EPA to approve the submittal within 60 days or disapprove within 90 days of the date of submission. *Id.* § 1313(c)(3); 40 C.F.R. § 131.21(a). An EPA disapproval must specify the changes necessary to assure the state or tribal standard will comply with the Act. *Id.* If the state or tribe does not adopt the specified changes within 90 days of receiving the EPA's disapproval, the EPA "shall promptly propose and promulgate" a federal water quality standard that complies with the Act. 40 C.F.R. § 131.22. Neither the CWA nor the EPA's implementing regulations define the term "promptly" for purposes of the EPA promulgating a federal water quality standard; however, some courts have interpreted the provision to require the EPA to act promptly and without delay.<sup>2</sup>

Delegated states and tribes have other CWA obligations, such as evaluating the quality of waters within their jurisdiction, determining which waters are impaired (i.e., not meeting EPA-approved water quality standards), and developing plans to restore impaired waters. States and tribes are required to submit impaired waters lists (referred to as 303(d) lists) and TMDLs to the EPA for review and approval. When a state or tribe submits to the EPA a 303(d) list or a TMDL, the EPA must review and act on the submittal within 30 days of receipt. 33 U.S.C. § 1313(d)(2). If the EPA disapproves a 303(d) list or a TMDL, the EPA is required to issue a federal list or a federal TMDL within 30 days of issuing the disapproval. *Id.*<sup>3</sup>

For many years, the EPA has routinely exceeded the review and action timelines established by Congress in the CWA. The EPA's disregard for its statutory deadlines has resulted in significant backlogs and lawsuits against the Agency for failing to comply with the Act and has hindered states' abilities to implement and enforce authorized programs. This delays state and tribal action on important water quality improvement activities and creates uncertainty for both local regulators and the regulated community. To address these problems, in 2017 the Agency began evaluating its internal processes and initiated process improvements designed to speed bureaucratic decision-making through the EPA's Lean

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<sup>1</sup> A state water quality standard becomes effective in the state when it is promulgated. The EPA's review and approval of a state or tribal standard makes the standard federally enforceable pursuant to the CWA.

<sup>2</sup> See *Defenders of Wildlife v. Browner*, 909 F.Supp. 1342 (D. Ariz. 1995); *Raymond Proffitt Foundation v. EPA*, 930 F.Supp. 1088 (E.D. Pa. 1996); *Idaho Conservation League v. Browner*, 968 F.Supp 546 (W.D. Wash. 1997). In *Raymond Proffitt*, the court observed that given the "relatively rapid submission-and-approval deadlines" for state water quality standards (60 days to approve, 90 days to disapprove), "Congress unquestionably intended the Administrator to prepare and publish regulations to fit comfortably within this calendar" and that "[b]y using the word 'promptly,' Congress expected the Administrator to begin preparing and publishing the regulations without undue delay." 930 F.Supp. at 1099-1100. The court further noted that expecting the Administrator to act within 10 days is "plainly an unreasonably short time" but "one or two years is clearly too long when matched with the section's stated deadlines and the provisions for review of a state's standards every three years." *Id.* In *Idaho Conservation League*, the court observed that an earlier delay of two years in disapproving a water quality standard compounded a seven-month delay in promulgating a federal standard. 968 F.Supp. at 549. These cases, while not providing a bright line rule for what constitutes "promptly," help to inform the timeframes in which the EPA must act.

<sup>3</sup> The plain language of 33 U.S.C. § 1313(d)(2) requires the EPA to issue a federal TMDL within 30 days after disapproving a state or tribal TMDL. The EPA's implementing regulations, promulgated at 40 C.F.R. § 130.7(d)(2), authorize the EPA to seek public comment on the federal TMDL and appear to authorize the EPA to modify the TMDL based on those comments. Given the clear requirement for the EPA to issue a TMDL (not a draft TMDL) within 30 days of disapproving a state or tribal TMDL, the EPA's regulations providing for additional time and procedure may subject individual decisions to legal challenge. This policy is designed to reduce the potential for legal challenges in the future while saving important taxpayer and Agency resources.

Management System (ELMS). ELMS has already resulted in meaningful process improvements across the Agency and will continue to pay dividends in the future, but additional steps are necessary to ensure that the EPA complies with its statutory obligations in the future.

Today's policy is intended to restore the rule of law, carry out Congressional intent, meet statutory obligations while fulfilling the Agency's mission, and require the Agency to be responsive to state and tribal partners. Implementing this policy will allow the EPA to provide appropriate oversight without substituting its policy preferences for the expertise and judgment of state and tribal regulators, consistent with the cooperative federalism principles embodied in the CWA.

### **Policy Directive Regarding Compliance with Statutory Deadlines**

The EPA's Office of Water expects all of the EPA Regional Offices and Regional Administrators to approve or disapprove state and tribal CWA submittals within the timelines established by Congress. For example, the EPA must approve water quality submittals within 60 days of the date of the submission or disapprove within 90 days, and the EPA must approve or disapprove 303(d) lists and TMDLs within 30 days.

State and tribal water quality standards are promulgated through lengthy public, administrative and, in many states, legislative processes. Section 303(d) impaired waters lists and TMDLs are developed through similar robust processes. Through these procedures, the state or tribe is expected to evaluate and incorporate appropriate and sound scientific information, make resource and risk management decisions based on local expertise, and consider and account for public input, including input from the EPA. The resulting water quality standard, 303(d) list, or TMDL should be reviewed by the EPA, consistent with the purpose and structure of the CWA, with appropriate deference given to the state or authorized tribe as the delegated CWA authority and local resource experts. The short timelines within which the EPA must act demonstrate that Congress intended the EPA to have an important oversight role in reviewing state water quality standards, 303(d) lists and TMDLs to ensure compliance with the Act, but not substitute its own judgment for that of capable state and tribal resource managers with authorized CWA programs where those managers are operating within the scope of their delegated authority. Compliance with statutory timelines in the CWA therefore must be accomplished in a manner consistent with Congressional intent, the procedural requirements of the Administrative Procedure Act, and in a manner that balances and harmonizes the EPA's other statutory obligations as appropriate.

### **EPA Disapprovals of CWA Program Submittals**

Beginning immediately, prior to issuing a disapproval of any state or tribal CWA program submittal, the Regional water program must have a written plan and a schedule in place to ensure all required follow up actions are taken consistent with CWA requirements and statutory timelines.

If the EPA intends to disapprove a water quality standard, the disapproval notification must identify the specific reasons why the submission does not meet the requirements in 40 C.F.R. Part 131. In issuing a disapproval for water quality criteria, the EPA shall not substitute its judgment for that of an authorized state or tribe or treat its CWA § 304(a) criteria and information as the only scientifically defensible method for meeting the requirements of 40 C.F.R. §§ 131.5 and 131.11. If the EPA determines that a submission is not based on sound scientific rationale, the Agency must clearly articulate the specific

scientific shortcomings and invite the state or tribe to supplement its submittal within the 90-day timeline established by Congress. Any EPA disapproval based on a lack of sound scientific rationale must cite to current and existing scientific literature and information, including where available peer-reviewed science. The Act requires states and tribes to review water quality standards on a triennial basis, and decisions at the state, tribal and federal level should be made on sound scientific information available at the time of the decision.

Given the lengthy and often multi-year process that states and tribes employ to promulgate water quality standards, it may be impractical for states and tribes to adopt modified water quality standards in a 90-day timeline. Therefore, in many cases, an EPA disapproval is likely to trigger the need for the Agency to promulgate a federal standard. In accordance with the case law principles described above, and consistent with other timelines for water quality standard review and action, including the requirement that states and tribes remedy a disapproval within 90 days, the EPA is expected to propose federal water quality standards promptly, without undue delay. Subject to this policy and to facilitate more effective program implementation and oversight, the EPA will interpret, for purposes of internal Agency procedures, promptly and without undue delay as requiring the proposal of federal standards within 90 days after a state or tribe fails to remedy a disapproval, and will finalize those standards within 90 days after proposal.<sup>4</sup> See 33 U.S.C. §§ 1313(a), (b)(1); 40 C.F.R. § 131.22. These timeframes should be more than adequate, as the information needed to correct the state and tribal submittals should be clearly articulated in the EPA's disapproval decisions.

If the EPA intends to disapprove a state's or tribe's 303(d) list or a TMDL, the Regional Administrator is expected to issue a federal list or a federal TMDL within 30 days of issuing the disapproval, consistent with the plain language of the statute and clear direction from Congress.

While the timeframes established by Congress are short, in most circumstances the Regional water programs should have sufficient information to meet those deadlines if the disapproval process is implemented correctly. For example, if a state's water quality standard is not based on sound science, the EPA should have relied on sound science to support a disapproval decision and therefore should be able to develop a revised federal standard expeditiously.

If the Regional water program plans to issue a disapproval and cannot meet applicable statutory deadlines for federal action triggered by that disapproval, the Regional Administrator must work with the Office of General Counsel and the Assistant Administrator for Water to develop a strategy to address that legal risk and to ensure that the Region is doing all it can to satisfy the requirements of the CWA.<sup>5</sup>

## **Conclusion**

The CWA is built on a foundation of cooperative federalism that envisions states and tribes implementing federal programs within their borders following a comprehensive authorization review

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<sup>4</sup> By incorporating a 90-day timeline to propose a federal water quality standard, the EPA will have a total of 270 days from the time it disapproves a state or tribal standard to the time it must issue a final federal standard—90 days to allow the state to remedy the disapproval, 90 days to propose a federal standard, and 90 days after proposal to issue a final federal standard.

<sup>5</sup> Unless subject to litigation and ongoing consultation with the EPA's Office of General Counsel and the Assistant Administrator for Water, existing Agency reviews of state or tribal submittals that currently exceed statutory deadlines should be identified by the Regional Administrator to the Assistant Administrator for Water within 30 days of the date of this memorandum to develop such a strategy.

and approval. Once authorized, the EPA's role is to ensure compliance with the Act, one of the primary responsibilities of the National Program Office. Congress mandated that the EPA review and act on CWA submittals within specific timelines, and thus informed the appropriate breadth and scope of the EPA's review. Because states and tribes are in the best position to manage and regulate their resources, the EPA should only disapprove state and tribal submittals if they fail to meet the requirements of the Act, after which the Agency must take definitive action within the deadlines established by Congress.