

MEMORANDUM

WQSP-00-02

SUBJECT: Questions and Answers on EPA's "Alaska Rule"

FROM: Geoffrey H. Grubbs, Director [original signed 9/15/00]  
Office of Science and Technology

TO: Water Division Directors, Regions I-X  
Great Water Body Program Directors

Attached are some questions and answers on the final *Alaska* rule that you may find helpful for general information on the new rule and for outreach to States and Tribes. You should feel free to distribute the attached materials to States, Tribes, and others interested in this rule.

On March 30, 2000, EPA revised its regulation that specifies when new and revised State and Tribal water quality standards (WQS) become effective for Clean Water Act (CWA) purposes (40 CFR 131.21, 65 FR 24641, April 27, 2000). Under EPA's new regulation (also known as the *Alaska* rule), new and revised standards submitted to EPA after May 30, 2000, must be approved before being used for CWA purposes. The final rule also provides that standards already in effect and submitted to EPA by May 30, 2000 may be used for CWA purposes, whether or not approved by EPA.

As the Regions work with States and authorized Tribes implementing the *Alaska* rule, additional issues and questions may arise. I encourage you to forward any such issues and questions to Headquarters. OST will then work with OGC and other offices to develop additional guidance as necessary. If you have any questions please contact me, or Betsy Southerland, Director of the Standards and Applied Sciences Division at 202-260-3966.

Attachment

cc: Diane Regas, OW  
Dana Minerva, OW  
Mike Cook, OWM

Charles Sutfin, OWM

Robert Wood, OWM

Robert Wayland, OWOW

Elizabeth Fellows, OWOW

Margaret Heber, OWOW

Susan Lepow, OGC

Lee Schroer, OGC

ORC Water Branch Chiefs, Regions I-X

Regional Water Quality Branch Chiefs, Regions I-X

Regional Water Quality Standards Coordinators, Regions I-X

**Q's and A's on the "Alaska rule"**  
**a/k/a**  
**"EPA Review and Approval of State and Tribal Water Quality Standards"**  
**September 12, 2000**

---

**Q. 1. What does this rule have to do with Alaska?**

A. Nothing specifically. It was proposed pursuant to a settlement agreement in litigation challenging EPA's actions with respect to the state of Alaska's water quality standards. Part of the challenge was targeted at EPA's interpretation of section 303 of the Clean Water Act (CWA), as expressed in 40 CFR part 131, EPA's 1983 national rule governing EPA review and approval of state and tribal water quality standards. We call the rule the "Alaska Rule" for shorthand. The Alaska rule modifies 40 CFR 131.21 by changing the point in time when state and authorized, tribal-adopted standards are considered the "applicable standards" for CWA purposes.

**Q. 2. What is the effective date of EPA's rule?**

A. May 30, 2000. The rule was published on April 27th, at 65 FR 24641.

**Q. 3. What are the key components of the rule?**

A. First, the regulation establishes a prospective general rule – that state and authorized tribal standards adopted on or after the effective date of the rule do not become the "applicable" standards for CWA purposes until they are approved by EPA. That is, standards adopted by states and authorized tribes on or after May 30, 2000, must be approved by EPA before they are the basis for actions under the CWA, e.g., establishment of water-quality-based effluent limitations under section 301(b)(1)(C) or development of TMDLs. See 40 CFR 131.21(c)(2).

Second, the rule also establishes a "transition provision" to address standards adopted before May 30, 2000, which under the previous regulation went into effect for CWA purposes as soon as they went into effect under state or tribal law. These pre-May 30 standards are considered "applicable water quality standards for CWA purposes" if, on May 30, they are still in effect under state law and have been submitted to EPA for review, whether or not approved by EPA. See 40 CFR 131.21(c)(1).

Third, after May 30, 2000, a state or tribal modification or repeal of any "applicable water quality standard" is not effective for CWA purposes until it has been approved by EPA. See 40 CFR 131.21(e). This effectively locks-in "applicable water quality standards" until EPA approves their repeal or replacement or promulgates a more stringent federal standard. That is, once a standard becomes an "applicable water quality standard for CWA purposes," it remains such until EPA approves a change. This "lock-in" applies whether the "applicable water quality standard" has that status because it was approved by EPA or because it qualified under the

transition provision.

**Q. 4. It sounds like EPA approval really federalizes the State or authorized Tribal water quality standard; does this mean that EPA approval is considered rulemaking?**

A. EPA's approval of a water quality standard is an adjudication where the Agency determines whether or not State or authorized Tribal standards are consistent with the CWA. The language and structure of CWA section 303 make it clear that Congress intended EPA approval to be an adjudication, not rulemaking. EPA does not codify approved standards. Hence, the notice and comment rulemaking requirements of the Administrative Procedures Act (APA) do not apply to EPA approval decisions. In the event of a disapproval decision, EPA does follow up with a rulemaking to put in place federal replacement standards. Rulemaking requirements do apply when EPA is promulgating a federal standard, not simply approving what a state or tribe has done. In addition, the State or authorized Tribal standards do go through notice and comment as part of the State or Tribal adoption process prior to submission to EPA.

**Q. 5. Does the rule change the substantive decision criteria for EPA review of State and authorized Tribal standards?**

A. No. Because the rule changes the significance of an EPA approval, however, EPA intends to meet the statutory time frames for approving or disapproving water quality standards (60 and 90 days, respectively) whenever possible.

**Q. 6. Do more stringent water quality standards need to be approved before they are considered "applicable" standards for CWA purposes?**

A. Yes. CWA section 303(c)(3) is explicit that all standards must be submitted to EPA for review and must be approved by EPA in order to be the "applicable" standards. However, EPA interprets CWA section 510 as meaning that EPA cannot disapprove a water quality standard because it is more stringent than required. See 65 FR 24644.

**Q. 7. Is there any way a State or authorized Tribe can use a more stringent but not yet approved water quality standard for CWA purposes?**

A. Such standards are not the "applicable" standards for CWA purposes and hence not required to be implemented. However, they are not preempted by the CWA. There are several indirect ways the State or authorized Tribe may implement these standards even for CWA actions. See 65 FR 24644-45. For example, if a state or tribe wishes to base a National Pollutant Discharge Elimination System (NPDES) permit on a standard that is clearly more stringent than the previous standard, EPA would not object since the permit would also assure compliance with the less stringent "applicable" water quality standard. Similarly, if a state or tribe bases a section 401 certification on the more stringent state requirement, as allowed under CWA section 401(d),

EPA would put the effluent limitations specified in the certification into an EPA- issued permit. If the state or tribe did not require such limitations as a condition of a section 401 certification, EPA would base the permit on the “applicable” standard.

For actions under section 303(d), the state or tribe must base listings on the “applicable” water quality standard; however, once a water is properly listed, a state may choose to do an overly protective TMDL to protect both the “applicable” standard and a new, as yet unapproved more stringent standard. The fact that the TMDL was more stringent than needed to meet the “applicable” standard would not be a basis for EPA to disapprove the TMDL. When EPA develops TMDLs itself, it would use the “applicable” standards.

**Q. 8. What happens if a State, under State law, repeals an “applicable” standard and promulgates a less stringent replacement and needs to use a standard before EPA has time to approve the new State standard, and the State says it lacks authority under State law to apply the repealed standard?**

A. The State cannot use the new standard for CWA purposes, e.g., in a final permit, until EPA has approved the standard.

As a practical matter, however, there are various things that can be done to accommodate CWA and state requirements. See 65 FR 24643. One approach is to work with EPA to expedite approval of the water quality standard where there is an imminent water quality standard-based action to be taken. If need be, the state may be able to defer taking action on permits involving the standard in question or, if EPA action is expected soon, can propose a permit with limitations based on the new standard. As long as EPA approves the standard before the permit is issued, the permit can be issued as proposed; if EPA disapproves the standard, it can object to the permit.

**Q. 9. What if a state court invalidates an “applicable” State water quality standard? Does the Agency still apply it?**

A. EPA’s response to this situation would have to be tailored to the facts at hand and the specifics of the State court’s ruling. Conceivably, one option would be for EPA to “approve” the result of the State court action if we believe the court’s decision was justified under the CWA.

**Q. 10. What about the backlog of unapproved standards and of unresolved disapproved standards?**

A. We are working to eliminate the current backlog as quickly as possible. To avoid unnecessary delay, Regions may take action on some parts of a submittal and defer action on other parts while trying to reach resolution of issues. Such partial actions should make it clear

which parts of the standards are being addressed and which are still under review.

**Q. 11. What happens if EPA later disapproves an unapproved State standard from the backlog that was covered by the transition provision? Are there implications for NPDES permits or TMDLs?**

A. The disapproved standard is still the applicable CWA standard and remains in the CWA WQS docket until EPA approves a revision to the standard, or promulgates a federal replacement standard [see 40 CFR 131.21(c)]. NPDES permit issuance and TMDL development would not be affected until the revised standard takes effect and supersedes the disapproved standard. NPDES permits and TMDLs issued after that time would need to be based on the revised standards. Where there are applicable reopener provisions, States and EPA Regions may choose to reopen some permits to reflect the revised standards depending on the circumstances (e.g., significant environmental risks at stake, etc.).

**Q. 12. How can I find out what the “applicable” water quality standard is?**

A. Each Regional office has prepared a hard copy CWA docket, for each of its states and authorized tribes, of all standards in effect as of the effective date of the rule, May 30, 2000. See 65 FR 24659, April 27, 2000, for names of contacts in each Region. The Regions will make changes in the dockets as new standards or revisions to existing standards are approved. EPA plans ultimately to replace these regional dockets with an electronic docket accessible through the Internet. EPA has initiated work on the development of the electronic docket and expects to have it operational (at least on a trial basis) in early 2001.

**Q. 13. What if the docket is incorrect? What controls the “applicable” water quality standard - the docket or what the federal regulation says is the “applicable” water quality standard?**

A. EPA’s regulations at 40 CFR part 131.21 govern. The docket is merely informational; it was not promulgated through rulemaking and is not binding. Although much effort was spent on checking its completeness, including written confirmation from states and tribes, some errors may be discovered.