

# STATE OF COLORADO

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John W. Hickenlooper, Governor  
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## **WATER QUALITY CONTROL COMMISSION**

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**Colorado  
Department  
of Public Health  
and Environment**

October 15, 2012

Martin Hestmark, Assistant Regional Administrator  
U.S. Environmental Protection Agency  
1595 Wynkoop Street  
Denver, CO 80202-1129

Re: EPA Disapproval Action on Additional 2010 Revisions to the Basic Standards and Methodologies for Surface Water

Dear Mr. Hestmark:

I am writing on behalf of the Colorado Water Quality Control Commission in response to Carol Campbell's December 8, 2011 letter. The Commission has discussed the letter, as well as the enclosed Rationale for EPA Action, with representatives of the Water Quality Control Division staff, as well as with legal counsel.

The Commission notes that the timing of EPA's purported disapproval action raises a question regarding its legal validity, coming well over a year after the adoption of the water quality standards in question. Section 303(c)(3) of the federal Clean Water Act sets forth a mandatory duty, where EPA determines that a state-adopted water quality standard is not consistent with the requirements of the Act, to notify the state of disapproval "not later than the ninetieth day after the date of submission of such standard".

EPA disapproved four aspects of the Commission's August 9, 2010 revisions to the Basic Standards and Methodologies for Surface Water, Regulation #31 (5 CCR 1002-31). This letter addresses each of these four issues.

### Section 31.7(3)(a)(ii)(C) (Temporary Modifications)

EPA disapproved the subsection which authorizes temporary modifications of water quality standards where "there is significant uncertainty regarding the timing of implementing attainable source controls or treatment." This subsection remains effective only through September 30, 2013, and was added as a bridge that could be available until the discharger-specific variance provisions become effective on October 1, 2013.

Because this provision will only be effective for approximately another year, the Commission believes that it is more appropriate to devote resources to developing guidance and processes to address discharger-specific variances rather than to engage in rulemaking to address EPA's concerns on this issue. If this provision is proposed to be used as the basis for the adoption of any new site-specific temporary modifications prior to October 1, 2013 such site-specific issues can be addressed in the applicable rulemaking hearing.

#### Section 31.8(2)(b)(i)(C) (Antidegradation)

EPA disapproved the revised version of the subsection which authorizes Use-Protected designations for segments that meet the definition in section 31.5 for "effluent-dependent stream" or "effluent-dominated stream." In 2010, the Commission revised this section to include the requirement that the segment had to be effluent-dependent or effluent-dominated during the period 2000-2009. This revision made the provision more stringent than it had been when originally adopted in 2005. EPA's action leaves the less stringent version of this provision (no baseline period) in place for federal purposes, and the more stringent provision in place for state purposes.

The Commission disagrees with EPA on whether effluent dependent/dominated waters should appropriately be designated as Use-Protected. The federal requirement is to maintain and protect water quality where "the quality of the waters *exceed* levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water."(emphasis added). 40 C.F.R. § 131.12(a)(2). At critical conditions, the water quality of effluent dependent/dominated waters does not exceed those levels, but rather *equals* those levels. This is because the assimilative capacity has been allocated based on the critical low-flow. The Commission believes that this is a "water quality-based" criterion and not simply a criterion based on the category of stream.

The Commission does not intend to take any action regarding this provision at this time. The Commission and Division are open to continued discussions regarding this issue with EPA and other stakeholders as part of the next cycle of Basic Standards review.

#### Molybdenum Table Value (Agriculture)

EPA disapproved the molybdenum table value for the protection of the Agricultural Use (300 ug/L) since it was based on the assumption that livestock received copper supplementation.

For the pending round of basin-specific water quality standards hearings, the Division did not rely on the assumption of livestock copper supplementation and accordingly proposed the 160 ug/L level, instead of the 300 ug/L level, unless site-specific evidence of copper supplementation is provided. In the longer term, the Commission plans to further address this issue as part of the next cycle of Basic Standards review. For example, one option may be to consider adoption of two table values, one to apply when copper supplementation is provided and one to apply when it is not. This option and any others advanced will be discussed with EPA and other stakeholders.

#### Nitrate and Arsenic Table Values (Water Supply)

EPA disapproved the nitrate and arsenic table values for protection of water supply as revised. These two table values are applied at the point of intake. For nitrate, this has been in effect for a very long time; for arsenic, this point-of-intake application was added for the Water Supply Use in 2005. In 2010, the Commission revised these footnotes to establish a default assumption for permit implementation purposes wherein the Division would assume the application of the standards throughout a water body segment unless a discharger brought forth information to establish the lack of impact on downstream water supplies. This shifted the burden of identifying the point of water supply intake from the Division to the discharger.

This revision made the provision more protective than it had been when originally adopted. EPA's disapproval leaves the less protective provision (no default assumption to apply standards outside of the mixing zone at the point of intake) in place for federal purposes, and the more protective provision in place for state purposes.

With respect to arsenic, the issue of footnote 14 is a sub-issue related to the broader issue of appropriate human-health-based arsenic table values and standards. Based on site-specific circumstances that have arisen within the last year, it is apparent that there is a need to revisit such table values and standards. The Division has initiated a stakeholder process to address these issues, leading to an April 2013 rulemaking hearing before the Commission. Because of the uncertainties and complexities of determining appropriate arsenic standards, the current proposal is that the April 2013 hearing consider the adoption of temporary modifications, with the issue of arsenic table values and standards addressed further as part of the 2016 Basic Standards rulemaking.

In addition, the Commission plans to further address the "point of intake" issue as part of the next cycle of Basic Standards review. The Commission has requested that the Division work with EPA and other stakeholders to more fully explore this issue at that time. Legitimate questions have been raised about why standards for nitrate and arsenic should be implemented in a different manner than other parameters.

Thank you for your attention to this matter. The Commission greatly appreciates EPA's active participation in Colorado's water quality standards hearings in recent years. We look forward to continuing to work with EPA as we move forward with refinement of Colorado's water quality program.

Sincerely,

Peter Butler, Chair  
Colorado Water Quality Control Commission

cc: Martha Rudolph  
Steve Gunderson