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April 25, 2016

Ref: 8EPR-EP

Lauren Evans, Chair
Water Quality Control Commission
4300 Cherry Creek Drive South
Denver, CO 80222-1530

Subject: WQCC Preliminary Decision Regarding the Grand Lake Clarity Standards (Regulation #33)

Dear Ms. Evans:

The EPA appreciates having an opportunity to participate in the Water Quality Control Commission (WQCC or Commission)'s rulemaking process regarding the Grand Lake clarity standards (Regulation #33). At the April 11, 2016 hearing the Commission preliminarily decided to make changes to the clarity standards. The revisions would:

- make no change to the narrative standard adopted in 2008,
- add goal qualifiers for water clarity (pursuant to 31.13(2)(a) of the Basic Standards and Methodologies for Surface Waters), and
- repeal the numeric clarity standard adopted in 2008 (4 meter secchi disk depth).

EPA would appreciate any information on the topics described below. We anticipate that such information will be useful and supportive of our action on the revised WQS pursuant to CWA Section 303 and 40 CFR Part 131.

1) Narrative standard. The Commission's preliminary action would not affect the narrative standard adopted in 2008 and revised in 2014, which provides that: "For Grand Lake, the highest level of clarity attainable, consistent with the exercise of established water rights, the protection of aquatic life, and protection of water quality throughout the Three Lakes system."

   The EPA has not yet acted on the narrative standard. With respect to state water quality criteria, the Agency's review is guided by the Clean Water Act and the EPA's implementing regulation, which require adoption of water quality criteria that protect the most sensitive designated uses based on sound scientific rationale (40 CFR § 131.11(a)(2)). States can consider the attainability of a water quality standard when specifying appropriate water uses to be achieved and protected (40 CFR § 131.10). Recreation E, aquatic life Cold 1, water supply, direct use water supply, and agriculture use classifications have been assigned to Grand Lake.

   - Is it the Commission's understanding that Grand Lake recreation uses are the most sensitive to changes in water clarity (i.e., of the use classifications that have been assigned to the lake)?

- Is it the Commission's understanding that the narrative standard was adopted in 2008 to protect the Recreation E use classification?
- If so, is it the Commission's intent that the narrative requirement for "the highest level of clarity attainable" will achieve a level of clarity that is fully protective of the Recreation E use classification?
- Does the Commission agree that EPA's review of the narrative standard should focus on the 40 CFR 131.11(a)(2) requirement that states must adopt water quality criteria that protect the most sensitive designated use?
- If not, in the opinion of the Commission, on what basis should EPA review the narrative standard (e.g., is it an attainability-based variance of some sort)?

2) Goal qualifiers. The Commission's preliminary action would establish, for the first time, goal qualifiers for clarity: "Goal Qualifier Grand Lake: 7/1 - 9/11, Clarity = 3.8 meter average and 2.5 meter minimum secchi disk depth."

   To support our review and potential CWA § 303(c) action, we are interested in better understanding the goal qualifiers, including whether they are intended to serve as "water quality standards" pursuant to CWA requirements, and how they are to be used, e.g., when making assessment and/or permitting decisions (for regulated activities that may affect Grand Lake clarity).

   - Is it the Commission's intent that the goal qualifiers are a type of "water quality standard" and therefore subject to EPA review pursuant to CWA requirements?
   - As a practical matter, is it the Commission's intent that the goal qualifiers are to be used when making assessment and/or permitting decisions (e.g., potential new/future discharges that may affect water clarity)?

3) Attainment Decisions. The draft Statement of Basis and Purpose (SBP) distributed to the parties by email on April 14, 2016 would include a statement that: "The Division will assess consistency with the adopted narrative standard by monitoring whether the proponents continue to implement the adaptive management process described in their Memorandum of Understanding and will review clarity measurements."

   - Is this draft statement intended to explain how attainment decisions pursuant to CWA § 303(d) are to be made, and if so, could the Commission's intent be clarified by replacing "the Division will assess consistency with the adopted narrative standard" with "the Division will assess <u>attainment</u> of the adopted narrative standard, pursuant to CWA § 303(d)…."?
   - What benchmark or numeric interpretation of the narrative standard does the Commission intend should be used by the Division for purposes of reviewing clarity measurements when assessing attainment of the narrative standard (i.e., how are clarity measurements to be used when making attainment decisions)?
   - Given the Commission's 2008 conclusion that "clarity in Grand Lake needs to improve" and the preliminary SBP language drafted for the 2016 decision specifying that "the Commission reiterates that improvement in the clarity of Grand Lake is necessary" is it the Commission's intent and understanding that the narrative standard is not being attained under current conditions, and that it may be appropriate to include the lake on the CWA § 303(d) list until the necessary improvements in clarity have been achieved?

4) Adoption Process. EPA is concerned about the adequacy of the opportunity for public participation with respect to the alternative proposal submitted by the Division on April 6, 2016. The December 14, 2015 public notice explained that "any alternative proposals related to the Grand Lake clarity standards will also be considered." No such alternative proposals were submitted with responsive comments, but the Division's responsive comments identified several issues and options, and noted that consideration of alternative numeric values "might cause a delay or continuation of the hearing process since parties would need time to evaluate the Proponent's or Division's alternate proposal." Following the pre-hearing conference, the pre-hearing order explained that "while the Division may recommend that the Commission consider an alternative proposal (and associated continuance of the hearing to give the proponents and parties an opportunity to consider and respond to the alternative proposal) <u>it may not delineate any such alternative proposal in its surrebuttal</u>" (underline added). In its April 6, 2016 surrebuttal, the Division submitted an alternative proposal (i.e., to delete the numeric clarity standard and adopt goal qualifiers instead). Five days later, this alternative proposal was preliminarily adopted by the Commission at the public hearing.

- How is the Division's proposal in its surrebuttal consistent with the process described in the pre-hearing order?
- Does the process followed in adopting the Division's alternative proposal comply with Colorado rulemaking requirements (e.g., regarding public notice)?
- EPA requests the Commission consider whether the adoption process was adequate to meet the public process requirements of 40 C.F.R. Parts 25 and 131.

We appreciate having an opportunity to participate in the review of the Grand Lake clarity standards. Any questions regarding this letter may be directed to David Moon of my staff (303 312-6833).

Sincerely,

Sandra D. Spence, Chief
Water Quality Unit