

KDHE Response to Comments following KSWQS Public Meeting December 3, 2020

1. Written comments

EPA comments on changes to the Implementation Procedures Section 3.4

Our EPA Region 7 WQS contact, Justina Gonzalez, provided feedback, comments, and questions on the proposed changes to Section 3.4 of the Implementation Procedures. To begin with, the removal of the current Section 3.4 for Frequency and Duration was asked for clarification that the rationale stemmed from EPA's 2017 action letter stating the addition of the Frequency and Duration as noted for only 303(d) applications does not make it a water quality standards (WQS) reviewable item and thus lacked approval or disapproval for its addition here. Due to the frequency and duration table being provided in KDHE's 303(d) methodologies, it is removed here in standards to avoid redundancy and potential conflict should the changes be made in one location but not the other. The EPA's request for clarification on which action letter's rationale applied to the change is confirmed as the July 2017 Action Letter cited.

The new Section 3.4 of the Implementation Procedures for the Copper Biotic Ligand Model (BLM) raised a couple of questions from EPA as well. Primarily, the final sentence provided was the focus of attention: "The median of both the CMC and CCC will be calculated and then inputted into metals calculation to establish protective aquatic life copper values."

Upon further review, it was determined that this sentence extends beyond the scope of standards and does not accurately describe application of the BLM results. Therefore, it has been removed.

EPA comments on proposed changes to the Dissolved Oxygen criteria under the Numeric Tables

During preliminary meetings with EPA to determine standing items to be addressed in this triennial review, EPA provided continuous feedback on the changes to the Dissolved Oxygen criteria and its supporting position paper. An example of feedback incorporated is stating the narrative criteria apply to all depths of the lake/reservoir even if the hypolimnion isn't specifically defined or used in the standards when the metalimnion and epilimnion are defined.

However, a standing item from a September meeting with EPA was their conflict with the usage of a single species in the position paper, Walleye, to determine the 3 mg/L in the metalimnion is protective of all coolwater species present in the state that would seek that layer for thermal refuge. Particularly, concern was expressed for the habitat requirements of Yellow Perch, Sauger, and Saugeye. Upon further review of the

literature, Sauger and Saugeye are adequately protected at the 3.0 mg/L criterion, but concern for Yellow Perch may be warranted with the proposed criteria.

The review of Yellow Perch and its dissolved oxygen requirements shows mixed consensus on what is an adequate concentration of dissolved oxygen for the species where there are literature sources citing 2 mg/L is sufficient for summer activities and in contradiction other sources cite 4 mg/L being needed to protect Yellow Perch sustainability. It is unclear which value is adequately protective in reservoir environments, so it is KDHE's position to take the more conservative approach of protecting at the 4 mg/L dissolved oxygen concentration levels in reservoirs with established Yellow Perch populations.

After contacting the Kansas Department of Wildlife Parks & Tourism, their sampling of aquatic species shows only a handful of water bodies with established populations of Yellow Perch present in the state. Thus, an additional change to the proposed criteria has been added under a new footnote subsection of Table 1g where a(4) reads "For reservoirs with established populations of Yellow Perch (*Perca flavescens*), 4.0 mg/L will be the applied Dissolved Oxygen criterion in the metalimnion."

Comment on Harmful Algal Blooms

Friends of the Kaw's Dawn Buehler provided a written comment stating "there is little in the revision to improve existing water quality or reduce or eliminate harmful algal blooms." KDHE would like to direct attention to its deferral items for this triennial review.

In summary, KDHE already assesses cyanotoxins under its Harmful Algal Bloom (HAB) Response Program, and warnings produced under this program have a procedure for consideration of adoption to the 303(d) impaired waters list. Additionally, the HAB Response Program adopted the magnitudes of EPA's 2019 recommended cyanotoxin criteria that have already been used in the 2020 recreation season. These changes adopted by the HAB Response Program are not WQS, but they are a revision made following EPA's latest cyanotoxin recommendations.

Finally, cyanotoxins are not regulatable criteria as point sources do not discharge these toxins, but KDHE is instead involved in reducing the causal parameters of cyanotoxin production through biology, total phosphorus, nitrate, and eutrophication TMDLs. Additionally, to prevent HAB's KDHE is actively working to reduce nutrient loading contributing to HAB events through its 319 watershed plans and technology based limits for nutrient reduction in major municipal wastewater treatment facilities part of the nutrient reduction program. These efforts are predicated on implementing the 3 narrative nutrient criteria previously established in the standards at K.A.R. 28-16-28e(d)(2)(A), K.A.R. 28-16-28e(d)(3)(D), and K.A.R. 28-16-28e(d)(7)(A).

Thus, it is KDHE's position to continue with its current program implementations to reduce HAB events and defer adoption of numeric criteria formally into the WQS while continuing to assess effective practices in reducing these events.

Comment on maintaining the triennial review schedule

Friends of the Kaw's Dawn Buehler provided a written comment for maintaining the 3-year cycle for revisions to WQS called for in the Clean Water Act. It is KDHE's position to continuously work and strive to meet this requirement of the Clean Water Act called for under 40 CFR § 131.20.

2. Verbal comments provided at the public meeting

Compliance Schedule Comments

During the public meeting, concern was expressed by the Kansas Sierra Club's Elaine Giessel about the proposed changes to compliance schedules in the K.A.R. During the meeting, EPA's Region 7 contact for WQS, Justina Gonzalez, offered to provide a memo with the federal justification for making the change. It has been appended to the end of this document and the pertinent material highlighted there.

Comments on Numeric Nutrient Criteria

During the meeting, verbal comments were provided by the Kansas Sierra Club's Elaine Giessel expressing concern over no new additional numeric nutrient criteria being proposed in the current triennial review. Primarily, KDHE would like to direct attention to the deferral items for its positions on nutrients related to this triennial review.

In shorter summary, KDHE continues to operate under its nutrient reduction program that is statewide in scope. This program applies limits to major municipal wastewater treatment facilities to meet technology based limits, and the 319 Watershed Plans work to address nonpoint source nutrient contributions. When HABs do occur, the Department has the HAB Response Program that alerts the public and coordinates with multiple agencies in addressing the event. Nutrient loading is an ubiquitous issue nationally, and in Kansas primarily loading is due to nonpoint source contributions entering our reservoirs which numeric nutrient criteria are largely ineffective in addressing due to the non-regulatory aspect of nonpoint sources under the Clean Water Act. However, EPA currently has draft criteria to aid in addressing nutrient impairments, and KDHE has provided comment on. We expect a finalized criteria and implementation document to address further in the next triennial review. As EPA develops new criteria and programs in addressing nutrient pollution, KDHE will continue to review, comment, and adopt as appropriate in its current and continued nutrient reduction endeavors.

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
WATER

May 10, 2007

MEMORANDUM

SUBJECT: Compliance Schedules for Water Quality-Based Effluent Limitations in NPDES Permits

FROM: James A. Hanlon, Director
Office of Wastewater Management
/s/

TO: Alexis Strauss, Director
Water Division
EPA Region 9

Recently, in discussions with Region 9, questions have been raised concerning the use of compliance schedules in National Pollutant Discharge Elimination System (NPDES) permits consistent with the Clean Water Act (CWA) and its implementing regulations at 40 C.F.R. § 122.47. The use of compliance schedules in NPDES permits is also the subject of ongoing litigation in California. The purpose of this memo is to provide a framework for the review of permits consistent with the CWA and its implementing regulations.

When may a permitting authority include a compliance schedule in a permit for the purpose of achieving a water quality-based effluent limitation?

In *In The Matter of Star-Kist Caribe, Inc.*, 3 E.A.D. 172, 175, 177 (1990), the EPA Administrator interpreted section 301(b)(1)(C) of the CWA to mean that 1) after July 1, 1977, permits must require immediate compliance with (*i.e.*, may not contain compliance schedules for) effluent limitations based on water quality standards adopted before July 1, 1977, and 2) compliance schedules are allowed for effluent limitations based on standards adopted after that date only if the State has clearly indicated in its water quality standards or implementing regulations that it intends to allow them.

What principles are applicable to assessing whether a compliance schedule for achieving a water quality-based effluent limitation is consistent with the CWA and its implementing regulations?

1. “When appropriate,” NPDES permits may include “a schedule of compliance leading to compliance with CWA and regulations . . . as soon as possible, but not later than the applicable statutory deadline under the CWA.” 40 C.F.R. § 122.47(a)(1). Compliance schedules that are longer than one year in duration must set forth interim requirements and dates for their achievement. 40 C.F.R. § 122.47(a)(3).

2. Any compliance schedule contained in an NPDES permit must be an “enforceable sequence of actions or operations leading to compliance with a [water quality-based] effluent limitation [“WQBEL”]” as required by the definition of “schedule of compliance” in section 502(17) of the CWA. *See also* 40 C.F.R. § 122.2 (definition of schedule of compliance).

3. Any compliance schedule contained in an NPDES permit must include an enforceable final effluent limitation and a date for its achievement that is within the timeframe allowed by the applicable State or federal law provision authorizing compliance schedules as required by CWA sections 301(b)(1)(C); 502(17); the Administrator’s decision in *Star-Kist Caribe, Inc.* 3 E.A.D. 172, 175, 177-178 (1990); and EPA regulations at 40 C.F.R. §§ 122.2, 122.44(d) and 122.44(d)(1)(vii)(A).

4. Any compliance schedule that extends past the expiration date of a permit must include the final effluent limitations in the permit in order to ensure enforceability of the compliance schedule as required by CWA section 502(17) and 40 C.F.R. § 122.2 (definition of schedule of compliance).

5. In order to grant a compliance schedule in an NPDES permit, the permitting authority has to make a reasonable finding, adequately supported by the administrative record, that the compliance schedule “will lead[] to compliance with an effluent limitation . . . ” “to meet water quality standards” by the end of the compliance schedule as required by sections 301(b)(1)(C) and 502(17) of the CWA. *See also* 40 C.F.R. §§ 122.2, 122.44(d)(1)(vii)(A).

6. In order to grant a compliance schedule in an NPDES permit, the permitting authority has to make a reasonable finding, adequately supported by the administrative record and described in the fact sheet (40 C.F.R. § 124.8), that a compliance schedule is “appropriate” and that compliance with the final WQBEL is required “as soon as possible.” *See* 40 C.F.R. §§ 122.47(a), 122.47(a)(1).

7. In order to grant a compliance schedule in an NPDES permit, the permitting authority has to make a reasonable finding, adequately supported by the administrative record, that the discharger cannot immediately comply with the WQBEL upon the effective date of the permit. 40 C.F.R. §§ 122.47, 122.47(a)(1).

8. Factors relevant to whether a compliance schedule in a specific permit is “appropriate” under 40 C.F.R. § 122.47(a) include: how much time the discharger has already had to meet the WQBEL(s) under prior permits; the extent to which the

discharger has made good faith efforts to comply with the WQBELs and other requirements in its prior permit(s); whether there is any need for modifications to treatment facilities, operations or measures to meet the WQBELs and if so, how long would it take to implement the modifications to treatment, operations or other measures; or whether the discharger would be expected to use the same treatment facilities, operations or other measures to meet the WQBEL as it would have used to meet the WQBEL in its prior permit.

9. Factors relevant to a conclusion that a particular compliance schedule requires compliance with the WQBEL “as soon as possible,” as required by 40 C.F.R. § 122.47(a)(1) include: consideration of the steps needed to modify or install treatment facilities, operations or other measures and the time those steps would take. The permitting authority should not simply presume that a compliance schedule be based on the maximum time period allowed by a State’s authorizing provision.

10. A compliance schedule based solely on time needed to develop a Total Maximum Daily Load is not appropriate, consistent with EPA’s letter of October 23, 2006, to Celeste Cantu, Executive Director of the California State Water Resources Control Board, in which EPA disapproved a provision of the Policy for Implementation of Toxic Standards for Inland Surface Waters, Enclosed Bays, and Estuaries for California.

11. A compliance schedule based solely on time needed to develop a Use Attainability Analysis is also not appropriate, consistent with EPA’s letter of February 20, 2007, to Doyle Childers, Director Missouri Department of Natural Resources, nor is a compliance schedule based solely on time needed to develop a site specific criterion, for the same reasons as set forth in the October 23, 2006, (referenced in Paragraph 10) and February 20, 2007 letters.

If you have any questions, please contact me at (202) 564-0748 or have your staff contact Linda Boornazian at (202) 564-0221.