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Ref: 8WD-IO

MEMORANDUM

SUBJECT: SB 358 Water Quality Standards Review; Rationale for EPA not acting on remaining provisions of SB358

FROM: Judy Bloom, Manager
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TO: The File

I. Introduction

EPA has reviewed the legislation adopted by the State of Montana in April 2021 (Senate Bill 358 or SB 358) for consistency with the Clean Water Act (CWA). In reviewing a state or tribe's regulation or statute, EPA considers first whether any provisions constitute a new or revised water quality standard (WQS) that EPA has the CWA section 303(c)(3) authority and duty to approve or disapprove. If it does, EPA must then determine if the provision is consistent with the requirements of the CWA and implementing regulations (i.e., is it approvable).

As discussed in more detail in the action letter,¹ EPA has determined that recent legislative actions in Section 2(1), Section 3, Section 4, and Section 7² of SB 358 signed into law on April 30, 2021, include changes that are new or revised water quality standards (WQS) that EPA must either approve or disapprove pursuant to Section 303(c) of the Clean Water Act (CWA). EPA has reviewed those provisions for consistency with the CWA and EPA's implementing regulations and found that they are not consistent with the requirements of the CWA and 40 CFR Part 131. Therefore, EPA is disapproving those provisions pursuant to CWA section 303(c) and Part 131, as detailed in the action letter, and they cannot be used for any CWA purpose. This Memorandum to File describes EPA's review of whether any provisions of SB 358 not disapproved by EPA are new or revised WQS. Relevant background and a summary of the review are provided below.

¹ See action letter from Darcy O'Connor, EPA Region 8 Water Division Director, to The Honorable Greg Gianforte, Governor of Montana.

² EPA addressed the portion of Section 7 codified at MCA 75-5-317(2)(u) in its action letter. Other provisions in Section 7 of SB 358 are addressed below.

II. EPA's Evaluation Whether Any Provisions of SB 358 Not Disapproved by EPA are New or Revised WQS

A. Framework for Determining What is a New or Revised WQS

CWA section 303(c)(2) requires states to submit new or revised WQS to EPA. CWA section 303(c)(3) provides for EPA review of such WQS. EPA's authority and duty to review and approve or disapprove a new or revised WQS is not dependent upon whether the provision was submitted to EPA for review.³ Therefore, EPA is obligated to analyze SB 358 to determine whether its provisions constitute new or revised WQS which EPA must either approve or disapprove pursuant to Section 303(c) of the Clean Water Act (CWA).

In October 2012, EPA posted a document online, entitled: "*What is a New or Revised Water Quality Standard Under CWA 303(c)(3)? Frequently Asked Questions*" (FAQs).⁴ EPA developed the document as an aid to discern when state or authorized tribal provisions constitute new or revised WQS, stating: "To date, EPA has evaluated each situation on a case-by-case basis. These FAQs consolidate EPA's plain language interpretation (informed by the CWA, EPA's implementing regulations at 40 C.F.R. Part 131, and relevant case law) of what constitutes a new or revised water quality standard that the Agency has the CWA Section 303(c)(3) authority and duty to approve or disapprove." The FAQs were, in part, an outgrowth of the Agency's experience in prior cases, and they are currently referenced in EPA's *Water Quality Standards Handbook*.⁵

EPA's FAQs describe a 4-part test: if all four questions below are answered "yes," then the provision would likely constitute a new or revised WQS that EPA has the authority and duty to approve or disapprove under CWA Section 303(c)(3).

- 1) Is it a legally binding provision adopted or established pursuant to state or tribal law?
- 2) Does the provision address designated uses, water quality criteria (narrative or numeric) to protect designated uses, and/or antidegradation requirements for waters of the United States?
- 3) Does the provision express or establish the desired condition (e.g., uses, criteria) or instream level of protection (e.g., antidegradation requirements) for waters of the United States immediately or mandate how it will be expressed or established for such waters in the future?
- 4) Does the provision establish a new WQS or revise an existing WQS?

³ The U.S. Court of Appeals for the 11th Circuit has held that EPA has a mandatory duty to act on new or revised state WQS, whether or not they are submitted to EPA. *Miccosukee Tribe of Indians of Florida v. EPA*, 105 F.3d 599 (11th Cir. 1997); *FPIRG v. EPA*, 386 F.3d 1070 (11th Cir 2004) (concurring with the reasoning in *Miccosukee*).

⁴ *What is a New or Revised Water Quality Standard Under CWA 303(c)(3)? Frequently Asked Questions*. Office of Water, U.S. Environmental Protection Agency. EPA No. 820-F-12-017 (October 2012). www.epa.gov/sites/default/files/2014-11/documents/cwa303faq.pdf.

⁵ See www.epa.gov/sites/default/files/2014-10/documents/handbook-chapter1.pdf.

Question 1 is a threshold question of legal applicability that stems from the use of the terms “adopt,” “law,” “regulations,” and “promulgate” in CWA section 303(a)-(c) and EPA’s regulations at 40 CFR 131.3(i) which specifies that WQS “are provisions of state or federal law.”⁶ Question 2 reflects the CWA articulation that WQS include three core components: designated uses, water quality criteria, and antidegradation requirements (see CWA sections 303(c)(2)(A) and 303(d)(4)(B)). Question 3 addresses the substance of the provision and whether it changes one or more of the components of a WQS, such that the provision expresses or establishes a different water quality goal for CWA purposes.⁷

Consistent with its placement as the final question, Question 4 only needs to be evaluated if Questions 1-3 are answered in the affirmative. It clarifies that EPA’s authority, as specified in CWA section 303(c)(2)(A), is to act only on new or revised WQS provisions, which includes provisions that have not previously been approved by EPA under section 303(c).⁸ EPA’s evaluation of whether a provision is new or revised requires a consideration of the effect of the provision on the WQS themselves. For example, if a provision meets the first three considerations but already exists as part of the state or authorized tribe’s EPA-approved and CWA-applicable WQS and was only copied over to another section of the regulation for ease of reference, such a re-statement does not have the effect of establishing or changing the applicable WQS. Therefore, the provision is not new or revised, and EPA does not have the authority or duty to take an action under CWA section 303(c).

B. Analysis of Whether Remaining Provisions in SB 358 are New or Revised WQS

EPA analyzed each remaining provision of SB 358, beyond those determined in the action letter to be new and revised WQS, using the 4-part test. EPA’s analysis on each provision is described below.

1. Section 1 of SB 358: now codified as MCA 75-5-321 and ARM 17.30.1388

Statutory Language

“Transition for nutrient standards. (1) By March 1, 2022, the department of environmental quality shall adopt rules related to narrative nutrient standards in consultation with the nutrient work group. (2) The rules shall provide for the development of an adaptive management program which provides for an incremental watershed approach for protecting and maintaining water quality, and that: (a) reasonably balances all factors impacting a water body; (b) prioritizes the

⁶ 40 CFR 131.3(i): Water quality standards are provisions of State or Federal law which consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses. Water quality standards are to protect the public health or welfare, enhance the quality of water and serve the purposes of the Act.

⁷ See 40 CFR 131.2: A water quality standard defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria that protect the designated uses.

⁸ As stated in EPA’s 2012 4-part test FAQs “A provision that EPA has never approved as a WQS would be considered ‘new.’ It must also meet the other three considerations to be a new or revised WQS.” *What is a New or Revised Water Quality Standard Under CWA 303(c)(3)? Frequently Asked Questions*. Office of Water, U.S. Environmental Protection Agency. EPA No. 820-F-12-017 (October 2012). www.epa.gov/sites/default/files/2014-11/documents/cwa303faq.pdf

minimization of phosphorus, taking into account site-specific conditions; and (c) identifies the appropriate response variables affected by nutrients and associated impact thresholds in accordance with the beneficial uses of the waterbody. (3) In developing the rules in subsection (2), the department shall consider options pertaining to whether the point source is new or existing and whether the receiving water body is considered impaired or unimpaired.”

4-Part Test Analysis

Question 1. Is it a legally binding provision adopted or established pursuant to state or tribal law?

Yes. Section 1 is legally binding under state law as it is part of the SB 358 legislation passed by the Montana legislature and signed by Governor Gianforte on April 30, 2021. Section 1 of SB 358 is now codified as MCA 75-5-321 and ARM 17.30.1388.

Question 2. Does the provision address designated uses, water quality criteria (narrative or numeric) to protect the designated uses, and/or antidegradation requirements for waters of the United States?

Yes. EPA reviewed this provision and concluded that it satisfies the second question of EPA’s 4-part test because it addresses water quality criteria parameters that would be used to protect designated uses for all waterbodies in Montana, including streams, nonwadeable rivers and lakes/reservoirs.

Question 3. Does the provision express or establish the desired condition (e.g., uses, criteria) or instream level of protection (e.g., antidegradation requirements) for waters of the United States immediately or mandate how it will be expressed or established in such waters in the future?

No. EPA has determined that this provision does not express or establish the desired condition (e.g., uses, criteria) or instream level of protection (e.g., antidegradation requirements) for waters of the United States immediately or mandate how it will be expressed or established in such waters in the future. Although the provision establishes a framework for MDEQ to use when revising its regulations in the future, this language does not mandate how MDEQ is to establish or express the desired condition. While the rulemaking mandated by this provision may result in the expression or establishment of the desired condition in the future, the current language provides discretion to the state to determine the future desired condition.

Question 4. Does the provision establish a new WQS or revise an existing WQS?

No. EPA's authority and duty to review and approve or disapprove such provisions under CWA section 303(c)(3) are limited to those WQS that are new or revised. As mentioned in Section II.A, Question 4 only needs to be evaluated if Questions 1-3 are answered in the affirmative. However, EPA chose to address Question 4 here for purposes of completeness. While this provision addresses water quality criteria (per Question 2), it does not establish or express the desired condition for Montana waterbodies (per Question 3), thus this provision does not establish a new WQS and does not have the effect of revising an existing WQS. In other words,

this provision cannot be new or revised WQS for which EPA has the authority and duty to act on under CWA section 303(c)(3) as it does not establish or express a desired condition for a waterbody. Therefore, this provision does not meet question 4 of the 4-part test.

Conclusion

As described above, this provision in Section 1 of SB358 does not meet questions 3 and 4 of the 4-part test and therefore is not a new or revised WQS that EPA has the authority and duty to approve or disapprove under CWA 303(c)(3).

2. Section 6 of SB 358, Section 75-5-105

Statutory Language

MCA is amended to read: ...”

Text strikes reference to 75-5-314 in this section, which addresses confidentiality of records.

4-Part Test Analysis

Question 1. Is it a legally binding provision adopted or established pursuant to state or tribal law?

Yes. Section 6 is legally binding under state law as it is part of the SB 358 legislation passed by the Montana legislature and signed by Governor Gianforte on April 30, 2021.

Question 2. Does the provision address designated uses, water quality criteria (narrative or numeric) to protect the designated uses, and/or antidegradation requirements for waters of the United States?

No. EPA reviewed Section 6 of SB358 and concluded that this provision does not address designated uses, narrative or numeric water quality criteria, nor antidegradation requirements. Rather, this provision addresses the confidentiality of records (e.g., trade secrets or other information unique to the owner) related to pollution sources. Therefore, the provision does not satisfy question 2 of the 4-part test.

Question 3. Does the provision express or establish the desired condition (e.g., uses, criteria) or instream level of protection (e.g., antidegradation requirements) for waters of the United States immediately or mandate how it will be expressed or established in such waters in the future?

No. EPA has determined that this provision does not express or establish the desired condition (e.g., uses, criteria) or instream level of protection (e.g., antidegradation requirements) for waters of the United States immediately or mandate how it will be expressed or established in such

waters in the future. The provision describes when information related to pollution sources could be considered confidential and not open to public use.

Question 4. Does the provision establish a new WQS or revise an existing WQS?

No. EPA's authority and duty to review and approve or disapprove such provisions under CWA section 303(c)(3) are limited to those WQS that are new or revised. As mentioned in Section II.A, Question 4 only needs to be evaluated if Questions 1-3 are answered in the affirmative. However, EPA chose to address Question 4 here for purposes of completeness. This provision does not address designated uses, criteria or antidegradation (per Question 2) nor does it establish or express the desired condition for Montana waterbodies (per Question 3), thus this provision does not establish a new WQS and does not have the effect of revising an existing WQS. In other words, this provision cannot be a new or revised WQS which EPA has the authority and duty to act on under CWA section 303(c)(3) as it does not address one of the three core components of WQS nor does it establish or express a desired condition for a waterbody. Therefore, this provision does not meet question 4 of the 4-part test.

Conclusion

As described above, this provision in Section 6 of SB358 does not meet questions 2, 3, and 4 of the 4-part test and therefore is not a new or revised WQS that EPA has the authority and duty to approve or disapprove under CWA 303(c)(3).

3. Section 7 of SB 358, Section 75-5-317

Statutory Language

MCA is amended to read: ...

~~(u)~~(v) any other activity that is nonsignificant because of its low potential for harm to human health or to the environment and its conformance with the guidance found in 75-5-301(5)(c)

(u) ~~any other activity that is nonsignificant because of its low potential for harm to human health or to the environment and its conformance with the guidance found in 75-5-301(5)(c).~~"

Analysis and Conclusion

EPA has determined that this component of Section 7 is a non-substantive revision because it simply moved the text previously in provision (u) to a new provision (v) in MCA 75-5-317, the section of Montana's antidegradation implementation methods that lists "nonsignificant activities." The text at issue did not change.⁹ Rather the state revised the lettering of MCA 75-5-317 to accommodate a new "nonsignificant activity" as provision (u); EPA addressed its disapproval of this new provision in the action letter. While EPA would normally act on non-substantive changes, as described in Question 6 of the 4-part test FAQs, EPA is not acting on this

⁹ See the EPA's January 26, 1999 action letter from Jack W. McGraw, Deputy Regional Administrator, to Marc Racicot, The Honorable Governor of Montana. Note the provision was MCA 75-5-317(2)(s) at that time.

non-substantive lettering change.¹⁰ Acting on this lettering change could create confusion as the newly proposed (u) provision, which has led to this lettering change, is being disapproved by EPA.

4. Section 5 of SB 358, Section 75-5-103

Statutory Language

MCA is amended to read:

Text *strikes* the following definitions:

- 2(a) "Base numeric nutrient standards" means numeric water quality criteria for nutrients in surface water that are adopted to protect the designated uses of a surface water body.
- 2(b) The term does not include numeric water quality standards for nitrate, nitrate plus nitrite, or nitrite that are adopted to protect human health.
- (22) "Nutrient standards variance" means numeric water quality criteria for nutrients based on a determination that base numeric nutrient standards cannot be achieved because of economic impacts or because of the limits of technology. The term includes individual, general, and alternative nutrient standards variances in accordance with 75-5-313.

Text *revises* the following definition:

- (23) "Nutrient work group" means an advisory work group, convened by the department, representing publicly owned and privately owned point sources of pollution, nonpoint sources of pollution, and other interested parties that will advise the department on ~~the base numeric nutrient standards, the development of nutrient standards variances, and~~ the implementation of those standards, and ~~variances together with~~ associated economic impacts.

Analysis and Conclusion

Definitions are often inextricably linked to how any WQS that use the corresponding terms will operate in practice. However, these deletions and revisions to definitions relate to provisions that EPA is disapproving, as discussed in the action letter. EPA is not acting at this time on any of the deletions and revisions to the definitions in Section 5 of SB358 but will evaluate whether action on any revised or deleted definition in this section is warranted at the time EPA approves any future WQS provisions that MDEQ adopts.

III. Overall Conclusion

As detailed in the action letter, EPA is acting to disapprove certain provisions in SB 358. Section II of this Memorandum addresses EPA's review of the provisions that EPA did not act on in the action letter to determine which, if any, provisions were new or revised WQS. As a result of the

¹⁰ *What is a New or Revised Water Quality Standard Under CWA 303(c)(3)? Frequently Asked Questions*. Office of Water, U.S. Environmental Protection Agency. EPA No. 820-F-12-017 (October 2012).

review, EPA determined that the provisions in Sections 1, 6 and 7 of SB 358 addressed in this Memorandum are not new or revised WQS because they do not meet all 4 questions in the 4-part test. In addition, as noted above in section II.C, EPA will evaluate whether action on any revisions or deletions of definitions identified in Section 5 of SB 358 is warranted in the context of future action on new or revised WQS to which they may be linked. EPA only has an authority or duty to act, as specified in CWA section 303(c)(2)(A), on new or revised WQS. Thus, based on the rationale described in this Memorandum to File, EPA is not acting on the remaining provisions in SB 358.