

MEMORANDUM

TO: The Utah Water Quality Working Group

FROM: Western Resource Advocates

SUBJECT: Proposed Narrative Biocriteria Standard

DATE: April 13, 2011

Issue:

The narrative biocriteria proposed by DWQ for inclusion in R317-2-7.3 contains language stating that the criteria would be unenforceable.

WRA's Proposal:

Eliminate the unenforceability language in the biocriteria standard proposed by DWQ to the Water Quality Standards ("WQS") contained in R317-2.

The Proposed Rule in its Current Form:

7.3 – Narrative Biological Standards

The taxonomic composition, richness or functional organization of an assemblage of aquatic organisms shall not differ from comparable measures observed at reference sites. Violations of this criterion will be determined using scientifically defensible and statistically rigorous methods and other information.

This biological criterion alone shall not be used for regulatory and enforcement actions, such as the development or enforcement of Utah pollution discharge elimination system permits. However, biological assessment methods that have been approved by the Executive Secretary, following consultation and review by the Board and other interested parties, may be used to assess support of biological uses as assigned in R-317-2-6. Biological assessment methods may also be used, in combination with other information, to support the development of site-specific standards, new or refined aquatic life use categories, or to support the need for new permit limits.

WRA's Alternative Language for the Proposed Rule:

7.3 – Narrative Biological Standards

The taxonomic composition, richness or functional organization of an assemblage of aquatic organisms shall not differ from comparable measures observed at reference sites. Violations of this criterion will be determined using scientifically defensible and statistically rigorous methods and other information.

This biological criterion may be used for regulatory and enforcement actions, such as the development or enforcement of Utah pollution discharge elimination system permits. Biological assessment methods that have been approved by the Executive Secretary, following consultation and review by the Board and other interested parties, may also be used to assess support of biological uses as assigned in R-317-2-6. Biological assessment methods may also be used, in combination with other information, to support the development of site-specific standards, new or refined aquatic life use categories, or to support the need for new permit limits.

Reason for WRA's Proposed Change:

The “unenforceability” language should be removed from the proposed biocriteria standard for two simple reasons. First, the qualifying language is unlawful under the Clean Water Act. Second, removing that language will simply make Utah join 37 other states, which have developed or are developing enforceable biocriteria.

Congress enacted the Clean Water Act (“CWA”) as a means to “restore and maintain the chemical, physical, and *biological* integrity of [the] Nation’s waters.” 33 U.S.C. § 1251(a) (*emphasis added*). In order to accomplish these broad objectives, Congress required the Environmental Protection Agency (“EPA”) to create effluent limitations for discharges of pollutants and the states to create water quality standards (“WQS”). *See* 33 U.S.C. §§ 1311, 1313. Through WQS, states promulgate standards that accomplish the dual policy objectives of restoring and maintaining the integrity of the nation’s waters and achieving water quality that promotes the protection and propagation of fish, shellfish and wildlife. EPA, Introduction to Water Quality Standards 1(October 1999).

In fact, both the CWA and the EPA implementing regulations require that water quality criteria, an integral facet of a WQS, *must* contain sufficient parameters or constituents to protect the designated use.” 33 U.S.C. § 1313, 40 C.F.R. §§ 131.6, 131.11 (*emphasis added*). The use of the word “must” indicates a mandatory duty. *See Glenn v. Ferrell*, 304 P.2d 380, 382 (UT 1956) (“[t]he word ‘must’ is mandatory unless some compelling reason indicating a contrary intent appears.”). *See also Natural Resources Defense Council, Inc. v. U.S.EPA*, 16 F.3d, 1395, 1399 (4th Cir. 1993) (“water quality standards are a critical component of the CWA regulatory scheme because such standards serve as a guideline for setting applicable limitations in individual discharge permits.”); *Ackels. v. U.S. EPA.*, 7 F. 3d 862, 865 (9th Cir. 1993) (permit limitations are “necessary to comply with state water quality standards, and the Clean Water Act requires permits to meet the state water quality standards”).

The proposed language of the Utah Department of Environmental Quality, Division of Water Quality’s (“DWQ”) biological standard states that the standard “shall not be used for regulatory and enforcement actions.” Because the standard is unenforceable, it violates the CWA, the implementing regulations and case law.

Moreover, removing the unenforceability language in the proposed biocriteria standard would not be unprecedented or lead to insurmountable implementation issues. It would simply make Utah’s standard consistent with the approach taken by 37 other states. To that end, as of

December 2002, when the EPA published its biocriteria findings in its *Summary of Biological Assessment Programs and Biocriteria Development for States, Tribes, Territories, and Interstate Commissions*, 29 states and tribes had enforceable narrative biocriteria and 4 states and tribes had enforceable numeric biocriteria. The United States Environmental Protection Agency. *Summary of Biological Assessment Programs and Biocriteria Development for States, Tribes, Territories, and Interstate Commissions*. Table 1 at 17; Figure 2 at 22-23. At that time of the EPA's issue, 22 additional states and tribes, some of which already had narrative biocriteria in place, had additional biocriterion measures under development. *Id.* Notably, the States of Ohio, Oklahoma, and Florida have promulgated both enforceable narrative and enforceable numeric biocriteria. It seems as though no state, other than Utah, has contemplated unenforceable standards.

Since the EPA issued its report nearly 10 years ago, there appears to have been neither any significant insurmountable problems with the implementation of biocriteria in the other 27 states, nor any significant litigation over enforceable biocriteria in the court system. The fact that a majority of the other states have promulgated enforceable biocriteria, without insurmountable problems or successful legal challenges, shows: 1) that biocriteria can be feasibly developed given our current technological, economic, and political circumstances; 2) that biocriteria need not be subject to unduly harsh interpretations; and 3) that industry can rely upon such interpretations with a reasonable degree of certainty.

Parties who will Benefit from this Change:

Agency and industry can both expect to benefit from this change to the proposed language. With a more concrete provision and an enforceable standard, agency will better know how to regulate industry, and industry will better know how it will be regulated. Also, with this change, agency could draw upon the research and experiences of the other 37 states to feasibly implement and effectively maintain its new biocriteria; it does not have to expend valuable resources to "reinvent the wheel." The original proposed language would likely engender uncertainties, and thus, administrative burdens for agency and hardships for industry. The new proposed language seeks to mitigate these potential pitfalls.

The public at large can also expect to benefit from this change to the proposed language. With a more concrete provision and an enforceable standard, the public will better know that both agency and industry are doing their best to fulfill their obligations under the CWA –to "restore and maintain the chemical, physical, and *biological* integrity of [the] Nation's waters."