

WATER QUALITY STANDARDS

REQUIRING COMPLIANCE IN NPDES PERMITS AND
EPA'S REVIEW AND APPROVAL OF STATE STANDARDS.



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REQUIRING COMPLIANCE WITH WATER QUALITY STANDARDS IN NPDES PERMITS

CITY & CNTY. OF SAN FRANCISCO, CALIFORNIA V. ENV'T PROT.
AGENCY, 604 U.S. 334, 145 S. CT. 704, 221 L. ED. 2D 166 (2025)



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CONFUSION ABOUT TEXT AND CONTEXT

Whatever “any more stringent limitation” may mean, the Court says, it does not authorize EPA to direct permittees to comply with the water quality standards.

City & Cnty. of San Francisco, California v. Env't Prot. Agency, 604 U.S. 334, 359, 145 S. Ct. 704, 722, 221 L. Ed. 2d 166 (2025)

WATER QUALITY STANDARDS ARE NOT EFFLUENT LIMITS: IS THIS TRUE?

In dissent, Judge Collins argued that the CWA “draws an explicit distinction between the ‘limitations’ that the agency must devise and impose on a particular permittee's discharges” and the water quality standards themselves.

City & Cnty. of San Francisco, California v. Env't Prot. Agency, 604 U.S. 334, 343, 145 S. Ct. 704, 713, 221 L. Ed. 2d 166 (2025)

SAN FRANCISCO'S MAIN ARGUMENT:

- ✔ All “limitations” imposed under § 1311 must qualify as “effluent limitations.”
- ✔ Therefore, “any more stringent limitation” means an effluent limitation.

THE SUPREME COURT'S RESPONSE:

- ✔ We cannot believe that Congress omitted the term “effluent” from §1311(b)(1)(C) simply because it wanted to save ink or assumed that regulators and interested parties would understand that the omission of the term was inconsequential.

City & Cnty. of San Francisco, California v. Env't Prot. Agency, 604 U.S. 334, 344, 145 S. Ct. 704, 713–14, 221 L. Ed. 2d 166 (2025)

WHAT DOES “ANY MORE STRINGENT LIMITATION” MEAN?



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TEXT AND CONTEXT

SAN FRANCISCO WINS:

We hold that the two challenged provisions exceed the EPA's authority. The text and structure of the CWA, as well as the history of federal water pollution legislation, make this clear. And resorting to such requirements is not necessary to protect water quality. The EPA may itself determine what a facility should do to protect water quality, and the Agency has ample tools to obtain whatever information it needs to make that determination. If the EPA does its work, our holding should have no adverse effect on water quality.

City & Cnty. of San Francisco, California v. Env't Prot. Agency, 604 U.S. 334, 339, 145 S. Ct. 704, 711, 221 L. Ed. 2d 166 (2025)



If the EPA does its work, our holding should have no adverse effect on water quality.



“[t]he text, structure, and pre- and post-enactment context” support this interpretation.

City & Cnty. of San Francisco, California v. Env't Prot. Agency, 604 U.S. 334, 345–46, 145 S. Ct. 704, 715, 221 L. Ed. 2d 166 (2025)



CWA § 1311(b)(1)(C) “does not authorize EPA to impose NPDES permit requirements that condition permitholders’ compliance on whether *346 receiving waters meet applicable water quality standards.”

Id.

ANY OTHER LIMITATION HAS LIMITS:

- ✔ [The CWA] “does not authorize EPA to impose NPDES permit requirements that condition permit holders’ compliance on whether receiving waters meet applicable water quality standards.”

City & Cnty. of San Francisco, California v. Env't Prot. Agency, 604 U.S. 334, 345–46, 145 S. Ct. 704, 715, (2025).

ANOTHER WAY OF LOOKING AT THE COURT’S DECISION:

- ✔ Whatever “any more stringent limitation” may mean, the Court says, it does not authorize EPA to direct permittees to comply with the water quality standards.

City & Cnty. of San Francisco, California v. Env't Prot. Agency, 604 U.S. 334, 359, 145 S. Ct. 704, 722, 221 L. Ed. 2d 166 (2025)

- ✔ Receiving water limitations, like any other permit condition, thus operate as “ ‘direct restrictions’ on polluters.” *Ante*, at — (quoting *State Water Resources Control Bd.*, 426 U.S., at 204, 96 S.Ct. 2022).

City & Cnty. of San Francisco, California v. Env't Prot. Agency, 604 U.S. 334, 364, 145 S. Ct. 704, 725, 221 L. Ed. 2d 166 (2025)

TEXT AND CONTEXT

San Francisco advances a narrower alternative, namely, that even if § 1311(b)(1)(C) is not limited to effluent limitations, it “does not authorize EPA to impose *NPDES permit requirements that condition permit holders’ compliance on whether receiving waters meet applicable water quality standards.*” Brief for Petitioner 19. We agree with this argument. As the City maintains, “[t]he text, structure, and pre- and post-enactment context” support this interpretation. *Ibid.*

City & Cnty. of San Francisco, California v. Env't Prot. Agency, 604 U.S. 334, 345–46, 145 S. Ct. 704, 715, 221 L. Ed. 2d 166 (2025)

TEXT AND CONTEXT (DISSENT)

This conclusion is puzzling. The entire function of § 1311(b)(1)(C) is to ensure that permitted discharges do not violate state water quality standards. And as discussed above, the provision gives EPA broad authority to achieve that aim through conditions imposed in NPDES permits. Why would that broad authority not allow EPA to tell permittees that they must not cause or contribute to a violation of the very standards that § 1311(b)(1)(C) serves to safeguard?

The answer, according to the Court, is that *a restriction does not count as a “limitation” if the permittee must identify the steps necessary to comply with it. Ante*, at 715. San Francisco's permit only authorizes discharges that do not degrade water quality below the applicable standard. It is up to the city, however, to formulate a plan to achieve that result. The city's plan, the Court asserts, is a “limitation” on its discharges, but the permit condition is not. See *ibid*. As best I can tell, the Court thinks that only the “direct source of restriction or restraint”—apparently, the most specific restriction—counts as a “limitation.” *Ibid*.

City & Cnty. of San Francisco, California v. Env't Prot. Agency, 604 U.S. 334, 359–60, 145 S. Ct. 704, 722–23, 221 L. Ed. 2d 166 (2025)

MULTI-DISCHARGER PROBLEM:

As previously explained, it is hard to believe that the 1972 Congress used § 1311(b)(1)(C) to perpetuate (in camouflaged form) the backward-looking enforcement scheme in the prior version of the WPCA. And it is even harder to accept the proposition that Congress did that without setting out any method for dealing with the multi-discharger problem.

MULTI-DISCHARGER PROBLEM:

The EPA's only response to this argument is to note that in this case the Oceanside facility is the only entity that discharges into the relevant area of the Pacific Ocean. But the multiple-discharger problem goes to the meaning of § 1311(b)(1)(C), and that provision cannot mean one thing in a single-discharger case and another when there are multiple dischargers.

TEXT AND CONTEXT

IS THIS STATEMENT CORRECT?

The EPA's only response to this argument is to note that in this case the Oceanside facility is the only entity that discharges into the relevant area of the Pacific Ocean.

City & Cnty. of San Francisco, California v. Env't Prot. Agency, 604 U.S. 334, 352, 145 S. Ct. 704, 718, 221 L. Ed. 2d 166 (2025)



Are Dischargers
the only source of
water quality
problems?



Is the issue presented by the
imposition of end-result
limitations really about a multi-
discharger problem?



CWA § 1311(b)(1)(C) “does not
authorize EPA to impose NPDES
permit requirements that condition
permitholders’ compliance on
whether receiving waters meet
applicable water quality standards.”

TEXT AND CONTEXT

WHAT IS THE PERMIT SHIELD?

Under what is known as the “permit shield” provision, an entity that adheres to the terms of its permit is deemed to be compliant with the Act. See 33 U.S.C. § 1342(k).

City & Cnty. of San Francisco, California v. Env't Prot. Agency, 604 U.S. 334, 341, 145 S. Ct. 704, 712, 221 L. Ed. 2d 166 (2025)



Because of the harsh penalties for violating the terms of a permit, the permit shield is invaluable.



But the benefit of this provision would be eviscerated if the EPA could impose a permit provision making the permittee responsible for any drop in water quality below the accepted standard.



The pre-1972 enforcement scheme made it necessary for federal authorities to “unscramble the polluted eggs after the fact.”

WHAT ARE THE PRACTICAL IMPACTS OF CITY & CNTY. OF SAN FRANCISCO, CALIFORNIA V. ENV'T PROT. AGENCY, 604 U.S. 334 (2025) ON NPDES PERMITTING IN ARKANSAS?*

-
- 1) ???????
 - 2) ???????
 - 3) ???????
 - 4) ???????
 - 5) ???????

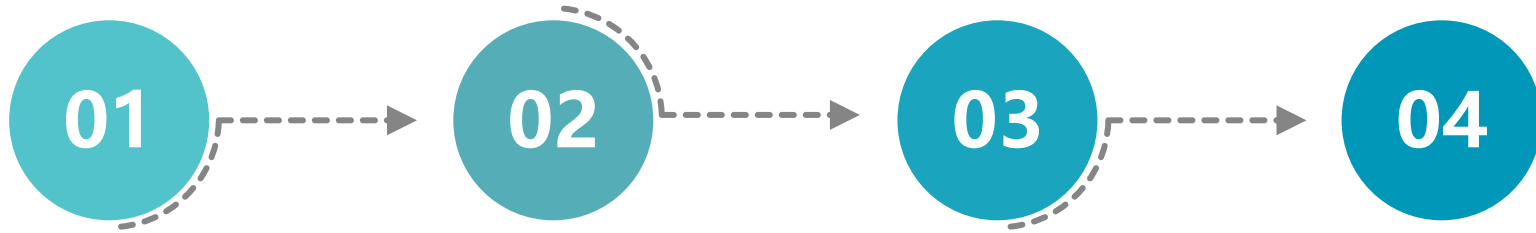
* This list is not intended to be exclusive or complete.

WHAT ARE THE PRACTICAL IMPACTS OF CITY & CNTY. OF SAN FRANCISCO, CALIFORNIA V. ENV'T PROT. AGENCY, 604 U.S. 334 (2025) ON NPDES PERMITTING IN ARKANSAS?*

- 1) None, because Arkansas does not have any combined sewer systems.
- 2) ???????
- 3) ???????
- 4) ???????
- 5) ???????

* This list is not intended to be exclusive or complete.

Why is this case important?



IT LIMITS EPA'S AUTHORITY

Whatever “any more stringent limitation” may mean, the Court says, it does not authorize EPA to direct permittees to comply with the water quality standards.

Water quality standards are not effluent limits.

The CWA term “limitation” means a “direct source of restriction or restraint” so long as that is not a directive to the permittee to comply with the water quality standards.

THE PERMITTING AUTHORITY DEVELOPS LIMITS

If the EPA does its work, our holding should have no adverse effect on water quality.

PERMIT SHIELD

Because of the harsh penalties for violating the terms of a permit, the permit shield is invaluable.

WHAT IS MISSING?

- ✔ (In fact, San Francisco made arbitrary-and-capricious arguments below, but the Ninth Circuit rejected them; the city did not seek this Court's review of that issue. See 75 F.4th 1074, 1092–1093 (2023).)

City & Cnty. of San Francisco, California v. Env't Prot. Agency, 604 U.S. 334, 366, 145 S. Ct. 704, 726, 221 L. Ed. 2d 166 (2025)

WHAT IS MISSING FROM THE DISCUSSION ABOUT THE MULTI-DISCHARGER PROBLEM?



REDACTED?

STATE WATER QUALITY STANDARDS



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WHAT ARE WATER QUALITY STANDARDS?

Water quality standards (WQS) are provisions of state, territorial, authorized tribal or federal law approved by EPA that describe the desired condition of a water body and the means by which that condition will be protected or achieved. Water bodies can be used for purposes such as recreation (e.g. swimming and boating), scenic enjoyment, and fishing, and are the home to many aquatic organisms. To protect human health and aquatic life in these waters, states, territories and authorized tribes establish WQS. WQS form a legal basis for controlling pollutants entering the waters of the United States.

<https://www.epa.gov/wqs-tech/what-are-water-quality-standards>

CORE COMPONENTS OF WQS:

Water quality standards consist of three core components. This includes designated uses of a water body, criteria to protect designated uses, and antidegradation requirements to protect existing uses and high quality/high value waters.

✓ Criteria

✓ Designated Uses

✓ Antidegradation Requirements

<https://www.epa.gov/wqs-tech/what-are-water-quality-standards>



CRITERIA

States, territories and authorized tribes adopt water quality criteria to protect the designated uses of a water body. Water quality criteria can be numeric (e.g., the maximum pollutant concentration levels permitted in a water body) or narrative (e.g., a criterion that describes the desired conditions of a water body being “free from” certain negative conditions). States, territories and authorized tribes typically adopt both numeric and narrative criteria.

[WQS Handbook, Chapter 3: Water Quality Criteria](#)

DESIGNATED USES

The WQS regulation requires states, territories and authorized tribes to specify goals and expectations for how each water body is used. Typical designated uses include:

- ✓ **PROTECTION AND PROPAGATION OF FISH, SHELLFISH AND WILDLIFE**
- ✓ **RECREATION**
- ✓ **PUBLIC DRINKING WATER SUPPLY**
- ✓ **AGRICULTURAL, INDUSTRIAL, NAVIGATIONAL AND OTHER PURPOSES.**

[More information on Designated Uses](#)



ANTIDegradation Requirements

One of the principal objectives of the Clean Water Act is to “maintain the chemical, physical and biological integrity of the Nation's waters.”

Antidegradation requirements provide a framework for maintaining and protecting water quality that has already been achieved.

Designated uses and water quality criteria are the primary tools states and authorized tribes use to achieve the objectives and goals of the Clean Water Act, and antidegradation requirements complement these tools by providing a framework for maintaining existing uses, for protecting waters that are of a higher quality than necessary to support the Clean Water Act goals, and for protecting waters identified by states and authorized tribes as Outstanding National Resource Waters (ONRWs).

[WQS Handbook, Chapter 4: Antidegradation](#)

EPA'S REVIEW OF STATE WATER QUALITY STANDARDS



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CLEAN WATER ACT FRAMEWORK:

Under § 303 of the Clean Water Act (“CWA”), states, territories, and authorized tribes (hereinafter, “States”) must promulgate water quality standards (“WQs”) for all waters within their jurisdictions. *See* 33 U.S.C. § 1313. WQs set maximum pollution levels, called “criteria,” for individual pollutants. *See id.* § 1313(c). Section 304(a) of the CWA also requires the Environmental Protection Agency (“EPA”) to develop nationwide recommendations for States' criteria. *Id.* § 1314(a). Although these § 304(a) recommendations are nonbinding, States must either adopt them or explain the decision to depart from them, and criteria not based on the § 304(a) recommendations must be justified scientifically. *See* 40 C.F.R. §§ 131.20(a); 131.11(b)(1)(iii) (2016).² Under § 303 of the CWA, EPA must review State WQs to ensure compliance with that act. *See* 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.5. When a State's WQs do not comply with the requirements of the CWA, EPA must promulgate WQs for the State directly. *Id.* § 1313(c)(3). Under those circumstances, EPA often implements its § 304(a) recommendations in the noncompliant State.

Ctr. for Biological Diversity v. United States Env't Prot. Agency, 168 F.4th 1164, 1168 (9th Cir. 2026)

SECTION 303 OF THE CLEAN WATER ACT

33 U.S.C. § 1313(c)(3)

(c) Review; revised standards; publication

(3) If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this chapter, such standard shall thereafter be the water quality standard for the applicable waters of that State. If the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this chapter, he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection.



EPA'S APPROVAL

EPA has sixty (60) days to *approve* a new or revised water quality standard.



EPA'S DISAPPROVAL

EPA has ninety (90) days to notify the state that it new or revised water quality standard *is not approved*.



EPA'S ACTION

EPA must specify the changes to the standard required for that standard to comply with the Clean Water Act.

EPA'S REVIEW OF STATE WATER QUALITY STANDARDS

Lessons learned from [Ctr. for Biological Diversity v. United States Env't Prot. Agency](#),
168 F.4th 1164 (9th Cir. 2026)



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ENDANGERED SPECIES ACT INTERSECTION

Under § 7 of the Endangered Species Act (“ESA”), federal agencies must carry out consultations with the Fish and Wildlife Service (“FWS”) and/or the National Marine Fisheries Service (“NMFS”) (together, “the Services”) before taking any “agency action” that “may affect” endangered species or their critical habitats.

Ctr. for Biological Diversity v. United States Env't Prot. Agency, 168 F.4th 1164, 1168 (9th Cir. 2026)

✓ 2016, EPA PROMULGATED NEW § 304(A) RECOMMENDATIONS FOR CADMIUM

EPA asserted that § 7 of the ESA only requires it to consult with the Services before approving or disapproving each State's WQSs under CWA § 303. *Id.*

✓ EPA'S ACTION CHALLENGED

Center for Biological Diversity (“CBD”) filed the instant action to invalidate the 2016 cadmium recommendations and compel EPA to engage in § 7 consultation before promulgating new recommendations under CWA § 304. *Id.*

✓ EPA MUST COMPLY WITH ESA § 7

EPA's publication of § 304(a) recommendations is an “agency action” that “may affect” listed species or critical habitat. *Id.*



SECTION 304(A) OF THE CLEAN WATER ACT: NONBINDING WATER QUALITY GUIDANCE PROMULGATED BY THE ENVIRONMENTAL PROTECTION AGENCY.

Section 304(a) of the Clean Water Act, entitled “Information and guidelines,” requires EPA to publish guidance “from time to time” on recommended maximum levels of various pollutants. 33 U.S.C. § 1314(a). If EPA has published new section 304 guidance for a particular pollutant, a State must consider that guidance, along with other “new information,” during its next triennial review. 40 C.F.R. § 131.20(a).

Ctr. for Biological Diversity v. United States Env't Prot. Agency, 168 F.4th 1164, 1183 (9th Cir. 2026)

EPA'S PUBLICATION OF § 304(A) RECOMMENDATIONS IS AN "AGENCY ACTION" THAT "MAY AFFECT" LISTED SPECIES OR CRITICAL HABITAT.

Section 7 of the ESA requires agencies to consult with the Services before performing any "agency action" that "may affect" listed species or their critical habitats. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). The terms "agency action" and "may affect" are defined broadly to ensure compliance with the ESA's substantive protections. *Karuk Tribe*, 681 F.3d at 1021, 1027; *see also Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1055 (9th Cir. 1994). EPA's publication of § 304(a) recommendations meets the definition of agency action and satisfies the relatively low "may affect" threshold to trigger mandatory consultation under § 7. *Karuk Tribe*, 681 F.3d at 1027.

Ctr. for Biological Diversity v. United States Env't Prot. Agency, 168 F.4th 1164, 1179–80 (9th Cir. 2026)

EPA'S PUBLICATION OF § 304(A) RECOMMENDATIONS IS AN “AGENCY ACTION” THAT “MAY AFFECT” LISTED SPECIES OR CRITICAL HABITAT.

First, most States had a demonstrated history of adopting EPA's § 304(a) recommendations. Second, EPA had a demonstrated history of implementing its § 304(a) recommendations in noncompliant States. *See, e.g.*, Water Quality Standards, 60 Fed. Reg. at 22229; 40 C.F.R. § 131.38(b)(1). Third, several States had legislation or regulations requiring or incentivizing state officials to adopt EPA's § 304(a) recommendations. *See* Me. Rev. Stat. Ann. tit. 38, § 420(2)(A); Minn. R. 7050.0218, subp. 4(C).

Contrary to EPA's assertion, it is irrelevant which States would adopt the cadmium § 304(a) recommendations; all that is needed to trigger § 7 consultation is “agency action” that “may affect” at least one member of a listed species. *See* 50 C.F.R. §§ 402.13–402.14.

Ctr. for Biological Diversity v. United States Env't Prot. Agency, 168 F.4th 1164, 1182 (9th Cir. 2026)

THE DISSENTING OPINION'S VIEW OF EPA'S SECTION 304(A) RECOMMENDATIONS

This case involves nonbinding water quality guidance promulgated by the Environmental Protection Agency.

Ctr. for Biological Diversity v. United States Env't Prot. Agency, 168 F.4th 1164, 1182 (9th Cir. 2026)

✓ ADOPTION IS NOT REQUIRED.

As EPA points out, “[a] state's response to EPA's § 304 recommendations can be the equivalent of ‘thanks for sharing.’ ” Ctr. for Biological Diversity v. United States Env't Prot. Agency, 168 F.4th 1164, 1185 (9th Cir. 2026)

✓ EPA'S SECTION 304 GUIDANCE IS NOT A SAFE HARBOR

Ctr. for Biological Diversity v. United States Env't Prot. Agency, 168 F.4th 1164, 1186 (9th Cir. 2026).

✓ ONLY A RECOMMENDATION

EPA does not have a “determinative or coercive effect” on a State's decision to propose criteria that incorporate EPA's section 304 recommendations. Ctr. for Biological Diversity v. United States Env't Prot. Agency, 168 F.4th 1164, 1186 (9th Cir. 2026).



EPA'S REVIEW OF STATE WATER QUALITY STANDARDS

LESSONS LEARNED FROM Nw. Env't Advocs. v. United States Env't Prot. Agency, 549 F. Supp. 3d
1218, 1233 (D. Idaho 2021)



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NONDISCRETIONARY DUTIES: 33 U.S.C. § 1313(c)

A step-by-step analysis of Section 303(c) and the undisputed events of this case shows that the EPA has violated its duties to promptly publish and promulgate a water quality standard for mercury in Idaho.

Nw. Env't Advocs. v. United States Env't Prot. Agency, 549 F. Supp. 3d 1218, 1224 (D. Idaho 2021)

NONDISCRETIONARY DUTIES: 33 U.S.C. § 1313(c)

A holistic reading of Section 303(c), as summarized above, shows that at every turn the duties are nondiscretionary. The States must review the standards; the States must submit revised or new standards to the EPA's review; the EPA must review and approve or disapprove the standards; and the EPA must publish and promulgate standards, if the States do not do so. The duty to promptly publish and promulgate a standard does not appear to be an exception in this mandatory statutory scheme. Plainly put, when the Court reads Section 303(c), it sees nothing that indicates Congress intended to carve out such a limited exception when it comes to the EPA's duties to promptly publish and promulgate under Section 303(c)(4). Indeed, Congress could have used the word “may” if it wished to do so, but it did not.

Nw. Env't Advocs. v. United States Env't Prot. Agency, 549 F. Supp. 3d 1218, 1233 (D. Idaho 2021)

SECTION 303 OF THE CLEAN WATER ACT

33 U.S.C. § 1313(c)(3)

(c) Review; revised standards; publication

(3) If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this chapter, such standard shall thereafter be the water quality standard for the applicable waters of that State. If the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this chapter, he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements. *If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection.*



EPA'S APPROVAL

EPA has sixty (60) days to approve a new or revised water quality standard.



EPA'S DISAPPROVAL

EPA has ninety (90) days to notify the state that it new or revised water quality standard is not approved.



EPA'S ACTION

EPA must specify the changes to the standard required for that standard to comply with the Clean Water Act.

NONDISCRETIONARY DUTIES: 33 U.S.C. § 1313(c)

Again, when disapproval of a revised or new standard occurs, paragraph (3) requires the EPA to “notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the [EPA] shall promulgate such standard pursuant to paragraph (4) of this subsection.” 33 U.S.C. § 1313(c)(3). The EPA's 2008 disapproval letter notified Idaho of the revised mercury standard's lack of compliance with the CWA and specified four potential changes to meet the CWA's requirements. To date, Idaho has not adopted any of those changes. Therefore, after the ninety-day period elapsed, the requirement arose that the EPA promulgate a CWA-compliant standard “pursuant to paragraph (4).” *Id.*

Nw. Env't Advocs. v. United States Env't Prot. Agency, 549 F. Supp. 3d 1218, 1224–25 (D. Idaho 2021)

EPA'S REVIEW OF STATE WATER QUALITY STANDARDS

QUESTIONS FROM [EPA's Action related to North Dakota's Revised Chronic Aquatic Life Criterion for Mercury](#)



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SECTION 303 OF THE CLEAN WATER ACT

33 U.S.C. § 1313(c)(3)

(c) Review; revised standards; publication

(3) If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this chapter, ***such standard shall thereafter be the water quality standard for the applicable waters of that State.*** If the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this chapter, he ***shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements....***



EPA'S APPROVAL

EPA has sixty (60) days to approve a new or revised water quality standard.



EPA'S DISAPPROVAL

EPA has ninety (90) days to notify the state that it new or revised water quality standard is not approved.



EPA'S ACTION

EPA must specify the changes to the standard required for that standard to comply with the Clean Water Act.

SECTION 303 OF THE CLEAN WATER ACT

33 U.S.C. § 1313(c)(3)

(c) Review; revised standards; publication

(3) ...If the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this chapter, he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements. *If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection.*



A holistic reading of Section 303(c)... shows that at every turn the duties are nondiscretionary

Nw. Env't Advocs. v. United States
Env't Prot. Agency, 549 F. Supp.
3d 1218, 1233 (D. Idaho 2021)



STATE ACTION

A State has ninety (90) days to adopt EPA's changes to its standard.



EPA'S ACTION

EPA must promulgate its standard if the state does not act.

SECTION 303 OF THE CLEAN WATER ACT

33 U.S.C. § 1313(c)

- (4) The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved--
- (A) if a revised or new water quality standard submitted by such State under paragraph (3) of this subsection for such waters is determined by the Administrator not to be consistent with the applicable requirements of this chapter, or
 - (B) in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter.

The Administrator shall promulgate any revised or new standard under this paragraph not later than ninety days after he publishes such proposed standards, unless prior to such promulgation, such State has adopted a revised or new water quality standard which the Administrator determines to be in accordance with this chapter.

NONDISCRETIONARY DUTIES

Receipt of the revised standards on June 18, 2021, initiated EPA's review pursuant to Section 303(c) of the Clean Water Act (CWA). Although new and revised rules took effect under state law on July 1, 2021, EPA's approval under CWA Section 303(c) is required before water quality standards (WQS) are effective for CWA purposes, including for implementation in the CWA Section 402 National Pollutant Discharge Elimination System (NPDES) permitting program (see 40 C.F.R. § 131.21(c)). (EPA letter, dated July 15, 2022)

✓ EPA'S TIME TO ACT

Pursuant to 33 U.S.C. § 1313(c)(3), EPA had until **September 16, 2021** to notify the state that its new or revised water quality standard is not approved and specify the changes to the standard required for that standard to comply with the Clean Water Act.

✓ EPA'S POSITION

Pursuant to 40 C.F.R. § 131.21(c), new or revised state WQS submitted to EPA after May 30, 2000, are not effective for CWA purposes until approved by EPA.

✓ EPA DID ACT TIMELY?

If EPA's duties under 33 U.S.C. § 1313(c)(3) are nondiscretionary, is a new or revised state WQS submitted to EPA after May 30, 2000, not effective for CWA purposes until approved by EPA, in accordance with 40 C.F.R. § 131.21(c)?



NONDISCRETIONARY DUTIES: 33 U.S.C. § 1313(c)

A holistic reading of Section 303(c), as summarized above, shows that at every turn the duties are nondiscretionary... the EPA must review and approve [**within 60 days**] or disapprove the standards [**within 90 days**].... Plainly put, when the Court reads Section 303(c), it sees nothing that indicates Congress intended to carve out such a limited exception when it comes to the EPA's duties.... Indeed, Congress could have used the word “may” if it wished to do so, but it did not.

(Using the words from Nw. Env't Advocs. v. United States Env't Prot. Agency, 549 F. Supp. 3d 1218, 1233 (D. Idaho 2021))

EPA'S AUTHORITY TO OBJECT TO A STATE'S WATER QUALITY STANDARD

✓ JURISDICTIONAL HOOK

If a state submits a revised or new water quality standard, it is not effective until EPA approves it. (see 40 C.F.R. § 131.21(c))

✓ EPA'S VIEW (see 40 C.F.R. § 131.21(C))

EPA's failure to act "not later than the ninetieth day after the date of submission of a new or revised standard" does not prevent EPA from disapproving a state's water quality standard.

EPA'S REVIEW OF STATE WATER QUALITY STANDARDS

MORE QUESTIONS FROM [EPA's Action related to North Dakota's Revised Chronic Aquatic Life Criterion for Mercury](#)



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EPA'S ACTION PURSUANT TO 40 C.F.R. § 131.21

Today EPA is disapproving revision of its chronic aquatic life criterion (ALC) for mercury at NDAC § 33.1-16-02.09... Pursuant to 40 C.F.R. § 131.21(e), with this disapproval, North Dakota's previous chronic ALC for mercury remains in effect for all CWA purposes.

(EPA letter, dated July 15, 2022)

EPA'S ACTION PURSUANT TO 40 C.F.R. § 131.21

To resolve the disapproval, North Dakota must either:

1. provide adequate scientific support for why the criterion it adopted meets CWA requirements (i.e., justify how the criterion protects sensitive species present in the state, such as pallid sturgeon, rainbow trout and bluegill),

or

2. adopt a new chronic criterion for mercury that protects aquatic life in the state from long term exposures via relevant exposure pathways (i.e., including the dietary exposure pathway).

(EPA letter, dated July 15, 2022)

CWA SECTION 303(c)(3) AND 40 C.F.R. § 131.22(a)

CWA Section 303(c)(3) and 40 C.F.R. § 131.22(a) provide North Dakota with 90 days to address this disapproval before EPA is obligated to promptly propose a revised chronic mercury criterion for North Dakota that meets CWA requirements. EPA recognizes the challenges North Dakota will have in meeting that 90-day deadline, especially when any revisions and/or new supporting documentation will be subject to public participation requirements at 40 C.F.R. § 131.20(b). EPA remains available to provide technical assistance to DEQ as it determines a path forward. (EPA letter, dated July 15, 2022)

CWA SECTION 303(c)(3) AND (4)

Contrary to the 90 days that CWA Section 303(c)(3) affords states to resolve a WQS disapproval, CWA Section 303(c)(4) does not contain a specific timeline for EPA to publish proposed regulations if a state does not remedy an EPA disapproval and says only that such action must be “prompt.” Given the complex scientific and technical challenges inherent in developing criteria that will protect the waters of a particular state, action must necessarily be determined on a case-by-case basis. EPA has made significant progress in assembling and evaluating the latest science that would support derivation of a protective mercury criterion for North Dakota.

(EPA letter, dated July 15, 2022)

CWA SECTION 303(c)(4)

If North Dakota is unable to address the disapproval within 90 days, EPA expects that an additional 24 months will be needed to complete the data evaluation and criteria derivation, document the complex technical analysis, and assemble the record necessary to support a federal rulemaking to establish a revised mercury criterion for North Dakota. Consistent with the CWA's goals and structure of cooperative federalism, EPA prefers that DEQ retain the lead role afforded to it by the CWA in establishing WQS for its waters. If DEQ is unable to address this disapproval within 90 days and EPA moves forward towards a federal rulemaking, EPA will halt that process if DEQ adopts protective criteria that EPA approves as consistent with CWA requirements.

(EPA letter, dated July 15, 2022)

CWA SECTION 303(c)(4)?

The EPA is not acting on North Dakota's amendment to NDAC Section 33.1-16-02.1-09 Aquatic Life Criteria (Table 2) withdrawing its chronic aquatic life criterion (ALC) for mercury of 0.88 µg/L in Table 2 and replacing it with its previous chronic ALC for mercury of 0.012 µg/L. The rationale for the EPA not acting on this amendment is discussed in the enclosure.

(EPA letter, dated March 4, 2024)

CWA SECTION 303(c)(4)?

Provisions the EPA is Not Acting on Today

North Dakota amended NDAC Section 33.1-16-02.1-09 Aquatic Life Criteria (Table 2) by withdrawing its chronic aquatic life criterion (ALC) for mercury of 0.88 µg/L in Table 2 and replacing it with its previous chronic ALC for mercury of 0.012 µg/L. ... Pursuant to 40 CFR § 131.21(e), and as a result of the EPA's 2022 disapproval, North Dakota's chronic ALC for mercury of 0.012 µg/L has continued to remain in effect for all CWA purposes. Accordingly, the EPA is taking no action on this provision having determined it is not a new or revised WQS that the EPA has the authority to review and approve or disapprove pursuant to its CWA § 303(c) authority and 40 CFR Part 131.

(EPA letter, dated March 4, 2024)

EPA'S REVIEW OF WATER QUALITY STANDARDS VERSES NPDES PERMITS



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33 U.S.C. § 1342 (d)

(d) Notification of Administrator

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.

40 C.F.R. § 123.44

EPA REVIEW OF AND OBJECTIONS TO STATE PERMITS.

(a)(1) The Memorandum of Agreement (MOA) shall provide a period of time (up to 90 days from receipt of proposed permits) to which the Regional Administrator may make general comments upon, objections to, or recommendations with respect to proposed [or draft] permits...” 40 C.F.R. § 123.44.



OBJECTIONS

EPA must make its specific objection within the 90-day period.



MEMORANDUM OF AGREEMENT

EPA shall provide notice of any objection within the period in the MOA for making general objections to a proposed (or draft) permit.



LIMITS

EPA must include *effluent limits or conditions* that would be in the permit.

WHAT HAPPENS IF EPA DOES NOT OBJECT WITHIN 90 DAYS?

If the Regional Administrator fails to provide a written objection to a draft permit within the initial time period or fails to provide timely written notice of the specific grounds for objection to a draft permit after making a general objection, *EPA shall be deemed to have waived its right to object to permit terms and conditions.* MOA § III.B.9.

EPA'S AUTHORITY TO OBJECT TO A STATE'S WATER QUALITY STANDARD

✓ JURISDICTIONAL HOOK

If a state submits a revised or new water quality standard, it is not effective until EPA approves it. (see 40 C.F.R. § 131.21(c))

✓ EPA'S VIEW (see 40 C.F.R. § 131.21(C))

EPA's failure to act "not later than the ninetieth day after the date of submission of a new or revised standard" does not prevent EPA from disapproving a state's water quality standard.

A SECOND LOOK AT EPA'S AUTHORITY TO OBJECT....

- [Loper Bright Enters. v. Raimondo](#), 603 U.S. 369, 412–13, 144 S. Ct. 2244, 2273, 219 L. Ed. 2d 832 (2024).



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33 U.S.C. § 1342(d)

Whether the CWA authorizes EPA's veto authority regulations is a question of statutory interpretation, to be resolved under **Chevron** principles. See supra p. 168 (Permit Conditions Unrelated to Effluents—Merits). Applying those principles to the issue at hand, we conclude that Congress' intent in § 402(d)(1) of the Act, 33 U.S.C. § 1342(d)(1), is not clear; because the agency's interpretation of the statute is reasonable, we uphold the challenged regulations.

Nat. Res. Def. Council, Inc. v. U.S.E.P.A., 859 F.2d 156, 182 (D.C. Cir. 1988)





CHEVRON IS OVERRULED

Chevron is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry. And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it. But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.

Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412–13 (2024).



KEEP IN TOUCH



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