

ALASKA STATE LEGISLATURE



TO THE
AG'S OFFICE

February 4, 2010

This is to request your opinion about whether legislating to change Alaska's mixing zone rule, which is a State water quality standard, violates, or would involve, the Federal Clean Water Act's (CWA) rulemaking requirements for making such changes. The CWA provides that water quality standards be developed through public comment and hearings on draft, science-based regulations. We request your opinion about how to ensure that the process for changing a water quality standard adheres to CWA requirements. What burdens would making such a change through legislation place on the State? What administrative and record requirements would be placed on the State by trying to revise a water quality standard through legislation?

Section 303 (c)(1) of the CWA states that:

(1) The Governor of the State or the State water pollution control agency of such State shall from time to time (but at least once each three years beginning with October 1972) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator.

Subsection 303 (c)(2)(A) states:

(2)(A) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of the water and serve the purposes of this chapter. Such standards shall be established

taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and also taking into consideration their use and value for navigation.

Along with the submission of a new or revised water quality standard to the Administrator, Subsection 303 (c)(2)(B),¹ in part, requires the State to:

adopt toxic criteria for all toxic pollutants listed pursuant to section 1317(a)(1) of this title for which criteria have been published under section 1314(a) of this title, the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State as necessary to support such designated uses. Such criteria shall be specific numeric criteria for such toxic pollutants. Where such numeric criteria are not available, whenever a State reviews water quality standards pursuant to paragraph (1), or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria based on biological monitoring or assessment methods consistent with information published pursuant to section 1314(a)(8) of this title.

Subsections 303 (c)(3) and (4) describe the process by which the Administrator of the Environmental Protection Agency (EPA) reviews the revised or new standard for consistency with the federal act and promulgates regulations regarding the revised or new water quality standard, if he/she approves it.

The CWA provides that water quality standards be developed through public comment and hearings on draft, science-based regulations. This rule-making process provides the EPA Administrator and the Commissioner of the Department of Environmental Conservation (DEC) an opportunity to determine whether there are science-based, public health and water quality protection reasons to revise or change a standard or to have a more stringent standard than that set by federal or current state law. The legislative process provides for hearings on legislation, but is significantly different than rulemaking because legislation is dependent upon votes, not whether it meets the arbitrary and capricious standard, which is needed to uphold rulemaking.

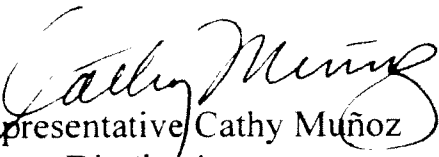
¹The full text of CWA § 303 (c) is attached

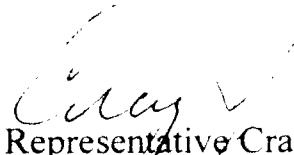
Based on the foregoing the undersigned seek your advice on the following questions:

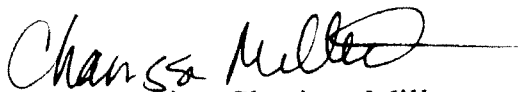
1. Would the information required by CWA § 303 (c)(2)(A) and(2)(B) have to be included in legislation to change a water quality standard?
2. If so, would DEC or the legislation's sponsor be required to provide the information?
3. If the answer to the previous question is that DEC would have to provide the information, what would happen if, based on the science, DEC disagreed with the change? For example, what if DEC found that the proposed, legislated, water quality standard reduced the value of the public water supply?
4. How would such legislation address the requirement in CWA § 303 (c)(2)(B) that the State adopt criteria for toxic pollutants? Would such information have to be included in the legislation? Would DEC be responsible for providing it or verifying it? Again, what if DEC disagreed?
5. How would a record satisfactory to EPA's administrative rules be made as part of such legislation?
6. How would the CWA's public hearing requirement be integrated with the legislative hearings? Would separate public hearings have to be held?
7. If the Administrator of EPA disapproves the proposed, legislated, water quality standard under CWA 303(c)(3) may he/she substitute his/her judgment as to what would be the appropriate standard? (Please consider the last two sentences of CWA § 303(c)(2) in giving your answer.) If so, could the Administrator also substitute his/her judgment as to what should be the appropriate numbers for the toxic substance criteria that CWA § 303 (c)(2)(B) requires a State to submit when adopting or revising its water quality standards? and
8. What would be the status of the proposed, legislated, water quality standard if the Administrator of EPA publishes it and a court determines that it is arbitrary and capricious under the Federal Administrative Procedures Act? Could a third party litigate whether the toxic substance criteria, that CWA § 303 (c)(2)(B) requires a State to submit when adopting or revising its water quality standards, are arbitrary and capricious under the Federal Administrative Procedures Act?

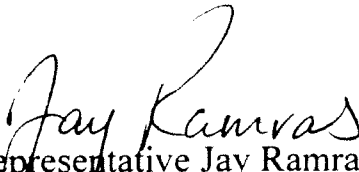
We appreciate your consideration of these issues and look forward to your response.

Sincerely,


Representative Cathy Muñoz
House District 4


Representative Craig Johnson
House District 28


Representative Charisse Millett
House District 30


Representative Jay Ramras
House District 10