

Note 1: For the purposes of this AD, a general visual inspection is defined as: "A visual examination of an interior or exterior area, installation, or assembly to detect obvious damage, failure, or irregularity. This level of inspection is made from within touching distance unless otherwise specified. A mirror may be necessary to enhance visual access to all exposed surfaces in the inspection area. This level of inspection is made under normally available lighting conditions such as daylight, hangar lighting, flashlight, or droplight and may require removal or opening of access panels or doors. Stands, ladders, or platforms may be required to gain proximity to the area being checked."

(1) For airplanes having serial numbers 3 through 519 inclusive, excluding serial number 462: Inspect within 36 months after October 27, 1998 (the effective date of AD 98-20-14, amendment 39-10781).

(2) For airplanes having serial numbers 520 through 540 inclusive: Inspect within 36 months after November 10, 1999 (the effective date of AD 99-21-09, amendment 39-11352, which superseded AD 98-20-14), or at the next "C" check, whichever occurs first.

New Requirements of This AD

Modification

(b) For all airplanes: Within 36 months after the effective date of this AD: modify the electrical wires in the cable trough below the cabin floor at Sections X510.00 to X580.50 (including a general visual inspection and any applicable repair) per Part III, paragraphs 1 through 9 and 12 through 20, of the Accomplishment Instructions of Bombardier Service Bulletin 8-53-80, Revision "A", dated July 25, 2000. Any applicable repair must be done before further flight.

Alternative Methods of Compliance

(c) In accordance with 14 CFR 39.19, the Manager, New York Aircraft Certification Office, FAA, is authorized to approve alternative methods of compliance for this AD.

Note 2: The subject of this AD is addressed in Canadian airworthiness directive CF-1998-08R2, dated July 10, 2000.

Issued in Renton, Washington, on October 14, 2003.

Ali Bahrami,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

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BILLING CODE 4910-13-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 131

[FRL-7576-2]

Water Quality Standards for Puerto Rico

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to establish designated uses and associated water quality criteria for six waterbodies and an area of coastal waters known as the *coastal ring* in the Commonwealth of Puerto Rico. These waterbodies are: Mayaguez Bay (from Punta Guanajibo to Punta Algarrobo); Yabucoa Port; Guayanilla and Tallaboa Bays (from Cayo Parguera to Punta Verraco); Ponce Port (from Punta Carenero to Punta Cuchara) and San Juan Port (from the mouth of Río Bayamón to Punta El Morro), as well as the area of coastal waters known as the coastal ring, defined as all coastal waters from 500 meters seaward to a maximum of three miles seaward. If this proposal is promulgated, the Federally designated use of primary contact recreation and the associated water quality criteria will be added to the Commonwealth's designated use for the above-referenced embayments and the coastal ring (referred to collectively below as the "Subject Waterbodies").

DATES: EPA will accept public comments on this proposed rule until November 19, 2003. A public hearing will be held on November 6, 2003, from 2 p.m. to 5 p.m. and from 7 p.m. to 9 p.m. Both oral and written comments will be accepted at the hearing.

ADDRESSES: Comments may be submitted by mail to Docket Manager, Proposed Water Quality Standards for Puerto Rico, U.S. EPA Region 2, 290 Broadway, New York, New York 10007, Attention Docket ID No. OW-2003-0072. Comments may also be submitted electronically or through hand delivery/courier. Follow the detailed instructions as provided in Section I.C. of the **SUPPLEMENTARY INFORMATION** section. The public hearing will occur at the Universidad Metropolitana (UMET) Theatre, Ave. Ana G. Mendez, Km 0.3, Cupey, Puerto Rico 00928.

FOR FURTHER INFORMATION CONTACT: Wayne Jackson, U.S. EPA Region 2, Division of Environmental Planning and Protection, 290 Broadway, New York, New York 10007 (telephone: 212-637-3807 or e-mail: jackson.wayne@epa.gov) or Claudia Fabiano, U.S. EPA Headquarters, Office of Science and Technology, 1200 Pennsylvania, Avenue NW., Mail Code 4305T, Washington, DC 20460 (telephone: 202-566-0446 or e-mail: fabiano.claudia@epa.gov).

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I. General Information

A. Who Is Potentially Affected by This Rule?

Citizens concerned with water quality in Puerto Rico may be interested in this rulemaking. Facilities discharging pollutants to certain waters of the United States in Puerto Rico could be indirectly affected by this rulemaking since water quality standards are used in determining water quality-based National Pollutant Discharge Elimination System (NPDES) permit limits. Categories and entities that may indirectly be affected include:

Category	Examples of potentially regulated entities
Industry	Industries discharging pollutants to the waters identified in § 131.40.
Municipalities	Publicly-owned treatment works discharging pollutants to the waters identified in § 131.40.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. This table lists the types of entities that EPA is now aware could potentially be affected by this action. Other types of entities not listed in the table could also be affected. To determine whether your facility may be affected by this action, you should carefully examine the water bodies identified in § 131.40 of today's proposed rule. If you have questions regarding the applicability of this action to a particular entity, consult one of the persons listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. How Can I Get Copies of This Document and Other Related Information?

1. **Docket.** EPA has established an official public docket for this action under Docket ID No. OW-2003-0072. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing under *Proposed Water Quality Standards for Puerto Rico* at Division of Environmental Planning and Protection, U.S. EPA Region 2, 290 Broadway, New York, New York 10007, and Caribbean Environmental Protection Division, U.S. EPA Region 2, 1492 Ponce De Leon Avenue, Suite 417, Santurce, Puerto Rico 00907. These Docket Facilities are open from 9 a.m. to 3:30 p.m., Monday through Friday, excluding legal holidays. The Docket telephone numbers are 212-637-3807 and 787-977-5836, respectively. A reasonable fee will be charged for copies.

2. **Electronic Access.** You may access this **Federal Register** document electronically through the EPA Internet under the **Federal Register** listings at <http://www.epa.gov/fedrgstr/>.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at <http://www.epa.gov/edocket/> to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search," then key in the appropriate docket identification number.

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA electronic public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in section I.B.1. EPA intends to work towards providing electronic access to all of the publicly available docket materials through EPA electronic public docket.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket identified in section I.B.1.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the Docket will be scanned and placed in EPA's

electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

C. How and to Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments.

1. **Electronically.** If you submit an electronic comment as prescribed below, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD-ROM you submit, and in any cover letter accompanying the disk or CD-ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

i. **EPA Dockets.** Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at <http://www.epa.gov/edocket/>, and follow the online instructions for submitting comments. To access EPA's electronic public docket from the EPA Internet Home Page, select "Information Sources," "Dockets," and "EPA Dockets." Once in the system, select "search," and then key in Docket ID OW-2003-0072. The system is an "anonymous access" system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail.* Comments may be sent by electronic mail (e-mail) to *OW-Docket@epa.gov*, Attention Docket ID No. OW-2003-0072. In contrast to EPA's electronic public docket, EPA's e-mail system is not an "anonymous access" system. If you send an e-mail comment directly to the Docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD-ROM.* You may submit comments on a disk or CD-ROM that you mail to the address identified in section I.C.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By Mail.* Send your comments to: Docket Manager, Proposed Water Quality Standards for Puerto Rico, U.S. EPA Region 2, 290 Broadway, New York, New York 10007, Attention Docket ID No. OW-2003-0072.

3. *By Hand Delivery or Courier.* Deliver your comments to the address identified in section I.C.2., attention Docket ID OW-2003-0072. Such deliveries are only accepted during the Docket's normal hours of operation as identified in section I.B.1.

D. What Should I Consider as I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.
2. Describe any assumptions that you used.
3. Provide any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at your estimate.
5. Provide specific examples to illustrate your concerns.
6. Offer alternatives.
7. Make sure to submit your comments by the comment period deadline identified.
8. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your response. It would also be helpful if you provided the name, date, and **Federal Register** citation related to your comments.

II. Background

A. Statutory and Regulatory Background

Section 303 (33 U.S.C. 1313) of the Clean Water Act (CWA or "the Act") directs States, Territories, and authorized Tribes (hereafter referred to as "States"), with oversight by EPA, to adopt water quality standards to protect the public health and welfare, enhance the quality of water and serve the purposes of the CWA. Under section 303, States are required to develop water quality standards for navigable waters of the United States within the State. Section 303(c) provides that water quality standards shall include the designated use or uses to be made of the water and water quality criteria necessary to protect those uses. The designated uses to be considered by States in establishing water quality standards are specified in the Act: public water supplies, propagation of fish and wildlife, recreation, agricultural uses, industrial uses and navigation. States are required to review their water quality standards at least once every three years and, if appropriate, revise or adopt new standards. The results of this triennial review must be submitted to EPA, and EPA must approve or disapprove any new or revised standards.

Section 303(c) of the CWA authorizes the EPA Administrator to promulgate water quality standards to supersede State standards that have been disapproved or in any case where the Administrator determines that a new or revised standard is needed to meet the CWA's requirements. In an August 11, 2003, Opinion and Order from the United States District Court for the District of Puerto Rico in the case of *CORALations and the American Littoral Society v. United States Environmental Protection Agency, et al.* (No. 02-1266 (JP) (D. Puerto Rico)), the Court ordered EPA to prepare and publish new or revised water quality standards for those waters which are currently classified as "Class SC" (secondary contact recreation) waters by the Commonwealth of Puerto Rico. EPA is, therefore, proposing Federal water quality standards for these waters in Puerto Rico.

EPA regulations implementing CWA section 303(c) are published at 40 CFR part 131. Under these rules, the minimum elements that must be included in a State's water quality standards include: use designations for all water bodies in the State, water quality criteria sufficient to protect those use designations, and an antidegradation policy (see 40 CFR 131.6).

Water quality standards establish the "goals" for a water body through the establishment of designated uses. Designated uses, in turn, determine what water quality criteria apply to specific water bodies. Section 101(a)(2) of the Act establishes as a national goal "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and * * * recreation in and on the water," wherever attainable. These national goals are commonly referred to as the "fishable/swimmable" goals of the Act. Section 303(c)(2)(A) requires water quality standards to "protect the public health or welfare, enhance the quality of water, and serve the purposes of this [Act]." EPA's regulations at 40 CFR part 131 interpret and implement these provisions by requiring that water quality standards provide for fishable/swimmable uses unless those uses have been shown to be unattainable. The mechanism in EPA's regulations used to overcome this presumption is a use attainability analysis (UAA).

Under 40 CFR 131.10(j), States are required to conduct a UAA whenever the State designates or has designated uses that do not include the uses specified in section 101(a)(2) of the CWA or when the State wishes to remove a designated use that is specified in section 101(a)(2) of the CWA or adopt subcategories of uses that require less stringent criteria. Uses are considered by EPA to be attainable, at a minimum, if the uses can be achieved (1) when effluent limitations under section 301(b)(1)(A) and (B) and section 306 are imposed on point source dischargers and (2) when cost effective and reasonable best management practices are imposed on nonpoint source dischargers. 40 CFR 131.10 lists grounds upon which to base a finding that attaining the designated use is not feasible, as long as the designated use is not an existing use: (i) Naturally occurring pollutant concentrations prevent the attainment of the use; (ii) Natural, ephemeral, intermittent or low flow conditions or water levels prevent the attainment of the use, unless these conditions may be compensated for by the discharge of sufficient volume of effluent discharges without violating State water conservation requirements to enable uses to be met; (iii) Human caused conditions or sources of pollution prevent the attainment of the use and cannot be remedied or would cause more environmental damage to correct than to leave in place; (iv) Dams, diversions or other types of hydrologic modifications preclude the attainment of the use, and it is not feasible to

restore the water body to its original condition or to operate such modification in a way which would result in the attainment of the use; (v) Physical conditions related to the natural features of the water body, such as the lack of a proper substrate, cover, flow, depth, pools, riffles, and the like unrelated to water quality, preclude attainment of aquatic life protection uses; or (vi) Controls more stringent than those required by sections 301(b) and 306 of the CWA would result in substantial and widespread economic and social impact.

A UAA is defined in 40 CFR 131.3(g) as a "structured scientific assessment of the factors affecting the attainment of a use which may include physical, chemical, biological, and economic factors" (see §§ 131.3 and 131.10). In a UAA, the physical, chemical and biological factors affecting the attainment of a use are evaluated through a water body survey and assessment.

Guidance on water body survey and assessment techniques is contained in the *Technical Support Manual, Volumes I-III: Water Body Surveys and Assessments for Conducting Use Attainability Analyses*. Volume I provides information on water bodies in general; Volume II contains information on estuarine systems; and Volume III contains information on lake systems (Volumes I-II, November 1983; Volume III, November 1984). Additional guidance is provided in the *Water Quality Standards Handbook: Second Edition* (EPA-823-B-94-005, August 1994). Guidance on economic factors affecting the attainment of a use is contained in the *Interim Economic Guidance for Water Quality Standards: Workbook* (EPA-823-B-95-002, March 1995). In developing today's proposal, EPA followed the same procedures set out for States in 40 CFR part 131 and EPA's implementing policies, procedures, and guidance.

EPA regulations effectively establish a "rebuttable presumption" that fishable/swimmable uses are attainable and, therefore, should apply to a water body unless it is demonstrated that such uses are not attainable. EPA adopted this approach to help achieve the national goal articulated by Congress that, "wherever attainable," water quality provide for the "protection and propagation of fish, shellfish and wildlife" and for "recreation in and on the water." CWA section 101(a). While facilitating achievement of Congress' goals, the rebuttable presumption approach preserves States' paramount role in establishing water quality standards in weighing any available

evidence regarding the attainable uses of a particular water body. The rebuttable presumption approach does not restrict the discretion that States have to determine that fishable/swimmable uses are not, in fact, attainable in a particular case. Rather, if the water quality goals articulated by Congress are not to be met in a particular water body, the regulations simply require that such a determination be based upon a credible "structured scientific assessment" of use attainability.

EPA's approach in this rulemaking does not undermine the Commonwealth's primary role in designating uses and setting criteria for waters in Puerto Rico. If the Commonwealth reclassifies the Subject Waterbodies to a swimmable designated use or adopts criteria sufficient to protect a swimmable use prior to EPA's finalizing this rule, EPA would expect to approve the Commonwealth's action and not finalize this rule. Alternatively, if the Commonwealth completes a sound analysis of use attainability, taking into account appropriate biological, chemical and physical factors, and concludes that the swimmable use is not attainable for these water bodies, EPA would expect to approve the Commonwealth's action, if it meets all requirements of EPA's regulations at 40 CFR part 131, and not finalize this rule. If the Commonwealth submits an adequate analysis which concludes that the swimmable use is not attainable after EPA takes final action, EPA would expect to initiate a rulemaking to rescind the rule. EPA encourages the Commonwealth to continue evaluating the appropriate use designation for these water bodies.

B. Current Puerto Rico Water Quality Standards

Puerto Rico's water quality standards regulation (PRWQSR) at Article 2 establishes a classification system containing the designated uses for water bodies in the Commonwealth. Puerto Rico has applied these use designations to all coastal, estuarine, and surface waters of the Commonwealth.

The current use designation adopted by the Commonwealth for the Subject Waterbodies is Class SC. Coastal waters designated as Class SC are "intended for uses where the human body may come into indirect contact with the water (such as fishing, boating, etc.) and for use in propagation and preservation of desirable species, including threatened or endangered species." (PRWQSR, at Article 3.2.3.)

EPA's regulations at 40 CFR part 131 require that waters designated for a use less protective than a fishable/

swimmable use be supported by a use attainability analysis, because neither the best usage or conditions related to the best usage for these waters include the fishable/swimmable uses, nor do all the criteria necessary to protect those uses apply. "Fishing" and "propagation and preservation of desirable species" are included as a condition of the best usage. As such, Class SC includes the "fishable" use established as a goal in the Clean Water Act. However, primary contact recreation and the criteria necessary to protect this use are not included for Class SC. Puerto Rico uses fecal coliform and enterococci bacteria criteria to protect for the primary contact recreation use. Class SC includes bacteria criteria sufficient to protect secondary contact recreation. However, these criteria do not provide protection from pathogens associated with fecal contamination during direct contact with the water and, therefore, do not protect for the swimming use.

Section 3.2.3 of the PRWQSR contains the use classifications and associated use-specific criteria for Class SC waters for dissolved oxygen, fecal coliforms, pH, color, turbidity, taste and odor producing substances, sulfates, and surfactants as MBAS (methylene blue active substances). With the exception of the criteria for fecal coliforms, which are not fully protective of the primary contact recreation use, these criteria for Class SC waters have been found to be protective of CWA section 101(a) uses and have been previously approved by EPA. These criteria are intended to protect aquatic life and/or general aesthetic conditions in these waters.

Water Quality Criteria for bacteria is the only parameter that is specifically intended to protect the primary contact recreation use. Water quality criteria for bacteria are intended to protect bathers from gastrointestinal illness in recreational waters. The water quality criteria establish levels of indicator bacteria that demonstrate the presence of fecal contamination. These levels should not be exceeded in order to protect bathers in fresh and marine recreational waters. The inclusion of primary contact recreation as a use for Class SC waters and the application of the indicator bacteria criteria described above would result in the Class SC waters being fully "swimmable." The remainder of the criteria that Puerto Rico applies to its coastal waters are sufficient to protect other CWA section 101(a) uses, such as aquatic life protection and human health protection from the consumption of fish based on the level of toxic pollutants in the water and in the fish tissue.

Section 3.1 of the PRWQSR contains narrative water quality criteria and numeric criteria for substances in toxic concentrations including inorganic substances, pesticides, non-pesticide organic substances, carbon tetrachloride, volatile organic substances, and semi-volatile organic substances. The criteria in section 3.1 are applicable to all waters of Puerto Rico, including those waters classified as Class SC. These criteria are protective of all applicable uses, and have been approved by EPA.

The Puerto Rico Environmental Quality Board (EQB) applies the Class SC designation for the bay components of the Subject Waterbodies from the zone subject to the ebb and flow of tides (mean sea level) to 10.3 nautical miles seaward, and from 500m from the shoreline to 10.3 nautical miles seaward for the coastal ring. However, as discussed below, it is clear that State jurisdiction under the CWA is limited to "navigable waters" of the United States, including territorial seas which extend only three miles seaward. Accordingly, in this proposal, the new use designation for coastal waters is limited to the territorial seas.

Section 303(c)(2)(A) of the CWA provides that States are to adopt water quality standards for "navigable waters." Under section 303(c)(3) (which provides for EPA review of State water quality standards), if EPA approves the State's water quality standards, they become the standards for the applicable waters of the State. Where the Administrator proposes and promulgates water quality standards, section 303(c)(4) provides that the State water quality standards shall apply to "navigable waters."

Section 502(7) of the CWA defines "navigable waters" as waters of the United States, including the "territorial seas." Section 502(8) defines "territorial seas" to mean "the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles." The "contiguous zone" and "ocean" are defined separately (*see* sections 502(9) and (10)).

The CWA also includes two other definitions (for "effluent limitations" and "discharge of a pollutant") that distinguish navigable waters from the contiguous zone and the ocean. These definitions also indicate that navigable waters are not meant to include the contiguous zone and the ocean. EPA has a long standing interpretation of the statute that does not include the

contiguous zone and ocean in the definition of navigable waters which is reflected in its regulations (40 CFR 122.2). The CWA authorizes each State that elects to administer its own NPDES permit program for discharges into navigable waters within its jurisdiction, to submit its program for EPA review (*see* section 402(b)). If EPA approves the State program, EPA suspends its issuance of permits under section 402(a), but only as to those navigable waters subject to the State program (*see* section 402(c)(1)). While the CWA definition of navigable waters includes the territorial sea, it does not include the contiguous zone or the ocean, both of which are defined as regions beyond the territorial sea. Read together, these provisions plainly indicate that Congress intended the State NPDES program jurisdiction to be limited to navigable waters including the territorial sea. States cannot assume NPDES permitting authority beyond the three-mile limit of the territorial sea.

Two decisions in the Ninth Circuit Court have addressed these jurisdictional issues. In *Pacific Legal Foundation et al. v Costle*, 586 F.2d 657 (9th Cir. 1978) *rev'd on other grounds*, 445 U.S. 198., the Court held that only the Administrator has authority to issue NPDES permits for waters beyond the territorial seas, and that the contiguous zone and the ocean clearly extend beyond the outer limits of the "navigable waters" which mark the extent of the power of the States to administer their own permit programs. The Court noted that "had Congress intended the power of the States to extend beyond the territorial seas," it easily could have so provided." *Id.* at 656. Further, citing the definition of "discharge of a pollutant," which distinguishes discharges to navigable waters from discharges to the contiguous zone or the ocean, the Court concluded that "it is apparent that 'ocean' and 'contiguous zone' waters are not included within the scope of 'navigable waters' * * * *Id.*

In *Natural Resources Defense Council v. EPA*, 863 F.2d 1420, (9th Cir. 1988), the Court held that "navigable waters" include only those waters landward from the territorial sea. *Id.* at 1435. In this case, Florida argued that it had jurisdiction to apply water quality standards more than three miles from the coast. The State contended that its maritime boundaries extended three maritime leagues (approximately 10.3 miles). Florida maintained that EPA must assure that discharges under EPA's general permit would comply with the State's water quality standards out to 10.3 miles. The Court disagreed, finding

that the State's jurisdiction is limited to the territorial seas. The Court noted that it is "difficult to ignore the express language of the Clean Water Act's definition of territorial seas." And, further, that "if there were any doubt that Congress intended to create a uniform three-mile boundary in the (CWA), the legislative history * * * indicates Congress consciously defined the term 'territorial seas' to make clear the jurisdiction limits of this particular legislation and its relationship to other statutes." *Id.* at 1436. For these reasons, EPA is proposing the new use designation for coastal waters limited to the territorial seas.

EPA is proposing to include primary contact recreation as a specified designated use for the Subject Waterbodies. In developing today's proposal, EPA evaluated the PRWQSR to determine which bacteria criteria would protect for the "swimmable" use, and would therefore ensure achievement of the CWA section 101(a)(2) goals. As a result, EPA is proposing the bacteriological criteria associated with Class SB (primary contact recreation) for fecal coliform and enterococci set out at Section 3.2.2 of the PRWQSR for the Subject Waterbodies because these criteria are protective of primary contact recreation. The proposed water quality standards for these water bodies, if ultimately promulgated, will be the basis for establishing NPDES permit limits by EPA Region 2.

C. Factual Background

1. Summary of Commonwealth and EPA Administrative Actions

In August 1990, the Commonwealth of Puerto Rico adopted revisions to the PRWQSR. These were sent to EPA on September 21, 1990, with the caveat from the Chairman of the EQB that the transmittal may not be the final submittal, since EQB was going to have public hearings on November 1, 1990. Because of this caveat, and because the requisite certification from the Commonwealth's Secretary of Justice was not submitted with the revisions as required by 40 CFR 131.6(e), EPA did not act on these revisions immediately.

From 1991 to 1993, EPA Region 2 worked with EQB on a series of draft revisions to the PRWQSR. These drafts were never adopted by Puerto Rico. In 1992, EPA included Puerto Rico in the National Toxics Rule, in large part because EPA did not consider the 1990 revisions to be officially adopted.

The requisite certification from the Commonwealth's Secretary of Justice was ultimately submitted to EPA on

February 25, 2002. Upon receipt of this certification EPA took final action on all new and revised provisions of the 1990 PRWQSR on March 28, 2002. These revisions included 11 separate new or revised provisions. The 1990 revisions to the PRWQSR, however, did not include any changes to the designation of specific waterbody segments, including upgrades from Class SC to SB.

On March 28, 2003, EQB submitted additional revisions to the PRWQSR that EPA approved on June 26, 2003. These revisions included the reclassification of ten bays/estuaries, previously classified as Class SC waters, to Class SB (Article 2.1.3). These included: Aguadilla Bay (from Punta Boquerón to Punta Borinquen); Arecibo Bay (from Punta Maracayo to Punta Caracoles); Fajardo Bay (from Playa Sardinera to Playa de Fajardo); Roosevelt Roads (from Punta Cabra de Tierra to Punta Cascajo); Port of Naguabo (from Playa de Naguabo to El Morrillo); Jobos Bay and Laguna de la Mareas (from Punta Rodeo to Punta Colchones); Guánica Bay inland waters north of the mouth of the river; Port of Dewey in Culebra; and Port of Isabel Segunda in Vieques and Puerto Real in Vieques between Cayo de Tierra and Cayo Real.

While the March 28, 2003, revisions to the PRWQSR did address ten bays/estuaries that were previously classified as Class SC waters by reclassifying them to Class SB, Puerto Rico recognized that it still needed to address the Subject Waterbodies. In an effort to do so, EQB, in its State Fiscal Year 2003 CWA Section 604(b) Consolidated Workplan, committed to develop a plan to outline a schedule for data collection and analysis and identify the applicable regulatory actions for these waters. EQB is currently completing this plan.

2. Summary of Legal Actions

On February 20, 2002, a complaint was filed in the U.S. District Court for the District of Puerto Rico by three environmental groups: CORALations, American Littoral Society, and the American Canoe Association. In this action, the plaintiffs alleged, among other things, that certain actions by EPA personnel had triggered a mandatory duty under section 303(c) of the CWA for EPA to prepare and propose regulations setting forth a revised water quality standard for any coastal waters that remained classified SC. The Court, in its August 11, 2003, Opinion and Order, ordered EPA to prepare and publish new or revised water quality standards for those coastal waters which are currently classified as Class SC waters.

III. Use Designations and Criteria for Waters Currently Designated as Class SC

A. Proposed Use Designations and Criteria for the Subject Waterbodies

EPA evaluated all available data and information to determine whether the swimmable use is attainable in the Subject Waterbodies. EPA's analysis was informed by the regulatory provisions at 40 CFR part 131 and technical guidance that EPA provided to States for developing use attainability analyses. The information that EPA used in its evaluation of the coastal ring component of the Subject Waterbodies shows that the swimmable use is attainable in these waters. That information included all available Quarterly Reports of the 301(h) Waiver Demonstration Studies for five Regional Wastewater Treatment Plants that discharge to the waters comprising the coastal ring. The ambient water quality data collected as part of these quarterly reports showed that the applicable bacteria criteria to protect primary contact recreation (fecal coliform and enterococci) were being attained in the waters of the coastal ring outside of the designated mixing zones. The quarterly reports also demonstrated that the bacteria criteria to protect primary contact recreation are being met at the edge of the mixing zone (based on the measured end-of-pipe concentrations of bacteria at each Regional Wastewater Treatment Plant and the critical initial dilution that is achieved at each ocean outfall).

As discussed in the *Puerto Rico Water Quality Inventory and List of Impaired Waters—2002 305(b)/303(d) Integrated Report Final Version* (February 2003), there is currently little or no data available on which to determine the attainability of the swimmable use in the bay components of the Subject Waterbodies. According to this report, there is insufficient data to determine the use attainment for 38% of the coastal miles and 89% of the estuarine acres. The Subject Waterbodies with insufficient data to make a use attainment determination include Yabucoa Port, portions of Guayanilla and Tallaboa Bays, and San Juan Port. The EQB determined that the following Subject Waterbodies were attaining water quality standards: Mayaguez Bay, Ponce Port, and portions of Guayanilla and Tallaboa Bays. However, EPA's regulations at 40 CFR part 131 require that water quality standards provide for fishable/swimmable uses unless those uses have been shown to be unattainable, which effectively creates a rebuttable presumption of attainability.

If the Commonwealth takes into account the appropriate biological, chemical, and physical factors in completing a sound analysis of use attainability and concludes that the swimmable use is not attainable in these waterbodies, EPA would expect to approve the Commonwealth's action (if it meets all requirements of EPA's regulations at 40 CFR part 131). In an effort to properly characterize the attainability of the bays which remain classified SC, EQB is developing a plan to outline a schedule for data collection and analysis in order to provide the information necessary for EQB to demonstrate whether the swimmable use is attainable in these waters.

The last broad category of information considered by EPA in its decision-making process was monitoring data from a sample of potentially affected dischargers to the water bodies (as reflected in Discharge Monitoring Reports or DMRs). As discussed in section V, EPA analyzed the extent to which the proposed Federal use designations and criteria may lead to the development of more stringent NPDES permit limits and, if so, what types of controls would be needed by potentially affected facilities to meet such limits. Discharger information was used in one of two ways by the Agency. First, EPA used monitoring data to assess point sources to the affected water bodies and to help determine whether their pollutant discharges could contribute to ambient exceedances of criteria. Second, the Agency used the monitoring data to determine whether potentially affected dischargers would need to make significant alterations to their operations (or if they could, in fact, meet permit limits for bacteria that would be associated with the swimmable use). Information indicating that potentially affected dischargers could generally meet such revised limits based on the proposed bacteria criteria would support the presumption that the swimmable use is attainable.

Based upon this approach, EPA evaluated all available data and information to determine whether the swimmable use is attainable for the Subject Waterbodies. As a result, EPA is proposing to include primary contact recreation as a specified designated use for the Subject Waterbodies. In addition, EPA is proposing to include bacteria criteria which are protective of primary contact recreation for the Subject Waterbodies. The proposed bacteria criteria are the same as the Commonwealth's criteria associated with the Class SB use for fecal coliform and enterococci, set out at Section 3.2.2 of the PRWQSR. If Puerto Rico classifies

these waterbodies with use designations consistent with the CWA and 40 CFR part 131 before a final rulemaking, EPA would expect to approve those use designations. This would eliminate the need to promulgate Federal water quality standards for any waterbody so reclassified. EPA notes that a water's use designation of primary contact recreation (made solely for CWA purposes) and adoption of water quality criteria protective of that use are intended to ensure that water quality will protect swimming if it occurs in such waters. A water's use designation of primary contact recreation is not an official government sanction that swimming necessarily is recommended in such waters. There may be other considerations, such as safety, in deciding whether swimming is appropriate.

EPA is soliciting comment for information about use attainability, especially for any Subject Waterbodies with no or limited data.

B. Request for Comment and Data

EPA believes the proposed primary contact recreation designated use and the bacteria criteria to protect primary contact recreation for the Subject Waterbodies are appropriate considering the requirements of the CWA and the information available to EPA at this time. EPA acknowledges that additional information may exist that may further support or contradict the attainability of a proposed primary contact recreation designated use and bacteria criteria in Subject Waterbodies. The Agency will evaluate any new information that is submitted to EPA during the public comment period with regard to the primary contact recreation use and bacteria criteria for the Subject Waterbodies. Based on the evaluation of new information, EPA will decide whether the primary contact recreation use and bacteria criteria for the Subject Waterbodies in today's proposal are appropriate and consistent with the CWA. To help the Agency ensure that this decision is based on the best available information, the Agency is soliciting additional information. The following paragraphs provide guidance on the type of information EPA considers relevant.

Specifically, EPA seeks information on the Subject Waterbodies that would help determine: (1) Whether primary contact recreation is or has been an existing use; (2) whether the designated use and criteria identified above are being attained or have been attained in the past; (3) whether natural conditions or features or human caused conditions prevent the attainment of this use and

criteria and whether these conditions can be remedied or would cause more environmental damage to correct than to leave in place; or (4) whether controls more stringent than those required by section 301(b) and 306 of the CWA would be needed to attain the use, and whether implementation of such controls would result in substantial and widespread social and economic impact. Below is a general discussion of the types of data/information requested by the Agency:

Ambient Monitoring Information: (1)

Any ambient water quality data for the Subject Waterbodies reflecting either natural conditions or human-caused conditions which cannot be remedied and which prevent the swimmable use or water quality criteria from being attained; (2) any available ambient biological data; (3) any chemical and biological monitoring data that verify improvements to water quality resulting from treatment plant/facility upgrades and/or expansions; and (4) any ambient water quality data reflecting nonpoint sources of pollution or best management practices that have been implemented for nonpoint source control.

Economic Data: Any information relating to costs and benefits associated with or incurred as a result of facility or treatment plant expansions or upgrades, including: (1) Qualitative descriptions or quantitative estimates of any costs and benefits associated with facility or treatment plant expansions or upgrades, or associated with facilities or treatment plants meeting permit limits; (2) any information on costs to households in the community with facility or treatment plant expansions or upgrades, whether through an increase in user fees, an increase in taxes, or a combination of both; (3) descriptions of the geographical area affected; (4) any changes in median household income, employment, and overall net debt as a percent of full market value of taxable property; and (5) any effects of changes in tax revenues if the private-sector entity were to go out of business, including changes in income to the community if workers lose their jobs, and effects on other businesses both directly and indirectly influenced by the continued operation of the private sector entity.

IV. Alternative Regulatory Approaches and Implementation Mechanisms

Today's proposal reflects EPA's determination that primary contact recreation is an appropriate use designation for the Subject Waterbodies based upon the information currently available to EPA. In developing a final rule, EPA will consider any data or

information submitted to the Agency during the comment period. However, it is possible that relevant information for these waterbodies may become available after completion of this rulemaking. If EPA ultimately promulgates a Federal "swimmable" use designation for these waterbodies, there are several ways to ensure that the use and its implementing mechanisms appropriately take into account such future information.

A. Designating Uses

States have considerable discretion in designating uses. A State may find that changes in use designations are warranted. EPA will review any new or revised use designations adopted by the Commonwealth for these waters to determine if the standards meet the requirements of the CWA and implementing regulations. If approved, EPA would withdraw any final Federal water quality standards which may result from today's proposal.

In adopting recreation uses, the Commonwealth may wish to consider additional categories of recreation uses. For example, Puerto Rico could establish more than one category of primary contact recreation to differentiate between waters where recreation is known to occur and waters where recreation is not known to occur but may be attained based on water quality, flow, and depth characteristics.

EPA cautions the Commonwealth that it must conduct use attainability analyses as described in 40 CFR 131.10(g) when adopting water quality standards that result in uses not specified in section 101(a)(2) of the CWA or that result in subcategories of uses specified in section 101(a)(2) that require less stringent criteria (*see* 40 CFR 131.10(j)).

B. Site-Specific Criteria

The Commonwealth may also develop data indicating a site-specific water quality criterion for a particular pollutant is appropriate and take action to adopt such a criterion into their water quality standards. Site-specific criteria are allowed by regulation and are subject to EPA review and approval. 40 CFR 131.11(a) requires States to adopt criteria to protect designated uses based on sound scientific rationale and containing sufficient parameters or constituents to protect the designated use. In adopting water quality criteria, States should establish numerical values based on 304(a) criteria, 304(a) criteria modified to reflect site-specific conditions or other scientifically defensible methods. Alternatively, States may establish narrative criteria

where numerical criteria cannot be determined or to supplement numeric criteria (*see* 40 CFR 131.11(b)). EPA does not have specific guidance for States and authorized Tribes on developing site-specific criteria for the protection of recreation uses, but this does not preclude the Commonwealth from developing its own scientifically defensible methods. Today's proposed rule does not limit Puerto Rico's ability to modify the criteria applicable to the Federal swimmable use.

C. Variances

Water quality standards variances are another alternative that can give a facility a limited period of time to comply with water quality standards. Puerto Rico has an EPA-approved variance procedure in the PRWQSR (Article 9). As discussed above, the proposed rule contains a Federal variance procedure.

EPA believes variances are particularly suitable when the cause of non-attainment is discharger-specific and/or it appears that the designated use in question will eventually be attainable. EPA has approved the granting of water quality standards variances by States when circumstances might otherwise justify changing a use designation on grounds of unattainability (*i.e.*, the six circumstances described in 40 CFR 131.10(g)). In contrast to a change in standards that removes a use designation for a water body, a water quality standards variance is time-limited and only applies to the discharger to whom it is granted and only to the pollutant parameter(s) upon which the finding of unattainability was based. The underlying standard remains in effect for all other purposes.

For example, if the Commonwealth or a permittee demonstrates that the primary contact recreation use can not be attained pursuant to 40 CFR 131.10(g) because of high levels of fecal coliforms from a wastewater treatment facility, but where an upgraded treatment technology might allow the designated use to be attained, a temporary variance may be appropriate. The variance would allow the discharger's permit to include limits based on relaxed criteria for fecal coliform until the new technology is put in place and it is determined if the underlying designated use is attainable. The practical effect of such a variance is to allow a permit to be written using less stringent criteria, while encouraging ultimate attainment of the underlying standard. A water quality standards variance provides a mechanism for ensuring compliance with sections

301(b)(1)(C) and 402(a)(1) of the CWA while also granting temporary relief to point source dischargers.

While 40 CFR 131.13 allows States to adopt variance procedures for State-adopted water quality standards, such State procedures may not be used to grant variances from Federally promulgated standards. EPA believes that it is appropriate to provide comparable Federal procedures to address new information that may become available. Therefore, under EPA's proposal, the Region 2 Regional Administrator may grant water quality standard variances where a permittee submits data indicating that the primary contact recreation designated use is not attainable for any of the reasons in 40 CFR 131.10(g). This variance procedure will apply to the primary contact recreation use for the Subject Waterbodies.

Today's proposed rule spells out the process for applying for and granting such variances. EPA is proposing to use informal adjudication processes in reviewing and granting variance requests. That process is contained in 40 CFR 131.40(c)(4) of today's proposed rule. Because water quality standards variances are revisions to water quality standards, the proposal provides that the Regional Administrator will provide public notice of the proposed variance and an opportunity for public comment. EPA understands that variance related issues may arise in the context of permit issuance.

The proposed variance procedures require an applicant for a water quality standards variance to submit a request and supporting information to the Regional Administrator (or his/her delegatee). The applicant must demonstrate that the designated use is unattainable for one of the reasons specified in 40 CFR 131.10(g). A variance may not be granted if the use could be attained, at a minimum, by implementing effluent limitations required under sections 301(b) and 306 of the CWA and reasonable best management practices for nonpoint source control.

Under the proposal, a variance may not exceed five years or the term of the NPDES permit, whichever is less. A variance may be renewed if the permittee demonstrates that the use in question is still not attainable. Renewal of the variance may be denied if EPA finds that the conditions of 40 CFR 131.10(g) are not met or if the permittee did not comply with the conditions of the original variance.

EPA is soliciting comment on the need for a variance process for EPA-promulgated use designations, the

appropriateness of the particular procedures proposed today, and whether the proposed variance procedures are sufficiently detailed.

V. Economic Analysis

This proposed rule will have no direct impact on any entity because the rule simply establishes water quality standards (*e.g.*, use designations) which by themselves do not directly impose any costs. These standards, however, may serve as a basis for development of NPDES permit limits. In Puerto Rico, EPA Region 2 is the NPDES permitting authority and retains considerable discretion in implementing standards. Thus, until EPA Region 2 implements these water quality standards, there will be no effect on any entity. Nonetheless, EPA prepared a preliminary analysis to evaluate potential costs to NPDES dischargers in Puerto Rico associated with future implementation of EPA's Federal standards.

Any NPDES-permitted facility that discharges to water bodies affected by this proposed rule could potentially incur costs to comply with the rule's provisions. The types of affected facilities may include industrial facilities and publicly owned treatment works (POTWs). EPA did not consider the potential costs for nonpoint sources, such as agricultural and forestry-related nonpoint sources, although EPA recognizes that the Commonwealth may decide to impose controls on these sources to achieve water quality standards. As a technical matter, nonpoint source discharges are difficult to model and evaluate for potential costs because they are intermittent, highly variable, and occur under different hydrologic or climatic conditions than continuous discharges from industrial and municipal facilities, which are evaluated under critical low flow or drought conditions. Thus, the evaluation of nonpoint sources and their effects on the environment is highly site-specific and data-sensitive. In addition, EPA did not address the potential monetary benefits of this proposed rule for Puerto Rico.

A. Identifying Affected Facilities

According to EPA's Permit Compliance System (PCS), there are 593 NPDES-permitted facilities in Puerto Rico. Eighty-four of the facilities are classified as major dischargers, and 509 are minor or general permit dischargers. However, EPA did not include general permit facilities in its analysis because data for such facilities are extremely limited and flows are usually negligible. Furthermore, EPA could not determine if any of these facilities actually

discharge to the affected water bodies because location information is not available in EPA's PCS database. Therefore, EPA's analysis includes a universe of 285 permitted facilities (84 majors and 201 minors).

To identify facilities potentially affected by the proposed rule, EPA assumed that only facilities that have the potential to affect (*i.e.*, cause an increase in fecal coliform levels) the Subject Waterbodies for which EPA is designating a new primary contact recreation use may be affected by the proposed rule. EPA identified these facilities by overlaying PCS facilities with the potentially affected waters and their tributaries currently designated for a Class SC use using GIS software. EPA assumed that only wastewater treatment plants or military facilities with similar effluent characteristics (*i.e.*, facilities having the potential to discharge fecal coliforms) would potentially be affected by the proposed rule. Table 1 summarizes the universe of potentially affected facilities by type and category.

TABLE 1.—ESTIMATED NUMBER OF FACILITIES POTENTIALLY AFFECTED BY THE PROPOSED RULE

Category	Number of facilities		
	Major	Minor	Total
Military	1	2	3
Municipal	19	10	29
Total	20	12	32

B. Method for Estimating Potential Compliance Costs

EPA identified a total of 32 facilities (20 majors and 12 minors) that may be potentially affected by the proposed primary contact designated use. EPA evaluated a sample of facilities based on discharger type and category from this group for potential cost impacts associated with the proposed rule. For these sample facilities, EPA evaluated available effluent data from its PCS database to determine the potential controls that may ultimately be needed as a result of the proposed rule.

EPA estimated on a case-by-case basis the most cost-effective control strategy for each sample facility to achieve compliance with the proposed criteria. EPA assumed that projected effluent limits for fecal coliform would be applied as criteria end-of-pipe (a monthly geometric mean of 200 colonies/100 mL and not more than 20% of samples exceeding 400 colonies/100 mL) because the facilities' current permits apply the current criteria in the same manner. EPA assumed that a

sample facility would incur costs if average monthly effluent concentrations (or existing permit limit, whichever is smaller) indicate that the facility would not be in compliance with the most stringent criterion.

EPA evaluated each facility's potential compliance with projected permit limits based on available monthly average fecal coliform values from the Agency's PCS database. If monthly average values are not available, EPA evaluated potential compliance based on maximum monthly values. EPA determined potential compliance with the projected limit for each sample facility based on the relative magnitude of the maximum average monthly values, the pattern of occurrence of such values (*i.e.*, when maximum values occurred), and current treatment performance characteristics (*e.g.*, BOD and TSS concentrations, compliance with current permit). For facilities exceeding their current limits, EPA assumed that facilities would install the necessary controls for compliance with current standards, and would incur costs for additional treatment process optimization (*e.g.*, increase chlorine dose, improve mixing conditions, increase contact time) for compliance with the projected limit. For facilities that are in compliance with their current permit limits but would not comply with the projected limit, EPA also assumed that process optimization of their chlorination process may be necessary for compliance with the projected limit.

C. Results

EPA estimated the potential costs associated with the proposed primary contact designated use for the Subject Waterbodies. Based on evaluation of the sample of potentially affected facilities, EPA estimated that the potential total annual cost associated with the proposed rule is \$2.7 million.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866, (58 FR 51735 (October 4, 1993)) the Agency must determine whether the regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy,

productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

It has been determined that this rule is not a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to OMB review.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). It does not include any information collection, reporting, or recordkeeping requirements.

Burden means the total time, effort or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 *et seq.*, generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant

economic impact on a substantial number of small entities. Small entities include small businesses, small organizations and small governmental jurisdictions.

For purposes of assessing the impacts of today's proposed rule on small entities, small entity is defined as: (1) A small business according to RFA default definitions for small business (based on SBA size standards); (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering these economic impacts of today's proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This proposed rule will not impose any requirements on small entities. The RFA requires analysis of the impacts of a rule on the small entities subject to the rule's requirements. See *United States Distribution Companies v. FERC*, 88 F.3d 1105, 1170 (D.C. Cir. 1996). Today's proposed rule establishes no requirements applicable to small entities, and so is not susceptible to regulatory flexibility analysis as prescribed by the RFA. ("[N]o [regulatory flexibility] analysis is necessary when an agency determines that the rule will not have a significant economic impact on a substantial number of small entities that are subject to the requirements of the rule," *United Distribution* at 1170, quoting *Mid-Tex Elec. Co-op v. FERC*, 773 F.2d 327, 342 (D.C. Cir. 1985) (emphasis added by *United Distribution* court).)

Under the CWA water quality standards program, States must adopt water quality standards for their waters and must submit those water quality standards to EPA for approval; if the Agency disapproves a State standard and the State does not adopt appropriate revisions to address EPA's disapproval, EPA must promulgate standards consistent with the statutory requirements. EPA also has the authority to promulgate criteria or standards in any case where the Administrator determines that a new or revised standard is necessary to meet the requirements of the Act. These State standards (or EPA-promulgated standards) are implemented through various water quality control programs including the NPDES program, which limits discharges to navigable waters except in compliance with an NPDES

permit. The CWA requires that all NPDES permits include any limits on discharges that are necessary to meet applicable water quality standards.

Thus, under the CWA, EPA's promulgation of water quality standards establishes standards that the State generally implements through the NPDES permit process. In this case, however, EPA Region 2 is the NPDES permitting authority in Puerto Rico. As such, EPA Region 2 has discretion in developing discharge limits as needed to meet the standards. While Region 2's implementation of Federally promulgated water quality standards may result in new or revised discharge limits being placed on small entities, the standards themselves do not apply to any discharger, including small entities.

Today's proposed rule, as explained earlier, does not itself establish any requirements that are applicable to small entities. As a result of this action, EPA Region 2 will need to ensure that permits it issues include any limitations on discharges necessary to comply with the standards established in the final rule. In doing so, the Region will have a number of choices associated with permit writing. While the implementation of the rule may ultimately result in some new or revised permit conditions for some dischargers, EPA's action today does not impose any of these as yet unknown requirements on small entities.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. The definition of "State" for the purposes of UMRA includes "a territory or possession of the United States." Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and Tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to

adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation of why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

Today's proposed rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local or Tribal governments or the private sector. The proposed rule imposes no enforceable duty on the Commonwealth of Puerto Rico, or any other State, local or Tribal governments or the private sector; rather, this rule proposes a designated use for primary contact recreation and associated bacteria criteria for the Subject Waterbodies, which, when combined with Commonwealth adopted water quality criteria, constitute water quality standards for those waterbodies. The Commonwealth and EPA may use these resulting water quality standards in implementing its water quality control programs. Today's proposed rule does not regulate or affect any entity and, therefore, is not subject to the requirements of sections 202 and 205 of the UMRA.

EPA has determined that this proposed rule contains no regulatory requirements that might significantly or uniquely affect small governments. As stated, the proposed rule imposes no enforceable requirements on any party, including small governments. Thus, this proposed rule is not subject to the requirements of section 203 of the UMRA.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct

effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.”

This proposed rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The proposed rule would not affect the nature of the relationship between EPA and States generally, for the rule only applies to waterbodies in Puerto Rico (which is considered a “State” for purposes of the water quality standards program). Further, the proposed rule would not substantially affect the relationship of EPA and the Commonwealth of Puerto Rico, or the distribution of power or responsibilities between EPA and the various levels of government. The proposed rule would not alter the Commonwealth’s considerable discretion in implementing these water quality standards. Further, this proposed rule would not preclude Puerto Rico from adopting water quality standards that meet the requirements of the CWA. Thus, Executive Order 13132 does not apply to this proposed rule.

Although Executive Order 13132 does not apply to this rule, EPA did consult with representatives of the Commonwealth in developing this rule. Prior to this proposed rulemaking action, EPA had numerous phone calls, meetings and exchanges of written correspondence with EQB to discuss EPA’s concerns with the Commonwealth’s water quality standards, possible remedies for addressing the inadequate sections of their water quality standards, the use designations and criteria in today’s proposal, and the Federal rulemaking process. For a more detailed description of EPA’s interaction with the Commonwealth on this proposed rulemaking, refer to section II.C.2. EPA will continue to work with the Commonwealth before finalizing these water quality standards for Puerto Rico. In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicits comment on this proposed rule from State and local officials.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled “Consultation and Coordination with Indian Tribal Governments” (65 FR 67249, November 6, 2000), requires EPA to develop an accountable process to ensure “meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” “Policies that have tribal implications” is defined in the Executive Order to include regulations that have “substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.”

This proposed rule does not have tribal implications. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. There are no Indian Tribes in Puerto Rico, where this rule would apply. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

Executive Order 13045: “Protection of Children from Environmental Health Risks and Safety Risks” (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be “economically significant” as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This proposed rule is not subject to the Executive Order because it is not economically significant as defined in Executive Order 12866. Further, it does not concern an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. This proposed rule, if promulgated, would establish water quality standards to meet the requirements of the CWA and the implementing Federal regulations.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use” (66 FR 28355 (May 22, 2001)) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (“NTTAA”), Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposed rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

EPA welcomes comment on this aspect of the proposed rulemaking, and, specifically, invites the public to identify potentially-applicable voluntary consensus standards and to explain why such standards should be used in this regulation.

List of Subjects in 40 CFR Part 131

Environmental protection, Indians—lands, Intergovernmental relations, Reporting and recordkeeping requirements, Water pollution control.

Dated: October 14, 2003.

Marianne Lamont Horinko,
Acting Administrator.

For the reasons set forth in the preamble, EPA proposes to amend 40 CFR part 131 as follows:

PART 131—WATER QUALITY STANDARDS

1. The authority citation for part 131 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

Subpart D—[Amended]

2. Section 131.40 is added to read as follows:

§ 131.40 Puerto Rico.

(a) *Use designations for marine waters.* In addition to the Commonwealth's adopted use designations, the following waterbodies

in Puerto Rico have the beneficial use designated in this paragraph (a) within the bays specified below, and within the Commonwealth's territorial seas, as defined in section 502(8) of the Clean

Water Act, and 33 CFR 2.05–5, except such waters classified by the Commonwealth as SB.

Waterbody segment	From	To	Designated use
Coastal Waters	500m offshore	3 miles offshore	Primary Contact. Recreation.
Guayanilla & Tallaboa Bays	Cayo Parguera	Punta Verraco	Primary Contact. Recreation.
Mayaguez Bay	Punta Guanajibo	Punta Algarrobo	Primary Contact. Recreation.
Ponce Port	Punta Carenero	Punta Cuchara	Primary Contact. Recreation.
San Juan Port	Mouth of Río Bayamón	Punta El Morro	Primary Contact. Recreation.
Yabucoa Port	N/A	N/A	Primary Contact. Recreation.

(b) *Criteria that apply to Puerto Rico's marine waters.* In addition to all other Commonwealth criteria, the following criteria for bacteria apply to the waterbodies in paragraph (a) of this section:

Bacteria: The fecal coliform geometric mean of a series of representative samples (at least five samples) of the waters taken sequentially shall not exceed 200 colonies/100 ml, and not more than 20 percent of the samples shall exceed 400 colonies/100 ml. The enterococci density in terms of geometric mean of at least five representative samples taken sequentially shall not exceed 35/100 ml. No single sample should exceed the upper confidence limit of 75% using 0.7 as the log standard deviation until sufficient site data exist to establish a site-specific log standard deviation.

(c) *Water quality standard variances.*

(1) The Regional Administrator, EPA Region 2, is authorized to grant variances from the water quality standards in paragraphs (a) and (b) of this section where the requirements of this paragraph (c) are met. A water quality standard variance applies only to the permittee requesting the variance and only to the pollutant or pollutants specified in the variance; the underlying water quality standard otherwise remains in effect.

(2) A water quality standard variance shall not be granted if:

(i) Standards will be attained by implementing effluent limitations required under sections 301(b) and 306 of the CWA and by the permittee implementing reasonable best management practices for nonpoint source control; or

(ii) The variance would likely jeopardize the continued existence of any threatened or endangered species listed under section 4 of the Endangered

Species Act or result in the destruction or adverse modification of such species' critical habitat.

(3) A water quality standards variance may be granted if the applicant demonstrates to EPA that attaining the water quality standard is not feasible because:

(i) Naturally occurring pollutant concentrations prevent the attainment of the use;

(ii) Natural, ephemeral, intermittent or low flow conditions or water levels prevent the attainment of the use, unless these conditions may be compensated for by the discharge of sufficient volume of effluent discharges without violating Commonwealth water conservation requirements to enable uses to be met;

(iii) Human caused conditions or sources of pollution prevent the attainment of the use and cannot be remedied or would cause more environmental damage to correct than to leave in place;

(iv) Dams, diversions or other types of hydrologic modifications preclude the attainment of the use, and it is not feasible to restore the water body to its original condition or to operate such modification in a way which would result in the attainment of the use;

(v) Physical conditions related to the natural features of the water body, such as the lack of a proper substrate, cover, flow, depth, pools, riffles, and the like unrelated to water quality, preclude attainment of aquatic life protection uses; or

(vi) Controls more stringent than those required by sections 301(b) and 306 of the CWA would result in substantial and widespread economic and social impact.

(4) Procedures. An applicant for a water quality standards variance shall submit a request to the Regional Administrator of EPA Region 2. The

application shall include all relevant information showing that the requirements for a variance have been met. The applicant must demonstrate that the designated use is unattainable for one of the reasons specified in paragraph (c)(3) of this section. If the Regional Administrator preliminarily determines that grounds exist for granting a variance, he/she shall provide public notice of the proposed variance and provide an opportunity for public comment. Any activities required as a condition of the Regional Administrator's granting of a variance shall be included as conditions of the NPDES permit for the applicant. These terms and conditions shall be incorporated into the applicant's NPDES permit through the permit reissuance process or through a modification of the permit pursuant to the applicable permit modification provisions of Puerto Rico's NPDES program.

(5) A variance may not exceed five years or the term of the NPDES permit, whichever is less. A variance may be renewed if the applicant reapplies and demonstrates that the use in question is still not attainable. Renewal of the variance may be denied if the applicant did not comply with the conditions of the original variance, or otherwise does not meet the requirements of this section.

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