§ 203.47 Do I keep royalty relief if prices rise significantly?

(a) You must pay royalties on all gas and oil production for which royalty suspension volume or royalty suspension supplement otherwise would be allowed under §§ 203.40 through 203.46 for any calendar year when the average daily closing NYMEX natural gas price exceeds the threshold of $9.34 per MMBtu, adjusted annually after year 2004 for inflation. The threshold price for any calendar year after 2004 is found by adjusting the threshold price in the previous year by the percentage that the implicit price deflator for the gross domestic product as published by the Department of Commerce changed during the calendar year.

(b) You must pay any royalty due under this paragraph, plus late payment interest from the end of the month after the month of production until the date of payment under 30 CFR 218.54, no later than 90 days after the end of the calendar year for which you owe royalty.

(c) Production volumes on which you must pay royalty under this section count as part of your royalty suspension volumes and royalty suspension supplements.

§ 203.48 May I substitute the deep gas drilling provisions in § 203.0 and §§ 203.40 through 203.47 for the deep gas royalty relief provided in my lease terms?

(a) You may exercise an option to replace the applicable lease terms for royalty relief related to deep-well drilling with those in § 203.0 and §§ 203.40 through 203.47 if you have a lease issued with royalty relief provisions for deep-well drilling. Such leases:

(1) Must be issued as part of an OCS lease sale held after January 1, 2001, and before April 1, 2004; and

(2) Must be located wholly west of 87 degrees, 30 minutes West longitude in the GOM entirely or partly in water less than 200 meters deep.

(b) To exercise the option under paragraph (a) of this section, you must notify, in writing, the MMS Regional Supervisor for Production and Development of your decision before September 1, 2004 or 180 days after your lease is issued, whichever is later, and specify the lease and block number.

(c) Once you exercise the option under paragraph (a) of this section, you are subject to all the activity, timing, and administrative requirements pertaining to deep gas royalty relief as specified in §§ 203.40 through 203.47.

(d) Exercising the option under paragraph (a) of this section is irrevocable. If you do not exercise this option, then the terms of your lease apply.

[FR Doc. 04–1299 Filed 1–23–04; 8:45 am]

BILLING CODE 4310–MR–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 131

[FRL–7613–2]

Water Quality Standards for Puerto Rico

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is promulgating 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 (from Punta Icacos to Punta Yeguas); 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. Through this promulgation, the Federally designated use of primary contact recreation and the associated water quality criteria are added to the Commonwealth's designated uses for the previously referenced embayments and the coastal ring (referred to collectively in this preamble as the ''Subject Waterbodies'').

DATES: This regulation is effective March 26, 2004.

ADDRESSES: The public record for this rulemaking has been established, is located at EPA Region 2, 290 Broadway, New York, New York 10007, and Carribean Environmental Protection Division, U.S. EPA Region 2, 1492 Ponce De Leon Avenue, Suite 417, Santurce, Puerto Rico 00907, and can be viewed between 9 a.m. and 3:30 p.m. at both locations.

FOR FURTHER INFORMATION CONTACT: For information concerning today's final rule, 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*).

SUPPLEMENTARY INFORMATION:

Table of Contents

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 waterbodies identified in § 131.40 of today's 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 at the *Water Quality Standards for Puerto Rico* docket, located at both the Division of Environmental Planning and Protection, U.S. EPA Region 2, 290 Broadway, New York, New York 10007, and the Carribean 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 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. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the one of the docket facilities identified in Section I.B. Once in the system, select ''search,'' then key in the appropriate docket identification number.

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, promulgating 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 waterbodies 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 waterbody through the establishment of designated uses. Designated uses, in turn, determine what water quality criteria apply to specific waterbodies. 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 waterbody 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 waterbody, 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 waterbody survey and assessment.

Guidance on waterbody 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 waterbodies 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 waterbody 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 waterbody. 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 waterbody, 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, EPA would expect to approve the Commonwealth's action and initiate a rulemaking to rescind today's rule. Alternatively, the Commonwealth might complete a sound analysis of use attainability (taking into account appropriate biological, chemical and physical factors) and conclude that the swimmable use is not attainable for these waterbodies. In this case, EPA would expect to approve the Commonwealth's action (assuming it meets all requirements of EPA's regulations at 40 CFR part 131) and initiate a rulemaking to rescind today's rule. EPA encourages the Commonwealth to continue evaluating the appropriate use designation for these waterbodies.

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 waterbodies 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.) The Class SC designation, however, does not provide protection from pathogens associated with fecal contamination during direct contact with the water. Therefore, Class SC does not protect for the swimming use.

EPA's regulations at 40 CFR part 131 require that waters designated for a use less protective than ''fishable/swimmable'' be supported by a use attainability analysis. ''Fishing'' and ''propagation and preservation of desirable species'' are included as a condition of the best usage for Class SC waters. Therefore, Class SC includes the ''fishable'' use established as a goal in the Clean Water Act; however, it does not include the ''swimmable'' use. 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 (*e.g.*, boating) but not primary contact recreation (*e.g.*, swimming). Criteria used for Class SC do not provide for protection from pathogens associated with fecal contamination during direct contact with the water and, therefore, do not protect for the primary contact recreation 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.

Bacteria is the only parameter that is specifically intended to protect for primary contact recreation. Water quality criteria for bacteria are intended to protect bathers from gastrointestinal

illness in recreational waters and they establish levels of indicator bacteria that demonstrate the presence of fecal contamination. Waterbodies should not exceed these levels if they are to protect bathers in fresh and marine recreational waters. Including primary contact recreation as a use for Class SC waters and applying 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 and human health protection from consuming 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.

Puerto Rico's 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 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 rulemaking, 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 CWA section 303(c)(3) providing for EPA review of State water quality standards, if EPA approves a 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, CWA 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's long standing interpretation of the statute does not include the contiguous zone and ocean in the definition of navigable waters (*see* 40 CFR 122.2). The CWA authorizes each State electing 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) reversed 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. The Court also held that the contiguous zone and the ocean clearly extend beyond the outer limits of the ''navigable waters'' that mark the extent of the power of 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 promulgating the new use designation for coastal waters limited to the territorial seas.

EPA is promulgating primary contact recreation as a specified designated use for the Subject Waterbodies. In developing today's rule, 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 promulgating 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 protect primary contact recreation. The water quality standards EPA is promulgating for these waterbodies 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 by Puerto Rico.

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 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 That EPA Is Promulgating Today

A. Use Designations and Criteria That EPA Proposed in October 2003

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 attained 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 occurs 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 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 for data collection and analysis so that they can 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 waterbodies (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 waterbodies 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 proposed to include primary contact recreation as a specified designated use for the Subject Waterbodies. In addition, EPA proposed 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, EPA would expect to approve those use designations and initiate rulemaking to rescind today's rule. 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.

B. Comments Received in Response to EPA's October 2003 Proposal

The Agency evaluated all the comments submitted to EPA during the public comment period for the proposed rule with regard to the primary contact recreation use and bacteria criteria for the Subject Waterbodies.

A few commenters noted that the Subject Waterbodies are not currently used for swimming purposes due to their physical characteristics and safety issues associated with their use as commercial ports and, therefore, should remain classified as secondary contact recreation. Two commenters noted that the U.S. Coast Guard has established ''safety zones'' in Guayanilla and Tallaboa Bays preventing other vessels from being within a certain distance of a vessel carrying Liquefied Natural Gas or Liquefied Hazardous Gas. Two commenters stated that Guayanilla Bay is being considered as part of the Port of Americas, a trans-shipment port being developed on the southern coast of Puerto Rico.

EPA recognizes that the Commonwealth does not wish to encourage swimming in some of the Subject Waterbodies because of their physical characteristics and safety issues. The Commonwealth has a range of options available to them, including demonstrating that it is not feasible to attain the primary contact recreation use in a use attainability analysis that supports removing the use. In fact, EPA has approved secondary contact recreation protection for waters used as commercials ports based upon adequate demonstration. In this case, EPA is aware from other sources in the record that primary contact recreation activities occur in portions of these waters at least on a limited basis. While this information does not automatically compel the Agency to require primary contact recreation, in this case there is no information to support that it is not feasible to attain water quality commensurate with primary contact recreation protection.

Furthermore, although portions of the waters in the Subject Waterbodies are specifically managed as ''safety zones'' precluding access, these conditions may not be present for the entirety of the waters designated for primary contact recreation in today's action. EPA's regulations are not intended to interfere with the Coast Guard's regulations. EPA's establishment of a primary contact recreation designated use for these waters does not advocate that swimming take place regardless of safety issues that may be present within the waterbody, such as the presence of vessels carrying hazardous cargo. For these reasons, EPA believes primary contact recreation is the appropriate designated use based on consideration of all available information at this time.

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 include a swimmable designated use; adopts criteria sufficient to protect a swimmable use; or completes a UAA, taking into account appropriate biological, chemical and physical factors, and concludes that the swimmable use is not attainable for 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) and initiate a rulemaking to rescind today's rule. EPA encourages the Commonwealth to continue evaluating the appropriate use designation for these waterbodies.

If the Commonwealth prefers to designate the Subject Waterbodies as secondary contact recreation (*i.e.*, Puerto Rico's current use classification of SC), and does not conduct UAAs for the waterbodies, it must set bacteriological criteria sufficient to support primary contact recreation. This approach is consistent with the CWA section 101(a) goal. EPA recognizes that, in some cases, it may not make sense to encourage use of a waterbody for swimming due to safety issues; however, swimming may occur anyway and, therefore, states establish water quality criteria sufficient to protect primary contact recreation throughout the waterbody and for any incidental contact recreation that may occur.

One commenter stated that fecal coliform is not an appropriate bacteriological criterion in tropical waters.

EPA is promulgating both fecal coliform and enterococci criteria for the Subject Waterbodies. EPA believes the use of both these indicators will adequately protect the primary contact designated use. Further, EPA has approved the use of these indicators in other states for tropical waters where primary contact recreation occurs. Where enterococci is newly adopted, as in Puerto Rico, States may continue to include fecal coliform in their water quality standards for a period of time so they can continue to make regulatory decisions while the state collects data on enterococci. EPA believes enterococci is a better indicator to protect against gastro-intestinal illness and EPA expects Puerto Rico to continue to collect the necessary enterococci data to enable the Commonwealth to remove the fecal coliform criteria for recreational waters during its next triennial review.

One commenter also stated that EPA must promulgate the same dissolved oxygen (DO) criterion for the Subject Waterbodies that Puerto Rico has for its Class SB waters because the lower DO criterion of 4 mg/l for Class SC waters will impede the aquatic life use.

EPA disagrees. The DO criterion for Class SC waters has been approved as protective of the aquatic life use. The biological monitoring information included in the Quarterly Reports of the 301(h) Waiver Demonstration Studies indicates that healthy aquatic ecosystems exist in Class SC waters in Puerto Rico, supporting the position that the DO criterion of 4.0 mg/l is adequate to protect aquatic life. In addition, the scope of this promulgation is limited to establishing a primary contact recreation use and associated bacteria criteria because the Subject Waterbodies do not meet the CWA's goal of ''swimmable.'' However, the use designations and associated criteria applicable to these waterbodies,

including the current DO criterion, do meet the ''fishable'' goal.

One commenter asserted that EPA must ensure today's action does not jeopardize the existence of threatened or endangered species.

On September 19, 2003, EPA initiated consultation with the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) regarding the proposed rule. In a letter dated October 7, 2003, FWS concurred that the final action is not likely to adversely affect threatened or endangered species. NMFS has not yet provided its final position. EPA is continuing to work with NMFS to conclude this consultation.

One commenter described his views on the state of compliance and enforcement activities in Puerto Rico. This comment did not pertain specifically to the facilities potentially affected by today's action and therefore not within the scope of today's action.

Based on thorough evaluation of information provided to EPA through the public comment process, EPA believes the primary contact recreation designated use and the bacteria criteria to protect primary contact recreation that were proposed for the Subject Waterbodies remain appropriate and consistent with the requirements of the CWA. Therefore, EPA is promulgating a designated use of primary contact recreation to be added to the current designated uses assigned to the Subject Waterbodies. EPA is also promulgating bacteria criteria sufficient to protect for the primary contact recreation use, which will supersede the Commonwealth's current bacteria criteria for the Subject Waterbodies.

IV. Alternative Regulatory Approaches and Implementation Mechanisms

Today's rule 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 today's rule, EPA considered data and information submitted to the Agency during the comment period. However, it is possible that relevant information for these waterbodies may become available in the future. 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 initiate a rulemaking to rescind the Federal water quality standards being promulgated today.

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. The regulation (*see* 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. This does not preclude the Commonwealth from developing its own scientifically defensible methods. Today's 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 allows EPA to modify the standards with respect to a facility requesting the variance. Puerto Rico has an EPA-approved variance procedure in the PRWQSR (Article 9). Today's rule also contains a Federal variance procedure.

Variances are particularly suitable when the cause of non-attainment is discharger-specific and/or data indicates 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 waterbody, a water quality standards variance is time-limited, only applies to the discharger to whom it is granted, and only applies to the pollutant parameter(s) upon which the finding of unattainability was based. The underlying standard remains in effect for all other purposes.

One example might be where the Commonwealth or a permittee demonstrates that the primary contact recreation use cannot be attained pursuant to 40 CFR 131.10(g) because of high levels of fecal coliforms and/or enterococci from a wastewater treatment facility, and it would cause widespread social and economic harm to comply with the standard and there is uncertainty whether an upgraded treatment technology might allow the designated use to be attained. In this case, a temporary variance may be appropriate. The variance would allow the discharger's permit to include limits based on relaxed criteria for fecal coliform and/or enterococci until the new technology is 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. It is appropriate to provide comparable Federal procedures to address new information that may become available. Therefore, under EPA's rule, the Region 2 Regional Administrator may grant water quality

standard variances where a permittee submits data demonstrating 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 rule spells out the process for applying for and granting such variances. EPA is establishing informal adjudication processes for reviewing and granting variance requests. That process is contained in 40 CFR 131.40(c)(4) of today's rule. Because water quality standards variances are revisions to water quality standards, 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 variance procedures in today's rule 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 will 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 today's rule, 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.

V. Economic Analysis

Today's 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.

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. 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 waterbodies 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 today's 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 this rule. Using GIS software, EPA identified these facilities by overlaying PCS facilities with the potentially affected waters and their tributaries currently designated for a Class SC use. 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 today's rule. Table 1 summarizes the universe of potentially affected facilities by type and category.

TABLE 1.—ESTIMATED NUMBER OF FACILITIES POTENTIALLY AFFECTED BY THIS 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 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 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 rule.

EPA estimated on a case-by-case basis the most cost-effective control strategy for each sample facility to achieve compliance with the bacteria criteria. EPA assumed that projected effluent limits for fecal coliform will 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 less) 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.

C. Results

EPA estimated the potential costs associated with the primary contact designated use for the Subject Waterbodies. Based on an evaluation of the sample of potentially affected facilities, EPA estimated that the potential total annual cost associated with the 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.* Today's rule simply establishes water quality standards that may serve as a basis for development of NPDES permit limits; it does not include any information collection, reporting, or record-keeping 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 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 rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This 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 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 directly apply to any discharger, including small entities.

Today's rule, as explained earlier, does not itself establish any requirements that are directly 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 this 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. 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 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 rule imposes no enforceable duty on the Commonwealth of Puerto Rico, or any other State, local or Tribal government or the private sector; rather, this rule establishes 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 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 rule contains no regulatory requirements that might significantly or uniquely affect small governments. As stated, the rule imposes no enforceable requirements on any party, including small governments. Thus, this 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 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 rule will 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 rule will 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 rule will not alter the Commonwealth's considerable discretion in implementing these water quality standards. Further, this rule will 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 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 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 rule, and the Federal rulemaking process. For a more detailed description of EPA's interaction with the Commonwealth on this rulemaking, refer to section II.C.2. EPA will continue to work with the Commonwealth with regard to their ongoing efforts to adopt water quality standards that meet the requirements of the CWA, including water quality standards for the Subject Waterbodies.

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 final 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 applies. 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 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.

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

As noted in the proposed rule, 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 rulemaking does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective March 26, 2004.

List of Subjects in 40 CFR Part 131

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

Dated: January 20, 2004.

Michael O. Leavitt,

Administrator.

■ For the reasons set forth in the preamble, EPA amends 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	Punta Icacos	Punta Yeguas	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 waterbody 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 waterbody, 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.

[FR Doc. 04–1545 Filed 1–23–04; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 0, 1, 76, and 78

[CS Docket No. 00–78, FCC 03–55]

Implementation of Electronic Filing for the Multichannel Video and Cable Television Service and the Cable Television Relay Service

AGENCY: Federal Communications Commission.

ACTION: Final rule; announcement of effective date.

SUMMARY: The Federal Communications Commission received Office of Management and Budget (OMB) approval of the rules implementing the electronic filing for the Multichannel Video and Cable Television Service and the Cable Television Relay Service published at 68 FR 26997 (May 19, 2003). The forms associated with this final rule are FCC Form 321, Aeronautical Frequency Notification, (OMB Control No. 3060–0310); FCC Form 322 Cable Community Registration, (OMB Control No. 3060–0331); FCC Form 324, Operator, Mail Address, and Operational Information Changes, (OMB Control No. 3060–1045 (new collection)); and FCC Form 327, Application for Cable Television Relay Service Station (CARS) Authorization, (OMB Control No. 3060–0055)

DATES: The amendments to 47 CFR 0.401, 1.1104, 1.1111, 1.1701 through 1.1707, 76.403, 76.620, 76.1610, 76.1801, 76.1803, 76.1804, 78.17, 78.20, 78.35 and 78.109 at 68 FR 26997 (May 19, 2003) are effective January 26, 2004.

SUPPLEMENTARY INFORMATION: The Federal Communications Commission released the Report and Order (R&O) in CS Docket No. 00–78; FCC 03–55, on March 19, 2003. The R&O revised our rules governing the filing of the majority of forms filed by the public for the Multichannel Video and Cable Television Service (''MVCTS'') and applications in the Cable Television Relay Service (''CARS'') and provided for electronic filing. The revised rule sections at 68 FR 26997, May 19, 2003, contained information collection requirements that required OMB approval. The Commission announces OMB approval and the rules are effective January 26, 2004. For questions concerning the effective date for the rule revisions contact Wayne T. McKee, Media Bureau, Engineering Division at (202) 418–2355 or via the Internet at *Wayne.McKee@fcc.gov*.

Pursuant to the Paperwork Reduction Act of 1995, Pub. L. 104–13, an agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. Notwithstanding any other provisions of law, no person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Questions concerning this revised information collection should be directed to Leslie F. Smith, Federal Communications Commission, (202) 418–0217 or via the Internet at *Leslie.Smith@fcc.gov*.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 04–1531 Filed 1–23–04; 8:45 am]

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