ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 131

[FRL–7397–2]

RIN 2040–AD35

Water Quality Standards for Alabama

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: EPA is proposing to establish a designated use for a segment of Five Mile Creek in Alabama. If this proposal is promulgated as final, the Federal designated use will supersede the State's designated use that EPA disapproved in 1986 and 1991. EPA disapproved the State's designated use because it is inconsistent with the Clean Water Act and EPA's implementing regulations. Specifically, EPA is proposing a designated use for the protection of fish and wildlife.

DATES: EPA will accept public comments on this proposed rule until December 23, 2002. Comments postmarked after this date may not be considered. A public hearing will be held on December 12, 2002 from 2 to 5 P.M. and from 7 to 9 P.M. Both oral and written comments will be accepted at the hearing.

ADDRESSES: Send your comments by mail to: Docket Manager, Proposed Water Quality Standards for Alabama, EPA, Region 4, Sam Nunn Atlanta Federal Center, 61 Forsyth Street, SW, Atlanta, Georgia 30303–3104, Attention Docket ID No. OW–2002–0023. 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 Sheraton Birmingham, 2101 Richard Arrington Jr. Boulevard North, Birmingham, Alabama, 35203.

FOR FURTHER INFORMATION CONTACT: Fritz Wagener, Water Quality Standards Coordinator, U.S. EPA Region 4, Water Management Division, Atlanta Federal Center, 61 Forsyth Street S.W., Atlanta, Georgia, 30303–3104 (telephone: 404–562–9267) or James Keating, U.S. EPA Headquarters, Office of Science and Technology, 1200 Pennsylvania Avenue NW, Washington, DC, 20460 (telephone: 202–566–0383).

SUPPLEMENTARY INFORMATION: This supplementary information section is organized as follows:

I. General Information

A. Potentially Affected Entities

Citizens concerned with water quality in Alabama may be interested in this rulemaking. Facilities discharging pollutants to certain waters of the United States in Alabama 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 those potentially affected
Industry	Industries discharging pollutants to the segment of Five Mile Creek identified in § 131.34.
Municipalities	Publicly-owned treatment works discharging pollutants to the segment of Five Mile Creek identified in § 131.34.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding NPDES facilities 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 body segment identified in § 131.34 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–2002–0023. 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 Alabama* at Water Management Division, EPA, Region 4, Sam Nunn Atlanta Federal Center, 61 Forsyth Street, SW, Atlanta, Georgia 30303–3104, phone # 404–562–9267. This Docket Facility is open from 9:00 AM to 3:30 PM, Monday through Friday, excluding legal holidays. 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 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 through the docket facility identified in 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.

For additional information about EPA's electronic public docket, visit EPA Dockets online or *see* 67 FR 38102, May 31, 2002.

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.'' While EPA is not required to consider these late comments, we will make every attempt to consider them.

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. EDOCKETS. 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–2002–0023. 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. Email. Comments may be sent by electronic mail (e-mail) to *wagener.fritz@epa.gov,* Attention Docket ID No. OW–2002–0023. 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 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 Alabama, EPA, Region 4, Sam Nunn Atlanta Federal Center, 61 Forsyth Street, SW, Atlanta, Georgia 30303–3104, Attention Docket ID No. OW–2002–0023.

3. By Hand Delivery or Courier. Deliver your comments to the address identified in I.C.2., attention Docket ID OW–2002–0023. Such deliveries are only accepted during the Docket's normal hours of operation as identified in 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 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 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. Today EPA is proposing Federal standards to supersede a portion of Alabama's standards that EPA has disapproved and the State has not revised.

EPA regulations implementing 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. States may also include policies generally affecting the standards' application and implementation in their standards. *See* 40 CFR 131.13. These policies are also subject to EPA review and approval.

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 and 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. This effectively creates a rebuttable presumption of attainability, *i.e.*, a default designation of fishable/swimmable beneficial uses should apply in the absence of sufficient information to the contrary. 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 affirmatively 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 believes that the ''use'' of a water body is the most fundamental articulation of its role in the aquatic and human environments, and all of the water quality protections established by the CWA follow from the water's designated use. If a use lower than fishable/swimmable is designated based on inadequate information or superficial analysis, water quality-based protections that might have enabled the water to achieve the goals articulated by Congress in section 101(a) may not be put in place. As a result, the true potential of the water body may not be realized, and a resource highly valued by Congress may be lost.

EPA seeks, through its oversight under section 303(c) of the CWA, to ensure that any State's decision to forego protection of a water body's potential to support fishable/swimmable uses results from a ''structured'' analysis of use attainment. Where, as in the case of this segment of Five Mile Creek in Alabama, the State provides no analysis to support a less than fishable/swimmable use designation, EPA disapproves the use designation. In some cases, as Alabama has done with regard to most of the use classifications originally disapproved by EPA (see section II.C., below), the State will revise its use classifications to protect fishable/swimmable uses.

In other cases, the State will conduct a more thorough analysis of use attainability to support a less than fishable/swimmable designated use. Indeed, Alabama has done so for several of the streams originally disapproved by EPA in 1986. However, where a State does neither, as in the case of a segment of Five Mile Creek, EPA will undertake Federal rulemaking to ensure the water quality goals of the CWA are effectively implemented.

In developing the attached proposed rule, EPA evaluated all available information, including physical, biological, and chemical parameters, to determine whether fishable/swimmable uses could be attained. As explained in detail below, EPA believes the available information regarding this water body segment does not rebut the presumption that fishable/swimmable uses are attainable. In fact, EPA believes that all of the currently available information affirmatively supports the conclusion that full fishable/swimmable uses are attainable.

EPA is working within the existing State framework and relying on the State's Fish and Wildlife (F&W) designated use for the protection of fishable/swimmable water. Similarly, EPA is deferring to the State water quality criteria necessary for meeting a F&W designated use. EPA's approach in this rulemaking does not undermine the State's primary role in designating uses for waters in Alabama. If the State reclassifies the segment of Five Mile Creek with a fishable/swimmable designated use prior to EPA's finalizing this rule, EPA would approve the State's action and not finalize this rule. Alternatively, if the State completes a sound analysis of use attainability, taking into account appropriate biological, chemical and physical factors, and concludes that the fishable/swimmable use is not attainable for this water body segment, EPA would approve the State's action if it meets all requirements of EPA's regulations at 40 CFR part 131, and not finalize this rule (or initiate rulemaking to rescind the rule if the State submits an adequate analysis after EPA takes final action). EPA encourages the State to continue evaluating the appropriate use designation for this segment of Five Mile Creek.

B. Current Alabama Water Quality Standards

Alabama's water quality regulations at 335–6–10 and 335–6–11 establish the following designated uses for assignment to water bodies in the State: Outstanding Alabama Water, Public Water Supply, Swimming and Other Whole Body Water-Contact Sports, Shellfish Harvesting, Fish and Wildlife (F&W), Limited Warmwater Fishery (LWF), Agricultural and Industrial Water Supply (A&I). Alabama has applied these use designations, singly or in some combination, to all surface waters of the State.

The current use designation adopted by the State for the segment of Five Mile Creek addressed in today's proposal is A&I. The best usage of waters designated for the A&I use includes ''agricultural irrigation, livestock watering, industrial cooling and process water supplies, and any other usage, except fishing, bathing, recreational activities, including water-contact sports, or as a source of water supply for drinking or food-processing purposes.'' The Alabama water quality regulations describe the A&I use as follows:

> The waters, except for natural impurities which may be present therein, will be suitable for agricultural irrigation, livestock watering, industrial cooling waters, and fish survival. The waters will be usable after special treatment, as may be needed under each particular circumstance, for industrial process water supplies.
>
> This category includes watercourses in which natural flow is intermittent and non-existent during droughts and which may, of necessity, receive treated wastes from existing municipalities and industries, both now and in the future. In such instances, recognition must be given to the lack of opportunity for mixture of the treated wastes with the receiving stream for purposes of compliance. It is also understood in considering waters for this classification that urban runoff or natural conditions may impact any waters so classified.

EPA's regulations at 40 CFR part 131 require that waters designated for a use less protective than a fishable/swimmable use, such as the A&I 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. For example, only ''fish survival'' is included as a condition of the best usage, and recreational activities are specifically excluded as uses for A&I waters. As such, the criteria adopted to support the A&I use do not provide protection for the propagation of aquatic life, nor protection from human pathogens during the swimming season.

As discussed in section II.C., EPA disapproved the designation of the A&I use for the segment of Five Mile Creek addressed in today's proposal. In developing today's proposal, EPA evaluated Alabama's existing water quality standards to determine which State use designations correspond to ''fishable/swimmable'' uses, and would therefore ensure protection of the CWA section 101(a)(2) goals. Rather than establish a new Federal use designation for this segment of Five Mile Creek, EPA believes it is preferable to apply a use designation that both meets the goals of the CWA and is consistent with longstanding State standards regulations. Because water quality standards for this segment, if ultimately promulgated, will be the basis for establishing NPDES permit limits by the State, the Agency believes that using an existing State use designation will facilitate implementation of the standards. This also facilitates withdrawal of Federal standards in the future, if Alabama takes appropriate action justifying such withdrawal.

EPA is proposing the State's F&W use set out at 335–6–10–.03 of the State's regulations for the segment of Five Mile Creek from Newfound Creek to Ketona.

The State's F&W use includes aquatic life uses and seasonal recreational uses that are consistent with the Clean Water Act section 101(a)(2) goals of fishable/swimmable. The best usage of waters designated for the State's F&W use include ''fishing, propagation of fish, aquatic life, and wildlife, and any other usage except for swimming and water-contact sports or as a source of water supply for drinking or food-processing purposes.'' The conditions related to best usage for F&W waters require that these waters ''will be suitable for fish, aquatic life and wildlife propagation.''

The State, in the listing of other usages of waters designated for the F&W use recognizes that waters designated for the F&W use ''may be used for incidental water contact and recreation during June through September, except that water contact is strongly discouraged in the vicinity of discharges or other conditions beyond the control of the Department or the Alabama Department of Public Health,'' and that these waters, ''under proper sanitary supervision by the controlling health authorities, will meet accepted standards of water quality for outdoor swimming places and will be considered satisfactory for swimming and other whole body water-contact sports.'' This aspect of the F&W use is protected by criteria for fecal coliform bacteria identical to the criteria adopted for the Swimming and Other Whole Body Water-Contact Sports use classification. The bacteria criteria apply June through September for the F&W use, whereas the bacteria criteria apply year round for the Swimming and Other Whole Body Water-Contact Sports use. EPA regulations at 40 CFR 131.10(f) provide States the option to ''adopt seasonal uses as an alternative to reclassifying a water body or segment thereof to uses requiring less stringent criteria'' as long as water quality criteria reflect the seasonal uses. As described below, the Alabama Environmental Management Commission determined that the F&W use was appropriate for this segment of Five Mile Creek in their recent reclassification efforts. EPA agrees that the F&W use, as applied to this segment of Five Mile Creek, reflects the CWA 101(a)(2) goal for ''recreation in and on the water'.

Provisions of the Fish and Wildlife water use classification also apply to the State's Limited Warmwater Fishery (LWF) use classification, with the following exceptions. The best usage of waters for the months from May through November include ''agricultural irrigation, livestock watering, industrial cooling and process water supplies, and any other usage, except fishing, bathing, recreational activities, including water-contact sports, or as a source of water supply for drinking or food-processing purposes.'' Also, the conditions related to best usage for the months from May through November require that the waters ''will be suitable for agricultural irrigation, livestock watering, and industrial cooling waters. The waters will be usable after special treatment, as may be needed under each particular circumstance, for industrial process water supplies.''

The standards for the LWF use also specify that, ''This category includes watercourses in which natural flow is intermittent, or under certain conditions non-existent, and which may receive treated wastes from existing municipalities and industries. In such instances, recognition is given to the lack of opportunity for mixture of the treated wastes with the receiving stream for purposes of compliance. It is also understood in considering waters for this classification that urban runoff or natural conditions may impact any waters so classified.''

Given that the LWF use incorporates several provisions associated with the A&I use for the months from May through November, 40 CFR part 131 requires that waters designated for the LWF use be supported by a use attainability analysis, because neither the best usage or conditions related to the best usage for these waters include all of the Clean Water Act section 101(a)(2) uses of fully fishable/swimmable.

If EPA promulgates final water quality standards as proposed, Alabama's existing water quality criteria adopted to protect the F&W use would apply to this segment of Five Mile Creek. These criteria are set out at 335–6–10–.05 (General Conditions Applicable to All Water Criteria), 335–6–10–.06 (Minimum Conditions Applicable to All State Waters), 335–6–10–.07 (Toxic Pollutant Criteria Applicable to State Waters), and 335–6–10–.09(4) (Specific Water Quality Criteria—Fish and Wildlife use).

Subsection 335–6–10–.05 establishes State policies applicable to all State waters regarding analytical procedures, collection of samples used to determine compliance with water quality criteria, mixing zones, criteria exceedances due to natural conditions, recreational use of State waters, and schedules of compliance with new water quality standards. Compliance with a modified effluent limit based on a new standard is required as soon as possible, ''but in all cases within three years of the adoption of the new standard.''

Subsection 335–6–10–.06 contains the ''free from'' toxicity provisions of Alabama's water quality standards applicable to all State waters. These provisions relate to general protection of State waters from adverse effects due to substances attributable to sewage, industrial wastes or other wastes from settling, floating, and toxicity.

Section 335–6–10–.07 includes a tabular listing of water quality criteria applicable to State waters pursuant to applicable designated uses. Included are: (1) Numeric criteria or criteria equations for protection of aquatic life from acute toxic effects for 24 parameters, (2) numeric criteria or criteria equations for protection of aquatic life from chronic toxic effects for 29 parameters (which apply to all State waters except those waters classified for Agricultural and Industrial Water Supply uses), (3) human health-based criteria equations, (4) Maximum Contaminant Levels for 100 parameters (applicable to waters classified for drinking water purposes), and (5) the minimum instream design flows to be used in application of water quality criteria.

This section also includes the criteria equations for 98 parameters for protection of human health from the consumption of fish and shellfish applicable to all State waters. Because the State's human health-based water quality criteria apply to all State waters, regardless of classification, human health criteria were not considered to have a direct effect in the analysis of the proposed revised classification of the Fish and Wildlife use for the stream segment considered in this proposed rule.

Subsection 335–6–10.09(4)(e) (Specific Criteria) contains the water quality criteria related to the protection of the above uses, including numeric and/or narrative criteria for pH, temperature, dissolved oxygen, whole effluent toxicity, bacteria, radioactivity and turbidity.

Criteria for protection of aquatic life for dissolved oxygen (DO) are contained in the Alabama water quality standards at Subsection (4)(e)(4), which includes, in pertinent part:

(i) For a diversified warm water biota, including game fish, daily dissolved oxygen concentrations shall not be less than 5 mg/l at all times; except under extreme conditions due to natural causes, it may range between 5 mg/l and 4 mg/l, provided that the water quality is favorable in all other parameters. The normal seasonal and daily fluctuations shall be maintained above these levels.

(iv) In the application of dissolved oxygen criteria referred to above, dissolved oxygen

shall be measured at a depth of 5 feet in waters 10 feet or greater in depth; and for those waters less than 10 feet in depth, dissolved oxygen criteria will be applied at mid-depth.

Subsection 335–6–10–.09(4)(e) also includes a reference to toxicity-based criteria applicable to the Fish and Wildlife use in section 335–6–10–.07. This Subsection includes narrative criteria for the protection from adverse effects of taste, odor, and color effects, including aesthetic qualities, as well as narrative criteria for the protection of palatability and marketability of fish, wildlife, shrimp and crabs taken from State waters.

C. Factual Background

1. Summary of State and EPA Administrative Actions

In a letter dated October 14, 1986, the EPA Regional Administrator for Region 4 disapproved use designations adopted by the Alabama Department of Environmental Management (ADEM) for 49 stream segments, including the segment of Five Mile Creek from Newfound Creek to Ketona, because the State failed to support a use classification less than ''fishable/swimmable'' in accordance with 40 CFR 131.10(j). From 1986 to 1991, 20 of the use designations were either upgraded to the Fish and Wildlife (F&W) use classification by ADEM or approved as the Agricultural and Industrial Water Supply (A&I) use by EPA based on a supporting analysis. On July 18, 1991, the EPA Regional Administrator for Region 4 disapproved 30 use designations adopted by ADEM, including the designation of A&I for the segment of Five Mile Creek from Newfound Creek to Ketona.

Between July 18, 1991 and today's proposal, ADEM reclassified the use designations of 17 of these 30 segments to the F&W use designation. On August 1, 2000, ADEM incorporated a new use classification of Limited Warmwater Fishery (LWF) as a provision of the State water quality regulations at 335–6–10–.09 (6), and ADEM has since reclassified 10 of these 30 stream segments to the LWF use designation. Four of these 10 reclassification actions included alternative water quality criteria which established more stringent criteria than the LWF designation requires for these four segments based on consideration of site specific conditions. EPA approved some of the reclassification actions involving the LWF use on March 15, 2001. In addition, EPA approved ADEM's A&I use designation for one of these 30 segments on March 15, 2000. The State made revisions and provided additional supporting analyses for the other segments. These recent actions and new information are being reviewed by EPA Region 4 under section 303 (c) of the CWA.

Although ADEM reclassified a segment of Five Mile Creek from Locust Fork to Newfound Creek to F&W in April 1997, the State has not completed actions to reclassify the segment of Five Mile Creek from Newfound Creek to Ketona to F&W or completed a use attainability analysis for this segment to show that the F&W use is not attainable. This is the only remaining segment of the 30 segments disapproved by EPA on July 18, 1991, that does not now have an approved use designation or State-designated use reclassification action under review.

2. Summary of Legal Actions

During the period from 1996 to the present when some of the administrative actions summarized above occurred, EPA has been served with several notices of intent to sue and subsequent suits for failure to take certain actions under section 303(c) of the CWA with regard to water quality standards disapproved by EPA. In each case, the Agency has entered into a consent decree with plaintiffs setting deadlines for EPA to take certain actions, which are described below.

The first of these legal actions was filed on September 18, 1996, when the Legal Environmental Assistance Foundation, Inc. (LEAF) filed suit in District Court in Alabama against EPA for failing to promptly propose Federal replacement water quality standards for a subset of use designations in Alabama disapproved by EPA. LEAF v. Browner No. CV–96–ETC–2454–S (N.D. Ala.). Under a consent decree that EPA and plaintiffs entered into on September 11, 1997, EPA proposed on March 5, 1998, to establish Federal water quality standards for nine stream segments in Alabama in a similar manner as today's proposed rule.

On April 28, 1999, the Alabama Rivers Alliance, Inc. (ARA) filed a 60-day notice under Section 505 of the Clean Water Act, stating an intention to file suit against EPA for failure to promulgate final standards for the stream segments addressed in EPA's March 5, 1998 proposal, and for failure to promptly propose replacement Federal standards for the remaining stream segments disapproved by EPA. This notice combined the contents of similar notices previously filed by LEAF on July 20, 1998 and May 23, 1995.

These parties filed suit on July 17, 2000. LEAF v. Browner No. CV–96–ETC–2454–S (N.D. Ala.). EPA and the plaintiffs subsequently signed a second consent decree which was entered by the court on January 23, 2001, which required that EPA either promulgate Federal standards for the stream segments addressed in the March 5, 1998 proposal, or approve the applicable State water quality standards for these 9 stream segments, no later than March 15, 2001. On December 5, 2000, ADEM had reclassified the use classifications for seven of the stream segments addressed in EPA's March 5, 1998, proposal to the LWF use, and reclassified the use designation for one of the stream segments addressed in EPA's March 5, 1998, proposal to the F&W use. On March 15, 2001, EPA approved these revisions to the State's water quality standards. Also on that date, based on the provisions of 40 CFR 131.10(g)(6), EPA approved the A&I use designation for the remaining stream segment that was addressed in EPA's March 5, 1998 proposal.

Under the terms and conditions of the January 23, 2001, consent decree (as amended on January 2, 2002), EPA was also required to sign a **Federal Register** notice proposing federal use designations for the eight remaining stream segments with a disapproved designated use, or withdraw the EPA disapproval of the existing Alabama standards for these eight stream segments by October 15, 2002. The attached proposal for the segment of Five Mile Creek from Newfound Creek to Ketona, combined with EPA Region 4's approval of the State's revisions to the remaining streams' designated uses will fulfill EPA's obligation under the consent decree.

3. Recent State Actions on Use Designation for Five Mile Creek

The ADEM held a public hearing on February 19, 2002, to consider proposed amendments to ADEM Administrative Code Rule 335–6–11–.02, which included a reclassification of a segment of Five Mile Creek from the A&I use to the F&W use. The public hearing was held to receive data, views, and arguments from interested persons regarding the proposed rules. The public comment period lasted from December 23, 2001, to February 22, 2002, a total of 61 days. Several commenters expressed support for the proposed reclassification of Five Mile Creek from Newfound Creek to Ketona.

However, one commenter opposed the reclassification because the level of total dissolved solids (including chlorides and sulfates) in the effluent of Sloss Industries (a discharger to Five Mile Creek) may result in its failure to meet

the chronic effluent toxicity requirements for LWF and F&W, and the cost of removing these salts were not considered in the reclassification. The commenter asserted that if those removal costs were considered, and if all costs were considered independent of the finances of the parent company (Walter Industries), then a substantial economic burden (as allowed by EPA's regulations at 40 CFR 131.10 (g)(6)) would be established.

In its Reconciliation Statement, which contains responses to comments received during the public comment period, ADEM stated that it ''believes the proposed Fish and Wildlife (F&W) use classification is attainable for this segment of Five Mile Creek. ADEM bases (SIC) its decision on the fact that none of the six factors [identified at 40 CFR 131.10(g)] can be used to support a designated use less than the F&W classification, which EPA has approved as consistent with the fishable/swimmable goal.'' ADEM added, ''The reclassification of Five Mile Creek from A&I to F&W will result in more stringent permit requirements for Sloss Industries, and additional treatment controls will be necessary. However, a feasibility study of the treatment control alternatives available to Sloss Industries demonstrates that: (1) The F&W permit limitations can be met by the facility, and (2) the incremental costs of meeting the F&W permit limits (over and above the costs of meeting the A&I permit limits) will not result in substantial and widespread economic impact.'' With respect to costs, ADEM based its conclusions on a Draft Economic Impact Analysis prepared by EPA, dated December 2001, and EPA's Response to Sloss Industries' comments, dated March 2002.

On April 9, 2002, the Alabama Environmental Management Commission approved reclassified use designations for several stream segments in the State, including the proposed segment of Five Mile Creek. On May 15, 2002, the Joint Legislative Committee of Administrative Regulation Review disapproved the proposed amendment of Alabama Administrative Code Rule 335–6–11–.02, which would upgrade the aforementioned segment of Five Mile Creek from an A&I to F&W use classification. The Committee subsequently proposed an amendment deleting any changes to the status of this segment of Five Mile Creek. On June 25, 2002, the Alabama Environmental Management Commission approved the Joint Legislative Committee's proposed amendment deleting any changes to the status of this segment of Five Mile Creek.

III. Use Designation for Five Mile Creek in Alabama

A. Overview

In terms of Alabama's water quality standards, EPA believes that the F&W use designation appropriately reflects fishable/swimmable uses. EPA has evaluated all available data and information to determine whether the F&W use is attainable. EPA's analysis was informed by the regulatory provisions at 40 CFR part 131 and technical guidance that EPA has provided to States for the development of use attainability analyses. As noted above, EPA regulations define a use attainability analysis as an assessment of the factors affecting attainment of a use, which may include ''physical, chemical, biological and economic factors * * *.'' 40 CFR 131.3(g). Consistent with this provision, EPA evaluated several categories of information in today's analysis of use attainability.

First, EPA evaluated available information regarding the characteristics of the waters in terms of habitat and the biological communities present. If the waters currently reflect habitat conditions and support biological communities commensurate with the F&W use designation, EPA considered this to be strong evidence in favor of an F&W designation. To facilitate this evaluation, EPA examined a 1997 study performed by EPA regarding the habitat and biological conditions in Five Mile Creek (the findings of this study are discussed below in section III.B). A related factor considered by EPA was the use designation in the adjacent segments of Five Mile Creek that are designated as F&W. If the segment of Five Mile Creek designated as A&I was similar in character to adjacent segments designated as F&W by the State, EPA considered such information as supporting the attainability of the F&W use.

Second, EPA reviewed available information regarding ambient stream chemical characteristics. EPA extracted chemical-specific data from the EPA Storage and Retrieval (STORET) Legacy system, which houses ambient water quality data for water bodies throughout the United States, including Alabama. EPA's evaluation focused on those pollutant parameters for which new or more stringent criteria would apply to the affected stream segment in Five Mile Creek. EPA evaluated the extent to which current ambient stream chemical concentrations met the F&W criteria. Significant exceedances of criteria established to protect fishable/swimmable uses may indicate that, notwithstanding the physical habitat and aquatic community present, the use is impaired to some extent. Where the biological and other information indicates that a water body is or could be generally supportive of the F&W use, exceedances of criteria for particular pollutant parameters may not be sufficient to preclude a F&W use. Rather, in some cases an aquatic community could reflect ambient conditions which are less than ideal. In such cases, full attainment of the criteria that support the use might lead to development of a more robust and diverse aquatic community than is currently present.

If significant exceedances of F&W water quality criteria (in terms of relative magnitude above the applicable criteria, duration and frequency of exceedance above the criteria, and the number and types of pollutants) occurred on a consistent basis, such information could suggest that a F&W use is currently not being fully attained. However, considerable judgment must be exercised when evaluating the extent to which current exceedances of water quality criteria in the stream indicate that the F&W use is not attainable within the meaning of the water quality standards regulations. Findings regarding attainability must take into account not only present circumstances, but also the pollutant reductions that would be achieved, at a minimum, through imposition of technology-based controls for point sources as well as implementation of best management practices for nonpoint sources.

The last broad category of information considered by EPA in its decision-making process was monitoring information for each of the dischargers on the stream segment (as reflected in Discharge Monitoring Reports or DMRs). As discussed in detail in section V.C., EPA analyzed the extent to which the proposed Federal use designations may lead to the development of more stringent NPDES permit limits and, if so, what types of controls would be needed by these facilities to meet such limits. Discharger information was used in one of two ways by the Agency. First, monitoring data was used to assess point sources to the affected stream segment and to assist in determining whether their pollutant discharges could contribute to ambient exceedances of criteria. Second, the Agency used the monitoring data to determine whether dischargers would need to significantly alter their operations (or could, in fact, meet permit limits that would be associated with the F&W use). Information indicating that dischargers could

generally meet such revised limits would support the presumption that the F&W use is attainable.

The location of elevated ambient levels of pollutants, combined with effluent monitoring data from permitted industrial and municipal wastewater discharges, provided information on possible sources of the pollutants, and whether combined sewer overflow (CSO) or other sources of storm water runoff might be contributing to any elevated pollutant levels. For example, if elevated pollutant levels occurred at stream locations upstream of permitted industrial and municipal wastewater discharges, or for pollutants not discharged in significant quantities from those sources, then this suggests that other sources are responsible for pollutant loadings to the stream segment. If elevated pollutant levels occurred at stream locations downstream of permitted industrial and municipal wastewater discharges, and there are records of discharge of those pollutants, then this suggests that those sources are contributing to pollutant loading. Based on the projected sources of pollutants, EPA projected potential costs of meeting criteria to protect the F&W use.

B. Proposed Use Designation for Five Mile Creek

Based upon the approach described above, EPA evaluated all available data and information to determine whether the F&W use is attainable for Five Mile Creek. If, prior to any final rulemaking by EPA, Alabama classifies Five Mile Creek with use designations consistent with the CWA and 40 CFR part 131, EPA will approve those use designations, eliminating the need to promulgate Federal water quality standards.

In 1997 EPA conducted a biological survey of several streams in the Birmingham area, including Five Mile Creek. The rapid bioassessment protocol utilized by agency scientists evaluated habitat, water chemistry, and benthic macroinvertebrate and fish communities. The study design allowed comparison of data from two sampling stations within the A&I segment to data from two sampling stations in the adjacent F&W segments (one in the upstream F&W segment and one in the downstream F&W segment). The results of this survey documented that Five Mile Creek had the most intact riparian zone and stream habitat of the Birmingham streams assessed in the study. All four stations received similar habitat evaluation scores (ranging from 118 to 123 (compared to the score of 118 at the reference site)). The total number of macroinvertebrate taxa differed from 20 at both stations in the A&I segment to 26 and 27 in the F&W segments, yet both stations in the A&I segment were rated as similar to the stations in the F&W segment. Likewise, based on the evaluation of fish communities, one station in the A&I segment was rated as similar to the stations in the F&W segments. The biological survey revealed evidence of a reduction in pollution sensitive macro-invertebrates at both stations in the A&I segment (Ephemeroptera, Plecoptera, Trichoptera (EPT) scores of 1 and 2 in the A&I segment versus 3 and 5 in the F&W segments), indicating that dischargers to the A&I segments may be affecting the local biological community.

The results of this survey reveal evidence that there is a viable resident aquatic community in the A&I segment of Five Mile Creek that would benefit from increased protection afforded with a F&W use designation. The habitat as well as the macroinvertebrate and fish communities found at sampling stations in the A&I segment are similar to those of the F&W segments of Five Mile Creek. This information supports the assertion that F&W is attainable for this segment.

Ambient chemical monitoring data are available for two stations on Five Mile Creek (FM1 and FM2) covering more than 20 years. EPA only evaluated data since 1980 to best reflect more recent stream conditions. Station FM1 is located just below two industrial dischargers, ABC Coke and Sloss Industries. Station FM2 is located downstream of FM1 and below the Five Mile Creek Waste Water Treatment Plant outfall. Available data from these stations include dissolved oxygen concentrations, levels of fecal coliform bacteria, and concentrations of various toxic priority pollutants and ammonia.

Dissolved oxygen (DO) levels, necessary to support aquatic life, are generally very good in Five Mile Creek. The mean DO concentration at FM1 is 8.7 mg/L (191 observations), with only 2.6% of these observations less than 5 mg/L (the F&W criterion). The mean DO concentration at FM2 is 8.48 mg/L with only 1.4% of observations less than 5 mg/L.

Criteria for fecal coliform bacteria are set to protect public health and welfare, as well as the seasonal recreational swimming use component of F&W. At station FM1, located upstream of the municipal wastewater discharge, 96.6% of the 88 observations from May 1989 to October 1998 meet (*i.e.*, are less than) the F&W single sample maximum criterion of 2,000 units per 100 mL. The geometric mean of fecal coliform bacteria measurements for this station is 145 units per 100 mL, below the F&W geometric mean criterion of 200 per 100 mL for June through September. At station FM2, below Five Mile Creek Waste Water Treatment Plant, 94.3% of the 87 observations from June 1989 to October 1998 have bacteria counts less than the F&W single sample maximum criterion of 2,000 per 100 mL. The geometric mean of measurements for this station is 232 per 100 mL for all observations, which is less than the F&W geometric mean criterion of 1,000 per 100 mL outside the swimming season. However, the geometric mean between June and September of 363 per 100 mL exceeds the F&W geometric mean criterion of 200 per 100 mL for this period of time. The exceedances of F&W fecal coliform criteria are generally not indicative of significant sewage treatment problems in this segment, yet appear largely attributable to the upstream Waste Water Treatment Plant. Optimization of Five Mile Creek Waste Water Treatment Plant's existing chlorination process would likely reduce fecal coliform levels to the necessary levels.

Criteria for toxic pollutants protect the waters for aquatic life survival (acute criteria) and propagation (chronic criteria) as well as human health from the consumption of aquatic organisms. Acute aquatic life criteria and human health criteria apply both to the A&I and F&W use; however, the F&W use also has chronic aquatic life criteria. Reported concentrations of copper, cyanide, mercury, and zinc occasionally exceed the acute and chronic aquatic life criteria at both stations. Reported concentrations of lead occasionally exceed the chronic criterion at both stations and arsenic concentrations occasionally exceed the human health (organisms only) criterion at both stations. In particular, reported concentrations of cyanide frequently exceed the chronic aquatic life criterion at both stations.

Both stations are downstream of facilities that discharge some of these pollutants found to be exceeding the ambient criteria. However, for other of these pollutants, there are no records indicating a discharge of such pollutants is occurring from the permitted facilities. As a result, some pollutants may continue to exceed criteria even with control of these permitted wastewater discharges, and additional controls on other sources might be needed to meet the current A&I use. If additional controls on other sources are put in place to meet the current A&I use, EPA projects that these controls would also provide the reductions needed to attain the F&W use. Jefferson County is

currently under a 1995 Consent Agreement with U.S. EPA to eliminate combined sewer overflow (CSO) discharges and frequent bypasses of the treatment facilities. However, there are no data on the relative contributions of the latter in relation to loadings from urban areas.

While conditions in this segment of Five Mile Creek indicate some ambient toxic pollutant exceedances, the stream segment meets the F&W criteria in most cases. EPA recognizes that additional controls on sources of certain pollutants would need to be implemented to meet criteria applicable to both the current A&I use as well as the proposed F&W use. However, based on currently available information, implementation of such control measures has not been shown to be infeasible (impacts of achieving reductions through point source controls are discussed further in section V. below).

As noted above, assessments of riparian zone, habitat, biological health, and ambient water quality demonstrate that this segment of Five Mile Creek supports viable benthic macroinvertebrate and fish communities and has physical parameters similar to those found to occur in the portions of Five Mile Creek currently classified for the F&W use. Also, while the discharges to this segment have some impact on water quality, the information available to EPA supports the conclusion that additional control measures are feasible. EPA believes that the currently available information as a whole supports the attainability of the F&W use. Therefore, EPA is proposing to reclassify this segment of Five Mile Creek to the F&W use designation.

C. Request for Comment and Data

EPA believes the F&W proposed designated use is appropriate considering the requirements of the CWA and the data and information available to EPA at the time of today's proposal. EPA acknowledges that additional data and information may exist which may further support or contradict the attainability of a F&W proposed designated use. Accordingly, the Agency will evaluate any new data and information submitted to EPA by the close of the public comment period with regard to designating the use for this stream segment. Based on that evaluation of any new data or information, EPA will make a final decision whether the F&W designated use in today's proposal is appropriate and consistent with the CWA. To assist the Agency in ensuring that this decision is based on the best available information, the Agency is soliciting additional information. To assist commenters, the following paragraphs provide guidance on the type of information EPA considers relevant.

Specifically, EPA is seeking information that would assist in determining (1) whether the designated use identified above is currently being attained or has been attained in the past; (2) whether natural conditions or features or human caused conditions prevent the attainment of this use and whether these conditions can or cannot be remedied or would cause more environmental damage to correct than to leave in place; or (3) 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 in-stream data for the Five Mile Creek stream segment subject to this proposal reflecting either natural conditions (*e.g.*, in-stream flow data or other data relating to stream hydrology) or human-caused conditions which cannot be remedied and which prevent the F&W use or water quality criteria from being attained; (2) any available in-stream biological data; (3) any chemical and biological monitoring data that verify improvements to water quality as a result of treatment plant/facility upgrades and/or expansions; and (4) any in-stream data reflecting nonpoint sources of pollution or best management practices that have been implemented for nonpoint source control.

Water Quality Modeling Information: (1) Any data or information on analytical models which can be used to evaluate or predict stream quality, flow, morphology; (2) any physical, biological or chemical characteristics relating to designated uses; and (3) the results of any such models which can be used to evaluate the attainment of designated uses.

Economic Data: Any information relating to costs and benefits associated or incurred as a result of facility or treatment plant expansions or upgrades. This information includes: (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 F&W is an appropriate use designation for the segment of Five Mile Creek from Newfound Creek to Ketona, based upon the information available to EPA at this time. EPA will consider any data or information submitted to the Agency by the close of the comment period in developing a final rule. However, it is possible that data and information may become available after completion of this rulemaking that will be relevant to the water quality standards for this stream. If EPA ultimately promulgates a Federal F&W use designation for this stream, there are several mechanisms available to ensure that the use and its implementing mechanisms appropriately take into account future information. These mechanisms are described below.

A. Designating Uses

States have considerable discretion in designating uses. The State may find that changes in use designations are warranted. As stated above, EPA will review any new or revised use designations adopted by the State for Five Mile Creek to determine if the standards meet the requirements of the CWA and implementing regulations. If approved, EPA would subsequently initiate withdrawal of any final Federal water quality standards which may result from today's proposal. However, the State must conduct a use attainability analysis as described in 40 CFR 131.3(g) when adopting water quality standards which result in uses which do not include fishable/swimmable, or which result in subcategories of uses which require less stringent criteria.

B. Site-Specific Criteria

The State may also develop data which indicates 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 which are based on sound scientific rationale and which contain 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, or establish narrative criteria where numerical criteria cannot be determined, or to supplement numeric criteria. See 40 CFR 131.11(b).

Currently, EPA guidance describes three procedures for States and Tribes to follow in deriving site-specific criteria. These are the Recalculation Procedure, the Water-Effect Ratio Procedure and the Resident Species Procedure. These procedures can be found in the Water Quality Standards Handbook (EPA–823–B940005a, 1994). EPA also recognizes there may be naturally occurring concentrations of pollutants which may exceed the national criteria published under section 304(a) of the CWA, and has issued policy guidance on establishing site specific aquatic life criteria equal to natural background. (Memo from Tudor T. Davies, Director, Office of Science and Technology to the Regional Water Management Division Directors, and State and Tribal Water Quality Management Program Directors, dated November 5, 1997).

Today's proposed rule does not limit Alabama's ability to modify the criteria applicable to the Federal F&W use.

C. Variances

Water quality standards variances are another alternative which can provide a facility with a limited period of time to comply with water quality standards. EPA recognizes that Alabama has chosen not to include a variance procedure in its State standards. EPA is providing an explanation of this procedure as additional information the public may find useful, and as discussed below, 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 in circumstances which would 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 which removes a use designation for a water body, a water quality standards variance 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 a designated aquatic life use is currently precluded because of high levels of metals from past mining activities which cannot be remediated in the short term, but it is expected that water quality will eventually improve, a temporary variance may be granted to a discharger with relaxed criteria for such metals, until remediation progresses and the use becomes attainable. The practical effect of such a variance is to allow a permit to be written using less stringent criteria for the problem parameters, while encouraging ultimate attainment of the underlying standard. All other parameter/pollutant criteria for that use would remain in effect. A water quality standards variance provides a mechanism for assuring compliance with sections 301(b)(1)(C) and 402(a)(1) of the CWA that require NPDES permits to meet applicable water quality standards, while granting temporary relief to point source dischargers for certain parameters.

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 data and information that may become available in the future. Therefore, EPA is proposing to authorize the Region 4 Regional Administrator to grant water quality standard variances where a permittee submits data indicating that the F&W designated use is not attainable for any of the reasons in 40 CFR 131.10(g). This variance procedure will apply to the F&W use for the specific segment of Five Mile Creek in today's proposal.

Today's proposed rule spells out the process for applying for and granting such variances. The Administrator is delegating to the Regional Administrator the authority to propose and grant these variances. This delegation should expedite the processing of variance requests. EPA is proposing to use informal adjudication processes in reviewing and granting variance requests. That process is contained in 40 CFR 131.34(b)(4) of today's proposed rule. Because water quality standard variances are revised water quality standards, the proposal provides that the Regional Administrator will provide public notice of the proposed variance and provide for an opportunity for public comment. EPA understands that variance related issues can often arise in the context of permit issuance. EPA Region 4 will work closely with the State permitting authorities to ensure that variance requests will be considered in conjunction with the State NPDES permitting process.

The proposed variance procedures require an applicant for a water quality standards variance to submit a request to the Regional Administrator (or his delegatee) with supporting information. 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 implementing 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

It has been determined that this proposed rule is not a ''significant regulatory action'' under the terms of Executive Order 12866. EPA's proposed rule does not itself establish any requirements directly applicable to regulated entities. While implementation of today's rule may ultimately result in some new or revised permit conditions for some dischargers, EPA's action today does not impose any requirements on dischargers. Nonetheless, EPA is attempting, within the limits of these uncertainties, to make an estimate of the potential costs which might ultimately result from this rule-making. The following is a summary of the economic analysis (EA) prepared for this proposed rule. Further discussion is

included in the full EA, which is included in the docket for this rule-making.

A. Method for Estimating Costs

Before estimating potential costs, EPA performed a screening-level analysis of use attainability to determine both the achievability of criteria that support the F&W use for the stream where they are exceeded, and the sources of pollutants that would need to be controlled. EPA then estimated costs by evaluating National Pollutant Discharge Elimination System (NPDES) permitted dischargers to the specific segment of Five Mile Creek. The table below lists the municipal and industrial facilities potentially affected by a change in designated use. All three facilities are classified as major dischargers (municipal facilities discharging more than one million gallons per day (mgd) or industrial facilities discharging toxic pollutants in toxic amounts).

FIVE MILE CREEK FACILITIES POTENTIALLY AFFECTED BY THE USE UPGRADE

Facility (capacity)	NPDES No.
ABC Coke (0.12 mgd)	AL0003417
Five Mile Creek Wastewater Treatment Plant (WWTP) (20 mgd).	AL0026913
Sloss Industries (3.2 mgd)	AL0003247

In evaluating these facilities, EPA used data and information from its Permit Compliance System and publicly available data sources, modeling results provided by ADEM, and information on facility treatment processes provided by EPA Region IV. EPA estimated revised facility effluent limits for conventional pollutants if data indicate that the segment is not currently attaining the State's receiving water criteria for the higher use designation, and the facility currently has permit limits for the pollutants. For toxic pollutants, EPA calculated revised effluent limits for pollutants exhibiting reasonable potential to exceed the State's criteria for each use (following Alabama's implementation procedures for developing effluent limits). EPA made a determination that reasonable potential exists to contribute to the exceedence of the water quality standard if the receiving water concentration that would result from discharge of a facility's maximum effluent concentration (MEC) would cause an exceedance of any of the State's criteria (*e.g.*, acute or chronic) for toxic pollutants.

For some toxic pollutants, NPDES permits for the two industrial facilities currently include only effluent guideline-based limits that represent best available technology (BAT). Section 301(b)(1)(c) of the CWA and EPA regulations at 40 CFR 122.44(d) require that more stringent limits be included in permits where necessary to meet applicable water quality standards. Therefore, EPA calculated water quality-based limits that would be necessary to achieve the A&I acute aquatic life and human health criteria. These effluent limits are consistent with the current A&I use, but have not been implemented in facility permits. EPA then estimated revised effluent limits for all toxic pollutants that would apply under a F&W classification based on acute and chronic aquatic life, and human health criteria (for consumption of organisms only). EPA used the two-value steady-state wasteload allocation procedure specified in EPA's Technical Support Document for Water Quality-based Toxics Control to make these calculations. EPA compared the MEC to the projected limits to estimate the pollutant loading reductions necessary for compliance. This conservative approach maximizes the estimate of necessary pollutant loading reductions.

EPA estimated the most cost-effective control strategy for each facility to achieve compliance. To estimate the potential costs associated with the controls, EPA used readily available documentation and updated these sources to 2002 dollars.

B. Estimated Costs Associated With Fish and Wildlife (F&W) Use

Point source dischargers to the 19.4 mile segment of Five Mile Creek are not meeting their current permit limits (some limits developed only to meet BAT and other limits developed to meet criteria to protect the current State designated use of A&I), and would require additional controls to come into compliance with these limits. Further, some of the current permit limits for these facilities are not reflective of the current (A&I) use designation, and additional costs would be incurred to meet limits based on the current A&I use designation. The annual costs to meet the State's current use designation of A&I for Five Mile Creek, which are not part of the costs for today's proposal to establish the F&W use designation for the same waterbody, could range from $4 million to $10 million.

Once in compliance with limits to meet the current A&I use, only process optimization is needed for these facilities to achieve the incremental pollutant loading reductions associated with a F&W use. The table below summarizes the estimated annual costs of these controls for today's proposal. In addition, based on ambient data for several pollutants, it appears that additional controls on other sources might be needed to meet criteria to protect the current A&I use in a more consistent manner. EPA projects that these controls would also provide the reductions needed to similarly meet the criteria associated with the F&W use.

ESTIMATED ANNUAL INCREMENTAL FACILITY COSTS TO ACHIEVE F&W USE CLASSIFICATION

[Millions of 2002 $]

Facility	Total capital	Annual capital [1]	O&M	Total annual
ABC Coke	0.11	0.011	0.0	0.011
Five Mile Creek WWTP	0.36	0.034	0.0	0.034
Sloss Industries	0.26	0.025	0.0	0.025
Total	0.73	0.070	0.0	0.070

[1] Reflects capital costs annualized at 7% over 20 years.

Toxic Pollutants. Analysis of effluent monitoring data indicates that ABC Coke and Sloss Industries would require additional controls to meet A&I acute aquatic life or human health criteria for PAHs, cyanide, ammonia, and metals. Both facilities would comply with projected effluent limits to meet F&W criteria with optimization of the treatment processes needed to reduce pollutant levels to the projected A&I limits.

Conventional Pollutants. Fecal coliform bacteria counts in Five Mile Creek exceed the geometric mean criterion of 200 per 100 ml for a F&W use. The most likely source of fecal coliform bacteria is the Five Mile Creek WWTP. This facility does not have a limit for fecal coliforms and there are no effluent data for this pollutant. However, optimization of the existing chlorination process at the facility would likely reduce fecal coliform bacteria in the effluent to levels that would meet the F&W criterion.

C. Estimated Pollutant Loading Reductions Associated with F&W Use

The table below summarizes the pollutant loading reductions needed for ABC Coke, Sloss Industries, and Five Mile Creek WWTP to comply with projected effluent limits associated with F&W use. For comparison, also shown are the reductions necessary to comply with the current designated use of A&I.

POLLUTANT LOADING REDUCTIONS ASSOCIATED WITH THE USE CLASSIFICATIONS

[lb/yr]

Pollutant	Use classification	
	A&I [1]	F&W [2]
Ammonia-N	185,668	0
Benzo(a)Anthracene	152	0
Benzo(a)Pyrene	201	0
Benzo(b)Fluoranthene	211	0
Benzo(k)Fluoranthene	79.1	0
Chrysene	160	0
Total Copper	261	0
Total Cyanide	6,772	157
Total Lead	34.4	356
Total	193,539	513

[1] Based on reducing the maximum effluent concentration to the current or projected limit.

[2] Load reduction of zero indicates that the projected A&I and F&W limits are equal.

VI. 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.

VII. Executive Order 13045—Children's Health

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.

VIII. 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 a water body segment in Alabama. Further, the proposed rule would not substantially affect the relationship of EPA and the State of Alabama, or the distribution of power or responsibilities between EPA and the various levels of government. The proposed rule would not alter the State's authority to issue NPDES permits or the State's considerable discretion in implementing these water quality standards. Further, this proposed rule would not preclude Alabama 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 State government in developing this rule. Prior to this proposed rulemaking action, EPA had numerous phone calls, meetings and exchanges of written correspondence with Alabama's Department of Environmental Management to discuss EPA's concerns with the State's water quality standards, possible remedies for addressing the disapproved sections of the water quality standards, the use designation in today's proposal, and the Federal rulemaking process. The data and descriptive information from these exchanges was essential to evaluating and analyzing the attainment of use designations for the stream segment in today's proposal. For a more detailed description of EPA's interaction with the State on this proposed rulemaking, refer to section II.C.2. EPA will continue to work with the State before finalizing these water quality standards for Alabama. 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.

IX. 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 9, 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 India 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 Jefferson County, Alabama, where Five Mile Creek is located. Thus, Executive Order 13175 does not apply to this rule.

In the spirit of Executive Order 13175, and consistent with EPA policy to promote communications between EPA and tribal governments, EPA specifically solicits comment on this proposed rule from tribal officials.

X. Executive Order 13211—Energy

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.

XI. 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 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 are listed in 40 CFR part 9 and 48 CFR chapter 15.

XII. Regulatory Flexibility Act as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996

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).) The Agency is thus certifying that today's proposed rule will not have a significant economic impact on a substantial number of small entities, within the meaning of the RFA.

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 National Pollutant Discharge Elimination System (NPDES) program, which limits discharges to navigable waters except in compliance with an EPA permit or a permit issued under an approved State program. 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 implements through the NPDES permit process. The State has discretion in deciding how to meet the water quality standards and in developing discharge limits as needed to meet the standards. While the State'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, the State of Alabama 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 State will have a number of discretionary choices associated with permit writing. While Alabama's 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.

XIII. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 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 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 any State, local or Tribal governments or the private sector; rather, this rule proposes designated uses for Five Mile Creek in Alabama which, when combined with State adopted water quality criteria, constitute water quality standards for that stream. The State 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. Moreover, any water quality standards, including those proposed here, apply broadly to dischargers and are not uniquely applicable to small governments. Thus, this proposed rule is not subject to the requirements of section 203 of UMRA.

XIV. 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.

XV. Endangered Species Act

Section 7 of the Endangered Species Act (ESA) requires Federal agencies, in consultation with the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS), to ensure their actions are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of habitat of such species which have been designated as ''critical.'' Consultation is designed to assist Federal agencies in complying with the requirements of section 7 by supplying a process within which FWS and NMFS provide such agencies with advice and guidance on whether an action complies with the substantive requirements of ESA.

There are no Federally listed species known to utilize this segment of Five Mile Creek and there is no critical habitat designated in Five Mile Creek. Therefore, EPA is not conducting section 7 consultation on this rulemaking with the FWS.

XVI. Plain Language

Executive Order 12886 directs each agency to write all rules in plain language. We invite your comments on how to make this proposed rule easier to understand. For example:

—Have we organized the material to suit your needs?
—Are the requirements in the rule clearly stated?
—Does the rule contain technical language or jargon that isn't clear?
—Would a different format (grouping and order of sections, use of headings, paragraphing) make the rule easier to understand?
—Would more (but shorter) sections be better?
—What else could we do to make the rule easier to understand?

List of Subjects in 40 CFR Part 131

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

Dated: October 15, 2002.

Christine Todd Whitman,

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.*

2. Section 131.34 is added to subpart D to read as follows:

§ 131.34 Alabama.

(a) *Use designations for surface waters.* In addition to the State adopted use designations, the following water body segment in Alabama has the beneficial use designated in this paragraph (a).

Basin	Stream segment	From	To	Classification
Warrior	Five Mile Creek	Newfound Creek	Ketona	Fish & Wildlife.

(b) *Water quality standard variances.* (1) The Regional Administrator, EPA Region 4, is authorized to grant variances from the water quality standards in paragraph (a) of this section where the requirements of this paragraph (b) 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) Subject to paragraph (b)(2) of this section, 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 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.

(4) *Procedures.* An applicant for a water quality standards variance shall submit a request to the Regional Administrator of EPA Region 4. 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 (b)(3) of this section. If the Regional Administrator preliminarily determines that grounds exist for granting a variance, he 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 Alabama'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. 02–26845 Filed 10–22–02; 8:45 am]

BILLING CODE 6560–50–P