

Topic #3 – Status of federally promulgated “fish consumption” designated uses in 40 C.F.R. § 131.31(b).

Background: In September 1993, EPA disapproved portions of Arizona’s surface water quality standards, including the absence of “fish consumption” as a designated use for certain water in Arizona. For the standards to be approvable, EPA stated that Arizona must either revise its standards to apply the “fish consumption” use to the identified waters *or* submit use attainability analyses (“UAAs”) for the identified waters. In response to this disapproval, ADEQ developed UAAs showing that it was not appropriate to assign the “fish consumption” designated use to ephemeral or effluent dominated waters in Arizona. EPA approved those UAAs in November 1995.

In April 1996, ADEQ finalized revisions to Arizona’s water quality standards that made additional changes to the standards in response to EPA’s “fish consumption” disapproval, including submittal of UAAs that addressed the remaining waters that EPA had identified as still at issue with respect to “fish consumption” designation. While recognizing that Arizona had appeared to have addressed all of EPA’s concerns, EPA nevertheless adopted 40 C.F.R. § 131.31(b), which listed fourteen waters in Arizona subject to the “fish consumption” designated use, because it was under court order to issue a final rule by the end of April 1996. 61 Fed. Reg. 20686-20694 (May 7, 1996). EPA noted in the preamble to the final 1996 rule that it would “expeditiously” remove those designations if and when it approved the submitted UAAs showing that the “fish consumption” use was not attainable in the waters (see 61 Fed. Reg. at 20687).

In 1998, EPA issued an approval letter with respect to the “fish consumption” UAAs submitted by ADEQ in April 1996 that addressed and resolved the fish consumption status of all of the segments in 40 C.F.R. § 131.31(b), with the exception of Davidson Canyon. ADEQ resolved Davidson Canyon in its 2002 triennial review by segmenting Davidson Canyon into appropriate reaches, with the non-ephemeral reaches carrying the fish consumption use. The Davidson Canyon segmentation and use designations were approved by EPA as part of its review of the 2002 triennial review (see correspondence dated October 22, 2002, which approved the 2002 rulemaking except for specific items, none of which related to the Davidson Canyon segmentation).

Recommendation: The above described developments obviate the need to add the “fish consumption” use to any of the waters identified in 40 C.F.R. § 131.31(b), making the regulation obsolete. This is because either (1) ADEQ has added the “fish consumption” use to the identified waters or portions thereof, or (2) ADEQ has prepared, and EPA has approved, UAAs justifying not adding the “fish consumption” use to waters (or portions thereof) where it is not designated.

Consistent with EPA’s promise to “expeditiously” remove the “fish consumption” use designations once the alleged issue was resolved, ADEQ should request that EPA initiate action to rescind 40 C.F.R. § 131.31(b).