

Advanced Notice of Proposed Rule Making - NYS Triennial Review of Water Quality Standards

SUMMARY

This Advanced Notice of Proposed Rule Making (ANPRM) is issued by the New York State Department of Environmental Conservation (the Department) to solicit early public engagement on the Department's Triennial Review of Water Quality Standards (WQS). Clean Water Act (CWA) section 303(c) and 40 CFR 131.20 include requirements for states to perform a formal regulatory review of WQS every three years, known as the Triennial Review. The Triennial Review is an opportunity for the Department to integrate the best available science and methodology into WQS to protect the waters of the State. Regulations subject to Triennial Review are any that direct the water quality standards, waterbody classification, and antidegradation policies and actions of the State and are predominantly detailed in Parts 700-706 of Title 6 of New York Codes, Rules, and Regulations (NYCRR) :

<https://www.dec.ny.gov/regs/2485.html>.

Since the Triennial Review rule making will amend State Regulations, there are requirements for public hearings per the State Administrative Procedure Act (SAPA). The Department is seeking public input through the ANPRM ahead of any rule making proposal or related hearings. The ANPRM will allow NYSDEC to provide a more dynamic response to public input. 40 CFR Part 25 supports utilizing this ANPRM to solicit public input ahead of any rule making proposals.

The Department drafted this ANPRM as a series of questions, the answers to which may assist the Department in determining WQS priorities and needs. These questions are summarized in the “Consolidated Questions and Submittal Instructions” section at the end of this ANPRM. To provide ample opportunity for public participation and input, the Department is allowing 180-days for public input, starting May 8, 2024. Input must be submitted according to the instructions provided in this ANPRM. Feedback provided in response to this ANPRM is not a comment for the purposes of rule making under SAPA but may inform the development of express terms and other documents supporting future rule makings, in the event the Department proceeds with a Notice of Proposed Rule Making.

The Department plans to hold three public information meetings to assist the public in submitting input in response to the ANPRM. Details on time, place, and attending these meetings will be provided on the Department’s website <https://dec.ny.gov/environmental-protection/water/water-quality/standards-classifications/ANPRM-triennial-review-of-water-quality-standards>. The Department anticipates holding at least one public information meeting after the close of the ANPRM, but before any related rule making proposals prompted by the ANPRM, to discuss the feedback and input received during the ANPRM. Details on time, place, and attending these meetings will be provided on the Department’s website <https://dec.ny.gov/environmental-protection/water/water-quality/standards-classifications/ANPRM-triennial-review-of-water-quality-standards>.

BACKGROUND

In accordance with the Clean Water Act (CWA), WQS are the regulatory and scientific foundation of protecting the State's waters from pollution and degradation. New York State Environmental Conservation Law (ECL) Articles 3, 15, and 17 provide statutory authority for adoption of water quality regulations and standards. ECL section 17-0101 specifically declares public policy to "maintain reasonable standards of purity of the waters of the state consistent with public health and public enjoyment thereof, the propagation and protection of fish and wildlife, including birds, mammals and other terrestrial and aquatic life, and the industrial development of the state, and to that end require the use of all known available and reasonable methods to prevent and control the pollution of the waters of the state of New York."

WQS are set to protect the best uses assigned to a waterbody. To simplify the assignment of best uses to waterbodies, the Department established a classification system for waters of the State. The classification system allows assignment of best uses (i.e., source of drinking water, swimming, fishing, etc.) to waters of the State without listing each waterbody and assigning best uses individually. See the table below for a summary of water Classes and best uses.

Water Class	Best Uses
Fresh Waters	
A, AA, A-S, AA-S	Source of water supply, primary contact recreation (swimming), secondary contact recreation (boating), fishing
B	Primary contact recreation (swimming), secondary contact recreation (boating), fishing
C	Fishing
D	Fishing ¹
Saline Waters	
SA	Shellfishing, primary contact recreation (swimming), secondary contact recreation (boating), fishing ¹
SB	Primary contact recreation (swimming), secondary contact recreation (boating), fishing
SC	Fishing
I	Secondary contact recreation (boating), fishing
SD	Fishing ¹
Ground Waters	
GA (fresh)	Source of water supply
GSA (saline)	Source of mineral water supply, conversion to fresh potable water
GSB (saline)	Receiving water for wastes

¹Fishing here includes survival only.

WQS are derived per pollutant, per best use, to identify the amount of a pollutant that can be present in the water column and still allow for the safe practice of the best

use. WQS can be expressed as either numerical (i.e., minimum, maximum) or narrative (i.e., “none in amounts that will impair...”) criteria. Numeric and narrative WQS are found in regulation at 6 NYCRR Part 703.

WQS, associated with a water through its classification, define the State’s water quality goals for that waterbody.

The WQS “Type” associates the individual WQS, sometimes referred to as criteria, to the best uses they protect. As such, WQS Types have distinct relationships to waterbody classes. The WQS Type also indicates what procedures were used to derive that WQS. The WQS Types used by the Department are detailed in the table below with the associated best uses, location of the derivation procedures in regulation, and applicable classifications.

WQS Type	Type (abbreviation)	Best Uses ¹	Derivation Procedures (6 NYCRR...)	Applicable Classes
Aesthetic (Food Source)	E(FS)	Fishing	702.14	A, AA, A-S, AA-S, SA, B, SB, C, SC, I, D, SD

² The shellfishing, primary contact recreation (swimming), and secondary contact recreation (boating) best uses do not have a WQS type associated with them. The standards to protect these best uses can be found in 6 NYCRR 703.4. WQS to protect the shellfishing best use are derived based on 6 NYCRR Part 47. The derivation of WQS to protect primary and secondary contact recreation can be found in 6 NYCRR 702.12.

Aesthetic (Water Source)	E(WS)	Source of water supply	702.14	A, AA, A-S, AA-S, GA
Aquatic (Acute)	A(A)	Fishing	702.9, 706	A, AA, A-S, AA-S, SA, B, SB, C, SC, I, D, SD
Aquatic (Chronic)	A(C)	Fishing	702.9, 706	A, AA, A-S, AA-S, SA, B, SB, C, SC, I
Health (Fish Consumption)	H(FC)	Fishing	702.8	A, AA, A-S, AA-S, SA, B, SB, C, SC, I, D, SD
Health (Water Source)	H(WS)	Source of water supply	702.2 – 702.7	A, AA, A-S, AA-S, GA
Wildlife	W	Fishing	702.13	A, AA, A-S, AA-S, SA, B, SB, C, SC, I, D, SD

Triennial Review Process and Timing

The Department anticipates it may make amendments to the following State regulations as part of the Triennial Review rule making, which include, but are not limited to:

6 NYCRR

- Part 609: Reclassification of Waters
- Part 700: Definitions, Samples and Tests
- Part 701: Classifications – Surface Waters and Groundwaters
- Part 702: Derivation and Use of Standards and Guidance Values
- Part 703: Surface Water and Groundwater Quality Standards and Groundwater Effluent Limitations
- Part 704: Criteria Governing Thermal Discharges
- Part 705: References
- Part 706: Appendices for Parts 700 – 705

A component of the Triennial Review rule making includes updating definitions, WQS derivation procedures, and other technical requirements of the WQS program detailed in regulation, may occur independently of the ANPRM. These amendments are necessary because USEPA requirements and the best available science for deriving WQS have changed since the Department's last Triennial Review. Since the State's WQS derivation process is detailed in regulation, those procedures in Part 702 must be updated before adopting any new WQS/criteria. The Department cannot propose and adopt new WQS based on derivation procedures not formally vetted through the State rule making process. As such, no updates to WQS/criteria in Part 703 will occur during this portion of the Department's Triennial Review rule making. The Department anticipates making such updates, using the updated WQS derivation procedures and the feedback of the ANPRM in subsequent portions of the Triennial Review rule making. The Department cannot restrict the public input received through the Triennial ANPRM

process, but notes the revisions to Part 702 are largely based on Federal requirements and public input on standard setting procedures may not result in material changes.

Additionally, in Governor Hochul's 2024 State of the State announcements² the Department was tasked with issuing phosphorus guidance values to support efforts to reduce the frequency of harmful algal blooms. Per the State of the State, the guidance values must be proposed and finalized within calendar year 2024. The proposal of these phosphorus guidance values will therefore occur on a schedule independent of the ANPRM and subsequent Triennial Review. The Department will provide additional opportunity for public comment on that guidance in 2024.

The WQS/criteria updates to Part 703 will weigh feedback received through the ANPRM, available and verifiable scientific data, supplemental water quality information³, current USEPA 304(a) criteria recommendations, and overall benefit to the State and its residents to determine the regulatory amendments included in the rule proposal.

This ANPRM does not act to solicit requests for waterbody reclassification since the Department already collects such information on a continuous basis. Requests for reclassification can be made by submitting a completed [Water Reclassification Request Form \(PDF\)](#). Certain fresh and saline waters of the state are currently under consideration for reclassification.

² <https://www.governor.ny.gov/sites/default/files/2024-01/2024-SOTS-Book-Online.pdf>, page 100.

³ Supplemental water quality information may include, but is not limited to, data on alkalinity, temperature, dissolved organic carbon (DOC), hardness and pH in the ambient waters of the State. This data is used to apply certain WQS.

KEY CONCEPTS

The Department encourages all stakeholders and members of the public to consider the questions posed in this ANPRM and provide input. To facilitate productive feedback, the Department provides the following Regulatory Definitions (per 6 NYCRR 700.1):

- *Acute toxic effect* means an effect that usually occurs shortly after the administration of either a single dose or multiple doses of a chemical or other toxic pollutant.
- *Aquatic life* or *aquatic biota* means fish, shellfish and those species of wildlife and plants that spend at least part of their life in water.
- *Best usages* as specified for each class of water means those uses as determined by the commissioner in accordance with the considerations prescribed by the Environmental Conservation Law.
- *Chronic toxic effect* means an effect that is irreversible or progressive or occurs because the rate of injury is greater than the rate of repair during prolonged exposure to a chemical or other toxic pollutant.
- *Oncogenic effect* means the induction of tumors that has been demonstrated in:
 - (i) humans;
 - (ii) two mammalian species;
 - (iii) one mammalian species, independently reproduced;
 - (iv) one mammalian species, to an unusual degree with respect to incidence, latency period, site, tumor type or age at onset;

(v) one mammalian species, supported by positive results in short-term tests that are indicative of potential oncogenic activity; or

(vi) one mammalian species, supported by positive results for another substance for which similar oncogenic effects are anticipated because of similarity of functional groups or metabolic or toxicologic pathways.

- *Pollutant* means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, and industrial, municipal, and agricultural waste discharged into water.
- *Pollution* means the presence in the environment of conditions and/or contaminants in quantities of characteristics that are or may be injurious to human, plant, or animal life or to property or that unreasonably interfere with the comfortable enjoyment of life and property throughout such areas of the State as shall be affected thereby.
- *Primary contact recreation* means recreational activities where the human body may come in direct contact with raw water to the point of complete body submergence. Primary contact recreation includes, but is not limited to, swimming, diving, water skiing, skin diving and surfing.
- *Secondary contact recreation* means recreational activities where contact with the water is minimal and where ingestion of the water is not probable. Secondary contact recreation includes, but is not limited to, fishing and boating.

- *Standards* mean such measures of purity or quality for any waters in relation to their reasonable and necessary use as may be established by the department pursuant to section 17-0301 of the Environmental Conservation Law.
- *Wildlife* means wild game and all other animal life existing in a wild state, except fish, shellfish and crustacea.

Additional information regarding NYS Water Quality Standards and Classifications, including pollutants currently regulated by NYS WQS may be viewed on the Department's website: <https://dec.ny.gov/environmental-protection/water/water-quality/standards-classifications>

CONSOLIDATED QUESTIONS AND SUBMITTAL INSTRUCTIONS

Input in response to the ANPRM must be submitted to the Department by midnight on November 4, 2024.

Input received at the ANPRM public meetings will also be recorded and given equal consideration.

Individuals seeking to submit responses to the consolidated questions below may do so by filing electronically via the following form:

<https://arcg.is/1OPGDq1>

Email submissions in response to this ANPRM may be sent to:

WQSRulemakings@dec.ny.gov

Mail submissions may also be sent to:

New York State Department of Environmental Conservation

ATTN: Gwendolyn Temple

625 Broadway, 4th Floor

Albany, NY 12233-3500

When responding via email or mail please include your name, title (as applicable), affiliation (as applicable), email, mailing address, and relevant comments for consideration including sufficient data and information as justification for the proposed amendments to WQS.

Provided below is the consolidated list of information being requested through this ANPRM. For any pollutant or condition recommended for a new or modified WQS, please include references to scientific literature or other resources documenting impacts to best uses linked to that pollutant or condition.

1. Certain pollutants may cause fish flesh consumed by humans to have a poor taste or odor. What new pollutants should the Department consider regulation of to protect the fishing best use and limit poor taste and odors in fish consumed by humans? These would be new standards with an E(FS) WQS Type.
2. Among the pollutants the Department currently regulates with an E(FS) WQS Type to prevent aesthetic impacts to fish flesh, should the Department consider modifying any of those WQS to better protect the fishing best use and limit poor taste and odors in fish consumed by humans?

3. Certain pollutants may cause drinking water to have a poor taste or odor. What new pollutants should the Department consider regulation of to protect the drinking water supply best use and limit poor tastes and odors in drinking water? These would be new standards with an E(WS) WQS Type.
4. Among the pollutants the Department currently regulates with an E(WS) WQS Type to prevent aesthetic impacts to drinking water, should the Department consider modifying any of those WQS to better protect the drinking water supply best use and limit poor tastes and odors in drinking water?
5. Certain pollutants may cause acute toxic effects to fish and aquatic life, such as increased mortality or permanent biological damage. What new pollutants should the Department consider regulation of to protect the fishing best use and limit acute toxicity to aquatic life? These would be new standards with an A(A) WQS Type.
6. Among the pollutants the Department currently regulates with an A(A) WQS Type to prevent increased mortality or permanent biological damage to fish, should the Department consider modifying any of those WQS to better protect the fishing best use and limit acute toxicity to aquatic life?
7. Certain pollutants may cause chronic toxic effects to fish and aquatic life, such as inhibited spawning or reproduction. What new pollutants should the Department

consider regulation of to protect the fishing best use and limit chronic toxicity to aquatic life? These would be new standards with an A(C) WQS Type.

8. Among the pollutants the Department currently regulates with an A(C) WQS Type to prevent impacts to fish spawning or reproduction, should the Department consider modifying any of those WQS to better protect the fishing best use and limit chronic toxicity to aquatic life?
9. Certain pollutants may be toxic to humans that consume fish caught in NY waters. What new pollutants should the Department consider regulation of to protect the fishing best use and limit toxicity to humans that consume fish? These would be new standards with an H(FC) WQS Type.
10. Among the pollutants the Department currently regulates with an H(FC) WQS Type to prevent toxic or oncogenic effects in humans that consume fish caught in NY waters, should the Department consider modifying any of those WQS to better protect the fishing best use and limit toxicity to humans that consume fish?
11. Certain pollutants may have toxic or oncogenic effects on humans when present in drinking water. What new pollutants should the Department consider regulation of to protect the drinking water supply best use and limit human exposure to toxic and oncogenic effects? These would be new standards with an H(W) WQS Type.

12. Among the pollutants the Department currently regulates with an H(W) WQS Type to prevent toxic or oncogenic effects in humans from drinking water, should the Department consider modifying any of those WQS to better protect the drinking water supply best use and limit human exposure to toxic and oncogenic effects?
13. Certain pollutants may have toxic effects on wildlife that live in or near the water and consume aquatic life as part of their basic diet. What new pollutants should the Department consider regulation of to protect the fishing best use and limit toxicity to wildlife that consume aquatic life? These would be new standards with an W WQS Type.
14. Among the pollutants the Department currently regulates with an W WQS Type to prevent toxic effects on wildlife that live in or near the water and consume aquatic life as part of their basic diet, should the Department consider modifying any of those WQS to better protect the fishing best use and limit toxicity to wildlife that consume aquatic life?
15. Certain pollutants, both biological and chemical, can cause death or illness in human consumers of shellfish. What new pollutants should the Department consider regulation of to protect the fishing best use and limit toxicity to humans that consume shellfish?

16. Among the pollutants the Department currently regulates, both biological and chemical, that can cause death or illness in human consumers of shellfish, should the Department consider modifying any of those WQS to better protect the fishing best use and limit toxicity to humans that consume shellfish?
17. Certain pollutants, mainly pathogenic organisms, can cause illness to humans engaged in swimming and other recreational activities that involve full submersion of the body and/or high probability of water ingestion. What new pollutants or pollutant indicators should the Department consider regulation of to protect the primary contact recreation (swimming) best use?
18. Among the pollutants the Department currently regulates, mainly pathogenic organisms that can cause illness to humans engaged in swimming and other recreational activities that involve full submersion of the body and/or high probability of water ingestion, should the Department consider modifying any of those WQS to better protect the primary contact recreation (swimming) best use?
19. Certain pollutants, mainly pathogenic organisms, can cause illness to humans engaged in boating and other recreational activities that involve incidental contact with the water and/or low probability of water ingestion. What new pollutants or pollutant indicators should the Department consider regulation of to protect the secondary contact recreation (boating) best use?

20. Among the pollutants the Department currently regulates, mainly pathogenic organisms that can cause illness to humans engaged in boating and other recreational activities that involve incidental contact with the water and/or low probability of water ingestion, should the Department consider modifying any of those WQS to better protect the secondary contact recreation (boating) best use?

21. Considering the Department's narrative WQS found in 6 NYCRR 703.2, are there any additions or modifications to narrative WQS that would enhance the protections of the State's waters? Narrative WQS do not have WQS Types or explicitly assigned best uses.

22. Considering the Department's "Water quality standards for pH, dissolved oxygen, dissolved solids, odor, color and turbidity" found in 6 NYCRR 703.3, are there any additions or modifications to these WQS that would enhance the protections of the State's waters? The WQS for pH, dissolved oxygen, dissolved solids, odor, color, and turbidity do not have WQS Types or explicitly assigned best uses.

23. Are there current NYS WQS that do not properly account for other environmental conditions when determining/evaluating how best uses may be impacted by a pollutant? This could include:

- Natural or background conditions of waters with respect to a pollutant,

- Chemical or physical properties of the water that may increase or decrease the toxicity or bioavailability of a pollutant.

24. Are there any policies or procedures in 6 NYCRR Part 609 or Parts 700-706 that limit the effectiveness of the Department in implementing the WQS program and protecting the waters of the State?

25. Considering all questions presented above, is there any ranking or prioritization among the WQS upgrades identified that the Department should consider?

Please reference responses to question numbers where applicable.