

# WILLIAMS MULLEN

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October 24, 2016

**VIA ELECTRONIC MAIL AND HAND DELIVERY**

Andrew Edwards  
Bureau of Water  
South Carolina Department of Health and Environmental Control  
2600 Bull Street  
Columbia, SC 29201

Re: Notice of Public Hearing and Opportunity for Public Comment:  
R. 61-68 Water Classifications and Standards

Dear Mr. Edwards:

Please find enclosed public comments submitted by Springs Industries, Inc. ("Springs") concerning the above-referenced proposed revisions to water quality standards ("Revised WQS") in South Carolina. Because required studies have not been completed, the Revised WQS are premature and should be held in abeyance or vacated until requirements under State law can be completed. Springs request these comments be incorporated into the administrative record for the Revised WQS.

Sincerely,  
WILLIAMS MULLEN



Ethan R. Ware

ERW:kc  
Enclosure

cc: Nick Odom  
Springs Industries, Inc.

PUBLIC COMMENT:  
PROPOSED AMENDMENT OF  
REGULATION R.61-68, WATER CLASSIFICATION  
STANDARDS

The South Carolina Department of Health and Environmental Control (“DHEC”) proposes to amend water quality standards in regulation R. 61-68, Appendix, for the State of South Carolina (“Revised WQS”). South Carolina State Register, Vol. 40, Issue No. 29, p. 74 (September 23, 2016.) The Revised WQS incorporate by reference certain numeric human health criteria for ninety-four (94) chemical pollutants published by the United States Environmental Protection Agency (“EPA”) at 80 Federal Register 36986 (June 29, 2015) (“EPA Criterion”). DHEC did not conduct studies as to the applicability or accuracy of the Revised WQS for waters of the State in South Carolina. “DHEC Regulatory Development Update,” p. 16 (September 23, 2016) (Revised WQS incorporates EPA Criterion by reference) and 80 Federal Register at 36989, Vol. 1 (EPA Criterion drafted without performing studies, “using externally peer-reviewed information sources” only). Despite the lack of water quality studies, the Revised WQS will be 1,000 times more stringent than existing water quality standards. Cf. e.g., 80 Federal Register at 36987, Table 1, 1, 2, 4 Trichlorobenzene (Revised WQS of 0.071 ug/L) and S.C. Codes Ann. R. 61-68, Appendix, No. 92, 1, 2, 4 Trichlorobenzene (current WQS of 35 ug/L and MCL of 70 ug/L). No economic or technological feasibility is considered by DHEC or EPA in proposing Revised WQS. 80 Federal Register at 36987, Col. 2. EPA did not intend states to adopt Revised WQS verbatim; rather, EPA intended states to conduct state-required studies first, which have not yet been performed in South Carolina.

STANDARD OF REVIEW

In order to be valid, regulations promulgated by an agency or department in South Carolina must be promulgated in accordance with terms of the implementing statute:

Boards of health and other sanitary authorities have no inherent legislative power; they cannot by their rules and regulations enlarge or vary the powers conferred on them by the law creating them and defining their powers, and any rule or regulation which is inconsistent with such law, or which is antagonistic to the general law of the state, is invalid.

30A C.J.S., Health and Environment, §14, adopted by South Carolina Attorney General, S.C. Attorney Gen. Op. No. 89-61 (May 17, 1989)(emphasis added). Therefore, the Revised WQS may not be promulgated, if they violate substantive or procedural requirements of South Carolina law.

WITHOUT PROPER STUDIES BY DHEC OR EPA INTO HUMAN HEALTH CRITERION  
AND ECONOMIC EFFECTS ON INDUSTRY, THE REVISED WQS VIOLATE  
APPLICABLE LAW AND INTENT OF EPA

Proposed Revised WQS cannot be incorporated by reference into South Carolina water quality standards. The State did not perform required studies on each chemical pollutant listed in the Revised WQS, and no consideration is given to economic impacts or technological feasibility of the Revised WQS. DHEC seeks to enforce as a regulation “information” intended only as a “consideration” by EPA.

The Clean Water Act (CWA), 33 U.S.C.A. §§ 1251 to 1388, requires each state promulgate water quality standards sufficient “to restore and maintain the chemical, physical and biological integrity of the nation’s waters.” 33 U.S.C.A. § 1251(a). According to South Carolina Courts, DHEC must develop and promulgate the water quality standards in this State, not EPA:

The CWA, thus, places the promulgation and implementation of water quality standards squarely within the jurisdiction of state law (citations omitted).

Western Carolina Regional Sewer Authority, et al. vs. South Carolina Department of Health and Environmental Control, et al, 1999 WL 1016064, p. 6 (S.C. Admin. Law Judge Div.).

EPA may periodically publish new and revised human health criteria to help DHEC develop numeric criteria, but the EPA Criterion are merely non-regulatory guidance. 80 Federal Register at 36987, Col. 3. “EPA’s recommended criteria [to be considered by DHEC] do not substitute for the CWA or regulations, nor are they regulations themselves.” Id.

Notwithstanding EPA’s guidance, to become a state numeric water quality standard and criterion in this State, the Revised WQS must be adopted in accordance with State statutes, not simply incorporated into State law.

Because EPA’s criteria documents are nonregulatory, they are not subject to the...requirements of the Federal Administrative Procedures Act, 5 U.S.C.A. §553, et seq. However, for criteria to become binding elements of State water quality standards, the CWA requires that they be adopted by [South Carolina DHEC] in accordance with State laws governing how regulations become laws....”

Western Carolina, 1999 WL 1016064, p. 9; see also, 40 CFR 25.10(b).

Revised WQS are authorized by the South Carolina Pollution Control Act (PCA), S.C. Code Ann. §§48-1-10 to 350, and the South Carolina Administrative Procedures Act (APA), S.C. Code Ann. §§1-23-10 to 380, in South Carolina. Existing water quality standards state “[t]hese regulations [are] promulgated pursuant to authority of the [PCA]”, S.C. Code Ann. R61-68.A.1, and the APA provides the procedures for proposing and adopting any State regulation, S.C. Code Ann. §1-23-110 to 150, 380. In fact, South Carolina courts have expressly stated:

1. Water quality standards are a creation of State law, not Federal law, Western Carolina, 1999 WL 1016064, p. 30; and
2. Both the PCA and APA govern promulgation of Revised WQS into State law, Id. (APA is applicable) and Id. at pp. 5-6 (PCA is applicable).

Because the Revised WQS do not satisfy requirements of the PCA and APA, they must be held in abeyance or otherwise vacated until DHEC complies with statutory requirements.

**Comment No. 1: Revised WQS Violate PCA Because Proper Studies Have Not Been Performed by the State**

Revised WQS proposed by DHEC may not be promulgated into final regulations, because “proper study” of each human health criterion has not been completed by DHEC. DHEC may not simply incorporate “informational sources” by reference into State water quality standards under the PCA.

The PCA requires DHEC (not EPA or another agency) perform a proper study for each water quality standard and human health criterion before a Revised WQS can be adopted for streams or groundwater in this State:

In order to attain the objectives of this chapter, [DHEC] after proper study . . . shall adopt rules and regulations and classification standards.

S.C. Code Ann. § 48-1-60 (emphasis added). The Revised WQS are to be regulations and will comprise water quality standards for each stream. Conversely, the EPA Criterion, which DHEC seeks to incorporate into State regulations, are not regulations or standards; they are merely technical information for “consideration” by DHEC when performing DHEC’s required studies of water quality in State law. 80 Federal Register at 36987, Col. 2 (“EPA’s recommended criteria provide technical information for states to consider in adopting water quality standards. . . .”). According to the PCA, individual studies for each EPA Criterion are necessary because the human health effects of each chemical pollutant are different and may affect water quality in a variable way:

It is recognized, due to variable factors, no single standard of quality and purity of the environment is applicable to all ambient air, land, or waters of the State.

Id. (emphasis added). Therefore, absent specific and “proper study” of each human health criterion in the Revised WQS by DHEC, the agency may not incorporate the Revised WQS into State regulations or “classification standards” for waters of the State.

The water quality studies required by PCA are not inconsequential, either. First, there is no provision authorizing DHEC to copy another agency's sources in place of performing the proper studies necessary for each human health criteria. That is all DHEC is proposing here: incorporating technical information sources into State Law without regard for its usefulness to waters of the State.

Second, the PCA states the DHEC studies must meet certain minimum criteria to comply with requirements of PCA. "In adopting the classification of waters and the standards of purity and quality, consideration must be given [to the following for each individual pollutant for which a Revised WQS is considered]":

1. Health effects of the chemical on the waters of the State, given the size, depth, surface area, volume, direction, flow, gradient and temperature of each stream;
2. Suitability of the area for receiving the specific chemical pollutants;
3. Effects the pollutants may have on use of the streams.

S.C. Code Ann. § 48-1-80. To date, DHEC has done none of this<sup>1</sup>.

The Revised WQS have not been the subject of any studies related to waters of the State into which the pollutants may be released:

1. DHEC performed no studies prior to proposing adoption of the Revised WQS for any pollutants covered by the regulations and merely proposes to incorporate by reference the Revised WQS given by EPA in the June 29, 2016, Federal Register;
2. EPA did not perform any studies at all in developing the new Revised WQS and simply "updated the human health criteria using externally peer-reviewed information sources", 80 Federal Register at 36989, Col. 1;
3. EPA developed the Revised WQS from unidentified "science documents" related to certain toxicity values and bioaccumulation, which DHEC has not

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<sup>1</sup> To the extent DHEC asserts these factors are part of an applicant's permit review process, the position contradicts the PCA. The PCA expressly requires the studies during the regulatory process, not during permitting.

reviewed or questioned and is not related to the factors required by PCA, §48-1-80(1) to (4); and

4. Generic information cited by EPA to develop the Revised WQS is limited to “scientific judgments,” “health toxicity values,” and “bioaccumulation factors,” and no proper studies related to characteristics of waters and alleged toxicants were performed. 80 Federal Register 36987, Col. 2.

**Comment No. 2: Revised WQS Violate PCA and APA Because No Consideration is Given to Economic Impact**

In order to be consistent with State law, Revised WQS must also take into account economic impact of the Revised WQS on industry in the State. The Revised WQS do not do that.

Under the PCA, all water classification regulations must be “consistent with . . . maximum employment [and] industrial development of the State.” S.C. Code Ann. § 48-1-20. In formulating Revised WQS into regulations, “consideration shall be given to \* \* \* encouraging the most appropriate use of the lands . . . for . . . industrial purposes [and] uses which have been made or may be made . . . for industrial consumption. . . .” S.C. Code Ann. § 48-1-80(2),(3).

As written, Revised WQS violate this requirement:

[Revised WQS] criteria do not reflect consideration of economic impacts or the technological feasibility of meeting pollutant concentrations in ambient water.

80 Federal Register 36987, Vol. 2 (emphasis added). Since DHEC is not conducting separate analysis of the listed EPA Criterion, no DHEC evaluation of the economic impacts has been or may be conducted. Given the Revised WQS reduce acceptable discharge levels of chemical pollutants by 1,000 times and the regulated community subject to the regulation is that same industry protected by the PCA, the economic impact on industry is verifiable, but not accounted for in the Revised WQS.

Moreover, the APA mandates the agency determine “substantial economic impact” of the Revised WQS on State industry through preparation of preliminary and final assessment reports. S.C. Code Ann. § 1-23-115(B). Because the Revised WQS incorporate the EPA guidance verbatim into regulations and the EPA human health Criterion do not include economic impact analysis, DHEC is foreclosed from completing a preliminary or final assessment report without review and evaluation of the original EPA Criterion sources, which it has not done.

Finally, DHEC may not claim the economic analysis occurs through a preliminary or final assessment required by the General Assembly. The PCA is quite specific: regardless of an economic assessment under the APA, no regulation may adopt water standards, which do not allow for continued use of waters of the State for industrial purposes. Restricting wastewater discharge levels by 1,000 times will do just that.

### **Comment No. 3: Not Intended for States to Incorporate by Reference**

EPA’s published water quality criteria are suggestions, not requirements. However, EPA makes clear its recommended criteria should not be incorporated by reference or substituted for a State’s analysis because EPA did not account for local and regional information about the waters of the State.

EPA states in the Federal Register Notice, its recommended criteria only provide information for “consider[ation] [by DHEC]...in adopting water quality standards.” 80 Federal Register 36987, Col. 2. “EPA’s recommended criteria do not substitute for the CWA or [State] regulations themselves . . . [and] do not impose legally binding requirements.” Id. at 36987, Col. 3. Rather, a State must adopt water quality criteria protective of their designated uses. EPA Office of Water Office of Science and Technology, EPA 822-R-15-001, EPA Response to Scientific Views from the Public on Draft Updated National Recommended Water Quality



Criteria for the Protection of Human Health, § 5.1.1, p. 34 (June 2015). “Criteria must be based on a sound scientific rationale and contain sufficient parameters or constituents to protect the designated uses” for each waterbody of a given state. Id.


To that end, EPA stated in a telephone conference recently, the Revised WQS are proposed merely for the State to determine if further research or studies are necessary for any or all of the ninety four (94) chemicals with revised criterion. States have discretion to adopt criteria on a case-by-case basis, which differ from EPA’s guidance. Id. at § 5.3.1, p. 37. EPA’s recommended Criterion are general in nature and based “solely on data and scientific judgments,” but do not account for local and regional data nor “reflect consideration of economic impacts or technological feasibility.” Id.

Therefore, South Carolina must analyze the recommended criteria with respect to its own waters of the State and their applicable uses, including accounting for local or regional data prior to adopting any proposed numerical limit. The General Assembly provided funding and authority to perform these specific studies. S. C. Code Ann. §48-1-50(6), (20), (21).

#### REQUESTED ACTION

Because the Revised WQS severely restricts existing human health criteria necessary to obtain a permit to operate industry in South Carolina, it is requested Revised WQS be held in abeyance or vacated pending completion of proper studies required by State law.

Submitted this 24<sup>th</sup> day of October, 2016.

  
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