

The text of this letter is as received. DWQ inserted the comments in the margin noting if the March 2010 draft of the Antidegradation Implementation Guidance was revised in response to the comments.

January 13, 2010

Christopher Bittner
Department of Environmental Quality
Division of Water Quality
288 North 1460 W
Salt Lake City, UT 84116

Via email

Dear Chris,

Thank you for the opportunity to comment on the draft *Utah Antidegradation Reviews: Implementation Guidance* (December 15, 2009). We wholeheartedly support Utah's action to create a more meaningful implementation process for the antidegradation policy, and look forward to working with you and the water quality standards work group on these issues.

Below you'll find comments on the draft document, arranged by section. Where possible, we attempted to provide suggestions for "fixes" or actual proposed language for your consideration. However, some of our comments are frankly open questions for consideration by the Division and/or the water quality standards work group. As you are well aware, many of these issues are being wrestled with for the first time in Utah so will benefit from an open and frank discussion.

Thank you for all your time and effort on involving stakeholders in the development of Utah's antidegradation implementation procedures. We will all benefit from this process through a more meaningful, informed policy.

Section 2 Comments

2.1.1 Category 1 Waters

We suggest adding a reference here to our proposed Section 7.0, which would address implementation of Category 1 protections.

Comment [C1]: Text was expanded but a new section was not added.

2.1.3: Category 3 Waters

We suggest editing this paragraph to make the intention of Tier 2 protections/Category 3 waters clearer. We suggest walking the reader through the four requirements of Tier 2 (or in this case, Level II) review. Those are 1.) ensuring existing uses are protected (see our comments on section 3.0, which suggest adding a brief discussion about how the Division does that), 2.) demonstrating that the degradation is necessary (alternatives review), 3.) showing the activity supports important social or economic development in the area where the waters are located and 4.) ensuring all statutory and regulatory requirements will be achieved in the watershed. This will be clearer than the

current, slightly choppy presentation, and provides a nice set up for the following sections – the Division could even refer to each by number here.

Comment [c2]: Adopted except “watershed” changed to “area of discharge” for consistency with R317

2.2.1 Material to Include with a nomination

The first paragraph in this section refers to evidence "that all applicable criteria are met." This is not a regulatory requirement for Category 1 or 2 waters. The rule simply states: "Waters of high quality which have been determined by the Board to be of exceptional recreational or ecological significance or have been determined to be a State or National resource requiring protection..." High quality does not necessarily mean "pristine" and the "or" in this language is important. Good water quality should be a consideration, but failure to meet a criterion or criteria should not bar consideration of the ecological and recreational significance or the State or National resource qualities.

Comment [c3]: Adopted

The first paragraph also discusses providing evidence that the biological composition is "statistically indistinguishable from physically comparable reference sites." See previous paragraph. In addition to the points made above, this might be a more important consideration for waters of ecological significance but would be irrelevant for a recreational resource, etc. Even for water nominated due to ecological significance, a water might be important because, just as one example, it serves as endangered species habitat without being of reference site quality.

Comment [c4]: Adopted with revisions

This also begs the question of if and how Utah officially designates reference sites that could be used in this process. If so, the state may want to consider nominating these reference reaches for Category 1 protection in the near future, in order to protect this important management tool.

2.2.2 Considerations for appropriate data and information to include with nominations

Again, the reference to "pristine" water quality is not in keeping with the larger definition and view of Category 1 waters. One factor for consideration may be "outstanding water quality" (rather than pristine quality, which essentially no longer exists in the United States, and perhaps the world) but it is not a requirement for protection.

Comment [c5]: Adopted

2.2.3 Public comment process for proposed reclassifications

We appreciate the agencies attention to public notice for Category reclassifications. Public input will be an important part of this process. However, we suggest adding an option for public hearings in additional locations if there is significant public interest and/ resource is of regional or statewide interest. For example, protecting an outstanding trout fishery in central Utah may be of as much – or even of more – interest to anglers in northern or southern Utah as it is to those in the local area. Proposed reworking of the draft language follows:

Comment [C6]: Adopted

"All data and information submitted in support of reclassification will be made part of the public record. The proposed reclassification is a rule change, and as such will trigger normal public notice and comment procedures. In addition to the normal public comment period, the DWQ will hold at least one public meeting in the area near the nominated water. If the issues related to reclassification are regional or statewide in nature or of broader public interest, the Division will consider requests for public meetings in other locations. Comments received during this meeting will be compiled and considered along with the information submitted with the nomination will be submitted to appropriate local planning agencies."

2.2.4 Reclassification decision making process

Comment [C7]: Adopted

In the interest of transparency, we suggest adding the phrase "with documentation on decision points" to the following paragraph as noted:

"The final reclassification decision will be based on all relevant information submitted to or developed by the DWQ. All data will be presented and discussed with the Water Quality Standards Workgroup. The DWQ will then submit their recommendations with documentation on decision points to the Water Quality Board who will make a formal decision about whether to proceed with rulemaking."

In addition, the Division may want to consider establishing a timeline for the review of proposed reclassification and a list of the "decision points" for the nomination in order provide more transparency about the process.

Section 3 Comments

Section 3.0 generally

We suggest adding a discussion of Level 1 review, particularly guidance for utilizing the off-ramps, either before this section or as the introduction (which would require renaming section 3.0 something like "Antidegradation General Procedures for Category 3 Waters). This could be a fairly short section, but should describe how the Division ensures existing uses are protected (Tier 1 review) for all regulatory actions and provide some basic information about appropriate interpretation of the off-ramps from Level II review.

Comment [c8]: Some additional detail added

For example, see comments on section 3.1.4 for suggested text on providing guidance as to "temporary" degradation. In another example, it might be helpful to provide readers with guidance as to how to determine if fish spawning will not be impaired. Does the Division suggest an applicant consult with their staff? With the Division of Wildlife Resources? Are there others ways to demonstrate the applicant qualifies for this off-ramp? The guidance need not establish hard and fast rules, but should be a tool for applicants and the public as they interpret the regulations.

Comment [C9]: Adopted

Comment [C10]: Adopted

We have concerns about the manner in which parameters (pollutants of concern)/activities requiring a Level II review are addressed throughout sections 3.1.1 and 3.1.3. The proposal does not appear to be consistent with federal or state rules. We incorporate by reference U.S. EPA Region 8's good comments (January 6, 2010 letter from David Moon, U.S. EPA Region 8 to Christopher Bittner, Utah Division of Water Quality) on these two sections, and ask for clarification from the Division about these topics and the questions raised by U.S. EPA.

Section 3.1.4: Temporary or limited

We note that in order to be in keeping with Utah's regulations, this section should address situations where degradation is temporary AND limited (not or). We'd also suggest that the Division clarify what is meant by temporary with the following language: "As a general rule of thumb, temporary means days or months not years." This is appropriate "guidance" to provide that will help applicants interpret the regulations.

Comment [C11]: Adopted

Section 3.4.1: General permits

As discussed at the 1/12/2010 meeting with stakeholders and the Division, this section needs a lot of research and work. As written, we maintain it would not meet federal requirements. As a compromise, the participants suggested language to be used as a bridge in this version of the

Comment [C12]: The General Permit section is acknowledged to be incomplete in this draft

guidance while additional work is done on the issue. We have not yet seen this language, but generally support the ideas discussed.

Section 3.4.2: 401 certifications

As discussed at the 1/12/2010 meeting with stakeholders and the Division, this section needs a lot of research and work. As written, it is not clear how the approach meshes with state and federal antidegradation requirements. As a compromise, the participants suggested language to be used as a bridge in this version of the guidance while additional work is done on the issue. We have not yet seen this language, but generally support the ideas discussed.

Section 3.4.3: Individual stormwater permits

This exemption is not in keeping with the state's regulations. Individual stormwater permits may only be "off-ramped" if one of the factors in R317-2-3.5(b) is applicable. We request removal of the entire section.

Comment [C13]: Section was revised but is still incomplete.

3.5.1: Public notification process

We support the Division's suggestion that an earlier review of pollutants of concerns and alternatives may be conducted. In addition, this section should be expanded to include public notice guidelines for 404 and 401 activities.

Comment [C14]: No changes to this draft. The guidance already recommends additional public comment periods. Required public comment periods are held.

Section 4: Pollutants of concern

The relevance of several of the questions presented here are not clear. For example, neither federal nor state regulations allow consideration of public interest in determining which pollutants receive antidegradation review. In another example, it is unclear whether the question about expected exceedance of numeric standards has any relevance to a Level II review (and why only numeric?). The applicable test is whether or not a pollutant is off-ramped under R317-2-3.5(b).

Comment [C15]: No revisions were made because we believe this is a valid consideration for the Executive Secretary in deciding if an ADR should be conducted.

We incorporate by reference U.S. EPA Region 8's good comments (January 6, 2010 letter from David Moon, U.S. EPA Region 8 to Christopher Bittner, Utah Division of Water Quality) on Section 4, and ask for clarification from the Division about these topics.

Section 5.2: General Considerations for Selecting Treatment Alternatives

This section lists a number of considerations for alternative selection. We provide comments on several of these considerations below:

Consideration 1: Utah's antidegradation rule already address this issue at R317-2-3.5(c)(2). It is unclear how the approach described in the draft guidance interacts with the rule. We request clarification from the Division about their intention with this consideration.

Comment [C16]: Changed "will" to "may"

Consideration 2: We agree that alternatives should generally be limited to proven or piloted processes when considering "innovative or alternative treatment" options. However, the language in this section suggests that both the Division and the discharger must agree on what is proven or piloted. This is the Division's decision, although consultation with the discharger (and public input) should of course inform the decision.

Comment [C17]: No changes necessary.

Consideration 5: This consideration (cost) is addressed in our rule at R317-2-3.5(c)(2), which defines how cost factors in to the alternatives review. This consideration should be removed from the guidance as it appears to conflict with our rule but allowing removal of an alternative based on

Comment [C18]: Section previously revised, comment no longer applies.

"marginal improvement." Assimilative capacity is a valuable resource, so less-degrading alternatives should receive considerations within the structure of our regulations.

Consideration 6: This consideration addresses feasibility. We agree that truly infeasible alternatives should be removed from consideration and suggest that the Division consider starting with this consideration. For more ideas on defining feasibility and using it to create a strong but targeted list of alternatives for review, please see *Conducting a meaningful, efficient antidegradation alternatives analysis: a road map* (Merritt Frey, River Network and Brad Klein, ELPC, May 2009). We also suggest the Division add language here stressing the importance of documenting the basis for decisions about the infeasibility of alternatives, and including that information with the Level 2 review documents for public review.

Comment [C19]: Additional details added. Reference will be considered for future drafts

Section 5.3: Special Project-Specific Scoping Considerations

This section simply establishes a "de minimus" threshold for an antidegradation light approach. This is not in keeping with the state regulations, nor recent court cases and EPA communication. To disregard possible alternatives for avoiding degradation based on an arbitrary de minimus criterion is contrary to regulation.

Comment [C20]: No changes made pending discussions with Standards Workgroup

Instead of having smaller dischargers arbitrarily consider fewer alternatives, the burden of research, documentation and economic analysis may be logically less for a discharge with a smaller impact than for a larger one. For example, see language in Section 6.0: "As with the Alternatives Analysis portion of the ADR, the size and scope of the SEEI should be commensurate with the size of the proposed project. Also, it is in the best interest of the project proponent to make the SEEI as thorough as possible if the project is likely to be controversial."

5.6: Procedures for Evaluating the Preferred Alternative

A note in section 5.6.1 suggests more meat is needed in this section. Here is some suggested text to consider as a starting point:

Comment [C21]: Adopted

The ranking should be from the least-degrading to the most-degrading alternative. Creating a ranked hierarchy of alternatives helps to simplify the applicant's selection of a "preferred" alternative. By ranking alternatives in this way, the applicant can avoid having to perform a detailed economic analysis on the universe of available alternatives, instead focusing effort and energy on only the "top" or least-degrading alternative. In a following step the applicant either selects the "top" alternative as the "preferred" alternative or conducts a more detailed review to justify eliminating that alternative from further consideration (i.e. more than 20% more expensive reference in the regulation).

In many cases a less-degrading alternative will be less-degrading for all or most of the pollutants of concern, so the ranking will be straightforward. However, the applicant should identify situations in which different alternatives are more or less degrading for individual pollutants. In these cases, the applicant should identify and document its rationale regarding the alternative that – on the whole – is least-degrading.¹ The DWQ must review this ranking and use BPJ to endorse or change the preferred alternative.

¹ For example, alternative A might be least-degrading for TDS, but result in a more degradation than alternative B for selenium. If there were a downstream impairment for TDS, that might influence a decision that the overall least-

5.6.2 Final Review and Selection of the Preferred Alternative

Several of the times listed in this section would appear to require changes to our current rule or have a questionable connection to the concept of antidegradation. Items 4 & 5, which address Net Environmental Benefit, are not considered in our regulations. The Division cannot address this issue here without a rule change. It is not apparent to us how Item 7 is relevant to antidegradation, nor is it addressed in our rule.

Comment [C22]: Minor revisions to text. DWQ believes that these are relevant considerations and is seeking input from Standards Workgroup

Comments on Section 6

6.2 Important Considerations in Developing SEEIs

The main thrust of the SEEI is missing from this section. The decision to degrade to accommodate important social and economic development for the public (and not individuals or corporations) must be clearly justified. As stated by U.S. EPA:

“This provision is intended to provide relief only in a few extraordinary circumstances where the economic and social need for the activity clearly outweighs the benefit of maintaining water quality above that required for “fishable/swimmable” water, and both cannot be achieved. The burden of demonstration on the individual proposing such activity will be very high.”

U.S. EPA’s Water Quality Standards Handbook, page 4-7, emphasis added.

Please consider adding the following text after the current last **paragraph**:

Comment [C23]: Adopted with minor editorial revisions.

“The most important general criteria to keep in mind is that the SEEI is about **proving** the degradation will support important social and economic development in the local area. The SEEI thus may not be about the economic benefits to an individual or corporation. Instead, the SEEI is about considering – and supporting an informed public discussion and decision about – the pros and cons of allowing water quality degradation.

Comment [C24]: Accepted with minor editorial changes

For example, the Washington State implementation guidance manual states that one of the “key purposes” of the socioeconomic evaluation is to “set the stage for a public discussion on the relative merits and tradeoffs associated with allowing water quality to be degraded.”² If the lowering of water quality resulting from the preferred alternative is not in the overriding public interest, then the agency must deny the permit. If the lowering of water quality is found to be in the overriding public interest, this finding is documented and submitted for public comment along with the draft permit incorporating the preferred alternative.

So, we suggest the following types of social harms and benefits for consideration in a SEEI.”

Also, please consider adding the following factor to the list of **factors**:

Comment [C25]: Adopted

degrading alternative in our example was alternative A. On the other hand, if there was no impairment downstream and the assimilative capacity reduction for TDS was 10 percent and the selenium reduction in assimilative capacity was 75 percent, the preferred alternative might be alternative B.

² Washington State Supplementary Guidance p. 13 (2005).

"6.2.7 Preservation of assimilative capacity

Review the pros and cons of preserving assimilative capacity for future industry and development. Applicants are encouraged to talk with local communities about their development plans, and should summarize the communities' position on utilizing assimilative capacity for the proposed project versus future plans or needs."

6.3 Review and approval of SEEIs

The language in this section – particularly the first sentence – completely turns the SEEI process on its head, and directly contradicts U.S. EPA guidance on the matter as presented earlier. The default is NOT in favor of the discharger, but rather in favor of preserving higher water quality – that is abundantly clear in the federal and state language. Furthermore, the "necessity" of the discharge is considered during the alternatives review. The SEEI process is about proving that the discharge will support important economic and social development in the local area, and is in no way a default decision.

In addition, the guidance must make clear that the SEEI process is not about proving economic benefit to the discharger, but rather to the communities and people in the local area. According to the federal antidegradation rules, the socio-economic test must at minimum address effects in the area "where the waters are located."

Interim Economic Guidance for Water Quality Standards fleshes out the U.S. EPA's position in as much detail as can be found:

"One important factor is defining the geographical area in which the impacts will occur. In the case of municipal pollution control projects, the affected community is most often the immediate municipality. The relevant geographic area for evaluating the importance of a private-sector development varies with each situation. The area will typically be determined by the area in which the majority of its workers live and where most of the businesses that depend on it are located. In either case, the geographical area considered must include "...the area in which the waters are located." (40 CFR 131.12 (a)(2)) There are no simple rules for defining the relevant area or community; the decision is based on the judgement (sic) of the applicant and state, subject to EPA review."³

6.5 Public comment

We suggest clarifying that a summary of the findings of the antidegradation review must be included in the permit statement of basis and draft permit, along with information on how to request the full antidegradation review (including alternatives review and SEEI information). If the full antidegradation review is requested by a commenter and not supplied in a timely manner, the guidance should suggest that the Executive Secretary has the discretion to extend the comment period.

Comment [C26]: Text was revised to "public projects" from "projects"

Comment [C27]: Agree, the word "public" projects added

Comment [C28]: Reference to be added in future draft

Comment [C29]: No changes to the text because DWQ believes current public comment process adequately addresses.

Comment [C30]: Disagree

³ Section 5.3.a as accessed at <http://www.epa.gov/waterscience/standards/econworkbook/chaptr5.html> November 16, 2009.

Suggested Section 7.0

Comment [C31]: No additional section added but text was revised.

We also suggest adding a Section 7.0 titled "Implementation Procedures for Category 1 Waters"

This section could provide basic implementation direction to augment the rule language on Category 1 waters. It need not be long, but it should provide brief background on Category 1 waters (Tier 3 waters or Outstanding National Resource Waters in the federal structure) direction on new and expanded discharges to Category 1 waters (barred) and discharges to tributaries of Category 1 waters. Suggested text for this section follows:

"As described in section 2.1.1 of this guidance, Category 1 waters receive the highest level of protection from degradation in Utah. The federal regulations that Category 1's protections derive from state:

"Where high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected."ⁱ

In a nutshell, this status (called Outstanding National Resource Water in the federal structure or Category 1 in Utah) is designed to protect the water quality of our most outstanding waterbodies by controlling discharges to those waters. In guidance, the Environmental Protection Agency (EPA) interprets "shall be maintained and protected" as follows:

"EPA interprets this provision to mean no new or increased discharges to ONRWs and no new or increased discharge to tributaries to ONRWs that would result in lower water quality in the ONRWs. The only exception to this prohibition, as discussed in the preamble to the Water Quality Standards Regulation (48 F.R. 51402) permits States to allow some limited activities that result in temporary and short-term changes in the water quality of ONRW."ⁱⁱ

So once designated it is clear that new and expanded discharges directly to the Category 1 river, lake or wetland are prohibited and that discharges to tributaries may not lower the water quality (but may be allowed if they match background concentrations in the waterbody)."

Thank you again for undertaking this challenging project. The Division's work to better outline their antidegradation procedures will result in better protections for public health and for wildlife. Despite the challenges of working through the many questions and issues related to this policy, we can all agree this is an outcome worth working hard to achieve.

Sincerely,

Merritt Frey
River Network

ⁱ 40 CFR 131.12(a)(3)

U.S. EPA, *Water Quality Standards Handbook*, Section 4.7. As accessed 4/10/2009 at <http://www.epa.gov/waterscience/standards/handbook/chapter04.html#section7>.