

## **State of Washington WQS Rule Language Concerning Antidegradation Review of General Permits**

(6) General permit and water pollution control programs are developed for a category of dischargers that have similar processes and pollutants. New or reissued general permits or other water pollution control programs authorized, implemented, or administered by the department will undergo an analysis under Tier II at the time the department develops and approves the general permit or program.

(a) Individual activities covered under these general permits or programs will not require a Tier II analysis.

(b) The department will describe in writing how the general permit or control program meets the antidegradation requirements of this section.

(c) The department recognizes that many water quality protection programs and their associated control technologies are in a continual state of improvement and development. As a result, information regarding the existence, effectiveness or costs of control practices for reducing pollution and meeting the water quality standards may be incomplete. In these instances, the antidegradation requirements of this section can be considered met for general permits and programs that have a formal process to select, develop, adopt, and refine control practices for protecting water quality and meeting the intent of this section. This adaptive process must:

(i) Ensure that information is developed and used expeditiously to revise permit or program requirements;

(ii) Review and refine management and control programs in cycles not to exceed five years or the period of permit reissuance; and

(iii) Include a plan that describes how information will be obtained and used to ensure full compliance with this chapter. The plan must be developed and documented in advance of permit or Program approval under this section.

**In a December 19, 2006 letter, the State of Washington's Department of Ecology provided additional information to U.S. EPA Region 10 regarding how antidegradation requirements are implemented for general permits.**

Excerpt from the December 19, 2006 letter from Washington DEQ to EPA

General permits are applied to a category of dischargers that have discharges that are similar enough in nature to be treated the same as far their permit requirements to meet the water quality standards, regardless of their geographic location (unless specified). In Washington, as in other states, individual facilities covered under a general permit do not go through facility-specific or site-specific analysis. These permits are developed and applied such that anyone eligible for coverage will receive a permit with requirements that will bring them into compliance with the water quality standards, including antidegradation requirements.

The permit itself is developed to comply with both Tier I and Tier II antidegradation requirements. During the development or re-issuance of a general permit, Ecology

will assess the anticipated level of degradation due to new or expanded discharges that are likely to be authorized by the general permit, and that level of degradation will be taken into account during the antidegradation review of the general permit. The permit or fact sheet will contain a determination whether or not the lowering of water quality from the anticipated discharges is necessary and in the overriding public interest.

Application of Tier II antidegradation requirements also occurs during the public review process. Public notice and comment opportunity occurs: 1) at the time a general permit is first developed, 2) each time the general permit is reissued (every five years), and 3) each time a facility applies for coverage under the general permit. A list of the facilities applying for coverage along with a list of the potentially affected water bodies will be public noticed each time a permit is reissued and each time that a facility applies for coverage under a general permit. The public notice will occur in both a local paper and on Ecology's webpage. The notice will identify the facilities requesting coverage, the receiving water bodies they may affect, and the fact that general permit conditions were established with the expectation that the facilities covered will meet water quality standards; including the antidegradation requirements. A contact name for obtaining more information on the antidegradation review will also be included.

Ecology will specifically include an opportunity for the public to challenge whether any of the facilities applying for coverage under the permit are appropriate based on concerns that they do not meet the state's antidegradation regulations. Any facility that would result in a lowering of water quality that is not determined to be in the public interest would be denied coverage under the general permit by Ecology and would be required to seek coverage under an individual permit.

**In a May 2, 2007 letter, EPA Region 10 approved revisions to Washington water quality standards, including the provision quoted above addressing antidegradation review of general permits**

Excerpt from the May 2, 2007 EPA Region 10 Action Letter

**EPA ACTION:** EPA approves the provision for Tier II review of general permits as consistent with 40 CFR § 131.12(a)(2). This provision requires that Tier II reviews be conducted at the time the State develops and approves the general permit or program.

EPA's approval of this provision differs from positions that EPA has taken in the past with regard to Tier II review at the general permit issuance stage. A brief discussion describing past actions that EPA has taken on Tier II review of general permits at the general permit issuance stage, and EPA's rationale for approving Washington's provision, is provided below.

### ***Previous EPA Statements Regarding Tier II Antidegradation Requirements and General Permits***

EPA has stated that conducting a Tier II antidegradation review at the time of general permit issuance would be difficult. *See* Final Reissuance of NPDES Storm Water Multi-Sector General Permit for Industrial Activities, 65 Fed. Reg. 64746 (Oct. 30, 2000). Specifically, EPA responded in 2000 to a commenter concerned with how Tier II review would be conducted in relation to activities under the NPDES Storm Water Multi-Sector General Permit for Industrial Activities by stating the following:

The commenter correctly recognizes the difficulty in determining what defines "necessary to accommodate important economic or social development" in accordance with 40 CFR Section 131.12(a)(2). By [regulation], this determination involves public participation, the assurance that water quality will be protected, and several other factors. EPA would have to modify the permit for each discharge in question in order to comply with 40 CFR Section 131.12(a)(2). Individual considerations such as these are contrary to the concept of a general permit. In addition, public participation would be impossible since the permit issuance authority would not know about the particular discharge to Tier II waters before a NOI [notice of intent] was submitted. Therefore, a facility operator must seek coverage under an individual permit to discharge to Tier II waters under 40 CFR Section 131.12(a)(2)'s allowable degradation provisions to satisfy the requirements for public participation and protection of water quality. The only discharges allowed coverage under today's permit are those which do not degrade the use of a Tier II water below its existing levels, even though those existing levels exceed levels necessary to support propagation of fish, shellfish and wildlife and recreation in and on the water.

65 Fed. Reg. 64736, 64793-94. In addition, in the *Final NPDES General Permits for Water Treatment Facility Discharges in the States of Massachusetts and New Hampshire*, 65 Fed. Reg. 69000 (November 15, 2003), EPA required each additional new or expanded facility seeking coverage under the general permit to first undergo individualized antidegradation review.

### ***West Virginia Tier II Antidegradation Procedures***

EPA departed from these previous statements when it approved the State of West Virginia's antidegradation implementation procedures on November 26, 2001. West Virginia had adopted an antidegradation implementation procedure stating that "[r]egulated activities that are granted coverage by a WVNPDES general permit will not be required to undergo a Tier II antidegradation review as part of the permit registration process." In approving West Virginia's procedure, EPA stated that it was possible for the Tier II antidegradation review to occur at either the general permit issuance stage or the individual notice of intent stage. With regard to the earlier statements made by the Agency, EPA argued that those statements regarding other general permits were inapposite and that the September 2000 Storm Water Multi-

Sector General Permit covered discharges from many industrial facilities in numerous states, such that EPA could not make a blanket antidegradation determination for so many discharges in such a large area in that case. In addition, EPA claimed that either approach is a permissible interpretation of EPA's antidegradation regulation. That is, while it was reasonable for the Agency to require Tier II review at the notice of intent stage, it is also reasonable simply to require antidegradation review on a general permit-wide basis.

### ***District Court Decision on EPA's approval of West Virginia's procedures***

On August 23, 2003, the U.S. District Court for the Southern District of West Virginia issued a decision regarding EPA's approval of West Virginia's methods for implementing its antidegradation policy. *Ohio Valley Environmental Coalition, et al. v. Horinko*, 279 F.Supp.2d 732 (S.D. W.Va. 2003). Specifically, the court held that EPA's approval of West Virginia's antidegradation implementation procedure allowing Tier II antidegradation reviews to be conducted during the general permit issuance stage rather than at the individual notice of intent stage was arbitrary and capricious. *Id.* at 763<sup>1</sup>.

In response to EPA's first argument that the Agency's earlier statements were inapposite, the court found that general statewide NPDES permits and general section 404 permits, like the September 2000 Storm Water Multi-Sector General Permit, also cover many separate discharges from different facilities in a large and varied geographic area. *Id.* at 760. The court found that EPA had not explained why the difficulties that were present in making blanket antidegradation determinations for the September 2000 Storm Water Multi-Sector General Permit were not also present for general permits in West Virginia. *Id.* The State could not know, the court held, the specific locations of the discharges that might be covered by the general permit because the locations are not known until individuals seek permission to discharge under the general permit. *Id.* at 761. The court asked if the State could determine, at the time the general permit is issued, whether a specific discharge will be associated with "important" economic or social development. *Id.* The court queried whether the State could determine, at the time the general permit is issued, whether the lowering of water quality would be "necessary" for such development. *Id.* And the court questioned if the State could conduct meaningful public participation before members of the public were aware of the nature and location of the specific discharges to be covered by the permit. *Id.*

---

<sup>1</sup> It is important to note that the West Virginia court agreed with EPA that the Agency's statements in its 1998 Advance Notice of Proposed Rulemaking ("ANPRM"), 63 Fed Reg. 36743, 36780 (July 7, 1998), in which EPA stated the Agency's position that States must apply antidegradation requirements to activities that are regulated under State or federal law, can reasonably be read to allow Tier II antidegradation review of a general permit at the general permit issuance stage. *Id.* at 759. The court disagreed with the plaintiffs, who had argued that EPA's statement in its ANPRM required Tier II antidegradation review of each individual use under that general permit. *Id.*

In summary, the court concluded that EPA had failed to offer a reasoned analysis, or a reasonable factual basis, to justify the change in its opinion that Tier II antidegradation review could not feasibly be performed at the general permit issuance stage. *Id.* at 761-62. However, the court noted that, inherent in the notion of an agency's discretion to interpret its own regulations is the idea that an agency may adopt any one of various reasonable interpretations of that regulation. *Id.* at 762. The court stated that an agency's prior choice of one reasonable interpretation does not preclude it from reconsidering its position in light of its ongoing experience and accumulated knowledge and adopting another reasonable interpretation. *Id.* That said, EPA's interpretation of its regulation must still be a reasonable one. *Id.*

### ***EPA's Basis for Approving Washington's procedures***

Since the court's decision in the West Virginia case, EPA has re-considered whether 40 CFR § 131.12(a)(2) could be satisfied by allowing States to conduct a Tier II antidegradation review at the general permit issuance stage. EPA hereby finds that such an approach is possible and could satisfy the requirements of the federal antidegradation regulation. Just as with other CWA requirements, and as the West Virginia court explained, there is no legal reason why States cannot comply with Tier II antidegradation requirements in a bundled manner as opposed to through an individual permit.<sup>2</sup>

Regarding EPA's statements in the context of earlier EPA-issued general permits, those statements reflect EPA's reasoning at that time for choosing not to conduct Tier II antidegradation review at the general permit issuance stage where EPA was the permit issuing authority. Either choice (i.e., conducting the review at the general permit issuance stage or at the individual Notice of Intent stage) is permissible and is consistent with EPA's regulations for approving water quality standards found at 40 CFR §§ 131.6 and 131.12.

EPA's antidegradation regulation for Tier II water bodies, at 40 CFR § 131.12, states:

(a) The State shall develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy pursuant to this subpart. The antidegradation policy and implementation methods shall, at a minimum, be consistent with the following:

\*\*\*

(2) Where the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public participation

---

<sup>2</sup> Note that whether the permit authority has reasonably conducted such a required Tier II review in issuing a particular general permit is an issue that a person may challenge (just as a person may challenge the reasonable application of any CWA requirement) in a permit. The possibility that a particular application of this provision may not be reasonable does not mean that the authorizing provision is inconsistent with the federal antidegradation regulation at 40 CFR § 131.12(a)(2).

provisions of the State's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully. Further, the State shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control.

EP A has now determined that it is possible for states (and EPA) to conduct a Tier II antidegradation review at the general permit issuance stage. Substantively, general permits are no different than individual permits; they must include all of the same types of permit limitations required to be included in individual permits. For example, in addition to general permits including mandatory technology-based requirements, as noted by the court in the West Virginia case, general permits must also contain, as needed, water quality-based effluent limits. 40 CFR § 122.28(a)(3). In addition, general permits must provide for public notice and comment. Under EPA's regulations, EPA-issued general permits are governed by 40 § CFR 122.28(b)(1), which cross-references all of the procedures, including notice and comment procedures, listed at 40 CFR part 124, which contains EPA procedures for issuing, modifying, revoking and reissuing or terminating NPDES permits. Included among the requirements for states to be authorized to administer the NPDES program is the requirement that states have legal authority to implement 40 CFR § 122.28(b)(1) and the notice and comment procedures at 40 CFR part 124. *See* 40 CFR § 123.25(a)(11), (26)-(34).

In the NPDES CWA section 402 discharge context, if a general permit were to apply to a particular industry statewide, independent of antidegradation requirements, the permit authority would be required to propose for public comment the area to be covered by the general permit and the proposed effluent limitations that would be authorized under such a general permit. Those proposed effluent limitations would be specific pollutant limits to be placed on each parameter in a discharge in order to comply with applicable technology-based requirements (e.g., best available technology or "BAT") and applicable state water quality standards.

As far as satisfying the requirements of 40 CFR § 131.12(a)(2), the permit authority could first identify and subject to public comment its determination of the high quality waters (if any) in the area to be covered by the general permit. Next, the permit authority could determine and subject to public comment its determination of whether the discharge limits it intends to propose would lower the quality of water in any high quality waters. This analysis would be subject to public comment in the permit process. Third, the permit authority, obtaining information as necessary from the permitted industry or industries, would conduct the Tier II antidegradation analysis - an analysis of reasonable alternatives to the discharge and a determination of whether any lowering of water quality in high quality waters would be "necessary

to accommodate important economic or social development in the area in which the waters are located."

As recommended by EPA in its July 7, 1998 ANPRM, the essence of finding that the limited lowering (still meeting water quality criteria and protecting applicable designated uses) is "necessary" is to "develop an analysis of pollution control/pollution prevention alternatives. By doing this, the State ensures that all feasible alternatives have been adequately evaluated, and that the least degrading reasonable alternative is implemented." 63 Fed. Reg. 36784. Further, in the ANPRM EPA stated that "EPA's current thinking is that determining the social and economic importance of a proposed activity is a public question best addressed by State, Tribal or local interests, perhaps as part of the development of a basin plan." Id.

Where the general permit is crafted to address a class of activities that are appropriately similar, the alternatives based on certain technologies or pollution prevention measures would be the same set of alternatives for all of the dischargers to be authorized under the general permit. And the finding of social or economic importance could be done with respect to a broader group of related dischargers over a broad geographic area, up to and including an entire state. Alternatively, the permit authority could choose to subcategorize different types of facilities and different types of water bodies within one general permit for separate "sub analyses" within the general permit. All of these analyses would be required to be subjected to public notice and comment and response by the permit authority. The reasonableness of this decision making, along with any other aspect of the general permit, would be subject to judicial review under applicable state permit procedures.

EPA finds that the Tier II antidegradation provision adopted by the State of Washington is consistent with 40 CFR § 131.12(a)(2). Washington's Tier II antidegradation provision specifically states that the Tier II review will occur at the time that the Department of Ecology develops and approves the general permit or program. On January 19, 2006, EPA received a letter from Washington's Department of Ecology that discussed how a Tier II antidegradation review would be conducted for general permits. In that letter, Washington explained that general permits are developed for a category of dischargers that have discharges similar enough such that their NPDES permit requirements are the same regardless of the geographic location of the discharge. Individual facilities do not undergo a site-specific analysis, rather the general permits are developed and applied such that any facility eligible for coverage will receive coverage under a general permit that contains requirements that will bring it into compliance with the applicable water quality standards, including antidegradation requirements.

Washington's letter also states that the general permit is developed to comply with Tier 1 (protection of existing uses, which is included in Tier II requirements) and Tier II antidegradation requirements. During the development or re-issuance of a general permit, Washington will assess the anticipated level of degradation due to new or expanded discharges to high quality (or Tier II) waters that are likely to be authorized

by the general permit, and that level of degradation will be taken into account during the Tier II antidegradation review of the general permit. The general permit or fact sheet will contain a determination whether the lowering of water quality from the anticipated new or increased discharges is necessary to accommodate economic or social development in the area in which the waters are located, as well as whether the lowering of water quality from the anticipated new or increased discharges is in the public interest.

According to Washington's letter, public notice and the opportunity to comment on the Tier II antidegradation review occurs: (1) at the time a general permit is first developed, (2) each time the general permit is re-issued (every five years), and (3) each time a facility applies for coverage under the general permit. A list of the facilities applying for coverage, as well as a list of the potentially affected water bodies, will be publicly noticed each time a general permit is re-issued and each time a facility applies for coverage under a general permit. The public notice will occur in both the local paper and on Washington's website. Washington will specifically include an opportunity for the public to challenge whether any of the facilities applying for coverage under the permit are appropriate based on concerns that they do not meet the State's Tier II antidegradation requirements. Any new or increased discharge that would result in a lowering of water quality on a high quality, or Tier II, water body that is not determined to be necessary to accommodate economic or social development in the area in which the waters are located, as well as in the public interest, would be denied coverage under the general permit and would be required to seek coverage under an individual permit.

Given the above, EPA finds that it is possible for the State of Washington to conduct a Tier II antidegradation review, consistent with 40 CFR § 131.12(a)(2), in the context of a general permit at the general permit issuance stage. As a result, EPA determines that this provision is consistent with 40 CFR § 131.12(a)(2) and EPA hereby approves this provision.