

**DWQ Responses to EPA REGION 8 WATER QUALITY UNIT COMMENTS ON
THE MARCH 21, 2010 DRAFT UTAH ANTIDegradation
IMPLEMENTATION GUIDANCE Dated April 26, 2010**

1. Section 1.0 – Introduction -The introduction states this draft of the implementation procedures focuses on UPDES permits. We understand and support the Division’s goal to address implementation guidance for UPDES permits first, and then address guidance for other permits in later drafts of the guidance. The introduction specifically identifies that additional guidance for general permits will be forthcoming in future drafts of the guidance, but does not mention other special permit considerations. Does the Division believe the existing guidance for other special permit considerations, such as 401 certifications and individual stormwater permits, are complete? If not, should they be mentioned as a “work in progress” in the introduction along with general permits?

DWQ Response: We agree that the aforementioned sections should be identified as “incomplete” as suggested. We have also added a Section 7.0 that specifically identifies portions of the guidance that are incomplete.

2. Section 2.2.3 – Decrease Protection of Surface Waters -This section provides examples where reclassification with less stringent protections might be appropriate. It is the state discretion to designate waters outstanding water resources; therefore it is also the state’s discretion to remove the designation if sufficient evidence is provided that the designation is no longer appropriate. We have one comment on the third example of situation where a reclassification with less stringent protections might be appropriate, which states:

- Water quality is more threatened by not permitting a discharge (e.g., septic systems vs. centralized water treatment).

Although this example is consistent with R317-2-3.2, which prohibits new point discharges to Category 1 waters, it seems counter intuitive that a decrease in the level of protection will better protect water quality. CFR 131.12(a)(2) requires that the water quality of outstanding waters should be maintained, and does not specifically identify that new point source discharges to these water should not be allowed. Would it be useful to consider revisions to the existing Category 1 requirements so that once a waterbody is classified as Category 1, the high water quality will be maintained?

DWQ Response: Our current intent is to address these (anticipated to be) infrequent situations by changing the Category of the water from Category 1 to Category 2, if appropriate. To change the rules as proposed by USEPA, the Category 1 designation would be equivalent to Category 2. Category 2 discharges will not degrade water quality, i.e., effluent concentrations are not greater than the receiving water.

3. Section 3.3.1 – Activities that are Considered to be New or Expanded Actions – This section identifies activities that are considered new or expanded. Although the guidance states pollutant loading will be taken into consideration, the focus of this section is on physical changes in a facility that will trigger a Level II ARD. There are other actions beyond the physical expansion that may result in an increase in pollutant loading, and therefore should be considered as new or expanded action. For example:

- For publicly owned treatment works and other treatment works treating domestic sewage, an industrial user has begun or increased a discharge of pollutants to the collection system.
- For other dischargers:
 - the production capacity has increased, or
 - the facility has begun a new activity that increases the amount of
 - pollutants discharged, or causes the facility to discharge pollutants not
 - previously discharged in significant amounts.

However, if the reissued permit will not allow an increase in the discharge of pollutants, then the State and the permitting authority may reasonably conclude that the reissued permit will not result in “lower water quality.”

We suggest that the Division include additional details on what actions, beyond physical expansion, could increase pollutant loading (either actual increased loading or the authorization of increased loading) and therefore should be considered new or expanded.

DWQ Response: As USEPA notes, “...if the reissued permit will not allow an increase in the discharge of pollutants, then the State and the permitting authority may reasonably conclude that the reissued permit will not result in ‘lower water quality.’” Under this scenario, an ADR is not required because water quality will not be degraded beyond what the permit already authorizes. If a renewed permit authorizes an increase in flow or concentration compared to the previous permit a Level II ADR is required.

POTW’s and other permittees complied with the ADR requirements applicable at the time their permit was issued. POTWs were designed to meet the permit effluent limits. Some POTWs implement pre-treatment programs to help ensure that their discharge does not exceed their permitted limits, i.e., so the design treatment capacity is not exceeded. This loading was included when the previous permits were issued. This applies to all parameters, including those without a water quality based effluent limit, provided that all of the parameters were clearly disclosed in the application. Therefore, if a POTW or other treatment works is not requesting an increase in flow, concentration, or loading, the permit will not permit additional degradation and a level II ADR is not required. The same rationale applies to industrial dischargers.

4. Section 3.3.3 -Activities that are not Considered to Results in Degradation: Example (d) -As stated in our comments letter submitted during the recent standards rulemaking (letter dated March 18, 2010), EPA does not have a national policy on whether the reasonable potential approach for excluding a Level II ADR is appropriate; however, we are concerned that under this exemption, water quality degradation could be allowed without a Level II review. It is still not clear what EPA's action will be on this example when the standard package is submitted for our review. Parameters identified in the permit application process that do not have effluent limits are still considered a pollutant covered by the permit. Section 402(k) of the CWA provides that compliance with an NPDES permit shall be deemed compliance with certain provisions of the CWA including provisions related to water quality effluent limitations (CWA § 302). We suggest that the Division consider adding details to the guidance that discuss the following scenarios.

If there are no technology-based effluent limits applicable to a given pollutant, and the discharge of that pollutant does not have reasonable potential to cause or contribute to excursions above WQS in the prior permit or the reissued permit, then neither the prior nor the reissued permit will include an effluent limit for the pollutant. However, the permittee is authorized to discharge the pollutant, under both the prior and reissued permits, as long as it is a constituent of wastestreams, operations or processes that were clearly identified during the permit application process.

If neither the prior nor the reissued permits contain an effluent limit for a given pollutant, there is no anticipated or proposed increase in the discharge of a pollutant relative to the prior permit, and limits for that pollutant can be shown to be unnecessary under the NPDES regulations (40 CFR 122.44), then the reissued permit can be considered to maintain the status quo for that pollutant and the permit should not be considered to allow "lower water quality" relative to the prior permit. However, this is not always the case.

In some cases for reissued permits, the wastestreams, operations and processes and the range and amounts of pollutants present in such wastestreams change since the time the prior permit was issued. If so, a draft reissued permit, based on the updated application, which does not establish effluent limits for that pollutant, may anticipate a greater discharge of a given pollutant relative to the prior permit. In this situation we suggest that it should be determined whether this increase allows "lower water quality", even though the parameter does not have reasonable potential to cause or contribute to an excursion above water quality criteria.

The process for this evaluation could be made between the level of discharge expected to occur under both the previous and reissued permits. If the Division determines that the

increased discharge would result in “lower water quality,” then a Level II ADR should be required.

DWQ Response: We believe our approach meets the applicable regulatory requirements. USEPA appears to agree that in most situations a renewed permit will not authorize further degradation if the following conditions are met:

- 1) the parameter was previously identified in the application,
- 2) based on a “reasonable potential” analysis, the parameter has a technology-based or water quality-based effluent limits, i.e., numeric permit limits, and
- 3) these limits are unchanged when the permit is renewed.

USEPA appears to be proposing a different approach for parameters that don’t have numeric permit limits. DWQ is recommending a consistent approach for all parameters because the permit authorizes the discharge of both whether or not the permit has numeric limits for the parameter. All of the parameters, those with effluent limits and those without effluent limits, complied with the antidegradation review requirements applicable at the time the permit was issued. When a Level II ADR is conducted, we expect that the parameters that undergo a detailed alternatives analysis using the criteria in Section 5 of the guidance will have effluent limits in the permit. These limits may need to be added to the permit as an outcome of the Level II ADR.

DWQ agrees that exceptional situations may occur that theoretically could authorize degradation beyond what was originally permitted. DWQ proposes to address these exceptional situations by the Executive Secretary requiring an antidegradation review in accordance with R317-2-3.5.a.1.

5. Section 3.6.2 – 401 Certifications – It appears that few changes were made to this section. We provided several comments on ways to improve the existing guidance in our January 6th letter. The implementation guidance should be consistent with the Utah antidegradation rule, which establishes that “the division will use the analysis in the 404(b)(1) finding document in completing its antidegradation review and 401 certification.” To summarize our concerns, it is not clear that the implementation guidance as currently drafted is consistent with the regulatory language. We suggest that the guidance should be clarified to establish that the Division has an independent responsibility (i.e., separate from the 404 process) to determine whether State antidegradation requirements have been satisfied, and that the 404(b)(1) finding document will be used as a resource to support the Division’s ADRs. There is no basis to conclude that all required elements of a Level II review are addressed in a 404(b)(1) findings document. Please see our January 6th letter for additional comments on this section.

DWQ Response: We agree that the 404(b)(1) may not meet all of the requirements for a Level II ADR. While this portion of the Implementation Guidance is a work-in-progress, DWQ intends to consult with US Army Corps of

Engineers to include a DWQ ADR application as part of the their certifications. The intent is to avoid unnecessary delays in completing the requirements for a 404 permit. DWQ is cognizant of our responsibility to ensure that 404 permits comply with the Clean Water Act and Utah Rules.

6. Section 3.6.3 - Individual Stormwater Permits – It is not clear when or if a Level II ADR will be conducted for individual stormwater permits. We recommend that the Division provide additional information on how the categorical exemption of the Level II review is consistent with R317-2-3.5(b) or additional information on when a Level II review will be conducted. For example, it may be appropriate to require a Level II ADR in the reissuance of a stormwater permit if monitoring data show that water quality is degrading. The ADR may then address an analysis of BMPs.

DWQ Response: DWQ anticipates further discussions with USEPA and other stakeholders prior to completing the stormwater permits antidegradation section. Our current thinking is that stormwater discharges are required to implement best management practices and that an ADR is unlikely to identify additional viable treatment options.

7. Section 4.0 - Pollutants of Concern - For Category 3 waters, Utah’s antidegradation rule requires maintenance of assimilative capacity based on the results of parameter-by-parameter reviews of all pollutants where degradation would be authorized. It is essential to conduct Level II reviews for an appropriate list of parameters. We recommend that only the parameters that fit criteria listed in R317-2-3.5(b) be excluded from a Level II ADR. It is important to identify parameters of concern using a process that derives from, and is authorized by, the Utah antidegradation rule. For example, it is not clear that the second question “is the parameter already included in an existing permit” is relevant. It may be more appropriate to start the process by asking what pollutants are known or, for new discharges, expected to be present in the discharge. Furthermore, for question 5, it is not clear how “designated conditions” will be defined. Please see our January 6th letter for additional suggestions of topics that could be discussed in the guidance to help identify pollutants that should be subject to a Level II ADR.

1. **DWQ Response:** We expect that pollutants that receive a detailed alternatives analysis using the criteria in Section 5 of DWQ (2010) will have permit limits. The Level II ADR is not limited to these pollutants but these pollutants were already determined to have the potential to adversely affect water quality through the reasonable potential analyses and should be considered for the Level II ADR. Question 5 was clarified to read: Are there parameters in the effluent that are known to potentially degrade the existing beneficial uses of the receiving water?