



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VIII

999 18th STREET - SUITE 500
DENVER, COLORADO 80202-2466

Ref: 8WM-WQ

MAR 1 1994

Subject: Transmittal of EPA-Headquarters
Guidance Memorandum Regarding
Nonpoint Sources and Antidegradation

Dear State or Tribal Colleague,

In a memorandum to the EPA Regional Water Management Division Directors dated February 22, 1994, EPA-Headquarters recently provided additional guidance regarding the federal antidegradation requirements at 40 CFR 131.12(a)(2). The purpose of this letter is to transmit to you a copy of that guidance memorandum (enclosed) and to provide a few additional clarifying remarks regarding implementation.

HIGH QUALITY WATERS AND NONPOINT SOURCES

The Headquarters memorandum primarily provides guidance regarding one sentence included in the federal antidegradation policy at 40 CFR 131.12(a)(2):

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.

This sentence has been somewhat controversial over the years because it appears to require a State to include, in its water quality standards, a provision requiring the State to assure that all cost-effective and reasonable best management practices (BMPs) for nonpoint sources will be achieved prior to allowing degradation of high quality waters. A number of States have resisted adoption of such a provision on the grounds that it could be interpreted as requiring, for nonpoint sources, achievement of BMPs that are not otherwise required under State law. The February 22, 1994 memorandum clarifies that State antidegradation rules need only include provisions to assure achievement of BMPs that are otherwise required under State nonpoint source control laws or regulations. Because States typically control most nonpoint sources through voluntary compliance programs, often there are no BMPs required under State law or regulation. As a result, incorporating a sentence such as the one quoted above into State water quality standards will not affect a particular nonpoint source unless and until a State establishes enforceable control requirements for that nonpoint source. In sum, the federal antidegradation requirements do not mandate regulatory controls for nonpoint sources.



However, adoption of an antidegradation provision such as the one quoted above is required and implementation may affect regulated activities where degradation of a high quality water is proposed and there is an existing compliance problem related to point sources or State-required controls for nonpoint sources. State antidegradation policies and/or implementation procedures must include provisions requiring the State to assure resolution of the compliance problem prior to allowing degradation in such cases. Additional detail regarding how this required antidegradation provision may be implemented is provided below.

IMPLEMENTING THE FEDERAL REQUIREMENT

In the Regional antidegradation implementation guidance dated August, 1993, the Region provided "model" language on this topic for inclusion in State antidegradation policies and implementation procedures (see page 23). For nonpoint sources, the model language clearly restricted application of the requirement to "State-required" BMPs. The model language also discussed the area over which the requirement should be applied, and included guidelines for concluding that compliance has been "assured." Below, the Region has provided additional discussion regarding implementation of this federally-required antidegradation provision. This discussion should be considered as a supplement to the August, 1993 Regional guidance.

Area of Application

Regarding the area over which the requirement should be applied, the Region continues to recommend application to an appropriate "zone of influence." The zone of influence in a particular case should be determined as appropriate to the parameter of concern, the characteristics of the receiving waterbody (e.g., lake versus river, etc.), and other relevant factors. Where available, a Total Maximum Daily Load analysis or other watershed-scale plan should be the basis for identifying the appropriate zone of influence. In general, the requirement should be applied to existing regulated point/nonpoint sources and parameters where compliance problems exist and it is reasonable to conclude that water quality degradation resulting from the proposed activity may overlap with or contribute to degradation resulting from the existing regulated point/nonpoint sources. As explained in the Headquarters guidance memorandum, a proposed new source of one substance should not be affected in any way by an existing regulated (noncompliant) source of a different substance.

Assurance that Compliance Will be Achieved

In implementing the requirement for proposed new and expanded discharges, States may consider schedules of compliance or other appropriate plans to implement controls sufficient "assurance" that the required controls will be achieved for existing regulated (noncompliant) sources within the zone of influence. Thus, required controls on existing regulated point and nonpoint sources need not be finally achieved prior to allowing


degradation provided that assurance of future compliance can be demonstrated and the public has an opportunity to review and comment on the State's conclusion.

CONCLUSION

The Region believes that the February 22, 1994 EPA-Headquarters guidance memorandum provides useful clarification of federal antidegradation requirements. In summary, State antidegradation policies or implementation procedures must include provisions requiring the State to assure resolution of existing compliance problems for parameters of concern prior to authorizing proposed activities that will result in degradation of high quality waters. However, the requirement is only applicable to existing nonpoint sources if enforceable control requirements have been established by the State. To facilitate implementation, the Region recommends that State antidegradation policies or implementation procedures spell out additional details, including procedures for identifying the area of application and any guidelines that will be used to determine that compliance has been assured.

If you or your staff have questions regarding this letter or the enclosed EPA-Headquarters guidance, please contact Bill Wuerthele, EPA Region VIII Water Quality Standards Coordinator, at (303) 293-1586.

Sincerely,



Dale Vodehnal, Chief
Water Quality Branch

Enclosure



FILE # _____

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

FEB 22 1994

OFFICE OF
WATERMEMORANDUM

SUBJECT: Interpretation of Federal Antidegradation Regulatory Requirement

FROM: Tudor T. Davies Director
Office of Science and Technology *Tudor Davies*

TO: Water Management Division Directors
Regions I - X

PURPOSE

The main purpose of this memorandum is to provide guidance on the interpretation of the antidegradation policy in 40 CFR 131.12(a)(2) as it relates to nonpoint sources. Guidance on this subject was requested by the regional water quality standards coordinators at their March 1993 meeting.

This memorandum also discusses the applicability of water quality standards to nonpoint sources, regardless of whether direct implementation mechanisms exist for nonpoint sources.

BACKGROUND

The Federal antidegradation policy requirement is found in Section 131.12 of the water quality standards regulation (40 CFR Part 131). This guidance addresses the language and intent of the Federal regulatory requirement. However, water quality standards are State laws or regulations. It is the actual language of a State's antidegradation policy that is implemented as the State's water quality standard. This guidance does not supersede existing State law or regulation.

In the early years of the standards program, most States adopted EPA's regulatory language or language consistent with the regulatory requirements for antidegradation. As the water program has evolved more attention is being given to actual antidegradation policy implementation and increasing attention to the need for controls on nonpoint sources. Although there are no Federally enforceable requirements for control of nonpoint sources in the Clean Water Act, water quality impacts from



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nonpoint sources have become increasingly evident. Many States have asked what the antidegradation policy requires for the development and implementation of nonpoint source controls in high quality waters.

There are two components of the water quality standards regulation that are relevant to this inquiry. First, the EPA rule provides that as one condition of allowing degradation of a high quality water, "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." (40 CFR 131.12(a)(2)). Second, degradation is also conditioned upon a State determination that "allowing a lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located." Id. (Emphasis added.)

THE ISSUE

Do those provisions REQUIRE a State to establish and implement best management practices (BMPs) for nonpoint sources before allowing degradation in high quality waters?

THE REGULATORY INTERPRETATION

Section 131.12(a)(2) does not REQUIRE a State to establish BMPs for nonpoint sources where such BMP requirements do not exist.

We interpret Section 131.12(a)(2) as REQUIRING States to adopt an antidegradation policy that includes a provision that will assure that all cost-effective and reasonable BMPs established under State authority are implemented for nonpoint sources before the State authorizes degradation of high quality waters by point sources.

DISCUSSION

Section 131.12(a)(2) does not mandate that States establish controls on nonpoint sources. The Act leaves it to the States to determine what, if any, controls on nonpoint sources are needed to provide for attainment of State water quality standards. See CWA Section 319. States may adopt enforceable requirements, or voluntary programs to address nonpoint source pollution. Id. Section 40 CFR 131.12(a)(2) does not require that States adopt or implement best management practices for nonpoint sources prior to allowing point source degradation of a high quality water. However, States that have adopted nonpoint source controls must assure that such controls are properly implemented before authorization is granted to allow point source degradation of water quality.

The rationale behind the antidegradation regulatory statement regarding achievement of statutory requirements for point sources and all cost effective and reasonable BMPs for nonpoint sources is to assure that, in high quality waters, where there are existing point or nonpoint source control compliance problems, proposed new or expanded point sources are not allowed to contribute additional pollutants that could result in degradation. Where such compliance problems exist, it would be inconsistent with the philosophy of the antidegradation policy to authorize the discharge of additional pollutants in the absence of adequate assurance that any existing compliance problems will be resolved.

EPA's regulation also requires maintenance of high quality waters except where the State finds that degradation is "necessary to accommodate important economic and social development in the area in which the waters are located." (40 CFR Part 131.12(a) (Emphasis added)). We believe this phrase should be interpreted to prohibit point source degradation as unnecessary to accommodate important economic and social development if it could be partially or completely prevented through implementation of existing State-required BMPs.

EPA believes that its antidegradation policy should be interpreted, with respect to the matters discussed in this memorandum, on a pollutant-by-pollutant and waterbody-by-waterbody basis. For example, degradation of a high quality waterbody by a proposed new BOD source prior to implementation of required BMPs on the same waterbody that are related to BOD loading should not be allowed. However, degradation by the new point source of BOD should not be barred solely on the basis that BMPs unrelated to BOD loadings, or which relate to other waterbodies, have not been implemented.

EPA understands that implementation of best management practices is an ongoing effort and that additional EPA guidance regarding best management practices may be needed in the future. Also, there are statutory changes under consideration that may impact the development and implementation of nonpoint source controls. EPA will be addressing such implementation issues in future guidance that is beyond the scope of this document.

The State antidegradation policy may be used to support State efforts for obtaining additional authority to control nonpoint sources (e.g., several States consider their water quality standards to be "self-implementing" or directly enforceable).

We recommend that States explain in their antidegradation policies or procedures how, and to what extent, the State will require implementation of otherwise non-enforceable (voluntary) BMPs before allowing point source degradation of high quality

waters. EPA understands this recommendation exceeds the Federal requirements discussed in this guidance. For example, nonpoint source management plans being developed under section 319 of the Clean Water Act are likely to identify potential problems and certain voluntary means to correct those problems. The State should consider how these provisions will be implemented in conjunction with the water quality standards program.

APPLICABILITY OF WATER QUALITY STANDARDS TO NONPOINT SOURCES
VERSUS ENFORCEABILITY OF CONTROLS

The main issue that this memorandum addresses, the requirement in Section 131.21(a)(2) to implement existing nonpoint source controls before allowing degradation of a high quality water, is a subset of the broader issue of the applicability of water quality standards versus the enforceability of controls designed to implement standards. A discussion of the broader issue is included here with the intent of further clarifying the nonpoint source antidegradation question. In the following discussion, the central message is that water quality standards apply broadly and it is inappropriate to exempt whole classes of activities from standards and thereby invalidate that broader, intended purpose of adopted State water quality standards.

Water quality standards serve the dual function of establishing water quality goals for a specific waterbody and providing the basis for regulatory controls. Water quality standards apply to both point and nonpoint sources. There is a direct Federal implementation mechanism to regulate point sources of pollution but no parallel Federal regulatory process for nonpoint sources. Under State law, however, States can and do adopt mandatory nonpoint source controls.

State water quality standards play the central role in a State's water quality management program, which identifies the overall mechanism States use to integrate the various Clean Water Act water quality control elements into a coherent management framework. This includes, for example: (1) setting and revising water quality standards for all surface waterbodies, (2) monitoring water quality to provide information upon which water quality-based decisions will be made, progress evaluated, and success measured, (3) preparing a water quality inventory report under section 305(b) which documents the status of the State's water quality, (4) developing a water quality management plan which lists the standards, and prescribes the regulatory and construction activities necessary to meet the standards, (5) calculating total maximum daily loads and wasteload allocations for point sources of pollution and load allocations for nonpoint sources of pollution in the implementation of standards, (6) implementing the section 319 management plan which outlines the State's control strategy for nonpoint sources of pollution, and

(7) developing permits under Section 402.

Water quality standards describe the desired condition of the aquatic environment, and, as such, reflect any activity that affects water quality. Water quality standards have broad application and use in evaluating potential impacts of water quality from a broad range of causes and sources and are not limited to evaluation of effects caused by the discharge of pollutants from point sources. In this regard, States should have in place methods by which the State can determine whether or not their standards have been achieved (including uses, criteria, and implementation of an antidegradation policy). Evaluating attainment of standards is basic to successful application of a State's water quality standards program. In the broad application of standards, these evaluations are not limited to those activities which are directly controlled through a mandatory process. Rather, these evaluations are an important component of a State's water quality management program regardless of whether or not an enforcement procedure is in place for the activity under review.

Water quality standards are implemented through State or EPA-issued water quality-based permits and through State nonpoint source control programs. Water quality standards are implemented through enforceable NPDES permits for point sources and through the installation and maintenance of BMPs for nonpoint sources. Water quality standards usually are not considered self-enforcing except where they are established as enforceable under State law. Application of water quality standards in the overall context of a water quality management program, however, is not limited to activities for which there are enforceable implementation mechanisms.

In simple terms, applicability and enforceability are two distinctly separate functions in the water quality standards program. Water quality standards are applicable to all waters and in all situations, regardless of activity or source of degradation. Implementation of those standards may not be possible in all circumstances; in such cases, the use attainability analysis may be employed. In describing the desired condition of the environment, standards establish a benchmark against which all activities which might affect that desired condition are, at a minimum, evaluated. Standards serve as the basis for water quality monitoring and there is value in identifying the source and cause of a exceedance even if, at present, those sources of impact are not regulated otherwise controlled.

It is acceptable for a State to specify particular classes of activities for which no control requirements have been established in State law. It is not acceptable, however, to specify that standards do not apply to particular classes of

activities (e.g. for purposes of monitoring and assessment). To do so would abrogate one of the primary functions of water quality standards.

If you have any additional questions, please contact David K. Sabock, Chief, Water Quality Standards Branch, 202-260-1318.

cc:

Water Quality Branch Chiefs, Regions 1 - X
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Lee Schroer, OGC
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