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April 26, 2010

Ref: 8EPR-EP

Christopher Bittner
Department of Environmental Quality
Division of Water Quality
288 N 1460 W
Salt Lake City, UT 84116-3231

Subject: Antidegradation Implementation Procedures

Dear Chris,

Enclosed with this letter are comments on the March 21, 2010 draft antidegradation implementation guidance. These comments are preliminary in nature and I expect that the list of issues where we have concerns - and also our recommendations and positions - will evolve as work group discussions continue. The enclosed comments are primarily intended to raise issues for discussion and alert the Division and the work group regarding our current thinking. In some cases we have also provided suggested language changes for consideration.

Thanks very much for the opportunity to provide comments and recommendations regarding the draft antidegradation implementation guidance. If you would like to discuss, please give me a call at (303) 312-6610.

Sincerely,

Lareina Guenzel

Lareina Guenzel
Water Quality Unit

Enclosure

EPA REGION 8 WATER QUALITY UNIT COMMENTS ON THE MARCH 21, 2010 DRAFT UTAH ANTIDEGRADATION IMPLEMENTATION GUIDANCE

We thank the Division of Water Quality (Division) for their efforts to address many of our concerns discussed in our comment letter dated January 6, 2010 and believe the March 21, 2010 draft is a substantial improvement over the previous draft guidance. Although many of our comments have been addressed, we still believe the current draft would benefit from additional rational and/or details on when a Level II antidegradation review (ADR) will be required for Category 3 waters. Our primary concern with the most recent draft is there continues to be uncertainty whether the guidance is fully consistent with Utah's antidegradation rule. We recommend for each activity discussed in the guidance where a Level II ADR is not required, or something less than a full Level II ADR is recommended, that the Division provide additional rational in the guidance on why the exclusion is consistent with rule.

In accordance with Utah's rule, Level II ADRs will be conducted for all Category 3 waters unless the following conditions apply (R317-2.3.5(b) – minus the examples in the regulation):

1. Water quality will not be lowered by the proposed activity or for existing permitted facilities, water quality will not be further lowered by the proposed activity.
2. Assimilative capacity (based upon concentration) is not available or has previously been allocated, as indicated by water quality monitoring or modeling information.
3. Water quality impacts will be temporary and related only to sediment or turbidity and fish spawning will not be impaired.
4. The water quality effects of the proposed activity are expected to be temporary and limited.

There are several activities in the guidance that EPA questions if they are consistent with Utah's rule. These activities include 401 certifications, individual stormwater permits, and parameters that will be subject to ADR (identification of parameters of concern).

Furthermore, the document would benefit from additional guidance on when a Level II ADR would be required for parameters without effluent limits and how a lowering of water quality will be determined.

We provide more detailed comments on these concerns throughout the enclosure.

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?

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?

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.

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 thought 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.

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 antidegradation reviews. 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.

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.

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.