



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

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January 6, 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 December 15, 2009 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) 312-6833.

Sincerely,

A handwritten signature in black ink that reads "D. Moon". The signature is stylized and includes a horizontal line at the end.

David Moon
Water Quality Unit

Enclosures (2)



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**EPA REGION 8 WATER QUALITY UNIT COMMENTS ON THE
DECEMBER 15, 2009 DRAFT UTAH ANTIDEGRADATION IMPLEMENTATION GUIDANCE**

- **General Comment** - We suggest that the Division develop guidance that is fully consistent with Utah's antidegradation rule, while also considering whether there are specific issues where additional regulatory authority is needed. In particular, to the extent that the Division is interested in relaxing or modifying current antidegradation requirements in particular situations or for particular types of permits, it may be best to do that with a rulemaking action. Guidance provides a useful way to let stakeholders know how the rule will be interpreted, but it should not be used in a way that essentially modifies the regulation. Another approach that can be considered is to develop the guidance in phases to allow more time to address especially difficult issues.
- **General Comment** – We suggest that it may be useful to include definitions of key terms in the guidance. Should the Division add a definitions section or discuss definitions included elsewhere in Utah rule?
- **Section 2.0** – We suggest that this section should emphasize that reviews will be conducted to implement antidegradation requirements for all waters of the State including Category 1, Category 2, and Category 3 waters, and that the questions to be answered by the review depend on the antidegradation protection requirements for the water segments that would be affected by the proposed activity. As currently drafted, there may be too much emphasis in this section on the necessity determination which is a key element (but not the only element) of the protection requirements for Category 3 waters.
- **Section 2.1.1** – This section provides an introduction to the protection requirements for Category 1 waters. It is noted that “future discharges of wastewater into these waters are not permitted.” It may be useful to consider situations where a Category 1 designation does not extend all the way to headwaters (even if there are none currently), and an activity is proposed in a segment located upstream of the Category 1 segment. What requirements apply to such situations and what implementation guidance is appropriate? If the Division develops procedures for Category 1 waters, this may be an issue that should be addressed. The same situation might arise for Category 2 waters that do not extend all the way to headwaters. Another implementation issue for Category 1 waters concerns situations where proposed activities may be authorized because water quality effects would be temporary and limited.
- **Section 2.1.2** – This section provides an introduction to the protection requirements for Category 2 waters. It is noted that discharges are permissible “provided no degradation of water quality will occur.” If the Division develops procedures for Category 2 waters, issues that might need to be addressed include: (1) use of upstream offsets (or pollutant

trading)¹ in the same drainage to achieve the “no degradation” requirement, (2) determination of background water quality concentrations, and (3) determination of effluent limits for point sources including how the magnitude and averaging period (e.g., daily max, 30-day average, etc.) are determined.

- **Section 2.1.3** – This section provides an introduction to the protection requirements for Category 3 waters. We suggest edits to establish that in Category 3 waters, proposed activities may be authorized provided water quality standards including designated uses, narrative and numeric criteria and antidegradation requirements will not be violated. In addition, we suggest introducing the concept that an antidegradation review for Category 3 waters includes a determination that: (1) existing uses would be maintained and protected (as part of all Level I reviews), (2) the degradation is necessary (i.e., there are no feasible less-degrading alternatives), (3) the proposed activity constitutes important social or economic development, and (4) all statutory and regulatory requirements will be achieved in the area of the discharge.
- **Section 2.2** – This section establishes that “any person” may nominate a surface water to be assigned to Category 1 or Category 2. Would it be useful to clarify that the Division may also nominate waters for Category 1 or Category 2 designations? In addition, it may be useful to add more detail on the process for nominating Category 1 or Category 2 waters, and how/when the State would respond (e.g., including a timeline).
- **Section 2.2.1** – This section describes information to include with a nomination for Category 1 or Category 2 designations. The draft language provides that “the nomination shall include...data that shows the biological composition to be statistically indistinguishable from physically comparable reference sites.” We suggest that this criterion may be too limiting and may exclude worthy candidates from consideration. Although we agree that in many situations Category 1 and Category 2 waters will have biological compositions similar to those found at reference sites (and may be where the reference sites are located), it may be useful to revise this criterion so that it does not: (1) imply that only sites with pristine conditions may be considered, and (2) imply that sufficient data to use a statistical test of similarity must be available for both the candidate site and physically comparable reference sites. Related points include:
 - Does DEQ have a procedure for identifying reference sites?
 - What about areas of the state (or waterbody types) where the existing reference network doesn't provide adequate coverage (for example, the western part of the state where fewer data are available)?
 - How would a lake or wetland be characterized as Category 1 or 2 if reference sites haven't yet been identified?

¹ Use of trading in an antidegradation review context would necessitate creating a trading program, identifying the eligible pollutants, and might require rule changes to authorize the approach.

Because guidance regarding the data and information to be used in evaluating nominations are listed in Section 2.2.2, we suggest revising the Section 2.2.1 language to something like...”and data that describe the biological condition.”

- **Section 2.2.2** – This section identifies additional criteria and types of information that may be used by the Executive Secretary in evaluating nominations for Category 1 and Category 2 designations. One criterion is “the surface water has pristine water quality.” We suggest that this criterion as drafted may be too limiting because of the word “pristine.” There are few, if any, waters that are pristine and some waters with only minor water quality changes may be excellent candidates. We suggest consideration of revisions for example: “the surface water has outstanding water quality characteristics.”
- **Section 2.2.4** – We suggest modifications to this section to identify (or cite) the criteria that will be used to determine whether a Category 1 or Category 2 designation is warranted, e.g., “based on considerations such as those listed in Section 2.2.2.”
- **Section 2.3** – This section provides an overview of the antidegradation review procedures. The first sentence states that ADR reviews for Category 2 and 3 waters are conducted at two levels. This conflicts with a statement in Section 2.1.2 that “Level 1 and Level 2 provisions...are not required for Category 2 waters.” In addition, the procedures summarized appear to be more relevant to the requirements for Category 3 waters. The Division should consider revising the title of the section to include “for Category 3 waters” and adding new sections to the guidance to address/summarize procedures for Category 1 and Category 2 waters.
- **Figure 1 Flow Chart** – We suggest moving the existing use question to the top of the flow chart because existing use protection requirements must be addressed in all Level I reviews per R317-2-3.5: “A Level I review is conducted to insure that existing uses will be maintained and protected.” The other purpose of a Level I review is to evaluate the criteria in Section 3.5b to determine if there are parameters where a Level II review is required, so those questions would logically come after the existing use protection question in the flow chart.
- **Section 3.1. Activities Requiring a Level II Review.** Although the purpose of Level I review is summarized in Section 2.3 and the flow chart, we suggest that it would be useful to include within Section 3 more discussion of Level I reviews, including the review process for the existing use protection requirement, and the guidance for implementing the “offramps” in R317-2-3.5(b). We suggest that the guidance clearly establish that the existing use protection requirement applies to all waters of the State and is evaluated for all proposed activities as an initial step in the Level I review. The second step is to evaluate whether there are pollutants where a Level II review is required. We suggest that it would also be useful to clarify the intergovernmental coordination and public participation process for Level I review conclusions (e.g., in situations where a Level II review is not required).

- **Section 3.1.1.** Does the guidance need to address situations where a new indirect discharge to a POTW is proposed? Would that situation be considered a new or expanded discharge that triggers an antidegradation review?
- **Section 3.1.1 and 3.1.3.** These sections include guidance for identifying parameters/activities subject to Level II review requirements. Section 3.1.1 establishes that the “design basis” of the facility will be used to determine whether the activity would constitute an expanded action. Similarly, Section 3.1.3 states that an activity will not be considered to result in degradation if the activity is occurring “within the design capacity” of the treatment plant. We have several comments about situations where a renewal permit (for an existing discharge) is issued, there is no proposal to increase the design flow capacity, but for one or more parameters the renewal permit will include water quality-based effluent limits for the first time. This would be a possibility, for example, where data now support a reasonable potential finding (either because sufficient data were not previously available, or because effluent quality has worsened), or for parameters where new ambient numeric criteria have been adopted for the first time. In these situations, the proposed language focuses on design capacity as a basis for deciding whether degradation would be authorized: “the design capacity of the facility, of both concentrations and loads, will be used to determine whether a proposed project lowers water quality.”

One comment is that it is not clear how the design capacity in terms of concentration will be determined for parameters where waste loads are not defined in the current permit. A second comment is that if existing (actual) concentrations and loads being discharged by the facility are less than the concentrations and loads to be authorized in the renewal permit, there would be a basis for concluding that the permit authorizes degradation. For example:

- For parameters where data now support a reasonable potential finding (either because sufficient data were not previously available, or because effluent quality has worsened) effluent limits based on full consumption of the remaining assimilative capacity could result in substantial additional degradation of ambient water quality (e.g., if the trend toward higher effluent concentrations continues).
- For parameters where new ambient numeric criteria have been adopted for the first time, it is possible that alternatives such as treatment process changes, pollution prevention or raw material substitution have not been evaluated, and there may be less-degrading alternatives that should be evaluated. By-passing the Level II antidegradation review for these parameters could result in a missed opportunity to minimize the water quality effects of the discharge and protect remaining assimilative capacity.

We suggest that the Division give further consideration to situations where a renewal permit will include water quality-based effluent limits for the first time. One way to avoid authorizing degradation would be to calculate such limits based on existing (actual)

concentrations and loads. The rationale would be that, if the new effluent limits require existing concentrations and loads to be maintained, then the new limits would not authorize degradation and remaining assimilative capacity would be maintained and protected. The discharger could accept the effluent limits based on existing concentrations and loads, or choose to do a Level II review.

An alternative approach that we submit for consideration is to include in the guidance language such as the following:

“For parameters where effluent limits are to be included in a renewal permit for the first time, a Level II antidegradation review is not required if the new effluent limits are equal to or less than existing (actual) effluent concentrations and loads, considering the expected degree of effluent variability.”

- **Section 3.1.4** – The heading for this section should be changed to “Activities that are Considered to be Temporary ~~and~~ ~~or~~ Limited” to be consistent with R317-2-3.5(b)(4). In addition, the bullets listed are similar but do not exactly match the language of R317-2-3.5(b)(4). We suggest that the guidance should begin by presenting the regulatory provision, and then provide additional details to assist with implementation as necessary. Developing implementation guidance on this topic may be especially useful for 402 general permits and 404 nationwide permits. Would it be useful to add more detail to the guidance regarding water quality changes that would be considered temporary and limited? Would it be useful to discuss several examples?
- **Section 3.4.1 – General Permits.** We suggest that the guidance in this section would benefit from additional development and clarification. For example, it is not clear when individual permits and full ADRs for individual activities will be required, or how antidegradation requirements will be applied to entire categories of activities to be covered by a general permit. The draft guidance notes that: “regulated discharges...may be subject to a full ADR if the Executive Secretary determines that cumulative degradation resulting from multiple discharges within a watershed, degradation from a single discharge over time, or other individual circumstances warrant a full antidegradation review at the time the general permit is issued.” However, it may be useful to clarify how cumulative degradation will be evaluated, and the circumstances where a Level II review would be conducted for individual activities or categories of activities. In particular, it may be helpful to clarify whether antidegradation reviews will be conducted whenever individual activities or categories of activities are expected to result in more than temporary and limited changes in water quality, per the requirements of R317-2-3.5(b)(4).

In addition, a rationale is needed to explain this statement: “the requirements can be considered met for permits and programs that have a formal process to select, develop, adopt, and refine control practices.” For example, it is not clear whether the formal process test would be evaluated before or after the Level II review (i.e., does it describe situations where Level II reviews are not required? is it an off-ramp from Level II

review?). In addition, it would be useful to develop a connection between the “formal process” test and Utah’s antidegradation requirements at R317-2-3.5. It is not clear that the proposed implementation guidance is authorized by Utah’s rule.

- **Section 3.4.2 - §401 Certifications.** Because this section is focused on how antidegradation requirements apply to Section 404 permits, we suggest that the title should be “Antidegradation Review Procedure for CWA 404 Permits.” If the Division agrees, an additional section would be needed for other federal permits that require 401 certification (e.g., FERC licenses). Also, it may be useful for the guidance to review Utah’s antidegradation rule at R317-2-3.5(c)(3) – Special Procedures for 404 Permits.” 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.” 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.

For example, for Category 3 waters, the Division’s antidegradation reviews should determine whether: (1) existing uses would be maintained and protected (as part of the Level I review), (2) the degradation is necessary (i.e., there are no less-degrading alternatives), (3) the proposed activity constitutes important social or economic development, and (4) all statutory and regulatory requirements will be achieved in the area of the discharge. The 404(b)(1) finding document may be especially useful in evaluating the necessity of degradation.

As currently drafted, the guidance provides that “regulated activities for which mitigation has been certified by the state pursuant to §401 of the Clean Water Act will not be required to undergo a separate Level II review in accordance with this document.” We find this statement confusing because it is not clear how the Division could reach a §401 certification conclusion in the absence of a Level II review (i.e., the Level II review must be completed in order to certify that antidegradation requirements have been met). To the extent that this statement means that Level II reviews will not be conducted as long as water quality degradation would be mitigated, we suggest that the statement may be inconsistent with federal and state antidegradation requirements. Development of a mitigation plan does not necessarily meet all objectives of an antidegradation review. For example, alternatives that would avoid water quality degradation need to be evaluated, and the other required elements of a Level II review need to be addressed.

Our understanding is that Level II antidegradation reviews are required for regulated activities except as provided in R317-2-3.5(b). Therefore, a determination that Level II reviews are not required for activities regulated under CWA Section 404 would need to

be based on a finding that one of the “offramps” in R317-2-3.5(b) is applicable. For example, in some cases it may be possible to conclude that a Level II review is not required because the degradation resulting from the activity to be permitted would be temporary and limited pursuant to R317-2-3.5(b)(4). We suggest that the Division re-evaluate what implementation guidance would be appropriate and consistent with the Utah antidegradation rule.

The Division should consider that at the time a request for 401 certification of a 404 permit is submitted to the State, the 404(b)(1) finding document may not be in final form. In other words, there is a timing problem that needs to be considered.

- **Section 3.4.3. Individual Stormwater Permits.** We suggest that clarification is needed regarding how antidegradation review requirements will be applied to individual stormwater permits including situations when Level II reviews will be conducted. It may be useful to develop additional rationale explaining why the procedures as drafted are consistent with the requirement to conduct Level II reviews for regulated activities, including stormwater permits, except as provided in R317-2-3.5(b). Our understanding is that Level II reviews are required unless one of the “offramps” in R317-2-3.5(b) is applicable.
- **Section 3.5.1. Public Notification Process.** We suggest that this section should address antidegradation review decisions for all regulated activities (i.e., activities that require a 402 or 404 permit or water quality certification pursuant to federal law). As currently drafted there is a focus on 402 permits only. It may also be helpful to add more procedural detail.
- **Section 3.5.2. Intergovernmental Coordination.** We suggest that additional detail is needed regarding the process for intergovernmental coordination. It may be useful for the Division to solicit input from State and Federal agencies regarding the appropriate procedures, including the process for soliciting intergovernmental participation on reviews of individual activities.
- **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. Parameters may be excluded from review based on the criteria listed in R317-2-3.5(b). 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 first question “are pollutants in the effluent exceeding or expected to exceed WQ numeric standards” is relevant. The central question is whether one of the “offramps” at R317-2-3.5(b) is applicable, e.g., whether the permit would authorize a lowering of water quality in the receiving water body.

We suggest that the guidance include procedures for parameters where numeric criteria have not yet been adopted, because for such parameters it may be important to evaluate whether less-degrading alternatives are available. Even in the absence of a numeric criterion, it is possible to determine whether ambient water quality would be degraded and to evaluate alternatives for minimizing degradation.

We suggest discussion of the following topics in the guidance for identifying pollutants to be addressed in the Level II review.

What pollutants are known or (for new discharges) expected to be present in the discharge? This list provides a useful starting point (e.g., based on available effluent monitoring data) and should be included in the documentation for the Level II review.

What pollutants in the discharge may be excluded from review because of factors identified at R317-2-3.5(b)?

- because water quality will not be lowered (e.g., a UPDES permit is being renewed and the proposed effluent concentration value and pollutant loading is equal to or less than the existing effluent concentrations value and pollutant loading)
- because assimilative capacity (based on ambient concentration) is not available or is already allocated
- because water quality impacts will be temporary and related only to sediment or turbidity and fish spawning will not be impaired
- because the water quality effects of the proposed activity are expected to be temporary and limited

Regarding whether water quality would be lowered, would effluent limits be equal to or more stringent than ambient background concentrations? Defining and determining “background water quality” is essential to determining whether assimilative capacity exists and whether the proposed activity would degrade water quality. This determination is challenging because ambient concentrations vary over time and from place to place in the receiving water body. It may be useful to develop procedures and examples.

For renewal permits, are there pollutants where effluent limits will be included for the first time (e.g., because data now support a reasonable potential finding, or because new water quality criteria have been adopted)? If existing (actual) concentrations and loads now being discharged by the facility are less than the concentrations and loads to be authorized in the renewal permit, there would be a basis for concluding that the permit authorizes degradation. Please see our comments above regarding sections 3.1.1 and 3.1.3.

Regarding whether assimilative capacity is available, are there pollutants where ambient criteria would be exceeded if point sources were discharging at their design capacity and authorized effluent concentrations during critical flow conditions? It may be important to evaluate whether assimilative capacity is available not by comparing the criteria to

current ambient conditions in the waterbody, but rather the ambient conditions that have been *authorized* during critical ambient flow conditions.

Regarding whether water quality impacts would be temporary and limited, are there pollutants that meet this test based on the criteria identified at R317-2-3.5(b)(4)? Factors to be considered in determining whether water quality effects will be temporary and limited may include the following:

- (a) Length of time during which water quality will be lowered,
- (b) Percent change in ambient concentrations of pollutants of concern,
- (c) Pollutants affected,
- (d) Likelihood for long-term water quality benefits to the segment (e.g., dredging of contaminated sediments),
- (e) Potential for any residual long-term influences on existing uses, and
- (f) Impairment of the fish spawning, survival and development of aquatic fauna excluding fish removal efforts.

- **Section 5.2(1). In-Stream Benefits of Discharge Water** – The first consideration listed in Section 5.2 authorizes the Executive Secretary to exclude non-discharge alternatives from the review process when an in-stream need for the discharge water is of “significant importance.” We agree that it would be reasonable for the alternatives evaluation process to consider whether non-discharge alternatives are feasible and how downstream uses (e.g., water supply) might be affected by removal of the discharge. However, it is not clear why excluding non-discharge alternatives from the alternatives analysis would be appropriate or whether the proposed approach is consistent with the Utah antidegradation rule. The Utah antidegradation rule addresses this issue as follows:

“It must also be recognized in relationship to evaluating options that would avoid or reduce discharges to the stream, that in some situations it may be more beneficial to leave the water in the stream for instream flow purposes than to remove the discharge to the stream.”

This rule language (R317-2-3.5(c)(2)) seems to indicate only that instream flow benefits of maintaining the discharge should be considered when evaluating alternatives.

- **Section 5.2(2). Innovative or Alternative Treatment Options.** We suggest revisions to more clearly indicate that the Division has responsibility and authority to determine which innovative/alternative treatment processes should be evaluated. Although we agree that the Division should consider input from the applicant, we suggest removal of the sentence stating that “alternatives processes not previously proven may be considered when both Executive Secretary and the Applicant agree that such a review is prudent.”
- **Section 5.2(5). Alternatives with Lower Costs.** We suggest removing this consideration. The purpose of the alternatives analysis is to identify whether there are feasible non-degrading or less-degrading alternatives. Pursuant to the Utah antidegradation rule, costs are considered to determine which alternatives are feasible. It

is not clear that the guidance as drafted is consistent with that premise because it suggests that an alternative that would provide only marginal water quality improvement might be selected (even though it is not the least-degrading alternative) because of lower cost. Level II reviews should require implementation of the least-degrading feasible alternative.

- **Section 5.2(6). Feasibility.** We agree that feasibility should be evaluated during the review of alternatives. We suggest modifications to this provision so that feasibility is evaluated as a first step in the review process. In other words, it would be consistent with Utah's rule to discontinue review of alternatives that are infeasible, provided the basis for the determination is documented and subjected to intergovernmental and public review. Regarding the pollutant trading example, we suggest that more detail should be included in the implementation guidance regarding situations where pollutant trading can be considered in conducting an antidegradation review. We suggest that in addition to considering trading as part of the alternatives analysis, it may be appropriate to consider trading arrangements in determining whether water quality would be degraded under R317-2-3.5(b)(1). Where a pollutant trading arrangement is in place, it may be possible to conclude that a Level II review is not required.
- **Section 5.2(7). Operations and Maintenance.** We suggest that the burden of preparing an initial O&M evaluation should be on the applicant seeking authority to degrade water quality. The Division's role should be to review the applicant's initial evaluation and determine whether there are any opportunities to avoid or minimize degradation. As an alternative to that default process, it makes sense to discuss the use of a third party to assess potential for O&M improvements.
- **Section 5.3, Section 5.3.1, Section 5.3.2, and Section 5.3.3.** These sections outline procedures and guidelines for reducing the number of alternatives that are evaluated in several situations. It is not clear that Utah's antidegradation rule provides authority to implement these procedures. We suggest that if the Division is interested in authorizing these procedures, it may be advantageous to first consider whether revisions to the State antidegradation rule are necessary and appropriate. We suggest that the Division re-evaluate what implementation guidance would be appropriate and consistent with the Utah antidegradation rule.
- **Identification of Effluent Limits Consistent with the Alternatives Analysis.** Somewhere in Section 5, the guidance should discuss development of effluent limits in situations where a permit is to be issued and the least-degrading alternative would not necessitate consumption of all remaining assimilative capacity. How will such effluent limits be determined and expressed?
- **Section 5.6.2. Final Review and Selection of the Preferred Alternative.** This section discusses various factors to consider in identifying the preferred alternative.

Section 5.6.2(2) – It is not clear whether the criteria, as drafted, are based on feasibility considerations. Opportunities to avoid or minimize degradation through O&M

improvements should be considered where feasible. We suggest that additional rationale should be prepared to justify the proposed approach.

Section 5.6.2(4) – We suggest dropping this consideration from the implementation guidance. State and Federal law requires implementation of the feasible alternative that avoids or minimizes degradation of water quality. The whole point is to maintain and protect “better than necessary” water quality conditions. There is no authority to consider net environmental benefits including how air quality might be affected. In addition, this does not appear to be a topic that should be handled in guidance, given the absence of authorizing language in the antidegradation rule.

Section 5.6.2(5) – We suggest dropping the phrase “net environmental benefits” from the discussion. The purpose of an alternatives analysis is to identify and evaluate alternatives (including associated mitigation) that will avoid or minimize degradation of water quality. We agree that mitigation projects may be useful in minimizing water quality degradation.

Section 5.6.2(7) – It is not clear why this criterion is included. Level II reviews are conducted to preserve high quality waters with remaining assimilative capacity. They are not a tool for restoring impaired waters. As such, it is not clear why the water body’s “potential for overall improvement” is a consideration in conducting an alternatives analysis. This criterion is subjective, would be difficult to implement, and does not derive from the Utah rule.

- **Section 6.0. Social and Economic Importance** – In discussing mitigation projects, we question whether the increased stream flow example is appropriate. Generally, an unnatural increase in stream flow (e.g., as a result of a point source discharge) is unlikely to provide benefits to stream biota. The increase in flow is more likely to disturb the natural and expected assemblage by changing the physical habitat and the natural hydrology (except perhaps where a stream was previously dewatered). It might be more appropriate to amend the increased flow example to describe a situation where a stream was previously de-watered, or to replace it with an example of a streambank stabilization project which is intended to restore natural physical habitat and biological characteristics.
- **Section 6.3. Review and Approval of SEEs.** We suggest editing the first sentence. The necessity of degradation determination is based on the alternatives analysis and is covered in Section 5 of the guidance. By contrast, an SEEI (Section 6) is completed to evaluate whether the proposed activity has economic or social importance in the area of the discharge. We suggest editing the first sentence as follows: “The Executive Secretary will rely on the SEEI as a basis for evaluating whether the proposed activity is of economic or social importance in the area of the discharge (R317-2-3.5(c)(4)).
- **R317-2-3.5(c)(1) - Will All Statutory and Regulatory Requirements be Met?** The draft implementation procedure does not address one of the required elements of a Level II review: the determination that there will be achieved all statutory and regulatory

requirements for all new and existing point sources and all required cost-effective and reasonable best management practices for nonpoint source control in the area of the discharge. This determination is a required element of a Level II review pursuant to State and Federal requirements. EPA guidance on this topic is enclosed in the form of a March 1, 1994 Region 8 letter transmitting a February 22, 1994 guidance memorandum issued by the Office of Science and Technology.