

## MEMORANDUM

**TO:** The Utah Water Quality Working Group  
**FROM:** Western Resource Advocates  
**SUBJECT:** Utah's Level II Antidegradation Review Examples  
**DATE:** April 13, 2011

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### **Issue**

Some of the examples of activities that are exemption from an Antidegradation Level II review are too ambiguous and do not provide adequate protection or review of activities that will degrade existing water quality.

*See Utah Antidegradation Reviews: Implementation Guidance §3.3.3 (May 2010).*

### **Proposal**

Change the antidegradation guidance document to include less ambiguous language than the example language found in Section 3.3.3.

### **Reason for the Recommendation**

The objective of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. Congressional intent is to eliminate the discharge of pollutants into navigable waters; protect fish, wildlife and provide for recreation in and on the water; and prohibit the discharge of toxic pollutants in toxic amounts. *33 U.S.C. §1251 (1972).*

As Utah implements antidegradation guidance for reviewing purposes, it needs to define the water quality goals of the water body by designating the use and setting criteria to protect the existing use. Standards should protect the health or welfare, enhance the quality of the water and serve the purpose of the Clean Water Act. Consideration should be given to the existing water use and value of public water supplies, propagation of fish, shellfish, and wildlife, recreation in and on the water, and agricultural, industrial, and other purposes including navigation. *40 C.F.R. §131.2 (2011).*

According to the Environmental Protection Agency's regulations, Utah at a minimum must provide water quality standards that protect existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained. *40 C.F.R. §131.12 (2011).* Utah's duty to protect existing instream uses could be seriously undermined if its regulatory language is ambiguous or difficult to apply.

In the Utah Antidegradation Review: Implementation Guidance Manual released on May 13, 2010, Utah proposed ambiguous language in the examples found in the Level II Antidegradation Review exemptions that could lead to legal problems if adopted. The proposed problematic examples read:

- b. An Antidegradation Level II review is not required where any of the following conditions apply:

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, examples include situations where:
  - (a) the proposed concentration-based effluent limit is less than or equal to the ambient concentration in the receiving water during critical conditions; or
  - (b) a UPDES permit is being renewed and the proposed effluent concentration and loading limits are equal to or less than the concentration and loading limits in the previous permit; or
  - (c) a UPDES permit is being renewed and new effluent limits are to be added to the permit, but the new effluent limits are based on maintaining or improving upon effluent concentrations and loads that have been observed, including variability; or
  - (d) a new or renewed UPDES permit is being issued, and water quality-based effluent limits are not required for a specific pollutant because it has been determined that the discharge will not cause, have reasonable potential to cause, or contribute to an exceedance of a State water quality standard for the pollutant.

The language found in the Level II Antidegradation Review examples is ambiguous and could be subject to open-ended discretion. Specifically, examples (a) and (c) contains ambiguous language that requires more precision to avoid unacceptable ambiguities. In example (a), the language “critical conditions” is not defined anywhere in the statute or regulations. This term could be interpreted as either drought level conditions or flooding level conditions. In example (c), the language “upon” is ambiguous. This language could be interpreted as either “lower than” or “higher than”. Also, the language “variability” is not well defined and could be interpreted to mean a host of different things.

Example (d) contains language that appears to illegally shift the focus of review. The adoption of example (d) would essentially eliminate an Antidegradation Level II Review. Adoption of this example could lead to costly legal battles.

Ambiguous language allows for abuse and misinterpretation that can hurt Utah’s water quality. By providing clear language that is well defined, Utah will be fulfilling its obligations under the Clean Water Act while also providing more certainty for permit applicants. The best approach in clearing up this ambiguous language would be to remove it from the regulation entirely. In the alternative, we suggest definitions and examples that will help clarify the existing language and that will aid Utah fulfilling its duties under the Clean Water Act while still providing some flexibility in antidegradation review. We will also suggest a case-by-case analytical framework for Antidegradation Review.

### **Benefiting parties**

#### Department of Water Quality (DWQ)

- Would not be concerned with abusive or inconsistent interpretation of regulatory language.

- Would make permitting and enforcement actions simply and straight-forward.
- Would eliminate worry about legal challenges and reduce the amount of time and resources defending itself.
- Would garner greater support from environmental group and the public in general.
- Would not be concerned with having EPA disapprove of their water quality standards.

#### Industry

- Would have certainty and consistency in the standard and review requirements.
- Would not cause change in the industry except that it would be more insulated from legal challenges because the regulatory language is clearer.

#### Environmental Groups

- Would protect Utah's waters to a great degree.
- Would focus attention on educating the public instead of challenging permits or regulations.