UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, WA 98101

Reply To
Attn Of: OWW-135

MAY - 2 2007

David C. Peeler, Program Manager
Washington Department of Ecology
P. O. Box 47600
Olympia, Washington 98504-7600

Re: EPA Review of the 2003 Water Quality Standards Regulations for Antidegradation

Dear Mr. Peeler:

The Environmental Protection Agency (EPA) has completed its review of the antidegradation provisions contained in the 2003 Washington water quality standards. We conducted our review pursuant to our authority under Section 303(c) of the Clean Water Act and the implementing regulations at 40 CFR 131.5 and 131.21. EPA is approving provisions WAC 173-201A-300 through 330, which are water quality standards under Section 303(c) of the Clean Water Act. The enclosure provides clarification about the provisions EPA approved.

We appreciate the efforts of your staff to coordinate this action with EPA throughout the WQS revision process. If you have any questions please feel free to contact me at (206) 553-7151.

Sincerely,

Christine Psyk for

Michael F. Gearheard, Director
Office of Water and Watersheds

Enclosure

cc: Melissa Gildersleeve, Washington DOE
Fran Wilshusen, Northwest Indian Fisheries Commission
Steve Landino, NOAA
Ken Berg, USFWS

ENCLOSURE

I. History

In August 2003 the Washington Department of Ecology adopted, and submitted to EPA, its revised 2003 Water Quality Standards (WQS) regulations. The WQS package contained the specific revisions to the regulatory language at WAC 173-201A, the Lt. Governor's certification that the revisions were duly adopted in accordance with State law, a summary of the changes made to the States water quality standards, the States response to comments document, and technical reports. Since receiving the package EPA has reviewed several provisions contained within the 2003 WQS package. EPA determinations as to these provisions are listed below.

- January 12, 2005 - EPA provided its determination on some of the provisions in the 2003 WQS (variance procedures, site specific criteria, use attainability analysis provisions, etc);
- February 10, 2005 - EPA sent a letter to the Department of Ecology clarifying that the provision for compliance schedules for dams (WAC 173-201A-510(5)) contained in the 2003 WQS revision was not a water quality standard;
- March 22, 2006 - EPA sent a letter to the Department of Ecology disapproving specific stream segments because the aquatic life use designation was incorrect, and in some cases the temperature criterion did not protect the fish uses.

The technical justification for today's action is discussed in part II of this enclosure.

II. Technical Justification

Today's action provides EPA's determination on the antidegradation provisions contained in Washington's 2003 WQS submittal. The following provides each of the antidegradation provisions that EPA reviewed, and EPA's determination. The underlined language in each provision denotes that the language is either new, revised, or reformatted. Language that is not underlined was in Washington's 1997 water quality standards and has not changed, it is included here to provide context for the overall provision.

1. WQS Provision: Description, WAC 173-201A-300(1) and (2)

(1) The antidegradation policy is guided by chapter 90.48 RCW, Water Pollution Control Act, chapter 90.54 RCW, Water Resources Act of 1971, and 40 CFR 131.12.

(2) The purpose of the antidegradation policy is to:
(a) Restore and maintain the highest possible quality of the surface waters of Washington;

(b) Describe situations under which water quality may be lowered from its current condition;
(c) Apply to human activities that are likely to have an impact on the water quality of a surface water;
(d) Ensure that all human activities that are likely to contribute to a lowering of water quality, at a minimum, apply all known, available, and reasonable methods of prevention, control, and treatment (AKART); and
(e) Apply three levels of protection for surface waters of the state, as generally described below:

(i) Tier I is used to ensure existing and designated uses are maintained and protected and applies to all waters and all sources of pollution.
(ii) Tier II is used to ensure that waters of a higher quality than the criteria assigned in this chapter are not degraded unless such lowering of water quality is necessary and in the overriding public interest. Tier II applies only to a specific list of polluting activities.
(iii) Tier III is used to prevent the degradation of waters formally listed in this chapter as "outstanding resource waters," and applies to all sources of pollution.

EPA ACTION: EPA is approving provision WAC 173-201A-30(1) as a non-substantive introductory paragraph. EPA approves provision WAC 173-201A-300(2) as consistent with section 303(c) of the Clean Water Act and the regulations at 40 CFR 131.12 (Antidegradation Policy). Federal regulations at 40 CFR 131.12 require States and Tribes to develop and adopt an antidegradation policy and identify methods for implementing the policy. It also requires the State's policy to be consistent with the following elements:

- existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained (131.12(a)(1))
- where the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully. 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 non point source control (40 CFR 131.12(a)(2))

- where high quality waters constitute an outstanding National resource, such as waters of national and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected (40 CFR 131.12(a)(3))

Washington's policy contains all of these elements.

2. WQS Provision: Habitat Restoration, WAC 173-201A-300(3)

(3) Habitat Restoration. Both temporary harm and permanent loss of existing uses may be allowed by the department where determined necessary to secure greater ecological benefits through major habitat restoration projects designed to return the natural physical structure and associated uses to a water body where the structure has been altered through human action. [Statutory Authority: Chapters 90.48 and 90.54 RCW. 03-14-129 (Order 02-14), §§ 173-201A-300, filed 7/1/03, effective 8/1/03.]

EPA ACTION: EPA is not required to act on this provision because it is not a water quality standard under section 303(c) of the Clean Water Act. The language in this provision indicates a general intention to restore habitat and it also implies that the Washington Department of Ecology will make case by case determinations as to when harm or loss of uses will be allowed. However, it is unclear as to how this provision would be implemented. It is not clear that this provision would result in changes to any underlying water quality criteria or uses. Therefore, EPA does not consider this provision to be a water quality standard under Section 303(c) of the CWA.

EPA would like to note that while this provision, as written by the Washington Department of Ecology, is not a federal water quality standard, the concept of habitat restoration is consistent with the goals of the CWA.

3. WQS Provision: Tier I, Existing and designated uses, WAC 173-201A-310(1)

(1) Existing and designated uses must be maintained and protected. No degradation may be allowed that would interfere with, or become injurious to, existing or designated uses, except as provided for in this chapter.

EPA ACTION: EPA approves the first sentence of this provision because it expands the Washington's 1997 antidegradation provisions at WAC 173-201A-060(70)(1)) to include designated uses as well as existing uses.

EPA approves the second sentence of this provision as consistent with section 303(c) of the Clean Water Act and the regulations at 40 CFR 131.12. Washington's 1997 WQS also had a provision that stated "... no further degradation which would interfere with or become injurious to existing beneficial uses shall be allowed." The 2003 WQS retained this provision but added the language "... except as provided for in this chapter." This language refers to other sections of the water quality standards. For example, at WAC 173-201A-200(1)(c)(i) the water quality standards allow a 0.3° C temperature increase when the natural condition of the water body exceeds the criteria established in Table 200(1)(c).

4. WQS Provision: Tier I, Not meeting existing and designated uses, WAC 173-201A-310(2)

(2) For waters that do not meet assigned criteria, or protect existing or designated uses, the department will take appropriate and definitive steps to bring the water quality back into compliance with the water quality standards.

EPA ACTION: EPA is not required to act on this provision as it is not a water quality standard under section 303(c) of the Clean Water Act. This provision simply states Washington's intention to bring water bodies into compliance with their criteria whenever they exceed those criteria.

5. WQS Provision: Tier I, Natural conditions, WAC 173-201A-310(3)

(3) Whenever the natural conditions of a water body are of a lower quality than the assigned criteria, the natural conditions constitute the water quality criteria. Where water quality criteria are not met because of natural conditions, human actions are not allowed to further lower the water quality, except where explicitly allowed in this chapter.[Statutory Authority: Chapters 90.48 and 90.54 RCW. 03-14-129 (Order 02-14), §§ 173-201A-310, filed 7/1/03, effective 8/1/03.]

EPA ACTION: EPA approves the first sentence in this provision as a non-substantive formatting and editorial change. This provision was included in the 1997 WQS at WAC 173-201A-070(1). The 1997 WQS contained the phrase "...said waters..." rather than the phrase "...a water body..." and this minor editorial change does not alter the provision that EPA previously approved and that was in effect in the 1997 WQS.

EPA approves the second sentence in this provision (i.e., "Where water quality criteria are not met because of natural conditions, human actions are not allowed to further lower the water quality, except where explicitly allowed in this chapter.") as consistent with the Clean Water Act and its implementing regulations at 40 CFR 131. Washington's WQS allow water

quality to be exceeded by a de minimis amount in the following cases: (1) it allows a temperature increase of 0.3°C when the natural condition of the water body exceeds the established temperature criteria; and (2) it allows a decrease of 0.2 mg/L in dissolved oxygen when the natural condition of the water body is less than the established dissolved oxygen criteria. EPA has approved these allowances and provided its rationale in sections IV.C.4, 8, 13, and IV.D.4 of this document. This provision simply re-states that these exceptions are allowed.

6. **WQS Provision: Tier II, Requirement for Tier II analysis, WAC 173-201A-320(1)**

(1) Whenever a water quality constituent is of a higher quality than a criterion designated for that water under this chapter, new or expanded actions within the categories identified in subsection (2) of this section that are expected to cause a measurable change in the quality of the water (see subsection(3) of this section) may not be allowed unless the department determines that the lowering of water quality is necessary and in the overriding public interest (see subsection (4) of this section).

EPA ACTION: EPA approves this provision as consistent with the Clean Water Act and its implementing regulation 40 CFR § 131.12 (Antidegradation policy).

EPA's regulation at 40 CFR § 131.12(a)(2) requires the State's antidegradation policy to protect water quality where water quality is better than that needed to support fish and aquatic life, and recreation in and on the water. Where these conditions exist, the water body is considered high quality and water quality must be maintained and protected unless lowering water quality is necessary to support important social and economic development.

The State's antidegradation policy must be consistent with the federal antidegradation policy, however, there are no minimum elements specified in EPA's regulations for implementation methods. Therefore, the State has discretion in deciding how to determine high quality waters. Washington's policy uses a "pollutant-by-pollutant" approach to determine which of its water bodies fall into its Tier II category of protection. Using this approach a determination is made as to whether water quality is better than applicable criteria for specific pollutants that would be affected by the proposed activity. Thus, available assimilative capacity for any given pollutant may be subject to Tier II protection, regardless of whether the criteria for other pollutants are being met. EPA believes this is an acceptable approach (see *Water Quality Standards Regulation; Proposed Rule*, July 7, 1998, page 36782). This approach is easy to implement because decisions are driven strictly by water

column data. Furthermore, this approach may result in more waters receiving some degree of Tier II protection because it would cover waters that are clearly not attaining goal uses.

7. WQS Provision: Tier II, Actions requiring Tier II analysis, WAC 173-201A-320(2)

(2) A Tier II review will only be conducted for new or expanded actions conducted under the following authorizations. Public involvement with the Tier II review will be conducted in accordance with the public involvement processes associated with these actions.

(a) National Pollutant Discharge Elimination System (NPDES) waste discharge permits;
(b) State waste discharge permits to surface waters;
(c) Federal Clean Water Act Section 401 water quality certifications; and
(d) Other water pollution control programs authorized, implemented, or administered by the department.

EPA ACTION: EPA approves this provision as consistent with the Clean Water Act and its implementing regulations at and 40 CFR § 131.12 (Antidegradation policy).

As stated previously, EPA's regulations do not specify minimum elements required in a State's implementation methods. Therefore, the State has discretion to determine how to implement its policy. Washington is requiring a Tier II analysis for "new and expanded actions" (see Part B.11 for EPA approval of this term) associated with NPDES permits, State waste discharge permits to surface waters, CWA 401 certifications, and other water pollution control programs authorized, implemented, or administered by the department. This provision identifies the activities over which the State has regulatory authority. The federal requirements do not create State or Tribal regulatory authority over otherwise unregulated activities. Therefore, EPA believes this provision is reasonable because it identifies the universe of activities, which are regulated by that State, that may trigger a Tier II antidegradation analysis.

Additionally, the federal regulations at 40 CFR § 131.12(a)(2) require that a public process be used when determining if lowering Tier II water quality is necessary. Washington's provision satisfies this requirement by requiring the public involvement process associated with the listed authorities (e.g., NPDES permits) be used as the vehicle for public involvement with the Tier II review.

8. WQS Provision: Tier II, Definition of measurable change, WAC 173-201A-320(3)

(3) **Definition of measurable change.** To determine that a lowering of water quality is necessary and in the overriding public interest, an analysis must be conducted for new or expanded actions when the resulting action has the potential to cause a measurable change in the physical, chemical, or biological quality of a water body. Measurable changes will be determined based on an estimated change in water quality at a point outside the source area, after allowing for mixing consistent with WAC 173-201A-400(7). In the context of this regulation, a measurable change includes a:

(a) Temperature increase of 0.3 °C or greater;
(b) Dissolved oxygen decrease of 0.2 mg/L or greater;
(c) Bacteria level increase of 2 cfu/100 mL or greater;
(d) pH change of 0.1 units or greater;
(e) Turbidity increase of 0.5 NTU or greater; or
(f) Any detectable increase in the concentration of a toxic or radioactive substance.

EPA ACTION: EPA approves this provision as consistent with the Clean Water Act and its implementing regulations at 40 CFR § 131.12 (Antidegradation policy).

This provision identifies what is considered a "lowering of water quality," and thus subject to a Tier II analysis. EPA's regulations do not specify a "significance" threshold below which an antidegradation review would not be required. Therefore, the State has discretion to determine when a change in water quality is significant enough to warrant a Tier II analysis. Washington is defining a "measurable change" for temperature, dissolved oxygen, bacteria, pH, and turbidity as the reportable limit that is used by the Department of Ecology's ambient monitoring program (*WAC 170-201A, Surface Water Quality Standards for the State of Washington, Responsiveness Summary,* July 1, 2003 page 102). Washington is defining a measurable change for toxics and radioactive substances as any detectable increase in concentration. Washington's method of applying antidegradation requirements only to those activities that will result in significant degradation is a reasonable approach that allows them to focus limited resources where they may result in the greatest environmental protection (*Water Quality Standards Regulation; Proposed Rule,* 63 FR 36783 (July 7, 1998)).

Additionally, Ecology is requiring the antidegradation analysis to occur at the edge of the mixing zone, and this provision also limits the allowable size of the mixing zone to the dimensions included in WAC 173-201A-400 (7). Since mixing zones are areas where water quality criteria may be exceeded it is reasonable to require the antidegradation analysis to occur outside of the mixing zone area.

9. **WQS Provision: Tier II, Public interest determination, WAC 173-201A-320(4)**

(4) **Necessary and overriding public interest determinations.** Once an activity has been determined to cause a measurable lowering in water quality, then an analysis must be conducted to determine if the lowering of water quality is necessary and in the overriding public interest. Information to conduct the analysis must be provided by the applicant seeking the authorization, or by the department in developing a general permit or pollution control program, and must include:

(a) A statement of the benefits and costs of the social, economic, and environmental effects associated with the lowering of water quality. This information will be used by the department to determine if the lowering of water quality is in the overriding public interest. Examples of information that can assist in this determination include:

(i) Economic benefits such as creating or expanding employment, increasing median family income, or increasing the community tax base;

(ii) Providing or contributing to necessary social services;

(iii) The use and demonstration of innovative pollution control and management approaches that would allow a significant improvement in AKART for a particular industry or category of action;

(iv) The prevention or remediation of environmental or public health threats;

(v) The societal and economic benefits of better health protection;

(vi) The preservation of assimilative capacity for future industry and development; and

(vii) The benefits associated with high water quality for uses such as fishing, recreation, and tourism.

(b) Information that identifies and selects the best combination of site, structural, and managerial approaches that can be feasibly implemented to prevent or minimize the lowering of water quality. This information will be used by the department to determine if the lowering of water quality is necessary. Examples that may be considered as alternatives include:

(i) Pollution prevention measures (such as changes in plant processes, source reduction, and substitution with less toxic substances);

(ii) Recycle/reuse of waste by-products or production materials and fluids;

(iii) Application of water conservation methods;

(iv) Alternative or enhanced treatment technology;

(v) Improved operation and maintenance of existing treatment systems;

(vi) Seasonal or controlled discharge options to avoid critical conditions of water quality;
(vii) Establishing buffer areas with effective limits on activities;
(viii) Land application or infiltration to capture pollutants and reduce surface runoff, on-site treatment, or alternative discharge locations;
(ix) Water quality offsets as described in WAC 173-201A-450.

EPA ACTION: EPA approves this provision as consistent with the Clean Water Act and its implementing regulations at 40 CFR § 131.6 (Minimum requirements for water quality standards submission), and 40 CFR § 131.12 (Antidegradation policy). The federal regulation at 40 CFR § 131.12 (a)(2) states "...that quality shall be maintained and protected unless the State finds...allowing lowering water quality is necessary to accommodate important economic or social development in the area in which the waters are located..."

Washington's provision requires the applicant to identify and select the best combination of site, structural and managerial approaches that can be feasibly implemented to prevent or minimize the lowering of water quality. The Department will use this information to determine if lower the water quality is necessary. This approach is consistent with the approach recommended by EPA. This approach allows the State to ensure that all feasible alternatives have been adequately evaluated and that the least degrading reasonable alternative is implemented. (*Water Quality Standards Regulation, Proposed Rule*, 63 FR 36784 (July 7, 1998))

Washington's provision also requires the applicant to submit information that the Department can use to evaluate whether a proposed activity that will result in degradation is necessary to accommodate important social or economic development in the area in which the waters are located. Washington's provision is reasonable and contains a number of factors that can be considered for this analysis. These factors are consistent with the factors that EPA recommended in its *Water Quality Standards Regulation, Proposed Rule* (63 FR 36784 (July 7, 1998)).

10. WQS Provision: Tier II, Department discretion, WAC 173-201A-320(5)

(5) The department retains the discretion to require that the applicant examine specific alternatives, or that additional information be provided to conduct the analysis.

EPA ACTION: EPA is not required to act on this provision because examining specific alternative or requiring additional information is the Washington Department of Ecology's discretion. It is not a water quality

standard under Section 303(c) of the Clean Water because it is a supplementary requirement beyond what the CWA requires.

11. WQS Provision: Tier II, General Permits, WAC 173-201A-320(6)

(6) General permit and water pollution control programs are developed for a category of dischargers that have similar processes and pollutants. New or reissued general permits or other water pollution control programs authorized, implemented, or administered by the department will undergo an analysis under Tier II at the time the department develops and approves the general permit or program.

(a) Individual activities covered under these general permits or programs will not require a Tier II analysis.

(b) The department will describe in writing how the general permit or control program meets the antidegradation requirements of this section.

(c) The department recognizes that many water quality protection programs and their associated control technologies are in a continual state of improvement and development. As a result, information regarding the existence, effectiveness, or costs of control practices for reducing pollution and meeting the water quality standards may be incomplete. In these instances, the antidegradation requirements of this section can be considered met for general permits and programs that have a formal process to select, develop, adopt, and refine control practices for protecting water quality and meeting the intent of this section. This adaptive process must:

(i) Ensure that information is developed and used expeditiously to revise permit or program requirements;

(ii) Review and refine management and control programs in cycles not to exceed five years or the period of permit reissuance; and

(iii) Include a plan that describes how information will be obtained and used to ensure full compliance with this chapter. The plan must be developed and documented in advance of permit or program approval under this section.

EPA ACTION: EPA approves the provision for Tier II review of general permits as consistent with 40 CFR § 131.12(a)(2). This provision requires that Tier II reviews be conducted at the time the State develops and approves the general permit or program.

EPA's approval of this provision differs from positions that EPA has taken in the past with regard to Tier II review at the general permit issuance stage. A brief discussion describing past actions that EPA has taken on Tier II review of general permits at the general permit issuance stage, and EPA's rationale for approving Washington's provision, is provided below.

Previous EPA Statements Regarding Tier II Antidegradation Requirements and General Permits

EPA has stated that conducting a Tier II antidegradation review at the time of general permit issuance would be difficult. *See* Final Reissuance of NPDES Storm Water Multi-Sector General Permit for Industrial Activities, 65 Fed. Reg. 64746 (Oct. 30, 2000). Specifically, EPA responded in 2000 to a commenter concerned with how Tier II review would be conducted in relation to activities under the NPDES Storm Water Multi-Sector General Permit for Industrial Activities by stating the following:

The commenter correctly recognizes the difficulty in determining what defines "necessary to accommodate important economic or social development" in accordance with 40 CFR Section 131.12(a)(2). By [regulation], this determination involves public participation, the assurance that water quality will be protected, and several other factors. EPA would have to modify the permit for each discharge in question in order to comply with 40 CFR Section 131.12(a)(2). Individual considerations such as these are contrary to the concept of a general permit. In addition, public participation would be impossible since the permit issuance authority would not know about the particular discharge to Tier II waters before a NOI [notice of intent] was submitted. Therefore, a facility operator must seek coverage under an individual permit to discharge to Tier II waters under 40 CFR Section 131.12(a)(2)'s allowable degradation provisions to satisfy the requirements for public participation and protection of water quality. The only discharges allowed coverage under today's permit are those which do not degrade the use of a Tier II water below its existing levels, even though those existing levels exceed levels necessary to support propagation of fish, shellfish and wildlife and recreation in and on the water.

65 Fed. Reg. 64736, 64793-94. In addition, in the *Final NPDES General Permits for Water Treatment Facility Discharges in the States of Massachusetts and New Hampshire*, 65 Fed. Reg. 69000 (November 15, 2003), EPA required each additional new or expanded facility seeking coverage under the general permit to first undergo individualized antidegradation review.

West Virginia Tier II Antidegradation Procedures

EPA departed from these previous statements when it approved the State of West Virginia's antidegradation implementation procedures on November 26, 2001. West Virginia had adopted an antidegradation implementation procedure stating that "[r]egulated activities that are granted coverage by a WV/NPDES general permit will not be required to undergo a Tier II antidegradation review as part of the permit registration process." In approving West Virginia's procedure, EPA stated that it was possible for the Tier II antidegradation review to occur at either the general permit issuance stage or the individual notice of intent stage. With regard to the earlier

statements made by the Agency, EPA argued that those statements regarding other general permits were inapposite and that the September 2000 Storm Water Multi-Sector General Permit covered discharges from many industrial facilities in numerous states, such that EPA could not make a blanket antidegradation determination for so many discharges in such a large area in that case. In addition, EPA claimed that either approach is a permissible interpretation of EPA's antidegradation regulation. That is, while it was reasonable for the Agency to require Tier II review at the notice of intent stage, it is also reasonable simply to require antidegradation review on a general permit-wide basis.

District Court Decision on EPA's approval of West Virginia's procedures

On August 23, 2003, the U.S. District Court for the Southern District of West Virginia issued a decision regarding EPA's approval of West Virginia's methods for implementing its antidegradation policy. Ohio Valley Environmental Coalition, et al. v. Horinko, 279 F.Supp.2d 732 (S.D. W.Va. 2003). Specifically, the court held that EPA's approval of West Virginia's antidegradation implementation procedure allowing Tier II antidegradation reviews to be conducted during the general permit issuance stage rather than at the individual notice of intent stage was arbitrary and capricious. Id. at 763.[1]

In response to EPA's first argument that the Agency's earlier statements were inapposite, the court found that general statewide NPDES permits and general section 404 permits, like the September 2000 Storm Water Multi-Sector General Permit, also cover many separate discharges from different facilities in a large and varied geographic area. Id. at 760. The court found that EPA had not explained why the difficulties that were present in making blanket antidegradation determinations for the September 2000 Storm Water Multi-Sector General Permit were not also present for general permits in West Virginia. Id. The State could not know, the court held, the specific locations of the discharges that might be covered by the general permit because the locations are not known until individuals seek permission to discharge under the general permit. Id. at 761. The court asked if the State could determine, at the time the general permit is issued, whether a specific discharge will be associated with "important" economic or social development. Id. The court queried whether the State could determine, at the time the general permit is issued, whether the lowering of water quality would be "necessary" for such development. Id. And the court questioned if the State could conduct meaningful public participation before members of

[1] It is important to note that the West Virginia court agreed with EPA that the Agency's statements in its 1998 Advance Notice of Proposed Rulemaking ("ANPRM"), 63 Fed. Reg. 36743, 36780 (July 7, 1998), in which EPA stated the Agency's position that States must apply antidegradation requirements to activities that are regulated under State or federal law, can reasonably be read to allow Tier II antidegradation review of a general permit at the general permit issuance stage. Id. at 759. The court disagreed with the plaintiffs, who had argued that EPA's statement in its ANPRM required Tier II antidegradation review of each individual use under that general permit. Id.

the public were aware of the nature and location of the specific discharges to be covered by the permit. Id.

In summary, the court concluded that EPA had failed to offer a reasoned analysis, or a reasonable factual basis, to justify the change in its opinion that Tier II antidegradation review could not feasibly be performed at the general permit issuance stage. Id. at 761-62. However, the court noted that, inherent in the notion of an agency's discretion to interpret its own regulations is the idea that an agency may adopt any one of various reasonable interpretations of that regulation. Id. at 762. The court stated that an agency's prior choice of one reasonable interpretation does not preclude it from reconsidering its position in light of its ongoing experience and accumulated knowledge and adopting another reasonable interpretation. Id. That said, EPA's interpretation of its regulation must still be a reasonable one. Id.

EPA's Basis for Approving Washington's procedures

Since the court's decision in the West Virginia case, EPA has re-considered whether 40 CFR § 131.12(a)(2) could be satisfied by allowing States to conduct a Tier II antidegradation review at the general permit issuance stage. EPA hereby finds that such an approach is possible and could satisfy the requirements of the federal antidegradation regulation. Just as with other CWA requirements, and as the West Virginia court explained, there is no legal reason why States cannot comply with Tier II antidegradation requirements in a bundled manner as opposed to through an individual permit.[2]

Regarding EPA's statements in the context of earlier EPA-issued general permits, those statements reflect EPA's reasoning at that time for choosing not to conduct Tier II antidegradation review at the general permit issuance stage where EPA was the permit issuing authority. Either choice (i.e., conducting the review at the general permit issuance stage or at the individual Notice of Intent stage) is permissible and is consistent with EPA's regulations for approving water quality standards found at 40 CFR §§ 131.6 and 131.12.

EPA's antidegradation regulation for Tier II water bodies, at 40 CFR § 131.12, states:

(a) The State shall develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy pursuant to this subpart. The antidegradation policy and implementation methods shall, at a minimum, be consistent with the following:

[2] Note that whether the permit authority has reasonably conducted such a required Tier II review in issuing a particular general permit is an issue that a person may challenge (just as a person may challenge the reasonable application of any CWA requirement) in a permit. The possibility that a particular application of this provision may not be reasonable does not mean that the authorizing provision is inconsistent with the federal antidegradation regulation at 40 CFR § 131.12(a)(2).

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(2) Where the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully. 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.

EPA has now determined that it is possible for states (and EPA) to conduct a Tier II antidegradation review at the general permit issuance stage. Substantively, general permits are no different than individual permits; they must include all of the same types of permit limitations required to be included in individual permits. For example, in addition to general permits including mandatory technology-based requirements, as noted by the court in the West Virginia case, general permits must also contain, as needed, water quality-based effluent limits. 40 CFR § 122.28(a)(3). In addition, general permits must provide for public notice and comment. Under EPA's regulations, EPA-issued general permits are governed by 40 § CFR 122.28(b)(1), which cross-references all of the procedures, including notice and comment procedures, listed at 40 CFR part 124, which contains EPA procedures for issuing, modifying, revoking and reissuing or terminating NPDES permits. Included among the requirements for states to be authorized to administer the NPDES program is the requirement that states have legal authority to implement 40 CFR § 122.28(b)(1) and the notice and comment procedures at 40 CFR part 124. *See* 40 CFR § 123.25(a)(11), (26)-(34).

In the NPDES CWA section 402 discharge context, if a general permit were to apply to a particular industry statewide, independent of antidegradation requirements, the permit authority would be required to propose for public comment the area to be covered by the general permit and the proposed effluent limitations that would be authorized under such a general permit. Those proposed effluent limitations would be specific pollutant limits to be placed on each parameter in a discharge in order to comply with applicable technology-based requirements (e.g., best available technology or "BAT") and applicable state water quality standards.

As far as satisfying the requirements of 40 CFR § 131.12(a)(2), the permit authority could first identify and subject to public comment its determination of the high quality waters (if any) in the area to be covered by the general permit. Next, the permit authority could determine and subject to public comment its determination of whether the discharge limits it intends to

propose would lower the quality of water in any high quality waters. This analysis would be subject to public comment in the permit process. Third, the permit authority, obtaining information as necessary from the permitted industry or industries, would conduct the Tier II antidegradation analysis – an analysis of reasonable alternatives to the discharge and a determination of whether any lowering of water quality in high quality waters would be "necessary to accommodate important economic or social development in the area in which the waters are located."

As recommended by EPA in its July 7, 1998 ANPRM, the essence of finding that the limited lowering (still meeting water quality criteria and protecting applicable designated uses) is "necessary" is to "develop an analysis of pollution control/pollution prevention alternatives. By doing this, the State ensures that all feasible alternatives have been adequately evaluated, and that the least degrading reasonable alternative is implemented." 63 Fed. Reg. 36784. Further, in the ANPRM EPA stated that "EPA's current thinking is that determining the social and economic importance of a proposed activity is a public question best addressed by State, Tribal or local interests, perhaps as part of the development of a basin plan." Id.

Where the general permit is crafted to address a class of activities that are appropriately similar, the alternatives based on certain technologies or pollution prevention measures would be the same set of alternatives for all of the dischargers to be authorized under the general permit. And the finding of social or economic importance could be done with respect to a broader group of related dischargers over a broad geographic area, up to and including an entire state. Alternatively, the permit authority could choose to subcategorize different types of facilities and different types of water bodies within one general permit for separate "sub analyses" within the general permit. All of these analyses would be required to be subjected to public notice and comment and response by the permit authority. The reasonableness of this decisionmaking, along with any other aspect of the general permit, would be subject to judicial review under applicable state permit procedures.

EPA finds that the Tier II antidegradation provision adopted by the State of Washington is consistent with 40 CFR § 131.12(a)(2). Washington's Tier II antidegradation provision specifically states that the Tier II review will occur at the time that the Department of Ecology develops and approves the general permit or program. On January 19, 2006, EPA received a letter from Washington's Department of Ecology that discussed how a Tier II antidegradation review would be conducted for general permits. In that letter, Washington explained that general permits are developed for a category of dischargers that have discharges similar enough such that their NPDES permit requirements are the same regardless of the geographic location of the discharge. Individual facilities do not undergo a site-specific analysis, rather the general permits are developed and applied such that any

facility eligible for coverage will receive coverage under a general permit that contains requirements that will bring it into compliance with the applicable water quality standards, including antidegradation requirements.

Washington's letter also states that the general permit is developed to comply with Tier 1 (protection of existing uses, which is included in Tier II requirements) and Tier II antidegradation requirements. During the development or re-issuance of a general permit, Washington will assess the anticipated level of degradation due to new or expanded discharges to high quality (or Tier II) waters that are likely to be authorized by the general permit, and that level of degradation will be taken into account during the Tier II antidegradation review of the general permit. The general permit or fact sheet will contain a determination whether the lowering of water quality from the anticipated new or increased discharges is necessary to accommodate economic or social development in the area in which the waters are located, as well as whether the lowering of water quality from the anticipated new or increased discharges is in the public interest.

According to Washington's letter, public notice and the opportunity to comment on the Tier II antidegradation review occurs: (1) at the time a general permit is first developed, (2) each time the general permit is re-issued (every five years), and (3) each time a facility applies for coverage under the general permit. A list of the facilities applying for coverage, as well as a list of the potentially affected water bodies, will be publicly noticed each time a general permit is re-issued and each time a facility applies for coverage under a general permit. The public notice will occur in both the local paper and on Washington's website. Washington will specifically include an opportunity for the public to challenge whether any of the facilities applying for coverage under the permit are appropriate based on concerns that they do not meet the State's Tier II antidegradation requirements. Any new or increased discharge that would result in a lowering of water quality on a high quality, or Tier II, water body that is not determined to be necessary to accommodate economic or social development in the area in which the waters are located, as well as in the public interest, would be denied coverage under the general permit and would be required to seek coverage under an individual permit.

Given the above, EPA finds that it is possible for the State of Washington to conduct a Tier II antidegradation review, consistent with 40 CFR § 131.12(a)(2), in the context of a general permit at the general permit issuance stage. As a result, EPA determines that this provision is consistent with 40 CFR § 131.12(a)(2) and EPA hereby approves this provision.

12. WQS Provision: Tier II, Comply with Tier I, WAC 173-201A-320(7)

(7) All authorizations under this section must still comply with the provisions of Tier I (WAC 173-201A-310).

EPA ACTION: EPA approves this provision as consistent with the Clean Water Act and its implementing regulations at 40 CFR § 131.12 (Antidegradation policy). Washington's provision is consistent with the federal regulation at 40 CFR § 131.12 (a)(2) which states that ".. In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully."

13. WQS Provision: Tier III, Introduction, WAC 173-201A-330

Tier III -- Protection of outstanding resource waters.
Where a high quality water is designated as an outstanding resource water, the water quality and uses of those waters must be maintained and protected. As part of the public process, a qualifying water body may be designated as Tier III(A) which prohibits any and all future degradation, or Tier III(B) which allows for de minimis (below measurable amounts) degradation from well-controlled activities.

EPA ACTION: EPA approves this provision as consistent with the Clean Water Act and its implementing regulations 40 CFR § 131.12 (Antidegradation policy). Washington's provision contains a designation for Tier III(A) waters that is consistent with 40 CFR § 131.12(a)(3), which requires that water quality in outstanding National resource waters be maintained and protected. Washington's provision also contains a Tier III(B), which allows de minimis degradation. This tier is analogous to a "Tier II ½", which is a more stringent application of the Tier II provisions of the antidegradation policy but slightly less stringent than the prohibition against any lowering in Tier III (A). This extra tier in the State's antidegradation policy is acceptable because it is a more stringent application of the Tier II provisions of the antidegradation policy, and therefore, permissible under Section 510 of the Clean Water Act (*Water Quality Standards Handbook: Second Edition*, EPA-823-B-94-005a, August 1994).

14. WQS Provision: Tier III, Eligibility, WAC 173-201A-330(1)

(1) To be eligible for designation as an outstanding resource water in Washington, one or more of the following must apply:

(a) The water is in a relatively pristine condition (largely absent human sources of degradation) or possesses exceptional water quality, and also occurs in federal and state parks, monuments, preserves, wildlife refuges, wilderness areas, marine sanctuaries, estuarine research reserves, or wild and scenic rivers;

(b) The water has unique aquatic habitat types (for example, peat bogs) that by conventional water quality parameters (such as dissolved oxygen, temperature, or sediment) are not considered high quality, but that are unique and regionally rare examples of their kind;
(c) The water has both high water quality and regionally unique recreational value;
(d) The water is of exceptional statewide ecological significance; or
(e) The water has cold water thermal refuges critical to the long-term protection of aquatic species. For this type of outstanding resource water, the nondegradation protection would apply only to temperature and dissolved oxygen.

EPA ACTION: EPA approves this provision as consistent with the Clean Water Act and its implementing regulations 40 CFR § 131.12 (Antidegradation policy). Tier III of the federal antidegradation policy is intended to identify and protect waters of extraordinary ecological, recreational or other significance. Washington's list of water bodies that may be eligible for Tier III protection is consistent with the types of water bodies described in 40 CFR § 131.12(a)(3).

15. WQS Provision: Tier III, Request for designation, WAC 173-201A-330(2)

(2) Any water or portion thereof that meets one or more of the conditions described in subsection (1) of this section may be designated for protection as an outstanding resource water. A request for designation may be made by the department or through public nominations that are submitted to the department in writing and that include sufficient information to show how the water body meets the appropriate conditions identified in this section.

EPA ACTION: EPA approves this provision as consistent with the Clean Water Act and its implementing regulations at 40 CFR § 131.12 (Antidegradation policy). Federal regulations do not provide a process for designating Tier III waters. Rather, states have flexibility to decide how this should be accomplished. EPA believes that Washington's methodology for nominating Tier III water bodies is reasonable.

16. WQS Provision: Tier III, Departmental procedures, WAC 173-201A-330(3)

(3) After receiving a request for outstanding resource water designation, the department will:
(a) Respond within sixty days of receipt with a decision on whether the submitted information demonstrates that the water body meets the eligibility requirements for an outstanding resource water. If the submitted information demonstrates that the water body meets the

eligibility requirements, the department will schedule a review of the nominated water for designation as an outstanding resource water. The review will include a public process and consultation with recognized tribes in the geographic vicinity of the water.

(b) In determining whether or not to designate an outstanding resource water, the department will consider factors relating to the difficulty of maintaining the current quality of the water body. Outstanding resource waters should not be designated where substantial and imminent social or economic impact to the local community will occur, unless local public support is overwhelmingly in favor of the designation. The department will carefully weigh the level of support from the public and affected governments in assessing whether or not to designate the water as an outstanding resource water.

(c) After considering public comments and weighing public support for the proposal, the department will make a final determination on whether a nominated water body should be adopted into this chapter as an outstanding resource water.

EPA ACTION: EPA approves this provision as consistent with the Clean Water Act and its implementing regulations at 40 CFR § 131.12 (Antidegradation policy). As stated previously, federal regulations do not provide a process for designating Tier III waters. Rather, states have flexibility to decide how this should be accomplished. EPA believes that Washington's methodology, tribal consultation process, and public process for Tier III water bodies are reasonable.

17. WQS Provision: Tier III, Exceptions, WAC 173-201A-330(4)

(4) A designated outstanding resource water will be maintained and protected from all degradation, except for the following situations:

(a) Temporary actions that are necessary to protect the public interest as approved by the department.

(b) Treatment works bypasses for sewage, waste, and stormwater are allowed where such a bypass is unavoidable to prevent the loss of life, personal injury, or severe property damage, and no feasible alternatives to the bypass exist.

(c) Response actions taken in accordance with the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), as amended, or similar federal or state authorities, to alleviate a release into the environment of substances which may pose an imminent and substantial danger to public health or welfare.

(d) The sources of degradation are from atmospheric deposition.

EPA ACTION: EPA is not required to on WAC 173-210A-330(4)(a) because it is not a water quality standard under Section 303(c) of the Clean

Water Act. Rather, this provision is an exercise of the State's enforcement discretion. However, it is EPA's position that States may allow some limited activities in Tier III waters that result in temporary and short-term changes in water quality provided the water quality criterion is not exceeded. Such activities are considered to be consistent with the intent and purpose of outstanding national resource waters (*Water Quality Standards Regulations*, November 8, 1983, page 51403).

EPA is not required to act on WAC 173-210A-330(4)(b) because it is not a water quality standard under Section 303(c) of the Clean Water Act. A "bypass" (i.e., the intentional diversion of waste streams from any portion of a treatment facility) for point sources is regulated through the National Pollutant Discharge Elimination System (NPDES) program (see 40 CFR § 122.41(m)(4) – Prohibition of Bypass). It is outside the authority of the water quality standards program to modify applicable federal regulations for the NPDES program.

EPA is not required to act on WAC 173-210A-330(4)(c) because it is not a water quality standard under Section 303(c) of the Clean Water Act. This provision simply cites the authority provided under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as Superfund. CERCLA was enacted by Congress on December 11, 1980 and provides broad Federal authority to respond directly to releases or threatened releases of hazardous substances that may endanger public health or the environment. Citing this Act in the water quality standards regulations does not make it a water quality standard.

EPA is not required to act on provision WAC 173-210A-330(4)(d) because it is not a water quality standard under Section 303(c) of the Clean Water Act. This provision addresses non-point source activities and EPA does not have authority to regulate non-point source activities under the CWA (*American Wildlands v. Browner*, 260 F.3d 1192 (10th Cir. 2001)).

18. WQS Provision: Tier III, Requirements for Tier III(A) and III(B), WAC 173-201A-330(5)

(5) Outstanding resources waters can be designated for either Tier III(A) or Tier III(B) protection.

(a) Tier III(A) is the highest level of protection and allows no further degradation after the waters have been formally designated Tier III(A) under this chapter.
(b) Tier III(B) is the second highest level of protection for outstanding resource waters and conditionally allows minor degradation to occur

due to highly controlled actions. The requirements for Tier III(B) are as follows:

(i) To meet the goal for maintaining and protecting the quality of Tier III(B) waters, sources of pollution, considered individually and cumulatively, are not to cause measurable degradation of the water body.

(ii) Regardless of the quality of the water body, all new or expanded point sources of pollution in Tier III(B) waters must use applicable advanced waste treatment and control techniques that reasonably represent the state of the art and must minimize the degradation of water quality to nonmeasurable levels where total elimination is not feasible. Nonpoint sources must use all applicable structural and nonstructural BMPs with the goal of reducing the degradation of water quality to nonmeasurable levels where total elimination is not feasible.

EPA ACTION: As stated above, EPA approves Washingtion's Tier III(A) and Tier III(B) designations as consistent with the Clean Water Act and its implementing regulations 40 CFR 131.12 (Antidegradation policy). Washington's provision contains a designation for Tier III(A) waters and clearly states that no further degradation is allowed in these waters. This is consistent with the federal regulations at 40 CFR 131.12(a)(3) which requires outstanding National resource waters to be maintained and protected.

Washington's provision also contains a Tier III(B) designation which allows de minimis degradation. This tier is analogous to a "Tier II ½" which is a more stringent application of the Tier II provisions of the antidegradation policy but slightly less stringent than the prohibition against any lowering in water quality as required by Washington's Tier III (A) designation. This extra tier in the State's antidegradation policy is acceptable because it is a more stringent application of the Tier II provisions of the antidegradation policy, and therefore, permissible under Section 510 of the Clean Water Act (*Water Quality Standards Handbook: Second Edition*, EPA-823-B-94-005a, August 1994). Washington's provision (WAC 173-201A-330(5)(b) makes it clear that sources of pollution to Tier III(B) cannot cause a measurable degradation to the water body. Washington has defined measurable change in WAC 173-201A-320(3).