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17 STATE OF CALIFORNIA
18 STATE WATER RESOURCES CONTROL BOARD

19
20 In the Matter of the Petition of NRDC, Los
Angeles Waterkeeper, and Heal the Bay, for
21 Review of Action by the California Regional
Water Quality Control Board, Los Angeles
22 Region, in Adopting the Los Angeles County
Municipal Separate Stormwater National
23 Pollutant Discharge Elimination System
(NPDES) Permit; Order No. R4-2012-0175;
24 NPDES Permit No. CAS004001
25

) REQUEST FOR OFFICIAL NOTICE
) RE: PETITION FOR REVIEW OF
) LOS ANGELES REGIONAL WATER
) QUALITY CONTROL BOARD
) ACTION OF ADOPTING ORDER
) NO. R4-2012-0175

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1 The Natural Resources Defense Council (“NRDC”), Los Angeles Waterkeeper
2 (“Waterkeeper”), and Heal the Bay (collectively, “Petitioners”), in conjunction with our Petition
3 for Review In the Matter of the California Regional Water Quality Control Board, Los Angeles
4 Region, in Adopting the Los Angeles County Municipal Separate Stormwater National Pollutant
5 Discharge Elimination System (NPDES) Permit; Order No. R4-2012-0175; NPDES Permit No.
6 CAS004001, hereby request that the State Water Resources Control Board (“State Board”) take
7 official notice of the following documents, pursuant to California Government
8 Code § 11515 and California Code of Regulations § 2050.6:

- 9 1. Attached as “Exhibit A” is a true and correct copy of a memorandum from
10 James A. Hanlon, Director, Office of Wastewater Management, U.S. EPA and Denise
11 Keehner, Director, Office of Wetlands, Ocean and Watersheds, U.S. EPA, to Water
12 Management Division Directors, Regions 1-10, (November 12, 2010). Evidence Code
13 section 452(c) allows the Board to take official notice of “[o]fficial acts of the
14 legislative, executive, and judicial departments of the United States. . . .” Courts have
15 found that “Official acts” under Evidence Code section 452(c) “include records, reports
16 and orders of administrative agencies.” (*Rodas v. Spiegel* (2001) 87 Cal.App.4th 513,
17 518.) A letter or memo from an agency concerning the interpretation of its own
18 regulations is an “official act” and therefore a proper subject of notice. (*In re Social*
19 *Services Payment Cases* (2008) 166 Cal.App.4th 1249, 1271-72 (agency letters
20 interpreting statute were proper subject of judicial notice as “official acts” of agency);
21 *People v. French* (1978) 77 Cal.App.3d 511, 521 n.12 (taking judicial notice of
22 Department of Health memorandum concerning interpretation of agency regulations).)
- 23 2. Attached as “Exhibit B” is a true and correct copy of a letter from Jon M.
24 Capacasa, Director, Water Protection Division, U.S. EPA, to Mr. Jay Sakai, Director,
25 Water Management Administration, Maryland Department of the Environment (August
26 8, 2012). Evidence Code section 452(c) allows the Board to take official notice of
27 “[o]fficial acts of the legislative, executive, and judicial departments of the United
28 States. . . .” Courts have found that “Official acts” under Evidence Code section 452(c)

1 “include records, reports and orders of administrative agencies.” (*Rodas v. Spiegel*, 87
2 Cal.App.4th at 518.) A letter or memo from an agency concerning the interpretation of
3 its own regulations is an “official act” and therefore a proper subject of notice. (*In re*
4 *Social Services Payment Cases*, 166 Cal.App.4th at 1271-72 (agency letters interpreting
5 statute were proper subject of judicial notice as “official acts” of agency); see also,
6 *People v. French*, 77 Cal.App.3d at 521 n.12.)

7 3. Attached as “Exhibit C” is a true and correct copy of Chapter 7 from U.S.
8 EPA’s NPDES Permit Writer’s Manual, EPA 833-K-10-001 (September 2010).
9 Chapter 7 is called “Final Effluent Limitations and Anti-backsliding.” Evidence Code
10 section 452(c) allows the Board to take official notice of “[o]fficial acts of the
11 legislative, executive, and judicial departments of the United States. . . .” Courts have
12 found that “Official acts” under Evidence Code section 452(c) “include records, reports
13 and orders of administrative agencies.” (*Rodas v. Spiegel*, 87 Cal.App.4th at 518.) A
14 manual or handbook of an administrative agency, especially when requested for the
15 purpose of showing the agency’s interpretation of its own regulations, is a proper
16 subject of notice. (*People v. Goodloe* (1995) 37 Cal.App.4th 485, 492-93 (taking
17 judicial notice of administrative bulletin issued by Department of Corrections regarding
18 its interpretation of criminal statute); *Cicairos v. Summit Logistics, Inc.* (2005) 133
19 Cal.App.4th 949, 956, fn. 1 (granting judicial notice of Division of Labor Standards
20 Enforcement Manual).)

21 4. Attached as “Exhibit D” is a true and correct copy of a memorandum from
22 James R. Elder, Office of Water Enforcement and Permits, U.S. EPA, to Water
23 Management Division Directors, Regions I-X, and NPDES State Directors (1989).
24 Evidence Code section 452(c) allows the Board to take official notice of “[o]fficial acts
25 of the legislative, executive, and judicial departments of the United States. . . .” Courts
26 have found that “Official acts” under Evidence Code section 452(c) “include records,
27 reports and orders of administrative agencies.” (*Rodas v. Spiegel*, 87 Cal.App.4th at
28 518.) A letter or memo from an agency concerning the interpretation of its own

1 regulations is an “official act” and therefore a proper subject of notice. (*In re Social*
2 *Services Payment Cases*, 166 Cal.App.4th at 1271-72 (agency letters interpreting
3 statute were proper subject of judicial notice as “official acts” of agency); see also,
4 *People v. French*, 77 Cal.App.3d at 521 n.12.)

- 5 5. Attached as “Exhibit E” is a true and correct copy of a document from U.S.
6 EPA, Region 9 called “Guidance on Implementing the Antidegradation Provisions of
7 40 C.F.R. 131.12,” (June 3, 1987). Evidence Code section 452(c) allows the Board to
8 take official notice of “[o]fficial acts of the legislative, executive, and judicial
9 departments of the United States. . . .” Courts have found that “Official acts” under
10 Evidence Code section 452(c) “include records, reports and orders of administrative
11 agencies.” (*Rodas v. Spiegel*, 87 Cal.App.4th at 518.) A manual or handbook of an
12 administrative agency, especially when requested for the purpose of showing the
13 agency’s interpretation of its own regulations, is a proper subject of notice. (*People v.*
14 *Goodloe*, 37 Cal.App.4th at 492-93 (taking judicial notice of administrative bulletin
15 issued by Department of Corrections regarding its interpretation of criminal statute);
16 see also, *Cicairos v. Summit Logistics, Inc.*, 133 Cal.App.4th at 956, fn. 1.)

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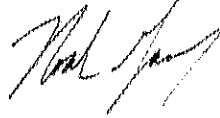
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1 For the foregoing reasons, Petitioners respectfully request that the State Board take official
2 notice of these documents.

3
4 Dated: December 10, 2012

NATURAL RESOURCES DEFENSE COUNCIL, INC.

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8 _____
9 Noah Garrison
10 Steve Fleischli
11 Attorneys for NATURAL RESOURCES
12 DEFENSE COUNCIL, INC. & HEAL THE BAY

13
14 Dated: December 10, 2012

LOS ANGELES WATERKEEPER

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16 _____
17 Elizabeth Crosson
18 Tatiana Gaur
19 Attorneys for LOS ANGELES WATERKEEPER
20 & HEAL THE BAY
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1 **PROOF OF SERVICE**

2 I am employed in the County of Los Angeles, State of California. I am over the age of 18
3 and not a party to the within action. My business address is: 1314 Second Street, Santa Monica,
4 California 90401.

5 On December 10, 2012 I served the within document described as REQUEST FOR OFFICIAL
6 NOTICE RE: PETITION FOR REVIEW OF LOS ANGELES REGIONAL WATER QUALITY
7 CONTROL BOARD ACTION OF ADOPTING ORDER NO. R4-2012-0175 on the following
8 interested parties in said action by placing a true copy thereof in the United States mail enclosed in
9 a sealed envelope with postage prepaid, addressed as follows:

10 Ken Berkman
11 City Engineer
12 30001 Ladyface Court
13 Agoura Hills, CA 91301

14 Terri Rodrigue
15 City Engineer
16 6330 Pine Avenue
17 Bell, CA 90201-1291

18 David Dolphin
19 111 South First Street
20 Alhambra, CA 91801-3796

21 John Oropeza
22 Director of Public Works
23 7100 South Garfield Avenue
24 Bell Gardens, CA 90201-3293

25 Susannah Turney
26 Environmental Services Officer
27 P.O. Box 60021
28 Arcadia, CA 91066-6021

Bernie Iniguez
Environmental Services Manager
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David Lopez
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Baldwin Park, CA 91706-4297

Bonnie Teaford
Public Works Director
P.O. Box 6459
Burbank, CA 91510

1	Alex Farassati	Patricia Elkins
2	ESM	Building Construction Manager
3	100 Civic Center Way	P.O. Box 6234
	Calabasas, CA 91302-3172	Carson, CA 90745
4	Mike O'Grady	Craig Bradshaw
5	Environmental Services	City Engineer
6	P.O. Box 3130	207 Harvard Avenue
	Cerritos, CA 90703-3130	Claremont, CA 91711-4719
7	Gina Nila	Hien Nguyen
8	2535 Commerce Way	Assistant City Engineer
9	Commerce, CA 90040-1487	205 South Willowbrook Avenue
		Compton, CA 90220-3190
10	Vivian Castro, Environmental Services	Hector Rodriguez
11	Manager	City Manager
12	125 East College Street	P.O. Box 1007
	Covina, CA 91723-2199	Cudahy, CA 90201-6097
13	Damian Skinner	David Liu
14	Manager	Director of Public Works
15	9770 Culver Boulevard	21825 East Copley Drive
	Culver City, CA 90232-0507	Diamond Bar, CA 91765-4177
16	Yvonne Blumberg	Steve Esbenshades
17	P.O. Box 7016	Engineering Division Manager
18	Downey, CA 90241-7016	1600 Huntington Drive
		Duarte, CA 91010-2592
19	James A Enriquez	Stephanie Katsouleas
20	Director of Public Works	Public Works Director
21	P.O. Box 6008	350 Main Street
	El Monte, CA 91731	El Segundo, CA 90245-3895
22	Ron Jackson	Maurice Oillataguerre
23	Building Maintenance Supervisor	Senior Environmental Program Scientist
24	P.O. Box 47003	Engineering Section
25	Gardena, CA 90247-3778	633 East Broadway, Room 209
		Glendale, CA 91206-4308
26	Dave Davies	Joseph Colombo
27	Deputy Director of Public Works	Director of Community Development
28	116 East Foothill Boulevard	21815 Pioneer Boulevard
	Glendora, CA 91741	Hawaiian Gardens, CA 90716

1	Arnold Shadbeh Chief General Service and Public Works 4455 West 126th Street Hawthorne, CA 90250-4482	Homayoun Behboodi Associate Engineer 1315 Valley Drive Hermosa Beach, CA 90254-3884
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12		
13	Shauna Clark City Manager 1245 North Hacienda Boulevard La Habra Heights, CA 90631-2570	Steve Forster Public Works Director 13700 La Mirada Boulevard La Mirada, CA 90638-0828
14		
15		
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Alhambra, CA 91803

1 I am "readily familiar" with the firm's practice of collection and processing
2 correspondence for mailing. It is deposited with U.S. postal service on that same day in the
3 ordinary course of business. I am aware that on motion of party served, service is presumed
4 invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for
5 mailing in affidavit.

6 I declare under penalty of perjury under the laws of the State of California that the
7 foregoing is true and correct.

8 Executed on December 10, 2012, at Santa Monica, California.

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Anna Kheyfets

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Exhibit A



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV 12 2010

OFFICE OF
WATER

MEMORANDUM

SUBJECT: Revisions to the November 22, 2002 Memorandum "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs"

FROM: James A. Hanlon, Director
Office of Wastewater Management

Denise Keehner, Director
Office of Wetlands, Oceans and Watersheds

TO: Water Management Division Directors
Regions 1 - 10

This memorandum updates aspects of EPA's November 22, 2002 memorandum from Robert H. Wayland, III, Director of the Office of Wetlands, Oceans and Watersheds, and James A. Hanlon, Director of the Office of Wastewater Management, on the subject of "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs" (hereafter "2002 memorandum").

Background

Section III of the 2002 memorandum "affirm[ed] the appropriateness of an iterative, adaptive management best management practices (BMP) approach" for improving stormwater management over time as permitting agencies, the regulated community, and other involved stakeholders gain more experience and knowledge. Since 2002, States and EPA have obtained considerable experience in developing TMDLs and WLAs that address stormwater sources. The technical capacity to monitor stormwater and its impacts on water quality has increased. In many areas, monitoring of the impacts of stormwater on water quality has become more sophisticated and widespread. Better information on the effectiveness of stormwater controls to reduce pollutant loadings and address water quality impairments is now available. In many parts of the country, permitting agencies have issued several rounds of permits for Phase I municipal separate storm sewer systems (MS4s), Phase II MS4s, and stormwater discharges associated with industrial activity, including stormwater from construction activities. Notwithstanding these developments, stormwater discharges remain a significant cause of water quality

impairment in many places, highlighting a continuing need for more useful WLAs and better NPDES permit provisions to restore impaired waters to their beneficial uses.

With this additional experience in mind, EPA is updating and revising the following four elements of the 2002 memorandum to better reflect current practices and trends in permits and WLAs for stormwater discharges:

- Providing numeric water quality-based effluent limitations in NPDES permits for stormwater discharges;
- Disaggregating stormwater sources in a WLA;
- Using surrogates for pollutant parameters when establishing targets for TMDL loading capacity; and
- Designating additional stormwater sources to regulate and treating load allocations as wasteload allocations for newly regulated stormwater sources.

EPA is currently reviewing other elements of the 2002 memorandum and will consider making appropriate revisions in the future.

Providing Numeric Water Quality-Based Effluent Limitations in NPDES Permits for Stormwater Discharges

In today's memorandum, EPA is revising the 2002 memorandum with respect to water quality-based effluent limitations (WQBELs) in stormwater permits. Since 2002, many NPDES authorities have documented the contributions of stormwater discharges to water quality impairment and have identified the need to include clearer permit requirements in order to address these impairments. Numeric WQBELs in stormwater permits can clarify permit requirements and improve accountability and enforceability. For the purpose of this memorandum, numeric WQBELs use numeric parameters such as pollutant concentrations, pollutant loads, or numeric parameters acting as surrogates for pollutants, such as stormwater flow volume or percentage or amount of impervious cover.

The CWA provides that stormwater permits for MS4 discharges shall contain controls to reduce the discharge of pollutants to the "maximum extent practicable" and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants. CWA section 402(p)(3)(B)(iii). Under this provision, the NPDES permitting authority has the discretion to include requirements for reducing pollutants in stormwater discharges as necessary for compliance with water quality standards. *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1166 (9th Cir. 1999).

Where the NPDES authority determines that MS4 discharges have the reasonable potential to cause or contribute to a water quality standard excursion, EPA recommends that, where feasible, the NPDES permitting authority exercise its discretion to include numeric effluent limitations as necessary to meet water quality standards. The 2002

memorandum stated "EPA expects that most WQBELs for NPDES-regulated municipal and small construction stormwater discharges will be in the form of BMPs, and that numeric limitations will be used only in rare instances." Those expectations have changed as the stormwater permit program has matured. EPA now recognizes that where the NPDES authority determines that MS4 discharges and/or small construction stormwater discharges have the reasonable potential to cause or contribute to water quality standards excursions, permits for MS4s and/or small construction stormwater discharges should contain numeric effluent limitations where feasible to do so. EPA recommends that NPDES permitting authorities use numeric effluent limitations where feasible as these types of effluent limitations create objective and accountable means for controlling stormwater discharges.

The Clean Water Act (CWA) requires that permits for stormwater discharges associated with industrial activity comply with section 301 of the Act, including the requirement under section 301(b)(1)(C) to contain WQBELs for any discharge that the permitting authority determines has the reasonable potential to cause or contribute to a water quality standard excursion. CWA section 402(p)(3)(A), 40 CFR 122.44(d)(1)(iii). When the permitting authority determines, using the procedures specified at 40 CFR 122.44(d)(1)(ii) that the discharge causes or has the reasonable potential to cause or contribute to an in-stream excursion of the water quality standards, the permit must contain effluent limits for that pollutant. EPA recommends that NPDES permitting authorities use numeric effluent limitations where feasible as these types of effluent limitations create objective and accountable means for controlling stormwater discharges.

Where WQBELs in permits for stormwater discharges from MS4s, small construction sites or industrial sites are expressed in the form of BMPs, the permit should contain objective and measurable elements (e.g., schedule for BMP installation or level of BMP performance). The objective and measurable elements should be included in permits as enforceable provisions. Permitting authorities should consider including numeric benchmarks for BMPs and associated monitoring protocols or specific protocols for estimating BMP effectiveness in stormwater permits. These benchmarks could be used as thresholds that would require the permittee to take additional action specified in the permit, such as evaluating the effectiveness of the BMPs, implementing and/or modifying BMPs, or providing additional measures to protect water quality.

If the State or EPA has established a TMDL for an impaired water that includes WLAs for stormwater discharges, permits for either industrial stormwater discharges or MS4 discharges must contain effluent limits and conditions consistent with the requirements and assumptions of the WLAs in the TMDL. See 40 CFR § 122.44(d)(1)(vii)(B). Where the WLA of a TMDL is expressed in terms of a surrogate pollutant parameter, then the corresponding permit can generally use the surrogate pollutant parameter in the WQBEL as well. Where the TMDL includes WLAs for stormwater sources that provide numeric pollutant load or numeric surrogate pollutant parameter objectives, the WLA should, where feasible, be translated into numeric WQBELs in the applicable stormwater permits.

The permitting authority's decision as to how to express the WQBEL(s), either as numeric effluent limitations or BMPs, including BMPs accompanied by numeric benchmarks, should be based on an analysis of the specific facts and circumstances surrounding the permit, and/or the underlying WLA, including the nature of the stormwater discharge, available data, modeling results or other relevant information. As discussed in the 2002 memorandum, the permit's administrative record needs to provide an adequate demonstration that, where a BMP-based approach to permit limitations is selected, the BMPs required by the permit will be sufficient to implement applicable WLAs. Improved knowledge of BMP effectiveness gained since 2002 should be reflected in the demonstration and supporting rationale that implementation of the BMPs will attain water quality standards and WLAs.

EPA's regulations at 40 CFR § 122.47 govern the use of compliance schedules in NPDES permits. Central among the requirements is that the effluent limitation(s) must be met "as soon as possible." 40 CFR 122.47(a)(1). EPA expects the permitting authority to include in the permit record a sound rationale for determining that any compliance schedule meets this requirement. Where a TMDL has been established and there is an accompanying implementation plan that provides a schedule for an MS4 to implement the TMDL, the permitting authority should consider the schedule as it decides whether and how to establish enforceable interim requirements and interim dates in the permit.

Lastly, NPDES permits must specify monitoring requirements necessary to determine compliance with effluent limitations. See CWA section 402(a)(2); 40 C.F.R. 122.44(i). Where WQBELs are expressed as BMPs, the permit must require adequate monitoring to determine if the BMPs are performing as necessary. When developing monitoring requirements, the NPDES authority should consider the variable nature of stormwater as well the availability of reliable and applicable field data describing the treatment efficiencies of the BMPs required and supporting modeling analysis.

Disaggregating Stormwater Sources in a WLA

As stated in the 2002 memorandum, EPA expects TMDL authorities will make separate aggregate allocations to NPDES-regulated storm water discharges (in the form of WLAs) and unregulated storm water (in the form of LAs). EPA also recognized that the available data and information usually are not detailed enough to determine waste load allocations for NPDES-regulated storm water discharges on an outfall-specific basis.

EPA still recognizes that decisions about allocations of pollutant loads within a TMDL are driven by quantity and quality of existing and readily available water quality data. However, today, TMDL writers may have better data or better access to data and, over time, may have gained more experience since 2002 in developing TMDLs and WLAs in a less aggregated manner. Moreover, since 2002, EPA has noted the difficulty of establishing clear, effective, and enforceable NPDES permit limitations for sources covered by WLAs that are expressed as single categorical or aggregated wasteload allocations.

Accordingly, for all these reasons, EPA recommends that WLAs for NPDES-regulated stormwater discharges should be disaggregated into specific categories (e.g., separate WLAs for MS4 and industrial stormwater discharges) to the extent feasible based on available data and/or modeling projections. In addition, these disaggregated WLAs should be defined as narrowly as available information allows (e.g., for MS4s, separate WLAs for each one; and, for industrial sources, separate WLAs for different sources or types of industrial sources or discharges.)

Where appropriate, EPA encourages permit writers to assign specific shares of the wasteload allocation to specific permittees during the permitting process.

Using Surrogate for Pollutant Parameters When Establishing Targets for TMDL Loading Capacity

Many waterbodies affected by stormwater discharges are listed as impaired under Section 303(d) due to biological degradation or habitat alteration, rather than for specific pollutants (e.g., metals, pathogens, sediment). Impairment can be due to pollutants where hydrologic changes such as quantity of flow and variation in flow regimes are important factors in their transport. Since the stormwater-source impairment is usually the result of the cumulative impact of multiple pollutants and physical effects, it may be difficult to identify a specific pollutant (or pollutants) causing the impairment. Using a surrogate parameter in developing wasteload allocations for waters impaired by stormwater sources may, at times, be the appropriate approach for restoring the waterbodies.

In the 2009 report *Urban Stormwater Management in the United States*, the National Research Council suggests: "A more straightforward way to regulate stormwater contributions to waterbody impairment would be to use flow or a surrogate, like impervious cover, as a measure of stormwater loading . . . Efforts to reduce stormwater flow will automatically achieve reductions in pollutant loading. Moreover, flow is itself responsible for additional erosion and sedimentation that adversely impacts surface water quality."

Therefore, when developing TMDLs for receiving waters where stormwater sources are the primary source of impairment, it may be suitable to establish a numeric target for a surrogate pollutant parameter, such as stormwater flow volume or impervious cover, that would be expected to provide attainment of water quality standards. This is consistent with the TMDL regulations that specify that TMDLs can be expressed in terms of mass per time, toxicity or other appropriate measure (40 C.F.R. §130.2(i)).

Where a surrogate parameter is used, the TMDL document must demonstrate the linkage between the surrogate parameter and the documented impairment (e.g., biological degradation). In addition, the TMDL should provide supporting documentation to indicate that the surrogate pollutant parameter appropriately represents stormwater pollutant loadings. Monitoring is an essential undertaking to ensure that compliance with the effluent limitations occurs.

Recent examples of TMDLs using flow or impervious cover as surrogates for pollutants in setting TMDL loading targets include: the Eagleville Brook (CT) TMDL and the Barberry Creek (ME) TMDL which used impervious cover as a surrogate; and, the Potash Brook (VT) TMDL which used stormwater flow volume as a surrogate.

Designating Additional Stormwater Sources to Regulate and Treating Load Allocations as Wasteload Allocations for Newly Regulated Stormwater Sources

The 2002 memorandum states that “stormwater discharges from sources that are not currently subject to NPDES regulation may be addressed by the load allocation component of a TMDL.” Section 402(p)(2) of the Clean Water Act (CWA) requires industrial stormwater sources, certain municipal separate storm sewer systems, and other designated sources to be subject to NPDES permits. Section 402(p)(6) provides EPA with authority to identify additional stormwater discharges as needing a permit.

In addition to the stormwater discharges specifically identified as needing an NPDES permit, the CWA and the NPDES regulations allow for EPA and NPDES authorized States to designate, additional stormwater discharges for regulation. See 40 CFR 122.26 (a)(9)(i)(C), (a)(9)(i)(D), (b)(4)(iii), (b)(7)(iii), (b)(15)(ii) and 122.32(a)(2). Since 2002, EPA has become concerned that NPDES authorities have generally not adequately considered exercising these authorities to designate for NPDES permitting stormwater discharges that are currently not required to obtain permit coverage but that are significant enough to be identified in the load allocation component of a TMDL. Accordingly, EPA encourages permitting authorities to consider designation of stormwater sources in situations where coverage under NPDES permits would afford a more effective mechanism to reduce pollutants in stormwater discharges than available nonpoint source control methods.

In situations where a stormwater source addressed in a TMDL’s load allocation is not currently regulated by an NPDES permit but may be required to obtain an NPDES permit in the future, the TMDL writer should consider including language in the TMDL explaining that the allocation for the stormwater source is expressed in the TMDL as a “load allocation” contingent on the source remaining unpermitted, but that the “load allocation” would later be deemed a “wasteload allocation” if the stormwater discharge from the source were required to obtain NPDES permit coverage. Such language, while not legally required, would help ensure that the allocation is properly characterized by the permit writer should the source’s regulatory status change. This will help ensure that effluent limitations in a NPDES permit applicable to the newly permitted source are consistent with the requirements and assumptions of the TMDL’s allocation to that source.

Such recharacterization of a load allocation as a wasteload allocation would not automatically require resubmission of the TMDL to EPA for approval. However, if the TMDL’s allocation for the newly permitted source had been part of a single aggregated or gross load allocation for all unregulated stormwater sources, it may be appropriate for the NPDES permit authority to determine a wasteload allocation and corresponding

effluent limitation specific to the newly permitted stormwater source. Any additional analysis used to refine the allocation should be included in the administrative record for the permit. In such cases, the record should describe the basis for (1) recharacterizing the load allocation as a wasteload allocation for this source and (2) determining that the permit's effluent limitations are consistent with the assumptions and requirements of this recharacterized wasteload allocation. For purposes of this discussion, it is assumed that the permit writer's additional analysis or recharacterization of the load allocation as a wasteload allocation does not change the TMDL's overall loading cap. Any change in a TMDL loading cap would have to be resubmitted for EPA approval.

If you have any questions please feel free to contact us or Linda Boornazian, Director of the Water Permits Division or Benita Best-Wong, Director of the Assessment and Watershed Protection Division.

cc: Association of State and Interstate Water Pollution Control Administrators
Water Quality Branch Chiefs, Regions 1 - 10
Permits Branch Chiefs, Regions 1 - 10

Exhibit B



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

AUG 08 2012

Mr. Jay Sakai, Director
Water Management Administration
Maryland Department of the Environment
1800 Washington Boulevard
Baltimore, Maryland 21230

Re: Specific Objection to Prince George's County Phase I Municipal Separate Storm Sewer System (MS4) Permit MD0068284

Dear Mr. Sakai:

On May 18, 2012, the U. S. Environmental Protection Agency (EPA or the Agency), received the latest draft of the above-referenced National Pollutant Discharge Elimination System (NPDES) permit (Prince George's County permit) which was reviewed pursuant to 40 C.F.R. § 123.44 and the Memorandum of Agreement (MOA) between MDE and EPA Region III (May 22, 1989).

On June 14, 2012, EPA sent written comments and a marked-up version of the Prince George's County permit to the Maryland Department of the Environment (MDE) requesting that changes be made to the draft permit. On June 15, 2012 EPA issued a time extension letter to increase our review time to 90 days, since we had reason to believe that the comments would not be addressed within the initial 30 day review period. EPA and MDE are currently in productive discussions on these issues. Since these discussions are ongoing and the 90-day review period will expire on August 16, 2012, EPA is issuing this specific objection to the issuance of the referenced permit pursuant to 40 C.F.R. §§ 123.44(b)(1) and (c)(1) and Section III.A of the MOA. As further explained herein, EPA believes that several substantive requirements for MS4 permits, as required by the federal Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* (CWA), and its implementing regulations, have not been incorporated into the Prince George's County permit.

EPA's objection to the draft permit and identification of revisions needed before EPA can remove the objection, *see* 40 C.F.R. § 123.44(b)(2)(ii), are described below:

1. Water Quality Standards

Federal regulations require that all NPDES permits contain limitations to control discharges which may cause, have the reasonable potential to cause or contribute to an excursion above water quality standards. 40 C.F.R. §122.44(d)(1)(i). Part VI of the draft Prince George's County permit (Enforcement and Penalties) contains general language

related to “minimizing” and “preventing to the MEP” contamination or physical alteration of waters of the state; however, it does not actually prohibit water quality exceedances. Please refer to EPA’s suggested language in our comments of June 14, 2012 and also consider the recommendation made therein that the language be contained in the first part of the permit and not placed in a later section that would get lost among standard conditions and boilerplate language.

MDE may also wish to refer to the 2011 previously approved Frederick County permit (p.7), which contains the following provision: “Frederick County shall annually provide watershed assessments, watershed implementation plans, opportunities for public participation, and TMDL compliance status *as required below to ensure that water quality standards are met for all water bodies in the County.*” (emphasis added) The italicized language, which was omitted from the Prince George’s County permit, would be appropriate to ensure attainment of water quality standards as well as consistency with federal regulations.

In order to resolve this portion of our objection, MDE must add the language recommended by EPA via the enclosed marked-up permit, the Frederick County language listed above, or similar acceptable language.

2. Anacostia Trash Total Maximum Daily Load (TMDLs)

EPA was pleased that the draft Prince George’s County permit includes requirements for trash and litter reductions at Part III.D.4. However, the permit fails to include specific requirements related to the Anacostia River and its associated Trash TMDL, which includes a wasteload allocation (WLA) for Prince George’s County. As noted above, federal regulations require that all NPDES permits contain limitations to control pollutants which will cause an excursion above any water quality standard. They also require that effluent limits developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, be consistent with the assumptions and requirements of any available applicable WLA(s) for the discharge developed under approved TMDLs. 40 C.F.R. § 122.44(d).

EPA provided language to MDE on June 14, 2012 to include in this section of the permit in accordance with the terms and conditions listed in the Anacostia TMDL. In order to resolve this portion of our objection, MDE must revise the permit to include EPA’s recommended language, or similar acceptable language.

3. Chesapeake Bay TMDL

In 2010, EPA issued a document entitled “Urban Stormwater Approach for the Mid-Atlantic Region and the Chesapeake Bay Watershed” (herein after “Urban Stormwater Approach”; available at: http://www.epa.gov/reg3wapd/pdf/pdf_chesbay/MS4GuideR3final07_29_10.pdf), which outlines the standards that permitting authorities within Region III are expected to adopt to ensure that MS4 permits will contribute to meeting the water quality objectives of the

Clean Water Act, including relevant WLAs. One such expectation is that "[p]ermits implementing Chesapeake Bay watershed WLAs should also include specific two year milestones, and the reporting requirements to determine if these milestones are being met." The Prince George's County draft permit does not contain sufficient requirements for Chesapeake Bay milestones and related reporting requirements. The section of the Prince George's County permit that relates to the Chesapeake Bay (Part V.A) provides background and generalities about the NPDES program related to the Chesapeake Bay TMDL; however, it fails to explicitly state what steps the permittee must actually take to comply with the TMDL.

EPA's permit review has concluded that although the 20% restoration strategy in the Prince George's County draft permit does present a Bay milestone (and apparently constitutes partial compliance with Maryland's Watershed Implementation Plan), it is not adequately expressed in the draft permit. EPA included recommended language in our marked-up permit at Part VI.A that would clearly state that by requiring a 20% reduction, compliance with the TMDL can be reasonably achieved for this permit term.

In order to resolve this portion of our objection, the permit shall be revised to include the recommended provision.

4. Backsliding

Backsliding is prohibited in NPDES permits. See Section 402(o) of the CWA, 33 U.S.C. § 1342(o) ("[A] permit may not be renewed, reissued, or modified on the basis of effluent guidelines...subsequent to the original issuance of such a permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit..."). See also 40 C.F.R. § 122.44(l). Allowing additional time to complete a task that was required by the previous permit constitutes a less stringent condition and violates the prohibition against anti-backsliding.

The draft Prince George's County permit contains a number of provisions which violate this principle. For example, the draft permit requires the permittee to, *inter alia*: (1) establish or implement a management program in areas served by the County's MS4 (Part III.D.1-3, at pp. 2-4); and (2) establish and publicize a compliance hotline for the public reporting of suspected illicit discharges (Part III.D.6.a). These same requirements are contained in Prince George's current permit. Prince George's County cannot be allowed an additional permit term to complete tasks that were required under the previous permit.

In order to resolve this portion of our objection, MDE must revise the draft permit to include new and updated permit requirements that will expand upon the tasks required by the current permit. For example, instead of requiring that a hotline be established as was required by the previous permit, this permit should include a provision to track the amount of calls received and actions taken in response to those calls. EPA's marked permit and comments to MDE reflected proposed language that would be acceptable to resolve this concern.

5. Industrial / Commercial Monitoring

Part III.C of the draft Prince George's County permit requires source identification of pollutants in certain categories of stormwater runoff County-wide. However, this requirement is insufficient because the draft permit does not specifically include the category of industrial and commercial sources. An inventory of industrial and commercial sites which could contribute pollutants to receiving waters is integral to compliance with the requirement under federal regulations that stormwater management programs for a description of "[d]escribe a monitoring program for storm water discharges associated with the industrial facilities identified in paragraph (d)(2)(iv)(C)..." 40 C.F.R. § 122.26 (d)(2)(iv)(C)(2).

EPA provided recommended language in Part IV.C, Part IV.D.3.b, and Part V.A.2 of the marked-up permit that was submitted to MDE. In order to resolve this portion of our objection, MDE must revise the permit in accordance with those recommendations.

EPA also suggests the following recommendations for inclusion in the County's permit.

1. Education

In Part IV.D.1 of the EPA marked-up permit (Management Programs), EPA recommended adding an additional section for staff training that includes requirements for new technology, implementing pollution prevention, good housekeeping, inspections and permit requirements. EPA believes this will improve employee efficiency and awareness during inspections while ensuring continued and thorough maintenance of the stormwater program.

2. Maximum Extent Practicable

Throughout EPA's permit mark up, we requested removing the use of the phrase "maximum extent practicable" or "MEP". EPA has a number of concerns about inclusion of this language: it is imprecise in its interpretation and thus makes enforcing the permit terms more difficult; it could lead to backsliding; and it rightfully is a determination to be made by the permitting authority in the permit's terms. All references to MEP, with the exception of the requirement that the permittee develop and implement the "Stormwater Management Act of 2007 and Environmental Site Design to the MEP" should be modified.

EPA looks forward to working cooperatively with MDE to resolve the remaining issues in an expeditious manner. Until the issues are resolved, however, in accordance with 40 C.F.R. §122.4(c), MDE may not issue the Prince George's County MS4 permit without written authorization from EPA.

If you have any questions, please contact me, or Evelyn S. MacKnight, Chief, NPDES Permits Branch, at (215) 814-5717.

Sincerely,

A handwritten signature in black ink, appearing to read "Jon M. Capacasa", written over a horizontal line.

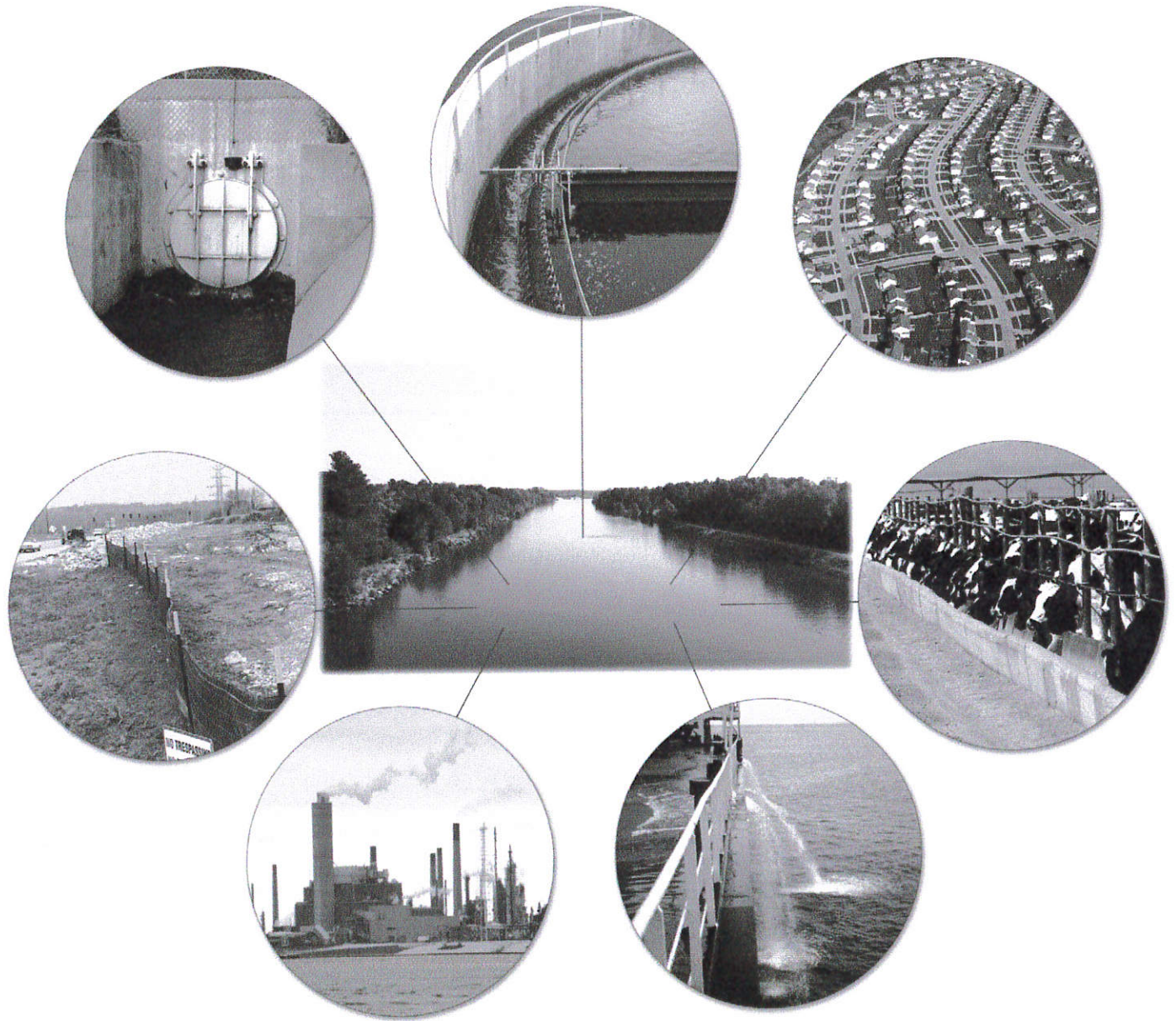
Jon M. Capacasa, Director
Water Protection Division

cc: Brian Clevenger, MDE
Samuel Wynkoop, Jr., Prince George's County

Exhibit C

U.S. Environmental Protection Agency

NPDES Permit Writers' Manual



U.S. Environmental Protection Agency
Office of Wastewater Management, Water Permits Division
State and Regional Branch

EPA-833-K-10-001 • September 2010



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United States Environmental Protection Agency

National Pollutant Discharge Elimination System (NPDES) Permit Writers' Manual

This guidance was developed by staff within the U.S. Environmental Protection Agency's (EPA's) Office of Wastewater Management and addresses development of wastewater discharge permits under the National Pollutant Discharge Elimination System (NPDES). NPDES permit development is governed by existing requirements of the Clean Water Act (CWA) and the EPA NPDES implementing regulations. CWA provisions and regulations contain legally binding requirements. This document does not substitute for those provisions or regulations. Recommendations in this guidance are not binding; the permitting authority may consider other approaches consistent with the CWA and EPA regulations. When EPA makes a permitting decision, it will make each decision on a case-by-case basis and will be guided by the applicable requirements of the CWA and implementing regulations, taking into account comments and information presented at that time by interested persons regarding the appropriateness of applying these recommendations to the situation. This guidance incorporates, and does not modify, existing EPA policy and guidance on developing NPDES permits. EPA may change this guidance in the future.

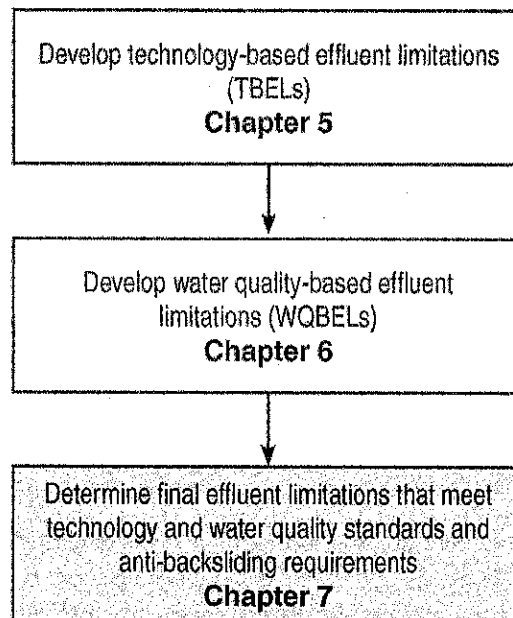
Water Permits Division
Office of Wastewater Management
Washington, DC 20460
(4203)
www.epa.gov/npdes

EPA-833-K-10-001
September 2010

CHAPTER 7. Final Effluent Limitations and Anti-backsliding

As illustrated in Exhibit 7.1, after calculating applicable technology-based effluent limitations (TBELs) and water quality-based effluent limitations (WQBELs), the permit writer must determine the final effluent limitations that will be included in the National Pollutant Discharge Elimination System (NPDES) permit for each pollutant or pollutant parameter. For reissued permits, that determination must also include an assessment of whether the revised effluent limitations are consistent with the Clean Water Act (CWA) requirements and NPDES regulations related to anti-backsliding.

Exhibit 7-1 Developing effluent limitations



7.1 Determining Final Effluent Limitations

When determining the final effluent limitations, the permit writer must ensure that all applicable statutory and regulatory requirements, including technology and water quality standards, are fully implemented.

- The permit writer determines the calculated limitations (TBELs, WQBELs, or some combination of the calculated limitations) that will ensure that all applicable CWA standards are met.
- As noted above, for reissued permits, if any of the limitations are less stringent than limitations on the same pollutant in the previous NPDES permit, the permit writer then conducts an anti-backsliding analysis and, if necessary, revises the limitations accordingly. A detailed discussion of the anti-backsliding provisions of the CWA and the NPDES regulations is included below in Section 7.2.

In addition, the permit writer should clearly explain in the fact sheet for the permit how the final limitations in the permit were determined and how those limitations meet both technology and water quality standards (including antidegradation) and, where appropriate, how an anti-backsliding analysis was applied to the final effluent limitations.

7.2 Applying Anti-backsliding Requirements

As noted in Section 7.1, after selecting the calculated effluent limitations for a pollutant that ensure that all CWA standards are met, the permit writer applies anti-backsliding requirements, as necessary, to determine the final effluent limitations. In general, the term anti-backsliding refers to statutory and regulatory provisions that prohibit the renewal, reissuance, or modification of an existing NPDES permit that contains effluent limitations, permit conditions, or standards less stringent than those established in the previous permit. There are, however, exceptions to the prohibition, and determining the applicability and circumstances of the exceptions requires familiarity with both the statutory and regulatory provisions that address anti-backsliding.

7.2.1 Anti-backsliding Statutory Provisions

Clean Water Act (CWA) section 402(o) expressly prohibits backsliding from certain existing effluent limitations. CWA section 402(o) consists of three main parts: (1) a prohibition on specific forms of backsliding, (2) exceptions to the prohibition, and (3) a *safety clause* that provides an absolute limitation on backsliding.

7.2.1.1 Statutory Prohibition Against Backsliding

First, CWA section 402(o)(1) prohibits the relaxation of effluent limitations for two situations:

- To revise an existing TBEL that was developed on a case-by-case basis using best professional judgment (BPJ) to reflect subsequently promulgated effluent limitations guidelines and standards (effluent guidelines) that would result in a less stringent effluent limitation.
- Relaxation of an effluent limitation that is based on state standards, such as water quality standards or treatment standards, unless the change is consistent with CWA section 303(d)(4). Section 303(d)(4) may be applied independently of section 402(o).

The prohibition against relaxation of effluent limitations is subject to the exceptions in CWA section 402(o)(2) and, for limitations based on state standards, the provisions of CWA section 303(d)(4). Those exceptions are outlined further in the following sections.

7.2.1.2 Exceptions for Case-by-Case TBELs

CWA section 402(o)(2) outlines specific exceptions to the general prohibition against revising an existing TBEL that was developed on a case-by-case basis using BPJ to reflect subsequently promulgated, less stringent effluent guidelines in a renewed, reissued, or modified permit. CWA section 402(o)(2) provides that relaxed limitations may be allowed where

- There have been material and substantial alternations or additions to the permitted facility that justify the relaxation.

- New information (other than revised regulations, guidance, or test methods) is available that was not available at the time of permit issuance and that would have justified a less stringent effluent limitation. If the effluent limitation was based on water quality standards, any changes must result in a decrease in pollutants discharged.
- Technical mistakes or mistaken interpretations of the law were made in issuing the permit under CWA section 402(a)(1)(b).
- Good cause exists because of events beyond the permittee's control (e.g., natural disasters) and for which there is no reasonably available remedy.
- The permit has been modified under CWA sections 301(c), 301(g), 301(h), 310(i), 301(k), 301(n), or 316(a).
- The permittee has installed and properly operated and maintained required treatment facilities but still has been unable to meet the effluent limitations (relaxation may be allowed only to the treatment levels actually achieved).

7.2.1.3 Exceptions for Limitations Based on State Standards

EPA has consistently interpreted CWA section 402(o)(1) to allow relaxation of WQBELs and effluent limitations based on state standards if the relaxation is consistent with the provisions of CWA section 303(d)(4) or if one of the exceptions in CWA section 402(o)(2) is met. The two provisions constitute independent exceptions to the prohibition against relaxation of effluent limitations. If either is met, relaxation is permissible.

CWA section 303(d)(4) has two parts: paragraph (A), which applies to *nonattainment waters*, and paragraph (B), which applies to *attainment waters*.

- **Nonattainment water:** CWA section 303(d)(4)(A) allows the establishment of a less stringent effluent limitation when the receiving water has been identified as not meeting applicable water quality standards (i.e., a *nonattainment water*) if the permittee meets two conditions. First, the existing effluent limitation must have been based on a total maximum daily load (TMDL) or other wasteload allocation (WLA) established under CWA section 303. Second, relaxation of the effluent limitation is only allowed if attainment of water quality standards will be ensured or the designated use not being attained is removed in accordance with the water quality standards regulations. This subsection does not provide an exception for establishing less stringent limitations where the original limitation was based on state permitting standards (e.g., state treatment standards) and was not based on a TMDL or WLA.
- **Attainment water:** CWA section 303(d)(4)(B) applies to waters where the water quality equals or exceeds levels necessary to protect the designated use, or to otherwise meet applicable water quality standards (i.e., an *attainment water*). Under CWA section 303(d)(4)(B), a limitation based on a TMDL, WLA, other water quality standard, or any other permitting standard may only be relaxed where the action is consistent with state's antidegradation policy.

Although the statute also identifies six exceptions in section 402(o)(2) where effluent limitations otherwise subject to the prohibition in section 402(o)(1) may be relaxed, the exceptions for technical mistakes or mistaken interpretations and permit modification, which are described above, would not apply to WQBELs.

7.2.1.4 Exception Safety Clause

CWA section 402(o)(3) is a *safety clause* that provides an absolute limitation on backsliding. This section of the CWA prohibits the relaxation of effluent limitations in all cases if the revised effluent limitation would result in a violation of applicable effluent guidelines or water quality standards, including antidegradation requirements. Thus, even if one or more of the backsliding exceptions outlined in the statute is applicable and met, CWA section 402(o)(3) acts as a floor and restricts the extent to which effluent limitations may be relaxed. The requirement affirms existing provisions of the CWA that require effluent limitations, standards, and conditions to ensure compliance with applicable technology and water quality standards.

7.2.2 Anti-backsliding Regulatory Provisions

Anti-backsliding regulations are found at Title 40 of the *Code of Federal Regulations* (CFR) 122.44(l). The regulations do not specifically address backsliding where a permittee seeks relaxation of an effluent limitation that is based on a state treatment standard or water quality standard [i.e., based on CWA section 301(b)(1)(C), 303(d) or 303(e)]. They do, however, address all other forms of backsliding.

First, the regulations at § 122.44(l)(1) restrict the relaxation of *final effluent limitations* and the relaxation of *standards or conditions* contained in existing permits. Thus, this regulation, in effect, addresses all types of backsliding not addressed in the CWA provisions (e.g., backsliding from limitations derived from effluent guidelines, from new source performance standards, from existing case-by-case limitations to new case-by-case limitations, and from conditions such as monitoring requirements that are not effluent limitations). Under the regulation, a permittee must meet one of the causes for modification under § 122.62 for the reissued permit to allow relaxation of such limitations, standards, or conditions.

Second, the regulations at § 122.44(l)(2)(i) directly reflect the specific prohibition imposed by CWA section 402(o) on backsliding where a permittee seeks to revise an existing case-by-case TBEL developed using BPJ to reflect a subsequently promulgated effluent guideline that is less stringent than the case-by-case requirement. The regulations include the same exceptions to this prohibition that are in CWA section 402(o)(2) and the same *safety clause* in CWA section 402(o)(3).

Thus, if the permit condition being considered for relaxation is either a case-by-case effluent limitation developed using BPJ or is any other limitation, standard, or condition other than an effluent limitation based on a state standard, the permit writer can apply the requirements in § 122.44(l). For effluent limitations based on state standards, the permit writer should apply the provisions of CWA sections 402(o) and 303(d)(4) directly. Exhibit 7-2 illustrates the process of applying the statutory and regulatory provisions addressing anti-backsliding.

Exhibit 7-2 Application of anti-backsliding requirements

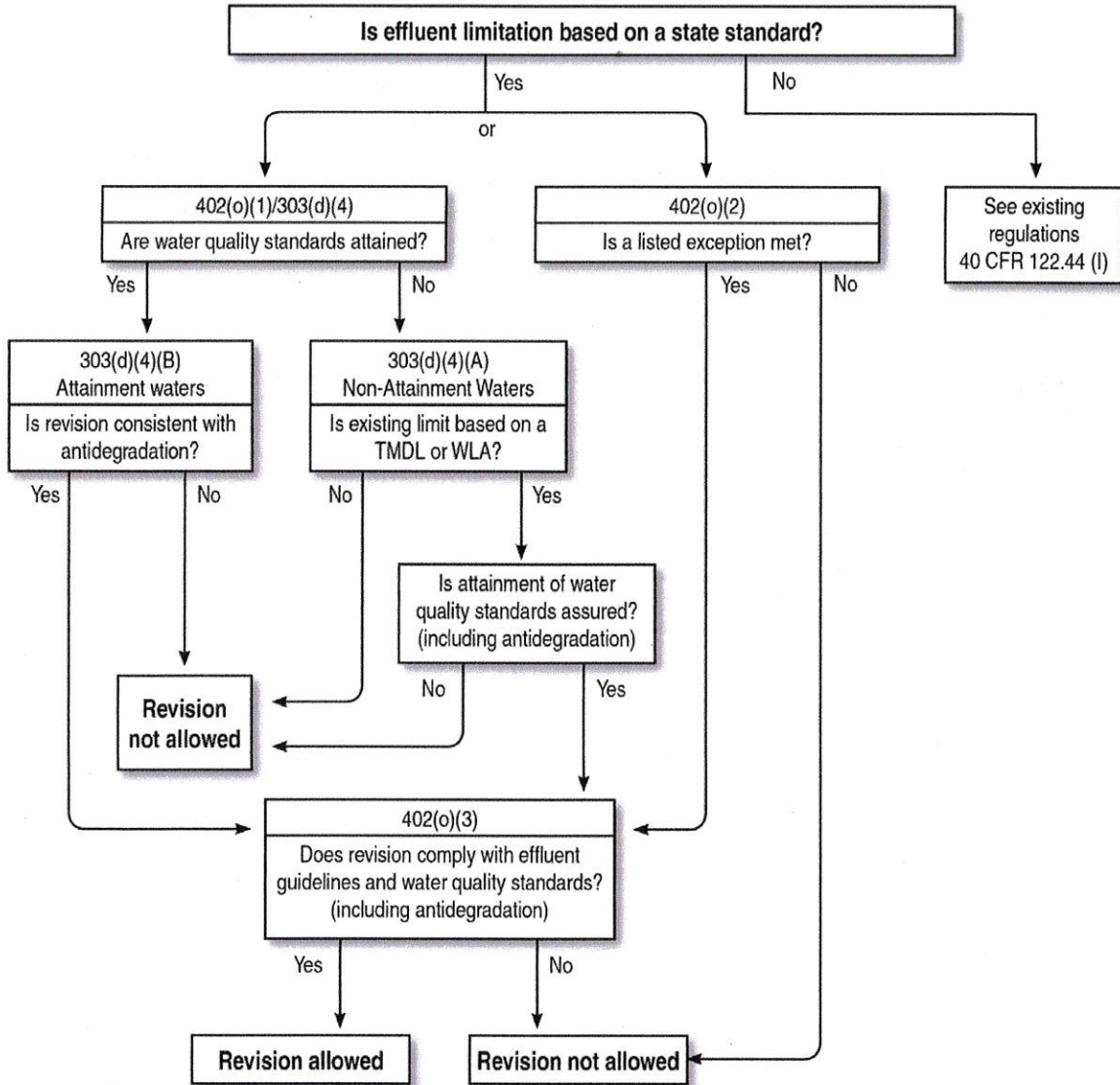


Exhibit 7-3 presents some examples of situations when backsliding might be a factor in effluent limitation development.

Exhibit 7-3 Backsliding examples

Example 1

- A publicly owned treatment works (POTW) seeks to relax its WQBEL for Pollutant X
- The current effluent limitation for Pollutant X is based on a TMDL and WLA for the POTW developed in accordance with § 130.7.
- The POTW is in compliance with its existing effluent limitation, and the applicable water quality standards for Pollutant X are attained.
- The POTW has developed new models with new river flow information. The models indicate that the water quality standards for Pollutant X would be maintained with a relaxed permit limitation.

Question:

May the effluent limitation for Pollutant X be relaxed?

Answer:

Possibly. Under the interpretation discussed above, WQBELs may be relaxed where one of the exceptions in CWA sections 402(o)(1) or (2) are met. In this case, although the new information from the models might meet the exception requirements criteria under CWA section 402(o)(2)(B)(i), CWA section 402(o)(2) will not justify the request unless the state reduces the pollutant loadings from other point sources or nonpoint sources of pollution. That is because, as discussed in Section 7.1 above, CWA section 402(o)(2) restricts the use of new information to cases where there is a decrease in the amount of pollutants being discharged.

The CWA section 402(o)(1) exceptions, on the other hand, might justify the request. In this case, the reference to CWA section 303(d)(4)(B) in CWA section 402(o)(1) is the relevant exception. CWA section 303(d)(4)(B) provides that, for receiving waters that meet water quality standards, permit limitations based on a TMDL or other WLA or other permit standard may be relaxed if the state's antidegradation policy requirements are met.

Example 2

- The state has established a technology-based treatment standard for fecal coliform pursuant to CWA section 301(b)(1)(C).
- The state later relaxes the standard in a revised regulation.
- A POTW, which has been in violation of its effluent limitation for fecal coliform based on the old standard, requests a revision of the limitation to reflect the new standard.
- Water quality standards for fecal coliform are not being attained.
- There was no TMDL or WLA developed. The basis of the effluent limitation was a state technology-based treatment standard.

Question:

May the fecal coliform effluent limitation be relaxed?

Answer:

No. Under CWA section 402(o)(1), the applicable provision is CWA section 303(d)(4)(A). This subsection does not authorize backsliding in this case (i.e., nonattainment waters) because it applies only to permit limitations based on a TMDL or other WLA. Here, the limitation in question is based on a state technology-based treatment standard.

Furthermore, if the permit sought to apply the exceptions in CWA section 402(o)(2), the new information provision would not allow the revision. For purposes of this section of the CWA, new information does not include *revised regulations*.

Exhibit 7-3 Backsliding examples (continued)**Example 3**

- The state has a narrative water quality criterion of *no toxics in toxic amounts*.
- On the basis of WET testing data or other information, the state found that the discharge would cause, have the reasonable potential to cause, or contribute to an excursion of the water quality standards in the receiving water—specifically the narrative water quality criterion.
- The permitting authority imposed a WET limitation under § 122.44(d)(1)(v).
- The permittee determines that Pollutant Z is the cause of WET measured in its discharge.
- The permittee can demonstrate through sufficient data (including WET testing data) that an effluent limitation for Pollutant Z will assure compliance with the narrative water quality criterion as well as the state's numeric criteria for Pollutant Z, as required by § 122.44(d)(1)(v).

Question:

May the state modify the permit to delete the WET limitation and to add the effluent limitation for Pollutant Z?

Answer:

Possibly. CWA section 303(d)(4) might justify the action. The applicable provision is CWA section 303(d)(4)(B) because the narrative water quality criterion is currently attained. The permittee is complying with the existing WET limitation to attain and maintain the criterion. Under CWA section 303(d)(4)(B), the existing effluent limitation may be relaxed as long as antidegradation requirements are met and the relaxed limitation will not cause a violation of any effluent guidelines or water quality standards applicable to the discharge. In this case, it appears likely that a relaxation would be permissible because the permittee can demonstrate that the new limitation for Pollutant Z will assure compliance with both the narrative and numeric water quality criteria; however, the permit writer might consider continuing WET monitoring to identify other potential sources of toxicity in the future.

Example 4

- An industrial permittee seeks to revise its WQBEL of 60 mg/L for total suspended solids (TSS) to 100 mg/L, which is its actual discharge level.
- The current effluent limitation is based on a WLA from a TMDL developed in accordance with § 130.7.
- The water quality standards are not being attained. The ambient concentration of TSS exceeds the applicable water quality criteria.
- An effluent limitation of 100 mg/L is consistent with applicable effluent guidelines.
- New modeling information shows that the water quality standards will be attained with an effluent limitation of 75 mg/L TSS.

Question:

May the effluent limitation for TSS be revised from 60 mg/L to 100 mg/L?

Answer:

No; however, the effluent limitation could be relaxed to 75 mg/L under either CWA sections 402(o)(1) or (2) exceptions.

The water quality standards are not being attained because of TSS. Therefore, under CWA section 402(o)(1), the applicable exception is CWA section 303(d)(4)(A). In this case, the permitting authority may allow backsliding to 75 mg/L because the existing effluent limitation is based on a WLA from a TMDL, and the data show that attainment of the water quality standards is assured with an effluent limitation of 75 mg/L (but not with a limitation of 100 mg/L).

Exhibit D



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
WATER

MEMORANDUM

SUBJECT: Interim Guidance on Implementation of Section 402(o)
Anti-backsliding Rules For Water Quality-Based Permits

FROM: James R. Elder, Director
Office of Water Enforcement and Permits (EN-335)

TO: Water Management Division Directors, Regions I-X
NPDES State Directors

Section 402(o) of the Clean Water Act (CWA), enacted in the Water Quality Act of 1987, establishes anti-backsliding rules governing two situations. The first situation occurs when a permittee seeks to revise a technology-based effluent limitation based on best professional judgment (BPJ) to reflect a subsequently promulgated effluent guideline which is less stringent. The second situation addressed by §402(o) arises when a permittee seeks relaxation of an effluent limitation which is based upon a State treatment standard or water quality standard.¹

With respect to the first situation, EPA's existing anti-backsliding regulations have recently been revised in the NPDES codification rule to include the new §402(o) requirements for revising technology-based BPJ limits based on subsequent effluent guidelines. These new regulations are found at 54 FR 246 (January 4, 1989) (see attached).²

In this guidance, except when otherwise specifically noted, the term "water quality-based effluent limitation" is used to refer to any effluent limitation established on the basis of CWA §301(b)(1)(C) or §303. Section 301(b)(1)(C) is not limited to requirements established on the basis of §303 water quality standards, but also includes any other State treatment requirements more stringent than required by the CWA (e.g., technology-based State treatment requirements).

²Please note that the 1988 Code of Federal Regulations (CFR) does not reflect the recent revisions to the rules. Please refer to the attachment, which sets forth all of EPA's current regulations concerning backsliding.

With respect to the second situation, §402(o)'s requirements for water quality-based permits will be included in the NPDES rulemaking to be proposed early next year. The purpose of this memorandum is to provide interim guidance on implementation of §402(o)'s requirements for water quality-based permits.

I. EFFECT OF SECTION 402(O) ON CURRENT EPA REGULATIONS

The statutory anti-backsliding provisions found at §402(o) take precedence over EPA's existing regulations governing backsliding, found at §122.44(1)(1) (attached). Therefore, the Regions and States must now apply the statute itself, instead of these regulations, when questions arise regarding backsliding from limitations based on State treatment or water quality standards.

EPA's existing anti-backsliding regulations continue to apply to questions regarding non-water quality-based effluent limits. Specifically, EPA's existing regulations govern backsliding questions regarding permit limitations based on effluent limitation guidelines, BPJ, or new source performance standards (NSPS). The existing regulations also apply to backsliding questions regarding permit conditions, (rather than permit limitations) even where the conditions in question are based on water quality considerations. Section 402(o) is silent on the issue of permit conditions, and only addresses backsliding from permit limitations.

II. INTERPRETATION OF SECTION 402(O)

A. OVERVIEW

Section 402(o), as it applies to water quality-based effluent limitations, establishes a prohibition against backsliding except in certain limited circumstances. The section is divided into three paragraphs. First, paragraph (o)(1) establishes the conditional prohibition against backsliding. It prohibits backsliding from water quality-based effluent limits unless the revised limits are established in compliance with §303(d)(4).³ Second, paragraph (o)(2) provides for a number of

³Please note that like §402(o), §303(d)(4) is also a new provision, which was enacted by the WQA of 1987 as part of the anti-backsliding amendments.

Both sections 303(d)(4)(A) and (B) apply to "waters identified under paragraph (d)(1)(A)" for which technology-based effluent limitations are insufficient to implement applicable water quality standards. The §303(d)(1)(A) identification

(Continued)

additional exceptions. These exceptions, discussed below, are similar to those found in EPA's existing regulations. Finally, paragraph (o)(3) establishes a baseline, which requires that all revised effluent limits assure compliance with applicable national technology-based guidelines, and State water quality standards, including a State's antidegradation policy.

It is important to note that restrictions on backsliding do not apply to challenged permit limits which have been stayed pending final agency action. For example, where a limit is challenged in an evidentiary hearing or administrative appeal, the limit may be made more or less stringent than the initially proposed revision, without that change being subject to the backsliding prohibition. The restrictions on backsliding do apply to limits with a delayed implementation date which have not been challenged.

B. LEGISLATIVE HISTORY

In order to fully understand §402(o), it is necessary to consider the legislative history of the provision. Because the provision, as enacted, reflects a combination of individual language and sections from the Senate and House bills, along with new language added by the Conferees, it is difficult to reconcile the various provisions of the statute. In light of this difficulty, and the conflicting and uncertain legislative history of the statute, EPA has attempted to interpret the provision in a manner which, to the extent possible, gives full meaning to all of its components and strengthens the development of water quality-based permit limits.

The anti-backsliding requirements of the WQA were developed in a Conference Committee that was established to resolve differences between House and Senate versions of the statute.⁴ In Conference Committee, differences between the House and Senate

requirement will be deemed to have been satisfied for purposes of anti-backsliding if a permit contains water quality-based effluent limitations. However, for the purpose of EPA regulations at 40 C.F.R. Part 130, a State is still required to identify and list these waters.

⁴The Senate anti-backsliding amendment was passed on June 13, 1985, as part of Senate bill S. 1128, 99th Cong., §115. The House anti-backsliding amendment was incorporated into the House bill that was passed on July 23, 1985 (H.R. 8, 99th Cong., §404).

versions of the anti-backsliding amendment were resolved by combining concepts and provisions from each of the bills.⁵

The Senate bill was written to add new provisions to both §§ 303 and 402 of the CWA. The provisions of §402(o)(2) would have applied to BPJ effluent limitations; while the provisions of §303(d)(4) would have applied to backsliding from water quality based effluent limits.

Unlike the Senate bill, the House bill was written to amend only CWA §402. These provisions were to apply to both BPJ and water quality-based effluent limitations.

With respect to backsliding from BPJ effluent limitations, the WQA essentially follows the House bill. However, for water quality-based effluent limitations, the WQA reflects a combination of the House and Senate bills plus additional language added by the Conferees. As with the Senate bill, WQA §404 was written in the form of amendments to both CWA §§ 303 and 404. As a result, WQA §404 reflects an effort by the Conferees to retain the overall structure and organization of the Senate bill while adding to that structure elements of the House bill.

As discussed above, §402(o)(1) establishes a conditional prohibition on backsliding from BPJ and water quality-based effluent limitations. For water quality-based effluent limitations, the primary exception to this prohibition is found at CWA §303(d)(4), drawn from the Senate bill.⁶ In the case of water quality-based effluent limitations which do not fall under this provision, or for backsliding from BPJ-based effluent limitations to reflect subsequently promulgated, less stringent effluent guidelines, the applicable exceptions are found in CWA §402(o)(2), (drawn from the House bill). Finally, under §402(o)(3) (which comes from the House bill), in no event may a BPJ or water quality based permit be revised to contain effluent limits less stringent than those required by effluent guidelines in effect at the time of the revision or which would result in violation of the applicable §303 water quality standard.

Both paragraphs 402(o)(1) and (o)(2) contain exceptions that apply to the relaxation of water quality-based permit limits. One of the issues faced by EPA in implementing the anti-backsliding provisions of the WQA was whether the exceptions should be read cumulatively or alternatively. In other words,

⁵Conf. Rep. No. 99-1004, 99th Cong., 2nd Sess., at 154 (1986) (hereinafter cited as Conf. Rep.).

⁶The Conference Report expressly notes that these backsliding exceptions apply in addition to the exceptions set forth at §402(o)(2) (Conf. Rept., 156).

must a permit meet exceptions within just one or both paragraphs in order to qualify for a relaxed limit. Given the language of the statute and its legislative history, EPA believes that the proper interpretation of WQA §404 is that backsliding from water quality based effluent limitations is allowable if either the requirements of CWA §303(d)(4) or of §402(o)(2) are met.

Before arriving at this interpretation, the Agency also considered whether WQA §404 could be read to mean that water quality-based permit limitations could only be made less stringent if an exception in both CWA §§ 303(d)(4) and 402(o)(2) were met. This interpretation was not accepted since it appears inconsistent with the statutory language, as well as being contradictory to the previously referred to language of the Conference Report. Moreover, interpreting WQA §404 to mean that exceptions in both §402(o)(2) and §303(d)(4) must be met would result in inconsistencies within the various provisions of WQA §404.

For example, CWA §303(d)(4)(A) clearly allows for the relaxation of water quality-based effluent limitations based on a revision of water quality standards, whereas §402(o)(2) would not allow this relaxation since the new information exception excludes revised regulations. Reading the statute to require that both §303(d)(4) and 402(o)(2) must be satisfied to allow backsliding from water quality based effluent limits thus would have the effect of reading §303(d)(4) out of the statute.

Another example of the inherent contradiction which would result from reading §303(d)(4) and §402(o)(2) cumulatively is shown by considering the additional language at the end of §402(o)(2) which was added by the Conference Committee. This language provides that relaxation of permit limits based on a revised wasteload allocation may only be allowed if there is a net reduction in pollutant loadings. In contrast, §303(d)(4) would allow such a revision if it "assured attainment" of water quality standards, without regard to its impact on pollutant loadings.

EPA believes that interpreting CWA §§ 303(d)(4) and 402(o)(2) as providing alternative grounds for backsliding from water quality based effluent limits is the interpretation most consistent with the statutory language itself, the legislative history, and the fundamental rule of statutory construction that a statute should be interpreted to give meaning to all its provisions and avoid contradictions between various statutory provisions.

III. IMPLEMENTATION OF SECTION 402(o)

A. BACKSLIDING IN NON-ATTAINMENT AND ATTAINMENT WATERS §303(d)(4)

1. INTERPRETATION OF §303(d)(4)

The most important provision relating to backsliding from water quality-based effluent limitations is §303(d)(4). As discussed above, §402(o)(1) provides that water quality-based permit limitations may not be relaxed except in compliance with §303(d)(4). Section 303(d)(4) has two parts: paragraph (A) applies to "non-attainment waters" and paragraph (B) applies to "attainment waters." The determination of attainment or non-attainment is made on a pollutant-by-pollutant basis at the time the application for the permit issuance, modification, revision, or reissuance is submitted.

2. NON-ATTAINMENT WATERS: §303(d)(4)(A)

For non-attainment waters, §303(d)(4)(A) provides that a permittee may backslide from a water quality-based effluent limitation if certain conditions are met. First, the existing permit limit being revised must be based on a Total Maximum Daily Load (TMDL) or other Wasteload Allocation (WLA) established under §303.⁷ Second, the revised permit limit must assure attainment of the water quality standard.⁸ The statute provides that there are two mechanisms for determining attainment of water quality standards. Implementation of the revised permit limitations may be sufficient to assure attainment. In addition, the statute provides that the use designation applicable to the stream segment may be revised in accordance with 40 C.F.R. Part 131.10.

3. ATTAINMENT WATERS: §303(d)(4)(B)

Section 303(d)(4)(B) provides that a permittee may backslide from a water quality-based effluent limitation where water quality meets or exceeds applicable water quality standards, if

⁷Section 303(d)(1)(C) of the CWA, and EPA regulations at 40 C.F.R. §130.7 require States to calculate TMDL/WLAs and submit them for EPA's approval for waters identified under §303(d)(1)(A).

⁸The determination of whether attainment of water quality standards is assured is made based on the assumption that all dischargers to a stream segment are complying with the requirements of their NPDES permits.

the revision is consistent with a State's approved antidegradation policy (see 40 C.F.R. §131.12).⁹

B. LISTED EXCEPTIONS: §402(o)(2)

As discussed above, §402(o)(2) lists six additional exceptions to the general prohibition on backsliding. This provision provides that in cases where the conditions of §303(d)(4) cannot be met, backsliding may be allowed in certain limited circumstances, listed below. The exceptions listed in §402(o)(2) are also applicable to backsliding questions concerning technology-based limits. Under these exceptions, backsliding from water quality-based permit limitations may be allowed under the following circumstances:

- 1) Where there have been material and substantial alterations or additions to the permitted facility which justify this relaxation;
- 2) Where good cause exists due to events beyond the permittee's control (e.g., Acts of God) and for which there is no reasonably available remedy;
- 3) Where the permittee has installed and properly operated and maintained required treatment facilities but still has been unable to meet the permit limitations (backsliding may only be allowed to the treatment levels actually achieved);
- 4) Where new information (other than revised regulations, guidance, or test methods) justifies backsliding from water quality-based permit limitations and other §301(b)(1)(C) limitations.¹⁰

Please note that although paragraph (o)(2) lists two additional exceptions, one for technical mistakes and mistakes of law and one for permit modifications or variances, the statute provides that these exceptions do not apply to water quality-based effluent limitations. However, under the paragraph (o)(1) exceptions, mistakes or new information may justify the relaxation of water quality-based permit limitations where the §303(d)(4) requirements are met.

⁹Note that §303(d)(4)(B) is broader than §303(d)(4)(A), in that (B) allows for the relaxation of permit limitations based on a §303 TMDL/WLA, any water quality standard established under §303, or any other permit standard, whereas (A) only allows for the relaxation of permit limitations based on a §303 TMDL/WLA.

¹⁰This exception applies to water quality-based permit limitations only where the revised limitations result in a net reduction in pollutant loadings and are not the result of another discharger's elimination or substantial reduction of its discharge because of compliance with the CWA or for reasons unrelated to water quality (e.g., shut down of operations).

D. RESTRICTIONS ON BACKSLIDING: §402(o)(3)

Section 402(o)(3) acts as a floor, by restricting the extent to which water quality-based permit limitations may be relaxed. Specifically, this paragraph prohibits the relaxation of such permit limitations below applicable technology-based effluent limitation guidelines and water quality standards. It requires compliance with a State's approved antidegradation policy when permit limitations are relaxed, since water quality standards include antidegradation requirements. In short, paragraph (o)(3) prohibits the relaxation of permit limitations, even where an exception would otherwise allow this relaxation, if there will be a violation of applicable effluent limitation guidelines or water quality standards, including antidegradation requirements.

III. EXAMPLES AND FLOW CHART

Attached to this document are examples of situations which require application of the anti-backsliding provisions, and an analysis of these which is consistent with this guidance. A flow chart which summarizes the decision-making procedure set forth in this guidance is also attached. In addition, copies of the relevant statutory and regulatory provisions are appended.

If there are any questions about this guidance, please feel free to give me a call, or have your staff contact Ephraim King at FTS/(202) 475-9539 or Thane Joyal at FTS/(202) 475-9520.

Attachments



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MEMORANDUM

OFFICE OF
WATER

SUBJECT: Draft Interim Guidance on Implementation of Section
402(o) Anti-backsliding Rules For Water Quality-Based
Permits

FROM: *James R. Elder*
James R. Elder, Director
Office of Water Enforcement and Permits (EN-335)

TO: Water Management Division Directors, Regions I-X
NPDES State Directors

As you know, the 1987 Water Quality Act (WQA) provisions modified EPA's position regarding backsliding from both technology-based effluent limitations based on best professional judgment (BPJ), and from water quality-based effluent limitations. Attached is a draft of the Interim Guidance which has been prepared to provide EPA's interpretation of the WQA requirements applicable to water quality-based limitations. I would appreciate your comments and suggestions on this draft.

The WQA establishes anti-backsliding rules governing two situations: revision of technology-based effluent limitations based on best professional judgment (BPJ) to reflect a subsequently promulgated effluent guideline which is less stringent; and revision of limitations based upon a State treatment standard or water quality standard. New regulations governing revision of technology-based BPJ limits based on subsequent effluent guidelines are found at 54 FR 246 (January 4, 1989).

With respect to backsliding from water quality-based effluent limitations, the attached draft guidance reflects our recommended interpretation of the WQA requirements. The statutory anti-backsliding provisions found at §402(o) take precedence over EPA's existing regulations governing backsliding. Therefore, the Regions and States must now apply the statute itself, instead of these regulations, when questions arise regarding backsliding from limitations based on State treatment or water quality standards.

We would appreciate hearing from you by October 16, 1989. If there are any questions or if you need additional information, please have your staff contact either Ephraim King (FTS 475-9539) or Thane Joyal (FTS 475-9520).

Attachment

ATTACHMENT 1

EXAMPLES REGARDING IMPLEMENTATION OF SECTION 402(o)

Example 1

Scenario:

- o POTW seeks to relax its water quality-based permit limitation for ammonia.
- o Current permit limitations are based on TMDL or WLA developed in accordance with 40 C.F.R. §130.7.
- o POTW is in compliance with its existing limit.
- o Water quality standard for ammonia is attained.
- o POTW has new information about flow levels, which indicates that the water quality standard for ammonia would be maintained with relaxed permit limits.
- o May the permit limit be relaxed?

Answer:

Possibly. Under the interpretation discussed above, the water quality-based permit limitations may be relaxed where one of the exceptions in paragraph (o)(1) or paragraph (o)(2) of CWA §402 is met.

In this case, although new information is being relied on to request the permit modification, paragraph (o)(2) will not justify the requested modification unless the State reduces the pollutant loadings from other point sources or non-point sources of pollution. This is because, as discussed above, paragraph (o)(2) restricts the use of new information to cases where there is a decrease in the amount of pollutants being discharged.

The paragraph (o)(1) exceptions, on the other hand, may justify this requested relaxation. In this case, the paragraph (o)(1) exception that is relevant is the reference to §303(d)(4)(B). It provides that for waters identified under §303(d)(1)(A) where applicable water quality standards are being attained, permit limitations based on a CWA §303 TMDL/WLA or other permit standard may be relaxed only if a State's antidegradation requirements are met. EPA's requirements for State antidegradation provisions are set forth in EPA regulations at 40 C.F.R. Part 131.

Example 2

Scenario:

- o Industrial permittee seeks to revise its water quality-based permit limitation for TSS to reflect actual discharge levels of 6000 mg/l.
- o Current permit limitations are based on a TMDL or WLA developed in accordance with 40 C.F.R. §130.7.
- o Current permit limitation for TSS is 1000 mg/l.
- o A permit limit of 6000 mg/l TSS is consistent with applicable effluent guidelines.
- o Permittee cites §402(o)(2)(E) in support of the revision, which states that permit limits can be revised where the limits have not been met despite the installation and proper operation and maintenance of required treatment facilities.
- o Water quality standard for TSS is not being attained.
- o Water quality standard for TSS will not be attained unless current permit limits are met.
- o May the requested revision be made?

Answer:

No. Even where a paragraph (o)(2) exception may otherwise allow for the relaxation of permit limitations, paragraph (o)(3) provides that this relaxation may not result in a violation of water quality standards.

This revision would also be prohibited if the permittee sought to apply the paragraph (o)(1) exceptions. The applicable provision under this paragraph is §303(d)(4)(A) since the TSS water quality standard is not being attained, and since the water has been "identified" under §303(d)(1)(A) because water quality-based effluent limits have been written for it. Revision of the permit's effluent limit for TSS could only be allowed under this section if compliance with applicable water quality standards is assured, or if the State determines that it is appropriate to reclassify the designated use of the waterbody in accordance with the provisions of 40 C.F.R. Part 131.

Example 3

Scenario:

- o Industrial permittee seeks to revise its water quality-based permit limitation for TSS to reflect actual discharge levels of 6000 mg/l.
- o Current permit limitations are based on a TMDL or WLA developed in accordance with 40 C.F.R. §130.7.
- o Current permit limitation for TSS is 1000 mg/l.
- o A permit limit of 6000 mg/l TSS is consistent with applicable effluent guidelines.
- o Water quality standard for TSS is not being attained.
- o New model shows that the water quality standard for TSS will be attained with a permit limitation of 4000 mg/l.
- o May the permit limit be revised from 1000 mg/l to 4000 mg/l?

Answer:

Yes. Such backsliding is permissible under either the paragraph (o)(1) or paragraph (o)(2) exceptions.

The water quality standard for TSS is not currently being attained. Therefore, under paragraph (o)(1) the applicable exception is found in §303(d)(4)(A). This section applies to waters identified under §303(d)(1)(A) where applicable water quality standards are not being attained. In this case, if the TSS limit was based on a TMDL or other WLA, backsliding is permitted because the data show that attainment of the applicable water quality standard is assured.

Alternatively, under paragraph (o)(2), new information can be relied on to relax permit limitations where there is a reduction in pollutant loadings and, pursuant to paragraph (o)(3), where water quality standards are complied with. Again, water quality standards are being met in this case, and there also will be a reduction in actual pollutant loadings since the new proposed permit level of 4000 mg/l will represent a real reduction compared with the actual discharge levels of 6000 mg/l.

Example 4

Scenario:

- o The State has established a technology-based treatment standard for fecal coliform pursuant to CWA §301(b)(1)(C).
- o The State later relaxes this standard.
- o A POTW, which has been in violation of this limit, requests a revision of its permit limit for fecal coliform to reflect the new standard.
- o Water quality standards for fecal coliform are not being attained.
- o Models show that attainment of water quality standards will be assured if the POTW complies with a revised, relaxed permit limitation for fecal coliform.
- o There was no TMDL or WLA performed because the standard was a State technology-based standard.
- o May the permit limitation be relaxed?

Answer:

No. Under paragraph (o)(1), the applicable provision is §303(d)(4)(A). This subsection does not authorize backsliding in this case because it only applies to permit limitations based on a §303 TMDL or other WLA (unlike §303(d)(4)(B) which is broader). Here, the limitation in question is based on a type of State treatment standard authorized under §301(b)(1)(C).

Furthermore, if the permittee sought to apply the paragraph (o)(2) exceptions, the new information provision under this paragraph would not allow the revision. New information does not include "revised regulations," which is the type of new information (i.e., the rulemaking revising the treatment standard) being relied on here to justify the backsliding.

Example 5

Scenario:

o A State has a narrative criterion "no toxics in toxic amounts." It has an EPA approved procedure for developing permit limits based on its narrative criterion.

o In issuing a §304(1) permit in April 1989, the State uses its approved procedures and applies a risk level 10^{-6} using EPA criteria, instream criteria of 0.013 ppq.

o The permit contains a numerical TCDD limit with a 1992 compliance date.

o If in 1990 the State issues a numeric criterion for TCDD which is less stringent than that used in the 1989 permit, e.g., risk level of 10^{-5} using EPA criteria, instream criteria of 0.13 ppq, may the permit be revised to reflect the new standard?

Answer:

Possibly. Under paragraph (c)(1), the applicable exceptions would be found in §303(d)(4).

If the water quality standard for TCDD is not being attained, the revision would only be allowed under §303(d)(4)(A) if the limit was based on a TMDL or other WLA, and the revision assured compliance with water quality standards, including antidegradation, or if the State determines that it is appropriate to reclassify the designated use of the waterbody in accordance with the provisions of 40 C.F.R. Part 131.

If the water quality standard for TCDD was being attained, §303(d)(4)(B) would allow the revision if antidegradation requirements were met.

Example 6

Scenario:

- o A State has no numeric standard for pollutant "A."
- o The State/EPA adopts an EPA water quality advisory recommendation for an appropriate instream concentration of the pollutant.
- o The State/EPA issues a permit containing a limit for pollutant "A" based on the water quality advisory recommendation.
- o Several years later, EPA revises the advisory recommendation to a pollutant "A" instream concentration that is 10 times higher (i.e. less stringent) than the original advisory, based upon new toxicity information that has been developed.
- o May the permit limit for pollutant "A" be relaxed to reflect the new toxicity data?

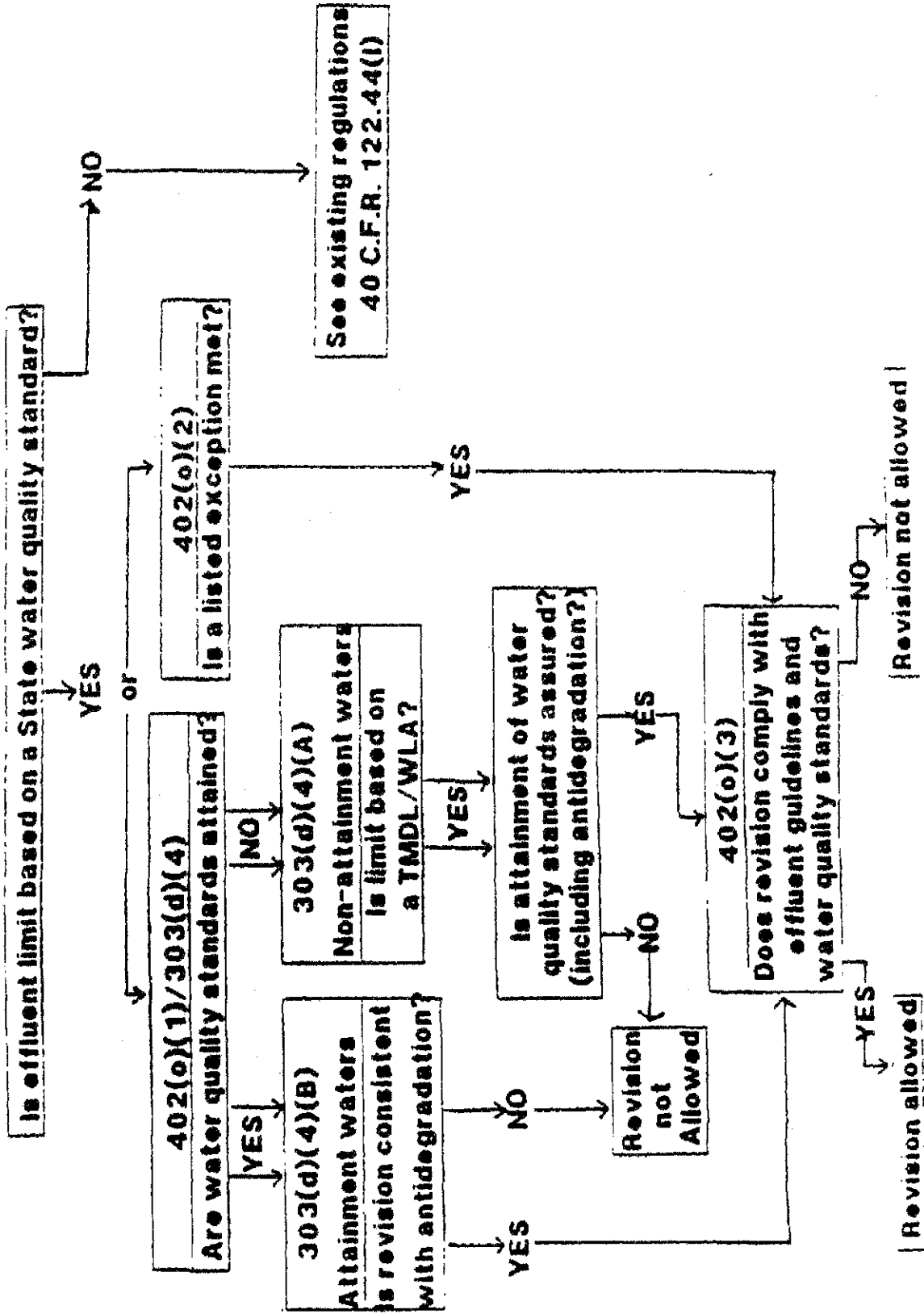
Answer:

Possibly. The applicable exceptions would be found in the paragraph (c)(1) reference to §303(d)(4).

If the water quality standard for pollutant "A" is not being attained, the revision would only be allowed under §303(d)(4)(A) if the limit was based on a TMDL or other WLA, and the revision assured compliance with water quality standards, including antidegradation, or if the State determines that it is appropriate to reclassify the designated use of the waterbody in accordance with the provisions of 40 C.F.R. Part 131.

If the water quality standard for "A" was being attained, §303(d)(4)(B) would allow the revision if antidegradation requirements were met.

Anti-backsliding Rules Relating to Water Quality-Based Effluent Limitations



Section 402(o)

(o) ANTI-BACKSLIDING.—

(1) GENERAL PROHIBITION.—In the case of effluent limitations established on the basis of subsection (a)(1)(B) of this section, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 304(b) subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit. In the case of effluent limitations established on the basis of section 301(b)(1)(C) or section 303 (d) or (e), a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with section 303(d)(4).

(2) EXCEPTIONS.—A permit with respect to which paragraph (1) applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant if—

(A) material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation;

(B)(i) information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or

(ii) the Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under subsection (a)(1)(B);

(C) a less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

(D) the permittee has received a permit modification under section 301(c), 301(g), 301(h), 301(i), 301(k), 301(n), or 316(a) or

(E) the permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the renewed, reissued, or modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification).

Subparagraph (B) shall not apply to any revised waste load allocations or any alternative grounds for translating water quality standards into effluent limitations, except where the cumulative effect of such revised allocations results in a decrease in the amount of pollutants discharged into the concerned waters, and such revised allocations are not the result of a discharger eliminating or substantially reducing its discharge of pollutants due to complying with the requirements of this Act or for reasons otherwise unrelated to water quality.

(3) LIMITATIONS.—In no event may a permit with respect to which paragraph (1) applies be renewed, reissued, or modified to contain an effluent limitation which is less stringent than required by effluent guidelines in effect at the time the permit is renewed, reissued, or modified. In no event may such a permit to discharge into waters be renewed, reissued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 303 applicable to such waters.

ATTACHMENT 4: Existing Anti-backsliding Regulations
40 C.F.R. 122.44(1)

(f) *Reissued permits.* (1) Except as provided in paragraph (1)(2) of this section when a permit is renewed or reissued, interim effluent limitations, standards or conditions must be at least as stringent as the final effluent limitations, standards, or conditions in the previous permit (unless the circumstances on which the previous permit was based have materially and substantially changed since the time the permit was issued and would constitute cause for permit modification or revocation and reissuance under § 122.82.)

[122.44 (1)(1) as revised by 54 FR 18780, May 2, 1989]

[122.44(1) and (2) revised by 54 FR 254, January 4, 1989]

(2) In the case of effluent limitations established on the basis of Section 402(a)(1)(B) of the CWA, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 304(b) subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit.

(i) *Exceptions* — A permit with respect to which paragraph (1)(2) of this section applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant, if—

(A) Material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation;

(B)(1) Information is available which was not available at the time of permit

issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or

(2) The Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under section 402(a)(1)(b);

(C) A less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

(D) The permittee has received a permit modification under section 301(c), 301(g), 301(h), 301(i), 301(k), 301(n), or 316(a); or

(E) The permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification).

(ii) *Limitations.* In no event may a permit with respect to which paragraph (1)(2) of this section applies be renewed, reissued, or modified to contain an effluent limitation which is less stringent than required by effluent guidelines in effect at the time the permit is renewed, reissued, or modified. In no event may such a permit to discharge into waters be renewed, issued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 303 applicable to such waters.

Section 303(d)(4)

(4) LIMITATIONS ON REVISION OF CERTAIN EFFLUENT LIMITATIONS.—

(A) STANDARD NOT ATTAINED.—For waters identified under paragraph (1)(A) where the applicable water quality standard has not yet been attained, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section may be revised only if (i) the cumulative effect of all such revised effluent limitations based on such total maximum daily load or waste load allocation will assure the attainment of such water quality standard, or (ii) the designated use which is not being attained is removed in accordance with regulations established under this section.


(B) STANDARD ATTAINED.—For waters identified under paragraph (1)(A) where the quality of such waters equals or exceeds levels necessary to protect the designated use for such waters or otherwise required by applicable water quality standards, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section, or any water quality standard established under this section, or any other permitting standard may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section.

Exhibit E

U.S. ENVIRONMENTAL PROTECTION AGENCY

Region 9

Guidance on
Implementing the Antidegradation Provisions
of 40 CFR 131.12


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June 3, 1987
Date

PURPOSE

This document provides general program guidance for the States of Region 9 on the development of procedures for implementing State antidegradation policies. The focus of this guidance is on 40 CFR 131.12 of the water quality standards regulation (promulgated in 48 FR 51407, dated November 8, 1983) which sets out requirements to be met before any action is taken that would lower the quality of the Nation's waters.

BACKGROUND

Section 101(a) of the Clean Water Act defines the national goal of restoring and maintaining the chemical, physical and biological integrity of the Nation's waters. Section 303(a)(4) of the Clean Water Act explicitly refers to satisfaction of the antidegradation requirements of 40 CFR 131.12 prior to taking various actions which would lower water quality. 40 CFR 131.12 requires that antidegradation provisions at least as stringent as those specified in that regulation be adopted by States as part of their water quality standards.

This guidance identifies the tasks to be performed by States to implement Section 131.12 of the water quality standards regulation. Those tasks that need the development of decision criteria by the States are identified. Such criteria are necessary to define those actions which require detailed economic or water quality impact analyses. The Agency expects States to develop and document these criteria in their antidegradation implementation procedures, for review and approval by EPA regional offices. The Agency's objective is to achieve the goals of the Act through an integrated approach to eliminating water pollution which includes the consistent application of State antidegradation policies. Figure 1 lays out the decision making process of an antidegradation analysis.

Many of the procedures identified herein are already performed by States as part of their regulatory programs. Consequently, this document primarily serves to delineate, in a consistent manner, the criteria EPA Region 9 will be using to evaluate both State and EPA decisions, for compliance with 40 CFR 131.12.

TIER III WATERS - Outstanding National Resource Waters

40 CFR 131.12(a)(3) prohibits any action which would lower water quality in waters designated as Outstanding National Resource Waters (ONRWS). Examples of such waters include, but are not limited to, waters of National and State parks and wildlife refuges, and waters of exceptional recreational or ecological significance:

TIER I WATERS

40 CFR 131.12(a)(1) prohibits any action which would lower water quality below that necessary to maintain and protect existing uses. In cases where water quality is just adequate to support the propagation of fish, shell fish and wildlife and recreation in and on the water, such water quality must be maintained and protected. In cases where water quality is lower than necessary to support these uses, the requirements in Section 303(d) of the Act, 40 CFR 131.10 and other pertinent regulations must be satisfied. Guidance concerning actions affecting these waters has been published elsewhere and will not be repeated here.

TIER II WATERS - High Quality Waters

Applicability

40 CFR 131.12 establishes certain minimum requirements for States to adopt regulating actions which would lower water quality in high quality waters. These waters are defined as those in which water quality exceeds that necessary to support propagation of fish, shellfish and wildlife and recreation in and on the water. Any action which would result in, or which would permit, a lowering of water quality must be addressed in State implementation procedures. Actions covered by antidegradation provisions include, but are not limited to the following:

Permit Actions

1. Issuance/Re-issuance/Modification of NPDES permits
2. Issuance of variances (e.g. 301(h), 301(m), etc.)

3. Issuance of permits for urban runoff
4. Issuance of Section 404 permits
5. Adoption of or alteration of mixing zones
6. Relocation of discharge
7. Commencement of discharge from a new source
8. Increases in the discharge of pollutants from point sources due to:
 - a. Industrial production increases
 - b. Municipal growth
 - c. New sources
 - d. Etc.

Standards/Load Allocation Actions

1. Water quality standards revisions
2. Revision of wasteload allocations
3. Reallocation of abandoned loads
4. Section 401 certifications (for example: concerning FERC licenses, Corps' actions, etc.)
5. Section 208 or Section 303(e) approvals
6. WQM plan approvals

"Non-point Source" Actions

1. Changes in BMPs
2. Resource management plan approvals
3. Land Management (e.g. Forest) plan adoptions, certifications or approvals

4. Changes in regulated agricultural activities
5. Changes in regulated silvicultural activities
6. Changes in regulated mining activities
7. Construction and operation of roads, dams, etc.

Other Actions

1. RCRA/CERCLA actions
2. Construction grant activities
3. Other "major Federal actions" (pursuant to NEPA and the Endangered Species Act)
4. Water quantity/water rights actions which affect water quality
5. Federal actions regulated by Section 313 of the Clean Water Act

Prior to proceeding with a detailed analysis of these or similar actions, the affected water body should be assessed to determine whether or not it falls into either Tier I or Tier III. If so, actions which would lower water quality in such waters are prohibited. Otherwise, the water body should be assessed to determine the adequacy of the beneficial uses and water quality criteria designated for that water body. Adequate water quality standards must be adopted and approved for an affected water body, pursuant to 40 CFR 131 prior to allowing any action to proceed which would lower water quality in that water body.

The first step in any antidegradation analysis is to determine whether or not the proposed action will lower water quality (see Figure 1). If the action will not lower water quality, no further analysis is needed and EPA considers 40 CFR 131.12 to be satisfied. If the action could or will lower water quality, and the affected water is not a Tier I or Tier III water, then the steps to be followed to determine whether or not 40 CFR 131.12 is satisfied are described in the following sections of this guidance.

Both point and non-point sources of pollution are subject to antidegradation requirements. While point sources are generally well regulated, procedures for controlling non-point source pollution have not been as extensively defined. Cost-effective and reasonable best management practices for non-point source controls must be designed to meet water quality standards. EPA policy, first issued as SAM-32 on November 14, 1978, states that where applicable water quality standards are not met, revised or additional best management practices (BMPs) should be applied in an iterative process to improve water quality to the point that standards are attained, and that designated uses are maintained and protected. In Region 9, States generally have broad authority to regulate non-point sources. As part of their implementation methodologies, States must adopt procedures which adequately assure that non-point sources of water pollution will comply with the antidegradation requirements of 40 CFR 131.12.

Implementation Procedures

Four **basic** elements should be included in State implementation procedures to ensure that actions affecting water quality are consistent with the provisions of 40 CFR 131.12. They are:

- ° Task A - Identify Actions that Require Detailed Water Quality and Economic Impact Analyses
- ° Task B - Determine that Lower Water Quality Will Fully Protect Designated Uses
- ° Task C - Determine That Lower Water Quality is Necessary to Accommodate Important Economic or Social Development in the Area in which the Waters are Located
- ° Task D - Complete Intergovernmental Coordination and Public Participation

Task A - Identify Actions that Require Detailed Water Quality and Economic Impact Analyses

This task established the types of analyses required for all actions that lower water quality in Tier II waters and decision criteria that define the degree of water quality and economic analysis required.

State procedures should include three parts. First, the State should develop procedures to document the degree to which water quality exceeds that necessary to protect the uses. Ambient monitoring data can be used to provide this documentation. States must adopt procedures to assure that, where little or no data exists, adequate information will be available to determine the existing quality of the water body or bodies, which could be adversely affected by the proposed action. Such procedures should include both an assessment of existing water quality and a determination of which water quality parameters and beneficial uses are likely to be affected. These assessments and determinations could be performed either by the State or the party proposing the action in question.

Second, the State should develop procedures that quantify the extent to which water quality will be lowered as a result of the proposed action. Simple mass balance calculations or more detailed mathematic modelling, such as that contained in waste-load allocations, can provide this information. Third, the State should develop decision criteria to define the degree of water quality change that warrants detailed water quality and economic impact analyses. Decision criteria could be based on direct measures, such as an absolute or percent change in ambient concentrations of the affected parameter or indirect measures such as changes in primary productivity caused by nutrients or changes in diurnal dissolved oxygen fluctuations.

Repeated or multiple small changes in water quality (such as those resulting from actions which do not require detailed analyses) can result in significant water quality degradation. To prevent such cumulative adverse impacts, a baseline of water quality must be established for each potentially affected water body, prior to allowing any action which would lower the quality of that water. This baseline should remain fixed unless some action improves water quality. At such time, the baseline should be adjusted accordingly.

Proposed actions to lower water quality should then be evaluated with respect to the baseline and the resultant water quality change should be determined. This determination should include the cumulative impacts of all previous and proposed actions and reasonably foreseeable actions which would lower water quality below the established baseline. Should the cumulative impact of actions significantly degrade water quality, more

detailed water quality and economic impact analyses would be necessary.

In any case, whether or not water quality is significantly lowered (thus leading to an economic analysis), the State must find that any action which would lower water quality is necessary to accommodate important economic and social development. Such a finding must include, at a minimum, the following determinations:

1. That economic and social development will occur, e.g. there will be new or increased production of goods or services by the party proposing the change, population will grow in the service area of a sewage treatment plant, etc.
2. That this economic or social development requires the lowering of water quality which cannot be mitigated through reasonable means.
3. That the lower water quality does not result from inadequate wastewater treatment facilities, less-than-optimal operation of adequate treatment facilities, or failure to implement or comply with methodologies to reduce or eliminate non-point source pollution.

Task B - Determine that Lower Water Quality Will Fully Maintain and Protect Designated Uses

All actions that could lower water quality in Tier II waters require a determination that existing uses will be fully maintained and protected. States should develop methodologies for making this determination.

Tier II waters, by definition, are those in which the water quality is better than necessary to support and maintain the biota and beneficial uses of the water. In most cases, specific numerical standards do not exist to protect these uses. Where such standards do exist, they are generally established to provide the minimum acceptable quality to protect the beneficial uses of the water. Often, such standards are established on a statewide or drainage basin-wide basis and thus may not adequately protect the biota or the uses of specific reaches. Consequently, comparing existing or projected water quality with adopted standards may not adequately define whether or not beneficial uses will be fully maintained and protected.

Water quality must also meet any applicable public health standards as well as maintain and protect the existing growth and reproduction of resident species. The water quality criteria guidance developed by EPA per §304(a) of the Clean Water Act provides a basis for this assessment. However, national water quality criteria (such as those contained in the "Gold Book") may not fully protect resident species. The criteria may not protect locally occurring species that either may not have been tested, or that have been tested, but require greater protection than the criteria provide. This determination involves a comparison of the species upon which biological testing has been completed in the criteria development documents with the species resident to the water body where water quality may be lowered. If the resident species are not adequately represented in the database, additional testing should be completed before lower water quality is allowed. Implementation methods should include procedures for making this comparison and define the circumstances (e.g., in terms of water quality change or extent of the biological testing database) that would require additional biological testing before water quality can be lowered.

Water quality criteria for dissolved oxygen or conventional and non-conventional pollutants may be subject to the same limitations and should be considered in the same way. For parameters for which no criteria guidance has been developed, biological testing or acceptable site specific criteria may be used to determine that lower water quality will fully maintain and protect designated uses.

The lowering of water quality through the discharge of conservative or persistent pollutants merits more intensive consideration by States, due to the bioaccumulative potential of these pollutants. These pollutants, particularly carcinogens, which are considered to have no safe "threshold" concentration, should have more stringent antidegradation requirements established for their analysis.

Other methods of determining whether or not beneficial uses are being maintained and protected include biological assessments, such as the aquatic ecoregions procedure, or ambient toxicity testing using standardized species. In some cases, assessing the quality of water bodies on a pollutant-specific basis could prove costly, particularly for waters in which a number of

discharges are located or for complex effluents. EPA's recently developed acute and chronic toxicity methodologies for assessing the toxicity of effluents or receiving waters could provide a more comprehensive and affordable alternative.

Task C - Determine that Lower Water Quality is Necessary to Accommodate Important Economic or Social Development

Actions which the State determines in Task A to significantly lower water quality require a determination that such actions are necessary for important economic or social development. 40 CFR 131.12(a)(2) and the August 1985 "Questions and Answers on Antidegradation", give general guidance on how to make this determination. Explicit criteria defining "important economic or social development" have purposely not been developed by EPA Headquarters, because of the varying environmental, economic and social conditions of localities throughout the country. Further explication of EPA Region 9's expectation concerning these determinations is appropriate and is presented below.

The fundamental requirement of this task is to establish a strong tie between the proposed lower water quality level and "important" economic or social development. If the party seeking the change in water quality cannot demonstrate the relationship between such development and water quality, then the proposed action is prohibited.

Demonstration of important economic or social development entails two steps. First, the party should describe and analyze the current state of economic and social development in the area that would be affected. The purpose of this step is to determine the "baseline" economic and social status of the affected community, i.e., the measure against which the effect of the water quality downgrade is judged. The area's use or dependence upon the water resource affected by the proposed action should be described in the analysis. The following factors should normally be included in the baseline analysis:

- ° Population
- ° Area employment (numbers employed, earnings, major employers);
- ° Area income (earnings from employment and transfer payments, if known);

- ° Manufacturing profile: types, value, employment, trends;
- ° Government fiscal base: revenues by source (employment and sales taxes, etc.)

Second, the party seeking the change in water quality should then demonstrate the extent to which the sought-for level of water quality would create an incremental increase in the rate of economic or social development and why the change in water quality is necessary to achieve such development. The party should provide analysis, along with the supporting data used in its preparation, showing the extent to which the factors listed above will benefit from the change in water quality requested. The analysis should demonstrate why such economic and social development requires the lower water quality. Other alternatives or changes in the project or other mitigation measures, which would prevent degradation of water quality should be identified in this analysis. The following factors may be included in the analysis of incremental effects expected to result from the degradation in water quality:

- ° Expected plant expansion;
- ° Employment growth;
- ° Direct and indirect income effects;
- ° Increases in the community tax base

Other components of this analysis could include an assessment of the overall environmental benefits to be achieved by the proposed action and the tradeoffs to be considered among the various media. The relative costs of various alternatives to the proposed action could also be analyzed.

The requirements for a given analysis will be site-specific, depending upon factors such as data availability, conditions specific to the relevant water body, the area of impact (city, county, State-wide), etc. The economic analysis may include estimation of the treatment costs necessary to maintain existing water quality; e.g. land treatment or advanced treatment. Staff of the EPA Regional office are available to assist States in determining the exact requirements of an analysis of

specific proposals to lower water quality. In addition, the Economic Analysis Branch in EPA Headquarters' Office of Water can assist State and Regional staff, when necessary.

Task D - Complete Intergovernmental Coordination and Public Participation

Public notification pursuant to 40 CFR 131.12 is required for all actions that lower water quality in Tier II waters. EPA requires that proposed actions which degrade water quality be reviewed by other appropriate agencies and that the public be given an opportunity to comment.

Documentation and public notification under antidegradation need not be a lengthy process in many cases and can be combined with other actions that require public notification. The public participation requirement may be met by holding a public hearing, e.g., as part of the adoption of an NPDES permit, as long as proper notice of a standards action is provided to the public (see WQS Handbook). Intergovernmental coordination consists of requests for review of proposed actions by affected local, State and Federal agencies, such as area-wide planning agencies, fish and wildlife agencies, etc.

The following is a summary of the public notification required to comply with the antidegradation provisions of the WQS regulation:

- ° A statement that the action must comply with the State's antidegradation policy and a description of the policy.
- ° A determination that existing uses will be maintained and protected. This will require an assessment and documentation for public review of (a) the amount the water quality currently exceeds that necessary to protect the existing and designated uses, and (b) the amount that water quality will be lowered as a result of the proposed action (see Task A).
- ° A summary of other actions, if any, that have lowered water quality and a determination of any cumulative impacts.
- ° A determination that lower water quality is necessary to

accommodate important economic or social development. This will require a detailed analysis or the rationale used to determine that a detailed analysis is not required (see Tasks A and C).

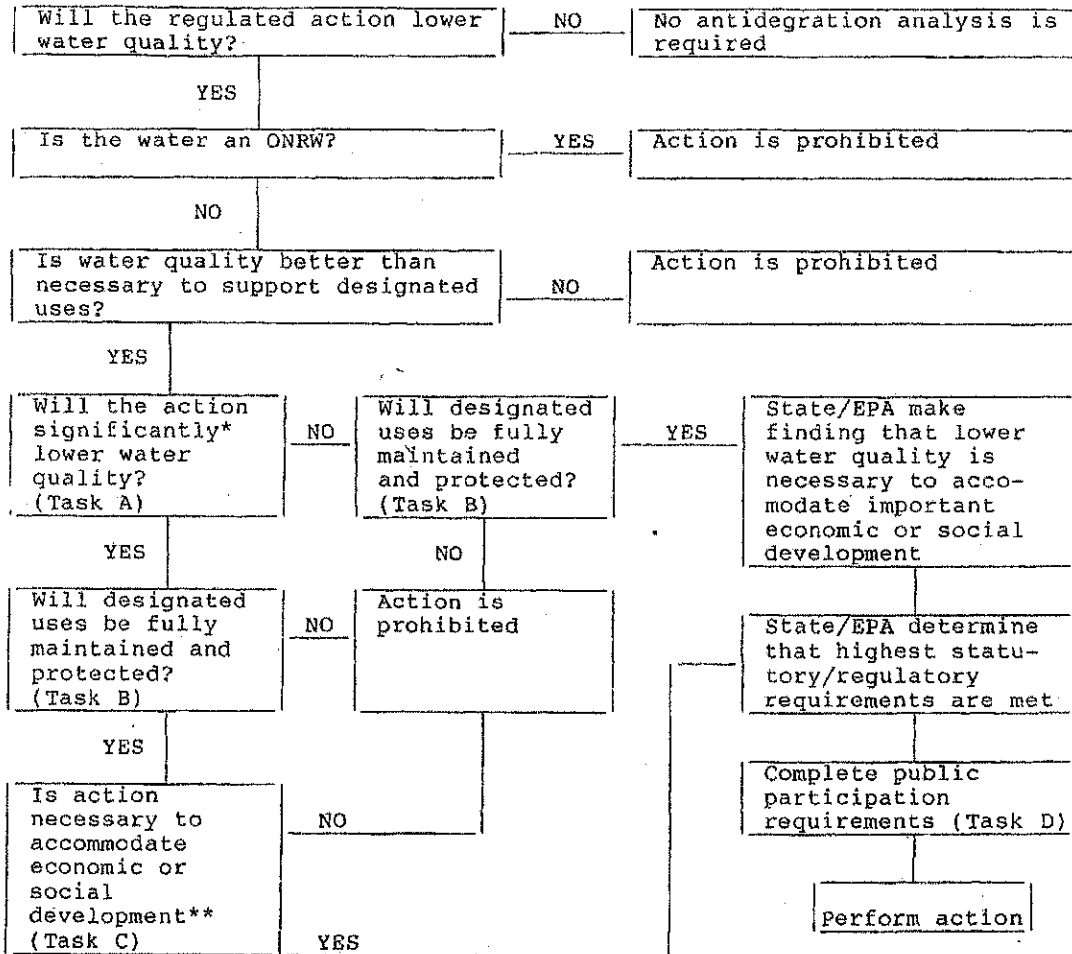
- ° A description of the intergovernmental coordination that has taken place.
- ° A determination that there has been achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for non-point sources.

OTHER CONSIDERATIONS

1. The decision criteria for determining that detailed water quality and economic analyses are needed may vary with the types of chemical pollutants. Some chemicals are believed to elicit an effect at a certain concentration (i.e., threshold chemicals). Other chemicals (i.e., non-threshold chemicals) have no safe level. Non-threshold chemicals include carcinogens, mutagens and teratogens. States are urged to apply more stringent review procedures to non-threshold chemicals.
2. NPDES permits do not routinely contain numerical limits for all of the substances found in a discharger's effluent. Nevertheless, all substances are subject to antidegradation policy implementation, whether or not they are specifically limited in the permit. To apply antidegradation to substances not currently limited in the permit, the State can utilize the notification procedures specified in 40 CFR 122.42, requiring dischargers to notify the State pollution control agency of any actual or anticipated change in effluent characteristics, as compared with those existing at the time the permit was issued.

FIGURE 1

Antidegradation Flow Chart



*Significance level and effect of cumulative impacts as defined by State

**Based on criteria defined by State