

## **ADOPTING THE ANTIDegradation PROVISIONS OF THE FEDERAL CLEAN WATER ACT INTO NEW HAMPSHIRE STATUTE**

### **SUMMARY**

The antidegradation provisions of the federal Clean Water Act (CWA) (40 CFR 131.12) require each state to adopt an antidegradation policy and develop a set of procedures to be used when evaluating activities that could degrade water quality or adversely affect water uses. In this discussion paper, the Department proposes to include the antidegradation provisions of the CWA into New Hampshire statute. The antidegradation provisions are currently in rule (Env-Wq 1708).

### **APPLICABLE LAWS AND REGULATIONS**

Federal regulations, 40 CFR 131.12 state:

- (a) The State shall develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy pursuant to this subpart. The antidegradation policy and implementation methods shall, at a minimum, be consistent with the following:*
  - (1) Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.*
  - (2) Where the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully. Further, the State shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control.*
  - (3) Where high quality waters constitute an outstanding National resource, such as waters of the National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected.*
  - (4) In those cases where potential water quality impairments association with a thermal discharge is involved, the antidegradation policy and implementing method shall be consistent with section 316 of the Act.*

New Hampshire surface water quality regulations, Env-Wq 1708, state:

*Env-Wq 1708.01 Purpose. The purpose of these antidegradation provisions is to ensure that the following provisions of 40 CFR 131.12 are met:*

*(a) Existing uses that the level of water quality necessary to protect the existing uses shall be maintained and protected;*

*(b) For significant changes in water quality, where the quality of the surface waters exceeds levels necessary to support propagation of fish, shellfish, and wildlife, and recreation in and on the water, that quality shall be maintained and protected unless the department finds, after full satisfaction of the intergovernmental coordination and public participation provisions that, in accordance with Env-Wq 1708.10, allowing lower water quality is necessary to accommodate important economic or social development in the area in which the surface waters are located. In allowing such degradation or lower water quality, the department shall assure that the highest statutory and regulatory requirements shall be achieved for all new and existing point sources and that all cost effective and reasonable best management practices for nonpoint source control shall be implemented;*

*(c) For insignificant changes in water quality, where the quality of the surface waters exceeds levels necessary to support propagation of fish, shellfish, and wildlife, and recreation in and on the water, that the quality shall be maintained and protected. In allowing such degradation or lower water quality, the department shall assure water quality adequate to protect existing uses fully. Further, the department shall assure that the highest statutory and regulatory requirements shall be achieved for all new and existing point sources and that all cost effective and reasonable best management practices for nonpoint source control shall be implemented;*

*(d) Where high quality surface waters constitute an outstanding resource water (ORW), that water quality shall be maintained and protected; and*

*(e) In those cases where a potential water quality impairment is associated with a thermal discharge, the antidegradation provisions shall ensure that the requirements of section 31 of the Clean Water Act are met.*

*Env-Wq 1708.02 Applicability. Antidegradation shall apply to:*

*(a) Any proposed new or increased activity, including point source and nonpoint source discharges or pollutants, that would lower water quality or affect existing or designated uses;*

*(b) Any proposed increase in loadings to a waterbody when the proposal is associated with existing activities;*

*(c) Any increase in flow alteration over an existing alteration; and*

*(d) Any hydrologic modifications, such as dam construction and water withdrawals.*

*Env-Wq 1708.04 Protection of Existing Uses.*

*(a) This section shall apply to all surface waters.*

*(b) A proposed discharge or activity shall not eliminate any existing uses or the water quality needed to maintain and protect those uses.*

*(c) Using the information provided in Env-Wq 1708.03, the department shall determine the existing uses for the waters in question.*

*Env-Wq 1708.05 Protection of Water Quality in ORW.*

*(a) Surface waters of national forests and surface waters designated as natural under RSA 483:7-a, I, shall be considered outstanding resource waters (ORW).*

*(b) Water quality shall be maintained and protected in surface waters that constitute ORW, except that some limited point and nonpoint source discharges may be allowed providing that they are of limited activity which results in no more than temporary and short-term changes in water quality. "Temporary and short term" means that degradation is limited to the shortest possible time. Such activities shall not permanently degrade water quality or result at any time in water quality lower than that necessary to protect the existing and designated uses in the ORW. Such temporary and short term degradation shall only be allowed after all practical means of minimizing such degradation are implemented.*

*Env-Wq 1708.06 Protection of Class A Waters.*

*(a) In accordance with RSA 485-A:8, I, discharges of sewage or waste to Class A waters shall be prohibited.*

*(b) Proposed new or increased activities that the department determines to no involved the discharge of sewage or waste shall be reviewed in accordance with Env-Wq 1708.01 through Env-Wq 1708.12.*

*Env-Wq 1708.07 Protection of Water Quality in High Quality Waters.*

*(a) Subject to (b), below, high quality waters shall be maintained and protected, except that insignificant changes in water quality, as determined by the department in accordance with Env-Wq 1708.09, shall be allowed.*

*(b) Degradation of significant increments of water quality, as determined in accordance with Env-Wq 1708.09, in high quality waters shall be allowed only if it can be demonstrated to the department, in accordance with Env-Wq 1708.10, that allowing the water quality degradation is necessary to accommodate important economic or social development in the area in which the receiving waters are located.*

*(c) Economic/social benefits demonstration and alternatives analysis shall not be required for authorization of an insignificant lowering of water quality. However, in allowing a lowering of water quality, significant or insignificant, all reasonable measures to minimize degradation shall be used.*

## DISCUSSION

The purpose of antidegradation is to protect and maintain existing water quality of state surface waters including their existing and designated uses. Antidegradation applies to all activities with the potential to adversely affect water quality or uses. The antidegradation provisions of the federal Clean Water Act (CWA) (40 CFR 131.12) require each state to adopt an antidegradation policy. In addition, the CWA requires states to develop a set of procedures to be used when evaluating activities that could degrade water quality or adversely affect water uses.

In New Hampshire, antidegradation is established by administrative rule in the state's Surface Water Quality Regulations (WQR) (Env-Wq 1700). The purpose of the WQR is to protect and maintain the quality of state surface waters by identifying designated uses, establishing water quality criteria to protect the uses, and establishing an antidegradation policy. There is no permit associated with the WQR. Instead, various permitting programs within the DES Water Division (e.g., Alteration of Terrain Permit, Wetlands Permit, Shoreland Permit) specify performance standards that are intended to result in compliance with the WQR. Each permitting program operates under its own set of administrative rules, none of which specifically include antidegradation. Therefore, having antidegradation in the WQR administrative rules satisfies the federal requirement set forth in 40 CFR 131.12, but falls short of consistently or fully implementing antidegradation across the DES permitting programs.

In 2009, as a result of the DES Alteration of Terrain (AoT) Program rule revisions (Env-Wq 1500, formerly Env-Ws 415), DES formed a workgroup of interested stakeholders to assist in the development of antidegradation rules language for the AoT Program. The outcome of the workgroup was the recommendation that, before additional antidegradation rules be developed, antidegradation should first be adopted into state statute.

House Bill 1305 was requested by the Department of Environmental Services in the 2010 legislative session. The bill was referred to interim study by the House Resources, Recreation, and Development Committee (RR&D). HB 1305 proposed an amendment to RSA 485-A by inserting the following sections:

1 New Paragraph; Definitions; Existing Surface Water Use. Amend RSA 485-A:2 by inserting after paragraph III-b the following new paragraph:

III-c. "Existing surface water use" means a use, other than assimilation or waste transport, which actually occurred in the waterbody on or after November 28, 1975, whether or not it is a designated use.

~~485-A:9-b Antidegradation~~ **Antidegradation** Requirements. In order to implement the antidegradation provisions of the federal Clean Water Act as required under 40 CFR section 131.12, the following shall apply:

I. Existing **and designated surface water** uses and the level of water quality necessary to protect existing **and designated surface water** uses shall be maintained and protected.

II. The water quality of high quality waters shall be maintained and protected unless the department finds, after full public participation, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the department shall impose such limitations or conditions on the activity as are necessary to ensure water quality adequate to protect existing **and designated surface water** uses fully.

III. The water quality of outstanding resource waters shall be maintained and protected.

IV. In those cases where a potential ~~water quality~~ **surface water** impairment is associated with a thermal discharge, the requirements of section 316 f the federal Clean Water Act shall be met.

~~V. The department shall impose such limitations or conditions on all new and existing point sources as are necessary to ensure that the highest statutory and regulatory requirements are achieved, and shall require the implementation of all cost effective and reasonable best management practices for nonpoint source control.~~

The task of Water Quality Standards Advisory Committee Antidegradation Working Group is to:

- (1) Review the antidegradation provisions (1) of the WQR in Env-Wq 1708 and the federal Antidegradation Policy in 40 CFR 131.12;
- (2) Determine if adopting antidegradation into state statute is necessary; and,
  - a. If it is determined to be necessary, make recommendations for any appropriate statutory language changes; or,
  - b. If it is determined to be unnecessary, determine if the DES administrative rules/regulations need to change to accommodate antidegradation.

The proposed changes to RSA 485-A:9b from the 2010 legislative session will be the starting point for discussions.