



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

OFFICE OF
WATER

JAN 27 2005

MEMORANDUM

Subject: Antidegradation Policy Approvals and Endangered Species Act
Consultations

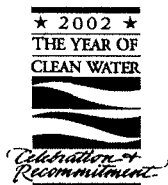
From: Geoffrey H. Grubbs, Director
Office of Science and Technology

To: Water Management Division Directors, Regions 1-10

I would like to share with you the attached analysis concerning Endangered Species Act (ESA) consultations on antidegradation policies established by states or authorized tribes within their water quality standards.

The attached policy analysis explains that this Office and the Office of General Counsel have determined that the Agency lacks relevant discretion to implement measures that would benefit listed species in connection with antidegradation policy approvals. Thus, EPA is not required under ESA to consult on the approval of antidegradation policies with the Fish and Wildlife Service and the NOAA Fisheries Service. If a state or authorized tribe submits to EPA for review an antidegradation policy that meets the requirements in 40 CFR § 131.12, then EPA is required by the Clean Water Act to approve the policy. Because EPA lacks authority to require the state or tribe to provide more than the minimum elements required in 40 CFR § 131.12, EPA lacks discretion to require inclusion of measures that would benefit listed species, thus making any ESA consultation on the approval of the antidegradation policy a meaningless exercise. Therefore, consultation is not required, consistent with the ESA and the Services' implementing regulations. See 50 C.F.R. § 402.03.

The implications of this determination are that EPA will not consult with the Services on the review and approval of antidegradation policies and procedures. I request that you discontinue any on-going consultations on antidegradation policy approvals and that you withdraw the biological evaluations, or those aspects of the biological evaluations relating to approval of antidegradation policies, for those consultations.



We have coordinated on this issue with the headquarters offices of the Fish and Wildlife Service and the NOAA Fisheries Service, and they defer to EPA's interpretation of its discretion under the Clean Water Act. The Services' headquarters offices will communicate to their regional and field offices this decision to discontinue consultations on antidegradation policy approvals. If you have any questions or concerns, please do not hesitate to call me at (202) 566-0430 or Denise Keehner, Director of the Standards and Health Protection Division, at (202) 566-1566.

Attachment

cc: Ben Grumbles
Mike Shapiro
Brent Fewell
Greg Peck
Great Waterbody Program Directors
Regional Water Quality Standards Branch Chiefs and Coordinators
Denise Keehner
Linda Boornazian
Steve Neugeboren, OGC
Tod Siegal, OGC
Everett Wilson, US FWS
Craig Johnson, NOAA-Fisheries

Attachment

Antidegradation Policy and ESA Consultation Analysis

Background

On February 14, 2003, USEPA Region 5 received a submittal of new and revised water quality standards from Ohio EPA, including an antidegradation policy and implementation procedures, for review and approval. Upon review, EPA Region 5 found Ohio's antidegradation policy and implementation procedures to be consistent with the requirements of 40 CFR 131.12 and approved the policy and implementation procedures subject to completion of the ESA consultation with U.S. Fish and Wildlife Service (FWS). During the consultation with FWS, questions arose regarding EPA's discretion with respect to the State's submission. Below is EPA's analysis of its discretion with regard to review and approval of State antidegradation policies under section 303(c) of the CWA and 40 C.F.R. § 131.12(a).

Endangered Species Act

Section 7(a)(2) of the ESA requires federal agencies to ensure, in consultation with the U.S. Fish and Wildlife Service and/or the U.S. National Marine Fisheries Service, that actions they authorize, fund or carry out are not likely to jeopardize the continued existence of any listed endangered or threatened species or destroy or adversely modify designated critical habitat of such species. 16 U.S.C. § 1536(a)(2). ESA implementing regulations require section 7 consultation wherever an agency action may affect listed species/critical habitat. 50 C.F.R. § 402.14. The regulations also state that section 7 applies "to all actions in which there is discretionary Federal involvement or control." 50 CFR § 402.03. In applying this standard, courts have looked to whether the agency has discretion to implement measures that would inure to the benefit of listed species. Where an agency has no authority to modify or refrain from action in a way that would benefit listed species, then ESA consultation would be a meaningless exercise and, consistent with § 402.03, would not be required.

Consistent with Section 7 of the ESA and with the ESA/CWA Memorandum of Agreement between EPA and the Services, when a state or authorized tribe submits new or revised water quality standards to EPA for approval, EPA consults with the Service(s) regarding any potential impacts of the approval action on listed species/critical habitat. EPA reviews new or revised state or tribal antidegradation provisions to determine if they meet the requirements of EPA's regulations. EPA's discretion to disapprove antidegradation provisions is limited to circumstances where the standards do not meet the requirements of EPA's regulations at 40 C.F.R. § 131.12.

Antidegradation Requirements

In reviewing new or revised water quality standards, EPA's regulation at 40 C.F.R. § 131.5 explains the determinations EPA must make. Included in the factors is whether the state submission includes the requirements of 40 C.F.R. § 131.6. EPA's regulation at 40 C.F.R. § 131.6, specifies minimum elements of state water quality standards. Among these is the requirement that the state have an "antidegradation policy consistent with § 131.12."

EPA's regulation at 40 C.F.R. 131.12 states:

Antidegradation Policy

- (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 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 impairment associated with a thermal discharge is involved, the antidegradation policy and implementing method shall be consistent with section 316 of the Act.

As stated above in 40 C.F.R. § 131.12, states are required to “develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy.” The minimum requirements for a state’s antidegradation policy with respect to protection of existing uses, high quality waters and outstanding national resource waters are specified in this section. When a state submits a new or revised antidegradation policy to EPA for review, EPA, under the regulation, can only require that the policy be consistent with the requirements in 40 C.F.R. § 131.12. Further, there are no minimum elements specified in EPA’s regulations for implementation methods. Since the publication of EPA’s regulations in 1983, EPA has maintained that EPA reviews such methods to determine whether they undermine the intent of the required elements of the antidegradation “policy” as specified in 40 C.F.R. 131.12. 48 Fed. Reg. 51400 (November 8, 1983).

EPA’s regulation at 40 C.F.R. §131.12(a)(3) requires states to have a category of outstanding National resource waters. While states must provide for such a category in their water quality standards, EPA has consistently interpreted its regulations to give states discretion in choosing whether to place any waters in this category, and importantly, EPA has consistently interpreted the regulation not to authorize EPA to designate ONRWs in states. See, *e.g.*, 63 Fed. Reg. 36742, 36786 (July 7, 1998) “Regarding the process for adoption of ONRWs, the existing regulation requires the State or Tribe to provide an ONRW level of protection in their antidegradation policies, but there is no requirement that any water body be so designated or any specificity as to how that is to be done.” This interpretation reflects the fact that ONRWs are waters whose quality typically far exceeds the CWA section 101(a) water quality goal of quality

necessary for the propagation of fish, shellfish, and wildlife and recreation in and on the water and the level of protection afforded ONRWs (maintaining existing water quality) is beyond that necessary to meet the goal.

Under 40 C.F.R. 131.12(a)(2), states must identify high quality waters consistent with the regulation, and then provide for a review process that is consistent with the regulation before giving away any assimilative capacity above that necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water. If a state establishes such a process consistent with EPA's regulations, EPA has no legal authority to disapprove the state's provisions.

Under 40 C.F.R. § 131.12(a)(1), states must provide that existing instream water uses and the level of water quality to protect those uses will be maintained and protected. Existing uses are those uses actually attained in the waterbody on or after November 28, 1975, whether or not they are included in the state's water quality standards. See 40 C.F.R. § 131.3(e). There are no specific requirements in EPA's regulations detailing how a state is to protect existing uses. Rather, provided that the language in a state's policy is facially consistent with §131.12(a)(1), EPA is required to approve it under the CWA.

Thus, if the antidegradation policy and implementation methods meet the Federal requirements described above, e.g., Tier 1 provisions indicate that the existing use will be protected, Tier 2 provisions indicate that the state has appropriately defined Tier 2 waters and provided for a review process consistent with 40 C.F.R. § 131.12(a)(2), and Tier 3 provisions provide for a category of outstanding National resource waters, then EPA's regulations would require EPA to approve the policy.

Ohio's antidegradation policy, which was submitted to EPA for approval with the State's new/revised water quality standards, meets all of the minimum requirements of 131.12. Because Ohio's antidegradation policy meets the requirements of EPA's regulations, EPA is required to approve the policy as submitted. First, Ohio's antidegradation policy appropriately includes a category of outstanding National resource waters. EPA has no regulatory authority to require Ohio to designate particular waters, including waters that support populations of listed mussel species, as ONRWs. Second, Ohio's policy requires protection of existing uses. Finally, the State's policy includes appropriate review procedures relating to protection of high quality waters. EPA has no authority to require additional protections or procedures. To the extent issues are raised

regarding whether the policy could be modified to provide additional procedures or requirements that might benefit listed species, EPA has no authority to require such modifications or to disapprove the policy in the absence of such modifications.¹

Conclusion

When a state or tribal antidegradation policy meets all the applicable requirements of EPA's regulation, as is the case with Ohio's antidegradation policy, EPA must approve the policy. ESA consultation with the Services is not required because the Agency does not possess the regulatory authority to require more than the minimum required elements of EPA's regulations (which are already present in Ohio's antidegradation policy), and thus EPA cannot implement measures that would benefit listed species.

¹ In addition, EPA notes that, while not required as minimum elements and thus beyond EPA's authority to require, Ohio has adopted implementation methods that provide certain additional considerations of relating to threatened and endangered species. For example, Ohio's methods indicate that, in Tier 2 waters, any proposed lowering of water quality requires public participation, and the Director shall consider the presence of listed species in considering whether to allow a lowering of water quality. Also, Ohio EPA has supplemental antidegradation training material in which two waters of particular concern with respect to listed mussel populations are identified as "very special general high quality waters." The training material states that new sources or CWA 401 permits on these streams, in the vicinity of mussel populations of concern, should have a higher bar to pass in the antidegradation review process.