

# NORTHWEST ENVIRONMENTAL ADVOCATES



September 8, 2010

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Office of Water  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
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Via E-Mail: [SHPDcomments@epa.gov](mailto:SHPDcomments@epa.gov)

Re: **Water Quality Standards Regulatory Changes; EPA-HQ-OW-2010-0606**

Dear Mr. Gardner:

Northwest Environmental Advocates (NWEA) appreciates this opportunity to comment on the U.S. Environmental Protection Agency's proposed changes to its water quality standards regulations. Generally we support EPA's proposals. We urge EPA, in revising its regulations, to consider its limited federal role under the Clean Water Act in implementing nonpoint source controls and to view its role in establishing the requirements for and taking action on states' water quality standards as an important consideration when addressing this significant source of pollution to the nation's waters.

## A. Antidegradation

We strongly support EPA's current regulation that requires states to identify and submit implementation methods for their antidegradation policies. While there are some regulations that work well without such implementation methods being spelled out, antidegradation is not one of them. In fact, despite its importance to water quality protection and restoration, and EPA's clarity that antidegradation is a part of water quality standards, antidegradation policies are routinely ignored by states. The proposed regulations offer EPA a significant opportunity to change the status quo and to ensure that states use the antidegradation policies to achieve the goals of the Clean Water Act.

We see several problems with the current regulations with regard to states' attention to antidegradation requirements and whether EPA takes this issue seriously when it acts on state submissions of new or revised water quality standards. These problems are as follows:

- (1) States do not prepare implementation methods or do so only for some aspects of the antidegradation policy, such as NPDES sources or just Tier II reviews. In particular, Tier I protection is ignored or seen as just a part of Tier II reviews;

- (2) Implementation methods that are not established by State rule, but instead in guidance, are subject to change at any time, without any public review or EPA action, and apply only to the water quality regulatory agency when, as part of water quality standards, the implementation methods should apply to all agencies seeking to apply standards to activities they regulate (e.g., federal, forestry, and agricultural agencies);
- (3) States' use of the categorical method rather than a pollutant-by-pollutant approach to determine the status of their waters can and does have the effect of virtually eliminating Tier II of the antidegradation policy. This, in turn, can also eliminate Tier III if a State limits Tier III to only those waters that are determined to be high quality waters; and
- (4) States routinely ignore policies and implementation methods they have adopted.

In particular, NWEA is very concerned with the disregard displayed by nearly all states concerning the requirement to protect existing uses under Tier I. Without any implementation methods established, this cornerstone of the water quality program goes ignored. As a result, states have allowed 35 years of degradation and localized extirpations, and even extinctions, of uses with impunity. States routinely ignore the "floor" of water quality, despite EPA's clarity on the importance of maintaining this floor.

We support EPA's proposal to require antidegradation implementation methods to be adopted into state rules because, as mentioned above, failure to include these essential methods in rules makes them inapplicable to any other agency than the water quality regulatory agency and, in addition, allows changes to be made without any public or EPA input or oversight. In addition, to ensure adequate protection of those waters with higher quality than required by standards and consistency across the nation, we urge EPA to require states to use a parameter-by-parameter approach to designating high quality waters subject to Tier II reviews. By way of example of both the importance of putting implementation methods into rules and the importance of the parameter-by-parameter approach, we provide EPA with the story of how Oregon changed from a parameter-by-parameter approach to determining which waters were high quality to a categorical approach.

Historically Oregon used a parameter-by-parameter method to identify its high quality waters.<sup>1</sup>

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<sup>1</sup> DEQ staff paraphrased comments by Larry Knudsen, the Attorney General for DEQ, stating that "Oregon determines water quality classification on a parameter by parameter basis." Memorandum from Avis Newell, Oregon Department of Environmental Quality, to Outstanding Resource Waters Work Group, Re: Notes from the April 21, 1998 Outstanding

Then, in preparing a draft internal guidance document for antidegradation implementation, the staff changed this long-standing policy to use of a categorical approach.<sup>2</sup> Even EPA commented that use of the categorical approach left few waters subject to Tier II protections.<sup>3</sup> Other than the guidance document in which the new policy was set out, without its having been identified as a change from previous practice, no documents were generated in which the change was identified, the public was invited to comment, the Oregon Environmental Quality Commission was asked to weigh in and approve, EPA was asked to approve, or the ramifications were explained. It was just done by staff.

As you can see from this example, this significant change to Oregon's water quality standards could be made without rulemaking, without public input, without approval by Oregon's Environmental Quality Commission, and without EPA action because EPA has not required antidegradation implementation methods to be a part of rulemaking. It is not even clear that when EPA commented on the guidance EPA understood that Oregon was making a change to its existing policy. The result was that state agency staff virtually eliminated any high quality waters in Oregon because nearly all waters in the state violate some water quality standard, in most instances temperature. This change in the interpretation of the antidegradation policy had further ramifications because Oregon's rules require a waterbody to be of "high quality" in order to be considered a candidate for Tier III protection. As a result of this change, it is unlikely that any waterbody in Oregon is now a candidate for this level of protection. This example demonstrates both why implementation methods must be adopted by rule, not guidance, as well as why EPA should require all states to use a parameter-by-parameter approach to designating high quality waters. Given states' near uniform disregard for applying Tier I protections, designation as a high quality water with its Tier II review is an important provision that states should not be allowed to negate. After all, there is no justification for not evaluating an increase in a pollutant in a high quality water that is known to affect human health just because the waterbody happens to be identified as impaired for a pollutant that affects aquatic life alone.

### **1. Tier 1 Protections**

We urge EPA to consider Tier I protection implementation methods to be one of the most pressing needs in water quality regulation. At a minimum, it is essential that EPA make clear to states that Tier I does not only apply in the context of Tier II reviews. Although EPA has been

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Resource Waters Work Group, April 30, 1998 at 1 (available from NWEA).

<sup>2</sup> Oregon Department of Environmental Quality, Response to Comments on Antidegradation Implementation Internal Management Directive, at 37 (Northwest Environmental Advocates' comments), undated, available from NWEA.

<sup>3</sup> *Id.* at 4 (EPA comments).

clear in the past that Tier I protections apply to all waters, states continue to disregard this policy.

**a. Establishing Tier I Implementation Methods**

Tier I protections, as EPA has stated consistently and clearly, establish the floor of water quality standards, the condition below which water quality cannot drop: “the absolute floor of water quality” providing “a minimum level of protection to all waters.”<sup>4</sup> Yet few states have any implementation method that addresses the need to protect existing uses and the water quality necessary to support them. In many instances, in the 35 years since existing uses were established, water quality and the uses dependent upon it have been degraded, uses have been extirpated, and some have even become extinct. Not only is Tier I not used to protect existing uses in the regulatory decisions states make but the Clean Water Act’s requirement to develop Total Maximum Daily Loads (TMDLs) become necessary to restore those existing uses if they have been removed or impaired. TMDLs, however, are not the only solution to degraded water quality and maintaining existing uses, nor should they be. TMDLs take considerable time and public resources to develop and implementation of TMDLs, particularly for nonpoint sources, is most often disregarded. At best it can be said implementation is very slow. Even in a state, such as Oregon, which is developing a more prescriptive approach to TMDLs to address lagging nonpoint source implementation, TMDLs cannot close the gap between the requirement to protect existing uses and the reality that they are being removed and impaired. In other words, EPA needs to look to water quality standards as a method of ensuring existing use protection rather than the current default which is to wait until existing uses are impaired and then to wait for a TMDL to be developed. Moreover, because Tier I applies to all waters, according to EPA, it can and should be used to protect both higher quality waters as well as to improve lower quality waters before a TMDL is completed, approved, and implemented.

As demonstrated in the attached memorandum,<sup>5</sup> there would be significant benefits to states’ adopting clear and specific antidegradation requirements for nonpoint sources as part of Tier I antidegradation policies and implementation methods. Such requirements would not have to wait until a TMDL is completed and, if incorporated into a State’s water quality standards rules, would constitute water quality standards that other agencies must meet. By requiring Tier I protections – through implementation methods – for all waters, EPA would ensure that several gaps would be filled. First, waters identified as needing a TMDL would be subject to some *minimum* level of protection (restoration) in the time period between rule adoption and TMDL completion. Currently, states are not required to have provide any level of protection to impaired

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<sup>4</sup> EPA Questions and Answers on Antidegradation 1985.

<sup>5</sup> Memorandum, from Nina Bell, Northwest Environmental Advocates to DEQ Staff, “Using Tier I Antidegradation Policy Requirements to Address Gaps in Water Quality Protection for Oregon’s Waters,” June 7, 2010.

waters until a TMDL is completed, a policy that has no rational basis, particularly for incremental water quality improvements such as those that apply to nonpoint sources. While the TMDL may demonstrate that *more* actions beyond basic controls are necessary, there are certain controls that are certain to be needed. Waiting for a TMDL to be completed before taking those basic pollution control actions merely postpones attainment of water quality standards and increases the risk of local extirpations of uses.

The second gap this approach would address are waters that violate narrative criteria but that have not been listed on the 303(d) list as impaired and therefore will not be scheduled for a TMDL. While ideally such waters would be identified and listed, the reality is that many are not whether due to lagging efforts on biocriteria development or states that simply have not made the effort to interpret how they will apply their narrative criteria. In this case, while water quality is impaired, and standards are not met, no pollution reduction actions will ever take place to restore the impairment because no TMDL will be developed. However, a Tier I implementation method that applies basic levels of water quality protection (restoration) to all waters would ensure that some level of protection would be attained. While this is not a solution to states' failure to implement narrative criteria, it would bring actual water quality benefits.

Likewise, where water quality criteria are below levels at which toxic pollutants can be detected and quantified, there will be no 303(d) listing and no TMDL developed even if water quality is violating the criteria. Again, Oregon poses an perfect example of this phenomenon. Over half of Oregon's new human health criteria (based on 175 grams/day of fish consumption) will be below the quantitation limit (QL) meaning that waters may well violate the criteria, but no pollution reduction actions will be taken because there will be no listing and therefore no TMDL will be required.

Likewise, as the memorandum points out, there are no triggering mechanisms to protect, maintain, or enhance water quality that is higher than the criteria in the following two situations: (1) where water quality has eroded over the 35 years since 1975, most states have no mechanism to identify and assess existing uses or to provide for their protection; and (2) where nonpoint sources will lower water quality that current meets water quality criteria, there is no Tier II mechanism to prevent further pollution.

The solution to all five of the gaps identified above are explicit Tier I protections. Such protections would be the minimum and, as explained, would not be sufficient in all cases, to ensure the protection (and restoration) of existing uses and the water quality necessary to support them. However, such protections would go a long way to improving and preserving water quality. Because Tier I requirements are water quality standards, other agencies that establish management practices for nonpoint sources would be required to meet them in developing practices for activities under their jurisdiction.

Tier I implementation methods could range from general narrative requirements and performance expectations to specific numeric provisions. For example, a Tier I requirement could be continuous forested riparian buffers of a required minimum width to prevent excess sedimentation and toxics associated with sediment, as well as to capture nutrient runoff. They could include a variety of baseline nonpoint source controls.

We urge EPA to adopt a requirement that states include Tier I protections in their water quality standards rules and set a high bar for the explicit nature of those protections in order to give meaning to the requirement.

#### **b. Identifying Existing Uses**

Tier I also requires identification of existing uses in order to provide them with protection. We are aware of only one state which requires the identification of existing uses. Pennsylvania has guidance on identifying waters for existing use protection, evaluating existing uses, keeping track of existing uses, upgrading existing uses into use designations.<sup>6</sup> Elsewhere, in practice, if the issue of existing uses is raised by a member of the public, the state agency defers to the current actual uses claiming that it has no way of identifying what uses and water quality existed 35 years ago. States can use, in many, if not most, cases surveys, historic records, anecdotal accounts, professional judgment, modeling, the health of species and the status of their populations to ensure identification of existing uses and/or the water quality to support such uses. However, even when a State addresses the issue, which is rare, it will informally (i.e., in guidance) adopt an impermissible requirement for establishing a use as “existing.” An example of this is the State of Washington’s Use Attainability Analysis (UAA) guidance which substitutes for existing uses phrases such as “uses that don’t exist,” and uses “occurring at a recent time.” This UAA Guidance also raises the important issue of who has the burden of proof. EPA should make clear that the burden is not on the public to identify existing uses but rather on the state to identify them where it intends to sanction some pollution-generating action.

## **2. Tier II Protections**

Given the lax attitude demonstrated by states to Tier II protections over a long period of time, we think that EPA should make clear that states must give meaning, in their antidegradation implementation methods, to all situations that trigger its application. Without such a clear understanding, states will continue to do what they believe is the minimum required. For Tier II reviews, EPA should require that:

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<sup>6</sup> Water Quality Antidegradation Implementation Guidance, Pennsylvania Dept. of Envntl. Protection, November 29, 2003, *available at* <http://www.elibrary.dep.state.pa.us/dsweb/Get/Document-47704/391-0300-002.pdf>.

- (1) All reasonable alternatives to the new or increased discharge or other loading must be considered as part of a Tier 2 antidegradation analysis;
- (2) If a new or increased pollution loading is found necessary to accommodate important social or economic development after a Tier II analysis, the least polluting reasonable alternative must be used and permit limits will be set based on the discharges that would be expected from use of the least polluting alternative;
- (3) There be procedures for determining the potential alternatives to the proposed new or increased discharge or other proposed activity that will increase pollution;
- (4) Factors be identified that will be considered in determining when a proposed polluting activity will accommodate important social or economic development and the method for making that Tier II determination;
- (5) Tier II applies to NPDES permits, individual and general, as well as to 401 certifications and nonpoint source changes;
- (6) The state will prepare a written antidegradation Tier II analysis if antidegradation is applicable to the decision to allow a new or increased load or explain in writing why the new or increased loading fits within an exception to Tier II antidegradation requirements if the state finds that such an exception is applicable; and
- (7) Public participation is meaningful and effective.

Certainly the rule should, at a minimum, be clarified to require that state antidegradation rules apply Tier II protection to protect all water bodies that support any significant human or aquatic life uses. As discussed above, there is no basis for not providing the Tier II higher level of protection for aquatic uses of a waterbody that happens to be degraded for human recreation. Likewise, a waterbody that impaired for aquatic life uses should have its recreational uses protected.

EPA should also revise and clarify the language in 40 C.F.R. § 131.12(a)(2) describing State assurances to achieve all cost-effective and reasonable best management practices for nonpoint source control. This wise policy is widely disregarded yet it remains one of EPA's few methods of forcing states to implement nonpoint source controls.

### **3. Tier III Protection**

We believe that all states should have a clear process for designation of water subject to Tier III. However, Northwest Environmental Advocates also strongly believes that it is a waste of public resources and misleading to the public to allow designations of waters for this level of protection if there is no method of assuring the protection. Therefore, at a minimum, waters that are designated need to have an implementation plan to assure no additional pollutant loading is allowed, from point or nonpoint sources. Alternatively or in addition, waters designated for Tier

III protection should have protections that are written into the water quality standards, much as the description of Tier I protections described above. Finally, as mentioned above, if EPA continues to allow states to avoid a parameter-by-parameter designation for high quality waters, some states, such as Oregon, will have precluded Tier III protections for any water.<sup>7</sup> Just as with Tier II protections, there is no policy rationale for lumping protections for aquatic life or human health together, nor is there any policy rationale for allowing unlimited additional pollution of one pollutant merely because a waterbody is already polluted with a different pollutant, even if they both affect the same use. There is simply no reason, this many decades after passage of the Act, that EPA might conclude it could ease up on water quality protection.

**B. Administrator's Determination**

We disagree with EPA's proposal to narrowly interpret the already clear statutory language on Administrator's determinations. It is clear that EPA is seeking to defeat, through new regulations, any future attempts by environmental organizations to convince federal courts that EPA is obligated to prepare water quality standards based on indications that EPA has determined existing standards are not sufficient to meet the requirements of Section 303. While in the short term, trying to prevent such litigation may be superficially appealing to the agency, it is tremendously short-sighted. In reality, the citizen's suit has played an important role in enhancing EPA's ability to protect and restore water quality, a fact that even EPA should be able to acknowledge in casting its eye back over the last few decades. Allowing citizens to make a claim that EPA should act, because it has already drawn a technical conclusion elsewhere, will likewise enhance water quality protections in the future.

**C. Uses**

EPA proposes to make clear that CWA goal uses are attainable unless otherwise demonstrated, a position that we believe is already stated in the regulations. However, we support making it more clear. We further support requiring the Highest Attainable Use closest to the goal being specified and adopted. Naturally, at this stage it is not clear what constitutes HAU. We urge EPA to maintain and clarify to the extent possible the importance of existing use support in this context.

**D. Variances**

As water quality criteria become more stringent and as states begin to issue NPDES permits that

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<sup>7</sup> See Letter from Michael Llewelyn, Oregon Department of Environmental Quality, to Pete Frost, National Wildlife Federation, regarding Outstanding Resource Water designations, August 25, 1998 (available from NWEA).



better comply with existing EPA regulations and the statute, the role of variances will become more important. We support EPA's current variance policy that they are changes to water quality standards that require EPA action. Overall, from a policy perspective, we believe that EPA should ensure that the outcome of variances and that of compliance schedules be as close as they can be from a water quality standpoint. The primary difference should be the fact that a source will only choose a compliance schedule when either it cannot obtain a variance due to the requirements of 40 C.F.R. § 131.10(g) and (h) and/or a source does not know that it can meet an effluent quality certain by a date certain, as required by EPA's compliance schedule regulations. In other words, variances should not be an opportunity for a source to avoid minimizing its pollution contribution to the maximum extent possible simply because it is unable to commit to an outcome and date certain. EPA should use this rulemaking as an opportunity to change its current policy that, with the exception of the Great Lakes Initiative (GLI) rules, allows sources to avoid making improvements.

EPA should make clear that states must use the correct process for developing variances, namely to treat them in the same fashion as any other change in standards. Public notice and participation requirements are important in this regard. In light of proposals in Oregon that have advanced the idea that states may adopt variances and call them something other than a "variance," we believe that EPA should make clear that a variance must, in fact, be called a variance to be one. The reason for this is simple: in order for the public notice to be meaningful to the public, it must be clear that the state regulatory agency is proposing to temporarily suspend otherwise applicable water quality criteria. It is our impression that in the context mentioned, EPA<sup>8</sup> has told Oregon that it may call a variance a "pollution reduction plan." It should go without saying that using that phrase would not signal that the state intended to change the standards.

### **1. Reliance on GLI for Non-GLI States' Variance Rulemaking**

Our recent experience in Oregon with regard to developing variance rules is troubling. EPA has signaled to the state that it can cherry pick aspects of the GLI that are most advantageous to state agencies and dischargers while ignoring those aspects that provide concurrent water quality protections. In the GLI these aspects are balanced. EPA itself has specifically cautioned against using portions of the GLI without considering the appropriate context.<sup>9</sup> The reason becomes

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<sup>8</sup> Reference to "EPA" views in the context of Oregon's toxic water quality standards triennial review generally refer to EPA Region X. We do not know the degree to which EPA headquarters has been consulted on these views, only that it has been involved in some discussions.

<sup>9</sup> Water Quality Standards Regulation Proposed Rule, hereinafter "Advance Notice of Proposed Rulemaking" (ANPRM), 63 Fed. Reg. 36741, July 7, 1998, at 36759.

clear when one compares the proposed provisions of Oregon's variance procedure with the GLI. The GLI provisions related to variances *require* numerous protective aspects that Oregon is *not* proposing to include in its rules, such as: a mandatory three-year review;<sup>10</sup> a permit reopener provision;<sup>11</sup> a requirement that the permittee characterize the extent of any increased risk to human health and the environment from granting the variance compared to the underlying water quality standards;<sup>12</sup> a requirement that the State conclude that such an increased risk is consistent with protection of public health, safety, and welfare;<sup>13</sup> a requirement for reasonable progress towards attaining standards;<sup>14</sup> an explicit reference to meeting the antidegradation policy;<sup>15</sup> a prohibition against variances for new or recommencing dischargers;<sup>16</sup> and a requirement that all conditions be incorporated into the permit of the applicant seeking the variance.<sup>17</sup> Instead, Oregon proposes to use portions of the GLI that would make issuing variances less onerous – such as interpreting requirements related to nonpoint sources as only those under the control of the source seeking the variance – without concurrently ensuring appropriate environmental and human health protections. This is all apparently with EPA's sanction.

Moreover, under the GLI, NPDES sources face a host of restrictions that are an important backdrop to the GLI variance procedures, restrictions that are not true in Oregon. Specifically, the GLI limits the expected load reductions from nonpoint sources that states can assume in issuing TMDLs. The GLI requires that these load allocations be set at existing pollutant loadings if changes, i.e. reductions, are not expected to occur.<sup>18</sup> In other words, TMDLs issued in GLI states are not allowed to factor unrealistic and unexpected pollutant load reductions from nonpoint sources, thereby increasing expected load reductions from point sources. In contrast, Oregon TMDLs routinely assume significant reductions by nonpoint sources in establishing wasteload allocations. Similarly, TMDLs in GLI states must account for accumulation of toxics

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<sup>10</sup> GLI Pt. 132, App F, Procedure 2 §B.

<sup>11</sup> GLI Pt. 132, App F, Procedure 2 §F.4.

<sup>12</sup> GLI Pt. 132, App F, Procedure 2 §C.2.b.

<sup>13</sup> GLI Pt. 132, App F, Procedure 2 §C.2.b.

<sup>14</sup> GLI Pt. 132, App F, Procedure 2 §F.2.

<sup>15</sup> GLI Pt. 132, App F, Procedure 2 §C.2.a.

<sup>16</sup> GLI Pt. 132, App F, Procedure 2 §A.1.

<sup>17</sup> GLI Pt. 132, App F, Procedure 2 §G.

<sup>18</sup> GLI Pt. 132, App F, Procedure 3 §B.3.b.i & ii.

in sediments<sup>19</sup> and there are severe restrictions on mixing zones for bioaccumulative chemicals of concern<sup>20</sup> among other stringent provisions that apply to NPDES dischargers. Despite these restrictions that militate in favor of issuing variances in GLI states, EPA has signaled to Oregon that it may omit the restrictions while relying on the GLI to issue variances that are longer than three years (in fact would carry with any administrative extension no matter how long), omit control of nonpoint sources, etc.

## 2. Time Frame for Variances

EPA has a long history of limiting the time frame for variances and, where they exceed three years, of requiring them to be reviewed during the triennial reviews. EPA has consistently defined variances as lasting for three years, sometimes up to five.<sup>21</sup> Where EPA has allowed variances to last beyond three years, it has not allowed them to be longer than five years.<sup>22</sup> Where a variance is allowed to go beyond three years, a three-year review from the date of the last triennial review submission to EPA has been required.<sup>23</sup> In order that this triennial review be meaningful, where a variance is allowed to go beyond three years, a re-opener clause has been required in associated NPDES permits.<sup>24</sup> However, in Oregon, EPA has signaled not only that the state may adopt a variance procedure that allows a five-year variance without a triennial review and without a requirement to gather information to ensure that a triennial review would be meaningful, but it has also apparently given the state the green light to adopt a variance rule that would allow the variance to run with any *administrative extension* of the NPDES permit. This is an outrageous and unwarranted loophole in water quality standards. To allow an unlimited time period for variances – to date, nobody has established a method of preventing an unlimited

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<sup>19</sup> GLI Pt. 132, App F, Procedure 3 §B.7.

<sup>20</sup> GLI Pt. 132, App F, Procedure 3 §C.1.

<sup>21</sup> See EPA Coordinating CSO Long Term Planning with Water Quality Standards Reviews (hereinafter “CSO Guidance”) 2001 at 34; EPA Guidance for State Implementation of Water Quality Standards for Section 303(c) at 6; EPA Definition of Water Quality Standards Terms 1979 at 1; EPA National Assessment of State Variance Procedures 1990 at 1.

<sup>22</sup> GLI Pt. 132, App F, Procedure 2 §B; EPA CSO Guidance 2001 at 34.

<sup>23</sup> 40 CFR § 131.20(a); GLI Pt. 132, App F, Procedure 2 §B; EPA CSO Guidance 2001 at 34; EPA Water Quality Standards Handbook 1993 at 5.3; GLI SID Sec. VIII.B.2.c; ANPRM at 36759; EPA Three-Year Water Quality Standard Reviews 1983 at 1.

<sup>24</sup> See GLI Pt. 132, App F, Procedure 2 §F.4, GLI SID Sec. VIII.B.2.c.

administrative extension in the face of a State unwilling to issue a new NPDES permit – when defining variances as “short term” makes a mockery of the entire process. Moreover, it flies in the face of the requirements of 40 C.F.R. § 131.20(a) that require re-examination of nonconforming uses every three years. Nonetheless, EPA has indicated this is acceptable. EPA should make clear that such a policy is not an acceptable time frame for a temporary variance in its proposed rulemaking.

With regard to the existing requirement that states review noncomplying uses in triennial review, EPA should ensure that this requirement is meaningful by ensuring that the variance holder obtains, and makes public, information that can be used in that review. (See “reasonable progress” section below.) For example, EPA’s conditions of a variance for CSO-affected waters emphasizes the importance of obtaining new information.<sup>25</sup> The GLI also explicitly notes that a renewal of a variance is subject to all of the same findings and procedures as an original variance.<sup>26</sup> EPA regulations<sup>27</sup> require the triennial re-examination of waterbodies with downgraded uses but to our knowledge no state has ever engaged in this review.

### **3. Existing Use Protection in Variances**

EPA has stated repeatedly that variances are subject to the “same substantive and procedural requirements as removing a designated use.”<sup>28</sup> One of these provisions is to ensure the protection of existing uses. This requirement to protect existing uses in the issuance of variances derives from several sources. First, existing use protection is the floor of water quality, below which State standards may not go and variances are changes to water quality standards.<sup>29</sup> This is encoded in the requirement to classify existing uses<sup>30</sup> as well as the antidegradation provisions to

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<sup>25</sup> EPA CSO Guidance 2001 at 34.

<sup>26</sup> GLI Pt. 132, App F, Procedure 2 §H; ANPRM at 36759.

<sup>27</sup> 40 C.F.R. § 131.20(a).

<sup>28</sup> EPA Water Quality Standards Handbook at 5.3; EPA Economic Guidance for Water Quality Standards 1995 at 1-3.

<sup>29</sup> EPA Water Quality Standards Handbook; EPA Questions & Answers on Antidegradation 1985.

<sup>30</sup> 40 C.F.R. § 131.10.

protect those uses<sup>31</sup>, which according to EPA must be read together.<sup>32</sup> Existing use protection is specifically noted, *twice*, in EPA regulations concerning the removal of designated uses, the same provision that is used for variances. EPA notes that the protection of existing uses is a site-specific exercise, which is wholly consistent with the issuance of variances.<sup>33</sup> EPA considers protection of existing uses as essential in issuing variances.<sup>34</sup> EPA notes that it is the necessity of preserving existing uses, as well as making reasonable progress towards ultimate attainment, that requires the conditions of a variance to be set as close as possible to the designated uses and “always retained at the level needed to preserve the existing use.”<sup>35</sup> These conditions include various prohibitions, control requirements, monitoring, and evaluation.<sup>36</sup> The requirement to protect existing uses pursuant to the antidegradation policy applies during triennial reviews/water quality standards changes, of which a variance is one<sup>37</sup> as well as the issuance of NPDES permits.<sup>38</sup> Last, the six factors of 40 C.F.R. §131.10(g) cannot be read outside the context of the text of §131.10(g), of §131.10(h), and of the antidegradation policy. Similarly, the GLI explicitly requires that in addition to the six factors, the variance seeker show the antidegradation requirements have been met.<sup>39</sup> Notwithstanding the clarity in EPA’s position, as set out above, we have been led to believe recently that EPA may have a more ambiguous view of this issue. We urge EPA to clarify that under no circumstances may a variance be used in a way that provides less than full support for existing uses.

In addition, EPA should make clear that permits issued pursuant to variances must still comply

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<sup>31</sup> 40 C.F.R. § 131.12.

<sup>32</sup> ANPRM at 36752.

<sup>33</sup> *Id.*

<sup>34</sup> EPA CSO Guidance 2001 at 34, *citing* 40 C.F.R. § 131.10(h)(1); ANPRM at 36759, 36760.

<sup>35</sup> EPA CSO Guidance 2001 at 34.

<sup>36</sup> *Id.* at 35.

<sup>37</sup> EPA Questions & Answers on Antidegradation.

<sup>38</sup> EPA Water Quality Standards Handbook.

<sup>39</sup> GLI Pt. 132, App F, Procedure 2 §C.2.a; GLI SID Sec. VIII.B.3.c.

with antidegradation requirements, including Tier I existing use protection.<sup>40</sup> The reason for this is clear: A variance applies to the applicable criterion alone and does not modify the application of the existing use and designated use provisions of the water quality standard.<sup>41</sup>

#### **4. Requirement for All Cost-Effective and Reasonable Nonpoint Source Controls**

As mentioned above, EPA has stated repeatedly that variances are subject to the “same substantive and procedural requirements as removing a designated use.”<sup>42</sup> The designated use removal provisions used for variances require the use of “all cost-effective and reasonable nonpoint source controls.”<sup>43</sup> This provision applies to issuance of a variance as a temporary removal of designated uses governed by the same EPA regulations.<sup>44</sup> In the GLI, this requirement was interpreted to mean that Best Management Practices (BMPs) must be implemented (1) by the *discharger* (2) *before* a variance is granted, two requirements that are specific to the GLI.<sup>45</sup> In contrast, the national regulations that apply to non-GLI states are consistent with, and identical to, the Tier II antidegradation protection language which applies to nonpoint sources *outside* the control of any individual point sources.<sup>46</sup> Because the use removal provisions apply to waterbodies and variances apply only to the specific discharger seeking the temporary suspension of one or more standards or criteria, a state should not be able to suspend requirements of the water quality standards on other sources – point or nonpoint – as an outcome of the variance. Therefore, the BMP requirements of 40 C.F.R. § 131.10(h)(2) apply to all

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<sup>40</sup> EPA Guidance for State Implementation of Water Quality Standards for CWA Section 303(c) (2) (B)1988 at 6.

<sup>41</sup> EPA Definition of Water Quality Standards Terms 1979 at 1.

<sup>42</sup> EPA Water Quality Standards Handbook at 5.3; EPA Economic Guidance at 1-3; EPA CSO Guidance 2001 at 34.

<sup>43</sup> 40 C.F.R. § 131.10(h)(2).

<sup>44</sup> ANPRM at 36760.

<sup>45</sup> GLI Pt. 132, App F, Procedure 2 § A.3.

<sup>46</sup> EPA Interpretation of Federal Antidegradation Regulatory Requirement 1994 at 2. In a similar vein, EPA notes that in issuing variances, the economic impacts that can be considered are those that result from treatment beyond that required by technology-based regulations. This includes both technology-based limits on point source discharges as well as BMPs to nonpoint sources. EPA Economic Guidance for Water Quality Standards 1995 at 1-1.

sources in the consideration of a variance application, not just the nonpoint sources under the control of the permittee seeking the variance. In addition, applying the GLI, rather than current national regulations, to non-GLI states causes a conflict because of the second of the two GLI-specific requirements. The GLI BMP requirements for permittees seeking variances must be met *prior* to issuance of the variance, while the clear language of 40 C.F.R. § 131.10(h)(2) discusses the State's finding that designated uses "*will be attained . . . by implementing [nonpoint source controls],*" a finding related to future attainability. While a state is not required to have enforceable controls on nonpoint sources, where it does have such controls, they must be implemented as part of the Tier II protections.<sup>47</sup> The same requirement should apply to removing designated uses through the provisions of 40 C.F.R. § 131.10. This result is also good policy as it provides EPA with a mechanism to ensure that states control nonpoint sources.

## 5. Multiple Source Variances.

Every EPA guidance document discussing variances has referred to them as specific to individual dischargers.<sup>48</sup> One reason is that a variance must establish a replacement criterion that is as close to the underlying applicable criterion as possible which by its very nature is a site-specific finding.<sup>49</sup> (Despite the obvious need for a replacement criterion, given that a variance is a change to a water quality standard, some states ignore this and instead merely issue a water quality based effluent limit for the source seeking the variance. In Oregon, EPA appears to have agreed to this approach.) Even the GLI does not sanction multiple source variances but explicitly discusses individual permit holders.<sup>50</sup> For example, the preamble describes Procedure 2 as allowing variances "applicable to *individual* existing Great Lakes dischargers."<sup>51</sup> In describing the applicability of Procedure 2, the GLI specifies that a variance "applies only to the permittee requesting the variance."<sup>52</sup> In fact, every other provision in the GLI makes reference to variances' applying to individual permittees (i.e., conditions to grant a variance, submission of a

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<sup>47</sup> *Id.* at 2 (emphasis added).

<sup>48</sup> *See, e.g.*, ANPRM at 36759; EPA National Assessment of State Variance Procedures 1990 at 1.

<sup>49</sup> ANPRM at 36759.

<sup>50</sup> GLI Pt. 132, App F, Procedure 2 §A; GLI preamble.

<sup>51</sup> GLI Preamble at 15,376 (emphasis added).

<sup>52</sup> GLI Procedure 2, § A.

variance application, public notice, and the final decision on a variance request).<sup>53</sup> Elsewhere, however, EPA has indicated that multiple source variances might be allowed under the GLI,<sup>54</sup> causing conflict with all of its other pronouncements and confusion about how such variances might be issued and still remain consistent with EPA regulations and guidance. In Michigan, EPA settled a lawsuit challenging EPA's approval of a multi-source variance for mercury with an agreement the state would establish the waste load allocations for permit holders on an individual basis, while allowing the determination that a variance was needed to be done for more than one permittee. It is confusing and misleading for EPA to contradict itself. We urge that EPA continue its existing policy of making variances specific to individual permittees.

## **6. Variances for New Sources.**

Another area of ambiguity is the use of variances for new sources. The GLI prohibits the application for variances to new or recommencing sources.<sup>55</sup> Aside from the GLI, we have not been able to find EPA policy statements with regard to the use of variances by new sources. We do, however, think that EPA policy should preclude this use. New sources should only be allowed to discharge to public waters if they do not make existing pollution problems worse. By definition, a source that requires a variance is making water unsafe for human health and/or aquatic life and, by definition, a new source will make clean-up to acceptable levels more difficult. These new sources must be made to adopt the most advanced technology rather than contributing to the situation in which pollution control technology remains stagnant. Otherwise, there the technology-forcing attributes of the water quality-based approach to pollution regulation will be undermined to say nothing of the state of the nation's water quality.

## **7. Reasonable Progress Towards Attainment and Variance Renewal.**

EPA has stated that it believes variances can be used to implement protection actions, assess their results, and study the underlying water quality problem to better understand it.<sup>56</sup> This is similar to stating that a variance should be more like a compliance schedule rather than a simple "get out of jail" card. We support this approach. EPA should use its proposed regulations to make variances more similar to compliance schedules, with the difference being that the latter will only be used by permittees able to commit to a date certain by which it can meet water quality-based

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<sup>53</sup> GLI at §§ C, D, E, F.

<sup>54</sup> ANPRM at 36759.

<sup>55</sup> GLI Pt. 132, App F, Procedure 2 §A.1.

<sup>56</sup> EPA Water Quality Standards Handbook at 5.3; ANPRM at 36758-60.



effluent limits certain. In order that this policy may be carried out, conditions for pollution control and monitoring must be required to be included in the variance and incorporated into the applicable NPDES permit. Frankly, unless there are other major changes anticipated – either to dramatically and quickly improve water quality or to change the water quality standards themselves – this approach is the only way to give meaning to the stated notion that variances are “short-term” exemptions from meeting standards.

EPA should also ensure that the required triennial review is used to evaluate whether the conditions of the variance have been met and the conditions the variance was based upon still apply.<sup>57</sup> Renewal should not be automatic but, rather, requires a new affirmative showing by the applicant, consistent with existing EPA policy.<sup>58</sup> If the permittee is not required to collect and report information on the variance conditions and the underlying water quality problem, the state will not have sufficient information upon which to make any assessments of how to ensure that variances are not renewed *ad infinitum*.

#### **8. A Variance Must Include a Replacement Criterion.**

EPA’s proposed rules should include making clear that because a variance is a change to the water quality standards, it must include a criterion that applies during the pendency of the variance. A WQBEL that is incorporated into the relevant NPDES permit cannot itself serve as a replacement criterion.<sup>59</sup> In fact, according to EPA, it is contrary to the requirements of sections 301(b)(1)(C) and 402(a)(1) of the CWA to issue a variance to an effluent limit.<sup>60</sup>

#### **E. Triennial Reviews**

We support EPA’s proposal to require states to engage in a triennial review scoping exercise. EPA should include in this proposal that there are some nonnegotiable aspects to each and every triennial review. Specifically, EPA must make it clear that if states ignore the 1987 Clean Water Act amendments regarding the requirement to update toxics criteria at every triennial review, states can expect EPA will do it in a timely manner. Since most states do not conduct triennial reviews on a triennial basis, EPA should automatically place states into the National Toxics Rule (to the extent required) when states fail to conduct timely triennial reviews or fail to update toxic

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<sup>57</sup> See ANPRM at 36759.

<sup>58</sup> ANPRM at 36759; GLL.

<sup>59</sup> ANPRM at 36759.

<sup>60</sup> EPA National Assessment of State Variance Procedures 1990 at 7.

criteria at each triennial review. Current delays in updating toxics criteria are intolerable and EPA has the ability to make this change with its regulations. EPA should also require that states follow existing regulations that require “[a]ny water body segment with water quality standards that do not include the uses specified in section 101(a)(2) of the Act shall be re-examined every three years to determine if any new information has become available.”<sup>61</sup> Since this rule already exists and is treated as if it does not, EPA should use the opportunity of this rulemaking to clarify that states will, in fact, be held to this provision.

#### **F. Reflect Court Decisions**

We support EPA’s incorporation of the three cited court decisions into its regulations to ensure consistency between states and regions and with court opinions. We are concerned, however, with the ambiguity of EPA’s briefing document which states, with regard to the Florida cases, that it intends to “[r]evise the definition of ‘water quality standards’ at 40 CFR 131.3 to more clearly define types of state/tribal provisions that need to be submitted to EPA for review and action.”<sup>62</sup> We presume that EPA intends to make its regulations *conform* with the court opinions, not to attempt to avoid the result of those opinions. If so, we strongly support such action. All too often, states have developed water quality standards that they submit to EPA for approval while passing other rules, and issuing other guidance, that have the effect of taking away the protections afforded by those standards. These other actions run the gamut, from 303(d) listing methodologies, NPDES permitting loopholes, nonpoint source exemptions, etc. EPA does a disservice to the public waters when it ignores these changes as fundamentally affecting the water quality standards it is authorized and required to approve or replace.

We suggest that in addition to the cases cited, EPA also incorporate the results of *Northwest Environmental Advocates v. EPA*, 268 F. Supp. 2d 1255, 1266-67 (D. Or. 2003) insofar as that decision required EPA to ensure that where criteria apply to different waterways depending on aquatic life cycle stages, the state must establish the time and place designations for the standards to be effectively enforced. EPA itself included such time and place designations in establishing standards for the State of Idaho. Both EPA, and the court in the above-cited decision, have noted that without information on when and where criteria apply, these more protective criteria are essentially without meaning.

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<sup>61</sup> 40 C.F.R. § 131.20(a).

<sup>62</sup> EPA Powerpoint, Listening Session: Proposed Rulemaking to Revise the Water Quality Standards Regulation, Office of Water, Office of Science and Technology, August 2010, [http://water.epa.gov/lawsregs/lawsguidance/wqs\\_listening.cfm#written](http://water.epa.gov/lawsregs/lawsguidance/wqs_listening.cfm#written), at 16.

## **G. Additional Comments**

We urge EPA to address three additional items in its water quality standards regulations review: (1) provisions that EPA currently considers not to be changes to water quality standards; (2) environmental justice concerns; and (3) clarifying what it means to protect the most sensitive beneficial use.

### **1. Defining What Constitutes a Water Quality Standard**

In the context of assisting Oregon with developing new toxic criteria for the protection of human health, EPA Region X prepared a document including the following section:

#### Examples of Provisions that **May Not** be Considered Water Quality Standards:

- non-substantive provisions (provisions that are not integral to, and do not modify, protections afforded by the designated uses, criteria, and antidegradation provisions)
- provisions that merely describe the sufficiency or reliability of information/data necessary for the state to make an attainment decision and do not change a level of protection (e.g., minimum sample size and age of data requirements, sampling techniques, quality assurance/quality control procedures)
- implementation provisions (point or nonpoint source)
- enforcement provisions
- listing policies<sup>63</sup>

In preparing this list of provisions that may not be considered by EPA to be water quality standards, EPA fails to address the substantive manner in which many of these types of provisions undermine or completely negate the application of water quality standards to a state's waters, contrary to the intent of the Clean Water Act. For example, under this approach, EPA would approve a water quality standard even if a state adopted a rule that clearly stated the standard was not to be used in NPDES permits or for control of nonpoint source pollution because those provisions constitute "implementation provisions." Yet, in doing so, a state would *completely negate* the application of the standards to all pollution sources, leaving only the role of standards in identifying impaired waters. Similarly, a state could pass a rule or establish guidance that the standards will not be used for listing purposes and presumably EPA would determine that those provisions were listing policies and therefore would neither constitute water quality standards subject to EPA action nor would EPA take them into account when taking

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<sup>63</sup> EPA Region X, "Water Quality Standards - Authorities, Definitions, and Considerations," January 13, 2009.

action on the standards. In other words, under the policy articulated by Region X, EPA has no method of ensuring that states cannot give protection with one hand and completely or partially take away that protection with the other, the latter action not being subject to EPA review and consideration of any sort. This is a nonsensical approach that EPA should remedy in this rulemaking.

## **2. Incorporating Environmental Justice Concerns**

In our opinion,<sup>64</sup> EPA has talked for many years about environmental justice without doing anything about it, namely incorporating the concern within its federal regulations. In that light, it is interesting to see EPA Administrator Lisa Jackson's recent memorandum to EPA employees that included the following statement:

We have begun a new era of outreach and protection for communities historically underrepresented in EPA decision-making. We are building strong working relationships with tribes, communities of color, economically distressed cities and towns, young people and others, but this is just a start. *We must include environmental justice principles in all of our decisions.* This is an area that calls for innovation and bold thinking, and I am challenging all of our employees to bring vision and creativity to our programs. The protection of vulnerable subpopulations is a top priority, especially with regard to children. Our revitalized Children's Health Office is bringing a new energy to safeguarding children through all of our enforcement efforts. We will ensure that children's health protection continues to guide the path forward.<sup>65</sup>

Revising EPA's water quality standards regulations offers EPA an excellent opportunity to put Ms. Jackson's challenge into action. It is well beyond the time when EPA should have established clear expectations that when states adopt and revise water quality standards and criteria, they must address vulnerable subpopulations. EPA could require that such issues be addressed in the adoption of numeric criteria or that states be required to adopt implementation methods in their water quality standards that explain how narrative criteria, along with designated use support and Tier I of the antidegradation policy, will be used to achieve the goal. It is unacceptable that EPA has done nothing to date; now is its best opportunity.

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<sup>64</sup> See, e.g., Bell, *Environmental Injustice Posed by Oregon's Water Quality Standards*, 20 J. Envtl. Law and Litigation 85 (2005), attached.

<sup>65</sup> <http://blog.epa.gov/administrator/2010/01/12/seven-priorities-for-epas-future/> (emphasis added).

In addition, EPA recently issued a draft “Plan EJ 2014.”<sup>66</sup> This memorandum stated in part, with regard to rulemaking, that:

EPA’s authority to develop regulations that put our nation’s environmental laws into effect is one of the Agency’s most important tools for protecting human health and the environment. EPA’s regulatory authority combined with the mandates of Executive Order 12898 charge EPA with responsibility to ensure that, as we develop Agency actions, we consider communities that are disproportionately impacted by pollution. By incorporating environmental justice into its rulemaking process, EPA will more effectively protect overburdened minority, low-income, and indigenous populations. Plan EJ 2014 calls upon EPA to integrate environmental justice into the fabric of its rulemaking process.

The Agency achieved a significant milestone in this effort in July 2010 by issuing the Interim Guidance on Incorporating Environmental Justice During the Development of an Action. This guidance calls upon Agency rule writers and decision-makers to consider environmental justice throughout all phases of a rule’s development – known as the Action Development Process (ADP) – from the point of its inception through all the stages leading to promulgation and implementation.<sup>67</sup>

Again, this appears to be a statement of EPA’s intent to put meaning into the Executive Orders on Environmental Justice<sup>68</sup> and To Protect Children’s Health.<sup>69</sup> We urge EPA to do it now.

### **3. Clarifying What it Means to Protect the Most Sensitive Beneficial Use**

When states adopt criteria, they are required to establish them in order to protect the most sensitive beneficial uses.<sup>70</sup> EPA’s regulations are much less clear about how to address

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<sup>66</sup> Memorandum from Cynthia Giles, EPA Assistant Administrator to National Environmental Justice Advisory Council Members, Re: Request for Recommendations on Plan EJ 2014 and Permitting Charge, July 27, 2010.

<sup>67</sup> *Id.* at 3.

<sup>68</sup> Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

<sup>69</sup> Exec. Order No. 13,045 (Apr. 27, 1997).

<sup>70</sup> 40 C.F.R. § 131.11(a)(1).

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categories within uses. EPA's general view appears to be that so long as a use, such as protection of human health, is designated generally, it need only be protected generally.<sup>71</sup> However, where a state chooses to establish subcategories of uses, the state is obligated to provide full protection for each subcategory. The EPA has used the problem of states' designating uses broadly to complain that its existing regulations do not allow it to force such states to be more specific.<sup>72</sup> This is a problem that EPA and others have identified and therefore it should be a candidate for EPA action in this proposed rulemaking. EPA need only clarify that even where states choose to designate broadly, they must establish an administrative record setting out the most sensitive beneficial uses in the broad categories and demonstrate that the criteria adopted protect those most sensitive uses. In other words, this identified problem is wholly in EPA's hands to remedy.

We look forward to assisting EPA in any way to improve its water quality standards regulations.

Sincerely,

Nina Bell  
Executive Director

Attachments: Memorandum, from Nina Bell, Northwest Environmental Advocates to DEQ Staff, "Using Tier I Antidegradation Policy Requirements to Address Gaps in Water Quality Protection for Oregon's Waters," June 7, 2010.

Bell, *Environmental Injustice Posed by Oregon's Water Quality Standards*, 20 J. Env'tl. Law and Litigation 85 (2005).

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<sup>71</sup> See EPA Water Quality Standards Regulation 63 Fed. Reg. 36,742, 36,749-50 (July 7, 1998).

<sup>72</sup> *Id.*