

Basis for Reversal and Approval of the Iowa Antidegradation Water Quality Submittal.

On January 19, 2017, the U.S. Environmental Protection Agency disapproved the revisions to Iowa's water quality standards related to the Iowa Antidegradation Implementation Procedures. Iowa had submitted revisions to 567 IAC Chapters 61 and 64 and the rule-referenced document titled *Iowa Antidegradation Implementation Procedure (AIP)* on December 12, 2016. After further discussions and review resulting in a determination to change a policy position, the EPA now reverses the decision of January 19, 2017 and hereby approves the submitted water quality standards set forth in the amended Iowa rules and AIP pursuant to Section 303(c) of the Clean Water Act for the reasons set forth below.

Basis for Disapproval

EPA's basis for disapproval, as set forth in the letter of January 19th, was a determination that Iowa's use of an economic efficiency cap unduly narrows the consideration of less degrading alternatives during the alternatives analysis required by 40 CFR 131.12(a)(2)(ii). The Iowa AIP states in pertinent part:

"Alternatives costing less than 115 percent of the base cost of the minimum level of pollution control are considered economically efficient. Alternatives greater than or equal to 115 percent of the base costs are not considered economically efficient. This economic efficiency standard establishes a determination that any reduction of pollutant load below the minimum level of pollution control has an environmental benefit which warrants the increased expenditure, subject to the 115 percent economic efficiency limitation. "¹

The applicable language of the federal regulations at 40 CFR 131.12(a)(2)(ii) states as follows:

"(ii) Before allowing any lowering of high water quality, pursuant to paragraph (a)(2) of this section, the State shall find, after an analysis of alternatives, that such a lowering is necessary to accommodate important economic or social development in the area in which the waters are located. The analysis of alternatives shall evaluate a range of practicable alternatives that would prevent or lessen the degradation associated with the proposed activity. When the analysis of alternatives identifies one or more practicable alternatives, the State shall only find that a lowering is necessary if one such alternative is selected for implementation."

EPA determined that these provisions "conflict with 40 CFR 131.12(a)(2)(ii) which requires an analysis of alternatives that evaluates a range of practicable alternatives"². EPA further made clear in the letter that Iowa's economic efficiency test is not consistent with EPA's intended meaning of "economically viable" as used in the definition of "practicable" at 40 CFR 131.3(n).

¹ This provision applies to Tier 2 waters. Iowa does not allow the use of an economic efficiency test for Outstanding Iowa Waters, for which only affordability can be applied as a limiting factor.

² Page 16, Letter from EPA Regional Administrator Mark Hague to Jon Tack, IDNR dated 1/19/2017.

Basis for Reversal and Approval

After further consideration and a change in policy position, the EPA now reverses its prior determination based upon the following considerations:

1. The Iowa AIP does require the evaluation of a range of less degrading alternatives. Section 3.1 of the Iowa AIP requires that , in relevant part:

“The applicant shall evaluate a range of non-degrading or less-degrading pollution control alternatives with the intent of identifying reliable, demonstrated processes or practices that can be reasonably expected to achieve greater pollution reduction. “

Iowa’s AIP requires that each applicant, in addition to the base pollution control alternative, analyze both non-degrading and less degrading alternatives in preparation of the alternatives analysis. Furthermore, the IDNR may require that the applicant evaluate additional alternatives if an appropriate range of alternatives was not evaluated. Therefore, the economic efficiency test does not limit the alternatives fully considered by the applicant.

The economic efficiency test does not limit the range of alternatives to be considered by an applicant, but instead limits when the state may mandate the selection of a particular alternative. The inclusion of a greater range of options, combined with the public notice and comment period, provide the opportunity for community involvement in the selection of the appropriate alternative. Interested citizens may advocate for any alternative and applicants have in some instances voluntarily chosen alternatives more costly than would be mandated by the Iowa DNR.

2. The language of the federal regulation at 40 CFR 131.12(a)(2)(ii) is contradictory. The second sentence requires that “The analysis of alternatives shall evaluate a range of practicable alternatives that would prevent or lessen the degradation associated with the proposed activity.” The third sentence states that “When the analysis of alternatives identifies one or more practicable alternatives, the State shall only find that a lowering is necessary if one such alternative is selected for implementation.”

These sentences are contradictory in that the first sentence cited indicates that a range of alternatives that have already been determined to be practicable will be analyzed. The third sentence clearly anticipates that the analysis of alternatives is not limited to only those which are practicable and is in fact a methodology to determine if any of the alternatives actually are practicable. The use of the introductory phrase “when the analysis of alternatives identifies one or more practicable alternatives” is an acknowledgement that there may be none.

As noted above, Iowa’s AIP requires a full analysis of alternatives to determine if any are practicable as required by the first and third sentences of the federal regulation. The potential that Iowa’s economic efficiency test could limit the range of practicable alternatives to be considered pursuant to the second sentence of the federal regulation is clearly within the contemplation of the regulation, as indicated by the introductory phrase cited above (*When the analysis of alternatives identifies...*). Therefore Iowa’s use of the economic efficiency test does not directly contradict the language of 40 CFR 131.12(a)(2)(ii).

3. The EPA’s disapproval was premised, in part, on a determination that the Iowa economic efficiency test is not consistent with EPA’s intended meaning of the term “economically viable” as used

in the definition of “practicable” at 40 CFR 131.3(n). Further explanation of such intent was set forth through citation to the EPA responses to comments during the public comment period on the *Water Quality Standards Regulatory Revisions Rule*. EPA has now determined that the absence of a definition for “economic viability” within the regulations has resulted in an inability to carry out the intent as described in the prior responses to comments. Without any provision in Iowa’s AIP that directly contradicts the plain language in the federal regulation, it is not possible to enforce the intent envisioned by EPA at the time of the prior rulemaking and a change in policy is required in regard to this water quality standards submission.

Summary

After the reconsideration of all materials previously submitted in regard to this matter and extensive discussion and analysis, EPA hereby reverses the disapproval determination made on January 19, 2017 and hereby approves Iowa’s Antidegradation Water Quality Standards submittal received on December 12, 2016 pursuant to Section 303(c) of the Clean Water Act.