Fields of Opportunities

STATE OF IOWA

TERRY E. BRANSTAD, GOVERNOR
KIM REYNOLDS, LT. GOVERNOR

DEPARTMENT OF NATURAL RESOURCES
CHUCK GIPP, DIRECTOR

December 5, 2016

Sent by certified mail

Karen A. Flournoy
Water, Wetlands, and Pesticides Division
USEPA REGION 7
11201 Renner Blvd.
Lenexa, KS 66219

RE: 567 IAC Chapter 61, Water Quality Standards, and Chapter 64, Wastewater Construction, Iowa Antidegradation Implementation Procedure

Dear Ms. Flournoy:

Please find enclosed for your approval rule revisions to *567 Iowa Administrative Code (IAC) Chapter 61, Water Quality Standards and Chapter 64, Wastewater Construction*. These rule revisions are submitted for review and approval pursuant to 33 U.S.C §1313(c)(2)(A).

Pursuant to 33 U.S.C. §1313(c)(3), EPA has a mandatory duty to either approve these revised standards within 60 days of submission or, within 90 days of submission, notify the State that the submission is not consistent with applicable requirements of the Clean Water Act and specify the changes necessary to meet such requirements. The statutory deadlines play a key role in maintaining the cooperative federalism of the Clean Water Act and in prescribing the level of review which is possible while complying with the time frames established by law. It is anticipated that EPA will comply with these deadlines. Please acknowledge receipt by email in order for the State of Iowa to accurately track these statutory deadlines.

The primary purpose of these rule revisions is to adopt an updated Iowa Antidegradation Implementation Procedure (Iowa AIP). The rules are also being re-organized to emphasize the distinction between the statewide antidegradation policy referenced at 40 CFR 131.12(a) and the implementation methodology referenced at 40 CFR 131.12(b). This distinction is important because, as noted in the preamble to EPA's 2015 water quality standards rulemaking, antidegradation implementation methodologies need not be adopted by states as water quality standards. It is ultimately for EPA to determine which portions of this submission you believe constitute water quality standards.

Revisions to the Iowa AIP were undertaken to revise one element of the practicability analysis required by Iowa's antidegradation procedure; the economic efficiency test. The prior economic efficiency test included a non-binding presumption. It presumed that wastewater pollution control alternatives for which costs are less than 115% of the base pollution control alternative are economically efficient but allowed for the possibility of exceptions.

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All economic efficiency tests, such as the test proposed in EPA Region 8's original antidegradation policy guidance, assume that there are environmental and human health benefits to reduced pollutant loadings and pair that assumption with a reasonable upper limit for the costs to be expended to achieve those benefits. Iowa's original AIP and adopted revisions are consistent with that methodology. At all times prior to the 2016 rulemaking, Iowa interpreted its antidegradation policy and implementation procedure to be based upon this assumption, but allowed for the possibility that an individual antidegradation alternatives analysis could present a scenario in which the environmental benefits of a project may be sufficiently disproportionate to the costs to create an exception to the non-binding economic efficiency standard. No such exception was identified in the more than 6 years of implementation (approximately 300 alternatives analyses) and no contrary comments were received from EPA Region 7 on any antidegradation analysis reviewed and approved by Iowa DNR.

At this time, it has been determined that it is in the best interest of the State of Iowa to implement a bright line standard for economic efficiency as a part of our practicability determination. Similar standards have been approved by EPA for the states of Wisconsin, Arizona, Alabama, and Mississippi. The presumption that reduced pollutant loads are environmentally beneficial remains in full force and effect as a part of the newly adopted Iowa AIP. Applicants are not provided the opportunity to disprove the existence or magnitude of the benefit, as they could with a non-binding standard.

This approach is consistent with the 2015 revisions to 40 CFR 131.3 and 131.12. Rule 131.12 states, in part:

> "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."

Two clear conclusions can be identified from this language. The first is that, in order to "evaluate a range of practicable alternatives"; one must first determine the practicability of those alternatives as an initial step. The second is that the rule clearly contemplates that there will be situations when no non-degrading or less-degrading practicable alternatives will be identified ("*When* the analysis of alternatives identifies one or more practicable alternatives…). If, and only if, non-degrading or less-degrading practicable alternatives are identified in the initial step then the analysis of non-degrading and/or less-degrading practicable alternatives can occur[1].

New language was added to the Iowa AIP which states "An alternative that satisfies all three factors of the Iowa antidegradation alternatives analysis is considered to be 'practicable' as defined at 40 CFR 131.3(n)." The three factors referenced are the factors contained within

[1] See also, 80 CFR 51033 (8/21/15) preamble to the 2015 rule revisions in which EPA states: "Section 131.12(a)(2)(ii) provides for preservation of high water quality by requiring a less degrading practicable alternative to be selected for implementation, **if available**, before states and authorized tribes may find that a lowering of water quality is necessary. This requirement applies even if the analysis identifies only one alternative. States and authorized tribes must still make a finding that a lowering is necessary **if the analysis does not identify any practicable alternatives that lessen degradation**." (emphasis added)

Section 3.2 "Evaluating and Selecting Alternatives". These factors consist of a technical evaluation, an economic efficiency evaluation and an affordability evaluation. The use of these factors is not inconsistent with the federal definition of "practicable" found at 40 CFR 131.3(n) which is defined as "technologically possible, able to be put into practice, and economically viable." As was clearly explained during the 2015 rulemaking, economic viability may consider factors beyond simple affordability. Neither an economic efficiency test in general nor a specific bright line percentage test is prohibited by the federal rule language. In fact, the use of an economic efficiency test is the norm throughout the nation. No specific provision of the federal regulations can be cited as conflicting with such a test. Without such a direct conflict, the Iowa economic viability test cannot be considered facially invalid. If a specific circumstance arises in the future in which the test, as applied, is determined to violate federal requirements, EPA can address such application through a permit objection or through the triennial review process.

However, please note that Iowa anticipates that further scrutiny and discussion would occur in unique circumstances such as a non-degrading alternative which is asserted to be close to the 115% threshold or another situation in which the specific conditions warrant implementation of an alternative that initially does not appear to be "practicable" (as federally defined). In such cases, further scrutiny by the Iowa DNR of cost estimates or additional discussions with the permitted facility may be warranted to identify the long-term benefits arising from selecting an initially-excluded less degrading option. In this way, the benefits arising from the former non-binding guidance could be realized while maintaining the integrity and transparency of the bright line standard.

Once the practicable alternatives (including a base pollution control alternative, i.e. an alternative that will meet the highest statutory and regulatory requirements pursuant to 40 CFR 131.12(a)(2)) are identified, the least degrading practicable alternative is subject to the determination of social and economic importance of Section 3.3 of the Iowa AIP, the public and interagency review of Section 4, and the Iowa DNR review provisions of section 5. These steps constitute the analysis of practicable alternatives required by 131.12(a)(2)"ii", as referenced in the first sentence quoted above.

In discussions with EPA there was concern that a situation could occur in which a practicable alternative would not be considered. This is not the case. All alternatives that satisfy the practicability analysis are subject to the remaining steps of the alternatives analysis.

As stated in our letter of May 11, 2016, the Iowa DNR is submitting this rule package with the following presumptions or understandings:

- Because the former non-binding economic efficiency guidance was interpreted by a District Court to allow for projects which are less than 115% of the base cost to be determined to not be economically efficient and to allow for projects of greater than 115% to be determined to be economically efficient, a binding 115% criteria is neither more stringent nor less stringent than Iowa's currently approved antidegradation requirements.

- The federal antidegradation policy does not require the direct cost evaluation of environmental benefits and comparison to costs of treatment alternatives considered.

- While the Iowa AIP requires that an applicant choose the least degrading alternative that is practicable, economically efficient, and affordable, the federal regulation only requires an applicant to choose one of the practicable (as defined in 40 CFR 131.3(n)) less degrading alternatives, if identified. Other states have mirrored the federal language. Therefore in situations where multiple alternatives exist which are between the base pollution control cost and the 115% economic efficiency threshold, Iowa DNR is proposing the least degrading alternative nearest to 115%, while the federal language (and multiple other states) would allow an alternative that was closer to the base cost. In other words, the federal language allows for the minimum reduction in pollutant loads, while Iowa requires the maximum that can be achieved within 115% of base cost.

- Based upon our review, Alabama (110%), Arizona (110%), Mississippi (110%) and Wisconsin (115%) have adopted bright line economic efficiency standards as proposed in the Iowa rulemaking. Delaware, Missouri, North Dakota, Utah and West Virginia have adopted non-binding criteria. We have no indication that those economic efficiency criteria have been disapproved by EPA or are otherwise subject to a determination by EPA that the binding economic efficiency criteria fail to satisfy the requirements of the Clean Water Act. Approximately half the states do not appear to be effectively implementing a required antidegradation policy at all. Iowa presumes that any finding in regard to Iowa's proposed rules would constitute a determination, as referenced at 40 CFR 131.22(b), that the antidegradation policies of Alabama, Arizona, Mississippi and Wisconsin do not meet the minimum requirements of the Clean Water Act. Actions taken against Iowa should also be reflective of EPA actions in regard to the states not fully implementing the antidegradation requirements of the Clean Water Act.

During the course of this rulemaking, the Iowa DNR received comments and made revisions to address comments. Changes made in response to comments include the following:

- The Iowa AIP contains the defined term "beneficial uses", which includes both designated and existing uses. A commenter noted several references in the Iowa AIP to "existing uses". These references should have always been to the defined term of "beneficial uses" and this was corrected.

- The federal antidegradation rule defines "practicable," as technologically possible, able to be put into practice, and economically viable. Section 3.2 of the Iowa AIP establishes a three part test based upon whether an alternative is practicable (primarily technological factors), economically efficient, and affordable. We have clarified that we intend Iowa's test to be equivalent to EPA's practicability determination. Knowing that EPA does not define "economically viable" to mean only affordable, economic efficiency is an acceptable consideration, as it was a part of the original EPA Region 8 guidance and has been incorporated into the procedures of at least 9 other states. The adopted Iowa AIP has language added to clearly state that Iowa views the 3-factor state test to be equivalent to the 3-factor federal practicability determination.

- Language was added to the Iowa AIP to clarify the issue of the presumption of environmental benefit and to emphasize that the Iowa AIP presumes that any lowering of

pollutant loads or concentrations has an environmental benefit without the need to prove that benefit. The alternative would be that the facilities requesting permission to discharge would be tasked with evaluating and determining how much of an environmental benefit will be realized by discharging less. That determination would then be commented upon by the public and reviewed by the Iowa DNR. Barring a strict and objective methodology, such a scenario will necessarily lead to disagreement and dispute. We are taking away the ability to dispute the benefit of pollution reduction and saying that, by definition, less pollutant loading is beneficial.

It is the expectation of the Iowa DNR that the review of these minor changes to the Iowa AIP will occur in the context of, and fully consider, the entire Iowa antidegradation program. Iowa has a robust program that we believe sets an example for the nation. We have intentionally chosen to establish a program that has unique characteristics such as:

1. No de minimis exceptions;
2. Pollutant by pollutant approach;
3. Inclusion of any increases in mass **or** concentration;
4. Determination based upon effluent loads, rather than in-stream concentrations;
5. The requirement to select **the least** degrading practicable option (as defined consistent with federal law) as opposed to any less degrading option.

Therefore, consideration of the acceptability of the proposed economic efficiency standard should be unique to Iowa's strong antidegradation framework and may be contingent upon this framework. Because EPA has allowed a variety of differing state provisions related to such antidegradation considerations as economic efficiency, determination of degradation, and de minimis exceptions; it is understood that the unique combination of each state's program characteristics are considered as a whole to determine the approvability of that specific program. Iowa supports such continued flexibility and EPA consideration that states have the primary role in establishing water quality standards.

Included with this submittal is a disk containing rulemaking documents related to the revisions and several additional items that will assist in your review. Included are the following:

1. Item 1 is the certification by the State Attorney General dated October 14, 2016. As required by the Clean Water Act), the Iowa Attorney General's office has prepared a certification that the requested Water Quality Standards were adopted pursuant to state law;

2. Item 2 is the final rule revision that was published in the Iowa Administrative Bulletin (**ARC 2695C**) on August 31, 2016;

3. Item 3 is the Notice of Intended Action that was published in the Iowa Administrative Bulletin (**ARC 2579C**) on June 8, 2016;

4. Item 4 contains the minutes from the Iowa Environmental Protection Commission (IEPC) meeting on August 10, 2016. The proposed amendments were adopted by the IEPC at the August 10, 2016 meeting;

5. Item 5 is the Public Participation Responsiveness Summary. It includes a summary of all of the public comments on the proposed rule changes and the Iowa DNR's initial response to those comments;

6. Item 6 is a tracked changes version of the Iowa AIP effective August 12, 2016. It reflects the changes made by this rulemaking effort;

7. Item 7 is the clean version of the Iowa AIP effective August 12, 2016;

8. Item 8 is 567 IAC Chapter 61, Water Quality Standards, effective on August 12, 2016;

9. Item 9 is 567 IAC Chapter 64, Wastewater Construction, effective on August 12, 2016; and

10. Item 10 is a copy of all of the public comments received as a part of this rulemaking effort.

Please let us know of any issues or concerns which arise during the 60-day review and approval process. If simple clarifications are possible and can be provided expeditiously to EPA, we would be happy to provide any assistance which will facilitate your approval of this submittal, should EPA determine that this submission constitutes a revised water quality standard.

If there is anything the Iowa DNR can do to assist or if you have questions, please do not hesitate to contact me at 515-577-9225 or Matthew Dvorak at 515-725-8397.

Sincerely,

Jon C. Tack, Chief
Water Quality Bureau

Copy of submittal letter to: Doug Hoelscher, Director, Iowa Office of State-Federal Relations.