

ANTIDEGRADATION: The Law

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Federal Clean Water Act

Recognizes an “Antidegradation Policy”
But Doesn’t Include Specifics.

- 33 U.S.C. § 1313(d)(4)(B)



- EPA Has Established Policy Through Regulations.
- 40 C.F.R. § 131.12



40 C.F.R. § 131.12(a):

“The State shall develop and adopt a state-wide antidegradation policy and identify the methods for implementing such policy pursuant to this subpart.”



- Alaska did develop an antidegradation policy.
- Compare 18 AAC 70.015 with 40 C.F.R. § 131.12.
- State policy is essentially identical to federal policy.
- It follows the same 3-tier structure.



Problem:

- Alaska hasn't identified methods for implementing its antidegradation policy, as required by the federal regulation.
- **NOTE:** These do not have to be in the regulation itself.



- EPA recognized this omission when it first approved Alaska's antidegradation policy.
- See EPA's April 7, 1997 approval letter.



Question:

What are legal consequences of Alaska's failure to identify implementation methods?



- EPA said (in 1997): Use EPA's 1993 Water Quality Handbook as Interim Guidance.
- Other stake-holders have argued that ADEC cannot make antidegradation determinations until it issues implementation guidance.



Examples in Alaska:

- Kivalina residents' challenge to ADEC's 2007 certification of discharge permit at Red Dog Mine.
- G.P. for oil and gas drilling in Cook Inlet.
- Recent comments on pending permit actions.



Examples from Other States:

- Oregon: Northwest Env'tal Advocates v. EPA, 268 F. Supp. 2d 1255 (D. Or. 2003)
- In light of Oregon's one-sentence "policy," Court ordered EPA to promulgate an implementation plan for that state.



Examples from Other States:

- Kentucky Waterways Alliance v. Johnson,
540 F.3d 466 (6th Cir. 2008)
- Issues: Parameter-by-parameter v.
waterbody-by-waterbody.
- Categorical or de minimus exemptions.
- Cumulative Impacts of de minimus
activities.



Examples from Other States:

- West Virginia:
Ohio Valley Env'tal Coalition v. Horinko
279 F. Supp. 732 (W.Va. 2003).
- Multi-pronged challenge to W. Va.'s antidegradation implementation procedures.



Examples from Other States:

- Idaho: Advocates for the West v. EPA
(60-day notice letter sent Sept. 28, 2009.)
- State allegedly has no implementation plan and has not assigned any waters to the three tiers.
- Notice Letter is prerequisite to Citizen's Suit.



NOTE: Reported cases are Against EPA, not States!

- Federal Law allows parties to appeal final federal agency decision to federal court.
- EPA's approval of a state's WQS under CWA § 303, is such a decision.
- See federal APA, 5 U.S.C. § 704.
- CWA Citizen's Suit also available against EPA for failure to promulgate WQS.

CONCLUSION:

- DEC recognizes its duty to develop implementation guidance.
- Let's keep the lawyers out of the process as long as we can!

