

**Idaho Antidegradation Implementation  
Discussion Paper  
Antidegradation Reviews for General Permits  
July 15, 2010**

In Idaho, both the Environmental Protection Agency (EPA) and the Corps of Engineers (Corps) can issue general permits for certain activities not requiring individual permits. A general permit (GP) can cover an indefinite number of activities or facilities across a wide geographical area, all of a similar nature.

Federal regulations (40 CFR 122.28) allow for general NPDES permits to be developed to cover multiple point sources that have common characteristics (e.g. similar operations, similar discharge constituents, etc.). Federal regulations (33 CFR 320.1) allow for the Corps to authorize a category or categories of activities having minimal impacts in a specific geographical region or nationwide. Historically, EPA has issued general permits with geographical service areas encompassing the entire state of Idaho (some of these general permits are also applicable in other geographical areas outside of Idaho). The Corps has issued Nationwide permits (which can cover qualifying activities across all of Idaho) as well as Regional permits (which cover smaller geographical areas within Idaho). Table 1 lists general permits that are, or will be applicable in Idaho.

**Table 1. Final and Draft General Permits Applicable in Idaho**

<b>Agency</b>	<b>Permit</b>
Corps	Nationwide Permits
	Regional General Permit 27 <sup>1</sup>
	Regional General Permit, Idaho <sup>2</sup>
EPA	Aquaculture Facilities in Idaho Subject to Wasteload Allocations under Selected TMDLs
	Aquaculture Facilities in Idaho (Not Subject to Wasteload Allocations)
	Groundwater Remediation Facilities
	Concentrated Animal Feeding Operations (CAFO)
	Construction Stormwater (CGP)
	Industrial Stormwater (MSGP)
	Vessel General Permit (VGP)
	Small Suction Dredge Mining <sup>3</sup>
Pesticide General Permit (PGP) <sup>3</sup>	

1. This Regional Permit is only applicable to the Pend Orielle River and Pend Orielle Lake

2. This Regional Permit is only applicable to navigable waters of the United States as defined by Section 10 of the Rivers and Harbors Act 1899.

3. This permit has not been finalized as of the date of this discussion paper.

The number of facilities covered under a given general permit can range from a handful to thousands. For example, the Groundwater Remediation Facility General NPDES Permit applies to facilities located anywhere within Idaho. Since its issuance in July 2007, only four facilities have been authorized coverage under this permit, and these facilities are located in Boise, Idaho Falls, Atlanta, and Nampa. On the opposite end of the spectrum, approximately 900 active construction activities within Idaho have been authorized coverage under the Construction

General Permit (CGP), which was issued in July 2008. The CGP also is characterized by dealing with activities that are normally temporary, in contrast to intermittent but ongoing stormwater discharge.

General permits are typically issued prior to knowing who will seek coverage, when facilities will seek coverage, how many facilities will seek coverage, and what the receiving water bodies will be. This presents challenges to analyzing their effect on water quality including antidegradation review because there is no site-specific information on which to base the review. Because of this, some individuals hold the opinion that antidegradation review should or must be conducted at the time at which each facility or activity seeks coverage under the general permit. On the flipside, it can be argued that conducting an antidegradation review at the time of general permit issuance is possible with certain assumptions and conditions, and necessary if general permits are to serve their purpose of streamlining the permitting process. For example, if stringent enough permit controls are in place, DEQ may be able to conclude there would be no lowering of water quality as long as the permit conditions are complied with. As another example, it may be possible to conclude at the general permit level that activities authorized under the general permit are necessary and important for social or economic development in the area.

Coupled with the argument of when an antidegradation review should be conducted for general permits, Idaho presents a unique situation because the state lacks permitting authority. Applicants seeking coverage under a general permit typically work directly with EPA or the Corps unless different requirements are specified in Idaho's Section 401 water quality certification. This makes coordination and timing of Idaho's antidegradation review more challenging.

The purpose of this paper is to explore ways in which the federal agencies have addressed antidegradation in past general permits, explore options for Idaho to consider, and discuss what other states have done.

### **Past Approaches to Antidegradation Implementation in General Permits**

The Corps has not directly addressed antidegradation issues in their issuance of the NWP or regional permits and neither did DEQ in its certification of these permits. EPA has not applied antidegradation to general permits consistently over the past ten years, and their approach seems to be evolving. In their final reissuance of the MSGP in 2000, (Fed. Reg. 65, Oct. 30, 2000, page 64746), EPA stated that conducting a Tier II antidegradation review at the time of permit issuance would be difficult. As such, the only discharges allowed coverage under the 2000 MSGP were those that "do not degrade the use of a Tier II water below its existing levels." Similarly, in a permit for water treatment facility discharges in Massachusetts and New Hampshire (FR 65, Nov. 15, 2003, page 69000), EPA required new or expanded facilities seeking coverage to first undergo an individual antidegradation review.

EPA took a different approach than described above in its approval of the antidegradation implementation procedures for West Virginia and Washington as well as in its issuance of recent general permits. In its approval of West Virginia's antidegradation implementation procedures (November 2001), EPA stated that it was possible for the Tier II antidegradation review to occur

at either the general permit issuance stage or the individual notice of intent stage. However, in *Ohio Valley Environmental Coalition v. Horinko*, 279 F. Supp.2d 732 (S.D.W.Va.2003), the court ruled that EPA's approval was not appropriate because EPA did not provide justification for "how the type of review called for in §131.12(a)(2), which is location-specific and requires public participation, can be done on a statewide or nationwide basis." The Court found it important to its determination that EPA had concluded, with respect to the 2000 MSGP, that antidegradation reviews could not be done at the time the general permit was issued.

#### *Groundwater Remediation General Permit (2007)*

This general permit authorized discharges from facilities that are remediating contaminated groundwater. The general permit lists "prohibited areas of discharge"; however, EPA may provide waivers to this permit provision provided DEQ issues an individual certification for such discharges. Prohibited areas of discharge include impaired waterbodies (where the waterbody is impaired for the pollutant which is in the discharge), special resource waters, and outstanding resource waters.

#### *Multi-sector General Permit (2008)*

This general permit authorizes stormwater discharges associated with various industrial activities. EPA modified how operators can meet antidegradation requirements in the 2008 MSGP (FR 73, Sep. 28, 2008, page 56575). New facilities seeking coverage under the permit must indicate on the Notice of Intent for coverage (NOI) whether the receiving water body is Tier I, II, or III. Before a new discharge can discharge to a Tier I waterbody, they must meet specific criteria in the permit (e.g. prevent all exposure to stormwater of pollutants for which the waterbody is impaired, or comply with an applicable TMDL). If a water body is Tier III, then the operator can not receive coverage under the general permit. If a water body is Tier II, then EPA will evaluate whether additional conditions are necessary to meet the antidegradation requirements or if an individual permit is necessary. So, in this instance, EPA will essentially make antidegradation determinations at the time of the NOI submittal for high quality waters. In general, however, EPA expects that compliance with the permit limits and conditions of the MSGP will be sufficient to satisfy Tier II antidegradation requirements because the controls will not result in a lowering of water quality (Fact Sheet, page 59). Thus, individual antidegradation determinations will generally not be necessary.

#### *Vessel General Permit 2008*

The vessel general permit (VGP) authorizes specific discharges from commercial and large recreational vessels. EPA argued that the vessels receiving coverage under the permit should not be considered new or increased discharges that would "foreseeably lower water quality." EPA further stated that generally, vessels covered under this permit and their discharges existed before EPA's issuance of the VGP and submission of those vessels' notices of intent to be covered under the VGP. Because these discharges are not new or increased, EPA concluded that they do not trigger antidegradation review. Furthermore, EPA argued that the issuance of the VGP will improve water quality as vessels carry out the permit's technology-based requirements.

#### *Construction Stormwater General Permit (modified 2009)*

This permit authorizes stormwater discharges from construction activities greater than 1 acre in size. The permit requirements are intended to ensure that permittees select, install, implement, and maintain control measures at their construction site that will be adequate and sufficient to meet water

quality standards for all pollutants of concern. These control measures will be considered as stringent as necessary to ensure that discharges do not cause or contribute to an excursion above any applicable state water quality standard, except in those instances where EPA requires additional controls. As such, EPA expects that compliance with the terms of the general permit will ensure compliance with water quality standards (CGP Fact Sheet). Furthermore, the permit requires compliance with applicable provisions in TMDLs. If a TMDL doesn't address individual construction sites, then EPA believes that compliance with the requirements of the CGP is sufficient for compliance with the TMDL. Neither the permit nor fact sheet specifically mentioned antidegradation (although certifications from New Mexico and the Puyallup Tribe of Indians did address antidegradation to some degree).

*Draft General Permit for Residually Designated Discharges in Milford, Bellingham, and Franklin, Massachusetts (2010).*

This permit authorizes stormwater discharges from designated discharges. A designated discharge is two or more acres of impervious surfaces located: 1) in the Charles River watershed; 2) in part or in whole in the municipalities of Milford, Bellingham, or Franklin, Massachusetts; and 3) on a single lot or two or more contiguous lots.

The draft permit contains water quality based effluent limits, some of which are based upon antidegradation provisions of Massachusetts water quality standards. For example, the permit requires new or increased discharges to high quality waters to notify EPA and DEQ a minimum of 60 days prior to discharging. This notification should include documentation demonstrating how the discharge will comply with the antidegradation requirements. The permit further specifies ways in which a discharge can be deemed to not cause significant lowering of water quality. In addition, the permit stipulates that all existing uses be protected and that new or increased discharges to outstanding resources and special resource waters are not authorized under the general permit. The permit, fact sheet, and other documents can be found at:

<http://www.epa.gov/region1/npdes/charlesriver/>

### **Approaches Idaho Considered**

Idaho needs to determine a policy for addressing antidegradation in our certifications of general permits. DEQ has not provided any specific conditions addressing antidegradation for a general permit to date. There are a variety of ways in which DEQ can address antidegradation for general permits. Each one is described in more detail below. DEQ may decide to implement one or a combination of these approaches, acknowledging that the selected approach will be permit-specific.

#### Approach 1

DEQ could exempt all general permits from Tier II antidegradation review. Kentucky tried this approach when it exempted CAFOs, stormwater discharges, and other categories of discharges from Tier II antidegradation reviews. In *Kentucky Waterways Alliance v. EPA*, 540 F.3d 466 (6<sup>th</sup> Circuit, 2008) the Court overturned EPA's approval of Kentucky's exemptions from Tier II review. EPA's approval of the exemptions was based upon EPA's conclusion that the discharges were all de minimus. The Court stated that while agencies can create exemptions to mandatory requirements for de minimus activities they must explain the basis for determining insignificance. With reservations, the Court held that a de minimus categorical exemption from Tier II review is allowable, holding that 10 % of the assimilative capacity of the water body is

the outer limit for a de minimus individual discharge. Since EPA did not even consider whether the Kentucky exemptions would allow individual dischargers to consume 10% of the assimilative capacity, the Court held that EPA acted contrary to law in approving the exemptions.

It appears as though exempting general permits from Tier II antidegradation review is not a viable option unless DEQ rules allowed for some de minimis discharge and there was adequate justification that such exemptions would result in de minimis lowering of water quality. Developing such a justification for general permits would be difficult.

#### Approach 2

Conduct an antidegradation review with the issuance of the general permit. It may be possible to demonstrate that some activities, when conducted in a manner that complies with the terms and conditions of a general permit would not result in a lowering of water quality. If DEQ determines that the permit complies with narrative and numeric WQS, applicable TMDLs, section 054 of our standards, and the activity would not lower water quality, then DEQ can conclude the permit will protect existing and designated beneficial uses in the receiving water body as well as maintain high water quality.

While this approach may work for some general permits (e.g. construction general permit, or small placer mining general permit), it might not be appropriate for other general permits (such as the groundwater remediation general permit). This approach would likely require a lot of work by DEQ initially to build a rationale that would withstand legal challenge.

#### Approach 3

Similar to Approach 2, conduct an antidegradation review with the issuance of the general permit but rather than concluding there would be no lowering of water quality, presume that activities covered under the general permit may result in a lowering of water quality but conclude they are necessary for important social or economic development in the area. It may be possible to justify the necessity and importance of a group of activities covered under a general permit at the general permit stage.

While this approach may work for some general permits (e.g. pesticide general permit), it might not be appropriate for other general permits (such as the groundwater remediation general permit). This approach would likely require a lot of work by DEQ initially to build a rationale that would withstand legal challenge.

#### Approach 4

Rather than providing an antidegradation review and §401 certification for a general permit, DEQ could require that each individual activity seeking coverage under a general permit obtain an individual review and certification. While this approach might be workable for general permits which don't cover a large number of facilities (e.g. the groundwater remediation general permit,), it would not be workable for general permits such as the construction stormwater general permit which covers hundreds of activities.

Given the sheer number of activities/facilities obtaining coverage under the various general permits in Idaho, this approach would require a substantial amount of agency resources to implement.

#### Approach 5

DEQ could require each discharge to a high quality water seeking coverage under a general permit to demonstrate compliance with the high quality water provisions in Idaho WQS. The discharger would need to demonstrate either 1) there will be no lowering of water quality; or 2) if there would be a lowering of water quality, that the activity is necessary for important social and economic development in the area and all other point and nonpoint source activities will achieve their highest levels of controls. Such a demonstration would need to undergo public and agency review.

In order to implement this approach, we may have to require that activities discharging to high quality waters obtain an individual water quality certification or meet certain conditions before being granted authorization by EPA. This is similar to EPA's approach to antidegradation under the 2008 MSGP. Similar to Approach 4, this approach might be workable for some general permits and not workable for others. The resulting DEQ workload could be great.

#### **Other States**

##### *Washington*

Washington rules indicate that new or reissued GPs will undergo an analysis under Tier II at the time the Department of Ecology develops and approves the GP. They specifically state in their rules that individual activities covered under these general permits will not require a Tier II analysis. However, in their *Implementing the Tier II Antidegradation Rules* guidance, Washington acknowledges that “it is important that the public be able to weigh in on whether individual actions are in the overriding public interest.” The antidegradation rule establishes a refutable presumption that they do, but only through a public notice of intent to provide coverage and expected compliance with antidegradation does the general public have an opportunity to question individual actions. Thus, requests for coverage should be public noticed in a local paper and on Ecology’s webpage.”

In its approval of WA WQS revisions, EPA found that it is possible to conduct a Tier II antidegradation review at the time of the permit issuance, stating:

“As far as satisfying the requirements of 40 CFR § 131.12(a)(2), the permit authority could first identify and subject to public comment its determination of the high quality waters (if any) in the area to be covered by the general permit. Next, the permit authority could determine and subject to public comment its determination of whether the discharge limits it intends to propose would lower the quality of water in any high quality waters. This analysis would be subject to public comment in the permit process. Third, the permit authority, obtaining information as necessary from the permitted industry or industries, would conduct the Tier II antidegradation analysis – an analysis of reasonable alternatives to the discharge and a determination of whether any lowering of water quality in high

quality waters would be “necessary to accommodate important economic or social development in the area in which the waters are located.”

Washington recently received an administrative appeal of their Industrial Stormwater General Permit for not meeting the Antidegradation Tier II requirements.

### *Oregon*

It is unclear whether and how Oregon implements antidegradation reviews for general permits. In their *Antidegradation Policy Implementation Internal Management Direction for NPDES Permits and Section 401 Water Quality Certifications* (IMD), Oregon states,

“Therefore, unless there are data to indicate that activities under a general permit are likely to cause a significant lowering of water quality, such activities should be considered as not likely to cause a lowering of water quality for the purposes of the antidegradation review. If DEQ staff believe that an activity proposed under a general permit will result in a lowering of water quality, then DEQ should require the source/discharger to apply for an individual NPDES permit.”

Furthermore, DEQ presumes that renewal of general permits with the same or more stringent effluent limits does not cause a lowering of water quality.

Later in the IMD, DEQ states:

“ New general permits should undergo an analysis of potential impact on water quality before they are issued. Modeling can be used, where appropriate, to determine the likelihood that water quality will be lowered as a result of activities under a general permit. Effluent limitations and operating conditions of the general permit should be designed to cause no lowering of water quality. This may require adherence to Best Management Practices or to progressively restrictive effluent limitations. If a lowering of water quality is likely to take place, then an analysis must be conducted to determine if the socioeconomic benefits of allowing the lowering of water quality outweigh the environmental costs.”

Oregon appeared to do a Tier 1 antidegradation review for their small suction dredge permit; however, it did not appear that they addressed Tier 2 waters. Rather, Oregon focused on how the permit was protective of impaired water bodies.

### *Utah*

Utah’s rules (although not yet approved by EPA) state that as general guidance, general permits (CWA Section 402 general permits and CWA Section 404 Nationwide and general permits) will be deemed to have a temporary and limited effect on water quality where there is a reasonable factual basis to support such a conclusion. In these instances, subsequent activities authorized under the general permits will not be subject to additional antidegradation reviews. Utah’s rules provide details about special procedures for Section 404 permits. Essentially their rules state, “Because the 404(b)(1) guidelines contains an alternatives analysis, the executive secretary will not require development of a separate alternatives analysis for the anti-degradation review. The division will use the analysis in the 404(b)(1) finding document in completing its anti-degradation review and 401 certification.”

*Kentucky*

Kentucky's original rules essentially exempted some general permits (e.g. stormwater, CAFO, coal mines) from the Tier II review process. This rule was challenged and the 6<sup>th</sup> Circuit Court held that EPA's approval of these exemptions was arbitrary and capricious. Kentucky's revised rules indicate that general permits are deemed to comply with the alternatives and socioeconomic analysis requirements as long as specific criteria are met. Such criteria include: the Fact Sheet issued with each permit will describe how the permitted activities will comply with antidegradation requirements (socioeconomic demonstration and alternatives analysis); the public will be notified of any activity granted coverage under the permit; and if the Cabinet determines that additional controls and requirements beyond those in the general permit are needed to meet antidegradation requirements, the applicant shall be required to obtain an individual permit. These rules were submitted to EPA in late 2009, and to date EPA has not approved or disapproved of the rules.

*Others*

Specific information in guidance or rule about how **Wyoming, Montana, and Nevada** implemented antidegradation in general permits was not readily available.