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From: Ross Noland
Sent: Friday, October 2, 2020 3:41:19 PM
To: CPP-antideg-comments
Subject: AIM Comment
Importance: Normal
Attachments:
Noland AIM Comment.pdf ;

Please accept the attached comment in .pdf format.

Thank you,

Ross Noland

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Noland AIM Comment.pdf

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October 2, 2020

VIA EMAIL ONLY (CPP-antideg-comments@adeq.state.ar.us)

Jacob Harper
Dept. of Energy and Environment
5301 Northshore Dr.
North Little Rock, AR 72118

Re: *Antidegradation*

To Whom It May Concern:

Please accept this comment on ADEQ's draft Antidegradation Implementation Procedure and Continuing Planning Process on behalf of myself and my client, the Arkansas Public Policy Panel. As an initial, threshold, matter, I must comment that many of the issues detailed below were raised during the 2018 and 2020 stakeholder proceedings, yet that input was not responded to or addressed in the draft documents which are now subject to public comment. For this reason, I incorporate the 2018 comment attached hereto, and restate some of those points below. In the future, I hope ADEQ will utilize stakeholder proceedings to improve draft documents and incorporate public input. Doing so will result in fewer issues to address during the public comment period, while also giving purpose to the stakeholder proceedings and the participants therein. Substantive comments follow.

1. The Draft AIM Does Not Address Nutrients

The draft AIM does not address what standards or data set is to be used when determining if nutrient pollutants trigger antidegradation review. Ecoregion standards could serve as a know baseline water quality measure for antidegradation purposes, providing a protective, known standard by which to implement this policy. The only mention of nutrients in the document is in Section 9, pertaining to nonpoint source pollution. Additional policy language, with a known nutrient standard, is need to protect against nutrient caused degradation.

2. AIM Definition of Pollutant of Concern

"Pollutant of Concern" is defined without a corresponding defined set of data for nutrient pollutants and their corresponding criteria. Additionally, it should be made clear in the document that addition of any pollutant or pollution, not just pollutants of concern, triggers antidegradation review.

3. AIM Definition of Tier III Waters and Section 4(C)

The proposed AIM definition of Tier III waters restricts Tier III protection to only those waters presently designated ERW, ESW, and NSW in Regulation 2. This does not give full meaning to APCEC Reg. 2.203, which states Tier III waters are "state or national resources, such as" ERW, ESW, and NSW waters. "Such as" is inclusive, not singularly determinative, of what is a Tier III water. The federal regulation defines Tier III waters as:

> Where high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected

40 C.F.R. § 131.12(a)(3). The draft implementation procedure gives meaning to the "waters of exceptional recreational or ecological significance" element of the federal regulation, but fails to give meaning to "state or national resources" in Reg. 2.203, which is a clear state implementation of the federal language stating "waters of National and State parks and wildlife refuges" receive Tier III protection.

The present document focuses on Tier II protection, as directed by the 2015 rule found at 80 Fed. Reg. 51019. However, in 2015, Arkansas was one of only two or three states that had never adopted an antidegradation implementation procedure, having failed to complete one despite being under development since 2001. Thus, Arkansas never completed a rule directing how the tiered status of a waterbody is determined. A more expansive definition of Tier III is needed to protect high quality waters that satisfy both Reg. 2.203 and 40 C.F.R. § 131.12(a)(3).

The Tier III definition must be more flexible to comply with the Clean Water Act. For example, Big Creek near Fifty-Six Arkansas (there are many Big Creeks in the State) does not enjoy Tier III protection. However, it possesses high quality water, borders a national forest, and flows through the Lower Buffalo Wilderness, to join the Buffalo National River. It is a "water of National" park. The current AIM does not allow for it to be considered for Tier III protection. ADEQ should not base Tier III protections solely on designated uses.

4. AIM Section 7-Existing Permit Renewals

The draft document does not require antidegradation review of permit renewals. Considering ADEQ has gone decades without implementing antidegradation review, this is a significant decision. ADEQ cannot continue to abdicate its duty to conduct antidegradation review. At a minimum, alternatives must be explored at renewal, with full antidegradation review preferable. Stated alternatively, this draft AIM does not account for 40 years of permitting decision made in the absence of antidegradation implementation.

5. AIM Section 8-Assimilative Capacity

It is also unclear how ADEQ is accounting for existing permits when determining assimilative capacity. If there are multiple permitted discharges to a water body, for which the permit did not undergo antidegradation review, it is possible the assimilative capacity is consumed. AIM 8(B)(4) does not, as written, seem to limit the number of discharges consuming 10% or less of a stream's assimilative capacity. At what point does antidegradation review disallow a discharge? An antidegradation policy must prohibit, under any circumstances a Tier II water becoming a Tier I water. Cumulative discharges, both new and existing, must not consume more than 10% of a stream's assimilative capacity under the presently proposed scheme.

6. AIM Section 8(B)(5)-Alternatives Analysis

The alternative analysis language is more permissive than that contemplated by 80 Fed. Reg. 51019. AIM 8(B)(5) states only that the applicant must show alternatives to a water quality lowering activity are "evaluated and considered." Rather, 80 Fed. Reg. 51019 requires a analysis of "a range of non-degrading and less degrading practicable alternatives," with a degrading option chosen only "where truly necessary." 80 Fed. Reg. at 51032. The "truly necessary" language is not found in the draft AIM.

7. AIM Section 9 Does not Address how Nonpoint Source Pollution BMPs are Monitored

40 CFR § 131.12(a)(2) requires states to assure "all cost-effective and reasonable best management practices for nonpoint source" controls are achieved. Section 9 of the AIM describes how Arkansas goes about nonpoint source best management practices, but states not method for determining how such practices are implemented. Without verification of implementation and efficacy, Section 9 has no meaning. It is unclear throughout the document how nonpoint source pollution is accounted for when determining baseline water quality and assimilative capacity. The AIM needs a developed statement on how nonpoint source pollution is considered when determining assimilative capacity and baseline water quality.

8. The AIM Does not Consider 303(d) Listings

The Clean Water Act requires state water quality standards to include three parts: designated uses, water quality criteria, and an antidegradation policy. Arkansas's 303(d) reports do not show violations of antidegradation, only violations of water quality criteria. Federal regulations require an accounting of antidegradation violations:

> For the purposes of listing waters under §130.7(b), the term "water quality standard applicable to such waters" and "applicable water quality standards" refer to those water quality standards established under section 303 of the Act, ***including*** numeric criteria, narrative criteria, waterbody uses, and ***antidegradation requirements***.

40 C.F.R. § 130.7(b)(3)(emphasis added). Thus, to implement antidegradation in Arkansas, the AIM should require all 303(d) reports to EPA to include streams where the tiered status of water body is violated, with a reporting column for each of the three tiered classes of waters defined by APCEC Reg. 2.201 *et seq.* The Tier III column must identify any Tier III waters suffering any level of degradation, while the Tier II column should identify waters suffering degradation in the absence of a proven economic or social need. Finally, the Tier I column must show waters degraded to the point water quality no longer protects and maintains existing uses. The proposed list is missing one-third of the necessary analysis, thus violating 40 C.F.R. § 130.7(b)(3).

Sincerely,

/s/ Ross Noland

Ross Noland

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ARKANSAS public policy panel

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August 24, 2018

Water Quality Planning Branch
Arkansas Department of Environmental Quality
5301 Northshore Drive
North Little Rock, Arkansas 72118

RE: Arkansas Antidegradation Implementation Focus Group

Dear Director Keogh, Water Quality Staff and Focus Group Participants:

Thank you for the opportunity to participate in the focus group for the Antidegradation Implementation chapter of the Continuing Planning Process document. The Arkansas Public Policy Panel has the following comments the working draft of the Antidegradation Implementation Chapter dated March 19, 2018 version 11 and the focus group discussions

Comment I: Tier determination and Tier III protections

We request that ADEQ and the CPP Stakeholder Group consider how the implementation procedure directs the agency to determine the tiered status of waterbodies, especially in regards to Tier III waters. The draft document focuses on Tier II protection, as directed by the 2015 rule found at 80 Fed. Reg. 51019. However, in 2015, Arkansas was one of only two or three states that had never adopted an antidegradation implementation procedure, having failed to complete one despite being under development since 2001. Thus, Arkansas never completed a rule directing how the tiered status of a waterbody is determined. Now is the time to consider how the ADEQ determines the tiered status of a water body.

The proposed implementation procedure defines Tier III waters as only those designated ERW, ESW, and NSW in Regulation 2. This does not give full meaning to APCEC Reg. 2.203, which states Tier III waters are "state or national resources, such as" ERW, ESW, and NSW waters. "Such as" is inclusive, not singularly determinative, of what is Tier III water. The federal regulation defines Tier III waters as:

> Where high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional

recreational or ecological significance, that water quality shall be maintained and protected

40 C.F.R. § 131.12(a)(3). The draft implementation procedure gives meaning to the "waters of exceptional recreational or ecological significance" element of the federal regulation, but fails to give meaning to "state or national resources" in Reg. 2.203, which is a clear state implementation of the federal language stating "waters of National and State parks and wildlife refuges" receive Tier III protection. Some states use the ONRW designation to protect wilderness waters and critical habitat, in addition to parks, refuges, and other unique water bodies. Florida's ONRW program includes parks, refuges, wilderness areas, memorials, and waters of special recreational or ecological significance.[1] Colorado includes water bodies that constitute "a significant attribute" of wilderness areas.[2] Montana automatically designates all "surface waters located wholly within the boundaries of designated national parks or wilderness areas."[3]

Second, Section 7.4(D) of the draft procedure does not provide true Tier III protection. Tier III protection does not allow new, permanent discharges resulting in degradation. Water quality in Tier III streams "shall be maintained and protected" pursuant to 40 C.F.R. § 131.12(a)(3). Only temporary degradation of Tier III waters is acceptable.

The current draft states "A Tier 3 waterbody's assimilative capacity is to be maintained in order to protect existing uses. Proposed new or expanding activities may proceed, but with no net increase of parameter load in excess of the assimilative capacity." This language does not provide Tier III protection, as it allow degradation. Assimilative capacity is not a metric utilized in reference to Tier III protection. The procedure, as written, appears to allow permanent degradation. As made clear in 1983, temporary degradation of Tier III waters is allowed, but not permanent degradation.[4]

<u>Language from other states in regards to Tier 3 waters:</u>

<u>Colorado</u>

2. (ii) The waters constitute an outstanding natural resource, based on the following:
    1. (A) The waters are a significant attribute of a State Gold Medal Trout Fishery, a National Park, National Monument, National Wildlife Refuge, or a designated Wilderness Area, or are part of a designated wild river under the Federal Wild and Scenic Rivers Act; or
    2. (B) The Commission determines that the waters have exceptional recreational or ecological significance, and have not been modified by human activities in a manner that substantially detracts from their value as a natural resource. [5]

<u>Florida</u>

(2) A complete listing of Outstanding Florida Waters and Outstanding National Resource Waters is provided in subsections (9) and (10). Outstanding Florida Waters generally include the

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[1] Fla. Admin Code Ann. R. § 62-302.700(2) (2006).
[2] Colo. Code Regs. § 1002-31:31.8(2)(a)(ii)(A)(2007).
[3] Mont. Admin. R. § 17.30.617(1)(2006).
[4] *See* 48 Fed. Reg. 51400
[5] Colo. Code Regs. § 1002-31:31.8(2)(a)(ii)(A)(2007).

following surface waters (unless named as Outstanding National Resource Waters):

(a) Waters in National Parks, Preserves, Memorials, Wildlife Refuges and Wilderness Areas;

(b) Waters in the State Park System and Wilderness Areas;

(c) Waters within areas acquired through donation, trade, or purchased under the Environmentally Endangered Lands Bond Program, Conservation and Recreation Lands Program, Land Acquisition Trust Fund Program, and Save Our Coast Program;

(d) Rivers designated under the Florida Scenic and Wild Rivers Program, federal Wild and Scenic Rivers Act of 1968 as amended, and Myakka River Wild and Scenic Designation and Preservation Act;

(e) Waters within National Seashores, National Marine Sanctuaries, National Estuarine Research Reserves, and certain National Monuments;

(f) Waters in Aquatic Preserves created under the provisions of Chapter 258, F.S.;

(g) Waters within the Big Cypress National Preserve;

(h) Special Waters as listed in paragraph 62-302.700(9)(i), F.A.C.; and,

(i) Certain Waters within the Boundaries of the National Forests.[6]

Missouri

Tier Three. There shall be no lowering of water quality in outstanding national resource waters or outstanding state resource waters.

(T) Outstanding national resource waters— Waters which have outstanding national recreational and ecological significance. These waters shall receive special protection against any degradation in quality. Congressionally-designated rivers, including those in the Ozark national scenic riverways and the wild and scenic rivers system, are so designated (see Table D).

(U) Outstanding state resource waters— High quality waters with a significant aesthetic, recreational, or scientific value which are specifically designated as such by the Clean Water Commission (see Table E).[7]

Montana

(1) All state surface waters located wholly within the boundaries of designated national parks or wilderness areas as of October 1, 1995, are outstanding resource waters (ORWs) . Other state waters may be designated an ORW by the board following the procedures in 75-5-316 , MCA, subject to approval by the legislature.[8]

Oregon

Outstanding Resource Waters Policy. Where existing high quality waters constitute an outstanding State or national resource such as those waters designated as extraordinary resource waters, or as critical habitat areas, the existing water quality and water quality values must be maintained and protected, and classified as "Outstanding Resource Waters of Oregon."

(a) The commission may specially designate high quality water bodies to be classified as Outstanding Resource Waters in order to protect the water quality parameters that affect ecological integrity of critical habitat or special water quality values that are vital to the unique

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[6] Fla. Admin Code Ann. R. § 62-302.700(2) (2006).

[7] Mo. Rev. Stat. § 10.20-7.031(3) (C)

[8] Mont. Admin. R. § 17.30.617(1)(2006).

character of those water bodies. The department will develop a screening process and establish a list of nominated water bodies for Outstanding Resource Waters designation in the Biennial Water Quality Status Assessment Report (305(b) Report). The priority water bodies for nomination include:

(A) Those in State and National Parks;

(B) National Wild and Scenic Rivers;

(C) State Scenic Waterways;

(D) Those in State and National Wildlife Refuges; and

(E) Those in federally designated wilderness areas.

(b) The department will bring to the commission a list of water bodies that are proposed for designation as Outstanding Resource Waters at the time of each triennial Water Quality Standards Review; and

(c) When designating Outstanding Resource Waters, the commission may establish the water quality values to be protected and provide a process for determining what activities are allowed that would not affect the outstanding resource values. After the designation, the commission may not allow activities that may lower water quality below the level established except on a short-term basis to respond to public health and welfare emergencies, or to obtain long-term water quality improvements.[9]

Recommendations:

- Include a first step in the Antidegradation Review process that determines the applicable Tier for the waterbody and documents how the Tier determination was made.

- Edits to draft language for 7.4 (D): ORWs are in APC&EC Regulation No. 2.203 for their outstanding natural or cultural resource value. ORW waters, **such as those waters**, designated as ERW, ESW, or NSW (APC&EC 2017, Appendix A, D). An ORW is Tier 3, regardless of baseline water quality for each parameter. A Tier 3 waterbody's **total** assimilative capacity is to be maintained in order to protect existing uses.

Comment II: Nonpoint source controls

EPA recommends that to be consistent with §131.12(a)(2), Arkansas's antidegradation policy needs to assure that all cost-effective and reasonable best management practices (BMPs) for nonpoint source control are implemented before the State allows the lowering of water quality in high quality waters. Arkansas's current policy states that "the State shall assure that…the provisions of the Arkansas Water Quality Management Plan be implemented with regard to nonpoint sources." Arkansas's current Water Quality Management Plan (208 Plan) specifies the point source dischargers and total maximum daily loads (TMDLs) in the state, but does not

[9] OAR § 340-041-0004(8)

currently provide any information about nonpoint source controls. In order to be consistent with 40 CFR 131.12(a)(2), the State needs to assure that any requirements concerning BMPs that are developed in the future are included in this plan. Another option available to the state is to revise the current language in the antidegradation policy to include the assurance for cost-effective and reasonable BMPs for nonpoint source control. This requirement does not mean that the state needs to institute new BMPs for water bodies where a Tier 2 review is being conducted, just that if the state already has mandatory BMPs in place, that they be properly implemented before lowering of high water quality is allowed.

Language from other states:

Oregon

Oregon Code § 340-041-0026 Appendix A**:** References policy documents and guidelines for activities that commonly contribute non-point source pollution …

(7) Log handling in public waters shall conform to current EQC policies and guidelines.

(8) Sand and gravel removal operations shall be conducted pursuant to a permit from the Division of State Lands and separated from the active flowing stream by a watertight berm wherever physically practicable. Recirculation and reuse of process water shall be required wherever practicable. Discharges, when allowed, or seepage or leakage losses to public waters shall not cause a violation of water quality standards or adversely affect legitimate beneficial uses.

(9) Logging and forest management activities shall be conducted in accordance with the Oregon Forest Practices Act so as to minimize adverse effects on water quality.

(10) Road building and maintenance activities shall be conducted in a manner so as to keep waste materials out of public waters and minimize erosion of cut banks, fills, and road surfaces.

(11) In order to improve controls over nonpoint sources of pollution, federal, state, and local resource management agencies will be encouraged and assisted to coordinate planning and implementation of programs to regulate or control runoff, erosion, turbidity, stream temperature, stream flow, and the withdrawal and use of irrigation water on a basin-wide approach so as to protect the quality and beneficial uses of water and related resources. Such programs may include, but not be limited to, the following:

(a) Development of projects for storage and release of suitable quality waters to augment low stream flow;

(b) Urban runoff control to reduce erosion;
(c) Possible modification of irrigation practices to reduce or minimize adverse impacts from irrigation return flows;
(d) Stream bank erosion reduction projects.

Oklahoma

Non-Point source discharges or runoff. Best management practices for control of non-point source discharges or runoff should be implemented in watersheds of waterbodies designated "ORW", "HQW", "SWS" or “SWS-R” in Appendix A of this Chapter and/or located within areas listed in

Appendix B provided however that development of conservation plans shall be required in sub-watersheds where discharges or runoff from non-point sources are identified as causing, or significantly contributing to, degradation in a waterbody designated "ORW." [10]

New Mexico

Further, the state shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable BMPs for nonpoint source control. Additionally, the state shall encourage the use of watershed planning as a further means to protect surface waters of the state.[11]

Recommendation:

Include language similar to New Mexico code stating that the "state shall assure that there be achieved all cost-effective and reasonable BMPs for nonpoint source control" and also reference the Arkansas 2018-2023 NPS Pollution Management Plan.

Comment III: Timing of alternative analysis review

It is critical that the antidegradation review's alternative analysis be incorporated early in the process when decisions are made about technology, most often at the facility planning stage. It is also critical that public notice and comment on the alternative analysis – as well as the response to public comment- happen at the point where alternatives are truly under review.

Recommendation: The Department should require that in the pre-design phase facilities 1.) notify the agency that they are beginning an alternative analysis; 2.) conduct the alternatives analysis and 3.) give broad public notice of their findings before moving forward with design and construction. The alternative analysis, public comment and response, and a justification of the final selection of the preferred alternative should be submitted to the state agency along with the facilities' permit application. [12]

Thank you for the opportunity to participate on the Focus Group for the Antidegradation Policy's Implementation Plan. Along with these comments I would also like to include support for the comments submitted by Ellen Carpenter on August 20, 2018.

Sincerely,
/s/
Anna Weeks Metrailer
Environmental Policy Associate

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[10] Oklahoma Code §785:45
[11] New Mexico Code § 20.6.4.8.A.2
[12] *See:* Conducting a meaningful, efficient antidegradation alternatives analysis: a road map. Merritt Frey, River Network and Brad Klein, ELPC. May 2009.