

Before the
ENVIRONMENTAL PROTECTION COMMISSION
and the
IOWA DEPARTMENT OF NATURAL RESOURCES

Petition by the Iowa Association of Municipal Utilities, the Iowa League of Cities, and the Iowa Association of Business and Industry (collectively "Petitioners") for the amendment of rules **relating to** antidegradation procedures and the issuance of construction permits



PETITION FOR
RULEMAKING

BRIEF STATEMENT OF APPLICABLE LAW

1. The federal Water Pollution Control Act and its various amendments (collectively the "Clean Water Act") require various permits for activity that would negatively impact water quality in the United States, including NPDES permits for point source discharges of pollutants under section 402 of the CWA.
2. Federal regulations implementing the CWA incorporate an "Antidegradation Policy" as part of the Act's Water Quality Standards (see 40 CFR part 131) and require states to adopt a statewide antidegradation policy. See 40 CFR 131.12(a).
3. The CWA implements a joint state/federal regulatory scheme for permitting and enforcement under section 402 of the Act and in Iowa, these duties have been delegated to the Department of Natural Resources.
4. Iowa Code sections 455B.171 through 455B.183 vest the Department of Natural Resources (DNR), under the oversight of the Environmental Protection Commission (EPC) with authority to regulate and protect surface water quality in Iowa.
5. Iowa Code section 455B.103(2) authorizes the director of the DNR to "recommend to the commission the adoption of rules to implement the programs and services assigned to it."
6. Iowa Code section 455B.105(3) authorizes the EPC to "adopt, modify or repeal rules for the implementation" of chapter 455B.
7. Iowa Code section 455B.173(2) authorizes the EPC to "establish, modify, or repeal water quality standards, pretreatment standards, and effluent standards in accordance with the provisions of [chapter 455B]."
8. Iowa Code section 455B.173(3) authorizes the EPC to "establish, modify, or repeal rules" pertaining to construction and operation permits for wastewater disposal systems and public water supply systems.
9. Pursuant to the federal regulations implementing the CWA, the EPC and DNR have adopted rules for water quality standards at 567 IAC chapter 61 and rules for wastewater construction permits at 567 IAC 64.

10. The EPC and DNR have established the federally required statewide Antidegradation Policy at 561 IAC 61.2(2), and the EPA has approved this policy..
11. The Antidegradation Policy is implemented by means of the "Iowa Antidegradation Implementation Procedures," a document which is incorporated into the Iowa administrative code by reference at 567 IAC 61.2(2)(e). The document itself is available on the DNR website.

DESCRIPTION OF AMENDMENTS TO ADMINISTRATIVE
RULES SOUGHT BY PETITIONERS

Petitioners hereby request that EPC and DNR make the following amendments to the rules relating to the CWA, Water Quality Standards, Construction and Operation Permits, the statewide Antidegradation Policy, and the Antidegradation Implementation Procedures:

1. Remove the implementation of antidegradation procedures from the statement of antidegradation policy and relocate it. Specifically, amend subrule 567 IAC 61.2(2) paragraph "e" by striking paragraph "e" in its entirety.
2. Move the antidegradation procedures (as stricken in item 1 above) from the statement of policy to the chapter of the rules relating to construction and operation permits. Specifically, amend 567 IAC chapter 64 by creating the following **new rule 64.17**:

567 - 64.17 (455B) Antidegradation implementation procedure. The four levels of protection provided by the antidegradation policy, as described in paragraphs "a" through "d" of subrule 567 IAC 61.2(2) shall be implemented according to the document entitled "Iowa Antidegradation Procedure" effective as of XX/XX/XXXX, which is hereby incorporated by reference. The document is available at <http://www.iowadnr.gov/Environmental-Protection/Water-Quality/Water-Quality-Standards/Antidegradation>.

3. Clarify the requirements pertaining to the consideration of alternative pollution control measures by eliminating the current "nonbinding guideline" for economic efficiency and instead instituting a "bright line" test for economic efficiency. Specifically, make the following amendments:

- a. Amend the document entitled "Iowa Antidegradation Procedure" effective 2/17/2010 at page 15, the first full paragraph, so it reads as follows:

~~Alternatives that are deemed practicable must undergo a direct cost comparison and alternatives that impose a cost that is disproportionate to the possible environmental gain may be eliminated from further consideration.~~ An analysis of pollution control costs, or economic efficiency, is appropriate when the applicant desires to optimize the balance between water quality benefits and project costs. General cost categories that should be considered include:

- b. Amend the document entitled "Iowa Antidegradation Procedure" effective 2/17/2010 at page 15, the last full paragraph, so it reads as follows:

~~As a non-binding guideline, alternatives~~ Alternatives costing less than 115 percent of the base cost of the minimum level of pollution control are ~~presumed to be~~ considered economically efficient. Alternatives greater than or equal to 115 percent of the base costs are not considered economically efficient. ~~should also be considered if implementation of the alternative would produce a substantial improvement in the resulting discharge. Conditions that might warrant consideration of alternatives of greater cost (above 115 percent) are the effectiveness, reliability, and environmental factors identified above. The base cost of the minimum level of pollution control is the cost of the controls required to protect beneficial uses and/or technology-based effluent limits, whichever is more expensive.~~

- c. Amend the document entitled "Iowa Antidegradation Procedure" effective 2/17/2010 at page 16, the second full paragraph, by striking the paragraph.
4. Adopt these amendments as soon as practicable, preferably on an emergency basis or an emergency after notice basis, so that the applicants awaiting permits do not see project delays.

PETITIONERS' ARGUMENTS IN FAVOR OF THE ACTIONS URGED IN THIS PETITION

Petitioners urge the EPC and the DNR to adopt the rule making urged in this petition for the following reasons.

1. First, while the original goal of the current rules and the Antidegradation Implementation Procedures document (effective as of 2010) may have been flexibility in applying the statewide antidegradation policy, the courts have not deferred to the agency's interpretation of the rules. Specifically, the District Court for the 5th Judicial District, in the matter of *Iowa Environmental Council v. Iowa Department of Natural Resources* (case no. CVCV 50224), recently reversed the agency's issuance of a construction permit to the City of Clarion for the expansion of the city's wastewater treatment facility. Clarion, a city of 2,791 residents, is in the process of upgrading from a lagoon system to a more efficient mechanical system as a cost of \$6.8 million. The suit filed by the Iowa Environmental Council would force Clarion to spend an additional \$3 million for the removal of nutrients which the upgraded facility is not currently designed to handle.
2. Second, as a result of such litigation, the current implementation procedures do not provide predictable outcomes during the administrative process. Without such predictability, applicants cannot plan or finance projects in a cost effective and timely manner. Currently, before an applicant may be issued a permit, the state's Antidegradation Procedures require an amorphous analysis of "environmental benefits" for all pollutants, including but not limited to aluminum and copper. Because it is virtually impossible to quantify how much an environmental benefit is "worth," subjectively determined amounts may be assigned to the removal of these pollutants, thereby complicating the engineering, planning, and financial decisions of local communities and businesses. A bright-line standard for the analysis of alternatives would better serve the

implementation of the policy by providing predictability in the administrative process for both the agency and the permit applicant.

3. Third, if third parties can successfully bring suit to stop the issuance of permits, then the likelihood of litigation becomes greater, and more litigation means more costs for applicants and more project delays. A bright-line standard would help keep permit issuance within the agency and out of the courts, in turn keeping permit costs low and issuance times short.
4. Finally, the timely and cost-effective issuance of permits is clearly in the public interest. For example, an upgraded wastewater treatment facility will clearly improve water quality compared to the status quo. Anything that delays the issuance of a permit in such cases is counter-productive to water quality improvement. Moreover, anything that needlessly increases project costs should be avoided because those costs will always be passed on to customers, ratepayers, and residents many of whom reside in economically stressed communities. When industry applicants face regulatory uncertainty in Iowa, delays can mean increased for consumers or even an impact on job creation projects in the state.

INTERESTED PARTIES TO THIS PETITION

Petitioners believe that the following parties all have an interest in seeing the DNR and the EPC adopt a "bright-line" standard for the implementation of Antidegradation Policy in Iowa:

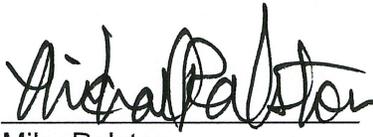
1. The 540 water utilities who are members of the Iowa Association of Municipal Utilities.
See <http://www.iamu.org>.
2. The 870 cities who are members of the Iowa League of Cities.
See <https://www.iowaleague.org>.
3. The 1,500 businesses and their 300,000 employees who make up the Iowa Association of Business and Industry.
See <https://www.iowaabi.org/>.

MEETING REQUESTED

Petitioners hereby request a joint meeting between the Director of the DNR, his legal staff, and IAMU, the League of Cities, and ABI to discuss the agency's response to this petition.

SIGNATURES OF PETITIONERS


Troy Dejoode
IAMU Exec. Dir.


Mike Ralston
ABI President


Alan Kemp
League of Cities Exec. Dir.