

Appalachian Power Company v. Train, 545 F.2d 1351, 1373 (4th Cir. 1976). Thus, whether antidegradation applies to nonpoint sources is solely a question of State and Tribal law. The CWA and EPA's regulations leave to the States and authorized Tribes the decision whether to regulate such sources by requiring that they undergo antidegradation review. *American Wildlands v. Browner*, 260 F.3d 1192, 1198 (10th Cir. 2001). EPA's proposed antidegradation methods must also meet the requirements of the ESA.

2. Why Is EPA Proposing Antidegradation Implementation Methods for the State of Oregon?

EPA is proposing methods for implementing the antidegradation policy adopted by the State of Oregon in order to comply with the court's final judgment in *Northwest Environmental Advocates v. EPA & NMFS* (August 13, 2003). At the time of the Oregon water quality standards litigation, EPA had approved Oregon's antidegradation policy. In addition, at the time of the initial briefing in the Oregon litigation, Oregon was in the process of developing methods for implementing its antidegradation policy. See "State of Oregon: Antidegradation Policy Implementation Internal Management Directive for NPDES Permits and Section 401 Water Quality Certifications," March 2001 ("the Directive"). These methods were not contained in Oregon's water quality standards regulations and were not submitted to EPA for review and approval as a "new or revised standard" under CWA section 303(c)(3). In addition, EPA did not review the Directive as part of any discretionary action to review Oregon's existing antidegradation regulations under CWA section 303(c)(4). Because of the jurisdictional argument EPA made in the Oregon litigation and because the implementation methods had not been submitted to EPA for review, EPA did not inform the court of the existence of Oregon's implementation methods. EPA argued that EPA was not subject to a mandatory duty under CWA section 303(c)(3) because there was no new or revised water quality standard regarding antidegradation that triggered a mandatory duty for EPA review, and that there could be no Administrative Procedure Act claim unless and until a party petitioned the Agency to act under its discretionary authority, because absent such a petition, there is no agency "action" to review. Although the court agreed with EPA in holding that EPA did not have a mandatory duty to review Oregon's implementation

methods, the court found that it could immediately review EPA's failure to exercise its discretionary authority to review Oregon's methods for implementing its antidegradation policy. 268 F.Supp.2d 1255, 1264 (D.Or. 2003). The court held that EPA acted arbitrarily in failing to exercise its discretion to promulgate an implementation plan for Oregon. The court, therefore, ordered EPA to promulgate an antidegradation implementation plan for Oregon. While EPA does not agree with the court's decision, EPA is complying with the court's order. 268 F.Supp.2d at 1265.

3. What Antidegradation Implementation Methods Is EPA Proposing for the State of Oregon?

Subsequent to the court's order, Oregon proposed to amend its water quality standards, including its antidegradation regulations, to include key elements of its antidegradation implementation methods within its regulations. Oregon Administrative Rule (OAR) 340-041-0004; August 15, 2003. EPA's proposed rule is based on Oregon's proposal. When Oregon finally adopts revisions to its water quality standards, Oregon is required to submit them to EPA for review. As part of its review of Oregon's new or revised water quality standards as contained in State regulation, EPA will also consider Oregon's implementation methods that are not in State regulation, as information that is relevant to understanding what the regulatory revisions mean in practice. The final judgment dated August 13, 2003, requires EPA by March 2, 2004, to either promulgate final regulations regarding methods for implementing Oregon's existing antidegradation policy or to approve Oregon's submission. Thus, EPA may approve Oregon's antidegradation methods even if they are not the same as this proposal, as long as they are consistent with the CWA. EPA will consider what is contained in the Directive as part of determining whether Oregon's implementation methods comport with the CWA.

Tier 1: EPA is proposing that, to implement Tier 1, any lowering of water quality in any water body must protect existing uses. Oregon's existing regulation currently contains provisions to protect existing uses. See e.g., 340-041-0004(1) Purpose; 340-041-0004(8)(c) High quality waters; and 340-041-0004(10), which refers in turn to 3401-041-0004(12)(a)(C). Due to the court's order, EPA is proposing, consistent with Oregon's Regulations and Directive (page 12 flow chart) that

in all waters, including those that are not high quality, the existing use must be protected. For example, even in a water body that is impaired, if it continues to support a limited aquatic life use or the water quality supported an aquatic life use since November 28, 1975, prior to any authorization that requires compliance with water quality standards, the level of water quality necessary to protect that "existing use" must be maintained and protected. 40 CFR 131.3(e); 131.12(a)(1).

Tier 2: The purpose of EPA's antidegradation regulations with regard to high quality waters, 40 CFR 131.12(a)(2), is to ensure that assimilative capacity in the waterbody is not used up without a public process to determine that lowering water quality is necessary to accommodate important social or economic development. EPA's regulation applicable to high quality waters contains terms that provide States, and Territories and authorized Tribes with significant discretion to determine what is a high quality water, what constitutes a "lowering" of water quality that would trigger a Tier 2 antidegradation review, and what constitutes a determination that the "lowering" is necessary to accommodate important social or economic development. Thus, in identifying methods for implementing antidegradation policies, EPA would like States and authorized Tribes to explain how they intend to implement these three aspects of the regulation.

Oregon's definition of high quality waters in its existing antidegradation policy tracks EPA's regulation precisely at 40 CFR 131.12(a)(2). Regarding an implementation method for this regulation, EPA proposes to follow Oregon's approach in defining a high quality water as one that has water quality that meets or is better than all water quality standards. In other words, a high quality water is one that is not a water quality-limited water. Directive at 21.

EPA recognizes that Oregon's approach reflects a waterbody-by-waterbody approach to antidegradation rather than a parameter-by-parameter approach. In EPA's ANPRM, July 7, 1998, EPA discussed the advantages and disadvantages to both approaches to designating high quality waters. 63 FR 36782, 36783. EPA also discussed these issues in the preamble to its proposed rule regarding antidegradation implementation procedures for Kentucky. 67 FR 68971, 67798-99 November 14, 2002. EPA interprets the regulation to authorize either approach. Although arguably a parameter-by-parameter approach may capture more