

waters as Tier 2 waters, EPA notes that Oregon includes waters that “meet” all water quality standards as Tier 2 waters, rather than using the term “exceed” in the regulation to exclude from Tier 2 review those waters that precisely meet water quality standards. Under Oregon’s approach, which EPA follows here, all waters are captured within the State’s water quality management system. Impaired waters are addressed through the TMDL provisions of CWA section 303(d) and those that are not impaired are not lowered absent a public process to determine that such lowering is necessary to accommodate important social or economic development. Further, Oregon’s approach has the advantage of relying on pre-existing assessment decisions rather than requiring additional assessment of the waterbody to determine if it is a Tier 2 water.

Regarding what constitutes a “lowering” that triggers Tier 2 review, in today’s proposed rule, EPA proposes a rule tracking Oregon’s proposed amendment to its antidegradation regulations that allows for certain *de minimis* loadings not to constitute a “lowering” of water quality that triggers Tier 2 antidegradation review. EPA has long interpreted the antidegradation policy to allow a determination that certain discharges have an insignificant impact on water quality and therefore may not require an antidegradation review. See EPA’s proposed rule regarding Kentucky’s antidegradation implementation methods, 67 FR 68791, November 14, 2002. See also “Proposed Water Quality Guidance for the Great Lakes System,” (GLI) 58 FR 20802, April 16, 1993; and “Supplementary Information Document for the Final Great Lakes Guidance,” Chapter VII at 203–225, 207–210 included in the record for this rule.

Specifically, EPA proposes that pollutant concentration increases are not considered lowering of water quality if there is no overall increase in the total mass load of the pollutant on at least an annual basis. Also, a *de minimis* change in temperature that does not reduce or degrade water quality of the State is not required to undergo Tier 2 review. EPA tracks Oregon’s definition of *de minimis* to mean a seven-day average maximum stream temperature increase or decrease of 0.30°C/0.54°F or less across the watershed.

Third, regarding what constitutes a finding that a lowering is necessary to accommodate important social or economic development, EPA tracks the main components of Oregon’s proposed antidegradation regulations and the main principles contained in Oregon’s

Directive, that the discharger/applicant provide the State with enough information to allow for a financial impact analysis that assesses whether allowing important economic and social development justifies lowering water quality. EPA is aware that Oregon has included in its proposed amendments much more detail of how this assessment would be done through a reference to certain parts of its Directive; however, EPA is not proposing that those specifics be contained in EPA’s proposed rule. EPA believes that including this degree of specificity in a Federal rulemaking is not required by the regulations at 40 CFR 131.12(a)(2) nor is it in the public interest because once codified, a subsequent Federal rulemaking would be necessary to allow the State to deviate from the Federal rule, and EPA does not wish to constrain a State’s discretion to this degree. EPA intends to consider the specifics of the Directive, incorporated into the State regulation, when EPA acts on the State’s final revised water quality standards regulations submitted to EPA.

*Tier 3:* EPA proposes to track Oregon’s proposed water quality standards regulation regarding Tier 3 implementation for Outstanding Resource Waters (ORWs). (In today’s proposed rule, EPA uses the term Outstanding Resource Water or ORW to be consistent with the State of Oregon’s terminology in its existing regulation.) EPA’s proposed rule describes the process the State would follow in designating high quality waterbodies to be classified as ORWs 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 character of those waterbodies.

#### *F. Effect of This Proposed Rule on the State’s Water Quality Programs*

EPA’s approach in this rulemaking does not undermine the State’s primary role in designating uses, establishing protective criteria, and ensuring the protection of high quality waters in Oregon. EPA prefers that States establish their own regulations. If the standards are adopted by the State for specific waters and approved by EPA before final promulgation of the Federal standards, EPA will not proceed with the final promulgation and the State standards will take effect for CWA purposes.

Water quality standards are implemented through such mechanisms as NPDES permits. The State has flexibility in how it implements these water quality standards. EPA has included a variance provision in today’s

proposed rule, 40 CFR 131.39(h), authorizing the Regional Administrator to grant variances based upon a permittee’s demonstration, consistent with the Federal regulations, that the use is not attainable. Variances are particularly suitable for instances where the cause of nonattainment is discharger-specific and it appears that the designated use in question will eventually be attainable or be demonstrated to be unattainable. For example, a permitted entity may have a long-term plan (*e.g.*, 20 or 30 years) in place that will result in the eventual attainment of water quality standards; however, in the intervening years attaining water quality standards may not be possible. In this circumstance, the entity may wish to seek a water quality standards variance. See Section V.C. In addition, the State will use these water quality standards, if finalized, in identifying impaired waters and establishing TMDLs. Where the State identifies waters subject to this rulemaking as impaired, the State has discretion in scheduling the water for TMDL development. Further discussion is contained in section V.F.

#### **IV. Economic Analysis**

These standards may serve as a basis for development of NPDES permit limits. In Oregon, the State is the NPDES permitting authority and retains considerable discretion in implementing standards. EPA prepared a preliminary analysis to evaluate potential costs to NPDES dischargers in Oregon associated with future State implementation of EPA’s Federal standards.

Any NPDES-permitted facility that discharges to water bodies affected by this proposed rule could potentially incur costs to comply with the rule’s provisions. The types of affected facilities may include industrial facilities and publicly owned treatment works (POTWs). EPA did not consider the potential costs for nonpoint sources, such as agricultural and forestry-related nonpoint sources because the CWA does not regulate nonpoint sources. EPA does, however, recognize that the State may decide to require controls under State law for nonpoint sources to achieve water quality standards. As a technical matter, nonpoint source discharges are difficult to model and evaluate for potential costs because they are intermittent, highly variable, and occur under different hydrologic or climatic conditions than continuous discharges from industrial and municipal facilities, which are evaluated under critical low flow or drought conditions. Thus, the evaluation of nonpoint sources and their