EPA's Review of Revisions to Ohio Environmental Protection Agency Antidegradation Rules under Section 303(c) of the Clean Water Act (Water Quality Standards Rule 3745-1-05 of the Ohio Administrative Code) WQSTS # OH2011-385

Date: JUL 15 2011

I. Summary

A. Date received by EPA: January 6, 2011

B. Submittal History: On December 30, 2010, the Ohio Environmental Protection Agency (Ohio EPA) submitted a request to the U.S. Environmental Protection Agency for review and approval of final revised antidegradation rules. Ohio EPA had previously submitted draft rule revisions to EPA for review on July 20, 2010. On August 16, 2010, EPA provided comments to Ohio EPA on the draft rule revisions.

The Ohio Attorney General's office sent a certification letter to EPA on March 31, 2011, certifying that the State of Ohio has the legal authority to adopt and implement the revised rule, and that the revisions were lawfully adopted. The rule package submission was considered complete when EPA received the letter of certification from the Ohio Attorney General's office on July 13, 2011. These revised rules were adopted by Ohio on December 29, 2010, and were to become effective on March 1, 2011.

C. Documents included in the submittal:

- Transmittal letter from Ohio EPA to EPA, dated December 30, 2010;
- Responsiveness Summary for OAC 3745-1-05: Antidegradation;
- Final revised rule language for OAC 3745-1-05:Antidegradation;
- Notice of Electronic Rule Filing for OAC 3745-1-05: Antidegradation;
- Ohio EPA's Findings and Orders for rule revisions to OAC 3741-1-05; Antidegradation, dated December 29, 2010;
- Ohio EPA's Notice of Adoption of Rule Governing Surface Water Quality Standards Program, OAC 3741-1-05: Antidegradation.

D. Other supporting documents: No other supporting documents were submitted by Ohio.

E. Description of Action:

Ohio EPA adopted revisions to its water quality standards rules for antidegradation. The revisions consist of changes to the following sections of Ohio's rules at OAC 3745-1-05:

- OAC 3745-1-05(B)(2)(b), applicability for existing sources;
- OAC 3745-1-05(C)(6)(a) and (c), allocation of reserve portion of a water body's assimilative capacity;

- OAC 3745-1-05(E)(4), petition procedures for revising set aside percentages for projects subject to OAC 3745-1-05.

In addition, small grammatical changes were made that do not substantively change the rule.

F. Basis of Action:

Ohio's revisions of their antidegradation rules are in response to a Joint Stipulation and Settlement Agreement over an appeal to the Ohio Environmental Review Appeals Commission (ERAC) of Ohio's 2003 antidegradation rulemaking. The appeal was filed by Buckeye Power, Inc.

These rule revisions are part of a larger draft antidegradation rulemaking package that was the subject of the appeal to ERAC. In order to come close to a target date of August 2010 in the Settlement Agreement for proposing revised rules to the Joint Committee on Agency rule Review (JCARR), Ohio EPA decided to proceed with the revisions described in this document as a separate rulemaking.

II. Areas Affected and Environmental Impacts

A. Area Affected: These rule revisions are applicable Statewide.

B. Environmental Impacts:

1. **Aquatic Life.** The rule revisions require that any reductions in set aside assimilative capacity for better quality waters must "adequately protect resident or representative species." An EPA Region 5 comment on the draft rule expressed concerns about possible negative impacts on the protection of rare or untested taxa. In response, Ohio EPA explained that a permit applicant requesting a reduction in set aside assimilative capacity would need to demonstrate that the reduction is still protective based on solid scientific evidence.

2. **Human Health.** These rule revisions do not affect human health.

III. CWA Sections 101(a)(2)/303(c)(2)/118(c)(2)/40 CFR 131 and 132 Review

A. EPA's authority under section 303(c)(2) of the CWA:

Water quality standards requirements of CWA sections 101(a)(2) and 303(c)(2) are implemented through federal regulations contained in 40 CFR 131; water quality standards requirements of CWA section 118, specific to waters of the Great Lakes System , are implemented through federal regulations contained in 40 CFR 132. Federal regulations at 40 CFR 131.21 require EPA to review and approve or disapprove state-adopted water quality standards. In making this determination, EPA must consider the following requirements of 40 CFR 131.5:

- whether state-adopted uses are consistent with CWA requirements;

- whether the state has adopted criteria protective of the designated uses;
- whether the state has followed legal procedures for revising its standards;
- whether state standards are based on appropriate technical and scientific data and analyses; and
- whether the state submission includes certain basic elements as specified in 40 CFR 131.6.

Section 101(a)(2) of the CWA specifies that designated uses "provide for the protection and propagation of fish, shellfish, and wildlife and provide for recreation in and on the water."

Section 303(c)(2) of the CWA requires that standards shall protect the public health and shall take into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational, agricultural, industrial, and navigational purposes

EPA is required to review and approve new and revised water quality standards submitted by states and tribes. Possible EPA actions include:

- **Approval** (where EPA has concluded that approval of certain revisions will have no effect on listed species, or is otherwise not subject to ESA consultation),
- **Approval subject to ESA consultation** (where EPA has concluded that certain revisions may effect listed species (including beneficial effects)),
- **Disapproval** (where EPA has concluded that certain revisions do not meet the requirements of the CWA or federal regulations and guidance), and
- **No EPA action** (where EPA has concluded that certain revisions are not revisions to the State's or Tribe's WQS and therefore do not need to be reviewed under Section 303(c) of the CWA.

Consistent with federal regulations at 40 CFR 131.21, new or revised water quality standards do not become effective for CWA purposes until they are approved by EPA.

B. Public Participation, Comments, and Issues Raised on Ohio's Draft Rules:

1. Public Participation Process

On July 20, 2010, Ohio EPA notified interested parties of its intention to revise antidegradation rule 3745-1-05. This notice was sent to approximately 1, 000 interested parties who were provided an opportunity to review and comment on the draft rule revisions. The notice informed the interested parties that the draft rules and fact sheet were available on the Ohio EPA's website.

On October, 5, 2010, the draft revised rule was proposed to the JCARR. The public comment period on the proposed rule also began on October 5, 2010. The proposed rule and updated fact sheet were made available on the Ohio EPA's website. On November 10, 2010, a public hearing on the proposed rule was held in Columbus, Ohio. That was also the date of the close of the public comment period.

2. Summary of Public Comments on the Draft and Proposed Rules, and Ohio EPA Responses

Ohio EPA received three comment letters from the public on the draft rule:

- Paul Anteau asked if the draft rules would affect a plant with a General NPDES permit. Ohio EPA responded that the draft rules would not affect facilities discharging under the terms of a General NPDES permit as long as that facility continues to meet conditions for eligibility under that General NPDES permit.
- Christopher Schrader stated that he was in favor of the draft rules. This comment was acknowledged by Ohio EPA.
- Association of Ohio Metropolitan Wastewater Agencies (AOMWA) commented only on 3745-01-5 (B)(2)(b) regarding existing sources that are exempt from all provisions of the antidegradation rules. AOMWA requested that the rule should add additional clarifying language regarding exemptions for combined and/or sanitary sewer overflows. Ohio EPA responded that application of antidegradation rules to combined and/or sanitary sewer overflows is outside the scope of this rulemaking. Ohio EPA further stated that it would consider this comment in the context of its larger comprehensive review of Ohio antidegradation rules.

Ohio EPA received one comment letter on the proposed rule:

- AOMWA repeated the comment submitted during public comment on the draft rule regarding exemption for combined and/or sanitary sewer overflows. Ohio EPA responded again by stating that it would consider this comment in the context of its larger comprehensive review of Ohio antidegradation rules.

3. Summary of EPA Comments on the Draft and Proposed Rules, and Ohio EPA's Responses

On August 16, 2010, EPA Region 5 provided written comments to Ohio EPA on the draft revised rules. These comments are summarized below:

- **Comment:** OAC 3745-1-05(B)(2)(b). Described the revised rule provisions, and stated that the previous permits approved by OEPA would have had to satisfy antidegradation rules to be consistent with water quality standards.
  Response: Ohio EPA acknowledged this comment.

- **Comment:** OAC 3745-1-05(C)(6). The proposed revisions will potentially eliminate any special protection of better quality intermediate waters, resulting in them being treated as Tier 2.
  Response: Ohio EPA stated that an applicant could demonstrate that a smaller set aside of the water body's pollutant capacity is still protective, based on solid scientific evidence. In this case, an antidegradation review would still be necessary before granting a lowering of water quality.

- **Comment:** OAC 3745-1-05(E)(4). EPA's comments on OAC 3745-1-05(C)(6) apply to this provision as well.
  Response: Ohio EPA referred to the response for OAC 3745-1-05(C)(6).

EPA did not comment on the proposed rule, which was not changed from the draft version of the rule.

C. EPA's Review of Ohio's Final Rules

1. Review of Submittal for Completeness

Regulatory Requirement:	Ohio Rule Submittal:
Use designations consistent with the provisions of section 101(a)(2) and 303(c)(2) of the Act **(40 CFR 131.6(a))**	Not applicable. This submittal does not include revisions to Ohio's use designations.
Methods used and analyses conducted to support WQS revisions **(40 CFR 131.6(b))**	Not applicable. This submittal does not include revisions to Ohio's methods and analysis for WQS revisions.
Water quality criteria sufficient to protect the designated uses of Wisconsin surface waters **(40 CFR 131.6(c))**	Not applicable. This submittal does not include revisions to Ohio's water quality criteria.
An antidegradation policy consistent with §131.12 **(40 CFR 131.6(d))**	The revisions to Ohio's antidegradation rules are consistent with 40 CFR 131.12.
Certification by the State Attorney General or other appropriate legal authority within the State that the WQS were duly adopted pursuant to State law. **(40 CFR 131.6(e))**	The Attorney General's certification letter was sent to EPA on March 31, 2011. The rule package submission was considered complete when EPA received the letter of certification from the Ohio Attorney General's office on July 13, 2011. These revised rules were adopted by Ohio on December 29, 2010, and were to become effective on March 1, 2011.
General information which will aid the Agency in determining the adequacy of the scientific basis of the standards which do not include uses specified in section 101(a)(2) of the Act as well as information on general policies applicable to State standards which may affect their application and implementation. **(40 CFR 131.6(f))**	Not applicable to this submittal.

2. EPA action on the final rule revisions submitted by Ohio

a. **OAC 3745-1-05(B)(2)(b). Description:** This section clarifies two additional situations where existing sources are exempt from the rule requirements for an antidegradation demonstration: 1)An antidegradation review is not required if a net increase in pollutant discharge is a result of allowing a limit up to that authorized by the immediately preceding effective NPDES permit, and which is not the result of a modification of a facility; and 2) An antidegradation review is not required for first-time limits for pollutants that are not the result of an increase due to a change in a discharge from what was previously authorized.

Review of Ohio's revised rule language: Ohio's revised language is consistent with 40 CFR 131.12 (antidegradation rules).

EPA Action: Ohio's revised rule is consistent with the Clean Water Act, and federal regulations and guidance. EPA approves this rule revision.

a. **OAC 3745-1-05(C)(6). Description:** This section adds language stating that a portion of the set aside assimilative capacity for "outstanding state waters" and "superior high quality waters" may be allocated to a source if that source can demonstrate that a smaller reserve capacity will adequately protect resident or representative species.

Review of Ohio's revised rule language: Ohio's revised language is consistent with 40 CFR 131.12 (antidegradation rules). However, to properly implement this revised rule language, Ohio EPA will need to determine that requests for reduced set aside assimilative capacity submitted under this revised language are based on sound scientific evidence.

EPA Action: Ohio's revised rule is consistent with the Clean Water Act, and federal regulations and guidance. EPA approves this rule revision.

b. **OAC 3745-1-05(E)(4). Description:** This section creates a procedure for reducing or eliminating set aside assimilative capacity for higher quality waters, except as necessary to protect the uses themselves.

Review of Ohio's revised rule language: Ohio's revised language is consistent with 40 CFR 131.12 (antidegradation rules). However, to properly implement this revised rule language, Ohio EPA will need to determine that requests for reduced set aside assimilative capacity submitted under this revised language are based on sound scientific evidence.

EPA Action: Ohio's revised rule is consistent with the CWA and federal regulations and guidance. EPA approves this rule revision.

IV. Documents Considered by EPA

EPA Memorandum: "Antidegradation Policy Approvals and Endangered Species Act Consultations". From Geoffrey Grubbs, Director, Office of Science and Technology to Water Management Division Directors, Regions 1-10, Jan. 27, 2005.

V. Endangered Species Act (ESA) Requirements

EPA's actions on the submitted revised antidegradation rules do not require consultation under the ESA, since EPA lacks discretion to alter its approval based on effects on federally-listed threatened or endangered species.