

United States  
Environmental Protection  
Agency

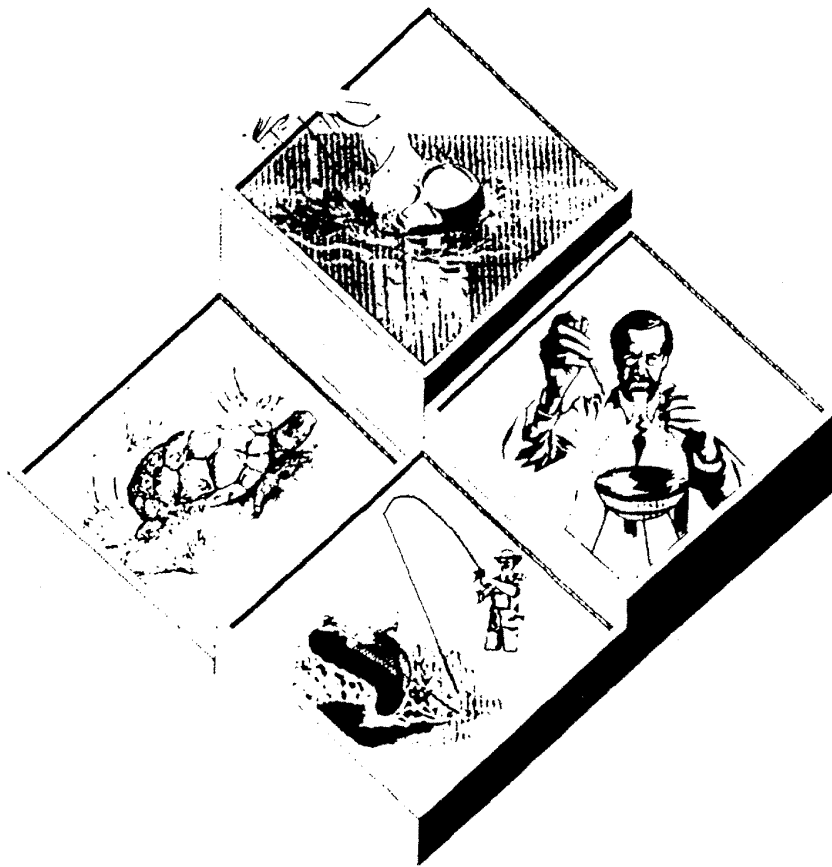
Office of Water  
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# Water Quality Standards Handbook:

## Second Edition



"... to restore and maintain the chemical,  
physical, and biological integrity of the Nation's  
waters."

Contains Update #1  
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Section 101(a) of the Clean Water Act



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The requirement for potential water quality impairment associated with thermal discharges contained in section 131.12 (a)(4) of the regulation is intended to coordinate the requirements and procedures of the antidegradation policy with those established in the Act for setting thermal discharge limitations. Regulations implementing section 316 may be found at 40 CFR 124.66. The statutory scheme and legislative history indicate that limitations developed under section 316 take precedence over other requirements of the Act.

As the States began to focus more attention on implementing their antidegradation policies, an additional concept was developed by the States, which EPA has accepted even though not directly mentioned in previous EPA guidance or in the regulation. This concept, commonly known as "Tier 2½," is an application of the antidegradation policy that has implementation requirements that are more stringent than for "Tier 2" (high-quality waters), but somewhat less stringent than the prohibition against any lowering of water quality in "Tier 3" (ONRWs). EPA accepts this additional tier in State antidegradation policies because it is clearly a more stringent application of the Tier 2 provisions of the antidegradation policy and, therefore, permissible under section 510 of the CWA.

The supporting rationale that led to the development of the Tier 2½ concept was a concern by the States that the Tier 3 ONRW provision was so stringent that its application would likely prevent States from taking actions in the future that were consistent with important social and economic development on, or upstream of, ONRWs. This concern is a major reason that relatively few water bodies are designated as ONRWs. The Tier 2½ approach allows States to provide a very high level of water quality protection without precluding unforeseen future economic and social development considerations.

### **4.3 State Antidegradation Requirements**

Each State must develop, adopt, and retain a statewide antidegradation policy regarding water quality standards and establish procedures for its implementation through the water quality management process. The State antidegradation policy and implementation procedures must be consistent with the components detailed in 40 CFR 131.12. If not included in the standards regulation of a State, the policy must be specifically referenced in the water quality standards so that the functional relationship between the policy and the standards is clear. Regardless of the location of the policy, it must meet all applicable requirements. States may adopt antidegradation statements more protective than the Federal requirement. The antidegradation implementation procedures specify how the State will determine on a case-by-case basis whether, and to what extent, water quality may be lowered.

State antidegradation policies and implementation procedures are subject to review by the Regional Administrator. EPA has clear authority to review and approve or disapprove and promulgate an antidegradation policy for a State. EPA's review of the implementation procedures is limited to ensuring that procedures are included that describe how the State will implement the required elements of the antidegradation review. EPA may disapprove and federally promulgate all or part of an implementation process for antidegradation if, in the judgment of the Administrator, the State's process (or certain provisions thereof) can be implemented in such a way as to circumvent the intent and purpose of the antidegradation policy. EPA encourages submittal of any amendments to the statement and implementing procedures to the Regional Administrator for pre-adoption review so that the State may take EPA comments into account prior to final action.

If a State's antidegradation policy does not meet the Federal regulatory requirements, either through State action to revise its policy or through revised Federal requirements, the State would be given the opportunity to make its policy consistent with the regulation. If this is not done, EPA has the authority to promulgate the policy for the State pursuant to section 303(c)(4) of the Clean Water Act (see section 6.3, this Handbook).

#### **4.4** Protection of Existing Uses - 40 CFR 131.12(a)(1)

This section requires the protection of existing uses and the level of water quality to protect those uses. An "existing use" can be established by demonstrating that:

- fishing, swimming, or other uses have actually occurred since November 28, 1975; or
- that the water quality is suitable to allow the use to be attained—unless there are physical problems, such as substrate or flow, that prevent the use from being attained.

An example of the latter is an area where shellfish are propagating and surviving in a biologically suitable habitat and are available and suitable for harvesting although, to date, no one has attempted to harvest them. Such facts clearly establish that shellfish harvesting is an "existing" use, not one dependent on improvements in water quality. To argue otherwise would be to say that the only time an aquatic protection use "exists" is if someone succeeds in catching fish.

Full protection of the existing use requires protection of the entire water body with a few limited exceptions such as certain physical modifications that may so alter a water body that species composition cannot be maintained (see section 4.4.3, this Handbook), and mixing zones (see section 4.4.4, this Handbook). For

example, an activity that lowers water quality such that a buffer zone must be established within a previous shellfish harvesting area is inconsistent with the antidegradation policy.

Section 131.12(a)(1) provides the absolute floor of water quality in all waters of the United States. This paragraph applies a minimum level of protection to all waters. However, it is most pertinent to waters having beneficial uses that are less than the section 101(a)(2) goals of the Act. If it can be proven, in that situation, that water quality exceeds that necessary to fully protect the existing use(s) and exceeds water quality standards but is not of sufficient quality to cause a better use to be achieved, then that water quality may be lowered to the level required to fully protect the existing use as long as existing water quality standards and downstream water quality standards are not affected. If this does not involve a change in standards, no public hearing would be required under section 303(c). However, public participation would still be provided in connection with the issuance of a NPDES permit or amendment of a section 208 plan or section 319 program. If, however, analysis indicates that the higher water quality does result in a better use, even if not up to the section 101(a)(2) goals, then the water quality standards must be upgraded to reflect the uses presently being attained (131.10(i)).

If a planned activity will foreseeably lower water quality to the extent that it no longer is sufficient to protect and maintain the existing

