

Dated: November 4, 2002.

**Patricia L. Toppings,**

*Alternate OSD Federal Register Liaison  
Officer, Department of Defense.*

[FR Doc. 02-28735 Filed 11-13-02; 8:45 am]

**BILLING CODE 5001-08-M**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[PA134-138-4193b; FRL-7391-7]

#### Approval and Promulgation of Air Quality Implementation Plans; PA; Revisions to Allegheny County Articles XX and XXI

**AGENCY:** Environmental Protection  
Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA proposes to approve the State Implementation Plan (SIP) revision submitted by the Commonwealth of Pennsylvania on behalf of Allegheny County. EPA is proposing approval of: A recodification of Allegheny County's air pollution control regulations, from articles XX to XXI; revisions of Allegheny County's article XXI regulations pertaining to general administrative provisions, emissions standards, emergency episode plans, test methods, and the permitting provisions for new and modified sources; approval of new and revised definitions associated with the article XXI provisions; and removal from the SIP of outdated and outmoded article XX provisions which are no longer codified in article XXI. In the final rules section of this **Federal Register**, EPA is approving the State's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A more detailed description of the state submittal and EPA's evaluation are included in a Technical Support Document (TSD) prepared in support of this rulemaking action. A copy of the TSD is available, upon request, from the EPA Regional Office listed in the **ADDRESSES** section of this document. If no adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. Please note

that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

**DATES:** Comments must be received in writing by December 16, 2002.

**ADDRESSES:** Written comments should be addressed to, Harold A. Frankford, Office of Air Programs, Mailcode 3AP20, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103; Allegheny County Health Department, Bureau of Environmental Quality, Division of Air Quality, 301 39th Street, Pittsburgh, Pennsylvania 15201; and the Pennsylvania Department of Environmental Protection, Bureau of Air Quality, P.O. Box 8468, 400 Market Street, Harrisburg, Pennsylvania 17105.

**FOR FURTHER INFORMATION CONTACT:**

Harold A. Frankford, (215) 814-2108, or by e-mail at [frankford.harold@epa.gov](mailto:frankford.harold@epa.gov). Please note that while questions may be posed via telephone and e-mail, formal comments must be submitted in writing, as indicated in the **ADDRESSES** section of this document.

**SUPPLEMENTARY INFORMATION:** For further information, please see the information provided in the direct final action for Pennsylvania, with the same title, that is located in the "Rules and Regulations" section of this **Federal Register** publication. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

Dated: September 27, 2002.

**Donald S. Welsh,**

*Regional Administrator, Region III.*

[FR Doc. 02-28697 Filed 11-13-02; 8:45 am]

**BILLING CODE 6560-50-P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 131

[EPA Docket ID No. OW-2002-0022; FRL-7408-3]

#### Water Quality Standards for Kentucky

**AGENCY:** Environmental Protection  
Agency (EPA).

**ACTION:** Proposed rule and request for  
comments.

**SUMMARY:** EPA is proposing water quality standards that establish an antidegradation policy and implementation methods for high quality waters in the Commonwealth of Kentucky. On August 7, 1997, EPA disapproved the Commonwealth's antidegradation provisions for "high quality waters" because the criteria for designating such waters were not sufficiently inclusive. The Commonwealth subsequently revised portions of the antidegradation provisions. However, the replacement standards did not address all of the disapproved items. The Clean Water Act requires the Administrator to propose and promulgate revised water quality standards if she determines that a standard adopted by a State is inconsistent with the Act.

**DATES:** EPA will consider written comments on the proposal received by March 14, 2003.

EPA will hold a public hearing on this proposed rule on January 23, 2003, from 2 pm to 5 pm and from 7 pm to 10 pm. If you need special accommodations at this meeting, including wheelchair access or sign language interpreter, you should contact Fritz Wagener at 404/562-9267 at least 15 business days prior to the meeting so that we can make appropriate arrangements.

**ADDRESSES:** Send your comments by mail to: Docket Manager, Attention Docket ID No. OW-2002-0022, Water Quality Standards for Kentucky, EPA, Region 4, Sam Nunn Atlanta Federal Center, 61 Forsyth Street, SW., Atlanta, Georgia 30303-3104. You may also submit comments electronically, or through hand delivery or courier. Follow the detailed instructions provided in I.C. The hearing will be conducted at the Capital Plaza Convention Complex, 405 Mero Street, Frankfort, Kentucky.

Comments may be submitted electronically, by mail, or through hand delivery or courier. Follow the detailed instructions provided in **SUPPLEMENTARY INFORMATION** Part I. General Information. **FOR FURTHER INFORMATION CONTACT:** Fritz Wagener, Water Quality Standards

Coordinator, Water Management Division, EPA, Region 4, Sam Nunn Atlanta Federal Center, 61 Forsyth Street, SW., Atlanta, Georgia 30303-3104, 404/562-9267, [wagener.fritz@epa.gov](mailto:wagener.fritz@epa.gov).

**SUPPLEMENTARY INFORMATION:** This section is organized as follows:

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**I. General Information**

*A. What Entities May Be Affected by This Action?*

Citizens concerned with water quality in Kentucky may be interested in this proposed rulemaking. Today's proposal, if made final, will establish an antidegradation policy for high quality waters in the Commonwealth of Kentucky (hereafter, "the Commonwealth" or "Kentucky") and methods for implementing the policy. High quality waters are waters where the quality of the water is better than the levels necessary to support propagation

of fish, shellfish, and wildlife and recreation in and on the water. Waters that currently are regulated by Kentucky under the Commonwealth's exceptional waters and outstanding national resource waters provisions of its regulations would not be subject to this rule because they are already protected under Kentucky's antidegradation program.

Entities potentially indirectly affected by this action are National Pollutant Discharge Elimination System (NPDES) permit applicants in Kentucky. Kentucky is authorized to issue these permits and does so through the Kentucky Pollutant Discharge Elimination System (KPDES) program, CWA section 404 dredge and fill permits, and other activities requiring a CWA 401 certification. The KPDES permit applicants (e.g., industries or municipalities) which request authorization from the Commonwealth of Kentucky for a new or an increased discharge to high quality waters in Kentucky are the entities potentially indirectly affected by this action. Categories and entities that may be indirectly affected include:

Category	Examples of potentially affected entities
Industry .....	Industries discharging pollutants to Kentucky high quality waters as defined in § 131.39 of this proposed rule.
Municipalities ....	Publicly-owned treatment works discharging pollutants to Kentucky high quality waters as defined in § 131.39 of this proposed rule.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding KPDES regulated entities likely to be affected by this action. This table lists the types of entities that EPA is now aware could potentially be affected by this action. Other types of entities not listed in the table could also be affected. To determine whether your facility may be affected by this action, you should carefully examine today's proposed rule. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

*B. How Can I Get Copies of This Document and Related Information?*

1. *Docket.* EPA has established an official public docket for this action under Docket ID No. OW-2002-0022. The official public docket consists of the

documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing under *Water Quality Standards for Kentucky* at Water Management Division, EPA, Region 4, Sam Nunn Atlanta Federal Center, 61 Forsyth Street, SW., Atlanta, Georgia 30303-3104. This Docket Facility is open from 9 am to 3:30 pm, Monday through Friday, excluding legal holidays. The Docket telephone number is 404-562-9267. A reasonable fee will be charged for copies.

2. *Electronic Access.* You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at <http://www.epa.gov/fedrgstr/>.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at <http://www.epa.gov/edocket/> to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search," then key in OW-2002-0022, the docket identification number.

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in I.B.1. EPA intends to work towards providing electronic access to all of the publicly available docket materials through EPA's electronic public docket.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or on paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket identified in I.B.1.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the Docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

For additional information about EPA's electronic public docket, visit EPA Dockets online or see 67 FR 38102, May 31, 2002.

### C. How and To Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery or courier. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments. The Agency will make every attempt to consider them, however.

1. *Electronically.* If you submit an electronic comment as prescribed in this section, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of

your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

i. *E-Dockets.* Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at <http://www.epa.gov/edocket>, and follow the online instructions for submitting comments. To access EPA's electronic public docket from the EPA Internet Home Page, select "Information Sources," "Dockets," and "EPA Dockets." Once in the system, select "search," and then key in Docket ID No. OW-2002-0022. The system is an "anonymous access" system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail.* Comments may be sent by electronic mail (e-mail) to [wagener.fritz@epa.gov](mailto:wagener.fritz@epa.gov), Attention Docket ID No. OW-2002-0022, Water Quality Standards for Kentucky. In contrast to EPA's electronic public docket, EPA's e-mail system is not an "anonymous access" system. If you send an e-mail comment directly to the Docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM.* You may submit comments on a disk or CD ROM that you mail to the mailing address in I.C.1. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By Mail.* Send your comments to: Docket Manager, Attention Docket ID No. OW-2002-0022, Water Quality Standards for Kentucky, EPA, Region 4, Sam Nunn Atlanta Federal Center, 61 Forsyth Street, SW., Atlanta, Georgia 30303-3104.

3. *By Hand Delivery or Courier.* Deliver your comments to: Docket Manager, Attention Docket ID No. OW-2002-0022, Water Quality Standards for Kentucky, EPA, Region 4, Sam Nunn Atlanta Federal Center, 61 Forsyth

Street, SW., Atlanta, Georgia 30303-3104. Such deliveries are only accepted during the Docket's normal hours of operation as identified in I.B.1.

### D. What Should I Consider as I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.
2. Describe any assumptions that you used.
3. Provide any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at your estimate.
5. Provide specific examples to illustrate your concerns.
6. Offer alternatives.
7. Make sure to submit your comments by the comment period deadline identified.
8. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your response. It would also be helpful if you provided the name, date, and **Federal Register** citation related to your comments.

## II. Background

### A. What Are the Applicable Federal Statutory and Regulatory Requirements?

Section 303 (33 U.S.C. 1313) of the Clean Water Act (CWA) requires States and authorized Tribes to adopt water quality standards for waters of the United States within their applicable jurisdictions. Such water quality standards must include, at a minimum: (1) Designated uses for all water bodies within their jurisdictions, (2) water quality criteria necessary to protect the most sensitive of the uses, and (3) antidegradation provisions consistent with the regulations at 40 CFR 131.12.

Antidegradation is an important tool for States and authorized Tribes to use in meeting the CWA's requirement that water quality standards protect the public health or welfare, enhance the quality of water and meet the objective of the CWA to restore and maintain the chemical, physical and biological integrity of the nation's waters.

EPA's regulation at 40 CFR 131.12 requires that States and authorized Tribes adopt antidegradation policies and identify implementation methods to provide three levels of water quality protection. The first level of protection at 40 CFR 131.12(a)(1) requires the maintenance and protection of existing instream water uses and the level of water quality necessary to protect those existing uses. Protection of existing uses is the *floor* of water quality protection afforded to all waters of the United States. Existing uses are ". . . those uses actually attained in the water body on or after November 28, 1975, whether

or not they are included in the water quality standards.” (40 CFR 131.3(e))

The second level of protection is for high quality waters. High quality waters are defined in 40 CFR 131.12(a)(2) as waters where the quality of the waters is better than the levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water. This water quality is to be maintained and protected unless the State or authorized Tribe finds, after public participation and intergovernmental review, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing lower water quality, the State or authorized Tribe must assure water quality adequate to protect existing uses. Further, the State or authorized Tribe must ensure that all applicable statutory and regulatory requirements are achieved for all new and existing point sources and all cost-effective and reasonable best management practices are achieved for nonpoint source control.

Finally, the third and highest level of antidegradation protection is for outstanding national resource waters (ONRWs). If a State or authorized Tribe determines that the characteristics of a water body constitute an outstanding national resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, and designates a water body as such, then those characteristics must be maintained and protected (*see* 40 CFR 131.12(a)(3)).

#### *B. What Are Kentucky's Antidegradation Provisions?*

The Commonwealth's antidegradation regulations are contained in 401 Kentucky Administrative Register (KAR) 5:029 section 1 and KAR 5:030. For the purposes of implementing antidegradation requirements, Kentucky places surface waters in one of three categories: ONRWs, exceptional waters, and use protected waters. Following is a brief discussion of these categories:

**ONRWs.** The two criteria that must be met in order for the Commonwealth to designate a water body as an ONRW are included in 401 KAR 5:030, section 1.(1)(a), as follows:

1. Surface water that meets, at a minimum, the requirements for an outstanding state resource water classification found in 401 KAR 5:031 section 7; and
2. Surface water that demonstrates to be of national ecological or recreational significance.

The provisions of 401 KAR 5:031 section 7 require the designation as an outstanding state resource water for the following: Waters designated under the Kentucky Wild Rivers Act; waters designated under the Federal Wild and Scenic Rivers Act; waters identified under the Kentucky Nature Preserves Act that are contained within a formally dedicated nature preserve or are published in the registry of natural areas; and waters that support federally recognized endangered or threatened species under the Endangered Species Act. Other waters of the Commonwealth given consideration for an outstanding state resource water designation include: Waters which flow through or are bounded by State or Federal forest land; waters that are of exceptional aesthetic or ecological value; waters that are a part of a unique geological or historical area recognized by State or Federal designation; or a water which is a component part of an undisturbed or relatively undisturbed watershed that can provide basic scientific data and exhibits two of the following characteristics: (1) The water body supports a diverse or unique native aquatic flora or fauna; (2) the water body possesses physical or chemical characteristics that provide an unusual and uncommon aquatic habitat; or (3) the water body provides a unique aquatic environment within a physiographic region. (*See* 401 KAR 5:031 section 7).

Kentucky requires that water quality in ONRWs be maintained and protected. Temporary or short-term changes in water quality may be allowed if the changes will not have a demonstrable impact on the ability of the ONRW to support its designation. Kentucky's provisions for ONRWs are consistent with EPA's requirements at 40 CFR 131.12(a)(3).

**Exceptional Waters.** Paragraph (2) of 401 KAR 5:029 section 1 contains the portion of Kentucky's antidegradation policy which addresses the requirements for waters with quality that is better than the levels necessary to support propagation of fish, shellfish and wildlife and recreation in and on the water. Kentucky defines exceptional waters in 401 KAR 5:030, section 1.(1)(b), using the following criteria:

1. Surface water designated as a Kentucky Wild River, unless it is categorized as an outstanding national resource water;
2. Outstanding state resource water that does not support a federally threatened or endangered aquatic species;
3. Surface water that fully supports all applicable designated uses and contains:
  - a. A fish community that is rated "excellent" by the use of the Index of Biotic

Integrity, included in "Methods for Assessing Biological Integrity of Surface Waters," incorporated by reference in section 4 of this administrative regulation; or

b. A macroinvertebrate community that is rated "excellent" by the Macroinvertebrate Bioassessment Index, included in "A Macroinvertebrate Bioassessment Index for Streams of the Interior Plateau Ecoregion in Kentucky," incorporated by reference in section 4 of this administrative regulation; and

4. Water in Kentucky's Natural Resources and Environmental Protection Cabinet's reference reach network.

Water bodies are included in Kentucky's Reference Reach Network after an extensive evaluation of water body and watershed characteristics. After initial and secondary screening based on factors such as riparian zone condition, surrounding land use, extent of hydrologic modification, habitat, and other physical characteristics, waters are selected for inclusion in the Reference Reach Network based on a review of the following: (1) Condition of the riparian zone, (2) bank stability, (3) percentage of fine sediment and algal mats in the substrate, (4) amount of suspended solids during normal weather conditions, (5) stable bottom habitat, (6) amount of solid waste in the water body and its banks, (7) land use, and (8) accessibility.

Kentucky's process for implementing antidegradation provisions for exceptional waters involves the application of specified effluent limitations for new or expanded discharges. For example, domestic discharges are limited to discharge at levels of 10 mg/l for five-day carbonaceous biochemical oxygen demand, 2 mg/l of ammonia nitrogen, 10 mg/l total suspended solids, and 7 mg/l dissolved oxygen, among others. Also, certain discharges are restricted to no more than one-half of the limitation that would have been permitted for use protected waters for other parameters. These limitations apply to new or expanded discharges, unless a permit applicant can meet the following requirements:

\* \* \* the applicant will demonstrate to the satisfaction of the cabinet that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located following the guidelines in "Interim Economic Guidance for Water Quality Standards Workbook," EPA, March 1995 incorporated by reference in section 4 of this administrative regulation and include an alternative analysis that shall consider the following:

1. Discharge to other treatment facilities;
2. Use of other discharge locations;
3. Water reuse or recycle;
4. Process and treatment alternatives; and

5. On-site or subsurface disposal.

KPDES permit renewals with discharges to exceptional waters that result in less than a 20 percent increase in pollutant loading are exempt from these antidegradation requirements. (See 401 KAR 5:030 section 1.(3)(a)6.)

*Use protected waters.* The Commonwealth's use protected category includes a mix of waters. Use protected waters are defined in 401 KAR 5:030, section 1.(1)(c) as including any "water not listed in section 3 of this administrative regulation as (an) outstanding national resource water or exceptional water."

Kentucky's regulations at 401 KAR 5:030 section 1.(4)(a) provide that: "All existing uses shall be protected and the level of water quality necessary to protect the uses shall be assured in the use protected water." A use protected water is also protected through the application of all applicable water quality criteria necessary to support its designated uses. In a letter dated May

24, 2001, from Mr. Jack A. Wilson, Director, Kentucky Division of Water, to Ms. Beverly Banister, Director, EPA Region 4 Water Management Division, the Commonwealth gave the following explanation of this category:

\* \* \* the use-protected category included all waters that were not ONRWs or exceptional, *i.e.*, waters that met uses and were impaired. It is more clear and straightforward to separate this use protected category into two categories: high quality water[s] (Tier 2) and impaired [waters] (Tier 1).

Based on this explanation, waters designated for antidegradation purposes as use protected waters include: (1) Waters with quality that is better than the levels necessary to support propagation of fish, shellfish, wildlife, and recreation in and on the water (in addition to waters meeting these criteria already designated as exceptional waters), (2) waters that just meet their designated aquatic life and recreation uses and (3) impaired waters which are not attaining their designated uses.

*C. Why Is EPA Proposing Federal Antidegradation Provisions for the Commonwealth of Kentucky?*

EPA is proposing Federal water quality standards for high quality waters in Kentucky because EPA disapproved the Commonwealth's antidegradation provisions that were intended to establish requirements for high quality waters commensurate with those required by EPA's Water Quality Standards regulation at 40 CFR 131.12(a)(2). The Commonwealth's provisions only apply to a limited subset of high quality waters rather than to all waters whose quality is better than the levels necessary to support propagation of fish, shellfish and wildlife and recreation in and on the water.

The following table shows EPA's estimate of the number of stream miles and water bodies in each of Kentucky's antidegradation categories.

Category of waters	Stream miles	Water bodies	% of total stream miles
Total .....	49,100.0	.....	100
Outstanding national resource waters .....	29.6	3	0.06
Exceptional waters .....	665.0	75	1.35
Use protected, but impaired .....	3,945.0	700	8.0
Use protected, and not determined to be impaired .....	44,460.0	( <sup>1</sup> )	90.6

<sup>1</sup> All others.

These estimates are based on EPA's analysis of waters currently listed in KAR 5:030 section 3, and information provided in the May 24, 2001, letter from the Kentucky Division of Water to EPA. The mileage reported as use protected and not determined to be impaired was estimated using the length of waters classified as *Partially Supporting* or *Not Supporting*, for aquatic life and swimming uses in the "1998 Kentucky Report to Congress on Water Quality," (*i.e.*, Kentucky's 305(b) Report) (Kentucky Natural Resources and Environmental Protection Cabinet, Division of Water, January 1999). EPA generated the stream mile estimates above for those use protected waters determined not to be impaired by subtracting the sum of the waters designated as ONRWs, waters designated as exceptional waters, and use protected waters, but impaired, from the total mileage reported in the Commonwealth.

Kentucky's approach limits the use of the special protections for high quality waters to the Commonwealth's exceptional waters category which

comprise just 1.35 percent of all its waters. However, Kentucky's 1998 305(b) Report shows that approximately 67 percent of the Commonwealth's unassessed waters are candidates for the high quality water protections. This pattern is confirmed by recent intensive watershed sampling in the Kentucky, Salt and Licking River basins, as well as data from random statewide aquatic life biological sample in wadeable streams conducted by the Kentucky Division of Water over the last two years. This recent sampling shows that approximately 60 percent of the sites fully support their designated uses.

The above information and analysis show that the eligibility criteria adopted by the Commonwealth for the exceptional waters category results in only a relatively small percentage of surface waters receiving the protection of the high quality water provisions at 401 KAR 5:029 section 1.(2). Therefore, EPA determined that Kentucky's exceptional waters category does not include other waters whose quality exceed levels necessary to support propagation of fish, shellfish and

wildlife and recreation in and on the water, as required in 40 CFR 131.12(a)(2). In addition, Kentucky's implementation procedures for the use protected category (401 KAR 5:030 section 1.(4)) do not require that the Commonwealth evaluate the necessity of lowering water quality, even though this category does include high quality waters.

In a letter of August 7, 1997, from John H. Hankinson, Jr., EPA Region 4 Regional Administrator, to General James E. Bickford, Secretary, Commonwealth of Kentucky Natural Resources and Environmental Protection Cabinet, EPA Region 4 disapproved the Commonwealth's eligibility criteria in 401 KAR 5:030 section 1.(3) for designating waters to be given high quality water protection, and specified the changes needed for EPA to approve a revised water quality standard. In an October 9, 1997, letter from General James E. Bickford, Secretary, Commonwealth of Kentucky Natural Resources and Environmental Protection Cabinet to John H. Hankinson, Jr., EPA Region 4 Regional

Administrator, responding to EPA's disapproval, Kentucky stated its intention to expand the universe of high quality waters receiving added protection from the effects of point source discharges regulated under the KPDES program. Kentucky also indicated that the revisions would be part of its upcoming triennial review of water quality standards.

Kentucky began its water quality standards triennial review in October 1998 with a public notice and mailing to interested parties of its intent to update uses, revise numeric criteria, strengthen mixing zone language, and to respond to EPA's 1997 antidegradation disapproval. The February 1999 "Administrative Register of Kentucky" included a notice of intent to revise the water quality standards regulation and to hold a public hearing on February 25, 1999. After adoption of revisions to Kentucky water quality standards on December 8, 1999, Kentucky submitted the results of its triennial review to EPA on December 15, 1999. However, the revisions did not sufficiently broaden the criteria to increase the number of eligible waters for the exceptional waters category, consistent with EPA's regulation at 40 CFR 131.12(a)(2). Therefore on August 30, 2000, EPA Region 4 notified the Commonwealth that the high quality waters provisions of Kentucky's water quality standards remained disapproved.

In a letter of May 24, 2001, from Mr. Jack A. Wilson, Director, Division of Water, to Ms. Beverly Banister, Director, Water Management Division, Kentucky clarified that the exceptional waters category is intended to provide a higher level of protection than the level for other high quality waters. Several States and authorized Tribes have created an additional category of water between high quality waters and ONRWs in their antidegradation policy. Kentucky's exceptional waters category generally includes more stringent controls than those required for high quality waters, but allows more flexibility to make adjustments in criteria and in permitting decisions than would normally be allowed if the water body were designated as an ONRW. EPA believes such a category is consistent with the intent and spirit of the antidegradation policy when supplementing the high quality water and the ONRW categories.

The Commonwealth has an active program to identify candidates for the exceptional waters category. The Kentucky Division of Water has identified 133 segments, which cover approximately 567 stream miles, meeting the criteria for inclusion in the exceptional waters category since the

previous triennial review completed in 1999. These waters have been found to meet the exceptional waters criteria based on ambient sampling in the Salt, Licking, Upper and Lower Cumberland, Tennessee, and Mississippi river basins. Many of these segments have been included in Kentucky's Reference Reach Network, and others have been found to contain either fish or macroinvertebrate communities rated as excellent using the Commonwealth's assessment methodologies for evaluation of biological integrity. However, as discussed in this section, Kentucky has no separate, readily identified high quality waters category commensurate with 40 CFR 131.12(a)(2).

### III. Today's Proposed Rule

Today's **Federal Register** notice proposes a high quality waters antidegradation policy, a definition of waters to which the policy would apply and methods for implementing the policy. Consistent with section 303(c)(4) of the CWA, if during the Federal rulemaking process, Kentucky adopts revisions to its antidegradation provisions which are approved by EPA Region 4, the proposal would not be made final. In addition, if Kentucky adopts revisions to its antidegradation provisions which are approved following publication of a final Federal rule, EPA would withdraw its rule.

EPA is providing an extended comment period in response to a request from members of the public. While EPA has a statutory obligation to take final action on the proposal in a timely manner, we also want to ensure that interested parties have an adequate opportunity to prepare and submit comments and to provide Kentucky with an opportunity to adopt its own revisions to the Commonwealth's antidegradation provisions.

#### *A. What Is the Proposed Policy To Protect Kentucky's High Quality Waters?*

EPA is proposing that the antidegradation policy in 40 CFR 131.12(a)(2) apply to high quality waters in the Commonwealth of Kentucky. The Agency notes that the language of the proposed policy is somewhat different from 40 CFR 131.12(a)(2). Those differences result only from our efforts to make the policy easier to understand, and do not suggest any substantive difference in the Agency's interpretation of 40 CFR 131.12(a)(2). The proposed high quality waters antidegradation policy in section 131.39(a) reads as follows:

(1) Where the quality of the water is better than levels necessary to support propagation of fish, shellfish, and wildlife and recreation

in and on the water, the Commonwealth of Kentucky (hereafter, Commonwealth or Kentucky) shall maintain and protect that quality unless Kentucky finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the Commonwealth's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the water is located.

(2) Before allowing lower water quality, the Commonwealth shall ensure that all measures to fully protect existing uses shall be achieved.

(3) Before allowing lower water quality, the Commonwealth shall ensure that the most protective statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control shall be achieved.

Today's proposal is substantially the same as Kentucky's current antidegradation policy in 401 KAR 5:029 section 1.(2), with the critical exception that EPA's proposal does not include the sentence: "For point source discharges, water quality shall be maintained and protected according to the procedures specified in 401 KAR 5:030, section 1.(3)."

This sentence in Kentucky's policy limits the number of waters protected to those identified as exceptional waters. As discussed in section II.C., EPA disapproved the Commonwealth's high quality antidegradation provisions because the eligibility criteria were not sufficiently inclusive.

EPA recognizes that the Commonwealth has adopted an antidegradation policy consistent with the provisions in 40 CFR 131.12(a)(2) for some of its high quality waters. EPA is proposing the policy for high quality waters in Kentucky, except for ONRWs and exceptional waters, in order to include high quality waters not currently recognized as such in Kentucky's water quality standards. This would allow the application of the antidegradation policy to certain waters now in the Commonwealth's use protected waters category.

EPA's proposed high quality waters policy in conjunction with the Commonwealth's existing antidegradation policy provides that before authorizing lower water quality in a high quality water, the Commonwealth shall ensure the implementation of all measures to fully protect existing uses. EPA interprets this provision to mean that Kentucky will evaluate the cumulative effects from previous loading increases to ensure that water quality will continue to protect existing uses. As stated previously, this level of protection is the

“floor” of water quality protection afforded to all waters.

The proposed antidegradation policy for high quality waters further provides that before lowering the water quality in high quality waters, Kentucky shall ensure that the most protective statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control shall be achieved.

EPA does not interpret the nonpoint source provision to require the establishment of nonpoint source control requirements where none exist. Rather, where nonpoint source control programs or regulatory requirements have been established under State authorities, these requirements are to be implemented prior to lowering the quality of high quality waters (see Memorandum from Tudor T. Davies, Director, EPA Office of Science and Technology to EPA Water Management Division Directors, Regions 1–10, Subject: Interpretation of Federal Antidegradation Regulatory Requirement, February 22, 1994).

#### *B. How Will Kentucky Identify a High Quality Water?*

Today’s proposal, if finalized, defines high quality waters as any surface water other than those currently designated by the Commonwealth as exceptional waters or ONRWs, where the quality of the water is better than the levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water. EPA’s current regulation provides a great deal of flexibility to States and authorized Tribes in making those decisions.

Identifying high quality waters is key for antidegradation to be effective. In general, States and authorized Tribes identify high quality waters using one of two approaches: (1) The parameter-by-parameter or pollutant-by-pollutant approach or (2) the designational or water body-by-water body approach. Under the parameter-by-parameter approach, States and authorized Tribes determine whether water quality is better than the applicable criteria for a specific parameter or pollutant that would be affected by a new discharge or an increase in an existing discharge of the pollutant. For example, if dissolved oxygen levels were at 7 milligrams per liter (mg/L) and the criteria were 5 mg/L, that water body would be a high quality water for dissolved oxygen, but might not necessarily be a high quality water for another parameter. Such determinations are generally made at the time of a permit application for a new discharge or an increase in an

existing discharge of the pollutant in question. The designational approach weighs chemical, physical, biological, or other factors to judge a water body’s overall quality. EPA has approved both approaches, and, under today’s proposed rule, either approach or a combination of the approaches would be available to the Commonwealth for identifying high quality waters.

Some States use the designational approach to identify high quality waters. Under one type of designational approach, a water body must attain both the aquatic life and recreational uses to be considered a high quality water. For example, a water body that is attaining one of its designated uses (such as aquatic life) would not receive an antidegradation review if the water body were not attaining its other use (such as recreation). EPA has found this approach to be consistent with 40 CFR 131.12. There are other ways to implement the designational approach. For example, a State could designate a water body as a high quality water for that use if the water body were attaining either the aquatic life use or the recreational use. Under this approach, an antidegradation review would be conducted for aquatic life uses when, for example, biological indices rated the macroinvertebrate or fish populations as “good” even if the fecal coliform densities exceeded levels safe for recreation in and on the water.

In today’s proposal, EPA is not requiring a specific approach that Kentucky must use in identifying high quality waters. Rather, the Agency is continuing its long-standing policy that would allow Kentucky to use, as appropriate, biological or chemical data or a combination of both on a parameter-by-parameter basis, or a designational approach to identify high quality waters. EPA is seeking comments on the pollutant-by-pollutant and designational approaches for identifying high quality waters.

The Commonwealth may identify high quality waters at the time of a permit application for a new discharge or an increase in an existing discharge, or may identify high quality waters at any time based on a review of ambient data showing that the quality of the water is better than the levels necessary to support the propagation of fish, shellfish, and wildlife and recreation in and on the water. To comply with the antidegradation policy for a high quality water, the Commonwealth must make a high quality water determination prior to allowing lower water quality in the water body.

Kentucky, in a May 24, 2001, letter from Jack A. Wilson, Director, Kentucky

Division of Water, to Ms. Beverly Banister, Director, Water Management Division, EPA Region 4, stated, “ \* \* \* the DOW (Division of Water) strongly disagrees with the parameter-by-parameter approach.” EPA interprets this statement as a strong preference by the Commonwealth that any Federal rule be written in a way not to limit its approach for the identification of high quality waters to the use of ambient chemical data.

The Commonwealth’s existing antidegradation program uses biological data and information to rate and evaluate waters. EPA considers Kentucky’s biological approach to be a valid framework for identifying high quality waters under today’s proposal. Kentucky has developed a substantial database on the occurrence and diversity of ambient macroinvertebrate populations and fish populations found in surface waters of the Commonwealth, and has used this data to establish indices of relative aquatic health for these two subpopulations of aquatic life.

Based on EPA’s review of Kentucky’s biomonitoring program, the data and the indices generated by the Commonwealth, EPA believes that the assessment of any segment resulting in a biological rating of “good,” rather than “excellent,” for either a macroinvertebrate or a fish population, when using the methods referenced in 401 KAR 5:030, section 1.(1)(b)3.a. and b., is sufficient to conclude that the ambient water quality of that segment is better than that “necessary to support propagation of fish, shellfish, and wildlife,” and, therefore, that segment should be considered to be a high quality water.

EPA believes that the Commonwealth, in some cases, has sufficient biological data for the assessment of aquatic life uses, and determinations for high quality waters, but, in other instances, additional data and information may be required. Where additional data and information are required for a determination, Kentucky could request the permit applicant to collect additional biological data using the methodologies referenced in the Commonwealth’s water quality standards regulation. If no biological data are available for the segment’s macroinvertebrate or fish population, a survey should be conducted for both macroinvertebrate and fish populations; a rating of “good” for either population is sufficient to document that the segment is a high quality water. However, EPA also believes that there may be some instances where the Commonwealth may choose to collect the necessary chemical data.

For recreational uses, the Commonwealth may use ambient water column data on bacteriological densities. Kentucky's existing water quality standards specify fecal coliform bacteriological criteria for protection of recreation in and on the water. In making judgments of water quality that is better than the levels necessary to support recreation in and on the water, the Commonwealth can use ambient data for fecal coliform densities. If Kentucky water quality standards are revised to include the use of water quality criteria for *E. coli* or enterococci, Kentucky must use the bacteria criteria that are adopted and approved at the time a determination for recreation high quality is made.

Under today's proposal, EPA does not require the Commonwealth to take a particular approach where there are insufficient data to make a definitive determination that a water body is high quality water. In the absence of definitive data and information which demonstrates that a water body is high quality, the Commonwealth may either consider the water body to be a high quality water for the purposes of meeting antidegradation permitting requirements, or require the collection of additional data for a high quality determination. If the Commonwealth considers the water body to be a high quality water, the Commonwealth will ensure that all other antidegradation requirements are met prior to making a determination as to whether the discharge is necessary to accommodate important economic or social development in the area in which the waters are located, and whether the discharge will be allowed.

EPA is soliciting comments on the approach in today's proposal, which provides Kentucky broad latitude in identifying high quality waters. EPA recognizes that Kentucky is likely to use the biological indices developed by the Commonwealth for rating ambient macroinvertebrate and fish populations, as an acceptable means for identifying the Commonwealth's high quality waters. EPA specifically requests comment on the use of biological data, and requests that commenters identify cases where a water body or water segment would not be identified as a high quality water using biological data, but that water body or segment would be demonstrated to be a high quality water through the consideration of ambient chemical data.

EPA also solicits comments on whether the regulation, if made final, should require the Commonwealth to use a particular approach in identifying high quality waters. EPA considered

specifying the parameter-by-parameter approach using only chemical data in the proposed rule. The parameter-by-parameter approach takes advantage of water column data, which, in many States, are more readily available than other types of data. Therefore, EPA is also requesting comments on this alternative approach to today's proposal.

#### *C. How Will Kentucky Implement the Proposed High Quality Waters Policy?*

##### *1. Significance of the discharge.*

Proposed activities that could result in a lowering of water quality in a high quality water, including proposed KPDES permits for new or increased discharges, would require an antidegradation review, unless the Commonwealth determines that the proposed activity will not result in a significant lowering of water quality. EPA's practice defers to States' judgment on identifying when an antidegradation review would not be needed. EPA does not interpret the antidegradation policy to preclude a determination that certain proposed new discharges or increases in existing discharges may have an insignificant or *de minimis* impact on water quality and, therefore, may not require an antidegradation review.

EPA's water quality standards regulation does not specify a threshold below which an antidegradation review would not be needed. However, EPA has long interpreted the antidegradation policy to allow a determination that certain proposed new discharges or increases in existing discharges may have an insignificant or *de minimis* impact on water quality and, therefore, may not require an antidegradation review. (See, for example, the November 10, 1986, memorandum signed by William A. Whittington, Director of the Office of Water Regulations and Standards, and James R. Elder, Director, Office of Water Enforcement and Permits, indicating that one of the principles of the antidegradation policy is a focus on significant actions.)

EPA has reflected this principle in the development of its own rulemakings. For example, in the "Proposed Water Quality Guidance for the Great Lakes System," (GLI) 58 FR 20802, April 16, 1993, EPA defined the term "significant lowering of water quality" and discussed the concept generally, stating that:

EPA and the Great Lakes States have chosen to prioritize actions that pose a threat to the protection and maintenance of water quality in high quality waters by focusing the Proposed Guidance on significant lowering of water quality. (*Id.*, p. 20894)

In the proposed Great Lakes rule, EPA considered certain chemicals to be bioaccumulative chemicals of concern (BCCs) and distinguished those chemicals from other parameters affecting water quality. For BCCs, EPA also considered any increase in mass loading of such a pollutant to result in a significant lowering of water quality. But for other pollutants, EPA included other factors such as assimilative capacity (in addition to loading) in determining whether a proposed discharge would result in a significant lowering of water quality. The proposed Great Lakes rule also noted that the decision-maker can make a case-by-case determination regarding the significant lowering of water quality based on other relevant considerations. The final rule did not reflect the significant lowering of water quality based on other relevant factors because it dealt only with BCCs.

As for non-BCCs, the Agency also discussed in the proposed Great Lakes rule the position that certain proposed discharges may not result in a significant lowering of water quality and, therefore, would not require an antidegradation review. EPA indicated that the definition of significant lowering of water quality for non-BCC pollutants is adequate to maintain and protect water quality of in the Great Lakes system. EPA also stated:

It does not undercut the requirement that limitations protect existing uses, *i.e.*, protect all applicable water quality standards. Rather, it limits the requirement to conduct an antidegradation review to situations when a source sought to increase existing permit limitations on the rate of mass loading, except as the increase is *de minimis* or there would be no change in ambient water quality, and thereby will limit the number of actions subject to a full antidegradation review. *EPA believes this is an appropriate balance between the need to protect water quality for these substances and the burden, to both the regulated community and the regulatory agencies, of conducting an antidegradation review.* (emphasis added). (*Id.*, p. 20895)

EPA has also discussed the concept of significant degradation in the "Advance Notice of Proposed Rulemaking," 63 FR 36742, July 7, 1998. EPA noted the use of significance determinations by States and Tribes and commented upon the concept generally:

Although not discussed in 40 CFR section 131.12 of the water quality standards regulation, State and on occasion Tribal Tier 2 implementation procedures often include guidelines which are used to determine when the water quality degradation that will result from a proposed activity is significant enough to warrant further antidegradation review. Where the degradation is not significant, the antidegradation review is

typically terminated for that proposed activity. The significance evaluation is usually conducted on a pollutant-by-pollutant basis, even where a water body-by-water body approach is used to identify high quality waters, and significant degradation for any one pollutant triggers further review for that pollutant. *Applying antidegradation requirements only to activities that will result in significant degradation is a useful approach that allows States and Tribes to focus limited resources where they may result in the greatest environmental protection.* (emphasis added). (*Id.*, p. 36783)

EPA considers the rationale set forth in the memorandum and these notices of proposed rulemakings, relative to the application of antidegradation review to activities involving a significant lowering of water quality, to be equally applicable here.

EPA believes that the assessment of the degree to which water quality is projected to be lowered as a result of proposed activities should consider factors such as:

- The projected magnitude of impact on the receiving stream (or possible effects on water bodies downstream of the receiving stream),
- The projected reduction in the assimilative capacity of the receiving stream(s), and potential impacts on sediment and biota,
- The magnitude of the increase in the discharge from a facility over existing or previously permitted discharges (or existing discharge loadings),
- The temporary nature of lowering water quality, or
- An evaluation which captures a combination of these factors.

These factors are similar to those which EPA Region 4 included in draft guidance to Region 4 States and Tribes on this issue. (*See* May 7, 1996, letter from Fritz Wagener, Chief Water Quality Standards Section to Terry Anderson, Water Quality Branch, Kentucky Division of Water.) However, this guidance also cautions States that the use of too high of a threshold in a determination of *de minimis* degradation could unduly restrict the number of proposed activities that are subject to a full antidegradation review.

EPA also believes that some situations will result in little or no impact, and these situations do not rise to the level that warrants further consideration under the high quality waters provisions of the antidegradation policy. Such a situation might involve the issuance of a general KPDES permit for a category of discharges where no water quality impact, or a very minimal water quality impact, is expected to result from the cumulative effect of all discharges that

are authorized by the issuance of the general permit.

2. *Alternatives to lowering water quality.* Those most likely to be indirectly affected by this rulemaking are persons requesting new permits to discharge into high quality waters and current permittees who are requesting a revision of their permits to expand their discharges into high quality waters. If the Commonwealth determines that the new or expanded discharge could result in a significant lowering of water quality, the proposed regulation for implementing the high quality water policy requires the Commonwealth before authorizing the lowering of water quality to determine that an increased discharge is necessary and that the lowering of water quality will accommodate important economic or social development. In making that determination, the Commonwealth would evaluate whether there are alternatives that would avoid the need to lower water quality and whether the lowering of water quality is important for economic and social development in the area of the discharge.

EPA considers pollution prevention and enhanced treatment alternatives analyses as an appropriate starting point and of particular importance in an antidegradation review for both industrial and municipal dischargers. Given the variety of engineering approaches to pollution control, a number of options are available that could reduce or eliminate the anticipated lowering of water quality. Some of these include substituting less-toxic or less-bioaccumulative chemicals for the toxic or bioaccumulative chemical. Another approach could involve water conservation to reduce the overall volume of waste water and possibly reduce pollutant mass loadings. Other approaches could include more careful control of the materials in the process stream, the recycle or reuse of waste byproducts, and operational changes to reduce the quantities of waste. Kentucky would need to make a determination that an alternative or combination of alternatives is cost-effective. If cost-effective pollution prevention alternatives are available, there would be no need for the lowering of water quality.

If the pollution prevention alternatives alone were not sufficient to eliminate the necessity for lowering of water quality, Kentucky would focus on ensuring that the actual degradation of the high quality water is reduced to the greatest extent practicable. EPA expects that Kentucky would evaluate whether the relative cost of the least costly

option for enhanced treatment would still allow the proposed activity to occur without resulting in a significant lowering of water quality. EPA has not established a benchmark for determining whether alternative or enhanced treatment options are affordable. Kentucky would make the determination.

As described in section II.B, Kentucky has adopted implementation procedures for exceptional waters at 401 KAR 5:030 section 1.(3). These procedures require the consideration of the following discharge and enhanced treatment alternatives in a demonstration that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located:

1. Discharge to other treatment facilities;
2. Use of other discharge locations;
3. Water reuse or recycling;
4. Process or treatment alternatives; and
5. On-site or subsurface disposal.

Kentucky's current regulations limit the application of this evaluation process to exceptional waters. EPA did not propose these specific elements for consideration in high quality waters because they might limit the type of information that the Commonwealth could potentially use in making a determination on the proposed lowering of water quality. For example, a more costly alternative could be available which might result in less water quality degradation, but the additional cost might be considered to be reasonable, in light of the degradation that would occur. Although EPA chose not to adopt Kentucky's procedures for exceptional waters for today's proposal, the Agency solicits comment on whether the Agency should use these provisions rather than the more general ones included in today's proposal.

3. *Impact of lowering water quality.* If the increased loading is determined to be necessary, Kentucky would then have to determine that the lowering of water quality would support important economic or social development in the area where the discharge is to occur. Kentucky's current regulations include a methodology ("The Interim Economic Guidance for Water Quality Standards: Workbook," U.S. EPA, 1995) for an applicant to follow when requesting a new or significantly increased discharge in exceptional waters. EPA believes that several types of analyses could be used to determine the effect of more stringent controls on the economic and social well-being of a community. Therefore, the proposed rule does not limit the Commonwealth to one methodology. The Commonwealth could develop or

identify guidance for applicants to use in evaluating the socioeconomic benefits to the affected community. The Agency would be particularly interested in receiving any peer-reviewed methodologies or literature relevant to these analyses.

Antidegradation reviews are typically triggered when a new or increased discharge is requested as part of a CWA section 402 KPDES permit, CWA section 404 dredge and fill permits, and other activities requiring a CWA 401 certification. Some States conduct antidegradation reviews as part of their continuing planning process or consider antidegradation reviews as part of their watershed planning process.

On October 1, 1999, Kentucky proposed revisions to the Commonwealth's water quality standards which included specific provisions for evaluation of new and expanded discharges to the category of use protected waters. These proposed provisions comprised an evaluation process for consideration of lowering water quality in use protected waters. However, the provisions were subsequently withdrawn from consideration prior to final adoption of the revisions to Kentucky's antidegradation provisions on December 8, 1999.

EPA is requesting comment on whether Kentucky's detailed October 1, 1999, proposal should be part of the final Federal regulation itself, or used to implement the broader regulatory language in today's proposed rule. Kentucky recommended in a letter of May 24, 2001, from Mr. Jack A. Wilson, Director, Division of Water, to Ms. Beverly Banister, Director, Water Management Division, that EPA pursue an approach based on the provisions formally proposed for adoption as revisions to Kentucky water quality standards on October 1, 1999, during the triennial review conducted by the Commonwealth. In that proposal, Kentucky included a socioeconomic demonstration, including an alternatives analysis, for the category of waters defined as "use protected" waters, but these provisions were withdrawn prior to adoption of the triennial review revisions to Kentucky water quality standards. As discussed in section B, the use protected category of waters includes any water not designated as an exceptional water or an outstanding national resource water by the Commonwealth. Kentucky also suggested that waters currently listed pursuant to CWA section 303(d) as having "impaired uses" be excluded from high quality water antidegradation requirements.

The eleven factors included in the October 1, 1999, proposal were:

1. The effect of the facility on an existing environmental or public health problem;
2. The increase or avoidance of a decrease in employment;
3. The increase in production level;
4. An increase in efficiency;
5. Industrial, commercial, or residential growth;
6. Any other economic or social benefit to the community;
7. Discharge to other treatment facilities;
8. Use of other discharge locations;
9. Water reuse or recycle;
10. Process and treatment alternatives; and
11. On site or sub-surface disposal.

EPA did not choose to include this level of specificity in the proposed rule because the list may not include all of the factors or alternatives that might arise in every circumstance. Further, EPA's historical position is that the States should retain some discretion in identifying the relevant factors to examine and the threshold of socioeconomic benefits necessary to justify a lowering of water quality in a high quality water.

EPA is also requesting comment on another alternative to today's proposal that would expand the number of waters in the exceptional waters category. Under such an approach, the entire suite of Kentucky's exceptional water implementation provisions in 401 KAR 5:030, section 1.(1)(a) and (b) would apply to all high quality waters in the Commonwealth. As stated previously in section II.B., Kentucky's exceptional waters implementation provisions generally include more stringent controls than those required by EPA's regulations at 40 CFR 131.12(a)(2) for high quality waters. EPA also recognizes that the Kentucky Division of Water has stated that portions of the implementation provisions for exceptional waters are more detailed than the Division would consider as applying to high quality waters. Therefore, any consideration of this alternative for inclusion in a final rule would be conditioned upon an agreement by the Commonwealth that application of all exceptional water implementation provisions was appropriate for all high quality waters in the Commonwealth.

4. *Administrative process.* EPA believes that the Commonwealth's existing administrative processes for public review of proposed decisions for waters protected under the provisions of 401 KAR 5:029 section 1.(2) may be used for all high quality waters. Kentucky's existing mechanisms for intergovernmental coordination and public participation processes in

antidegradation decisions for the Commonwealth's existing categories of surface waters will serve decision-making well on all high quality waters. These existing administrative processes are contained in 401 KAR 5:030, 401 KAR 5:075, and sections .015, .017, .160, .270, .280, and .320 of Kentucky Revised Statute (KRS) chapter 013A.

These provisions include the following: A copy of the public notice is mailed to:

1. The applicant,
2. EPA Region 4,
3. Federal and State agencies with jurisdiction over fish, shellfish and wildlife resources, the Advisory Council on Historic Preservation, Kentucky Historical Society and other appropriate authorities, including any affected States,
4. The U.S. Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service,
5. Any user identified in the permit application of a privately-owned treatment works, and
6. Persons on a mailing list developed by the Kentucky Division of Water by:

- Including those who request in writing to be on the list,
- Soliciting persons from lists of participants in past permit proceedings in the area, and
- Notifying the public of the opportunity to be put on the mailing list through periodic publication in the public press and in such publications as newsletters, environmental bulletins, or State law journals.

In addition, KDOW maintains a list of Electronic Mail addresses as a replacement or as a supplement to its mailing list, and publishes a notice of proposed KPDES permitting actions on the KDOW web site. For major KPDES permits, Kentucky Division of Water is required to publish a notice in a daily or weekly newspaper in the area potentially affected by the facility or activity.

EPA believes that Kentucky's public participation processes are consistent with the Agency's requirements and therefore, does not see the need for additional implementing regulations for this purpose. For an example of a Public Notice which includes notification that provisions of the Commonwealth's antidegradation policy have been applied in the development of KPDES permit conditions, please visit the Web site: <http://water.nr.state.ky.us/dow/2002-23.htm>.

EPA, in developing today's proposed rule, reviewed the provisions of Kentucky Revised Statutes chapter 013A00 section .100, which require an administrative body in the Commonwealth to prescribe by administrative regulation, the

implementation, or interpretation of a statement, policy, procedure, or other requirement of general applicability. EPA acknowledges that many of the details and/or options for implementing the proposed rule are outlined in the notice of today's proposed rule. While EPA is publishing today's proposed rule based on the conclusion that the Commonwealth should be in a position to implement the rule as proposed, the level of detail in any final rule will be determined after a thorough review of all comments that relate to this statutory provision limiting Kentucky's ability to implement the regulation.

EPA is particularly interested in receiving comments relating to whether today's proposal provides a sufficient level of detail and provides an adequate regulatory basis for the Commonwealth (1) to consider protection of high quality waters in the Commonwealth, and (2) to issue KPDES permits in cases where important social or economic development can be demonstrated to be necessary for lowering of water quality in these high quality waters. In light of Kentucky's statutory provision, the Agency also seeks comment on whether some of the guidance set forth in this notice should instead be codified as a part of the rule.

#### *D. What Are the Potential Cost Implications of the Proposed Rule?*

The total annualized cost of today's proposed rule for both the Commonwealth and the dischargers could range from \$127,000 to \$3,000,000. The proposal does not impose any predictable impacts with the exception that EPA's rule could increase the number of waters that may benefit from high quality waters protection. However, economic consequences that would flow from this proposal are uncertain because they are wholly dependent on discretionary activities of individual dischargers and the Commonwealth.

If the Commonwealth were to identify high quality waters as a result of this rule, all new and existing dischargers wanting to increase their discharges into those waters would have to ask Kentucky to authorize the discharge, including any lowering of the water quality. If Kentucky were to grant the request, the only cost to the discharger would be the cost of its request (and supporting documentation) to Kentucky.

If Kentucky were to deny the request to lower water quality, the discharger would bear the additional cost for the controls needed to avoid lowering the water quality. Economic consequences flowing from EPA's proposal if finalized would depend on the Commonwealth's

actions (including waiving antidegradation reviews for increased discharges that it determines would not significantly affect water quality). Given the uncertainty of possible outcomes, EPA cannot fully predict the economic consequence of its action.

Although this proposed rule does not directly impact small entities, EPA nonetheless tried to examine the costs of having to supply the necessary documentation to support a request for a discharge that would lower water quality for a high quality water in Kentucky. EPA examined the costs of submitting the analyses and concluded that, relying on conservative assumptions, this cost could range from \$2,300 to \$30,000 for a minor discharger and \$10,000 to \$72,000 for a major discharger. Small entities may be more likely to be classified as minor dischargers than as major dischargers; minor dischargers may be less likely to request increases in discharges because they discharge and are permitted for fewer toxic pollutants, which are more likely to adversely affect water quality in small amounts triggering an antidegradation review. However, EPA cannot determine the number of small entities that may incur this onetime cost, or the impact of this cost on affected small entities (because high quality waters in the State of Kentucky have not been identified, and the specific facilities or types of facilities likely to be affected cannot be estimated). Nonetheless, given the low magnitude of these costs, that they are onetime costs, and that increased discharges are likely to be associated with increases in production, revenues (which could result in a change in classification from small entities to large entities), and profits, the costs would not likely impose a significant economic impact on a substantial number of small entities.

#### **IV. Statutory and Executive Order Reviews**

##### *A. Executive Order 12866 (Regulatory Planning and Review)*

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether the regulatory action is "significant" and therefore subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

1. Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs,

the environment, public health or safety, or State, local, or tribal governments or communities;

2. Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

3. Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

4. Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

It has been determined that this rule is not a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to OMB review.

##### *B. Executive Order 13045 (Protection of Children From Environmental Health Risks and Safety Risks)*

Executive Order 13045: "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be "economically significant" as defined under E.O. 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

The proposed rule is not subject to the Executive Order because it is not economically significant as defined in Executive Order 12866. Further, it does not concern an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children.

##### *C. Executive Order 13132 (Federalism)*

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" are defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

This proposed rule does not have federalism implications. It will not have substantial direct effects on the States,

on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The proposed rule would not affect the nature of the relationship between EPA and States generally, for the rule only applies to high quality waters in Kentucky. Further, the proposed rule would not substantially affect the relationship of EPA and the Commonwealth of Kentucky, or the distribution of power or responsibilities between EPA and the various levels of government. The proposed rule would not alter the State's authority to issue KPDES permits or the State's considerable discretion in implementing the antidegradation high quality waters provisions. Further, this proposed rule would not preclude Kentucky from adopting water quality standards that meet the requirements of the CWA. Thus, Executive Order 13132 does not apply to this rule.

Although Executive Order 13132 does not apply to this rule, EPA did consult with representatives of the Commonwealth of Kentucky in developing this rule. EPA met with representatives of the Kentucky Division of Water on December 13, 2001, and on December 14, 2001, with representatives of the Kentucky Natural Resources and Environmental Protection Cabinet and the Division of Water on approaches addressed in the proposal. The representatives with whom EPA met expressed strong disagreement with the parameter-by-parameter approach to identifying high quality waters. Their strong preference was for any Federal rule not to limit Kentucky's approach for the identification of high quality waters to the use of ambient chemical data. The Commonwealth's existing antidegradation program uses biological data and information to rate and evaluate waters. EPA is proposing to continue its longstanding policy that would allow Kentucky to use, as appropriate, biological data, chemical data or a combination of both types of data on a parameter-by-parameter basis or a designational approach to identify high quality waters.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicits comment on this proposed rule from State and local officials. EPA plans to continue to help Kentucky adopt its own antidegradation high quality waters provisions so that EPA will not have to finalize the rule. In addition, the proposed rule provides an extended 120 day comment period

which will help provide additional time for the Commonwealth.

#### *D. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)*

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." "Policies that have tribal implications" is defined in the Executive Order to include regulations that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes."

This proposed rule does not have tribal implications. It will not have a substantial direct effect on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. There are no Indian tribes in Kentucky. Thus, Executive Order 13175 does not apply to this rule. In the spirit of Executive Order 13175, and consistent with EPA policy to promote communications between EPA and tribal governments, EPA specifically solicits comment on this proposed rule from tribal officials.

#### *E. Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use)*

This rule is not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)) because it is not a significant regulatory action under Executive Order 12866.

#### *F. Paperwork Reduction Act*

This proposed action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* It does not include any information collection, reporting or recordkeeping requirements. Burden means the total time, effort or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install,

and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15.

#### *G. Regulatory Flexibility Act, as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996*

The Regulatory Flexibility Act (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) (5 U.S.C. 601 *et seq.*), generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations and small governmental jurisdictions.

For purposes of assessing the impacts of today's proposed rule on small entities, small entity is defined as: (1) A small business according to RFA default definitions for small business (based on SBA size standards); (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This proposed rule will not impose any requirements on small entities.

The RFA requires analysis of the impacts of a rule on the small entities subject to the rule's requirements. *See United States Distribution Companies v. FERC*, 88 F.3d 1105, 1170 (D.C. Cir. 1996). Today's proposed rule establishes

no requirements applicable to small entities, and so is not susceptible to regulatory flexibility analysis as prescribed by the RFA. (“[N]o [regulatory flexibility] analysis is necessary when an agency determines that the rule will not have a significant economic impact on a substantial number of small entities that are subject to the requirements of the rule,” *United Distribution* at 1170, quoting *Mid-Tex Elec. Co-op v. FERC*, 773 F.2d 327, 342 (D.C. Cir. 1985) (emphasis added by *United Distribution* court).) The Agency is thus certifying that today’s proposed rule will not have a significant economic impact on a substantial number of small entities, within the meaning of the RFA.

Under the CWA water quality standards program, States must adopt water quality standards for their waters that include antidegradation policies and implementation methods and must submit those water quality standards to EPA for approval; if the Agency disapproves a State standard and the State does not adopt appropriate revisions to address EPA’s disapproval, EPA must promulgate standards consistent with the statutory requirements. EPA also has the authority to promulgate uses and criteria in any case where the Administrator determines that a new or revised standard is necessary to meet the requirements of the Act. These State standards (or EPA-promulgated standards) are implemented through various water quality control programs including the National Pollutant Discharge Elimination System (NPDES) program, which limits discharges to navigable waters except in compliance with an EPA permit or a permit issued under an approved State program. The CWA requires that all NPDES permits include any limits on discharges that are necessary to meet applicable water quality standards.

Thus, under the CWA, EPA’s promulgation of water quality standards establishes standards that the State implements through the NPDES permit process. The State has discretion in deciding how to meet the water quality standards and in developing discharge limits as needed to meet the standards. While the State’s implementation of Federally promulgated water quality standards may result in new or revised discharge limits being placed on small entities, the standards themselves do not apply directly to any discharger, including small entities.

Today’s proposed rule, as explained earlier, does not itself establish any requirements that are directly applicable to small entities. As a result of this

action, the Commonwealth of Kentucky will need to ensure that permits it issues include any limitations on discharges necessary to comply with the antidegradation policy and procedures for high quality waters established in the final rule. In doing so, the Commonwealth will have a number of discretionary choices associated with permit writing. While Kentucky’s implementation of the rule may ultimately result in some new or revised permit conditions for some dischargers, including small entities, EPA’s action today does not impose any of these as yet unknown requirements on small entities.

#### *H. Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with “Federal mandates” that may result in expenditures to State, local and tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

Today’s proposed rule contains no Federal mandates (under the regulatory

provisions of title II of the UMRA) for State, local or Tribal governments or the private sector. The proposed rule imposes no enforceable duty on the State or any local or Tribal government or the private sector; rather this rule proposes an antidegradation policy and implementation methods for certain high quality waters in Kentucky which, when combined with the uses Kentucky designated for the waters of the Commonwealth and the water quality criteria adopted to protect the designated uses, constitute the water quality standards for high quality waters. The Commonwealth may use these resulting water quality standards in implementing its water quality control programs. Today’s proposed rule does not regulate or affect any entity and, therefore, is not subject to the requirements of sections 202 and 205 of the UMRA.

EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect any small governments. As stated, the proposed rule imposes no enforceable requirements on any party, including small governments. Moreover, any water quality standards, including those proposed here, apply broadly to dischargers and are not uniquely applicable to small governments. Thus this proposed rule is not subject to the requirements of section 203 of the UMRA.

#### *I. National Technology Transfer and Advancement Act of 1995*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposal does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards. EPA welcomes comments on this aspect of the proposed rulemaking and, specifically, invites the public to identify potentially applicable voluntary consensus standards and to explain why such

standards should be used in this regulation.

#### *J. Endangered Species Act*

Pursuant to section 7 of the Endangered Species Act (ESA), 16 U.S.C. 1536, in consultation with the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS), Federal agencies must ensure that their actions are not likely to jeopardize the continued existence of any listed, threatened or endangered species or result in the destruction or adverse modification of designated critical habitat of such species. Today's proposal would extend antidegradation protection for waters that presently may be under-protected by Kentucky's standards and would potentially improve the protection afforded to threatened and endangered species.

The U.S. Fish and Wildlife Service (the Service or FWS) has been involved in several ways during the development of the various provisions of 401 KAR 5:030, and has supported the revision to Kentucky's water quality standards which established 401 KAR 5:030 as new regulatory provisions of the Commonwealth. In a letter dated September 11, 1995, from Dr. Lee A. Barclay, Cookeville, Tennessee Field Supervisor, to Fritz Wagener, Chief, Water Quality Standards Section, EPA Region 4, the Service responded to EPA Region 4's request for comments on the initially adopted antidegradation implementation procedures, as follows: "The Service endorses this revision to Kentucky's water quality standards."

In addition, EPA and the Service conducted an informal consultation of EPA's August 30, 2000, approval of other revisions to Kentucky's standards. The Service provided comments on the EPA's draft Biological Evaluation of the standards revisions by letter November 1, 2000. On July 10, 2001, the informal consultation was completed, based on the Service's concurrence submitted from Dr. Lee A. Barclay, Cookeville, Tennessee Field Supervisor, FWS, to Ms. Beverly H. Banister, Director, Water Management Division, EPA Region 4, that the revisions to the standards were not likely to adversely affect threatened or endangered species.

The Service's endorsement of Kentucky's water quality standards pertains only to compliance with Endangered Species Act. EPA determines whether the State or Tribal water quality standards are in

compliance with the CWA and implementing regulations.

EPA is transmitting this proposed rule to the Service for review and comment, concurrent with the publication of today's notice. That transmittal constitutes EPA's initiation of informal consultation with the Service on this proposed rule, pursuant to section 7 of the Endangered Species Act and its implementing regulations. EPA will continue to work closely with the Service to ensure the final rule will not adversely affect threatened or endangered species.

#### *K. Plain Language*

Executive order 12886 directs each agency to write all rules in plain language. We invite your comments on how to make this proposed rule easier to understand. For example:

- Have we organized the material to suit your needs?
- Are the requirements in the rule clearly stated?
- Does the rule contain technical language or jargon that isn't clear?
- Would a different (grouping and order of sections, use of headings, paragraphing) make the rule easier to understand?
- Would more (but shorter) sections be better?
- What else could we do to make the rule easier to understand?

#### **List of Subjects in 40 CFR Part 131**

Environmental protection, Indian lands, Intergovernmental relations, Reporting and recordkeeping requirements, Water pollution control.

Dated: November 7, 2002.

**Christine Todd Whitman,**  
*Administrator.*

For the reasons set out in the preamble, EPA proposes to amend 40 CFR part 131 as follows:

#### **PART 131—WATER QUALITY STANDARDS**

1. The authority citation for part 131 continues to read as follows:

**Authority:** 33 U.S.C. 1251 *et seq.*

#### **Subpart D—[Amended]**

2. Section 131.39 is added to read as follows:

#### **§ 131.39 Kentucky.**

(a) *What antidegradation policy applies to high quality waters in the*

*Commonwealth of Kentucky?* (1) Where the quality of the water is better than levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, the Commonwealth of Kentucky (hereafter, Commonwealth or Kentucky) shall maintain and protect that quality unless Kentucky finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the Commonwealth's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the water is located.

(2) Before allowing lower water quality, the Commonwealth shall ensure that all measures to fully protect existing uses are implemented.

(3) Before allowing lower water quality, the Commonwealth shall ensure that the most protective statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control shall be achieved.

(b) *What are high quality waters?* High quality waters include any surface water of the United States within the Commonwealth of Kentucky where the quality of the water is better than that necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, except for waters regulated by Kentucky under 401 Kentucky Administrative Register 5:030 sections 1.(1)(a) and (b).

(c) *How will the Commonwealth evaluate requests to lower water quality?* The Commonwealth shall evaluate the following information when deciding whether to approve a request to lower water quality in a high quality water:

(1) Alternatives to the Request to Lower Water Quality. Any cost effective pollution prevention alternatives, enhanced treatment techniques, or other alternatives that are available to the entity, that would eliminate or significantly reduce the extent to which the increased loading results in a lowering of water quality.

(2) Important Economic or Social Development. The economic or social development and the benefits to the area in which the waters are located that will be foregone if the lowering of water quality is not allowed.

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