



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 4
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ATLANTA, GEORGIA 30303-8960

JAN 08 2010

Gerrit Jobsis, Director
Southeast Region
American Rivers
Devine Street, Suite 202
Columbia, South Carolina 29205

Dear Mr. Jobsis,

The Environmental Protection Agency (EPA) is in receipt of your letter, dated July 2, 2009, to Lisa Perras Gordon of the Water Quality Standards Section. Your letter requests that EPA review and address the sufficiency of policy guidance written by the North Carolina Division of Water Quality (DWQ). The policy guidance you forwarded to EPA for review, "Stream Mitigation for FERC-Related 401 Certifications," is a draft, internal guidance used by DWQ. You also specifically ask whether or not a state may "properly treat land preservation as compensatory mitigation for the adverse impacts of a project's flow regulation on aquatic uses." Your request for review has raised several questions regarding this state policy and its application in particular water quality standards (WQSs) certifications. EPA is currently in the process of thoroughly reviewing these issues with the State.

DWQ has not submitted this mitigation policy to EPA for review as a policy applying or implementing WQSs under 40 C.F.R. § 131.13. States may utilize policies implementing or applying WQSs which have not been submitted to or approved by EPA, but such policies must be consistent with the state's underlying EPA-approved WQSs.

With respect to your specific inquiry as to whether land preservation can be used as compensatory mitigation for adverse impacts of a project's flow on aquatic uses, the answer centers on whether the adverse impacts relate only to flow (water quantity), or whether these impacts are, in fact, affecting water quality standards. The Supreme Court in PUD No. 1 of Jefferson County v. Washington Department of Ecology, 114 S. Ct. 1990 (1994), addressed the question of whether flow may be linked to water quality standards and whether a state may include specific flow requirements in its CWA Section 401 Certifications or deny a certification based on flow. That case involved a Federal Energy Relicensing Commission (FERC) relicensing of a hydropower plant. In that instance, it was determined that the State could require the licensee to maintain certain stream flows as a condition of the Section 401 Certification in order to meet WQSs. The Court noted that the distinction between water "quality" and "quantity" is artificial and specifically addressed under what conditions flow or quantity could affect quality, stating:

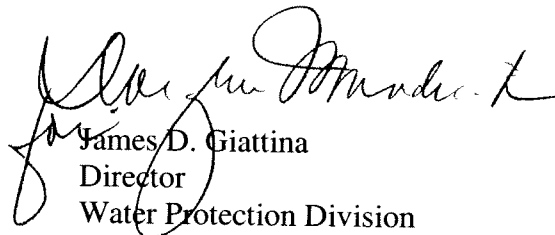
“In many cases, water quantity is closely related to water quality; a sufficient lowering of the water quantity in a body of water could destroy all of its designated uses, be it for drinking water, recreation, navigation or...as a fishery.”

Therefore, flow can be determined to affect WQSs and minimum flow levels may be required to meet those standards. However, there could also be cases where the designated use and the associated narrative and numeric criteria and antidegradation policy may not be affected by certain changes in the flow regime. Flow levels, in those instances, may not be relevant to meeting the applicable WQSs. Determinations regarding the level of flow that may be necessary to meet applicable WQSs have to be made on a case-by-case basis, unless a specific WQS for flow has already been promulgated for the water at issue. If a particular level of flow is determined to be necessary to meet applicable WQSs for a FERC project, compensatory land mitigation cannot be used in exchange for the project’s adverse impacts on such flow.

It is important to note that for activities regulated by, and permitted under, Section 404 of the CWA, there are very specific conditions under which compensatory mitigation can be used for certain types of impacts to wetlands and other aquatic resources. Section 404 of the CWA is not a program that is delegated to the State of North Carolina, and is solely under the purview of EPA and the Corps of Engineers. Therefore, Section 404 Compensatory Mitigation and the extensive process and requirements associated with making such mitigation determinations are beyond the scope of this letter. For your information, Section 404 mitigation regulations and guidance can be referenced at the following web link: <http://www.epa.gov/wetlandsmitigation/#regs>.

EPA appreciates the opportunity to provide information to address American Rivers’ questions and concerns, and for your patience in awaiting our response. EPA is in the process of following up with the State regarding EPA’s concerns on the potential WQSs issues that could arise through application of this draft mitigation policy in the Section 401 Certification of FERC licenses. Please feel free to contact Lisa Perras Gordon at 404-562-9317, if you have any questions.

Sincerely,


James D. Giattina
Director
Water Protection Division

cc: Tom Welborn, Chief
Wetlands, Coastal and Oceans Branch, EPA Region 4

Coleen Sullins, Chief
Division of Water Quality, North Carolina DENR