Unresolved issues in the Antidegradation Rulemaking

1. In the current draft we propose to allow a *de minimis* that which ranges from 10% to as high as 30% of the unused loading capacity. In light of the recent West Virginia federal court decision (Ohio Valley Environmental Coalition vs. Horinko), should we change the *de minimis* to no higher than 10%? Is 30% of something ever really a '*de minimis*' portion?

2. How should we handle ubiquitous BCCs like mercury?

3. The current draft of the antideg rules require that exceptional use waters have the same antideg requirements as OSRWs. This is consistent with what the water rules currently require but not consistent with the 1999 draft (they were rolled into the OHSRW group and given somewhat lower protection). SEA431 (P.L. 140-2000)/HEA1221 (P.L. 231-2003) requires they be treated same as OSRWs for situations when a significant lowering of water quality has been determined to occur but doesn't specify implementation procedures for BCCs and non-BCCs. Should we continue to go forward with the requirement that exceptional use waters be protected at the same level as OSRWs?

4. SEA431/HEA1221 requires the board to evaluate all the exceptional use waters and designate them as OSRWs or, presumably, to remove their special designation if they don't merit the OSRW designation. No mention of this issue has been made in the current draft.

5. SEA431 allows the discharger to implement a 'water quality improvement project' in an OSRW *in lieu* of paying a fee or doing an antidegradation demonstration. The statute requires the state to come up criteria for the submission and approval of such projects. What should be required?

6. SEA431 allows dischargers to an OSRW that want to cause a significant lowering of water quality to pay a fee 'not to exceed $500,000' for each significant lowering. SEA431 doesn't provide many details on how we should charge for increased pollutant discharges. Should there be a sliding scale based on the amount of unused loading capacity the discharger wants to use up?

7. The WQAG debated the issues of how the state would make the decision on whether a significant lowering of water quality was necessary to accommodate important social or economic development in the area in which the waters are located. The WQAG report gave three possible options:

    A. a particular industry or category of activity/situation is declared by the Water Pollution Control Board (by regulation) or by the General Assembly (by state law) "to accommodate important economic or social development in an area" no matter where or what other conditions exist;
    B. IDEM uses its judgment to decide (ultimate responsibility), OR
    C. the local government in the area makes a formal determination after

appropriate public notice; IDEM can override this determination only with good cause (this could either be the mandatory first step for non-excluded industry or it could be an optional first step for non-excluded industry).

Which option should be incorporated into the rules?

8. The WQAG recommended a rather detailed procedure for calculating the ambient background concentration (or existing water quality) necessary for determining the "unused loading capacity" that is used to determine if a significant lowering of water quality has occurred (based on there being some "de minimis" level that is not considered a significant lowering of water quality). This procedure involved the evaluation of at least 10 samples collected over different times and flows and evaluated using a specific equation. The procedure and equation were developed by a separate group and presented as a proposal to the WQAG. The WQAG subsequently approved the procedure. Should this be used as the specific method to determine "ambient background concentration" (or existing water quality) for antidegradation purposes?

9. Other issues?