



Greater Yellowstone Coalition

People protecting the lands, waters, and wildlife of the Greater Yellowstone Ecosystem, now and for future generations.

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RE: GYC's Comments on Preliminary Draft Negotiated Rule, Docket No. 58-0102-1301

Dear Paula,

Greater Yellowstone Coalition ("GYC") submits the following comments regarding the Preliminary Draft Negotiated Rule, Docket No. 58-0102-1301 ("Draft Rule"). GYC is a 501(c)(3) non-profit organization dedicated to protecting the lands, waters, and wildlife of the Greater Yellowstone Ecosystem. GYC has offices in Idaho, Wyoming, and Montana with approximately 40,000 members and supporters nationwide. GYC has a strong interest in the management of Idaho waters and their associated wildlife and recreational resources. GYC's members regularly use and enjoy Idaho waters for activities such as fishing, hiking, boating, hunting, wildlife viewing, spiritual renewal, biological and botanical research, photography, and other pursuits. GYC's members' use and enjoyment of Idaho waters will be affected by the rule when it is finalized.

BACKGROUND

In 1997, the Environmental Protection Agency ("EPA") approved Idaho's antidegradation policy, but it did not contain implementation methods as required. In 2010, EPA was sued for its failure to promulgate antidegradation implementation methods for Idaho in the absence of a state-developed plan. In order to avoid a federally promulgated rule, the Idaho Department of Environmental Quality ("IDEQ") began negotiated rulemaking on April 17, 2010 to develop antidegradation implementation methods for the state of Idaho. IDEQ's proposed antidegradation implementation methods rule went through numerous drafts that were subject to public comment. Based on public comments, IDEQ

changed some provisions of the rule before sending the rule to the Idaho Board of Environmental Quality, which approved the rule on November 12, 2010. The Idaho Legislature reviewed Idaho's pending rule and adopted it on March 18, 2011. On March 24, Idaho's Attorney General certified the rule. The rule was then sent to EPA for approval. Before EPA approved the rule, GYC commented on the rule citing numerous concerns, including allegations that the definition of "degradation" and the mandatory de minimis provision in the rule were illegal. Nevertheless, EPA approved the rule on August 18, 2011.

On February 14, 2012, GYC filed suit in Idaho federal district court against the EPA for its approval of the Idaho antidegradation implementation methods rule. GYC alleged that the rule was illegal and in contradiction with the Clean Water Act on two counts. The first claim challenged the definition of "degradation" under the rule, defined as "a change in a pollutant that is adverse to designated or existing uses." GYC claimed that this definition impermissibly tied degradation to existing uses rather than including a lowering of water quality. The second claim challenged the propriety of the de minimis provision, which stated that IDEQ "shall determine insignificance when the proposed change in an activity or discharge, from conditions as of July 1, 2011, will not cumulatively decrease assimilative capacity by more than ten percent (10%)." This mandatory de minimis provision enacted an automatic exemption from Tier II antidegradation review for activities and discharges falling below an established bar for significance (10% assimilative capacity). The provision gave IDEQ no discretion to determine that discharges that fell below the bar may still result in significant pollution requiring review.

On April 4, 2013, the court held a hearing to discuss the claims. In the meantime, EPA had filed for a voluntary remand to reconsider its approval of the mandatory de minimis provision, especially as it related to bioaccumulative pollutants. On April 24, the court filed its Memorandum Decision and Order. The court held that the definition of degradation was permissible because "Idaho gave . . . clarification, representing to the EPA and to this Court that degradation means a change in a pollutant that reduces water quality." Order at 10. Therefore, IDEQ is required to find that any lowering of water quality constitutes degradation, regardless of whether that lowering of water quality impacts existing uses.

In this same Order, the court granted EPA's voluntary remand motion, giving the agency 90 days to inform the court whether it would withdraw its approval of the de minimis provision, or in the alternative it would decide not to take a new action and file a cross-motion for summary judgment. The court retained jurisdiction. GYC and Earthjustice sent comments to EPA for consideration of this issue on May 29.

On July 23, EPA informed the court that it was withdrawing its approval of the de minimis provision. EPA withdrew its approval "because, in at least some cases, this provision could require Idaho to deem insignificant, and therefore exempt from Tier 2 review, certain proposed activities or discharges involving bioaccumulative pollutants even though such activities or discharges may cause significant degradation." Technical Support Document at 6. Further, "[t]he EPA's view is that even a seemingly small discharge of a bioaccumulative pollutant may, in fact, ultimately cause significant degradation." Id. at 6.

EPA further explained that there is currently no de minimis provision in effect for CWA purposes when implementing the antidegradation water quality standard in Idaho. EPA noted that IDEQ would have several options going forward. IDEQ could either forego a de minimis provision, make the de minimis provision discretionary, or revise the de minimis provision to exclude bioaccumulatives completely. Id. at 10.

As a result of this background, IDEQ has initiated the current rulemaking. IDEQ now proposes a discretionary de minimis rule. Additionally, IDEQ is proposing unrelated changes to their provisions dealing with water quality limited waters and TMDLs.

Comments on the Current Draft Rule¹

Changes to Antidegradation Implementation Provisions.

We support IDEQ's proposal to use a discretionary rule to determine when an activity or discharge may be insignificant. We do think, however, that the rule could be clarified in terms of EPA's Technical Support Document disapproving the previous mandatory rule.

First, we support the rule's statement that "[a] cumulative decrease in assimilative capacity of more than ten percent (10%), from conditions as of July 1, 2011, always constitutes significant degradation." Draft Rule 052.08(a)(i). This statement is helpful to clarify that while IDEQ has discretion to determine whether some discharges are insignificant, that discretion is limited by a threshold level of 10% decrease in assimilative capacity.

A further limiting factor on that discretion is whether the discharge or activity at issue will release bioaccumulative pollutants. EPA withdrew its approval of the previous mandatory rule, finding that bioaccumulative pollutants were of specific concern:

The EPA's view is that even a seemingly small discharge of a bioaccumulative pollutant may, in fact, ultimately cause significant degradation. The EPA has concluded that because Idaho Code § 39-3603(2)(c) requires Idaho to exempt every discharge or activity involving a bioaccumulative pollutant that meets its "insignificance" test from Tier 2 review, without the ability to consider such discharges or activities on a case-by-case basis, Idaho could be required to use the provision where the proposed activity or discharge would not be truly insignificant, or *de minimis*.

Technical Support Document at 6. EPA continued to express its concern of bioaccumulative pollutants:

¹ On August 29, IDEQ issued Draft No. 2 of the Negotiated Rule with changes based on the first rulemaking meeting on August 28. Our comments pertain to this version of the Rule.

In light of the special characteristics of bioaccumulative pollutants . . . discharges or activities involving such pollutants should not automatically be considered “insignificant” and thus excluded from the public Tier 2 evaluation process. The EPA’s view is that, for discharges of such pollutants, a Tier 2 review may be appropriate to ensure that all feasible alternatives that might prevent or minimize even relatively small levels of additional discharges of bioaccumulative pollutants are evaluated, and to ensure that any additional lowering of water quality from bioaccumulative pollutants is associated with important social and economic development. Therefore, the EPA would expect Idaho to carefully consider any proposed lowering of water quality by bioaccumulative pollutants before determining that such lowering would be insignificant.

Id. at 9. And again, when describing how IDEQ could fix this rule by issuing a discretionary rule, EPA repeated its advice:

The EPA would expect Idaho to carefully consider any proposed lowering of water quality by bioaccumulative pollutants before determining that it would be insignificant. In addition, Idaho’s decision that a proposed lowering of water [quality] (sic) by bioaccumulative pollutants would be insignificant, in any given instance, would be open to public review and input.

Id. at 10.

The Draft Rule corrects the mandatory issue by adding a discretionary component, but goes on to state that this discretion should be exercised “taking into consideration the size and character of the activity or discharge and the magnitude of its effect on the receiving stream.” Draft Rule 052.08(a)(i). Because this does not necessarily deal directly with EPA’s concerns, we would propose adding the following language:

taking into consideration the size and character of the activity or discharge, the magnitude of its effects on the receiving stream, and if relevant, the bioaccumulative character and nature of pollutants

This language would more appropriately address EPA’s concerns about bioaccumulative pollutants and will ensure that IDEQ in the future does not fail to consider the persistent and toxic impacts of bioaccumulative pollutants.

Changes to Water Quality Limited Waters and TMDLs Provisions.

It appears that based on the rulemaking meeting on August 28, IDEQ has removed language in 055.04 stating that IDEQ shall “take those actions necessary to ensure that the existing uses of each water body and the level of water quality necessary to protect those uses shall be maintained and protected.”

Because IDEQ must comply with antidegradation policies for water bodies requiring a TMDL, and because antidegradation requires IDEQ to maintain water quality (and not only protection of designated or existing uses), we support the removal of this language.

Sincerely,



Andrea Santarsiere
Idaho Conservation and Legal Associate