



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 Final Proposed Rule, Docket No. 58-0102-1301

Dear Paula,

Greater Yellowstone Coalition ("GYC") submits the following comments regarding the final proposed Negotiated Rule, Docket No. 58-0102-1301 ("Proposed 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 Final Proposed Rule

Changes to Antidegradation Implementation Provisions

As written, we believe that the current rule does not appropriately address EPA's concern that degradation caused by bioaccumulative pollutants should not be considered insignificant due to their accumulative nature. We thus again ask that IDEQ add the following language:

taking into consideration, 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. If IDEQ declines to adopt this language, then the guidance directing implementation of these rules must clarify that it is inappropriate for IDEQ to consider degradation caused by bioaccumulative pollutants as insignificant.

Changes to Water Quality Limited Waters and TMDLs Provisions

Based upon comments submitted by the Idaho Association of Commerce and Industry ("IACI") on September 13, 2013, IDEQ added the following language to 055.02:

TMDLs do not need to be developed for water bodies where other pollutant control requirements are expected to achieve full support of uses and compliance with water quality standards in a reasonable period of time. Such water bodies shall be identified as Category 4(b) waters in the Integrated Report.

This language is repetitive and unnecessary, as well as inappropriate here. First, the title of the subsection is "Water Bodies Needing Development of a Total Maximum Daily Load (TMDL)." Thus, there is no need to state within the subsection which water bodies may or may not require a designated TMDL. To add language regarding Category 4(b) waters would only be repetitive and confuse the

purpose of this provision. Furthermore, because there are other waters that are impaired but do not require a TMDL -- for example waters categorized under Category 4(a) and Category 4(c) -- it is clear that IACI is trying to insert this language as a self-fulfilling purpose to stress a situation that is irrelevant here. Adding this language suggests that the only situation in which TMDLs are not required is “where other pollutant control requirements are expected to achieve full support of uses and compliance with water quality standards in a reasonable period of time.” Such is not the case, and thus we urge IDEQ to strongly reconsider insertion of this language.

Second, as drafted Section 055.02 states as follows:

Those water bodies identified in the Integrated Report as not fully supporting designated or existing beneficial uses and not meeting applicable water quality standards despite the application of required pollution controls shall require the development of TMDLs or other equivalent processes, as required under Section 303(d)(1) of the Clean Water Act.

Section 303(d)(1) of the Clean Water Act requires development of TMDLs for waters not meeting water quality standards. The Act does not allow a state to develop “other equivalent processes” as this language suggests. Rather, if there are other pollutant control measurements that will bring a waterbody into compliance with water quality standards, EPA may approve an exception to the TMDL requirement. IDEQ, however, cannot on its own decide to develop “other equivalent processes” in lieu of a TMDL. This language is misleading and a misinterpretation of the Clean Water Act’s requirements and must be corrected. The current language cannot and should not be approved by EPA.

Finally, the language “to achieve full support of uses” is repetitive. A water body that complies with water quality standards will generally support designated and existing uses, and thus there is no need to include language about supporting uses. Again, adding superfluous language here will confuse the point of this provision, which should remain as straight-forward as possible. Indeed, all of the EPA guidance documents which we reviewed only referred to including a water body in Category 4(b) if pollution controls would achieve compliance with water quality standards - we found no reference to the impact of pollution controls on designated uses.

Sincerely,



Andrea Santarsiere

Idaho Conservation and Legal Associate